CLEARED TO LAND

JANUARY 2019

IN THIS ISSUE

UAE: MORE GOLD FROM THE DESERT
By Sebastian Smith and Eiko L. Grieger 4

LETTERS OF INTENT: ARE YOU (UN)INTENTIONALLY BOUND?
By Peter Morton, Sidanth Rajagopal, and Hannah K. Davies 8

WESTERN SYDNEY AEROTROPOLIS: A FRAMEWORK FOR FURTHER AEROSPACE-RELATED DEVELOPMENT
By Clive Cachia and Kirstie Richards 12

INTEGRATING SPACE LAUNCHES AND REENTRIES INTO THE NATIONAL AIRSPACE SYSTEM
By Paul Stimers 16

ARGENTINA: SILVER SKIES
By Sebastian Smith 18

NOTE FROM THE EDITORS

Happy new year and welcome to our latest edition of K&L Gates' *Cleared to Land* published jointly by our Aviation and Banking & Asset Finance practice groups to keep you updated on significant developments and issues relating to aviation law and asset finance globally.

In this issue, we examine new UAE laws impacting the aircraft finance industry, legal developments that may increase the appetite for new aircraft in relation to operations in Argentina, and regulatory issues that the commercial space sector is facing with respect to rockets and reentries into the U.S. National Airspace System. Also included is an article that explores the construction of the Western Sydney Airport and the planning framework for the greenfield land surrounding it, known as the Western Sydney Aerotropolis, which focuses on creating a new high-skill jobs hub across a variety of sectors. These articles, among others included, have all been drafted by K&L Gates lawyers who focus on these matters on a daily basis.

We hope you find this edition of *Cleared to Land* interesting and welcome your feedback.

EDITORS

Robert Melson
Practice Area Leader – Finance
Tokyo
+81.3.6205.3602
robert.melson@klgates.com

James Bradley
Partner
Singapore
+65.6507.8113
james.bradley@klgates.com

UAE: MORE GOLD FROM THE DESERT

Sebastian Smith, Partner, and Eiko L. Grieger, Counsel

INTRODUCTION

In July 2018, the *South China Morning Post* positively covered Xi Jinping's visit to the UAE to sign a series of deals to boost the People's Republic of China's presence in the Middle East. Given China's seemingly endless round-the-world deal broking extravaganza, this was not a standout headline.

It is, nonetheless, an impressive turnaround in light of Dubai's 2007 predicament – when Abu Dhabi stepped in to bail out its neighboring Emirate. Since 2007, the UAE has revitalized its tourism and financial services industries, of which the aviation sector is an important part. Not only has Dubai become a major aviation hub, it is also the home of Emirates airline. Various aircraft leasing companies and banks are also proliferating in Dubai and the surrounding Middle East region.

In its quest to keep up-to-date, the UAE has modernized its value-added tax ("**VAT**") regime and the UAE Movable Assets Register, which are addressed below. At the time of writing, these issues are new or are still in a state of flux. As such, reputable UAE legal and tax counsel should be consulted before entering into any future transaction.

NEW UAE VAT REGIME

In addition to the newly introduced UAE VAT law (which came into effect January 1, 2018), the sale of an aircraft asset (airframe, engine, part, etc.) located in the UAE is now subject to UAE VAT (but may be subject to the zero rate of UAE VAT where the aircraft or aircraft parts are used for commercial passenger transportation).

Generally, a seller is required to register for UAE VAT in relation to any aircraft asset exceeding the threshold for registration. If aircraft assets are considered zero-rated supplies, a seller may be exempt from the above noted registration, subject to the affected party completing an online application process with the UAE federal tax authority ("**FTA**"), which may be time consuming in light of the schedule of an on-going transaction.

Parties in aircraft finance transactions may only rely on an exemption from UAE VAT following clearance by the FTA, as failure or even delay to do such a registration may result in various penalties and taxes being imposed.

The purchaser of an aircraft may wish to request evidence of completion of the above mentioned processes or ensure that its indemnity provisions in the sale agreement properly reflect the risks pertaining to the sale.

Alternatively, all parts of the aircraft need to be located outside of the UAE (including over international waters) at the same time to perform a title transfer outside of the jurisdiction to avoid the UAE VAT regime.

UAE MOVABLE ASSETS REGISTER VERSUS MORTGAGE REGISTRATION

Last year, the UAE introduced a new law on Mortgage of Movable Assets to Secure a Debt[1] (the "**Mortgage Law**"). The Mortgage Law introduces major changes to the way lenders may take effective security over any moveable tangible or intangible asset, existing or in the future. The Mortgage Law permits mortgages over movable assets, including aircraft assets, without the need to transfer possession.

Looking at the Mortgage Law from an aircraft finance perspective, it is interesting to see that a separate Security Registry has been implemented for security created pursuant to the new Mortgage Law. Although it should also be noted that the UAE has ratified the Cape Town Convention and hence security over aircraft assets have so far typically been registered with the International Registry ("**IR**").

That being the case, the new Mortgage Law is not applicable for excluded assets which are moveable assets such as ships, vehicles and aircraft that require registration in a "special register". While aircraft are required to be registered on the national aircraft register of the General Civil Aviation Authority ("**Aircraft Register**") it is unclear whether the Aircraft Register or the IR is considered a "special register" under the new Mortgage Law. As no official guidance

is currently given by the relevant authorities, this vacuum may create a legal risk which should be considered going forward. No transaction party will want to deal with a scenario of filings on the Aircraft Register, IR and the registry under the new Mortgage Law which differ.

To quote the German turn of phrase: “Before the court and on the high seas one is in God’s hands alone”. That said, we suggest that reputable local counsel should be consulted for any recent updates on the subject matter.

SUMMARY

The UAE’s financial oasis Dubai, known as “The City of Gold”, appears very much worthy of its namesake given it will be able to raise further revenue with the new tax regime. Moreover, the UAE has clearly recognized the concerns of aircraft lessors and financiers with its approach to taking security over valuable assets. In short, the UAE seems keen to maintain its sophistication in relation to the aircraft finance industry.

[1] *Federal Law No. 20 of 2016 was implemented when Cabinet Resolution No (5) of 2018 was passed.*

AUTHORS

Sebastian Smith
Partner
Tokyo
+81.3.6205.3606
sebastian.smith@klgates.com

Eiko L. Grieger
Counsel
Tokyo
+81.3.6205.3608
eiko.grieger@klgates.com

LETTERS OF INTENT: ARE YOU (UN)INTENTIONALLY BOUND?

Peter Morton, Partner, Sidanth Rajagopal, Partner,
and Hannah K. Davies, Associate

A party entering into a letter of intent ("LOI") may consider it to be just that: merely an expression of intent which is not legally binding. However, from an English law perspective, the label that is given to a document is only one of a number of factors that would be considered as relevant in establishing whether the document creates legally binding obligations.

It is very important to carefully consider whether there is an intention to be bound and, if so, how to effectively record that in your LOI (or similar documents such as "Heads of Agreement", "Heads of Terms" or "Term Sheets").

By way of a recent example of how these issues can arise in the aviation sector, in the case of *Novus Aviation Limited v Alubaf Arab International Bank BSC(c)* [2016], the parties entered into a "Commitment Letter" under which the bank agreed to provide equity to Novus Aviation for an aircraft purchase. The bank did not consider the letter to be binding, whereas Novus Aviation understood the letter to be binding. The bank then decided it no longer wanted to enter into the transaction, and Novus Aviation sued the bank for damages for breach of the Commitment Letter. Although Novus Aviation had not countersigned the Commitment Letter and it stated that the lender's commitment to the transaction *"shall be conditional upon satisfactory review and completion of documentation"*, the court held that due to the language of the letter and the provisions contained therein, the Commitment Letter was binding on the parties.

It is clear that, under English law, an assessment of whether or not an LOI is legally binding will require consideration of the document as a whole, as well as the language used in the LOI and its features. In this article, we consider the relevant considerations from the English law perspective.

WHEN IS AN LOI BINDING IN THE EYES OF THE LAW?

The following components must be present for the LOI to constitute a binding contract:

a) offer;

b) acceptance;

c) consideration;

d) intention to create legal relations; and

e) certainty of terms.

The first three components will normally exist purely from the parties drafting and signing an LOI, which sets out the key terms of the transaction between the parties, including the payment of any deposit and any agreed price.

In determining whether the parties intended to create legal relations, the court will consider the language of the LOI and surrounding circumstances and whether that leads objectively to a conclusion that legal relations were intended by the parties. Where there is an agreement and the subject of that agreement relates to business affairs, the onus of demonstrating any lack of intention to be bound will be on the party asserting it. The chart at the end of this article offers some suggestions as to what to include and/or remove from an LOI if the parties intend to be (or not be) bound by the LOI.

With regards to the final requirement (certainty of terms), the finding of a document being too uncertain as to be unenforceable, is a last resort for the court. If the court has concluded that the parties intended to create legal relations, the court will make every effort to give effect to the parties' intention by construing the words used in a way which gives them practical meaning such that the document does not fail for uncertainty.

CONCLUSION

Disputes frequently arise as to whether an LOI (or similar such document) is legally binding or not. To limit the risk of such disputes arising, it is vitally important that parties consider all aspects of any proposed LOI, and take legal advice as necessary, to ensure that the signed document has the intended effect.

AUTHORS

Peter Morton
Partner
London
+44.20.7360.8199
peter.morton@klgates.com

Sidanth Rajagopal
Partner
London
+44.20.7360.8189
sidanth.rajagopal@klgates.com

Hannah K. Davies
Associate
Singapore
+65.6507.8184
hannah.davies@klgates.com

DO YOU INTEND THE LOI TO BE LEGALLY BINDING?

YES ☑

- Establish with the other party the objectives of the negotiations and record them clearly and concisely in the LOI. Ensure the LOI is not lacking any essential terms of the transaction.
- Label the LOI "Binding letter of intent".
- Agree upon the following terms and include these within the LOI:
  - Parties' intention for the terms of the LOI to be legally binding and effective upon signature;
  - Payment mechanics, for example, payment clause setting out the amount, payment mechanism and timeline for payment including reference to any deposit agreed;
  - Termination clause setting out the grounds upon which the parties may validly terminate the LOI; and
  - Boilerplate clauses including confidentiality, exclusivity, governing law and jurisdiction.
- Use clear and unambiguous language which undoubtedly shows intention to impose actual obligations on the parties, e.g. Party X "shall…"; Party Y "covenants…".

NO ☒

- Name the document "Non-binding letter of intent, subject to contract".
- Agree upon the following terms and include these within the LOI:
  - The intention of the parties is not to be contractually bound by the LOI; and
  - Negotiations may be terminated without liability at any time until a definitive agreement has been executed.
- Consider and agree upon those terms which should be legally binding, for example those provisions relating to confidentiality and costs of the negotiation, and clearly divide these parts of the LOI from the rest of the document by stating that the LOI is not intended to be a legally binding contract, except for the following clauses [list the applicable clause numbers] which the parties have agreed are binding.
- Mark all correspondence before and after entering into the LOI as "subject to contract" (although note this is not conclusive and the language of the LOI can "trump" a "subject to contract" stipulation on the face of the LOI).

WESTERN SYDNEY AEROTROPOLIS: A FRAMEWORK FOR FURTHER AEROSPACE-RELATED DEVELOPMENT

Clive Cachia, Special Counsel, and Kirstie Richards, Special Counsel

WHAT HAS HAPPENED?

The Western Sydney Airport, Sydney's second international airport, is currently under construction and set to open in 2026.

To support this new Airport, the Australian and New South Wales ("**NSW**") Governments have announced the planning framework for the greenfield land surrounding it, known as the Western Sydney Aerotropolis. AUD20 billion in government funding has been committed through a state-owned enterprise to fast-track infrastructure projects in this special development zone.

The Aerotropolis focuses on creating a new high-skill jobs hub across the aerospace, spanning the integrated transport and logistics, defense, advanced health, food agtech and education sectors.

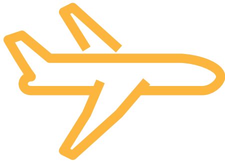
OPPORTUNITIES FOR THE PRIVATE SECTOR

The Australian and NSW Governments acknowledge the need for significant private sector investment to deliver the Aerotropolis and have been busy setting up the framework to attract and facilitate that investment. The Governments have established a new Western Sydney Development Authority to oversee the planning and development of the Aerotropolis. The Development Authority will facilitate and collaborate with industry partners to design tailored service facilities and co-ordinate infrastructure developments. More specifically, it will have broad powers and responsibilities to:

- acquire and consolidate land;
- plan for infrastructure provision and co-ordination;
- develop government-owned land (including potential joint ventures) with private landowners;
- assist with industry and other business attraction initiatives; and
- liaise with Western Sydney Airport.

The NSW Government has also established the Western Sydney Investment Attraction Office with a mandate to co-ordinate and attract domestic and international investment. This Office will act as a conduit, assisting investors to partner with government

agencies, planning officials and industry groups to identify investment opportunities within the Aerotropolis region. Early investors will benefit from having the power to shape industry clusters and forge strong alliances with government bodies from the outset.



These initiatives follow the conclusion of the Western Sydney City Deal, a 20-year agreement between all three levels of government to develop the Western Sydney Aerotropolis. The agreement focuses upon six key priority domains: (1) infrastructure connectivity, (2) future employment, (3) skills and education, (4) planning and housing supply, (5) inclusive communities and environment, and (6) a formal long-term governance structure in implementing the plan. The agreement serves to support these private industry sectors and provide access to domestic and international markets to stimulate economic growth.

IMMEDIATE PRIORITIES

More recently, the NSW Government has disclosed its immediate priorities for the Aerotropolis by releasing the draft **Stage 1 Land Use and Infrastructure Implementation Plan**. This Plan prioritizes the planning and development of the three initial precincts as follows:

1. Aerotropolis Core – designated to be a 1,055 hectare, 60,000 jobs and 8,000 homes precinct. It is proposed that this precinct will focused on a diverse suite of industries including the defense, aerospace and high technology industries and will be connected to potential new science, technology, engineering and mathematics-based universities, an updated aerospace institute and a new public high school.
2. Northern Gateway – designated to be a 1,120 hectare, 22,500 jobs and 3,400 homes precinct. The employment areas of this precinct will focus on food technology and research, food production and processing, agribusiness, warehousing and logistics and other export-related activities.
3. South Creek – designated to be a 1,950 hectare and 500 job precinct to promote the residential aspects of the Aerotropolis, including community facilities, restaurants and cafes as well as promoting the environmental and ecologically friendly credentials of the proposed Western "Parkland" City (see **link** for details).

The initial precincts of the Aerotropolis Core and Northern Gateway offer the greatest growth potential given their close proximity to the site of the Western Sydney Airport and the joint Australian and NSW Government funded 3-year AUD10.6 billion work investment program and proposed rail connections.

The remaining six precincts will be sequenced to match infrastructure investment and population and employment growth. While further details will be forthcoming, this Plan makes it clear that it will be possible for landowners and industry to accelerate precinct plans for later stages (subject to a range of provisos, including that any such development must be at no cost to government, represent orderly development and be fully supported by enabling infrastructure).

NEXT STEPS

Private investors into the Aerotropolis should collaborate at an early stage with the proposed new Western Sydney Development Authority and other governmental stakeholders in order to advance their projects.

The planning framework will be further refined with proposed re-zonings and the level of contributions required from developers for delivery of key infrastructure within the Aerotropolis.

There have already been some notable successes with the NSW Government signing two long-term investment agreements with Mitsubishi Heavy Industries and Sumitomo Mitsui Financial Group. These and further investments will be required to meet the capital demands of the project and to help ensure that the Western Sydney Airport and the Aerotropolis are truly world-class. Further information on becoming an anchor tenant in the Aerotropolis can be found **here**.

AUTHORS

Clive Cachia
Special Counsel
Sydney
+61.2.9513.2515
clive.cachia@klgates.com

Kirstie Richards
Special Counsel
Sydney
+61.2.9513.2512
kirstie.richards@klgates.com

INTEGRATING SPACE LAUNCHES AND REENTRIES INTO THE NATIONAL AIRSPACE SYSTEM

Paul Stimers, Partner

Propelled by new technologies like reusable rockets, the global space launch market is booming. Commercial launch companies have dramatically increased launch rates, with all signs indicating further acceleration in 2019 and beyond.

Because these launches (and any associated reentries) transit the National Airspace System ("**NAS**"), the commercial space sector is attracting the attention of airspace regulatory agencies – and of legacy users of the airspace, most notably airlines. At issue: how best to integrate launches and reentries with other beneficial uses of these national assets.

Nowhere is this issue more salient than in the United States, which has the most launches and reentries, the most airline flights, and a regulatory agency – the Federal Aviation Administration ("**FAA**") – that is the subject of numerous legislative proposals, even as it attempts to modernize the way it oversees the NAS.

THE IMPACT OF LAUNCHES AND REENTRIES

Launches and reentries interact with the NAS in ways that are fundamentally different from aviation. To begin with, launch windows are often tightly constrained, not by schedules, but by the laws of physics. Precise calculations govern when to launch satellites into specific orbits, or to arrange an in-space rendezvous. Therefore, a launch delay may mean waiting days, weeks, or even months to try again.

Second, most launches and reentries pass through the NAS quickly, and with little or no capability to maneuver. With aircraft, an air traffic controller can direct pilots to change heading or altitude in order to avoid a collision. In the case of a potential collision between an aircraft and a launch or reentry vehicle, however, only the aircraft is able to maneuver (one exception being hybrid launchers, in which the "first stage" of the launcher is an aircraft, launching a rocket from its wing).

Historically, the FAA has handled launches and reentries by creating "special activity airspace" ("**SAA**") – a zone around the launch or reentry that is restricted to all other users of the NAS.

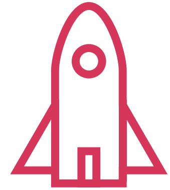
This approach works well from a safety perspective, but SAA zones can be large and long-lasting, which can create delays for aircraft that have to go around them.

Airline organizations have begun to complain about the growing impact of these zones upon the airline business. While space launches from the United States number in only the dozens per year (compared to more than 87,000 flights in the United States per day), the commercial spaceflight industry is growing. It makes sense to plan now for a future in which aircraft and spacecraft routinely and efficiently share the NAS.

A POTENTIAL SOLUTION

Fortunately, the issue can largely be resolved by making SAA zones small and dynamic, rather than large and static. Currently, the FAA closes airspace based on pre-launch trajectory analysis and debris modeling that was not designed to minimize air traffic disruption. Similarly, the FAA is not able to use real-time information about a launch vehicle's position and trajectory, even though that information is readily available. Allowing the FAA to improve its modeling and adjust in real time would drastically reduce the size of the SAA zone at any given time, making it less of an obstacle for nearby aircraft.

Commercial spaceflight operators and air travel organizations have been contributing to an FAA Aviation Rulemaking Committee ("**ARC**") process to address this issue. The ARC process should lead to reforms that will enable the FAA to reduce the impact of launches and reentries on other NAS users. And the U.S. Congress has the opportunity through legislation to redesign the FAA's regulatory architecture to help keep it abreast of new technology.



CONCLUSION

As commercial spaceflight becomes more common, integrating the NAS – and other countries' airspaces – will continue to challenge regulators. Engaging with stakeholders in the aviation and commercial spaceflight sectors, finding technological solutions, and remembering that the NAS is a public asset will help ensure that the commercial spaceflight industry grows alongside other airspace users in a way that is fair and beneficial to all concerned.

AUTHOR

R. Paul Stimers
Partner
Washington, D.C.
+1.202.661.3883
paul.stimers@klgates.com

ARGENTINA: SILVER SKIES

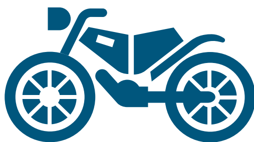
Sebastian Smith, Partner

"I now know, by an almost fatalistic conformity with the facts, that my destiny is to travel".

– *Motorcycle Diaries* by Ernesto Che Guevara

Che Guevara, an Argentinian Marxist revolutionary, made his epiphany-inducing motorcycle road trip in the 1950s – a journey that he chronicled in *Motorcycle Diaries*, which has since been immortalized into a film. In his acclaimed travelogue, he prolifically describes Argentina and South America's diverse terrain and recounts many of the difficulties he faced in traversing it.

Modern air travel has, of course, given the general public much easier access to the continent and the recent elimination by the Argentinian government of the domestic airfare price ceiling has not only incentivized start-ups such as Norwegian Air Argentina, but also bolstered the ambitions of existing operators such as Andes and Avianca. This minimum fare rule was originally imposed to protect long-haul bus operators from airlines undercutting their fares.



Whilst this appears to be good news for investors, some will take a "wait-and-see" approach, given the new competitors in the market and Argentina's recent cash call to the IMF which has triggered a currency devaluation of the Peso.

CAPE TOWN CONVENTION

Aircraft financiers, who must always consider the worst case scenario of aircraft repossession and/or the insolvency of an airline, will no doubt be given comfort that Argentina has ratified the Cape Town Convention and corresponding Protocol in August 2018 and that the form of Irrevocable De-Registration and Export Request Authorization ("**IDERA**") has recently been agreed with the Argentinian civil aviation authorities.

TAX

For the purposes of tax amelioration, tax advice should obviously be sought as to the existence of any withholding tax in respect of the leasing structures being considered. For example, an aircraft lessor with an Irish incorporated leasing

vehicle may consider establishing a Swedish intermediary and using a head lease/sublease structure so as to take advantage of the relevant tax treaties where there is an Argentine lessee. Consideration should also be given to mitigation against stamp duty and, to this end, whether documents should be executed outside of Argentina or the lease re-characterized for the purposes of Argentinian law using an offer letter. Argentinian legal counsel should always be consulted in the drafting of such a letter.

TAKE-AWAYS

In short, the appetite for new aircraft in relation to operations in Argentina, along with the Argentinian government's commitment to the corresponding legal landscape, will hopefully help ensure that it becomes an emerging aviation player in the future. Whether that will be sufficient to persuade the hardiest of travelers to swap their motorcycles for air travel remains to be seen.

AUTHOR

Sebastian Smith
Partner
Tokyo
+81.3.6205.3606
sebastian.smith@klgates.com

A GLOBAL PERSPECTIVE

Our broad global platform allows us to guide clients through the legal challenges of the ever-changing international landscape. With fully integrated offices on five continents, the deep latticework of relationships across our offices and practices enables our clients to respond to diverse legal issues and risks through the services of one law firm, with one communication.

THE AMERICAS

EUROPE AN
THE MIDDLE EAS

BTI Client Service 30
for **five** consecutive years in 2017

Named to **GLOBAL ELITE BRAND INDEX** 2018*

*Acritas

BTI BRAND ELITE
for four consecutive years in 2017

Named to
GLOBAL 20
for cross-border work for **seven** consecutive years*

*Law360, 2017

Strong presence in key capital cities and world commercial and financial centers

Visit **KLGATESHUB.COM** for comprehensive industry-based digital content at the intersection of legal and business issues.

K&L GATES

K&L Gates is a fully integrated global law firm with lawyers located across five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants, and entrepreneurs in every major industry group, as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2019 K&L Gates LLP. All Rights Reserved.

19601