Universidade Católica Portuguesa
Faculdade de Direito
Católica Global School of Law

The Cape Town Convention
Transnational law under the test of the aviation market

Victoria Brandès-Salamo

Master of Transnational Law
supervised by Professor Jan H. Dalhuisen
Lisbon, June 9th 2020

To my father

We must all obey the great law of change. It is the most powerful law of nature.

Edmund Burke

Table of contents

1. Glossary

ABS: Asset Backed Security

AFIC: Aircraft Finance Insurance Consortium

ASU: Aircraft Sector Understanding

AWG: Aviation Working Group

CIFL: Convention on International Financial Leasing

CISG: Convention on Contracts for the International Sale of Goods

CS: Contracting State(s)

CTC: Cape Town Convention

DGCA: Directorate General of Civil Aviation

ECA: Export Credit Agencies

EETC: Enhanced Equipment Trust Certificate

ETC: Equipment Trust Certificate

IATA: International Air Transport Association

IBM: Internal Bank Model

ICAO: International Civil Aviation Organisation

IDERA: Irrevocable De-registration and Export Request Authorisation

IR: International Registry

LCC: Low Costs Carriers

LGD: Loss Given Default

LTV: Loan To Value

MAC: Mining, Agricultural and Construction

NCRI: Non-Consensual Rights or Interests

OECD: Organisation for Economic Co-operation and Development

REIO: Regional Economic Integration Organisation

RWA: Risk Weighted Asset

UCS: Unsecured Corporate Bonds

UN: United Nations

UNCITRAL: United Nations Commission on International Trade Law

UNIDROIT: The International Institute for the Unification of Private Law

WTO: World Trade Organisation

2. Introduction

The aviation sector has dramatically expanded over the last decades. Whereas the GDP worldwide only increased by 2,8% per annum, passenger air traffic grew at an average annual growth rate of 5%[1], doubling every 15 years[2]. In terms of passengers, it took twenty-seven years from 1960 to 1987, to jump from 100,000 to 1 billion, the term was reduced to 18 years to reach 2 billion, 7 years for 3 billion and 4 years to reach 4,3 billion in 2018[3]. Seemingly, this trend will not slow down. According to the two main manufacturers -Boeing and Airbus- the number of aircraft is projected to almost double from the current 22,680 aircraft to 47,680 in 2038[4].

This evolution means that the current financing, mainly through commercial banks, will need to evolve. Banks cannot provide any longer the requested financing for the increased number of deliveries especially because they have to abide by the more stringent rules of Basel IV and they need to comply with their internal requirement for balanced exposure in their portfolio of risks. New sources of financing, involving stakeholders not necessarily aware of the constraints of the aircraft market, will have to be explored. These investors will be keen to invest if they feel confident that their rights and assets are well protected.

In the late 1980s, the need to attract increased financing for high-value mobile equipment such as aircraft led the International Institute for the Unification of Private Law (the "UNIDROIT") to work on what will become, in 2001, the Convention on International Interests in Mobile Equipment. Commonly called the Cape Town Convention (the "CTC')[5], this international treaty works jointly with specific-equipment protocols: Aircraft Protocol (adopted in November 2001), the Railway Rolling Stock Protocol (February 23, 2007), the

---

[1] Facts and Figures, World Aviation and World Economy, ICAO

[2] Solid passenger traffic growth and moderate air cargo demand in 2018, ICAO, 2018

[3] ibid

[4] Global Market Forecast, Cities, Airports& Aircraft 2019-2018, Airbus, 8

[5] Articles of the Convention are in arabic numbers while the articles of the Protocol are in roman numbers.

Space Protocol (March 9, 2012) and the newly adopted Mining, Agricultural and Construction (the "MAC") Protocol (November 22, 2019).

In this dissertation, I will only focus on the CTC and its Aircraft Protocol because it is widely applied, unlike the others; as such, I shall give many examples of the complex relationship between transnational law and domestic law.

So far, eighty countries have ratified the CTC[6]. Together with its aircraft equipment Protocol, it can be considered as one of the most successful commercial treaties for the stability and economic benefits it has brought to its Contracting States (the "CS").

As mentioned in its Article 3, the CTC applies "when the debtor is situated in a CS", irrespective of the location of the creditors.

Taking into account the great deal of ratifications, the CTC can truly be considered as a "mandatory" treaty and thus a transnational instrument. It can be interpreted as the re-emergence of the *lex mercatoria*[7]; it is not national neither territorial but rather the result of immanent and spontaneous bottom-up law formation[8]. Transnationalisation seems to encompass a dynamic concept of law; it moves with the facts, leaving statist thinking legal formalism and doctrinal thinking behind[9]; both could be seen as impediments to the development of the aircraft market.

However, conflicts may arise as regards the application of transnational law -CTC- in the domestic legal system of CS, as will be argued later. Thus, it is fair to wonder whether the efficiency of a transnational law as the CTC can cope with the framework of the legal environment of the CS.

In this context, the practical issues of the Convention will have to be addressed. My analysis will argue that the modern *lex mercatoria* approach should be used to overcome the conflicts between the CTC and the domestic legal systems of its CS.

---

[6] Status on ratification, UNIDROIT

[7] The *lex mercatoria* approach highlights the idea that fundamental principle, custom and practices, general or common rules take precedence over private international law or conflict of law rules.

[8] Dalhuisen, Jan. The Transnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 3

[9] ibid, 232

Part 1 will describe the aviation environment of the CTC. Then, in the second part, I will focus on the specificities and the anticipated benefits of the Convention. Finally, in the third part, I will deal with the numerous challenges faced by the Convention as a transnational treaty.

Part 1: Aviation environment

The first part will assess the key features of the aviation environment and their likely evolution. The analysis will focus on three aspects: the market, the financing environment, the institutions and legal structures involved in the aviation sector.

3. The market

The aviation market is by nature internationally-oriented. The sale of its goods, and its operations can be understood as a major starting point of transnational commercial and finance law[10]. According to Aihwa Ong, transnational market networks aim to redistribute systems of power and to create transnational physical and social structures that stretch the bounds of governmentality[11]. The objectives of the CTC are actually to shrink the boundaries between CS domestic laws regarding mobile equipments with the idea to harmonise the regulations that could improve the predictability, the transparency of the aviation market and to facilitate aircraft financing.

Actually, it may be argued that the CTC contributed to the resilience of the market during such events like the 2008 financial crisis or SARS. Likewise, the accepted risks for the manufacturers in terms of investments, the opportunities represented by the Low Cost Carriers (the "LCCs") for the passengers, the development of the leasing structures, and the increased financing available for the new aircraft can be linked one way or another to the transnationality of the CTC and its Aircraft Protocol.

---

[10] Dalhuisen, Jan. The Transnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 30

[11] Ong, Aihwa. "Latitudes, or how markets stretch the bounds of governmentality" in Neoliberalism as Exception: Mutations in Citizenship and Sovereignty,123

According to International Air Transport Association (the "IATA")[12], the aviation market grows 3.5% annually on average (2018) i.e much more than the GDP worldwide. Traffic, as mentioned earlier, is expected to double in the next 15 years as air transportation becomes more affordable in certain regions of the world i.e Asia-Pacific with the increase in the number of middle-class people (earning more than $20,000 annually). This region is anticipated to lead world traffic by 2038[13].

Air transport is playing an important role in the global economy: commercial aviation contributes 3.6% of global GDP and supports more than 65 million jobs[14]. Besides, between 2015-2019 airlines have registered accrued operating profits of $269.3 billion[15] almost superseding their results over the period between 1970 and 2014.

4. The manufacturers

The market is equally shared by the duopoly Boeing/Airbus. The aviation industry is highly cyclical and its huge investments to develop new products are based on a long-term scale. Any market downturn may mean a large number of dismissals with serious outcomes on the industrial environment and namely on the sub-contractors.

Under the current buoyant market and orders from airlines and leasing companies, the manufacturers have increased their deliveries: in 2019, Airbus delivered 860 aircraft (800 in 2018) and Boeing 625, only because of the 737Max crisis (806 in 2018)[16]. To shorten the time gap between the order and the delivery, both manufacturers have pushed up their production capacities. In this respect, Airbus and Boeing realised how important it would be to develop a legal instrument to facilitate the aircraft financing, and as a consequence, upon request from UNIDROIT, set up the Aviation Working Group (the "AWG") (see 8.4) to promote what is now called the CTC.

---

[12] Garcia, Marisa. "Air Travel Projected to Double in 20 Years, But Protectionism Poses Thread", Forbes, October 24, 2018

[13] Global Market Forecast. Cities, Airports & Aircraft 2019-2038, Market, Commercial Aircraft, Airbus, issue 6. August 2019, 10

[14] ibid, 3

[15] ibid, 15

[16] Bergman, Paul. Boeing sets new airplane delivery records, expands order backlog, January 2019, Boeing

This fast-growing market also raises legal issues related to the structures of transactions in which the aircraft object is constantly moving from one jurisdiction to another. In other words, the lex situs rule, which was the basis of the Chicago convention, is clearly outdated.

Should the legal environment of the airlines be satisfactory, it would be assumed, within the limits of Basel III and IV, that the banks would be willing to extend their financing to the growing number of stakeholders. Likewise, as the leasing companies represent almost 50% of the current deliveries, and bearing in mind that their aircraft are redeployed to new lessees every seven years, their confidence to repossess them smoothly should be enhanced. Furthermore, as the banks are no longer able to finance all the deliveries, new sources of financing should be sought -namely the capital markets. They can only be accessed if legally everything is in place to protect proprietary rights and to guarantee the mobility of their creditors' assets if needed.

The CTC addresses these issues through its general principles and its provisions dealing with bankruptcy, de-registration, exportation, remedies, among others.

5. The leasing companies

The number of leasing companies has significantly increased over the last fifteen years. In fact, many investors are eager to set up leasing companies because they know that the risk of losing the asset is low and that the redeployment of the aircraft at the end of the lease is almost immediate. In addition, their diversified portfolio allows a regular flow of revenues and the return on investment upon disposal is significant.

However, a leasing company is not obviously a risk-free venture. The major problem arises when the lessee goes bankrupt and as a consequence the lessor has to redeploy the aircraft from one jurisdiction to another. It is therefore of utmost importance to rely on a legal set of rules that will support these cross-border transactions. As said before, the Chicago convention (1944) is no longer the appropriate tool.

6. The airlines

Three topics will be described under this heading: the number of airlines, the low-cost airlines and the companies in the Indian and Chinese booming markets.

In the early days of commercial aviation, only a few airlines operated, most of them state-owned, and their aircraft were financed either through fund/guarantee provided by their government shareholder or by commercial bank loans.

Privatisation, open sky agreements and liberalisation of the traffic have contributed to the tremendous increase in the number of airlines. In 2003, they were 365 to serve what is called aviation mega-cities where half of the world population lived at the time; in 2018, there were 516[17].

Most of these new airlines are not providing the financial comfort that the creditors would wish. Thus, the importance of a legal instrument like the CTC.

The same can be said of the LCCs. Their growth has been extremely fast. In 2002, they represented 8% of the traffic, today 25%, 40% in 2038[18]. Their business model is quite simple: volume and low price. The margins are very thin. It means that any volatility in the market may precipitate their insolvency and thus the need to proceed quickly to repossess eventually the aircraft.

China and India are experiencing the most important growth in their traffic. In twenty years, these countries will become the largest aviation markets and will have taken deliveries of 16,325 aircraft mostly single-aisle aircraft[19]. Taking into account the size of the country, a creditor runs the risk that in the event of bankruptcy, it will not repossess the aircraft which may be operated by another airline with the support of the government. Hence the importance of the ratification of the CTC by China and India, although it will be mentioned that the rules set up for the Irrevocable De-registration and Export Request Authorisation (the "IDERA"), and agreed by both countries in a specific declaration, are not yet properly implemented.

---

[17] Global Market Forecast. Cities, Airports & Aircraft 2019-2038, Market, Commercial Aircraft, Airbus, issue 6. August 2019, 24

[18] ibid, 24

[19] ibid, 70

7. Financing institutions

Bearing in mind the high price of an aircraft, the growing numbers of deliveries, and the new financial regulations, banks cannot support any longer the expansion of the aircraft market. New actors are needed such as pension funds or insurance companies.

7.1 The banks

Historically, commercial banks have been the main sources of finance to the aviation sector, either directly or through a guarantee granted by the Export Credit Agencies (the "ECAs"). They represent roughly 25% to 35% of new aircraft delivery funding[20]. With the reduction of state-owned airlines, more consideration has been given to the asset, and the security provided by the collateral (aircraft) in a transaction. It is therefore unsurprising that aircraft financing is now called asset-based financing.

The combination of two factors strengthens the role of the asset: first, banks are limited in their resources dedicated to the aircraft market at a time when the demand for financing is growing. Banks are actually bound by the so-called "portfolio effect" which means that a balance in the allocation of resources within each bank is a pillar of its internal exposure policy; secondly, external regulations on capital requirements known as Basel III and IV will become more stringent.

Therefore, new sources of funding are emerging which common basis is the key role of the asset. The US aviation market that represented until recently the world's largest air passenger traffic flows[21] is using extensively and solely financing through capital markets. Section 1110 of the United States (the "US") Bankruptcy code, translated in Alternative A of Article X is, without doubt, the major contributing factor to this situation. Hence the idea to extend this tool worldwide.

---

[20] Guandalino, Richard, Aircraft Financing& The Cape Town Convention, Executive Master Corporate Finance& Capital Markets, SciencesPo Executive Education, 11

[21] Global Market Forecast, Cities, Airports& Aircraft 2019-2038, Airbus, 82

7.2 Insurance companies and pension funds

These are recent but powerful actors in aircraft financing. Aviation financing provides an opportunity for insurers to access investment-grade debt collateralised on long-lasting assets.

In a nutshell, aircraft financing provides a long and stable cash-flow -which is valorised by insurance companies which need to get a flow of regular revenues -because debt cash flows are contractual and thus known in advance most of the time.

As an example, Enhanced Equipment Trust Certificate (the "EETC") offer the longest cash-flow term in the US, with an average of a 12-year term and 9-year weighted average life. It also provides security, especially emphasised by the framework of the CTC for the countries outside the US, as cash flows are secured on physical assets. Besides, unlike other assets like real estate or industrial plants, they are fungible and can be reallocated. Finally, the relatively long economic life of an aircraft -25 years on average- is undoubtedly attractive.

Apart from their involvement in the capital markets through specific structures set up by banks, insurance companies are committed to dedicated projects like the Aircraft Finance Insurance Consortium (the "AFIC"), aircraft non-payment insurance products, in place since June 2017[22]. It has been developed by Marsh in cooperation with Boeing and seeks to make use of billions of dollars of risk capital in the insurance market to support financiers exposure to borrowers in the aircraft finance market. The insurers do not provide funding themselves but they assume the risk of default by providing their guarantee.

The regulatory framework provided by the CTC is necessary to ensure that the CTC is well understood, properly implemented and applied by CS.

8. The structural environment of the CTC

Besides regular actors of the industry, the CTC has brought to light stakeholders whose participation has been and is significant.

[22] AFIC: Supporting Aircraft Finance, Aviation& Aerospace, 2019, MARSH

8.1 The International Institute for the Unification of Private Law

Based in Rome, UNIDROIT is an independent intergovernmental organisation whose objective is to modernise, harmonise, and coordinate private law with an emphasis on commercial law between states and groups of states. It can also formulate uniform law instruments, principles and rules to achieve these objectives.

UNIDROIT was at the origin of the Convention on Mobile Equipment and lodged the invitation to Airbus and Boeing to join efforts in this field. After the adoption of the CTC, it has become the depositor of the instruments of ratification by the CS. It sets up templates of the declarations to be made and advise the states willing to access to the CTC.

8.2 International Association for Air Transportation

An agreement between Denmark, Germany, Great Britain, Norway and Sweden in the Hague in 1919 gave birth to the International Association for Air Transport (the "IATA"). It is the prime vehicle for inter-airline cooperation in promoting safe, reliable, secure and economical air services. The establishment of a clearing mechanism between airlines is of significant importance, among other objectives. Seventy-fourth years after its creation, IATA continues to be a major actor in air transport through its initiatives for the improvement of the industry and its actors. Far to be the only one, other organisations are also working in order to enhance the air transport environment through better regulations and financial services.

8.3 International Civil Aviation Organisation

This United Nations (the "UN") organisation, based in Montreal, which competencies are more on the technical side of the aircraft sector was able to understand and convince its members that the CTC would give a further impetus to the development of the aviation market. The diplomatic conference was convened under the joint auspices of UNIDROIT and the International Civil Aviation Organisation (the "ICAO"). It plays today a major role in one of the key features of the CTC: the International Registry (the "IR"). It has been appointed by the diplomatic conference in Cape Town as the Supervisory Authority of this registry according to Article 17 of the Convention and Article XVII of the Aircraft Protocol. As such it

is responsible for appointing, supervising, dismissing the Registrar, setting up the fees and promulgating regulations for the IR's operations (see 9.4.3).

8.4 The Aviation Working Group

In 1994, UNIDROIT sent an invitation to Airbus and Boeing to set up a structure that would support the project of the Convention on Mobile Equipment. They overcome their tough commercial antagonism and they agreed to create an ad hoc industry group: the AWG. Since then, it was closely involved in the drafting of the Convention and has actively monitored its ratification and its implementation. Moreover, it has set up a Cape Town Academic Project with the universities of Oxford and Washington to follow up the implementation and the compliance of the CTC by the CS.

Part 2: The Cape Town Convention

In this part, the structure of the Convention and its principles will be first assessed with a special emphasis on its innovative features. Then, the expected numerous benefits attached to its ratification and proper implementation will be described.

9. Overview of the Convention and its Aircraft Protocol

The CTC is a treaty which could be described under the terms of Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"[23]. The term of "transnational law" seems more appropriate to define the CTC insofar as it includes both public and private international laws which regulate actions or events that transcend national frontiers[24]. Often considered as one of the most successful

---

[23] Treaties, Encyclopaedia entries, last updated February 2010, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law

[24] Dalhuisen, Jan. The Transnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 22

commercial law treaties, it is worth wondering whether its attraction is not actually the end result of its transnational nature.

As a precedent, it is worth mentioning the 1988 UNIDROIT Convention on International Financial Leasing (the "CIFL"), less successful than the CTC - only 10 CS- which legal principles have been taken up by the CTC. For example, in Article 6(2) reference will be made to private international law if the Convention fails to bring an answer to the matter. But as it will be explained further, the reference to private international law, far from being advantageous to the CS, appears to be quite challenging. However, it is interesting to highlight that in its article 6(1), the 1988 Convention outlines in the preamble that in its interpretation, consideration should be given to good faith in international trade. The nature of good faith is an overarching legal principle which makes it difficult to define in absolute terms[25].

The CTC is silent about the concept. Actually, it could be argued that the abstract nature of the notion of good faith would have brought more difficulty and complexity in the interpretation and could have undermined its core objectives. When a vague and open-textured wording, such as good faith is used without limiting parameters, the risk of borderline cases and compliance-related uncertainties is substantially increased[26].

Although different in nature but perhaps more pragmatic the CTC relies on the less controversial concept of "commercially reasonable manner" to describe the use of remedies available to the creditor (Article 13).

I will explore below first the structure of the Convention, its objectives and its principles. Then, I will focus on the main provisions as illustrative of these objectives and principles. Finally, I will introduce specific comments about the IR, one of the most innovative aspect of the CTC.

9.1 The two-instrument structure: objectives and principles

Adopted by a Diplomatic Conference in Cape Town on November 16, 2001, the Convention on international interests in mobile equipment, commonly called the Cape Town

---

[25] Reinhold Stever, "Good faith in International Law", 40

[26] Wool, Jeffrey "Compliance with Transnational Commercial Law Treaties", 9

Convention (the "Convention"), only entered into force in March 2006 upon completion of three ratifications. The Convention does not apply to a category of object until the relevant Protocol is in force. The aircraft equipment Protocol required eight ratifications (Article XXVIII). Together with the Convention, the Conference adopted the aircraft equipment Protocol.

The two-instrument approach between the Convention and its Protocols is quite interesting: the Convention can be considered as a framework structure that has to be put into perspective with the relevant protocol. This structured approach avoids cluttering up the text of the Convention with detailed equipment specific rules and provides a convenient mechanism for modifying the Convention provisions by the Protocol to meet the particular needs of the industry sector involved.

9.2 The Aircraft Protocol

According to its Article I, the Protocol applies to aircraft and aircraft objects, meaning airframes, aircraft engines and helicopters.

The Convention cannot achieve effectiveness by itself because it is not equipment-specific, therefore it has to be read conjointly with its specific Protocol which defines the class of equipment to which it relates. A unique feature is that the Protocol controls the Convention, which cannot come into force until the relevant Protocol is in force, and which can be amended by the Protocol[27]. Also, as stated in Article 6(2) in the case of any inconsistency the Protocol will prevail.

This two-instrument approach is actually attractive as it avoids duplication and inconsistency between the non-equipment-specific provisions of the Convention with its equipment-related Protocol and allows a uniform interpretation of such provisions, regardless of the type of equipment involved.

So far, eighty CS and the EU have ratified the Convention whereas only seventy seven ratified the Aircraft Protocol. It does not make sense for a CS to ratify the Convention without the relevant Protocol attached. One significant example was Spain that ratified the Convention in June 2013 but only adopted the Aircraft Protocol in November 2015. The official reason

[27] Sir Goode, Roy. Asset Identification Under The Cape Town Conventions Protocols, 139

was that Spain -a civil-code country- needed extra time to assess the various options opened by the Protocol and its likely outcomes on the domestic legal environment. In spite of a two-year assessment, the ratification of the Protocol is leaving aside some key questions like the one entry or multi-entry point for registration or bankruptcy.

9.3 Objectives of the CTC

The Convention and its Protocol are designed to fulfil five objectives as set out in the preamble:

- To facilitate the acquisition and financing of economically important items of mobile equipment by providing for the creation of an international interest which will be recognised in all CS. The availability of financing for the airlines situated in countries where the legal system does not provide enough comfort to the financiers is clearly highlighted. It can be especially relevant for developing countries.

- To provide the creditor with a range of basic defaults and insolvency-related remedies and where there is evidence of default, a means of obtaining a speedy interim relief pending final determination of its claims on the merits. The autonomy of the contracting parties in agreeing on the events of default and the way to get the asset maintained and protected under such a situation is obviously privileged.

- To establish an electronic international registry for the registration of international interests. As will be described later, both concepts of international interest and international registry are at the centre of the CTC to protect priority and proprietary rights.

- To ensure through the relevant Protocol that the particular needs of the industry sector concerned are met.

- By these means to give creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs. All

means of financing are mentioned which is in relation to the urgent need to find new ways of financing the growing number of upcoming deliveries.

These objectives as described in the Preambles of both the Convention and the Protocol are illustrated by five underlying principles:

- Practicality whilst reflecting the key elements of asset-based financing and leasing transactions.
- Party autonomy in contractual relationships so that their agreements should be respected and enforced. As we will see, in the CTC, there is only one mandatory declaration (Article 54-2) under which a CS would agree that the parties may define remedies in an event of default without the leave of the court. Likewise for the de-registration and the re-export of the aircraft equipment without any involvement of a court.
- Predictability: all the provisions of the CTC are having this objective that would provide comfort to the creditor but, will not set aside the interests of the debtor. This feature is clearly mentioned even in a situation where the CTC would be silent in a given situation. Article 5(1) points out that "in regard to the Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application". This principle is also reflected in the priority rules (Article 29).
- Transparency: through rules which provide for the registration of an international interest.
- Sensitivity to national legal cultures in allowing the CS to weigh economic benefits against established rules of national law to which it attaches importance. This is reflected in the nineteen opt-in/opt-out declarations that I will review but also through the concept of non-consensual rights (Articles 39 and 40).

9.4 The main provisions of the CTC

The above main principles are translated into several innovative provisions that aim to cover a various range of events as regards to aircraft assets. But beyond that, its main provisions seems to highlight its "universal" nature, the CTC aims to be the "only" legal

reference (a "*sui generis*" instrument) in the specific field of mobile equipment. However, as it will be seen in part 3, this objective might be challenged by CS domestic regulations.

First, I will focus on the concept of international interest mentioned in Article 2. Then, the idea will be to explore the regime of declarations set up by the Convention. Finally, a specific paragraph will deal with the IR.

9.4.1 The concept of international interest (Article 2)

It is the core concept of the treaty. It is defined in Article 2 of the Convention as "an interest in an aircraft object which is either granted by a chargor under a security agreement, or vested in a person who is a conditional seller under a title reservation agreement or vested in a person who is a lessor under a leasing agreement".

The creation of an international interest assumes several conditions (Article 7): first, there must be an agreement in writing that creates or provides for the interest. The agreement must identify the object following the Protocol terms.Then, it must be related to an object of which the chargor, conditional seller or lessor has the power to dispose of. Last but not least, the debtor is either situated in a CS at the time of the conclusion of the agreement creating or providing for the international interest or in any CS under the law of which it is incorporated or formed or where it has its registered office or statutory seat, where it has its centre of administration or where it has its place of business (Articles 3 and 4).

The international interest is the first category of interest with which the Convention and the relevant Protocol are dealing. The basic rule in this respect is mentioned in Article 29 of the Convention: "a registered international interest has priority over any other interest subsequently registered and over an unregistered interest. It is the implementation of transparency and predictable principles. The objective is to protect the proprietary rights of the creditor".

The second category of interest is called "prospective interests". They are interests intended to take over identifiable equipment as international interests in the future but which have not become international interests yet. This kind of interest can be registered as such in the IR but does not have an effect until it actually becomes an international interest. It will be

rank for priority purposes as from the time of its registration as a prospective international interest.

The third category is called “national interests”. They are registered under a national registration system and the CS has made a declaration under Article 50 excluding the application of the CTC. They cannot be registered as an international interest but notice of it can be registered in the IR, thereby securing its priority in the same way as if they were a registered international interest.

The fourth category is called ‘registrable non-consensual rights arising under national law”. Under a declaration of Article 40, they may be registered and they will be treated as international interest.

Finally, the fifth category is called “non consensual rights or interests” arising under national law and given priority without registration. The declaration under Article 39 would specify those rights or interests. For any non-consensual right or interests that a CS does not declare, they will be unregistered interests subject to Article 29 and so subordinated to any registered interests on the IR. The “rights having priority without registration” (Article 39) brings order to the treatment of priorities between national law and international interests that would not, without the use of Article 39, have any basis for constant interpretation by courts of that CS.

Based on the registration with the IR, any party knows exactly the international interests on an aircraft object and their order. This “first-to-file” priority rule is not only a gain of time in a bankruptcy situation but it also strengthens, in theory, the effectiveness of the CTC in any kind of legal system.

9.4.2 Regime of declarations

The second significant innovation rests on the set of declarations that a ratifying state may opt-in or may op-out (nineteen in total between the Convention and its Aircraft Protocol)[28]. Not only the regime of declarations strengthens the case-to-case nature of the

[28] See Annex 3

Convention but it also allows to cover a larger range of possible events. In return, the effectiveness of the ratification will heavily depend upon the declarations made: "Opt-in" means a declaration that a CS is required to make if it wants a particular provision of the Convention or the Protocol to apply. "Opt-out" means a declaration that a CS is required to make to exclude the application of a particular provision of the CTC as applied by the Protocol (Article 8, choice of law, and Article 13, relief pending final determination).

There are two mandatory declarations that a State or a Regional Economic Integrated Organisation (the "REIO"), are required to make: Article 48(2): specification by a REIO of matters governed by the Convention in respect of which competence has been transferred to the organisation by its members. Article 54(2) whether remedies may be exercised without the leave of the court.

All declarations other than those made under Article 60 (application of the Convention priority rules to pre-existing rights or interests) may be modified or replaced by subsequent declarations under Article 57 or withdrawn under Article 58. Reservations are not allowed: it is a unilateral declaration by a state purporting to exclude or modify the legal effect of certain provisions. Unlike reservations, declarations merely clarify the state's position and do not intend to exclude or modify the legal effect of a treaty.

Finally, the last group of declarations -a catch-all category- includes declarations under Article 53 regarding the determination of court and under Article 52 where states can choose in which territorial units the Convention will apply.

This scheme was adopted to allow civil law and common law countries to agree to the treaty. In theory, various declarations should be made by the states in order to accommodate their domestic legal constraints without altering the effectiveness of the treaty. In reality, states are strongly advised that several declarations are essential to ensure enhanced economic benefits and protection to the creditors. As an example, the benefits of the CTC can only be achieved if Article XI, Alternative A is preferred to Alternative B in a bankruptcy situation. "A" will allow repossession of the asset in 60 days whereas "B" would depend on the willingness of the domestic judge (see 10.1.2).

For example, it is worth highlighting that in the framework of the Arrangement of Export Credit, the Aircraft Sector Understanding (the "ASU") agreed by the Organisation for Economic Co-operation and Development (the "OECD") member states plus Brazil have clearly said that the access to the CTC discount is subject to a set of specific declarations, the so-called "qualifying declarations"[29].

The Aircraft Protocol provides additional declarations as regards to aircraft objects. Provision of Article XXIV(2) superseding Rome Convention on Precautionary Attachment of 1933 and Article XXX(5) dealing with exclusion of Article XXI (modification of jurisdictions provisions) are applicable unless excluded by these above declarations. Besides, CS can choose to apply or not the Protocol to territorial units i.e Article XXIX. These following articles only apply where a CS has made a declaration under Article XXX: Article VIII (choice of law), Article X (modification of provisions regarding relief pending final determination), Article XI (remedies on insolvency), Article XII (insolvency assistance), Article XIII (de-registration and export request authorisation).

9.4.3 The International Registry

As stated in the Chapter IV of the Convention, Article 16, the IR shall be established for registrations of "international interests, prospective interests and registrable non-consensual rights and interests; assignments and prospective assignments of international interests; acquisitions of international interests by legal or contractual subrogation under the applicable law; notices of national interests; and subordinations of interests referred to in any of the preceding subparagraphs".

It provides electronic registration and set up an order to "international interests" which are recognised by all ratifying states, with priority being determined on a "first-to-file" basis. It is currently operated by Aviareto Limited ("the Registrar") in Ireland. It is responsible for the efficient operation of the IR in conformity with the Protocol and the regulations made accordingly. It is supervised by ICAO (the Supervisory Authority). This Authority has the power to appoint and dismiss the Registrar and to set up the fees. The IR was set up in 2006, and in January 2019, it reached a total of 1 million registrations.

---

[29] See Annex 4

In practice, a party to a transaction can register an interest with the consent of the other party(ies). The default remedies will only be available in respect of international interests. The international interest will guarantee the creditor's priority over unregistered interests and will ensure the effectiveness of the registered interest in insolvency proceedings.

Registration may also be discharged by or with the written consent of the party in whose favour it was made. Likewise, the registration may define an expiry date, beyond which it will elapse.

The IR is an electronic system in which registrations and searches are carried out by computer-to-computer transmission. It is a notice filing system, not one requiring the filing of documents or the registration of specific transactions. As already mentioned, it is quite a unique instrument to define the priority ranking in a waterfall following the disposal of the asset in a bankruptcy situation. Not only it adequately fulfils the principles of predictability and transparency but it has also become an essential tool to address the various interests related to any aircraft object.

10. The CTC benefits

The CTC offers enhanced protections for investors through a predictable legal framework with an emphasis on transparency between the different protagonists of an aircraft transaction.

Its various benefits can be explained by the balanced relationship between civil and common law concepts that the Convention set up in its provisions.

Among them, I decided to focus first on the insolvency regime- Article XI of the Protocol -subject to the opt-in declaration by the CS. It is of utmost importance to bring confidence to the creditors. Then, the default remedies provisions -Chapter III of the Convention- and, namely the Article 13 dealing with relief pending final determination will be described as they are also a material source of security for the creditor/chargee.

Finally, the expected economic benefits from the ratification of the Convention with the recommended declarations should be emphasised. It should bring down the costs of the financing (margins, legal bills) or, in a few countries, it would simply allow financing when otherwise it would have been ruled out. As an example, the "ASU discount" granted by the members of the OECD in support to the export credit should be singled out as it is the most obvious case where a number can be associated with the ratification/implementation of the CTC.

10.1 Remedies on insolvency: Article XI

One of the reasons for the attraction of the Convention can be explained by its insolvency remedies as stated in Article XI of its Protocol which only applies when a CS that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3). Described by Sir Roy Goode in the Official Commentary to the CTC as the "single" most significant provision of the entire UNIDROIT project, it establishes a specific framework for creditors who want to take back their asset in case of insolvency. More specifically, a CS can adopt one of the Alternatives -A or B- established by Article XI or may decide none of them and apply its domestic law. So far, seventy eight countries have ratified Alternative A, two countries have opted for Alternative B, and no country has selected the domestic law option. Where the ratifying state opts to keep its insolvency laws, creditors' rights on insolvency will depend on how pro-creditor that state's insolvency laws are. While many common law jurisdictions happen to be creditor-friendly; many civil law countries, on the contrary, tend to be more debtor-friendly.

Before the in-depth analysis of the Alternatives A and B, it is first necessary to have a quick overview of section 1110 of the US bankruptcy code which is at the origin of the insolvency remedies of the CTC.

10.1.1 Section 1110 of the US Bankruptcy code

The concept of a judicial "stay" used to grant a reasonable time to the debtor to try and restructure its business is the key feature of the insolvency proceedings in the US. In the meantime, debtors are be able to retain the asset and to carry on their operations, to generate

revenues and to preserve employment. This stay is important: should the airline be denied to retain the asset, it would not generate revenues and would have to cease its activities. In many jurisdictions, especially in the civil-code countries, before the CTC, there was no visibility regarding the repossession of the asset. It meant a material risk for the creditor because of the quick depreciation of an aircraft especially when its maintenance is not properly performed (see 10.4.2).

The US Congress passed the new federal Bankruptcy Code in 1978 and since then the prevailing section 1110 has been successfully used. Economically, its success can be assessed by the number of capital market transactions that have taken place since then allowing the US airlines, including those under bankruptcy, to raise billions of dollars.

In addition, the US Bankruptcy Code goes a step further by limiting the time period for the automatic stay. This limitation is a great advantage to aircraft's creditors because the sooner they get back their assets, the faster they can proceed with their redeployment and get revenues. Above all, the creditor wants to avoid the risk of losing the operating value of the asset because of miscarriage from the debtor.

Within 60 days of filing its bankruptcy petition, the airline must either cure all defaults under its financing documents or it runs the risk of repossession by the creditor/owner. Not only the debtor must cure all the defaults but it has to "agree to perform all its obligations" under the contractual documentation.

The positive outcomes of the Section 1110 explain the willingness by the drafters of the CTC to mirror its provisions but with an objective of simplification. The limited stay provides material benefits to the creditors and, as illustrated in the US it can be seen as an incentive to invest in the aircraft sector. The provisions of Article XI actually fulfil the objectives of predictability and transparency as described above.

10.1.2 Alternative A and Alternative B

Initially intended to be mandatory, the insolvency rules have become optional to obtain widespread acceptance of the treaty in various legal systems. Therefore, at the time of ratification, a CS must select which option it will ratify although as said earlier, it can decide that its own domestic rule for bankruptcy will remain legally applicable.

According to Alternative A -also called the "hard" rule- subject to a waiting period, the creditor will either repossess the asset or will obtain from a debtor or the insolvency administrator the curing of all past defaults and a commitment to perform the debtor's future obligations. The underlying rationale of Alternative A is to provide financiers and lessors with the assurance of a clear and unqualified rule; and it also assumes that the creditor holds an international interest that could be effective in the insolvency proceedings.

In return, according to Alternative B -called the "soft" rule"- the repossession of the asset will depend upon a court decision. Article XI(4) related to Alternative B requires the creditor to provide evidence to the courts of its claims and proof that its international interest has been registered. Paragraph 5 of Article XI stipulates that the creditor is not entitled to take possession pending the court's decision and Article XI(6) adds that the aircraft object cannot be sold.

The basic rule of Alternative A: if a debtor cannot pay its creditor, it will be able to repossess its asset after a waiting period, between thirty-five and sixty days. The "waiting period" shall be specified by a declaration of the CS. Meanwhile, the lessee/debtor must maintain the aircraft and thus its value under the initial agreed contract. This waiting period cannot be extended. This alternative favours the contractual discussion between the parties and clearly reflects the philosophy of the CTC based as already pointed out on predictability and transparency. It opens the door to attractive financing solutions like the capital markets or more simply allows reduced margins.

With Alternative B, in return, the debtor is bound to cure all the defaults within an agreed period. If it fails, the creditor will be entitled to repossess the aircraft subject to a positive decision by a Court. In asset-based financing, time is essential in order to keep the value of the asset. The involvement of a judge opens uncertainty as to the timing of his decision and the terms under which repossession will be allowed or the way the operator will maintain the aircraft.

The benefit of Alternative A compared to Alternative B can be highlighted by the example of Compañia Mexicana de Aviación ("Mexicana")[30] case. Mexicana was Mexico's oldest flagship airline together with Aeromexico, when it was state-owned. On August 2nd, 2010, Mexicana filed for bankruptcy protection in Mexico in order "to restructure its costs and insure the viability of the company". Incidentally, the airline also filed for Chapter 15 of Bankruptcy Code in a New York court on the basis that it needed protection from its creditors who could seize its U.S assets. The repossession of the aircraft operated by Mexicana was the stumbling block issue for the lessors/creditors.

According to the Mexican Bankruptcy Code[31] as soon as the debtor is declared insolvent, the decision by a judge should not exceed 185 calendar days (60 days only according to US section 1110) and it may be extended under certain conditions. During this workout stay, the airline debtor should perform its obligations under the aircraft leases conditions (which was not the case). But, in any event, the lessor is not entitled to repossess the aircraft until the court allows it. The situation could have been different should Mexico have adopted the CTC, entered into force in 2007, with the Alternative A instead of Alternative B. Thus, a court decision was required to decide on the future contractual relationship between the parties and namely to allow the repossession of the aircraft. In the meantime, the lessors had no other option but to leave their aircraft in the country and incur a loss of revenues but, more importantly, they could fear that their aircraft would not be properly maintained and that the technical records would be lost.

As shown by the example of Mexicana the issue can be critical for the asset itself, for the confidence that the creditors will have in the state and, for the achievement of the goals of the CTC. Hence the importance of opting-in for Alternative A.

The insolvency remedies provided by the Convention and its Protocol are considered significant achievements in order to fulfil the expected economic objectives of the treaty.

As mentioned above, time is of essence to keep the value of the assets. Under Alternative A and its 60-day "stay" period, the debtor is committed to maintain the aircraft. To that effect, the CTC sets out in Article 13 a number of remedies.

---

[30] Hansen W. Chrisitan, Bernal Eugenio, Rico Caso, Juan Pablo, Orozco Waters Rodrigo, "Mexicana Airlines files for bankruptcy", 2010

[31] Ley de Concursos Mercantiles was enacted on May 12th 2000 with an entry in force the next day.

10.2 Article 13: relief pending final determination

According to the CTC, Article 54-2 (the only mandatory declaration), the CS will have to issue a declaration exempting the parties to go to court. However, extrajudicial remedies are required to be exercised in a "commercially reasonable manner".

Article 13 provides the creditor who adduces evidence of default with the right to speedy relief pending final determination of its claim. Subject to the declaration made by the CS under Article 55, the parties can agree in their contract on the remedies they will apply in an event of default. On a strict theoretical point of view, some scholars have argued that Article 13 is not an interim relief but rather an advance enforcement remedy (see below).

If the parties cannot agree and if the government, according to Article 54, has not allowed self-help it will be up to the court to decide which measures should be adopted. But, the court is bound to decide within a very short period as specified in the instrument of ratification. Article X of the Protocol requires that the CS specify in their declaration the number of working days from filling the petition that will constitute speedy relief (which has typically between three and ten calendar days).

Relief of Article 13 will only be granted under specific circumstances. At the creditor's request, the court can agree on the preservation of the object and its value, or the possession, control or custody of the object, or the immobilisation of the object or the lease and management of the object and the income therefrom.

However, the CTC also takes into account the debtor's interests by requiring agreement for this set of measures between the parties. But, it allows courts to impose protective measures in favour of the debtor or any other interested persons should the creditor does not comply with its obligations under the Convention to the debtor or fails to establish its claim on the final determination.

Article 13 does not seem to reflect any relief measures traditionally existing in national systems[32]. For example, "freezing orders" that restrain a defendant from removal or

[32] Cuniberti, Gilles, Advance relief under the Cape Town Convention, 79

disposal of his assets from his jurisdiction can be found in English law[33]. Likewise, seizure order or interim jurisdictions can be found in German law. But the significant difference here is that traditional interim relief by court order does not usually assume the prior existence of a contractual agreement. According to the Convention and its Protocol, Article 13 is a *sui generis* remedy[34]. Thus, it should be interpreted autonomously from any effective specific national legal system. It is obviously a way to achieve uniformity among the CS.

Although Article 13 " is to be interpreted in accordance with the Convention, not by reference to national law", it seems out of reach (see part 3 below). Actually, there is a lack of an obvious standard, as the article, for instance, does not specify the kind of proof required for the successful application of relief measures. On the other hand, Article 13 does not fit with any remedies commonly found in national legal systems, and as the delegation of the US stated in the negotiations of the treaty, it is a "hybrid between a final remedies provision and one that addresses interim relief"[35]. Article 13 raises several questions as regards to the implementation and interpretations of transnational concepts of law. Although the "hybridity" of transnational law concepts might bring flexibility and enhance their applicability, it must be recalled that conflicts may often arise from the interaction between domestic policies and transnationalism minimum standards. This will be further developed in part 3.

10.3 Article IX: IDERA

IDERA is another significant innovation introduced by the CTC. It encompasses two concepts that are implemented at the outset of a transaction: first, a certificate of de-registration of the relevant aircraft, second, the certificate of export and physical transfer of the aircraft from one territory to another. Actually, at the outset of the transaction upon request from the parties, the Civil Aviation Authorities will provide both documents. Subject to the declaration made according to Article XIII, they will allow the owner/creditor to repossess the aircraft following the occurrence of an event of default without further approvals by local authorities or courts. This is an important feature in order to allow effective re-marketing of

---

[33] Cuniberti, Gilles, Advance relief under the Cape Town Convention, 83

[34] Veneziano, Anna, Advance relief under the Cape Town Convention and its Aircraft Protocol: A comment on Giles Cuniberti's interpretative proposal, 190

[35] ibid, 67

aircraft objects: dual registration is not permitted, as mentioned in Article 18 of the Chicago Convention.

IDERA will only be available if agreed between the parties and following the occurrence of a default (Article XI).

IDERA is especially relevant in the current aircraft market environment where the leasing companies have dramatically expanded (see 5). At the same time, the development of the market has generated the establishment of numerous start-up which are obviously financially weak and could become insolvent. On this backdrop, it is important to realise that the holder of the IDERA is the sole person authorised to request de-registration and re-export of the aircraft. Besides, the IDERA cannot be revoked by the debtor without the written consent of the creditor.

The Kingfisher case will illustrate the importance of IDERA[36]. Kingfisher Airlines Limited was an airline operating in India until December 2012 when its huge indebtedness forced the airline to cease its activity. The airline started its commercial operations in 2005 with four new Airbus A320-200 aircraft and quickly grew until it had a fleet of over sixty aircraft. Despite losses, the company continued to expand its fleet and at some point, merged with another domestic operator, Air Deccan. In addition, Kingfisher ordered more than 100 Airbus aircraft including the jumbo aircraft A380. The gigantic dreams of his founder came to an end in 2012 after a loss of more than US$ 1 billion.

DVB Aviation Finance Asia PTE, Ltd, a German financier leased two aircraft to Kingfisher but could not benefit from IDERA as India only ratified the CTC in 2008. Despite an early agreement between the airline and DVB for the de-registration and re-export of the aircraft (actually a Power of Attorney), Kingfisher notified the DGCA that it objected to the de-registration and unilateral termination of the lease on the basis that (a) Kingfisher had a right under the lease to purchase the aircraft and (b) had acquired an equity interest in the aircraft through the rentals paid to DVB under the lease, which could not be taken away from Kingfisher. The DGCA refused to allow the de-registration and the export of the aircraft. DVB had no other alternative but to lodge a complaint with local jurisdiction.

---

[36] Gerber N. Dean, Walton R. David."De-registration and Export Remedies under the Cape Town Convention", 49-50

The first judgment was in favour of DVB, but, the DGCA did not change its stance. A second judgment confirmed the initial one. It directed DGCA to immediately de-register the aircraft and further held that Kingfisher's no-objection certificate was not required if DVB holds the benefit of a de-registration power of attorney empowering the DGCA to de-register the aircraft which it did. With IDERA, instead of a two-year legal battle with all the associated costs, the aircraft would have left almost immediately the country.

However, as I will comment later, the effectiveness of the IDERA process can be limited by several factors, especially in countries where local authorities/jurisdictions are reluctantly complying with the CTC or sometimes are not instructed to act accordingly.

10.4 Economic benefits

International dealings or professional cross-border activities needs to no longer be national but rather emanates from a legal order of its own[37]. It seems rather obvious to consider that the future of the aviation market will rely on the stability of the legal framework. Although as it will be described in part 3 the challenges ahead for the implementation and the compliance of the CTC are significant.

A creditor will expect from the CTC prompt enforcement of its rights and namely the repossession of the aircraft equipment on time. Hence, the importance of Article XI, Alternative A, Article 13 and Article X on remedies and relief pending final determination, Article XIII regarding de-registration and export, Article XIX, Article 18(5) about the IR and Articles 7 related to the constitution of an international interest. Nevertheless, in order to produce maximum benefits, it is obvious that the CTC must be effectively implemented, which means that its provisions must be strictly and reliably enforced by national authorities.

It is important to realise that the aircraft industry, like many high-tech sectors, because of its cyclicality mainly relies on external finance. As shown in Rajan and Zingales study[38],

---

[37] Dalhuisen, Jan. TheTransnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 1

[38]Rajan G. Raghuram, Zingales, Luigi,"Financial Dependence and Growth", The American Economic Review, 562

industries with a need for external finance grow faster in countries with well-developed financial markets and where an appropriate and safe legal framework is in place.

The economic benefits will be assessed under a triple perspective: first, the new sources of financing and their outcomes, then, the consequences of the above articles of the CTC on the future value of the aircraft equipment, finally, I will single out the importance of the so-called “Cape Town discount”.

10.4.1 The new sources of financing

For a long time, aircraft financing was unsecured i.e the loan was based on the creditworthiness of the creditor or when financiers were dealing with a state-owned airline, the sovereign guarantee was a mandatory condition. When the value of the collateral was acknowledged as a security, the first secured finance leases were granted which meant, in particular, a better loan to value or an extended-term for the financing. With an enhanced security package like Section 1110 in the US, and now the CTC, the capital markets (bonds) can be taped. And together with banks, pension funds, insurance companies, wealthy individuals are now involved in these financings through structures like EETC or Asset Backed Security (the”ABS”)[39]. In 2019, capital markets accounted for 30% of the aircraft financing market[40].

Whereas the US capital markets were closed to non-US airlines under the Section 1110 (the benefit of the section was limited to airlines having a US certificate to fly), the CTC has opened this source of financing to other airlines like Emirates, Air Canada, Turkish Airlines, Latam so that they can benefit from this attractive financing.

The economic advantage provided by the implementation of the CTC can be illustrated by the following example. The French airline company -Air France- and the Spanish airline company -Iberia- went to the US capital market - in 2003 for Air France and Iberia in 1999, 2000 and 2004- despite the non-ratification of the CTC by their civil-code countries (so far, France has still not ratified, whereas Spain did it in two steps). Therefore in a bankruptcy-related event, any repossession would have relied on a court decision which

[39] See Annex 1

[40] Current Aircraft Finance Market Outlook, Boeing

timing could not be anticipated with certainty. Thus, the liquidity facility, which is a mandatory provision in the documentation to get access to the capital markets (in case of default or insolvency by the debtor, it ensures the creditor/investor that the payment of its interests will be made) requested from both airlines were equivalent to 36 months for Air France and 42 months for Iberia[41].

In return, two US airlines- United and Delta- with a worse creditworthiness than their Europeans counterparts had only to put in place a 12-month liquidity facility. When the United Arab Emirates ratified the CTC with the "right" declarations, the liquidity facility requested from their airline, Emirates, was in line with its American competitors. After this costly and disappointing experience, Air France and Iberia refrained from tapping this source of financing.

10.4.2 The CTC and the future value of the aircraft equipment

As was mentioned before several provisions of the CTC, namely Article XI on bankruptcy and IDERA, allow the creditor to repossess and redeploy quickly its asset. Professor Linetzky in his 2009 mathematical model called DAFIM for risk assessment and risk-based pricing of secured asset financing[42] underlined the potential risks faced by a creditor if the repossession cannot take place in due course:

- Accrued interest during the repossession delay period while the lender does not receive interest payments and has no access to the aircraft.
- Continuing economical depreciation of the aircraft during the repossession delay period.
- Continuing exposure to the market risk volatility of the aircraft market during the repossession period.

Theses elements are included in the assessment of the so-called Loss Given Default (the "LGD") i.e any delay in the repossession of an asset means a percentage of loss in the value of the aircraft. In other words, any delay in the repossession increases the risk of loss upon disposal of the aircraft.

---

[41] Linetsky, Vadim, Accession to the Cape Town Convention by the UK: An EconomicImpact Assessment Study, AWG, 2010, 7

[42] ibid

10.4.3 The qualifying declarations

In the framework of the 2011 ASU, the OECD governments plus Brazil set out a list of advised declarations (see Annex 4) made by a CS that could bring additional comfort to the ECAs and therefore allow a reduction in the premium requested for each of the eight categories of airlines risks as defined in the ASU Agreement. When an export credit is extended to an airline, the ECAs will grant a 10% discount on their premium. As an example, for $100M airline B-rated, the reduction would be $100,000 of the aircraft price. This discount is subject to an assessment of both the ratification and the conditions of the implementation of the CTC.

The CS is expected to opt-in for Article XI with Alternative A, for Article XIII (IDERA), for Article VIII (choice of law). Furthermore, at least one of the two following declarations regarding the timely application of remedies should be chosen: either the mandatory declaration under Article 54-2 or declaration linked to Articles X and 13. The CS should not opt-out from the declarations of Article 13 (relief pending final determination) and Article 43 (jurisdiction under Article 13).

Beyond the arithmetics, the message sent by the governments to the markets is quite clear: these qualifying declarations are necessary in order to consider that the airline-risk is actually reduced following the CTC ratification. Besides, the assessment takes into account the implementation of the CTC in the given country. It means that the OECD wants to check that the CTC's primacy compared to the domestic laws dealing with the same subject is confirmed. As it will be mentioned later, the efficiency of transnational law is very much dependent upon the hierarchy of norms applied by the CS in its domestic legal system.

Finally, as the list of the ASU discount beneficiaries and non-beneficiaries is public, the whole process is an incentive for the CS that lags behind in terms of qualifying declarations to amend them. It remains to be seen what could happen if a country on the list of the agreed CTC discount does not comply in the future. Removing this state from the list would have consequences far beyond the sole subject of export credit. This raises the issue of the enforcement regime of the Convention and more especially the solutions that should be devised if a CS infringes the terms of the treaty (see 13).

As of today, thirty two countries are entitled to the OECD discount, three are under review by the OECD[43]. Even if the process of eligibility for the discount is demanding, it is a significant support for a country that aims to develop further its aviation sector.

Despite its numerous benefits -such as predictability, transparency, and stability- that can be explained by the nature of the treaty, including both common law and civil law concepts, the transnationalisation of the treaty may be challenged in many ways as will be analysed in part 3. It will also be explained how the gaps between the theory of the CTC and its practice can be overridden. The use of the domestic law will not be necessarily the backstop solution unlike the Convention suggests. The resort to the *lex mercatoria* approach and its transnationalism minimum standards: fundamental principle, custom or industry practices, legislation, general principle, and party autonomy[44] could be, instead, a reasonable solution.

Part 3: Challenges of the Cape Town Convention

Throughout the first two parts, an ideal scenario was described: the market dramatically expanded, the number of stakeholders has increased and diversified in the wake of the changes occurred in the air transport (deregulation, liberalisation). At the same time, superseding the obsolete treaties of Chicago(1944) and Geneva(1948), the CTC with its innovative solutions and general principles seems to provide a reasonable legal framework in order to enhance the confidence of the interested parties.

The story, however, falls short of the main stumbling block of the CTC: the key issue, and the success of the CTC rely on the interaction between transnational commercial law –the treaty- and the current laws of the CS. As Joost Pauwelyn and Manfred Elsig wrote: « Treaty interpretation intervenes at a crucial stage between commitment and compliance »[45]. It means

---

[43] OECD Secretariat, sector Understanding on Export Credits for Civil Aircraft, Cape Town List, List of State qualifying for the reduction of the minimum premium rates referred to in article 36 of Appendix II of the ASU

[44] Dalhuisen, Jan. TheTransnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 180

[45] Havel F.. Brian& Mulligan Q. John, The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic, 85

that predictability and autonomy principles could be jeopardised and thus undermined the confidence of the creditors. The potential benefits, that the creditors/debtors were supposed to obtain would not materialise. Moreover, as the CTC does not include any dispute mechanism like other commercial treaties, the risks of mischief when the treaty is incorporated in the current legal system of the CS cannot be underestimated.

I will first highlight the issues related to the incorporation of the CTC into the different legal systems and eventually suggest how conflicts between domestic laws and the treaty may be overcome. In particular, the analysis will focus on the gap-filling concept. Then, the consequences of the absence of a dispute mechanism will be examined. Finally, I will focus on the question of "time": does the Convention still make sense in the fast-moving aviation environment ? In other words, is there a risk of obsolescence of the Convention with more up-to date domestic laws applied instead?

11. The complex relationship between the CTC and domestic law

The CTC can be seen as uniform law which stands in the traditional sense for treaty law as evidenced by the 1980 United Nations Commission on International Trade Law (the "UNCITRAL") Vienna Convention[46]. Thus, as soon as it is properly incorporated by the CS in its legal system, it will be applied automatically and directly by the local judges as part of the national lex fori. In other words, it would appear that the treaty should prevail over applicable domestic private international law rules.

The primacy of the treaty over all domestic laws dealing with the same subject is the basic assumption under which confidence of the creditors and the development of the market would happen. This primacy is highly dependent upon the national policy about the hierarchy of norms.

Therefore, the implementation process is a complex but key milestone for the success of the CTC: several domestic laws with the same objectives must be amended or put aside. Some practices must be adjusted.

The CTC is having the force of law in a long-rooted administrative and jurisdictional environment. Whilst States may agree on a set of rules, their application is highly dependant

---

[46] Dalhuisen, Jan. TheTransnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 343

upon the behaviour of those domestic actors within the CS who are responsible for their interpretation and enforcement i.e national judges/administrative agencies.

However, the CTC is ambivalent: it aims to harmonise a legal framework for a very large range of states whereas it emphasises the idea of the specificity of each of them or advocates a "case-to-case". The Space Protocol gives an interesting illustration of this risk with the new concept of « public service »[47]. Not only it does not define the concept in the Protocol but the fact that satellite services can be provided on an international basis to various states that may have different interpretations of public service definitely weakens the position of the creditors.

Article 39 "Rights having priority without registration" (see 9.4.1) provides another illustration of this ambivalence. By making a declaration under Article 39(1)(b) a CS can preserve its local law rights of arrest and detention for non-payment of charges for public services related to an aircraft object without registering these rights in any registry[48]. Although the CTC doest not permit the CS to create a new right or interest or a new priority, it allows them to declare that a category of local Non-Consensual Rights or Interests (the "NCRIs") that already have a priority over consensual interests will enjoy the same priority against registered international interests created under the Convention within that CS[49]. All the same, Article 39 is consistent with the basic objectives and principles stated in the Preamble of the Convention. However, the priority of national local NCRIs over registered international interest is questionable. Likewise, for the unpredictability it creates[50].

The "case-to-case" nature of the CTC is consistent with its core principles, but, now that eighty states have ratified the Convention, this specificity may jeopardise a full-fledged implementation.

---

[47] Overview Space Assets, UNIDROIT

[48] Pritchard, John; Lloyd, David, "Analysis of Non-Consensual Rights and Interests under Article 39 of the Cape Town Convention", 14

[49] ibid, 4

[50] ibid, 9

I will first describe the different legal systems faced by the CTC and the possible outcomes. Three examples will then be introduced in order to demonstrate how voluntarily or by ignorance the future of the CTC may be hit.

11.1 Different legal systems

To acquire force of law, the CTC is subject to the Constitution of the CS and the choice made between monism and dualism. Whilst in a monist system, international law is automatically incorporated into national law, in return, in the dualist system, a vote of the Parliament is required.

On this backdrop, the place of the treaty in the legal system may vary from one country to another; sometimes, it is ranked as the highest legal norm (i.e France, Netherlands, Portugal). On the contrary, in other states, some laws not directly linked to the scope of the treaty will survive with potential conflicts in the future.

Despite a lot of innovations based on several *sui generis* concepts, on which the core principles of the CTC apply, the treaty cannot be considered as an all-encompassing commercial code. Thus, the relationship between its international substantive law provisions and otherwise applicable national law remains critical. Here, it seems that an acceptable implementation of the treaty in a domestic legal system can only be achieved through the re-emergence of different sources of law within the modern *lex mercatoria*. In other words, the legal differences between CS should not be overemphasised. Instead, it seems more rewarding to assess the commonality between them and the ways the discrepancies could be overcome. Perhaps, transnationalism minimum standards would answer the question.

Beforehand, I would like to highlight three examples where the CTC's efficiency is put into question by national stakeholders.

11.2 Voluntary mis-interpretation: China: IDERA (Article 15)

According to Article 15, the national registration authorities must comply to the request for de-registration using a properly submitted IDERA (see 10.3). China's decision to require a court order using the previously submitted documents seems contrary to Article 15's

purpose i.e providing creditors a more certain and expedited de-registration process in the event of debtor insolvency[51].

After long discussions, China agreed to soften its position: it would only request the creditor to demonstrate its possession of the aircraft object and would commit to act quickly (ten days) in order to issue its court order. Despite this change, the OECD remained unconvinced and decided that China should be left out of the list of the countries eligible for the CTC discount.

11.3 Voluntary non-compliance: Oceanair case, Brazil

Brazil ratified the CTC in 2011 with Alternative A including a 30-day period before the creditor may take possession of its asset. Besides, according to the CTC, the courts of other states must apply the declarations of the primary insolvency jurisdiction. Both principles were infringed in the case of Avianca Brazil[52]. In December 2018, the airline filed a petition for judicial restructuring in the Brazilian Bankruptcy Court but also initiated a Chapter 15 filling in the United States Bankruptcy Court for the Southern District of New York. The Brazilian court agreed to a 30-day stay. But in January 2019, the US Bankruptcy Court entered an order ("the Provisional Order") granting provisional recognition and relief and imposed a stay within its territorial jurisdiction, beyond the 30-day agreed by a Brazilian court. First wrong interpretation by the US court. Then, upon the expiry of the 30 day period the Brazilian court decided, in violation of the CTC, an extension of the stay for another period of 30-day: second infringement. Finally, the US court also extended the stay to another 30-day period: third violation. In both cases, domestic courts voluntarily decided against the primacy of the CTC and jeopardised the creditors' confidence in the strict implementation of the CTC.

11.4 Ignorance of the parties autonomy: Nigeria and choice of law (Article VIII)

---

[51] Gerber N. Dean& wALTON R. David, De-registration and Export Remedies undertake Cape Town Convention, 67

[52] Harrison GoodrichJulier, "Avianca Brazil- What happens in Cape Town stays in Cape Town", thought leadership, Publications, Latest airline restructuring news, Norton Rose Fulbright, April 2019

The CTC includes jurisdictional rules: they intend to override the private international law principles which a court seized of a matter that would usually apply to determine the national courts competent to hear CTC's cases and enforce the substantive rights created by the CTC.

Early cases have shown that some courts are either not sufficiently aware of the CTC and its applicability or sometimes suffer from institutional bias in favour of pre-CTC national law. Article 42 is a general rule allowing the parties to an agreement creating an international interest to choose specific courts to adjudicate CTC claims. It expressly overrides domestic conflict of laws rules concerning CTC claims insofar as CS is involved.

In the First Nation Airways case[53], the courts of Nigeria claimed jurisdiction over a repossession action covered by the CTC in a manner that was inconsistent with the principles of Article 42, notwithstanding that the parties had designated the courts of England as their exclusive forum to hear the CTC claims. The court then ordered the exercise of applicable CTC repossession remedies based on domestic legal principles.

These breaches of the CTC principles must not be overemphasised because they are limited in numbers. In return, as they involve some « target » countries of the CTC (by their size and importance in the aviation sector) they have to be taken seriously into consideration. As highlighted before, their mere existence cast doubts over the efficiency of the CTC in the relevant CS and may jeopardise the confidence of the potential creditors.

In the light of these three cases, it can be understood that sometimes the CTC or its interpreters (UNIDROIT, AWG…) do not provide enough guidelines related to its interpretation or its implementation towards the domestic legal system of the given CS. The following part will be dedicated to the assessment of the concept of gap filling as suggested by the treaty.

12. Gap filling

[53] Lessard, Mark, Jebely, Paul& WooL, Jeffrey, Of Swords and Shields: The Role and Limits of Courts in the Enforcement of the Cape Town Convention's Substantive Repossession Remedies, 88

With the introduction of a new transnational substantive law, the CTC and its Aircraft Protocol aim to eliminate the conflicts of law rules[54]. When the matter is not expressly addressed by the CTC, Article 5(2) stipulates that the issue must be settled in accordance with its general principles: practicality, party autonomy, predictability, transparency, and sensitivity. These principles are not all in line with the basic components of the modern *lex mercatoria* such as fundamental principle, custom and practices. According to the CTC, if these principles do not provide an answer to a given situation, it should be referred to the applicable law.

Reference to applicable law as mentioned in Article 5(3) means the domestic rules of the law applicable by virtue of the rules of private international law of the forum state. The concept of modern private international law has a basis in national law and thus remain domestic in nature. Thus, private international law of this sort is unlikely to be able to properly take into account the ever-increasing legitimate interests of the parties' own states or those or any other that might be directly or indirectly concerned with the transactions[55].

The use of private international law as a gap-filling raises concerns although it should be assumed that the result cannot be inconsistent with the express terms and principles of the CTC. However it cannot be underestimated that it would give priority to social concerns and government interests against foreign international interests (NCRI's are a good illustration). Even in the context of party autonomy -as in the case of the CTC- where parties may choose the applicable legal regime or choose their national system if it seems more appropriate, it remains to be seen how far they can diverge from the treaty without putting at risk its basic objectives. The nineteen declarations of the CTC were supposed to add enough flexibility in order to allow a large number of countries to access the Convention. But, it cannot be hidden that to some extent they threaten the "universality" and the transnational nature of the treaty towards diversity between the states which is not the initial intent of the CTC. As an example, Article XIII (IDERA) is an opt-in declaration, and as mentioned above (10.3), it can be very challenging for the creditor to repossess its asset in an insolvency event if an IDERA does not exist per se.

---

[54] Kreuze F. Karl,Jurisdiction and choice of law under the Cape Town Convention and the Protocols thereto, 149

[55] Dalhuisen, Jan. TheTransnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, 300

Actually, as a transnational instrument, the CTC is facing two risks: first, the interpretation by the practitioners i.e judges/administrative agencies who may hold a restrictive or a conflicting approach and thus prefer to use the positive local law. However, the specificity and the technicality of the CTC together with a highly specialised Protocol may, to some extent, deflect interpretive diversity by national tribunals/agencies. But, at the same time, it can jeopardise the efficient implementation and application of the CTC in national legal systems.

Then, the risk of renationalisation i.e new laws will supersede the provisions of the treaty and make the general principles useless. The so-called « renationalisation » starts from two basic features: over time, new domestic laws more in line with the evolution of the aircraft market may be adopted. States are likely to develop perspectives on what they believe they have committed to in ratifying the CTC that are different from those they held at the time of adoption. Having the hands tied by an international treaty is not necessarily viewed positively in local politics and national systems are subject to more frequent revisions, refinement, and interpretations than transnational treaties.

Both risks have the same outcomes: they blur the objectives of the treaty and jeopardise the confidence of the creditors. Likewise for the absence of an enforcement mechanism.

13. Absence of an enforcement mechanism

As briefly mentioned above, there is no international dispute resolution in the CTC although it is highlighted that the CTC not only establishes legal rules that are to be enforced in domestic courts but it sets explicit procedural rules and deadlines for local tribunals to follow in the administration of judicially-provided remedies. But is it enough?

Government policies have always had a significant impact on the law, especially on bankruptcy laws. Bankruptcy law is very specific to the states and its interests. Therefore it goes without saying that local judges may prefer to favour and thus preserve domestic bankruptcy laws and interests over international law matters i.e Oceanair case (11.3).

The only actual, but limited, enforcement mechanism can be found with the ASU. A state entitled to the CTC discount may risk forfeiture if it fails to comply with its obligations under the treaty. In the worst case, it could refrain the ECAs from granting export credit to an airline located in this country. It is limited because it would not support the case of a private creditor or a leasing company trying to repossess its asset or to terminate the lease. Likewise, it is obvious but understandable that the OECD members would consider the global geopolitical outcomes of such a decision in terms of investments in the given country for example in order to delay as much as possible the withdrawal of the discount.

In that context and in order to enhance the efficiency of the CTC, it might be worth looking at different options for an enforcement regime.

International Commercial Court on the model of the International Court of Justice could be an interesting solution: the judgments would be international and thus should become universally enforceable as such. Seemingly attractive, it is highly unlikely that states would agree to be subject to an external jurisdiction on topics so sensitive in domestic policy.

Another option suggested by M. Van Alstine ("Dynamic Treaty Interpretation", 1998) would be to enhance « a dynamic process of interaction between national courts on an international level ». Greater uniformity would eventually be achieved[56]. However, it seems highly unlikely that CS would agree to apply jurisprudence coming from other states.

Or, it might sound appropriate to use arbitral tribunals in the framework of the World Trade Organisation (the "WTO") which has developed an international trade jurisprudence. From that perspective, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards -known as the "New York Convention"- offers a comprehensive and effective way of resolving international disputes by arbitration. In order to avoid discrimination between foreign arbitral awards and local judgments, the CS should ensure that these awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards[57].

The application of the New York Convention to the CTC could be used to enhance its predictability as regards to the issues that may arise between the Convention and the domestic

---

[56] Havel F. Brian& Mulligan Q. John, The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic, 83

[57] Hodges QC Paula, Henderson Alastair, Satryani Gitta, Naish Vanessa, Ambrose Hannad; "60 years of the New York Convention: a triumph of trans-national legal co-operation, or a product of its time and in need of revision?", published in Inside Arbitration, issue 6, Herbert Smith Freehills, July 2018

law. The New York Convention could also strengthen the attractiveness of a country and in the case of the CTC, it might increase the confidence of the creditors and facilitate the financing of aircraft.

This oversight on a dispute mechanism puts in jeopardy the success of the CTC. As mentioned before, the CTC approach is very much dependent on the co-operation/willingness of its CS. Actually, without any enforcement mechanism, the CTC runs the risk that the CS may give priority to national interests against international interests. In practice, legal scholars expect the state, as a matter of fact, to comply with its international obligations, particularly those reflected in a treaty. Two arguments have been highlighted: the repetitional theory where states comply to maintain and enhance their reputation and the realist-efficient theory where the state comply when it is efficient[58].

In any event, a growing gap may arise between the principles and the provisions of the CTC and their practical implementation. The CS has indeed an important role to play in order to communicate, to inform and to instruct the jurisdictions/administrative agencies. Last but not least, time is the ultimate test for a treaty faced with a rapidly evolving market.

14. The test of time

In a fast-moving market such as the aviation market, it is reasonable to wonder whether the provisions of the CTC will still (and for how long?) be consistent with the needs of the market. In the worst case scenario, can the treaty survive only through its general principles and objectives? Or, would it need to be reviewed and amended by a new diplomatic conference?

Less than twenty years after its adoption, it is obviously too early to convene a new conference. Article 61 of the CTC and Article XXXVI of the Protocol are dealing with this item. However, it is hard to assume that a new diplomatic conference would take place without years of discussions about such an opportunity. Besides, amendments would have to be ratified by the various states. Notwithstanding the efforts and time needed, it would potentially create discrepancies between the states that approved the initial treaty and those which may not approve all the amendments if declarations were again to be allowed. As a clue, neither the Chicago nor the Geneva Conventions have been amended. They have been replaced by a new treaty which provisions superseded the old ones.

---

[58] Wool, Jeffrey, "Compliance with Transnational Commercial Law", 11

However, it could be suggested to convey the interpretation and application of the CTC toward a more modern *lex mercatoria* approach. International organisations should be strongly encouraged to assess guidelines, to set up database of legal administrative decisions and circulate updated information about the CTC. The objective would be to provide compliance incentives and information that would facilitate uniform and internationally oriented interpretation. Transnational minimum standards (fundamental principle, custom or industry practices, legislation, general principle, and party autonomy) should be recommended for conflicts emerging between the CTC and the domestic legal environment of its CS.

15. Conclusion

The CTC and its Aircraft Protocol answer, undoubtedly, the needs of the growing number of cross border transactions in the aircraft sector. The high number of ratifications is clearly a positive signal in this respect and translates the views that the development of the aircraft market justifies the recognition of the primacy of the CTC over the domestic laws dealing with the same subjects. Through their access to its key features the vast majority of the CS have likewise confirmed their support to the main principles of the CTC (transparency, predictability, parties autonomy) aiming at providing enough confidence to the financiers in order to facilitate the aircraft financing.

But, at the same time, the implementation of the CTC and the compliance by the courts/administrative agencies of the CS will be ultimately the major benchmarks to assess the success of the CTC and to achieve its expected benefits. The core concept of primacy could face administrative and/or jurisdictional obstacles against which the CTC does not provide crystal clear solutions: no dispute resolution, recourse to gap filling and thus to the general principles of the CTC, when no explicit provisions exist in the documents, and finally the acknowledgement by the CTC that private international law may apply.

These challenges/weaknesses could be tackled should the modern *lex mercatoria* approach and its basic concepts –fundamental principal, customs and industry practices, general principle and party autonomy- prevail in all circumstances.

Together with the new *lex mecatoria*, we could also wonder whether the method of « reflective equilibrium » as introduced by John Rawls in his « Theory of Justice » may bring answers/solutions to the limits faced by the CTC. The method of reflective equilibrium if applied by the tribunals/administrative agencies, consisting in working back and forth among considered judgments, principles, and rules or rethinking any of these elements, whenever necessary, in order to achieve an acceptable coherence among them, shall allow the CTC to better adjust to the up-coming changing environment .

16. List of key words

All the definitions below can be found in Article 1 of the Convention and Article I of the Protocol.

Aircraft: means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters.

Creditor: means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement.

Debtor: means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest.

De-registration of the aircraft: means deletion or removal of the registration of the aircraft from its aircraft register in accordance with the Chicago Convention.

Insolvency proceedings: means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation.

International interest: means an interest held by a creditor to which Article 2 applies.

Leasing agreement: means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment.

Non-consensual right or interest: means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation.

Security agreement: means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person.

17. Bibliography

Aircraft Datas

A1- Global Market Forecast, Cities, Airports& Aircraft 2019-2038, Issue 6, 2019, AIRBUS, https://www.airbus.com/aircraft/market/global-market-forecast.html
A2- Current Aircraft Finance Market Outlook, Boeing Capital Corporation, 2019, BOEING, https://www.boeing.com/resources/boeingdotcom/company/capital/pdf/2019_cafmo.pdf
A3- The month in review: December 2019, Orders and Deliveries, Commercial Aircraft, AIRBUS, https://www.airbus.com/aircraft/market/orders-deliveries.html
A4- AFIC: Supporting Aircraft Finance, Aviation& Aerospace, 2019, MARSH, https://www.marsh.com/uk/industries/aviation-aerospace/afic-supporting-aircraft-financing.html

Books

B1- DALHUISEN, Jan, The Transnationalisation of Commercial and Financial Law. The New Lex Mercatoria Concerning Professional Dealings and its Sources, Vols. I and II, 6th edition, published by Hart Publishing Oxford, 2016
B2- Sir GOODE, Roy, Convention on International Interests in Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock, Official Commentary, 2nd edition, published by UNIDROIT, 2014
B3- Murphy, Rob, Desai Nasreen. Aircraft Financing, Euromoney Books, Fourth edition, 2010
B4- Practioner's Guide to The Cape Town Convention and The Aircraft Protocol, The Legal Advisory Panel of the Aviation Working Group, published by the AWG, 2015

Conventions & Protocols

C1- Convention on International Interests in Mobile Equipment, Cape Town, 2001, https://www.unidroit.org/instruments/security-interests/cape-town-convention

C2- Aircraft Protocol, Cape Town, 2001, https://www.unidroit.org/instruments/security-interests/aircraft-protocol

C3- Convention on International Financial Leasing, Ottawa, 1988, https://www.unidroit.org/instruments/leasing/convention-leasing

C4- United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf

C5- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf

C6- Convention on International Civil Aviation, Chicago, 1944, https://www.icao.int/publications/Documents/7300_orig.pdf

C7- CTC ratification status, https://www.unidroit.org/status-2001capetown

C8- Aircraft Protocol ratification status, https://www.unidroit.org/status-2001capetown-aircraft

C9- CTC Declarations Matrix, https://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/declarations/capetownconv-aircraftprot-decltable-matrix.pdf

C10- Declarations Memorandum, https://www.unidroit.org/english/documents/2011/depositary/dc09-dep-01rev4-e.pdf

C11- CISG and Related Transaction, Texts and Status, UNCITRAL, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg

C12- Overview Space Assets, UNIDROIT, https://www.unidroit.org/overview-2012-space-assets

C13- Section 1110- Aircraft equipment and vessels, 2019 U.S Bankruptcy Code, https://www.usbankruptcycode.org/chapter-11-reorganization/subchapter-i-officers-and-administration/section-1110-aircraft-equipment-and-vessels/

Cape Town Convention Journal articles (newest issues to oldest ones)

J1- LESSARD, Mark, JEBELY, Paul& WOOL, Jeffrey. Of Swords and Shields: The Role and Limits of Courts in the Enforcement of the Cape Town Convention's Substantive

Repossession Remedies, Cape Town Convention Journal, Vol.6, 2017, PKP Publishing Services Network, pp.78-96, https://ctcjournal.net/index.php/ctcj/article/view/8/4

J2- GRAY G. Donald, GERBER N. Dean& WOOL Jeffrey. The Cape Town Convention aircraft protocol's substantive insolvency regime: a case study of Alternative A, Cape Town Convention Journal, Vol.5, 2016, Taylor& Francis Online, pp.115-144, https://www.tandfonline.com/doi/full/10.1080/2049761X.2016.1290517

J3- GRAY, Kenneth. CTC in Europe: assessment of ratifications to date and implications of Brexit on the ratification by the UK, Cape Town Convention Journal, Vol.5, 2016, Taylor& Francis Online, pp.1-21, https://www.tandfonline.com/doi/full/10.1080/2049761X.2016.1252136

J4- WEBER, Ludwig. Public and private features of the Cape Town Convention, Cape Town Convention Journal, Vol.4, 2015, Taylor& Francis Online, pp53-66, https://www.tandfonline.com/doi/full/10.1080/2049761X.2015.1102011

J5- HAVEL F. Brian& MULLIGAN Q. John. The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic, Cape Town Convention Journal, Vol.3, 2014, Taylor& Francis Online, pp.81-94, https://www.tandfonline.com/doi/abs/10.5235/204976114814222467

J6- GERBER N. Dean& WALTON R. David. De-registration and Export Remedies under the Cape Town Convention, Cape Town Convention Journal, Vol.3, 2014, Taylor& Francis Online, pp.49-68, https://www.tandfonline.com/doi/abs/10.5235/204976114814222485

J7- KREUZER, F. Karl. Jurisdiction and choice of law under the Cape Town Convention and the Protocols thereto, Cape Town Convention Journal, Vol.2, 2013, Taylor& Francis Online, pp.149-164, https://www.tandfonline.com/doi/abs/10.5235/204976113808311448

J8- WOOL, Jeffrey & JONOVIC, Andrej. The relationship between transnational commercial law treaties and national law- A framework as applied to the Cape Town Convention, Cape Town Convention Journal, Vol.2, 2013, Taylor& Francis Online, pp.65-129, https://www.tandfonline.com/doi/abs/10.5235/204976113808311385

J9- PRITCHARD, John & LLOYD, David. Analysis of Non-Consensual Rights and Interests under Article 39 of the Cape Town Convention, Vol.2, 2013, Taylor& Francis Online, pp.3-40, https://www.tandfonline.com/doi/abs/10.5235/204976113808311457

J10- VENEZIANO, Anna. Advance relief under the Cape Town Convention and its Aircraft Protocol: A comment on Gilles Cuniberti's interpretative proposal, Cape Town Convention

Journal, Vol.2, 2013, Taylor& Francis Online, pp.185-190, https://www.tandfonline.com/doi/abs/10.5235/204976113808311376

J11- ZWITEN VAN, Kristin. The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives, Cape Town Convention Journal, Vol.1m 2012, Taylor& Francis Online, pp.53-77, https://www.tandfonline.com/doi/abs/10.5235/CTC.2012.53

J12- GLAISTER J. William; MURPHY, Robert; CHAN, Marisa; DUNNE Ellie & ACRATOPULO Julian, Lex situs after Blue Sky: is the Cape Town Convention the solution?, Cape Town Convention Journal, Vol.1, 2012, Taylor& Francis Online, pp.2-23, https://www.tandfonline.com/doi/abs/10.5235/CTC.2012.3

J13- CUNIBERTI, Gilles. Advance relief under the Cape Town Convention, Cape Town Convention Journal, Vo.1, 2012, Taylor& Francis Online, pp.79-94, https://www.tandfonline.com/doi/abs/10.5235/CTC.2012.79

Organisations datas

O1- HUAY SIEW, Tan. Overview& Status of Ratification- Cape Town Convention& Aircraft Protocol 2001, ICAO Legal Seminar, Nairobi, Kenya, November 2017, Civil Aviation Authority of Singapore, https://www.icao.int/Meetings/LegalSeminar/Documents/TSH_Cape%20Town%20Convention%20and%20Airport%20Protocol%202001%20(final).pdf

O2- LINETSKY, Vadim. Accession to the Cape Town Convention by the UK: An Economic Impact Assessment Study, AWG, 2010, http://awg.aero/wp-content/uploads/2019/09/UKCTC-Econ-Impact-Final-Version.pdf

O3- Solid passenger traffic growth and moderate air cargo demand in 2018, ICAO, 2018, https://www.icao.int/Newsroom/Pages/Solid-passenger-traffic-growth-and-moderate-air-cargo-demand-in-2018.aspx

O4- Memorandum on Aviation Insurance in the context of Financing and Leasing, AWG, July 2010, http://awg.aero/wp-content/uploads/2019/09/AWG-Insurance-Memorandum-29-July-2010.pdf

O5- Trade and Agriculture Directorate participants to the Arrangement on Officially Supported Credits, OECD, 2020, pp. 77-78, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2020)1

O6- OECD Secretariat, sector Understanding on Export Credits for Civil Aircraft, Cape Town List, List of State qualifying for the reduction of the minimum premium rates referred to in article 36 of Appendix II of the ASU, https://www.oecd.org/trade/topics/export-credits/documents/oecd-export-credits-prevailing-cape-town-list-asu.pdf
O7- Facts and Figures, World Aviation and World Economy, ICAO, https://www.icao.int/sustainability/Pages/Facts-Figures_WorldEconomyData.aspx

Specialised Articles, Presentations, Dissertation and Dictionary entry

S1- BERGMAN, Paul. Boeing sets new airplane delivery records expands order backlog, Strong finish to 2018 results in delivery records, https://www.boeing.com/company/about-bca/washington/2018-deliveries-strong-finish.page
S2- FLECHTNER M. Harry. UNCITRAL published in Audiovisual Library of International Law, Office of Legal Affair, UN (2009), https://legal.un.org/avl/pdf/ha/ccisg/ccisg_e.pdf
S3- GARCIA, Marisa. "Air Travel Projected to Double in 20 Years, But Protectionism Poses Thread", Forbes, October 24, 2018, https://www.forbes.com/sites/marisagarcia/2018/10/24/iata-raises-20-year-projections-to-8-2-billion-passengers-warns-against-protectionism/#4ae458ce150f
S4- GUANDALINO, Richard. Aircraft Financing& The Cape Town Convention, Executive Master Corporate Finance& Capital Market, SciencesPo, Formation Continue
S5- Sir GOODE, Roy. Asset IdentificationUnder The Cape Town Conventions Protocols, 81 Law and Contemporary Problems (2018), https://scholarship.law.duke.edu/lcp/vol81/iss1/7/
S6- HAKEN, Bob. AFIC- Aircraft non-payment insurances- a new aircraft financing product, Thought Leadership, Publications, 2008, Norton Rose Fulbright, https://www.nortonrosefulbright.com/en/knowledge/publications/fafe9ab9/afic---aircraft-non-payment-insurance---a-new-aircraft-financing-product#section8
S7- HANSEN W. Chrisitan; BERNAL Eugenio; RICO C. Juan Pablo; OROZCO W. Rodrigo."Mexicana Airlines files for bankruptcy", White &Case LLP, published August 6, 2010, https://www.lexology.com/library/detail.aspx?g=824bf2f2-b255-48bb-a802-ffc0f8179171
S8- HODGES QC, Paula; HENDERSON, Alastair; SATRYANI, Gitta; NAIS, Vanessa& AMBROSE, Hannah. 60 years of the New York Convention: A triumph of Trans-national legal co-operation, or a product of it's time and in need of revision, Inside Arbitration,

Perspectives on Cross-border Disputes, 6th Issue, 2018, pp.2-10, https://www.herbertsmithfreehills.com/latest-thinking/60-years-of-the-new-york-convention-a-triumph-of-trans-national-legal-co-operation

S9- MACLEOD A. Kevin. Aviation Debt Capital Markets Are Growing: An Overview of Recent Trades, Global Transportation Finance Newsletter, 2016, Vedder Thinking, Vedder Price, pp.2-5, https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2016/05/aviation-debt-capital-markets-are-growing-an-overv/files/global-transportation-finance-newsletter--may-2016/fileattachment/global-transportation-finance-newsletter--may-2016.pdf

S10- RAJAN G. Raghuram& ZINGALES Luigi. Financial Dependence and Growth, The American Economic Review, Vol.88, Issue 3, 1998, JSTOR, http://siteresources.worldbank.org/INTEXPCOMNET/Resources/Rajan_and_Zingales_1998.pdf

S11- REINHOLD, Steven. Good faith in International Law, UCL Journal of Law and Jurisprudence 2013, Bonn Research Paper on Public International Law No.2/2013, SSRN,pp. 40-63, https://discovery.ucl.ac.uk/id/eprint/1470678/1/2UCLJLJ40%20-%20Good%20Faith.pdf

S12- TRASCHLER, Thomas. A uniform application of Article 13 of the Cape Town Convention via an autonomous interpretation, Uniform Law Review, Vol.21, Issue 4, 2016, Oxford Academic, pp.640-662, https://academic.oup.com/ulr/article/21/4/640/2917908

S13- WHITTLE, Miria& LANDSBERG, Ernst. Aviation finance: an interesting prospect for long-term investors, EY, 2017, https://www.ey.com/Publication/vwLUAssets/ey-aviation-finance-as-a-long-term-investment/$File/ey-aviation-finance-as-a-long-term-investment.pdf

S14- Open discussion on framework for economic assessment of the protocols, CTC Academic Project, University of Oxford, Faculty of Law, 2016, https://www.law.ox.ac.uk/sites/files/oxlaw/jeffrey_wool_-_open_discussion_on_framework_for_economic_assessment_of_the_protocols.pdf

S15- Aviation Leaders Industry Report 2020, KPMG& Airline Economics, KPMG International Cooperative, https://assets.kpmg/content/dam/kpmg/ie/pdf/2020/01/ie-steering-the-supercycle-aviation-leaders-report-2020.pdf

S16- “Security agreement”, Investopedia, viewed 5/02/20, https://www.investopedia.com/terms/s/security-agreement.asp

17. Annex 1: Aircraft Financing[59]

The most usual ways to finance an aircraft involve either the banks with or without the support of the ECAs or the leasing companies or capital markets.

17.1 Aircraft lease

Whilst in the 1980's around 1,7% of the delivered aircraft were going to leasing companies, this number has reached 50% in 2020[60]. The benefits of leasing for airlines, at least operating lease, are namely no residual value risk, an improved balance sheet, tax advantages, and airlines can operate new modern aircraft without large investments.

A lease is an agreement by which one party grants to another party a right to possession or control of an object in return for rental or other payment for a given time. There are roughly two types of leasing agreements: the finance lease where the ownership will be transferred to the lessee at the end of the lease, and the operating lease where the aircraft is returned to the lessor at the end of the lease.

17.1.1 Finance lease

A finance lease is a structure in which a financing institution, usually a bank or a syndicate of banks, is purchasing and financing an aircraft upon a mandate of an airline. The financier(s) will remain the legal owner of the asset for the duration of the lease and will provide the financing to the airline over a fixed term -generally 12 years- with an obligation for the airline to acquire the ownership title of the equipment at the end of the lease assuming the financing is fully paid out. The financing will usually only cover 80% of the aircraft price (loan to value), the balance being the downpayment or equity provided by the airline. During the lease, assuming no payment default, the lessee will be granted quiet enjoyment over the asset.

In a finance lease, the lessor will bear the economic risks but, in return, will get the benefits of the future value of the asset. During the lease, the lessee will pay instalments

---

[59] Murphy, Rob, Desai Nasreen. Aircraft Financing, Euromoney Books, Fourth edition, 2010

[60] Mazareanu, E. Share of leased aircraft in the aviation industry worldwide from 1970 to 2020, Transportation& Logistics, Aviation, Statista, February 2020

representing both the principal and the interests on the financing. The interest rate is mainly based on the creditworthiness of the airlines but also includes an assessment of the legal environment in which the airline operates.

As far as the repayment of the financing is concerned, several structures may be contemplated. The most common one is the "annuity style structure" whereby the same instalments will be paid over the term of the lease although interests will be higher at the beginning.

In the "straight line model", the principal is divided equally over the term and the interests are calculated according to the outstanding amount of the loan. Obviously, the instalments will be higher at the outset and will gradually diminish. From a cash flow point of view for the airline, this latter structure is more costly in the short-run. But, it is traditionally a structure that takes into account a certain skepticism by the banks toward the airline. Hence, the idea to reduce their exposure to the airline and to amortise the aircraft as quickly as possible.

Notwithstanding these two structures, there is always the option of "financing with a balloon". From the outset, the financier would agree to be left with a balloon of 20% at the end of the lease. The ownership will only be transferred if the balloon is repaid at the end of the lease. Of course, the financing institution may agree to refinance the balloon over three years so that the transfer of title will only occur at that time. In terms of cash flow, during the initial period, the airline will pay less than on a full pay-out basis. Needless to say that the balloon option is limited to the best credits and sometimes with the guarantee of the manufacturer.

17.1.2 Operating lease

An operating lease is a contract in which the lessee agrees to rent an asset in exchange for monthly payments to the lessor -the leasing company- which will retain the ownership rights. Unlike the finance lease, the lessee will have to return the aircraft at the end of the lease or before, if there is an agreement with the lessor. At the outset of the operating lease, the lessee will pay a security deposit usually equivalent to three months rentals. It will also pay in addition to the rent maintenance reserves in order to allow the regular technical inspection of the aircraft.

The lease will generally run for 6/7 years and can be renewed upon agreement on the terms and conditions between the parties. The legal environment should thus allow a smooth transfer of the aircraft from one country to the other. This is exactly the objective of IDERA and the insolvency regime (Article XI). Hence the importance of the ratification of the CTC.

The operating lease provides flexibility in the management of the fleet of an airline and will allow adjustments in the fleet according to the passenger traffic fluctuations. It could alleviate the financial burden of an airline which will take delivery of a great deal of aircraft. Besides, the operating lease is the only available option for start-up airlines.

17.2 Export Credit Agencies

ECAs are government or government-supported organisations which promote exports from their own country by offering guarantees or insurance on financing. They are mandated by their respective government to provide either credit guarantees or direct lending[61]. The banks providing the financing through a finance lease would request the guarantee of the ECAs. If agreed, it would mean that in the event of insolvency or material default by the airline, the ECAs would repay the outstanding amount of the financing to the banks and will be taken care of the remarketing of the aircraft. In practice, the support of the ECAs means almost a risk-free transaction for the financing institutions except for a residual value of 5% of the financing. ECAs guarantees are especially important in a market where the banks are reluctant to commit to new financing. During the financial crisis of 2008, the ECAs supported roughly 35% of the manufacturers eligible deliveries.

A framework called in the aircraft industry, ASU is agreed among the members of the OECD to support export credits. The last version of ASU dates back to 2011. The objective is to ensure a level playing field among the manufacturers and "encourage competition among exporters based on quality and price of goods and services exported rather than on the most favourable officially supported financial terms and conditions". ECAs offer different methods of support -direct funding, guarantees, and insurance- depending on the nature of the export transaction and the type of risk that the exporter wishes to cover.

The ASU defines the supporting rules for civil aircraft and it also fixes the main requirements for new aircraft support. First, the transaction must be asset-backed with a first

---

[61] Guandalino, Richard. Aircraft Financing& The Cape Town Convention, Executive Master Corporate Finance& Capital Market,18

priority interest on the aircraft, with cross-default & cross-colaterisation whenever it is possible. Risk mitigants are also required, depending on the risk category. For lower-risk the maximum Loan To Value (the "LTV") for official support is 80% whereas for risk categories 2 to 8, the maximum LTV for official support is 85%. The maximum maturity is 12 years. Moreover, credit rates shall be above the minimum premium rates which are updated quarterly. Finally rules the repayment of principal and interest payment are following what was introduced for finance lease above.

Important to realise that the ECAS cannot support exports to their own countries. It means that none of the airlines of the four European countries home of Airbus (UK, Germany, Spain, France) and the US, home of Boeing, - the so-called "home countries"- are eligible to export credit.

The main ECAs supporting aircraft manufacturers in Europe are Bpifrance (France), Euled Hermes (Germany) and UK Export Finance (UKEF) acting together when an Airbus aircraft is to be supported, and, in the US (Eximbank).

After the peak of support in the years 2009/2012, the support granted by the ECAs fell below 5% of the eligible deliveries, and unless a global aviation sector downturn occurs, aircraft financing with ECA support should remain quite low. This reduced percentage can also be explained by the regulatory changes that affected the market for ECAS-backed credits. In practice, OECD's 2011 ASU has increased the cost of ECA-supported financing and led airlines and lessors to seek other sources of financing such as capital markets.

17.3 Capital markets

Capital markets mean a way to trade long-term debt (over a year) or equity-backed securities to investors and not banks. Capital markets help channelled surplus funds from savers to institutions which then invest them into securitised products. It consists of primary markets and secondary markets, the first one deal with the trade of new issues of stock and with securities, whereas the second one deals with the exchange of existing or previously-issued securities.

Since the start of the financial crisis in 2008, increased capital adequacy requirements and regulatory reforms have put pressure on bank balance sheets. In addition, the revision of

the conditions of the ASU 2011 has increased the cost of export credit agency. Therefore, the debt capital markets seem to be more appropriate to finance an aircraft, especially when it is realised that banks cannot necessarily support the financing large portfolio of aircraft. In 2018, capital markets financed almost 28% of new aircraft deliveries[62].

More and more airlines and lessors are looking to financing their assets through direct access to the capital markets. It is especially true in the US or Japan. In that context, the CTC aims to facilitate the access to capital market, especially with Article XI, Alternative A. In practice, market commentators reported that approximately $17 billion of aviation-related debt securities were sold in the U.S capital market in 2015, which meant a 20% increase over the previous year.

Enhanced Equipment Trust Certificate (the "EETC") structures and ABS are the most commonly used debt capital markets products.

EETC is a structured corporate credit to a single airline, backed by a pool of aircraft. It enhances the creditworthiness of traditional ETCs secured by lease receivables and leased aircraft. The EETC funding structure is designed to offer airlines a competitive source of secured financing while offering to investors strong protections and prompt access to collateral in the case of airline insolvency or default from the debtor. This structure has been successfully employed by non-US airlines such as Air Canada, British Airways, Virginia Australia, LATAM and Emirates airlines.

Asset Backed Security (the "ABS") are quite similar to secured corporate bonds but they are designed to provide enhanced security to investors by isolating the aircraft equipment and related lease rights on which the investor is secured from the risk of the underlying originator's insolvency. It can be defined as a security whose income payments and hence value are derived from and collaterised (or "backed") by a specified pool of underlying assets. The pool of assets is typically a group of small and illiquid assets that are unable to be sold individually. An ABS will fund a pool of aircraft, managed by a lessor, operated by multiple airlines and that can be redeployed to new operators if required. The aircraft equipment is owned by a special purpose vehicle which (directly or indirectly) issues secured bonds to investors on cash flows generated by that aircraft equipment.

---

[62] O'Mara, Joe. Finance market, Aviation Industry Leaders Report 2019, KPMG

The ABS structure does mitigate insolvency risk but it would not mitigate potential difficulties or delays in recovery of the aircraft equipment following the insolvency of the airline operating the equipment.

The third most use method on capital market aviation debt is Unsecured Corporate Bonds (the "UCS"). UCS are structurally the most straightforward type of debt issuance. They are publicly issued bonds that are not collaterised on underlying assets. Issuers are typically subject to a few restrictive conditions. The financing structure is not isolated from the risk of issuer insolvency, neither are investors provided with security over the issuers' assets. That is why investors need to look at the creditworthiness of the issuer in order to assess default.

18. Annex 2: Aircraft Protocol Ratification Status

First 10 countries by alphabetic order

Complete table available from the UNIDROIT website (https://www.unidroit.org/status-2001capetown-aircraft)

State	Signature	Ratification (RT) Acceptance (AC) Approval (AP) Accession (AS)	Declarations (art.)	Entry into force
Afghanistan		25.07.2006 (AS)	XXIX,XXX(1),(2),(3)	01.11.2006
Albania		30.10.2007 (AS)	XIX,XXX(1)	01.02.2008
Angola		30.04.2006 (AS)	XXX(1),(2),(3)	01.08.2006
Argentina		10.01.2018 (AS)	XIX,XXX(1),(2),(3)	01.08.2018
Australia		26.05.2015 (AS)	XXX(1),(3)	01.09.2015
Bahrain		27.11.2012 (AS)	XXX(1),(2),(3)	01.03.2013
Bangladesh		15.12.2008 (AS)	XXIX,XXX(1),(2),(3)	01.04.2009
Belarus		27.09.2011 (AS)		01.01.2012
Bhutan		04.07.2014 (AS)		01.11.2014
Brazil		30.11.2011 (AS)	XIX,XXX(1),(2),(3)	01.03.2012

19. Annex 3: Declarations capable of being made under the CTC

19.1 Declarations under the Convention

Related Article	Type	Description
39(1)(a) / 39(4) 39(1)(b)	Optional Optional	Priority of non-consensual rights and interests without registration Preservation of right of providers of public services to arrest or detain
40	Optional	Registrable non-consensual rights or interests
48(2)	Mandatory (region)	Competence of Regional Economic Integration Organisation
50	Opt-out	Application of Convention to internal transactions
52	Specific	Application of Convention in relation to territorial units
53	Optional	Determination of courts
54(1) 54(2)	Opt-out Mandatory	Granting of lease over charged object by chargee Exercise of remedies with leave of the court Extra judicial or self-help remedies
55	Opt-out	Relief pending final determination
60	Opt-in	Transitional provisions

19.2 Declarations under the Protocol

Related Article	Type	Description
VIII	Opt-in	Choice of law
X	Opt-in	Relief pending final determination or “Speedy relief”, refer to Article 13
XI	Opt-in	Remedies on insolvency Alternative A: “hard rule” Alternative B: “soft rule”
XII	Opt-in	Insolvency assistance
XIII	Opt-in	De-registration and export request authorisation IDERA
XIX	Optional	Designation of entry point
XXI	Opt-out	Modification of jurisdiction provisions
XXIV	Opt-out	Relationship with 1933 Rome Convention
XXVII(2)	Mandatory (region)	Competence of Regional Economic Integration Organisation
XXIX	Optional	Application of Protocol in relation to territorial units

20. Annex 4: Qualifying declarations

1. For the purpose of Section 2 of Appendix II, the term "qualifying declarations", and all other references thereto in this Sector Understanding, means that a Contracting party to the Cape Town Convention (Contracting Party):

a) Has made the declarations in Article 2 of this Annex, and

b) Has not made the declarations in Article 3 of this Annex.

2. The declarations for the purpose of Article 1 a) of this Annex are:

a) Insolvency: State Party declares that it will apply the entirety of Alternative A under Article XI of the Aircraft Protocol to all types of insolvency proceeding and that the waiting period for the purposes of Article XI (3) of that Alternative shall be no more than 60 calendar days.

b) Deregistration: State Party declares that it will apply Article XIII of the Aircraft Protocol.

c) Choice of Law: State Party declares that it will apply Article VIII of the Aircraft Protocol.

And at least one of the following (though both are encouraged):

d) Method for Exercising Remedies: State Party declares under Convention Article 54(2) that any remedies available to the creditor under any provision of the Convention which are not expressed under the relevant provisions thereof to require application to a court may be exercised without leave of the court (the insertion "without court action and" to be recommended (but not required) before the words "leave of the court");

e) Timely Remedies: State Party declares that it will apply Article X of the Aircraft Protocol in its entirety (though clause 5 thereof, which is to be encouraged, is not required) and that the number of working days to be used for the purposes of the time-limit laid down in Article X(2) of the Aircraft Protocol shall be in respect of:

1) The remedies specified in Articles 13 (1) (a), (b) and (c) of the Convention (preservation of the aircraft objects and their value; possession, control or custody of the aircraft objects; and immobilisation of the aircraft objects), not more than that equal to ten calendar days, and

2) The remedies specified in Articles 13 (1) (d) and (e) of the Convention (lease or management of the aircraft objects and the income thereof and sale and application of proceeds from the aircraft equipment), not more than that equal to 30 calendar days.

3. The declarations referred to in Article 1 b) of this Annex are the following:

a) Relief Pending Final Determination: State Party shall not have made a declaration under Article 55 of the Convention opting out of Article 13 or Article 43 of the Convention; provided, however, that, if State Party made the declarations set out under Article 2 d) of this Annex, the making of a declaration under Article 55 of the Convention shall not prevent application of the Cape Town Convention discount.

b) Rome Convention: State Party shall not have made a declaration under Article XXXII of the Aircraft Protocol opting out of Article XXIV of the Aircraft Protocol; and

c) Lease Remedy: State Party shall not have made a declaration under Article 54 (1) of the Convention preventing lease as a remedy.

4. Regarding Article XI of the Aircraft Protocol, for Member States of the European Union, the qualifying declaration set out in Article 2 a) of this Annex shall be deemed made by a Member State, for purposes hereof, if the national law of such Member State was amended to reflect the terms of Alternative A under Article XI of the Aircraft Protocol (with a maximum 60 calendar days waiting period). As regards the qualifying declarations set out in Articles 2 c) and e) of this Annex, these shall be deemed satisfied, for the purpose of this Sector Understanding, if the laws of the European Union or the relevant Member States are substantially similar to that set out in such Articles of this Annex. In the case of Article 2 c) of this Annex, the laws of the European Union (EC Regulation 593/2008 on the Law Applicable to Contractual Obligations) are agreed to be substantially similar to Article VIII of the Aircraft Protocol.