



CTC in Europe: assessment of ratifications to date and implications of Brexit on the ratification by the UK

Kenneth Gray

To cite this article: Kenneth Gray (2016) CTC in Europe: assessment of ratifications to date and implications of Brexit on the ratification by the UK, Cape Town Convention Journal, 5:1, 1-21, DOI: [10.1080/2049761X.2016.1252136](https://doi.org/10.1080/2049761X.2016.1252136)

To link to this article: <https://doi.org/10.1080/2049761X.2016.1252136>



© 2016 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 15 Nov 2016.



Submit your article to this journal [↗](#)



Article views: 834



View related articles [↗](#)



View Crossmark data [↗](#)

CTC in Europe: assessment of ratifications to date and implications of Brexit on the ratification by the UK

Kenneth Gray*

Since the Cape Town Convention (CTC) first came into force in 2006, the rate of ratifications by European jurisdictions has dramatically accelerated. Seventeen jurisdictions forming part of the European continent, including nine currently within the EU, are now Contracting States. Six of those have ratified within the past two years alone.

In ratifying the CTC, the European Union (EU) has asserted competence in respect of those provisions regarding choice of law, jurisdiction and insolvency. That assertion, if correct, leaves the Member States unable to make declarations in respect of those matters.

On 23 June 2016, a referendum in the UK on its continued membership of the EU resulted in a vote to leave. The departure of the UK from the EU raises the question of whether any further action is required by the UK in connection with its ratification, whether any new declarations will be required to be made by the UK and whether any new legislation will be required in the UK to ensure that the CTC remains in effect.

* Kenneth Gray is a Consultant at Norton Rose Fulbright LLP and has 30 years' experience of advising on banking and security law globally. He joined Norton Rose (as it then was) in 1986, founded its Paris office in 1990 and became a Partner in 1993. He has been a Consultant to the practice since 2006. Kenneth focuses primarily on strategic issues (such as Brexit, the impact of new sources of finance, the implementation of the Basel Accords and the Cape Town Convention). Kenneth has an MA from Cambridge University and has qualified as a solicitor in England and Wales and as an avocat at the Paris bar. He is a member of the Legal Advisory Panel to the Aviation Working Group.

Anna Veneziano of Unidroit, Rasmus Mandøe Jensen and Mette Riber Rasmussen of Plesner, Denmark, Max Ganado, Daniel Aquilina and Matthew Xerri of Ganado Advocates, Malta, Pål Sveinsson of Arntzen de Besche Advokatfirma AS, Norway, Maxim Astafiev, Deputy Director of Legal Support, S7 Group, Russia, Teresa Rodríguez de las Heras Ballell, Universidad Carlos III de Madrid, Spain, Henril Ossborn and Fredrik Christiansson of Advokatfirman Vinge KB, Sweden and Ivan Zievakov of Lexwell and Partners, Ukraine have all assisted with, and provided content for, this article. I am grateful for their invaluable assistance. Any errors are my responsibility.

1. Introduction

In the 10 years since the Convention on International Interests in Mobile Equipment (the 'Cape Town Convention' (CTC)) and the Protocol thereto on Matters Specific to Aircraft Equipment (the 'Protocol', and together the 'Convention') first came into force in 2006, they have been ratified by 17 jurisdictions wholly or partly forming part of the European continent,¹ of which nine are currently in the European Union² (EU). The EU has itself ratified the Convention as a 'Regional Economic Integration Organisation'.

This paper considers:

- (a) the ratification of the Convention by the EU;

¹ Albania, Belarus, Denmark, Gibraltar, Guernsey, Ireland, Latvia, Luxembourg, Malta, Norway, Russia, San Marino, Spain, Sweden, Turkey, Ukraine and the UK.

² Denmark, Gibraltar, Ireland, Latvia, Luxembourg, Malta, Spain, Sweden and the UK.

- (b) the declarations made by each of the European Contracting States and their compliance or otherwise with the Qualifying Declarations³ under the Sector Understanding On Export Credits For Civil Aircraft of September, 2011 supplementary to The Arrangement On Officially Supported Export Credits (ASU); and
- (c) the ratification of the Convention by the United Kingdom (UK).

On 23 June 2016, a referendum in the UK resulted in a vote to leave the EU. This paper also considers the consequences of the UK's departure from the EU ('Brexit') as regards its ratification of the Convention and its transposition into English law.

This article does not consider:

- (a) the ratification of the Convention by non-European dependencies of the United Kingdom (the Cayman Islands and, shortly, Bermuda) or the Netherlands (Aruba, the Caribbean Netherlands, Curaçao and Saint Maarten);
- (b) the imminent ratification of the Convention by the Isle of Man; or
- (c) Moldova (which has ratified the CTC but not the Protocol).

2. The ratification of the convention by the European Union

The EU ratified the Convention as a Regional Economic Integration Organisation (REIO) on 29 April 2009 in accordance with Article 48 of the CTC and Article XXVII (2) of the Protocol. Pursuant to those Articles:

- (a) the EU was entitled to ratify the Convention because it has competence over certain matters governed by it;
- (b) the EU has the rights and obligations of a Contracting State to the extent of that competence; and

³ The 'Qualifying Declarations' are set out in Annex 1 to Appendix II to the ASU.

- (c) the EU has made declarations⁴ (the EU Declarations) specifying the subject matter of that competence.

An important issue, discussed further in Section 5 below, is whether, the EU having established its competence over those matters, the Member States, when themselves individually ratifying the Convention, could have agreed to be bound by those provisions in their own right or whether their ratification extended only to the parts of the Convention in respect of which they retained competence.

The EU Declarations do not apply to Denmark which has negotiated an exemption from EU competence on the relevant subject areas as set out in the 'Protocol on the position of Denmark', which is annexed to the Treaty on European Union (the TEU). The basis for Denmark's ratification of the Convention is, therefore, the same as for non-Member States.

In this section, I consider:

- (a) how the relative competences of the EU and the Member States are established under the relevant EU treaties;
- (b) the competences claimed by the EU in the EU Declarations; and
- (c) the actual declarations made by the EU as a consequence.

The division of competences between the EU and the Member States is set out in Part 1 of the Treaty on the Functioning of the European Union (TFEU). Competences may be either:

- (a) exclusive competences, as set out in Article 3 TFEU. Exclusive competences include the customs union, competition policy, monetary policy for the Eurozone, the common fisheries policy and common commercial policy;

⁴ Declarations lodged by the European Union under the CTC at the time of the deposit of its instrument of accession <<http://www.unidroit.org/status-2001capetown?id=1658> and <http://www.unidroit.org/status-2001capetown-aircraft?id=1573>> accessed 21 September 2016.

- (b) shared competences, as set out in Article 4 TFEU. Shared competences are extensive and include the areas of ‘freedom, security and justice’ (Article 4(j)), including:
- (i) judicial cooperation in civil matters having cross-border implications (Article 81(1));
 - (ii) the mutual recognition and enforcement between Member States of judgments (Article 81.2(a)); and
 - (iii) the compatibility of rules applicable in Member States concerning conflict of laws and of jurisdiction (Article 81.2(c)); or
- (c) supporting competences, as set out Article 6 TFEU. These are areas where the EU may take action to support, coordinate or supplement the actions of Member States in areas such as industry, culture and tourism.

EU competences must also be exercised in accordance with the principles of subsidiarity and proportionality. The subsidiarity principle sets out that the EU should only act if the objectives of the proposed action cannot be sufficiently met by the Member States, and can be better achieved by the EU. The principle of proportionality is set out in Article 5(4)(1) TFEU which provides that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties.

The final rule determining the competence of the EU in any matter is Article 2(2) of TFEU which provides that the Member States may only legislate in an area of shared competence if the EU has not exercised its competence in that area (or if it has decided to cease exercising its competence).

The provisions of the Convention for which the EU claimed competence in the EU Declarations are matters of shared competence and, therefore, to the extent that the EU has already taken legislative action in respect of these, the Member States are unable

independently to legislate for, or to make any declarations in respect of, those provisions.

In the EU Declarations, the EU specified that it had competence over matters (the EU Competences) which are the subject of:

- (a) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I);⁵
- (b) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the Insolvency Regulation);⁶ and
- (c) Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I),

and, therefore, those provisions in the Convention dealing with such matters would take effect in a ratifying Member State in accordance with the EU Declarations at the same time as the Convention takes effect in that state following its ratification without the need for any further domestic legislation. It follows that any subsequent ratification of the Convention by a Member State would not extend to these matters. Rather, the direct applicability of these provisions complement the Member State’s own ratification, so allowing the whole Convention to take effect. I will consider this issue further, in the context of Brexit, in Section 5 below.

⁵ Since the date of the EU Declarations, Brussels I has been replaced by Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the ‘Recast Brussels Regulation’). However, since all references to Brussels I in this paper relate to events before the date of the Recast Brussels Regulation, I have retained references to Brussels I and to the Articles of that Regulation.

⁶ The recast Insolvency Regulation 2015/848 came into force on 26 June 2015 applying to insolvency proceedings from 26 June 2017. However, the extent of the EU Competences must be measured against the legislation in force at the time of the EU Declaration.

The EU Declarations do not expressly specify which declarations required or permitted under the Convention fall to be made by the EU to the exclusion of the Member States as a consequence of the EU Competences. However, the EU did make a declaration under Article 55 of the CTC (relating to relief pending final determination) to the effect that the Member States would only apply Articles 13 and 43 of the CTC in accordance with Brussels I. It also declared that Article XXI of the Protocol (Modification of jurisdiction provisions) would not apply within the Member States, those issues again being reserved for Brussels I.

In respect of the Protocol, the EU expressly declined to make a declaration under any of:

- (a) Article XXX(1) concerning Article VIII (Choice of law);
- (b) Article XXX(2) as regards Article X (Modification of provisions regarding relief pending final determination);
- (c) Article XXX(3) as regards Article XI (Remedies on insolvency), whilst noting that the Member States 'keep their competence concerning the rules of substantive law concerning insolvency'; or
- (d) Article XXX(5) in respect of Article XXI (Modification of jurisdiction provisions).

The EU asserted its right to decide whether or not to make any declaration in respect of those Articles. That assertion of competence was based, in the case of Article XXX(1), on Rome I, in the case of Articles XXX(2) and (5) on Brussels I and, in the case of Article XXX(3), on the Insolvency Regulation. Consequently, the Member States, when ratifying the Protocol, are unable to make any declarations under those Articles. Whilst the declarations under Articles XXX(1), XXX(2) and XXX(5) clearly fall within the ambit of Rome I and Brussels I, the situation is less clear for that under Article XXX(3).

The question of where competence lies in respect of insolvency matters (and so, concretely, who is entitled to make a declaration

under Article XXX(3) of the Protocol) is a complex one. Whilst the regulation and coordination of cross-border insolvency proceedings would be expected to fall within the category of judicial cooperation for the purposes of 4(j) TFEU (and so be shared competence), the issue is less clear for substantive insolvency law and domestic insolvency procedures where the principle of subsidiarity should prevail. The Insolvency Regulation itself does not address substantive insolvency laws relating (for example) to moratoria, such as those in Alternative A: rather it provides for recognition of jurisdiction and acceptance of proceedings (for example, the court of a Member State may no longer entertain insolvency proceedings in respect of entities whose centre of commercial interests is outside that Member State). The recast Insolvency Regulation (EU Regulation 2015/848 of 20 May 2015) introduces a framework for group insolvency proceedings with the aim of improving the efficiency of insolvency proceedings concerning different members of a group of companies to encourage cooperation across the group and rescue of the group as a whole. However, it does not seek to harmonise substantive rules. Therefore Article XI either:

- (a) is purely Member State competence, on the basis of subsidiarity; or
- (b) even if it is shared competence, relates to substantive insolvency law – a matter on which the EU had not yet legislated at the time of the EU Declaration, and so remains open for the Member States to address.

If the Member States do indeed retain their competence for rules of substantive law on insolvency as stated in the EU Declarations, that competence, by definition, extends not only to domestic legislation but also to the right to make a declaration under Article XXX(3). If, however, the EU is correct in asserting that a declaration under Article XXX(3) falls within an EU Competence, it necessarily follows from Article 2(2) TFEU

that the Member States no longer have the right to legislate for Alternative A as a matter of substantive domestic law.

The better view is that, for the reasons stated above, the competence in respect of Alternative A remains with the Member States; that they are at liberty to make a declaration under Article XXX(3) or to amend their substantive insolvency laws; and that the approach taken by the EU on this issue is misguided.

In fact, apart from Luxembourg (which has made a declaration in respect of Alternative A), the Member States wishing to adopt Alternative A-style remedies have amended their substantive laws on insolvency to achieve this.

3. Summary of ratifications

The 17 European jurisdictions that have ratified the Convention can be divided into three categories:

- (a) those that are currently listed on the list maintained by the OECD in accordance with Appendix II to the ASU (the OECD List), allowing for a discount from the minimum premium rate for export credits;
- (b) those that have ratified the Convention and made the Qualifying Declarations, but whose inclusion on the OECD List is yet to be agreed; and
- (c) those that have ratified the Convention but have not made the Qualifying Declarations.

(a) *Five European jurisdictions are on the OECD List: Luxembourg, Malta, Norway, Sweden and Turkey*

- (a) Luxembourg ratified the Convention in June 2008. Of the EU Member States that have ratified the CTC, Luxembourg is the only one to have made a declaration under Article XXX(3) adopting Alternative A (the other Member States

having opted either to amend their substantive laws appropriately or not to adopt the Alternative A regime). Notwithstanding the EU's claim to exclusive competence in respect of that declaration, Luxembourg's declaration should still be valid for the reasons set out in Section 2 above.

Prior to its ratification of the CTC, Luxembourg was believed to be an 'engine accession' jurisdiction – that is, one whose laws provided for title to an engine to vest in the owner of the airframe on which it is installed – and leases to its carriers were drafted on this basis. This regime conflicts with the notion of 'title tracking' guaranteed by the Convention under which international interests in engines remain effective in favour of the relevant creditor notwithstanding that engine's installation on a particular airframe. The conflict would have resulted in problems where engines were installed on airframes if the engines and airframes were subject to different leases dated before and after the Convention. One airline resolved these issues by re-executing all of their leases and security agreements following ratification, so bringing their entire fleet within the title-tracking regime of the Convention.

- (b) Malta ratified the Convention in October 2010. It has a relatively large number of aircraft on its registry.⁷ It is an increasingly important centre for service providers and for lessors and leasing structures.

The Maltese courts have recently considered the interaction between Brussels I and the CTC.⁸ The particular question addressed related to the

⁷ 227 at 20 July 2016.

⁸ *Aeroporto Catania S.p.A. vs ALS Irish Aircraft Leasing MSN 215 Limited u Wind Jet SpA*, Rikors Numru. 864/2012 and *Aeroporto Catania S.p.A vs Eden Irish Aircraft Leasing MSN 204 Limited u Wind Jet SpA*, Rikors Numru. 865/2012.

apparent conflict between the declarations made by a Member State under Article 39 of the CTC and the obligations of that Member State under Articles 31 and 33 of Brussels I. Article 31 deals with jurisdiction – it provides that ‘Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter’. Article 33 deals with enforcement of judgments: it requires a Member State to recognise a judgment of another Member State without any special procedure being required. The conflict would arise where there is a potential for Brussels I to afford a third party a right over the relevant aircraft object which prejudices the holder of a registered international interest, where that third party’s interest is not of a category covered by the Article 39 declaration made by the forum state.

The declaration by the EU under Article 55 of the CTC reads: ‘Pursuant to Article 55 of the CTC, where the debtor is domiciled in the territory of a Member State of the Community, the Member States bound by [Brussels I] will apply Articles 13 and 43 of the CTC for interim relief only in accordance with Article 31 of [Brussels I] ...’. This addresses jurisdiction specifically: it does not address Article 33 of Brussels I and neither does it prioritise Brussels I over the Convention generally.

The interplay between the CTC and Brussels I has already been considered in this journal⁹ and I will not repeat the arguments here. However, it is worth

considering the facts of the cases, the decisions reached by the Maltese court and their potential consequences.

Wind Jet SpA (‘Lessee’), an Italian airline, was the operator of two Airbus A320 aircraft on lease from two Irish companies, Eden Irish Aircraft Leasing MSN 204 Limited and ALS Irish Aircraft Leasing MSN 215 Limited (‘Lessors’). The aircraft were registered in Ireland and the Lessors consequently had registrable (and registered) international interests in respect of the airframes.¹⁰ The Lessee entered into insolvency proceedings, owing €2.3 m to Società Aeroporto Catania SpA (‘Airport’). Those dues, under Italian law, resulted in a ‘special privilege’ over the aircraft in favour of the Airport, an attachment right in rem ranking above the interests of the legal owner of an aircraft. The Lessors terminated the Leases on the Lessee’s default and, before any order was issued by the Italian court, flew the aircraft to Malta in an attempt to protect the aircraft from the Airport’s claim: Malta’s declaration under Article 39 of the CTC does not provide for the Airport’s interests to be non-consensual rights or interests of a category which has priority over a registered international interest.

Before the Italian courts, the Airport applied for, and obtained, an order for a precautionary arrest warrant, a *Sequestro Conservativo*, in respect of the aircraft under the Italian Navigation Code and the Italian Civil Procedure Code. By this order, the Airport was granted a right to detain the aircraft pending payment of the unpaid airport charges. If the charges were not subsequently paid following a final judgment, the

⁹ Alan McCarthy and Marie O’Brien, ‘Article 13 of the Cape Town Convention and Article 31 of Regulation No. 44/2001 – An EU Law Perspective’ (2014) 3(1) *Cape Town Convention Journal* 33–47. DOI:10.5235/204976114814222449

¹⁰ In fact, under the Maltese law implementing the Convention, registration of international interests is permitted for both the airframe and the engines in these circumstances.

Airport would have had the right to petition the Italian court for an order requiring the sale of the aircraft and for their debt to be paid in priority from the sale proceeds.

On the basis of the *Sequestro Conservativo*, the Airport applied to the Maltese court for a precautionary warrant of arrest, citing Article 31, but not Article 33, of Brussels I. At this point, the Lessors deposited a security with the court to obtain the release of the aircraft, arguing that that deposit should be returned to them if the arrest of the aircraft had not been validly granted.

The case is difficult. It is not clear why the Airport relied on Article 31, and not the more obvious Article 33, of Brussels I. The Airport was asking the court for a Maltese precautionary warrant of arrest (on the basis of the Italian court's order), founding the jurisdiction of the court on Article 31 of Brussels I. However, the fact that the court had jurisdiction clearly did not require it to grant the requested order: such a decision would need to have been based on Article 33 of Brussels I by way of enforcing the *Sequestro Conservativo*.

These were interim proceedings. The question of the relative priorities of the Lessors and the Airport on the Lessee's insolvency, or on the sale of the aircraft, did not fail to be considered by the court. The case was eventually resolved amicably so the substantive issues were never decided but a number of questions arise.

If the Airport had obtained an order for the sale of the aircraft from the Italian court, and for the sale proceeds to be applied in priority in satisfaction of its claims, would the Maltese court have enforced it under Article 33 of Brussels I? If so, it would be granting the Airport's claim priority over an international

interest even though its interest is not of a category covered by the Maltese declaration under Article 39. Conversely, a decision in favour of the Lessors would have been contrary to Article 33 of Brussels I. There is therefore an immediate apparent and potential conflict between Brussels I and Article 39.

It is also interesting to consider what is meant by priorities in the context of an international interest held by an operating lessor (in effect securing its right to repossess the aircraft object and so its economic ownership of the aircraft object) and that of an airport's claim for dues owing it. As the former's interest is to the full economic value of the aircraft object, granting it priority over the airport's claim, or indeed any other creditor's, by definition annihilates the latter and would make the *Sequestro Conservativo* meaningless. For the same reason, the precautionary arrest warrant granted by the Maltese court can only be rationalised, if, on the eventual sale of the aircraft, the proceeds would have been available to satisfy the Airport's claim and this could only happen if the Airport's claim was given priority.

In the event, the Maltese court decided the issue in the Airport's favour. The decision (which only analysed whether there was a *prima facie* case allowing the continued detention of the aircraft) seems to have taken account (although not explicitly stated) of the declaration made by the EU under Article 55 of the CTC (although, as stated previously, that declaration only addresses jurisdiction and has no bearing on the substance of Article 39) and of the fact that the Lessee and the Lessors were, under Italian law, jointly and severally liable for the charges due to the Airport. The court therefore did not take account of Malta's declarations under Article 39 of the CTC and the decision raises the possibility of a conflict

with those declarations.

Any decision to prioritise Brussels I over the Convention, if correct, would reduce the degree to which commercial parties can rely on Article 39 declarations made by Member States: the priority which is supposed to be guaranteed by the Convention can be subverted by the enforcement of a court order of another Member State. Would the a court have reached the same conclusion if the Lessors had previously entered into a security agreement in respect of the aircraft creating a registrable (and registered) international interest? If it did, that would have had the effect of subordinating the rights of the creditor to those of the Airport. Or was the fact that, under Italian law, the Lessors were jointly liable with the Lessee determinative, so that the Airport would have had priority over an international interest held by the Lessors but not over one held by any other party? Such a distinction is not contemplated by the Convention.

We may imagine a different scenario were, after flying the aircraft to Malta, the Lessors had sold them to purchasers who had then proceeded to register their sale. Would the Maltese court have applied Brussels 1 in priority over the rights of the registered buyers? If the effect of the *Sequestro Conservativo* is to create a right in rem, it is difficult to see why not. But the application of this rule in these circumstances would serve to increase uncertainty in the transacting of contracts relating to aircraft.

Conversely, Article 33 of Brussels I permits the holder of an international interest to enforce its rights in a Member State which is not party to the Convention if it first obtains a favourable judgment of a court in a Contracting State. We can therefore envisage a situation in which the priorities guaranteed by the Convention can be enforced in Member States which have not ratified the

Convention by the use of Article 33 of Brussels I.

It is important for buyers and creditors in respect of aircraft objects to understand that their rights are at risk in Contracting States from the claims of creditors even if those claims are not associated to rights in respect of which an Article 39 declaration has been made.

- (c) Norway ratified the Convention in December 2010. It is the registry state of two major airlines – Norwegian and (alongside Sweden and Denmark, which have both also ratified the Convention) SAS. As with Luxembourg, Norway has a pre-Convention engine accession regime but, unlike Luxembourg, taking into account the amount of affected equipment, it would be unreasonable for new leases and security agreements in respect of all Norwegian equipment to be executed. The registration of international interests over engines and the management of the airlines' fleet is therefore a sensitive issue from a documentary perspective.

Considering first, the pre-CTC position: the Norwegian aircraft registry does not consider engines as separate assets. As a starting point, the engines on wing at the time of a sale should in most cases be the engines which are sold, as title to the engines passes to the buyer as part of the registration of transfer of title of the aircraft.

When the engine is off wing (and is considered more than temporarily de-installed), the engine would under Norwegian laws be regarded as a piece of movable property, and title passed by agreement (and perfected against third parties by subsequent physical delivery). If no such physical delivery took place, the sale and lease back of engines off wing was regarded as not legally possible in Norway, as the buyer/lessor would not have taken delivery of the engines off wing.

It is a presumption in the Norwegian Aviation Act that the registered owner of an aircraft also has title to the engines on wing. If an aircraft is sold, the engine serial numbers (ESNs) are not included in the registration bill of sale and the ESNs are not registered. So in theory an engine belonging to a third party may be sold as part of the aircraft, even if it does not belong to the seller.

However, the Convention has been incorporated into Norwegian law by the passing of a short Act to the effect that the Convention should now be regarded as Norwegian law. The Norwegian Aviation Act has been amended to the effect that the Convention shall prevail as applicable over the provisions in the Aviation Act regulating registration of aircraft. However, given the recent ratification of the Convention by Norway, there is no settled practice yet as to how this matter is dealt with transactionally.

There is a registration fee of up to NK15,150 (approximately \$1,750 as July 2016) payable in respect of the registration of mortgages on the Norwegian Aircraft Register. Those fees are not payable in respect of security agreements constituted under the Convention.

It is notable that Norwegian has recently financed aircraft by means of Enhanced Equipment Trust Certificates (or similar instruments). Norway's inclusion on the OECD List will have resulted in an increased appetite from institutional investors for Norwegian's paper.

- (d) Sweden ratified the Convention on 30 December 2015. It is interesting to contrast the consequences of ratification by Sweden and Norway. Whereas, in Norway, there are problems in the treatment of title to engines installed on airframes but only a relatively minor tax on registration of mortgages, the converse is true in Sweden. The law on title to

engines installed on airframes is seen as being much more flexible than Norway's. However, Swedish aircraft mortgages carry a registration tax calculated at 1.00% of the secured debt, making them economically prohibitive. There was initially some discussion as to whether mortgages needed to be registered on both the Domestic Registry and the International Registry, which would have required payment of the tax. However, this year, transactions have been completed for Swedish registered aircraft, in which the creditors have relied exclusively on security agreements constituted under the Convention, to the exclusion of domestic Swedish law mortgages, so avoiding the requirement for the payment of the registration taxes. Initial questions as to how Irrevocable De-registration and Export Request Authorisations (IDERAs) would operate have also successfully been resolved.

- (e) Turkey ratified the Convention in August 2011. However, the registration of IDERAs with the Turkish Civil Aviation Authority was problematical until July 2014, when it revised a Directive on Implementation and Enforcement of the IDERA to provide greater clarity. Following that revision, Turkey was included on the OECD List.

It is notable that Turkish Airlines has used Enhanced Equipment Trust Certificates to finance aircraft recently, including in the Tokyo capital markets.

(b) Six European jurisdictions have ratified the Convention and made the Qualifying Declarations but are not on the OECD List

- (a) Denmark ratified the Convention in October 2015. No issues as to the implementation have been identified and its eligibility for inclusion on the OECD List is being evaluated.

As is the case with Norway, issues arise in connection with engine

accession. Since the Convention has only been in force in Denmark since 1 February 2016 and due to the fact that rights registered prior to that date continue to be registered in the Danish National Register, we are yet to see any real consequences of the ratification.

The previous practice in Denmark as relates to title to engines installed on airframes was that the security right in an aircraft, according to § 22 paragraph 1 of the Act on Registration of Rights to Aircraft (*flyregistreringsloven*), which implements Article XVI of the Geneva Convention on International Recognition of Rights in Aircraft, also includes the accessories placed in the aircraft – including engines. This right even continued to exist in a situation where the engine was temporarily separated from the aircraft. If the separation was permanent any security rights in the aircraft would then include any new (replacement) engine installed on the airframe. This remains the law in relation to all rights registered in the Danish National Register and in relation to any future rights registered in the Danish National Register.

If the aircraft is subject to the registration rules of the Convention, the rights cannot be registered in the Danish National Register according to the Danish national rules, but will instead have to be registered in the International Register under the Convention. This is to avoid any double registrations of rights.

This dual approach will cause problems where engines are installed on airframes where one of the items of equipment is subject to the Convention and the other is not. Given the recent ratification of the Convention by Denmark, a practical solution has yet to be established but it seems likely that the provisions of the Convention will prevail in respect of installations of

engines on airframes which take place following its coming into force in Denmark. It will however be necessary to verify whether leases to Danish operators concluded pre-ratification accurately reflect the Convention's principles.

- (b) Guernsey ratified the Convention alongside the UK in November 2015. Although a Crown Dependency of the UK, Guernsey does not form part of the EU. Accordingly, at the time of ratification, the UK made a series of declarations under the Convention for Guernsey in respect of matters for which the EU had claimed competence (see Section 2 above).

Guernsey hosts a significant aircraft register – the '2-register' – which hosts a number of corporate jets and off-lease lessor-owned aircraft. The commercial benefit to Guernsey of being included on the OECD List would probably be of a more general, confidence-boosting nature than the entitlement to a discount on export credit premia.

- (c) Russia originally ratified the Convention on 25 May 2011. At the time of that ratification Russia did not make any declarations under Articles VIII or XIII of the Protocol. That omission was rectified on 28 January 2013 when Russia lodged further declarations with Unidroit applying those Articles. Russia has therefore made the Qualifying Declarations.

However, Russia has not been included on the OECD List because of doubts as to the effectiveness of its implementation of the Convention into its laws (which implementation is required by paragraph 37(c) of Appendix II to the ASU). Those doubts arise from:

- (i) a lack of case law in Russia as to the application of the Convention in Russia as a consequence of the relatively few aircraft registered in

- Russia (but see comments on Transaero below);
- (ii) concerns as an ambiguity in the drafting of the declaration Russia made in respect of Article 39(1)(a) of the CTC. The declaration refers to the different types of monetary claim which have priority over ‘international interests’ on insolvency. The ambiguity arises because ‘international interests’, as defined in the Convention, represent interests in the objects specified in the Convention rather than monetary claims. Since Article 39(1)(a) is intended to regulate the priority of different interests rather than monetary claims, the likely interpretation of this declaration will be that any interests securing those types of claim will have priority over ‘international interests’ in Russia but there is no certainty that that is indeed the interpretation a Russian court would apply. Whether or not these concerns are justified, they should not prevent Russia’s inclusion on the OECD List as the relevant declaration is not a Qualifying Declaration; and
 - (iii) problems which arose in connection with the export and customs clearance of certain aircraft operated by KrasAir in 2009 and 2010.¹¹ It should be noted that these events arose prior to the ratification by Russia of the Convention. Some lawyers¹² believe that, following the Russian ratification of the Convention, any administrative arrest of the aircraft by the customs authorities in similar circumstances

could be removed by the owner or mortgagee of the aircraft by court proceedings which might take up to six months.

Some comfort may be drawn from the letter of 18 February 2016 addressed by the General Director of Transaero Airlines to the Aviation Working Group confirming that, following the commencement of insolvency proceedings in respect of the airline, it intended to comply with its obligations under the Convention.¹³ However, the application of the Convention by the courts, customs authorities and other state institutions of Russia in the context of those proceedings has not been tested.

- (d) San Marino ratified the Convention on 9 September 2014. It has the curious distinction of being the only Contracting State which does not possess an airport. It has, however, signed Article 83 *bis* agreements¹⁴ with Saudi Arabia, Lebanon and Nigeria, allowing aircraft registered in San Marino to be operated by entities holding Air Operator Certificates in these jurisdictions. No issues as to the implementation of the Convention by San Marino have been identified and its eligibility for inclusion on the OECD List is being evaluated.
- (e) Ukraine ratified the Convention on 31 July 2012 and made the Qualifying Declarations. It legislated for the Convention by the Law on Ratification of Treaty no 4904-VI dated 6 June 2012 (the Treaty Law). By virtue of the Law on Ukraine’s International Treaties No. 1906-IV of 29 June 2004, the Treaty Law takes precedence over other laws of the Ukraine, except for the constitution. On 16 August 2013, the State Aviation Service of Ukraine (SASU,

¹¹ For details of these cases, please see Ludwig Weber (2015) ‘Public and private features of the Cape Town Convention’ (2015) 4 *Cape Town Convention Journal* 53–66. DOI:10.1080/2049761X.2015.1102011

¹² Maxim Astafiev, Deputy Director of Legal Support, S7 Group.

¹³ Alexander Burdin, ‘Letter from Transaero to AWG’, <[http://www.awg.aero/assets/docs/letter-from-transaero-to-awg-\(eng\)-and-russia.pdf](http://www.awg.aero/assets/docs/letter-from-transaero-to-awg-(eng)-and-russia.pdf)> accessed 21 September 2016.

¹⁴ Chicago Convention on International Civil Aviation 1944, art. 83 *bis* Agreements.

the body authorised to apply the Convention in Ukraine) approved the Instruction on Provision of the Authorization Code for Access to the International Registry of International Interests in Mobile Aircraft Equipment and Registration of the Irrevocable Power to Apply for Deregistration and Export of the Mobile Aircraft Equipment. SASU also appointed a person in charge of issuing the authorisation codes and providing liaison with the International Registry.

AeroSvit Airlines filed for bankruptcy in December 2012 but its lessors were able to repossess their aircraft and/or to transfer their leased aircraft to Ukraine International Airlines without the need for court intervention.

Since 2013, SASU has issued 82 authorisation codes and registered 23 IDERAs. However, the application of the Convention by SASU, the Courts and state institutions in Ukraine has not been tested.

- (f) The UK ratified the Convention on 27 July 2015. The ratification of the Convention by the UK is considered in detail in Section 4 below.

(c) Six European jurisdictions have ratified the Convention and not made the Qualifying Declarations

- (a) Albania ratified the Convention 30 October 2007 but made no declaration under Articles X or XI of the Protocol.
- (b) Belarus ratified the Convention on 28 June 2011 but made no declarations under Articles VIII, X, XI or XIII of the Protocol.
- (c) Gibraltar ratified the Convention alongside the UK in November 2015. It is a Crown Dependency of the UK and forms part of the EU. At the time of ratification, the UK made no declaration under Article XXX(3) of the Convention for Gibraltar and Gibraltar has not

amended its insolvency laws to align with Article XI of the Protocol.

Gibraltar has no aviation authority and is not a jurisdiction commonly encountered in aircraft finance.

- (d) Ireland ratified the Convention on 29 July 2005. At the time of ratification, Ireland made no declaration under Article XI of the Protocol so the bankruptcy protection regime of examination (which is inconsistent with Alternative A) remained in force. However, the State Airports (Shannon Group) Act 2014 provides that the provisions of Alternative A may be implemented in Ireland by a ministerial order. No such ministerial order has yet been made. If and when it is made, Ireland will be able to make the further declarations required under the Convention to establish the Qualifying Declarations.
- (e) Latvia ratified the Convention on 8 February 2011 but did not make any declarations under the Protocol.
- (f) Spain ratified the CTC in June 2013, but did not ratify the Protocol until November 2015.¹⁵ The Government of Spain made some additional declarations under the CTC at the time that it ratified the Protocol, and these came into effect on 1 June 2016 in accordance with Article 57(2) of the CTC. This paper considers the position in Spain as from that date, when the Convention, including those additional declarations became effective.

The implementation of the Convention by Spain has been particularly problematical because (i) Spain has not made the Qualifying Declarations, (ii) Spain has designated the *Registro de*

¹⁵ For a detailed review of Spain's implementation of the Convention, please see Teresa Rodríguez De Las Heras Ballell, 'Key points for the effective implementation of the Cape Town Convention: the accession of Spain to the Aircraft Protocol' [2016] *Uniform Law Review – Revue de droit uniforme* 1–30. DOI:10.1093/ulr/unw011

Bienes Muebles, in practice the *Registro Provincial de Bienes Muebles de Madrid* (RBM) as its national entry point under Article XIX(1) of the Protocol and (iii) there has been confusion caused by the interaction between the RBM, the Aircraft Registry – the *Registro de Matriculas de Aeronaves* (RMA) – and the International Registry.

Spain has failed to make the Qualifying Declarations because:

- (i) it has made a declaration under Article 54.2 of the CTC that ‘all remedies available to the creditor under the provisions of the Convention, the exercise of which is not subordinated by virtue of such provisions to a petition to the court, may be exercised only with leave of the court’. This is a curious declaration in that non-judicial methods for enforcement of interests over tangible assets are otherwise permitted in Spain under the *Ley 5/2015 de la Jurisdiccion Voluntaria* so it is arguable that non-judicial remedies are available in Spain notwithstanding this declaration. That argument is reinforced by Spain’s declaration under Article 53 of the CTC under which it stated that ‘all courts and competent authorities in accordance with the laws of the Kingdom of Spain will be the relevant courts for the purposes of Article 1 and Chapter XII of the Convention’ – the reference to ‘competent authorities’ could be held to include notaries, who conduct non-judicial enforcement procedures;
- (ii) it has not made any declaration under Article XXX(2) of the Protocol in respect of Article X. Although the EU Declarations assert that this is a declaration of EU Competence but one which the EU has declined to make, that condition would be satisfied if the law of Spain is substantially

similar to that set out in Article X and if the time periods in which the relevant remedies can be exercised in Spain reflect those specified in paragraph 2(e)(2) of Annex 1 to Appendix II to the ASU. That remains to be established; and

- (iii) it has neither made any declaration under Article XI of the Protocol nor amended its insolvency laws to reflect the terms of Alternative A.

Maybe rather curiously, Spain has declared that it will apply Article XIII of the Protocol relating to the use of IDERAs and that, in this case, its declaration under Article 54(2) of the Convention will not apply. The logical consequence of this declaration is that one can posit a situation where:

- (A) an aircraft is leased to a Spanish lessee and the lessor registers the resulting international interests over the airframe and the engines with the International Registry;
- (B) the lessee signs an IDERA designating the lessor as the authorised party and the IDERA is duly recorded by the RMA;
- (C) an event of default occurs under the lease;
- (D) the lessor is entitled to require the deregistration of the aircraft from the RMA (and presumably the RBM) without the need for judicial authorisation but does require a court order (or the order of another competent authority) to exercise any of its other rights (for example, to repossess the aircraft).

Alone amongst the Contracting States that have made a declaration under Article XIX(1) of the Protocol, Spain has chosen not to designate its aircraft registry, the RMA, as its national entry point. The designation of the RBM – and the interplay between the RBM and the RMA – had initially caused significant procedural difficulties.

The RMA is the national aircraft register of Spain for the purposes of the Chicago Convention on International Civil Aviation 1944. Ownership, leases, liens and other interests over aircraft are capable of being recorded in the RMA: not as a means to perfection, but simply as a means of publicising the interests.

The RBM, on the other hand, is a register relating to ownership of, and various interests in, certain moveable assets, including aircraft. The registrar initially refused registration of any interests over an aircraft object if ownership of that aircraft object was not first registered. It was therefore necessary to comply with the formalities required to make this registration before it issued any authorisation codes necessary for the international interests to be transmitted to the RMA or the International Registry.

There were significant formalities required to be complied with as regards the registration of the aircraft with the RMA (including the notarisation and apostilling of the lease, the provision of a Spanish Taxpayer Reference Number (NIF) by the lessor to the RBM and the obtention of notarial certificates relating to the signatories, their capacity and due incorporation of the lessee). However, these difficulties appear to have been resolved as the RMA has now agreed to issue authorisation codes allowing international interests to be registered with the International Registry without the aircraft first being registered with it.

Detailed regulations relating to the registrations (and to the registration of IDERAs) are yet to be published. There has been considerable debate as to whether the IDERA should be registered directly with the RMA or whether it should be registered with the RBM, as designated entry point, which would then transmit it to the RMA. In practice the latter course of action is being adopted.

4. Ratification of the convention by the UK

The Convention was ratified by the UK on 27 July 2015 and came into force on 1 November

of that year. Whether the Convention was fully ratified by the UK in its own capacity at that time, or only ratified to the extent of the UK's competences, the remainder having already been previously ratified on its behalf by the EU, is further discussed at Section 5 below.

Insofar as it relates to the EU Competences, the Convention became directly applicable within the UK upon its complete ratification by virtue of S2(1) of the European Communities Act 1972 (ECA) which provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.

The implementing legislation for the Convention (insofar as it relates to matters for which the UK retained competence) is The International Interests in Aircraft Equipment (CTC) Regulations 2015 (the UK Regulations). The UK Regulations are secondary legislation, that is legislation made by a person (normally, a Government minister: in this case the Secretary of State for the Department of Business, Innovation and Skills) to whom the British Parliament has delegated its democratic legislative mandate.

This means of legislating for the Convention has, as a consequence, certain constraints in the way in which the Regulations are able to amend other English laws currently in force. The use of secondary legislation can be controversial constitutionally as it derogates from the general constitutional principle that it is for Parliament to enact legislation. Therefore, where Parliament has delegated these powers, the courts exercise great scrutiny to ensure that the relevant minister has not exceeded the powers delegated to him or her.

The enabling legislation relied on by the Government for the purposes of enacting the

UK Regulations is Section 2(2) of the ECA, which permits the relevant Minister to use secondary legislation to

make provision ... for the purpose of implementing any [EU obligation] ... of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised ... or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above.

The rights and obligations referred to in sections 2(1) and 2(2) include those stemming from the EU Treaties. Section 1(3) ECA states that 'If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the EU Treaties as herein defined, the Order shall be conclusive that it is to be so regarded'. That declaration was made, in respect of the Convention and the Protocol, by The European Union (Definition of Treaties) (Convention on International Interests in Mobile Equipment and Protocol thereto on matters specific to Aircraft Equipment) Order 2014. To the extent that that order is indeed conclusive, the right of the Government to use secondary legislation for the purposes of implementing the Convention and the Protocol is established.

The designation of the Convention as an EU Treaty resulted in those parts of the Convention which are EU Competences being directly applicable within the UK under Section 2(1) of the ECA. There was therefore no need for the UK Regulations to address these matters: indeed, these being matters of shared competence on which the EU had already legislated, the UK is precluded from further legislating in these areas by Article 2.2 TFEU. This has not been fully respected: for example Regulation 42 of the UK Regulations (*Choice of Forum*) purports to implement Article 42 of the CTC. The two provisions have not been drafted identically: if there were to be a conflict in the application of these provisions to any

circumstance, the Convention should prevail because: (i) Regulation 6(2) of the UK Regulations provides that they are subject to, and to be applied in accordance with, the provisions of the Convention, (ii) Article 2(2) TFEU renders ineffective any purported legislation by the UK on matters of EU Competence and (iii) Article 42 of the CTC is directly applicable in the UK by virtue of s2(1) of the ECA. In the circumstances, the purpose of the different drafting of the provision is questionable.

The sensitivity of the Government to ensure that the UK Regulations fall within the delegated powers under the ECA, led to the UK Regulations being framed so as to minimise the extent to which any existing law was revoked or otherwise modified in a way which would might otherwise have more appropriately been dealt with by primary legislation. Thus (for example) the *lex situs* rule derived from the Blue Sky case¹⁶ remains in force unaltered as regards English law aircraft mortgages and charges. In that case, the court held that:

- (a) it is the laws of the physical location of an aircraft at the relevant time which determine whether a property interest, such as a mortgage, is effectively created over it;
- (b) if the aircraft is registered in a different jurisdiction to that of the *lex situs*, a mortgage which is valid under the laws of the state of registration but which is invalid under the domestic laws of the *lex situs* jurisdiction will be ineffective in England; and
- (c) English law will look only to the domestic laws of the *lex situs* jurisdiction without reference to its conflict of laws rules in deciding the issue of validity of the mortgage.

However, Regulation 6(3) of the UK Regulations makes it clear that the *lex situs* connection is not required for the purposes of creating an international interest. It is therefore

¹⁶ *Blue Sky One Ltd & Ors v Mahan Air & Ors* [2010] EWHC 631 (Comm)

possible for an international interest to be created over an aircraft object under an English law CTC-compliant security agreement at a time when the aircraft object is situated outside England (or English airspace) even though it remains impossible to create an English law mortgage or charge over the aircraft object at such time.

The situation regarding sales is less clear because the Government chose not to address it explicitly in the way it had the international interest, leaving the reader to infer that it wished to leave the situation unchanged. The common law rule in *Blue Sky* applies to sales to the same extent as it does to mortgages. However, whereas it is possible for the UK Regulations to create a new type of security interest to which the *lex situs* rule does not apply, that argument cannot be applied to sales. It is impossible to argue that the UK Regulations create a new type of sale since (unlike security) all sales are conceptually the same.

Regulation 6(3) states that

... the international interest has effect where the conditions of the Cape Town Convention and the Aircraft Protocol are satisfied (with no requirement to determine whether a proprietary right has been validly created or transferred pursuant to the common law *lex situs* rule).

That Regulation does not apply to sales. Regulation 38 (mirroring Article III of the Protocol) goes on to provide that 'Regulation 6 insofar as it implements Articles 3 and 4 of the Cape Town Convention' (emphasis added) applies in relation to sales, but this does not attach to Regulation 6(3), which does not relate to the specified Articles.

The contrary argument, which leads to the conclusion that the *lex situs* rule does not apply to sales within the Convention, derives from Regulation 6(2) which provides that 'These Regulations are subject to, and to be applied in accordance with the provisions of [the Convention].' If the Convention does not require the *lex situs* rule to be satisfied for a sale to be effective, neither should the UK Regulations. It is necessary, therefore, to

consider what conditions the Convention attaches to the effectiveness of a sale.

The formalities prescribed by Article V(1) of the Protocol in relation to a contract of sale (reproduced as Regulation 39 of the UK Regulations) do not refer to the *lex situs*, but this is not controversial. Under English law, the *lex situs* rule applies to the sale, not the contract of sale. There is some confusion in the Protocol between the terms 'sale' and 'contract of sale' but the Official Commentary confirms expressly at paragraph 5.30 that the provisions of Article V(1) apply only to the former. Indeed, if it were otherwise, the commonly used mechanism of concluding a sale of an aircraft object by transferring possession of it to the buyer would not be valid under the Protocol because it was not in writing.

Article V(2) of the Protocol (reproduced as Regulation 40) states that 'a contract of sale transfers the interest of the seller in the aircraft object to the buyer according to its terms'. Therefore, assuming that the contract of sale complies with the formalities in Article V(1), it cannot be argued that this Article allows an additional formality to be added to the transaction – compliance with the rules of the *lex situs* – for the sale to be effected. This argument accords with the Official Commentary at paragraph 5.31. It must therefore be the case that, although the Government refused to disapply the *lex situs* rule to sales explicitly, Regulation 40 is effective to do so to the extent that the Convention applies.

There is also some confusion as to whether Section 859A of the Companies Act 2006 (Companies Act) (which requires an English company to register certain charges created by it with Companies House) applies to security agreements. Such a requirement for registration as an additional formality to those set out in Article 7 of the Convention would be contrary to the principles of Convention. Paragraph 9 of Schedule 5 to the UK Regulations states that the registration requirements is 'not to apply to a charge which is an international interest'.

It is important to distinguish between an agreement creating an international interest

which is also a charge and an agreement which creates an international interest and, separately, a charge. An example of the former would be where an English debtor charges an aircraft object situated in England in favour of a creditor. That charge would also be, and be the same as, an international interest and (it would seem) not be registrable by virtue of the aforesaid paragraph 9.

However, the agreement may be effective both to create an international interest for the purposes of the Convention and, separately, a charge under existing English law. For example, an English debtor may agree to grant an interest in the aircraft object to its creditor, when the aircraft object is situated outside England, and, in the same agreement, that that aircraft object shall be subject to a charge in favour of that creditor, effective from the first time it enters English airspace. Section 859 of the Companies Act would apply to the second limb of the agreement, which would consequently require registration.

Failure to register the charge would render it void against a liquidator, an administrator or a creditor of the debtor.¹⁷ It would not otherwise impact on the validity of the parallel international interest. However, when a charge becomes void, the money secured by it immediately becomes payable. So, failure to register the charge would accelerate the underlying loan, albeit secured by the valid international interest.

The distinction between an international interest and a charge may not always be clear and it is advisable to register any such interest in accordance with Section 859A of the Companies Act notwithstanding the provisions of paragraph 9 of Schedule 5 to the UK Regulations.

5. Consequences of Brexit

On 23 June 2016, a referendum held in the UK resulted in a vote to leave the EU by a margin of 52% to 48%. That referendum result is

¹⁷ Section 859H Companies Act 2006.

advisory and of no legal consequence, though it will be politically difficult for the government of the UK to ignore it. For the moment, the laws of the UK which are related its membership of the EU (including the UK Regulations) are unaffected.

No jurisdiction has previously left the EU (although Greenland and Algeria left its predecessor, the EEC [European Economic Community], and the status of St Barthélemy within the EU has been altered). The process for doing so and the legal and constitutional ramifications (including in relation to the departing state's rights and obligations under international treaties) are about to be tested for the first time.

The mechanism for the UK's exit from the EU is set out in Article 50 TEU which provides:

- (1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
- (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
- (3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned,

unanimously decides to extend this period.

Article 50.1 TEU is problematical for the UK which does not have a written constitution. The right of the UK Government to give the withdrawal notice required under Article 50(2) without the backing of an Act of Parliament is currently being challenged before the courts. A decision of the Supreme Court is expected at the end of 2016. The Prime Minister has announced that the Article 50 notice will be given in March 2017 with the actual date for withdrawal occurring two years after that.

Three principal questions need to be addressed in connection with Brexit and the Convention:

- (a) Does the UK need to re-ratify, or to amend, or to confirm its ratification of the Convention?
- (b) Does the UK need to make any new declarations?
- (c) Will the Convention continue to have the force of law in the UK following Brexit?

The EU negotiates a range of agreements with third states or organisations, most commonly Association Agreements, Free Trade Agreements, Partnership and Cooperation Agreements and Economic Partnership Agreements. In this activity the EU must respect the limits of its competence. The EU has exclusive competence for many of these: they are agreements which the EU will have ratified and are binding all of the Member States, without the need for them to ratify them. There is no explicit law on what the effect of the ratification of such exclusive competence agreements will be as regards the UK following Brexit. The Vienna Convention on Succession of States in respect of Treaties of 1978 addresses treaties constituting an international organisation and treaties adopted within an international organisation but it does not address treaties adopted by an international organisation with third party states. It has, in any event, been ratified

by very few states. The closest parallel to Brexit would be countries gaining independence: they have historically not considered themselves bound by international treaties concluded by their previous ruling powers. This has been the case, for example, in Australia, South Africa, Ireland and the CIS. It therefore is safest to assume that, following Brexit, the UK will not continue to be bound by treaties exclusively concluded by the EU on its behalf.¹⁸

The CTC is, however, a mixed agreement, that is one which has been ratified by both the EU and the participating Member States. There has been much discussion as to whether the UK would remain a party to mixed agreements following Brexit and, if so, on what terms.¹⁹ However, much of that discussion has focused on the territorial coverage of the agreement being limited to the EU (and so not including the UK post-Brexit) or the definition of the Contracting States to that agreement as being the 'Member States' of the EU. These particular concerns are not relevant as regards the Convention.

As mentioned in Section 2 above, the EU Declarations relate to matters which are EU Competences and which, therefore, the UK could not (at least as a matter of EU law) address at the time of its ratification of the Convention. On this issue, paragraphs 4.311 and 4.312 of the Official Commentary are clear: 'Only the [EU] and not its Member States has competence to conclude international agreements which affect those regulations'; 'the [EU] has exclusive competence in relation to the specified matters and Member States no

¹⁸ See Vaughne Miller and Arabella Lang, 'Brexit: how does the Article 50 process work?' (*House of Commons Library*, 30 June 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7551>> accessed 21 September 2016.

¹⁹ See, for example, Dr Markus Gehring, 'Brexit and EU-UK trade relations with third states' (*EU Law Analysis*, 6 March 2016) <<http://eulawanalysis.blogspot.co.uk/2016/03/brexit-and-eu-uk-trade-relations-with.html>> accessed 21 September 2016.

longer have independent authority to legislate concerning them’.

Following Brexit, does that mean that the UK’s ratification of the Convention is of itself only effective to the extent of its competences at the time, or that its ratification is invalid, or can the other Contracting States rely on the UK’s instrument of accession, ignore the detail of its relationship with the EU and assume full ratification by the UK? There are competing arguments:

- (a) The UK’s instrument of accession makes no mention of the EU. It may be argued that it is not for the other Contracting States to establish on what basis the UK has agreed to be bound by the Convention. The UK has, on the face of the instrument of accession, agreed to be fully bound.
- (b) However, the EU Declarations state expressly that the Member States have ‘transferred their competence’ in respect of certain matters to the EU. There is a distinction to be made between a transfer of competence (which implies that the transferor no longer has a right to address these matters) and an agreement only to exercise a competence with the permission of the EU.
- (c) Following Brexit, the UK will not have made any declarations in respect of the matters covered by the EU Declarations. However, none of the declarations are compulsory. If the UK wishes to make new declarations in respect of those provisions (as it would need to in relation to Article 55 of the CTC and Article XXI of the Protocol, where the references to Brussels I will no longer be correct), it may do so under Article 57(2) of the CTC. However, failure to make any such additional declarations would not impact on the validity of the UK’s ratification of the Convention.
- (d) Notwithstanding the above, there are parts of the Convention which are EU Competences and are not optional

matters subject to declarations: for example, Articles 42, 44 and 45 of the CTC. Having transferred its competence to the EU in respect of these matters, the UK had no power to be agreed to be bound by them at the time that it ratified the Convention. That raises issues as to the applicability of the Convention within the UK but the question of whether that affects the validity of the UK’s ratification of the Convention is more complex. Generally, the due domestic process for the ratification of treaties by any one state is not of concern to other Contracting States but there is no actual precedent for the case being considered.

However, an analogy may be drawn with Article 47 of the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention) which suggests that the validity of the ratification of a treaty by a contracting state may, at least in some circumstances, be invalidated where the other parties are on notice of a failure to follow due process:

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

It might be argued that:

- (i) the authority of the EU to express the consent of the UK to be bound by the Convention is subject to the restriction of the UK remaining a Member State;
- (ii) the authority of the UK to consent to be bound by the Convention is subject to the TFEU;

and those restrictions were expressly or impliedly notified to the other negotiating states. Certainly, the other Member States party to the Convention would have been aware of them and the issues are clearly addressed in

the EU Declarations. This argument would lead to the conclusion that the agreement by the UK, by virtue of its ratification of the Convention, to be bound by those areas of the Convention which are EU Competences will not automatically be valid following Brexit.

- (e) It would be highly undesirable for the UK to be obliged to denounce the Convention on Brexit and ratify it anew. Such a procedure would cause a legal hiatus and would be of no benefit to the UK or any other Contracting State. The UK should resolve any doubt as to the validity of its commitment to be bound by the EU Competences by making a formal declaration, taking effect at the time of Brexit, confirming its original instrument of accession and its continued intention to be bound by the EU Competences. That declaration may be made at the same time as those referred to in paragraph (f). There may be some debate as to whether that declaration is necessary or permitted by the Convention. However, other Member States have made declarations not expressly permitted by the Convention – for example, Spain in respect of the status of Gibraltar. The acceptance of such a declaration by the UK would resolve any continuing doubt.
- (f) Following Brexit, the EU Declarations will no longer apply to the UK and it will need to consider the additional declarations it should make in its own right to achieve the Qualifying Declarations, given that those that relate to Articles VIII, X and XI of the Protocol are somewhat relaxed for Member States. It is to be hoped that, given the history of the UK's relationship with the Convention, the OECD would agree to treat the UK as if it remained a Member State for the purposes of giving effect to the Qualifying Declarations.

There are several hundred EU Treaties, both exclusive and mixed, and the UK will need to consider between now and the date of Brexit

which of these it will choose to maintain and from which it will choose to withdraw. It is inconceivable that it will choose to withdraw from the Convention on the basis of Brexit alone. We will have to wait to see what procedures are adopted by the UK Government in agreement with international bodies to ensure that it remains bound by those EU Treaties which it wishes to maintain.

The principal legislative act that will be required to give effect to Brexit will be the repeal of the ECA. There is no settled law as to whether secondary legislation (such as the UK Regulations) can survive the repeal of the primary legislation under whose aegis the delegated powers were conferred on the relevant minister. However, the majority view (including the published view of the House of Commons Library)²⁰ is that secondary legislation will automatically fail in the event that its sponsoring primary legislation is repealed unless the UK Parliament takes active steps to preserve it.

Parliament will therefore need to take active steps, at the time that the ECA is repealed, to preserve the enforceability of (i) the parts of the Convention which are currently directly applicable in the UK by virtue of s2(1) ECA and (ii) the UK Regulations. The Government has indicated that it will take steps to grandfather all existing EU-derived law, at least initially, at that time. In fact, if such a law were explicitly to provide for effectiveness of the UK Regulations in full following Brexit, it would no longer be necessary to consider which provisions of the Convention were originally directly applicable by virtue of s2(1) ECA.

There are many thousands of laws having direct applicability and of statutory instruments currently in force in the UK which derive from European law. Although no announcement has yet been made by the Government, it is reasonable to suppose that the UK Parliament will

²⁰ Vaughne Miller and Arabella Lang, 'Brexit: how does the Article 50 process work?' (*House of Commons Library*, 30 June 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7551>> accessed 21 September 2016.

seek to legislate so that all such laws are initially preserved, and that it will subsequently decide which ones to repeal, rather than attempting immediately to identify the laws it wishes to survive.

The UK will undergo a legislative upheaval over the next few years as it extricates itself from the EU. The process will be complex – particularly in situations where the EU

framework relies on a necessary multilateral reciprocity, or where there is an EU regulator involved, or where there is doubt as to the UK's desire to continue to be subject to the relevant legislative regime. Fortunately, none of those considerations apply to the Convention. However, the volume of legislative activity required and the timetable within which it must be achieved is daunting.