THE INFLUENCE OF THE CAPE TOWN CONVENTION IN AIRCRAFT FINANCE TRANSACTIONS

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The Cape Town Convention and the Aircraft Protocol

The Cape Town Convention ("CTC") and the Aircraft Protocol ("AP") thereto were concluded on the 16th November 2001 at Cape Town under the auspices of:

- International Institute for the Unification of Private Law ("UNIDROIT")
- International Civil Aviation Organisation ("ICAO")
The Cape Town Convention

Umbrella Convention:

different Protocols for different types of assets:

- Aircraft Objects
  (Cape Town, 2001)

- Railway Rolling Stock
  (Luxembourg, 2007)

- Space Assets
  (Berlin, 2012)
Cape Town Convention

Facilitates the efficient financing and leasing of mobile equipment

Assists in the development of cost-effective modes of transport and space assets

Bringing significant economic benefits to countries at all stages of economic development
Cape Town Convention

A sound, internationally adopted legal regime for security, title-retention and leasing interests

Will encourage the provision of finance and leasing and reduce its cost

Greater security offered to creditors and lessors – will lower the risk of loss, enhance credit rating of the loan
Cape Town Convention: 5 Key Objectives

1. Facilitate the acquisition and financing of mobile equipment
2. Provide the creditor with default and insolvency-related remedies
3. Establish an electronic international registry for the registration of international interests
4. Ensure that the particular needs of the industry sector concerned are met
5. To give intending creditors greater confidence in the decision to grant credit
Cape Town Convention: Different types of protected interests

- **Loan secured by security interest in the object**

- **Sale under an agreement (title reservation, or conditional sale):** seller reserves ownership till payment in full

- **Lease:** finance lease or operating lease
Cape Town Convention: Cape Town Discounts

- 2011 Aircraft Sector Understanding (replaces the 2007 ASU)
- Applies to financing by Export Credit Agencies
- A maximum reduction of 10% off the Minimum Premium Rate is available if the operator is based in a country that ratified the Cape Town Convention, made the qualifying declarations, and properly implemented the treaty
Cape Town Convention: Cape Town Discounts – Export Credit Agencies

An Export Credit Agency is a private or quasi-governmental institution that acts as an intermediary between national governments and exporters to issue export financing. The financing can take the form of credits (financial support) or credit insurance and guarantees (pure cover) or both, depending on the mandate the ECA has been given by its government.

Example of export credit agencies:
(i) United States – Export-Import Bank of the United States (Ex-Im Bank);
(ii) France - Compagnie Francaise d’Assurance pour le Commerce Extérieur (COFACE);
(iii) China – Export-Import Bank of China (CEXIM)
Cape Town Convention: Cape Town Discounts

The Cape Town Convention offers Contracting States three options on insolvency namely:

(i) **Alternative A – Creditor Friendly Approach.** This provides the creditor with a clear timetable during which they can negotiate the return or retention of the aircraft.

(ii) **Alternative B – Debtor Friendly Approach.** The enforcement remedies depend upon a discretion exercised by the national court in accordance with applicable domestic law.

(iii) **Existing insolvency law retention.** In this case the Contracting State would not reap the economic benefits of the Cape Town since financiers would not consider the ratification to have brought the necessary level of certainty in insolvency.
CTC Support: International Registry (Aviareto) – www.aviareto.aero

Welcome to a new era in aviation!

After nearly a decade of work and negotiations, the vision behind an all-embracing international treaty system covering the financing of a wide range of mobile equipment took its first steps to becoming a reality at the diplomatic conference in Cape Town, on Friday 16th November 2001. The Cape Town Treaty texts were signed in Cape Town by many leading aviation countries.

The International Registry is at the centre of the Cape Town Treaty system. In simple terms, if interests which are registrable under the legal texts are not registered with the International Registry when the Cape Town Treaty applies, they will not have priority over those which are registered. In that sense, registration is legally mandatory; if priority, a key feature of any financing, is to be ensured.
CTC Support: International Registry (Aviareto)

- Electronic Registry
- Electronic Registration and Electronic Searches
- Priority is determined on a “first-to-file” basis
Aviation Working Group (‘AWG’): History

1994: UNIDROIT requested the formation of an industry group to assist in the development of an international treaty on the financing and leasing of mobile equipment - The Cape Town Convention. Airbus and Boeing agreed to form the AWG which is today made up of all the leading industry players: manufacturers, financiers and lessors.

The statutory objects of AWG, are to contribute to the development and acceptance of policies, laws, regulations and rules that:

- Facilitate advanced international aviation financing and leasing
- Address inefficiencies in aviation financing or leasing or that constrain these transactions.
Main functions of the Aviation Working Group

The AWG monitors the way in which the CTC is:

- Implemented
- Adopted
- Enforced
Aviation Working Group – Legal Advisory Panel

The work of AWG is enhanced by an external legal advisory panel, that comprises leading practitioners of international aviation finance law. The main purposes of the Legal Advisory Panel are:

- To provide thoughts and support to AWG on the implementation and institutionalisation of the CTC, and
- To discuss, critique and provide advice to AWG on other possible law reform activities consistent with its purpose.
- The Legal Advisory Panel also assisted in drafting the Practitioner’s Guide and the model law which is has been adopted by Malta.
Implementation of the CTC

The AWG monitors the implementation, adoption and enforcement of the CTC and its Aircraft Protocol in countries which have ratified or acceded to these instruments, by:

- Seeing whether a strong, commercially oriented set of declarations were made by such country on ratification/accession;
- Seeing whether the Treaty has the force of law, and whether the CTC will prevail over national law in case of conflict;
- Seeing that once implemented, the provisions of the CTC are properly adopted;
- Seeing that the enforcement provisions of the CTC are used correctly.
Adoption of the CTC – the case of China

Ratified the CTC in February 2009, and entered into force on 1 June 2009

Various concerns when ratified:

- Lack of self-help without Court authorisation
- Various privileges which took priority over international interests
- The CTC would only apply to cross-border transactions
Implementation of the CTC – the case of India (Kingfisher)

Concerned planes which had been acquired prior entry into force of the Cape Town Convention

Kingfisher was in default of its obligations towards banks

Problems with the de-registration of the aircraft: due to government protected claims such as airport dues, and other fees

Court of Appeal accepted to de-register most aircraft after extensive legal battle and delays
Implementation of the CTC – the case of India (Kingfisher)

“We are closely monitoring the situation involving aircraft leased and financed to Kingfisher, all of which should be promptly returned, de-registered, and exported in accordance with express contract provisions”

- Jeffrey Wool, Secretary General, Aviation Working Group

Source: http://online.wsj.com/article/SB10001424127887324789504578383870299072446.html
Enforcement of the CTC – the case of Malta

- Malta has been under the spotlight due to enforceability issues
- Aircraft registered in Ireland had been brought to Malta (being a CTC jurisdiction) to repossess the aircraft (due to an event of default)
- Aircraft had been subject to a special privilege in Italy
- Italian Court ordered a precautionary warrant of arrest of the aircraft
- A precautionary warrant of arrest was sought in Malta
Enforcement of the CTC – the case of Malta

Maltese Court referred to the Brussels Regulation 44/2001

Maltese Court did not implement CTC arguments (as made) in the judgement

Maltese Court argued that repossession of the aircraft had not been affected

It is our view that other EU jurisdictions to the CTC would have had the same issues
The Aviation Community

Main players of the aviation industry are looking at the developments taking place in different jurisdictions.

Important for all persons concerned to know the advantages presented by our law and how to adopt the law in different circumstances.

Countries who implement the Cape Town Convention are under the watchful eye of the AWG.
Thank you.

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