

G.R.F. DALLEY & PARTNERS

NIGERIA:

THE CAPE TOWN CONVENTION

1. Background:

On the 14th of November 2004 the Nigerian Civil Aviation Act of 2006 was passed into Law. Under section 73(2) of the Act the Convention on International Interests in Mobile Equipment 2001 and the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment 2001, generally known as the Cape Town Convention and Protocol, were duly adopted and effectively now have the force of Law, in Nigeria.

Essentially delegates at the Cape Town Convention recognised the need for acquisition and efficient use of high value equipment by Airline Operators, the role of asset based financing and leasing and the importance of creating a formidable but clear legal framework aimed at guaranteeing a universally protected and well recognised right, on the part of the financier/lender, in such equipment. Ultimately by reducing credit risk, growth and efficiency would be enhanced. Prior to the Convention financiers/lenders in respect of high value mobile equipment were often faced with differing domestic legal and administrative systems and were often unable to enjoy recognition of rights and certainty of interests in respect of said equipment. This led to a lack of available funding for airline operators, particularly in Countries like Nigeria, often considered to be high risk borrowers. Hence the Convention creates a regime which establishes a legal framework for international interests in Mobile Equipment and in order to monitor and protect this interest there exists an international registration system to be housed at the international Registry.

The Convention is to be supported by a number of Protocols the first of which is the Protocol on Matters specific to Aircraft Equipment. It is important to bear in mind that the Protocol applies solely to airframes, aircraft engines with a minimum of 1750 lbs of thrust if jet propelled and at least 550 rated take off shift horse power if turbine or piston powered and helicopters.

2. International Interest:

The Convention under Article 2 provides for the creation of an international interest under the following circumstances:

- Interest granted by the chargor by way of security agreement
- Interest vested in the conditional seller under a title reservation agreement or
- Interest vested in a lessor under a leasing agreement.

It is pertinent to note that an international interest in the object extends to proceeds of that object (however not proceeds of sale or rentals).

a. Formal requirements:

Naturally there must either be a security agreement (with determinable obligations without the need to state a sum or maximum sum secured) or a title reservation agreement or a leasing agreement, in writing.

The said written agreement must relate to an object which the chargor, conditional seller or lessor, respectively has the power to alienate. In the case of a security agreement the security obligations must be determined.

The equipment must conform to the strict requirements of the relevant Protocol. Therefore in the case of aircraft objects, the Protocol on matters specific to aircraft equipment requires that there must be a description of the Aircraft object that contains the manufacturer's serial number, the name of the manufacturer, its model and designation.

3. Application of the Convention:

The Convention takes effect upon the conclusion of the agreement creating the international interest; however the debtor must be situated in a Contracting State at the time of concluding the relevant agreement. It is not necessary for the creditor to be located in the Contracting State.

The debtor is said to be situated in a Contracting State where:

- Incorporated or formed under the Laws of the Contracting State
- It has a registered office or statutory seat in the Contracting State
- It has its centre of administration in the Contracting State or
- It has a place of business (assuming the debtor has more than one place of business then we shall rely on the principle place of business or if it has no place of business the habitual residence).

4. Registration:

Under Article 16 of the Convention there shall be an International Registry for the registration of not only International Interests but in addition:

- Prospective International Interests and registrable non-consensual rights and interests
- Assignment and prospective assignment of international interests
- Acquisition of international interests by legal or contractual subrogation under the applicable law
- Notices of national interests
- Subordination of interests stated above.

The register which is expected to be computer based may also include where appropriate amendments, extensions or discharge of a registration.

The added advantage of the computer based register is the fact that creditors are able to file directly with the International Registry from anywhere in the world.

a. Requirements:

The Protocol and regulations are to specify requirements for registration expected to include criteria for the identification of aircraft objects for the purpose of:

- Effecting registration – including obtaining requisite consent
- Conducting and issuing search reports
- Securing the confidentiality of information

b. Consent:

The registration exercise will not be valid without obtaining due consent. (Article 20 requires that in creating, amending or extending the creation of International Interests, Prospective International Interests, Assignment and prospective assignment of international interests, the consent of both parties must be obtained). In the subordination of an International Interest to another International Interest the consent of the person whose interest is being subordinated must be obtained and in discharging the International Interest the consent of the holder of the interest is required.

It appears that in the case of transfer of rights by way of contractual subrogation's, non-consensual rights or interest and notices by National interests only the subrogee, the holder of non-consensual rights and the Nation State may apply for registration.

c. Advantages of registration:

- Simple
- Expedient
- Inexpensive
- Priority of registration on the International Register on a first come basis
- Priority of registration on the International Register over prior unregistered interests
- Priority of registration on the International Register over prior national registrations. Interestingly under Article 29 (5) the priority of competing interests may be varied by agreement between the parties, however an assignee of a subordinated interest is not bound by an agreement to subordinate the interest unless as at the date of assignment the subordination had been registered.
- Effective in Insolvency proceedings against the debtor.

The certificate issued by the International Registry upon registration is prima facie proof that the Certificate has been issued and of the date and time of registration, amongst other facts.

5. Assignment:

Article 31 of the Convention stipulates that all rights (general referred to as an associated right) to payment or other performance by a debtor under agreement and secured by or associated with the airline object, once assigned transfers to the assignee a. the related international interest and b. all the interests and priorities of the assignor under the Convention. It is however important to bear in mind that the terms of assignment of the associated rights as per Article 31 is not sacrosanct and can be varied by the agreement of parties.

a. Formal Requirements:

The assignment is required to:

- Be in writing
- Permit the associated rights to be identified under the contract from which they emanate

In the case of assignments by way of security, enable the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured.

b. Debtor's duties:

The debtor to the associated rights is bound to the assignee only if (a) the debtor is notified of the assignment either by the assignor or with his authority (b) the notice identifies the associated rights. The above provisions shall not affect the priority of competing assignments.

c. Priority of Competing Assignments:

In the likely event that there are two competing assignment of associated rights and at least one of the assignments includes the related international interest that is registered, the Convention would be invoked in the same manner as towards a registered international Interest under Article 29 of the Convention.

Default Remedies:

a. Chargees under security agreements:

Article 8 of the Convention states that in the event of default (defined in Article 11 as events so defined in writing by parties and where there is no such agreement events which substantially deprive the creditor of what he is entitled to expect under the agreement) the chargee may exercise one or more of the following remedies: (a) take possession or control of the object (b) sell or lease the object, collect or receive any income or profits accruing from the object; in the alternative a Court order may be obtained to exercise the steps in (a),(b) or (c).

However it must be expressed that the above steps can only be taken:

- Subject to prior agreement by the chargor and declarations by the Contracting State (Article 8 (1))
- In a commercially reasonable manner (i.e. in conformity with the terms of the security agreement. Article 8 (3)). This is conditional upon the fact that the security agreement is not manifestly unreasonable.

b. Conditional Seller/Lessor:

The conditional seller or lessor under a title reservation or leasing agreement may terminate the agreement and take possession or control of the object or in the alternative may proceed to Court and obtain an order to sanction the above actions.

c. Assignments:

The provisions relating to the remedies in the case of assignments are identical with the above provisions.

d. Additional Remedies:

In addition to the above the creditor, under the provisions of Article IX of the Protocol, may procure the deregistration and exportation of the object away from the territory in which the object is located. In order to achieve this, the creditor has to obtain the consent of the holder of any registered interest in order of ranking in priority.

The creditor may, pending the final determination of his claim, depending on prior agreement by the debtor, may seek speedy relief from the Court. The form of relief may include the following:

- Preservative Orders
- Orders guaranteeing control, custody or possession
- Immobilisation of the Object
- Order permitting the lease or management of the object and collection of income there from.

The above provision stipulates that the Contracting State “shall ensure” that the creditor obtains from the Court speedy relief. However as at the time the new Act was being implemented in Nigeria there was no provision domesticating this issue particularly the number of working days within which the relief must be granted. There is no doubt that the Courts, in Nigeria, will have the responsibility of determining the scope of the phrase “speedy relief”.