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Ludwig Weber

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# Public and private features of the Cape Town Convention

Ludwig Weber\*

*The mechanism of the Cape Town Convention (CTC) – with its two instruments approach, public and private actors, the declarations system, and involving a single International Registry with global reach – is a complex one. Both public and the private features in the CTC interface closely to achieve the objective of facilitating asset-based financing at the international level across national borders. The public features of the Convention include the International Registry System with treaty status, the declaration system, the designated entry points and the jurisdiction provisions. They essentially serve the purpose of enabling the remedies set out in the CTC and the Protocol to be exercised in an appropriate and effective manner. The private features of the Convention include the remedies themselves, including the default remedies, remedies of speedy relief, self-help remedies, and remedies in insolvency. They are exercised by private parties in their own right. The purpose of the following article is to focus on the duality of public and private features in the CTC.*

## 1. Introduction

The Cape Town Convention ('CTC' or the 'Convention'), adopted on 16 November 2001 and in force since 1 March 2006, has now 68 States Parties while the related Aircraft Protocol (the 'Protocol') has now 59 States Parties.<sup>1</sup> Among these are major aviation States as well as States involved in the manufacturing and/or financing of aircraft, including Australia, Brazil,

Canada, China, Indonesia, Nigeria, Russia, Spain, Turkey, the United States and, as from 1 November of this year, the United Kingdom.<sup>2</sup>

The International Registry (the 'Registry') established under the CTC became operational concurrently with the entry into force of the CTC. Since that date, in a time span of little less than 10 years, registrations against more than 340,000 aircraft objects have been entered on the Registry. Roughly two-thirds of these are engines, one third airframes and about 4% helicopters. In 2014, approximately 100,000 new registrations were recorded and the total number of registrations now stands at 613,900.

As a result, in a relatively short time span, the centre of gravity in the financing and leasing of aircraft and engines has shifted from purely national registrations to registrations under the

\* Senior Civil Aviation Policy and Management Adviser/Project Coordinator, International Civil Aviation Organization (ICAO); Adjunct Professor, McGill University, Montreal; formerly Director, Legal Bureau, ICAO, and in charge of the CTC development process for ICAO from 1998 to 2001; on behalf of the Preparatory Commission for the International Registry, in charge of the establishment of the International Registry from 2004 to 2006. This article was written in the author's personal capacity. The valuable assistance of Artur Eberg, LL.M. (McGill), Air Law and Business Consultant PMP (PMI), in the research for this article is acknowledged. Email: [lweber@icao.int](mailto:lweber@icao.int)

<sup>1</sup> Status as of 15 August 2015; for the text of the instruments, see ICAO Docs 9793 and 9794; for their status, States Parties and declarations, see <<http://www.unidroit.org/status-2001capetown>>, accessed 6 September 2015.

<sup>2</sup> The UK ratified the CTC on 27 July 2015 and the instruments will enter into force for the UK on 1 November 2015. The UK extended their application to the Cayman Islands, an important centre for off-shore financing. See <<http://www.unidroit.org/status-2001capetown>>, accessed 6 September 2015.

CTC in the Registry, and in many cases to a mix of both.

In a globalized economy and particularly in civil aviation which is one of the four enablers of globalization together with shipping, telecommunications and the Internet, there was obviously a need for such a facility and even though there may be shortcomings, the CTC can be regarded as a success.

The relatively high rate of ratifications of the CTC and its Protocol and the high volume of registrations can be explained by four main factors:<sup>3</sup> (1) the need for a legal framework of this type in the aircraft transaction market, (2) the Convention's balanced, practical approach and clear drafting style, (3) exceptionally strong practical needs to mitigate the credit risk in the field of aircraft finance, and (4) a 'Cape Town discount' for aircraft operators reducing the cost of credit, made available by governmental export credit agencies under an OECD understanding, starting in 2006 (for details, see Part 2c(iv) below).

The mechanism of the CTC, with its two instruments approach, public and private actors and involving a single International Registry with global reach, is a complex one. The purpose of this article is to focus on the duality of public and private features in the CTC.

## 2. Public features

### 2a. International Registry System

The most visible public feature of the CTC is the International Registry established under the Convention.<sup>4</sup> It has a unique status, since it is presently the only global electronic registry established under public international law.<sup>5</sup>

<sup>3</sup> L Weber and A Eberg, 'The Cape Town Convention and its implementation in the Commonwealth of Independent States (CIS)' (2014) 39(1) *Air and Space Law* 1, 4.

<sup>4</sup> Chs IV and V of the Convention (Arts 16–26); Ch III of the Protocol (Arts XVII–XX).

<sup>5</sup> There are also several other international global registries, such as the *UNESCO Memory of the World*

The International Registry is established for the registration of international interests as defined in Article 2 of the Convention as well as of prospective international interests, assignments and prospective assignments of such interests, acquisitions of such interests by subrogation, registrable non-consensual rights and interests, notices of national interests, and subordinations of interests. In line with the Protocol, the mandate of the International Registry is limited to interests in aircraft objects, ie, airframes, aircraft engines and helicopters. In accordance with Article III of the Protocol, the Registry may also register contracts of sale and prospective sales of aircraft objects.

The International Registry is an electronic notice-based registry. Registration, modifications of registrations and discharges may only be effected through electronic means by use of the Internet, and not in hardcopy. Furthermore it is sufficient for the user to give notice to the Registry in the form of electronically transmitted information in accordance with the applicable Regulations and Procedures for the International Registry. The user is not required to submit evidence in the form of signed hardcopy documents, and the Registry is not obligated to check the veracity of the information submitted by users; neither is the Registry responsible or liable for incorrect, misspelled or otherwise erroneous information transmitted by users.

The authority of each user can however be ascertained and checked through the mandatory user registration system, which involves *inter alia* the allocation of a unique digital

*Register, the UNESCO Higher Education Institutions Registry, the International Art Loss Register (London) and the International Domain Name Registry, administered by ICANN. However, the UNESCO registries are listings compiled by UNESCO committees. The London Art Loss Register and the ICANN Registry were set up by private parties and do not have public law status. The International Art Loss Register is operated by a commercial company, while ICANN, the operator of the domain name registry for the Internet, is a non-profit corporation incorporated in the US. Other international global registries were also set up and are operated by non-governmental parties.*

certificate to each user for the purposes of authentication. Access to the Registry for purposes of registration is restricted to registered users only. Registered users can be private parties or public entities, but in practice virtually all users are private parties.

Since March 2006, the Registry is open for registration of international interests in aircraft objects.<sup>6</sup> Registration gives public notice of the international interest globally. It enables the creditor to preserve its priority over other competing interests. In insolvency proceedings, it enables the effectiveness of the registered interest as against competing creditors as well as the debtor.<sup>7</sup> So far only the Aircraft Protocol is in force, but should the Railway Assets Protocol or Space Assets Protocol ever enter into force, the International Registry is designed also to be able to accommodate these additional assets.

Under Chapter IV of the CTC, the International Registry System comprises the International Registry itself, a Supervisory Authority (the 'SA') with international public status, and Regulations and Procedures adopted by the SA. The Conditions of Use of the Registry are adopted by the International Registry itself, subject to the approval by the SA.

## 2b. *The role of ICAO*

Pursuant to Resolution No 2 of the Cape Town Diplomatic Conference of 2001, the Council of the International Civil Aviation Organization ('ICAO') accepted the mandate to act as Supervisory Authority of the International Registry with regard to aircraft objects. ICAO, the UN Specialized Agency for civil aviation, has exercised that supervisory function since March 2006. Prior to that date, it provided the Secretariat for the Preparatory Commission for the International Registry

which was in charge for setting up the International Registry by the time of entry into force of the CTC.<sup>8</sup>

In accordance with Article 17 of the CTC, the Supervisory Authority has the mandate to establish the International Registry, to appoint and dismiss the Registrar, to supervise the operation of the Registry, and 'to do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol'.<sup>9</sup> The Supervisory Authority shall report periodically to contracting States concerning the discharge of its obligations under the Convention and Protocol.<sup>10</sup>

The Supervisory Authority has issued Regulations and Procedures for the International Registry in conformity with Article 17 paragraphs 2(d) and (e) of the Convention. The Regulations provide rules, *inter alia*, on the information required to effect the different types of registrations, amendments and discharges, rules on searches, on operational complaints and on relations with designated entry points. The procedures are administrative in nature and address administrative items required by the Regulations as conditions of use of the International Registry, or otherwise relating to the technical operation and administrative processes of the International Registry. The Regulations and Procedures, being issued by the Supervisory Authority, regulate the Registry and the relationship to its users from a public-law viewpoint.<sup>11</sup>

By virtue of Chapter IV of the CTC and the International Registry Regulations and Procedures issued by ICAO, the Registry enjoys international public law status. It also enjoys international public oversight by ICAO of the registration of private interests and rights, which ensures:

<sup>6</sup> For a detailed account of the International Registry and its functioning, see L Weber, 'The New Registry for International Interests in Aircraft Equipment under the Cape Town Convention and Protocol of 2001' (2006) 55 *ZLW* 1.

<sup>7</sup> Art 30 of the Convention, Arts XI–XII of the Protocol.

<sup>8</sup> Regarding the role of the Preparatory Commission, see Weber (n 6) 3–5.

<sup>9</sup> See CTC Art 17 para 2(i).

<sup>10</sup> CTC Art 17 para 2(j).

<sup>11</sup> Regulations and Procedures for the International Registry, ICAO Doc 9864, 5th edn 2013.

- global accessibility;
- transparency of operations;
- publication of operating results;
- neutrality regarding users;
- accountability to the Supervisory Authority;
- availability of a complaints procedure;
- liability towards users for errors and omissions of the Registrar; and
- availability of judicial review.

These elements are highly important for the credibility and full functionality of the International Registry and also for the continued support of the International Registry System by States and by the user community. It is worth noting that in its almost 10 years of operations, involving on average 60,000 registrations per year some of which represent very significant monetary value, disputes over registrations or the operation of the Registry have been rather few. Less than 10 formal complaints have been lodged with the Registrar and only three cases of judicial review have been filed against the Registrar. All three cases concerned the discharge of registered non-consensual rights and interests and their removal from the registry.<sup>12</sup> The positive record and the sound operation of the International Registry System as a whole are important for establishing the credibility of this new type of institution at the international level.

### 2c. Declaration system

(i) *General remarks.* Under the provisions of the CTC, an elaborate declaration system has been established which aims at flexibility as regards State obligations flowing from the CTC, on the one hand, and standardization and transparency of individual State commitments, on the other. States ratifying the Convention must make certain declarations (mandatory declarations) at the time of ratification, the most important of which is the

<sup>12</sup> Cases *PNC Equipment Finance LLC v Aviareto* (Irish High Court, 19 December 2012), *Transfin v Stream Aero Investments* (Irish High Court, 20 April 2013) and *Belair Holdings Ltd v Etrole Holdings Ltd and Aviareto* (Irish High Court, 26 March 2015). See Part 2(e) below.

declaration on availability of self-help remedies, Article 54(2) of the CTC.

All declarations are published by the depositary and their full wording is available on the depositary's website. The declaration system is highly important for the status of registered international interests in the International Registry, and thus for the risk assessment of the related financial transactions.

(ii) *Mandatory declaration on self-help remedies.* Of the 68 States having so far ratified the CTC, a large majority, namely 52 States have declared that self-help remedies shall be available in their territories; eight other States have declared that self-help remedies shall not be available,<sup>13</sup> and the remaining eight States have not made any declaration on this subject, although the declaration is mandatory.

As has previously been pointed out, the States that have failed to make the mandatory declaration under Article 54(2) should be regarded as not fully compliant with the CTC. In line with Article 17 of the Vienna Convention of the Law of Treaties, the legal effect is restrictive treaty application. The practical effects are however not overly significant since in relation to these States, the CTC applies without any of the provisions on self-help remedies, in particular without Article 8(1), (3) and (4) of the CTC, ie, as if a negative declaration on self-help remedies had been made. Article 8(2) and Article IX of the Aircraft Protocol shall however be applicable.

(iii) *Optional declarations.* Most declarations are optional, among these are for example, declarations on internal transactions, on courts to have jurisdiction and on territorial units.

<sup>13</sup> Self-help remedies are not permitted in China, Cuba, Egypt, Kuwait, Mexico, Saudi Arabia, Spain and the UAE; they are permitted in all other States Parties having made a declaration under Art 54(2); see the Declarations on Article 54(2): <<http://www.unidroit.org/status-2001capetown>>, accessed 6 September 2015.

The same is true for the declarations under the Aircraft Protocol, such as declarations on speedy relief, on remedies on insolvency and on insolvency assistance. However, despite their optional nature, they are nevertheless a precondition for full treaty application, in particular Articles 13, 39, 40 and 55 of the Convention, and Articles XI, XII and XIII of the Protocol.

(iv) *Qualifying declarations under the ASU.* Certain declarations, eg, those on availability of self-help remedies, on remedies in insolvency and on speedy relief, are particularly important for the financial risk assessment of aircraft transactions. Consequently, they are treated as so-called ‘qualifying declarations’ under the OECD *Sector Understanding on Export Credits for Civil Aircraft (1 September 2011)* (the ‘ASU’).<sup>14</sup>

The term ‘qualifying declarations’ includes declarations which ought to be made, and others which ought not to be made. The first group includes those under Protocol Article VIII (Choice of law), Article X (Speedy relief), Article XI (Remedies on Insolvency, Alt. A), Article XIII (IDERA) and Convention Article 54(2) (Self-help remedies). The second group includes the declarations referenced in Article 3 of Annex I of Appendix II to the ASU, namely those under Convention Article 54(1) (excluding lease as a remedy under Article 13), under Convention Article 55 (opt-out of speedy relief) unless self-help remedies are declared available, and under Protocol Article XXIV(2) (opt-out of Article XXIV (1) providing for the Convention superseding the 1933 Precautionary Arrest Convention).

Under the ASU, a ‘Cape Town discount’ is available if the operator (or, in certain cases, the borrower) is situated in a Contracting State included in an eligibility list (the ‘Cape Town List’).<sup>15</sup> The decision to include a country on

the Cape Town List is made by the Participants in the ASU.<sup>16</sup> The main criterion is whether such Contracting State (1) has made ‘qualifying declarations’, and (2) has implemented the Convention and Protocol, in particular as regards the qualifying declarations.<sup>17</sup> Thus, there is a direct link between the qualifying declarations and the availability of the ‘Cape Town discount’ for financial aircraft transactions.

The amount of the ‘Cape Town discount’ is determined monthly by the OECD and published by it.<sup>18</sup>

(v) *States Parties without declarations.* Among the States having ratified or acceded to the CTC, there are presently seven States Parties without having made any declarations under the Convention<sup>19</sup> and five States Parties without having made any declarations under the Protocol.<sup>20</sup> It should be recalled that under the CTC, two declarations are

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Malaysia, Panama, Canada, Mongolia, Rwanda, Ethiopia, Myanmar, Senegal, Fiji, New Zealand, Singapore, Indonesia, Nigeria, Tajikistan, Kazakhstan, Norway, Turkey, Kenya, Oman, Luxembourg and Pakistan

<sup>16</sup> Currently the Participants are: Australia, Brazil, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland and the United States. See OECD Doc TAD/PG (2013) 11, Annex III: Sector Understanding On Export Credits For Civil Aircraft (2013), s 3.

<sup>17</sup> AWG, *A Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol* (revised edn November 2012), Annex B Part III.

<sup>18</sup> See: OECD, Premium and Interest Rates related to the Aircraft Sector Understanding, <<http://www.oecd.org/tad/xcred/asu.htm>>, accessed 6 September 2015. ASU2011 proposes to airlines less favorable terms than had existed before. Thus, the minimum premium charged by Export Credit Agencies (ECAs) for any supported financing has more than doubled, while the standard repayment term has been shortened and the amount of discount has been decreased.

<sup>19</sup> Burkina Faso, Côte d'Ivoire, Gabon, Moldova, Seychelles, Syria and Zimbabwe.

<sup>20</sup> Bahrain, Belarus, Bhutan, Cameroon, and Saudi Arabia. Two States, Kuwait and Latvia made a declaration under Article 54(2) of the Convention, which under Article XXXI of the Protocol is deemed to have also been made under the Protocol.

<sup>14</sup> OECD Doc TAD/ASU(2011)1, 31 August 2011.

<sup>15</sup> See the present status of the list, comprising 22 States, at <<http://www.oecd.org/tad/exportcredits/ctc.htm>>, accessed 6 September 2015, listing Angola,

mandatory (Article 54(2) for States and Article 48(2) for REIO's) and other declarations, while legally optional, are nevertheless required for full treaty application (Article 13, 39, 40, 55 of the Convention, and Article XI, XII, XIII of the Protocol).

As indicated above, in line with Article 17 of the Vienna Convention of the Law of Treaties the legal effect of ratification of CTC without any declarations is restrictive (partial) treaty application. This means that the CTC including the Protocol applies without the provisions for which according to their wording a declaration is necessary, namely Articles 39, 40, 50, 52–55, 57, 58 and 60 CTC and Articles XXIV, XXIX–XXXI, XXXIII and XXXIV of the Aircraft Protocol. Such restrictive or partial application of the CTC and the Protocol is legally in line with Article 17 of the Vienna Convention since the remaining provisions of the treaty can still stand on their own. However, it is clear that the value of the CTC and the Protocol in relation to these countries is much reduced under these circumstances, since the following important rules are essentially not applicable in these States Parties:

- self-help remedies (Article 54(2) of the Convention);
- speedy relief (Article 13, 55 Conv., Article X of the Protocol);
- priority of non-consensual rights and interests (Article 39(3), 40 of the Convention);
- priority rules on pre-existing rights and interests;
- insolvency (Article XI of the Protocol);
- insolvency assistance (Article XII of the Protocol); and
- deregistration and export request authorization (Article XIII of the Protocol).

From the viewpoint of creditors, lessors and financing parties, the essential remedies of CTC are not available in these countries, including self-help, speedy relief, IDERA, insolvency remedies and insolvency assistance procedures. The financing risk is accordingly higher.

It may be useful for the depositary, or for the AWG, to call the attention of the 12 States to this problem. Unless this is done, the 12 States may not be seen as fully compliant with CTC. This fact will undoubtedly be taken into account for risk assessment in the financing of aircraft.

(vi) *States without Protocol*. There are also nine States Parties who have ratified the Convention but not the Protocol.<sup>21</sup> This case is addressed in Articles 6 and 49 (1) of the Convention which provide that there is no treaty relationship with these States regarding aircraft objects. Consequently, the ratification of the Convention by these States is irrelevant for aircraft financing transactions and no remedies or rights are available under the Convention or Protocol in relation to aircraft, engines or helicopters in those States. Any registrations in the International Registry relating to debtors or operators situated in these States will not be enforceable.<sup>22</sup>

#### 2d. *Designated entry points*

Another public feature with visibility are the designated entry points for registrations. These entry points may be designated under Article XIX of the Aircraft Protocol and 18(5) of the CTC, and in practice they serve to utilize an existing national registration system as the entry point for CTC registrations. Thus, a registration on the national register serving as a designated entry point will, if it satisfies the requirements of the CTC, also simultaneously

<sup>21</sup> As of 15 August 2015, they include: Burkina Faso, Costa Rica, Côte d'Ivoire, Gabon, Moldova, Seychelles, Spain, Syria and Zimbabwe.

<sup>22</sup> It should be noted that the International Registry will accept registrations relating to aircraft objects of debtors or lessees situated in these countries and will not check the status prior to registration. Consequently, it is important for users to ascertain the status of the registrations as to enforceability by means of the Contracting State Search, s 7.5 of the Regs and 13(d) of the Procedures for the International Registry, ICAO Doc 9864, 5th edn 2013.

produce and transmit the information to the International Registry for registration.

It is interesting to note that so far, only eight States Parties to CTC have made use of this facility and have lodged a declaration on designated entry points (Albania, Brazil, China, Mexico, the UAE, Ukraine, Vietnam and the US); all of them have designated the national civil aviation administration, and in some cases specifically the civil aircraft registry, as the designated entry point. In five of these States, the designation is mandatory only for registrations as regards airframes and helicopters, but not as regards engines. International interests in aircraft engines can therefore be registered in these five States, including Brazil, Mexico, the UAE, Vietnam and the US, either through the national registry or directly with the International Registry.

For three States, namely Albania, China and Ukraine, the declarations under Article XIX of the Protocol provide that all registrations are to be made through the national entry point, which is the respective national civil aviation administration. This would include registrations relating to aircraft engines. However, it should be noted that this stipulation is not in line with Article XIX paragraph (2) of the Protocol, under which '[a] designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of aircraft engines'.

The result is at best ambiguous. The declarations of the three countries concerned containing the designation under Article XIX of the Aircraft Protocol mandate the private parties under their jurisdiction to use their national entry point for engine-related registrations, while the declarations are non-compliant with the CTC on this point. Private parties in these countries who register engine-related interests directly with the International Registry may risk non-compliance with their national law, although being entitled to register directly with the International Registry under the CTC.

This ambiguity should be removed. It may be useful for the depositary, or for the AWG, to call the attention of the three States to this problem. A small amendment to their respective declarations, to bring them in line with Article XIX paragraph (2) of the Aircraft Protocol, would be in order. Unless this is done, the three States cannot be seen as fully compliant with the CTC; this fact should be taken into account for risk assessment in the financing of engines.

Furthermore, it is not known whether the technical and IT infrastructure has been created in the civil aviation administrations of all eight countries with designated entry points to permit seamless interface with the International Registry. The extremely small number of registrations from some of these countries may suggest that this has not been done in all cases.

## *2e. Jurisdiction provisions*

The jurisdiction provisions of the CTC give primary importance to party autonomy: Article 42 of CTC gives the parties to a transaction the choice of forum, regardless whether or not that forum has a connection with the transaction of the parties. The CTC therefore leaves it entirely to the parties to negotiate and agree on forum; in practice, the preferred forum of the financing party/creditor/lessor will in most cases prevail as the agreed forum.

As regards court orders requested by the creditors for speedy relief, in particular in case of default, the courts of the Contracting State where the aircraft object is situated have jurisdiction concurrently with the forum chosen by the parties (Art 43 para 1 of the CTC) and, for airframes and helicopters, the State of Registry also has jurisdiction (Art XXI of the Protocol).

As regards court orders for speedy relief specifically for the lease or management of the object, Article 43 paragraph 2 provides for jurisdiction of the State where the debtor is situated, concurrently with the forum of choice

of the parties. For airframes and helicopters, the State of Registry also has jurisdiction (Article XXI of the Protocol).

It should be recalled that where self-help remedies are permitted, and this is the case in the large majority of States Parties to the CTC (presently 52 out of 68 States),<sup>23</sup> court orders under Article 13(1), 43 paragraphs 1 and 2 of the CTC are not required for repossession and lease or management of the object. Where self-help-remedies are exercised, the only relevant jurisdiction is the forum of choice of the parties under Article 42. Consequently, jurisdiction is in these cases more a private than a public feature of the CTC.

Article 44 provides for jurisdiction in relation to damage awards or orders against the Registrar. Since the International Registry has its seat in Dublin, Ireland, the Commercial High Court in Dublin has been declared by Ireland to be the competent court. This jurisdiction has already been exercised in three cases, namely *PNC Equipment Finance LLC v Aviarreto*,<sup>24</sup> *Transfin v Stream Aero Investments*<sup>25</sup> and *Belair v Etole and Aviareto*.<sup>26</sup> All three cases concerned the discharge of a non-consensual interest from the Registry. In the first case, a US court had ordered a US party to effect the discharge and that party failed to comply with the US court order. The plaintiff then obtained an order from the Commercial High Court in Dublin for the Registrar to remove the disputed registration from the Registry. In the second case, relating to entitlement to a sales commission, the Commercial High Court accepted that it had jurisdiction over the dispute stemming from Article 44 of the CTC and, deeming the registration invalid, ordered the defendant to discharge it from the Registry.

<sup>23</sup> Self-help remedies are not permitted in China, Cuba, Egypt, Kuwait, Mexico, Saudi Arabia, Spain and the UAE; they are permitted in all other States Parties, see the Declarations on Article 54(2): <<http://www.unidroit.org/status-2001capetown>>, accessed 6 September 2015.

<sup>24</sup> Irish High Court, 19 December 2012.

<sup>25</sup> Irish High Court, 20 April 2013.

<sup>26</sup> Irish High Court, 26 March 2015.

In the third case, the defendant Etole had made a registration of a non-consensual interest which did not fall under the Convention. The debtor was not situated in a Contracting State and no declaration under Article 40 had been lodged. Consequently, the registration was ordered to be discharged.

### 3. Private features

The default remedies of the CTC, giving creditors, lessors and other financing parties the legal tools to obtain speedy repossession of the aircraft object in the case of default, are core elements of the CTC system and the *raison d'être* of the instruments. They are designed to be exercised by private parties and set out in Articles 8 to 15 Convention and Articles IX to XVI of the Protocol.

In any situation where full repossession first requires deregistration and export of the aircraft object, a deregistration and export request will first have to be made to the national registry authorities of the State of registration. Unless IDERA<sup>27</sup> is used, that process can be complicated and lengthy, thwarting the objective of speedy repossession. Furthermore, in some countries, the re-export of the aircraft may trigger intervention by customs authorities. The following section focuses on the interface of private parties' default remedies with action by public authorities.

#### 3a. Default remedies and IDERA

The Irrevocable De-registration and Export Request Authorisation Form (IDERA), which is found in the Annex to the Protocol, is designed to speed up and facilitate the deregistration and export mechanism. It aims at the deregistration, export and physical transfer of the aircraft in accordance with the provisions of Article IX of the Protocol. The IDERA is presented to the registered operator or owner of the aircraft or helicopter in question for execution and signature. In line with Article IX (5) of the Protocol, the national registry

<sup>27</sup> See Part 3(a) below.

authority where the aircraft is registered as to nationality shall forthwith honor the request for deregistration and export, subject to applicable safety laws and regulations.

From the viewpoint of the registry authorities, IDERA has both a positive and a negative aspect. On the one hand, in cases of disputes between private parties following default, IDERA defines a relatively clear path of action for the registry authority which ought to permit staying out of the dispute. On the other hand, the normally available discretion of the registry authority is significantly narrowed. In the recent *Kingfisher* and *SpiceJet* cases before the High Court in India, the deregistration mechanism, IDERA and the related provisions in the CTC and Aircraft Protocol were put to the test.

*Kingfisher* case<sup>28</sup>. India had ratified the CTC in 2008. As a late fallout from the financial crisis, in 2012 Kingfisher Airlines ceased operations, with more than 1 billion USD owing. Two of the creditors and lessors of Kingfisher (namely DVB Bank ['DVB'] and the International Lease Finance Corporation [the 'ILFC']) lodged requests with the Indian Directorate General of Civil Aviation (the 'DGCA') and applications to the Indian courts to deregister and repossess their aircraft.

DVB, an acquisition financier for two A320-232 aircraft, sought to deregister and repossess its aircraft and successfully repossessed one of them, as it was outside of India, but faced difficulty in the deregistration process. Kingfisher objected to the deregistration of the aircraft, claiming that it had ownership rights. This led DVB to sue the DGCA and Kingfisher. Kingfisher argued that it had a purchase option and an acquired equity interest in the aircraft

through payment of rent to the lessor under the lease agreement.<sup>29</sup>

The court ultimately directed the DGCA to deregister the aircraft. The court, however, did not go into the merits of Kingfisher's claims that the deregistration of the aircraft conflicted with the airline's right to exercise its purchase option. Like DVB, the ILFC faced similar hurdles in regaining possession of its six leased aircraft. It took the company six months to secure the successful removal of one of its A321 aircraft.<sup>30</sup>

In this case, the CTC could not protect the petitioners because India had failed to adopt implementing legislation and adjust existing regulations, and therefore the pre-CTC local laws applied. Also, the acquisition and delivery of the aircraft had predated the ratification of the CTC by India. Meanwhile, commentators noted that India's behavior in the *Kingfisher* case had undermined the Cape Town Convention.<sup>31</sup>

*SpiceJet* cases<sup>32</sup>. In December 2014, SpiceJet, an Indian air carrier, had defaulted on payment of lease rent for three B737 aircraft. The foreign lessors promptly issued repossession notices to the airline. SpiceJet did not comply. The petitioners submitted the respective IDERAs to

<sup>29</sup> A Ramanathan and N Narayanan, 'Aviation Disputes in India: Flying Unchartered Skies', *Acquisition International* (1 June 2014) 45–60.

<sup>30</sup> 'Kingfisher Suspension Raises Question for Lessors & Financiers, Could Add to India's Cost Pressures', *Center for Aviation* (28 March 2013), <<http://centreforaviation.com/analysis/kingfisher-suspension-raises-question-for-lessors-financiers-could-add-to-indias-cost-pressures-102603>> accessed 6 September 2015.

<sup>31</sup> 'India's Misbehaviour Undermines Cape Town Convention', *Air Finance* (13 March 2013), <<http://www.airfinancejournal.com/Article/3341264/Indias-misbehaviour-undermines-Cape-Town-convention.html>>, accessed 6 September 2015.

<sup>32</sup> *AWAS 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr* (2015) WP(C) 871/2015 (India); *Wilmington Trust SP Services (Dublin) Limited v Directorate General of Civil Aviation & Anr* (2015) WP(C) 747/2015 (India).

<sup>28</sup> See 'Aircraft Deregistration and Repossession in India: Lessons from Kingfisher and SpiceJet', Katten, Muchin, Rosenman LLP (21 May 2015), <[http://www.kattenlaw.com/Aircraft\\_Deregistration\\_and\\_Repossession\\_in\\_India\\_Lessons\\_from\\_Kingfisher\\_and\\_SpiceJet#\\_ftnref13](http://www.kattenlaw.com/Aircraft_Deregistration_and_Repossession_in_India_Lessons_from_Kingfisher_and_SpiceJet#_ftnref13)>, accessed 6 September 2015.

the DGCA with a request to de-register the aircraft and permit their export and physical transfer to Singapore. The DGCA instructed SpiceJet to surrender the Certificate of Registration (COR) and deactivate the 'Mode S' transponder code of the aircraft. When the Airline failed to comply, the DGCA did not issue a deregistration order. Consequently, the lessors applied to the High Court in Delhi.

SpiceJet argued *inter alia* that the repossession of aircraft would impact public interest (labor, and passengers' rights), that the court had no authority to issue an order to DGCA for de-registration of the aircraft and that the issue of termination of the lease agreements first required determination by a competent court. Further, it argued that the DGCA on receiving the request for deregistration had the discretion, not an obligation, to issue a deregistration order; where, as was the case here, liens on the aircraft were subsisting for wages of employees, taxes and dues owed by the airline to various statutory authorities, the DGCA could not order the de-registration.

The High Court considered whether the petitioners are entitled to seek deregistration and export of the aircraft under the IDERA and, if so, what consequential relief ought to be granted. The court, after reviewing the commitments of India under the CTC and Protocol:

- confirmed the obligation of the DGCA to deregister the aircraft upon the lessors' application;
- determined that termination of the lease agreements is not required for the exercise of the default remedies under the CTC;
- rejected the argument that de-registration and re-possession of the aircraft would impinge upon the public interest; and finally,
- held that DGCA should forthwith de-register the aircraft.<sup>33</sup>

Meanwhile, upon a subsequent SpiceJet application, the court ordered that the DGCA give

<sup>33</sup> *SpiceJet* cases (n 32).

SpiceJet the opportunity to reach settlements. The settlements were agreed, and the plaintiffs did not need to petition for execution of the court's order of deregistration against the DGCA.

The *SpiceJet* case, while lessening some of the uncertainty surrounding the *Kingfisher* case, clarified the obligations of national registry authorities pursuant to an IDERA, at least in India. However, it is clear that in certain other countries the same problems may occur where national registry authorities may be reluctant to deregister aircraft of national carriers upon petition of foreign lessors or creditors in the absence of a court order.

As part of the fallout of the *SpiceJet* cases, in February 2015 the Ministry of Civil Aviation of India amended Rule 30 of the Aircraft Rules 1937, by insertion of a new sub-paragraph (7)<sup>34</sup> which mandates the DGCA to cancel a registration upon presentation of an IDERA.<sup>35</sup> While Rule 30 could formerly be read to give the DGCA a large degree of discretion, instead of an obligation, to cancel the registration upon receipt of deregistration request

<sup>34</sup> The new sub-paragraph reads as follows: '(7) The registration of an aircraft registered in India, to which the provisions of the Cape Town Convention or Cape Town Protocol apply, shall be cancelled by the Central Government, as provided in the Cape Town Protocol, if an application is received from IDERA Holder prior to expiry of the lease along with:—

(i) the original or notarised copy of the IDERA; and

(ii) a certificate that all Registered Interests ranking in priority have been discharged or the holders of such interest have consented to the deregistration and export:

Provided that the deregistration of an aircraft by the Central Government under sub-rule (6) or sub-rule (7) shall not affect the right of any entity thereof, or any inter-governmental organisation, or other private provider of public services in India to arrest or detain or attach or sell an aircraft object under its laws for payment of amounts owed to the Government of India, any such entity, organisation or provider directly relating to the services provided by it in respect of that object.'

<sup>35</sup> Ministry of Civil Aviation of India, Notification No GSR 78(E) dated 9 February 2015.

accompanied by an IDERA, that discretion has now been removed.<sup>36</sup>

Even before the *SpiceJet* cases, other States parties to the CTC had similarly clarified their national rules on deregistration to accommodate IDERA. In July 2014, the Turkish Civil Aviation Authority revised a Directive on Implementation and Enforcement of the IDERA to provide greater clarity on its recordation and enforcement.<sup>37</sup> In 2011, the Civil Aviation Administration of China had updated the administrative procedures regarding IDERA issued in 2009.<sup>38</sup> The amendment was made in order to improve the local regulations so as to implement the provisions of the Convention and the Protocol.<sup>39</sup>

Furthermore, in November 2014, the AWG issued guidance material on the subject, namely a 'Model Implementing IDERA Regulation',<sup>40</sup> which contains a model for a national IDERA Regulation and explanatory comments. Moreover, it published a useful 'Summary of Requirements regarding Deregistration and Export'.<sup>41</sup>

<sup>36</sup> *SpiceJet* Cases (n 32), para 22.3.

<sup>37</sup> See CTC Academic Project online: <<http://cdm15895.contentdm.oclc.org/cdm/singleitem/collection/p15895coll3/id/110/rec/1>>; also see AWG Summary of National Implementation (February 2015) p 24, <<http://www.awg.aero/assets/docs/CTC%20Summary%20Chart%20-%20Final%20Draft.pdf>>, both accessed 6 September 2015.

<sup>38</sup> Civil Aviation Administration of China, IDERA Administrative Procedures dated 24 August 2009.

<sup>39</sup> Clifford Chance, Client Briefing 'Recent PRC Legal Developments Relevant to the Aviation Sector: IDERA and Others', <[http://www.cliffordchance.com/briefings/2011/08/recent\\_prc\\_legaldevelopments\\_relevantto0.html](http://www.cliffordchance.com/briefings/2011/08/recent_prc_legaldevelopments_relevantto0.html)>, accessed 6 September 2015.

<sup>40</sup> AWG Model Implementing IDERA Regulation (November 2014), <<http://www.awg.aero/assets/docs/IDERA%20Regulation%20-%20AWG%20Model%20-%20FINAL%20NOV2014X.pdf>>, accessed 6 September 2015.

<sup>41</sup> AWG Summary of Requirements regarding Deregistration and Export, <<http://www.awg.aero/assets/docs/Summary%20of%20CTC%20Requirements%20re%20de-registration%20and%20export.pdf>>, accessed 6 September 2015.

### 3b. *Default remedies and customs authorities*

In some countries, one of the risks of the creditor or lessor in repossession and re-export is the intervention by customs authorities.<sup>42</sup> If at re-export of the aircraft there appear to be outstanding customs payments of the debtor or lessee with respect to the aircraft, the lessor may be required to settle them. It may become even more difficult if the lessee has committed any customs offence, including failure to comply with the applicable customs procedures, or otherwise breach customs legislation or regulations.

Certain of the debtor's or lessee's breaches of customs rules can lead, in accordance with the applicable law, to fines and/or the confiscation of the leased aircraft or engine; and, second, the customs authorities may be entitled to arrest the aircraft or engine during the administrative offence investigation.

For example, in the Russian Federation, when a sub-lease of a leased aircraft is arranged with permission of the lessor but without prior permission of the customs authorities, the airline can be subjected to an administrative fine. Such a fine can amount up to two times the cost of the aircraft (lease payments), and can result in confiscation thereof, although in practice confiscation does not seem to be applied. However, the customs authorities willingly utilize the authority to temporarily arrest the aircraft or other transport vehicles during the investigation of such cases. The rules of the Russian Customs Code which were in force before 1 July 2010, served as an additional barrier to re-export of the aircraft. Accordingly, the foreign lessor was unable to repossess the leased aircraft in a commercially reasonable manner.

*KrasAir* cases<sup>43</sup>. This issue is well demonstrated by the case of the three aircraft leased by *KrasAir*, a Russian international scheduled airline based in Krasnoyarsk and part of the

<sup>42</sup> See Weber and Eberg (n 3) for more details.

<sup>43</sup> Cases №A33-7750/2009 and №A33-8485/2010.

Air Union alliance. Although it arose before the accession of Russia to the CTC, it can nevertheless serve as an example of intervention of Customs Authorities in repossession attempts. The airline filed for bankruptcy in 2008. It had operated a number of Boeing 737s, 757s and 767s, leased from foreign lessors. Nearly all aircraft were successfully repossessed by the lessors, excluding a Boeing 757 (registration number EI-DUE), a Boeing 737 (EI-DNT) and a Boeing 767 (EI-GAA). These three aircraft were determined by the Krasnoyarsk Customs Authorities to have been the subject of administrative offences committed by KrasAir. The aircraft were consequently arrested, as an interim measure, and stored at Moscow Domodedovo airport under the control of Customs Authorities and later were withdrawn from use.

The owner of the Boeing 757 (EI-DUE), ILFC, twice applied to the court of Krasnoyarsk Krai with claims against Krasnoyarsk Customs to lift the arrest. ILFC claimed the unlawfulness of the actions of the customs authorities, and three juridical instances sequentially held that the arrest was unlawful.<sup>44</sup> While the customs authorities were authorized to arrest the aircraft, they had not followed the required arrest procedures.

Despite the decision of the court that the arrest was unlawful and the arrest was therefore terminated, ILFC was still unable to repossess the Boeing 757 (EI-DUE). A rule of the Russian Customs Code, which was in force at the time of the dispute, stipulated that a foreign entity could not apply to customs for a change of customs regime for temporarily imported objects. The aircraft had been temporarily imported into Russian territory under an application by Krasair, and the customs authorities were ready to accept any further applications only from that airline. ILFC therefore had to address itself once more to the court, claiming that the rejection by the Krasnoyarsk Customs of the transfer of the 'regime of temporary import in relation to the

aircraft' to ILFC was unlawful. This claim was rejected by the court. However, it stated that in the case of termination of the lease agreement, ILFC would be able to protect its rights more effectively.<sup>45</sup>

Today, the consequences of possible interference with repossession by customs authorities are probably less severe than in 2008 because of two events: (i) the accession of Russia to the Convention in 2011, and (ii) the adoption of a new Customs Code of the Customs Union of Belarus, Kazakhstan and Russia. The 'draconian' confiscation and arrest rules of the Russian Code of Administrative Offences, however, are still in force and while the risk of confiscation of foreign aircraft leased by the airline – the offender of customs rules – is minimal, the risk of a temporary arrest is still high. The customs authorities are not limited in their power of aircraft arrest by any objective test or binding precedent; also there are neither any instructive decisions or comments of Russia's highest courts, nor any relevant common decisions of member States of the Customs Union of Belarus, Kazakhstan and Russia relating to arrest or to IDERA. This is why such interim arrests may have to be expected by lessors or creditors, and the fact that the aircraft is not owned but merely operated by a Russian airline will not be an obstacle for the customs authorities.

As a result, lessors should contractually require the lessee's compliance with its country's customs regulations, including due payment of any applicable customs duties, and monitor it; and stipulate the lessee's non-compliance with customs regulations as an event of default, triggering the lessor's right to terminate the agreement without consent of lessee.<sup>46</sup> They should also incorporate the full set of provisions regarding termination of the lease agreement without consent of the defaulting lessee. Whether this may also be apply in a similar way to creditors who are financing

<sup>44</sup> Case №A33-7750/2009.

<sup>45</sup> Case №A33-8485/2010.

<sup>46</sup> See Weber and Eberg (n 3) 32.

equipment which is exported should be considered in some more detail.

Although the legislative framework in the Russian Federation is now more developed after accession to the Cape Town Convention,<sup>47</sup> lessors may still face a number of challenges in the course of repossession attempts. Regardless of the dispute settlement clause in the lease agreement, the lessor may have to apply to the Russian courts to obtain access to the aircraft. Further, despite the declaration of Russia under Article 54 (2) of the CTC that self-help remedies shall be available, repossession without recourse to courts or arbitration may in practical terms be unsuccessful and self-help may result in liability if not exercised cautiously. The lessor may be unable to clear the aircraft through customs without the cooperation of the lessee and may be required to discharge any outstanding customs payments. Generally speaking, repossessions are still uncommon in Russia and also in other jurisdictions, and may pose unexpected practical difficulties.

#### 4. Conclusions

The mechanism of the CTC, with its two instruments approach, public and private actors, the declarations system and involving a single International Registry with global reach, is a complex one. Both public and the private features in the CTC closely interface in order to achieve the objective of facilitating asset-based financing at the international level across national borders.

The public features include the International Registry System with treaty status under chapter IV of the CTC and with supervision by ICAO, the declaration system, the designated entry points and the jurisdiction provisions. The public features essentially serve the purpose of enabling the remedies set out

in the CTC and the Protocol to be exercised in an appropriate and effective manner.

By virtue of Chapter IV of the CTC and the Registry Regulations and Procedures issued by ICAO in its capacity as Supervisory Authority, the Registry enjoys international public law status. It also enjoys international public oversight by ICAO of the registration of private interests and rights, which ensures global accessibility and transparency of operations. In its almost 10 years of operations involving on average 60,000 new registrations per year, disputes have been few. The positive record and the sound operation of the International Registry System as a whole are important for establishing the credibility of this new type of institution at the international level.

Under the provisions of the CTC, an elaborate declaration system has been established which aims at flexibility as regards State obligations flowing from the CTC, on the one hand, and standardization and transparency of individual State commitments, on the other.

Among the States having ratified or acceded to the CTC, there are presently seven States Parties which have not made any declarations under the Convention and five States Parties which have not made any declarations under the Protocol. From the viewpoint of creditors, lessors and financing parties, the essential remedies of the CTC are not available in these countries, including self-help, speedy relief, IDERA, insolvency remedies and insolvency assistance procedures, and the financing risk is accordingly higher. Unless this problem is taken care of, the 12 States may not be seen as fully compliant with the CTC. This fact will undoubtedly be taken into account when assessing risk in the financing of aircraft.

There are nine States Parties which have ratified only the Convention but not the Protocol. In line with Articles 6 and 49 (1) of the Convention, the ratification of the Convention by these States is of no relevance for aircraft financing transactions and no remedies or rights are available under the Convention or Protocol. Any registrations in the International Registry

<sup>47</sup> The Russian Federation acceded to the CTC and Protocol on 25 May 2011, with effect from 1 September 2011. See <<http://www.unidroit.org/status-2001capetown>>, accessed 6 September 2015.

relating to debtors or operators situated in these States will not be enforceable.

So far, eight States Parties to the CTC have lodged a declaration on designated entry points, including the US. All have designated their national civil aviation administration, and some specifically their civil aircraft registry, as the designated entry point. In five of these States, the designation is mandatory only for registrations as regards airframes and helicopters, but not engines.

The private features of the CTC include the remedies themselves, in particular the default remedies, remedies of speedy relief, self-help remedies, remedies in insolvency and all other CTC remedies. They are exercised by private parties in their own right, against other private parties, related to and arising from events under private law contracts. The default remedies of the CTC, which give creditors, lessors and other financing parties the legal tools for obtaining speedy repossession of the aircraft object in case of default, are core elements of the CTC system. Together with the insolvency remedies, they constitute the *raison d'être* of the instruments. The remedies are set out in Articles 8 to 15 of the Convention and Articles IX to XVI of the Protocol.

In any situation where repossession requires deregistration and export of the aircraft object, a deregistration and export request will first have to be made to the national registry authorities of the State of registration. Since that process can be complicated and lengthy, IDERA is designed to facilitate the matter for all parties. Furthermore, in some countries, the re-export of the aircraft may trigger the intervention of customs authorities. In the recent *SpiceJet* cases, the obligations of national registry authorities pursuant to IDERA were clarified,

at least in India. In other countries where national registry authorities may be reluctant to deregister aircraft of national carriers upon petition of foreign lessors or creditors in the absence of a court order, the same problems may occur. Several State Parties to the CTC have therefore amended their regulations on aircraft registration in order to take account of IDERA.

In some countries, another risk borne by the creditor or lessor in respect of repossession and re-export is the potential intervention of customs authorities. The debtor's or lessee's previous breaches of customs rules can lead, in accordance with the applicable law, to fines and/or the confiscation of the leased aircraft or engine, and the customs authorities may be entitled to arrest the aircraft or engine during the administrative offence investigation, as in the *KrasAir* case. Consequently, creditors and lessors should contractually require the debtor's or lessee's compliance with customs regulations and stipulate non-compliance with customs regulations as an event of default, triggering the right to terminate the agreement.

Overall, in the almost 10 years of operation the CTC has become an important vector in the field of aircraft financing. In a globalized economy, of which civil aviation is one of the four enablers together with shipping, telecommunications and the Internet, there was obviously a need for such a facility. However, some further work needs to be done towards full compliance by States Parties in relation to declarations and implementing rules, in particular regarding IDERA, and in some countries in relation to customs regulations, in order to give effect to the CTC. Furthermore, additional States should be encouraged to ratify the Convention and Protocol.