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The relationship between the Geneva and Cape Town conventions

Donal Hanley*

This article examines the relationship between the Cape Town Convention (insofar as it relates to aircraft) and the Geneva Convention. The latter continues to apply to rights not constituting international interests under, and to rights in aircraft below the minimum threshold set out in, the former. The Geneva Convention provides that the law of the state of registration of the aircraft in question is the applicable law for rights and interests covered by it but gives no guidance as to whether such law is the domestic law only of that state or includes that state's private international law rules. The Cape Town Convention provides that references in it to applicable law are to the domestic law of the state in question but, in fact, relevant references therein to applicable law are few and international interests under the Cape Town Convention are sui generis interests not dependent on national law.

The relationship between the Convention on the International Recognition of Rights in Aircraft signed at Geneva on 19 June 1948 (the 'Geneva Convention') and the Convention on International Interests in Mobile Equipment signed at Cape Town on 16 November 2001 (together, in the context of aircraft, with the Protocol to the Convention on International Interests in Mobile Equipment on Matters

specific to Aircraft Equipment [the 'Aircraft Protocol'], the 'Cape Town Convention') is not always fully understood or, indeed, easy fully to understand.

Article XXIII of the Aircraft Protocol provides that, for Contracting States that are also party to the Geneva Convention, the Cape Town Convention shall supersede the Geneva Convention as it relates to aircraft and aircraft objects¹ as defined in the Aircraft Protocol. Article XXIII goes on to provide that 'with respect to rights or interests not covered or affected by' the Cape Town Convention, 'the Geneva Convention shall not be superseded'. Sir Roy Goode, in the Official Commentary to the Cape Town Convention,² writes that the Cape Town Convention retains 'the provisions of the Geneva Convention relating to

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¹ The Aircraft Protocol defines aircraft objects in Art I as 'airframes, aircraft engines and helicopters' thus allowing for the separate application of the Cape Town Convention to aircraft engines.

² See also further extracts from the Official Commentary set out for convenience in the Annex.

the recognition of rights and interests which are not “covered or affected by” the present Convention, a phrase intended to be read widely’.³

1. Aircraft, engines and parts

1.1 Aircraft

Article I(2) of the Aircraft Protocol defines aircraft to mean aircraft as defined for the purposes of the Chicago Convention which are either ‘airframes with aircraft engines installed thereon or helicopters’. It goes on to define airframes for the purposes of the Cape Town Convention as being ‘other than those used in military, customs or police services’ which are certified to transport at least eight persons including the crew or goods in excess of 2750 kilograms. Aircraft engines are defined as aircraft engines which, in the case of jet propulsion engines, have at least 1750lb of thrust or its equivalent or, in the case of turbine or piston-powered engines, at least 550 rated take-off shaft horsepower or its equivalent.

In fact, the Convention on Civil Aviation signed at Chicago on 7 December 1944 (the ‘Chicago Convention’) does not define aircraft at all but does provide, in Article 3(a), that the Chicago Convention shall be ‘applicable only to civil aircraft, and shall not be applicable to state aircraft’ and, in Article 3(b), that ‘[a]ircraft used in military, customs and police services shall be deemed to be state aircraft’.

Article XIII of the Geneva Convention likewise provides that the Geneva Convention shall not apply to ‘aircraft used in military, customs or police services’. However, unlike the Cape Town Convention, there is no minimum passenger, cargo or engine capacity required in order for the Geneva Convention to apply. Thus, for those States which are party to both the Geneva Convention and the Cape Town Convention, the Geneva

Convention shall still continue to apply, without reference to the Cape Town Convention, to aircraft which do not meet such minimum capacity criteria.

Article XVI of the Geneva Convention provides that:

[f]or the purposes of this Convention the term ‘aircraft’ shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.

1.2 Aircraft engines

The Geneva Convention only deals with aircraft and, pursuant to Article X(1), certain spare parts, but not to aircraft engines themselves. This meant that there was no provision in the Geneva Convention for the recognition of separate interests in aircraft engines. As mentioned above, however, the Cape Town Convention includes aircraft engines as standalone aircraft objects over which international interests may be created.

Given that aircraft engines, which meet the threshold criteria, are aircraft objects for the purposes of the Cape Town Convention, international interests created thereover, in this author’s view, clearly prevail, due to the supersession provisions of the Cape Town Convention, over any contrary interests pursuant to the Geneva Convention, which does not recognize separate rights in engines. Thus, accession of title to engine issues should not arise in states which are party to the Cape Town Convention even when they are also party to the Geneva Convention.

In the *Cimber Sterling A/S* bankruptcy case,⁴ the Danish High Court on 19 June 2015 applied a modified rather than absolute title accession principle in interpreting Article XVI of the Geneva Convention and the equivalent domestic Danish legislation. Under an absolute title principle, the estate in bankruptcy would be entitled to the airframe, plus any engines installed but owned by third parties (at least

³ Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects: Official Commentary* (3rd edn, UNIDROIT 2013) para 5.101.

⁴ BS SKSK-1292/2012, 1301/2012, 1302/2012, 1303/2012, 1304/2012 and 1206/2012.

up until the point of installation) plus temporarily uninstalled engines. This would potentially mean that the liquidator could claim ownership of up to four engines in respect of an airframe which could only hold two engines at any one time.

Jakobsen and Midtgaard Pedersen comment that, in applying a modified title accession principle,

the High Court, at least in principle, agreed with the bankruptcy estate to the extent that it is an assessment of the fate of the original engine that will determine accession of the replacement engine – and not the other way around.⁵

In other words, if the removed engine was determined to be only temporarily removed, title thereto is kept by the airframe owner and title to an installed engine in temporary substitution therefor is retained by the original engine owner. If, however, the removed engine is determined to have been permanently removed, the airframe owner has no claim to it pursuant to Article XVI of the Geneva Convention but can claim title to the engine installed on the airframe in replacement therefor. Given this uncertainty, Jakobsen and Midtgaard Pedersen⁶ comment that little comfort is available to lessors of engines to Danish airlines but that the situation should soon be resolved given that the Cape Town Convention is expected to become part of Danish law in 2015.

1.3 Parts

Although, '[i]n classical Continental thinking, to extend the creditors' secured rights over the spare parts was a monstrosity',⁷ Article X (1) of the Geneva Convention provides:

If a recorded right in an aircraft of the nature specified in Article 1, and held as security for the

⁵ Morten Jakobsen and Morten Midtgaard Pedersen, 'The Danish Aircraft Engine Dispute – The Sequel' (2015) *Air & Space Law* (forthcoming).

⁶ *ibid.*

⁷ Jacob Sundberg, 'Rights in Aircraft: A Nordic Lawyer Looks at Security Rights in Aircraft' (1983) 8 *Annals of Air and Space Law* 233, 237.

payment of an indebtedness, extends, in conformity with the law of the Contracting State where the aircraft is registered, to spare parts stored in a specified place or places, such right shall be recognised by all Contracting States, as long as the spare parts remain in the place or places specified, provided that an appropriate public notice, specifying the description of the right, the name and address of the holder of this right and the record in which such right is recorded, is exhibited at the place where the spare parts are located, so as to give due notification to third parties that such spare parts are encumbered.

Thus, security rights over spare parts are only covered if the law of the state of registration recognizes them and if those spare parts relate to a specific aircraft.

Parts which are not spare parts as such but which are temporarily removed from an aircraft are covered by Article XVI of the Geneva Convention which extends the definition of 'aircraft' beyond the airframe, engines, propellers, radio apparatus to include 'all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom'.

The Cape Town Convention has no similar provision: parts are not within the definition of aircraft objects, airframes or aircraft engines, since references in the definitions thereof to parts are limited to those which are 'installed, incorporated or attached' thereon, therein or thereto. It should, however, be noted that Article 29(7) of the Cape Town Convention provides that the Cape Town Convention:

does not affect the rights of a person in an item, other than an object. Held prior to its installation on an object if under the applicable law those rights continue to exist after than installation; and

does not prevent the creation of rights in an item, other than an object, which has been previously installed on an object where under the applicable law those rights are created.

2. Background to Geneva Convention

Consideration of an international legal framework for protection of interests in aircraft goes back over 80 years:

As early as 1931, the Comité international technique d'experts juridiques (CITEJA) began to study the question of development of a convention on aircraft mortgages. Shortly after the Second World War, this subject was studied by the Interim Assembly (1946) of the Provisional International Civil Aviation Organisation (P-ICAO), the First Assembly of the International Civil Aviation Organisation (ICAO) in 1947 and the First Session of the ICAO Legal Committee in the same year. At Geneva, in 1948, the Second Assembly of the ICAO Assembly adopted the Convention on International Recognition of Rights in Aircraft.⁸

Quite apart from issues of accession of title to aircraft engines,⁹ whereby the owner of an airframe on which an aircraft engine is installed automatically becomes the owner of the engine, regardless of who owned it prior to installation, the applicability or non-applicability of certain forms of security to movable assets such as aircraft varied greatly depending on the national legal system, in particular depending on whether such a legal system is based on English common law or continental European civil law. 'Faced with two opposing systems, both created and existing without any great concern for the unique characteristics of the international aviation industry'¹⁰ and '[u]nable to resolve systemic differences between ... common law and civil law traditions', the Geneva Convention conference of 1948 ultimately adopted a convention 'served only as a choice of law treaty'.¹¹

⁸ Gerald FitzGerald, 'A Canadian Central Registry for Security Interests in Aircraft: A Progress Report' (1984) 9 *Annals of Air and Space Law* 3, 15–16.

⁹ See discussion in Donal Hanley, *Aircraft Operating Leasing: A Legal and Practical Analysis in the Context of Public and Private International Air Law* (Kluwer Law International 2012) 88–95.

¹⁰ Donald Bunker, *International Aircraft Financing, Volume 1: General Principles* (International Air Transport Association 2005) 614.

¹¹ Brian Havel and Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2014) 348.

The Geneva Convention has been described as 'ill-suited to handle the demands of modern asset-based and lease-based financing'.¹² Even Lord Wilberforce, later Lord Justice in the House of Lords, who had a special interest in aircraft finance law and represented the United Kingdom at the Geneva Convention conference in 1948,¹³ wrote that 'it was fully recognized at Geneva that this Convention—the best that could be achieved in the time—is but a stage in the development of an effective system of international protection for securities on aircraft'.¹⁴

Whilst agreeing with Wilberforce in conceding that the Geneva Convention was 'the best that could be achieved under the circumstances', Bunker remarks that it has been 'seldom relied upon and really gives no great comfort to creditors'.¹⁵ This echoes Rosales who wrote in 1991 that a further problem with the Geneva Convention is 'the fact that there are no reported decisions, to this writer's knowledge, dealing in any great detail with the operation of the Geneva Convention, a situation which adds an aura of uncertainty to the treaty'.¹⁶ 'In the late 1980s, the need to facilitate greater financing for high-value mobile equipment such as aircraft led Unidroit to being working'¹⁷ on what would eventually become the Cape Town Convention. An exploratory working group set up by Unidroit

¹² *ibid* 350.

¹³ See B Patrick Honnebier, 'The English Blue Sky Case: Topical International Aviation Law Finance Issues', rectified contribution offprint from Sagar Singamsetty (ed), *Contemporary Issues and Future Challenges in Air and Space Law: Celebrating 25 years of IIASL (Liber Amicorum)* (Air & Space Law Books 2011) 5, fn 4.

¹⁴ RO Wilberforce, *The International Recognition of Rights in Aircraft* (1948) 2 ILQ 421, 422.

¹⁵ Donald Bunker, 'Securing Aircraft Financing' (2004) 29 *Annals of Air and Space Law* 147, 169.

¹⁶ Rex Rosales, 'Recordation of Rights in Aircraft and International Recognition: A Comparison between the American and Canadian Situations' (1991) 16 *Annals of Air and Space Law* 195, 215.

¹⁷ Havel and Sanchez (n 11) 351–352.

concluded, in the context of the Geneva Convention, that:

[t]here was a Convention which contained rules for the recognition and priority of security interests in aircraft but it was generally recognized that it was in some respects outdated, particularly in its treatment of the financing of aircraft engines separately from an airframe. A significant number of major States were noted not to have ratified this Convention.¹⁸

3. Principal differences in the scope of the Geneva Convention and the Cape Town Convention

Article I of the Geneva Convention provides that the Contracting States undertake to recognize:

- (a) rights of property in aircraft;
- (b) rights to acquire aircraft by purchase coupled with possession of the aircraft;
- (c) rights to possession of aircraft under leases of six months or more; mortgages, hypothèques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

- (i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and
- (ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.

The Cape Town Convention provides, pursuant to Article 2 and Article II(1) of the Aircraft Protocol, that an international interest is one in an aircraft object (see definition above):

- (a) granted by the chargor under a security agreement;
- (b) vested in a person who is the conditional seller under a title reservation agreement; or
- (c) vested in a person who is the lessor under a leasing agreement,

¹⁸ Unidroit International Institute for Unification of Private Law, *Restricted Exploratory Working Group to Examine the Feasibility of Drawing Up Uniform Rules on Certain International Aspects of Security in Mobile Equipment*, Study 62, 1992, Doc 5, p 4.

and also, pursuant to Article III of the Aircraft Protocol, vested in a buyer under a contract of sale.

The Cape Town Convention applies, under Article 3(1) where, at the time of the creation of the international interest, the debtor (defined in Article 1 as modified by Article II(1) of the Aircraft Protocol) to mean the chargor, conditional seller, lessor or buyer referred to above) is 'situated in a Contracting State' or, under Article IV of the Aircraft Protocol, in the case of 'a helicopter, or ... an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry'. Further, in order to gain priority protection under the Cape Town Convention, the international interest must be registered in the International Registry¹⁹ set up pursuant to the provisions of Article XVII of the Aircraft Protocol.

There are some important differences here in scope between the two conventions, as well as significant overlap.

3.1 Types of interest in aircraft

As shown above, the Cape Town Convention recognizes rights of chargors under a security agreement, defined in Article 1 to mean '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'. It is submitted that this should *generally* cover the same types of interest as those listed in the Geneva Convention at Article I(1)(d) as 'mortgages, hypothèques and similar rights in aircraft which are contractually created as security for payment of an indebtedness'.

The Cape Town Convention also recognizes the rights of a person who is a conditional seller under a title reservation agreement whereas the Geneva Convention protects 'rights to acquire aircraft by purchase coupled with possession of the aircraft'. This will normally be rights of

¹⁹ This may constitute the 'public record' referred to in Art I(1)(ii) of the Geneva Convention.

the conditional buyer. Similarly, the Cape Town Convention recognizes the rights of a lessor under a leasing agreement whereas the Geneva Convention recognizes 'rights to possession of aircraft under leases of six months or more'.²⁰ Presumably, this means the rights of the lessee (in the absence of a default) or (in the case of a default by lessee) the lessor where lessor has then the right to possession of the aircraft).

Finally, the Cape Town Convention has no equivalent of the Geneva Convention's general recognition of 'rights of property in aircraft', in respect of which Matteesco Matte observes that '[t]his may refer to the owner himself or one who is destined to become the owner'.²¹

3.2 Existence or recognition of interest

Whereas the Geneva Convention only recognizes under Article I certain interests 'provided that they have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution', the Cape Town Convention actually creates 'international interests' under Article 2(3). Further, Article II(3) of the Geneva Convention provides that a 'Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law'.

In addition to the interests recognized pursuant to Article I, the Geneva Convention also provides for recognition of certain other interests, such as certain rights over compensation due for salvage or expenses indispensable for the preservation of the aircraft. The Aircraft Protocol does not deal with these issues, although, interestingly, the Space Protocol to the Cape Town Convention, dealing with

satellites and other space assets, touches on salvage in Article IV(3).²²

3.3 Governing law

The Geneva Convention provides, in Article I, that interests that are the subject matter thereof should have been 'constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution'.²³ This means that, with respect to such Article I interests, the *lex registrii*, or law of the state of registration of the aircraft pursuant to the Chicago Convention, rather than the *lex situs*, or the law of the state where the aircraft was physically present at the time of the creation of the interest, applies.²⁴

It has been a matter of some debate as to whether the Geneva Convention reference to laws of the state of registration is a reference to the domestic laws only of such a state or includes reference to the rules of private international law of that state also, which may result in *renvoi*. Reuleaux and Tonnaer²⁵ argue that this should be construed as referring to domestic law only whereas Honnebier²⁶ counter-argues

²² 'Nothing in the Convention or this Protocol affects any legal or contractual rights of an insurer to salvage recognised by the applicable law. "Salvage" means a legal or contractual right or interest in, relating to or derived from a space asset that vests in the insurer upon the payment of a loss relating to the space asset.'

²³ Note that Art 4(1) on rights in respect of salvage or preservation applies the laws of the state where such salvage or preservation takes place; Art 4(4)(b) regarding interruptions or suspensions to a three month time limit on such salvage or preservation claims applies the laws of the forum (that is, the laws of the court hearing the request for interruption or suspension); and Art 7(1) on certain procedures to be followed in case of sales of aircraft in execution (or Art 10(3) in the case of spare parts) applies the laws of the state where the sale takes place.

²⁴ Of course, the *lex registrii* itself may provide that the *lex situs* applies.

²⁵ Matthias Reuleaux and Hein Tonnaer, 'Financing Aircraft Engines: Pitfalls and Solution' *ZLW* 56. Jg 1/2007, 33–44, para 2.2.

²⁶ BP Honnebier, 'Clarifying the Alleged Issues Concerning the Financing of Aircraft Engines' *ZLW* 3/2007, 383, para 1.3.

²⁰ Art XVI(1) of the Aircraft Protocol provides certain quiet enjoyment rights for a lessee or borrower in the absence of a default within the meaning of Art 11 of the Cape Town Convention.

²¹ Nicolas Matteesco Matte, *Treatise on Air-Aeronautical Law* (McGill University 1981) 567.

that it also include reference to the rules of private international law. This can be important in the context of accession of title to engines.

In the *Blue Sky* case,²⁷ Beatson J of the English High Court held:

In the case of a transfer of title to tangible moveables, such as the aircraft in this case, the reference to the *lex situs* is to the domestic law of the place where the aircraft are situated on the relevant date, and not to its entire law including its choice of law rules; that is the doctrine of *renvoi* does not apply.

The Cape Town Convention deals with this matter in Article 5(3):

References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

The Cape Town Convention does not give guidance as to what the applicable law is. The text of the Cape Town Convention does not, in fact, determine the applicable law in the context of international interests as a matter of property law, but only as to matters of contract law, where under Article VIII of the Aircraft Protocol, parties are free, in the case of a Contracting State having made a declaration under Article XXX(1), to choose the governing law of their agreement, contract of sale, or related guarantee contract or subordination agreement. In such instances, under Article VIII(3), the reference to the law chosen by the parties is, unless otherwise agreed, to the domestic laws of the state in question.

Given that the Cape Town Convention actually *creates* international interests, the terms of the convention itself govern as a matter of property law and priorities. An international interest is thus a *sui generis* interest. Goode makes this clear in the Official Commentary where he states that:

The provisions of the Convention relating to an international interest reflect a central purpose of the Convention, which is to create a new and

sui generis interest which is neither derived from nor dependent on national law and to confer on the holders of rights *in rem* over the equipment a means of protecting those rights by registration in the International Registry.²⁸

It is worth noting, in this context, Article 5(1) and (2) of the Cape Town Convention which provide:

- (1) In the interpretation of this 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.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3.4 Registration of interest

Article I of the Geneva Convention requires that rights protected by it must be ‘regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality’. Under Article II(1), all ‘recordings relating to a given aircraft must appear in the same record’. According to Sundberg:

The Geneva Convention does not oblige any Contracting State to maintain a Public Record of the type referred to in Art I(1)(ii). All it does is to provide that *if* one Contracting State maintains such a Record, then other Contracting States are obliged to give recognition to rights entered upon the same.²⁹

The Cape Town Convention provides for an international registry. It could potentially be the register referred to in the Geneva Convention but the fact that, as discussed above, the types of aircraft and interests therein covered by each convention are not exactly the same, albeit with varying degrees of overlap, should be borne in mind.

²⁷ *Blue Sky One Ltd v Mahan Air and Another* [2010] EWHC 631 (Comm) [201].

²⁸ Goode (n 3) [2.42].

²⁹ Sundberg (n 7) 247.

3.5 Priority of interest

The Geneva Convention provides for priority of interests registered and otherwise complying with Article I(1) over other interests. Article I(2) then provides:

Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not admit or recognise any right as taking priority over the rights mentioned in paragraph 1 of this Article.

Other exceptions then follow. Article IV(1) provides:

In the event that any claims in respect of: (a) compensation due for salvage of the aircraft, or (b) extraordinary expenses indispensable for the preservation of the aircraft give rise, under the law of the Contracting State where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognised by Contracting States and shall take priority over all other rights in the aircraft.

Then there is Article VI:

In case of attachment or sale of an aircraft in execution, or of any right therein, the Contracting States shall not be obliged to recognise, as against the attaching or executing creditor or against the purchaser, any right mentioned in Article I, paragraph 1, or the transfer of any such right, if constituted or effected with knowledge of the sale or execution proceedings by the person against whom the proceedings are directed.

Diederiks-Verschoor comments on Article VI that:

It should be noted that the debtor's awareness of the sale in execution is a prerequisite: a notice on the record is not sufficient. The party against whom execution procedures are brought must be aware they have commenced. The Article tries to prevent the fraudulent transfer of an aircraft, *viz.* the creation of a claim by a debtor who knew the aircraft was under execution.³⁰

Finally, in the context of other rights taking priority over Article I rights, in the English High

³⁰ IHPH Diederiks-Verschoor, *An Introduction to Air Law* (Kluwer Law International 2006) 269.

Court case of *Global Knafaim*,³¹ Collins J held, although without citing authority to support his position, that nothing in the Geneva Convention protected a creditor's right under Article I thereof from subsequent seizure by Eurocontrol for the fleet debt of its debtor:

[*Counsel for the creditor*] submits that Article 1(2) forbids fleet lien at least where an owner's rights are overridden. I do not think that Article 1(2) has the wide effect which is suggested by Mr Thompson. Most states have laws which enable property to be seized if, for example, taxes are unpaid. It would be remarkable if such measures were prohibited by Article 1(2). It is, I think, aimed at private rights which might normally be enforceable by overriding rights specified in Article 1(1). I do not think it was intended to or can extend to rights in the public interest which can ensure payment of amounts due.

The Cape Town Convention sets out at Article 29 a system of priority whereby, subject to certain exceptions such as for unregistered interests, such as the fleet lien the subject of the *Global Knafaim* case, earlier registered international interests have priority over later registered international interests, and registered international interests have priority over registrable but unregistered international interests.

Indeed, in contrast to Article VI of the Geneva Convention, which gives priority to certain prior unregistered interests where there is actual knowledge thereof over subsequent registered interests, the Cape Town Convention provides, in Article 29(1), that a 'registered interest has priority over any other interest subsequently registered and over an unregistered interest' and goes on to provide, in Article 29(2)(a), that the priority of a registered interest under Article 29(1) applies 'even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest'.

The priority system under the Cape Town Convention supersedes that under the Geneva

³¹ *Global Knafaim Leasing Limited & Another v The Civil Aviation Authority & Another* [2010] EWHC 1348 (Admin) 21.

Convention in cases where both conventions are in effect.

4. Interplay of Geneva Convention and Cape Town Convention

Although Crans writes that ‘the interface of the two regimes remains unclear’³² and that ‘[i]t would appear that the Geneva Convention and the Cape Town Convention are not aligned, with Geneva opting for the *lex registrii* and Cape Town opting for the domestic rules of law applicable by virtue of the rules of private international law of the forum State’,³³ which, domestic rules may, it should be noted, provide for the *lex situs* to apply, and although he is correct insofar as there is no express alignment to be found in the texts of either convention, the situation may, in practice, not be quite so stark, at least with regard to *in personam* contractual rights.

Honnebier writes that:

It is noted that the Cape Town Convention only supersedes the Geneva Convention in relation to matters within the scope of the former treaty. The latter treaty may, to some extent, complement the former. It is a private international laws treaty seeking the recognition of rights in aircraft, which may make the uniform substantive laws regime of the former convention more complete. It is emphasized that a state that accedes to the Cape Town Convention does not have to withdraw from the Geneva Convention.³⁴

In fact, it seems that there was some expectation that the Cape Town Convention would build on the Geneva Convention with regard to applicable law. Thus, Djojonegoro writes, in the context of the drafting of what was then referred to as the Unidroit Convention and which would become the Cape Town Convention, that

³² Berend Crans, ‘Aerial Conflicts of Law: An Analysis of Conflicts of Law Rules as Applied to Aircraft’ in Pablo Mendes de Leon (ed), *From Lowlands to High Skies: A Multilevel Jurisdictional Approach towards Air Law* (Martinus Nijhoff 2013) 215, 221.

³³ *ibid* 220.

³⁴ Honnebier (n 26) 9.

[i]n principle, both the Geneva and Unidroit Conventions would be coordinated. For example, the conflicts of law principle under Art (1)(i) of the Geneva Convention is maintained, thus ensuring minimal disruption of the existing legal order.³⁵

Clarke and Wool, in the context of giving the history of cooperation among the study group founded by Unidroit (originally invited to draft a treaty by Canada), the International Civil Aviation Organization and the Aviation Working Group (the ‘AWG’, formed among major manufacturers, financiers and lessors by Airbus and Boeing), mention that the AWG ‘noted that the basic issue underlying the *lex situs* problem has already been addressed in the Geneva Convention of 1948’.³⁶

In the Official Commentary, Goode, while acknowledging that ‘very little remains of the Geneva Convention in its application to aircraft objects within the scope of the Cape Town Convention’,³⁷ states:

It is however possible to argue that the basic concept in the Geneva Convention – the recognition of rights arising under the laws of the State of registry – can be preserved by a complementary construction of the two instruments. Where the Convention and Protocol are in force, they constitute the ‘law’ for the purposes of Art. I(1)(i) of the Geneva Convention in that State.³⁸

But this only applies to those interests covered by the Geneva Convention but not superseded by the Cape Town Convention. Those interests are set out in the Official Commentary and repeated in the [Appendix](#).

³⁵ Anda Djojonegoro, ‘The Unidroit Proposal for a Uniform Air Law: A New Aircraft Mortgage Convention?’ (1997) 22 *Annals of Air and Space Law* 53, 60–61.

³⁶ Lorne Clark and Jeffrey Wool, ‘International Aviation Finance Laws Revisited: A Report on the Development of the Proposed Unidroit Convention on International Interests in Mobile Equipment as applied to Aircraft’ (1998) XXIII *Annals of Air and Space Law* 271, 272.

³⁷ Goode (n 3) [5.102].

³⁸ *ibid* [5.104].

It should also be noted that, of course, the Cape Town Convention does not bind non-parties thereto. Thus, the supersession discussed above only applies where both states in question are parties to the Cape Town Convention but not where neither or only one of them is. But even in some cases, it may have some relevance, as discussed suggested by Goode above and further in the Official Commentary:

The effect of the present Article³⁹ is limited to the relations between Contracting States to the Cape Town Convention; it has no effect on the rights and obligations of a Contracting State to the Cape Town Convention in its relations with a non-Contracting State, so that the Geneva Convention will continue to apply where both such States are Parties to that Convention. See Article 30(4)(b) of the Vienna Convention. In such a case the Geneva Convention will complement the Cape Town Convention where the applicable law is that of a State Party to the Cape Town Convention, since for the purposes of the Geneva Convention the law of a Contracting State Party to that Convention will then include the law incorporating the Cape Town Convention.⁴⁰

As regards those interests in respect of which the Cape Town Convention does supersede the Geneva Convention, Goode states:

This supersession of the Geneva Convention covers all rules relating to the creation, enforcement (including enforcement in insolvency), perfection and priorities of interests, as well as related assignments.⁴¹

5. Conclusion

Crans is of the view that the Cape Town Convention does not 'give a practical tool in international transactions because the applicable law is not identified'.⁴² Writing in light of the *Blue Sky* case, Crans states that 'the *lex registrii*,

provided "*renvoi*" is excluded, provides the best conflicts of law rule for aircraft'⁴³ and thus suggests, quite reasonably, that '[r]atification could be made more attractive if the Cape Town Convention would offer the additional benefit it lacks today: application of the property laws of the *lex registrii* of the aircraft'.⁴⁴ Although the international interest is a *sui generis* interest not dependent on national law, if the Cape Town Convention is amended in the future, it is submitted that it is worth considering therein the issue of the application of the *lex registrii* to international interests.

APPENDIX

*Geneva Convention Provisions remaining in force under Cape Town Convention*⁴⁵

5.105. The provisions of the Geneva Convention remaining in force for a Contracting State Party to the Cape Town Convention are provisions relating to:

- (1) the recognition of rights of first ownership of an aircraft or of ownership not resulting from a sale where those rights are recorded in a public aircraft nationality register of the Contracting State concerned, since such rights are not covered by the Cape Town Convention;
- (2) priorities between two unregistered international interests (since these fall outside the Cape Town Convention);
- (3) the duty under Article X of the Geneva Convention to recognise the extension of security rights in an aircraft to 'stored' (i.e. unattached) spare parts under the law of the Contracting State where the aircraft is registered (Article X), since in a Geneva Convention Contracting State the law in question will be the applicable law for the purposes of Article 29(7)(a) of the Cape Town Convention – but in relation to aircraft engines Article X, as previously stated, is overridden by the Convention and the Aircraft Protocol.

³⁹ Art XXIII on supersession of the Geneva Convention.

⁴⁰ Goode (n 3) [5.106].

⁴¹ *ibid* [3.128].

⁴² Crans (n 32) 219. See also above.

⁴³ *ibid* 225.

⁴⁴ *ibid* 226.

⁴⁵ Official Commentary, Goode (n 3).

The Geneva Convention also continues to govern rights in aircraft objects which fall below the capacity threshold set out in Article I(2)(b), (e) and (l) of the Aircraft Protocol.

5.106. The effect of the present Article is limited to the relations between Contracting States to the Cape Town Convention; it has no effect on the rights and obligations of a Contracting State to the Cape Town Convention in its relations with a non-Contracting State, so that the Geneva

Convention will continue to apply where both such States are Parties to that Convention. See Article 30(4)(b) of the Vienna Convention. In such a case the Geneva Convention will complement the Cape Town Convention where the applicable law is that of a State Party to the Cape Town Convention, since for the purposes of the Geneva Convention the law of a Contracting State Party to that Convention will then include the law incorporating the Cape Town Convention.