

## COVID 19 AIR TRANSPORT DISRUPTION

## STATEMENT ON AIRLINE RESTRUCTURING PRINCIPLES

RELEASE DATE: 22 October 2020

- A.** In response to the disruption to air transport caused by COVID 19 (**c-19**), this document (this **document**) comprises a statement on guiding principles (the **principles**, and, each, a **principle**) which the Aviation Working Group (**AWG**) recommends in order to materially enhance the prospects for a successful airline restructuring (whether through a voluntary, *ad hoc* process without the aid of court proceedings, or through a process involving a plan, scheme of arrangements, or other structure of any kind, **restructurings** or a **restructuring**). This statement of principles has been prepared by AWG as an elective guidance tool.<sup>1</sup>
- B.** Where this document is referred to, including in correspondence or legal documentation, that reference should be to the **AWG statement on airline restructuring principles, released 22 October 2020**, or, in short the **AWG restructuring principles, 22.10.20**. If this document is amended, an updated reference will be included.
- C.** In this document, references to an **airline** includes its affiliates, to an **aircraft creditor** is limited to creditors, and includes its affiliates, that have leased or financed aircraft equipment to or for an airline, and to **aircraft equipment** includes all technical records related to it.
- D.** The principles are as follows:

**Principles relating to legal rules****Principle 1: no involuntary modification**

A restructuring shall be effected by consensual agreement, where feasible without the aid of an administrative or judicial process. There shall be no class or group voting. If an aircraft creditor does not agree with the terms of a restructuring, it retains its legal rights. No restructuring shall impose involuntary modification of the legal rights of an aircraft creditor.

Purpose and rationale: arms-length, consensual adjustments to the terms of a transaction are acceptable as matter of freedom of contract. Any legally compelled adjustment to terms is antithetical to that freedom. The preferred approach to a restructuring is through an out of court process, and principle 10 outlines steps to enhance the efficiency of that process.

**Principle 2: applicable law and forum**

Forum shopping connected to a restructuring is injudicious and subject to legal and enforceability challenges. Forum shopping is present<sup>2</sup> where (a) the intent or consequence of a selected forum is to avoid application of alternative A where declared by the airline jurisdiction (each defined below), or (b) if judicial sanction is required, it is done by a court in, and with reference to the laws of, a country other than one:

- (1) in which the airline has its main base of operations and from whose regulatory authority it derives its authority to operate its aircraft (the **airline jurisdiction**), or, if different
- (2) that has ratified the Cape Town Convention and its Aircraft Protocol (CTC) but only where (i) the airline jurisdiction declared alternative A under art XI of the Aircraft Protocol (alternative A), and (ii) there are assurances that the courts of such country shall strictly apply that declaration by the airline jurisdiction to, and in the context of, a restructuring (the **applying CTC jurisdiction**).

Purpose and rationale: the assumptions which formed the basis for the original transaction's approval and pricing should remain operative in an insolvency setting. Transactions are approved and priced with reference to an insolvency risk assessment made with respect to the laws of an airline's real home jurisdiction. The Cape Town Convention's rules applying alternative A to a restructuring must be applied.

<sup>1</sup> This document is not intended to, and should not be construed as, representing the policies, positions or views of, nor an agreement among or binding upon, the Aviation Working Group's members, or any of them, either as a general matter or with regard to any specific circumstance.

<sup>2</sup> In light of c-19 market conditions, and so long as such conditions continue, there may be an exception where the airline jurisdiction neither (1) ratified CTC and made the alternative A declaration, nor (2) has effective laws, practices, and institutions to facilitate restructurings.

## **Principles relating to content of restructurings**

### **Principle 3: clear and realistic target and viable business plan**

A restructuring shall have a clear and realistic target, implementing a new and viable business plan for on-going and future operations. It should include the provision of new equity and/or government support, as the context requires.

**Purpose and rationale:** without a realistic target, a restructuring will fail to materialize. Without a viable business plan, a restructuring will only defer the date of the ultimate failure of the business, with increased costs and losses in the interim.

### **Principle 4: transparent process for, and to facilitate, bi-lateral negotiations on informed basis**

Any contract modification shall be based on the foundational principle of freedom of contract, and effected through bilateral negotiations between an airline and each of its aircraft creditors. The process through which any such modification is sought shall permit informed decision-making. That requires sufficient transparency, as to major structural elements of a rescheduling, to permit aircraft creditors to assess the economic basis, and, as among aircraft creditors and as between aircraft creditors all other constituencies, the equitable nature, of that rescheduling.

**Purpose and rationale:** there should be a reasonable basis for aircraft creditors to (a) make independent decisions regarding the concessions that are justified by, and equitable under, the circumstances; (b) evaluate whether the concessions being offered, as a collective matter, are adequate to achieve the targeted outcome; and (c) judge whether the concessions are distributed in an equitable manner across the relevant creditor groups.

### **Principle 5: debt ranks ahead of equity**

In a restructuring, debt shall rank ahead of equity, in general, but may include (1) partial preservation of, and targeted incentives for, existing equity rights, and (2) special rules to encourage the investment of new equity.

**Purpose and rationale:** the assumptions which formed the basis for the original transaction's approval and pricing regarding the hierarchy of enterprise risks and rewards should be preserved. An incentive for existing shareholders to cooperate and new sources of capital to invest may be advisable.

### **Principle 6: conversion of debt to equity**

Any proposed conversion of debt to equity shall be calculated, as among all creditors, on a *pari passu* basis and without discrimination, and, consistent with principle 5, should be granted economic priority over the existing equity. The holders of such debt converted to equity shall have board representation. A restructuring shall set out any proposed (1) conversion rate, (2) share issuance price, and (3) any lock-up period or conditions, in each case, for discussion with, and approval by, each aircraft creditor. The foregoing shall be designed to retain existing operating rights and airline and aircraft nationality and to comply with applicable competition law.

**Purpose and rationale:** indebtedness that is 'forgiven' amounts to a contribution of capital to the going concern and merits compensation on that basis.

### **Principle 7: fair treatment of non-participating aircraft creditors**

Aircraft creditors who elect to repossess aircraft are contributing to the success of the restructuring, and, thus (1) an airline shall fully cooperate with aircraft returns in terms of ferry flight, records, on-wing engines, and regulatory approvals, all in accordance with the provisions of the underlying contract or as otherwise expressly agreed, (2) aircraft creditors shall retain their residual claim with respect to any deficiency from compliance with contract terms, with such claims being entitled to a recovery, as among all unsecured creditors, on a *pari passu* basis and without discrimination, and (3) liens on, and other adverse claims to, such repossessed aircraft arising out an airline's operations shall be promptly discharged.

**Purpose and rationale:** a restructuring may benefit from voluntary return of aircraft, and that should be recognized and facilitated, including by use of airline resources. There should be a safeguard against any direct or implied compulsion for an aircraft creditor to participate on terms that it would otherwise consider unacceptable in order to avoid diminution in value, damage, or loss of its asset.

## **Principles relating to process of restructuring**

### **Principle 8: storage and maintenance of aircraft equipment**

During any restructuring discussions, all aircraft equipment shall be properly stored and maintained (following all applicable manufacturer recommendations) without discrimination among aircraft creditors, or as between aircraft owned by an airline and such aircraft creditors, and the airline shall otherwise take action to preserve and maintain asset value. Aircraft creditors shall be granted access to aircraft equipment and aircraft records at reasonable times. No parts shall be removed from aircraft equipment except to maintain its airworthiness. Liens and other adverse claims against such aircraft equipment arising through the airline shall be promptly and fully discharged.

Purpose and rationale: there should be an obligation on a distressed airline to maintain asset value and mitigate the risks to aircraft creditors associated with retaining possession of aircraft equipment.

### **Principle 9: information and timing**

Aircraft creditors shall (1) receive from an airline (a) full details of a restructuring and new business plan on a timely basis, shall be regularly and promptly updated, and shall have access to the work of any financial adviser retained by an airline, in each case, without discrimination, and (b) monthly statements reflecting the sources and uses and cash and projected cash balances over the ensuing 90 days, and (2) be given a reasonable period of time to respond to proposals, presumptively a week, and without provisions that favor first responders or that otherwise distort bilateral negotiations.

Purpose and rationale: basic procedures are needed to make the 'realistic targets', 'viable business plan' and 'informed consent' aspects of principles 3 and 4 more specific and operative. Deadlines and procedures should not be used for the purpose of distorting bilateral negotiations.

### **Principle 10: aircraft creditor efforts to facilitate assessment of restructuring**

Aircraft creditors shall make maximum efforts to facilitate an efficient process relating to a proposed restructuring, including by considering a procedural coordination committee and/or common counsel. Any such committee shall follow compliance principles and practices to ensure adherence to competition laws.

Purpose and rationale: aircraft creditors should play their part in all procedural aspects designed to facilitate a reorganization.

**E.** AWG may issue revisions to this statement and/or supplemental materials to aid in or facilitate its use, interpretation, or application.

**END**

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