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European Banking Authority

Our Reference OSBD1/00.00/EUROPE/64298063v1

21 May 2019

Dear Ladies and Gentlemen

Consultation Paper EBA/CP/2019/01: Draft Guidelines on Credit Risk Mitigation for institutions applying IRB Approach with own estimates of LGDs

This is a response to Question 2 in the Consultation Paper: **Do you agree with the proposed clarifications on the assessment of legal certainty of movable physical collateral? How do you currently perform the assessment of legal effectiveness and enforceability for movable physical collateral?**

By way of introduction, this firm represents many financial institutions involved in the financing of high value transportation assets which in their nature move from one jurisdiction to another and frequently move across multiple jurisdictions, principally ships, aircraft and batches of shipping containers. We operate from offices in 14 cities worldwide. We are involved in both the initial documentation of financings and in work-outs, re-possession and enforcements. We have experience of re-possession and enforcements in many jurisdictions. The views expressed in this response are ours and not made on behalf of any of our clients, although we are aware of a number of our clients and other industry stakeholders who hold similar views.

Difficulty arises from limb (d) of paragraph 20, requiring legal opinions from the set of jurisdictions where the collateral could move during the lifetime of the loan according to the collateral agreement. It would generally be completely impractical to obtain multiple opinions in international asset finance deals involving aircraft, ships and containers in an attempt to cover any jurisdiction where the relevant asset could move during the life of the facility. The collateral agreement will only rarely impose restrictions on where the asset can go to based on CRM issues. Typically, the only restrictions will be those imposed by insurance requirements (war zones etc.) and sanctions. In most transactions it would be completely off-market to restrict the movement of assets to jurisdictions in respect of which no favourable CRM opinion were held. If that were to be required it would put institutions regulated by the EBA at a serious disadvantage in the cross-border asset finance space. It would be hard to imagine how such institutions could continue to finance the relevant classes of asset.

The 2002 Cape Town Convention gives comfort as regards aircraft in relation to the countries which have signed up to the Aircraft Protocol (currently 76 states). The 1948 Geneva Convention on the International Recognition of Rights in Aircraft is also of significance (with 91 contracting states). The 1952 Brussels Arrest

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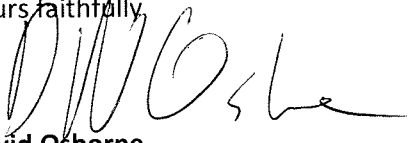
Convention is widely adopted by maritime jurisdictions around the world and gives comfort as regards the arrest of ships. The two Conventions on Maritime Liens and Mortgages have, in contrast, received little traction. However, the absence of widely adopted Maritime Liens and Mortgages Conventions is not in practice an impediment to enforcement of security in light of the points in the next paragraph.

Financial institutions experienced in asset finance transactions fully appreciate the importance of the jurisdiction in which they might have to enforce. If the asset is likely frequently to be in an unfavourable jurisdiction, that will be taken into account at the credit decision stage. In other cases the trading pattern will be monitored as soon as a loan shows signs of distress with a view to trying to ensure that enforcement takes place in a favourable jurisdiction or at least does not end up taking place in an unfavourable one.

We are happy for this response to be disclosed.

Please do not hesitate to contact David Osborne (email: dosborne@wfw.com) if you have any comments or questions arising out of this response.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D Osborne', written over the typed name.

David Osborne
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