AIR NAVIGATION AND AIRPORT CHARGES

POSITION PAPER OF
AVIATION WORKING GROUP

October 2011

AIR NAVIGATION AND AIRPORT CHARGES

POSITION PAPER OF
AVIATION WORKING GROUP

A. INTRODUCTION

1. Rules that have the effect of allowing air navigation and airport authorities to hold aircraft owners/lessors and financiers responsible for unpaid charges owed by the operator, for example, those granting such entities super priority or detention rights against aircraft, are inefficient and against general principles. AWG is committed to working with these authorities and other bodies to find alternative approaches that address our concerns, while ensuring effective collection of amounts needed to finance air navigation and airport systems.

2. Certain air navigation and airport authorities have broad priority and detention rights against an aircraft for debts owing to that entity, including debts arising through use of other aircraft (the latter, a so-called "Fleet Lien**"**). The effect of such priority and detention rights is to penalise owners/lessors and financiers who neither contributed to the incurred debt nor have the practical ability to prevent that debt from accumulating. AWG believes that owners/lessors and financiers - innocent parties - should not simply by virtue of having property rights in aircraft be made liable for navigation and airport charges incurred by operators.

B. EUROCONTROL / UK AIRPORT AUTHORITIES

3. It is AWG's position that 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 (an "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 by way of a Fleet Lien is incompatible 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 position paper AWG will review (a) the requirements of both the Article and the legal principle identified above; and (b) the question whether the law relating to Fleet Liens complies with these requirements.

(i) 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 also 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 28ff 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.

(ii) Compatibility of Fleet Lien with Article 1 of Protocol No. 1

16. AWG accepts that the efficient collection of air navigation, Eurocontrol and airport charges is a legitimate aim in the general interest. However, AWG believes that the provisions relating to Fleet Liens:

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 a 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. Fleet Liens are arbitrary in their 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;

b. there is therefore no way for property rights holders to establish the likelihood of their exercise, nor is there a requirement to provide such holders with information on indebtedness in respect of which it might be exercised;

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;

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 a 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; and

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. Neither the British airports 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 the amount of any financial exposure.

20. Exercise of the powers of the 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" and that the charges due to BAA, a privately owned company, are "entirely contractual." In this respect, therefore, they are incurred in the context of a commercial operation on both sides 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 25 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. a. Unpaid air navigation and airport charges do not constitute a significant problem for the British airports 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 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);

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 with sale rights to ensure payment of such charges;

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 British airports and Eurocontrol decide when to impose a Fleet Lien);

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;

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;

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;

h. Property rights holders cannot protect themselves by insurance;

i. Once a 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;

j. The British airports 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 British airports' and Eurocontrol's decision to continue providing services to the operator without payment should not be borne by one property rights holder through a Fleet Lien;

k. By contrast with property rights holders, the British airports and Eurocontrol are much better placed to (i) know the amount of such charges, (ii) take steps to minimise exposure to non-payment and (iii) enforce payment by means other than Fleet Lien. 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 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. The British airports have suggested that this approach would be "far more disruptive for the users of those aircraft, the operator and the authority itself." 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."

26. The British airports have argued that the AWG position amounts to the contention that (a) Article 1 of Protocol No. 1 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).

27. 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.

(iii) ***Regulation 1794/2006***

28. Commission *Regulation 1794/2006* of 6 December 2006 lays down a common charging scheme for air navigation services, 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.

29. 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;

30. 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 <u>to the users of air navigation services that finance the system</u> and stimulate integrated service provision (underlining added).

31. 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.

32. 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".

33. 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

34. 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).

35. 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).

36. 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.

37. 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.

38. This provision, taken in context and in the light of Recital 15 (quoted in paragraph 33 above) appears to indicate that the enforcement contemplated is of the operator's obligation to pay promptly and fully.

39. 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.

40. 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.

C. NAV CANADA / CANADIAN AIRPORT AUTHORITIES:

41. It is AWG's position that an asserted right to seize and detain (Canadian air authorities do not have the power to sell) an aircraft owned by, or mortgaged to, one party for debts owed by an operator in respect of the air navigation and airport charges to Canadian air authorities relating to all aircraft operated by that operator by way of a Fleet Lien, as recently interpreted by the Canadian courts, is inconsistent with principles of statutory interpretation and public policy in Canada. In particular, statutes which interfere with property rights are to be subject to due process and strict, or restrictive, interpretation by Canadian courts.

(i) The Principle of Strict Interpretation:

42. As Pierre-André Côté writes in *The Interpretation of Legislation in Canada* 3ed. (Scarborough: Thomson Canada Limited, 2000. at 267.) the object of the principle of "strict interpretation" is not necessarily to interpret statutory provisions in the most limited way possible. Rather, strict interpretation requires that statutes cannot be extended to situations not explicitly provided for in the language of the statute. The presumption is, if the legislature intended to interfere with the rights and freedoms of a subject, it would have done so in explicit and precise terms.

43. Section 12 of the *Interpretation Act*, R.S.C. 1985 c. I-21 appears to preclude the application of strict interpretation by requiring that every statute "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

44. However, Chief Justice Cartwright (as he then was) preserved strict interpretation as a check against expansive government power in *R. v. Bélanger* [1970] S.C.R. No.

567 by casting it into a subsidiary, albeit secure, role. At p. 573, Cartwright C.J. concludes

> Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which had failed to explain itself.

45. The accepted meaning of the nature of the ambiguity or reasonable doubt Cartwright C.J. referred to is found in Justice Cory's (as he then was) reasons in *R. v. Hasselwander* [1993] S.C.J. No. 57. At para. 31 Cory J. explains

> the rule of strict construction becomes applicable only when attempts at the neutral interpretation suggested by s. 12 of the *Interpretation Act* still leave reasonable doubt as to the meaning or scope of text of the statute... the real intention of the legislature must be sought, and the meaning compatible with its goals applied *(emphasis added)*.

(ii) Ambiguity of provisions creating a Fleet Lien in Canada

46. The wording of Canada's various aviation regulations has resulted in a number of ambiguities and questions of interpretation. These ambiguities have led to significant, lengthy and costly litigation. The *Canada 3000 Inc. (re)* [2006] S.C.J. No. 24 ("*Canada 3000*") cases, involving an Ontario airline (Canada 3000) and a Quebec airline (Inter-Canadien), went to the Supreme Court of Canada (SCC), which partially overturned the Ontario Court of Appeal. The air authorities tried to appeal the Alberta Court of Appeal decision in *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 to the SCC (leave to appeal denied). The decision in *Skyservice Airlines Inc. (re)* [2011] O.J. No. 2077 ("*Skyservice*") has been appealed to the Ontario Court of Appeal by several lessors.

47. It is AWG's position that any provisions depriving innocent third party financiers of their property rights should be very narrowly constructed and that certainty as to the application of seizure rights must be returned to the industry.

(iii): Application of the Principle of Strict Interpretation to Fleet Liens in Canada:

48. AWG accepts that effective collection of airport charges and navigation fees is necessary to support the useful services provided by airport and navigation authorities. However, AWG believes that the provisions relating to the Canadian Fleet Lien specifically:

a. are ambiguous and should be subject to strict interpretation; and

b. should not be interpreted liberally as to do so would be inconsistent with the underlying policy of the applicable legislation.

49. There are suggestions in the *Skyservice* lower court decision that termination, or even expiry, of a lease that terminates an airline's right to be an operator of an aircraft is not good enough to render that aircraft seizure-proof, but that a full repossession of that aircraft would be necessary. This goes even further than the harsh law as applied in the U.K. and can render an aircraft that is no longer leased to an airline subject to a Fleet Lien for all debts incurred to the Canadian air authorities by the airline. It is AWG's position that this cannot be good law. Even in the U.K., as confirmed in the *Global Knafaim Leasing Limited & CGTSN Limited v. The Civil Aviation Authority BAA Limited* [2010] EWHC 1348 (Admin) ("*GKL*") decision at para. 14,

> if a lease has been terminated, the lessee will have ceased to be the operator and so the power to detain will be limited to that ensuing under s. 88(1)(a)(i) [under which a Fleet Lien is not authorized].

50. The power of air authorities to seize and detain the aircraft owned or operated by defaulting persons is found in section 56(1) of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 (CANSCA) and section 9(2) of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 (ATMMA).

51. AWG believes the provisions creating Fleet Lien are ambiguous within the meaning set out by Cory J. in *Hasselwander*. Accordingly, the provisions should be interpreted strictly, mitigating their unforeseen and potentially far reaching effects.

(iv) Public policy:

52. In *Canada 3000*, Binnie J. commented that, for various reasons (including that the air authorities cannot withhold services from airlines) "the lessors are in a better position to protect themselves from airline defaults than are the air authorities." This comment was quoted by Collins J. in *GKL*. While that might have been the case at the time of the *Canada 3000* decision (2006), that is certainly not the case now. Canadian air authorities have the same rights to require prepayments and deposits as the property rights holders and their ability to refuse clearance and

take-off rights, and even to seize and detain aircraft, give the air authorities much stronger ability to protect themselves. Even the last remaining right of the property rights holder, which is to repossess its property, can only be exercised if the air authorities have not arrived first.

(v) The Correct Interpretation of CANSCA and ATMMA

53. CANSCA and ATMMA were designed to be secondary, economic legislation to complement the larger legislative scheme. Unlike the *Aeronautics Act*, R.S.C. 1985, c. A-2 which is focussed on public safety, CANSCA and ATMMA purport to provide a measure of financial security in the volatile aviation industry.

54. AWG supports increased financial security for entities working in the aviation industry, including air authorities. However, AWG does not believe that the Parliament of Canada could have intended to limit the need for financial security to air authorities. The razor thin margins and heavy competition puts lessees at constant financial risk. A long line of bankruptcy jurisprudence demonstrates legal titleholders, the lessors who invest the largest amount of capital upfront, face corresponding and derivative risk to their aircraft investment. Financial security in the aviation industry must be structured to ensure that all of these interests are protected and balanced, not merely to protect those of air authorities.

55. Accordingly, AWG believes that CANSCA and ATMMA should be interpreted in light of their purpose to help attain financial stability within the aviation industry as a whole.

56. Under any interpretation, an order to seize and detain "any such aircraft" makes anything other than arbitrary enforcement of the order impossible. Legal titleholders have no basis of knowing in advance whether an aircraft they leased to a defaulting airline will be the subject of a seizure and detention. In the experience of AWG, contrary to Justice Phillips' and Justice O'Brien's comments in *Zoom,* this uncertainty has the effect of encouraging a race to repossess leased aircraft. A race which necessarily causes more financial distress to the already troubled airline and undermines the goals of CANSCA and ATMMA – to promote financial security within the aviation industry.

57. The effect of the interpretations of CANSCA and ATMMA that have inadvertently created such a race has only worked to subvert

a. the purposes of Canada's bankruptcy and insolvency legislation that requires at least a limited stay against enforcement so that an airline can restructure its affairs; and

b. the policy behind Canada's personal property security legislation which recognizes that giving asset financiers first priority property interests in collateral is necessary to encourage and enhance the advancement of asset-based financing to capital intensive industries like the airline industry.

58. Prior to *Canada 3000* and subsequent cases, in the event of airline financial difficulties, the property rights holders, when considering whether to leave their aircraft with the airline in support of its restructuring efforts, made a commercial decision balancing various risks. Now, given the race created by the Canadian cases, any property holder would be penalised by leaving its aircraft with an airline in Canada after the first sign of financial difficulty. This will have a material adverse impact on the ability of Canadian airlines to restructure in future.

59. The current interpretations of Canadian air authority Fleet Lien rights provide a strong disincentive for air authorities to effectively manage and collect their airline accounts. They can now almost completely ignore their credit management responsibilities while an airline is solvent knowing that in the event of insolvency it needs to only have to seize one or two aircraft to force the property holders to pay the airline's air authority debts in full. Good policy requires that the air authorities have an incentive to use all tools at their disposal to manage and collect their accounts while their debtors are still solvent, which is not the case if the can stand by (and even let debts accumulate) and collect from innocent third parties after the fact.

60. Finally, such an interpretation is consistent with the value Canada places on preserving individual rights and freedoms. As Justice Spence stated, in obiter in *Bayshore Shopping Centre Ltd. v. Nepean (Township)* [1972 S.C.R. 755], "no authority need be cited for the proposition that a man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions." Aircraft owners, innocent of defaulting on any payments owed to airports or navigation

authorities, should not be denied their right to property because of the actions of others.

D. LEGISLATIVE CHANGE

61. AWG believes that English and Canadian courts, respectively, should interpret existing law in line with the reasoning set out above. In the event that is not the case, AWG believes that legislative change to the relevant statutes is required.