IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No: CO/12012/2008

B E T W E E N:-

THE QUEEN on the application of

(1) CGTSN LIMITED
(2) GLOBAL KNAFAIM LEASING LIMITED

Claimants

- and –

(1) THE CIVIL AVIATION AUTHORITY
(2) BAA LIMITED

Defendants

- and -

(1) EUROCONTROL
(2) NATS (EN ROUTE) PLC
(3) NATS SERVICES LIMITED

Interested Parties

AVIATION WORKING GROUP

Intervener

SUBMISSIONS ON BEHALF OF AVIATION WORKING GROUP

A. INTRODUCTION

1. The present submissions are made by the Aviation Working Group (AWG) in accordance with CPR 54.17 in accordance with the permission granted in the order of [ ] J dated [ ] 2009.

2. AWG will confine its submissions to the issue of the compatibility of an asserted right to detain and sell an aircraft owned by or mortgaged to one party ("a property rights holder") for debts owed by a lessee or mortgagor ("operator") in respect of the air navigation and airport charges to UK authorities and (on behalf of all its Member States) Eurocontrol relating to all aircraft operated by that

operator ("Fleet Lien") with the right to peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No.1 to the European Convention on Human Rights. In the following sections of this submission AWG will make submissions as to (a) the requirements of that Article; and (b) the question whether the provisions of law relating to Fleet Lien comply with these requirements.

3. The factual material on which AWG relies is set out in the statement of its solicitor, Stephen Grosz, which is attached hereto. That statement is based on information provided by, and has been authorised by, AWG.

B. THE REQUIREMENTS OF ARTICLE 1 OF PROTOCOL NO. 1

4. Article 1 guarantees the right to property. It contains three rules: a general rule concerning peaceful enjoyment of possessions, a rule relating to deprivation of property and a rule relating to control of use of property: *James & others v United Kingdom* (1986) 8 E.H.R.R. 123, at [37].

5. For present purposes it is not necessary to determine which rule applies to the exercise of the Fleet Lien since "The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule." (*James*, loc. cit.) Recent practice of the European Court of Human Rights has found it unnecessary to determine under which limb of Article 1 of Protocol No. 1 an interference falls: *Beyeler v Italy* (2003) 36 E.H.R.R. 5, at [106], *Jokela v Finland* (2003) 37 E.H.R.R 26, at [49]; *Broniowski v Poland* (2005) 40 E.H.R.R. 21, at [135-136]. The applicable principles are broadly similar in each case. In essence, it must be shown that (a) the measure in question is lawful, (b) it pursues a legitimate aim in the public interest and (c) a fair balance has been struck between the general interest and the rights of the individual. AWG will address each of these three requirements in order.

Lawfulness

6. In order to be lawful, a measure must not only be in accordance with applicable domestic law. The law in question must be accessible and foreseeable, and its application should be foreseeable and avoid arbitrariness. Thus, in *Hentrich v France* (1994) 18 EHRR 440 at [42], the European Court of Human Rights

considered that a system of pre-emption by the French tax authorities did not satisfy the requirement of lawfulness because it:

> "…operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention."

7. The Court has also emphasised the importance of procedural guarantees in assessing the question of lawfulness. In the above-cited *Hentrich* case, the Court said that:

> A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue's position - all elements which were lacking in the present case.

8. In *Capital Bank AD v Bulgaria, Application no. 49429/99*, judgment of 24 November 2005 at [134], the Court said:

> The requirement of lawfulness, within the meaning of the Convention, presupposes, among other things, that domestic law must provide a measure of legal protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention. Furthermore, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence. It is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of judicial review does not amount, in itself, to a violation of that provision. Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures. (references removed)

9. Article 16 of Commission Regulation 1794/2006 of 6 December 2006 laying down a common charging scheme for air navigation services (see further paragraphs 30ff below), also exemplifies the need for effective procedural guarantees, providing that:

> "Member States shall ensure that decisions taken pursuant to this Regulation are properly reasoned and are subject to an effective review and/or appeal procedure."

Legitimate aim in the public interest

10. A measure of interference with the right to peaceful enjoyment of possessions must be shown to be taken in pursuit of the general interest. Unlike other articles governing qualified Convention rights, Article 1 does not list the aims which may be pursued.

Fair balance/proportionality

11. In determining whether a measure of interference is justified, it is not enough that it pursues a legitimate aim in the public interest. As the Court made clear in *James & others v United Kingdom*:

> Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ((1983) 5 E.H.R.R. 35, para. 69). The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (ibid. para. 73).

12. In assessing whether such a balance has been struck, it will be relevant to take account of the seriousness of the aim sought to be pursued and, although not conclusive, the extent to which such aim might be achieved by other, less intrusive, means. Account may also be taken of the extent to which other States party to the Convention have found it necessary to take similar measures: *Hentrich v France* at [47]. The Court can also have regard to measures adopted by the European Union.

13. Moreover, the existence of procedural guarantees to mitigate the rigour of measures of interference will also be relevant to the question whether the property owner bore an individual and excessive burden: *Hentrich,* at [49]; *AGOSI v United Kingdom* (1987) 9 E.H.R.R. 1, at [55].

14. The need for procedural safeguards is a fundamental requirement of the rule of law. It is reflected in Article 16 of Commission Regulation 1794/2006 laying down a common charging scheme for air navigation services, which provides:

> Member States shall ensure that decisions taken pursuant to this Regulation are properly reasoned and are subject to an effective review and/or appeal procedure.

15. In certain cases, in particular those involving forfeiture, the behaviour of the owner of the property subject to forfeiture is a relevant factor. Thus, in *AGOSI v United Kingdom* at [54], which concerned forfeiture of smuggled goods by Customs and Excise, the Court said:

> The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account.

C. COMPATIBILITY OF FLEET LIEN WITH ARTICLE 1 OF PROTOCOL NO. 1

16. AWG accepts for the purpose of these proceedings that the efficient collection of air navigation, Eurocontrol and airport charges is a legitimate aim in the general interest. However, AWG submits that the provisions relating to Fleet Lien:

    a. do not meet the requirements of lawfulness; and

    b. do not strike a fair balance between the general interest and the fundamental rights of the property rights owner.

Lawfulness

17. AWG accepts that the provisions of domestic law authorise the exercise of powers of Fleet Lien. However, AWG submits that domestic law does not meet the requirements of foreseeability, absence of arbitrariness and compliance with the rule of law.

18. The Fleet Lien is arbitrary in its application because:

    a. there are no transparent rules of practice as to the circumstances in which, and the aircraft against which, it will be exercised (see paras 15-17 of the second witness statement of Stephen Grosz ("WS2");

    b. there is therefore no way for property rights holders to establish the likelihood of its exercise, nor is there a requirement to provide such holders with information on indebtedness in respect of which it might be exercised (see paras 27-30 of WS2);

c. it operates in only one of the 38 Member States of the Eurocontrol system and effectively bypasses the rules relating to enforcement against the operator in the territory in which it is based (see paras 19 and 26 of WS2);

d. it also effectively bypasses the principle that charges should be paid by the users of air navigation services, embodied in Commission Regulation 1794/2006;

e. it contains no effective procedural safeguards: once Fleet Lien is exercised, there is little that property rights holders can do to challenge the allegation that the operator is indebted for the sums claimed;

f. it imposes a *de facto* requirement on the property rights holder to pay a debt which it did not incur, the accrual of which it has no control over and which is unrelated to the that person's seized aircraft.

19. As is explained in WS2, neither the Defendants nor Eurocontrol (who are often the major creditor in cases such as this) have any published rules or guidance as to the circumstances in which they will ask UK authorities to exercise powers of Fleet Lien. They do not, for example, set a threshold amount above which the powers are to be exercised, nor do they set out the considerations to be taken into account in deciding when to request its exercise. Thus, property rights holders cannot foresee to a degree which is reasonable, the circumstances in which they might risk one of their aircraft being subject to the power. In addition, because there is no requirement to provide such holders with precise, reliable information about the extent of charges owed by an operator with whom they have a contractual relationship, they cannot be assured in advance of the amount of any financial exposure.

20. Exercise of the powers of Fleet Lien is not attended by procedural guarantees which are sufficient in the circumstances. Authorities are not obliged to – and do not – give notice to property rights holders (or operators) of an intention to exercise their powers. Once such powers are exercised, there is no requirement to furnish property rights holders with details of the charges in respect which the powers have been exercised. Thus although property rights holders are entitled to be joined in proceedings seeking an order for sale of an impounded aircraft, and they are entitled to any balance of the proceeds of sale after satisfaction of

those charges and related expenses, they are not given information which would enable them effectively to:

a. challenge compliance with one of the conditions precedent to an order for sale, namely the existence of a valid debt; or

b. establish the extent of their entitlement to the balance of the proceeds of sale after payment of such debt and related charges.

Fair balance/proportionality

21. AWG submits that the exercise of powers of Fleet Lien is disproportionate, does not strike a fair balance between the general interest and the fundamental rights of property rights holders and places an individual and excessive burden on the latter.

22. When assessing the question of fair balance or proportionality, the nature of the aim to be achieved is important. While collection of air navigation, Eurocontrol and airport charges may be a legitimate aim, it should be borne in mind that the charges in issue are "a debt incurred in the course of … business" (BAA's summary grounds, at [43]) and that the charges due to BAA, a privately owned company, are "entirely contractual" (ibid. at [8]). In this respect, therefore, they are incurred in the context of a commercial transaction in the same way as the obligations arising between the operator and the property rights holder.

23. It should also be remembered that asset-based financing has become prevalent in the industry over the last twenty-five years. The legal framework authorising Fleet Lien was enacted prior to this and, therefore, the balance to be struck was not considered in light of the legal and economic issues associated with asset-based financing. Nor was account take of Eurocontrol's standing to bring proceedings against operators that fail to pay charges, which dates from the Multilateral Agreement Relating to Route Charges, signed in Brussels on 12 February 1981.

24. For the reasons explained in WS2:

a. Unpaid air navigation and airport charges do not constitute a significant problem for the Defendants or for Eurocontrol. In this respect, the position is different from that in *Greenalls Management Ltd v Customs and Excise Commissioners* [2005] 1 WLR 1754 (to which BAA's grounds refer at [28]),

where the measures in question were justified by the fact that "large-scale evasion of excise duty on spirits is a very serious problem which may call for draconian procedures and remedies" (per Lord Walker at [38], referring to the judgment of Lawrence Collins J in *Re Anglo-German Breweries* (2002) EWHC 2458 (Ch) (see paras 18-20 of WS2);

b. They can, in any event, be effectively collected from the aircraft operator by means other than Fleet Lien, and no jurisdiction other than the United Kingdom employs a Fleet Lien to ensure payment of such charges (see para 21 of WS2);

c. Aviation operators are subject to a high degree of government regulation, making it easier to control their activities;

d. The possibility of the exercise of powers of Fleet Lien is, however, a very considerable risk for property rights holders, who may find themselves required to meet the debts of the whole fleet of an operator, over which they have no control (both because the operator is solely responsible for flight planning and because the Defendants and Eurocontrol decide when to impose Fleet Lien) (see paras 22-23 of WS2);

e. The powers of Fleet Lien may be exercised for a debt of any amount. Thus an aircraft worth millions of Euros may be impounded for a trivial debt (see para 20 of WS2);

f. There is in practice little that property rights holders can do to inform themselves reliably of the likelihood of Fleet Lien being exercised, and they are not entitled to information which would enable them accurately to determine the amount of any outstanding charges (see paras 27-30 of WS2);

g. There is little that property rights holders can do in practice to protect themselves effectively against default by the operator. Most property rights holders are financial institutions, who are merely extending credit, with aircraft as financial security for that credit. It is that very security – which is adequate in most commercial transactions – which the exercise of powers of Fleet Lien overrides (see paras 31-37 of WS2);

h. Property rights holders cannot protect themselves by insurance (see para 38 of WS2);

i. Once Fleet Lien is exercised, there is little that property rights holders can do as a legal matter effectively to challenge the allegation that the operator is indebted for the sums claimed (see paras 39-40 of WS2);

j. The Defendants and Eurocontrol (including through a collective decision-making process) have the sole control (and the property rights holder has no control) over allowing the operator to continue to increase its debt through continued use of services after non-payment; the risks arising from the Defendants' and Eurocontrol's decision to continue providing services to the operator without payment should not be borne by one property rights holder through Fleet Lien (see paras 46-48 of WS2);

k. By contrast with property rights holders, BAA/CAA/Eurocontrol are much better placed to (i) know the amount of such charges (see para 42 of WS2), (ii) take steps to minimise exposure to non-payment (see paras 43-45 of WS2) and (ii) enforce payment by means other than Fleet Lien (see paras 49-51 of WS2). They can refuse to allow the aircraft to which unpaid charges relate to take off until the charges are paid in full or until an adequate security deposit is paid. There would be no need to detain the aircraft through the creation of a lien, only to refuse the provision of airport and navigation services. BAA suggests that this approach would be "far more disruptive for the users of those aircraft, the operator and the authority itself" (summary grounds at [20]). AWG submits that this approach is the most effective and fair means of addressing the matter of unpaid air navigation and airport charges.

25. The Fleet Lien, in the context of asset-based financing, interferes with the property of property rights holders by virtue of actions of others over which they have little or no control and, moreover, relating to charges incurred by aircraft in which they have no property interest. The charges in question arise from commercial agreements between operators and enterprises providing airport and air navigation services. Those providers have "freely chosen to enter into contractual relations with the operators" (see BAA's grounds at [24]).

26. In these respects, the circumstances are different from those in *Greenalls Management Ltd v Customs and Excise Commissioners*, on which BAA relies at [28] – [30] of its summary grounds. In *Greenalls Management,* the duty payable arose out of the application of general taxation law rather than from any commercial

decision on the part of the Commissioners. There was nothing that the Commissioners could do to prevent a person from incurring excise duty and there were no effective powers of collection from the person principally liable.

27. BAA argues (summary grounds [24]) that the Claimants' argument amounts to the contention that (a) Article 1 of Protocol No. requires the airport authority to bear the risk of operator insolvency; (b) "The owner (despite having freely entered into contractual relations with the operator) should be absolved of any responsibility for the charges"; and (c) the airport authority to which the charges were owed "should be deprived of *any* means to recover them" (emphasis added).

28. As to (a) and (c), it is within the power of an airport authority to control the operator's level of indebtedness to it and it is wrong to say that it is deprived of all means of collection. As to (b) the means of protection open to the property rights holder are very limited, in particular since the Fleet Lien overrides its principal security. The fact that its rights and duties arise from a contractual relations freely entered into does not distinguish the property rights holder from the airport authority.

29. BAA (summary grounds at [31]) seeks to draw an analogy between the Fleet Lien and the liability for chancel repairs which was in issue in *Aston Cantlow and Wilmcote with Billesly Parochial Church Council v Wallbank* [2004] 1 AC 546. In *Aston Cantlow,* however, the liability was an "obligation which rests on the owner of rectorial land, not as a result any outside intervention with the possession of the land by the state but as a matter of private law" (Lord Nicholls at [71]). That is not the position here.

D. REGULATION 1794/2006

30. AWG refers to Commission Regulation 1794/2006 of 6 December 2006 laying down a common charging scheme for air navigation services (**attached**), which has applied since 1 January 2007 (Article 18(2)). The rules for a common charging scheme were developed with the assistance of Eurocontrol (Recital 2). AWG draws attention to the particular features of the common charging scheme set out in the following paragraphs.

31. The scheme is intended to "contribute to the achievement of greater transparency with respect to the determination, imposition and enforcement of charges to airspace users" (Recital 3). The Regulation repeats the emphasis on transparency at various points: see, for example, Recitals 10 and 16, Articles 3(2), 7(1), 8, 12(1) and 15, and Annexes II and III.

32. The Regulation embodies the principle that the user pays for air navigation services. Thus, Recital 3 provides that:

> The system should also encourage the safe, efficient and effective provision of air navigation services to the users of air navigation services that finance the system and stimulate integrated service provision. (underlining added)

33. Article 2(a) provides that:

> 'User of air navigation services' means the operator of the aircraft at the time when the flight was performed or, if the identity of the operator is not known, the owner of the aircraft, unless he proves that another person was the operator at that time".

Thus, the user of air navigation services, on whom the burden of payment is intended to fall, is normally the operator of the aircraft. It is only the owner if the identity of the operator is not known, in which case the owner is regarded as the operator unless he proves that another person was the operator. It is noteworthy that this is the only reference to the owner in the entire Regulation.

34. The Regulation also refers frequently to airspace users, and while this expression is not defined, Article 2(b) defines 'airspace users' representative' as:

> "any legal person or entity representing the interests of one or several categories of users of air navigation services".

From this it may be deduced that the expression "airspace users" has the same meaning as "users of air navigation services".

35. The principle of user pays finds further expression in Recital 15, which provides that:

> "It is important to reinforce the legal means necessary to ensure prompt and full payment of air navigation charges by users of air navigation services."

is embodied in Article 3, which expressly refers to the imposition of charges on users of air navigation services. Article 14(2) also provides that:

> Users of air navigation services shall promptly and fully pay all air navigation charges

36. Because it is users, rather than property rights holders, who bear the obligation of meeting charges for air navigation services, the Regulation provides that obligations of consultation are owed to airspace users' representatives: see, for example, Recital 16, Articles 1(6), 3(5), 4(2), 4(3) and 15(1).

37. Similarly, the obligations of transparency and provision of information are owed to airspace users and their representatives: see, for example, Recital 10 and Articles 8, 12(4) and 15(2).

38. The Regulation provides that charges may be used to provide funding "to assist specific categories of airspace users and/or air navigation service providers in order to improve collective air navigation infrastructures, the provision of air navigation services and the use of airspace in accordance with Community law". Property rights holders who are not airspace users are not designated as potential beneficiaries of such funding.

39. Article 14 deals with the collection of charges. It provides:

> "1. Member States may collect charges through a single charge per flight.
>
> 2. Users of air navigation services shall promptly and fully pay all air navigation charges.
>
> 3. Member States shall ensure that effective enforcement measures are applied. These measures may include the denial of air services, detention of aircraft or other enforcement measures in accordance with applicable law."

40. This provision, taken in context and in the light of Recital 15 (quoted in paragraph 35 above) appears to indicate that the enforcement contemplated is of the operator's obligation to pay promptly and fully.

41. Finally, mention has been made, in paragraph 9 above, of Article 16, which requires that decisions taken by Member States pursuant to the Regulation are properly reasoned and subject to effective review and appeal procedures.

42. This would include decisions made in the context of measures under Article 14 for the enforcement of the obligation of users of air navigation services to pay all air navigation charges promptly and fully.

26 February 2009 **Stephen Grosz, Bindmans LLP**

Solicitors for the Aviation Working Group

Stephen Grosz
2nd Witness Statement
Intervener
Exhibit SG1
26 Feb 09

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WITNESS STATEMENT

I, Stephen Grosz, partner of Bindmans LLP 275 Gray's Inn Road London, say as follows:-

FLEET LIEN AND PROPERTY RIGHTS

1. I represent the Aviation Working Group ("AWG") in these judicial review proceedings. I am authorised to make this statement in support of the submissions filed on behalf of AWG. I exhibit a bundle of documents marked

SG1. The contents of this witness statement are based on information given to me by the representatives of AWG.

2. The purpose of this witness statement is to set out, on behalf of AWG, the experience of the aviation industry (represented by AWG's members, listed in paragraph 5 below) in relation to the Fleet Lien and to update AWG's 2004 position paper, 'Eurocontrol and Air Navigation Charges' ("the Position Paper"), which the Claimants exhibit at Volume 1, Tab 4, page 109.

AWG

History of AWG

3. AWG, a not for profit entity, was formed in 1994 at the request of the International Institute for the Unification of Private Law (UNIDROIT), an intergovernmental organisation made up of 63 member states whose purpose is the modernising, harmonising and co-ordinating of private and in particular commercial law as between States and groups of States.

4. AWG's objects are to contribute to the development and acceptance of polices, laws, regulations and rules that facilitate advanced international aviation financing and leasing, and to address inefficiencies that constrain these transactions. AWG has been active in a wide range of law reform developments, including the development of treaties and other instruments on leasing, secured financing, insolvency and on liability to third parties in connection with the use of aircraft. AWG regularly works with governments and international organisations, including the International Civil Aviation Organization (the United Nations body with competence on international civil aviation).

Membership

5. AWG is co-chaired by Airbus and Boeing, and its members comprise the major aviation manufacturers and a number of leading financial institutions, including most of the world's largest leasing companies. AWG's members and their affiliates manufacture substantially all modern commercial aircraft and engines, and lease and finance a substantial majority of such new equipment. The following are members of AWG: Airbus; Boeing; AerCap; Aircastle; ATR; Aviation Capital Group; AWAS; BNP Paribas; BOC Aviation; Bombardier Aerospace; Calyon Airfinance; Citibank; Dubai Aerospace Enterprise Ltd; DVB;

Embraer; General Electric; GE Capital Aviation Services; International Lease Finance Corporation; JPMorgan; KfW IPEX-Bank; Mitsubishi Corporation; Morgan Stanley; RBS Aerospace; Rolls-Royce; SAFRAN and United Technologies Corporation (Pratt & Whitney Division).

AWG's work relating to air navigation charges and related liens

6. AWG has been following legal developments relating to aircraft liens and detention for over 10 years, and it published its Position Paper (referred to in paragraph 2 above) in 2004. This paper is available on AWG's website and is accompanied by the following text:

> Rules in favour of air navigation authorities that have the effect of holding owners/lessors and financiers responsible for unpaid charges owed by the operator, for example, those granting such entities super priority rights against aircraft, are inappropriate, inefficient, and against general principles.
>
> AWG is committed to working with these authorities to find sensible and practical solutions that address our concerns, while ensuring effective collection of amounts needed to finance air navigation systems.

7. AWG has had an active sub-group specialising in aviation navigation charges and related liens for over 5 years. The sub-group has had continuous, if informal, contact with Eurocontrol and, most recently, addressed its Study Group for Route Charges in Brussels on 8 October 2008.

8. AWG has been, and remains, in discussions with Eurocontrol on a range of matters relating to its route charges and, in particular, their enforcement. It has proposed various means designed to provide more transparency to the collection and enforcement processes, specifically as they relate to third parties. AWG has also consulted with Eurocontrol, the EU and its Member States, and has submitted formal comments on drafts of Commission Regulation (EC) No 1794/2006 laying down a common charging scheme for air navigation services.

9. AWG, and a number of its members, have also been approached by UK government officials on issues relevant to the Fleet Lien, such as the arrangements for repatriating passengers following the insolvency of an airline. AWG also works with UK and other official export credit agencies on the legal framework applicable to government-supported international financing transactions and is therefore familiar with the relationship between financing practice and regulation.

Background - asset based financing and leasing arrangements

10. Among the largest costs to the aviation industry are those associated with the acquisition and use of modern aircraft and aircraft engines, which require large amounts of capital. Therefore, because of the relative strength of aircraft values, such costs are usually facilitated by asset-based financing arrangements which, to a large extent, include the leasing of aircraft from owners to operators. Leased aircraft currently represent approximately one-third of the world's fleet of modern commercial aircraft and if aircraft subject to other forms of asset-based financing are included, that fraction is significantly higher.

11. Furthermore, asset-based financing plays a fundamental role in the development of the aviation industry by, amongst other things:

    a. facilitating the acquisition and use of modern, fuel-efficient and environmentally friendly aircraft;

    b. allowing airlines to respond flexibly to economic trends and to access new markets; and

    c. providing essential start-up support to low-cost carriers, thus increasing competition in the aviation industry.

12. From the above it can be seen that air transport depends to a significant extent on a system in which the operator of the aircraft ("operator") is an entity different from the owner or mortgagee of the aircraft ("property rights holder"). This system, centred on asset-based financing, places full control of and responsibility for aircraft operations on the operator, with property rights holders providing financing facilities. Most property rights holders are financial institutions, which are merely extending credit, with aircraft as financial security for that credit.

13. I am informed that in some legal contexts the property rights holders are relieved entirely of legal responsibility for operational matters. In most legal systems, the operators, rather than the property rights holders, are responsible for injury to passengers and third parties and for damage to property caused by aircraft operations. The laws of the United Kingdom follow this approach, as set out in section 76(4) of the Civil Aviation Act 1982 [Tab 1, page 1 of SG1]. For the most recent international example see Article 13 of Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties which states:

> Neither the owner, lessor or financier retaining title or holding security of an aircraft, not being an operator, nor their servants or agents, shall be liable for damages under this Convention or the law of any State Party.

This draft Convention will be the subject of a Diplomatic Conference under the auspices of the International Civil Aviation Organisation, to be held in April 2009. I also refer to paragraphs 30-42 of AWG's submissions, which analyse the position under Commission Regulation (EC) No 1794/2006.

14. Asset-based financing has become prevalent in the industry over the last twenty-five years. The legal framework authorising Fleet Lien was enacted prior to this and, therefore, was not considered in light of the legal and economic issues associated with asset-based financing. That framework, created by the Civil Aviation (Eurocontrol) Act 1962, has since been carried forward into subsequent legislation without reassessment in light of materially changed circumstances. I deal with this matter further in paragraph 26 below.

AWG's evidence in relation to the Fleet Lien and Property Rights

Foreseeability of operation of Fleet Lien

15. There are no published rules as to the circumstances in which the powers of Fleet Lien will be exercised. Furthermore, there are no criteria or guidelines applicable to its exercise and therefore there is no basis to conclude that similar cases are addressed similarly.

16. Where Eurocontrol charges are concerned, the decisions on where and when to take enforcement action are made by its enlarged Committee for Route Charges, whose State representatives may take into account non-financial matters [Volume 1, Tab 4, page 93 of the Claimants' evidence]. There may be political factors in decision-making by the Committee that cannot be assessed or anticipated by those potentially adversely affected by enforcement actions.

17. Moreover, the Fleet Lien can be exercised for any amount of debt, however trivial, there being no minimum threshold. Since it can be exercised only in the United Kingdom (see below regarding The Republic of Ireland), its incidence is dependent entirely on the chance of an aircraft landing in a UK airport when the debts are being pursued, regardless of where the debts arose.

Unpaid airport and navigation charges are not a significant problem

18. It is clear that unpaid air navigation and airport charges do not constitute a significant problem for the Defendants or for Eurocontrol, since there is no significant default or non-collection. The Position Paper reported that Eurocontrol collected 98.63% of its charges in 2002 and 99.3% in 2003, without recourse to the Fleet Lien. Furthermore, Eurocontrol's Annual Report on the Operation of the Route Charges System for 2007 [Volume 1, Tab 4, page 175 of the Claimants' evidence] recorded that Eurocontrol's recovery rate for 2006 was 99.76%, and notes that "[t]his is again the highest rate of recovery achieved after one year…after the last year's record breaking figure of 99.71%." AWG has not seen equivalent data for the collection of airport charges.

19. AWG has informed me that the Fleet Lien is exercised rarely. This suggests that collection of unpaid charges is not a common problem, as the Fleet Lien is not routinely exercised to enforce collection. Despite this, AWG has also noted a high incidence of enforcement of Eurocontrol charges in the United Kingdom and, significantly, the majority of these debts were incurred outside of the United Kingdom. The exact figures are difficult to gauge, as Eurocontrol is not required to disclose the numbers of aircraft involved and the jurisdictions in which they are detained [Volume 1, Tab 4, page 93 of the Claimants' evidence]. This is of great concern to the aviation industry as such action effectively undermines one of the fundamental aims of the 1981 Multilateral Agreement Relating to Route Charges ("the 1981 Agreement") [Volume 1, Tab 4, page 119, Para 5.4 of the Claimants' evidence] namely the institution of "common policies" for the collection of navigation charges across Europe. In addition, disproportionate enforcement (and threatened enforcement) of charges in the United Kingdom of Eurocontrol debts effectively bypasses Article 13 of the 1981 Agreement, which requires that recovery proceedings be instituted where the debtor's business is registered [Volume 1, Tab 4, page 59-8 of the Claimants' evidence]. Given the lack of transparency noted above, there is a widespread perception that the effectiveness of Fleet Lien has fuelled the development of a quasi-political form of forum shopping.

20. My attention has been drawn to two cases in 2005 where Eurocontrol threatened two Spanish airlines (Spanair and Iberworld) with detention of aircraft in the

United Kingdom in relation to Eurocontrol charges incurred by a bankrupt Italian operator (Volare). The charges were incurred on wet lease flights made between Spain and Italy, thus having no connection with the United Kingdom. One of those claims was for only €2,000.

21. Airport and navigation charges can, in any event, be effectively collected from an aircraft operator by means other than Fleet Lien, and they are so collected in jurisdictions other than the United Kingdom as well as by the majority of UK airports which reportedly do not have the Fleet Lien power. The figures cited in paragraph 18 above also highlight that aviation authorities across Europe are successfully collecting Eurocontrol charges without recourse to the Fleet Lien and, consequently, are utilising other methods of enforcement, such as not allowing an aircraft to take off until a security has been given or the charges have been met in full. Further methods of enforcement are considered below.

Risk to property rights holders

22. By contrast with the Defendants and Eurocontrol, the exercise of Fleet Lien presents a considerable risk for property rights holders, who can find themselves required to meet the debts of the whole fleet of an operator, over which they have no control (because the operator is solely responsible for flight planning and the because the Defendants and Eurocontrol are responsible for the imposition and collection of charges and decide when to exercise powers of Fleet Lien).

23. If the Fleet Lien is exercised it has the potential to wipe out large amounts of equity in the case of property rights holders or principal in the case of mortgagees. By way of example, if the Fleet Lien is exercised over an aircraft leased to an insolvent operator, the owner can be left with a Eurocontrol bill (relating to debts accumulated by an entire fleet and in favour of navigation services to the 38 Eurocontrol Member States) equal to the full value of the detained aircraft. However, despite the seriousness of the risk, the Fleet Lien remains a non-registrable debt, making it impossible for property rights holders to establish the extent of potential third party rights in their aircraft. Moreover, this non-registrable debt takes priority over other forms of security.

24. Furthermore, the risk to property rights holders can fundamentally undermine the financial structure under which the air transport industry is financed.

25. In aviation financing the aircraft acts as security for the financiers, thus reducing the cost of credit to the aircraft owners or financiers who are, therefore, in a position to offer affordable commercial terms to operators, who are the typical customer. For this system to work, owners and financiers must have a reasonable degree of commercial certainty regarding the incidence and extent of third party interests in their aircraft as the provision of capital is priced to reflect standard asset-based financing risks. However, these arrangements are not designed to include operational risks, such as the Fleet Lien, which can discourage financiers: the Fleet Lien creates a significant financial risk which is not susceptible to an *ex ante* calculation or risk mitigation through insurance.

26. When the original Fleet Lien legislation – the Civil Aviation (Eurocontrol) Act 1962 – was passed, the effects of the Fleet Lien power on the aviation industry were not really considered or understood for the following reasons: first, because the Fleet Lien power lacked a common law pedigree [Volume 1, Tab 4, pages 79 to 89 of the Claimants' evidence]; and, secondly, because the structure of the aviation leasing and financing industry was not, at that time, underpinned by asset-based financing. In addition, Eurocontrol's initial role was more limited than it is today as it did not have any power to collect charges. In 1971 the regional route charges system was agreed which involved a single charge per flight in the airspace of the United Kingdom and the other 10 member states. At that stage the amounts in question owed by an operator would have been far less. However, Eurocontrol has since expanded from 11 to 38 states and is encouraging further enlargement to include all 42 members of the European Civil Aviation Conference (ECAC). With that expansion and the ever-increasing importance of asset-based financing in the sector, the effects are now significant, particularly where the United Kingdom's enforcement measures have gone further than Eurocontrol's "common policy" in respect of charges (see para 19 above). Under the Multilateral Agreement Relating to Route Charges, signed in Brussels on 12 February 1981, member states agreed that each state would give Eurocontrol the power to sue an operator, in the operator's country of incorporation or main place of business, for the full sum of unpaid Eurocontrol charges owed by the operator. There is no agreement or requirement for member states to (i) detain or sell aircraft to enforce payment of the charge (ii) seek

payment from non-operators or (iii) prefer Eurocontrol charges over other debts or interests.

Lack of reliable information and certainty

27. There is, in practice, little that property rights holders can do to ensure that they are consistently and reliably informed of the likelihood of Fleet Lien being exercised, and they are not entitled to information which would enable them accurately to determine the amount of any outstanding charges from either the Defendants or Eurocontrol.

28. Eurocontrol has recently taken steps to make information relating to outstanding debts (but not enforcement guidelines or criteria) available to some property rights holders, although only with the operator's consent (which can be revoked at any time). However, such information and processes have the following limitations:

    a. Eurocontrol is not subject to a regulatory framework under which it is required to provide property rights holders with information on outstanding charges incurred by their aircraft and by other aircraft in the operator's fleet. Consequently, any decision by Eurocontrol to release information to owners is made on an ad hoc basis;

    b. As Eurocontrol covers 38 states, the amount of charges can rapidly increase in a very short period of time without the knowledge of the property rights holder. [See volume 2, Tab 6, page 446 of the Claimants' Evidence; and, for a similar situation in respect of NATS charges see ibid. at page 449];

    c. There is no uniform requirement for the 38 Eurocontrol states to provide information relating to outstanding charges, making any information patchy and inherently unreliable;

    d. In any event the information provided by Eurocontrol is generally a fleet-wide figure for charges, which is not broken down on an aircraft by aircraft basis. Therefore, property rights holders are unable to assess what charges relate to their aircraft;

    e. Any monitoring of charges by the lessor is of little practical value, since the billing systems of Eurocontrol (and BAA and Nats), and their credit terms, may permit the airline to accumulate substantial amounts of unpaid charges.

29. In summary the information is unreliable and can quickly become out of date. Furthermore, it is dependent on the permission of the operator and Eurocontrol whose decision-making process, with regard to the release of information, appears to be entirely arbitrary.

30. AWG has been in talks with Eurocontrol about the setting up of an online service through which property rights holders can search for unpaid charges against their aircraft or the operator's fleet. However, this initiative has been resisted on the grounds that the information is confidential and, in any event, unavailable because of the lack of reliable, current data from some Eurocontrol members.

Lack of protection against risk of Fleet Lien

31. There is little that property rights holders can do in practice to protect themselves effectively against the consequences of exercise of the Fleet Lien following default by the operator. There are three possible methods of protection highlighted in BAA's response to the letter before claim and at paragraphs 26 and 32 of their summary grounds of opposition to the claim, i.e. the taking of a security deposit, the requirement of a contractual indemnity and a clause precluding the operator from landing the aircraft in the United Kingdom.

32. As to the taking of a security deposit: In an operating lease, it is common for the lessor to require a security deposit. This is designed to protect the lessor against a wide variety of losses and expenses arising out of the lessee's default, including unpaid rent, defective condition of the aircraft on redelivery or repossession, and other expenses and costs associated with the lessee's default or insolvency. Such a deposit is commonly equal to two or three months' rental, which is usually the maximum which is commercially possible. This would be wholly inadequate to cover the magnitude of the potential Fleet Lien charges.

33. In order to calculate a deposit to cover unpaid charges, <u>each</u> property rights holder would first have to ascertain the number of aircraft in the operator's fleet and then seek to establish the level of unpaid charges, or likely unpaid charges, across the whole fleet. Since aircraft leases and mortgages do not dictate the routes on which the operator can fly (either concerning the subject aircraft or other aircraft in the fleet) except in the extreme case of war risk, any aircraft in the fleet could be the subject of an exercise of powers of Fleet Lien against an aircraft

which landed in the United Kingdom and the property rights holder would have no method of monitoring this with any certainty.

34. By way of example, if an operator had a fleet of 30 aircraft and each incurred charges of $300,000, each property rights holder would have to require the operator to pay a security deposit of $9,000,000 in order to protect itself adequately against the Fleet Lien. Such an approach, which is suggested by the Defendants as a means of obtaining "sufficient security to cover commercial risk", would require total security deposits of $270,000,000, assuming there were no common property rights holders across more than one aircraft, in order to protect its property rights [Volume 1, Tab 4, page 96 of the Claimants' evidence]. This would impose an intolerable burden on the operator and is neither proportionate nor commercially feasible.

35. In sharp contrast, BAA and CAA (including on behalf of Eurocontrol) could require a single deposit on a fleet-wide basis to cover the total amount owed to them which could be increased or decreased as necessary over time. As discussed below, the difference is literally one between adding the maximum exposure or some reasonable fraction thereof (where BAA, CAA and Eurocontrol require security in respect of an individual operator) and multiplying it (where multiple property rights holders require, in respect of each aircraft, security for likely charges incurred by the entire fleet).

36. As to a contractual indemnity: All aircraft leases contain a broad indemnity by the lessee airline for all losses and expenses suffered or incurred by the property rights holder as a result of the lessee's operation of the aircraft. However, this indemnity is of little value where the airline has become insolvent. Insolvency is precisely the circumstance in which the Fleet Lien would usually be exercised, and an indemnity would merely create an unsecured claim for the property rights holder along with the airline's other creditors. A fleet-wide lien, potentially applicable to charges relating to 38 states, is simply outside of the range of commercial risks that a property rights holder can be sensibly asked to take and manage.

37. As to a contractual prohibition on landing an aircraft in the United Kingdom: such a restriction is commercially and practically impossible: in practice the only possible contractual restriction imposed on airlines is in respect of countries

where landing is prohibited by law (for example by international sanctions) or which are outside insurance cover (for example war zones). Given the need for flexibility within an airline fleet – for example so that aircraft can be diverted when another aircraft is grounded for technical reasons – it is not possible to impose such limitations.

Insurance

38. I am informed that property rights holders cannot protect themselves with insurance as, quite simply, there is no such insurance available. This is because the risk of Fleet Lien is so uncertain and the potential financial exposure so serious that, statistically, it is an incalculable risk, which insurers are unwilling to cover.

Lack of procedural protection

39. Property rights holders have no right to be given notice of an intention to exercise powers of Fleet Lien and I am informed that such notice is not routinely given.

40. Once the Fleet Lien is exercised, there is little that property rights holders can do effectively to challenge the allegation that the operator is indebted for the sums claimed. This is because the property rights holder has no automatic right to the information required to mount such a challenge. Although the property rights holder is entitled to be joined to any application for permission to sell an aircraft **(**under section 88(4)(b) of the Civil Aviation Act 1982 for airport charges and regulation 6(1) of the Civil Aviation (Chargeable Air Services) (Detention and Sale of Aircraft) Regulations 2001 and regulation 7(1) of the Civil Aviation (Chargeable Air Services) (Detention and Sale of Aircraft for Eurocontrol) Regulations 2001 for navigation charges) this right to joinder does not entitle them to detailed information which would enable them to verify that the conditions precedent to an order for sale have been fulfilled, or to establish the amount of their entitlement to the net proceeds after payment of charges and expenses.

BAA, CAA and Eurocontrol are better placed to enforce payment of charges

41. By contrast with the position of the property rights holder, BAA, CAA and Eurocontrol are far better placed to (i) know the amount of such charges, (ii) take

steps to minimise exposure to non-payment and (iii) enforce payment by other means other than Fleet Lien.

(i) Knowledge of the amount of charges

42. The operator, and not the property rights holder, enters into a contractual relationship with BAA, CAA and Eurocontrol for their services and, consequently, has operational and regulatory responsibility relating to air navigation and airport charges. The property rights holder is not a party to these contracts and is not in a position to monitor the aircraft's (or the fleet's) activity and the amount of charges being levied against it. The nature of these contractual relationships reflects the commercial reality of the airline financing industry, which I have explained above.

(ii) BAA and CAA (including for amounts that may be owed to Eurocontrol) can require proportionate security geared to the amounts owed

43. Unlike the property rights holders, BAA and CAA (including for amounts that may be owed to Eurocontrol) can require payment of a security deposit for the aircraft in question before the flight takes off.

44. BAA, CAA and Eurocontrol are also in a position to monitor charges on an aircraft by aircraft basis, which would completely obviate the need for the Fleet Lien. Alternatively, and unlike individual property rights holders, the BAA and CAA can require aggregate security – on a fleet-wide basis – calculated (without multiplicative accounting) to the maximum exposure of the operator or some reasonable fraction thereof, taking into account the payment history (which only they have) and the credit rating of that operator. There is no legal or practical impediment to this approach and it is within the power of BAA and CAA (including on behalf of Eurocontrol) to provide an aircraft-specific estimate of charges upon which the security deposit could be based.

45. By way of illustration the conditions of use for Luton Airport (a non-BAA Airport) make provision for credit facilities which [Tab 2, page 14, para 6.1 of SG1]:

> require payment of a deposit which is equal to twice the charges anticipated to be payable over a period equal to the credit period…..Should payment of charges not be made within the credit period, or the volume of charges prove to be higher than anticipated, the Company will require an additional amount of deposit to be paid, or reserves the right to withdraw credit facilities with immediate effect.

(iii) BAA, CAA and Eurocontrol are in a position to minimise the accumulation of unpaid charges

46. BAA, CAA and Eurocontrol could provide a more prompt and transparent billing and collection system, thereby operating a tighter credit control. Such a system could be linked to security deposits, discussed above, or discontinuation of services, discussed below. Such a system and its consequences should be transparent and applicable across all Eurocontrol states.

47. In fact, BAA already has the power to require prompt payment of debts. Paragraph 2.3.1 of BAA's Conditions of Use for its Scottish airports provides that charges [Volume 1, Tab 4, page 245 of the Claimants' Evidence]:

> become due on the day they were incurred and shall be payable to the airport company on demand and in any event before the aircraft departs from the airport unless otherwise agreed by the airport company (which agreement may be withdrawn at any time at the discretion of the airport company) or unless otherwise provided in the terms for payment included in the invoice for such charges.

The same clause is to be found in BAA's Conditions of Use relating to London Heathrow and Gatwick Airports.

48. BAA can also require new operators to lodge a deposit equivalent to 3 months' charges. This is reviewed after 12 months, whereupon it can be refunded, presumably if the payment record is satisfactory. These arrangements, if put in place, permit the bonding by an operator of its obligation, thus eliminating the perceived need to look to property rights holders for the debts of others.

(iv) Enforcing payment by means other than the Fleet Lien

49. It is the regulatory authorities, and not the property rights holders, who have responsibility for policing the payment of airport and navigation charges.

50. Where charges are unpaid, the aviation authorities can refuse to allow the aircraft to which unpaid charges relate to take off until the charges are paid in full or until an adequate security deposit was paid. There would be no need to detain the aircraft through the creation of a lien, only to refuse the provision of airport and navigation services. Furthermore, there would be no requirement to pay the charges incurred by aircraft in which a property rights holder has no interest. Consequently, the 'user' or operator is required to pay for charges it has incurred and, in the case of default, the financial implications for the property rights

holder could be limited to its own aircraft. I understand that this practice is used successfully in Germany [for examples of enforcement measures in other jurisdictions see Volume 1, Tab 4, page 120 of the Claimants' evidence] and is the norm in many, if not most, European States.

51. By way of example, Luton Airport's conditions of use provide that "Where credit facilities have not been granted in advance of use of the airport, operators must arrange payment of all fees prior to departure" [Tab 2, page 9 of AWG's evidence]. Similarly Newquay Airport's conditions of use provide that if they have "not agreed credit facilities with the Operator or the credit facilities have been withdrawn payment shall be due on demand and, in any event before the Aircraft in relation to which the Charges have been incurred departs from the Airport" [Tab 3, page 8, para 7.2 of SG1].

Ireland

52. The Claimants have referred to the legal position in the Republic of Ireland (unlike others in Europe) as being similar to that of the United Kingdom regarding Fleet Lien. In fact it differs from that in the United Kingdom.

53. Until 1998 the position in relation to the Fleet Lien in Ireland was the same as in the United Kingdom. However, as the Air Navigation and Transport (Amendment) Act 1998 explicitly excluded Eurocontrol charges from the definition of "airport charges", an aircraft cannot be detained in Ireland for unpaid Eurocontrol charges, whether on a fleet or individual aircraft basis. Only if the aircraft has to be sold to pay the airport charges, then the full amount of Eurocontrol charges owed by the operator is afforded priority from the remaining sale proceeds. Thus, unpaid Eurocontrol charges cannot trigger the exercise of a detention right in the Republic of Ireland and Eurocontrol only obtains priority in sale proceeds to the extent the airport charges have to be settled by a forced sale.

54. In connection with its ratification of the Protocol consolidating the Eurocontrol International Convention relating to Co-operation for the Safety of Air Navigation (adopted in Brussels in 1997 but not yet in force), Ireland recently carried out a detailed review and consulted the Irish Aviation Authority, Dublin Airport Authority, Eurocontrol itself and the Attorney General's office.

Furthermore, the Protocol was debated in both houses of the Irish Parliament in main sessions and in the Select Committee stages. During these debates, issues similar to those being considered in this case were raised, including the need for effective collection of Eurocontrol charges, recognition that, given Eurocontrol's high collection rates, the machinery available to collect across Europe was working well without Eurocontrol having recourse to a detention right and the difficulties caused when financiers could ultimately become liable for charges incurred by an operator's entire fleet. In particular it was noted that Eurocontrol has the power to bring proceedings against operators that fail to pay charges and, consequently, that the Fleet Lien is not necessary [Tab 4, page 1-2 of SG1].

55. Accordingly, Ireland ratified the Protocol with the following reservation [Tab 5, pages 1-2 of SG1]:

> The ratification by Ireland of the Revised Eurocontrol Convention is subject to a declaration that the provisions in Annex IV of the aforesaid Convention providing for a lien on the aircraft and for joint and several liability shall not apply.

I believe that the contents of this statement are true.

Signed… ……

Stephen Grosz

Dated……26 February 2009……..