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## Guide to Aviation Lawyers 2014

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## CONTENTS

### Editor's letter /02

### Legal market moves in 2014 /04

A review of recent legal market moves.

### Skymark deal analysis /08

William Mace examines Skymark's cancelled A380s.

### Case to watch: Ex-Im's law suit /09

Delta Airlines' numerous law suits against the Export-Import Bank of the United States have prompted a political debate over whether to reauthorize the export credit agency. William Mace reports.

### Russian sanctions hit aviation /11

Joe Kavanagh speaks to lawyers to determine how the latest set of sanctions is affecting the Russian aviation sector.

### Locking in the rate / 13

Stephenson Harwood partner, Saugata Mukherjee, and associate, James Yao, examine how airline treasury staff can best keep interest rates low for aircraft purchases.

### Legal survey /16

In its second legal survey *Airfinance Journal* highlights the most active aviation law firms by financing structure and region.

### Heading to the top /26

*Airfinance Journal* recognizes eight of the most promising legal associates for 2014.

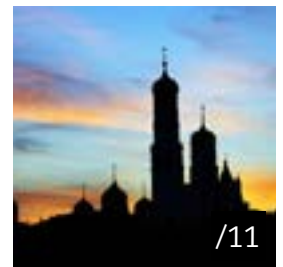
### Repossession in Brazil /29

Stewart B Herman and Timothy J Lynes, partners of Katten Muchin Rosenman, examine how aircraft repossession could change in Brazil after the country's implementation of the Cape Town Convention.

### Directory /32



/04



/11



/26



/29



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## EDITOR'S LETTER

# Keep your partner happy

Many top aviation lawyers are being lured to new firms in a global competition for legal talent.

Finding a good lawyer is always hard, but it seems keeping some of the top ones is even harder. This year many senior aviation lawyers have defected to rival teams in a global war for legal talent.

In the past 18 months the heads of aviation for Norton Rose, Stephenson Harwood, DLA Piper and Jones Day have left for new homes as law firms jostle to win the best-connected partners and their clients. Senior lawyers, who have been with their respective team for years, are now being tempted to jump ship. Ince & Co, Holland & Knight, Pillsbury, Vedder Price, Stephenson Harwood and K&L Gates have all boosted their existing aviation teams recently with senior recruits.

The interesting question is why now? The battle for talent always exists but appears to have become particularly fierce recently because of a buoyant aviation market. According to lawyers, some of the larger firms are throwing resources towards their existing aviation practices to expand into new areas within aviation and shore up weaknesses in their existing services.

The change has been accompanied by a global shift in the aviation market of the geography of airline clients, as Asian airlines and lessors acquire more aircraft, as well as a wider global investor base eager for new aircraft. In short, law firms are trying to keep up with the sheer demand for legal services in a very active sector. This pressure is not letting up either. A London senior associate cheerfully confided he was getting at least two or three calls a day from recruitment agents as one company looks to increase its staff numbers in Asia.

Legal recruitment, particularly at the very senior level, is different to other professions – even within aviation. For most jobs, recruiters will simply offer a potential candidate a higher salary, or a portion of shares or equity, to lure them.

A law firm, on the other hand, will have a long series of negotiations with a prospective partner before offering him or her a role. One senior US lawyer describes it as a “complicated dance”. The firm needs to perform a basic due diligence on the potential new partner’s existing book of business. Only after that process is com-

pleted can it begin discussing salary.

In addition, the firm poaching talent will need to be careful it makes sure the prospective new partner will enjoy similar rewards to its existing partnership. Get this wrong and it causes disgruntlement among the existing partnership base.

Often a partner will move with a handful of chosen associates. Law firms are increasingly attempting to poach a team of lawyers. Partners who have established books of business are supported by promising associates. If a firm really wants to expand it normally has to secure the whole team.

“If you are talking about a partner with a \$1.5 million practice, moving one individual is not going to move the needle,” adds the lawyer.

Aviation practices tend to be relatively small compared with other practices in law firms. Outside of a handful of very large law firms, many aviation practices tend to involve fewer than half-a-dozen lawyers. For a law firm to expand quickly it is much easier for it to hire a rival team that is already dominant in a different jurisdiction than try to train or create a team to take on the incumbent. Buying a ready-made team also eliminates the competition and guarantees clients almost immediately.

There are limits to this endless expansion. Law firms will be mindful that they are creating genuine synergies within their practices and there is a finite pool of talent. Similarly, lawyers want to move to firms which have platforms that can support their business or have powerful brands to help them attract new customers. Not all firms can offer these conditions.

Nonetheless, given the buzz in today’s market, sensible legal firms should be taking care their existing talent is content where they are.

DICKON HARRIS,  
Editor,  
*Airfinance Journal*



Matheson

Left to right: Stuart Kennedy,  
Chris Quinn, Gerry Thornton

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## LEGAL MARKET

# Moves in 2014

### January/February

#### White & Case adds aviation partner

Law firm White & Case has added Ji Hoon Hong as aviation finance-focused partner in its New York office.

Hong's work concentrates on structured debt capital markets transactions for the aviation industry.

He played a seminal role in the development of the enhanced equipment trust certificate product during the 1990s, and continues to focus on this area. He also has experience in asset-backed securitizations and equity and debt capital markets transactions.

Hong joins White & Case from Shearman & Sterling.

#### Stevens & Bolton launches aviation practice

Stevens & Bolton has recruited two lawyers from asb law to set up a new aviation practice.

The team is led by Richard Mumford, a specialist aviation litigator, who was previously the head of asb's dispute resolution team and later its aviation team.

Mumford specializes in complex legal disputes, and is experienced in cross-border litigation and debt and asset recovery.

Mumford is joined by former colleague, Daniel James. James, formerly an associate at asb law, and a senior associate at Stevens & Bolton, specializes in aircraft purchases, as well as sale and leasing structures.

### March

#### Holland & Knight hires Miami aviation partner

Holland & Knight has recruited JC Ferrer as an aviation finance partner

Ferrer, who was previously a partner with K&L Gates, joins the firm's financial services and Latin America practice groups in Miami. Ferrer represents lenders, lessors, airlines and aircraft manufacturers in connection with the purchase, sale and finance of private and commercial aircraft.

#### Norton Rose's head of aviation moves to Vedder



Neil Poland, a Norton Rose Fulbright partner and global head of the firm's aviation practice, has become a partner at Vedder Price's London office.

Poland has been a partner at Norton Rose since 2001, specializing in asset and structured finance deals in aviation and rail. In particular, he has a wide experience of restructurings and operating lease structures, export credit financings, public debt issues and assisting aircraft deliveries.

Before joining Norton Rose in 1999, he spent four years as an associate at Slaughter and May and trained at Clifford Chance.

Speaking to *Airfinance Journal*, Gavin Hill, Vedder's London managing partner, says: "We are very pleased that Neil will be joining us. He is an excellent lawyer, is highly regarded within the leasing and financing community and is someone that we have come to know well over many years of working on transactions together."

Norton Rose has appointed Munich-based partner Ralf Springer as its head of aviation, and London-based partner Duncan Batchelor as deputy head of aviation.

Jeremy Edwards, global head of banking and finance, Norton Rose Fulbright, told *Airfinance Journal*: "We can confirm that Neil is retiring from the practice. We thank him for his contribution and wish him all the best for the future."



#### William Fry launches aviation practice

William Fry has launched an aviation practice out of Dublin.

The law firm, which has its headquarters in Ireland and has offices in London, New York and California, has hired David Maughan to lead the new team.

Maughan joins from Maples, where he has worked as a partner since 2007 specializing in aviation finance, in particular asset finance and securitization. His experience includes the establishment of aircraft leasing and joint venture companies in Ireland.

He will be assisted by existing William Fry senior associate Jenny Ahern and associate Liam Quinn.

*Airfinance Journal* understands that the firm is planning to hire at least three additional lawyers to build the aviation team, including those at partner level.

Speaking to *Airfinance Journal* about the creation of the new practice, Maughan says: "It is primarily due to the continued growth and development of the Irish aviation industry. The government has undertaken several initiatives to help this. For example, we have seen the Irish Stock Exchange announce a specific aviation debt platform."

#### Ince & Co recruits head of commercial aviation

Law firm Ince & Co has appointed Hugh O'Donovan as head of commercial aviation.

O'Donovan joins from Quadrant Chambers. He will report to Ince's global head of aviation, Gillie Belsham.

O'Donovan is a barrister and former solicitor who has specialized in aviation regulatory, commercial and competition law for nearly 30 years.



## LEGAL MARKET

# Moves in 2014

### Bird & Bird adds Middle East aviation partner

Global law firm Bird & Bird has appointed a new partner, Anna Anatolitou, to lead the growth of the company's Middle East aviation practice.

Anatolitou previously served as general counsel for the Air Arabia Group. She previously worked at Norton Rose Fulbright.

Anatolitou has a broad range of aviation-focused experience, and has acted as counsel for clients that include airlines, insurers, manufacturers, airports, lessors, financiers and maintenance, repair and overhaul companies.

### Casdagli retires from Reed Smith

Emma Casdagli has left her partnership at Reed Smith Richards Butler's Hong Kong office and retired from practicing law altogether.

Casdagli's retirement after 21 years in aviation finance leaves Reed Smith's Hong Kong office without an aviation-focused department, a company source tells *Airfinance Journal*. She officially retired on December 31, but an adequate replacement could not be found. Casdagli joined Richards Butler as a partner in 2006 after previously heading up Clifford Chance's aircraft finance practice for Asia from 2001.

## April

### Pillsbury secures DLA Piper's London team

Pillsbury has hired DLA Piper's aviation partners Graham Tyler and Debra Erni, as well as three DLA Piper aviation associates, to the firm's finance practice in London.

Tyler headed up the DLA Piper UK asset finance practice and will be in charge of creating a new London-based aviation practice for Pillsbury. The team is set to join the firm at the beginning of May.

Adam Beavill and Sarah Humpleby, DLA Piper's senior aviation associates, are also moving to Pillsbury, as is associate Rahkni Savjani. Beavill and Humpleby were identified as rising stars by *Airfinance Journal's* law surveys in 2011 and 2013 respectively.

Tyler will report to Mark Lessard, co-leader of Pillsbury's transportation finance team, and Mats Carlston, leader of the firm's finance practice.

Tyler has more than 20 years' experience in structured asset financing and leasing. He has advised on domestic and multi-jurisdictional asset financing transactions utilizing a wide variety of structures, including secured debt transactions, operating and finance leasing, Islamic finance, tax leasing and export credit-backed financing.

"We are delighted to be joining Pillsbury's well respected asset and transportation finance practices," says Tyler. "A number of synergies with the Pillsbury team already exist, and we are very excited to have the opportunity to work with them to expand further their practice in this area."

Tyler and Erni are the second major additions to the firm's aircraft finance practice in the past year. Thomas Zimmer, co-leader of the transportation finance team, joined Pillsbury's San Francisco office in April 2013, launching its west coast aircraft finance and leasing practice.

Meanwhile, DLA Piper has appointed Vanessa Leigh as a legal director in the firm's aviation practice, part of the litigation and regulatory group.

Leigh trained at Barlow Lyde & Gilbert before moving to Gates and Partners in 2006. She became a partner in 2007. According to DLA Piper, Leigh is an experienced aerospace insurance lawyer with a wide range of clients, including airlines, regulators, manufacturers and insurers/reinsurers.



### Stephenson Harwood aviation head moves to Milbank

Paul Ng, Stephenson Harwood's global aviation chief, has resigned to join Milbank, Tweed,

Hadley & McCloy.

He will be based in Singapore and head Milbank's aviation and aerospace practice for the Asia-Pacific, although his departure date has yet to be confirmed. Ng has worked on some of the biggest aviation deals in Asia, including Lion Air's \$24 billion order for 234 Airbus aircraft last year and Bank of China's \$1 billion acquisition of Singapore Aircraft Leasing Enterprise, now known as Boc Aviation.

He joined Stephenson Harwood in 2009 from Freshfields Bruckhaus Deringer.

Ng is qualified to practice in multiple jurisdictions, including as an attorney in New York, as a solicitor in England and Wales, as a barrister in England and Wales (non practicing) and also as an advocate and solicitor in Singapore.

Richard Parsons will take Ng's position as Stephenson Harwood's new global head of aviation.

## May



### K&L Gates hires transport securitization partner

The Chicago office of global law firm K&L Gates has added Vivek Bhatt as a partner in its debt capital markets practice. Bhatt joins K&L Gates from Vedder Price. An experienced financial transactions lawyer, Bhatt acts on a wide range of asset-backed securities and complex financial transactions. His primary focus is on the secu-



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# LEGAL MARKET

## Moves in 2014

ritization of transportation assets, including commercial aircraft loans and leases, railcar leases and shipping containers.

Alan Barry, administrative partner of K&L Gates' Chicago office, says: "Vivek's broad securitization practice further strengthens the firm's finance offerings, especially our global transportation finance, capital markets and structured finance practices."

### Vedder Price promotes lawyers

Vedder Price has made two attorneys, Robert Hanks and Ji Woon Kim, shareholders. Both lawyers were awarded Rising Stars by *Airfinance Journal*, an award that singles out the eight most promising aviation attorneys of the year.

Hanks, a member of the firm's global transportation finance team, predominantly works on commercial aviation and railcar finance. Hanks also deals with domestic and international leasing and finance transactions. He was awarded a Rising Star in 2012.

Kim, global transportation finance attorney, advises lenders, export credit agencies and aircraft operators on equipment finance matters. He was awarded a Rising Star in 2013.

## June

### SGR hires Norton Rose attorney

Law firm Smith, Gambrell & Russell (SGR) has employed Jeanne Forsyth for its New York office as an aviation associate working on equipment finance in the aviation industry.

Forsyth moves from Norton Rose Fulbright, where she worked alongside Marc Latman, who was hired by SGR in April. Forsyth and Latman will be working in SGR's newly created aviation consultancy practice, SGR Aviation Consulting, which

focuses on advising airlines, other aviation businesses and companies with aviation clients.



### CMS picks head of aircraft finance

CMS Cameron McKenna has appointed Keith Wilson as head of aircraft finance and a partner in its asset finance team.

Based in London, Wilson joins the firm from Berwin Leighton Paisner (BLP) and has 25 years' experience in aircraft finance. BLP lost another of its aviation lawyers recently when Ren Legal announced it had appointed Adam Longney as a senior associate.

Although primarily focused on the aircraft finance and leasing industry, Wilson also has considerable experience of other asset classes, including oil and gas financing and leasing – particularly reserve-based lending – vendor financing, ship finance and property finance.

Rita Lowe, head of banking and international finance, CMS, says: "Keith is an extremely experienced and widely recognized practitioner in aviation finance. Keith will work alongside an international team to support and strengthen our existing expertise and international client base."

## July/August

### Jausas partner moves to Fornesa

Former Jausas partner Sergi Giménez has been hired by Fornesa Abogados to specialize in aviation and international business law.

Giménez will take with him a team of three lawyers that has been at Jausas for eight years.

## September

### Dentons recruits from Jones Day's New York team

Law firm Dentons has expanded its aviation finance department by hiring two new partners in its New York Office.

Elizabeth Evans, the new global co-chair of the firm's aviation finance practice, is joining the firm with Deepak Reddy. Both lawyers were previously at the New York office of Jones Day, with Evans working as a partner and Reddy as a counsel. They both joined Jones Day in 2010.

Dentons' other co-chair of aviation finance is Nick Chandler, who is based in London.

### Kaye Scholer chooses Clyde & Co partner

Law firm Kaye Scholer has appointed aviation finance lawyer Sidanth Rajagopal as a partner in its London office.

Previously a partner in the Dubai office of UK firm Clyde & Co, Rajagopal specializes in the leasing and purchasing of aircraft and engines for the commercial and private jet markets.

His clients have included Air Costa, SpiceJet, Veling Limited, Acia and Kenya Airways.

Rajagopal started his career at the Economic Laws Practice in New Delhi, moved to Luthra & Luthra Law Offices before joining Clyde & Co as an associate, eventually becoming an equity partner.



### Greenberg Traurig welcomes back partners

Former Greenberg Traurig shareholders Jeffrey Tenen and Israel Sanchez have rejoined the law firm after a year at Hughes Hubbard

& Reed.

Also joining the new Global Aircraft and Equipment Finance and Leasing Practice and returning to Greenberg Traurig is Ellen Fontanella, who will be joining as a senior associate. ▲

## NEWS ANALYSIS

# Skymark's super-jumbo gamble

Airbus's decision to cancel Skymark Airlines' substantial order for six A380s could have dire consequences for the Japanese carrier, but its implications for the rest of the industry are unclear.

At the time of writing Skymark had issued a "going concern" warning about the impact of lost investment into the aircraft construction and potential for penalty payments of up to \$700 million to Airbus.

Shinichi Nishikubo, Skymark's chief executive, called the penalties "outrageous" and "beyond common sense"; however, it was under his leadership that the order was made, and he will have to navigate the turbulent air from now on.

He said the company intended to address the costs by discontinuing unprofitable services at regional airports and borrowing funds from financial institutions, according to Japan's Nikkei news wire.

The vague plan comes as cold comfort to the airline's business partners and creditors. In contrast to Japan Airlines' recent rescue from bankruptcy, Skymark would be less likely to undergo a state-supported insolvency process, according to Japanese sources.

"Last time the government rescued JAL, which was not very popular, and this time it's a smaller airline and the airline does not have any political power. The current government does not have a good reason to help them," says an experienced Asian leasing executive.

## Skymark's risky order

The underlying business issue for Skymark is the increasing level of competition from pure low-cost airlines in Japan.

The airline restructured a fleet of leased 737-800s, but then suddenly, in 2011, announced the order for Airbus's second-biggest aircraft type: the A380-800. The order was a gamble that the carrier, which until that point had only offered domestic short-haul flights, could expand internationally.

Its decision to order six A380s was criticized at the time. One leasing source recalls: "From the outset, the very first comment on hearing of the order was 'are you crazy?' Many people in the market expected the future problems when they



**Skymark's risky plan to order A380s has unravelled.**

heard the news."

At least some of the blame lies at Airbus's feet, says the source, commenting that the manufacturer should have seen that Skymark was not in a position to make good on its promised acquisitions given its mediocre financial results at the time.

"Airbus should have been aware of the potential problem – how can the airline operate the plane with its business model?"

When contacted by *Airfinance Journal*, an Airbus spokesman said that each order is a confidential agreement that is negotiated directly with the airline, and would not be drawn on this particular case, but did add that Airbus "only does reasonable deals".

The Skymark example raises the question whether similarly expanding airlines, of which there are many in Asia, should be more cautious with their fleet planning.

Airlines need to be careful because firm aircraft purchase contracts typically do not have cancellation clauses for the buyer. Amendments, deferrals, or delays will often be allowed by mutual negotiation, confirms a senior lawyer to *Airfinance Journal*, but a solid cancellation clause for the buyer is unlikely to be introduced.

One side effect of the Skymark case is that it could propel even further the use of operating lessors as a flexible and friendly option for acquiring aircraft. Lessors already have huge market share in Asia and around the world, but such punitive actions by a manufacturer make leasing seem an even more attractive option.

## Skymark explores options

At the time of writing the airline is still operating and its shares are still trading, but they dropped to ¥155 (\$1.5) by mid-August, their lowest point in the past five years.

But another Asian legal source says the "going concern" warning issued by the airline and the apparent damages to its finances resulting from such a hefty penalty will cause creditors to explore their options and ask stern questions of the airline's plans.

"Skymark have obviously got business creditors at all levels of their operation, and they would be reading Nikkei and thinking 'what's going on?' and putting a call in for sure."

The leasing source says lessors will be ready to repossess their aircraft, but will not do so if it means there is no chance of the airline recovering.

"A creditor may repossess the aircraft but that could trigger the worst scenario, so lessors may hesitate to do that, but it may be a matter of time," he says.

Until then, Skymark will need to convince creditors that it can trade its way out of this predicament, and in so doing it will probably need to trim its fleet and reorganize its route network as Nishikubo has already indicated it will. ▲



## CASE TO WATCH

# Delta Airlines' legal challenges against Ex-Im Bank

Delta Airlines' numerous law suits against the Export-Import Bank of the United States have prompted a political debate over whether to reauthorize the ECA. William Mace reports.

The future of the Export-Import Bank of the United States (Ex-Im Bank) is uncertain. The government institution is synonymous with its biggest client, Boeing, and has supported billions of dollars of aircraft deliveries for the US manufacturer since its creation. However, the bank is at the centre of a legal and political battle that could reshape, or potentially end, its existence.

As *Airfinance Journal* goes to press, the signs are that US Ex-Im is likely to have its reauthorization delayed until June 2015.

The nine-month stay of execution is being granted as the US House of Representatives seeks to avoid a partisan spat over the future of the bank and help ensure an agreement on a bill that will keep the government running until mid-December.

The bank's remit was originally set to expire on September 30, but the issue of the bank's charter has become increasingly contentious between both political parties. Various Republicans, most notably US congressman Jeb Hensarling, have expressed their desire to wind down the bank because they claim the bank's main beneficiaries, Boeing and Caterpillar, are receiving an unnecessary subsidy from tax-payers to help their already successful businesses.

The bank's supporters, and most US Democrats, state that rival exporters in other countries all receive support through their respective export credit agencies (ECAs), and that closing Ex-Im Bank would be tantamount to unilateral disarmament by the US, which would punish US exporters.

The political debate over the future of the ECA has picked up steam in recent years thanks to a number of law suits brought against Ex-Im Bank by Delta Airlines.

## Delta's law suits

Delta, the US's third-largest airline by revenue, has taken a hard line against the bank since it engaged in the first of four law suits challenging its legality and authority in 2012. The airline has argued that Ex-Im Bank offered foreign rival carriers an unfair advantage over domestic US airlines which are unable to access the bank's guarantees.

The first suit was initially filed by the Airline Pilots Association (Alpa) and the Air Transport Association (ATA) on behalf of nine of its 15 member airlines, including Delta. Delta eventually took over as second plaintiff when ATA dropped out on appeal.

The plaintiffs alleged that the bank violated the Bank Act by acting "arbitrarily and capriciously" by approving support for transactions involving Air India "without considering the extent to which they



are likely to have an adverse effect on the domestic airline industry" and on "domestic employment".

Further grounds for the complaint were that the bank allegedly approved the commitments without considering "whether Air India is able to offer reasonable assurances of repayment", and that went ahead without considering whether they cause "a substantial injury to the domestic airline industry".

The suit also said the bank was remiss in "not providing notice, soliciting comment and providing a reasoned explanation for its decision".

The plaintiffs' arguments continued in that vein before concluding that the violations "warrant the issuance of a temporary restraining order and a preliminary injunction".

The judge decided not to grant an injunction, partially on the basis of then vice-president of Ex-Im's transportation division Robert Morin's assertion that the bank's inability to close the deal it had already made with Air India would harm its reputation as a reliable source of financing.

"This is a particular risk considering that foreign purchasers could turn to competing Airbus aircraft that receive more certain support from the European export credit agencies," Morin told the court.

The case went to a formal hearing where Judge James E Boasberg decided in favour of Ex-Im Bank, stating: "In the end, it finds that plaintiffs have established standing and that the bank's loan-guarantee determinations are, at least in a limited sense, subject to judicial review. But after winning these battles, plaintiffs lose the war. When all is said and done, the bank's decision to approve the Air India commitments was neither arbitrary and capricious nor contrary to law."

However, that judgment was reversed when the US Court of Appeal let the Air India deal stand, but directed the Ex-Im Bank to provide a "reasonable explanation for how the Economic Impact Procedures, which screen out loans and loan guarantees to service providers, square with the statute's requirements".

The bank was also required to, or, "adequately



## “Delta Air Lines’s chief executive Richard Anderson has proposed that the bank should be prohibited from financing widebody aircraft to foreign airlines.

consider and explain any adverse effects that these particular Air India loan guarantees have on US industries and US jobs, or take whatever other action the bank deems appropriate to comply with the Bank Act and the APA”.

The bank did so, publishing two 30-plus page responses in June 2013.

But, those responses did not satisfy Delta Air Lines, and have formed the basis for continued legal attacks on the bank’s place in the US’s economic landscape.

Three further court challenges by Delta are still ongoing. “The bank’s subsidies have gone too far and it is time for reform,” Delta Air Lines chief executive Richard H Anderson explained to a government select committee.

Anderson has proposed that the bank should be prohibited from financing widebody aircraft to airlines that are owned by foreign states, supported by foreign states, or are creditworthy in their own right.

Second, the bank should be required to be “completely transparent in its widebody aircraft financing”.

Third, it should be required “to conduct a full economic impact analysis of every widebody aircraft transaction that it finances, to ensure that any harm to US airlines and our employees is properly taken into account”.

As part of that analysis, it should give affected parties, including US airlines, an opportunity to study and comment on its decisions and provide a public justification for any funding decisions subsequently made.

Finally, Anderson wants Congress to reaffirm the directive it gave when Ex-Im Bank was last reauthorized in 2012 – that the Treasury negotiate with its European counterparts to eliminate widebody aircraft financing.

For the Ex-Im Bank’s part, its president and chairman, Fred Hochberg, told the committee he wanted a “stepped increase” in the bank’s exposure cap by \$20 billion, to \$160 billion.

He says the \$160 billion cap would support an estimated 1.3 million US jobs between 2015 and 2019.

Hochberg called the global trade environment “brutally competitive”. He said every industrialized nation had its own form of Ex-Im Bank or export credit agency, and that the bank was not competing against private sources of funding.

“When the private sector can provide financing, we prefer that course of action. Ex-Im Bank does not compete with private sector lenders, but rather provides financing for transactions that would otherwise

not take place because commercial lenders are either unable or unwilling to provide financing support.”

Assuming the bill goes ahead, then US Ex-Im will receive a temporary reprieve until next June but

it also allows its political opponents more time to build a case against the ECA. By next summer the bank could face mandatory legal reforms. At the very least it will be readying itself for a nasty political fight to save its existence. ▲

### DELTA LAWSUITS AGAINST EX-IM BANK – STATUS UPDATE

#### Delta v Ex-Im Bank (Delta I)

**Filed** 16/11/11; status: concluded

**Plaintiffs:** Airline Pilots Association (Alpa) and the Air Transport Association (ATA). ATA dropped out on appeal, and Delta Air Lines was added as a plaintiff.

**Issue:** challenges to Ex-Im Bank’s authorization of \$1.8 billion to support the export of Boeing 787 Dreamliner aircraft to Air India.

**Argument:** plaintiffs argued that Ex-Im Bank’s economic impact procedures did not follow the requirements of the bank’s charter with respect to the Air India authorizations.

**Rulings:** the US District Court ruled in Ex-Im Bank’s favour. US Court of Appeals remanded to Ex-Im Bank to explain its economic-impact procedures more thoroughly.

**Remand:** Ex-Im Bank has completed two papers in accord with the remand.

#### Delta v Ex-Im Bank (Delta II)

**Filed** 13/2/13; status: ongoing

**Plaintiffs:** Delta Air Lines, Hawaiian Air and Alpa.

**Issue:** challenge to Ex-Im Bank’s new economic impact procedures (in effect as of 1/4/13), which examine aircraft applications for Ex-Im Bank financing more closely.

**Argument:** plaintiffs argue that the procedures do not follow the bank’s charter requirements. Ex-Im Bank disputes this claim.

**Status:** the case has been fully briefed on motions for summary judgment filed by both parties. Awaiting further action from the US District Court.

#### Delta v Ex-Im (Delta III)

**Filed** 3/4/13; status: ongoing

**Plaintiffs:** Delta Air Lines, Hawaiian Air and Alpa.

**Issue:** challenge to Ex-Im Bank’s authorizations of five specific transactions supporting exports of Boeing aircraft to a number of foreign airlines. All of the transactions at issue were approved under the bank’s previous economic impact procedures in effect before 1/4/13.

**Argument:** plaintiffs argue that Ex-Im Bank’s 2012 charter reauthorization requires that the new economic impact procedures for aircraft transactions should have been applied retrospectively. Ex-Im Bank disputes this claim.

**Status:** the case has been fully briefed on motions for summary judgment filed by both parties. Awaiting further action from the US District Court.

#### Delta v Ex-Im Bank (Delta IV)

**Filed** 10/1/14; status: ongoing

**Plaintiffs:** Delta Airlines, Hawaiian and Alpa.

**Issue:** repeat challenge to issue litigated in Delta I – Ex-Im Bank’s authorization of \$1.8 billion to support the export of Boeing 787 Dreamliner aircraft to Air India.

**Argument:** plaintiffs argue that Ex-Im Bank’s remand responses to the US Court of Appeals ruling in Delta I are not sufficient. Ex-Im Bank disputes this claim.

**Status:** the case has been fully briefed on motions for summary judgment filed by both parties. Awaiting further action from the US District Court. ▲



## REGULATORY UPDATE

# Russian sanctions hit aviation

Joe Kavanagh speaks to lawyers to determine how the latest set of sanctions is affecting the Russian aviation sector.

“Things are quite murky in the Russian market generally – not just for aviation,” notes Philip Lamzin, legal director at DLA Piper, on the wave of economic regulations levelled against Russia by the European Union and the US over the summer.

“Some of the western banks have simply closed down the books on Russia, and aren’t taking on any more Russian risk at all because the situation is so unstable,” adds Lamzin.

The net result of the sanctions has meant that Russian airlines and lessors are finding it much harder to access capital. European banks have become extremely cautious lending to Russia in the wake of the sanctions, while many of the large Russian state banks that have traditionally financed domestic airlines have been prevented by the sanctions from raising offshore capital in Europe. This has pushed airlines towards the arms of non-Russian lessors.



“It’s difficult for anyone to find long-term financing at the moment and all the major airlines are trying to reschedule >>>

## EU AND US INCREASE PRESSURE

In the last week of July the EU approved a round of stage-three sanctions, which targeted not just individuals and companies but whole industries. Russia’s financial industry was hit hard by these sanctions, which limit access to EU capital markets for Russian state-owned financial institutions. The list included VEB, VTB, Sberbank, Gazprombank and Rosselkhozbank.

These state banks’ leasing arms include VEB Leasing, VTB Leasing and Sberbank Leasing, which collectively own more than 130 aircraft, many of them on lease to Russian airlines. If their access to capital dries up, then this could limit their ability to acquire new aircraft, which would limit their usefulness to Russian airlines.

In July the US Treasury Department’s Office of Foreign Assets (OFAC) added many of these banks to its own list of sanctioned bodies – the Sectoral Sanctions Identifications (SSI) list. These sanctions

prevent the listed companies accessing debt with a maturity of more than 90 days from US lenders. The SSI list includes Russian individuals and companies determined by OFAC to be working in the financial services, energy, mining, defence and engineering industries.

As *Airfinance Journal* went to press the EU had issued a further set of sanctions, including Regulation 960/2014 that targets certain Russian oil firms, as well as extending the restrictions for the access of key Russian banks to the capital markets. The enhanced capital restrictions have now included financial instruments with a shorter maturity, which has been reduced from 90 days to 30 days. In addition, the new sanctions have been extended to United Aircraft Corporation, the manufacturer of the Sukhoi Superjet 100.

The US has signalled that it will also introduce additional sanctions, but the details have not yet been announced. ▲



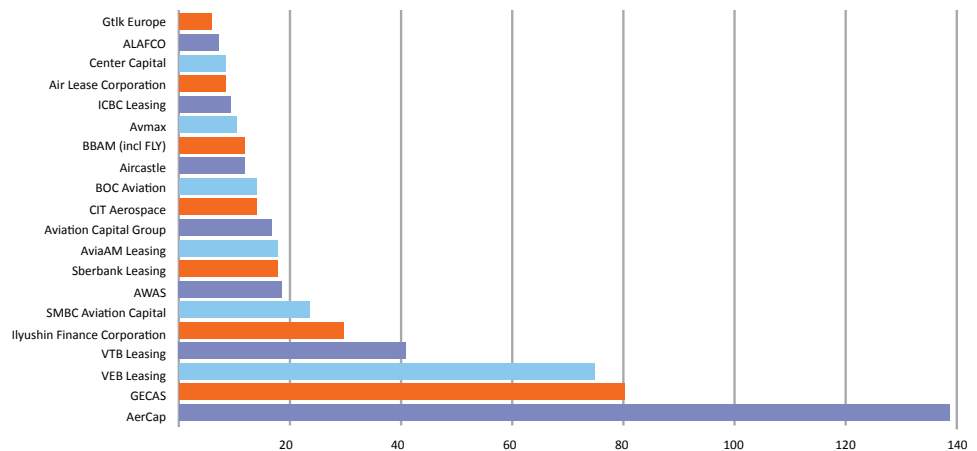
## “Deals are still proceeding but with trepidation, especially on orders that are already placed.”

their deliveries or look for alternative options. For example, if we are talking about new Boeing deliveries, no one would be able to get US Ex-Im financing at the moment and people are looking for sale and leasebacks instead. The operating lessors have much more appetite for risk,” adds Lamzin.

One London-based corporate financier, who asked to be anonymous said although sanctions are not explicitly prohibiting business, they have made financing Russian airlines or lessors less attractive for foreign banks.

“There are no specific thresholds or limitations so far, but there’s enough to prevent us looking at potential deals that otherwise could have been done,” adds the financier.

Total aircraft leased to Russian airlines



Source: AtlasData

### DOBROLET – THE FIRST CASUALTY

Dobrolet, which only began flights in June, had to suspend operations after it was placed on the European Union sanctions list.

In a document announcing the decision to add Dobrolet to its list of sanctioned bodies, the Council of the European Union said the carrier had exclusively operated flights between Moscow and Simferopol, in Crimea, which “undermines Ukrainian sovereignty and territorial integrity”.

The subsidiary of Aeroflot, Russia’s largest airline, stopped its operations when several European partners annulled their contracts as a result.

Dobrolet’s suspension also cost lessors: Dublin-based SMBC Aviation Capital had to cancel the delivery of a Boeing 737-800 to the airline after it was advised about legal complications. SMBC did not comment on what it has done with the aircraft.

Having transferred Dobrolet’s aircraft, Aeroflot says it will create a new low-cost carrier to replace the sanctioned airline. Aeroflot adds it is com-



mitted to the low-cost carrier model and believes it has a future in Russia.

Philip Lamzin, legal director at DLA Piper, says: “The grounding of Dobrolet basically showed that the sanctions could ground most Russian airlines in a day. The lessors issued grounding notices and terminated leases, the insurance stopped working because all the aircraft are insured on European or US markets, and the maintenance contracts also got terminated automatically. So potentially the airline business, an international business that involves a lot of cross-border transactions, is very much exposed to the sanctions.” ▲

In the immediate wake of the sanctions in July one legal source confided that new commercial loans for Russian lessors and airlines were “dead in the water”.

Nathan Cheifetz, a partner with Blakes, also notes: “There have been two transactions, involving Russian purchasers of aircraft, that have been put on the back burner until people see where this is going to fall out.” However, other lawyers have been more sanguine and state that no aviation deals had been delayed by the sanctions.

Zarrar Sehgal, partner with Clifford Chance, says: “I think on future transactions there is a concern, especially if you’re a debt financier, slightly if you’re a global bank that’s doing a lot of business or a leasing company that has significant Russian interest. The knock-on effect is that if you’re doing a large portfolio deal that has a significant Russian composition those have to be re-done, to either lower the composition or to remove it completely.

“I think there will be more clarity, one way or the other. People are pretty much operating in a grey area at the moment, where there is enhanced concern but it hasn’t stopped deals but where it isn’t business as normal. Deals are still proceeding but with an increased level of scrutiny and trepidation, especially on orders that are already placed.” ▲

# SPONSORED EDITORIAL

## Locking in the Rate



**Saugata Mukherjee**  
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While many factors influence the economics of an aircraft financing, the one number that is foremost on the borrower's mind is the interest rate cost of such financing. Given the long tenure of most aviation financings (typically around 8 - 12 years compared to other medium-term commercial financings), the interest rate risk is greater and more difficult to predict. With LIBOR at historical lows, borrowers have sought to eliminate interest rate uncertainty and lock in low fixed rate financings.

### Benefits of fixing the interest rate

For the CFO of an airline or aircraft lessor, there are two main benefits in fixing the interest rate on the financing of an aviation asset - certainty and cost.

**Certainty.** As little as 7 years ago, the USD LIBOR benchmark hovered around 5% per annum. Today, the LIBOR benchmark is close to zero with negative LIBOR provisions being considered as standard in loan documentation. Movements in interest rates are notoriously difficult to predict and many companies have been caught out by adverse interest rate movements.

While airlines and lessors are expected to be proficient in the ins-and-outs of the aviation industry (and anticipating future aircraft values), predicting long-term LIBOR with any degree of certainty is much more complicated (if not, impossible). By fixing the interest rate on a financing, the job of managing cash flows in respect of the financed asset becomes much easier.

**Cost.** With LIBOR rates being close to zero and signs of an improving global economy, fixing

the interest rate at current levels will likely result in savings throughout the life of the financing. Provided that the cost of such fixing is not too high, a borrower stands to make significant savings on its interest rate cost in the long run.

### Options available to a borrower

The concept of hedging interest rate exposure seems simple enough, i.e., exchanging a floating rate for a pre-determined fixed rate. However, there are several structuring options available to a borrower to hedge its interest rate risk in a financing. Each such option has its own set of pros and cons.

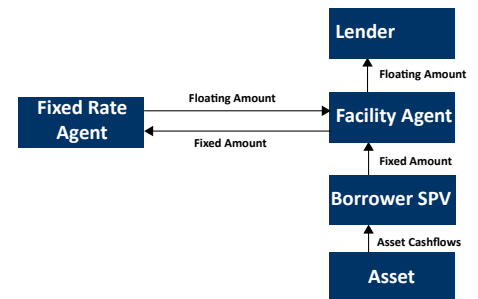
Broadly speaking, the most common options available to a borrower are:

- a fixed rate loan agreement;
- an interest rate swap (IRS) entered into by the borrower (through its special purpose borrowing vehicle (SPV); and
- an IRS entered into by the borrower's parent, treasury or affiliate entity.

**1. Fixed rate loan.** It is possible that the borrower will be offered a fixed rate loan by the lenders. However, more often than not, the fixed rate will actually be offered as an option embedded within a floating rate loan agreement. The option will be exercisable by the borrower, allowing it to convert the floating rate loan to a fixed rate loan. Mechanically, this is achieved through the use of a fixed rate agent (often the same party as the facility agent). Under this arrangement, following the borrower's option exercise, the fixed rate agent will provide an indicative fixed rate in respect of the financing on a fixing date. Should the borrower choose to accept this fixed rate, all or part of the loan will be converted to a fixed rate loan.

In terms of cashflows, on an interest payment date:

1. the borrower SPV will pay a fixed interest payment ("Fixed Amount") to the facility agent who will, in turn, pay such amount to the fixed rate agent; and
2. the fixed rate agent will pay the floating interest payment equal to the interest payment owing under the loan (Floating Amount) to the facility agent who will, in turn, pay the such amount to the lenders.



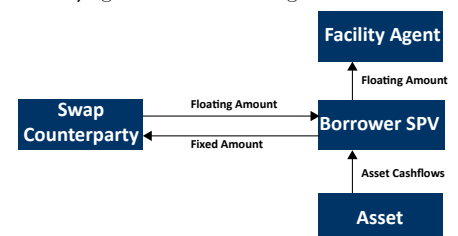
While the fixed rate option simplifies the documentation process for the borrower (no additional derivative documents to negotiate), the manner in which the fixed rate option is documented will have significant impact on the risk allocation vis-à-vis the borrower and the lenders. As the fixed rate agent will be making payments into the financing, the allocation of the fixed rate agent risk (in terms of its failure to make payment, other default or insolvency) will be a key consideration.

While the borrower may argue that its payment obligations under the loan are satisfied once it has paid the fixed amount to the facility agent (given that the facility agent is likely to be the same entity as the fixed rate agent), the syndicated lenders will argue that the fixed rate agent risk should be a risk borne by the borrower.

### 2. IRS entered into by borrower SPV.

A second option available to the borrower is to have its borrowing vehicle (that is, the borrower SPV) hedge its interest rate risk by entering into an IRS (usually with one or more lenders). In such a scenario, the payment dates under the IRS and the loan agreement will be aligned so that, on an interest payment date:

1. the borrower SPV will pay the Fixed Amount under the IRS to its swap counterparty; and
2. simultaneously, the swap counterparty will pay the Floating Amount to the borrower SPV who will, in turn, pay this amount to the facility agent under the loan agreement.





## The negotiation of an IRS is not without pitfalls for a borrower unfamiliar with ISDA documentation.

Entry into of an IRS will require negotiation of additional transaction documentation. Over-the-counter (“OTC”) derivatives such as IRS are likely to be documented in the form of a Master Agreement published by the International Swaps and Derivatives Association, Inc. (“ISDA”). In this structure, the swap counterparty will have access to the collateral available to the lenders. Its ranking in the proceeds waterfall (*vis-à-vis*) lenders will be a subject matter of inter-creditor negotiations.

The cost of entering into the IRS by the borrower SPV may be attractive given the prevalent use of ISDA documentation (liquid market) and the availability of the asset as security (to collateralise the mark-to-market movement on the IRS). However, the negotiation of an IRS is not without pitfalls for a borrower unfamiliar with ISDA documentation. In particular, the different economic features of an IRS compared to a loan mean that the same negotiating approach cannot be taken.

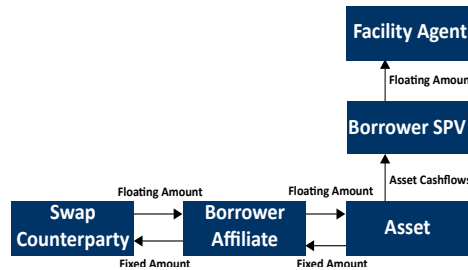
While the borrower would be exposed to swap counterparty risk (which may be partially mitigated by set-off, if the swap counterparty is also a lender to the deal), a well negotiated IRS may offer the borrower a cost effective method of hedging its interest rate risks under the loan agreement.

### 3. IRS entered into by a borrower

**Affiliate.** A third option available to the borrower is to hedge the interest rate risk indirectly through the borrower’s parent, treasury or an affiliate entity (“Affiliate”) entering into an IRS. In such a scenario, on the interest payment date:

1. the Affiliate will pay the Fixed Amount under the IRS to its swap counterparty while simultaneously receiving the Floating Amount from the swap counterparty;
2. the Affiliate will then adjust the Floating Amount against the Fixed Amount yield from the asset (these payments may be recorded as book-entries, or indeed consolidated as part of the borrower group’s wider treasury operations); and
3. the borrower will pay the Floating Amount to the facility agent under the loan agreement.

From the borrower’s perspective, it is cleaner to have the Affiliate’s arrangements to be dealt



with entirely separately and not form part of the actual financing. In other words, the terms of these arrangements, their continuance (and termination) and in fact, whether they’re at all entered into or not will be immaterial and have no impact on the actual structuring or negotiations of the principal financing documents. However, in certain cases, lenders will insist that the Affiliate’s arrangements are critical to the credit of the deal. In such a scenario, the terms of any such arrangement (and their amendment and/or termination) will need to be blessed (and controlled) by lenders. In any event, the swap counterparty (to a Affiliate) will not have access to the collateral available to the lenders (and even if it does, it will rank junior in the waterfall to all creditors in (or connected with) the financing).

When compared to the second option, this method has a number of potential advantages and disadvantages.

#### Advantages:

- the ability of the borrower to leverage of existing relationships/documentation between the borrower Affiliate and swap counterparty;
- unlike the borrower SPV, the potential better credit of the borrower Affiliate may result in cheaper pricing for the IRS; and
- the swap counterparty will not have access to the deal collateral as security.

#### Disadvantages:

- the entry of the IRS by the borrower Affiliate will use up the borrower Affiliate’s credit line with the swap counterparty; and
- the swap counterparty may charge a higher cost for the IRS given the lack of underlying collateral (or request for additional collateral).

### Documenting the IRS under ISDA framework

#### A. The ISDA Framework.

For those unfamiliar with the ISDA framework, the process of negotiating and documenting an IRS may seem daunting at first. As with master agreements published by various industry bodies, understanding the documentation architecture is key.

An ISDA Master Agreement is split into the following sections:

- The Master Agreement – which is available in pre-printed forms (a 1992 version and a 2002 version), contains the standard provisions of the contract (representations, events of default, covenants and boiler plates) and governs the legal and credit relationship between the two counterparties. Unless otherwise provided, an ISDA Master Agreement between two parties will govern all OTC derivative transactions between them. This document is not negotiated by the parties.
- The Schedule to the Master Agreement – which contains negotiated elections and amendments to the general provisions contained in the Master Agreement.
- The Confirmation – which contains the commercial terms of a transaction as well as any transaction specific modifications.
- ISDA Definitions – which are standard terms and definitions published by ISDA and used for documenting particular types of transactions (such as interest rate derivatives, cross-currency swaps, credit default swaps, equity derivatives, commodity derivatives, etc.).

#### B. SPV IRS.

Where the borrower SPV elects to enter into an IRS in connection with an asset financing, lenders will inevitably request that such IRS be linked to the financing (“SPV IRS”). In contrast to a standard OTC derivative transaction, an SPV IRS will require special consideration.

One of the key features of an SPV IRS is that the ISDA Master Agreement will be a transaction document under the facility agreement. Consequently, representations, covenants, events of default and termination events which are applicable under the facility agreement will also apply to the ISDA Master Agreement. The following should be borne





## Given the cheap money market environment, it makes sense for borrowers to fix their interest rate costs given the continued revenue pressures in the aviation industry.

in mind while negotiating an SPV IRS:

- *Events of Default* – The standard events of default under the ISDA Master Agreement should be dis-applied with respect to the borrower SPV. While this may appear counter-intuitive at first instance, this allows for a single set of events of default to cover both the loan and the IRS.
- *Single transaction* – While the ISDA Master Agreement is drafted to allow for multiple derivative transactions to be governed under it, this should not be the case with respect to an SPV IRS. Unrelated OTC transactions should not be governed by the same ISDA Master Agreement as the bespoke default and credit terms applicable to an SPV IRS are not appropriate for application outside of the financing.
- *Change of lender* – The swap counterparty to an SPV IRS is likely to be a lender in the

financing. If the swap counterparty ceases to be a lender (due to transfer of loan), it is likely to request that the SPV IRS be novated or terminated. Given such events are usually outside of the borrower's control, costs of such novation/termination should either be borne by the relevant lender or shared between the parties.

- *Full/partial prepayment* – Facility agreements will usually contain provisions which allow the borrower to fully and/or partially prepay a loan. Given the notional amount under an SPV IRS will match the original loan amount, parties should ensure that there is mechanism under the SPV IRS which allows for the reduction of this notional amount to avoid over-hedging.

While the factors relevant to negotiating an SPV IRS are not limited to the above, consideration of these factors will help in ensuring a well-balanced and tailored transaction for all parties.

### Conclusion

Given the cheap money market environment, it makes sense for borrowers to fix their interest rate costs given the continued revenue pressures in the aviation industry. With several structuring options available to parties, each option must be considered carefully to find the one that is most appropriate for the parties and the transaction.

The consequences of selecting the wrong option may have a significant impact in terms of costs and risk allocation. As with many other things in life, the devil is in the detail. ▲

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# Judging the winners

Airfinance Journal reveals the winning law firms in the second year of its legal survey, which recognizes the most active law firms in 2013 by regions and financing structure.

This is the second year of our revised legal survey. We have seen a tremendous increase in participation with more law firms submitting more deals. We are grateful for all those which worked with us to improve the survey.

*Airfinance Journal* has based its legal survey on the *Airfinance Journal* Deals Database. All aviation law firms are invited to submit deals to be included in the database. The team then reviews the different deals and selects the eligible deals for the database. This list is combined with existing deals in the database and the most active law firms are then selected by region and product type.

It is important to stress that the legal survey reviews deals from 2013 only. This is significant because we recognize that markets change, as do law firms, however we felt this was the only way to offer an accurate snapshot of total global legal activity. Our aim is to be transparent and impartial. All of the deals used to judge the winners are eventually loaded into the Deals Database and can be reviewed by our readers. In this sense our survey is unique. Our researchers assess each deal to verify them and to avoid double counting.

The benefit of using the database is that we can offer a granular presentation of law firm activity by both product type

“Our aim is to be transparent and impartial. All of the deals used to judge the winners are eventually loaded into the Deals Database and can be reviewed by our readers.”

and region. No other survey we are aware of does this. No other survey has independent researchers assessing the deals to ensure the quality of the overall results.

As we acknowledged last year, there are limitations to the survey. Not all the deals in the database have law firms attached to them. This means we have many more potential deals that we could not include in the survey. In addition, we recognize that client confidentiality is an issue for law firms when submitting deals. All law firms face this restriction.

Nevertheless, the survey is the most comprehensive of its type and crucially offers real insight into the aviation market. The survey gives a strong indication of which law firms are most favoured for certain deal types and for certain regions.

## Overall rankings

Like last year 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 and product and category. A law firm that tops North America, for instance, or Operating Leases receives five points and the second receives four points, and so on.

We would like to extend our appreciation to all the law firms which submitted deals and worked with us this year for the legal survey. We look forward to continuing to work with you.

DICKON HARRIS  
Editor,  
*Airfinance Journal*

MICHAL DUFF,  
Managing Director,  
*The Airline Analyst*



“This year we’ve seen an increase in securitization deals as that market continues to grow out of the downturn.”

William Glaister, head of global asset finance group, Clifford Chance

## The Winners

Rank	Firm	Total Score
1	Clifford Chance	48
2	White & Case	27
3	Dentons	20
4	Allen & Overy	17
5	Stephenson Harwood	16
6	Clyde & Co	10
7	Milbank	9
8	Pillsbury	8
9	Blakes	5
10	Simmons & Simmons	3
11	Shearman & Sterling	1
12	Stikeman Elliott	1
13	Hogan Lovells	1
14	Walkers	1
15	Nishimura & Asahi	1

The legal survey is split 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 firms based on how they

place in each respective region and product type. We have produced overall rankings based on these results.

Clifford Chance is the overall winner of *Airfinance Journal's* second legal survey. The firm came top in Europe, Operating Leases, Export Credit, Middle East and Commercial Loan.

Clifford Chance partner William Glaister puts his firm's success down to having his team “positioned in the right places”.

He says: “Experts in every region display our ability to execute global transactions for our clients. The global team remains closely coordinated, so that we are prepared when one market heats up. This year we’ve seen an increase in securitization deals as that market continues to grow out of the downturn. Clients have also become interested in a variety of other creative capital markets financing techniques.”

White & Case is ranked second overall in the survey, being the most active law firm for structured leases in 2013, and was the second most active firm in the Asia-Pacific region.

Chris Frampton, partner and global head of asset finance, has an “optimistic outlook” for financing activity in 2015, providing geopolitical disruption is avoided.

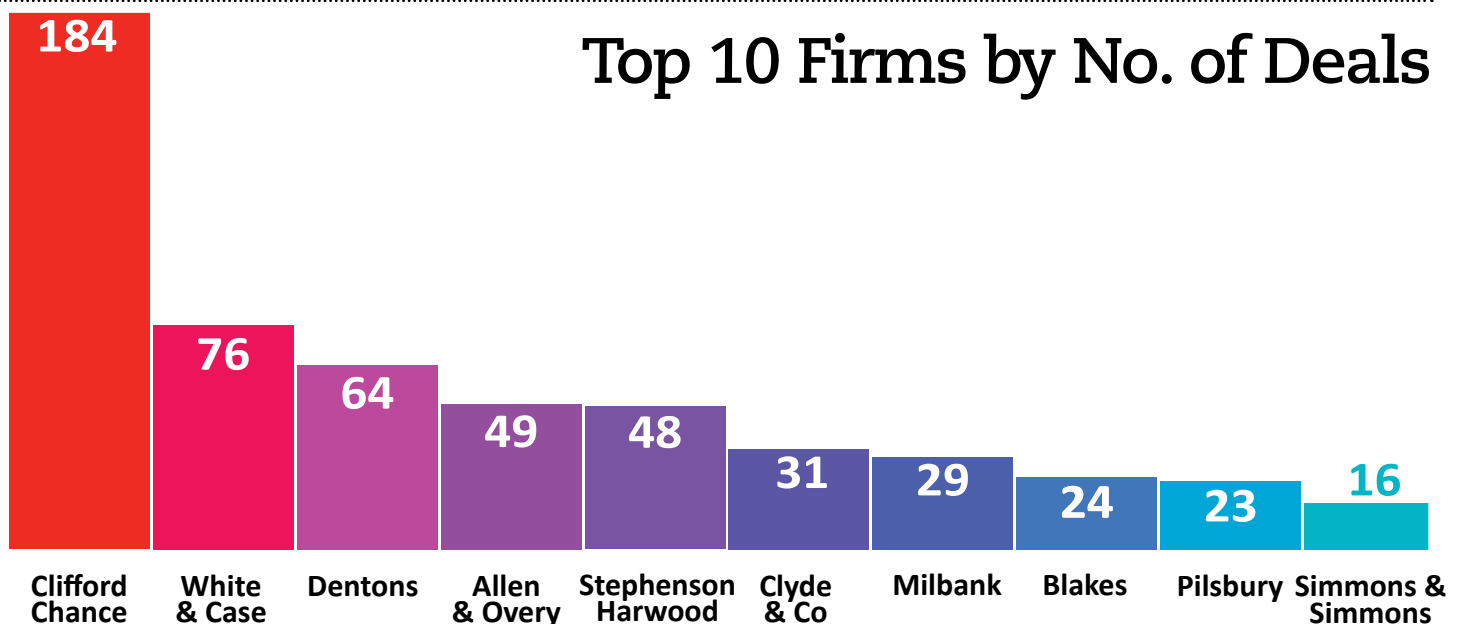
He says: “Although each region will have

its own trends, in our view a unifying principle will be the development of diversified funding sources.

“We expect increased use of the US capital markets in 2015, both in combination with ECA support and through structured financings utilizing the EETC [enhanced equipment trust certificates] and ABS [asset-backed securities] products. Increased levels of interest in US dollar financings by Chinese airlines and operating lessors, which we expect to continue, will bear upon developments in this area.

“In all regions, we expect bank financings to remain at significant levels, at least for 2015. This, combined with continued availability of ECA support, will be critical given capital demand levels, including as a result of anticipated portfolio-based transactions. We also foresee continued use of tax-oriented products such as Jolcos [Japanese operating lease with call options], possibly in combination with the development of hybrid products that access new sources of debt capital.

“We have an optimistic outlook for financing activity in 2015 (absent geopolitical disruption). Although each region will have its own trends, in our view a unifying principle will be the development of diversified funding sources.” ▲



Source: *Airfinance Deals Database*



## “I still expect to see much more Chinese aviation lending – and leasing – activity in Africa.”

Paul Jebely, Clyde & Co’s global head of aviation

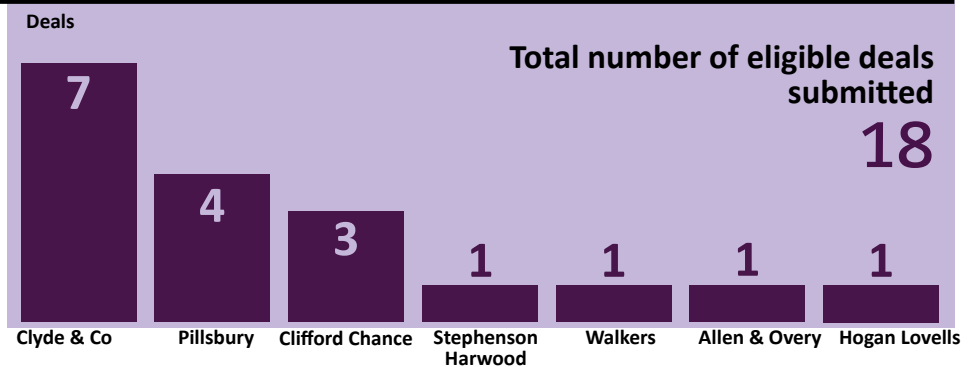
### Africa

African airlines signed a steady flow of deals as lessors and a new wave of aviation banks slowly became more comfortable with the region’s airlines. Lawyers advising in the region are bullish about its prospects as they highlight the various carriers seeking to replace their fleets.

Paul Jebely, Clyde & Co’s global head of aviation finance, says many African state carriers are keeping the firm busy as they acquire aircraft.

Jebely adds: “In general, Africa Rises also translates into Africa Flies. These – plural – are potential filled and potential fuelled emerging markets. For example, we have seen and will

Lawfirm	Deals	Points
Clyde & Co	7	5
Pillsbury	4	4
Clifford Chance	3	3
Stephenson Harwood	1	1
Walkers	1	1
Allen & Overy	1	1
Hogan Lovells	1	1



continue to see state-owned African airlines renewing their fleets or re-establishing business plans – look at Rwanda, Mozambique or Namibia for examples.

He says: “There was a relatively significant number of deliveries over the past year, particularly in the regional jet place. We saw – and will continue to see – plenty of appetite from international lenders, though they tend to only focus on top-tier credits, whereas South African banks,

such as Investec, Nedbank and RMB, are more committed to the continent as a whole. This is, of course, coupled with solid participation from development agencies and banks – like AfriExim. The elephant in the room, as ever, is China. I still expect to see much more Chinese aviation lending – and leasing – activity in Africa.”

Lawyers state that despite the rise in premiums deals backed by export credit agencies (ECAs) remain popular in the region. ▲

### Asia-Pacific

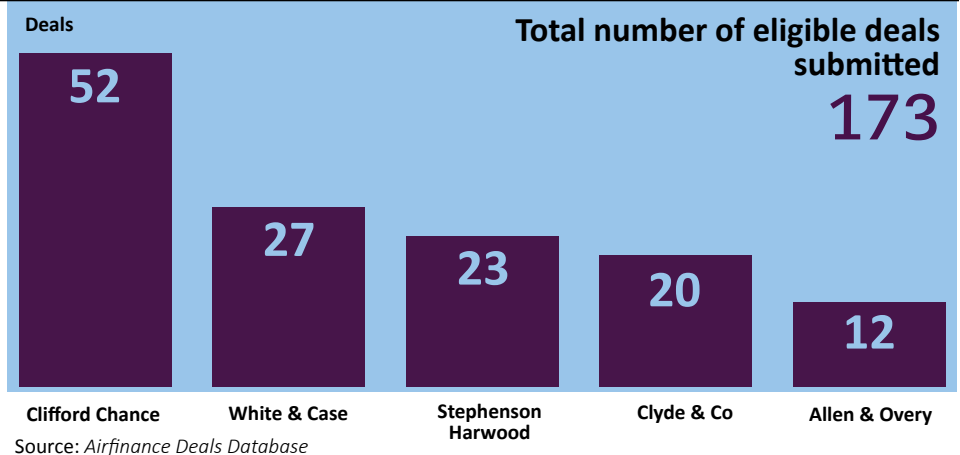
Asia-Pacific (combined with the Asia region as a whole) is the fastest-growing aviation market in the world.

Despite the tragedies that have hit Malaysia Airlines other airlines are registering strong growth. China Eastern, for example, recently announced it intends introducing 239 aircraft by 2018.

Safety concerns still affect parts of the region, particularly Indonesia, but these are likely to be resolved if corruption can be reduced.

Mike Smith, a partner at White & Case, which was the second most active law firm in the region, says: “Outside of the Jolco [Japanese operating lease with call option] market, we have seen a significant growth in Asian operating lessor activity, with a

Lawfirm	Deals	Points
Clifford Chance	52	5
White & Case	27	4
Stephenson Harwood	23	3
Clyde & Co	20	2
Allen & Overy	12	1



number of significant new investments or joint ventures in aircraft and engine leasing, as well as substantial portfolio financing, both on a recourse and non-recourse basis.

“In addition, we have seen a marked increase in the use of dollar financing by Chinese aircraft leasing companies and airlines. We expect our market-leading position in acting for Chinese aircraft leasing

companies in Ex-Im Bank financings to lead to other mandates for more complex dollar financings generally.”

Large law firms will be turning their heads towards this burgeoning region over the next decade in search of lucrative deals. ▲

“With the high number of deliveries of new aircraft to Latam carriers, the airlines in the region continue to pursue a mixed fleet policy, combining finance leases with sale and leasebacks/operating leases.”

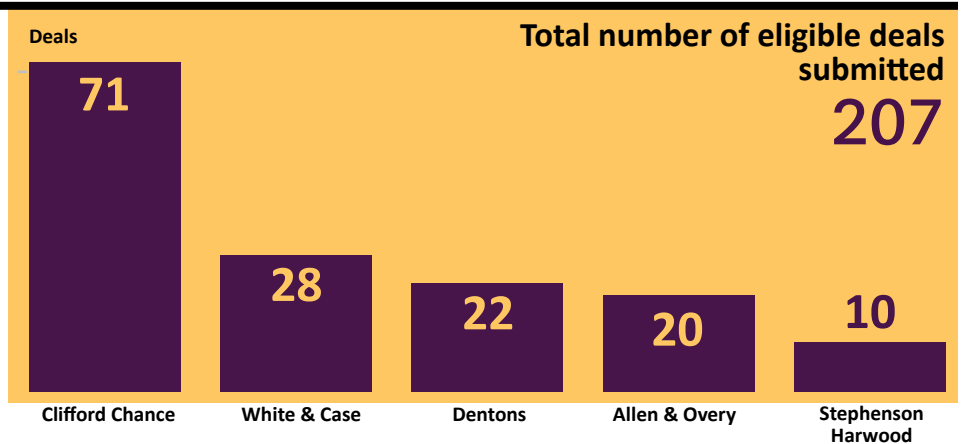
Serge Sergiou, partner, Dentons

## Europe

Europe has yet to recover fully from the 2007-08 financial crash, yet the continent still saw more deals than any other region in the world.

William Glaister, a partner at Clifford Chance, says: “A lot of the activity we see revolves around the operating lessor with strong capital raising by them. We also see a lot of activity with European ECA involvement.”

He added that ECA debt remains an “attractive financing option” for airlines, and



Lawfirm	Deals	Points
Clifford Chance	71	5
White & Case	28	4
Dentons	22	3
Allen & Overy	20	2
Stephenson Harwood	10	1

Source: Airfinance Deals Database

that this year Clifford Chance expects to see clients accessing the capital markets through ECA-backed deals.

Together with North America, Europe has the most mature aviation market in the world. Ireland’s Ryanair, one of the most

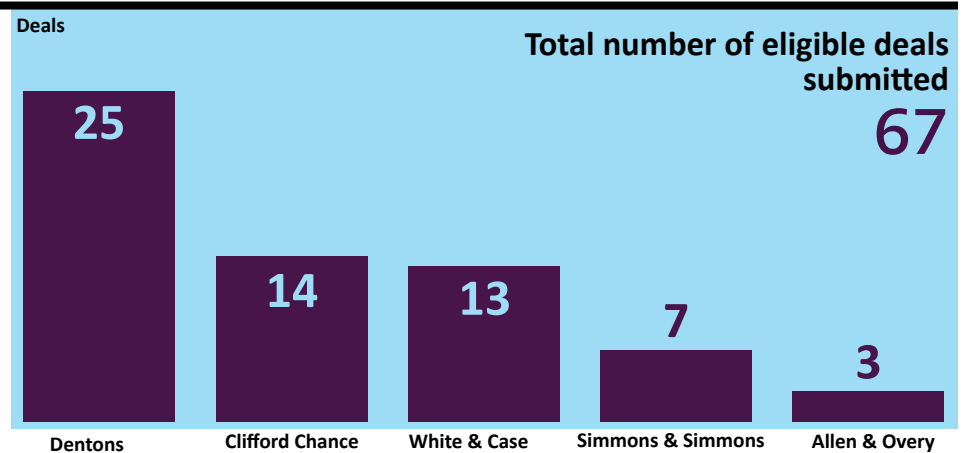
financially sound carriers in the region, recently announced it was purchasing 100 737 Max 200 aircraft. Deals like these suggest the region will remain important, despite the threat from growing aviation markets in Asia and the Middle East. ▲

## Latin America

Dentons wins this region and was, by some way, the most active law firm in 2013 advising Latin American airlines. Latin America has become a booming market and boasts some of the fastest-growing airline credits. In 2013 both Volaris and Avianca succeeded in US listings. Lessors have been eager to strike deals in the region and win sale/leasebacks as they try to partner with the region’s larger carriers.

Serge Sergiou, a partner in Dentons’ global aviation group, confirms the level of leasing activity last year.

He says: “2013 was another busy year in the operating lease market for Latam carriers. As well as growth in fleet sizes, a number of the larger carriers in the region have been replacing older equipment and have tapped the operating lessor



Lawfirm	Deals	Points
Dentons	25	5
Clifford Chance	14	4
White & Case	13	3
Simmons & Simmons	7	2
Allen & Overy	3	1

Source: Airfinance Deals Database

pool of aircraft. Sale and leaseback activity has also been strong, no doubt impacted by increasing ECA premia following the introduction of the new ASU rules. A number of carriers in the region have been keen to introduce new technology equipment into their fleets (787, A350 and Neos), accessing this equipment through the existing lessor order books.”

Sergiou adds that Latin American airlines like to use lessors to help manage their residual values.

He says: “Sale and leaseback activity for new technology aircraft has been strong with a number

of operating lessors who do not have their own aircraft on order bidding very competitively in order to secure this equipment through sale and leaseback transactions.

“With the high number of deliveries of new aircraft to Latam carriers, the airlines in the region continue to pursue a mixed fleet policy, combining finance leases with sale and leasebacks/operating leases in order to manage their balance sheets and to hedge their residual value positions. The outlook for 2014 continues to be strong.” ▲



## “We also expect to see significant use in future of ECA-supported bonds for Canadian airlines.”

Donald Gray, head of Blakes' aircraft finance practice group.

### Middle East

Clifford Chance came comfortably top in the region last year, advising 36 deals, while Dentons was in second place.

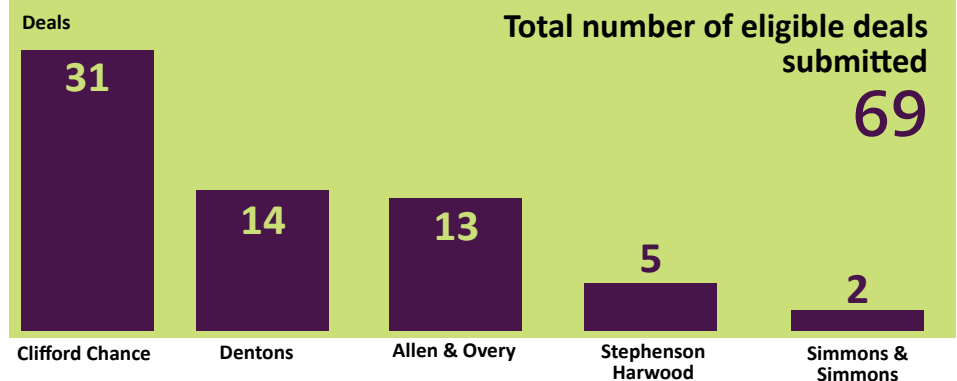
The Middle East has a market value of \$640 billion, and grew at a rate of 11% in 2013, according to manufacturer Boeing's long-term forecast.

Based on Airbus and Boeing's forecasts, the Middle East will increase its share of world traffic by 50% between 2013-32.

Organizations such as Gulf Cooperation Council and International Airfinance Corporation have helped financing in the region, such as through the establishment of a \$5 billion sharia-compliant leasing fund with Airbus and

Lawfirm	Deals	Points
Clifford Chance	31	5
Dentons	14	4
Allen & Overy	13	3
Stephenson Harwood	5	2
Simmons & Simmons	2	1

Source: Airfinance Deals Database



Islamic Development Bank.

The region's carriers have been busy, and collectively have accessed a mixture of structures, including ECA deals, Islamic financings and enhanced equipment trust certificates (EETCs).

Dubai-based carrier Emirates remains a strong force in the region, while smaller rival Etihad is increasing its presence in the European market with investment in what it has termed an “equity alliance”, the most notable

recent example being its acquisition of a 49.9% stake in struggling Italian flag carrier Alitalia.

The region's big three airlines – Emirates, Etihad and Qatar Airways – are using their advantageous geographical location to compete with established European and Asian carriers on Europe to East Asia and Australia routes.

As a result, they have significant order backlogs relative to their existing fleet size. The three airlines have almost twice as many aircraft on order than are in their current fleets. ▲

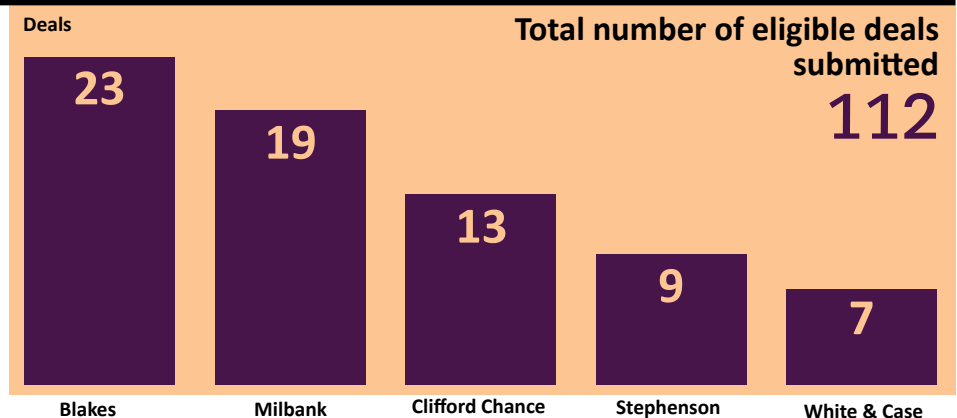
### North America

Blakes was the most active law firm in North America last year followed by Milbank. Blakes came top in this category thanks in part to a number of deals it advised in Canada. Deliveries of new aircraft to major Canadian airlines had slowed over the preceding two years, but 2013 saw a large burst of new activity.

Air Canada took the last five of its 777-300ERs, the first five of its new 787 Dreamliners and placed a large new order for 737 Maxs as part of a large fleet renewal, switching from A320s to the 737 family. WestJet took a number of new 737-800s, placed a new order for 737s and decided to break into the widebody market with 767-300ERs. Its subsidiary, WestJet Encore, also took a large

Lawfirm	Deals	Points
Blakes	23	5
Milbank	19	4
Clifford Chance	13	3
Stephenson Harwood	9	2
White & Case	7	1

Source: Airfinance Deals Database



number of Q400 deliveries.

Donald Gray, the head of Blakes' aircraft finance practice group, says there has been considerable interest by Canadian investors in a number of enhanced equipment trust certificates issued, including Air Canada, United, Hawaiian and BA.

Commenting on the last year of activity, Gray adds: “The main trend we saw in Canada was the first use of the US capital markets for aircraft financing, and we expect this to continue with very

little difference, for the first time, between ongoing Canadian and US airline access to these markets. The only major difference that we expect to see between Canadian and US trends is that, while US carrier access to ECA financing remains limited to regional aircraft, Canadian carriers remain significant users of ECA financing, both external, primarily through Exim, and internally through EDC. We also expect to see significant use in future of ECA-supported bonds for Canadian airlines.” ▲

“We have already seen a significant pick-up in ABS transactions, and hope to see more.”

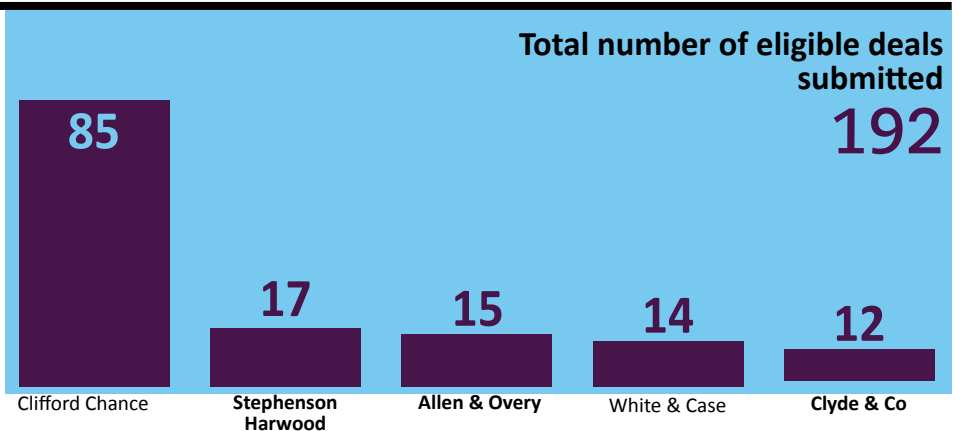
Hugh Robertson, partner, Milbank

## Commercial loans

Banks seemed more eager to offer commercial loans in 2013. Despite concerns raised after the Eurozone crisis in 2011, the arrival of Basel III and competing structures such as US Ex-Im bonds, which tempted investors with cheaper pricing, commercial loans remain the most popular form of financing

Lawfirm	Deals	Points
Clifford Chance	85	5
Stephenson Harwood	17	4
Allen & Overy	15	3
White & Case	14	2
Clyde & Co	12	1

Source: Airfinance Deals Database



for investors.

Clifford Chance, the law firm which closed the most commercial loan deals, says it is continuing to see significant activity in the commercial debt markets.

William Glaister, a partner at the firm, adds: “As new banks – particularly from Asia – enter the space they look to start with commercial debt financing to strong credits. We see this trend continuing.”

## Capital Markets

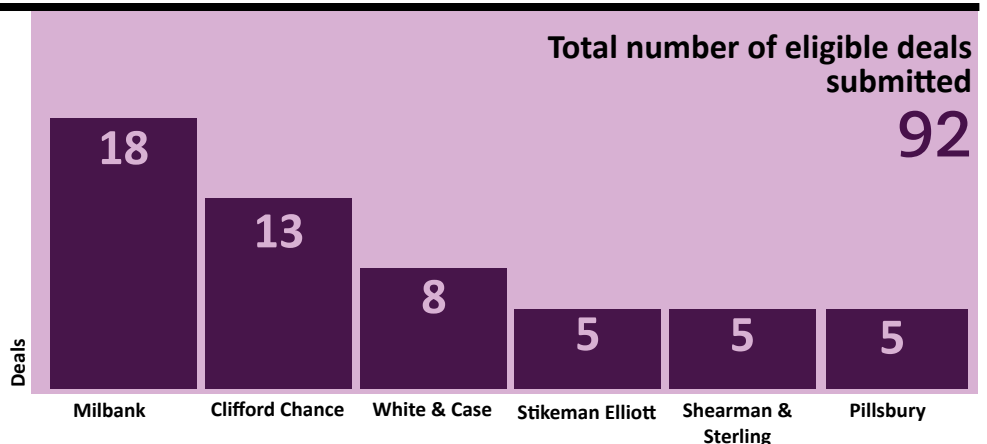
The capital markets have become a recent focus for both airline and lessor treasury teams. Those aviation credits lucky enough to take advantage of the capital markets have been able to receive very cheap financing, either through EETCs, through ECA-backed bonds and even asset-backed securities (ABS) deals.

Last year was a particularly active market for ABS deals for lessors and the wider adoption of enhanced equipment trust certificates by airlines, including non-US carriers. It was the third best year for the market, with about \$8.5 billion-worth of EETCs issued. There has not been this level of issuance since 2001, when US carriers collectively issued \$10.3 billion-worth of EETCs.

However, airlines and financiers confide that

Lawfirm	Deals	Points
Milbank	18	5
Clifford Chance	13	4
White & Case	8	3
Stikeman Elliott	5	1
Shearman & Sterling	5	1
Pillsbury	5	1

Source: Airfinance Deals Database



fewer EETCs should be issued in 2014. Hugh Robertson, a partner in the New York office of Milbank, Tweed, Hadley & McCloy and leader of the firm’s transportation and space group, confirms the EETC market has softened in 2014.

“The flow of capital markets offerings certainly has not stopped but it has slowed from the very fast pace of issuances in 2013,” says Robertson. He adds: “We have recently seen EETCs from several major US airlines, and we hope to see more issuances by airlines in and out of the US as we head into 2015. Airlines and lessors are constantly evaluating their various financing

options. The relative attractiveness of these varies greatly over time. For example, this year has seen an apparent pick-up in the number of financings by commercial banks, and ECA-supported transactions have continued at a good pace. We have already seen a significant pick-up in ABS transactions, and hope to see more.”

At least four non-US airlines are believed to be examining the possibility of doing an EETC. Gerardo Grajales, Avianca-Taca’s chief financial officer, said in September that the carrier was exploring the possibility of arranging an EETC financing for its incoming deliveries.



“We expect Chinese leasing companies, airlines, and many others, to take advantage of ECA-guaranteed bonds in the coming year.”

Justin Benson, head of asset finance for EMEA, White & Case.

## Export Credit

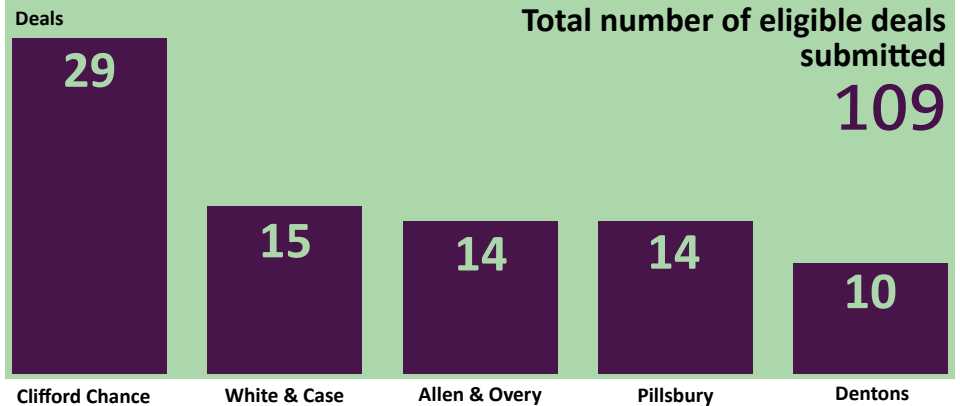
Export credit has been a key source of liquidity in the market during the most recent financial crisis but new rules surrounding the premiums of ECA debt, under the new ASU, has changed the attractiveness of ECAs for airlines.

Justin Benson, head of asset finance for Europe, Middle East and Africa at White & Case, says the hike in premiums has had some impact on the level of ECA support needed. In addition, he notes airlines last year enjoyed the increased availability of “relatively cheap commercial bank debt and continued appetite from the capital markets”.

He adds: “We expect this trend to continue in

Lawfirm	Deals	Points
Clifford Chance	29	5
White & Case	15	4
Allen & Overy	14	3
Pillsbury	14	3
Dentons	10	1

Source: Airfinance Deals Database



2015 for so long as such sources of debt remain readily available, but there will still be demand for ECA support of new aircraft types, as well as from those carriers who have large orders and wish to diversify their source of funding and from those who struggle to access the commercial bank market or the capital markets.”

Benson says that Asia and Latin America are two regions that still have “significant interest” in

using ECA support.

He adds: “We expect Chinese leasing companies, airlines and many others to take advantage of ECA-guaranteed bonds in the coming year following the recent prefunded Ex-Im Bank bond deal on which we acted – the first Ex-Im Bank-guaranteed bond issue for a Chinese leasing company – and indications from the European ECAs that they are considering supporting prefunded bonds.” ▲

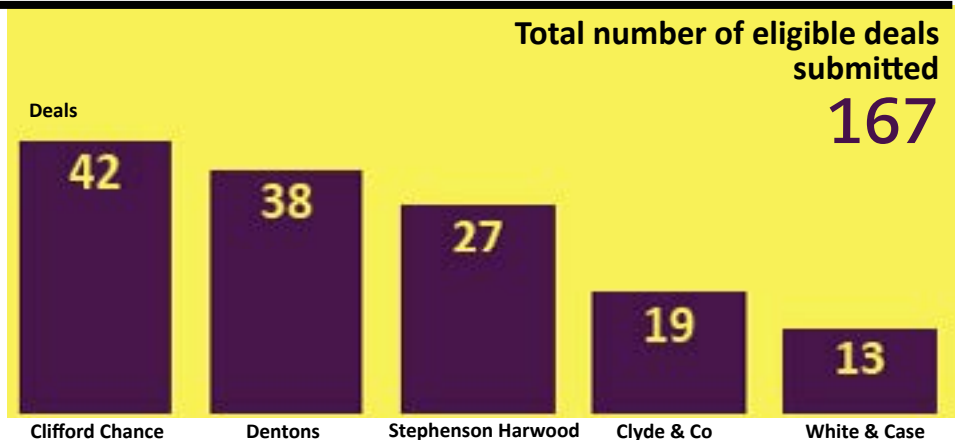
## Operating Leases

Clifford Chance was the most active law firm in 2013 advising on sale/leaseback deals but Dentons followed it closely. Sale/leasebacks was one of the most dominant financing structures last year. Lessors are in expansion mode and, as a result, many have been competing fiercely to acquire aircraft through purchase/leasebacks. The number of lessors in the market looking to do these deals means that airlines are increasingly able to sign multi-aircraft sale/leasebacks.

In 2013 AerCap agreed to purchase/leaseback nine new A350-900s, four new 787-9s and two new 787-

Lawfirm	Deals	Points
Clifford Chance	42	5
Dentons	38	4
Stephenson Harwood	27	3
Clyde & Co	19	2
White & Case	13	1

Source: Airfinance Deals Database



8s from Latam Airlines’ order backlog, as well as 10 A330-200s.

The size of this deal makes it exceptional but it is not uncommon for lessors to be signing three or four aircraft sale/leasebacks. The level of competition is also good news for the airlines.

Nick Chandler, co-chair of Dentons’ global aviation group, says: “The sale and leaseback market continues to be very active, particularly for strong

airline credits and for aircraft such as 737NGs and A320s. For the airline, SLBs [sale/leasebacks] mean 100% financing and an opportunity to generate a cash benefit on sale. For the lessors, SLBs provide a strong regular cash flow and a tradeable asset. Competition between the existing lessors, new entrants to this product and an active Jolco market mean that strong airline credits can find some attractive deals.” ▲



“Demand for the Jolco product is probably stronger at this time as at any that we have seen in the last decade.”

Simon Collins, partner, White & Case.

## Structured Leases

Jolcos are proving increasingly popular in the structured lease market. The structure offers investors significant tax savings by taking advantage of the Japanese tax system.

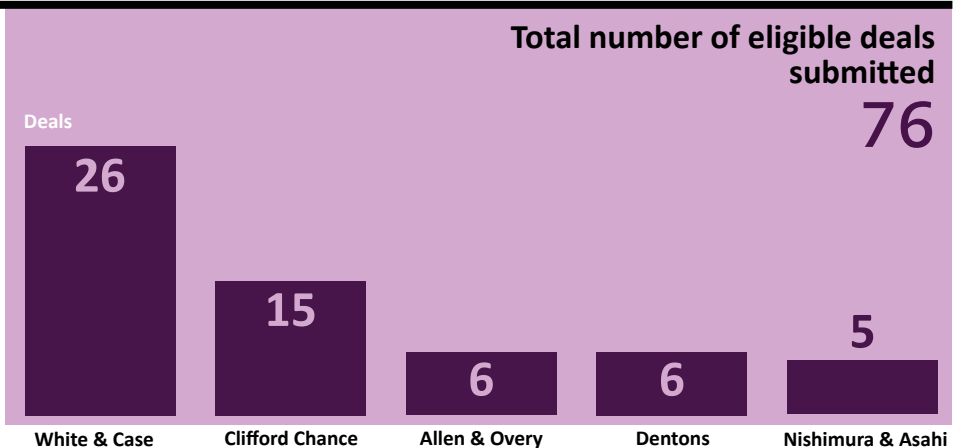
Simon Collins, a partner at White & Case, the most active law firm in the structured lease market, confirms the importance of Jolcos.

“Demand for the Jolco product is probably stronger at this time as at any that we have seen in the last decade, with strong appetite from Japanese equity investors,” he says.

However, although the availability of Jolcos has

Lawfirm	Deals	Points
White & Case	26	5
Clifford Chance	15	4
Allen & Overy	6	3
Dentons	6	3
Nishimura & Asahi	5	1

Source: Airfinance Deals Database



generally increased, the market will probably favour simpler versions of what can become a complex structure.

“We have seen an expansion of the availability of the Jolco, with a number of airlines coming to the Jolco market for the first time, as well as the growth in Jolcos to operating lessors,” says Collins.

He adds: “While there have been several hybrid structures completed recently, including the EETC/Jolco hybrid, we think on the whole that the market will continue to be cautious about becoming too creative with the Jolco, in order to avoid unwanted scrutiny by the Japanese tax authorities.”

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## EDITORIAL

# Cape Town Convention v Brussels Regulation 44/2001



**Dr Nicolai Vella**  
PARTNER  
FENECH & FENECH  
ADVOCATES

Dr Nicolai Vella Falzon, a partner at Fenech & Fenech Advocates, explores the tensions between the implementation of the Cape Town Convention against existing European laws.

Shortly after Malta's ratification of the Cape Town Convention and its Aircraft Protocol (CTC) the first of possibly numerous future legal issues relating to the effectiveness of the CTC in relation to other domestic and European laws was brought up for discussion before the courts of Malta.

The issue, which remains largely unresolved, concerns the interplay between the CTC and Brussels Regulation 44/2001 in instances where separate creditors are invoking their respective rights in relation to the same aircraft on the basis of these legislative instruments.

The matter has been the subject of academic discussion since the Wind Jet arrests that occurred in Malta towards the end of 2012, and the subsequent court proceedings relating to the arrests.

Wind Jet was an Italian aircraft operator which went into financial distress in 2012. A major creditor of Wind Jet was Catania Airport, which in terms of Italian law enjoyed a special privilege over the aircraft operated by Wind Jet for the payment of airport charges. More importantly for the purposes of this discussion, as a matter of Italian law Catania Airport also enjoyed a direct right of action against the owners of the aircraft for the unpaid charges. The aircraft operated by Wind Jet were owned by a number of separate aircraft lessors, typically registered in Ireland. At the time that Wind Jet ceased operations because of its financial difficulties a number of those aircraft were physically located in or sent to Malta.

In order to protect its interests, Catania Airport, invoking the provisions of Regulation (EC) No 44/2001 of December 22 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, obtained the precautionary arrest of the aircraft lying in Malta as security for the claims of Catania Airport (in terms of Italian law) directly against the owners of the aircraft.

In their defence of the aircraft arrests the owners of the aircraft argued that at the time of the arrests the owners were in the process of exercising their rights in terms of the CTC to take absolute control and possession of the aircraft after the default of Wind Jet as operator and lessee of the aircraft. The owners of the aircraft were each registered international interest holders in terms of the CTC and, as such, argued that in terms of Maltese law, which provides for the priority of the CTC over any other law, the arrests were unlawful because they frustrated their rights to take control,

possession and custody of the aircraft.

At first instance the court, relying primarily on procedural considerations (these being *prima facie* proceedings) dismissed these arguments stating that (i) Catania Airport had the right to arrest the aircraft in terms of Regulation 44/2001; (ii) in terms of ranking of claims, the priority of the owners as registered international interest holders would be unaffected by the arrests; and (iii) the owners of the aircraft were entitled to obtain the release of the arrests by depositing security in court and accordingly their rights to repossess the aircraft were not effectively hindered. An appeal was filed challenging the decision of the court but, in the meantime, the cases were withdrawn after an extra-judicial resolution of the dispute.

The interplay between the Brussels Regulation and the CTC in such cases is still not entirely resolved. Article 55 of the CTC provides that where the debtor is domiciled in the territory of a member state, the member states bound by Regulation 44/2001 will apply Articles 13 and 43 of the CTC for interim relief only in accordance with Article 31 of Regulation 44/2001 as interpreted by the Court of Justice of the European Communities. Furthermore, the member states of the EU transferred their competence as regards matters that affect jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to the EU.

Does this imply that Regulation 44/2001 reigns supreme and that a creditor can peruse of the rights even to the extent that they frustrate or interfere with the rights of other creditors under the CTC?

It is submitted that this conclusion cannot be inferred from a reading of Article 55 of the CTC. That provision merely states that when granting interim relief member states bound by regulation 44/2001 must provide such relief in accordance with the regulation. It does not, however, deal with the issue of priority in the event of a conflict between the CTC and the regulation.

On the other hand, while the CTC (being largely interested with priority) provides for remedies in favour of creditors holding registered security interests, it does not specifically limit the remedies available to other unsecured creditors under other legislative instruments. There appears to be a problem, therefore, in so far as interim remedies are concerned when the CTC and EU law overlap – a problem that may require legislative intervention to be resolved. ▲



## RISING STARS 2014

# Heading to the top

Airfinance Journal recognizes eight of the most promising legal associates for 2014.

### Brian Liu, Hughes Hubbard



Brian Liu admits he got into the aviation financing industry through “happenstance”. After a summer internship with Milbank, Tweed, Hadley & McCloy, he had the opportunity to work for the leasing department there.

“I find the asset class itself very interesting,” says Liu. “The legal aspect is very broad; it impacts international and domestic law and there’s the security and the tax element – very technical.”

Liu has acted in connection with the offering of enhanced equipment trust certificates (EETCs) in registered and private deals on behalf of United Continental, Hawaiian Airlines, US Airways and Emirates.

He has also represented lessors, including the Emerald Aviation Finance Limited securitization, which was the first asset-backed securitization transaction of its type to close since the 2007-08 financial crisis.

Steven Chung, partner, says: “Brian is a superstar in the aviation finance community. He has an innate ability to sort through difficult legal issues and work through them... in a way that achieves a positive result for all parties. Clients rave about his strong work ethic and ability to execute deals.”

When he is not working, Liu enjoys spending time with his family. His wife, Mary, is a physician and they have two children – a newborn, Simon, and a four-year-old, Nathan. They live in Brooklyn, New York City.

### Chris Mitchell, Allen & Overy



Chris Mitchell’s highlight of the past year was closing a \$927 million British Airways EETC incorporating Japanese operating lease with call option (Jolco) equity to finance 14 Airbus and Boeing aircraft.

“Dealing with the issues involved with a Jolco added to the issues involved in a capital markets financing, coordinating parties in four jurisdictions and different time zones, and successfully closing under immense time pressure to the satisfaction of all parties involved. It doesn’t get much more rewarding than that,” he tells Airfinance Journal.

Another enjoyable challenge was negotiating an A320neo purchase agreement with Airbus and a 737 Max purchase agreement with Boeing on behalf of an operating lessor.

“After my first taste working on an aviation deal I was hooked and haven’t wanted to do anything else since,” says Mitchell. “I love the variety of the work that is involved. On any given day I could be dealing with a number of different deal types – debt, leasing, procurement contracts and capital markets – it’s rarely the same.

“It is also nice to look out the window at an airport and spot – or fly on – an aircraft from one of the deals you have worked on.”

Mitchell is an avid rugby and cricket fan, as well as being a connoisseur of good coffee – on or off deal.



“It is nice to look out the window at an airport and spot – or fly on – an aircraft from one of the deals you have worked on.”

Chris Mitchell, Allen & Overy

### Victoria Koob, Freshfields Bruckhaus Deringer



Victoria Koob started her aviation career with Mallesons Stephen Jacques (now King & Wood Mallesons) based in New South Wales, Australia.

Now, working in London for Freshfields, Koob has represented lessors, banks and

airlines in export credit-supported financings, multi-aircraft portfolios, leasing and predelivery payment facilities.

Koob says the AerCap acquisition of International Lease Corporation took up nine months of her life, and is still on-going.

“We were at the forefront of everything that was going on on the aviation side of AerCap,” she says. “It covered everything you can come across in aircraft transactions. There was a lot of structuring issues which were very interesting, and working out how to structure things in the most efficient way possible.”

When Australian-born Koob is not working, she likes to take advantage of all the football matches going on in the UK.

“The highlight of being in the UK is you can go to big games,” she says. “This year I was glad the AerCap deal finished in time for me to go to the World Cup.”

Koob particularly likes working in aviation because of the tangibility of aircraft as assets.

“I’m not a plane-spotter by any means, but it’s still exciting when you go on a plane,” she says. “It’s so much a part of your life and it’s something you can definitely relate to.”

“Having worked in it as well for years it’s a very close-knit community. Changing country doesn’t mean that you’re working in a different field.”

Robert Murphy, partner, global head of asset finance, says: “Victoria is one of our top performers, and a valued member of our aviation team. She is smart, knowledgeable,

technically extremely able and commercially attuned. She has grown a strong reputation with aviation sector clients over the past few years.

“On the AerCap-ILFC deal, Victoria was a key member of the core Freshfields team, managing a very large team of lawyers on a complex multi-jurisdictional project. Her contribution to the successful implementation of this project was highly commended by senior AerCap management.”

### Patrick O’Reilly, Clifford Chance



Patrick O’Reilly joined Clifford Chance in 2004 in the firm’s London office before transferring to New York in 2009.

He says his favourite recent deal was a \$1.5 billion rate term loan facility for International Lease Finance Corpora-

tion, which is the largest term loan facility for any aircraft operating lessor to date.

“I guess it was one of the first securitization-like transactions since the downturn, and it was a securitization transaction but structured as a bank deal loan rather than securities,” he says.

O’Reilly has advised Avolon on its \$636 million asset-backed securitization for its newly established special purpose company, Emerald Aviation Finance Limited.

In addition, he was the winner of Airfinance Journal’s 2013 Capital Markets Deal of the Year Awards for his sale of a portfolio of 26 Gecas aircraft to AABS.

John Howitt, co-head of asset finance, says: “Patrick is a very highly regarded lawyer in the global aviation finance market, who impresses clients in the US and internationally with his attention to detail, his intellectual capabilities and his knowledge of the sector and experience on some of the industry’s most complex transactions.”

In his spare time O’Reilly likes travelling and spending time with his children – four-year-old Isabelle and two-year-old Celeste.

### Jeremy Chase, Herbert Smith Freehills



Since moving to Singapore in 2008 Jeremy Chase has advised lenders and borrowers in connection with the investment of more than \$6 billion-worth of debt. He joined Herbert Smith Freehills from Allens Linklaters in 2013.

Chase’s highlight of the past year was his involvement in Virgin Australia’s EEN issue in 2013.

“I think probably what made that deal particularly interesting was it truly involved our offices across the entire network,” he says.

“In Singapore we’re really at a crossroads for deals generally, so I could be working on deals in Indonesia, Thailand, the Philippines, China or Singapore sometimes and they’ll be involving the European and Asian banks. It’s a real melting pot.”

Despite being an aviation financing enthusiast, one of Chase’s favourite hobbies takes place in the water rather than the air – sailing.

“I’m a very competitive sailor,” he says. “I’ve got a small boat here with some friends. I was going to learn to fly once, but turned up in Thailand and there was a small aircraft crash which put me off learning to fly there.”

John Angus, partner, says: “Jeremy is now a core member of our growing aviation finance practice where he routinely advises lenders in connection with lending structures into regional jurisdictions, including Malaysia, Philippines, the People’s Republic of China and Indonesia. As a senior lawyer in the team, Jeremy is heavily involved in educating junior lawyers in the region in relation to the intricacies of aircraft finance.”

>>>



### Melissa Jones-Prus, Pilsbury



Melissa Jones-Prus began her aviation career with Pilsbury in the summer of 2008, where she found the deals the aviation group was working on to be the most exciting.

"I had a lot of foreign airline clients and foreign bank clients and

that's been really interesting for me to get exposure to how the aviation industry works in a variety of countries around the world," she says.

One of her key clients has been Cargolux, for whom she has arranged Ex-Im Bank financings, commercial financings and capital markets offerings, as well as transactions involving accreting loans, mezzanine loans and tax-driven junior loans.

Jones-Prus even represented the cargo airline in connection with the restructuring of finance and operating leases for their entire fleet of 747s to make them Cape Town compliant.

"I have been able to develop a very close relationship with Cargolux and work with them on very large international transactions," she says.

"I actually had the opportunity to attend a delivery for Cargolux at the Boeing delivery centre. It definitely adds a tangible reward that you wouldn't necessarily have in a general corporate financing."

In her free time, Jones-Prus likes travelling abroad and exploring New York City, where she lives and works.

"I really enjoy living in NYC – trying all the restaurants in the city," she says. "I think it's the variety that appeals to me the most. I love Japanese food, new American food, Italian food. You have pretty much everything you can dream of."

Mark Lessard, partner, says: "Melissa has distinguished herself not only through the breadth of her experience – working for airlines, banks and lessors – but also through her ability to navigate complex multi-jurisdictional structures and her exceptional client service. She is one of our team's key associates, and has a bright future in aviation finance."

### Nathan Leavitt, Holland & Knight



Nathan Leavitt is based in Holland & Knight's New York and San Francisco offices, and practices in the firm's structured finance group.

Leavitt has just finished a half-time secondment to Gecas,

during which he supported the senior vice-president and lead counsel for Latin America and the Caribbean based in São Paulo, Brazil.

One "vivid highlight" of the past year has been working on a Gecas engine securitization for 32 engines on lease to 15 different lessees situated in eight different countries.

"Watching them come together and shine under the pressure of a tight timeline and a complex structure to deliver top-notch, on-time results was an inspiring thrill," he says.

Before entering law school Leavitt did not even know the aviation finance industry existed, but when he was introduced to it as a summer associate he was "immediately taken in by the passion of the practitioners, the pace and complexity of transactions, the sentiment that perfection is almost good enough, the tight-knit nature of the industry and [the fact] that, as an asset class, it doesn't get any cooler than aircraft."

When he is not working Leavitt enjoys rebuilding vintage two-stroke motorcycles, attending music festivals and any meal with hot sauce.

William Piels, partner, says: "Nate is quite adept at grasping the concepts that drive complicated structures, whether they are for bankruptcy remoteness, tax situs or other purposes, and applying those concepts to new deals or working within them to solve commercial issues. He is an outstanding problem solver."

### Sebastian Smith, K&L Gates



Sebastian Smith got his first taste of the aviation industry as a trainee when he was seconded to Airbus in Toulouse. There he witnessed the first A380 test flight and flew to Airbus's private airport in Ham-

burg to assist on a delivery.

Beginning his career at Freshfields Bruckhaus Deringer in 2003, he qualified in the firm's aircraft finance department two years later. Although based in London, Smith was seconded to Freshfields' Hong Kong office, where he acted for Lion Air and AirAsia and advised Bank of China on its successful bid to acquire Sale (now BOC Aviation). He was also seconded to SMBC Aviation Capital.

Smith works in K&L Gates' Singapore office but spends a lot of time in Tokyo advising Japanese banks, leasing companies and trading houses on Jolcos and sale/leasebacks. Recently he worked on the Japan Airlines purchase order for 31 A350s (with 25 options), as well as CRJ1000 transactions for Garuda.

His most exciting deal was when he witnessed his first ferry flight of an aircraft for which he had prepared the delivery documentation.

"That feeling will never go away," he says.

Robert Melson, partner, says: "Sebastian is the best aircraft finance senior associate with whom I have worked during my 17 years in Asia. Last year he was involved in over 50 aircraft finance transactions, all of which he handled with aplomb. I am certain he will have a great future in the industry."

Outside of work, Smith enjoys five-a-side football, swimming and watching art-house and independent films. He is also passionate about road trips, and is planning a two-week drive across New Zealand. ▲



## SPONSORED EDITORIAL

# Current issues in aircraft repossession in Brazil

Stewart B Herman and Timothy J Lynes, partners of Katten Muchin Rosenman, examine how aircraft repossession could change in Brazil after the country's implementation of the Cape Town Convention.



**Stewart B Herman**  
PARTNER  
KATTEN MUCHIN  
ROSENMAN



**Timothy J Lynes**  
PARTNER  
KATTEN MUCHIN  
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In June 2005 Brazil's first airline, Varig, filed for bankruptcy protection in the Brazilian courts, testing the new bankruptcy code that had come into effect in February of that year. Although the letter of the law provided robust protection to lessors, the wide discretion afforded individual judges meant that the code was at times not implemented in practice. Nearly 10 years later, what is the state of the process of repossessing a commercial aircraft in Brazil?

Although there have been no repossessions from a major passenger airline since Varig, Varig's cargo arm, Varig Logistica, had four aircraft repossessed through the Brazilian courts in the course of its bankruptcy.

This article provides an overview of Brazil's bankruptcy law pre-Cape Town in practice with Varig Logistica, as well as some issues that may arise in repossessing aircraft in Brazil and concludes with a look at the future now that the Convention on International Interests in Mobile Equipment, 2001 (the Cape Town Convention) and Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, 2001 (the Aircraft Protocol) have come into force in Brazil.

### **The Brazilian repossession system – pre-Cape Town**

Although most leases require that the lessee be notified of a default, when facing the prospect of having to engage in a legal action in Brazil to recover the leased

aircraft, it is prudent to provide a second written notice of actual lease termination, even if not required under the terms of the lease. The reason for this is that in the event a court action is filed, the lessee cannot argue that the lease was not properly terminated.

If the lessee has been provided with notice, then the next step is to file a request for ex parte injunctive relief with the court located in the lessee's legal headquarters. The court has a variety of options at its disposal but the most likely is that it will issue a preliminary injunction, allowing the lessor nominally to take possession of the aircraft, within a few days. Once issued, the injunction also provides the lessee an opportunity to file a defence.

In the meantime, the aircraft cannot be taken out of Brazil nor will it be deregistered by the Brazilian authorities. Once the lessee files a defence, the judge will then rule on the claim, likely providing the lessor with the ability to repossess and export the aircraft. There is no self-help remedy under Brazilian law, even with the adoption of Cape Town, and so any repossession must be done through the courts.

It is also important to note that under Brazilian law, filing for bankruptcy protection does not automatically terminate the lease. Even if the lease provisions specify the termination of the lease if there is a bankruptcy filing, it is unlikely that Brazilian courts will enforce it.

In the US, Section 1110 of the Bankruptcy Code provides a 60-day stay for a lessee of aircraft and aircraft equipment that is a commercial airline, after which the airline has a positive obligation to return the aircraft or abide by the lease obligations (as may be renegotiated with the lessor). On the other hand, Brazilian law permits a lessee to continue to fulfil the obligations of all contracts regardless of a bankruptcy filing. However, the lessee is under no positive obligation to do anything, and it falls to the lessor to commence the repossession action.

### **Repossession in action – Varig Logistica**

Varig Logistica (VarigLog) was the freight



## Bankruptcy protection in Brazil places the lessor's interest above those of the majority of other creditors but does subordinate it to employee credits.



**The National Congress of Brazil which has implemented the Cape Town Convention.**

arm of Varig that continued on while Varig's commercial operations were wound down. VarigLog in turn was hard hit by the financial crisis and limped along for a few years before filing for bankruptcy protection after a clash between an American fund and its Brazilian partners. During this time VarigLog defaulted on its lease obligations to Wells Fargo as owner trustee for four Boeing 757s and Wells Fargo sought to repossess the aircraft.

In December 2011 Wells Fargo filed a claim in São Paulo seeking to recover the four 757s and obtained a favourable decision a month later from the lower court. However, VarigLog appealed, seeking to retain the aircraft, and in so doing obtained a stay so that Wells Fargo could not immediately recover the aircraft.

The appeals court also ruled against VarigLog and awarded the aircraft to Wells Fargo, pending a response from VarigLog. When a final decision was issued, VarigLog filed a separate, ultimately unsuccessful, suit to return possession of the aircraft to it. The Wells Fargo suit cleared the courts

in about two months with some additional weeks necessary to deal with the bureaucratic formalities before Wells Fargo could take possession in February 2012 and export the aircraft from the country.

### **Practical obstacles and delays to repossession**

Although the repossession of the aircraft from VarigLog was reasonably quick, especially in relation to other cases that are winding their way through the courts, it does illustrate some of the potential avenues for delay in the Brazilian system.

The most prominent one, shown in the VarigLog case, is that the Brazilian legal system provides for a variety of appeals, including interlocutory appeals and appeals on non-substantive issues. If a lessee wants to delay the recovery process, it may take advantage of these appeals. VarigLog engaged in some of these delay tactics, appealing the court decisions and utilizing the response period to ensure the aircraft were out of the country at the time the final decision was issued, further delaying

the re-acquisition of the aircraft by the lessor. While repeatedly doing so could result in fines for litigating in bad faith, a lessee under a payment default will likely not have the sums to pay any of the fines, rendering them essentially meaningless in many respects.

Other potential delays can vary depending on the region where the repossession suit is filed and the judge to which it is assigned. In locations such as São Paulo or Rio de Janeiro, Brazil's main economic hubs, the courts have more experience with these types of repossession claims and, accordingly, suits filed in these jurisdictions generally move more rapidly. If the lessee's legal headquarters is in a city outside of these business centres, such as Curitiba or Belo Horizonte, the judge to whom the

Wells Fargo filed a claim in São Paulo seeking to recover the four 757s and obtained a favourable decision a month later from the lower court. However, VarigLog appealed, seeking to retain the aircraft, and in so doing obtained a stay so that Wells Fargo could not immediately recover the aircraft.





## The one issue that may inhibit a smooth transition is the conflict between Brazil's current bankruptcy law and the provisions it adopted under Cape Town.

case is assigned is less likely to be familiar with the law governing aircraft repossessions and may take more time before issuing a decision.

Additionally, bankruptcy protection in Brazil places the lessor's interest above those of the majority of other creditors but does subordinate it to employee credits, which opens up potential pitfalls depending on whether an employee union decides to bring a suit. In VarigLog, the union brought a suit to freeze all of VarigLog's assets but it was dismissed. However, in a subsequent bankruptcy, this could pose a more formidable obstacle to a lessor's attempt to recover an aircraft.

Finally, it is worth noting that even with a favourable decision from the courts, a lessor may run into problems exporting the aircraft from Brazil. The importation and registration of aircraft, which may be under a temporary admission regime, is taken care of by the Brazilian lessee. Normally, the same lessee would obtain the necessary export paper work; however, this is often not feasible in repossession cases.

Previously, the state court would, in its order, require the customs authorities to provide the lessor the necessary paperwork to export the aircraft. However, recently some courts have ceased to do so, noting that as state courts they do not have jurisdiction over the federal customs authority. In other cases, the customs authority, when presented with the order, has questioned whether they are required to oblige.

### Implementation of Cape Town – impact on aircraft repossession

Since Brazil formally implemented the Cape Town Convention and Aircraft Protocol, effective November 30 2011, there have not yet been any major lease defaults to put Cape Town into practice. However, even without a test case for Cape Town, there are still some things to be gleaned from it.

First, in the declarations that implement Cape Town, Brazil has elected to permit the use of irrevocable deregistration and export request authorizations (Ideras). These potentially mitigate the difficulty of obtaining the necessary export paperwork.



**New rules should mean repossessions like Varig Logistica's should be easier in future.**

In locations such as São Paulo or Rio de Janeiro, Brazil's main economic hubs, the courts have more experience with these types of repossession claims and, accordingly, suits filed in these jurisdictions generally move more rapidly.

The Brazilian Aeronautical Registry has communicated that it will comply with Ideras within five days, although there is no practical evidence to indicate whether this in fact will occur. Overall, even with some initial delays in implementation, the expectation is that Cape Town will substantially speed up the repossession process.

The one issue that may inhibit a smooth transition is the conflict between Brazil's current bankruptcy law and the provisions it adopted under Cape Town. As mentioned above, Brazil's current bankruptcy provisions do not provide a stay from repossession but rather require that the lessee continue to abide by the lease obligations. In adopting Cape Town, Brazil adopted Alternative A of Article XI, imposing a 30-day stay period. The conflict between the two provisions might lead to initial delays as the Brazilian courts determine which law applies to the transaction.

### Conclusion

The enforcement climate in Brazil for aircraft lessors has improved since the Varig insolvency. The adoption of the Cape Town Convention in Brazil should give aircraft lessors greater certainty as to the ability to repossess from a defaulting airline. Further lessee defaults will be the test. ▲

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							2.0
							6.6
							6.6
							3.6
							3.9
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							1.7
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							3.8
							4.4
							4.2
5	1	3	3	3	N/A	N/A	2.7
5	2	4	4	4	2.7	2.7	3.6
2	3	8	4	8	5.4	5.1	5.5
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