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14 October 2005

Miss Becky Yu
Clerk to Bills Committee
on Civil Aviation (Amendment) Bill 2005
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Miss Yu,

**Bills Committee on
Civil Aviation (Amendment) Bill 2005**

Meeting on 24 October 2005

Thank you for your letter of 28 September 2005.

2. At the Bills Committee meeting on 15 July 2005 to study the subject Bill, the Administration was requested to provide the following information -

- (a) the policy intent of exempting passive owners of aircraft from the strict liability under section 8;
- (b) whether the drafting of the proposed section 8(5) can reflect the policy intent on the one hand and address Members' concern on the possible diminution of protection for third parties, such as cargo owners and consumers. If not, the improvement which the Administration would suggest to refine the drafting; and

- (c) findings and relevant reference materials regarding the legal research on past court cases in relation to the interpretation of “management”.

3. The following sets out the Government’s response to the above requests.

Policy Intent of the Proposed Exemption

4. Section 8(2) of the Civil Aviation Ordinance (Cap. 448) imposes strict liability on the owner of an aircraft for loss or damage caused to third parties on land or water by the aircraft. Section 8(4) provides that the term “owner” includes “the person having the management of the aircraft for the time being”. It is worth noting that in other local civil aviation legislation, e.g. the Hong Kong Civil Aviation (Investigation of Accidents) Regulations (Cap. 448B) and the Air Navigation (Hong Kong) Order 1995 (Cap. 448C), the term “operator” is defined as the “person having the management of aircraft”. It is therefore clear that the intent of the existing law is to impose strict liability on aircraft owners, which include both owners and operators.

5. As far as an aircraft owner is concerned, the strict liability in section 8 applies regardless of whether he plays any role in the management of the aircraft. This imposes an undue burden on owners who are not involved in the management of the aircraft (hereafter referred to as “passive owners”), notably financiers who purchase and own aircraft and then lease them to airlines. In many other jurisdictions with a developed aviation industry (such as the US, UK, New Zealand, Australia and Singapore), the passive owners are relieved of the strict liability. The policy intent of the Bill is to exempt passive owners from the strict liability, so as to bring our regulatory framework in line with common practice overseas.

Exemption under the Proposed Section 8(5)

6. Under the existing section 8, the strict liability provides a wide scope of legal protection to third parties by holding both the owners and

operators strictly liable. When formulating the legislative proposal, our guiding principle is to strike the right balance between preserving the policy intent and minimizing possible diminution of the existing legal protection to third parties on land or water. We therefore propose to exempt only those passive owners so as to preserve as far as possible the existing legal protection to third parties. Specifically, it is proposed that a new section 8(5) be introduced to exempt an aircraft owner who, at the time of the incident causing the loss or damage, fulfils the following criteria -

- (a) the aircraft is bona fide demised, let or hired out for a period exceeding 14 days;
- (b) no member of the crew of the aircraft is in the employment of such owner; and
- (c) the owner does not have the management of the aircraft.

Criteria (a) and (b) cater for typical leasing arrangements between passive owners and airlines whereby an owner leases an aircraft to an airline without crew for a certain period (commonly known as “dry-lease”). Similar exemption criteria can be found in the relevant legislation governing aircraft strict liability in the UK, Singapore and New Zealand. It should be noted that even in the case when the passive owner is exempted, there would ultimately be a party, the most obvious example being the airline, who is in actual possession of the aircraft, provides the crew and operates the aircraft. This party will continue to carry the strict legal liability under the law and it will not be able to claim any exemption under our proposed legislative amendments.

7. In the course of our consultation, however, there were concerns that an owner who retains some management functions in relation to the aircraft, e.g. repair and maintenance, may still be exempted by fulfilling criteria (a) and (b). We recognise this concern and have introduced a third criteria, viz. criterion (c), in order to serve as an additional safeguard to ensure that only genuine passive owners are exempted.

8. We believe that the existing formulation fully reflects the policy intent to relieve passive owners of the strict liability without compromising the level of legal protection to third parties.

Interpretation of “Management”

9. During the Bills Committee meeting on 15 July 2005, there were discussions about whether the term “management” covers “maintenance and repair” and whether the term should be further defined.

10. As noted above, the term “management” is used in the context of defining an operator of aircraft in other civil aviation legislation in Hong Kong. Similar provisions can be found in some UK civil aviation legislation. The term is however not further defined in any relevant Hong Kong and UK legislation.

11. We have researched into court cases in Hong Kong and other common law jurisdictions regarding the interpretation of “management” in relation to aircraft. We cannot locate any direct judicial authority on the interpretation of the term. However, there is a relevant *judicial dicta* in an English case *Civil Aviation Authority v Internationale Nederlanden Aviation Lease BV & Ors [1997] 1 Lloyd’s LR 96*. In that case, the court was tasked to identify who was the operator of an aircraft (which as defined under the relevant UK legislation meant “the person having the management of the aircraft”). The court found that “the management of an aircraft typically includes two crucially important aspects: ensuring that the aircraft is at all times airworthy, and ensuring that it has a competent, qualified and certified crew”. Though short of a *ratio decidendi*, the case would be highly persuasive and authoritative on subsequent cases when the court is required to decide on who is the person having the management of an aircraft.

12. We are of the view that the term “management” covers “maintenance and repair”. In aviation terms, “maintenance and repair” are crucial to ensuring aviation safety and thus fall squarely within the meaning of “management”. According to the Air Navigation (Hong Kong) Order 1995, an aircraft shall not fly unless it is airworthy. It is an

international practice promulgated by the International Civil Aviation Organization that the maintenance and repair function is a determining factor concerning the airworthiness of an aircraft. This is further confirmed by the English case quoted above, in which the court linked the concept of airworthiness, one of the two crucial aspects of management, with “proper maintenance”. Seen in that light, it would be extremely difficult for any person who has the responsibility to ensure the airworthiness of the aircraft, either by undertaking the maintenance and repair functions himself, or through engaging a third party, to reasonably argue that he is not involved in the management of the aircraft.

13. We also consider it undesirable to further define the term “management”. Aviation is by nature a highly specialized, complicated and dynamic industry. In local and overseas jurisdictions, we are not aware of any specific definitions being assigned to management of aircraft. When deciding on whether a party has the management of an aircraft at a particular time, one inevitably has to look at a whole host of relevant factors. We are mindful of our limitations in proposing an apt and time-honoured definition. As noted above, there have been some efforts being made by the court to interpret the term. It would be prudent to leave this matter to the evolution of case laws.

Submission from Johnson Stokes and Master (JSM)

14. We also note the submission from JSM forwarded to us on 22 September 2005. JSM submits that only “operator” of aircraft should be held strictly liable. This is a major departure from the policy intent of the Bill. If only operators were held strictly liable, all owners would enjoy the exemption from strict liability. This represents a substantial diminution of legal protection to third parties on land or water. Before responding to the Bills Committee, we thought it prudent that the industry’s perspectives be taken into account. We are now consulting the industry and hope to be able to respond to the Committee at the coming Bills Committee meeting.

15. Enclosed is a list of Government representatives who will attend the Bills Committee on 24 October 2005. We look forward to the further discussion at the meeting.

Yours sincerely,

(Ms WONG Ching-yee, Jenny)
for Secretary for Economic Development and Labour

