



The Cape Town Convention 5 years on

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The Cape Town Convention¹ came into force in the Cayman Islands on 1 November 2015 introducing registrable “international interests” in respect of aircraft and aircraft engines and setting out the rights to which the holders of such interests are entitled. The Convention has now entered into force in more than 75 countries. The implementation of the Convention triggered the repeal of the Cape Town Convention Act, 2009 which had been enacted with the aim of creating equivalent interests and rights (as a matter of domestic law) until such time as the Convention came into effect.

In the five years since the Convention came into force we have advised leasing companies, aircraft owners, lenders and others that use Cayman structures for financing and leasing aircraft on the rights and interests conferred by the Convention and the impact of the Convention on pre-existing rights and interests. We expect that the recovery of the global aviation market will lead to increased demand for export credit and other supported financing solutions that use Cayman Islands bankruptcy remote entities. The rights and remedies under the Convention and how they will be recognised as a matter of Cayman Islands law will remain one of the material considerations for such transactions.

An immediate impact of the COVID-19 pandemic has been the significant increase in the number of aircraft that are registered in the Cayman Islands. The Cayman aircraft register

has proved popular for the temporary registration of aircraft that have been taken out of service and are being stored or transitioned between operators (discussed in our [aviation bulletin in September 2019](#)). We have helped clients understand the steps that should be taken to protect and record rights and interests in such aircraft and have also assisted with the exercise of rights under the Convention to procure the de-registration of aircraft from the Cayman Islands register.

In this briefing we revisit key points concerning the implementation of the Convention in the territory and share our experience of how the Cayman Islands Civil Aviation Authority (the “CAACI”) has responded to de-registration requests made in accordance with the Convention.

Implementing Legislation

Due to its status as a British Overseas Territory the implementation of the Convention in the Cayman Islands required the Convention to first be ratified by the United Kingdom and then extended to the territory. This was accomplished via a declaration by the United Kingdom under Article 52 of the Convention which extended its application to the Cayman Islands and the enactment and commencement in the Cayman Islands of the International Interests in Mobile Equipment (Cape Town Convention) Act, 2015.

¹ The Convention on International Interests in Mobile Equipment concluded in Cape Town, South Africa on 16 November 2001.

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The Cayman Islands is not itself a Contracting State within the meaning of the Convention rather it is a territorial unit of a Contracting State (the United Kingdom). Article 52(5) of the Convention and Article XXIX(5) of the Aircraft Protocol provide that a company which is a debtor (such as a lessee under a lease or the chargor under a security agreement), and which is incorporated in a territorial unit, is considered to be situated in a Contracting State for all purposes of the Convention. Cayman Islands special purpose vehicles now tick the box for financing parties that prefer/require all transacting entities to be situated in a Cape Town jurisdiction.

Declarations

Article 52 of the Convention further provides that a Contracting State may make declarations permitted under the Convention in respect of its territorial units that are different from the declarations made regarding that Contracting State itself and/or the declarations made regarding any other territorial unit of that state. The declarations permitted by the Convention that have been made with respect to the Cayman Islands are:

Declarations pursuant to Article 39 of the Convention

A declaration was made under Article 39(1)(a) of the Convention that all categories of non-consensual rights or interests which as a matter of Cayman Islands law have priority over an interest in an aircraft object equivalent to that of the holder of a registered international interest shall, to that extent, have priority over a registered international interest, whether in or outside insolvency proceedings.

A declaration was made under subsection (b) of Article 39 to provide that nothing in the Convention shall affect the right of the Government of the Cayman Islands (or other provider of public services) to arrest or detain an aircraft object under the laws of the Cayman Islands for payment of amounts owed to such entity, organisation or provider directly relating to those services.

A declaration was also made under Article 39(4) of the Convention with the effect that a right or interest of a category covered by the declaration made under Article 39(1)(a) of the Convention shall have priority over an international interest registered prior to the date of deposit of United Kingdom's instrument of ratification.

Declaration pursuant to Article 53 of the Convention

A declaration was made under Article 53 of the Convention which enables a Contracting State to declare the relevant courts for the purposes of Article 1 and Chapter XII of the Convention (any claim brought under the Cape Town Convention). In relation to the Cayman Islands this is the Grand Court of the Cayman Islands.

Declaration pursuant to Article 54(2) of the Convention

A declaration was made under Article 54(2) of the Convention that any remedy available to the creditor under any provision

of the Convention, which is not expressed in the Convention to require application to the court, may be exercised without court action and without leave of the court.

Declaration pursuant to Article XXX(1) of the Aircraft Protocol

A declaration was made pursuant to Article XXX(1) of the Aircraft Protocol such that Articles VIII (Choice of law), XII (Insolvency assistance) and XIII (De-registration and export request authorisation) all apply.

Declaration pursuant to Article XXX(2) of the Aircraft Protocol

A declaration was made with respect to Article XXX(2) of the Aircraft Protocol, meaning that Article X (Modifications of provisions regarding relief pending final determination) will apply in its entirety and that the number of days for "speedy relief" is 10 working days in the Cayman Islands from the date the application for relief is filed.

Declaration pursuant to Article XXX(3) of the Aircraft Protocol

A declaration was made with respect to Article XXX(3) of the Aircraft Protocol so as to apply Article XI, Alternative A in its entirety to all types of all insolvency proceedings and that the waiting period for the purposes of Article XI(3) of that alternative is sixty (60) calendar days.

Declarations were not made in respect of the following provisions:

No declaration pursuant to Article 40 of the Convention

A declaration was not made with respect to Article 40 (Registrable non-consensual rights or interests) which means no non-consensual rights or interests are registrable as international interests under Cayman Islands law.

No declaration pursuant to Article 50 of the Convention

A declaration was not made with respect to Article 50 of the Convention (Internal transactions) which means that the Convention will apply to internal transactions.

No declaration pursuant to Article 54(1) of the Convention

A declaration was not made with respect to Article 54(1) of the Convention which means that a chargee is not prohibited from granting a lease over an aircraft in the Cayman Islands.

No declaration pursuant to Article 55 of the Convention

A declaration was not made with respect to Article 55 of the Convention which means that the provisions of Articles 13 and 43 apply in all respects in the Cayman Islands.

No declaration pursuant to Article 60 of the Convention

A declaration was not made with respect to Article 60(1) of the Convention which means that the Cape Town Convention does not apply to a pre-existing right or interest and therefore all such pre-existing rights and or interests retain the priority they enjoyed under applicable law before 1 November 2015.

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No declaration pursuant to Article XIX of the Aircraft Protocol

A declaration was not made with respect to Article XIX (Designated Entry Points) of the Aircraft Protocol which means that international interest registrations can be filed directly with the international registry.

No declaration pursuant to Article XXX(5) of the Aircraft Protocol

A declaration was not made with respect to Article XXX(5) of the Aircraft Protocol meaning that the provisions of Article XXI (Modification of jurisdiction provisions) of the Protocol apply in all respects. This means that for the purposes of Article 43 of the Convention and subject to Article 42, a court of the Cayman Islands also has jurisdiction where the object is a helicopter, or an airframe pertaining to an aircraft, for which the Cayman Islands is the State of registry.

Irrevocable De-registration and Export Request Authorisation

As a result of the declaration under Article XXX(1) of the Aircraft Protocol an Irrevocable Deregistration and Export Request Authorisation (an "IDERA") may be issued in respect of a helicopter or an airframe registered in the Cayman Islands and provides to the person named therein the rights set out in the Aircraft Protocol. The "authorised person" named in an IDERA (or other person designated by that "authorised person") shall be the sole person entitled to deregister and export the relevant aircraft object. The CAACI must record all IDERAs submitted to it and cooperate with any exercise of remedies by the "authorised person" or its designee. As a result of the Convention coming into effect changes were made to the provisions of the Air Navigation (Overseas Territories) Order, 2013 (as amended) to reflect the requirements of the Conventions regarding IDERAs.

Exercising rights under an IDERA

We have acted for a number of clients with respect to the exercise of rights under aircraft mortgages in relation to which IDERAs have been filed at the CAACI. Our experience has included cases in which the registered owner was aware that the mortgagee would procure de-registration of the aircraft and cases in which the mortgagee was acting without the knowledge of the registered owner. In all cases the CAACI responded promptly to requests by the authorised person named in the relevant IDERA and lessors and secured parties should be confident that their rights under the Convention will be recognised by the Authority.

Conclusion

The implementation of the Convention in the Cayman Islands was a useful development for creditors that participate in aircraft finance transactions that use Cayman Islands structures and for the secured financing of aircraft registered

in the Islands. With respect to the recognition of international interests it placed the Islands on an equal footing with other jurisdictions that are commonly used for setting up special purpose vehicles to finance or invest in aircraft.

With respect to security interests in aircraft registered in the Islands a secured party will benefit from the de-registration and other rights conferred by the Convention but given it was introduced only five years ago some consideration may still need to be given to the possibility of competing pre-existing rights and interests. The range of all possible relevant rights and interests is beyond the scope of this bulletin but we would highlight that in certain situations there is an argument for registering an aircraft mortgage on the register of aircraft mortgages maintained by the CAACI in addition to registering the corresponding international interests in the International Registry.

This article is part of the Carey Olsen Aviation Bulletin 2020/2021 series.

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