INSIGHT

New laws to support aviation

Some of the amendments to the Civil Code, to the Financial Institutions Act and to the Interest Rate (Exemption) Regulations address indirect factors needed to grow business opportunities around aircraft and their operators, not necessarily involving aircraft registration.

Max Ganado

Everyone is by now aware that the aviation project launched in 2010 is developing well. The government has recognised that the momentum gained in the first six years of operations needs to be supported by new initiatives and indeed has taken such initiatives in the last months of 2016 and with the first legal notice issued in 2017.

Tax incentives for aviation expertise

The legal notice (LN1/2017) extends the tax incentives to highly qualified employees of aviation companies from the initial period of four to five years to a maximum of 10 years. These incentives are very important for us as an island as we do not have enough qualified persons on the ground. As the industry grows, we need to encourage foreign experts to come and work in Malta and affect a transfer in know-how, training Maltese to be able to take up senior posts in the future. This complements the educational initiatives taken in this sector.

A major initiative was taken in November 2016 through the enactment of the Registration (Amendment) Act, 2016 (Act LII/2016). This law has developed some themes of a detailed nature which all aim at enhancing the Maltese legal system around the aviation topic on a broad front. This is the best way to succeed in this new sector as it would be meeting challenges and agendas of many operators. Malta will succeed best if we diversify the industry and not limit our focus to the registration of aircraft and aircraft mortgages. The fact that we see operators of aircraft fleets, educational and training establishments, aircraft maintenance companies, paintwork and design companies and others locating in Malta to take advantage, not only of our taxation incentives, our legal infrastructure and our human resources, but even of our geographic position, means a lot. We are managing to create an environment where the business opportunities start to become localised with a market developing on the ground, rather than far away in other centres. We are reducing our risks through diversification of factors of attraction. With the world changing radically with regard to the use of tax incentives to attract businesses, this approach will prove to be critical in the future.

> *"Malta will succeed best if we diversify the industry and not limit our focus to the registration of aircraft and aircraft mortgages"*

Amendments to the Civil Code

The amendments to the Civil Code address contracts of sale and purchase of aircraft, promises of sale (*konvenji*) relating to aircraft and contracts of letting, or leasing as it is better known, of aircraft. The amendments extend to aircraft engines, and incidentally apply to ships as well, as we have the same growth and flexibility agendas in the maritime industry as we have in aviation.

The amendments address the problem of our Civil Code having been enacted in the 1850s, having a focus on immovable property or land and not being flexible enough to cater for the market realities required to deal with aircraft and their engines. The market reality in this sector is that English and New York law have become the leaders in the global markets for these types of transactions for two reasons. They are very flexible and give maximum autonomy to the parties to agree on anything they wish and their courts are very expert and efficient when disputes arise. This has permitted a high degree of certainty to develop on the legal subjects. So anyone buying an aircraft, an aircraft engine, or leasing an aircraft, will likely use English or New York law and courts in their contracts. So Maltese law becomes totally irrelevant as long as we allow the free choice of these two foreign laws, apply them consistently and allow submission to these two courts and respect the submission – which we do on the whole. But that means Maltese law never develops nor needs to develop until a market sector comes along and must use Maltese law if it wishes to qualify as a local transaction for any legal reasons, such as the location of assets on the ground, the law relating to security rights which tend to be very domestic in nature or some rules of taxation. With the growth of aviation activity in Malta, these cases where Maltese law is required to apply have started to emerge.

The problem we then face is that the context of the Maltese Civil Code provisions on sale, promises of sale and leases is non-tech or low tech. The law does not cater for a high-tech world in an efficient manner. There is a bias in Maltese law which, as a rule, pro-

Continued on page 6

INSIGHT

'The law does not cater for a high-tech world in an efficient manner'

Continued from page 5

tects debtors (as opposed to creditors) or possessors (as opposed to owners or lenders) which is a killer in this context of very high value assets where delays in enforcing remedies and/or re-possession of assets costs millions very quickly with equally fast deterioration of assets. So the first challenge is removing the bias in favour of one party so as to bring about efficiencies in remedies and to eliminate the possibilities of a party using the inefficiencies to gain leverage in a dispute.

So article 1351A has been introduced into the Civil Code to state that all agreements relating to sale of aircraft or their engines shall be governed by the agreement reached between the parties and the international usages of trade applicable in the context which shall prevail over the provisions of the Code in case of conflict. This means, for example, that the presumption in our law that risk passes on the agreement of thing and price will not apply, as in this sector no risk ever passes before delivery of an aircraft or engine. Brokerage is not presumed to be one per cent absent agreement and the agreement, disallowed under Maltese law, that you cannot have a contract of sale for the benefit of a person to be named in the future, can be overwritten. Not that it happens very often, but a sale of an aircraft between a husband and a wife should be possible although prohibited by the Code, but more importantly the warranties under Maltese law can be tailored to the realities of aircraft in 2017, as can the remedies in case of breach of warranties.

The most important effect is the general principle of freedom of contract which will allow a Maltese operator, or any party in relation to a Maltese aircraft, to choose foreign law or, more relevantly, to agree contractually on what is normally valid and effective under foreign law while still having the contract regulated by Maltese law.

Warranties and remedies which are not the norm under the Code, but usually seen in international aircraft contracts, are now possible with certainty.

We eliminate the risk that a court would read into such a contract some concept which is mundane to land or domestic contexts, into a clearly written or standard aircraft sales and purchase contract.

The same rule then applies specifically to a promise of sale (*konvenju*), which under our law is subject to rather unexpected procedural rules for their enforcement. There are many conflicting judgments on article 1357(2), almost always relating to immovable property, where judicial letters feature in relation to deposits and enforcement. This situation is unworkable if extended to any aircraft or engine, and more so to internationally-operated aircraft. So again, the Civil Code now allows the parties to agree on the manner in which these agreement lapse. Notices can be legally given by electronic means and not necessarily by a judicial letter through our courts – a procedure all foreign buyers and sellers just cannot understand, both in terms of utility and on how it is done between two foreign parties.

It takes these provisions out of the very limited domestic context to one which can operate internationally.

Max Ganado is a partner at Ganado Advocates.

London banks' Brexit battle heads to Europe

Andrew MacAskill and Anjuli Davies

Banks with large London operations say they will step up lobbying European officials because they are running out of arguments to convince the British government the industry needs single market access after Britain leaves the European Union.

Banks have focused on pressuring British officials to push for as much market access as possible since voters decided seven months ago to leave the EU. They held fewer meetings with European officials, according to several senior sources in the financial services industry.

The focus is shifting because after scores of meetings and research reports, banks, which say they may begin moving staff and operations out of London in the next few months if there is no clarity, feel they are running out of new points to make.

Prime Minister Theresa May said on Sunday she was not interested in Britain keeping "bits" of its EU membership, interpreted by some as signalling she will favour immigration controls over access to the single market.

Banks are now planning a new round of lobbying to highlight how a hard Brexit could harm the EU and the UK. They have identified French politicians, EU regulators and government officials, as key groups to win over.

"The battle for Britain is over, the battle for France is about to begin," said one senior lobbyist.

Another senior lobbyist for one of the major global banks said he would spend more time in Brussels this year to target the EU's chief Brexit negotiator Michel Barnier and his teams as well as Didier Seeuws, a Belgian diplomat, who is helping coordinate the Brexit negotiations.

Another lobbyist said he was planning to visit Paris to meet with French politicians and regulators later this month.

Britain's position as Europe's financial centre is emerging as one of the main collision points in the Brexit talks. Some European politicians see an opportunity to challenge British dominance of finance after decades of viewing its free-wheeling "Anglo-Saxon" model of capitalism with suspicion.

EU leaders like French President François Hollande have said they plan to weaken Britain's grip on finance by, for instance, demanding the lucrative business of clearing euros should move to the eurozone. UK-based banks had total outstanding loans of more than £1.1 trillion to European companies and governments at the start of 2016.

Finance is Britain's most important industry, accounting for about a tenth of its economic output and is its biggest source of business tax revenue.

The British government has also privately appealed to financial organisations to make their case in Europe if they want a transitional period where their ability to operate in the EU would be phased out gradually over several years.

Bankers say more work is needed on forging a consensus between Britain and Europe on what any transitional deal may look like. European officials say they will not discuss such a deal before Britain triggers article 50 of the EU's Lisbon Treaty to start the process of leaving the EU.

"Everyone has a different definition of what it means in Europe and within Whitehall. We're trying to get a common view on what transition means," one of the lobbyists said.

Nevertheless, banks feel they have largely finished putting forward their case for single market access.

"We feel we've been lobbying the UK government to death. We've presented every piece of evidence, every report, research, you name it," one of the lobbyists said.

"We've been repeating ourselves for a month or two now... What else do they really need from us now?" **(Reuters)**