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Cape Town Convention and international sanctions: the case of European Union sanctions against Russia

David Fennelly*

The Cape Town Convention, while focused on a relatively specialised area of international finance, forms part of the broader system of international law and interacts in various ways with the other rules of that system, including international sanctions. This article explores the relationship between sanctions and the Cape Town Convention regime, taking as a case study the implications of the recent EU sanctions regime against Russia for the Registry established under the Aircraft Protocol and based within the EU. The increasing prominence of sanctions as a tool within the international legal system requires those who interact with the Convention regime, and their advisers, to keep international sanctions under review. In the case of EU sanctions against Russia, notwithstanding their very wide reach, the sanctions appear to have very limited effect on the activities of the Registry. Moreover, the privileged status of the Convention within the EU legal order arguably provides a significant level of protection for the Registry and its activities.

1. Introduction

Although the Cape Town Convention and its Aircraft Protocol have emerged as highly innovative and successful instruments of public international law, familiarity with the Convention regime is largely confined to the field of aviation finance. References to the Convention regime within the literature on public international law are few and far between. Yet, despite its very specialised nature, the Convention does not exist in isolation but forms part of the broader system of international law and interacts in various ways with other rules of international law. In this article, we will explore the relationship between the

Convention and an increasingly important body of international rules: sanctions. The international community, and individual members of the community, have increasingly had recourse to non-forcible measures in their international relations – such as trade embargos, asset freezes, and travel restrictions – in response to alleged violations of international law. In light of its important role in international trade, transport and finance, the Convention regime is not immune from the implications of such measures.

The relationship between the Convention and sanctions is complex and multifaceted. First and foremost, sanctions may inhibit or prohibit the underlying transactions which parties may wish to bring within the scope of the Cape Town Convention regime. Second, and of most interest for the purposes of this article, sanctions may interfere with the effective operation of the International Registry system established under the Convention and its Protocol. While the functions of the

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Registry are essentially administrative in nature, they are nonetheless fundamental to the effective operation of the Convention regime as a whole. In the case of the Aircraft Protocol, the Registry is Aviareto Limited, an Irish incorporated company which is a joint venture between SITA SC and the Irish Government.¹ Because the Registry is based in the European Union ('EU'), it is *prima facie* subject to sanctions or restrictive measures adopted by the EU, in some cases autonomous in character, in other cases implementing United Nations ('UN') sanctions.² As the Registry operates under the Convention and is specifically established to give effect to its provisions, the possible applicability of EU sanctions to its activities poses potential challenges for the Registry. For this reason, this article will focus on EU sanctions, although other sanctions may also be relevant to the Registry's activities.³

In order to put this issue in context, in Section II, we will provide a brief introduction to sanctions. In Section III, we will look in more depth at a specific regional sanctions regime as a case study: the recent, high profile restrictive measures adopted by the European Union ('EU') in response to the Russian incursion into Ukraine. In Section IV, we will consider the potential implications of such sanctions for the International Registry established under the Cape Town Convention and its Aircraft Protocol. We will conclude by considering how the tension between the Convention

regime and international sanctions might be alleviated.

2. International sanctions: an introduction

The terms 'sanctions', or 'international sanctions', are 'not, strictly speaking, a term of art in public international law'.⁴ Yet, in practice, the terms are used to describe the range of non-forcible measures which States, acting collectively through the UN or individually, take in response to violations of international law.

In the international legal system, traditionally and still to a large extent today, save to the extent that the United Nations Security Council takes the role upon itself, there is no formal, centralised system for imposing sanctions in response to violations of international law. Under Chapter VII of the UN Charter, the United Nations Security Council has the power to adopt non-forcible measures. Where the Security Council has determined that there exists a threat to or breach of international peace and security or an act of aggression, it may decide under Article 41 of the Charter 'what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures'. These measures 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.⁵ UN Security Council action requires agreement among its 15 members, and in particular among its five veto-wielding permanent members. Prior to 1990, the Security Council had recourse to mandatory sanctions in only two cases: South Africa and Rhodesia.

¹ See the website of Aviareto: <<http://www.aviareto.aero/about-us/>> accessed 2 September 2015. See also Rob Cowan and Donal Gallagher, 'The International Registry For Aircraft Equipment: The First Seven Years, What We Have Learned' (2014) 45(3) *Uniform Commercial Code Law Journal* 225.

² See in this regard Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, UNIDROIT 2013) 16–17.

³ In light of the very broad reach of some of the US comprehensive sanctions regimes, issues may arise for the Registry where it is involved with transactions with or through the US or using US currency or using or providing certain US technology to user entities.

⁴ Antonios Tzanakopoulos, 'Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility' in Ali Marossi and Marisa Bassett (eds) *Economic Sanctions under International Law* (Springer 2015) 146.

⁵ See Art 41 in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002).

However, since the end of the Cold War, the Security Council has adopted a wide range of sanctions against a diverse group of States and indeed non-State actors.⁶ Over time, it has shifted from quasi-comprehensive sanctions regimes against States, as in the case of Iraq, to much more targeted measures, directed at specific individuals or groups, as in the case of the 1267 regime relating to Osama bin Laden, Al-Qaida and the Taliban.⁷

Beyond the UN Security Council, States, acting individually or collectively (for example, within regional groups), may adopt unilateral or autonomous sanctions. As a matter of international law, such measures, where they are adopted specifically in response to a breach of international law, are more properly considered as 'countermeasures'.⁸ In the absence of a centralised system of enforcement and oversight, there may often be controversy about whether such measures are lawful countermeasures as a matter of international law. The US sanction regimes against Cuba provides a good case in point.⁹ Within the EU, Member

States have increasingly coordinated and centralised their sanctions activity over the past 30 years.¹⁰ Over the past 18 months, in the face of deadlock within the UN Security Council, many members of the international community – including Australia, Canada, the EU, Japan and the United States of America – have adopted sanctions against Russia arising from what those States consider to be Russia's violation of Ukraine's sovereignty and territorial integrity through its annexation of Crimea.

As UN and unilateral sanctions regimes have expanded in their scope and coverage, they have come to affect an ever-greater array of fields of international trade and finance. Aviation is no exception. Indeed, one of the seminal cases on the effect of sanctions within the European legal order, the *Bosphorus Airways* case, involved an aircraft leased by the Turkish airline from the national airline of the former Yugoslavia which was impounded by the Irish authorities at Dublin airport.¹¹ Insofar as the Cape Town Convention and its Aircraft Protocol is concerned, many of the parties are among the most prominent jurisdictions which either impose sanctions (such as Canada, the EU and a number of its Member States, and the United States of America) or are subject to such sanctions (such as Belarus, Cuba, Myanmar, Russian Federation, Ukraine). This makes it all important for those operating under the Cape Town Convention regime – and *a fortiori* those operating the regime itself, including in the Registry – to pay close attention to international sanctions, particularly having regard to the potential civil and indeed criminal liability which might attach to non-compliance with such sanctions.

⁶ For an excellent overview up to 2004, see Vera Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN Charter' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Brill 2004). For a survey of the current sanctions regimes, and the committees responsible for their oversight, see the website of the UN Security Council <<http://www.un.org/sc/committees/>> accessed 2 September 2015.

⁷ See the webpage of the UNSCR 1267 Sanctions Committee <<http://www.un.org/sc/committees/1267/>> accessed 2 September 2015.

⁸ See the commentary to Art 22 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts which defines as non-forcible measures taken by an injured State in response to a breach of international law 'in order to procure its cessation and to achieve reparation for the injury'.

⁹ While the sanctions have been amended in light of the renewal of diplomatic relations between the US and Cuba, their legality has been the subject of longstanding debate, including within the United Nations General Assembly: see eg UN General Assembly Resolution A/RES/69/5 (2014), the latest in a long line of resolutions calling into question the compatibility of the sanctions with the UN Charter and international law.

¹⁰ For an account of the evolution of the EU practice, see Daniel Bethlehem, 'The European Union' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Brill 2004).

¹¹ Judgment in *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others*, Case C-84/95, ECLI:EU:C:1996:312; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRH 1.

Although the formal terminology of international law is more nuanced, the term ‘sanctions’ is in practice applied to non-forcible measures, whether adopted within or outside the UN framework. For the purposes of this article, I have adopted a broad approach to the definition of sanctions – and the term international sanctions used in the title – which encompasses the variety of non-forcible measures to which members of the international community have recourse in response to a violation or alleged violation of international law. Within the confines of this article, it is not, however, possible to examine the very wide range of sanctions regimes which might affect or interact with the Cape Town Convention regime. Because the Registry is based in the EU and thus subject to EU law, EU sanctions are of primary importance to the day-to-day operation of the Registry. For this reason, I have taken the recent EU sanctions regime against Russia in respect of Ukraine as a case study of some of the issues which may arise when the Registry must consider, and contend with, international sanctions. While each sanctions regime must be considered on its own terms, because all EU sanctions regimes share the same legal basis and take effect through similar legal instruments, the principles which apply in the case of Ukraine sanctions regime are, for the most part, generally applicable across all EU sanctions regimes.¹²

3. EU sanctions against Russia in respect of Ukraine: a case study

(a) *The imposition of sanctions by the European Union*

Over the past 30 years, EU Member States have taken an increasingly centralised approach to the imposition of sanctions, or ‘restrictive measures’ as they are formally described under

¹² However, it should be noted that there may be an additional layer of complexity in respect of sanctions adopted by the United Nations Security Council insofar as the Supervisory Authority under the Convention, ICAO, considers itself bound by such sanctions independently as a matter of international law.

the EU Treaties. As foreign policy cooperation among Member States has intensified over time, not only did the EU institutions become the conduit through which the Member States gave effect to their obligations under UN sanctions in a uniform manner but it also provided the forum within which the EU began to adopt its own autonomous sanctions.¹³ This Europeanisation of sanctions practice coincided with the reinvigoration of the Security Council’s activity as the Cold War came to a close. The EU Treaties, as they have evolved over time, have put in place a two-step process for the adoption of sanctions, whether to give effect to UN sanctions or for the imposition of the EU’s own autonomous measures.

In the first instance, there must be a decision by the Council of the European Union under Chapter 2 of Title V of the Treaty on European Union (TEU), which relates to the Common Foreign and Security Policy and which continues to operate under a special, intergovernmental regime. Under Article 29 TEU, the Council ‘shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature’ and ‘Member States shall ensure that their national policies conform to the Union positions’.

Second, where such a decision has been adopted and ‘provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries’, Article 215(1) of the Treaty on the Functioning of the European Union (TFEU) then provides that ‘the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures’ and ‘shall inform the European Parliament thereof’. Article 215(2) TFEU states that, where the Council decision so provides, ‘the Council may adopt restrictive measures under the procedure referred to in paragraph

¹³ Bethlehem (n 10).

1 against natural or legal persons and groups or non-State entities'. Article 215(3) TFEU specifies that these acts 'shall include necessary provisions on legal safeguards'. In adopting the necessary measures under Article 215(1) TFEU, the Council generally acts by way of regulation in order to ensure the uniform application of the measures across the EU. Under Article 288 TFEU, regulations have general application, are binding in their entirety and directly applicable in all Member States. In contrast to directives, the other principal form of EU secondary legislation, regulations are not dependent on Member States' implementing measures for their application. In some cases, however, national measures may be needed to supplement the regulations.

It is through this mechanism – involving a decision of the Council under the Common Foreign and Security Policy and a decision of the Council under the TFEU – that the EU has adopted a wide range of sanctions. In some cases – for example, the sanctions against Al-Qaeda, the Taliban and Osama Bin Laden – the EU's sanctions give effect to sanctions adopted by the United Nations Security Council. In other cases, however, the EU adopts its own unilateral or autonomous measures. At present, the EU has over 30 sanctions regimes in place, some of which are targeted at Contracting States under the Convention such as Afghanistan, Russia, Sudan, Syria, Ukraine and Zimbabwe.¹⁴ While the detail of each sanctions regime varies according to the specific problem or problems being targeted, EU sanctions generally follow a similar pattern and comprise common elements such as travel restrictions, asset freezes, arms embargoes or some combination of these elements, directed against certain designated States, entities or individuals.

¹⁴ For a comprehensive list of the EU sanctions currently in force, see the website of the European External Action Service: <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf> accessed 2 September 2015.

(b) *The status of sanctions within the EU legal order*

In order to understand the relationship between EU sanctions and the Cape Town Convention regime, it is necessary to review the status of these rules within the EU legal order.

As we have seen at the outset, the Registry currently established under the Aircraft Protocol, while it derives from, and operates under the Convention and the Protocol, is in form an Irish incorporated company and, as such, bound by applicable Irish and EU law. Ireland acceded to the Convention on 29 July 2005 and to the Protocol on 23 August 2005, with the Convention and Protocol entering into force in respect of the State on 1 March 2006. In order to give effect to the Convention and the Protocol in Irish law,¹⁵ the Oireachtas enacted the International Interests in Mobile Equipment (Cape Town Convention) Act 2005, which provides *inter alia* that, subject to subsection (2) (relating to its temporal application from their entry into force), 'the Cape Town Convention and the Aircraft Protocol have the force of law in the State in relation to matters to which they apply'.¹⁶ The texts of the Convention and the Protocol are scheduled to the Act of 2005.¹⁷ The 2005 Act

¹⁵ In accordance with Art 29.6 of the Constitution of Ireland 1937, no international agreement 'shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

¹⁶ International Interests in Mobile Equipment (Cape Town Convention) Act 2005 s 4(1). With a view to facilitating the establishment of the Registry in Ireland, the Act of 2005 also made provision for the power of the Minister for Transport to acquire shares in the company constituting the International Registry (s 10) and for the protection of operation of the International Registry (s 11).

¹⁷ See also SI No 927/2005, International Interests in Mobile Equipment (Cape Town Convention) (Declarations) Order 2005; SI No 31/2008, Rules of the Superior Courts (Cape Town Convention) 2008; Part 8 of the State Airports (Shannon Group) Act 2014 (giving the Government the power to make an order to give effect to Article XI (Alternative A) of Aircraft Protocol to Cape Town Convention).

allowed Aviareto, on its appointment as Registrar, to exercise its functions under Irish law in accordance with the Convention and the Protocol. In addition, it took steps to safeguard the operation of the International Registry in Ireland: for example, under section 11 of the 2005 Act, a court or tribunal ‘may not make an order or decision that would have the effect of binding the Registrar if the order or decision would prevent the Registrar from providing the services prescribed by the Cape Town Convention and Aircraft Protocol’. While the Irish courts would, as far as possible, interpret Irish law in a manner compatible with Ireland’s obligations under the Convention and the Protocol,¹⁸ the 2005 Act does not give the Convention a status superior to other Irish legislation and the 2005 Act, in common with all Irish statutes, must cede, in case of conflict, to binding and supreme EU law.¹⁹ It follows that, if there were a conflict between Aviareto’s obligations under the Convention regime as given effect in Irish law through the 2005 Act, and EU law (including EU sanctions), the EU sanctions would *prima facie* prevail.

However, this position is significantly nuanced by the fact that the EU itself is also a party to the Cape Town Convention and its Aircraft Protocol, which is therefore a mixed agreement for the purposes of EU law.²⁰ The European Union acceded to the Convention and the Protocol, in its capacity as a Regional Economic Integration Organisation, on 28 April 2009, with the Convention and Protocol entering into force for the Union on 1 August 2009. Council Decision 2009/370/EC

provided for the accession of the then Community to the Convention and the Protocol, the texts of which were attached to the Decision.²¹ Although the EU’s accession to the Convention is unusual in that it occurred at a stage when only a very small number of Member States had become parties to the Convention,²² the EU is nonetheless bound by the Convention to the extent of its competence.²³ As a

²¹ Under Art 1 TEU (Lisbon), it is provided that the ‘Union shall replace and succeed the European Community’. Annex I of the Decision contained the Community’s declaration of competence in respect of the Convention and Protocol. As para 5 of the declaration makes clear, the Community enjoyed – and the Union now enjoys – competence over certain matters which affect the Brussels, Insolvency and Rome Regulations: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). The declaration notes, at para 7, that the exercise of competence transferred to the EU by its Member States ‘is, by its nature, liable to continuous development’.

²² At the time of the EU’s accession, only Ireland and Luxembourg were parties to the Convention and the Protocol. Since its accession, Latvia and Malta have also acceded to the Convention. In addition, the Netherlands has acceded in respect of the Netherlands Antilles and Aruba while Spain has acceded to the Convention but not to any of the Protocols. France, Italy and Germany are signatories. The UK ratified on 27 July 2015, which ratification will become effective on 1 November 2015. The Council Decision specifically excluded Denmark from its application and Denmark is not therefore bound by the Convention, even in respect of matters which fall within EU competence. See the website of the UNIDROIT which contains data on the status of the Convention: <<http://www.unidroit.org/status-2001capetown>> accessed 2 September 2015.

²³ The Court of Justice has generally adopted a very broad understanding of its jurisdiction to give preliminary rulings on, and determine the direct effects, of mixed agreements within the legal orders of Member States within the scope of EU law: see eg Judgment in *Parfums Christian Dior*, C-300/98 and 392/98, ECLI:EU:C:2000:688; Judgment in *Commission v Ireland*, C-13/00, ECLI:EU:C:2002:184; Judgment in *Commission v France*, C-239/03, ECLI:EU:C:2004:598; Judgment

¹⁸ *The State (DPP) v Walsh* [1981] IR 412; *Ó Domhnaill v Merrick* [1984] IR 151.

¹⁹ Judgment in *Costa*, 6/64, ECLI:EU:C:1964:66; Judgment in *Internationale Handelsgesellschaft*, 11/70, ECLI:EU:C:1970:114; Judgment in *Simmenthal*, 106/77, ECLI:EU:C:1978:49. See also Gerald Hogan and Gerry Whyte (eds), *JM Kelly: The Irish Constitution* (4th edn, Bloomsbury 2003) para 5.3.90.

²⁰ On mixed agreements generally, see Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010).

matter of EU law, the status of the Convention and the Protocol are governed by Article 216 (2) TFEU which provides that agreements concluded by the Union 'are binding upon the institutions of the Union and on its Member States'. The Court of Justice of the European Union has consistently affirmed that, from the time they come into force, international agreements concluded by the EU 'form an integral part' of EU law.²⁴ This principle applies not only to international agreements concluded by the EU alone but also to mixed agreements concluded both by the EU and some or all of its Member States.²⁵ International agreements concluded by the EU, such as the Convention and its Protocol, occupy an intermediate status in the EU legal order between the Treaties, on the one hand, and EU secondary legislation, on the other. The Court of Justice has consistently affirmed that international agreements, properly concluded, prevail over any inconsistent secondary legislation.

This is significant in two respects. First, as appears from the judgment in Case C-61/94 *Commission v. Germany*, 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such

provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements'.²⁶ Second, if the provisions of secondary Community legislation cannot be interpreted in a manner consistent with an international agreement concluded by the EU, the international agreement prevails. In Case C-344/04 *IATA*, the Court, after referring to then Article 300(7) EC (now Article 216(2) TFEU), confirmed that international agreements 'prevail over provisions of secondary Community legislation'.²⁷ International agreements concluded by the EU would *a fortiori* prevail over any conflicting provisions of Member States' law.²⁸ Moreover, in the context of mixed agreements, the Court has recognised the importance of the duty of loyal cooperation between the EU and the Member States, now laid down in Article 4(3) TEU.²⁹ While there might well be issues about the extent to which individual economic operators could rely on the direct effect of the Cape Town Convention's provisions before the EU courts,³⁰ the status of the Convention and the Protocol within the EU legal order precludes, at least at the level of principle, any direct conflict between the Convention regime and EU law and in particular EU sanctions.

The status of the Convention within EU law reflects the positive disposition of the European

in *Lesoochránárske zoskupenie*, C-240/09, ECLI:EU:C:2011:125. It has done so even in circumstances where not all Member States are independently bound by the mixed agreement in question: see eg Judgment in *Lesoochránárske zoskupenie* (relating to a preliminary reference from Slovakia in relation to the Aarhus Convention which Ireland had signed but not ratified); Judgment in *Z*, C-363/12, ECLI:EU:C:2014:159 (relating to a preliminary reference from Ireland in relation to the UN Convention on the Rights of Persons with Disabilities which Ireland had signed but not ratified).

²⁴ Judgment in *Haegeman*, 181/73, ECLI:EU:C:1974:41; Judgment in *Merck Genéricos – Produtos Farmacêuticos*, C-431/05, ECLI:EU:C:2007:496; *Katsivardas*, C-160/09, ECLI:EU:C:2010:293; Judgment in *TNT Express Nederland*, C-533/08, ECLI:EU:C:2010:243.

²⁵ Judgment in *Demirel*, 12/86, ECLI:EU:C:1987:400; *Hermès International*, C-53/96, ECLI:EU:C:1998:292; Judgment in *Lesoochránárske zoskupenie*, C-240/09, ECLI:EU:C:2011:125.

²⁶ Judgment in *Commission v. Germany*, C-61/94, ECLI:EU:C:1996:313 para 52. See also judgment in *Bellio F.lli*, C-286/02, ECLI:EU:C:2004:212, para 33.

²⁷ Judgment in *IATA*, C-344/04, ECLI:EU:C:2006:10, para 35. See also judgment in *Soysal and Savatli*, C-228/06, ECLI:EU:C:2009:101.

²⁸ Judgment in *Soysal and Savatli*, C-228/06, ECLI:EU:C:2009:101 paras 57–59.

²⁹ Judgment in *Commission v Ireland*, C-459/03, ECLI:EU:C:2006:345 (*MOX Plant*).

³⁰ Judgment in *Kupferberg*, 104/81, ECLI:EU:C:1982:362; Judgment in *Portugal v Council*, C-149/96, ECLI:EU:C:1999:574; Judgment in *Intertanko*, C-308/06, ECLI:EU:C:2008:312; Judgment in *Air Transport Association of America*, C-366/10, ECLI:EU:C:2011:864; Judgment in *Lesoochránárske zoskupenie*, C-240/09, ECLI:EU:C:2011:125; Judgment in *Z*, C-363/12, ECLI:EU:C:2014:159.

Union towards international law, including what is sometimes described as the ‘international law friendly’ approach of the Court of Justice of the European Union.³¹ For its part, Article 3(5) of the Treaty on European Union specifically provides that, in its relations with the wider world, the European Union shall contribute *inter alia* to peace, security and ‘the strict observance and the development of international law, including respect for the principles of the United Nations Charter’. This is the constitutional foundation for the privileged status of international agreements within the EU legal order, at a level superior to EU legislation, a status that is significantly stronger than that which traditionally prevailed in many domestic legal systems, including, in particular, those within the common law world.³² Because the International Registry is based within the EU, as will be discussed further below, it arguably benefits from this privileged status of the Convention regime in EU law.

(c) *The case of EU sanctions in relation to Ukraine*

In the wake of Russia’s incursion into Ukraine, and annexation of Crimea, in March 2014, many members of the international community alleged that Russia had committed a serious violation of international law. Because of Russia’s permanent membership of the UN Security Council, action at that level was not a realistic option. As a result, individual States or groupings of States – such as the EU – decided to take action unilaterally or through regional international organisations. For its part, Russia denied that it had acted contrary

³¹ Pieter Jan Kuijper, ‘Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law’ in Jan Wouters, Andre Nollkaemper and Erika De Wet (eds), *The Europeanisation of International Law* (TMC Asser Press 2008) 29.

³² For a useful overview of the status of treaties in domestic law (including in Australia, Canada, UK and US), see David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (OUP 2014).

to international law and, in response, imposed sanctions of its own targeted in particular at Canada, the EU and the US. These sanctions raise a whole host of complex and interesting issues of international law, EU law and their relationship.³³ Moreover, they raise difficult questions about the effectiveness and legitimacy of such sanctions. Within the confines of this article, it is not possible to address these broader issues meaningfully.

In the case of the EU, the Council adopted a number of decisions under Article 29 TEU within the framework the Common Foreign and Security Policy which provided for restrictive measures, in the form of travel restrictions and asset freezes. The initial Council Decision 2014/119/CFSP, adopted on 5 March 2014, was succeeded by Council Decision 2014/145/CFSP of 17 March 2014.³⁴ These measures were directed at persons responsible for actions which undermined or threatened the territorial integrity, sovereignty and independence of Ukraine, and natural or legal persons associated with them, which persons were listed in the Annex to the respective Council Decisions.³⁵

Acting under Article 215(1) TFEU, the Council then adopted the necessary measures to give effect to these sanctions. As is its practice, it did so by way of regulation. The Council initially adopted Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine. This was succeeded by Council Regulation (EU) No 269/2014 of 17

³³ For an interesting recent contribution, see Katarina Simonen, ‘Final Comment: Legal Review of New EU Sanctions against Russia in light of Recent Jurisprudence of the European Courts’ in Ali Marossi and Marisa Bassett (eds) *Economic Sanctions under International Law* (Springer 2015) 237.

³⁴ For access to the relevant EU legislation, see the Eur-Lex website <<http://eur-lex.europa.eu/homepage.html?locale=en>> accessed 2 September 2015.

³⁵ The Council has adopted a number of further decisions under the CFSP amending or adding to the relevant Council Decisions.

March 2014 ('the Regulation'), which remains the core piece of EU secondary legislation in relation to the EU's sanctions regime in respect of Ukraine. The Regulation is, under Article 288 TFEU, directly applicable in, and binding on, all Member States including Ireland, under whose law Aviareto, the Registry for the Aircraft Protocol, operates.³⁶

Article 2 of Council Regulation (EU) No 269/2014 (as amended by Council Regulation (EU) No 476/2014) is the central provision:

1. All funds and economic resources belonging to, owned, held or controlled by any

³⁶ Ireland has adopted a number of measures to give further effect to the EU sanctions. Under the European Union (Restrictive Measures Concerning Ukraine) Regulations 2014, Ireland gives effect to Article 15 of the Regulation by laying down penalties for infringements of the Regulation. Regulation 4 provides that a person who contravenes the provisions of the Council Regulation – as regards (a) the freezing of funds or economic resources, (b) the making available of funds or economic resources, (c) the supply of information to or co-operation with the competent authority, or (d) the participation in activities to circumvent the requirements of the Council Regulations as regards paragraph (a), (b) or (c) – 'shall be guilty of an offence'. The penalties for such an offence are set out in Regulation 6. Regulation 7 permits the Central Bank of Ireland, designated as the competent authority, to 'give such directions or issue such instructions to a person as it sees fit' for the purposes of the administration and enforcement of the Council Regulations or these Regulations while, under Regulation 8, failure to comply with such a direction or instruction is also an offence. Regulation 9 provides that, where a body corporate is guilty of an offence under the Regulations and the offence is proved to have been committed with the consent or connivance on the part of any person, being a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, 'that person shall, as well as the body corporate, be guilty of an offence and is liable to be proceeded against and punished as if he or she were guilty of the first mentioned offence'. In addition, under the Financial Transfers (Restrictive Measures Concerning Ukraine) (Prohibition) Order 2014, it is provided *inter alia* that a person 'shall not make a financial transfer between the State and another country the effect of which would be to enable or facilitate, directly or indirectly, the doing of any thing which is a contravention of the Council Regulations'.

natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies or natural or legal persons, entities or bodies associated with them, as listed in Annex I.

For the purposes of this article, I will refer to the persons listed in Annex I to the Regulation as the sanctioned entity or entities. The relevant terms in Article 2 are very broadly defined in the Regulation. Article 1 of the Regulation defines the terms 'economic resources' and 'funds', as well as 'freezing of economic resources' and 'freezing of funds'. Economic resources 'means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services': Article 1(d). Freezing of economic resources means 'preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them': Article 1(e). Funds, under Article 1(g), means 'financial assets and benefits of every kind, including, but not limited to':

- (i) cash, cheques, claims on money, drafts, money orders and other payment instruments;
- (ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;
- (iii) publicly- and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
- (iv) interest, dividends or other income on or value accruing from or generated by assets;
- (v) credit, right of set-off, guarantees, performance bonds or other financial commitments;

- (vi) letters of credit, bills of lading, bills of sale; and
- (vii) documents showing evidence of an interest in funds or financial resources.

Freezing of funds, under Article 1(f), means

preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management.

In addition to the sanctioned entities, Article 2 extends its application to ‘natural or legal persons, entities or bodies associated with them’.³⁷

The broad and uncertain scope of these measures has caused the High Court of England and Wales, in the *Rosneft* case, to refer certain questions to the Court of Justice of the European Union for preliminary ruling.³⁸ In particular, the High Court has sought a ruling from the Court of Justice as to whether the term ‘financial assistance’ in Article 4(3) of the EU Regulation includes the processing of a payment by a bank or other financial institution. To date, the EU courts have generally adopted a broad and purposive approach to the interpretation of the provisions of EU legislation imposing sanctions.³⁹ Under the Court of Justice’s case law,

³⁷ Article 17(d) and (e) confirms that the Regulation shall apply *inter alia* ‘to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State’ and ‘to any legal person, entity or body in respect of any business done in whole or in part within the Union’. Article 15 provides that Member States shall lay down the rules on penalties applicable to infringements of the provisions of the Regulation.

³⁸ *OJSC Rosneft Oil Company, R (On the Application Of) v Her Majesty’s Treasury & Ors* [2015] EWHC 248 (Admin) (09 February 2015), <<http://www.bailii.org/ew/cases/EWHC/Admin/2015/248.html>>; see also the application to the CJEU, Case C-72/15, *Rosneft* (pending).

³⁹ Judgment in *Möllendorf and Möllendorf-Niehuus*, C-117/06, ECLI:EU:C:2007:596; Judgment in *Afrasiabi*

the concept of ‘making available’ in the context of restrictive measures has been considered to encompass ‘all the acts necessary under the applicable national law if a person is effectively to obtain full power of disposal in relation to the asset concerned’.⁴⁰ It remains to be seen whether the Court of Justice in *Rosneft* will clarify the limits of the EU’s restrictive measures.

Articles 4, 5 and 6 of the Regulation do provide for certain derogations from Article 2. Article 4(1) allows the competent authorities of Member States to authorise the release or making available of certain frozen funds or economic resources, under such conditions as they deem appropriate, where they have determined that the funds or economic resources are either: (a) necessary to satisfy the basic needs of natural or legal persons listed in Annex 1 or dependent persons, (b) intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services, (c) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources or (d), subject to prior notification, necessary for extraordinary expenses. Article 5 permits competent authorities to authorise the release of funds or economic resources which are *inter alia* the subject of a judicial, administrative or arbitral decision rendered prior to the imposition of the sanctions and would be used exclusively to satisfy claims under such a decision. Article 6 permits competent authorities to authorise, subject to certain conditions, the release of frozen funds or economic resources where payments by a listed person are due under a contract or agreement or obligation entered into or arising before the imposition of the sanctions. To ensure coordination among EU Member States, competent

and Others, C-72/11, ECLI:EU:C:2011:874. However, the EU courts have set limits, in appropriate cases, to the scope of the sanctions: see eg see judgment in *M and Others*, C-340/08, ECLI:EU:C:2010:232.

⁴⁰ Judgment in *Afrasiabi and Others*, C-72/11, ECLI:EU:C:2011:874, para 40.

authorities must inform other Member States and the Commission of any authorisations under these provisions.

However, Article 9 of the Regulation extends the scope of the measures in Article 2 by providing that it 'shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2'. Circumvention provisions of this kind have been incorporated into many EU sanctions regimes and they add further breadth and uncertainty to the already broad and uncertain scope of EU sanctions. In the *Afrasiabi* case, the Court of Justice interpreted a similar provision as applying to

activities which, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement ... of the regulation, none the less have the object or effect, direct or indirect, of frustrating the prohibition laid down in that provision'⁴¹

In response to the escalating crisis in Ukraine, the EU adopted further measures over the course of 2014, designed to apply pressure on Russia and those allied to Russia in Ukraine. Council Regulation (EU) No 269/2014 has been amended on a number of occasions to add further natural and legal persons to the list of persons to which the restrictive measures apply (most recently by Council Regulation (EU) No 959/2014). Of interest in this regard is the extension of the sanctions to the Russian low-cost airline, Dobrolet, in July 2014.⁴²

In addition, the Regulation been supplemented by further regulations which significantly extend the scope of the restrictive measures in certain respects, notably, under

Council Regulation (EU) No 833/2014 which imposes restrictions on exports of certain dual-use goods and technology, on certain services related to the supply of arms and military equipment, on the transfer of technology for the oil industry and on access to the capital market for certain financial institutions.⁴³ On 8 September 2014, under Council Regulation (EU) No 960/2014,⁴⁴ the Council imposed further restrictions on exports of dual-use goods and on access to the capital markets, and has prohibited the provision of services for deep water oil exploration and production, arctic oil exploration and production or shale oil projects. Insofar as access to capital markets is concerned, Article 5 of Council Regulation (EU) No 833/2014 (as amended by Council Regulation (EU) No 960/2014) provides that it 'shall be prohibited to directly or indirectly purchase, sell, provide brokering or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 90 days'. However, recital (6) of Council Regulation (EU) No 960/2014 makes it clear that financial services

other than those referred to in Article 5 of Regulation (EU) No 833/2014, such as deposit services, payment services, insurance services, loans from the institutions referred to in Article 5(1)

⁴¹ Judgment in *Afrasiabi and Others*, C-72/11, ECLI:EU:C:2011:874, para 68.

⁴² Council Implementing Regulation (EU) No 826/2014 of 30 July 2014 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

⁴³ Council Implementing Regulation (EU) No 826/2014 of 30 July 2014; Council Implementing Regulation (EU) No 810/2014 of 25 July 2014; Council Regulation (EU) No 833/2014 of 31 July 2014; Council Regulation (EU) No 811/2014 of 25 July 2014; Council Regulation (EU) No 811/2014 of 25 July 2014; Council Implementing Regulation (EU) No 577/2014 of 28 May 2014; Council Implementing Regulation (EU) No 753/2014 of 11 July 2014; Council Regulation (EU) No 476/2014 of 12 May 2014; Council Implementing Regulation (EU) No 477/2014 of 12 May 2014; Council Implementing Regulation (EU) No 433/2014 of 28 April 2014; Council Implementing Regulation (EU) No 381/2014 of 14 April 2014; Council Implementing Regulation (EU) No 284/2014 of 21 March 2014.

⁴⁴ Council Regulation (EU) No 960/2014 of 8 September 2014 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

and (2) of that Regulation and derivatives used for hedging purposes in the energy market are not covered by these restrictions.

In its recent report on these sanctions, the UK's Financial Markets Law Committee – a non-profit organisation based in London which is concerned with education and advancement of financial markets law – has highlighted the considerable uncertainty that these additional sanctions give rise to.⁴⁵

Insofar as dual-use goods are concerned,⁴⁶ under Article 2(1) of Council Regulation (EU) No 833/2014, it shall be prohibited

to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology, whether or not originating in the Union, to any natural or legal person, entity or body in Russia or for use in Russia, if those items are or may be intended, in their entirety or in part, for military use or for a military end-user.

Article 2a of Council Regulation (EU) No 833/2014, as inserted by Council Regulation

⁴⁵ Financial Markets Law Committee, *Issues of Legal Uncertainty Arising in the Context of EU Contract Sanctions* <http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc_paper_eu_contract_sanctions.pdf> accessed 2 September 2015.

⁴⁶ Dual-use goods and technology are defined by reference to Council Regulation (EC) No 428/2009, which establishes an EU-wide regime for the control of exports, transfer, brokering and transit of dual-use items. Article 2(1) of the Council Regulation (EC) No 428/2009 defines dual-use items as 'items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices'. Article 3 of the 2009 Regulation requires that an authorisation shall be required for the dual-use items listed in Annex I. Category 5 of Annex I deals with telecommunications and 'information security'. Category 5A002 addresses *inter alia* 'information security' systems, equipment and components therefor', designed or modified 'to use "cryptography" employing digital techniques performing any cryptographic function other than authentication or digital signature' and having certain algorithmic characteristics. For its part, Category 5D002, in section c1, includes specific software 'having the characteristics, or performing or simulating the functions of the equipment, specified in 5A002'.

(EU) No 960/2014, provides that it shall be prohibited

to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology as included in Annex I to Regulation (EC) No 428/2009, whether or not originating in the Union, to natural or legal persons, entities or bodies in Russia as listed in Annex IV to this Regulation

and further 'to provide technical assistance, brokering services or other services related to the goods and technology set out in paragraph 1'. Annex IV lists nine specific entities which appear to be involved primarily in the development of weapons, arms or related goods. As with the earlier measures, these further measures were not only very broad but also uncertain in their scope.

4. The implications of EU sanctions for the International Registry under the Cape Town Convention and its Aircraft Protocol

(a) The functions of the Registry: a recap

In order to understand how the EU sanctions against Russia might affect the operation of the Registry, it is instructive to briefly review the functions of the Registry under the Convention and Protocol. At its simplest, the Cape Town Convention creates a legal framework for the registration and recognition of international interests in mobile equipment.⁴⁷ The Aircraft Protocol, which was opened for

⁴⁷ The concept of an international interest is defined in Article 2 of the Convention. Chapter II of the Convention sets out the formal requirements for the constitution of an international interest while Chapter VIII addresses the effects of an international interest as against third parties. There are also detailed provisions in relation to default remedies (Ch III), assignments of associated rights and international interests and rights of subrogation (Ch IX), rights or interests subject to declarations by Contracting States (Ch X) and jurisdiction (Ch XII). In accordance with Article 3 CTC, the Convention applies 'when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State'.

signature alongside the Convention, implements and applies this framework to the specific case of airframes, aircraft engines and helicopters.⁴⁸ The operation of the Convention regime in respect of aircraft is based on the Convention and the Protocol (which in accordance with Article 6 of the CTC ‘shall be read and interpreted together as a single instrument’), as well as Regulations and Procedures which have been adopted to give effect to those instruments.⁴⁹ Central to the Convention and the Protocol – what, for the purposes of this article, I refer to as the Cape Town Convention regime – is the creation of an international registry for international interests in mobile equipment, such as aircraft. This system is provided for in Chapters IV to VII of the Convention and, in the case of aircraft specifically, Chapter III of the Protocol.⁵⁰ Under Article 17(2) of the CTC, the Supervisory Authority, which is the International Civil Aviation Organisation (ICAO), shall *inter alia* establish or provide for the establishment of the International Registry, appoint and dismiss the Registrar, and supervise the Registrar and the operation of the International Registry. It shall also make regulations and establish procedures in relation to the International Registry.⁵¹

⁴⁸ Article IV(1) AP extends the Convention’s sphere of application, on certain conditions, to helicopters, or airframes pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry.

⁴⁹ Regulations and Procedures for the International Registry (6th edn, ICAO 2014).

⁵⁰ Article 16(1) CTC provides that an International Registry ‘shall be established for registrations’ of interests recognised under the Convention. Different international registries may be established for different categories of object and associated rights (Article 16(2) CTC). The Registry is established by the Supervisory Authority. In accordance with Article XVII(1) AP, by Resolution of the Diplomatic Conference, ICAO was designated as the Supervisory Authority for the purposes of the Convention and Protocol: Resolution No 2 of the Cape Town Diplomatic Conference (Annex VI to the Official Commentary).

⁵¹ See Art 17(2)(d) and (e) CTC. The Supervisory Authority ‘may enter into any agreement requisite for

Under Article XVII(5) of the Protocol, the first Registrar ‘shall operate the International Registry for a period of five years from the date of entry into force of this Protocol’ and, thereafter, ‘the Registrar shall be appointed or reappointed at regular five-yearly intervals by the Supervisory Authority’. As indicated in the Introduction, Aviareto Limited – an Irish incorporated company which is a joint venture between SITA SC, a Belgian telecommunications company owned by an international airline consortium, and the Irish Government – was appointed as Registrar with effect from 2006, under a contract for an initial five-year period. In 2011, Aviareto and ICAO concluded a new contract, under which Aviareto is operating the International Registry for a further five years, until 2016.

In general terms, the function of the Registrar is to ‘ensure the efficient operation of the International Registry and perform the functions assigned to it by this Convention, the Protocol and the regulations’: Article 17(5) of the CTC. More specifically, the Registrar has *inter alia* the following duties:

- to operate and administer the centralised functions of the Registry on a 24-hour basis (Art XX(4) of the Protocol);
- to approve registry user entities or administrators of such entities and to limit registration to such entities (s 4, Regs) and to revoke approval or block or disable users in certain circumstances (s 10.10, Procedures);⁵²

the performance of its functions, including any agreement referred to in Article 27(3)’: Art 17(3) CTC.

⁵² Thus, for example, while Aviareto has among its functions the approval of register used entities (‘RUEs’) (s 2.1.15 of the Regs) such approval is formal in nature, being based on the Registrar’s reasonable conclusion that: (a) that such entity and administrator are who they claim to be; and (b) on the basis of information submitted, and without undertaking specific legal analysis, that the latter is entitled to act as administrator of the former, in each case, following the standards and procedures set out in the International Registry Procedures (s 4.1, Regs).

- to facilitate registrations to be entered into the International Registry data base and made searchable in chronological order of receipt (Art 18(4) CTC), and, in appropriate cases, to facilitate the discharge or amendment of registrations;
- to permit searches of the Registry (Art 22 (1) CTC) and issue registry search certificates (Art 22(2) CTC), subject to compliance with the Regulations and Procedures (s 4.5, Regs);
- to collect fees for its services and facilities (Art17(2)(h) CTC; s 13, Regs).⁵³

The International Registry is ‘a notice-based electronic registration system’, not a title registry.⁵⁴ The functions of the Registrar – Aviareto – under the Convention and Protocol, are essentially administrative in nature.⁵⁵ The

⁵³ Among the other functions of the Registry are the following: to maintain a list and establish arrangements for direct entry points designated by Contracting States (Art 18(5) CTC; Art XIX AP; s 12, Regs); to facilitate the discharge of registrations in accordance with court orders (Art 44(2) CTC); to send prompt electronic confirmation of registration to named parties, registering person and all persons entitled to receive notice of registration (s 6, Regs); to maintain and make available a list of declarations, withdrawals and categories of non-consensual rights and interests communicated to it by the Depositary (Art 23 CTC); to deal in the first instance with any complaints concerning the operation of the Registry (s 8, Regs); to ensure confidentiality (s 9, Regs), to maintain statistics (s 10, Regs) and to provide an annual report to the Supervisory Authority (s 11, Regs); to procure insurance or a financial guarantee covering its liability under Article 28 CTC.

⁵⁴ Art 17(2)(i) CTC.

⁵⁵ Under Article 18(2) CTC, the Registrar ‘shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid’. The Registry’s limited function is also apparent in the Regulations. Section 3.1 states that the Registry is ‘established as the facility for effecting and searching registrations under the Convention and the Protocol’. As appears from s 3.2 of the Regulations, since the Registry ‘merely provides notice of registrations’, ‘the facts underlying any such registration or registered interest shall determine whether it falls within the scope of the Convention or the Protocol’. Section 3.6 of the Regulations makes it clear that the Registry ‘may be used for no other purpose than that set forth in ss 3.1 and 3.2,

Registrar’s exercise of its functions is also subject to supervision of ICAO, in its capacity as Supervisory Authority under Article 17 of the CTC.⁵⁶ Yet the effects of registration, as set out in Chapter VIII of the Convention, are extremely significant. Under Article 29(1) of the CTC, a registered interest ‘has priority over any other interest subsequently registered and over an unregistered interest’. Thus, while the Registry’s functions are essentially administrative in nature, they are nonetheless of fundamental importance to the effective operation of the entire Cape Town Convention system.

The Registry is a creature of the Convention and the Protocol. Its central purpose is to give effect to the Convention regime. It follows that it must act at all times in accordance with the Convention, the Protocol and the Procedures and Regulations adopted thereunder. Article 5(1) of the CTC provides that, in interpreting the Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application. The preamble to the Convention speaks of the need to ensure that ‘interests in [mobile] equipment are recognised and protected universally’. The Registry plays a special role in ensuring this universal recognition and protection.

Goode, in the Official Commentary, has noted that the Convention ‘deals with rights and obligations in private law and obligations of Contracting States relevant to the enforcement of those rights’.⁵⁷ He continues:

It does not address, and is generally not intended to affect rules of criminal law, tort law, or regulatory public law in national legal systems.

unless approved in advance by the Supervisory Authority and subject to the terms of that approval’.

⁵⁶ It is also the Supervisory Authority which owns the proprietary rights in the data bases and archives of the Registry (Art 17(4) CTC), which reports to the Contracting States (Art 17(2)(j)), and which deals with any operational complaints that cannot be resolved by the Registry itself (s 8, Regs).

⁵⁷ Goode (n 2) 16.

Contracting States remain free to apply and enforce their rules of criminal law and tort law, as well as regulatory measures designed to impose economic sanctions or to prevent money laundering, drug dealing and the like, and regulations in the field of financial services law and competition law. This has always been taken for granted in private commercial law conventions, which make no reference to the above matters. There may, of course, be cases where a provision of the Convention specifically covers a point that would ordinarily be dealt with as a matter of public law, and Article 27 of the Vienna Convention on the Law of the Treaties expressly provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁵⁸

It is certainly true that, generally speaking, private commercial law conventions only deal with private rights and obligations and do not therefore displace or prevail over countervailing domestic public law. In the ordinary course, the Convention and domestic rules of criminal, tort and public law will have distinct fields of application so that there will be relatively little interaction or scope for tension between the different bodies of law. Yet the Convention is not solely a creature of private law and, in many respects, including in the elements of its institutional framework such as the International Registry, the Convention straddles the private law and public law spheres.⁵⁹ As a result, where the fields of application of the Convention and domestic public law overlap, as may sometimes be the case of sanctions, there is the potential for conflict between the Convention regime and domestic public law.

There is no doubt that the Registry is *prima facie* bound by all applicable Irish, and by extension EU, law, including the EU sanctions which are discussed in the following section. Yet the Convention itself also forms an integral part of Irish and EU law. In case of potential conflict between domestic and international

law, most legal systems – including, as already discussed, those of Ireland and the EU – endeavour to avoid conflict between domestic law and international law by seeking, insofar as it is possible, an interpretation of domestic law that is compatible with international law. It is only where this is not possible to do so that it becomes necessary to consider the relative hierarchical status of the respective sources of law within the domestic legal system.

In the case of the relationship between the Cape Town Convention and international sanctions, a provision of central importance is Article 26 of the CTC which provides that ‘no person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter’. Article 26 CTC is framed in mandatory terms. While it is not absolute in that it is subject to compliance with the procedures prescribed by the Convention, nor is Article 26 CTC expressed to be subject to the rules of criminal law, tort law or regulatory public law of the Registry’s host State, including, for example, economic sanctions which may be applied within that State.⁶⁰ Bearing in

⁶⁰ At present, the Regulations and Procedures under which the Registry operates make no reference to sanctions. One possible solution to the problem raised by Article 26 CTC might be for the Supervisory Authority to amend the Regulations and, in particular, the Procedures so as to allow the Registry to refuse access to the Registry in circumstances where access would entail a breach of international sanctions. Insofar as the Supervisory Authority is, or considers itself to be, bound by international sanctions, such as United Nations sanctions, this might offer a mechanism for ensuring that the Convention regime is operated in a manner compatible with its obligations. More generally, in approaching these difficult issues, the Registry might seek guidance from the Supervisory Authority under Article 17(2)(g) CTC. This might reduce or eliminate the scope for tension between sanctions and the Convention. However, if such guidance or amendments to the Procedures were confined to UN sanctions only, questions would remain about the applicability of unilateral or autonomous sanctions regimes (i.e. those imposed by States otherwise than in the implementation of UN Security Council resolutions) and, more broadly, about the principle of universal

⁵⁸ *ibid* 16–17.

⁵⁹ L Webber, ‘Public and Private Features of CTC’ (2015) 4 *Cape Town Convention Journal* [this issue].

mind the Official Commentary's guidance, may it be argued that Article 26 CTC deals only 'with rights and obligations in private law and obligations of Contracting States relevant to the enforcement of those rights' and does not in any way affect or limit the application of sanctions? Having regard to the Registry's role and functions, is Article 26 CTC properly considered as relating solely to rights and obligations in private law such that they are necessarily displaced by any countervailing obligations under Irish or EU public law? The answers to these questions are not clear-cut. The general principle set out in the Official Commentary – that private commercial law conventions affect only private law rights and obligations and do not affect rules of regulatory public law – is of course relevant but does not resolve the difficulties of interpretation posed by Article 26 CTC as it takes effect within the Irish and EU legal systems. In particular, while the Registry does not itself enjoy international legal personality and takes the form of a private company under Irish law, its establishment is nonetheless provided for under the Convention and it carries out important functions of an international character the implications of which extend far beyond the parties involved in a specific transaction or the State in which it is established. Moreover, having regard to the importance of universal recognition and protection of rights under the Convention, it is clear that the effectiveness of the Registry and the objectives of the Convention as a whole could be undermined if access to the Registry's facilities were subject to additional conditions not set out in the Convention and subject to variation according to the jurisdiction within which the Registry is established or the domestic laws of different Contracting States or the jurisdictions in which the registry user entities are established. The increasing array of international sanctions regimes provides a good example of the types of measures which might vary from one jurisdiction to another

recognition and protection underpinning the Convention as a whole.

and thereby potentially interfere with the operation of the Registry.

These considerations emphasise the importance of seeking to reconcile, to the extent possible, the potentially conflicting obligations under the Convention and under domestic public law which the Registry may face. Where it is not possible to reconcile those obligations, for example through a Convention-compatible interpretation of domestic public law, the relative hierarchical status of the Convention and domestic public law may take on some considerable importance. It is against this backdrop that we must consider whether the obligations under EU sanctions, such as those against Russia relating to Ukraine, affect the Registry in its operations and activities and, if so, whether those obligations are compatible or in conflict with its obligations under the Cape Town Convention itself, including Article 26 of the CTC.

(b) The applicability of the sanctions to the Registry

While, as discussed in Part 3(b) above, the status of the Convention in EU law arguably provides important protection to the Registry, it does not remove all uncertainty which the broad terms of the Regulations carry with them. We will look at Regulation (EU) No 269/2014 (as amended) and Council Regulation (EU) No 833/2014 (as amended) in turn.

There are a number of aspects of the services and facilities provided by the Registry which may be relevant in this regard:

- registration as, and enjoying the status of, a registry user entity ('RUE') (particularly a transacting user entity ('TUE'));
- the processing of a registration by the Registry;
- the discharge of a registration;
- the processing of searches and provision of search information;
- the payment of fees by user entities to the Registry for its services;
- the making of refunds to user entities by the Registry;

- the provision of telephone assistance to user entities.

Although the Registry is a notice-based, rather than title, registry and its functions are essentially administrative in nature, by using the Registry, RUEs (and, in particular, TUEs) may obtain benefits associated with the priority accorded to international interests under Article 29 of the CTC.

(i) *Regulation (EU) No 269/2014 (as amended)*. First, although the terms ‘funds’ or ‘economic resources’ are very widely defined in Article 2 of the Regulation No 269/2014, and their scope is potentially extended by the circumvention provision in Article 9, it is difficult to argue that most of the core services and facilities – registration of RUE status, registration or discharge of a particular transaction, and the provision of telephone assistance – constitute either ‘economic resources’ or ‘funds’ within the meaning of the Regulation, at least on a plain reading of its provisions.⁶¹ This conclusion is reinforced by the consideration that the Regulation should, so far as possible, be interpreted in a manner compatible with the international agreement. Thus, the core activities of the Registry appear to fall squarely outside the scope of the EU sanctions against Russia.

Second, the position in relation to the provision of search certificates by the Registry is less straightforward insofar as Article 1(g)(vii) of the Regulation includes within its very broad definition of funds ‘documents showing evidence of an interest in funds or financial resources’.⁶²

⁶¹ While, for new applicants to the system, the Registrar undertakes a formal confirmation of their identity, the Registrar’s role in other respects occurs through the automatic operation of its electronic system and the Registrar has no role in the conduct or determination of the validity of the underlying transactions.

⁶² While the jurisprudence of the European Union courts has not yet had to provide guidance on this term, in the context of the UN sanctions regime against Iran, there was discussion as to whether this

Under Article 22(2) of the CTC, search certificates state all registered information relating to an object, together with a statement indicating the date and time of registration or, alternatively, that there is no information relating to an object. Under Article 2(5) of the CTC, an international interest in an object ‘extends to proceeds of that object’. While the search certificate has a limited function and effect under the Convention regime, under a very broad interpretation of Article 1(g)(vii), it could be argued that search certificates issued by the Registry fall within the definition of ‘funds’ under the Regulation with the result that the Registry could be restricted in making available such certificates to listed entities. However, the duty to interpret the Regulation in a manner compatible with the Convention and the Protocol strongly militates against such a conclusion. The provision of search certificates is integral to the Registry’s operation, as is clear from Articles 22 and 26 of the CTC. If the Registry were to refuse to provide search certificates to sanctioned entities otherwise entitled to such certificates, it might not be in a position to comply with its obligations under Articles 22(2) and 26 of the CTC. In light of this potential conflict between the Convention and the Regulation, there is a strong argument that Article 1(g)(vii) and Article 2(2) of Council Regulation (EU) No 269/2014 should be interpreted in a manner consistent with the Convention. Under such an interpretation of these provisions, search certificates – because of their special character and limited function and effect – would not fall within the definition of ‘funds’, an interpretation which is, in any event, arguably more consistent with the definition of funds in Article 1(g) as a whole.

Third, the elements of the Registry’s functions for the purposes of the Regulation which are potentially most problematic are those which involve monetary transactions,

term extended to the international financial network Society for Worldwide Interbank Financial Telecommunications (SWIFT): see eg ‘Swift Sanctions on Iran’, *Wall Street Journal*, 1 February 2012.

no matter how small. This can arise in a number of ways: for example, the payment of transaction fees to the Registry and the issuing of refunds by the Registry. While the figures in question may be modest, difficulties in payment to and from the Registry could nonetheless have significant implications for the practical operation of the Registry and deprive user entities of the benefits accruing under the Convention.

On the one hand, the Regulation might prevent the Registry from charging or collecting fees from user entities which are the subject of sanctions. The collection of fees is provided for *inter alia* in Article 17(2)(h) of the CTC, in Section 13 of the Regulations and Section 18 of the Procedures. While Article 2(1) of the Regulation is limited to 'all funds and economic resources belonging to, owned, held or controlled by' sanctioned entities, it is possible that payments made to the Registry by sanctioned entities could be considered as falling within the terms of Article 2(1). In this regard, recent case law of EU courts⁶³ and guidance from national authorities, such as the United Kingdom Treasury,⁶⁴ signals a potentially more far-reaching approach to the interpretation of provisions such as Article 2(1) than that which previously prevailed; under this broad interpretation, any funds arriving in the EU which have come from, or through, a sanctioned entity must be frozen. While this is primarily directed at banks and other financial institutions, it may, in appropriate circumstances, apply to other entities, including companies (for example, if a company was aware that it had received funds

from a sanctioned entity but these funds had not already been frozen by the relevant bank or financial institution). Of course, it is unlikely in practice that the Registry would in fact receive a payment from a sanctioned entity, because the funds in question would be frozen before reaching the Registry. If Article 2(1) were interpreted as applying to payments by sanctioned entities to the Registry, this could create tension with the system established by the Convention to some extent: while Article 2(1) would not necessarily prevent the Registry from collecting fees, the freezing of such fees from sanctioned entities might be regarded as undermining Article 17(2)(h) of the CTC (as given effect in Article 13 of the Regulations) or indeed Article 26 of the CTC (to the extent that the freezing of fees might result in the Registry denying access to the Registry's registration and search facilities). In accordance with the principle of consistent interpretation referred to in Part 3(b) of this article, the Regulation should be interpreted in a manner consistent with the Convention and the Protocol. This principle supports a narrower interpretation of Article 2(1), which would exclude from its scope the payments of fees by sanctioned entities to the Registry.

Second, if the Registrar were to issue a refund payment to a sanctioned entity (or associated entity), this would *prima facie* fall foul of Article 2(2) of the Regulation in that the Registrar would be making available certain funds to or for the benefit of sanctioned entities. However, in this regard, the scope for tension between the Regulation and the Convention is limited: there is no express provision in the Convention and Protocol addressing the payment of refunds by the Registry.⁶⁵ In respect of Article 26 of the CTC specifically, the refusal or failure to make a refund does not involve the denial of access to the

⁶³ Judgment in *Europäisch-Iranische Handelsbank AG v Council of the European Union*, T-434/11, ECLI:EU:T:2013:405

⁶⁴ See HM Treasury notification of revised policy dated 17 July 2014: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332052/Policy_revison_sanctions.pdf> accessed 6 September 2015. In the questions section, it is stated that the UK has had to change its view in order to comply with the case-law of the European Court of Justice and further that the change 'also brings the UK in line with the policies of other EU Member States'.

⁶⁵ The only reference to a refund in the Regulations and Procedures is in paragraph 6.3 of the Annex to the Regulations relating to the Closing Room: 'If such pre-registered registrations are not so released, the coordinating entity shall be entitled to a refund of such fees, less applicable third party payment processing expenses.'

registration and search facilities of the International Registry. As a result, it is difficult to argue that a prohibition on the making of refunds by reason of Article 2(2) of Council Regulation (EU) No 269/2014 gives rise to a conflict with the Convention. There is no necessary or direct conflict between the obligation imposed on by Article 2(2) of Council Regulation (EU) No 269/2014 and its obligations under the Convention and Protocol. If the Registry were to make refunds to sanctioned entities, in the absence of authorisation from the competent national authority, it would run the risk of falling foul of EU law. Because there is no specific duty on the Registry to make refunds under the Convention, the Registry should in principle be capable of fulfilling its obligations under the Convention while complying with the relevant EU sanctions. While the collection of fees would be a very common activity of the Registry, the payment or processing of refunds is likely to be far less common and could possibly be addressed through alternative measures. While it is something to which the Registry should give due attention, it is likely to have very limited implications in practical terms for the Registry.

(ii) *Regulation (EU) No 833/2014 (as amended)*. In the course of its operations, the Registry may provide certain software and digital certificates to user entities in order to enable those entities to access the Registry. Having regard to the terms of Council Regulation (EU) No 833/2014 (as amended), the question arises as to whether the provision of such software/digital certificates by the Registry to sanctioned entities would fall within the prohibition on the transfer of dual-use goods and technology under Article 2 or Article 2a of this Regulation. While the applicability of these provisions would obviously depend on the specific software used by the Registry, it is at least arguable that the software/digital certificates fall within the scope of Category 5 in Annex I to the 2009 Regulation.

Under Article 2(1) of Council Regulation (EU) No 833/2014, the prohibition on sale, supply, transfer or export of dual-use goods and technology to persons in Russia or for use in Russia applies 'if those items are or may be intended, in their entirety or in part, for military use or for a military end-user'. Having regard to the very limited purposes for which the relevant software would be provided by the Registry and the limited ends to which it is intended to be put, which relate exclusively to the operation of the Registry, it must be concluded that the provision of such software by the Registry, whether to persons in Russia or for use in Russia or more generally, would not be and would not be intended to be, either in whole or in part, 'for military use or for a military end-user' such as to bring it within the scope of Article 2(1).

Under Article 2a(1) of Council Regulation (EU) No 833/2014 (as inserted by Council Regulation (EU) No 960/2014), the prohibition on sale, supply, transfer or export of dual-use goods and technology is not subject to a similar 'non-military use' limitation. However, Article 2a(1) is specifically confined 'to natural or legal persons, entities or bodies in Russia as listed in Annex IV to this Regulation' ('the listed entity' or 'the listed entities'), most of which are involved in the arms industry in Russia.⁶⁶ Article 2a(2) also prohibits the provision of technical assistance or other services relating to such goods or technology to those entities. Articles 2a(3) and 2a(4) limit the scope of this prohibition in respect of existing contracts, on the one hand, and goods and technology intended for the aeronautics and

⁶⁶ The list is as follows: JSC Sirius (optoelectronics for civil and military purposes); OJSC Stankoinstrument (mechanical engineering for civil and military purposes); OAO JSC Chemcomposite (materials for civil and military purposes); JSC Kalashnikov (small arms); JSC Tula Arms Plant (weapons systems); NPK Technologii Mashinostrojenija (ammunition); OAO Wysokototschnye Kompleksi (anti-aircraft and anti-tank systems); OAO Almaz Antey (state-owned enterprise; arms, ammunition, research); OAO NPO Bazalt (state-owned enterprise, production of machinery for the production of arms and ammunition).

space industry and existing civil nuclear capabilities within the EU, on the other. If any of the entities listed in Annex IV to Council Regulation (EU) No 960/2014 were Registry user entities or applicants for this status, the effect of Article 2a(1) might be *prima facie* to prohibit the Registry from transferring any further software to those entities or indeed providing any technical assistance or other services relating to such software to those entities. Once again, while this is something of which the Registry should be cognisant, it is likely to have very limited implications for the Registry in practice.

5. Conclusion

In conclusion, international sanctions play an increasingly prominent role within the international legal system and, in this way, increasingly touch or trench upon international trade and finance transactions. International sanctions regimes, such as the EU sanctions regime against Russia, cast a cloud of uncertainty over many international transactions. As the Report of the Financial Markets Law Committee illustrates, the very broad and uncertain scope of the sanctions makes it difficult for entities and economic operators within the EU to identify precisely where the limits of their obligations lie under the Regulations. From the perspective of aviation finance specifically, the example of Dobrolet in the EU sanctions regime against Russia demonstrates that these

issues are not purely theoretical. Against this backdrop, it is important to consider the potential implications of the sanctions for the International Registry under the Cape Town Convention regime.

Because of the essentially administrative nature of its functions, the EU sanctions have only a limited effect on the Registry's ability to fulfil its obligations under the Convention regime. With very limited possible exceptions, the services and facilities of the Registry fall outside the scope of the restrictive measures adopted by the EU in respect of the situation in Ukraine. In this regard, the privileged status of the Convention within EU law – vis-à-vis ordinary instruments of EU legislation such as those imposing sanctions – arguably enures to the benefit of the Registry. First, even within the very limited areas of the Registry's activities that could conceivably be subject to sanctions, the duty to interpret such sanctions in a Convention-compatible manner shields the activities of the Registry to a considerable extent from the implications of EU sanctions. Second, in the unlikely scenario of a conflict between the Convention and EU sanctions, the Convention would, as a matter of EU law, prevail. In this respect, the EU's participation in the Convention regime, and the Registry's location within the EU, provides strong protection for the effective operation of the Cape Town Convention regime within an international legal system where sanctions appear to have an ever-expanding reach.