



# Airfinance JOURNAL

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Financial intelligence for commercial aviation

A SPECIAL SUPPLEMENT

## Guide to Aviation Lawyers 2013



Editor  
**Dickon Harris**  
+44 (0)20 7779 8853  
dharris@euromoneyplc.com

Senior reporter  
**Jamie Bullen**  
+44(0)20 7779 8242  
jbullen@euromoneyplc.com

Reporters  
**Yana Palagacheva**  
+44 (0)20 7779 8029  
ypalagacheva@euromoneyplc.com

**Joanna Vickers**  
+44 (0)20 7779 8072  
jvickers@euromoneyplc.com

Technical editor  
**Geoff Hearn**

Group sub editor  
**Peter Styles Wilson**

Production editor  
**Clare Wood**

Publisher  
**Graham Sherwood**  
+44 (0)20 7779 8857  
gsherwood@euromoneyplc.com

Advertising Executive  
**Ben Sharpington**  
+44 (0)20 7779 8231  
bsharpington@euromoneyplc.com

Subscriptions account manager  
**Sarita Bains**  
+44 (0)20 7779 8015  
sbains@euromoneyplc.com

Deals database manager  
**Alfonso Olivas**  
+44 (0)20 7778 8225  
aolivas@euromoneyplc.com

Business group manager  
**Sean Brierley**  
+44 (0)20 7779 8207  
sbrierley@euromoneyplc.com

Divisional director  
**Roger Davies**

SUBSCRIPTIONS / CONFERENCES HOTLINE  
+44 (0)20 7779 8999 / +1 212 224 3570  
hotline@euromoneyplc.com

CUSTOMER SERVICES  
+44 (0)20 7779 8610  
Nestor House, Playhouse Yard, London, EC4V 5EX

Executive chairman: Richard Ensor  
Directors: Sir Patrick Sergeant, The Viscount Rothermere,  
Neil Osborn, Dan Cohen, John Bots, Colin Jones, Diane Alfano,  
Christopher Fordham (managing director), Jaime Gonzalez,  
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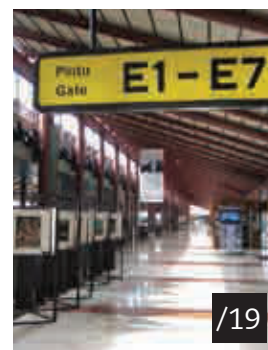
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## EDITOR'S LETTER

# Boeing's rise in backstop commitments

Despite an abundance of liquidity to fund new aircraft orders, airlines are demanding more backstop commitments from the US manufacturer. Dickon Harris investigates.

I was told by one industry source recently that we are living in a "golden age of commercial financing".

Airlines, according to the financier, have never had it so good. The market has plenty of banks willing to fund new aircraft, including new participants, and this year has seen a growing list of carriers succeed in tapping the US capital markets for the first time. Sources state that about 12 to 15 non-US carriers are looking to tap the capital markets within the next 12 months and, judging by the recent issuances, should probably do quite well.

For those airlines unable to access the capital markets, lease rates are still very competitive and lessors are expanding their fleets rapidly. Carriers today have plenty of options to fund new aircraft.

But this raises an interesting conundrum. If airlines can fund new aircraft deliveries so easily, why are they asking for more backstop commitments from Boeing?

### Ultimate form of financing

Manufacturers offer their customers backstop financing to help fund aircraft deliveries. An airline pays a fee to ensure the availability of the financing and, if they require it when the aircraft delivers, will pay a separate, much higher rate for the financing from the manufacturer.

Unlike a car loan from a car manufacturer, airframers deliberately set the cost of this financing at a premium far and above the market rate offered by bank loans. The last thing an aircraft manufacturer wants to be is the primary financier to its customers. The high rates associated with backstop funding explain why so few of these arrangements are crystallized into actual financing (typically less than 10% in any given year, according to Boeing).

Boeing's financing arm, Boeing Capital, has stated that the amount it makes available under these commitments has steadily increased in the past few years. In 1999 Boeing Capital had about \$4.8 billion in backstop commitments on its books. In 2005 it was \$11.4 billion, \$9.8 billion in 2010, \$15.8 billion in 2011 and at the end of 2012 it was \$18 billion.

### Nervous airlines

The big question is why this recent rise has occurred. There are several drivers behind this phenomenon. The first is that more airlines are ordering more aircraft. If a manufacturer, for instance, typically finances 1% of its customer deliveries, increased deliveries will inevitably force the manufacturer to

increase its provision of customer financing. Both Boeing and Airbus have boasted record backlogs for 2013.

The second factor is that airlines have not forgotten the banking contraction that occurred in the financial crisis for aviation deals. Prudent airlines are willing to pay additional fees for the peace of mind of having financing in place, just in case. Airlines are buying these commitments as funding insurance in an uncertain world. Carriers are worried, for instance, about the impact of future banking regulation on the amount, or tenors, banks are willing to offer to fund new aircraft.

Boeing Capital states that another reason operators are asking for commitments is not based on unease over commercial banks but on concerns over the role of US Ex-Im. Export credit agency (ECA) financing has often been described as the last line of financing for aviation credits that commercial banks are unwilling to fund. Airlines worldwide will have witnessed this last line having to justify its existence (successfully) to secure its reauthorization last year from the US Congress.

Recently Boeing Capital argued this is one reason why US Ex-Im's role is vital for its exports. A weakened US Ex-Im means the manufacturer has to offer more backstop commitments. Boeing dislikes offering backstop commitments because they represent contingent liabilities that eat up its balance sheet. This is money, argues Kostya Zolotusky, Boeing Capital's managing director, that would be better used for research and development into new aircraft technologies.

Insurance is about the perception of risk. US Ex-Im survived the Delta lawsuit with its guarantees to Air India in place. It marshalled general support to ensure that both the US public and Congress understood its role in supporting exports. The North American ECA is again due for reauthorization in May 2014. Both Boeing and US Ex-Im will be hoping for a calmer public debate over its role. The odds are likely that Boeing will have to cough up more in backstop financing commitments anyway this year than last merely based on the fact that airlines are ordering more aircraft. However, if US Ex-Im's reauthorization process is smoother, then there is a better chance that fewer airlines will be asking for this service based on the strength of US Ex-Im's political standing. ▲

DICKON HARRIS,  
Editor,  
*Airfinance Journal*  
dharris@euromoneyplc.com



## LEGAL MARKET

## Moves in 2013

## January/February

**Clyde & Co makes top appointments**

Clyde & Co has appointed Emma Pond as a legal director and Alan Meneghetti as a partner in the firm's aviation practice in London.

Pond will be advising clients on finance structures with a focus on borrowers and lessors. She was previously a partner with Dewey & LeBoeuf, and has expertise in the US, Middle East and Russia.

Meneghetti will join the firm's regulatory and commercial aviation team in London. He will be advising on commercial contracts and arrangements, including procurement, distribution and supply.

Aviation partner Peter Macara will be relocated from the Clyde & Co London office to work with Beaumont & Son in Rio de Janeiro.

**Hogan goes for Alexander McMyn**

Hogan Lovells has appointed Alexander McMyn as a partner. McMyn will be based in Singapore.

McMyn practiced for Linklaters in Singapore before joining Hogan Lovells. His remit is to build on the firm's existing regional strengths in aviation finance, banking and structured finance in Asia. The firm has three banking partners already based in Hong Kong, but McMyn will focus on work generated from South-East Asian clients.

He will work with Singapore-based partners Stephanie Keen (mergers and acquisitions) and

Andrew Carey (capital markets). Ling Lui, a mandarin speaking senior associate with more than 12 years' aviation finance experience, and a team of three associates will support McMyn.

## March

**Hughes Hubbard expands Miami aviation practice**

Hughes Hubbard has employed two aviation lawyers for its Miami practice from Greenberg Traurig. Jeffrey Tenen joins as partner, while Israel Sanchez has joined the group as counsel. Both lawyers were previously shareholders at Greenberg Traurig.

The addition of the aviation duo comes after the expansion of the Hughes Hubbard litigation department in Miami. Partner Rafael Cruz-Alvarez joined the office in January.

Tenen represents domestic and foreign air carriers, leasing companies and lenders specializing in aircraft acquisitions, sales, leasing and financings.

Sanchez has extensive experience in structuring, drafting and negotiating financing and leasing transactions (including tax-based leveraged and cross-border leasing, synthetic leases and operating leases).

**Iata appoints general counsel**

The International Air Transport Association (Iata) has appointed Jeffrey Shane as general counsel. Shane will begin working with the association from April 2 and will be based at its headquarters in Montreal.

Shane joins the association from law firm Hogan Lovells, where he has been a partner since 2008. Before that he served as US undersecretary of transportation for policy, US Department of Transportation (DOT), from 2003-2008, a position to which he was appointed by the then president, George W Bush.

In this role Shane supervised all economic regulation of aviation, as well as US international aviation relations. His tenure at the DOT encompassed the signing of the landmark European Union-US open-skies agreement.

**Holland & Knight appoints Durham as partner**

Law firm Holland & Knight has appointed Phillip Durham as a partner in its New York office.

Durham specializes in domestic and cross-border asset-based financing, leasing, capital markets and sale and acquisition transactions.

In September Durham was selected as one of *Airfinance Journal's* rising stars, a selection of the most promising associates working within aviation. He is vice-chair of the American Bar Association's aircraft financing sub-committee.

**Bird & Bird adds London aviation partner**

Law firm Bird & Bird has hired Brett Hailey as partner in its London

office and international aviation sector group.

Hailey specializes in aircraft financing and leasing, and brings more than 20 years' experience in the aviation sector. He moves from SNR Denton, where he was a partner.

## May

**CMS appoints new partner**

International law firm CMS has appointed Tim Elliot as an asset finance partner to its international finance team.

Elliot is joining CMS from Allen & Overy. He specializes in structured and asset finance on debt and leasing transactions, particularly aviation finance and export credit transactions.

Andrew Ivison, head of International Finance, CMS, says: "Tim brings with him a wealth of asset finance expertise, particularly within the aviation and export credit space."



## LEGAL MARKET

# Moves in 2013



### **Bird & Bird hires aviation lawyer for Singapore office**

Law firm Bird & Bird has appointed Leo Fattorini to its international aviation

group. Fattorini will be based in the Singapore office and has more than 10 years' experience in the aviation industry, most recently with Virgin Atlantic. He was previously part of the aircraft finance team at DLA Piper.

He specializes in aircraft financing and leasing, negotiating sale and purchase agreements and all forms of aircraft commercial agreements.

Paul Briggs, the co-head of Bird & Bird's international aviation group, says: "Brett Hailey's recruitment in London earlier this year gave us big ticket aircraft finance capability. Now Leo has joined we have practical touching-the-metal capability in Asia to advise airlines, lessors and investors on all legal issues."



### **Zimmer moves to Pillsbury**

Pillsbury has appointed veteran aviation lawyer Thomas Zimmer as a co-leader of its transportation finance team. Zimmer

moves from Holland & Knight, where he was a partner. Based in San Francisco, he will serve as co-leader of Pillsbury's transportation finance team along with partner Mark Lessard in New York.

He was previously chair of Holland & Knight's finance group and was the deputy section leader of its business law section.

Zimmer represents clients in aircraft finance and equipment leasing, commercial finance, corporate finance, mergers and acquisitions and general corporate law. He has more than 20 years' experience on domestic and cross-border equipment leasing and asset-based financing transactions involving aircraft, rail and vessels.

Lessard says: "Tom significantly increases our exposure to aircraft leasing, which is the fastest-growing area of air finance and is clustered on the west coast.

He is also an aggressive and energetic entrepreneur – traits that we regard highly here at Pillsbury."

### **Norton Rose promotes aviation lawyers**

Law firm Norton Rose has promoted two London aviation lawyers – Alison Baxter and Ian Giles – to partner. The announcement is part of 25 promotions across its global corporate, banking and litigation practice groups.

Baxter joined Norton Rose in 1989, and has been a legal consultant in the firm's London banking team since 2007.

She has represented airlines, banks, export credit agencies and lessors in a wide variety of transactions. Baxter has worked on numerous European export credit financings and predelivery payment financings for both Airbus and Boeing aircraft.

Giles, a competition lawyer based in the London office, specializes in all aspects of competition/anti-trust law across a wide range of industry sectors, but with a particular focus on shipping and aviation.

### **Allen & Overy's Moscow office has promoted Ilya Dvorkin to counsel.**

Dvorkin joined the office in 2008, and has been leading the firm's aircraft finance practice in Russia as a senior associate.

He previously spent 18 months in Allen & Overy's London office as a member of its structured and asset finance team. He has experience across predelivery payment financings, export credit agency financings, portfolio sales and leasing, as well as related Russian tax, customs and regulatory issues. He was among the lawyers advising international lessors on the KrasAir and KD Avia cases.

## June

### **Clyde & Co adds partner and associate**

International law firm Clyde & Co has added a new aviation finance partner, Sidanth Rajagopal, to its

Dubai office.

Rajagopal, who was a partner at Clasis Law, Clyde & Co's associate law firm based in India, specializes in financing, leasing and purchasing of aircraft and engines.

Clyde & Co also has appointed Tim Lin to its Hong Kong-based aviation team as an associate.

Lin joins from lessor Aviation Capital Group, where he was in-house counsel.

Paul Jebley, head of aviation finance, Asia and Africa, Clyde & Co, says: "I am very pleased that Tim decided to join our team in Hong Kong. He is an excellent leasing lawyer, with great experience in the Asian markets. Our lessor, bank and airline clients will benefit from his experience and skills."

### **Watson, Farley & Williams appoints new aviation partner**



Watson, Farley & Williams has promoted Jahnvi Ramachandran and Kavita Shah as partners, asset finance. Both will be based

in London.

Ramachandran specializes in transport finance, with an emphasis on the aviation sector.

She has experience across acquisition, financing and leasing of commercial aircraft, business jets and helicopters. Ramachandran has acted for banks, lessors, airlines and export credit agencies.

Shah specializes in international finance, with experience in ship, structured and project finance.

Ramachandran was named a rising star in *Airfinance Journal's* guide to Aviation lawyers in 2011.

Watson, Farley & Williams also has promoted Ahmad Khonsari and Daniel Marhewka, who are both in the firm's corporate team in Munich.

### **Payne becomes DLA Piper aviation director**

DLA Piper has appointed Tony Payne as aviation legal director in its London office.

He previously was assistant general counsel at Nats Holdings, formerly National Air Traffic Services Limited. He was also a commercial >>>



## LEGAL MARKET

# Moves in 2013

lawyer in Australia.

Payne has practiced as an aviation lawyer for almost a decade in the UK. He has been advising clients on compliance and non-compliance issues associated with International Civil Aviation Organization conventions, European regulations and domestic law, certification, changes of ownership, as well as supporting consultation exercises.



### Trowers & Hamlins hires aviation litigator

Trowers and Hamlins has appointed Alex Burton to its dispute resolution and litigation department. Burton is the second commercial litigation partner to join the London team since January.

Burton joins from Reed Smith, where he was a partner in the firm's EME commercial disputes group.

He is a highly experienced commercial litigation lawyer with expertise across a range of sectors, including financial services, professional liability and aviation.

### Clifford Chance adds two partners

Clifford Chance has added two partners to its London and New York asset finance teams.

Oliver Hipperson has joined the London team, while Emily DiStefano joins the firm in New York.

DiStefano arrives from Debevoise & Plimpton, where she served as counsel in the corporate department. She has significant experience in aviation finance, including secured lending, leasing, private equity and restructuring.

DiStefano also regularly advises US airlines on public and private enhanced equipment trust certificates. She was selected as a rising star in *Airfinance Journal's* 2010 Lawyers Guide.

Hipperson joins the asset finance team at the law firm's London offices. Hipperson specializes in aircraft leasing and financing. He has been a senior associate at Clifford Chance since 2007.

## July/August

### Norton Rose and Fulbright complete merger

Norton Rose and Fulbright & Jaworski completed a merger on June 3. The new law firm will be called Norton Rose Fulbright and has 150 aviation lawyers globally.

Neil Poland, Norton Rose's global head of the aviation group, based in the UK, will lead the expanded aviation practice.

### Kennedys merges with Gates and Partners

Litigation and dispute resolution law firm Kennedys and specialist aviation and aerospace law firm Gates and Partners have merged.

The merger, which took effect from June 1, will take Kennedys' partner count to 176. It will have more than 1,120 employees worldwide. The merged firm will be known as Kennedys and will be led by its senior partner, Nick Thomas.

The specialist aviation team, Kennedys Aviation, will comprise more than 60 people, including 20 partners.



### DLA Piper secures Dentons' Moscow staff

Anna Otkina, a partner and the head of Dentons Moscow's aviation practice, has moved to DLA Piper as a partner. Two other Moscow-based Dentons lawyers – Philip Lamzin, a legal director, and Shagav Gazhiev, an associate – have joined Otkina. Otkina worked for SNR Denton for more than 11 years. Lamzin joined the firm in 2006 and Gazhiev three years ago.

Lamzin was named a rising star in *Airfinance Journal's* 2011 Guide to Aviation Lawyers.

SNR Denton merged with Salans and Fraser

Milner Casgrain in March, and changed its name to Dentons. *Airfinance Journal* understands that the former SNR Denton aviation team decided to leave shortly after the merger. A Dentons representative tells *Airfinance Journal* the firm is still doing a lot of Russian aviation work and is "in the process of looking to rebuild the team".

According to the source, there are two partners and one associate in Dentons still actively doing Russian law aviation deals.



### Jones Day hires FAA assistant chief counsel

Law firm Jones Day has hired Rebecca MacPherson, the Federal Aviation Administration's assistant chief counsel for international law, legislation and regulations. She will join the Washington office as counsel in the airlines and aviation practice. MacPherson's role at the FAA included responsibility for reviewing and approving rulemaking documents, providing legal advice on issues arising from existing regulations and developing positions on international law issues.

Her legislation portfolio addressed agency representation on all policy matters before the US Congress.

MacPherson served for eight years as associate chief counsel of the National Highway Traffic Safety Administration before joining the FAA in 2004 as assistant chief counsel for regulations.

### Blake Laphorn appoints new partner

Law firm Blake Laphorn has promoted aviation lawyer Mark Turnbull to partner.

Turnbull specializes in international aircraft finance, advising on the sale, purchase, leasing and financing of aircraft and related regulatory and commercial matters.

A UK-based lawyer, Turnbull is part of the banking and finance practice group based in the firm's City of London and Southampton offices.

Turnbull was chosen as one of *Airfinance Journal's* legal rising stars in 2011. ▲



## DEAL ANALYSIS

# BA prices first UK EETC

It is always exciting to see a precedent set but it is rare to see two within the same deal. In June British Airways plc, subsidiary of International Airlines Group (IAG), priced the first British enhanced equipment trust certificate (EETC). The deal is the first modern EETC to incorporate a Japanese operating lease with call option (Jolco) tax equity.

The \$927 million privately issued EETC is the first to be structured under English law, and is secured against 14 aircraft. The Jolco portion of the transaction will fund the equity.

The deal is secured against six A320s, six 787-8s and two 777-300ERs, which are due for delivery between June 2013 and June 2014.

Citi was the lead structuring agent, lead bookrunner and global coordinator on the deal, while Deutsche Bank, HSBC and Morgan Stanley were the joint active bookrunners. Milbank acted as adviser to the underwriters; Allen & Overy advised the issuer.

### Deal structure

According to deal sources the transaction is based on a special purpose vehicle that sits in the middle of both transactions. The deal incorporates an unnamed Cayman-based owner and a Japanese lessor, NBB. One of the reasons it succeeded was the ability of Citi to construct a deal that satisfied both sets of investors.

“The Japanese investors invest into a Japanese lessor, which prepays rent to the owner. The prepayment of rent combined with the debt equals the purchase price for the aircraft,” explains Milbank partner, James Cameron.

“The EETC investors take comfort from the fact that the entity that owns the aircraft is Cayman, which is familiar jurisdiction that gives good security. The Japanese investors are well placed because they have invested in a Japanese entity, which helps insulate them from withholding tax. From an equity perspective, it a domestic deal.”

The deal is distinct to other Jolcos. One of the biggest issues to resolve on the deal was that of cross-collateralization. EETC investors will often look for full cross-collateralization, something that Jolco investors will often try to resist. However, deal arrangers convinced the Jolco investors this was a necessary commercial risk, which they accepted.

“We were tasked to blend an EETC with a traditional Jolco structure,” says Thomas Blimel, managing director, Citi global markets. “The objective was to ensure that key terms that EETC investors, rating agencies and Jolco investors would

be looking for were preserved – for example, cross-collateralization. What we wanted to accomplish is to structure the EETC portion of this financing such that it looks like something investors have seen before in precedent EETC transactions.”

### Highly rated

In an unusual move the legal team accompanied the banking team to educate both investors and the ratings agencies on the intricacies of repossessions under English law. The effort clearly paid off because the rating agencies offered investment-grade ratings on the two separate tranches of the transaction.

The class-A certificates were rated Baa1/A/A, while the class-B were rated Ba1/BBB/BBB. In addition, the deal secured an 18-month liquidity facility provided by Helaba, a significant vote of confidence in the robustness of UK repossession rights. In contrast, Doric’s repeated EETC on behalf of Emirates had a 24-month liquidity facility.

The EETC portion of the deal is split between two tranches, including a \$721.610 million class-A tranche, which has an 11-year tenor, a 7.9-year weighted average life and a 55.2% initial loan to value.

The \$205.372 million class-B has a seven-year tenor, a 4.2-year weighted average life and a 70.6% initial/max loan to value.

The class-A certificates priced at 4.625% and the class-B priced at 5.625%.

### Benefits of English law

A separate challenge was getting US investors comfortable with an EETC under English law. The UK is one of the several jurisdictions that has not ratified the Cape Town Convention, and this was the first EETC that was solely reliant on English law.

Financiers and lawyers involved in the deal are quick to point out the benefits of English law for investors. “English law is very creditor friendly. Don’t forget this was also structured as a lease, which makes it even better from the creditor’s perspective because it means the transaction falls under English contract law that can provide some solid protections to investors,” says Scott Debanco, director, Citi Global Markets. One of the main attractions under English law is that in the case of default a creditor can exercise self-help remedies immediately. This is different to both Section 1110 in the US or Cape Town, which both allow the borrower to delay repayment for a period of time under bankruptcy or repossession.



### BA’s deals relies on a special purpose vehicle behind both the Jolco and the EETC.

Milbank’s Cameron echoes the notion that under English contract law it is hard to imagine a scenario in which the airline would have a credible argument over delayed payments, especially to security trustees.

Other lawyers comment that the operating lease that lies at the heart of the British Airways EETC was crucial for the deal’s success.

“Normally under a bankruptcy all of the creditors are stayed, which means they cannot enforce or repossess their aircraft,” says Donald Gray, head of the aircraft finance practice at Blakes. “The reason that BA did the Jolco is because under English bankruptcy law, if you have title to an asset you cannot be stayed for as long as if you had a mortgage, which is the standard EETC structure. The UK does not have either Section 1110 or Alternative A. The operating lease is what helped convince the rating agencies to give the favourable ratings and ensured that a facility of only 18 months, without further issuer enhancements, would be all that was required.”

Ultimately the deal represents exceptional value to BA. It is hard to conceive how the carrier could hope to achieve cheaper all-in financing.

The transaction has also introduced BA to the US capital markets, and crucially sets a precedent that other airlines can follow. This transaction is a repeatable deal not for just BA but for a variety of airlines worldwide taking advantage of the English law regime to access the US capital markets.

Relatively few carriers can access the Jolco market, which prefers flag carriers, but the attraction of this deal structure is that airlines can now easily combine an EETC with a finance or tax lease. ▲



## CASE TO WATCH

## Gecas to appeal Lebedev case

Gecas and PK Airfinance plan to appeal a court decision that ordered them to pay \$17 million in damages and costs to Russian oligarch Alexander Lebedev. Dickon Harris reports.

Gecas and PK Airfinance are planning to appeal a recent UK high court decision in which the two GE subsidiaries were found to have conspired against firms owned by Russian oligarch Alexander Lebedev in a case involving seven leased aircraft.

Under the ruling Gecas and PK Airfinance have to pay about \$17 million in damages and costs. Airfinance Journal understands that the aircraft lessor plans to launch appeal within the next few months.

The case, which concluded in early August, involved seven A320 aircraft acquired by two firms, Alpstream Aviation Ltd and Betastream Ltd. The companies, both part of Lebedev's NRC Group, used PK Airfinance to fund the used jets, which were between six and nine years old, in 2007 and 2008.

The aircraft were leased out to Blue Wings, a German low-cost airline. When Blue Wings went bankrupt in 2009 PK Airfinance, which had a mortgage over the aircraft, seized them.

Airfinance Journal understands that one aircraft was in severe state of disrepair and was later scrapped. The other six Blue Wings aircraft were repossessed from the airline in poor condition, in breach of their redelivery terms while the mortgage facility was in severe arrears.

#### Aircraft auction

According to the judge, Justice Burton, Gecas had arranged a non-binding letter of intent for six of the aircraft to be leased to US carrier JetBlue Airways. PK Airfinance spent \$49 million to renovate the aircraft, as if they were "rolling out of the factory" in order to meet the requirements of JetBlue.

Under UK repossession rules, the lender must get the highest price possible for the asset, recovering its loan and passing on the remains of the sale price to the former owner – in this case, Alpstream.

According to Justice Burton's judgment, PK Airfinance arranged a "minimalist" auction in which it then acquired the aircraft for \$171.5 million on May 18 2010, and transferred the aircraft to Gecas on an inter-company basis. The aircraft were then leased to JetBlue Airways Corporation of America.

PK did not highlight the substantial amount of works performed on the aircraft in any of the advertising at the auction, according to the



**The seventh recovered Blue Wings aircraft that was later scrapped by PK Airfinance**

court ruling. In the end 38 interested parties contacted PK after the auction was advertised but only NRC Group and PK Airfinance attended the auction.

#### "Going through the motions"

Justice Burton said PK knew of the conflict between its role as mortgagee and its role in assisting Gecas to secure the aircraft so that they could be leased to JetBlue.

Justice Burton added that PK Airfinance representatives had deliberately misled Alpstream about the negotiations with JetBlue, leading then to believe that Gecas was remarketing the aircraft on behalf of Alpstream when they knew, and concealed from Alpstream, that there was an express get-out clause for JetBlue if Alpstream and not Gecas were to be the lessors.

Justice Burton said: "The reality is that PK knew that they were going through the motions and preferring the interests of Gecas over their obligations as mortgagee, and they covered this up where necessary. They knowingly took a risk, namely setting up a minimalist auction, in which PK would be in a position to outbid any comers by putting forward a bid... so as to secure the aircraft for Gecas, while paying no regard at all to their duties to take care to obtain the best possible price for them."

In a written statement Gecas responded: "We are disappointed with the court's ruling. We did everything in our power to manage the claimants' defaults appropriately and in accordance with standard industry practices. There was no wrongful conduct here and we plan to appeal the decision." ▲





## EDITORIAL

# Cape Town opens capital market doors

Airlines have started to make regular forays into the capital markets, especially the US debt capital markets. A key factor behind this has been the Cape Town Convention, writes Jamie Bullen.

“Capital markets are the holy grail of aircraft finance,” said Boeing Capital’s Kostya Zolotusky in 2010.

Aviation’s chance of finding its holy grail has started to become a reality over the past year or so. Asian carriers have tapped their local capital markets – notably the Chinese big three issuing short-term notes into the Chinese bond market. Lessors such as ILFC and ALC have also been issuing both secured and unsecured notes on a regular basis.

There has also been a pickup since 2012 in non-US airlines issuing enhanced equipment trust certificates (EETCs) for the first time in about a decade. Much of that is because of the Cape Town Convention (CTC), which standardizes bankruptcy codes with the US and gives surety on repossessions. That has seen US debt capital market investors’ appetite for non-US EETC issuances grow.

However, the picture was bleaker before 2012.

### Pyrrhic victory

Air France and Iberia attempted issuing EETCs in 2003, but ended up with deals that were modified to such an extent that industry insiders do not see them as true EETCs. Regularly tapping the capital markets looked for a long time like never becoming a reality for the world’s airlines.

In fact, the only carriers able to do tap these markets on a regular basis were the US airlines, which regularly issued investment-grade debt through structures such as EETCs into the US capital markets.

For non-US airlines that meant potential competitors which were sub-investment grade were able to access investment-grade debt through EETCs, while they had to rely only on traditional financing structures.

### Wings of change

That started to change finally in 2012. US Ex-Im-backed bonds for airlines became a regular occurrence, and UK Export Finance and Coface, the European export credit agencies, started to back airline bonds in 2013.

In mid-2012 Doric and Emirates issued the first non-US EETC transaction in nearly a decade – since Air France and Iberia’s attempts. The \$587.5 million deal was not only the first EETC relying on the A380 as collateral, but also the first EETC to rely on Cape Town Convention mortgages rather than Section 1110.

Since then Doric and Emirates have repeated the deal, and have been joined as non-US EETC issuers by Air Canada and British Airways.

### Alternative A

A major factor in allowing non-US airlines to issue EETCs is the Cape Town Convention, a treaty that normalizes a country’s bankruptcy code with the US’s Section 1110 if the provision Alternative A is enforced. Another part of the treaty, the Irrevocable De-Registration and Export Request Authorization, provides a framework for the speedy return of assets in working condition in the event of a default – which is key for investor confidence because those assets will have to be remarketed.

US investors which pour money into EETCs are institutional investors and pension funds. These investors like regularity and certainty. The advantage of Cape Town’s Alternative A is that it allows those investors to tick off one item on their list – namely that in the event of a default the carrier will adhere to the US’s bankruptcy laws. This makes them comfortable with a non-US issuer, and therefore more likely to invest.

“From a security enforcement and recovery perspective Alternative A will prevent the imposition of national insolvency law on this new special aircraft insolvency regime in that remedies allowed under the convention cannot be prevented or delayed through national law – eg, national law could not delay the recovery of aircraft records or place a stay on enforcement post the waiting period; an examinership stay would not operate beyond the waiting period to prevent the exercise of remedies by the lessor or financier,” says Ken Rush, partner, Walkers.

This is a view that ratings agencies have also taken. Fitch has stated that, in the case of Air Canada’s EETC, it sees Alternative A giving the creditor the same protection in Canada as the legal protection provided by Section 1110.

The Doric and Emirates deals also took advantage of Alternative A.

However, the Doric/Emirates EETC did not achieve the same terms as US airlines – namely an 18-month liquidity facility and the ability to issue the riskier tranche-C debt. Instead, they got a 24-month liquidity facility, while US airlines can get 18-month liquidity facilities even when under Chapter 11, such as American Airlines’ recent issuance.

According to Donald Gray, partner, Blakes, a pure EETC for a non-US issuer is one that has the same terms as US airlines get.

Under this definition, the first pure EETC by a non-US issuer – one with an 18-month liquidity facility – was Air Canada’s issuance in May 2013.



## “Cape Town in my view is allowing – and will continue to allow – non-US airlines to access the capital markets”

Donald Gray, Blakes

### Praise Canada

Ratings agency Fitch singled out Cape Town when assessing the airline's EETC.

“Importantly, Canada has adopted CTC in the manner that is intended to be most favorable to EETC holders in a potential default with all the key declarations including: (i) Alternative A, which essentially exports Section 1110 into foreign jurisdictions with the same 60-day stay period following an insolvency event; (ii) self-help remedies; (iii) an Irrevocable De-Registration and Export Request Authorization registration, which obligates AC [Air Canada] and the Canadian government to assist creditors in the deregistration and export of the aircraft; (iv) and choice of law. CTC Alternative A also requires AC to maintain and preserve the aircraft and its value in accordance with the financing agreement during the 60-day stay period, which is an additional enhancement over Section 1110,” stated an April 2013 press release from Fitch.

Air Canada's issuance clearly impressed the market. The Canadian carrier managed to lock in some very tight coupons: the 13-year class-A certificates have a coupon of 4.125% a year, while the nine-year class-B certificates have an interest rate of 5.375% a year and the six-year class-C certificates 6.625%.

The class-A certificates were rated A by Fitch, Baa3 by Moody's and A- by Standard & Poor's (S&P). The B certificates were rated BB+ by Fitch, B1 by Moody's and BB by S&P. The C certificates were rated BB- by Fitch, B3 by Moody's and B by S&P.

These ratings are astonishing given how the agencies view Air Canada as a base credit. Fitch rates Canada as B, S&P rates it as a B-, while Moody's rates it Caal. In short, the EETC secured a nine-notch upgrade from two of the agencies and a seven-notch upgrade from Moody's.

However, Fitch did note that Cape Town had yet to be tested in a Canadian court.

“The CTC has yet to be tested in Canadian courts, which adds some uncertainty, but Fitch does not view this as a significant concern in Canada given the reliability of its legal system,” stated the ratings agency.

It is the reliability of the jurisdiction's courts and legal systems that will ultimately allow non-US airlines to issue pure EETCs, according to legal sources.

### Cape Town plus location

A key difference between the Doric/Emirates and Air Canada EETCs was the length of the liquidity facilities required. Doric and Emirates managed a

24-month facility, while Air Canada got 18 months. This is despite both relying on Cape Town. One reason for the disparity is how a country's legal and political risk is viewed.

Canada has never reneged on a treaty's obligation, and its courts have to enforce statutory law. The picture in the UAE is not so clear. Therefore, what is possible to achieve in terms of liquidity facilities – and issuing riskier tranches such as the C class – is diminished because investors are surer of Canada respecting the treaty than the UAE.

In terms of widening the scope of non-US airlines issuing EETCs, there will be grades. Essentially, some jurisdictions are viewed as more reliable than others, regardless of Cape Town.

“Cape Town in my view is allowing – and will continue to allow – non-US airlines to access the capital markets. But I do not think all of the world's major airlines will be able to access them because essentially what will happen is that rating agencies and investors will look at the airline's home jurisdiction plus Cape Town enforcement and come to a view based on that. It boils down to legal risk and political risk. For example, the Canadian courts are seen as predictable, efficient and trustworthy and have always respected treaties. Legal systems in other countries are not necessarily seen in the same light,” says Blakes' Gray.

Though Cape Town will benefit more difficult jurisdictions by tempting banks and lessors into the region, it will not open up the capital markets because there will be doubts over whether the national or local courts will abide by the treaty. Some jurisdictions are seen as so unreliable that their airlines may never be able to access the capital markets.

Others will be able to access the market, but will have to have longer liquidity facilities and are unlikely to be able to issue C-tranche debt.

Solid jurisdictions such as Australia and New Zealand will likely be viewed by investors and rating agencies in the same way as Canada. A legal source says that Qantas and Air New Zealand would likely get pure EETC terms if they tried to enter the market.

Essentially what types of EETCs airlines get, if at all, if Cape Town has been ratified will be based on the home country's courts – and historically how consistent their judgments have been.

### Lower with Cape Town

The other non-US issuer of an EETC recently did so without Cape Town being ratified. British Airways (BA) issued an innovative EETC combined with Japa-

nese operating lease with call option under UK law.

While this EETC is a pure EETC because of the 18-month liquidity facility, the lack of Cape Town may have made it a more expensive transaction for British Airways. Three industry sources tell *Airfinance Journal* that if the UK had ratified Cape Town before BA issued the EETC, pricing could have been up to 50 basis points lower.

Indeed, the issuance may only have been possible because of how well regarded UK law is by investors in terms of consistency – and that UK law is generally regarded as debtor friendly.

Even for a strong, well regarded jurisdiction such as the UK, the ratification of Cape Town will allow cheaper access to the US capital markets because the Alternative A standardization alleviates US capital market investors' concerns.

### Not a free for all

The US capital markets will not open for all airlines. But they will open up for a lot more airlines than has been the case in the past.

Sean Corrigan, a New York-based aviation finance lawyer with Norton Rose Fulbright, says: “With Section 1110-like protections now available to secured lenders in a number of jurisdictions through their adoption of Cape Town's Alternative A, US capital markets should be much more receptive to the offerings of non-US airlines from those jurisdictions. I suspect that the recent EETC offerings involving Emirates and Air Canada are only the first of what could be a steady stream of new such offerings in the US.”

Jeffrey Wool, secretary-general of the Aviation Working Group, shares this view, and emphasizes that Cape Town was inherently designed to achieve this.

“There is no surprise that the CTC – where properly ratified and implemented – directly and materially facilitates capital market transactions, as the methodology of the rating agencies was taken into account, as early as the 1990s, in designing the terms of the treaty.”

Aviation has been looking to access the capital markets, particularly in the US, for some time. Cape Town effectively standardizes non-US jurisdictions so that investors are comfortable with what they are investing in.

That standardization will allow more airlines which are sub-investment grade to access the investment-grade debt that US airlines have had exclusive access to for a long time. Expect most of them to try to take advantage of it. ▲



## LEGAL SURVEY

# Ranking the lawyers

Airfinance Journal unveils its revised legal survey which recognises the most active law firms in 2012 by both regions and financing structure.

This year we have revised our legal survey. Instead of asking clients to vote for their favourite firms, we have based the survey on the transactions recorded and published within the Airfinance Deals Database. Our aim is to be strictly transparent and impartial – therefore all of the deals in the following tables are published deals in the database.

To meet these requirements all of the firms made a considerable effort not only putting deal lists together, but also speaking to their clients to ensure we could include the deals in the Airfinance Deals Database. These restrictions meant that some of the submissions could not be considered in the survey.

**“The benefit of using the Deals Database is that we can offer a granular presentation of law firm activity by both product type and region.”**

The benefit of using the deals database is that we can offer a granular presentation of law firm activity by both product type and region. The survey allows us to confirm the most active law firm for aviation export credit agency financing, or for tax leases. In this sense the survey is unique. No other survey, or study, displays the different niche areas within aviation financing. The resulting league table is also completely transparent. If anyone wants to check the numbers they are there in the database.

There are of course limitations to the survey. The Airfinance Deals Database has more than 550 deals for aircraft in 2012. However, of these deals only about half have a legal firm attached. All of the deals have details of the financings but many

have little information on which law firm represented either the borrower or the lender. These are important caveats, as certain financing structures, most notably tax leases, tend to be opaque. Nevertheless, the survey represents broad underlying trends within the aviation finance market. It is also the only survey that offers both a transparent view of legal activity and separates law firms by their product specializations and regions.

### Overall rankings

The survey records the overall number of deals for each law firm. A deal, as defined by the survey, represents one mandate and can contain multiple aircraft. In addition to presenting the most active law firms by product and regions the survey also aggregates how law firms have performed to produce an overall ranking.

Law firms secure points based on where they place for each region, product and category. A law firm that tops North America, for instance, or the operating leases section receives five points and the second receives four points, and so on.

This is the first year of the survey, and we have plans to expand its scope to drill down into regions and offer further analysis.

All of this would not have been possible without the help and cooperation of the different law firms involved. We would like to extend a thank you to everyone who took part in the survey and who took the time to submit their deals.

DICKON HARRIS,  
Editor, Airfinance Journal,

ALFONSO OLIVAS,  
Manager, Airfinance Deals Database



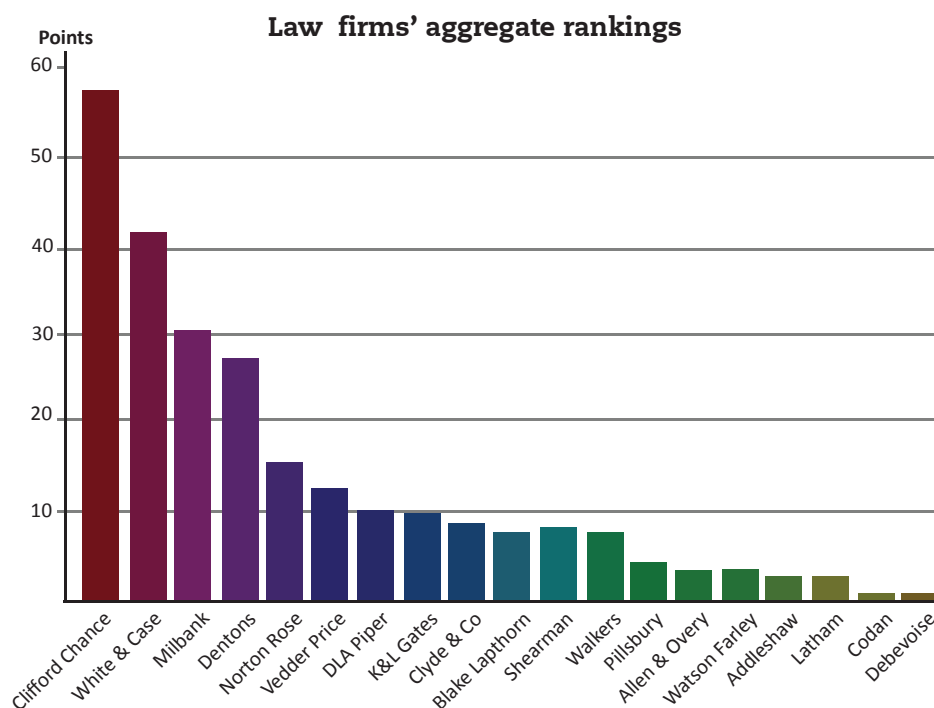


## The legal survey reviews 286 deals in 2012

### The Winners

Pos	Lawfirm	Points	Avg. Aircraft
1	Clifford chance	57	5.0
2	White & Case	42	2.6
3	Milbank	31	7.5
4	Dentons	28	3.8
5	Norton Rose	16	2.0
6	Vedder Price	13	2.8
6	DLA Piper	10	2.3
6	K&L Gates	10	1.8
7	Clyde & Co	9	2.0
7	Blake Lapthorn	8	2.1
7	Shearman & Sterling	8	8.0
8	Walkers	8	1.9
9	Pillsbury	5	5.8
9	Allen & Overy	4	1.9
10	Watson Farley	4	1.0
10	Addleshaw	3	2.3
11	Latham	3	3.2
11	Codan	1	14.3
11	Debevoise	1	14.0

Source: Airfinance Deals Database



The legal survey is split both by product type, category and region. In addition to summarizing the most active law firm by the number of deals, we have also aggregated the results awarding points to law firms based on how they place in each respective region and product type. Based on these results we have produced overall rankings.

Clifford Chance is the overall winner of Airfinance Journal's inaugural legal survey. It came top in Europe, Africa and Asia, and polled first for several financing structures.

Clifford Chance partner William Glaister puts his firm's success across the globe down to having the personnel in the right places and effective communication.

He says: "Our success is in large part down to having the right people in the right places; by having experts in each region we can demonstrate to clients our ability to execute trans-

actions globally. At the same time the global team remains closely coordinated, ensuring that best practices and market developments are communicated globally."

White & Case is ranked second overall in the survey. White & Case was the most active law firm for operating leases in 2012, and was the second most active firm in Asia, Europe and Latin America in 2012.

Christopher Frampton, global head of White & Case's asset finance group, sees significant growth opportunities for 2014.

"We continue to believe that the industry's significant funding requirements will be met by varying capital sources," he says. "We have seen some IPOs, and we expect that trend to continue. The debt capital markets will play a vital role. The globalization of the EETC product will continue, and at some point we expect the ABS market to rebound. We

expect to see more Jolco financings, and also believe that funds and other investors will continue to show interest in operating lessors. Our combined US-English law capabilities and presence in key financial centres around the globe position us perfectly for all these developments."

Milbank was in third place overall in the survey. It was the most active law firm advising in the capital markets in 2012 and the most active in North America.

"We are a very client-driven firm, always striving to position ourselves to meet the changing needs of our clients," says Elihu Robertson, a partner at Milbank. "We expect a continuing demand for non-US EETCs, other capital markets products and more traditional bank and lease products, with a growing emphasis on large transactions efficiently placed in the capital markets."



The increasingly mobile and affluent population means the potential of the African market is immense, and global financiers are becoming more confident to invest in the region.

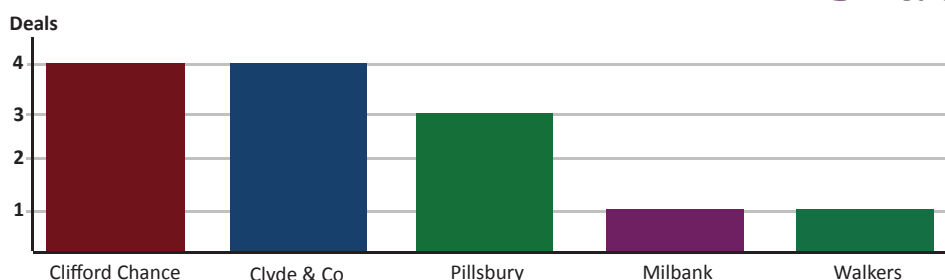
## Africa

The aviation industry in many African countries continues to be plagued by weak transport infrastructure and economic instability. While the continent boasts a few stronger flag carriers, many of the smaller airlines still face difficulties when trying to access affordable finance and lease deals.

Last year Africa contributed only 18 aviation finance deals – just 3.9% of the global total, according to the Airfinance Deals Database.

“The African aviation finance industry faces many of the same challenges faced by airlines in seeking increased growth and profitability in Africa,

Pos	Lawfirm	Deals	Points
1	Clifford Chance	4	5
1	Clyde & Co	4	5
2	Pillsbury	3	4
2	Milbank	1	3
3	Walkers	1	3



Source: Airfinance Deals Database

including opening routes, improving airports, attracting more debt and equity sources, addressing actual and perceived security and safety risks, improving governmental support of the aviation industry and reducing high taxes and fees,” says Thomas Zimmerman, partner at Pillsbury.

“Additional challenges faced by the aviation finance industry include the large number of airlines with small fleets, limited routes, actual and perceived bankruptcy and repossession risks,” he adds.

While there are challenges, the increasingly mobile and affluent population means the potential of the market is immense, and global financiers are becoming more confident to invest in the region.

“For now, the main financing sources for aircraft in Africa will likely come from outside the continent including export credit agency-supported deals, operating lessors and financing sources from the United States, Europe, the Middle East and China,” says Zimmerman. ▲

**13** Deals

## Asia

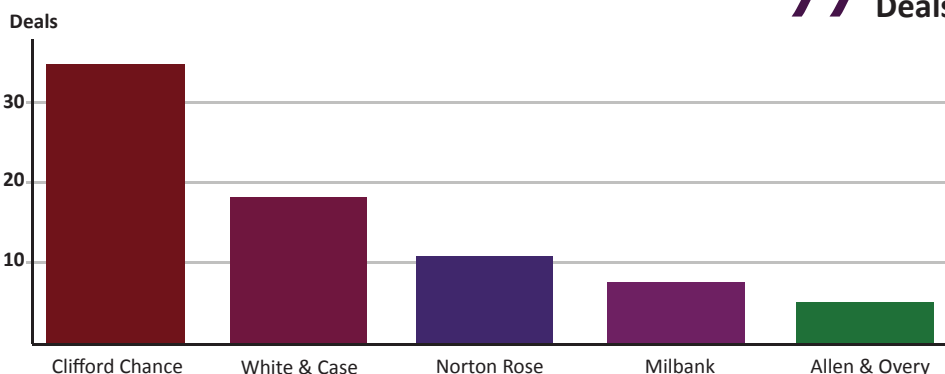
Asia is seen as the boom region for aviation. The Chinese airlines continue to grow their fleets, there is an increasingly buoyant Indonesian aviation sector, the remarkable success story of the AirAsia brand continues and we are seeing new markets – such as Myanmar – opening for aviation.

In terms of deliveries over the next few years, a lot of capital will be needed to finance the region’s airline growth.

In 2012 Asia recorded 155 deals, according to the Airfinance Deals Database – giving it a global market share of 33.9%. The legal survey examines 77 of these deals. This makes it one of the most competitive areas in which to do business, and it remains largely a region where relationships count.

The top five law firms in Asia, according to this year’s survey – Allen & Overy, Clifford Chance, Milbank, Norton Rose and White & Case, – all understand the importance of client relationships.

Asia is a region whose airlines are set to expand their fleets, and most big law firms are searching for ways to receive a slice of the lucrative action on offer. ▲



Source: Airfinance Deals Database

Pos	Lawfirm	Deals	Points
1	Clifford chance	35	5
2	White & Case	19	4
3	Norton Rose	12	3
4	Milbank	7	2
5	Allen & Overy	6	1

“Most big law firms want a slice of the lucrative Asian action on offer”

**77** Deals

“The EETC market is a particularly efficient one for North American carriers.”

Elihu Robertson, Partner, Milbank.

## Europe

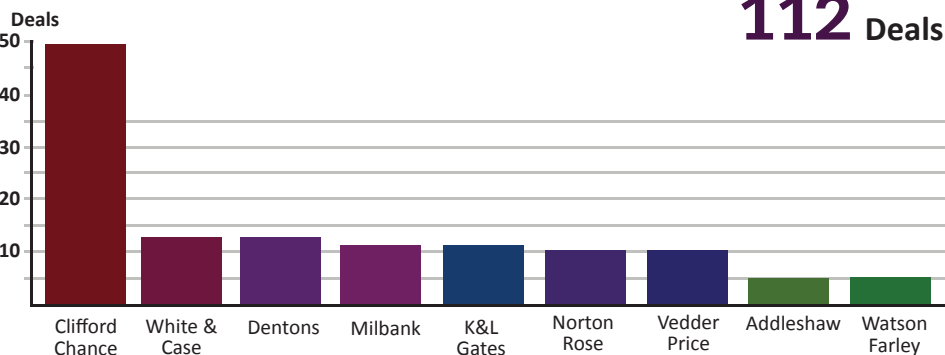
Europe has been through a difficult period recently, with the eurozone crisis and many countries in the region on the brink of prolonged recession.

There have also been high-profile bankruptcies, with the likes of Hungarian carrier Malev failing.

Despite this, Europe is still a hotbed of deals. It accounted for 28.9% of deals in 2012, making it the year’s second busiest region, after Asia.

Much of this can be put down to the concentration of lessors in Europe, specifically in Ireland, being very active in the last quarter of 2012. Europe had only a 21% market share in third quarter but this increased to 30% after a spate of lessor deals in the fourth quarter.

The region, along with North America, also has the most mature aviation market, with many established airlines. These include flag carriers and low-cost airlines such as Ryanair and easyJet, which both posted large orders with Boeing and Airbus recently,



112 Deals

\*Deals with lawfirms’ information attached  
Source: Airfinance Deals Database

“Despite the recent eurozone crisis, Europe is still a hotbed of deals.”

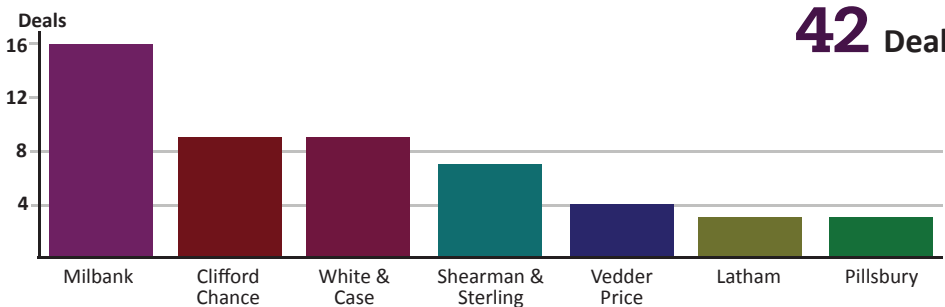
ensuring that Europe will most likely continue to be an important region for aviation despite lingering concerns over its economic future. ▲

Pos	Lawfirm	Deals	Points
1	Clifford chance	49	5
2	White & Case	13	4
2	Dentons	13	4
3	Milbank	11	3
3	K&L Gates	11	3
4	Norton Rose	10	2
4	Vedder Price	10	2
5	Addleshaw	5	1
5	Watson Farley	5	1

## North America

Last year Milbank, by some distance, was the most active law firm advising on borrowers based in North America. North America accounted for 16% of all deal activity in 2012 but this figure is expected to increase by the end of 2013. One reason is that many of the North American carriers are preparing significant fleet renewals. Operating lessors are therefore jostling to secure large sale/leaseback deals from these carriers, which represent some of the most established credits within aviation.

However, North American carriers have a distinct advantage against many, but not all, of their foreign rivals in that they can access the US debt capital markets. Many assume that the US market will continue to be dominated by enhanced equipment trust certificates (EETCs).



42 Deals

Pos	Lawfirm	Deals	Points
1	Milbank	16	5
2	Clifford chance	9	4
2	White & Case	9	4
3	Shearman & Sterling	7	3
4	Vedder Price	4	2
5	Latham	3	1
5	Pillsbury	3	1

Source: Airfinance Deals Database

“The EETC market is a particularly efficient one for North American carriers,” notes Elihu Roberts, a partner at Milbank. “North American airlines like airlines worldwide will seek the least expensive solutions to their financing needs, and we expect EETCs to remain a very attractive alternative for them.” ▲





## “One interesting feature of the Middle Eastern market is how the low-cost carrier model is being applied in the region.”

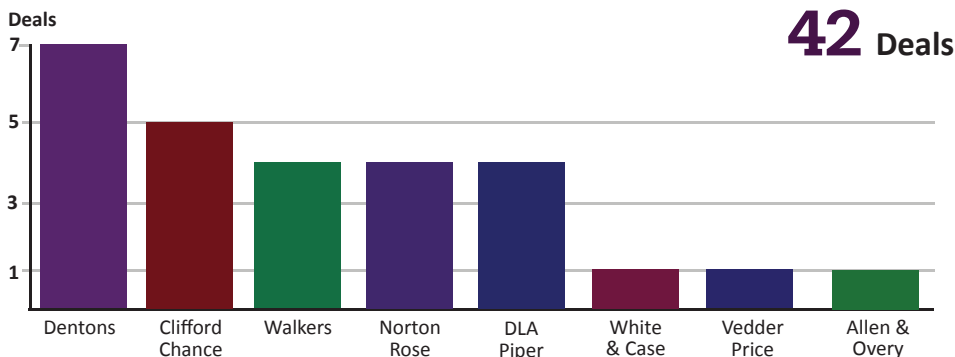
Paul Jarvis, Partner at Dentons

### Middle East

The Middle East is rapidly evolving into an aviation hot spot. The global-centrality of the Gulf has encouraged the building up of hubs in Dubai, Doha and Abu Dhabi, and there have been numerous large orders coming out of the region in recent years.

Middle Eastern aviation deals clocked up 8.1% of the global total, as detected by the Airfinance Deals Database.

Pos	Lawfirm	Deals	Points
1	Dentons	7	5
2	Clifford chance	5	4
3	Walkers	4	4
4	Norton Rose	2	3
4	DLA Piper	2	3
5	White & Case	1	2
5	Vedder Price	1	2
5	Allen & Overy	1	2



Source: Airfinance Deals Database

“One interesting feature of the Middle Eastern market is how the low-cost carrier [LCC] model is being applied in the region,” says Paul Jarvis, a partner at Dentons based in Abu Dhabi.

“An example of this is flydubai’s recent decision to make a dual-class offering on its flights, reflecting how the LCC model can be developed for the Middle Eastern market,” agrees Bill Gibson, a partner at Dentons in London.

On the full-service carrier side, rapidly expand-

ing airlines such as Emirates and Etihad continue to dominate headlines.

“The biggest challenge facing Emirates will be to continue to arrange the quantum of funding needed for its aircraft deliveries,” says Paul Holland, partner at Dentons and Middle Eastern specialist. “Emirates has recently closed ECA [export credit agency] bond financings for Airbus A380 aircraft – the first Coface bonds – and they will continue to be at the fore for new and innovative financings,” he adds. ▲

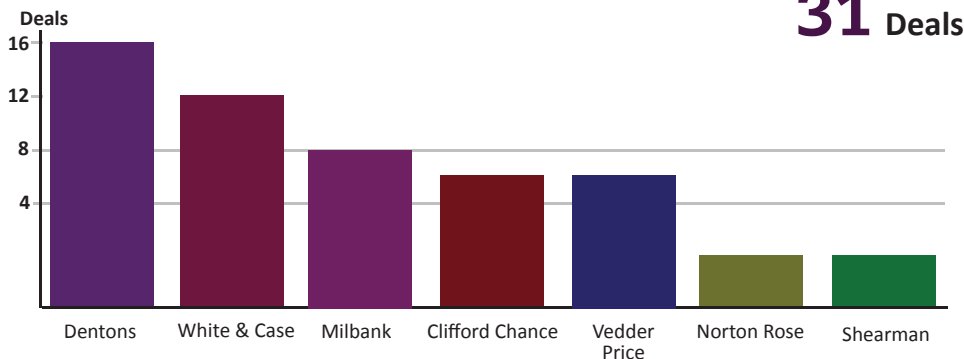
### Latin America

Latin American deals comprised a respectable 9.2% of the global total last year, according to the Airfinance Deals Database.

Over the past year there has been a slight shift in financing structures in the region. “There has been an increase in operating leases provided by the Chinese operating lessors, as well as a relative dearth in commercial debt financings made available directly to airlines outside of the Jolco [Japanese operating lease with call option] market,” says Serge Sergiou, a partner at Dentons and Latin American specialist.

While the Latin American market has continued to rely on export credit-supported financing to a large extent, Latin American carriers have also shown themselves to be open to more innovative forms of financing.

“Latam’s US Ex-Im bond was a prefunded bond issued in order to finance Boeing 777 deliveries, and was one of the first prefunded bonds to complete. Likewise, the UK Export Finance ECA bond for Airbus aircraft was the first European



Source: Airfinance Deals Database

ECA bond,” says Sergiou.

Other airlines have benefited from ECA-supported financing for regional aircraft, such as Azul for its ATR fleet.

Latam’s tradition for innovation was also reflected in its \$2.6 billion 25-aircraft sale/leaseback transaction with AerCap.

Sergiou says: “The transaction is notable not just for its size, but also for the fact that the aircraft are all widebodies.” ▲

Pos	Lawfirm	Deals	Points
1	Dentons	10	5
2	White & Case	8	4
3	Milbank	6	3
4	Clifford chance	5	2
4	Vedder Price	5	2
5	Norton Rose	2	1
5	Shearman	2	1

“With commercial bank debt for airlines remaining compromised, the sale/leaseback product has helped them fill the funding gap”

Nick Chandler, Head of aircraft financing, Dentons

## Commercial loans

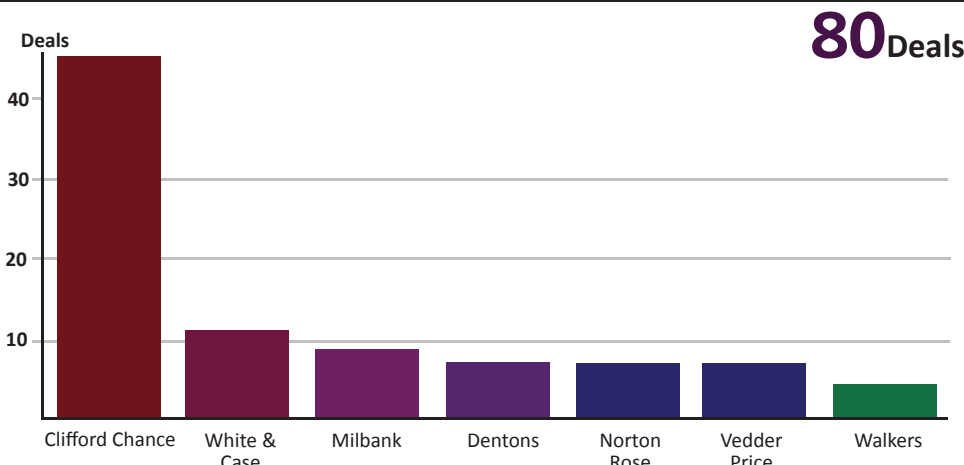
Some might have feared commercial debt went away in 2012. The aftershock of the eurozone crisis in 2011, the imminent arrival of Basel III and other structures such as US Ex-Im bonds offering far cheaper pricing may have given the impression that commercial debt was disappearing.

However, the numbers do not reflect this. For widebody deals in 2012, 21.2% were financed using commercial debt. Forty-four narrowbodies – 16.5% – were also financed under the structure.

While traditional aviation banks may have had some reservations over commercial debt, local banks started to rise – especially in Asia. The Chinese big three carriers especially have come to rely on local banks, which offer them very good margins on commercial debt.

Glaister of Clifford Chance – which came out on top in commercial debt in this year’s legal survey – has an upbeat outlook on commercial debt in air finance.

He says: “We continue to see significant activity in the commercial debt markets – with a number of banks, especially Asian banks, entering the aviation finance market.” ▲



Source: Airfinance Deals Database

“A number of Asian banks are entering the aviation finance market.”

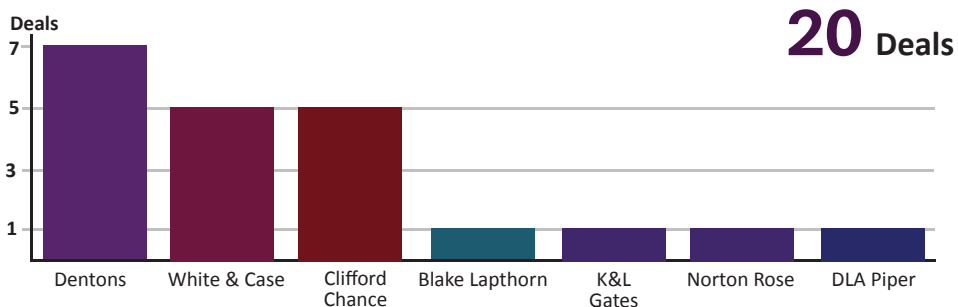
Pos	Lawfirm	Deals	Points
1	Clifford chance	45	5
2	White & Case	11	4
3	Milbank	9	3
4	Dentons	7	2
4	Norton Rose	7	2
4	Vedder Price	7	2
5	Walkers	5	1

## Sale/leasebacks

As lessors’ share of the market continues to shift up to the 40% mark, sale/leaseback deals are an increasingly popular option for airlines seeking to offload hefty orders or move existing aircraft off their balance sheets.

In 2012 the Airfinance Deals Database registered 72 sale/leaseback transactions – 16% of the total aviation finance deals for the year. Denton’s dominated last year’s sale/leaseback activity, racking up seven deals. White & Case and Clifford Chance followed closely behind with five deals each.

“With commercial bank debt for airlines remaining compromised, the sale/leaseback product has helped them fill the funding gap, and airlines’ reliance on the sale/leaseback product will no doubt continue for the next 12 months. Airlines also like the sale/leaseback



Source: Airfinance Deals Database  
product because it offers a 100% financing of the aircraft, as well as fleet flexibility,” says Nick Chandler, head of aircraft financing at Dentons.

There has been particular growth in the Asian sale/leaseback market. “The Chinese operating lessors have also continued their expansion into non-Chinese airlines and we are seeing more Japanese lessors in the sale/leaseback market,” adds Chandler. ▲

Pos	Lawfirm	Deals	Points
1	Dentons	7	5
2	White & Case	5	4
3	Clifford chance	5	4
4	Blake Laphorn	1	3
4	K&L Gates	1	3
4	Norton Rose	1	3
4	DLA Piper	1	3



In 2012 Export Credit was still a favourite of airlines, with 32% of all widebodies and 31% of turboprops financed under ECA guarantee, according to the *Airfinance Deals Database*.

## Export Credit

With the introduction of the 2011 Aircraft Sector Understanding on January 1 2013 increasing the cost of export credit agency-backed financing, there is an assumption in the market that its present market share may drop this year.

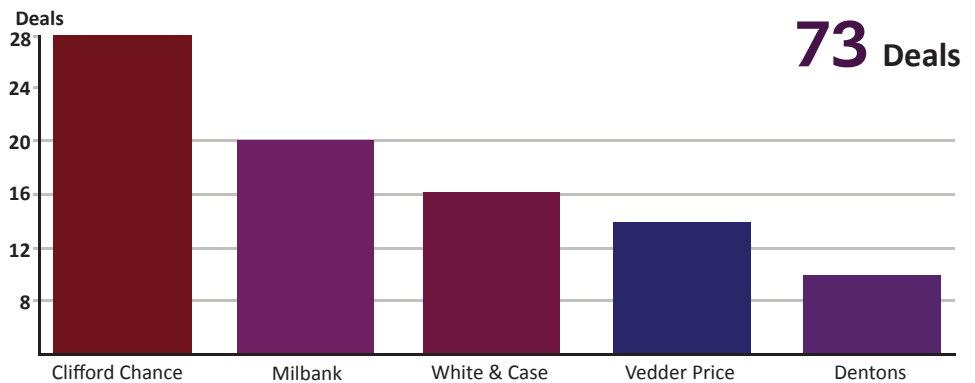
But in 2012 it was still a favourite of airlines, with 32% of all widebodies and 31% of turboprops financed under ECA guarantee, according to the *Airfinance Deals Database*.

One important development in the market was the emergence of US Ex-Im-backed bonds, a favourite financing tool of airlines because of increasingly decreasing coupon rates.

“On the US Ex-Im deals the bond documentation is now very well settled,” says William Glaister, a partner at Clifford Chance.

Clifford Chance was ranked as the most involved law firm on export credit agency deals in 2012. Glaister does not see ECA financing going anywhere, despite the higher premiums.

“ECA debt remains an attractive financ-



Source: *Airfinance Deals Database*

Pos	Lawfirm	Deals	Points
1	Clifford chance	28	5
2	Milbank	20	4
3	White & Case	16	3
4	Vedder price	14	2
5	Dentons	10	1

ing option for airlines; whilst we can see better quality credits starting to find ECA debt as expensive if not more expensive than commercial comparables because of the premium increases, the effect is not so significant and has to be balanced against the diversification of funding sources which airlines and operating lessors seek,” says Glaister. ▲

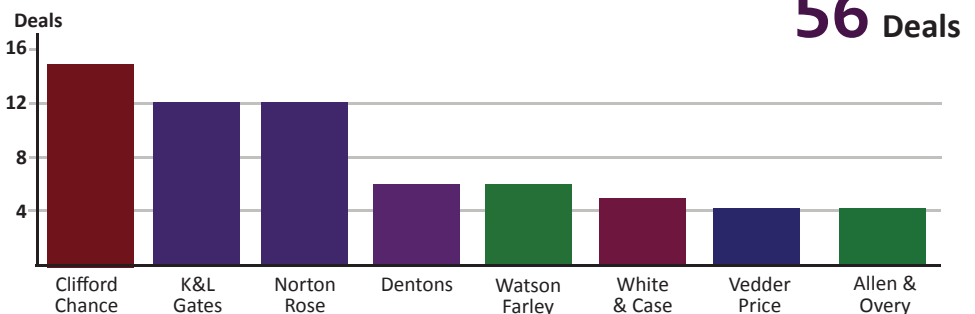
## Tax leases

Tax leases, which in the survey include Jolcos and KG funds, are one of the more opaque financing structures within aviation. However, carriers have been vocal in the past 18 months about their desire to use these structures.

“Demand continues to exceed supply, reminiscent of 2007. There are just not enough RFPs [requests for proposals] from top-tier airlines to meet the needs of Japanese equity investors,” explains Robert Melson, a partner at K&L Gates.

“This had led to some Japanese leasing companies/investors deploying their equity in Jolcos with US, Chinese and Japanese operating lessors, with such operating lessors acting as lessees in those Jolcos as opposed to the traditional structure which has a top-tier airline as the lessee,” he adds.

One worrying trend for investors has been the prospect of airlines returning aircraft under Jolcos, which leaves the Japanese investor base, the ultimate owner of the aircraft, with a diffi-



Source: *Airfinance Deals Database*

cult remarketing issue. However, Melson states this has not put off investors.

“While there are certainly one or two airlines that will find it hard to go to the Jolco financing trough again due to their failure to exercise purchase options, that has not dampened investor appetite generally and those airlines that continue to exercise their purchase options are receiving many bids on their Jolco RFPs this year resulting in their recognizing high-net present value cost savings,” adds Melson. ▲

Pos	Lawfirm	Deals	Points
1	Clifford Chance	15	5
2	K&L Gates	12	4
2	Norton Rose	12	4
3	Dentons	6	3
3	Watson Farley	6	3
4	White & Case	5	2
5	Vedder Price	4	1
5	Allen & Overy	4	1



“Given the large order books of some of the lessors and the competition for mandates that this creates, it seems a good time for airlines to be in the market for operating lease deals.”

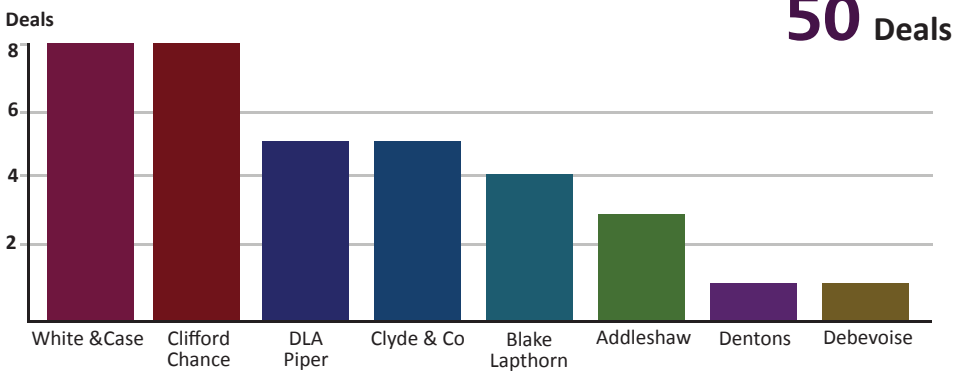
Chris Hansen, Partner, White & Case

## Operating leases

In 2012 White & Case was the most active law firm for operating leases. This has been one of the most dynamic areas of the market. Last year operating leases represented 25% of all financing structures for new aircraft deliveries.

They now account for 40% of aircraft financings, an incredible surge that Chris Hansen, a White & Case partner based in Miami, who specializes in

Pos	Lawfirm	Deals	Points
1	White & Case	8	5
1	Clifford chance	8	5
2	DLA Piper	5	4
2	Clyde & Co	5	4
3	Blake Lapthorn	4	3
4	Addleshaw	3	2
5	Dentons	1	1
5	Debevoise	1	1



Source: Airfinance Deals Database

the US and Latin American markets, says is likely to continue.

“Operating lessors continue to aggressively seek deals with airlines for new aircraft, often looking to place some of their own orders along with a sale/leaseback component sought by the airlines. Given the large order books of some of the lessors and the competition for mandates that this creates, it seems a good time for airlines to be in the market for operat-

ing lease deals, particularly airlines prepared to sign up for longer lease terms,” he adds.

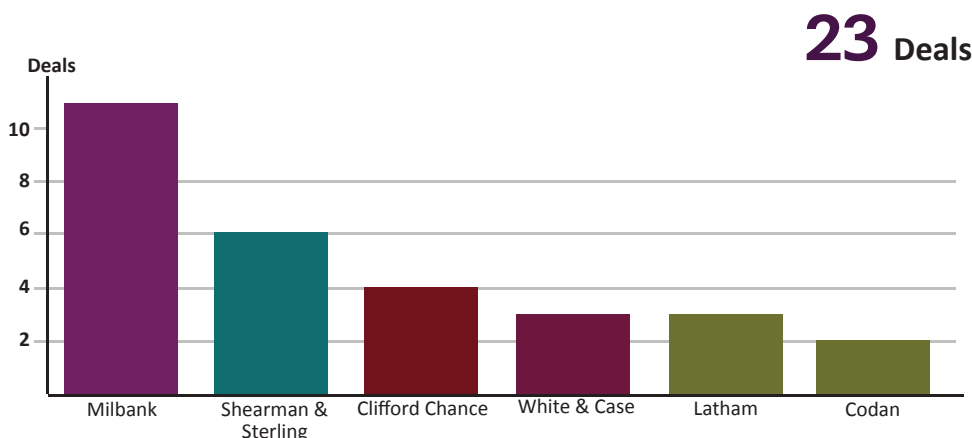
One interesting trend Hansen notes is that lessors seem to be more willing to include a predelivery payment component in their sale/leaseback deals, which always adds a level of complexity to the contracts, but is welcomed by airlines trying to manage cash flow while preparing to take on significant numbers of newer, more fuel-efficient aircraft. ▲

## Capital markets

One of the big financing stories of 2012 was the resurgence of debt capital market deals for aviation. This was driven partly by the introduction of ECA-backed bond issuances, but primarily by the low interest rates that enticed many carriers to issue new EETCs or refinance their existing deals to lock in cheap rates.

Milbank was the most active law firm advising on debt capital market deals in 2012. When asked about the possibility of more EETCs appearing in 2014, Robertson is quietly optimistic.

“It’s hard to predict the exact timing of deals,” he says, “but we expect to see more non-US EETCs in 2014 and in due course to see the product become a significant financing option for airlines that can issue them. The increasing cost of ECA-supported financing and the manufacturers’ robust order books will continue to incentivize the investment needed to develop this very deep, largely untapped financing source. Each new jurisdiction for an EETC presents unique legal and other challenges, and we expect an exciting 2014.” ▲



Source: Airfinance Deals Database

“We expect to see more non-US EETCs in 2014.”

Pos	Lawfirm	Deals	Points
1	Milbank	11	5
2	Shearman & Sterling	6	4
3	Clifford chance	4	3
4	White & Case	3	2
4	Latham	3	2
5	Codan	2	1



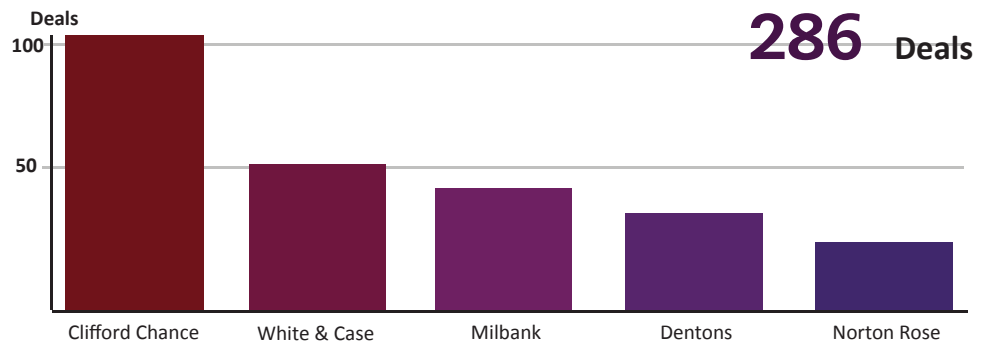
“A number of lessors and airlines will close larger multiple aircraft deals rather than single asset transactions.”

Neil Poland, Global head, Aviation group at Norton Rose Fulbright

## Global Activity

Looking at just the sheer number of deals the five most active law firms last year closely match the five overall winners in our legal rankings. This is an unsurprising trend, after all the more deals a law firm does the better the chance it has to be ranked first and collect more points. In 2012 the aviation landscape was dominated by operating leases. Using the latest consolidated figures from Airfinance Journal's Deals Database operating leases accounted for 32% of all deals done in 2012. This was closely followed by commercial debt (25%) and

Pos	Lawfirm	Deals	Points
1	Clifford chance	107	5
2	White & Case	50	4
3	Milbank	41	3
4	Dentons	31	2
5	Norton Rose	26	1



ECA financing (19%). Judging by the first half of the year it looks like operating leases will again be the dominant financing structure this year but all of the regions appear to be booking healthy levels of activity. Neil Poland, the global head of the aviation group at Norton Rose Fulbright agrees that deal activity is widespread.

“Our practice is busy in Asia, the Middle East and Europe, and we are increasingly working with our new colleagues in the US since our recent

combination creating Norton Rose Fulbright. There has been a lot of activity in the Jolco market, with many clients creating novel Jolco structures this year. Export credit financing remains busy too. Two major features in the market which are set to remain are the desire of a number of lessors and airlines to close larger multiple aircraft deals rather than single asset transactions, and for the continued use of the capital markets as a funding source,” comments Poland. ▲

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## SPONSORED EDITORIAL

## Opening Asean's skies

The Association of South East Asian Nations has set a 2015 deadline for an open-skies treaty. Paul Ng, global head of aviation at Stephenson Harwood, examines the association's progress in forming a treaty.



**Paul Ng**  
GLOBAL HEAD OF  
AVIATION  
STEPHENSON HARWOOD

The South-East Asian region over the past decade easily ranks as one of the fastest-growing areas in terms of new aircraft deliveries and passenger traffic. With record orders of commercial aircraft coming from its fast-growing low-cost airline sector; an impressive number of airline initial public offerings in Indonesia, Malaysia, Thailand, Singapore and the Philippines and the presence of some world-class blue chip carriers, many consider this region the one to watch (outside that of China and India).

The region's airlines have been operating under an archaic and limiting regime of ad hoc bilateral air services agreements signed between the relevant countries in the region. These bilateral air services agreements strictly set out, among other things, the number, frequency and timing of flights between the relevant countries that can be flown by carriers registered in such countries when operating between such countries.

The 10-member nation Association of South East Asian Nations (Asean) has set the goal of achieving a single aviation market (A-SAM), or open-skies policy, within the bloc by 2015. However, as this date draws near, a number of member states have yet to ratify the core agreements and protocols implementing A-SAM – the Multilateral Agreement on Air Services (MAAS), the Multilateral Agreement on the Full Liberalization of Air Freight Services (Maflafs) and the Multilateral Agreement for the Full Liberalization of Passenger Air Services (Mallpas).

Commentators have also questioned whether these treaties go far enough, and whether there will be sufficient political will among the Asean states, each of which are at different stages of economic development, to agree and implement a comprehensive open-skies regime within South-East Asia.

#### The nine freedoms of the air

Aviation treaties (most famously, the Chicago Convention on International Civil Aviation of 1944) typically entail air carriers of one particular state (A) being granted certain numbered freedoms in relation to the airspace of other countries (B and C).

These include:

- first freedom – A's right of over-flight of B;
- second freedom – A's right to land in B during over-flight, without picking up passengers;
- third freedom – A's right to carry traffic into B;
- fourth freedom – A's right to carry traffic from B back to A's home state; and
- fifth freedom – A's right to fly between B and C during flights that originate or terminate in A's home state.

In addition, four higher-level freedoms are frequently noted and discussed (particularly, in the International Civil Aviation Organization's Manual on the Regulation of International Air Transport), even though they are seldom recognized in international treaties. These are:

- sixth freedom – A's right to carry traffic between B and C, on flights via A's home state;
- seventh freedom – A's right to carry traffic between B and C, without need to connect via A's home state;
- eighth freedom – A's right to carry traffic between two points within B on a flight that originates within A; and
- ninth freedom – A's right to carry traffic on flights that originate and terminate entirely within B.

A true open-skies treaty would be a multilateral agreement, entailing all signatories granting first through ninth freedoms to carriers from other signatories, on all routes, and for an unlimited number of flights. Most, open-skies agreements, however, fall short of this. For example, the EU-US Open Skies Agreement – originally signed in 2007 – permits US carriers the right to fly between two points within the European Union, but does not open the US domestic market to European Union carriers.

A-SAM envisages a similarly limited open-skies policy – the present treaties only deal with the grant of first through fifth freedom rights between member states.

#### A-SAM

The project to create A-SAM can trace its roots back to plans in the early 1990s to improve transport and communications within Asean as a means of boosting trade and economic development. Aviation





## It remains unclear whether Indonesia, Cambodia, Laos and Brunei will ratify the relevant protocols/agreements before the 2015 target.

policy first became a prime focus at the first meeting of the Asean transport ministers' forum in March 1996. Members agreed to cooperate on the "development of a competitive air services policy which may be a gradual step towards an open-sky policy in Asean". This commitment was then contained in the Asean Plan of Action in Transport and Communications 1997, and the Successor Plan of Action in Transport 1999-2004.

The A-SAM project was formally launched in 2003 with the publication of the Roadmap for the Integration of Asean: Competitive Air Services Policy. This called for the realization of Asean open skies by 2015. The Action Plan for Asean Air Transport Integration and Liberalization, 2005-2015, published the following year, set out a number of subsidiary steps to liberalize air transport services further, and facilitate the realization of open-skies.

The three core treaties underpinning A-SAM – MAAS, Maffafs and Maffpas – were then progressively negotiated between 2007 and 2010. The treaties provide for the following:

- Maffafs – the main agreement grants first and second freedoms with respect to air cargo services between all signatories. The protocols further grant third- to fifth-freedom rights between designated points with international airports (protocol 1), and all points with international airports (protocol 2);
- MAAS – the main agreement grants first and second freedoms with respect to passenger air services between all signatories. The protocols further grant third- to fifth-freedom rights between designated points within the Asean sub-region to which the signatory belongs (protocols 1 and 2), designated points between Asean sub-regions (protocols 3 and 4) and Asean capital cities (protocols 5 and 6); and
- Maffpas – the main agreement grants first and second freedoms with respect to passenger air services between all signatories. The protocols further grant third- to fifth-freedom rights between designated points with international airports (protocol 1), and all points with international airports (protocol 2).

However, to date not all Asean members have ratified the agreements or their protocols. Indonesia has not yet ratified Maffafs or its protocols. MAAS has been adopted by all Asean signatories, but Indo-

nesia has not ratified protocols 3 and 4, and neither Indonesia nor the Philippines have ratified protocols 5 and 6. This means that other Asean carriers' access to Manila and Jakarta airports is still by means of bilaterally agreed treaties.

Maffpas, which provides for the greatest degree of liberalization, has the largest number of derogations, with Indonesia, Cambodia, Laos and Brunei all refusing to ratify the agreement or its protocols. It remains unclear whether any of these nations will ratify the relevant protocols/agreements before the 2015 target.

### Benefits of open skies

The economic benefits that full ratification of the treaties would bring – both to consumers and airlines – are fairly self-evident, and are borne out by the experience of other open-skies projects in other parts of the world.

The most obvious is greater and more efficient competition between airlines for air passenger and cargo customers.

An end to restrictions on supply of air services enables efficient airlines to compete with and replace inefficient airlines previously protected by regulations based on national boundaries. This leads to cost savings in the industry (and arguably lower fares for the customer). Inefficient airlines would in turn either be forced to consolidate with rivals or adopt the practices of more efficient ones or, if unable to do so quickly enough, get squeezed out of the market altogether.

It is no coincidence that the rise of the low-cost carrier model has accompanied the gradual global easing of restrictions on passenger air travel since the late 1980s. In the Asean region, the ascendance in the 2000s of low-cost carriers has transformed air travel by winning over a large market share of passengers, and in many countries, such as Indonesia and Malaysia, they have become the dominant carrier, eclipsing the incumbent legacy/national carriers forcing them to modernize and adopt more efficient business models in order to be able to compete.

Increased supply of passenger air services can also have the effect of creating its own demand. Passenger numbers rise as greater provision of flights to greater number of destinations encourages them to abandon other means of transport, or fly to a new place for the first time. This has many further benefits – creating more jobs in the aviation industry and stimulating the economies of newly linked destinations. Liberalization of the Malaysian-Thailand aviation market – a process that began in

the mid-2000s – is estimated to have expanded the market by 37%, creating 4,300 new full-time jobs, and contributing \$114 billion to the economies of both countries.

Liberalization also clearly benefits airlines. Increased route availability offers carriers the chance to expand, either organically, through consolidation with other airlines, or through alliances or joint ventures. This leads to considerable economies of scale. Increased size can substantially increase bargaining power with suppliers, from original equipment manufacturers to fuel and maintenance services providers. Fixed costs can be spread more widely over larger numbers of fare-paying passengers, reducing their proportion of an airline's cost base. Also, utilization of aircraft can be intensified by focusing services on key hubs, or combining traffic with alliance partners, in order to raise load factors.

### Differing attitudes towards A-SAM implementation

It should be noted that the failure to ratify MAAS, Maffpas and Maffafs fully by the 2015 deadline does not constitute, as far as Asean is concerned, the failure of the A-SAM project. At the 17th Asean Air Transport Minister's meeting in 2011, although member states committed to the vision of open skies by 2015, they expressly stated that an "Asean minus-X" formula was to be used in implementation – ie, that flexibility would be accorded in the implementation process, and that some members could agree to derogate from implementation in the short to medium term, even as others continued to proceed.

Moreover, globally the pace of liberalization so far, in real terms, is relatively unimpressive. It took fully 48 years – from the signing of the Chicago Convention in 1944 to 1992 – for the first open-skies regime to be instituted between the US and the Netherlands. The open-skies agreement between the US and the EU was signed only in 2007.

Reluctance on the part of certain Asean members to implement A-SAM fully is simple to understand. Countries with fledgling aviation industries – such as Cambodia or Laos – are reluctant to expose themselves to competition from countries with strong aviation industries, such as Singapore or Malaysia.

Meanwhile, air carriers in countries with large internal markets – such as Indonesia or the Philippines – balk at the prospect of being forced to share or cede this market to competitors. This is particularly when reciprocity under A-SAM would entail the limited benefit of access to foreign markets such as Singapore. It is for this reason that carriers such





## Failure to fully implement A-SAM may disadvantage ASEAN carriers as a whole.

as Garuda and Cebu Pacific lobby their respective governments persistently against ratification. In so doing, they often couch their arguments in terms of unfairness caused by disparities in levels of economic development, or inadequate domestic aviation infrastructure.

The perspective on A-SAM is entirely different from countries with more developed aviation industries. Malaysia's AirAsia would most likely be one of the winners of open skies. Already a powerful presence in the Asia-Pacific aviation market, it would be able to leverage its existing expertise to capitalize on new routes, increasing passenger numbers and further reducing costs.

Singapore is similarly in favour, although for slightly different reasons. Already one of the largest aviation hubs in the region and possessed of a deep pool of aviation-related services and skill, open skies would likely only increase Singapore's importance. That it has no domestic aviation market to protect further militates in favour of ratification.

### Where next?

Many carriers in Asean side-step the problems caused by restricted access to foreign markets by setting up minority-owned subsidiaries in countries with

which access to foreign carriers is restricted. Majority owned by local interests, they nonetheless operate under the same branding and using the same booking and other infrastructure as the parent airline to achieve economies of scale. Thus, for example, AirAsia has been able to export its branding to the Thai market through its affiliate, Thai AirAsia. In some cases this practice has proved relatively successful, enabling airlines to establish a large footprint across several countries within Asean.

As has been pointed out by other commentators, however, notwithstanding the subsidiary model, failure to implement A-SAM fully may disadvantage Asean carriers as a whole. This is because of the potentially unequal impact of aviation treaties concluded between Asean and other single large countries that grant rights which do not exist between Asean members.

For example, the Asean-China Air Transport Agreement of 2010 grants unlimited third- and fourth-freedom rights between airlines in China and certain Asean countries. However, these unlimited rights do not exist within Asean. As a consequence, China-based carriers are able to fly to all points within Asean from any point in China. Asean-based carriers, meanwhile, are only able to connect any

point in China with their domestic bases. Over the long run this means that Chinese carriers are able to build much more extensive route networks than their Asean counterparts, putting them at a potentially significant competitive advantage.

The struggle for and against ratification of Asean open-skies, then, is in no small measure a lobbying struggle between those airlines seeking to protect domestic markets, and those seeking to protect against encroachment of extra-Asean carriers on routes into and out of Asean as a whole.

### Conclusion

With increasing pressure from the international aviation community (including the International Air Transport Association), an open-skies regime within Asean seems a question of when rather than if. However, at least initially, such a regime will be very different from a European Union-style open-skies regime, but is more limited to third, fourth and fifth freedoms within member states.

Hopefully, with these freedoms secured, they will act as building blocks for other freedoms to follow, and help remove the obstacles and support the continued growth of the aviation industry in one of the most vibrant markets in the world. ▲

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STEPHENSON HARWOOD

### Paul Ng

Partner, Global head of aviation  
[paul.ng@shlegal.com](mailto:paul.ng@shlegal.com)

### Simon Wong

Consultant, Hong Kong  
[simon.wong@shlegal.com](mailto:simon.wong@shlegal.com)

### Saugata Mukherjee

Partner, Singapore  
[saugata.mukherjee@shlegal.com](mailto:saugata.mukherjee@shlegal.com)

### Richard Parsons

Partner, London  
[richard.parsons@shlegal.com](mailto:richard.parsons@shlegal.com)

### Edward Campbell

Partner, Paris  
[edward.campbell@shlegal.com](mailto:edward.campbell@shlegal.com)



## RISING STARS 2013

# Heading to the top

Airfinance Journal recognizes eight of the most promising legal associates for 2013.

### Kelvin Zha, Clyde & Co



Kelvin Zha joined Clyde & Co as a senior associate in Hong Kong in May 2012. In little more than a year he has already represented a long list of clients throughout Asia and Africa, including Investec, ILFC, China

Development Bank and Nok Airlines.

He has worked on a range of structures, including secured loan financing, operating lease, predelivery payments and sale/leasebacks.

Zha finds representing financiers for predelivery payment deals one of the most interesting aspects of the job, and enjoys trying to understand the risk of lenders and how it may be allocated to other parties.

He also likes the international reach he gets at Clyde & Co. "You have to deal with different laws in different jurisdictions and local counsels because an aircraft is a highly moveable asset, and finance documents are governed by different laws for different reasons. It is an experience and a thrill," says Zha.

Zha joined Clyde & Co from the Beijing office of King & Wood, where he was a senior associate in the aviation finance team. Before that he held a senior role in the legal department of China Southern Airlines.

Paul Jebely, head of aviation finance for Asia and Africa at Clyde & Co, says: "Kelvin serves as an excellent bridge. From our office in Hong Kong he has worked alongside the rest of our team on aircraft finance and lease matters where we advise the likes of ICBC, Investec, GE Capital, Credit Suisse and many others. He is certainly a rising star."

### Sarah Humpleby, DLA Piper



Sarah Humpleby got her first taste of the aviation industry as a dispute resolution trainee working on a mediation involving aircraft records. She realized that aviation was the sector she wanted to focus on soon

after graduating into banking and finance.

Humpleby started her career as a trainee solicitor at Trowers & Hamblins in 2004. She joined DLA Piper's London office as a solicitor in 2010 and became a senior associate in 2013. She has acted for clients across the aviation industry, including major operating lessors, financiers and airlines.

Humpleby says the most exciting deal she has worked on was her first deal at DLA Piper.

"We were acting for Waha Capital as lessor on the delivery of six new Airbus A330s to Etihad. I attended the first delivery in Toulouse and was lucky enough to be able to walk around on board the aircraft before its ferry flight to the UAE. It was exciting to work with a tangible asset and be able to see the finished product," she remembers.

Recent deals Humpleby has worked on include advising a major European bank on the refinancing of four Airbus aircraft for a European airline, as well as representing a Japanese lessor on the acquisition and leasing of two new Airbus aircraft on lease to an Indian carrier.

Debra Erni, partner, DLA Piper, says: "Sarah is one of the most responsive and proactive lawyers we have ever had the pleasure of working with and never fails to deliver for our clients. She is particularly adept at simplifying difficult concepts for newcomers to the industry and those whose first language is not English, which has benefited our practice immeasurably."

Humpleby's passion is travelling with her husband. They recently enjoyed scuba diving in Belize and travelled through Guatemala.



“It’s hard to beat the thrill of working on a complex and novel transaction structure.”

Mara Abols, Pillsbury

### Mara Abols, Pillsbury



Mara Abols jokes that the aviation bug bit her as a child. She feels that the international nature of the industry was a natural fit having lived and studied in many countries.

Abols started working at Pillsbury in 2008 and has primarily focused

on aircraft finance. She is a senior associate in Pillsbury’s finance practice section, and has extensive experience acting as counsel to airlines, lenders and aircraft manufacturers on financial and commercial matters. Those include purchase and sale, operating and finance leases, predelivery payment financing, debt restructuring, capital market financing, export credit financing and insolvency proceedings.

One of the highlights of her career was her involvement in the first yen-denominated US Ex-Im-guaranteed capital markets financing for Turkish Airlines, which recently closed.

“It’s hard to beat the thrill of working on a complex and novel transaction structure,” says Abols.

She was also acting counsel on three of Airfinance Journal’s 2012 deals of the year, representing Atlas Air, Willis Lease and Ethiopian Airlines.

One of the most exciting moments in her work was flying on the maiden voyage to Addis Ababa when Ethiopian Airlines took delivery of its first Boeing 787.

“Flying at such close range over mountains on such an amazing aircraft that we had helped to finance, I definitely had a moment that may have included some tears of joy,” she remembers.

Mark Lessard, partner, Pillsbury, says: “Mara is a very hard worker and a builder who has done a fantastic job solidifying the firm’s relationships with key clients. Her cross-cultural communication skills have made her a particularly effective advocate for several of our foreign airline clients.”

Outside work Abols is an avid tennis player and amateur photographer.

### Christopher Fickes, Hughes Hubbard



Christopher Fickes did not set out to be an aviation finance attorney, but says that through his law firm internship was drawn to the atmosphere and sophisticated international nature of the practice.

Fickes started his career in Milbank’s global transportation finance group in 2005 and moved to Hughes Hubbard in 2010.

He has represented various clients, including financiers, lessors and hedge funds and private equity investors interested in aircraft. Fickes has advised on a range of structures, including US Ex-Im Bank financings, syndicated loans, term loans and securitization. He has also represented bond investors in enhanced equipment trust certificate restructurings in the Chapter 11 proceedings of Northwest Airlines, a deal that Fickes sees as his most exciting experience in aviation so far.

Fickes represented Wells Fargo on its joint venture with Avolon, which Airfinance Journal awarded as equity deal of the year for 2012. Fickes says: “Working through equity and debt terms on a deal of the year was interesting and exciting all at once, particularly because the joint-venture structure seems to be an area that more investors are looking at as a way to get into the aviation finance space.”

He also recently acted for Air Lease Corp in its \$120 million inaugural US Ex-Im financing and for Awas in its \$250 million commercial facility arranged by CACIB.

Steven Chung, partner, Hughes Hubbard, says: “Chris is a real leader in the aviation finance community. Clients have strong faith in his approach to transactions and his ability to execute a deal from start to close.

Chung’s biggest joy outside work is spending time and travelling with his wife and one-year-old daughter.

### Stuart Kennedy, Matheson



Stuart Kennedy joined Matheson in 2008 and later qualified into the asset finance group where he now works as an associate attorney.

During his banking and finance rotation as a trainee Kennedy worked very

closely with the asset finance group where an opportunity later arose. “I haven’t looked back since,” he says.

Kennedy has experience in advising international financing institutions, aircraft lessors and airlines on various aircraft purchase, sale, financing and leasing deals. Recent transactions he has worked on include predelivery payment (PDP) financing, Japanese operating lease with call options, bridge loans and export credit agency financing. Kennedy is also advising on different aspects of the Cape Town Convention.

One of the highlights in his career has been advising Awas on its \$120 million revolving predelivery payment facility. The deal became Airfinance Journal’s 2012 PDP deal of the year.

Kennedy loves working in Dublin, which he refers to as “the epicentre of the industry”.

He says: “Most of the main lessors are based here. I particularly enjoy the cross-border nature of the work we do and the complex transactions that are structured through Ireland.”

Chris Quinn, head of Matheson’s aviation finance group, says: “Stuart is an excellent lawyer and transaction manager who can foresee a potential issue and have it sorted before it becomes a problem, thereby ensuring that aircraft are delivered on time, keeping the lessors, financiers and airlines happy.”

Kennedy is an avid rugby fan and attends as many provincial and international games as he can.





“Being part of getting a brand new aircraft type into service was a tremendous experience.”

**Paul Carrington, Clifford Chance**

**Paul Carrington, Clifford Chance**



It was Paul Carrington's first firm that chose to put him in its aviation group. Since then he says he has not wanted to work anywhere else.

Carrington joined Clifford Chance in 2005 and progressed to senior associate

in 2008. He has been involved in a number of high-profile deals, including the sale of RBS Aviation Capital and the predelivery payment financing for 10 Dreamliners for Ethiopian Airlines, both of which were awarded Airfinance Journal deals of the year for 2012.

Closing the sale of RBS Aviation Capital to SMBC last year is the highlight of Carrington's carrier so far. He says: “Combining the wider corporate issues of a \$7 billion competitive auction, with needing to know the fine details of any one of 200 individual aircraft leases, was an enjoyable challenge, and it was great that all parties were pleased with the outcome.”

The most exciting aviation moment he had was the very first A380 delivery to Singapore Airlines. “Being part of getting a brand new aircraft type into service was a tremendous experience and, as a bonus, my family actually recognized the aircraft I was talking about,” he jokes.

Carrington also advised Deutsche Bank on the PDP financing for seven Boeing 787s for Air India – the first PDP transaction that closed for the Dreamliner since its re-entry into service.

Nick Swinburne, asset finance partner, Clifford Chance, says: “Paul approaches the most complex legal problems with enthusiasm, pragmatism and excellent technical skills. He gives advice that is legally precise, but which considers the wider commercial context.”

Carrington enjoys cooking and being an Australian exploring the northern hemisphere.

**Lindsey Clegg, Addleshaw Goddard**



Lindsey Clegg is a managing associate in Addleshaw Goddard specializing in complex cross-border disputes, aviation industry disputes and international arbitration.

She says that aviation finance is one of the areas

that fascinates her most because of its complexity, variety and global reach.

She has advised a number of lessors, carriers and manufacturers on disputes, including advising in events of default, termination and asset recovery, settlement negotiations, refinancing and drafting of associated documentations.

The most exciting deal she worked on was acting for a US-based aircraft owner and head lessor to resolve successfully a complex leasing dispute where proceedings had already started, and injunctive relief obtained, by the finance company in three different jurisdictions after a sub-lessee default.

“Resolution involved coordinating a legal team spanning four different jurisdictions, urgent, without notice applications to the English Commercial Court for our own injunctive relief and, ultimately, negotiating a lucrative settlement deal for our client,” remembers Clegg.

Rory MacCarthy, head of aviation finance at Addleshaw Goddard, says: “Lindsey is a highly valued member of the firm's aviation practice. She is enthusiastic, incredibly diligent and competent, and much appreciated by the clients she works with.”

Clegg has led a number of training days for FTSE 100 clients on key issues in the sector and is regularly being invited to events as a guest speaker.

She loves running marathons, long distance walking and anything else that involves being active, preferably outdoors with Reese, her Boston terrier.

**Ji Woon Kim, Vedder Price**



Ji Kim says that fate sent him to the aviation industry. A friend referred him to a paralegal position in the global transportation finance group at Vedder Price while he was looking for work experience out of college.

Things worked well for Kim – the work experience turned into a permanent job and today he is an associate in the New York office of Vedder Price and a member of the firm's global transportation finance team.

Kim represents and advises lenders, export credit agencies, carriers and others in a variety of finance matters. Those include cross-border leverage leases, mortgage financings, warehouses, revolving credit facilities and export credit agency-backed financings.

The most exciting deal Kim has worked on was representing DVB Bank for a back-leverage sale/leaseback transaction for two 737s subject to operating leases to JAL.

“The pressure to get the deal done in a very short period of time was immense, but it was an instance where we got to see what our deal team was made of. We accepted the challenge and closed the transaction in time to the satisfaction of our client,” says Kim.

The transaction was named Airfinance Journal's 2011 sale/leaseback deal of the year.

“Ji is a true asset to our global transportation finance team, both on the client and the firm sides. He is a dedicated and experienced finance attorney, and a zealous advocate for our clients. Ji's ability to gain our clients' trust and to contribute to our sophisticated cross-border transactions is unmatched,” says Jeff Veber, shareholder, Vedder Price global transportation finance team, New York.

Kim loves spending time with his wife, Susie, and their three young daughters, Sejung, Sebin and Sejin, and enjoys playing golf. ▲





## SPONSORED EDITORIAL

# Examining Ireland's leasing sector

Catherine Deane, a partner in McCann FitzGerald's aviation and asset financing group, comments on the history and resilience of the Irish leasing sector.



**Catherine Deane**  
PARTNER  
MCCANN FITZGERALD

### How long has McCann FitzGerald been involved in aviation finance and aircraft leasing?

It is estimated that about 40% of the world's commercial jet aircraft are leased and 50% of those leased aircraft are owned, leased and managed out of Ireland. Irish leasing companies own, lease and manage about \$150 billion-worth of aircraft assets (about 19,000 aircraft). However, aviation leasing and financing is not a recent phenomenon in Ireland.

During the 1970s and 1980s Guinness Peat Aviation (GPA Group) and Tony Ryan spearheaded the growth in aviation leasing from GPA's headquarters in the Shannon Free Zone. By the end of the 1980s it was the largest owner and lessor of aircraft in the world (\$3 billion in aircraft assets, 164 aircraft, 64 airline customers, 170 employees, \$150 million in pre-tax profits and a \$850 million new order book).

In 1987 McCann FitzGerald worked on a \$2.5 billion corporate credit facility for GPA, which was at that time the largest financing facility made available to a non-publicly quoted company. In the early 1990s McCann FitzGerald also worked with GPA on the first aircraft securitization (Alps), and between 1993 (following the rescue of GPA by GE Capital after the failed GPA initial public offering in 1992) and 1996 McCann FitzGerald worked on the restructuring of GPA culminating in the Airplanes Securitisation in 1996 (still the largest aircraft securitization – 229 aircraft on lease to 83 lessees in 40 countries, and raising \$4 billion).

In the period after the rescue of GPA by GE Capital many highly motivated and experienced executives left GPA and GE Capital and set up new leasing companies, creating a new and diversified generation of aircraft leasing companies in Ireland. These included

SMBC Aerospace (originally IAMG, then RBS Aerospace and finally SMBC after its acquisition by SMBC in 2012 for \$7 billion), Pembroke Group, Babcock & Brown, Fly Leasing and more recently Awas and Avolon. At the same time GE grew its presence in Ireland and, post-1996 after various takeovers and acquisitions, GPA emerged as AerCap. Fifteen of the top 22 leasing companies in the world and eight out of the top 10 leasing companies are based in Ireland.

### Can you outline your expertise and the range of services offered by McCann FitzGerald?

McCann FitzGerald has been at the forefront of advising aviation clients since the end of the 1970s and early 1980s. McCann FitzGerald has the largest aviation financing group of any of the Irish law firms, with four partners specializing in aviation (Catherine Deane, Hilary Marren, Joe Fay and Georgina O'Riordan), together with a number of other partners who have specialized in aviation over the years and who combine an aviation practice with other specialized banking and finance practice areas.

McCann FitzGerald provides a full range of services to its aviation clients, including

The aviation industry is a US dollar industry, so the possibility of the break-up of the euro appears not to have had a discernible impact on the aviation industry.



## 15 of the top 22 leasing companies in the world and 8 out of the top 10 leasing companies are based in Ireland.

aircraft and aircraft engine owners and lessors (those based in Ireland and those which are based abroad but own and lease aircraft in Ireland), as well as international aviation financiers, export credit agencies, aviation service providers, maintenance facilities, equity investors, funds and airlines.

Services provided by McCann FitzGerald include negotiating financing facilities secured on aircraft assets around the world, the sale and purchase of aircraft portfolios, leasing agreements with airlines, sale/leaseback arrangements with airlines, joint-venture arrangements, manufacture purchase and support documentation, maintenance contracts, securitizations, restructuring and repossessions. We also work for non-Irish lessors (from China, the US, Japan and the Nordic regions, among others) setting up leasing platforms in Ireland.

### Can you give me some examples of the types of projects you have worked on recently?

Many of the projects we work on are not in the public domain, but recent transactions include: the sale/leaseback of eight new Airbus aircraft with an East Asian flag carrier; sale/leaseback of seven new Boeing aircraft with a Brazilian airline; the ECA-backed financing of a portfolio of aircraft on lease to airlines in Russia, Spain and the Middle East; securitization of a portfolio of 87 engines on lease to airlines around the world; establishing a joint venture between an Irish lessor and a US fund to acquire a portfolio of used aircraft on lease to airlines around the world; Canadian export credit agency-backed financing of a sale/leaseback of five business jets; and numerous large-scale portfolio acquisitions. We are extremely busy and have seen an increase in activity levels in the past two-to-three years.

### Can you outline your take on the factors behind the success of aviation leasing in Ireland?

Factors contributing to the continued success of Ireland as a location for aviation business include: experienced aviation executives and



**McCann FitzGerald Partners – aviation and asset finance: Georgina O’Riordan, Catherine Deane, Joe Fay and Hilary Marren.**

## McCann FitzGerald has the largest aviation financing group of any of the Irish law firms, with four partners specialising in aviation.

companies in an English-speaking member state of the EU; a stable legal environment, a strong educated and independent judiciary, an efficient commercial court for speedy resolution of disputes, the separation of powers between the judiciary and executive and the application of the rule of law; access to lawyers, accountants and tax advisers with vast experience in, and knowledge of, aviation; access to expert service providers – company secretarial and accounts management; familiarity of lessees, airlines, financiers and investors with Ireland, and the fact that since 2006 Ireland has been a party to the Cape Town

Convention; a very efficient Irish Aviation Authority (for those wishing to have foreign-leased aircraft registered on the Irish Register – as at June 30 2013 there were more than 1,230 aircraft registered on the Irish register); and an extensive network of double-taxation treaties and a competitive rate of corporation tax.

### Is this sector proving quite resilient given the global economic backdrop?

The aviation industry is a US dollar industry, so issues surrounding the possibility of the break up of the euro did not seem to us to have a discernible impact on the aviation industry. The industry is a global one, so provided there is growth in parts of the world, this can offset recessions in other parts of the world.

### Are there any trends worth highlighting in this sector?

Trends we see are the growth in Chinese lessors globally; increased interest in equity providers/funds investing in aircraft (that is tangible) assets; growth in helicopter leasing companies locating in Ireland; and potential competition from other financial centres (Singapore, Hong Kong and Tianjin, China). ▲



## SPONSORED EDITORIAL

# Consumers challenge US frequent-flyer programmes

Timothy J. Lynes, a partner at Katten Muchin Rosenman LLP, examines a recent case before the US Supreme Court involving frequent flyer programmes. The issue for the Court to consider is whether certain US state common law claims are preempted under the Airline Deregulation Act.



**Timothy J. Lynes**  
PARTNER  
KATTEN MUCHIN  
ROSENMAN LLP

The US Supreme Court will hear argument this term in *Northwest, Inc v Ginsburg*<sup>1</sup>, in which it will consider whether the Ninth Circuit Court of Appeals erred in holding that a plaintiff's implied covenant of good faith and fair dealing claim in an action involving a frequent-flyer programme was not preempted under the Airline Deregulation Act of 1978.

#### Airline Deregulation Act

In 1978, in an effort to further efficiency, lower prices and increase competition by deregulating domestic air transport, Congress passed the Airline Deregulation Act of 1978 (ADA)<sup>2</sup>, which included a preemption clause “[t]o ensure that the States would not undo federal deregulation with regulation of their own”<sup>3</sup>. The preemption clause provides that “no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of an air carrier...”<sup>4</sup>

#### Supreme Court precedent

The Supreme Court has considered preemption under the ADA in three cases: *Morales v Trans World Airlines*<sup>5</sup>; *American Airlines, Inc v Wolens*<sup>6</sup>; and *Rowe v New Hampshire Motor Transport Ass’n*<sup>7</sup>.

In *Morales*, the court confronted an effort by the National Association of Attorneys General to enforce guidelines governing the content and format of airline fare advertising under state general consumer protection laws. The court explained that the phrase “relating to” indicated a “broad preemptive purpose” and meant “having a connection with, or reference to, airline ‘rates, routes or services’,” ultimately holding that the ADA preempted the state restrictions on price advertising

because such guidelines related to airline rates<sup>8</sup>.

Even if the guidelines at issue were considered to refer directly to advertising, and touched on airline fares indirectly, the court concluded that such indirect regulation would “have the forbidden significant effect upon fares” to warrant preemption under the ADA<sup>9</sup>. The *Morales* court noted, however, that the ADA may not preempt state laws that are “too tenuous, remote, or peripheral... to have a preemptive effect”<sup>10</sup>.

*Wolens* involved a class action in which the plaintiffs alleged that American Airlines violated the Illinois consumer fraud and deceptive business practices laws, and breached its contract with customers by modifying the frequent-flyer programme through imposed capacity controls and blackout dates on a retroactive basis, thus devaluing credits previously accumulated. The court, noting that frequent-flyer programmes relate to rates and services, concluded that the plaintiffs’ claims under the consumer fraud statute required enforcement of state law, and thus were preempted under the ADA.

The breach of contract action, however, was not preempted: “We do not read the ADA’s preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings.”<sup>11</sup>

Where a remedy is confined to the terms of a contract, there is no enactment or enforcement of state law to trigger ADA preemption. Because the remedy in such a cause of action is “simply hold[ing] parties to their agreements”, according to *Wolens*, federal law does not preempt breach of contract claims.<sup>12</sup>

Federal courts hearing breach of contract actions are confined to the bargain of the parties to an air carrier contract, and must not enlarge or enhance the remedies sought by state laws or parties external to the agreement.<sup>13</sup> Moreover, the court noted that neither the US Department of Transportation nor its predecessor have the authority or ability to oversee



## The court concluded that such indirect regulation would “have the forbidden significant effect upon fares” to warrant preemption under the ADA.

air carrier contract disputes – a reality that supports the exclusion of breach of contract claims from ADA preemption.<sup>14</sup>

In *Rowe*, the Supreme Court considered the preemptive effect of the Federal Aviation Administration Authorization Act (FAAAA),<sup>15</sup> which prohibits states from enacting any law relating to a carrier’s price route, or service.<sup>16</sup>

The *Rowe* plaintiffs challenged as preempted by the FAAAA a Maine law that forbade any person from knowingly transporting tobacco to a person in Maine unless the sender or recipient has a Maine licence, and which required tobacco retailers to use a delivery service that verified that the recipient of a tobacco order may legally purchase tobacco. The court, noting that the preemption clause of the FAAAA was borrowed from the ADA, held that under *Morales*, the Maine law related to carrier services because it prompted tobacco retailers to seek delivery services that differed from those that “in the absence of the regulation, the market might dictate”.<sup>17</sup>

The *Rowe* court also noted that if a frequent-flyer programme can be preempted under federal law, as the court in *Wolens* held, then it must also preempt state regulation of a carrier’s picking up and delivery of goods.<sup>18</sup>

### Background and procedural posture

Respondent S Binyomin Ginsberg was a member of Northwest’s WorldPerks frequent-flyer programme, gaining Platinum Elite Status in 2005. In 2008 Northwest revoked Ginsberg’s membership. Ginsberg allegedly abused the programme by complaining too frequently about Northwest’s

services, and continually asking for compensation over and above the programme guidelines.

In January 2009, alleging that Northwest acted arbitrarily by revoking his WorldPerks membership without valid cause, Ginsberg brought a class action against Northwest, asserting four state law claims: breach of contract; breach of implied covenant of good faith and fair dealing; negligent misrepresentation; and intentional misrepresentation. Ginsberg sought damages of more than \$5 million and injunctive relief requiring Northwest to restore the frequent-flyer membership status of the class members and prohibiting Northwest from future revocations of frequent-flyer membership status without valid cause.

The federal district court granted Northwest’s motion to dismiss, disposing three of Ginsberg’s claims as being preempted by the ADA, concluding that the dismissed claims required the enforcement of state law and related to both airline prices and services. The district court further noted that, under *Wolens*, frequent-flyer programmes relate to prices and services, and the WorldPerks programme was none other than a frequent-flyer programme.

On the other hand, the district court concluded that a cause of action alleging a breach of the terms of an agreement the airline entered into voluntarily was not preempted under the ADA because such a claim did not require the enforcement of state law. Instead, the district court concluded that such a claim would involve the enforcement of the parties’ own undertakings, as *Wolens* requires.

Nevertheless, the district court dismissed Ginsberg’s breach of contract claim for failure to provide sufficient evidence of any material breach by Northwest under the WorldPerks Agreement. That agreement provided that any abuse of the WorldPerks programme, including improper conduct determined by Northwest in its sole judgment, is ground for cancellation of the membership. The district court concluded that Northwest was not obligated to explain its decisions regarding membership revocation or define what constituted “improper conduct”. To hold otherwise would be an enlargement or enhancement of the parties’ agreement beyond its express terms. Such a result is prohibited by *Wolens*.

At the motion to dismiss stage Ginsberg argued that the implied covenant of good faith and fair dealing should be treated as a breach of contract claim because Minnesota law imposed such a duty on all parties in every contract. Such a duty, according to Ginsberg, applied to (and limited) Northwest in exercising its “sole judgment” in revoking Ginsberg’s WorldPerks membership. The district court rejected that argument, explaining that the requirement that parties conduct themselves in good faith and deal fairly with one another is one of state policy, and not one of contract, that is given the force and effect of law.

Ginsberg moved for reconsideration of dismissal of his claims, renewing his previous arguments and arguing that the district court erred in failing to recognize that the ADA preemption clause does not apply to state common law claims. The court denied the motion, explaining that

<sup>1</sup> No 12-462.

<sup>2</sup> 49 USC App § 1301 et seq.

<sup>3</sup> *Morales v Trans World Airlines*, 504 US 374, 378 (1992).

<sup>4</sup> 49 USC § 41713(b).

<sup>5</sup> 504 US 374 (1992).

<sup>6</sup> 513 US 219 (1995).

<sup>7</sup> 552 US 364 (2008).

<sup>8</sup> *Morales*, 504 US at 384.

<sup>9</sup> *Id* at 388.

<sup>10</sup> *Id* at 390.

<sup>11</sup> *Wolens*, 513 US at 228.

<sup>12</sup> *Id* at 229.

<sup>13</sup> *Wolens*, 513 US at 232.

<sup>14</sup> *Id* at 230-32. Under 49 USC § 41712, the US Department of Transportation has jurisdiction over airlines in regard to alleged deceptive trade practices.

<sup>15</sup> 49 USC § 40120, et seq.

<sup>16</sup> 49 USC § 14501(c).

<sup>17</sup> *Rowe*, 552 US at 370.

<sup>18</sup> *Id* at 373.





## At stake is the uniform regulatory mechanism under which airlines conduct themselves.

**“The Ninth Circuit, by categorically excluding state common law claims from ADA preemption has misconstrued Supreme Court precedent and perpetuated a conflict among the circuit courts of appeals.”**

Wolens distinguishes between terms an airline itself stipulates and any enlargement or enhancement based on state laws or polices external to the agreement.

For purposes of evaluating potential exclusions from ADA preemption under Wolens, no distinction is made between state common law claims and state statutes. In conclusion, the court noted that state common laws affecting contracts are expansions beyond the express terms of the agreement that exist independently of such contracts.

### **Ninth Circuit opinion<sup>19</sup>**

Ginsberg asserted one error on appeal to the Ninth Circuit: that the district court’s

conclusion that the ADA preempted his implied covenant of good faith and fair dealing claim.<sup>20</sup> The Ninth Circuit accordingly reversed the district court’s ruling, concluding that the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing.<sup>21</sup> The dismissal of Ginsberg’s claim based on federal preemption doctrine, according to the Ninth Circuit, was a misapplication of the law because the ADA was never designed to preempt that type of dispute.

The Ninth Circuit, citing its precedent in *West v Northwest Airlines, Inc.*,<sup>22</sup> held that implied covenant of good faith claims are “too tenuously connected to airline regulation to trigger preemption under the ADA”,<sup>23</sup> and concluded that while *West*, which stands for the same proposition, was a pre-Wolens case, it remains good law in the Ninth Circuit. It also concluded that its holding in *Charas v Trans World Airlines, Inc.*,<sup>24</sup> that the savings clause and preemption clause of the ADA provide evidence that Congress did not intend to preempt state tort remedies already existing at common law (provided that such remedies do not significantly impact federal deregulation), applies to already existing state contract remedies.<sup>25</sup>

The Ninth Circuit further noted that the implied covenant of good faith and fair dealing neither interferes with the deregulation mandate of ADA nor forces airlines to adopt or change their prices, routes or services, which is a prerequisite for ADA preemption.<sup>26</sup>

The Ninth Circuit also held that implied covenant claims do not “relate to” prices or services. According to the court, the link between the restrictions placed on airlines by implied covenant claims and the airlines’ rates is too tenuous to

consider the cause of action “related to” airline fares. The district court also interpreted the ADA’s “related to” language too broadly, concluding that Congress intended the preemption language to apply to state laws directly regulating rates, routes, or services.

### **Conclusion**

The Ninth Circuit, by categorically excluding state common law claims from ADA preemption (thus keeping Ginsberg’s implied covenant claim alive), has misconstrued Supreme Court precedent and perpetuated a conflict among the circuit courts of appeals. Where Wolens acknowledged a limited exclusion from ADA preemption for claims involving enforcement of private contractual obligations, the Ninth Circuit seeks to expand an air carrier’s obligations to those beyond its voluntary undertakings – citing Wolens as support. Such a reading is inconsistent with both Morales and Wolens, and at least one circuit to rule on the issue.<sup>28</sup>

This is an important case for airlines and the administration of frequent-flyer programmes. At stake is the uniform regulatory mechanism under which airlines conduct themselves. Moreover, should the Supreme Court affirm the holding of the Ninth Circuit, air carriers may see an increase in breach of contract claims that would have otherwise been preempted by federal law without the Ninth Circuit’s misstep in Ginsberg.

But given the fact that the Ninth Circuit’s holding appears at odds with the precedents of both the Supreme Court and its sister circuits, it seems unlikely that the court will adopt the Ninth Circuit’s categorical exclusion of state common law claims from preemption under the ADA and FAAAA. ▲

<sup>19</sup> *Ginsberg v Northwest, Inc.*, 695 F3d 873 (9th Cir 2012).

<sup>20</sup> *Id.* at 875.

<sup>21</sup> *Id.*

<sup>22</sup> 995 F2d 148 (9th Cir 1993).

<sup>23</sup> *Wolens*, 995 F2d at 151.

<sup>24</sup> 160 F2d 1259, 1264 (9th Cir 1998) (en banc).

<sup>25</sup> *Ginsberg*, 695 F3d at 880.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 881.

<sup>28</sup> See *Travel All Over the World, Inc v Kingdom of Saudi Arabia*, 73 F3d 1423, 1433 (7th Cir 1996) (“Morales does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted. Instead we must examine the underlying facts of each case to determine whether the particular claims at issue ‘relate to’ airline rates, routes, or services.”).

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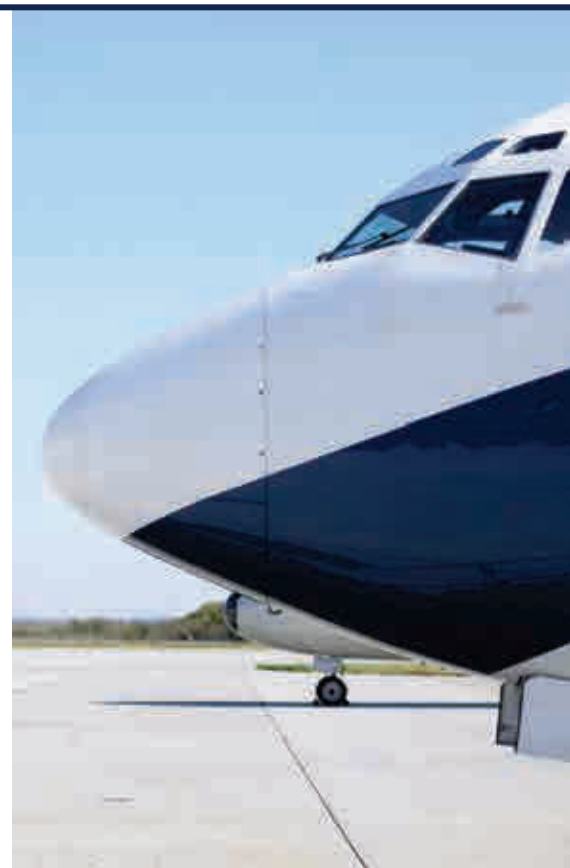
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Contact:

Timothy Lynes, Aviation Practice Chair

+1.202.625.3686 | [timothy.lynes@kattenlaw.com](mailto:timothy.lynes@kattenlaw.com)

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**Donald Gray**

t: +1-416-863-2750

[donald.gray@blakes.com](mailto:donald.gray@blakes.com)

**Nathan Cheifetz**

t: +1-416-863-2969

[nathan.cheifetz@blakes.com](mailto:nathan.cheifetz@blakes.com)

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**For more information contact:**

**Catherine Duffy**

Partner

T: +353 1649 2244

E: [cduffy@algoodbody.com](mailto:cduffy@algoodbody.com)

**Maireadh Dale**

Partner

T: +353 1649 2629

E: [mdale@algoodbody.com](mailto:mdale@algoodbody.com)

**Séamus Ó Cróinín**

Partner

T: +353 1649 2255

E: [socroinin@algoodbody.com](mailto:socroinin@algoodbody.com)

**Marie O'Brien**

Partner

T: +353 1649 2705

E: [mobrien@algoodbody.com](mailto:mobrien@algoodbody.com)

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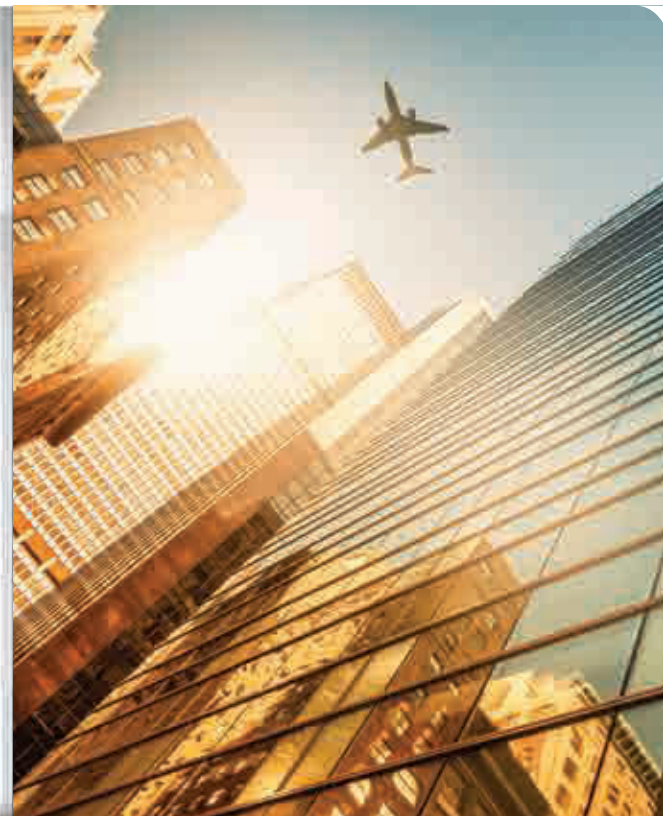
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100 North Broadway Ave. • Suite 1500 • Oklahoma City, OK 73102 • USA  
Tel: 405.232.7777 • Fax: 405.232.9898

**Jack P. Gilchrist**, *Shareholder*  
**Chad A. Gilson**, *Associate*  
**W. Jason Hartwig**, *Associate*  
**Peggy S. Horinek**, *Counsel*  
**Nick C. Linholm**, *Counsel*

[jgilchrist@debeegilchrist.com](mailto:jgilchrist@debeegilchrist.com) - 405.702.9500  
[cgilson@debeegilchrist.com](mailto:cgilson@debeegilchrist.com)  
[jhartwig@debeegilchrist.com](mailto:jhartwig@debeegilchrist.com)  
[phorinek@debeegilchrist.com](mailto:phorinek@debeegilchrist.com)  
[nlinholm@debeegilchrist.com](mailto:nlinholm@debeegilchrist.com)

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**Thomas A. Zimmer, co-leader:** [thomas.zimmer@pillsburylaw.com](mailto:thomas.zimmer@pillsburylaw.com) | 415.983.1333

**Mark N. Lessard, co-leader:** [mark.lessard@pillsburylaw.com](mailto:mark.lessard@pillsburylaw.com) | 212.858.1564

**William C. Bowers:** [william.bowers@pillsburylaw.com](mailto:william.bowers@pillsburylaw.com) | 212.858.1106

**C. Payson Coleman:** [payson.coleman@pillsburylaw.com](mailto:payson.coleman@pillsburylaw.com) | 212.858.1426

**Charlotta Otterbeck:** [charlotta.otterbeck@pillsburylaw.com](mailto:charlotta.otterbeck@pillsburylaw.com) | 212.858.1409

**Michael P. Schumaecker:** [michael.schumaecker@pillsburylaw.com](mailto:michael.schumaecker@pillsburylaw.com) | 212.858.1433

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+49.69.9726.3939  
Holger Neumann

**Hong Kong**  
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Sébastien J. Evrard

**London**  
+44.20.7039.5959  
Charlotte L. Sallabank

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Artur L. Badra

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### Contacts:

#### Mark Bisset

London  
T: +44 (0)20 7876 4854  
E: mark.bisset@clydeco.com

#### Philip Perrotta

London  
T: +44 (0)20 7876 4891  
E: philip.perrotta@clydeco.com

#### Oliver Tebbit

Dubai  
T: +971 4 384 4620  
E: oliver.tebbit@clydeco.com

#### Sidanth Rajagopal

Dubai  
T: +971 56 646 0141  
E: sidanth.rajagopal@clydeco.com

#### Paul Jebely

Hong Kong  
T: +852 2287 2883  
E: paul.jebely@clydeco.com

#### Maylis Casati-Ollier

Paris  
T: +33 1 44 43 88 67  
E: maylis.casati-ollier@clydeco.fr

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**Michael Mulitz**  
michael.mulitz@kayescholer.com  
+1 212 836 7532

**Henry Morriello**  
henry.morriello@kayescholer.com  
+1 212 836 7170

**Daniel Hartnett**  
daniel.hartnett@kayescholer.com  
+1 312 583 2380

**Scott Talmadge**, Bankruptcy & Restructuring  
scott.talmadge@kayescholer.com  
+1 212 836 7039

**Willys Schneider**, Tax  
willys.schneider@kayescholer.com  
+1 212 836 8693

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**KEN HOFFMAN** | 305.579.0809 | [HOFFMANK@GTLAW.COM](mailto:HOFFMANK@GTLAW.COM)

**SIMONE BOAYUE-GUMBS** | 305.579.0783 | [BOAYUES@GTLAW.COM](mailto:BOAYUES@GTLAW.COM)

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