

5 August 2014

Ms Hayley Gowen
Cape Town Treaty Team
Department of Business, Innovation and Skills
4th Floor, Abbey 1
1 Victoria Street
London
SW1H 0ET

(By post and email: hayley.gowen@bis.gsi.gov.uk)

Dear Ms Gowen

Re: Cape Town Convention and the Blue Sky Decision

This letter is sent on behalf of the Financial Law Committee of the City of London Law Society. Information about the Society and the Committee and its members appears at the end of this letter. This letter relates to the subject matter covered in the BIS consultation “Ratification of the Convention on international interests in mobile equipment and Protocol thereto on matters specific to aircraft equipment”, and so should be read as a response to that consultation.

The Financial Law Committee's Members have had the opportunity to consider the Memorandum sent to you by Kenneth Gray of Norton Rose Fulbright LLP on 22nd July (copy attached and marked Annex “A”). There is strong support from members of the Committee and their firms for the adoption of the proposals made in that Memorandum in the legislation to bring the Cape Town Convention into force in the UK. The City of London Law Society would be grateful if you would take that into account in considering the proposals in the Memorandum.

If you would like to discuss this with members of the Committee please contact Dorothy Livingston, Chairman of the Committee, or Richard Calnan, Chairman of its Working Group on the law on the taking of security. Their contact details appear at the end of this letter.

The CLLS

The City of London Law Society (“CLLS”) represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

Yours sincerely

A handwritten signature in black ink that reads "Alasdair Douglas". The signature is written in a cursive, flowing style.

Alasdair Douglas
Chair, CLLS

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**THE CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Ms. Dorothy Livingston (Herbert Smith Freehills LLP) (Chairman) (email: Dorothy.Livingston@hsf.com, tel: 020 7466 2061)

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P. Warner (Sullivan & Cromwell LLP)

P.R. Wood (Allen & Overy LLP)(Emeritus)

Annex “A”

Implementation of the Cape Town Convention by the United Kingdom

Blue Sky issues

- 1 There has been some disagreement and considerable debate as to how the ratification of the Cape Town Convention (the **Convention**) by the United Kingdom would affect the so called *Blue Sky* rule. As you know, the problem with the decision in *Blue Sky* is that, in order for a valid proprietary interest to be created over an aircraft in accordance with English law, the aircraft must be physically situated in England at the time of its creation. We do not need to repeat the arguments we have had about the interaction of the Convention and *Blue Sky* here but would note that the fact there was such an extensive discussion is indicative of the desirability of clarifying the question.
- 2 When deciding on the approach that we would propose to BIS, we were conscious that the secondary legislation that is being proposed to implement the Convention into the laws of the United Kingdom cannot be used:
 - (a) to amend existing law, except to the extent necessary to implement the Convention or to make it workable or to clarify the law; or
 - (b) to “improve” the Convention.
- 3 We believe that the secondary legislation could be used to define clearly the boundary between the sphere of application of the Convention and existing law, and, in so doing, it could help to mitigate the *Blue Sky* problem.
- 4 Under the Convention, an international interest can arise independently of other domestic laws. An international interest is created if the requirements of the Convention are complied with, even if it does not satisfy the requirements of any domestic law (such as the *lex situs* rule, notarisaton, payment of duties etc..). This is clear from the Official Commentary (see, for example, paragraphs 2.5, 2,18 and 2.41) but much of the debate we have been having relates to whether the Convention itself could be interpreted in this way.
- 5 Our concern is to ensure that the autonomous nature of an international interest is clear to a court interpreting the Convention. We want to avoid the possibility that a court might decide that, because a security agreement creates a right in rem, or proprietary right, over the aircraft, the *Blue Sky* decision should apply to it. We believe that the secondary legislation could be used to assure the primacy of the Convention, by clarifying that an international interest can arise autonomously under the terms of the Convention and constitute a proprietary interest or right in rem.
- 6 We would propose the following wording for the legislation:

- (a) **An agreement which relates to a transaction of a type covered by the Convention and which complies with Article 7 of the Convention creates or provides for an international interest.**
- (b) **An international interest is an autonomous proprietary interest (or right in rem).**
- (c) **An agreement which creates an international interest therefore creates a proprietary interest (or right in rem) even if that agreement might not otherwise have created a proprietary interest (or right in rem) under the law of that part of the United Kingdom under which it is created (for instance, because it is created under English law at a time when the object concerned is not in England [or because it is created under Scottish law without transferring possession of the object][or Northern Irish example if relevant]).**

- 7 The first two points are descriptions of what the Convention does. The last point draws a conclusion from the first two. This is helpful to ensure the first two are consistently interpreted and applied.
- 8 The clause will need to be completed in the light of advice received from colleagues in Scotland and Northern Ireland. We would suggest speaking to Hamish Patrick at Tods Murray and Feargal O'Loan at Tughans (and we are happy to do this ourselves if BIS would like us to).
- 9 A Cape Town Security Agreement can only create an international interest either (i) as regards the airframe and engines, if the debtor is located in a Contracting State or (ii) as regards the airframe only, even if the debtor is located in a non-Contracting State, if the aircraft is registered in a Contracting State. Therefore, there will be circumstances where it cannot be used (for example, where there is a Japanese borrower in respect of an aircraft registered in Spain, neither of these countries having ratified the Convention). In these circumstances, any English law security over the aircraft would have to be taken by the lenders in accordance with the law as it currently stands.
- 10 However, we believe that the proposed solution will greatly mitigate the detrimental effects of the *Blue Sky* decision, particularly if (as we believe will be the case) the Cayman Islands and other British Overseas Territories, where a great many aircraft owners are incorporated, ratify the Convention shortly after the United Kingdom does.
- 11 We would also recommend that the legislation should specify that regard should be had to the Official Commentary in its interpretation. We believe that this has been done by a number of jurisdictions, including Ireland, Singapore, Malta and most of the Canadian provinces.

NORTON ROSE FULBRIGHT LLP