

Cape Town Convention

Summary of Requirements regarding De-registration and Export

Background

1. The Cape Town Convention,¹ a major international treaty, was expressly designed to reduce transaction risk, thus facilitating, and reducing the cost, of aviation credit. It reduces such risk by providing clear and precise rules, not general or discretionary standards. Such rules include those relating to timing, as prompt action is a core feature of the Cape Town Convention system. These clear and timing-related rules serve the overarching objective of providing commercial predictability, to be relied upon by the financial community.

2. Non-compliance with the clear and timing-related Cape Town Convention provisions by a state party to it (a **'contracting state'**) has two material consequences, one legal and the other commercial. As a legal matter, such non-compliance constitutes a violation of an international legal obligation. It is a well-established principle of international law that a state may not invoke provisions of its internal law as justification for its failure to perform a treaty. As a commercial matter, such non-compliance prevents the risk reduction contemplated by the Cape Town Convention and the use of the treaty as a means of facilitating financing and leasing. That, in turn, has substantial negative macro-economic consequences on the non-complying state, including on tourism, trade, investment, and employment, given the direct links between aviation and these elements.

CTC Requirements

3. The Cape Town Convention provides for a series of remedies, available at the election of a creditor (including a lessor), in the case of a default by a debtor (including a lessee). A default takes its meaning from the terms of a contract, and a court or other authority may not add to or otherwise modify that commercial agreement. See Convention, art. 11(a).

4. Included in that set of remedies are the de-registration and export of an aircraft. The former is required given the provisions of the Chicago Convention of 1944, which prevent the nationality registration of an aircraft in more than one jurisdiction at a time. Without de-registration, the other remedies are ineffective, as an aircraft cannot be redeployed, which is fundamental to the Cape Town Convention and to the very concept of leasing and secured credit. Any restriction on the physical export produces the same practical consequence. For these reasons, the Cape Town Convention addresses these items with clear rules, which override otherwise applicable national law. The core remedies of de-registration and export are set out in Protocol, art. IX.

¹ The phrase **'Cape Town Convention'** means the Convention on International Interests in Mobile Equipment (the **'Convention'**) as modified by the Protocol on Matters Specific to Aircraft Equipment (the **'Protocol'**).

5. Underscoring the criticality of these two remedies to the Cape Town Convention system, the treaty augments them with a procedural counterpart: an irrevocable de-registration and export request authorization. See Protocol, art. XIII (and the form of the document, referred to herein as an **IDERA**, annexed to the Protocol). The provisions of Protocol, art. XIII, and the use and mandatory recognition of an IDERA apply if, and only if, a contracting state so declares. See Protocol, art. XIII(1).

6. The IDERA is a creature of the Protocol, *sui generis* in nature, and not derived from or dependent upon national law. It was drafted to overcome existing impediments to de-registration and export. It is a standing direction by a debtor (borrower or lessee) to the registry authority) to honour a request for de-registration made by the holder of the IDERA. To be effective, a debtor must agree to, in fact must sign and submit, the IDERA. See Protocol, art. XIII (2) and Official Commentary, para. 3.31 et. seq. Where so agreed, signed, and submitted, an IDERA is binding and irrevocable. An IDERA goes further than, and is not an equivalent of, a national law power of attorney: an IDERA holder is acting in its own name, not as an agent of the debtor, and is enforcing a treaty remedy.

7. The holder of the IDERA is the sole person authorised to request de-registration and export of an aircraft. See Protocol, art. XIII(3). Importantly, Protocol, art. IX(5) states that when such request is made, the registry authority 'shall' be honour it if two conditions are met:

- a. The request is properly submitted under a recorded IDERA, and
- b. The holder certifies – if required by the registry authority – that all prior registered interests have been discharged or have consented.

8. Registry authority discretion is replaced by a mandatory rule. The only qualification to the above IDERA rules relates to 'applicable safety laws and regulations'. This, however, does not apply to de-registration remedies. See Official Commentary, para. 3.36. It applies to export and physical transfer, and may only qualify that export remedy where and to the extent *bona fide* safety issues are implicated.

9. The IDERA process is purely documentary, dispensing with the need for the regulatory authority to investigate external facts. Save as provided by safety laws and regulations (such exception limited to the remedy of export), the registry authority may not impose any additional requirements. The registry authority may not require further consents, including that of the debtor. See Official Commentary, para. 5.48. By necessary extension, the registry authority may not condition these remedies on actions within the control of the debtor, such as (i) returning the original certificate of registration or airworthiness, or (ii) changing the aircraft's transponder codes. Such, *de facto*, would require debtor consent, which could be used to frustrate the treaty's terms. Nor, for the same reason, may the registry authority condition de-registration on the creditor having possession of the aircraft. These items have been recognized in AWG's model implementing IDERA regulation (posted on www.awg.aero, the **Model IDERA Regulation**) at point 6.3.1.

10. On timing and timetables, the Protocol, at art. XIII (4), requires a registry authority to 'expeditiously co-operate with and assist' the holder of the IDERA in carrying out the remedies of de-registration and export. This is to be read in light of the foregoing discussion of (i) a purely documentary process, (ii) the absence of factual investigation, and (iii) the prohibition on

requesting debtor consent. A very short time period is contemplated. The Protocol provides an express timetable of five (5) days in two specific contexts. From these examples, AWG has been recommending a regulatory timetable of five (5) days for de-registration and (subject to safety laws) export, following a request from an IDERA holder. See Model IDERA Regulation at point 6.2.1.

11. As made clear in the Official Commentary, at para. 3.31, the foregoing IDERA action by a registry authority does not involve a court order. That is further supported where the contracting state's declaration in respect of Convention, art. 54(2) states that such remedies may be 'exercised without court action' and/or 'without leave of the court'.

While a court order requirement is therefore inconsistent with the IDERA process, the CTC gives the creditor an alternative court route: instead of enforcing an IDERA, a creditor may request the court to order expedited CTC judicial remedies.² The choice belongs to the creditor, not the registry authority. In the case of court action, the above-mentioned five (5) day timetable applies following a period for the receipt of a court order granting possession of the aircraft to the creditor (for relief pending final determination) set out in the contracting state's declaration (most set a period of between three (3) and ten (10) day). See Convention, art. 13 (setting out the treaty standard) and Protocol, art X (which contemplates a timetable), together with Official Commentary, para 3.32. The latter provisions reflect and advance the prompt action required by the CTC.

12. For completeness on the matter of timing, there is a 'waiting period' on remedies, as set out in the contracting state's declaration,³ but only upon the occurrence of an 'insolvency-related event', which is centred on the commencement of formal insolvency proceedings.⁴ See Convention, art. 1(l) (definition of insolvency proceedings) and Protocol, art. I(m)(definition of insolvency-related event) and XI (main insolvency provision). A contracting state may not apply that waiting period absent formal insolvency proceedings.

13. Finally, the de-registration remedy may not be conditioned on, and is not subject to, payment or fulfillment of claims relating to priority, non-consensual interests or rights of detention, in each case under the contracting state's declaration. Such claims are unaffected by de-registration. The claimants retain the ability to assert such claims, whether before or after the de-registration remedy is effected. See Official Commentary at para. 3.36.

END

² This applies if, and only if, judicial timetables are contemplated under the contracting state's declaration in respect of Protocol, art X.

³ Most declarations set out a sixty (60) day period, but some have a thirty (30) day period.

⁴ This applies if, and only if, Alternative A applies by virtue of the contracting state's declaration in respect of Protocol, art XI.