

PRO FORMA LETTER – ON COMMENCEMENT OF INSOLVENCY

[_____] 2020

[addressee]

CC: [as applicable]

Re: Compliance with the Cape Town Convention and its Aircraft Protocol during insolvency proceedings in respect of [_____]

Dear [_____],

We refer to the commencement of [insolvency proceedings] (the **'insolvency proceedings'**) instituted [by/against/in respect of] [_____] (the **'Airline'**) [in which you were appointed [administrator/temporary manager]].

Background on the Aviation Working Group

1. We write on behalf of the Aviation Working Group (www.awg.aero, **'AWG'**). AWG, a not-for-profit entity co-chaired by Airbus and Boeing and comprised of the world's major aviation manufacturers, leasing companies, and financial institutions, was formed, at the request of governments, to contribute to the development of the Cape Town Convention (the **'Convention'**) and its Aircraft Protocol (the **'Protocol'**). AWG is considered by many to be the leading expert on the Convention and the Protocol (collectively, the **'Cape Town Convention'**).

2. Without limitation, AWG or its representatives (i) chaired the group that drafted the original Protocol, (ii) were involved in every meeting on the development, negotiation, and diplomatic agreement of the Convention, (iii) work with governments around the world on implementation of, and compliance with, the Convention and the Protocol, (iv) chair the advisory board to the International Registry for the Convention, and (v) direct the Cape Town Convention academic project, which provides annotations to the *Official Commentary to the Cape Town Convention* (4th ed UNIDROIT 2019) (the **'Official Commentary'**). The Official Commentary, approved for distribution by the UNIDROIT Governing Council, is a critically important source for proper interpretation of the Cape Town Convention.

3. As part of its global undertaking to advance and seek full implementation of, and compliance by countries with, the Convention, AWG consults with governments, submits expert, legal papers, and prepares other supporting materials. This document is a part of that undertaking. AWG does not address commercial matters, but, rather, focuses on the requirements of the Convention, including international law obligations assumed by contracting states, and as implemented into national law.

4. AWG works actively and reports on the proper implementation and interpretation of, and compliance with, the terms of the Cape Town Convention. AWG developed the CTC Compliance Index (www.compliance-index.awg.aero, the **'CTC Compliance Index'**) which assesses and scores compliance by contracting states with their undertakings under CTC. The CTC Compliance Index provides an objective, data-driven assessment of legal risk, which is central to transactional, credit and financial risk decision-making.

Cape Town Convention in light of international law and the declarations made by [_____]

5. [_____] [ratified/acceded to] the Cape Town Convention on [_____], and the treaty came into effect on [_____] (the **'Effective Date'**). From the Effective Date, the Cape Town Convention sets out international law obligations *binding* on [_____]. Under universally accepted principles of international law, [_____] cannot raise national law as a defense to non-performance of its treaty obligations. See art 27 of the Vienna Convention on the Law of Treaties. These obligations extend to all parts of the government: executive, legislative and judicial. The insolvency proceedings are considered judicial for these purposes.

[6. As a matter of internal [_____] law, the Cape Town Convention prevails over conflicting national law. That is the case given [insert basis of primacy]. See [insert national law citation for that basis]. Thus, [_____]’s] internal and national law requirements are the same: the terms of the Cape Town Convention are to be applied, regardless of any conflicting national law.]¹

7. [_____] has declared that it will apply Alternative A under art XI of the Protocol in all insolvency proceedings (**Alternative A**). It has declared a ‘waiting period’ of [_____] [calendar] days (the **‘waiting period’**). See points [9 and 11] for the implications of that waiting period declaration.

8. Thus, Alternative A applies in the Airline’s insolvency proceedings, regardless of conflicting national law. This application of the Cape Town Convention, including Alternative A, will serve as an important benchmark of the implementation of, and compliance with, the Cape Town Convention in [_____].

The results will have a material impact on the country scoring for [_____] under the CTC Compliance Index, which, in turn, will impact future financing and credit decisions for all airlines in [_____]. In its discretion, such results may also directly impact decisions by the OECD as to whether, in the future, airlines in [_____] are eligible for the ‘Cape Town discount’ under the OECD’s Aircraft Sector Understanding (on international export credit).

Requirements under Alternative A

9. Under the Cape Town Convention, the commencement of the insolvency proceedings [has activated][will activate] Alternative A. According to art XI(2)(a) of the Protocol (Alternative A), the insolvency administrator or the debtor, as applicable, shall **give possession of the aircraft object** to the creditor **no later than** the end of the ‘waiting period’ ([_____] [calendar] days), unless, before the end of the waiting period, the insolvency administrator or the debtor has cured all defaults and agreed to perform all future obligations under the relevant agreement. A creditor and a debtor may voluntarily agree to extend the waiting period.

Please note that if a creditor is entitled to possession of an aircraft object before the end of the waiting period under national law, the Cape Town Convention requires that the creditor shall be given possession at such earlier time. See art XI(2)(b) of the Protocol (Alternative A).

10. In addition, pursuant to art XI(5) of the Protocol (Alternative A), unless and until the creditor is given the opportunity to take possession:

(a) the Airline **shall preserve the aircraft object and maintain it and its value** in accordance with the leasing or financing agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under domestic law.

11. The creditor is also entitled to the other remedies available under the Cape Town Convention, including de-registration of the aircraft, export and physical transfer of the aircraft object from [_____] and other remedies specified in the Cape Town Convention, in each case, at the time specified in point 9 above.

12. All other Cape Town Convention provisions, including those relating to the creation of international interests, and the priority of interests registered with the treaty’s International Registry, must also be strictly complied with.

13. Can you please confirm your undertaking to strictly adhere in the insolvency proceeds to the Cape Town Convention requirements, including the applicable time periods, set out in points [9-12] above. Please do so through a letter to the undersigned sent to email address below. Please also confirm that we may post a copy of your letter on the websites of AWG and the CTC academic project.

We are looking forward to your cooperation and stand ready to assist, as may be requested, on matters related to the requirements of the Cape Town Convention.

¹ Include in all cases where CTC has national law primacy.

Thank you for considering these matters.

Sincerely yours,

Jeffrey Wool
secretary general
Aviation Working Group
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CC: [_____]