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# De-registration and Export Remedies under the Cape Town Convention

Dean N. Gerber and David R. Walton\*

*De-registration and export remedies under the Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol are integral components of the overall suite of remedial rights provided under the treaty and address some of the legal and procedural shortcomings of otherwise available applicable law. This article provides a critical analysis of the key provisions of the Convention and Protocol dealing with de-registration and export remedies and also identifies some of the key areas where the Convention and Protocol may need a broader interpretation in order to give effect to their desired goals. This article also identifies questions surrounding the use of the Irrevocable De-registration and Export Request Authorization (or "IDERA") and provides suggested guidance for its implementation and use.*

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## Introduction

Default remedies in virtually every aircraft lease and secured lending document contain provisions allowing the owner or financier to seize the leased or financed equipment and arrange for its de-registration and export from the jurisdiction in which the relevant aircraft is located. In a default scenario, exercising these remedies – provided that they may be carried out efficiently – is typically the best approach for a financier to preserve the value of the equipment, and can often mean the difference between achieving an expected recovery versus incurring a significant loss.<sup>1</sup> However, having just one of these remedies – possession or

de-registration and export – readily available is often insufficient to permit the creditor to achieve its aim of fully preserving its residual value or realizing on its collateral.

Case in point involves Kingfisher Airlines ('Kingfisher') in India. Kingfisher started its commercial operations in 2005 with four new Airbus A320-200 aircraft and quickly grew until it had a fleet of over 60 aircraft. Although the airline routinely posted financial losses, it nonetheless continued to expand its fleet, merging with Indian domestic operator Air Deccan and placing large orders with Airbus – totalling more than 100 aircraft, including the super-jumbo A380 model. Unfortunately, Kingfisher's financial troubles continued to mount until it was forced to cease operations in 2012, having recorded more than US\$1 billion in losses. In the normal course, one would expect that de-registration and export

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<sup>1</sup> As with any equipment-based financing, the likelihood of prompt access to the equipment following a default is key to the risk analysis and therefore the decision whether to extend credit and, if so, how to

price the transaction. If a lengthy delay could occur, the equipment may deteriorate in the hands of a defaulting operator and placing the equipment back into revenue-producing operations will take far longer, increasing the lessor's or financier's expected loss given default. Such an increase may lead the financier to decide not to proceed with the financing or to proceed only with greater protections against default or increased compensation from the debtor for the greater risk involved.

of aircraft from an airline following the loss of its operating certificate and termination of operations would be relatively simple to accomplish. Indeed, DVB Aviation Finance Asia PTE, Ltd. ('DVB'), a German financier of two Airbus A320-232 aircraft leased to Kingfisher<sup>2</sup>, in pre-Cape Town Convention transactions, was able to seize the aircraft outside of India – in Turkey – where the aircraft were located at the time the leases were terminated.<sup>3</sup> The only issue to tend to was de-registration in connection with the exercise of remedies as provided in the financing documents, which DVB assumed would be quickly confirmed by the Indian Directorate General of Civil Aviation ('DGCA'). In fact, under DGCA Rule 30(2)(a)(iv), the original basis for registration of the aircraft in India was Kingfisher's right, as a DGCA-regulated airline, to lease the aircraft; once that right was terminated, the basis for registration of the aircraft in India was removed because the aircraft no longer had a nexus to India.<sup>4</sup> The DGCA, however, did not see it that way. Following receipt by the DGCA of letters from DVB requesting de-registration, and notwithstanding that DVB possessed a de-registration power of attorney ('DPOA')<sup>5</sup>, Kingfisher notified the DGCA

<sup>2</sup> A separate lease for each aircraft was entered into in June 2006. Kingfisher defaulted under each lease and DVB terminated the leases in 2012. *DVB Aviation Finance Asia PTE Ltd v Directorate Generale of Civil Aviation, et al*, WP (C) 7661/2012 and CM No. 4208/2013 (8 April 2013). The Kingfisher leases predated the ratification and implementation of the Cape Town Convention (as further described herein) and as such the protections afforded under the Cape Town Convention were not available to DVB. Had the leases been entered into post-effective date of the Convention in India, a different result should have been achieved.

<sup>3</sup> The Kingfisher court was somewhat predisposed to ruling in favour of DVB as the aircraft were already outside of India and therefore outside of the jurisdiction of the Indian courts. It would certainly be a more difficult decision for an Indian court to rule on a lessee's claim of equitable rights while the subject aircraft was within the court's territorial jurisdiction.

<sup>4</sup> DGCA Aircraft Rule 30(2)(a)(iv) (1937), available at <http://www.dgca.nic.in/rules/car-ind.htm>, accessed 30 September 2014.

<sup>5</sup> A DPOA is a routine deliverable in the context

that it objected to the de-registration and unilateral termination of the lease on the basis that Kingfisher (i) had a right under the lease to purchase the aircraft and (ii) had acquired an equity interest in the aircraft through the payment of rent to DVB under the lease, which could not be taken away from Kingfisher.<sup>6</sup> Thereafter, the DGCA required DVB to supply a certificate from Kingfisher confirming that it had no objection before processing the de-registration, forcing DVB to commence court proceedings against both Kingfisher and the DGCA seeking, among other things, an order directing the DGCA to immediately de-register the aircraft. The court eventually directed the DGCA to de-register the aircraft and further held that Kingfisher's no-objection certificate was not required if DVB had the benefit of a de-registration power of attorney, empowering it to de-register the aircraft (which it did).<sup>7</sup> But the delay in achieving de-registration, which greatly inhibited any remarketing effort, coupled with the litigation costs, imposed a

of cross-border aircraft lease or financing transactions, particularly for jurisdictions in which the registration of the aircraft is dependent upon the status of the operator, and is essentially controlled by the operator. The DPOA would normally grant a specific financing party – a lessor or secured lender, or a trustee acting on behalf of the lender – authorization to seek de-registration of the aircraft following the occurrence of certain events, for instance, a loan default or termination of a lease. A DPOA is typically irrevocable and requires no consent or other action by the grantor in order to be effective. While, in theory, DPOAs are intended to provide speedy de-registration of the aircraft in a remedies exercise, the reality is that the utility of a DPOA is often limited. In some jurisdictions, the civil aviation authority will require a court order to accompany the de-registration request before giving any effect to a DPOA. In other jurisdictions, DPOAs are, by law, revocable and/or terminable by the grantor (notwithstanding their express irrevocability) thereby severely limiting their effectiveness in a hostile work-out environment.

<sup>6</sup> Nithya Narayanan, 'Aircraft Repossession in India – Turbulence Ahead, Buckle Up!' (2013), available at <http://ssrn.com/abstract=2353197>, accessed 30 September 2014.

<sup>7</sup> The court did not go into the merits of Kingfisher's argument that de-registration of the aircraft was not consistent with its right to exercise the purchase option under the lease.

tremendous burden on DVB.

As the Kingfisher case highlights, successfully obtaining possession of an aircraft is itself insufficient to allow a lessor or financier to properly redeploy the aircraft if it is not coupled with the practical and legal ability to de-register it, with the concomitant right to re-register the aircraft in a suitable alternate jurisdiction.<sup>8</sup> The Convention on International Civil Aviation, commonly referred to as the ‘Chicago Convention’<sup>9</sup>, sets forth certain standards and practices of civil aviation among its member states (currently 191). Chief among them is the directive that aircraft are to have the nationality of the ‘State in which they are registered’<sup>10</sup> and most significantly an aircraft cannot be validly registered ‘in more than one State, but its registration may be changed from one State to another’<sup>11</sup> so long as such registration is in compliance with the laws and regulations of the contracting state in which such aircraft is registered.<sup>12</sup> Each member state of the Chicago Convention has complete flexibility in deciding the requirements it will impose for registration, including whether it will insist, as is done in many countries, that only its own citizens may own aircraft placed on its register and whether, where an owner and an operator are not the same entity, as would be the case

for leased aircraft, the registering entity should be the owner or the operator. Determining the type of registration regime (owner-based vs operator-based) is critical to the risk analysis for any aircraft lease or secured financing and could play a pivotal role in determining whether the lessor or financier will be able to efficiently recover and redeploy the aircraft. A lessor or financier would typically have far greater control over the de-registration process in an owner-based registry regime; the converse is true in an operator-based regime.

Similarly, national procedural rules affecting the export of properly seized and, if applicable, de-registered aircraft could potentially create significant impediments to the basic commercial rights sought by parties to an aircraft financing. If, for example, a jurisdiction required a financier to satisfy specific tax obligations of a debtor airline, imposed burdensome regulatory requirements or required the remittance of substantial duties unrelated to the actual export of the aircraft, such actions could effectively bar the export of the aircraft. While such actions may have an arguable basis in law, there may be an ulterior motive to protect the airline from losing valuable equipment that could be essential to its continued operation. Any such impediment to the physical transfer of an aircraft from existing territory by a financier could, as in the case with any delay in de-registration in a default scenario, similarly impose significant hardship in terms of loss of value and damage to aircraft collateral.<sup>13</sup>

This article will focus on de-registration and export remedies under the Convention on International Interests in Mobile Equipment (the ‘Convention’) and its Aircraft Protocol (the ‘Protocol’, and together with the Convention, the ‘Cape Town Convention’, or in short, ‘CTC’) which were aimed at addressing many of the legal and procedural shortcomings described above.<sup>14</sup> Much of the analysis for

<sup>8</sup> A replevin or seizure action involving the aircraft and/or the related records is typically the focus of a financier’s remedies analysis under local law at the outset of a transaction. De-registration (and the related export of the aircraft) following repossession of the equipment is often left to a second tier analysis and, in some cases, for good reason since many jurisdictions do not pose any significant impediments to such actions. As the world of available operators of aircraft equipment continues to grow, and as more and more jurisdictions open up to the lease and finance of aircraft, this second tier analysis becomes ever more important since many of these jurisdictions will have little experience addressing these issues and each may be eager to protect its local carrier (which may be the flag carrier for the state).

<sup>9</sup> Convention on International Civil Aviation, 7 December 1944, 61 Stat 1180, 15 UNTS 295 (hereinafter the ‘Chicago Convention’).

<sup>10</sup> *Ibid*, article 17, 61 Stat at 1185.

<sup>11</sup> *Ibid*, article 18, 61 Stat at 1185.

<sup>12</sup> *Ibid*, article 19, 61 Stat at 1185.

<sup>13</sup> As with de-registration rights following default, the imposition by local authorities of undue barriers to export would increase the financier’s expected loss given default and therefore limit the availability of finance or increase its cost to the debtor.

<sup>14</sup> *Convention on International Interests in Mobile Equipment and Protocol to the Convention on International*

this article comes from the available legislative history of the Cape Town Convention<sup>15</sup> as well as the superb Official Commentary to the Cape Town Convention (the ‘Official Commentary’) prepared by Professor Sir Roy Goode.<sup>16</sup>

### **The Cape Town Convention: De-registration and Export and the IDERA**

Although ambitious from the start, the Cape Town Convention project did not initially seek to address issues pertaining to de-registration and export.<sup>17</sup> By the mid-90s, however,

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*Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, each adopted in Cape Town, South Africa, 16 November, 2001.

<sup>15</sup> A compilation of the legislative history of the Cape Town Convention can be found at <http://www.ctcap.org/>.

<sup>16</sup> Professor Sir Roy Goode, *Official Commentary to the Cape Town Convention* (3<sup>rd</sup> edn UNIDROIT 2013). The Official Commentary is a critically important source for analyzing the Cape Town Convention and developing and enhancing an understanding of its considerable terms and scope. This is no more so demonstrated than in the area of the CTC’s provisions addressing de-registration and export remedies. Several of the Cape Town Convention’s terms touch on the availability of these critical remedies and the Official Commentary is particularly useful in sorting through these various CTC provisions. Suffice to say, Professor Goode provides extremely helpful guidance and clarity in this area and the authors (as well as the aviation finance community generally) owe him a tremendous debt of gratitude for his extraordinary work with regard to the harmonization of these provisions (without which this article would have been painstakingly more difficult to prepare).

<sup>17</sup> In 1992, Professor Ronald CC Cuming, analyzing the responses to a questionnaire distributed by the International Institute for the Unification of Private Law (‘UNIDROIT’) to interested parties seeking to study international regulation of aspects of security interests in mobile equipment, when addressing post-default remedies to be made available to secured parties in the context of financings involving mobile equipment, stated:

A party to the proposed Convention (or rules) would agree to recognize the enforceability of a security interest in mobile equipment as provided in the law of the debtor’s principal place of business subject to two qualifications: (i) recognition need not extend to remedies other than seizure and sale

prompted by the nascent Aviation Working Group (‘AWG’)<sup>18</sup>, the drafters became focused more on issues relating to de-registration and export of aircraft in a default setting, recognizing that these issues present significant hurdles to the recovery of an asset and the overlay of the Convention would provide an ideal means of addressing them in a broad and comprehensive fashion. In a memorandum prepared jointly by Airbus Industrie and The Boeing Company (on behalf of the AWG), it was suggested that the Convention would materially benefit financiers, lessors and operators of aircraft if it addressed de-registration and export on the basis that:

The right to “de-register” the aircraft for Chicago Convention purposes, and the export of the aircraft, in each case following a default are essential elements of the basic repossession, seizure and collateral realization concepts contemplated by the proposed convention. These rights need to be available *immediately upon “repossession”*, whenever the same shall occur, without the need

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of the equipment; and (ii) all procedural matters associated with seizure and sale would be governed by the law of the State in which the equipment is seized. The Convention (or rules) would contain a non-exhaustive list of matters that are to be treated as procedural.

No mention was given to any concept of de-registration or export of such equipment (indeed, his conclusions suggested that such matters would be governed by the law and procedural rules of the applicable forum). Ronald CC Cuming, ‘Basic issues identified in responses to the Questionnaire on an international regulation of aspects of security interests in mobile equipment’ (1992) UNIDROIT Study LXXII, Document 4, available at <http://www.ctcap.org/>.

<sup>18</sup> In 1994, UNIDROIT requested the formation, by Airbus and Boeing, of an ad hoc international industry group to provide detailed, coordinated input to assist UNIDROIT in the development of the Cape Town Convention. In response to that request, Airbus and Boeing agreed to form the Aviation Working Group. They jointly invited others into this grouping. The initial and subsequent invitees were a number of major manufacturers, financial institutions and leasing companies. Since that time, AWG has evolved from an ad hoc, informal group to a not-for-profit legal entity and its scope of activity and membership has expanded significantly. It now addresses a wide range of topics affecting international aviation financing and leasing.

for further governmental or regulatory action (e.g., separate review or proceedings by aviation authorities) and/or acquiescence by the airline (e.g., consent to such de-registration and export) (*emphasis added*).<sup>19</sup>

The AWG Memo helpfully suggested that national rules regarding de-registration and export of aircraft are potential obstacles to the basic commercial rights of possession and sale (which were, at the time, the main focus of the default remedies being proposed by the Convention drafters) and convention-based de-registration and export remedies should therefore be viewed on par with these basic creditor rights.<sup>20</sup> The final agreed draft of the Convention which was signed in Cape Town, South Africa in 2001 contained language very similar to that originally suggested by the AWG and as such the related terms of the Convention should be viewed and interpreted in a manner consistent with intent and purposes outlined in the AWG memo.

Chapter III of the Convention provides a financier with a set of basic remedies in the event of a debtor's default.<sup>21</sup> There is a distinction drawn between the rules governing the remedies of a chargee (which are covered in Articles 8 and 9 of the Convention) and those applicable to a conditional seller or lessor (which are set out in Article 10 of the Convention). These basic remedies cover such things as taking possession of the equipment<sup>22</sup> and, in the case of a security agreement, foreclosure and sale of the equipment in or towards satisfaction

of the applicable secured obligations.<sup>23</sup> While these remedies in general are not the focus of this paper, it is important to recognize that they provide a traditional suite of options for a lessor or financier following a default which are consistent with those typically available under traditional financing documents.

The default remedies available under the Protocol expand the available remedies contained in the Convention to include provisions dealing with de-registration and export. Article IX(1) of the Protocol provides:

- In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:
- (a) procure the *de-registration* of the aircraft; and
  - (b) procure the *export* and *physical transfer* of the aircraft object from the territory in which it is situated (*emphasis added*)<sup>24</sup>

The purpose of these additional remedies is to address specifically the concerns initially set out in the AWG Memo and allow a creditor to remove the aircraft from the debtor's control and place it in the control of the creditor.<sup>25</sup> In the case of de-registration, the remedy also permits a subsequent re-registration in accordance with the terms of the Chicago Convention.<sup>26</sup> The effect of these provisions is to enable the creditor to obtain the cooperation of the applicable aviation registry and other administrative authorities of the

<sup>23</sup> Convention, Article 9.

<sup>24</sup> Protocol, Article IX(1).

<sup>25</sup> In line with one of the core principles of the CTC – party autonomy – these remedies are available to the creditor only to the extent the debtor so agreed. See Official Commentary, Goode (n 16) para 2.17.

<sup>26</sup> Article IX(1)(a) of the Protocol is focused on aircraft (as opposed to aircraft objects) because only aircraft are registered. Of course, the Chicago Convention registration rules only apply to airframes, and not engines. So although Article IX(1)(a) is focused on aircraft, it should be read to mean aircraft objects constituting airframes or helicopters. By contrast, the separate remedy of export and physical possession is given in respect of an aircraft object (as opposed to aircraft) and thus extends to engines (including uninstalled engines).

<sup>19</sup> 'Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft', (1995) UNIDROIT Study LXXII, Document 16, available at <http://www.ctcap.org/> (the 'AWG Memo').

<sup>20</sup> Ibid 18. The AWG Memo went on to say that '...the inability to re-register the aircraft, in accordance with the laws of the country of registry, will significantly reduce the marketability of the aircraft since all potential purchasers or operators will be aware that, pending proper de-registration, the aircraft cannot be put into revenue generating service in any other jurisdiction.' *Id.*

<sup>21</sup> Convention, Articles 8 through 15.

<sup>22</sup> Convention, Articles 8(a)(1) and 10(a).



place of registration of the aircraft and, in the case of export, the place where the aircraft is located,<sup>27</sup> in connection with the exercise of remedies relating to the de-registration and/or export. These remedies are, however, only available (a) to the extent agreed by the debtor (which agreement can be given any time)<sup>28</sup> and (b) following the occurrence of a default (as specified in Article 11 of the Convention).<sup>29</sup>

Additionally, Article IX(1) provides the foundation for two separate and distinct Protocol-driven approaches for a financier to achieve de-registration and export of an aircraft in a default scenario, the conditions and terms of each varying somewhat depending upon which route is taken.<sup>30</sup> The first route, via Article X(6) of the Protocol, is for the creditor to obtain relief pending final determination (hereinafter, 'advance relief') under Article 13 of the Convention from a court in the jurisdiction where the aircraft is registered (or, if the remedy being sought is solely export of the aircraft from a jurisdiction other than the jurisdiction of registry, the jurisdiction where the aircraft is located)<sup>31</sup> or the equivalent relief from a

foreign court whose jurisdiction is recognized by the applicable home court (and need not be a court in a Contracting State), and notify the relevant authorities of the grant of the order (this route is known as the 'Court Route'). The court order sought by the creditor would grant possession or control of the aircraft to the creditor or otherwise remove possession of the aircraft from the debtor in favor of, for example, a trustee or other third party. In this scenario, the creditor is entitled to have the remedies specified in the court order made available to it within five business days. The other route, via Articles XIII and IX(5) and IX(6) of the Protocol, is available if the debtor provided an irrevocable de-registration and export request authorization ('IDERA') which was lodged with the requisite authorities, which must then co-operate expeditiously to de-register and export the subject aircraft (this route is known as the 'IDERA Route'). Both of these routes are described in more detail below. It is important to recognize, however, that while the two routes described above are dependent upon the appropriate declarations having been made by the applicable Contracting State<sup>32</sup>, the remedies of de-registration and export under Article IX(1) of the Protocol are not themselves dependent upon any such declaration and may therefore be invoked independently of the two above routes provided the debtor has agreed that these remedies would apply following a default. In such case the creditor must satisfy the requirements of Articles IX(1) and (2) and

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<sup>27</sup> See discussion below on use of IDERA which we believe was intended to be limited to use in the jurisdiction in which an aircraft is registered.

<sup>28</sup> Protocol, Article IX(1).

<sup>29</sup> Official Commentary, Goode (n 16) para 5.44. The creditor must also be mindful of the restrictions contained in Article IX(2) and (6) of the Protocol which impose a burden on the creditor to obtain consents from the holders of any registered interests ranking in priority to that of such creditor prior to exercising de-registration and export remedies and also to provide reasonable prior notice to certain interested persons in the context of the exercise of these remedies by a charge other than pursuant to a court order.

<sup>30</sup> Although the Protocol itself establishes the foundation for each of the two routes to be described, Professor Goode in the Official Commentary provided the needed clarity for the organization and proper understanding of these specific remedial routes and deserves credit not only for the terminology used in describing them but also for fitting each of the Protocol provisions into the appropriate remedial slot such that the multiple references to de-registration and export can make logical sense. See Official Commentary, Goode (n 16) paras 3.30-3.36 and 5.45-5.48.

<sup>31</sup> The Official Commentary and to a lesser degree,

the Protocol itself, when describing the remedies available under Article IX(1) of the Protocol in the context of the Court Route typically refer only to the jurisdiction where the aircraft is registered (as opposed to the jurisdiction, if different, where such aircraft may be located). This stems from the fact that these provisions are describing both de-registration and export remedies (and so the reference to the state of registry is appropriate) but one should not infer from these references that export remedies may only be exercised in the state of registry.

<sup>32</sup> For the Court Route, the Contracting State must have made a declaration under Article XXX(2) applying Article X of the Protocol and for the IDERA Route, the Contracting State must have made a declaration under Article XXX(1) applying Article XIII of the Protocol.

follow the applicable procedural requirements of the relevant jurisdiction; however, if the necessary declarations have been made by the applicable Contracting State, a creditor would be more likely to utilize one of the two routes described above.

## Two Routes for De-registration and Export

### *Court route*

The Court Route stems from the advance relief available under Article 13 of the Convention (as modified by Article IX of the Protocol) and is premised upon a creditor seeking such relief from a court in the jurisdiction where the aircraft is registered (or, in the context of export, located) or an equivalent order from a foreign court which need not be situated in a Contracting State. Article X(6) of the Protocol provides that with regard to the de-registration and export remedies in Article IX(1):

- (a) they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State no later than five working days after the creditor notifies such authorities that the relief specified in Article [13]<sup>33</sup> is granted... and that the creditor is entitled to procure those remedies in accordance with the terms of the Convention; and
- (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.<sup>34</sup>

Professor Goode describes the Court Route as follows:

A creditor invoking Article X(6) must have obtained an order...which gives possession or control to

the creditor or otherwise removes control from the debtor. In the case of an order by a foreign court, the relief must be 'recognized' by the court of the State of registry...The basic idea is that any order should be either made or recognized by a court in a Contracting State which is the State of registry...To trigger Article X(6) the creditor must notify the relevant authority (a) that relief has been granted under Article 13(1) and (b) that the creditor is entitled to procure the remedies of de-registration and export. The purpose of this requirement is to dispense with the need for the authority to investigate external facts and to require it to rely solely on the creditor's notification... Once the creditor has notified the authorities of the grant of relief [the authorities] come under two distinct obligations. The first obligation is to make the remedies available within five working days of the notification...The second obligation is expeditiously to co-operate with and assist the creditor in the exercise of the remedies of de-registration and export in accordance with the applicable aviation laws and safety regulations...<sup>35</sup>

A creditor's entitlement to utilize the Court Route stems from the debtor's agreement as required by Article IX(1).<sup>36</sup> As the remedies of de-registration and export are routinely included in financing documentation, it would be unusual (to say the least) if a debtor did not expressly agree in advance to the exercise of such remedies. That said, the debtor need not agree to the exercise of such remedies in the agreement creating or providing for the applicable international interest and availability of these remedies can be agreed at any time.<sup>37</sup> Utilization of the Court Route may not, however, be utilized by a creditor if there exists a holder of a registered international interest having priority to that of the creditor seeking to exercise such remedies, unless the consent

<sup>35</sup> Official Commentary, Goode (n 16) para 3.32.

<sup>36</sup> Article IX(1) refers to the 'agreement' of the debtor in the context of Chapter III of the Convention, under which the agreement of the debtor need not be in writing and can be general in nature, for example, covered by language making available 'all remedies under the Convention and Protocol'. See Official Commentary, Goode (n 16) para 2.79.

<sup>37</sup> Official Commentary, Goode (n 16) para 3.31.

<sup>33</sup> The actual language of the Protocol refers to Article IX(1) but this has been widely viewed as a drafting error. The Official Commentary clarifies that the reference should be to an order granting relief under Article 13(1) of the Convention which is clearly the intent from, among other things, earlier drafts. See Official Commentary, Goode (n 16) para 3.32.

<sup>34</sup> Protocol, Article X(6).



in writing of such holder is first obtained.<sup>38</sup> No IDERA (or corresponding declaration) is necessary in order to make use of the Court Route.

### *IDERA route*

The IDERA Route does not require a court order, and instead provides for a standing direction to the applicable registry authority<sup>39</sup> in a Contracting State to honour a request for de-registration and export if certain prerequisites are met. Article XIII(2) of the Protocol, which applies where the applicable Contracting State has made the appropriate declaration<sup>40</sup>, sets out very specific mandates regarding the utilization of an IDERA in a Contracting State and rules for the use and effectiveness of an IDERA in such State.

First, Article XIII(2) of the Protocol provides that where the debtor has issued an IDERA ‘substantially’<sup>41</sup> in the form annexed to the Protocol and has submitted it for ‘recordation’<sup>42</sup> to the registry authority,

<sup>38</sup> Article IX(2) of the Protocol.

<sup>39</sup> The term ‘registry authority’ is defined in the Protocol to mean ‘the national authority or the common mark registering authority, maintaining an aircraft register in a Contracting State and responsible for the registration and de-registration of an aircraft in accordance with the Chicago Convention.’ Protocol, Article 2(o).

<sup>40</sup> Protocol, Article XIII(1). The IDERA form was first suggested by the AWG in 1997 as part of the group’s comments on the then revised draft articles of the Convention. ‘Revised Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment’, (1997) UNIDROIT Study LXXII, Document 36. Interestingly, the final form of the document was almost identical to the draft IDERA initially proposed by the AWG.

<sup>41</sup> See discussion below regarding the IDERA form and proposed changes to it mandated by specific jurisdictions when effecting implementing legislation and regulation.

<sup>42</sup> The term ‘recordation’ as used in this context does not necessarily require either the establishment of a formal recordation procedure for an IDERA by the applicable authority or that such IDERA be searchable via a public or quasi-public database. Rather, it should suffice that a formal mechanism for acceptance of the IDERA by such authority is established and that such

that IDERA shall be recorded.<sup>43</sup> The Protocol in this instance specifically refers to the ‘registry authority’ (i.e., the authority maintaining the aircraft nationality register), as opposed more broadly to a Contracting State. Accordingly, if a Contracting State has made the relevant declaration, it is obliged to establish a recordation system for IDERAs and implement suitable procedures to allow for the submission and recordation of IDERAs in a manner consistent with the aims of the Cape Town Convention.

Article XIII(3) of the Protocol goes on to provide that the person in whose favour an IDERA has been issued (the ‘authorized party’) or its certified designee<sup>44</sup> shall be the

authority maintains a suitable record or file of the particular authorized party and any certified designee, so that it is clear who has the authority to exercise de-registration and export remedies for a particular aircraft under an IDERA – particularly because *only* the authorized party or, if relevant, its certified designee may exercise de-registration and export remedies.

<sup>43</sup> Protocol, Article XIII(2).

<sup>44</sup> The term ‘certified designee’ is not defined in the CTC. It is generally considered to mean any party designated by the named authorized party as acting as an agent for such authorized party. In structured finance scenarios, a lessor of an aircraft who is itself the authorized party under an IDERA could name a debt or collateral trustee as its certified designee (although typically in these structures, the debt or collateral trustee would prefer to have an IDERA issued to it directly from the applicable lessee). In any event, care should be taken when a creditor seeks to authorize a certified designee to be sure that the requirements, if any, set forth by the applicable civil aviation authority for such designation have been satisfied. See, for example, the very straightforward form of designation letter attached as appendix 4 to CAR Part V, Chapter 1, June 2014 revision, on the Registration of Civil Aircraft, issued by the Civil Aviation Authority of the United Arab Emirates. While an authorized party may provide for a certified designee to have the ability to exercise rights under an IDERA, the rights under an IDERA should not follow an assignment of rights by the authorized party, it being understood that an IDERA may not itself be assigned. An authorized party could name an assignee as its ‘certified designee’ or, better yet, arrange for a new IDERA to be issued by the debtor in replacement

sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the IDERA and applicable aviation safety laws and regulations.<sup>45</sup> The de-registration mechanism envisioned by Article XIII is intended to establish a clear set of rules which do not involve the exercise of discretion by officials at the registry authority, subject to applicable safety laws and regulations. Once a registry authority receives a request from the authorized party, it is bound to effect de-registration and, to the extent within its authority, permit export of the aircraft, in each case without the need for a court order.

The IDERA form describes the aircraft as the applicable airframe or helicopter (in either case designated by make, model and serial number as well as registration mark) together with all 'installed, incorporated or attached accessories, parts and equipment', which presumably would include installed engines<sup>46</sup>. Thus, while the use of the IDERA in the context of de-registration is rightfully limited to the applicable airframe or helicopter, when considered in an export scenario, its scope expands to include the

for the existing IDERA. Financing document drafters would be wise to include the cancellation and re-issuance of an IDERA as one element of debtor cooperation upon assignment of a lease, conditional sale agreement or loan.

<sup>45</sup> Protocol, Article XIII(3).

<sup>46</sup> Care should be taken by a financier when dealing with unrelated engines which by chance happen to be installed on the financier's airframe at the time remedies are being exercised. While under an IDERA the financier certainly has the right to export the airframe to which the unrelated engines maybe installed and therefore arguably the right to export those unrelated engines, the Convention is perfectly clear that mere installation of such engines on the applicable airframe referred to in the IDERA confers no rights or interests in such engines to the financier. Depending upon the circumstances and upon the time amount of time which may be available, and assuming the interested parties can be identified, notice to parties having an interest in any unrelated engines and, ideally, prior consultation would be advisable. Having said that, in most cases one could safely assume that securing possession and export of the equipment in a neutral location would be viewed favourably by most financiers, including parties with an interest in unrelated engines.

broader aircraft, including the equipment then installed on the aircraft and uninstalled engines located in the State of registry. That said, it would seem beyond the scope of the IDERA to seek to utilize it in the context of the export of an uninstalled engine located in another Contracting State or an engine installed on an unrelated airframe unless such rights are otherwise available to the authorized party (or its certified designee) under applicable law.

Protocol Article XIII(3)'s use of the term 'sole' should be viewed in context and is intended to mean that the authorized party (or its certified designee) shall have the exclusive right to exercise the remedies under Article IX(1) of the Protocol. This is an important limiting factor so that the applicable registry authority need look only to a single party for this important instruction. The IDERA form on the other hand provides instruction to the authority that 'the authorised party or the person it certifies as its designee is the sole person entitled to... procure the de-registration of the aircraft... and...procure the export and physical transfer of the aircraft'. The latter wording by itself suggests a broader meaning. Taken literally, the IDERA provides that the authorized party, to the exclusion even of the debtor, has the 'sole' right to request de-registration and/or export, even outside of an enforcement of remedies context. While the Protocol in Article IX(5) instructs the applicable registry authority to honour a request for de-registration and export pursuant to a properly submitted IDERA subject only to the requirement (if any) for such authorized party to certify that all registered interests ranking in priority to that of such authorized party have been discharged (or the holders of such interests have consented to the de-registration and export), in our view the use of the word 'sole' in this context does not necessarily mean that the right to de-register and/or export is given to the exclusion of the debtor<sup>47</sup>. An international

<sup>47</sup> Article XIII(3) of the Protocol explicitly states that the authorized party (or certified designee) is the 'sole person entitled to exercise the remedies specified in Article IX(1) of the Protocol,' in other words the authorized party/certified designee is the sole person entitled to exercise the additional default remedies

interest, and the priority established by virtue of its registration with the International Registry, would not be impacted by a de-registration initiated by a debtor, even if registration of the aircraft was the original (and sole) connecting factor giving rise to the international interest in the first place<sup>48</sup>, and therefore a debtor's right to de-register and/or export need not be restricted in this fashion and there is no reason that financiers could not continue to provide contractual limitations on a debtor's ability to de-register and re-register aircraft<sup>49</sup>. In any event, the use of the word 'sole' should not be interpreted to mean that a registry authority itself lacks the power in its own right to de-register aircraft under the registry authorities rules, including for instance the failure of the aircraft to remain eligible for registration.

Finally, Article XIII(4) of the Protocol helpfully provides that other administrative authorities in Contracting States shall co-operate expeditiously with and assist the authorized party in the exercise of the remedies specified in Article IX.<sup>50</sup> This clause provides additional

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contained in the provisions of the Protocol which modify the default remedies section laid out in Chapter III of the Convention. The same tie-in to these default remedies is contained in the form of IDERA: 'In accordance with that Article [i.e. *Article XIII of the Protocol*], the undersigned hereby requests (i) recognition that the authorised party or the person it certifies as its designee is the sole person entitled to...'. It therefore appears to the authors to be the case that the word 'sole' is intended to define the persons authorized to exercise remedies as opposed to being intended to define the persons authorized (more generally) to de-register and export.

<sup>48</sup> See Official Commentary, Goode (n 16) para 3.30.

<sup>49</sup> Some commentators have suggested that the design of the IDERA was intended to prevent a debtor from de-registering an aircraft and that its terms should be read broadly to prevent the debtor from obtaining de-registration without the consent of the authorized party as this would provide the creditor benefitting from the IDERA further collateral/security protection. While the authors do not subscribe to this interpretation, individual registry authorities may opt to so restrict a debtor's de-registration rights when an IDERA is recorded.

<sup>50</sup> Protocol, Article XIII(4). Article XIII(4) is consistent with the general provision of Article IX(5) of the Protocol which provides that the registry

assurances to financiers that export remedies will be honoured, particularly inasmuch as it would be relatively common for governmental authorities other than the aircraft registrar to have responsibility for export authorization. In this regard the reference to 'other administrative authorities' should be viewed broadly and would include governmental bodies and administrative agencies having authority to grant export clearances, export licenses, air navigation clearances and any other administrative license, consent, authorization or other approval necessary to export an aircraft from the relevant jurisdiction.

Professor Goode in the Official Commentary describes the IDERA Route as follows:

The second route [IDERA Route], via Articles XIII and IX(5) and (6), is for the creditor to procure from the debtor the issue in favour of the creditor of an irrevocable de-registration and export request authorization (IDERA) and lodge this with the requisite authorities, who must then co-operate 'expeditiously'. This route, which does not involve a court order, is that envisaged by Article IX(5)...<sup>51</sup>

Article XIII provides that the initial step towards securing de-registration and export when utilizing the IDERA Route is recording the IDERA with the registry authority. The duty of the registry authority under Article IX(5) of the Protocol to honour the IDERA

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authority in a Contracting State 'shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if...the request is properly submitted by the authorized party under a recorded irrevocable de-registration and export request authorization'. Article XIII(4) is not, however, by its terms, limited to de-registration or export. Rather, the language of the clause more broadly directs the registry authority and other administrative authorities in any applicable Contracting State to expeditiously cooperate and assist in the exercise of all of the remedies specified in Article IX (which are not limited to just de-registration and export). This language is notably broader than that contained in prior drafts of the Protocol which directed such authorities to cooperate with the 'speedy completion' of de-registration and export pursuant to instruction under an IDERA, which suggests that a broader reading of Article XIII(4) is warranted.

<sup>51</sup> Official Commentary, Goode (n 16) para 3.31.

is then triggered by a request from the authorized party, or its certified designee, to de-register and/or export the aircraft. If the registry authority requires, such a request must also contain a certification that prior ranking registered interests, if any, have been discharged or that the holders thereof have consented to such de-registration and export. A creditor following the Court Route under Article X(6) of the Protocol must obtain an order for advance relief under Article 13(1); however, no similar order is required in order to exercise the rights pursuant to the IDERA Route. Furthermore, the exercise of rights utilizing the IDERA Route is not dependent upon repossession of the aircraft by the creditor.<sup>52</sup> Exercise of the export remedy is always subject to applicable aviation safety laws and regulations<sup>53</sup> and, as a practical matter, repossession of the aircraft would be expected to occur prior to or shortly following de-registration.

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<sup>52</sup> Official Commentary, Goode (n 16) para 3.33. The AWG Memo, which formed the foundation for many of these provisions, suggests a more restrictive approach by stating that '[t]hese rights [referring to de-registration and export] need to be available immediately upon 'repossession', whenever the same shall occur, without the need for further governmental regulation or action. AWG Memo p. 17. The reference to repossession suggests that the intent of the language was not to provide the Article XIII remedies prior to actual recovery of the aircraft by the authorized party. In this regard the AWG Memo should not be viewed in a limiting fashion. While de-registration and, certainly, export remedies would in the normal course be sought following repossession of an aircraft by the applicable financier, there is nothing in the Convention itself which would suggest that possession is a pre-requisite to the exercise of any such remedy. Indeed, the inclusion of the mandate that the exercise of such remedies must be accomplished in accordance with applicable aviation safety laws and regulations provides suitable regulatory oversight which would protect against any adverse consequences arising in such circumstances.

<sup>53</sup> See discussion below for an examination of the phrase 'applicable safety laws and regulations'.

## Practical Issues Relating to De-Registration and Export

### *De-registration and export*

When a financier considers the various Protocol tools available to assist with the exercise of remedies related to the de-registration and export of an aircraft, two specific issues arise. The first is whether these remedies must be utilized in tandem or rather are they intended to be separate, independent rights allowing for de-registration without a corresponding export, and vice versa. The second issue relates to the geographic scope of the availability of the remedies and, specifically, whether the Protocol intends that the remedies may only be used only in the state of registry of the aircraft.

Obviously, if an aircraft is on the ground in a Contracting State that is not also the state of registry, the remedial right sought by the authorized party in that Contracting State would be the export of such aircraft.<sup>54</sup> Alternatively, if a financier has successfully repossessed an aircraft in a jurisdiction where export assistance was not required but the aircraft remained on an operator-based registry system in another Contracting State, the financier would seek the specific remedial rights contained in the Protocol for the registry authority to effect de-registration. Depending upon which remedial route is taken to effect de-registration and export, the availability of the specific remedy sought may vary.

The concept of de-registration and export shows up in three distinct places in the Protocol. The first is Article IX of the Protocol which provides for the general extension of the default remedies under Chapter III of the Convention to include de-registration and, separately in another clause, export and physical transfer of the aircraft object from 'the territory in which

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<sup>54</sup> Indeed, if the applicable international interest was an operating lease and the jurisdiction of registry was an 'owner based' registry, then there would be no need for the lessor to seek de-registration in this instance.

it is situated.<sup>55</sup> Recall that Article IX(1) of the Protocol is not itself dependent upon a declaration, so that it is open to the creditor to exercise these rights (without considering the Court Route or the IDERA Route) in conformity with the procedural requirements of the *lex fori*. There is nothing in Article IX that would suggest that these remedies must occur jointly or within the same Contracting State or that a creditor must exercise both remedies, rather than one or the other.<sup>56</sup> That said, it is clear that without the benefit of the specific declarations under Article 54(2) of the Convention and Article XXX(2) of the Protocol (in respect of advance relief under Article 13 of the Convention and X(6) of the Protocol) and Article XXX(1) (in respect of the IDERA remedies available under Articles IX(5) and XIII of the Protocol), a financier's rights would be far more limited and more importantly, it would not have the benefit of specific direction to the registry authority (and other administrative authorities) and courts in the context of exercise of such remedies.

A creditor following the Court Route must first obtain an order for advance relief under Article 13(1) of the Protocol from a court of the State in which the aircraft is registered (or if the remedy is solely export and such aircraft is located in a State other than the state of registry, such other State) or equivalent relief from a court whose jurisdiction is recognized

by the court of the State of registry. Thereafter the creditor would notify the registry authority and other administrative authorities, as applicable, that the relief has been granted, in which case such authorities have five working days after notification to make such remedies available.<sup>57</sup> Separately, Article X(6) of the Protocol provides that:

the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies [referring to the remedies in Article IX(1)] in conformity with the applicable aviation safety laws and regulations.<sup>58</sup>

It is noteworthy that Article X(6) of the Protocol also does not make any distinction regarding the de-registration and export remedies. Paragraph (a) of Article X(6) (which mandates a five working day maximum for delivery of the applicable remedies) refers to 'registry authority and other administrative authorities, as applicable, *in a Contracting State (emphasis added)*'<sup>59</sup> which could arguably suggest that the referenced administrative authorities must be in the same Contracting State as the registry authority, thereby limiting the availability of such remedies. However, this limitation is unnecessary and would significantly limit the availability of these important remedies which is at odds with the broader purpose of the Convention.<sup>60</sup> Paragraph (b) of Article X(6), however, merely refers to the 'applicable authorities,' without tying these authorities together with the registry authority 'in a Contracting State,' and therefore could be viewed as more broadly available beyond just

<sup>55</sup> Protocol, Article IX(1).

<sup>56</sup> The fact that de-registration and export are covered in Article IX in separate paragraphs would seem to support this interpretation and Professor Goode in the Official Commentary specifically recites that they are 'separate' remedies. See Official Commentary, Goode (n 16) para 3.30. Professor Goode does suggest in paragraph 3.30 of the Official Commentary that the 'effect of the provisions is to enable the creditor to invoke the co-operation of the registry and other administrative authorities of the *existing place of registration* in connection with de-registration and export (*emphasis added*)' but the language does not appear to be limiting and is simply describing a situation where both remedies are intended to be exercised in the applicable Contracting State (which happens to be the state of registry). See Official Commentary, Goode (n 16) para 3.30.

<sup>57</sup> Protocol, Article X(6).

<sup>58</sup> Protocol, Article X(6)(b).

<sup>59</sup> Protocol, Article X(6)(a).

<sup>60</sup> The prior version of the Sir Roy Goode *Official Commentary to the Cape Town Convention* (Revised Edition, 2008) ('POC') treated the directives set out in paragraphs (a) and (b) of Article IX consistent with this broader reading and provided that '[p]aragraph 6 of this Article specifies a strict time-limit for making remedies of de-registration and export available and requires the authorities responsible for de-registration and approval of exports to give co-operation and assistance to facilitate exercise of those remedies...' See POC para 5.53.



the state of registry; however, in paragraph (b) such authorities are mandated to ‘expeditiously co-operate with and assist the creditor in the exercise of such remedies’ without imposing a deadline of five working days.<sup>61</sup>

The IDERA provisions contained in Article XIII of the Protocol similarly refer to the ‘remedies specified in Article IX(1)’<sup>62</sup> and do not suggest that de-registration remedies may only be exercised in conjunction with export remedies. The IDERA form itself separates these two remedies into separate paragraphs<sup>63</sup> and upon a plain reading of the form there is no suggestion that these remedies must be used in tandem.<sup>64</sup>

With regard to the IDERA Route then, the issue is less about whether one must exercise both remedies concurrently but rather whether the IDERA itself has any extraterritorial effect such that it could be used to assist with the export of the designated aircraft in a jurisdiction outside the jurisdiction of registry. While that would certainly be useful for a financier, we do not believe that the IDERA should be used in that fashion. By its terms, the IDERA is specifically addressed to a registry authority and in several places requires the party completing the IDERA to insert into the form the ‘name of country’, which is intended to be the country of registry, thereby demonstrating

some intent that it serves the unique purpose of providing guidance to the specific authorities in the country of registry. The IDERA form also provides specific instruction to the authorities in the *named* country to co-operate with the authorized party with a view to the ‘speedy completion of such action’.<sup>65</sup> This again suggests that a broader use of the IDERA to assist with the export of an aircraft or related aircraft objects from any jurisdiction other than the one named may not have been intended. That the IDERA is intended to be recorded in the jurisdiction of registry and therefore presumably is readily available for review by authorities in such jurisdiction (and would not necessarily be so available to the administrative authorities in any other jurisdiction) further supports this narrower interpretation.

It is worth noting that Article XIII of the Protocol contains language in paragraph (4) which is similar to the language contained in paragraph 6(b) of Article X, instructing ‘[t]he registry authority and other administrative authorities in *Contracting States*’ (*emphasis added*) to expeditiously co-operate with and assist the authorized person in the exercise of remedies under Article IX. The language in Article XIII, refers to ‘Contracting States’ rather than following the reference to ‘a Contracting State’ in Article X(6)(b), suggesting perhaps a broader reading of Article XIII. While it is unclear whether the potentially broader scope of this language was intended by the drafters, we believe that it should not be viewed as standing for the proposition of a cross-border utilization of an IDERA in order to seek the export of an aircraft from a Contracting State which is not the state of registry.<sup>66</sup> Given the narrower jurisdictional references in the IDERA form, it appears to make more logical sense to keep the IDERA itself limited to use within the state of registration named in the IDERA.

<sup>61</sup> Protocol, Article X(6)(b).

<sup>62</sup> Protocol, Article XIII(3).

<sup>63</sup> The actual text of the IDERA form (attached as an Annex to the Protocol) provides that the authorized party (or its designee) is entitled to:

(a) procure the de-registration of the aircraft from the [insert name of aircraft register] maintained by the [insert name of registry authority] for the purposes of Chapter III of the Convention on International Civil Aviation, signed at Chicago, on 7 December 1944, and

(b) procure the export and physical transfer of the aircraft from [insert name of country]

<sup>64</sup> Notwithstanding this plain reading, the Federal Aviation Administration in the United States has, to date, taken a more restrictive view and currently limits the use of an IDERA to those situations in which the authorized party seeks not only to de-register an aircraft but also export such aircraft from the United States. 14 CFR 47.47(a)(2012).

<sup>65</sup> See Annex to Protocol.

<sup>66</sup> More than likely the provisions of Article XIII(4) were drafted simply to be consistent with the other provisions in the Protocol addressing the exercise of these remedies, while not seeking to expand the scope and use of an IDERA.



### *Applicable aviation safety laws and regulations*

Article IX(5) of the Protocol requires the registry authority in a Contracting State 'subject to any applicable safety laws and regulations' to honour a properly submitted request for de-registration and export.<sup>67</sup> As highlighted above, another Protocol provision also mandates that applicable authorities are to expeditiously co-operate with creditors in the exercise of the de-registration and export remedies under Article IX(1) of the Protocol, but only in conformity with (and without affecting) the 'applicable aviation safety laws and regulations'.<sup>68</sup> In addition, Article XIII(3) provides that the authorized party may exercise de-registration and export remedies 'only in accordance with the [IDERA] and applicable aviation safety laws and regulations.'

So, what is intended by the phrase 'safety laws and regulations'? The phrase is not defined in the Protocol, nor in the Convention, but the Official Commentary provides relevant and insightful guidance:

...the duty to honour the IDERA is subject to any applicable safety laws and regulations (Article XIII(3)). These will normally be applicable *only* to export and physical delivery, not to de-registration. As with the court route, the IDERA route is intended to be purely documentary; the purpose is to dispense with the need for the authority to investigate any external facts. (*emphasis added*)<sup>69</sup>

As noted from the Official Commentary then, any conditional compliance with applicable safety laws and regulations should not apply to the de-registration remedy in isolation. This conclusion logically follows from the fact that de-registration of an aircraft does not mean that the aircraft is necessarily required to move and therefore that it must be capable of lawful, safe operation. Indeed, registration and operation/airworthiness are separate and distinct: it is possible, for example, that a regulator may

revoke the certificate of airworthiness for an aircraft on its registry without impacting the aircraft's registration.<sup>70</sup> While in practice aircraft registration and airworthiness certification are often dealt with in parallel, there is an important distinction between the two that is recognized by the Official Commentary, and it seems correct to us that the de-registration remedy should be made available without safety regulations being relevant. This is also consistent with the discussion above highlighting that the exercise of de-registration rights, in isolation from export remedies, is not dependent upon repossession of the aircraft by the creditor (as presumably it would be difficult if not impossible to comply with any applicable safety laws or regulations in respect of an aircraft when not in possession of it).

Notwithstanding the clear mandate set forth above, at least one registry authority has concluded (in the authors' view incorrectly) that 'safety laws and regulations' empower it require compliance with numerous preconditions to the exercise of a creditor's de-registration rights under an IDERA. The Irish Aviation Authority ('IAA'), through its Safety Regulation Division, issued an Aeronautical Notice recently setting forth the protocol it would follow upon receipt of a request for de-registration under an IDERA. The notice stated the requesting party must certify 'that all mandatory actions connected with deregistration have been accomplished, and [submit] certification for these tasks to verify the actions'. The IAA's notice attaches a form of de-registration request to be submitted by an authorized party which includes, as 'mandatory items,' the following:

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<sup>70</sup> See, for example, Chapter 2.5 of the Singapore Airworthiness Requirements, outlining the requirements for a Permit to Fly for, *inter alia*, aircraft which are registered in Singapore but no longer hold a valid Certificate of Airworthiness. See also the US FAA regulations concerning revocation of a Certificate of Airworthiness, 14 CFR §21.181 (2012), which do not also invalidate the registration of the relevant aircraft, and 14 CFR §47.3 (2012), listing the requirements for registering an aircraft, which do not include an evaluation of the aircraft's airworthiness.

<sup>67</sup> Protocol, Article IX(5).

<sup>68</sup> Protocol, Article (X)(6)(b) and (7) and Article XI(8)(b).

<sup>69</sup> Official Commentary, Goode (n 16) para 3.36.

- Nationality and registration marks are removed from the aircraft.
- Fireproof plate removed from the aircraft.
- Mode S code has been negated.
- 406 Mhz emergency locator transmitters have been removed or code negated.
- All Irish Aviation Authority certificates as issued to the aircraft are returned to the Authority.

Presumably, the reason for these additional requirements is to reduce the likelihood of operation of the aircraft while (apparently) still registered with the registry authority. This is an understandable position for an aviation authority to take; however, in our view it would be better if these ends could be achieved by other means which are less likely to hinder the exercise of the de-registration remedy made available under the Protocol.

A better approach to dealing with IAA's concerns is set out in the regulations issued by Transport Canada Civil Aviation Authority ("Transport Canada") to address de-registration by an authorized party when utilizing an IDERA. These regulations provide that '*[h]aving obtained the cancellation of the registration of the aircraft, if the aircraft is to be exported, the Authorised Party assumes responsibility for and must fulfill obligations under the [commercial aviation regulations] to allow removal of the aircraft from the Canadian aircraft registry (emphasis added)*' including certain of the same 'mandatory items' set out in the IAA's notice.<sup>71</sup> The regulations go on to further provide that 'The original of the nationality certificate issued by the CAAC shall be returned to it after de-registration'.<sup>72</sup> This approach is consistent with the Official Commentary in relation to safety laws and regulations because

the mandatory requirements (i) are not a precondition to cancellation of the registration of the aircraft and (ii) apply only 'if the aircraft is to be exported'. Because operation of an unregistered aircraft is illegal, presumably Transport Canada is taking the sensible view that cancelling registration of an aircraft is sufficient means to prevent its further operation with Canadian identification, and it has placed the responsibility for removing the Canadian identification squarely on the shoulders of the person seeking to de-register the aircraft - the authorized party - prior to export.

That safety laws and regulations would be solely relevant to export and physical transfer of an aircraft follows logically from the implication that an aircraft being exported or physically transferred may well be operated and therefore export and physical transfer are much more likely to implicate safety rules. And it is worth pointing out for the sake of clarity that the Protocol's 'export' remedy is not in our view intended to place any obligation on a registry authority to issue a certificate of airworthiness for export (or, as discussed below, any requirement on the creditor, as a condition to exercise of such remedy, to put the aircraft in a suitable condition so that such a certificate would be issued). This sort of certificate of airworthiness, which is often part of an ordinary course transfer of an airworthy aircraft between states, is not something that we believe the Protocol had in mind when it directed the registry authority and other administrative authorities to 'expeditiously cooperate with and assist' in the exercise of Article IX remedies; instead, the obligation to provide assistance in the 'export' of the aircraft is meant to deal only with the legal aspects of removing property from the relevant jurisdiction lawfully and the only obligation on the part of the authorities is to provide necessary assistance in order to allow the creditor to achieve that aim (subject to applicable safety laws and regulations).<sup>73</sup> Similarly, the registry authority

<sup>71</sup> See *Staff Instruction SI 200-001*, Issue 01, Effective Date 30 April 2014, available at [https://www.tc.gc.ca/media/documents/ca-opssvs/SI\\_200-001\\_Issue\\_01.pdf](https://www.tc.gc.ca/media/documents/ca-opssvs/SI_200-001_Issue_01.pdf), accessed 30 September 2014.

<sup>72</sup> *Ibid.* See also *Administrative Procedures for the De-Registration of Nationality of Civil Aircraft According to an IDERA*, Document No. AP-45-AA-2011-02R1, Date of Issuance 14 June 2011, para 3.4.

<sup>73</sup> While any deep analysis of the relationship between the Cape Town Convention and national law is beyond

should not require compliance with the protocols and requirements needed in order to issue an unqualified airworthiness certificate as a precondition to permitting export. Compliance with the standards established for the issuance of this type of certification is unnecessary in an enforcement context when a creditor would normally be looking only to move the aircraft to a protective environment (i.e., out of the debtor's jurisdiction) and would be an unnecessary expansion of the 'applicable safety laws and regulations' qualifiers. In a different context, registry authorities typically issue special flight permits (commonly referred to as ferry permits) to permit flight for aircraft that may not otherwise meet applicable unqualified airworthiness requirements. The aim of a special flight permit is to establish that an aircraft is capable for safe flight and in our view satisfaction of comparable requirements in an enforcement context (subject to suitable restrictions on operation) achieves the proper balance between a creditor's Convention rights and applicable safety concerns and therefore should be the standard applied when a creditor seeks to avail itself of the export remedies under the Convention. It would then be the responsibility of the creditor to concern itself with re-registration of the aircraft in a new state, and with the airworthiness requirements of that new state of registry, once the aircraft is de-registered and exported.

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the scope of this article, it is clear that the Convention remedy is not intended to address or supersede regulatory public law measures in a Contracting State and is not an authorization to transfer the aircraft to any specified territory (for example, in violation of applicable export control limitations or economic sanctions) but rather is only authority to transfer such aircraft from its existing territory. This is an important distinction as the Cape Town Convention should not be viewed as a means of circumventing otherwise applicable regulatory public law, criminal law or other laws which pose no conflict with the Convention. Official Commentary, Goode (n 16) para 2.9. As such, it is important to recognize that any export sought by a creditor in the context of the exercise of remedies would nonetheless need to be compliant with a state's general restrictions and public policy in this context.

### *Application to 83bis situations*

In an effort to resolve the problems associated with international leasing or charter operations in terms of determining the particular aviation authority bearing the responsibility of oversight functions for maintenance, safety and the like, i.e., the state of registry or the state of the operator, the International Civil Aviation Organization ('ICAO') put forward a mechanism permitting the transfer of duties and functions from the state of registry to the state of the operator in order to ensure better regulation and oversight over air safety in the case of international lease, charter or interchange of aircraft. The legal framework detailing the terms of the agreement is contained in the protocol relating to Article 83bis ('83bis') of the Convention on International Civil Aviation.<sup>74</sup> Transfer of oversight functions and duties in this context could include a variety of functions including compliance with the rules and regulations relating to the flight and maneuver of aircraft in force, issuing and rendering a valid aircraft certificate of airworthiness, and issuing and rendering valid pilots' and other crew members' licences.<sup>75</sup>

In the context of an 83bis scenario, an aircraft is purposely registered in a jurisdiction other than the home jurisdiction of the operator. As the financed aircraft would none-the-less be based in such operator's jurisdiction, the remedies of de-registration and export must be specifically considered and analyzed in the context of two separate jurisdictions.

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<sup>74</sup> *Article 83BIS, Protocol Relating to an Amendment to the Convention on International Civil Aviation*, signed at Montreal on 6 October 1980.

<sup>75</sup> To effect the transfer, the parties must enter into transfer agreements, which must state, specifically, the duties and functions to be transferred. Such agreement shall be recognized by all other contracting states which have ratified it. The state of registry shall be relieved of responsibility in respect of the functions and duties transferred. *Article 83BIS, Protocol Relating to an Amendment to the Convention on International Civil Aviation*, signed at Montreal on 6 October 1980, Section 1.

If the country of registry is a Contracting State under the Cape Town Convention, there is no reason why an IDERA in this scenario could not be recorded in the state of registry (in which case following a default the creditor would likely enforce its right to de-register via the IDERA Route).<sup>76</sup> Even if an IDERA is not issued, the remedy of de-registration would be available in the country of registry using the Court Route (assuming the applicable Contracting State made the relevant declaration). The mere fact that the operator is not based or even operating in said jurisdiction should not pose any impediment to the exercise of the de-registration remedy.

Similarly, if the creditor sought to exercise remedies against the debtor airline in its home jurisdiction, it could utilize the Court Route, if available. In such a scenario, the availability of the IDERA would not be helpful in the context of Cape Town remedies since its effectiveness is limited to the jurisdiction of registry.<sup>77</sup>

#### *IDERA form and formalities of execution and enforcement*

A critical element of the proper implementation of the IDERA provisions of the CTC is the establishment of procedures for recording IDERAs with the local registry authority setting up a mechanism for acceptance of an IDERA by the registry and for maintaining a suitable record or file of the particular

<sup>76</sup> Even if the country of registry was *not* a Contracting State, an IDERA may still prove useful if, under applicable laws of such state, said instrument would be effective to delegate appropriate authority to the authorized party to cause de-registration (although there would, in this instance, be no additional compulsion on the applicable authorities to act expeditiously to cause any such de-registration).

<sup>77</sup> Some commentators have suggested that it may be helpful in these situations to have an IDERA nonetheless registered/recorded with the aviation authority in the operator's home jurisdiction. Any such registration would be without legal effect, in our opinion, unless recognized by otherwise applicable (non-Cape Town Convention) law and should not permit the creditor to achieve either de-registration or export of the aircraft from such jurisdiction utilizing the protections afforded by the Cape Town Convention.

authorized party and any certified designee so that it is clear who has the authority to exercise de-registration and export remedies for a particular aircraft under an IDERA and so that a valid de-registration request may be honoured expeditiously. As stated above, recording an IDERA is the responsibility of the local registry authority and not the International Registry. Thus, implementing regulations must set out specific guidelines to contracting parties for the formalities which must be complied with in order to record IDERAs in line with the aims of Article XIII of the Protocol.

A properly recorded IDERA puts specific burdens on the registry authority to honour requests for de-registration and export and requires the registry authority and other administrative authorities to co-operate and assist with the exercise of these remedies. A registry authority must honour any such request even if applicable law would not otherwise recognize an IDERA, would typically place certain conditions on the exercise of rights under such a document or would normally allow such a document to be revoked. These principles are fundamental to the CTC.<sup>78</sup> The corollary to the above then is the inherent limitation imposed on Contracting States that they may not impose additional requirements and burdens to the effectiveness of an IDERA not otherwise contemplated by the CTC.<sup>79</sup> These additional requirements may take the form of added pre-requisites to the effectiveness of an IDERA or even to changes to the prescribed form of IDERA which is annexed to the Protocol.

<sup>78</sup> As set out in Jeffrey Wool and Andrej Jonovic, 'The relationship between transnational commercial law treaties and national law – A framework as applied to the Cape Town Convention' (2013) 2 *Cape Town Convention Journal* 65 at 75 the CTC must be viewed as 'pre-empting national law rules that are incompatible with the Convention, such as those that purport to...add to the de-registration, export, and IDERA provisions by permitting the civil aviation authority to act in a quasi-judicial capacity and/or require the debtor's consent to the exercise of IDERA rights.'

<sup>79</sup> As a general matter then, governments may not impose conditions on or take actions that would adversely impact basic CTC rights, including on matters on which the CTC is silent. *Ibid.*

Take, for example, the form of the IDERA itself. The form is set out as an Annex to the Protocol. Article XIII of the Protocol further provides that to be effective, the IDERA must be 'substantially' in the form attached to the Protocol. A Contracting State would run afoul of the treaty provisions (and potentially dilute its usefulness) if it were to materially alter the form itself as a requirement to recordation and/or effectiveness in such State.<sup>80</sup> However, the use of the term 'substantially' gives rise to the possibility that some such changes would be permissible so long as the intent of the IDERA-related provisions of the CTC are honoured and its broader purpose achieved. For example, the implementing legislation for some jurisdictions does not contemplate counter-signature of each IDERA by the registry authority as means of acknowledging that the registry authority agrees to the terms of each IDERA. Instead, the registry authority's agreement to the terms of the IDERA is 'deemed' to occur upon acceptance of the IDERA for recordation, as evidenced by a stamp.<sup>81</sup> In the view of the authors, this sort of change would not render an IDERA

recorded in that jurisdiction invalid nor under these circumstances would deletion of the registry authority's counter-signature block do any harm to the intent and purpose of the provisions of Article XIII. In another example, the US FAA requires that a notation be made on each IDERA describing the specific security interest to which it relates.<sup>82</sup> Again, such a change should be permitted because it does not negatively impact basic rights and would not in any way limit or restrict the ability of the parties to obtain the benefits of the CTC. However, any alteration to the form which creates additional conditions to an IDERA's effectiveness or otherwise alters its substantive terms would undermine the intent and purpose of Article XIII and must be avoided in implementing regulations.<sup>83</sup>

Procedural rules regarding execution and utilization of an IDERA in a particular jurisdiction should also be considered in this context. For example, many jurisdictions require documents to be notarized and authenticated (consularized) in order to be used

<sup>80</sup> Certainly it could also be inferred by the CTC that Contracting States may not be permitted to make any changes to the form attached to the Protocol because the use of the term 'substantially' in Article XIII of the Protocol relates to the debtor's submission of the IDERA and thus it could be argued that the registry authority has no right to refuse to give effect to an IDERA in the prescribed form. As a practical matter, however, it makes more sense for a Contracting State to approve a form IDERA meeting the substantiality test and utilize this form for all IDERAs recorded in that State for the sake of consistency and certainty. Accordingly, the authors have no objection to a registry authority specifying in implementing regulations the form of IDERA it will accept, even if that form includes modifications that are non-substantive and minor in nature. Care must be used in such implementing regulations if any minor changes are made, and of course it would be far better for treaty compliance purposes to use the exact form annexed to the Protocol.

<sup>81</sup> It would be a different result if a registry authority sought to delete the acknowledgment and agreement entirely – and not provide for the functional equivalent through other means – as such a change would be deemed a substantial deviation from the form.

<sup>82</sup> US Department of Transportation, *Recording of Aircraft Ownership and Security Documents* § 13, available at [http://www.faa.gov/licenses\\_certificates/aircraft\\_certification/aircraft\\_registry/media/afs-750-93.pdf](http://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/media/afs-750-93.pdf), accessed 30 September 2014. This notation assists the FAA in cross-indexing the IDERA to the security documents which are also recorded in the aircraft registry.

<sup>83</sup> It remains to be seen what action could be taken by a Contracting State that imposes undue changes to the form IDERA or establishes unnecessary or cumbersome requirements for its execution, recordation and/or enforcement. Once the Convention is in force in a Contracting State it is obliged to ensure that its domestic laws give effect to the applicable provisions of the Convention. The obligations under Article XIII of the Protocol impose positive obligations on any Contracting State that made the related declaration to apply the IDERA provisions. Failure to comply with these obligations would be a breach of the Convention by such State. Unfortunately, the traditional view is that a private party cannot assert treaty rights directly against a Contracting State in such a scenario and as such an aggrieved party would need to invoke the aid of the State of which it is a national to take the issue up on its behalf. See Official Commentary, Goode (n 16) para 2.236.



is such jurisdiction. Would then a requirement that an IDERA be similarly legalized prior to recordation with a specific registry authority be consistent with the terms of the CTC? Given the *sui generis* nature of international interests and the clear intent of the drafters of the Convention to dispense with unnecessary local law requirements which may give rise to impediments to enforcement (absent concerns under applicable aviation and safety laws and regulations), such limitations to the effectiveness of an IDERA should, if possible, be avoided and those jurisdictions which seek to impose these procedural requirements should look to amend their internal procedures to specifically authorize the use of the IDERA without the need to comply with such formalities. While the legalization requirements and process may not create an undue burden to establishing an effective IDERA, if the sum of such requirements effectively deny or limit in any material way the availability of the IDERA approach, then they would seem to violate the spirit of the provisions of Article XIII which are intended to dispense with the need for the regulatory authority to investigate any external facts.

Similarly, the regulations implementing the IDERA provisions into national law of a Contracting State must be consistent with the foregoing and may not impose any additional requirements or burdens to effective utilization of IDERA rights by an authorized party (or its certified designee). Following China's ratification of the Cape Town Convention, the Civil Aviation Administration of China ("CAAC") issued procedures in respect of de-registration of aircraft using an IDERA. These procedural requirements included, as a specific condition to de-registration and export, the presentation of a document issued by a local court approving such remedies. Having made the declaration under Protocol Article XIII, however, China implicitly agreed that the CAAC would act upon the IDERA (notwithstanding its other declarations under Convention) without the requirement for any court action.<sup>84</sup> The CAAC's rationale

<sup>84</sup> See Official Commentary, Goode (n 16) para 5.70 which clarifies that the IDERA route does not involve a court order.

for requiring a court document was that as China did not make the applicable declaration under Article 54 making remedies under the Convention available without leave of court, de-registration rights under the IDERA (which clearly involve the exercise of remedies) should be similarly limited.<sup>85</sup> Although consistent with the overall package of remedies available to a financier in China, this approach is at odds with the basic underpinnings of Article XIII and it is not recommended that other Contracting States follow this path.<sup>86</sup>

What if it is not the registry that makes changes to the IDERA form but rather the issuer of the document? An example might be a debtor who prefers to expressly recite in the body of an IDERA that it is only exercisable following the occurrence of an event of default under the applicable financing document. Should the registry authority accept the IDERA and give effect to the supplemental

<sup>85</sup> Following consultations, compromise wording for the procedures in China was ultimately agreed that effectively limited the scope of the required court order to provide only that the authorized person under the IDERA is entitled to possession of the aircraft under the Cape Town Convention (this would mean that a creditor could deliver a court order issued by a Chinese court pursuant to Article X of the Protocol (authorizing possession) to the CAAC, and this order would satisfy the condition). Although any requirement for a court order has the potential to severely impede the exercise of remedies, the applicable Chinese court, under China's existing declarations in respect of what constitutes 'speedy' relief for purposes of Article 13(1) of the Convention, would need to act within 10 days and as such it was generally felt that the added burden was not so significant as to materially impede a creditors right to seek de-registration and export via the IDERA Route. If a jurisdiction has not made this declaration under Article X of the Convention, then any requirement for a court order would more seriously jeopardize the availability of IDERA remedies and the applicable Contracting State could be the subject of a dispute for failure to comply with its treaty obligations (and certainly financiers would be wise to consider the ramifications of any such requirement).

<sup>86</sup> See Aviation Working Group, *Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol: Summary of National Implementation* (October 2013), available at [http://www.awg.aero/assets/docs/CTC-IP\\_Summary\\_Chart.pdf](http://www.awg.aero/assets/docs/CTC-IP_Summary_Chart.pdf), accessed 30 September 2014.



terms? This is obviously an easier case since in this instance such a change materially alters the IDERA form and, therefore, it would fail to be 'substantially' in the form set out in the Annex. The regulatory rules of most jurisdictions having made the Article XIII declaration specifically (and correctly) prohibit submission of a non-conforming IDERA. While the parties to a transaction are always free to contractually alter the availability of specific remedies, it should not be left to the specific registry authorities to decipher the intent of the parties when submitting an IDERA form.

### Conclusion

The availability and reliability of de-registration and export remedies will remain critically important to a financier's decision to enter into an aircraft lease or secured loan transaction because an aircraft cannot be remarketed effectively, and the creditor cannot properly mitigate its damages, until the aircraft

is de-registered and exported. The Cape Town Convention offers Contracting States, and companies doing business there, significant clarity, enhancement and predictability in respect of these important remedies in the context of such transactions. Much of the Cape Town Convention, particularly as it relates to remedial rights available to financiers, supplements or provides entirely new remedies otherwise available in a non-Cape Town Convention setting, so it will take time and effort by Contracting States to further develop and embed these concepts with the local courts and with registry (and other) administrative authorities. Due in large part to clear and unambiguous guidance provided by the Official Commentary, coupled with the ever watchful efforts of industry groups such as the AWG, these concepts and approaches will, over time, be further refined with the ultimate goal to provide financiers and operators with the needed certainty in order to achieve the aims of the Cape Town Convention.