



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

African AWG Regional Event

**Cape Town Convention and its Aircraft Protocol
and Cross Border Transferability of Aircraft
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The Cape Town Convention and its Aircraft Protocol: the basic legal framework

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The Cape Town Convention: An Innovative Legal Regime for Aircraft Financing and Leasing (1)

Decision to undertake work in this area prompted by concrete economic considerations:

- Overall economic benefits of **enhancing private financing** of the aircraft industry
- Positive externalities (e.g. greater safety of air travel)

BUT:

- **LEGAL OBSTACLES** in using asset-based financing and leasing, particularly in cross-border transactions, without uniform law:
 - Legal systems vary in their approach to recognition of security interests, the process for enforcement, and the remedies available

NEED TO IMPROVE THE EFFECTIVENESS OF CREDITOR'S REMEDIES BOTH CROSS-BORDER AND INTERNALLY

ENHANCE **PREDICTABILITY AND REDUCE RISKS**

An Innovative Legal Regime for Aircraft Financing and Leasing (2)

Solution:

International treaty system adopted jointly by UNIDROIT and ICAO in 2001

- Parties to a security agreement, a sale with retention of title, a leasing agreement have the option of creating **an autonomous “international interest”** and register it in a dedicated, asset-based, wholly electronic **international registry**
- The registered interest prevails and is enforceable in contracting States against later registered and non registered interests, and against national interest (with well-defined exceptions)

Underlying principles:

- giving effect to parties' agreement
- enhancing predictability to reduce risks

Treaty design: two-tier structure Convention/Protocol

- Main Convention contains the general legal regime
- Protocols adapt them to a particular type of **uniquely identifiable equipment** and to the needs of a **specific industry sector**
 - Aircraft Protocol applies to **airframes**, aircraft **engines** and **helicopters**
- Convention enters into force only in conjunction with a Protocol
- Convention and Protocol are to be interpreted as a single instrument
- CTC Art 6(2): Protocol prevails in cases of inconsistency

Treaty design: connecting factors

- “The Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the **debtor** is situated in a Contracting State” – CTC Art 3(1)
- test applies only once in time
- location of creditor is irrelevant
- additional connecting factor under Aircraft Protocol: registration in national aircraft register in a Contracting State

Treaty design: system of declarations

- Contracting States are permitted to make **declarations** modifying the operation of some provisions
 - States may wish to protect specific national interests (e.g. CTC Art. 39 and 40)
 - States may wish to enhance the economic benefits of the Protocol by opting into Protocol's provisions strengthening creditors' rights (in particular in relation to choice-of-law, enforcement and insolvency)
 - Mandatory declaration: CTC Art. 54(2) – State shall declare whether or not any remedy available to the creditor under any provision of the CTC which does not expressly require application to the court may be exercised only with leave of the court
- Policy choice by States!
- Choice has economic consequences!

Cape Town Convention: Key Features (I)

- ☐ **Autonomous, consensual «international interest»:**
 - granted by a chargor under a **security agreement**
 - vested in a **conditional seller under a title reservation agreement**
 - vested in a **lessor under a leasing agreement**” (CTC Art. 2(2))
 - Aircraft Protocol: extension of application of some provisions to **sales** (AP Arts. III and V)

- ☐ **Minimalist requirements for “creation” (inter-partes effectiveness):**
 - ☐ Agreement in writing
 - ☐ Enables the object to be identified (AP Art. VIII = manufacturer’s serial number, name and model designation)
 - ☐ Enables security obligations to be determined (without the need to state a sum or maximum amount)

- ☐ **Uniform law ensures effectiveness of the international interest as against third parties through the establishment and operation of **the international registry**:**
 - ☐ transparency
 - ☐ predictability

Cape Town Convention: Key Features (2)

- ❑ Objective and simple rules for determining **priorities**: registered interest takes free of unregistered or subsequently registered interests, irrespective of actual or constructive knowledge, and including those in national law
 - ❑ (except for non-consensual interests declared by States under Conv Art. 39 and subject to subordination agreements)
- ❑ Quick and effective **default remedies** (enforcement measures), including advance relief during court proceedings pending final determination
- ❑ Effectiveness in **insolvency proceedings** of the debtor

Default remedies and enforcement

- Parties may agree as to what constitutes default (CTC Art. 11(1))
- Basic remedies available to creditor, where contractually agreed, are:
 - **take possession** (CTC Arts. 8(1)(a) and 10)
 - **sell or grant a lease** (CTC Art. 8(1)(b))
 - **collect or receive income** (CTC Art. 8(1)(c))
 - **vesting of object in satisfaction (strict foreclosure)** (CTC Art. 9)
 - **termination of agreement** (lessor and conditional seller) (CTC Art. 10)
- Protocol provisions enhancing specific remedies (AP Art. IX):
 - **Deregistration of aircraft**
 - **Export and physical transfer of aircraft**
- Advance relief pending final determination (CTC Art 13 and AP Art. X)

States may modify remedy provisions of the Convention through the system of declarations

Insolvency rules

- **General rule: international interest effective in insolvency if registered (CTC Art. 30)**
- **Contracting States may opt into more effective insolvency provisions contained in the Protocol (AP Art. XI):**
 - **Choice of 2 options (Alternative A and B), otherwise domestic law applies**
 - **Alternative A allows full enforcement with clear time-frames, also in restructuring or rescue proceedings**
 - **Most ratifying States have elected Alternative A**
 - **Alternative A is a crucial provision as regards economic benefits**



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