The Cape Town Convention and Its Implementation in Russia and the Commonwealth of Independent States (CIS)

Ludwig Weber & Artur Eberg*

The ability of creditors to establish and enforce claims against a debtor is crucial for the financing of highly valuable moveable assets such as modern aircraft. There is a direct correlation between the length of time from default of the operator to repossession of the aircraft and the acceleration of the risks of exposure of the creditor. The legal framework of the Cape Town Convention and Aviation Protocol attempts to introduce a legally certain and speedy enforcement system. But a manifestly common law approach is reflected in the Cape Town Convention, and a number of common law concepts, familiar to common law traditions but new to civil law traditions in Russia, Kazakhstan and Ukraine, were in fact implanted into the laws of these countries. Notwithstanding the conclusions of the Aviation Working Group regarding the effective implementation of Convention remedies into the national laws of the three States of review, aircraft repossessions are still exceptional there and may pose unexpected practical difficulties, mostly in Russia and Ukraine. Thus, further efforts of the national rule makers are necessary for the achievement of the fulfillment of one of the main principles of the Cape Town System – the prompt enforcement principle.

1 INTRODUCTION

International commercial aircraft transactions are complex legal deals involving airlines, manufacturers, leasing companies, banks, governmental Export Credit Agencies (ECAs) and other parties such as insurance companies and public capital markets. The main international legal framework for such transactions is the Convention on International Interests in Mobile Equipment (the ‘Cape Town Convention’) and the Protocol to the Convention on Matters Specific to Aircraft Equipment (the ‘Aircraft Protocol’)**. These two instruments form the Cape Town System, which now provides the international rules applicable to the majority of the world’s aircraft financing and leasing transactions.

* Prof. Dr. Ludwig Weber, Adjunct Professor, McGill University, Montreal, and Senior Civil Aviation Policy and Management Adviser, ICAO; Artur Eberg, LLM, McGill University, Montreal, and Counsel, ‘Eberg, Stepanov and Partners’.
** Convention and Protocol signed on 16 November 2001 at Cape Town, ICAO Doc. 9793 and 9794.

© 2014 Klwer Law International BV, The Netherlands
The present review focuses on international transactions of aircraft aimed to upgrade the fleet of three Member States of the Commonwealth of Independent States (CIS), namely the Russian Federation, the Republic of Kazakhstan and Ukraine. All three States acceded to the Cape Town Convention and Aircraft Protocol, Kazakhstan in 2009, Russia in 2011 and Ukraine in 2012.

Russia, Kazakhstan and Ukraine can be regarded as leaders among CIS Member States, both in terms of level of development and in terms of aviation activities. Russia’s economy continues to be the region’s largest, accounting for more than 70% of the region’s GDP in 2011. The economies of Ukraine and Kazakhstan follow Russia in size.\(^1\)

Each of them also represents quickly growing aviation communities. Following the disintegration and economic collapse of the USSR in the early 1990s, the aviation markets of Russia, Kazakhstan and Ukraine grew dramatically in 2000–2013, restoring the former sizes. Although these countries are traditional aircraft manufacturers (mainly Russia and Ukraine) their commercial air fleets have been renewed substantially by foreign-produced passenger aircraft. In 1994, western-built aircraft represented 2% of the Russian fleet in service; in 2005 they represented 16%; and in 2011, almost three quarters (74%).\(^2\) The trend of the replacement of the retiring old Soviet-era airplanes, mainly by foreign-manufactured units, will continue, while the CIS manufacturers offer modern models of Tupolev, Ilyushin, Antonov and Sukhoi Superjet.

The current legal framework of the three reviewed States is arguably far from the Cape Town System standards, and in many cases creditors still consider Russia, Kazakhstan and Ukraine as risky places to sell or lease aircraft. As a result, their aircraft operators enjoy less favourable conditions in the international aircraft market than their peers from other countries with more advanced legal and judicial systems.

All three States follow civil law traditions. In addition, Russia and Kazakhstan today are united in a Customs Union and pursue a coordinated international trade policy. Lastly, during the seventy years of the Soviet period, a regime of State monopoly for foreign trade was in place in all republics. Thus, airline operators and other entities were excluded from direct participation in international commercial transactions and have not gained adequate experience.

Russia and CIS are commonly defined as one of eight global aviation markets, along with North America, Europe, China, India, Latin America, Middle East and Africa, and Asia Pacific. It is one of the regions in which long-term GDP


\(^2\) Airbus, Presentation, *Airline Market Developments in Russia* (St. Petersburg, 14 October 2011) at slide 8 (on file with authors).
RUSSIA, THE CIS AND THE CAPE TOWN CONVENTION

The growth forecast is above average and which will require a significant number of new aircraft to support the growth of the aviation industry. Today the commercial fleet of all CIS Member States counts 1,428 aircraft, and demand for new airplanes for 2013–2032 is evaluated at 1,707 units, with a total value of USD190 billion.

2 THE OBJECTIVES AND PRINCIPLES OF THE CAPE TOWN CONVENTION

2.1 OBJECTIVES OF THE CONVENTION AND PROTOCOL

The ability of creditors to establish and enforce claims against a debtor is crucial for the financing of highly valuable moveable assets such as modern aircraft. The legal framework of the Convention and the Protocol attempts to introduce a legally certain, effective and speedy enforcement system that can assure and encourage financiers to invest in aircraft objects. Upon the full implementation of this framework, facilitation of the modernization of airline fleets around the world is well anticipated. The Convention was drafted to enable airlines, particularly of countries with challenging credit ratings, to modernize their fleets through easier access to aircraft at reduced financing costs.

The fundamental purpose of the Cape Town Convention System is to offer creditors the highest possible security when financing high-value equipment. In this context much will depend upon the enforcement remedies. Thus, the core piece of the Convention is Chapter 3: 'Default remedies'. Everything else in the Convention is set up to serve this purpose. The registration system and the priority regime serve no other purpose than to regulate who has the right to enforce and what kind of remedies such person or entity can use.

2.2 LEVEL OF SUCCESS OF THE CAPE TOWN CONVENTION

As mentioned above, the Cape Town Convention and Aircraft Protocol together constitute the main modern legal framework of cross-border aircraft transactions. A joint creature of UNIDROIT and ICAO, the Convention and Protocol were signed at Cape Town on 16 November 2001 and entered into force on 1 March 2006.

---

5 Ibid., at 1.
The Convention today has fifty-nine States Parties,\(^6\) the Aircraft Protocol fifty-three States Parties, and together they can be regarded as one of the most successful recent commercial law treaties.\(^7\) For instance, the comparison of the level of ratifications of the Cape Town Convention and all other international commercial law treaties designed by three principal intergovernmental organizations dealing with harmonization at the global level — namely UNCITRAL, UNIDROIT and the Hague Conference on Private International Law, adopted in the twenty years before the adoption of the Cape Town Convention, i.e., 1980–2000 — reveals that among all nine conventions, matching the above-mentioned criteria, only one — namely the Convention on Contracts for the International Sale of Goods (Vienna, 1980) — demonstrates a comparable number of seventy-nine ratifications. Five conventions, on International Bills of Exchange and International Promissory Notes (New York, 1988), on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991), on the Assignment of Receivables in International Trade (New York, 2001), on Agency in the International Sale of Goods (Geneva, 1983), and on the Law Applicable to Contracts for the International Sale of Goods (Hague, 1986) have not yet entered into force and are under prospect of remaining no more than propositions. Three other conventions — on Independent Guarantees and Stand-by Letters of Credit (New York, 1995), on International Financial Leasing (Ottawa, 1988) and on International Factoring (Ottawa, 1988) — are in force, but have failed to reach significant acceptance worldwide: with an unimpressive number of Contracting States — between seven and ten — they can hardly be considered successful treaties.

2.3 Factors of Success of the Convention

The success in achieving a high rate of ratification of the Cape Town Convention and Aircraft Protocol can be explained by four main factors: (1) the need for a legal framework of this type in the aircraft transaction market, (2) the Convention's balanced, practical approach and sophisticated drafting style, (3) exceptionally strong practical pressures for harmonization in the field of aircraft finance, and (4) a 'Cape Town Discount' for aircraft operators, given by several governmental ECAs and the OECD in 2006 and 2007 (for details, see 4.3 below).


The Convention is unique with its 'Declarations System', which permits the States to deposit numerous opt-in and opt-out declarations stipulated by the Convention and the Protocol. Structurally, the adoption of a basic Convention text, supplemented by flexible asset-specific protocols (for air, rail and space assets) has been hailed as a valuable innovation in the drafting of international instruments. Indeed, the flexible multiple-choice approach can overcome the reluctance of a State to join the multilateral treaty. The final goal of the adoption of the Cape Town Convention System and real added-value received by the Member States, however, is the improvement of opportunities for all stakeholders in asset-based financing of aircraft equipment. Therefore, it is particularly the second, third and fourth of the foregoing factors, which may be defined as 'value-added' factors, which explain the high willingness of States to join and implement the new international regime stipulated by the Cape Town Convention and Aircraft Protocol. The real value to all parties concerned is represented by the Convention's substantive rules which govern the securitization of aircraft financing, minimize the risks of aircraft cross-border transactions to a reasonably acceptable level and ultimately lead to the so-called 'Cape Town Discount'.

The Cape Town Convention and Aircraft Protocol were designed principally to overcome the problem of obtaining secure and readily enforceable rights in high-value equipment, which by their nature have no single, fixed location. This problem had essentially derived from the widely different approaches taken by legal systems of different States towards the issues of security, title reservation and leasing rights in the movable equipment.

The sole international instrument that regulated aircraft financing before the Cape Town Convention was the Convention on the International Recognition of Rights in Aircraft (the 'Geneva Convention'), signed on 16 June 1948. The Geneva Convention was based on a system of reciprocal recognition of national laws, in other words, a conflict of laws approach. The objective of the Convention was merely to obligate Contracting States to recognize security rights created under the national law of other States. The Convention was much criticized for its failure to promote international substantive law uniformity.

The Geneva Convention was signed in 1948 and it reflected the economic and political realities of that epoch. However, since its adoption the world witnessed tremendous growth of the aviation industry, globalization of
international trade and several basic shifts in regulation of aviation affairs. The industry was successively liberalized and de-regulated. National government implemented the programmes of privatization of air carriers, with the ultimate effect of minimization of participation of States in the ownership of national airlines and in their subsidization.

Overall, the major relevant changes since the adoption of the Geneva Convention can be described by the following main features:

(a) the value and amount of commercial airplanes, as well as their technical ability for speedy dislocation to any part of the planet, have increased dramatically;
(b) the number of aircraft cross-border transactions and their complexity also have grown in multiples; and
(c) the reduced direct participation by States in financing and/or in guaranteeing the financing of aircraft acquisitions.

As a result, the level of creditors' risks in transactions became much higher, which accordingly caused impediments to all industry stakeholders, including manufacturers, airlines and financiers. It was obvious that the lack of uniformity in the regulation of aircraft finance had to be overcome by a new international instrument, which would ensure greater legal predictability for financiers of commercial aircraft. Therefore, it can be stated that there were exceptionally strong practical pressures for harmonization in the field of international aircraft financing.

2.3(a) Innovations and Advantages of the Convention

Unlike the Geneva Convention's conflict of laws approach, the Cape Town Convention and Aircraft Protocol lays down a set of substantive rules. The main innovations of the Cape Town Convention and its advantages were identified by the International Civil Aviation Organization (ICAO) in the following manner:

- **Legal advantages** – Through the creation of a new uniform international regimen governing the taking of security in high-value mobile equipment, based on the creation of an international interest in such categories of equipment that is to be recognized in all Contracting States and on the establishment of an electronic international registration system for the registration of such interests, the Convention and the Protocol will greatly improve predictability as to the enforceability of security, title reservation and leasing rights in aircraft objects.

- **Economic advantages** – The creation of this new international regime facilitating the creation, perfection and enforceability of security, title
regulation of aviation affairs. The regulated. National governments of air carriers, with the ultimate states in the ownership of national the adoption of the Geneva main features; airplanes, as well as their technical part of the planet, have increased transactions and their complexity by States in financing and/or in acquisitions.

actions became much higher, which industry stakeholders, including obvious that the lack of uniformity in overcome by a new international predictability for financiers of that there were exceptionally strong of international aircraft financing.

laws approach, the Cape Town set of substantive rules. The main advantages were identified by the D) in the following manner:

of a new uniform internationaly in high-value mobile equipment, national interest in such categories of all Contracting States and on the national registration system for the nation and the Protocol will greatly stability of security, title reservation of this new international regime and enforceability of security, title reservation and leasing rights in aircraft objects will provide confidence to lenders and institutional investors, making it possible ... to attract domestic and foreign capital in respect of such equipment. It will improve opportunities for asset-based financing of high-value aircraft equipment. By virtue of the improved legal predictability that it will permit, it should reduce risks for creditors and consequently borrowing costs for debtors and facilitate the extension of credit for the acquisition of high-value aircraft equipment.12

2.3[b] Interests of All Stakeholders

The legal framework of the Convention and Protocol introduces a legally certain and effective system that may attract the following parties to international aircraft transactions:

1. financiers, who are assured and encouraged to invest in commercial aircraft objects;
2. airlines, particularly of countries with challenging credit ratings, enabling them to modernize their fleets through easier access to commercial aircraft at reduced financing costs; and
3. manufacturers, enabled to produce more aircraft with higher value, to invest into development of new models of aircraft and to support their buyers through loans, loan assistance and other types of credit support.

Governments, with their interest in modernization of national air fleets, on the one hand, and desirous to avoid negative effects on the national balance sheets and treasuries caused by governments' participation in guaranteeing and subsidizing of airplanes acquisitions, on the other, supported the Cape Town Convention. With the implementation of the Convention's principle of asset-based financing, the direct involvement of States in aircraft transactions has become for good part unnecessary.

2.3[c] Discount of ECAs

Nevertheless, during the period after the Diplomatic Conference in November 2001, initially few States manifested the will to ratify the Cape Town Convention and Aircraft Protocol or to accede to it — till 1 March 2006 only nine countries. Such

number of the Member States ensured the entry into force of the Convention and Protocol (3 States for the Convention, 8 States for the Protocol), but demonstrated that notwithstanding the practical pressures in favour of the new international treaty, States were not in a hurry to ratify, before the International Registry under the Convention and the Protocol was set up in March 2006.

In September 2006, the leading aviation States, through the intermediary of their ECAs, took part in a global promotion of the Convention. The Export-Import Bank of the United States informed in its Press Release named ‘Ex-Im Bank Extends Offer of Reduced Exposure Fee for Buyers in Countries Implementing the Cape Town Treaty’ about the following common efforts:

The Export-Import Bank of the United States (Ex-Im Bank) today extended its offer to reduce its exposure fee by one-third on asset-backed financings of new U.S.-manufactured large commercial aircraft for international buyers in countries that ratify and implement the Cape Town Treaty and the related aircraft equipment protocol.

In addition, Ex-Im Bank's board of directors applauded the progress that Ex-Im Bank and its counterpart export credit agencies (ECAs) in Europe have made to date in developing a common approach to offering improved financing terms to airlines based in countries that ratify and implement the Cape Town Treaty.

Within less than a year, in July 2007 the intergovernmental Organization for Economic Co-operation and Development ('OECD'), with its recognition of the importance of the Cape Town Convention and Aircraft Protocol on aviation sales and reduced financing costs, also joined in the Convention's advancement. The OECD developed specific guidelines for the ECAs. These guidelines, known as the Sector Understanding on Export Credits for Civil Aircraft, also included measures allowing ECAs to reduce costs of credits to airlines located in States that have ratified the Convention and Protocol. Therein the OECD also declared the 'Cape Town Discount'.

It was after the 2006–2007's decisions of Ex-Im Bank, its European counterparts and the OECD that the membership in Cape Town Convention and Aircraft Protocol started to grow dramatically.

---

13 See Article 49 para.1 of the Convention, and Article XXVIII para.1 of the Protocol.
16 Ibid., at Arts. 22-24 and Annex I of Appendix III.
17 See also, above, explanation to n. 13.
2.4 Main Principles of the Cape Town Convention System

The Cape Town Convention System is based on three main principles – the transparent priority principle, the prompt enforcement principle and the bankruptcy law enforcement principle. In this article, the authors mostly concentrate on the evaluation of the implementation of the two latter principles in the domestic laws of the three States of review.

2.4[a] The Prompt Enforcement Principle

The prompt enforcement principle is one of the asset-based financing principles. It embodies the capacity to promptly enforce rights against assets generating proceeds and revenues, and corresponds to the objective of the Convention to enable aircraft financiers to promptly take control and possession of the aircraft upon default of their debtor.

The ability of creditors to establish and enforce claims against a debtor is crucial for the efficient financing of moveable assets. The longer the time between default ... and repossession, ... the lower the expected recapture-value of the asset, the greater the opportunity costs and the greater the risk of exposure of the creditor. Thus, there is a direct correlation between the length of the time for repossession and the acceleration of the risks of the creditor.

2.4[b] The Bankruptcy Law Enforcement Principle

The Cape Town Convention and Aircraft Protocol substantive provisions aim, among other things, to minimize the extent to which bankruptcy and insolvency laws interfere with the rights of holders of interests in aircraft property.

The Geneva Convention is silent on how domestic or foreign insolvency proceedings are to be balanced against rights recorded against an aircraft, such as leases and mortgages. Hence, there is an unresolved conflict in the context of an airline bankruptcy between the law of the place where an aircraft foreclosure sale might occur, whether or not under the Geneva Convention, and the rights which various holders of claims against the aircraft may have under other but nonetheless applicable insolvency schemes. Using a jurisdiction's choice of law provisions to
employ, for example, English law does not necessarily eliminate concerns about
local public policy issues. This is not exactly a transparent and predictable
bankruptcy enforcement scenario.

As Stone asserted in 2001, before the Cape Town Diplomatic Conference:

All of this generates a call for order out of this chaos and uncertainty and is addressed by
Unidroit …

[Unidroit] would level the playing field of risk among various nations substantially so that
unanticipated occurrences — such as … where or when insolvency proceedings are
commenced — will have little or no impact on the trillions of dollars-worth of transactions
to be concluded. It is a particularly valuable tool for the newly independent states and
emerging markets as an alternative to law reform.

Contracting states to Unidroit which opt in to all of its provisions will have agreed as to
… unambiguous rights of enforcement and no bankruptcy interference with
repossession. This is what business wants, for the obvious rewards to both sides of a
transaction.21

The Cape Town Convention, as an international treaty dealing with substantive
principles such as prompt enforcement and non-interference of domestic
bankruptcy regimes, was in sharp contrast to the 2001 current legal regime
globally. By focusing on substantive legal rules to be adopted in Contracting States,
the Convention significantly reduces the risks and the costs of concluding
international asset-based aircraft financing transactions.

3 DEFAULT REMEDIES OF THE CAPE TOWN CONVENTION AND
THE AIRCRAFT PROTOCOL

Most commercial aircraft can be appraised and manufacturers, lessors and lenders
will, in many circumstances, base transactions on predictions of future value. The
availability of the aircraft in case of default is the core of the problem. The asset
cannot fully support the financing if the financier's right to the asset cannot be
enforced in the jurisdiction where it happens to be at the time of default, or if the
rights of other creditors have priority in that jurisdiction, or if repossession is held
up by a bankruptcy moratorium or if significant delays in enforcement are a
probability. Given the mobility of the asset, the resulting situation for the financier
will in many cases be something of a lottery.22

The centre-piece of the Convention, namely Chapter 3 ‘Default remedies’, and
all other provisions in the Convention are set up to regulate who has the right to
enforce and what kind of remedies such person can use. A core purpose of the

21 ibid.
22 Stephen J. McGairl, Proposed UNIDROIT Convention: International Law for Asset Finance (Aircraft), 4
necessarily eliminate concerns about exactly a transparent and predictable way.

The Town Diplomatic Conference: a chaos and uncertainty and is addressed by the official treaty dealing with substantive and non-interference of domestic laws to the 2001 current legal regime to be adopted in Contracting States, rules and the costs of concluding transactions.

TOWN CONVENTION AND

and manufacturers, lessors and lenders on predictions of future value. The first is the core of the problem. The adequate financier's right to the asset cannot be to be at the time of default, or if the jurisdiction, or if repossess is held significant delays in enforcement are a resulting situation for the financier.

Convention is the creation of greater certainty that, upon default, creditors can swiftly but in a commercially reasonable manner exercise their remedies to repossess, deregister and export, if applicable, and sell or otherwise realize upon the value of the aircraft objects. According to the Official Commentary on the Convention, the availability of adequate and really enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously.

Indeed, in transactions involving high-value equipment, the chargee in a security agreement, the lessor in a leasing agreement and the conditional seller in a title reservation agreement, are the less protected parties and particularly vulnerable to the risk of default. That is why issues of protection, enforcement and priorities are essential.

3.1 LIST OF REMEDIES

Default remedies are set forth both by the Convention and Protocol. The variety of remedies, universal to all types of movable assets, is contained in the Chapter 3 of the Convention. This Chapter prescribes the basic default remedies of a chargee, a conditional seller and a lessor. Additional remedies, applicable in the events of default in respect to aircraft objects, are stipulated in Chapter 2 of the Protocol. Both the Convention and the Protocol provide remedies upon default with respect to aircraft objects that may be exercised by lessors, conditional sellers and secured parties in respect of international interests in their favour, all in their roles as creditors.

The whole variety of remedies proposed by the Convention and Protocol is the following:

(a) Remedies of the chargee:
   (i) taking possession or control of any object charged to it;
   (ii) selling or granting a lease of any such object;
   (iii) collecting or receiving any income or profit arising from the management or use of any such object;
   (iv) taking ownership of the object;


Ibid., at para. 2.49. On the role of default remedies, see also Weber, supra n. 18, at 201-205.


(b) Remedies of conditional seller or lessor:
(i) termination of the agreement;
(ii) possession or control of the object;
(c) Remedies available to all creditors:
(i) speedy relief, pending final determination of claim;
(ii) de-registration; and
(iii) export and physical transfer.

3.2 CLASSIFICATION OF REMEDIES

Overall, the Cape Town System remedies can be classified in the following groups and sub-groups:

(i) remedies of chargee and remedies of lessor and conditional seller;
(ii) judicial and extra-judicial remedies; and
(iii) default remedies and remedies on insolvency.

It is worth mentioning that the set of Cape Town remedies adopted by a Contracting State depends on the declarations made by that State. The Convention is unique with its 'Declarations System', which permits the Contracting States to deposit numerous opt-in and opt-out stipulated declarations. Such opportunity for States causes a significant variety of different sets of remedies that can be enforced by the creditors in different jurisdictions.

Furthermore, the Cape Town Convention remedies supplement, but do not displace, existing remedies in a jurisdiction under national law (except to the extent that existing national law remedies are inconsistent with mandatory provisions under the Chapter 3 of the Convention). In accordance with Article 12 of the Convention, any remedies additional to Chapter 3 of the Convention and Chapter 2 of the Protocol, which are permitted by the applicable law (including any remedies agreed upon by the parties) may be exercised.

Nevertheless, not all remedies in the Convention are automatic. Some of the basic remedies must be agreed by the debtor in order to be effective. Such remedies usually are already agreed in typical standard forms of leases, conditional sale agreements and security agreements and are consistent with aircraft default remedies provided for by major international legal regimes.

\[\text{AWG Practitioners Guide, supra n. 23, at 105.}\]
\[\text{Ibid.}\]
drafters expected that parties would create their own remedies within practical constraints, and flexibility is built into the *Convention* so that remedies may be modified by the parties.\(^{29}\)

### 3.3 Basic Principles of Remedies

Thus, the main approaches and principles used by the drafters in formulating the *Cape Town Convention* default remedies include the following:

1. *Substantive rules:* Remedy provisions contained in both the *Convention* and *Protocol*.
2. *Expediency:* A key feature of the remedies is its intentionally speedy, expeditious character.
3. *Dependence on declarations:* The set of remedies adopted by a Contracting State depends, in part, on the State's declarations.
4. *Non-exclusivity:* Additionally to *Cape Town* remedies, any remedies permitted by the applicable national law may be exercised to the extent that they are not inconsistent with the mandatory provisions of Chapter 3 of the *Convention*.
5. *Party autonomy:* The Parties to a transaction may agree on (1) extra-judicial enforcement of the majority of the *Cape Town* remedies, (2) events, which constitute default, and (3) on additional remedies.

### 4 Declarations Under the Cape Town Convention and the Aircraft Protocol

The drafters of the *Cape Town Convention* have used some non-traditional drafting techniques, which differ significantly from the traditional style: the *Convention* has 2 tiers — i.e., the *Convention* itself and the specific protocols related to different types of mobile equipment. It also creates a 'menu' of declarations, which can be made by a Contracting State when ratifying the Convention or acceding to it, and from which a Contracting State can choose. Such techniques can be explained by the objective of the drafters aimed at creating a flexible system catering for a large variety of situations, while wishing to attract a maximum possible number of ratifications of the *Convention*.

During the development of the Convention and the Aircraft Protocol it became clear that the solutions advocated for some of their provisions might run so counter to the legal

\(^{29}\) *Ibid.*, at 104.
traditions of certain States as to make these provisions potentially unacceptable to those States. The solution adopted was to give Contracting States the possibility of making choices in respect of these matters under the Convention and the Aircraft Protocol through a system of declarations.\textsuperscript{31}

4.1 \textbf{Legal nature and types of declarations}

The \textit{Cape Town Convention} and \textit{Aircraft Protocol} declarations can legally be brought under the term 'reservation' as it is defined by the 1969 Vienna Convention on the Law of Treaties\textsuperscript{32} — i.e., a 'unilateral statement, however phrased or named, made by a State, … whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State'.\textsuperscript{33} There are a large variety of declarations specified by the \textit{Cape Town Convention} and \textit{Aircraft Protocol}, and Contracting States cannot make any other reservations.\textsuperscript{34}

The \textit{Convention} and \textit{Protocol} provide for one mandatory declaration to be made by Contracting States,\textsuperscript{35} all other declarations are optional in nature. This is the declaration provided for by Article 54(2) of the \textit{Convention} as to whether certain remedies may only be exercised with leave of the court. The Article stipulates that this declaration must be made at the time of a Contracting State's ratification, acceptance, approval of or accession to, the \textit{Aircraft Protocol}. Instruments of ratification or accession to the \textit{Protocol} will not be accepted by the Depositary unless they are accompanied by the mandatory Article 54(2) declaration.

Opt-in declarations are those declarations which must be lodged by a Contracting State in order for a provision of the \textit{Convention} or \textit{Protocol} to have effect in relation to that State.\textsuperscript{36} Conversely, opt-out declarations are those which must be lodged in order to opt-out of a provision of the \textit{Convention} and \textit{Protocol} by


\textsuperscript{33} Article 2(1)(d) of Vienna Convention on the Law of Treaties.

\textsuperscript{34} Article 56 of the \textit{Convention} provides that no reservations may be made thereto but that declarations authorized by Arts 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with the provisions. Article XXXII of the Aircraft Protocol provides that no reservations may be made thereto but that declarations authorized by Arts XXIV, XXIX, XXX, XXXI, XXXIII and XXXIV may be made in accordance with those provisions.

\textsuperscript{35} The other mandatory declarations provided for under Art. 48(2) of the \textit{Convention} and Art. XXVII(2) of \textit{Protocol} are addressed not to Contracting States, but to Regional Economic Integration Organizations.

\textsuperscript{36} The provisions in respect of which opt-in declarations may be made are:

- \textit{Convention}: Art. 60; and
- \textit{Protocol}: Arts VIII, X, XI, XII, and XIII.
the Contracting State.\footnote{37} Certain optional declarations, which relate to a Contracting State's own national law,\footnote{38} are neither opt-in nor opt-out.

It is important to note that, notwithstanding the numerous available declarations, the principal substantive concepts and institutions of the Cape Town System, namely the 'international interest', the international registry and the registration-based priority regime, cannot be opted out from, excluded or modified by a Contracting State.

\subsection{4.2 Depositary}

UNIDROIT has been designated as depositary of the Convention under Article 62 thereof, which also sets out the depositary functions. Accordingly, texts of all declarations made by the Contracting States can be found on the UNIDROIT website.\footnote{39} Additionally, UNIDROIT proposes several instruments related to declarations, including a Table of Declarations Made by Contracting States,\footnote{40} a Declarations Explanatory Memorandum\footnote{41} and desired declaration forms.\footnote{42}

\subsection{4.3 Qualifying declarations}

As mentioned above,\footnote{43} in July 2007 OECD developed a set of specific guidelines for the ECAs\footnote{44} involved in aircraft export, known as the 'Sector Understanding on Export Credits for Civil Aircraft', or in short 'ASU'. Today the third revised version

\begin{itemize}
\item Convention: Arts R(1)(b), 13, 43, and 50; and
\item Protocol: Arts XXI and XXIV(2).
\end{itemize}

\footnote{37} The provisions in respect of which opt-out declarations may be made are:

\footnote{43} See sub-para. 2.3(c), above, for more on the OECD specific guidelines for the export credit agencies.

\footnote{44} See sub-para. 2.3(c), above, for more on the OECD specific guidelines for the export credit agencies.
of this document is in force (ASU 2011), adopted in September 2011. ASU 2011 includes measures allowing ECAs to reduce costs to airlines located in States that have ratified the Convention and Protocol, i.e., to receive the ‘Cape Town Discount’ in the amount of up to 10%. In regard to declarations, the basic novelty of ASU 2007, followed by ASU 2011, was the rule that access to this discount was granted to airlines of the States that not only had ratified the Convention, but also had made a special set of Cape Town System declarations, the so-called ‘qualifying declarations’. More precisely, the ASU 2007 term ‘qualifying declarations’ means that a Contracting State:

1. has made the declarations listed in Article 2 of Annex I to ASU; and
2. has not made the declarations listed in Article 3 of this Annex.

The declarations to be made by a Contracting State are the following:

(a) Insolvency: that it will apply the entirety of Alternative A under Article XI of the Protocol to all types of insolvency proceedings and that the waiting period shall be no more than sixty calendar days.

(b) Deregistration: that it will apply Article XIII of the Protocol.

(c) Choice of Law: that it will apply Article VIII of the Protocol.

Additionally, at least one of the following declarations should be made (though both are encouraged):

(a) Method for Exercising Remedies: under Convention Article 54(2) that any remedies available to the creditor under any provision of the Convention, except those which expressly require application to a court, may be exercised without leave of the court.

(b) Timely Remedies: that it will apply Article X of the Protocol in its entirety and that the number of working days to be used for the purposes of the time-limit shall be:
   (i) not more than ten days for preservation of the aircraft objects and their value, possession, control or custody of the aircraft objects, and immobilization of the aircraft objects; and
   (ii) not more than thirty days for lease or management of the aircraft objects and the income thereof and sale and application of proceeds from the aircraft equipment.

---


15 ASU2007, supra n. 15, at Art. 1 of Annex I. See also ASU2011, supra n. 45 at Art. 1 of Annex I.
17 Ibid.
adopted in September 2011.45 ASU reduce costs to airlines located in States rel, i.e., to receive the ‘Cape Town’ regard to declarations, the basic novelty the rule that access to this discount was had ratified the Convention, but also declarations, the so-called ‘qualifying declarations’ means

Article 2 of Annex I to ASU; and in Article 3 of this Annex.47

State are the following:

completeness of Alternative A under Article 15 insolvency proceedings and that the

Article XIII of the Protocol.

Article VIII of the Protocol.

declarations should be made (though

under Convention Article 54(2) that

creditor under any provision of the

pressly require application to a court, the court.

apply Article X of the Protocol in its

working days to be used for the

reservation of the aircraft objects and

either or custody of the aircraft objects,

aircraft objects; and

lease or management of the aircraft thereof and sale and application of

equipment.

2011, revised September 2011 TAD/ASU

2011, supra n. 45 at Art. 1 of Annex I.

The declarations, which must be avoided by a Contracting State, are the following:

(a) Relief Pending Final Determination: a State Party shall not make a declaration opting out of Article 13 or Article 43 of the Convention.

(b) Rome Convention: a State Party shall not make a declaration opting out of Article XXIV of the Protocol.

(c) Lease Remedy: a State Party shall not make a declaration preventing lease as a remedy.

4.4 EVOLUTION OF THE SECTOR UNDERSTANDING ON EXPORT CREDITS FOR CIVIL AIRCRAFT

The OECD ASU, while attracting Contracting States by the ‘Cape Town Discount’, considerably narrows down the flexible approach proposed by the Convention drafters to offer a choice among a large variety of declarations proposed by the Convention and Protocol. The international treaty which started with the extraordinary flexible multi-options approach was thereby reduced by the financiers to a monolithic set of rules with regard to those parties who wish to benefit from the Cape Town Discount. According to a summary of the AWG released in May 2013,48 35 out of 51 Protocol parties have made the ASU 2007 qualifying declarations. Initially, a number of Contracting States had made other sets of declarations, but later, likely driven by the efforts of national airline communities and international finance groups, those States deposited subsequent declarations which complied with the ASU 2007 qualifying declarations rule.

There is some irony in the fact that the conditions of the ‘bonus’ of the Sector Understanding on Export Credits for Civil Aircraft have changed considerably since their first version (i.e., ASU 2007), and have become significantly less attractive. Today, in regard to main conditions of financing, ASU 2011 proposes to airlines less favourable terms: Thus, the minimum premium charged by 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 from 20% to 10%. Today, aircraft finance practitioners explain that the revised ASU 2011 aims to ensure that ECA financing does not displace available private-sector financing by offering unduly competitive rates. Instead, airlines are encouraged to

use ECA financing as a last resort when the private sector is unable to offer acceptable rates due to perceived risks or capacity constraints.49

4.5 DECLARATIONS OF RUSSIA, KAZAKHSTAN AND UKRAINE

4.5[a] Qualifying Declarations

All three States that are the subject of this article – Russia, Kazakhstan and Ukraine – have properly made ASU qualifying declarations.50 Indeed, they apply the Alternative A related to remedies on insolvency (with the waiting period of sixty calendar days), and apply deregistration and export remedies. Any remedies available to the creditor under any provision of the Convention, except those which expressly require application to a court, may be exercised in all three States extra-judicially. All three States declared that they will apply Article VIII of the Protocol, authorizing the parties to a lease agreement, a contract of sale, a related guarantee contract or a subordination agreement to agree on the law which is to govern their contractual rights and obligations.

The texts of the lodged declarations are available on the website of the depositary (UNIDROIT).51 The matrix of declarations, made by Russia, Kazakhstan and Ukraine, is enclosed as Annex I to the present article.

The Russian Federation deposited with UNIDROIT its instrument of accession to the Convention and Protocol on 25 May 2011. The declarations lodged at that time did however not correspond to the set of qualifying declarations – the opt-in declarations related to deregistration and choice of law were not made. On 28 January 2013, nearly two years later, both of these former declarations were subsequently lodged with UNIDROIT.

Kazakhstan made declarations three times – on 21 January 2009, on 15 March 2011 and on 16 November 2012 – and ultimately has been evaluated by the AWG as having performed all ASU qualifying declarations.

Ukraine ratified the Convention and Protocol last among the three States on 31 July 2012, but has made the qualifying declarations directly at the time of ratification.

It is worth mentioning that only Kazakhstan made the opt-in declaration related to Article X of the Protocol (Timely Remedies). According to ASU guidelines, this declaration composes the set of qualifying declarations, but a

50 See AWG information online: AWG<http://wwwwawg.org/projects/capetownconvention/#information>. See also AWG Summary of National Implementation, supra n. 48, at 13, 20, 23.
private sector is unable to offer, by constraints.49

RUSSIA, THE CIS AND THE CAPE TOWN CONVENTION

Member State can refrain from its adoption in the case of an adoption of a declaration under Article 54(2) of the Convention (Method for Exercising Remedies).52 Russia and Ukraine have made the Article 54(2) declaration and thus are in formal compliance with the requests of ASU. Meanwhile, the same ASU rules encourage the adoption of both declarations – i.e., the approach demonstrated by Kazakhstan.

4.5[b] Other Declarations

In addition to the qualifying declarations, the three States of review have lodged with UNIDROIT the following declarations:

<table>
<thead>
<tr>
<th>State</th>
<th>Related Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russia</td>
<td>39(1)(a)</td>
<td>Priority of non-consensual rights and interests without registration</td>
</tr>
<tr>
<td></td>
<td>39(1)(b)</td>
<td>Preservation of right of providers of public services to arrest or detain</td>
</tr>
<tr>
<td></td>
<td>53</td>
<td>Determination of courts</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>39(1)(a)</td>
<td>Priority of non-consensual rights and interests without registration</td>
</tr>
<tr>
<td></td>
<td>39(1)(b)</td>
<td>Preservation of right of providers of public services to arrest or detain</td>
</tr>
<tr>
<td></td>
<td>39(4)</td>
<td>Priority of non-consensual rights and interests without registration</td>
</tr>
<tr>
<td></td>
<td>40</td>
<td>Registrable non-consensual rights or interests</td>
</tr>
<tr>
<td></td>
<td>53</td>
<td>Determination of courts</td>
</tr>
<tr>
<td></td>
<td>XII</td>
<td>Insolvency assistance</td>
</tr>
<tr>
<td>Ukraine</td>
<td>50</td>
<td>Application of Convention to internal transactions</td>
</tr>
<tr>
<td></td>
<td>53</td>
<td>Determination of courts</td>
</tr>
<tr>
<td></td>
<td>XIX</td>
<td>Designation of entry point</td>
</tr>
</tbody>
</table>

52 Article 2 of Annex 1 of ASU2007. See also Art. 2 of Annex 1 of ASU2011.
53 Articles of the Cape Town Convention are in Arabic numerals; Articles of the Aviation Protocol in Roman numerals.
4.6 Implementation

4.6[a] ‘Proper’ and ‘Effective’ Implementations

In fact, being party to the Convention and Protocol and depositing of qualifying declarations do not compose a full set of requirements, fulfilment of which will permit the Contracting party to be included in the OECD Cape Town List, thereby allowing national airlines to access the OECD discount. In addition to the foregoing, the State must have implemented the Cape Town Convention into its laws and regulations in such a way that the Convention commitments are appropriately translated into national law.\(^{54}\)

The AWG has commented on the requirements for national implementation of the Cape Town System and provided its views on the fulfilment of these requirements by the Contracting States. In doing so, the AWG utilizes two different terms relating to implementation:

(a) ‘proper implementation’, which means that the Convention and Protocol:
   (1) have the force of law in the Contracting State (i.e., a national court would be compelled to apply the Convention and Protocol);
   and
   (2) have priority over or supersede any conflicting law in such Contracting State;\(^{55}\)
   and

(b) ‘effective implementation’, which means that, in addition to ‘proper implementation’, a strong, commercially oriented set of declarations were made by the Contracting State when ratifying or acceding to the Convention.\(^{56}\)

And as an objective proxy for whether such declarations were made, the AWG determines whether a country made the qualifying declarations as set out in the ASU.\(^{57}\) The AWG summary of implementation of the Convention by all Contracting States is available on the AWG website.\(^{58}\)

Under the legal system of certain States, the Convention and Protocol obtain the force of national law as a result of such States’ ratification. The AWG notes that in numerous countries:

\(^{54}\) ASU2011, supra n. 45, at Art. 37(c).

\(^{55}\) AWG Practitioners Guide, supra n. 23, at 51.

\(^{56}\) AWG Summary of National Implementation, supra n. 48, at 2.

\(^{57}\) Ibid.

\(^{58}\) See information online: AWG <http://www.awg.aero/assets/docs/CTC-IP-Summary-Chart-%20May-release1.pdf>.
international treaties constitute the highest form of law (constitutional law excepted), and, thus, their legal force is not dependent upon national implementing law. Rather, they take 'direct effect' or have 'direct application' in such countries upon ratification. In other countries some form of implementing legislation is required to 'transform' or 'incorporate' these international legal instruments into national law.  

The issue of priority or prevalence of Convention rules over national law is classified by the AWG in the four following ways:

1. Express legislation, where the treaty prevails by virtue of express wording in legislation or a decree.

2. Lex specialis, where the treaty prevails because it is more specific than otherwise applicable, conflicting general legal rules.

3. Lex posteriori, where the treaty prevails since it was made later in time than otherwise applicable, conflicting general legal rules, and

4. Higher legal norm, where the treaty is a higher legal norm and prevails over otherwise conflicting domestic legal rules, whether through constitutional or similar provisions, or judicial decisions.

4.6(b) Implementations in Russia, Kazakhstan and Ukraine

In all three States of review, the Convention and Protocol have the force of law. In Russia both instruments have the force of law pursuant to Clause 15(4) of the Constitution, which provides that international treaties that apply to the Russian Federation form part of the domestic legal system. Accession to the Convention was achieved through enactment of the Federal Law dated 23 December 2010 in accordance with the Federal Law ‘On International Treaties of the Russian Federation’. A separate Federal Law has been adopted on 5 June 2012 with respect to subsequent declarations.

---


The Convention and Protocol have the force of law in Kazakhstan by virtue of 'ratification' through the adoption of a law on 5 July 2012. This law was passed 3 years after the accession by Kazakhstan to the Convention in order to ensure that it has priority over national law.

In Ukraine, the Convention and Protocol have the force of law following its entry into force on 1 November 2012, pursuant to the Constitution of Ukraine and the Law on Ukraine's International Treaties.

In all three States, the Convention and Protocol have priority over conflicting national laws as a higher legal norm. In Russia, Clause 15(4) of the Constitution provides that, if an international treaty to which the Russian Federation has acceded establishes rules different from those provided for in any domestic law, the rules established by the international treaty shall apply. Article 4(3) of the Constitution of the Republic of Kazakhstan contains the same rule – it provides that ratified international treaties prevail over any inconsistent national law. In the case of Ukraine, it is not the Constitution but the Law on Ukraine's International Treaties which stipulates that the international conventions have priority over Ukrainian laws (except for the Constitution of Ukraine).

Thus, in all three countries the Convention and Protocol (i) have force of law and (ii) prevail over national conflicting laws as the higher legal norm. Moreover, in accordance with the information and conclusions of the AWG contained in the Summary of National Implementation, all three countries appear to satisfy the requirements for a Cape Town Discount. Taking into consideration that 'effective implementation' is one such requirement, according to the criteria of the AWG, all three countries have effectively implemented the Convention and Protocol into national law. The extract from the AWG Summary of National Implementation related to Russia, Kazakhstan and Ukraine is attached to the present article as Annex II.

4.7 CAPE TOWN LIST OF OECD

Any State which follows the OECD conditions – i.e., (i) becomes a Contracting party to the Convention and Protocol, (ii) makes qualifying declarations, and (iii) effectively implements the Convention in its laws and regulations – is eligible to be

---

64 Law of Republic of Kazakhstan No 29-V ZRK of 5 July 2012 'On Ratification of the Convention in International Interests in Mobile Equipment and of the Protocol to the Convention in International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment'.


66 Law on Ukraine's International Treaties, supra n. 65.

67 AWG Summary of National Implementation, supra n. 48, at 15, 20, 23.

68 ASU2011, supra n. 45, at Art. 37(c).
of law in Kazakhstan by virtue of the Law of 5 July 2012.64 This law was passed in order to ensure that the Convention and Protocol have priority over conflicting domestic law. Clause 15(4) of the Constitution of Ukraine states that the Convention and Protocol have priority over any inconsistent national law. The Law on Ukraine's International conventions have priority over the Constitution and Protocol (i) have force of law as the higher legal norm. Moreover, the laws and regulations of the AGW contained in the three countries appear to satisfy this requirement. Taking into consideration the criteria of implementation of the Convention and Protocol, the AGW Summary of National Implementations and Ukraine is attached to the...
(iv) risk of interference of customs authorities.

The majority of the aircraft operated today in Russian air space are leased from non-Russian companies and registered outside the Russian Federation.\textsuperscript{74} For this reason this article concentrates mostly on the review of such type of aircraft transactions.

A manifestly common law approach is reflected in the Convention. This fact has been noted by Russian academics since the outset of negotiating of the treaty.\textsuperscript{75} On the one hand, it did not become a barrier to the accession of Russia to the Convention. Thus, during the drafting of the law on accession to the Convention, the Interministerial Working Group ascertained that the Cape Town Convention contains norms that differ from those current in Russian legislation (e.g., related to default remedies).\textsuperscript{76} Nevertheless, governed by the principle of priority of the norms of an international agreement over the norms of Russian law, the Working Group decided to present the draft law to legislators.\textsuperscript{77} A number of common law concepts, including extra-judicial remedies, insolvency procedures, termination of agreement, leasing,\textsuperscript{78} consequently became new implants into Russian law.

5.1[a] Self-help Remedies, Repossession, De-registration

Extra-judicial (or self-help) remedies are comparatively new to Russian jurisprudence. According to the opinion of practitioners, they can hardly be exercised in respect of aircraft repossession in the territory of the Russian Federation: If the lessee does not voluntarily return the aircraft to the lessor, self-help remedies will unlikely be exercisable by the lessor, and a Russian court’s judgment will have to be obtained.\textsuperscript{79} In fact, as it was noticed before the accession of Russia to the Convention, there is ‘no self-help’ or equivalent concept under Russian law.\textsuperscript{80}

\textsuperscript{74} Timur Aitkulov, Victoria Borkevicha & Evgeniya Krasnitskaya, ‘Repossession of Aircraft in Russia: Practical and Legal Issues’ Clifford Chance (April 2013) at 1, online: Clifford Chance http://www.cliffordchance.com/publicationsandviews/publications/2013/04/repossession_of_aircraft_in_russia_practical.html [Borkevicha et al., ‘Repossession’].
\textsuperscript{75} Koushnikov, supra n. 26, at 432.
\textsuperscript{77} Ibid., at 136.
\textsuperscript{78} For a current Russian academic discussion on the nature of leasing, see generally Andrey V. Egorov, Leasing rent or financing, March 2012 Vestnik VAS R. 636 (2012).
\textsuperscript{79} See Borkevicha et al., ‘Repossession’, supra n. 74, at 2.
The repossession of an aircraft from a Russian lessee generally involves physical repossession of the aircraft, its customs clearance and obtaining flight permission for a ferry flight outside Russia. If the aircraft is located in Russia, then the lessee may face difficulties getting access to the aircraft, unless the airline, its employees or airport authorities are willing to provide cooperation. Any self-help remedies that involve use of force, violence or other extraordinary measures may expose the lessor to the risk of being accused of abuse of its rights, which could result in administrative or even criminal liability. Practitioners surmise that there is still no set of developed legal work which can be put into practice, which would efficiently allow the foreign financier or the lessor to be able to repossess the aircraft easily in Russia. Factual inability of repossession without leave of a court is in clear contradiction to the declaration of Russia under Article 54(2) of the Convention, and Russian authorities have to develop effective legal and practical mechanisms to be in conformity with its ‘extra-judicial’ commitments.

Additionally there is an issue of de-registration procedures. First, at the moment it is not clear whether leased aircraft and/or transactions regarding them have to be registered in the Russian Federation. Russia maintains a dual registry system: (i) aircraft are registered in the Russian State Registry of Civil Aircraft (the ‘Aircraft Registry’); (ii) change of title to and encumbrances over aircraft are registered in the Russian Unified State Registry of Interests in Aircraft and Transactions Therewith (the ‘Title Registry’). It is evident that aircraft registered abroad need not be registered in the Aircraft Registry. But the question about registration of leases in the Title Registry is still under discussion and requires

---

74 Geoffrey P. Burgess, Alan V. Kartashkin & Dmitry A. Karanasylov, Debevoise & Plimpton LLP, Aircraft Repossession in Russia (10 July 2013) at 2 online: Debevoise&Plimpton LLP <http://wwwDebevoise.com/files/Publication/40a9fcee-41c0-4e42-99d3-7b513c8cc588/Attachment/20111217_0220_002_864_972_524172d64b5220%20Repossession%20of%20AirCraft%20in%20Russia.pdf> [Kartashkin et al.].
75 Nick Chandler, Anna Otkina & Philip Lamzin, SNR Denton, Financing and Leasing Aircraft in Russia — Everything You Need to Know (27 September 2011) at slide 17, online: SNR Denton <http://files.denton.com/creative/seminars/24665/> [Chandler et al.].
76 Registration in Aircraft Registry is done in accordance with:
- Russian Air Code; and
77 Registration in Title Registry is done in accordance with:
- Federal Law No 31-FZ of 14 March 2009 ‘About State registration of Interests in Aircraft and Transactions Therewith'; and
additional legislative explanations. If the view about necessity of registration of, for example, operating leases in the Title Registry prevails, it would contradict the common international practice and would necessitate the adoption of specific regulations for lease deregistration in case of aircraft reposition.

5.1[b] Enforcement of Foreign Judgments

Disputes arising out of or in connection with aircraft lease agreements with a Russian party and other transaction instruments are usually referred to the jurisdiction of a certain foreign court, often New York or English courts and/or an international arbitration forum. Meanwhile, a judgment of a New York or an English court will hardly be enforceable in Russia. A foreign court judgment would most likely be enforceable if the relevant court decision is adopted by a court in a country that has a treaty on the mutual recognition of court decisions with Russia. But Russia has no such treaties with the US, the UK and most Western European countries. In the absence of a treaty, the foreign judgment can still be recognized and enforced in Russia based on the principle of reciprocity; meanwhile, in practice it is a rather rare and unpredictable matter. But as for awards of an international arbitration forum, the 1958 New York Convention establishes grounds for its recognition and enforcement in the Russian Federation. For this reason it is preferable for parties to agree on an arbitration clause rather than on a foreign jurisdiction clause. Nevertheless, some international legal practitioners recommend application to a Russian court as the most advisable method of seeking to repossess the aircraft if it is located in Russia.

5.1[c] Risk of Application of Russian Law

Current market practice in leasing of aircraft is to have the aircraft lease agreement and transaction instruments being governed by English or New York law. Before Russia’s accession to the Cape Town Convention, one of the legal issues raised by

---

86 Borkevicha et al., Repossession, supra n. 74, at 1.
88 Borkevicha et al., Repossession, supra n. 74, at 4.
89 Ibid., at 1.
RUSSIA, THE CIS AND THE CAPE TOWN CONVENTION

view about necessity of registration of aircraft repossession, it would contradict the Russian law could be rejected by Russian courts. It was based on two rules of Russian law:

1. aircraft is defined by the Russian Civil Code as an immovable property object, and
2. contracts relating to immovable property located on the territory of the Russian Federation shall be subject to Russian law.

The reasonable expectation was that a Russian court would define an aircraft operated by a Russian airline under any agreement, including an operating lease, as located in the territory of Russia. And correspondingly, the court could regard Russian law as applicable to the agreement, despite the agreement of the parties about other applicable law. This opinion was shared by the European Bank of Reconstruction and Development and the AWG in April 2011 in a joint letter to the Russian Association of Aircraft Operators, and by the US Ex-Im Bank in its letters to several Russian airlines in February 2012. Afterwards, this risk was mitigated by the second set of declarations made in 2012: Russia declared the applicability of Article VIII (Choice of Law). The declaration took effect on 1 August 2013, thus eliminating the future possibility of the court's disagreement with the parties' choice of applicable law. The validity of the party autonomy principle in choice of law was also stressed in the Parliamentary Explanatory Note to the draft of the Law on Additional Declarations.

---

7. Article 130 of the Russian Civil Code 'The Moveables and the Immovables':
   1. To the immovables (the immovable property, realty) shall be referred the land plots ...
      To the immovable shall also be referred the air-borne ... vessels ...

8. Article 1213 of the Russian Civil Code 'The Law Governing Contracts Relating to Immovable Property':
   Contracts relating to plots of land ... and other immovable property located on the territory of the Russian Federation shall be subject to Russian law.


5.1[d] Russian Internal Discussion

Generally, the current situation can be characterized as an active discussion between the Russian aviation community and authorities about the necessity of adopting new Russian legislation aimed at implementing the Law on Additional Declarations—i.e., to implement the rules of the subsequent declaration which are related to Article XIII (Deregistration and Export Request Authorization), and thereby to the Irrevocable De-Registration and Export Request Authorisation (IDERIA). In fact, the Parliamentary Explanatory Note directly stated the requirement of changes to the Russian Air Code, as well as to several acts of the Government of the Russian Federation and the Ministry of Transport of Russia aimed for the creation of the mechanism of exclusion of the aircraft from the State Registry of Civil Aircraft of the Russian Federation (Deregistration) based on IDERA, and to registration of IDERA by the designated State authority. Two authorities were appointed to be in charge of the preparation of the changes to the Act—the Ministry of Transportation and the Ministry of Economic Development. Nevertheless, no draft of any changes—neither of the Air Code, nor of any normative act—were prepared and represented to the Government for the further adoption procedures.

Overall, today there are a wide variety of public opinions of involved parties over the implementation of new rules: (i) the airline community follows the Parliamentary Explanatory note and insists on adoption of normative acts related to IDERA, but the Ministry of Transport disagrees; (ii) the airline community and the Ministry of Transport find changes in the customs rules necessary, but in the Parliamentary Explanatory Note the opposite approach is stressed; (iii) the Ministry of Transport proposes changes to bankruptcy law, contrary to the opinion of the Ministry of Economic Development, while (iv) all parties agree that there is no legal or practical necessity to change the Russian Air Code, as

---

95 Form of Irrevocable De-Registration and Export Request Authorisation is annexed to the Aviation Protocol [IDERIA].
96 Parliamentary Explanatory Note, supra n. 94, at para. 2.
97 Main Russian regulations related to the aircraft registration see in supra n. 83, 84.
99 See Parliamentary Explanatory Note, supra n. 94, at Art. 2; Tasoun, supra n. 98; Golovin, 'MIntrans', supra n. 98.
100 ATO.ru, Ministry of Economic Development rejected proposals of AEVT to the changes of FZ-361 (13 April 2012) online: ATO.ru <http://www.atoru.ru/content/minekonomrazvitiya-otvergo-predlozheniya-avt-po-izmeneniya-fz-no361> [translated by co-author A.Eberg]; Tasoun, supra n. 98.
characterized as an active discussion and authorities about the necessity of implementing the Law on Additional and Export Request Authorization, and on Export Request Authorization. The Parliamentary Explanatory Note directly stated the Code, as well as to several acts of the Ministry of Transport of Russia for exclusion of the aircraft from the State Federation (Deregistration) based on the designated State authority. Two of the preparation of the changes to the Ministry of Economic Development, neither of the Air Code, nor of any presented to the Government for the

of public opinions of involved parties (i) the airline community follows the on adoption of normative acts related disagrees; (ii) the airline community is in the customs rules necessary, but in opposite approach is stressed; (iii) the bankruptcy law, contrary to the opinion; while (iv) all parties agree that to change the Russian Air Code, as Request Authorisation is annexed to the Aviation

5.1[c] Risks of Interference by Customs Authorities

One of the main risks of the creditor in repossession and re-export procedures in Russia is the intervention by the customs authorities. If at re-export of the aircraft there appear to be outstanding customs payments of the 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 offences, including failure to comply with the declared customs procedures, or otherwise breach of the Russian customs legislation. The problem is that, first, a number of lessee’s breaches can lead, in accordance with the Code of Administrative Offences, to the confiscation of the leased aircraft; and, second, the customs authorities are entitled to arrest the aircraft during the administrative offence investigation. For example, in the case of sub-lease of the leased aircraft without prior permission of the customs authorities, the airline will be penalized by an administrative fine in the amount of one to two times the cost of the aircraft, with or without confiscation thereof. Such sanction can be characterized as ‘draconian’. However, in practice the confiscation does not seem to be applied – the authors did not discover any case where an aircraft or sea-going vessel owned by a foreign entity was confiscated as a result of an administrative offence of the Russian operator. However, the customs authorities willingly utilize the authority to arrest the 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.

This issue can be well demonstrated by the case of the Russian airline KrasAir. This case arose before the accession of Russia to the Cape Town
Convention; nevertheless it can be seen as a good example of expected behaviour of Customs Authorities. The airline became bankrupt in 2008. It operated a number of Boeing 737s, 757s and 767s, 109 leased from foreign lessors. Nearly all aircraft were successfully repossessed, excluding three planes: Boeing 757 (registration number EI-DUE),110 Boeing 737 (EI-DNT)111 and Boeing 767 (EI-GAA),112 which were determined by the Krasnoyarsk Customs Authorities to have been the subject of administrative offences, committed by Krasair. Their foreign owners and lessors have been unable to repossess the aircraft and to re-export them from Russia. The aircraft were stored for years at Moscow Domodedovo airport under the control of Customs Authorities and finally were withdrawn from use.

The owner of Boeing 757 (EI-DUE) – International Lease Finance Corporation (ILFC) – twice applied to the Court of Krasnoyarsk Krai with claims against Krasnoyarsk Customs, as follows:

(1) Case No A33-7750/2009113

In December 2008, Krasnoyarsk Customs arrested Boeing 757 (EI-DUE) operated by KrasAir, as an interim measure in an administrative case against the airline. ILFC claimed the unlawfulness of the actions of the Customs authorities to the court, and all three juridical instances sequentially held that the arrest was unlawful. Meanwhile, the courts found that Customs in fact were authorized to arrest the aircraft,114 but had not followed the required arrest procedures.115

(2) Case No A33-8485/2010116

In spite of the decision of the court about unlawfulness of the arrest, and of the fact that the arrest was terminated, ILFC was still unable to repossess the Boeing 757 (EI-DUE). The reason was that the aircraft had been temporarily imported into Russian territory under

---

109 See information online: Planespotters.net <http://www.planespotters.net/Airline/KrasAir>.
113 Arbitrage Court of Krasnoyarsk Krai, Decision of 7 October 2009, Case No A33-7750/2009.
114 Ibid., at 4.
115 Procedures of arrest are stipulated in Art. 27.14 of the Russian Code of Administrative Offences.
116 Arbitrage Court of Krasnoyarsk Krai, Decision of 30 September 2010, Case No A33-8485/2010.
example of expected behaviour of Krasair in 2008. It operated a number of foreign lessors. Nearly all aircraft planes: Boeing 757 (registration 111 and Boeing 767 (EI-GAA); 112 customs Authorities to have been the by Krasair. Their foreign owners aircraft and to re-export them from Moscow Domodedovo airport under were withdrawn from use.

— International Lease Finance out of Krasnoyarsk Krai with claims

air attack Customs arrested Boeing 757 as an interim measure in an ILFC claimed the unlawfulness authorities to the court, and all three told that the arrest was unlawful. Customs in fact were authorized to not followed the required arrest about unlawfulness of the arrest, terminated, ILFC was still unable to). The reason was that the aircraft into Russian territory under


RUSSIA, THE CIS AND THE CAPE TOWN CONVENTION

application by Krasair, and the customs authorities were ready to accept any further applications only from the airline. In fact, the general rule of the Russian Customs Code, which was in force at the time of the dispute, stipulated that the foreign entity could not be vested with power to apply to Customs for a change of customs regime of temporarily imported objects. ILFC claimed to the court 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. But the claim was not allowed by the court. Meanwhile, the court stated that in the case of termination of the lease agreement, ILFC would be able to protect its rights more effectively. 117

Today, the consequences of possible interference with repossession by customs authorities are probably less severe than in 2008 because of two key events: (i) the accession of Russia to the Convention, and (ii) the adoption of a new Customs Code of the Customs Union of Belarus, Kazakhstan and Russia. 118 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 comments of Russia's highest courts, nor relevant common decisions of Member States of the Customs Union relating to arrest or to IDERA. This is why such interim arrests have to be expected by the creditors, and the fact that the aircraft is not owned but merely operated by the Russian airline will not be an obstacle for customs authorities.

5.1[1] Related Recommendations

The following measures to mitigate the risks of detention of aircraft by Russian customs authorities may be recommended:

117 Ibid., at 4-5. The court made this conclusion on the basis of Art. 16(2) of the Russian Customs Code, which permits the foreign owner or possessor to fulfill customs operations for customs clearance of the owned/possessed goods only when movement of the goods across borders of the Russian Federation is carried out without the conclusion of a contract with the Russian party. The court decided that this rule is applicable in the case of a leasing contract term expiration, in connection with contract cancellation, or the termination of the contract by consent of the parties on other bases.

118 In cases specified by international treaties of the Member States of the Customs Union, Art. 279(3)(1) of the Customs Code of the Customs Union allows the transfer, of a temporarily imported aircraft, from the possessor to another person without permission of customs authorities.
Creditors should:
- incorporate the full set of provisions regarding termination of the lease agreement without consent of the defaulting debtor;\textsuperscript{119}
- monitor the lessee's compliance with Russian customs regulations, including due payment of any applicable customs duties;\textsuperscript{120} and
- stipulate in the lease agreement the lessee's non-compliance with Russian customs regulations as an event of default, triggering the lessor's right to terminate the agreement without consent of lessee;

Russian airline operators should:
- initiate the adoption of changes to the Russian Code of Administrative Offences, with a view to deleting provisions permitting confiscation of leased aircraft in the case of a mere administrative offence committed by the operator;

It is further recommended that Member State governments of the Customs Union (i.e., Belarus, Kazakhstan and Russia) consider adopting a common Act related to implementation of IDERA.

A full set of recommendations regarding aircraft transactions involving parties from Russia, Kazakhstan or Ukraine is contained in Annex III to the present review.

Although the legislative framework in Russia is more developed after accession to the Cape Town Convention, 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. Repossession without recourse to courts or arbitration may 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 and may pose unexpected practical difficulties.\textsuperscript{121}

5.2 Kazakhstan

The legislation of the Republic of Kazakhstan on transactions relating to aircraft and on implementation of the Cape Town Convention can be defined as more developed, clear and predictable than that of the Russian Federation. Thus, it is more favourable to international creditors.

\textsuperscript{119} See explanation, above, in n. 118. In July 2010, the rule of Art. 16(2) of the Russian Customs Code was substituted by the same rule of Art. 186(2) of the Customs Code of the Customs Union.

\textsuperscript{120} Kartashkin et al., supra n. 81, at 4.

\textsuperscript{121} Kartashkin et al., supra n. 81, at 4–5.
visions regarding termination of the contract of the defaulting debtor,\textsuperscript{119} with Russian customs regulations applicable customs duties,\textsuperscript{120} and at the lessee’s non-compliance with an event of default, triggering the reenewal without consent of lessee.

...ings to the Russian Code of a view to deleting provision ed aircraft in the case of a mere by the operator; Member State governments of the Kazakhstan and Russia) consider implementation of IDERA.

...transactions involving parties from Annex III to the present review.

...Russia is more developed after sors may still face a number of attempts regardless of the dispute lessee may have to apply to the Repossession without recourse to self-help may result in liability if not to clear the aircraft through customs may be required to discharge any speaking, repossessions are still difficulties.\textsuperscript{121}

...on transactions relating to aircraft Convention can be defined as more the Russian Federation. Thus, it is of Art. 16(2) of the Russian Customs Code acts Code of the Customs Union.

\begin{itemize}
\item[5.2(a)] Distinguishing Features of Kazakh Law
\end{itemize}

The rules of the Kazakh Civil Code on the law applicable to international agreements involving aircraft do not permit dual interpretation: the principle of party autonomy regarding choice of law is confirmed.\textsuperscript{122} The fact that an aircraft is defined by the law as an object of immovable property\textsuperscript{123} will trigger applicability of Kazakh law, but only in the absence of a provision on applicable law in the agreement.\textsuperscript{124}

Contrary to the Russian dual registry system, the registration of aircraft operated by Kazakh airlines, as well as of rights thereto and transactions therewith, are all effected in one registry, i.e., the Kazakh State Registry of Civil Aircraft.\textsuperscript{125} Also, there is no vagueness as in the case of Russia, regarding the question of necessity of registration of lease agreements; such agreements are registered in accordance with the provisions of the existing rules. In order to enter into a lease agreement, a lessee should obtain a permit from the civil aviation authorities for the lease of an aircraft and should register the aircraft, the right to possess/use the aircraft and the leasing agreement itself.\textsuperscript{126}

Kazakhstan alone among the three States of review adopted regulations establishing rules in relation to IDERA and specified procedures relating to recording of IDERA and to enforcement under them. These Regulations, as well as standard form documents related to IDERA, were approved by the Minister of Transport and Communications of the Republic of Kazakhstan in September 2012. Pursuant to the Regulations, the civil aviation authorities are responsible for recording of IDERA. The recording procedure is set out by the Regulations: either the operator or the owner must execute an IDERA in the form attached to the Regulations, and the civil aviation authorities have to record IDERA within two working days.\textsuperscript{127} Also, the Regulations set out the procedures for enforcing IDERA: according to the Regulations, the aircraft have to be deregistered within ten working days after application.\textsuperscript{128}

\begin{itemize}
\item[119] Tair Kutelev & Olga Chentsova, Aquisan Law Firm, Memorandum Regarding Aircraft Repossession in Kazakhstan (24 July 2013) (on file with authors).
\item[120] Article 118 Civil Code of the Republic of Kazakhstan.
\item[121] ibid., at Art. 1113.
\item[122] Regulations on State Registration of Civil Aircraft of the Republic of Kazakhstan, Rights Thereto and Transactions Therewith (approved by the Order of the Minister of Transport and Communications of the Republic of Kazakhstan No 613 of 18 September 2012) [Kazakh Regulations on State Registration].
\item[124] Kazakh Regulations on State Registration, supra n. 125, at clause 46.
\item[125] ibid., at clauses 49–53.
\end{itemize}
5.2[b] Common Features of Kazakh and Russian Law

The commonly used jurisdiction clause of an aircraft lease agreement with a Kazakh party assigns disputes to the courts of New York or the UK. However, as in the case of Russia, a judgment of New York or English courts is unlikely to be enforced in the Republic of Kazakhstan because (i) a foreign court judgment would be enforceable only in the case of the presence of a treaty on mutual recognition of court decisions,\textsuperscript{129} and (ii) Kazakhstan did not sign such treaties with the US or with the UK.\textsuperscript{130} Therefore, the practical value of such jurisdiction clauses is doubtful if a dispute requires enforcement in Kazakhstan.

5.2[c] Recommendations and Conclusions

Taking into consideration the number and the content of the Convention declarations lodged by the Republic of Kazakhstan, and the internal laws and regulations adopted, the following conclusion can be drawn: Kazakhstan is the most consistent among the three States in its efforts to implement the Convention rules. The fact that Kazakhstan is already included in the Cape Town List and, thus, Kazakh airlines are already authorized to benefit from the Cape Town Discount, clearly reflects this consistency. Only one recommendation can be offered to Kazakh government authorities: to negotiate with the two other members of the Customs Union (i.e., with the Russian Federation and the Republic of Belarus) the adoption of common IDERA customs regulations. To creditors in cross-border aircraft transactions with aircraft operators domiciled in the Republic of Kazakhstan, it should be recommended to provide for the following provisions of related transaction agreements: (1) a clause determining the law of the UK or of New York to be the applicable law, and (2) a clause for resolution of disputes by international arbitration.

5.3 Ukraine

5.3[a] Aircraft Dual Registration

The aircraft operated in Ukraine are registered in the State Aircraft Register, maintained by the civil aviation authorities, but the encumbrances over the aircraft are registered in the State Register of Pledges over Movable Property, maintained

\textsuperscript{129} Article 423(1) Civil Procedures Code of the Republic of Kazakhstan.

\textsuperscript{130} Kuleleev & Chentsova, supra n. 122. See also Natalya Lazutina, Specialties of Aircraft Leasing: from the United Kingdom and the United States to Kazakhstan, 63 (L.M. Short Thesis, Central European University, 2008) [unpublished].
by the Ministry of Justice of Ukraine (formerly, such encumbrances were registered in the State Register of Mortgages). Thus, Ukraine has the same dual aircraft registration system as Russia, but has different registration authorities. Meanwhile, the Ukrainian Civil Code, contrary both to Russian and Kazakh Codes, does not define an aircraft as an immovable object.

The inconvenience caused by dual registration might be mitigated by adoption of specific domestic legislation or regulations which govern IDERA.s and establish a regulatory framework for their recording and enforcement (deregistration and export of aircraft). Until today, unlike Kazakhstan, the Ukraine did not enact such regulations (as is the case in Russia). Moreover, IDERA regulations would significantly mitigate the risks of customs intervention in repossession procedures.

5.3[b] Evaluation of Custom Risk

The risk of detention in re-exporting aircraft by the Ukrainian Customs authorities is not as high as in relation with their Russian colleagues. The reason is the following: on the one hand, the Ukrainian Customs Code stipulates the rules for confiscation of transport objects in the customs law offenses (the Code states that an object which is not owned by the offender might also be confiscated); but on the other hand, the formal elements of such offences differ dramatically from the Russian provisions and could hardly be executed in the purchase or leasing of foreign aircraft. In fact, the aircraft might be confiscated only in case of being smuggled into Ukrainian territory. Nevertheless, IDERA regulations would considerably facilitate and accelerate customs clearance of the re-exported aircraft. Otherwise, as stressed by Ukrainian legal practitioners, the repossessing creditor or lessor may hardly proceed against an aircraft object without permission of a court. Seizing the aircraft in Ukraine ... may be a challenging procedure pending the adoption of implementing administrative (procedural) regulations. Without such adoption, Ukraine, like Russia, will de

132 See Art. 181 Civil Code of Ukraine 'Immovable and Movable Things'.
133 See Vlassik & Demyanenko, supra n. 131, at 3.2.
134 Customs Code of Ukraine No 4495-VI of 15 March 2012.
135 Ibid., at Arts 465, 472, 482, 484.
136 Ibid., at Art. 465(3).
facto not follow its commitment under the Article 54(2) declaration ('extra-judicial' remedies) lodged by Ukraine with UNIDROIT.

As with Russia and Kazakhstan, (i) judgments of the US and the UK courts are hardly recognized in Ukraine, but (ii) foreign arbitral awards are binding and shall be enforced under the rules of the 1958 New York Convention. That is why it would be practical for creditors of Ukrainian airlines to utilize the same provisions of aircraft transaction agreements — stipulating that UK or NY law is the applicable law and including an international arbitration clause — as are used by creditors of Russian and Kazakh operators.

5.3[c] Bankruptcy of AeroSvit Airlines

One of the most salient events in the Ukrainian aviation industry following the ratification of the Cape Town Convention was the bankruptcy of the leading Ukrainian airline, Aerosvit Airlines ceased operations at noon of 4 January 2013. The airline had filed for bankruptcy on 29 December 2012 in the Ukrainian court. Aerosvit had operated a fleet of thirty-one aircraft, primarily comprised of Boeing 737s and 767s. The aircraft operated by AeroSvit were detained at various airports. An aircraft, ready for departure, was held back in Warsaw on 4 January 2013 while another was impounded in Stockholm the following day. A similar situation with the airline occurred in Tel Aviv on 6 January. On 29 December 2012, pursuant to the order of the Commercial Court of the Kyiv Region, bankruptcy proceedings in respect of Aerosvit were initiated based on the application of the airline. Pursuant to said order, the court introduced the procedure of administration of debtor’s assets, appointed the administrator of assets, and imposed a moratorium on satisfaction of creditors’ claims. In February 2013, the court decided to stop bankruptcy procedures. Nevertheless the airline ceased all flights. One month earlier, the owner of the aircraft – a European leasing company – was able to repossess several Boeing 737-800s and to lease them to

---


under the Article 54(2) declaration with UNIDROIT.
judgments of the US and the UK courts.
foreign arbitral awards are binding under the 1958 New York Convention. That is
of Ukrainian airlines to utilize the statements — stipulating that UK or NY law is
national arbitration clause — as are raised by
Ukrainian aviation industry following the
tion was the bankruptcy of the leading
operations at noon on 4 January 2013 on
29 December 2012 in the Ukrainian
of thirty-one aircraft, primarily operated by
AeroSvit were detained at departure, was held back in Warsaw and ended in
Stockholm the following day, and arrived in Tel Aviv on 6 January. On 27
of the Commercial Court of the Kyiv
district of AeroSvit were initiated based on the said order, the court introduced the
assets, appointed the administrator of the assets of the creditors’ claims. In February
proceedings. Nevertheless the airline — owner of the aircraft — a European leasing
Boeing 737–800s and to lease them to

Yarenko, Law Business Research Ltd., Enforce para. 28, online: Arringer <http://arringer.ru/files/20 Foreign%20Judgement%202013.pdf>,
den AeroSvit’s aircraft detained at various airports (7 January 2013), online,
hen global.com/news/articles/debt-ridden-aerosvit-aircrafts,
bankruptcy procedure of AeroSvit (10 January 2013) online: Ukraine
upload/mediabrary/newsletters/assets_newsletters/index
bankruptcy procedure (7 February 2013) online: Ukraine

another Ukrainian airline. Between January and July 2013, AeroSvit has
returned fourteen Boeings and Embraers to the lessors, but, as of 31 July, seven
Boeing aircraft were still stored by the airline. Thus, seven aircraft were already
out of operation seven months after filing of the insolvency application. The destiny of these stored aircraft will be closely followed. At the date of writing of
the present review, no repossession claims of the lessors were filed with the courts.

6. CONCLUSIONS

Russia, Kazakhstan and Ukraine have effectively implemented the Cape Town
Convention and Aircraft Protocol remedies into national laws and regulations.
Nevertheless, for the achievement of the fulfillment of one of the main principles of
the Cape Town System — the prompt enforcement principle — further efforts of
national rule makers are necessary.

There are many common features in the regulation of secured asset-based
aircraft transactions in all three States reviewed. For all of them, the remedy
provisions stipulated by the Cape Town Convention and Aviation Protocol were
recently introduced into their national legislation. A number of concepts familiar to
common law traditions but new to civil law traditions in Russia, Kazakhstan and
Ukraine — concepts such as extra-judicial remedies, unilateral termination of the
agreement, irrevocable authorization, asset repossession in insolvency, etc. — were
incorporated into national law in all three States under the constitutional principle
of an international treaty prevailing over national laws without the adoption of
domestic rules and regulations.

The Republic of Kazakhstan is the most consistent one among the three
States in its implementation of the Convention rules, and its inclusion in the OECD
Cape Town Convention List reflects this consistency. Accordingly, the rights of
creditors are more secured in Kazakhstan today. Only one recommendation can be
offered to Kazakh authorities: to negotiate with the two other members of the
Customs Union (i.e., with the Russian Federation and the Republic of Belarus)
the adoption of common IDERA customs regulations.

The most difficult item in the implementation of the Cape Town Convention
remedies for the other two States, Russia and Ukraine, is the adoption of national
regulations on IDERA, which is obligatory for both registration and customs
authorities. Also, it is highly recommended that these two countries make a
decision under Article X of the Aviation Protocol (timely remedies). But there is a
clear understanding that, in the current situation of an expectation of the inclusion

143
144
145
146
of both countries in the Cape Town Convention List, law makers do not
demonstrate any high motivation to make new declarations to the Convention,
and only a negative decision of the OECD might give an impetus to new attempts
by national authorities.

Finally, the Russian law relating to confiscation of foreign aircraft in cases of
breach of customs rules by Russian operators, and providing for corresponding
powers of customs authorities to arrest the aircraft, needs to be brought in line
with current legal realities by the Russian authorities.

In Annex III to the present review, a comprehensive set of recommendations is
made in relation to cross-border aircraft transactions with Russian, Kazakh and
Ukrainian parties.
## Annex I: Table of Declarations Made by Russia, Kazakhstan and Ukraine

<table>
<thead>
<tr>
<th></th>
<th>39 (1) (5)</th>
<th>39 (4)</th>
<th>40</th>
<th>50</th>
<th>52</th>
<th>53</th>
<th>54 (1)</th>
<th>54 (2)</th>
<th>55</th>
<th>60 (1)</th>
<th>XIX (1)</th>
<th>XXXX (1): VIII Choice of law</th>
<th>XXXX (2): XII Insolvency Assistance</th>
<th>XXXX (3): XII De-registration and export request authorization</th>
<th>XXXX (4): XII Insolvency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republic of Kazakhstan</td>
<td>In</td>
<td>In</td>
<td>In</td>
<td>In</td>
<td>NJR</td>
<td></td>
<td>In</td>
<td>In</td>
<td>In</td>
<td></td>
<td>In</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Russian Federation</td>
<td>In</td>
<td>In</td>
<td></td>
<td>In</td>
<td>NJR</td>
<td></td>
<td></td>
<td>In</td>
<td>In</td>
<td></td>
<td>In</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ukraine</td>
<td>Out</td>
<td>In</td>
<td>NJR</td>
<td>Other</td>
<td>In</td>
<td></td>
<td>In</td>
<td>In</td>
<td></td>
<td>In</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

IN: opt-in declaration made  
OUT: opt-out declaration made  
NJR: non judicial remedies (without leave of court)  
Other: other declaration made

### Resources:


### ANNEX II. EXTRACTS FROM AWG SUMMARY OF NATIONAL IMPLEMENTATION

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of ratification /accession</th>
<th>Date of entry into force of the Cape Town Convention</th>
<th>2. Eligibility for the Cape Town discount (*)</th>
<th>3. Did the country make Qualifying Declarations under the ASU(++)</th>
<th>4. Does the Treaty take priority over conflicting national law</th>
<th>5. Method by which the Treaty acquires force of law</th>
<th>6. IDERA</th>
<th>7. Additional comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kazakhstan</td>
<td>Date of accession: 21 January 2009</td>
<td>Date of entry into force: 1 May 2009</td>
<td>Yes</td>
<td>Protocol Article VIII (made)</td>
<td>Yes Higher Legal Norm Article 4.3 of the Constitution of the Republic of Kazakhstan provides that ratified international treaties prevail over any inconsistent national law.</td>
<td>The Treaty has a force of law in Kazakhstan by virtue of ratification through the Law of Republic of Kazakhstan No. 29-V 3PK dated 5 July 2012 (the Law). See column 7</td>
<td>Applicable</td>
<td>The Law passed subsequent to the accession by Kazakhstan ratified the Treaty in order to ensure that the Treaty has priority over national law.</td>
</tr>
</tbody>
</table>

---

145 AWG Summary of National Implementation, supra n. 48 at 13 (Kazakhstan), 20 (Russia), 23 (Ukraine).
<p>| Country                  | Date of accession: 25 May 2011 | Date of entry 1 September 2011 | 2. Eligibility for the Cape Town Convention (<em>) | 3. Did the country make Qualifying Declarations under the ASU(</em>**): Not yet considered by OECD See column 7 | 4. Does the Treaty take priority over conflicting national law: Yes – pending effectiveness of subsequent declarations Protocol Article VIII (made) – effective as of 1 August 2013 Protocol Article XI (made) – Alt A – 60 calendar days Protocol Article XIII (made) – effective as of 1 August 2013 Convention Article 54(2) – non judicial remedies permitted Protocol Art X (not made) Made no declarations prohibited under Article 3 of Annex I of Appendix II to the ASU | 5. Method by which the Treaty acquires force of law: The Treaty has the force of law pursuant to Clause 15(4) of the Constitution of the Russian Federation, which provides that recognised principles of international law and international treaties that apply to the Russian Federation form part of the domestic legal system. The accession to the Treaty was achieved through enactment of the Federal Law of the Russian Federation No. 361-FZ dated 25 December 2010 (the Convention Act), in accordance with Article 5 of the Federal Law | 6. IDERA: Applicable | 7. Additional comments: The bolded declarations referred to in column 3 have been deposited with UNIDROIT but will come into force on 1 August 2013. Implications, if any of the declaration under Article 39 and practicalities of deregistration and export (upon effectiveness of declaration under Article XIII of the Protocol) are being assessed. |</p>
<table>
<thead>
<tr>
<th>Country Date of ratification / accession</th>
<th>2. Eligibility for the Cape Town discount (*)</th>
<th>3. Did the country make Qualifying Declarations under the ASU(**)</th>
<th>4. Does the Treaty take priority over conflicting national law</th>
<th>5. Method by which the Treaty acquires force of law</th>
<th>6. IDERA</th>
<th>7. Additional comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Date of ratification / accession</td>
<td>Date of entry into force of the Cape Town Convention</td>
<td>Eligibility for the Convention</td>
<td>Did the country make Qualifying Declarations under the ASU(**)</td>
<td>Does the Treaty take priority over conflicting national law</td>
<td>Method by which the Treaty acquires force of law</td>
</tr>
<tr>
<td>---------</td>
<td>---------------------------------</td>
<td>---------------------------------------------</td>
<td>-------------------------------</td>
<td>----------------------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Ukraine</td>
<td>Determine: 31 July 2012</td>
<td>1 November 2012</td>
<td>Not yet considered by OECD</td>
<td>Yes Protocol Article VIII (made) Protocol Article XI (made) – Art A – 60 calendar days Protocol Article XIII (made) Convention Article 54(2) – non-judicial remedies permitted Protocol Art X (not made) Made no declarations prohibited under Article 3 of Annex I of Appendix II to the ASU</td>
<td>Yes Higher Legal Norm Pursuant to the Law No.1906-JV the Treaty has priority over other laws except for the Constitution of Ukraine.</td>
<td>The Treaty has the force of law in Ukraine following its entry into force on 1 November 2012, pursuant to the Constitution of Ukraine and the Law on Ukraine’s International Treaties No. 1906-JV dated 29 June 2004 (the Law No. 1906-JV).</td>
</tr>
</tbody>
</table>

(*) AWG comment: please visit http://www.oecd.org/tad/exportcredit/cix.htm for the official OECD list.

(**) AWG comment: please visit http://www.unidroit.org/english/implement/imain.htm for UNIDROIT list of declarations; note however that UNIDROIT does not express any view on whether a state has made all qualifying declarations.
ANNEX III. RECOMMENDATIONS

A. To creditors in cross-border aircraft transactions:

A.1 transactions with aircraft operators domiciled in the Russian Federation, the Republic of Kazakhstan or Ukraine:

A.1.1 to designate the law of the UK or NY as applicable to transaction agreements;

A.1.2 to mandate international arbitration for disputes arising under transaction agreements;

A.2 transactions with aircraft operators domiciled in the Russian Federation:

A.2.1 to incorporate the full set of provisions regarding termination of the lease agreement without consent of the defaulting debtor;

A.2.2 to incorporate a clause permitting to monitor the lessee’s compliance with Russian customs regulations, including due payment of any applicable customs duties;

A.2.3 to stipulate in the lease agreement the lessee’s non-compliance with Russian customs regulations as an event of default, triggering the lessor’s right to terminate the agreement without consent of lessee.

B. To legislators:

B.1 of the Russian Federation:

B.1.1 to adopt changes to the Russian Code of Administrative Offences, which will terminate the formal possibility of confiscation of the leased aircraft in the case of administrative offence committed by the operator;

B.1.2 to adopt the subsequent declaration under Article X of the Aviation Protocol (Timely Remedies);

B.2 of Ukraine:

B.2.1 to adopt the subsequent declaration under Article X of the Aviation Protocol (Timely Remedies).

C. To government civil aviation and customs authorities:

C.1 of the Russian Federation:

C.1.1 to customs authorities: to adopt an agency-level act related to implementation of IDERA;

C.1.2. to aviation authorities: to adopt an agency-level act related to implementation of IDERA;

C.2 of Ukraine:
RAFT TRANSACTIONS:

Operators domiciled in the Russian Federation or Ukraine:
UK or NY as applicable to transaction

arbitration for disputes arising under

Operators domiciled in the Russian Federation:

provisions regarding termination of the
faulting debtor;
requesting to monitor the lessee's compliance

with due payment of any applicable

to the lessee's non-compliance with a default, triggering the lessor's right to terminate the lease.

Russian Code of Administrative Offences:

of confiscation of the leased aircraft in the name of the lessee

by the operator;

of Article X of the Aviation

Convention under Article X of the Aviation

Convention.

Customs authorities:

draft an agency-level act related to

import regulations

C.2.1 to customs authorities: to adopt an agency-level act related to implementation of IDERA;

C.2.2 to aviation authorities: to adopt an agency-level act related to implementation of IDERA.

D. To the Eurasian Economic Commission of the Russian Federation, Republic of Kazakhstan and Republic of Belarus:

D.1. to adopt a Decision on common IDERA customs regulations.