

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

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

11 August 2014

Dear Ms Gowen

Re: Department for Business, Innovation and Skills consultation: Ratification of the Convention on International Interests in mobile equipment and Protocol thereto on matters specific to aircraft equipment

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. This response in respect of the Department for Business, Innovation and Skills consultation on the Ratification of the Convention on International Interests in mobile equipment and Protocol thereto on matters specific to aircraft equipment has been prepared by the CLLS Insolvency Law Committee. The views expressed in this submission are those of the Insolvency Law Committee as a whole, and the Committee’s views are not necessarily those of its members’ firms.

Yours sincerely



Alasdair Douglas
Chair, CLLS

© CITY OF LONDON LAW SOCIETY 2014

All rights reserved. This paper has been prepared as part of a consultation process.
Its contents should not be taken as legal advice in relation to a particular situation or transaction.

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

Individuals and firms represented on this Committee are as follows:

Hamish Anderson (Norton Rose Fulbright LLP) (Chairman)

C. Balmond (Freshfields Bruckhaus Deringer LLP)

J. Bannister (Hogan Lovells International LLP)

G. Boothman (Ashurst LLP)

T. Bugg (Linklaters LLP)

A. Cohen (Clifford Chance LLP)

L. Elliott (Herbert Smith Freehills LLP)

S. Frith (Stephenson Harwood)

I. Johnson (Slaughter and May)

B. Klinger (Sidley Austin LLP)

B. Larkin (Berwin Leighton Paisner LLP)

D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)

Ms J. Marshall (Allen & Overy LLP) (Deputy Chairman)

B. Nurse (Dentons UKMEA LLP)

J.H.D. Roome (Bingham McCutchen LLP)

P. Wiltshire (CMS Cameron McKenna LLP)

M. Woollard (King & Wood Mallesons SJ Berwin LLP)

Working party members for this consultation:

Adrian Cohen

Dominic McCahill



Ratification of the Convention on International Interests in mobile equipment and Protocol thereto on matters specific to aircraft equipment: consultation response form

The closing date for this consultation is **11 August 2014**

Name: Adrian Cohen and Dominic McCahill

Organisation (if applicable): City of London Law Society Insolvency Law Committee

Address:

Please return completed forms to: Hayley Gowen, 4th Floor – Abbey 1, Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET, 020 7215 6096; hayley.gowen@bis.gsi.gov.uk

Please tick the box which is most relevant for you:

<input checked="" type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

Question 1 (paragraphs 27-35)

Do you agree that the UK should make a general declaration that all existing and future non-consensual rights with priority under UK law over an interest equivalent to an international interest should retain their priority under the terms of the treaty, including over any interests registered on the International Registry prior to ratification of the treaty in the UK? Why?

Yes No Not sure

Comments: We agree with the reasoning set out in paragraphs 27-35.

Question 2 (paragraphs 27-35)

Do you agree that the UK should make a declaration to retain any rights to arrest or detain an aircraft object for non-payment of amounts owing for the provision of public services relating to that aircraft object or another object are unaffected? Why?

Yes No Not sure

Comments: We agree with the reasoning set out in paragraphs 27-35.

Question 3 (paragraphs 36-38)

Do you think UK should make a declaration under article 40 to allow a judgment creditor to register:

- (a) Any specific type(s) of judgment debt, even where no separate enforcement order has been made ? or
- (b) Any judgment debt in respect of which a specific type of enforcement order has been made?

Yes No Not sure

Comments: We do not think that such a declaration should be made on the basis that it would fundamentally change the priority of such judgments and we cannot see that this change is necessary for the purpose of encouraging finance and saving costs.

Question 4 (paragraphs 36-38)

If your answer is “yes” to either or both of the above questions, please list the types of judgment debt or the types of enforcement order that you think should give rise to the right of registration on the International Registry.

Yes No Not sure

Comments: Not applicable.

Question 5 (paragraphs 39-41)

Do you agree that the treaty should apply to internal transactions as well as international transactions? Why?

Yes No Not sure

Comments: We agree with the reasoning set out in paragraphs 39-41.

Question 6 (paragraphs 44-45)

Do you agree that a creditor should be able to grant a lease whilst the aircraft object is situated in the UK in the event of a default. Why?

Yes No Not sure

Comments: We cannot see any reason why a creditor should not be able to grant a lease in such circumstances.

Question 7 (paragraphs 46-47)

Do you agree that the UK should continue to allow the use of extra-judicial remedies except where a moratorium is in place? Alternatively, what problems/issues do you envisage (if any) if there is no court involvement? Why?

Yes No Not sure

Comments: We agree with the reasoning set out in paragraphs 46-47.

Question 8 (paragraphs 51-53)

Do you agree that pre-existing rights registered on the National Register of Aircraft Mortgages should retain their priority over subsequently registered interests on the International Registry? Why?

Yes No Not sure

Comments: We agree that re-registration should not be required for existing rights on the national register, and their priority ought to be maintained over subsequently registered interests on the international register. Any re-registration would be costly and administratively burdensome.

Question 9 (paragraphs 56-58)

Do you think that the UK should define the term *speedy* and if so how?

Yes No Not sure

Comments: Given the fact that a declaration is to be made under art 54(2) we do not consider a definition is necessary. In any event there is nothing to suggest that the existing court practice, needs any such time limit to be imposed as we understand that the English court already deals with such applications in a timely fashion.

Question 10 (paragraphs 59-76)

Should the UK adopt provisions in accordance with Alternative A or retain existing national insolvency law and why?

Yes No Not sure

Comments: Our view is that the existing national insolvency law should continue to apply and Alternative A should not be adopted. Our reasons are as follows:

a. UK insolvency law provides a robust regime for secured creditors and lessors of chattels and those with other proprietary claims. Consequently, a clearly demonstrable benefit ought to be established before adopting changes which affect one aspect of a single industry and class of assets. We are not aware that there is evidence, or at least sufficient evidence, that makes out the case for change.

b. The role of capital markets in aircraft finance in the UK is relatively recent and we are aware of only a couple of instances. This has at least two significant consequences. First, there is necessarily a dearth of evidence as to what impact implementing Alternative A would have on the cost of aircraft finance in the UK. Second, the nascent role of capital markets in aircraft finance in the UK suggests that caution should be exercised before placing too much weight on the experience to date. For example, if the participants' prior experience is derived only from the US, it would not be surprising if those participants were strongly in favour of Alternative A, given that it is modelled on paragraph 1110 of the US Bankruptcy Code.

c. The existing legislation framework promotes business rescue either outside of a formal process (eg, in the form of a consensual restructuring or through the use of a scheme of arrangement (which is a composition procedure)) and in the formal context, primarily in the form of administration. An airline in financial difficulty which is unable to resolve its difficulties outside of an insolvency proceeding would ordinarily be expected to go into administration.

d. An administration imposes a moratorium for the duration of the process (usually 12 months unless extended) and applies to secured and proprietary claims. However, in practice most corporate rescues in the UK take place either outside the context of administration or if administration is used it is often as a tool to sell the business and assets on a "pre-packed" basis so as to avoid prolonged trading in administration.

e. The use of aircraft by a company in administration would give rise to a claim which would rank as an expense of the administration. Such expenses rank ahead of administrator's remuneration and are unlikely in practice to be incurred unless they can be readily paid. Consequently, a creditor's position should not become materially worse during the period of use. A creditor who believes that its position is being materially prejudiced by an administrator's refusal to return aircraft can seek relief from the court on an urgent basis. In most cases, such a hearing could take place well within 60 days. In practice the creditor and the administrator will agree the terms upon which the company can continue to use the aircraft during the administration or the administrator will return the aircraft. If an administrator was attempting to restructure or sell the business and to include the continued use of the aircraft in such proposal, they would need the consent of the creditor unless the creditor could be bound by a scheme of arrangement supported by a majority of creditors (seventy five percent in value and a majority in number participating in the relevant creditor meeting) in a similar position to the creditor or if the administrator is in a position where he can obtain an order overreaching the creditor's interest.

f. Consideration should be given to the changes which would be required to existing national insolvency law in order to implement Alternative A. A debtor would be required to cure all defaults save for a default arising from the opening of insolvency proceedings and to perform all future obligations under the relevant transaction documents by the end of the specified waiting period. Taken literally, this would require, for example, any defaults arising from a debtor's insolvency (as distinct from the opening of insolvency proceedings), payment defaults and breaches of financial covenants to be cured by the expiry of the waiting period. If any event had occurred which caused the loan amount to be accelerated, then the full amount would have to be repaid. If a waiting period of 60 days were chosen, we do not consider that realistically a debtor could be expected to cure anything other than payment defaults which had occurred prior to the date of curing. The obligation imposed on the debtor to perform all future obligations also gives rise to issues about the role and status of the administrator who will be keen to exclude any personal liability for subsequent breach by the debtor. By reason of the above, effectively, it appears that the introduction of Alternative A would likely mean that a creditor would be entitled to possession of the aircraft after the waiting period, unless a new agreement were reached with the debtor.

g. We do, however, recognise that one argument in favour of Alternative A is the desirability of having the same regime apply internationally. This is a matter of policy and is distinct from the impact of any change within the UK.

Question 11 (paragraphs 59-76)

What impact do you think adopting Alternative A would have on the rescue of viable businesses in distress?

Yes No Not sure

Comments: We consider that overall Alternative A would improve the negotiating position of the aircraft finance creditors but have a negative impact on the rescue culture. In particular, it would be unlikely that a rescue could be achievable within the waiting period. Consequently, the debtor would have to reach an accommodation with those creditors or hand back the aircraft. That is not to say that the aircraft finance creditors would in some circumstances (e.g. where there isn't a strong market demand for the aircraft) be unwilling to reach an agreement in view of the costs and delay which would arise if not withstanding those market conditions they have to sell or lease the recovered aircraft to a third party. However the difficulties relating to the administrators' obligations to cure any defects (as referred above) may mean that in practice often the opportunity to resolve by negotiation won't be a realistic option. Whilst, we understand that this dynamic has worked well in cases under Chapter 11 of the US Bankruptcy Code where a number of airlines have been successfully restructured, we would note that Alternative A only imports one aspect of the US Bankruptcy Code, and so the experience of Alternative A in other jurisdictions may be different.

Question 12 (paragraphs 59-76)

If you believe the UK should adopt provisions in accordance with Alternative A, what waiting period should the UK adopt?

Yes No Not sure

Comments: Whilst we do not advocate the adoption of Alternative A, we consider that if it were to be adopted, the waiting period should be 60 days in order to be consistent with other jurisdictions.

Question 13 (paragraphs 59-76)

If the UK does adopt Alternative A, what level of discount to the cost of financing would likely be attributable specifically to this measure?

Yes No Not sure

Comments: We are unable to comment upon the likely level of discount to the cost of financing.

Question 14 (paragraphs 81-84)

Do you agree that the UK should allow debtors to provide creditors with an IDERA to enable a creditor to apply for the de-registration and export of an aircraft object in cases of default? Why?

Yes No Not sure

Comments: We can see the practical advantages in this.

Question 15 (paragraphs 85-87)

Do you agree that the UK should not designate any entry points for the passing of information on registration of international interests in helicopters and airframes to the International Registry? Why?

Yes No Not sure

Comments: We agree that the UK shouldn't designate entry points which would only add unnecessary costs and administration.

Question 16 (paragraphs 90-97)

Considering your answers to the other questions in this consultation, do you believe the UK should make declarations in line with the Aviation Sector Understanding? Why?

Yes No Not sure

Comments: We are not convinced that such declarations would necessarily mean a discount, which remains at the discretion of the credit support agencies.

Question 17 (paragraph 98)

Do you agree with the Government's estimate of a one-off familiarisation cost to business of £5,000 to understand the provisions of the treaty and the declarations made by the UK? Why?

Yes No Not sure

Comments: This seems low, but we are not in a position to comment.

Question 18 (paragraph 99)

In your view, would any of the proposals in this document have an adverse impact on any community or group within a community? Why?

Yes No Not sure

Comments: See our responses to questions 10 and 11 above – the proposals could have an adverse effect on the rescue culture and as a consequence unsecured creditor may lose out.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes No

© Crown copyright 2014

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ This publication is also available on our website at www.gov.uk/bis

URN BIS/14/452RF