

Finance
Case Law Update
Rosling King LLP



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In *Novus Aviation Limited v Alubaf Arab International Bank BSC* [2016] EWHC 1575 (Comm), the Commercial Court has held that the defendant bank was bound by a Letter of Commitment despite the lack of a countersignature by the borrower which did not automatically render it invalid.

The Facts

The Claimant, Novus Aviation Limited (“Novus”), a company which arranges the financing, purchase and leasing of aircraft, was approached by the Defendant, Alubaf Arab International Bank BSC (the “Bank”), a Bharani bank, who expressed an interest in providing approximately \$40m of equity funding towards the purchase of an aircraft to be leased to Malaysia Airlines. Novus supplied the Bank with a Letter of Commitment which the Bank duly signed and returned. Upon receipt Novus did not countersign the document but continued with the transaction; instructing lawyers and withdrawing the funding offer from the wider market.

Following accounting concerns, the Bank withdrew from the transaction three weeks prior to the delivery of the aircraft. Novus treated this withdrawal as a repudiatory breach of the Letter of Commitment and sought damages for losses in fees totalling in excess of \$8m. The Bank argued that the Letter of Commitment was never intended to create a legally binding agreement. In any event, even if it was found to create legal relations, the Bank further argued that as Novus did not countersign the Letter of Commitment it could not be enforceable. Finally the Bank contended that the person signing on its behalf, who was the Head of Treasury and Investments at the bank, did not have the requisite authority to do so as the sole signatory because the investment amount required two authorised signatories sign the document in accordance with the Bank’s internal authorisations.

The Decision

The Commercial Court held that the Letter of Commitment was enforceable thereby rejecting the Bank’s arguments in full.

Applying established case law, the Court reiterated that the test for deciding whether a document is intended to create legal relations must be based on what was communicated between the parties rather than by their subjective states of mind. The Bank had stated, through email and telephone calls, that they had approved the funding. Novus pushed forward with the transaction to which the Bank did not object. Whilst Novus may have failed to supply a countersigned copy, the Bank did not insist on this nor did they object to the continuance of the transaction in its absence. The conduct of the parties therefore showed the intention that the Letter of Commitment was to be legally binding.

As to the point on authority, the Court thought it unlikely that the Head of Treasury and Investments at the bank would be mistaken as to the extent of his authority. In addition, had more than one signature been required (as the Bank contended) then the Court felt that the Bank would have arranged for the letter to be executed by two people. In any event, the Court held these arguments to be purely academic and that, as the Head of Treasury had represented himself as having apparent authority to sign Novus was entitled to rely on this.

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The case highlights the need for clarity when agreeing Letters of Commitment (as well as other similar documents like letters of intent, comfort letters or term sheets). If parties do not intend to be bound by the terms of these then care should be taken to make this expressly clear. The lack of signature by one party will not necessarily prevent enforceability and the Courts will assess the conduct of the parties when considering whether the letter constitutes a valid agreement. In order to avoid the pitfalls above, when signing up to Letters of Commitment (or the like), parties should ensure the following to reduce the risks of being inadvertently bound by terms that they did not mean to be bound by:

- It should be clearly stated that the letter is not intended to create a legally binding agreement and that the terms are subject to contract.
- They include provisions stating that signature and countersignature is the only valid form of acceptance by both parties.
- Waiver of signature/countersignature can only be agreed in writing and that the conduct of the parties will not amount to acceptance.
- Where some terms are intended to have binding legal effect (such as undertakings to pay costs or confidentiality) and others are not, this needs to be very clearly sign-posted to avoid any ambiguity.

In addition, it should be noted that arguing an agreement is invalid based upon the authority of the individual executing it is a difficult one to run where a signatory signs with what reasonably appears to be apparent authority. Lenders in particular should ensure that their staff are fully aware of the limits of their authority and should implement strict signing processes to avoid any issues later down the line.

For further information, please contact [Alexander Pelopidas](#) or the Partner with whom you usually deal.