CAPE TOWN CONVENTION: A PLATFORM TO FACILITATE GLOBAL AIRCRAFT FINANCING? A CASE STUDY ON THE EFFECTIVENESS OF EXERCISING THE IRREVOCABLE DE-REGISTRATION AND EXPORT REQUEST AUTHORIZATION IN CONNECTION WITH DEFAULT OF LEASE PAYMENTS ON AIRCRAFT OBJECTIVES BY THE DEBTOR IN INDIA

Susanna Halonen-Manner

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University of Helsinki

Faculty of Law

International Business Law

Ville Pönkä

HELSINGIN YLIOPISTO
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UNIVERSITY OF HELSINKI

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Susanna Halonen-Manner

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Tiivistelmä – Referat – Abstract
The field of international aviation has in the past decades had many regulatory changes and new international aviation treaties have been introduced. One example is the international private law instrument on property, signed on November 16 of 2001, the Convention on International Interests on Mobile Equipment, (Convention) along with the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Aircraft Equipment (Protocol), hereinafter collectively called the CTC. The aim with the CTC was to create clear and uniform rules to facilitate international financial transactions on aircraft objectives. CTC, as a modern instrument, provides for flexibility allowing states to make declarations in line with its national policies. A creditor friendly declaration by a state with less legal barriers at international level reduces the exposure of risk for the creditors. As a consequence, the cost of financing aircraft is reduced for the air carriers.

This thesis examines the ultimate test of the instrument namely the main legal issues related with the exercising of creditor rights when the debtor defaults on the rental payments of e.g. operational leases of aircraft. The underlying presumption is that if a state has opted-in on "self-help" remedies such as the irrevocable deregistration and export request authorization (IDERA) then creditors financing aircraft in a CTC jurisdiction could rely on the declarations voluntarily made by the state in the event of a default of the debtor. This provides legal certainty. The IDERA is the core of the instrument. It effectively rules out the possibility for national aviation authorities and courts to use its discretion. Furthermore, clear rules on priority based on the established international registry for creation and perfection of an interest will support the process of exercising creditor rights. There is one exception to the priority order, the non-consensual rights and interests (NCRI). A validly registered international interests would however have priority over the NCRI in case the lien declared under the Convention is not derived from the domestic law of the state.

By using case study as method, the discussion ultimately concerns if the CTC provides an effective platform for the aviation industry to facilitate global aircraft financing. The results on the case law of Spice Jet in India provides that deregistration of aircraft as part of the scope of IDERA does not permit the exercise of discretion by the aviation authority. While the court adjudicated the case correctly and upheld the CTC rules it seems that India continues not to be effectively compliant to the CTC. The CTC is a complex instrument consisting of 99 Articles. The Aviation Working Group (AWG) offers education to states and other stakeholders. It has also recently established a new risk assessment tool, the Compliance Index. This tool provides a predictive assessment on future compliance by Contracting States. This case clearly shows the unfairness of the NCRI as a concept particularly in an operational lease transaction. Liens fit ill with the modern aviation industry of today. Leasing as a form of financing tend to be most common used form of financing. There are valuable guidelines for states in connection to liens and fleet liens.

Deregistration as a concept is a process under the Convention on International Civil Aviation of December 7, 1944 (Chicago Convention) and relates to the Certificate of Registration (COR) of aircraft. All aircraft need to bear a nationality. The notion of registration and reregistration is regulated in the Chicago Convention, but there is no mention of deregistration. This gap has consequences for the CTC. The International Civil Aviation Organization (ICAO) has previously facilitated the process of Art 83bis with good results. ICAO could similarly take the lead and provide solutions and best practice in order to close the gap between registration and re-registration. This would further enhance the global aircraft financing as an effective platform for the aviation industry.

Avainsanat – Nyckelord – Keywords
Cape Town Convention, the irrevocable deregistration and export request authorization (IDERA), discretion, operational leases, liens, Chicago Convention

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Tiivistelmä – Referat – Abstract

Under de senaste årtiondena har området för internationell luftfart gått igenom flera ändringar av lagstiftningen och nya internationella fördrag gällande luftfartyg har införts. Ett exempel på detta inom privaträttens område är Konventionen om internationella säkerhetsrätter i lösa saker (konventionen) signerad den 16 november 2001 tillsammans med Protokollet till konventionen om internationella säkerhetsrätter i lösa saker (protokollet) vilka reglerar säkerhetsrätter i lösa saker. Hädanefter används förkortningen CTC för de båda två instrumenten. Syftet med CTC var att skapa klara och enhetliga regler för att underlätta internationella finansiella transaktioner gällande luftfartsobjekt. CTC fungerar som ett modernt rättsligt instrument som skapar flexibilitet genom att låta staterna göra deklarationer enligt de nationella reglerna. En deklaration gjord av en stat som tar hänsyn till borgenären och minimerar de rättsliga barriärerna minskar samtidigt borgenärens exponering för risk. Som en följd minskar kostnaderna av flygplansfinansiering för flygbolagen.

Denna pro gradu-avhandling examinerar CTC och det huvudsakliga rättsliga problemet relaterad till utövning av borgenärens rättigheter när en gäldenär underlåter att betala hyran för t.ex. en operationell lease av ett luftfartyg. Det underliggande antagandet är att ifall en stat har tagit i sitt bruk en ”opt in” lösning för ”själv-hjälp” som berättigar till rättsmedel som t.ex. en oåterkallelig fullmakt för avregistrering och export (IDERA), så kan den finansierande borgenären förlita sig på att den frivilliga deklarationen av staten i en CTC jurisdiktion gäller ifall gäldenären försummar sina skyldigheter. Detta i sin tur förser rättslig säkerhet. IDERA utgör en central del av CTC. IDERA utesluter effektivt möjligheten för nationella flygmyndigheter och domstolar att använda sig av gottfinnande. Dessutom stöds borgenärens rättigheter genom tydliga regler om prioritering vid användandet av de internationella luftfartsregistret. Det finns ett undantag till prioriteringsordningen nämligen så kallad legal rättighet eller säkerhetsrätt (NCRI) . En giltigt registerad internationell rättighet har däremot skydd gentemot en panträtt deklarerad under konventionen om panträtten inte härstammar från den nationella lagen.

Pro gradu-avhandlingen använder fallstudie som en metod för att undersöka ifall CTC fungerar som en effektiv plattform för flygindustrin genom att underlätta global finansiering av luftfartyg. Resultatet av Spice Jet fallet i Indien föreskriver att avregistrering av ett luftfartyg som en del av IDERA inte tillåter de nationella flygmyndigheterna att använda sig av gottfinnande. Även om domstolen dömde rätt i fallet genom att försvara reglerna i CTC, ser det ut som att Indien fortsätter att inte effektivt efterleva CTC. CTC är ett komplext instrument som består av 99 stycken artiklar. Aviation Working Group (AWG) erbjuder skolning till stater och andra intressenter. AWG har också nyligen skapat ett nytt redskap för riskbedömning nämligen det så kallade efterlevnads indexet (compliance index). Detta redskap skapar en förutsägbar analys av framtida efterlevnad av konventionsstaterna. Spice Jet fallet visar en klar orättvisa av NCRI i synnerhet gällande operationella leasingkontrakt. En panträttighet passar dåligt ihop med den nutida moderna flygindustrin. Dessutom fungerar leasing som den mest använda formen av finansiering. Det finns värdefulla instruktioner för stater gällande panträtter.

Avregistrering som ett koncept är en process i Chicagokonventionen om internationell civil luftfart som undertecknades i Chicago den 7 december 1944 (Chicagokonventionen) och relaterar till registeringsintyg av luftfartyg. Alla luftfartyg måste ha en nationalitet. Registering och återregistering av luftfartyg regleras i Chicagokonventionen, men det nämns inget om avregistrering. Detta gap påverkar också CTC. Den internationella civila luftfartsorganisationen (ICAO) har tidigare underlättat processen av Art 83 bis i Chicagokonventionen med goda resultat. ICAO kunde på ett liknande sätt ta en ledande roll och bereda lösningar samt best practice för att fylla gapet mellan registrering och avregistrering. Detta i sin tur skulle förbättra den globala finansieringen av luftfartyg och göra den till en ännu mera effektiv plattform för flygindustrin.

Avainsanat – Nyckelord – Keywords

Kapstadskonventionen, en oåterkallelig fullmakt för avregistrering och export (IDERA), gottfinnande, operationell leasing, panträtt, Chicagokonventionen

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ABBREVIATIONS

AOC	Air Operator Certificate
ASU	Aircraft Sector Understanding
AWG	Aviation Working Group
COR	Certificate of registration
DGCA	Director General of Civil Aviation
ECA	Export Credit Agency
EUROCONTROL	European Organization for Safety of Air Navigation
ICAO	International Civil Aviation Organization
ICAR	Indian Civil Aviation Register
IDERA	Irrevocable de-registration and export request authorization
IDPOA	Irrevocable de-registration power of attorney
IR	International Registry
NCRI	Non-consensual right or interest
OECD	Organization for Economic Cooperation and Development
SARP	Standard and Recommended Practices

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1. INTRODUCTION

1.1 Background

The past decades, the field of international aviation can be recognized as an era with many regulatory changes. Such changes include the deregulation applicable for air carriers both in the US and the Europe.[1] The liability regime, a private international law instrument for passengers and cargo was modernized when the Montréal Convention was adopted in 1999.[2] Another international private law instrument on property was signed on November 16 of 2001, the Convention on International Interests on Mobile Equipment, (Convention) along with the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Aircraft Equipment (Protocol), hereinafter collectively called the CTC.[3] The purpose with the CTC was to create clear and uniform rules to facilitate international financial transactions on aircraft objectives.[4] The common denominator for these international instruments is the benefits enjoyed by the end user, the consumer. This could be through lower airfare pricing, improved availability in terms of time schedules[5] and uniform measures for the protection of passengers and cargo in the case of damage.[6]

Regulatory changes, in terms of the CTC, has also had consequences for creditors financing aircraft. A more creditor friendly environment with less legal barriers at international level reduces the exposure of risk for the creditors.[7] When risk is mitigated the cost of financing aircraft is reduced for the air carriers. Also, a wider pool of international sources to finance the transactions become available.[8] Aircraft is an expensive moveable asset. A new e.g. Boeing 737-800 aircraft costs 98,1 MUSD, in average.[9] It is therefore no coincidence that air carriers rely mainly on obtaining capital, debt financing, on the external market as opposed to financing such

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[1] Airline Deregulation Act of 1978 in the US and the three Council Regulations (EEC) No 2407/92, (EEC) No 2408/92 and (EEC) No 2409/92 now replaced by Regulation EC No.1008/2008.
[2] Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) (Montréal Convention).
[3] Convention on International Interests on Mobile Equipment (adopted 16 November 2001, entered into force 1 March 2006) (Convention) and Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Aircraft Equipment (adopted 16 November 2001, entered into force 1 March 2006) (Protocol).
[4] Convention, preamble. The Protocol defines aircraft objectives as "airframes, aircraft engines and helicopters".
[5] See e.g. (Forsyth – Gillen – Huschelrath – Niemeier – Harmut 2013) p. 27-28.
[6] Convention for the Unification of Certain Rules Relating to International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) (Warsaw Convention) and Montréal Convention.
[7] Downs 2014, p. 865.
[8] Saunders –Walter 1998, p. 24.
[9] ATW Online 2017. Available at https://atwonline.com/data-financials/airbus-boeing-average-list-prices-2017 (Visited on 23.04.2019).

high value asset with internal financing using its equity. Over 75% of the financing of aircraft is through external instruments.[10] In the current deregulated environment very few air carriers are state owned so called "flag carriers". This means that the availability of public sources for backing up funding which would also be less risky for creditors has decreased.[11] Nevertheless, given the current situation with the ongoing Covid 19 crisis, the market can see an increase in state financing or the bailing out of air carriers.[12] The use of export credit agencies (ECA) as a form of obtaining external financing is also increasing. This is the instrument typically used in economic down turns and is viewed as a better option for a state supported transaction over bail outs.[13]

Interestingly, regardless of how the overall world economy performs and the high cost of aircraft, it seems to be trendy for the air carriers to continuously renew its fleets. There is certainly a commercial value to fly a modern aircraft.[14] In addition, from an environmental point of view, the new aircraft are equipped with modern engines that are more fuel efficient and reduces the CO2 emission. The reduction of CO2 emissions has decreased in average by one percent per passenger mile since the 1980s.[15] This trend seems to be stronger with the Covid 19 crisis as air carriers are speeding up the process of exiting older aircraft types. There will for example be a need to exit 1800 wide body aircraft in short term. Such aircraft will eventually be replaced with more environmentally friendly aircraft.[16] Apart from the renewal of fleet there is also an expectation that the aviation sector will grow. According to the market outlook of Boeing the total world fleet at 2036 will consist of 46, 950 aircraft as opposed to the amount of 23,480 individuals recorded in 2016.[17] As a consequence of the Covid 19 crisis the financial results and manufacturing of new aircraft have of course dramatically fallen. There is however consensus within the industry that the business will eventually pick-up.[18] Boeing has revised its forecast and expects a fall in the near and medium term. The need of new aircraft will fall in

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[10] OECD 2011. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/asu(2011)1&doclanguage=en (Visited on 15.7.2020).
[11] Honnebier 2017, p. 338.
[12] Financial Times 2020. Available at https://www.ft.com/content/8c4e90f4-c61e-447d-a3ef-78d29e4cf56d (Visited on 4.7.2020).
[13] Lexology 2020. Available at https://www.lexology.com/library/detail.aspx?g=44821232-044a-4650-afff-4c544765b80b (Visited on 04.07.2020).
[14] Honnebier 2017, p. 337.
[15] Rolls Royce 2020. Available at https://www.rolls-royce.com/media/press-releases/2019/18-06-2019-the-sustainability-of-aviation-a-joint-statement-by-seven-of-the-worlds.aspx (Visited on 5.2.2020).
[16] IBA Aero 2020. Available at https://www.iba.aero/insight/covid-19-the-dynamics-of-sale-leaseback-market-have-changed-dramatically/ (Visited on 04.07.2020).
[17] Boeing 2020 A.
[18] Boeing 2020 B. Available at https://investors.boeing.com/investors/investor-news/press-release-details/2020/Boeing-Reports-First-Quarter-Results/default.aspx (Visited on 04.07.2020).

the next 10 years by 11 % compared to previous forecast amounting to 18,350 aircraft. The total amount of aircraft in the world is estimated to be 48,400 aircraft by 2036. This is close to the pre-Covid19 estimates.[19]

In order to facilitate market trends and deregulation of the industry, a solution at global level where the creditor interests are upheld is offered by the CTC. CTC entered in to force on March 1st of 2006 as the eighth instrument of the Protocol and the third instrument of the Convention had been deposited with its depositary. The depositary is the International Institute for the Unification of Private Law (UNIDROIT).[20] The Convention and the Protocol are to be read as one instrument. In case of any discrepancies, the Protocol will prevail over the Convention.[21] CTC is an autonomous instrument. Like other international instruments, interpretation of terms and concept when independent shall be referenced to the system and objectives of the CTC.[22] Only if interpretation of the CTC is not clearly established in the instrument itself, shall it be interpreted in line with "*the general principles on which it is based".* Use of applicable law is to be used as a last resort.[23] Roy Goode refers to these principles in his official commentary as the main elements that financial and leasing transaction are based upon. Applicable law may be used as a last option meaning the "*domestic law of the State whose law is applicable by the rules of private international law of the forum"*. This is key to avoid the use of "*renvoi*".[24]

There are currently 79 states that have ratified the Protocol.[25] Debtors e.g. air carriers located in a CTC jurisdiction may be able to have the benefit of reduced cost of the financing of aircraft.[26] A good example follows from the accession of the UAE. The same year when the UAE acceded the CTC one of its air carriers, Etihad, placed the largest aircraft order in the aviation history.[27] A key premise for such advantages is dependent on how the state in question has chosen to apply the optional provisions when ratifying the instrument. CTC as a modern instru-

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[19] Simple Flying 2020. Available at https://simpleflying.com/boeing-aircraft-demand-forecast-cut/ (Visited on 7.10.2020).
[20] Convention, Article 49. Protocol, Article XXVIII.
[21] Convention, Article 6.
[22] Gebauer 2020, p. 686.
[23] Convention, Article 5.
[24] Goode 2013, para 4.61–4.64.
[25] Protocol status. Available at https://www.unidroit.org/status-2001capetown-aircraft (Visited on 21.04.2020) A prerequisite for the CTC to become effective in a State requires a ratification of the Aircraft Protocol and the Convention. Currently there are 82 States that have only ratified the Convention. Convention status. Available at https://www.unidroit.org/status-2001capetown (Visited on 21.04.2020).
[26] AWG 2016, p.1.
[27] Downs 2014, p. 892.

ment provides for flexibility allowing states to make declarations in line with its national policies. This is a central part to the instrument.[28] Wool refers, to the flexibility in the CTC, as a model of unification that is policy driven. Here the fundamental legal concepts are achieved on one hand while the policy questions are left for the individual states to decide on.[29] This is connected to the idea of "net regulatory burden ", meaning "that countries give up some degree of national sovereignty in exchange for financial gains to market participants".[30]

Apart from the attractiveness of gaining access to less costly capital from the market using the modern model of flexibility when ratifying the CTC there is also another side to it.[31] This is the core of the instrument, namely, to have the aircraft repossessed in case of default or insolvency of the debtor. [32] How does the treaty play out in practice when a debtor defaults in payments or becomes insolvent in a CTC jurisdiction?

1.2 Research question

The ultimate test of the instrument is when the debtor fails in payments or becomes insolvent and the creditor wants to exercise its rights to have the aircraft repossessed.[33] Given the flexibility of the instrument, allowing a state to make declarations to the treaty, it can lay out the rules on how such rights shall be carried out. Furthermore, having an adequate registration system that is asset-based at international level with clear rules on priority will support the process of exercising creditor rights. The aim of the thesis is to examine the main legal issues associated with the exercising of creditor rights when the debtor defaults on the rental payments of aircraft. The research question is as follows; Does the CTC provide an effective platform for the aviation industry to facilitate global aircraft financing?

The underlying hypothesis is that states are given the freedom when ratifying to opt-in or opt-out on critical rules of the CTC. This includes e.g. rules on speedy relief from the court in the interim while waiting for the final determination of a case and the use of the irrevocable de-

[28] Bisset 2016, p. 50.
[29] Wool 1997, p. 49–50.
[30] Levich 2011, p. 17.
[31] Downs 2014, p. 864 and 868.
[32] Convention, Chapter III. Protocol, Chapter II, Article XXX-XXXI.
[33] Saidova 2018, p. 167.

registration and export request authorization (IDERA) allowing for an aircraft to be deregistered in the jurisdiction of the debtor and allow for the aircraft to be exported.[34] Another important rule refers to the declaration on the choice of a time frame in case of insolvency of the debtor.[35] These opt-in declarations effectively rule out the possibility for national aviation authorities and courts to use its discretion. The expectation would therefore be that creditors financing aircraft in a CTC jurisdiction could rely on the declarations voluntarily made by the states in the event of a default of the debtor.

One challenge is the fact that the international legal environment does not provide for a system to resolve issues when a state fails to fulfill its obligations under the CTC. It becomes rather a task for the financial market to correct such failures. This only occurs post facto in the form of higher cost of finance. Such correction could consequently apply for all air carriers that have their principal place of business in that state.

Another aspect is that the CTC is complex and extensive consisting of 99 Articles.[36] Furthermore it is not very well known. A good example follows from the "choice of laws clause" in e.g. a lease agreement within aviation. Some lawyers claim that when parties use modern laws such as the law of the State of New York the parties are covered. Choice of law applies between the parties to the contract on aspects related to the agreement. It would not apply to third parties in terms of proprietary interests in most of the countries.[37]

I find the CTC as a very interesting treaty as it is first of its kind providing a platform containing international rules on substantive property law for the aviation industry. It is a very different treaty compared to other treaties established under the International aviation law. On the public International aviation law side there are instruments that very much relate to aviation safety and security aspects.[38] Most states have or do ratify those. This makes sense as this is for the common good for the industry. And specifically, safety or security aspects does not include elements of competition. On the private International aviation law side, the Warsaw Convention

[34] Convention, Article 13. Protocol, Article X (3).
[35] Protocol, Article XI.
[36] Goode 2003, p-10.
[37] For a detailed discussion see Honnebier 2017, p 349. An analyze of the effects of the Cape Town Convention on four selected issues that hinder the international financing and leasing of aircraft and engines. Implementing the Cape Town Convention and the domestic laws on secured transactions.
[38] e.g. Convention on International Civil Aviation of December 7, 1944 (entered into force April 7, 1947) (Chicago Convention), Article 83bis. Protocol relating to an amendment to the Convention on International Civil Aviation. Signed at Montreal on 6 October 1980. (entered into force June 20, 1997) (Article 83bis))

preceding the Montréal Convention focus on rules on liability for the protection of the passengers and the cargo.[39] I have chosen this topic as I have worked in the industry, thus gained practical experience in the area of the study. My experience will also be reflected in the research. In my opinion, CTC is the first treaty where states can become a part of promoting growth, competition and modernization of the industry. A more modern fleet supports better the environmental objectives of today. Growth secures the availability of commercial routes. Lastly, competition reduces the travel costs for the end user. This promotes the opportunity for more people to travel and discover new cultures in other parts of the world.

1.3 Methodology and scope of the research

The objective of the thesis is to examine the main legal issues associated with the exercising of creditor rights when the debtor defaults. This includes mainly the application of the IDERA in connection to deregistration and export of aircraft. Here the CTC provides for strict rules to protect the creditors.[40] This provides legal certainty. A general prerequisite for exercising or enforcing the CTC rules is that the interest in the aircraft objective has been validly created and is effective. The non-consensual rights and interests (NCRI) are an exception that can have priority over a validly created international interest.[41] In certain cases, there is also protection offered by the CTC for the debtors.[42] The protection of debtors is outside of the scope of this thesis.

Case law becomes an important vehicle to assess the CTC on its efficiency as a platform in global aircraft financing in practice. There is little case law known to the writer under the CTC since it became effective in 2006. The case law available addresses mainly the enforcement of creditor rights when the debtor defaults. The best suited methodological approach to assess the research question is by a qualitative approach using case study.

Case study is the type of research "…aimed at gaining as full and complete of an understanding as possible of the object under study".[43] This type of method differs from the normative discipline, "law on paper", as it pursues to attain evidence from the real world "law in practice".

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[39] Warsaw Convention. Montréal Convention.
[40] CTC, Article 2. Recognizes three different categories of creditors. The term creditor will be used in general throughout this thesis covering those categories. Only in specific cases when CTC specifies different rules having added value to this thesis, will the specific categories be discussed.
[41] Protocol, Article 39 (1).
[42] See Convention Article 11 and Protocol Article XVI (1).
[43] Miller 2018, p. 382.

Case law fulfills the purpose, as the form of data is collected from real life.[44] As with any type of research method there is both strengths and weaknesses. The weaknesses particularly connected to case studies are related to validity and reliability. Validity in terms of how case law has been chosen to secure the choice is unbiased. Reliability considerations referring to replication of the case study.[45] These are valid considerations and have been addressed when formulating the research question. The case under scrutiny in this thesis is chosen based on the fact that it is interesting as it deals with one of the core concepts of the CTC, namely IDERA. This is a known case also amongst legal scholars within the field of the law of property in the international aviation sector. There is thus high-quality material available to support the research. Lastly, the original language of the case law, as a central source to this thesis, is in English. The sources that will be used for referencing this thesis consists primarily of international conventions and the CTC in particularly, commentary notes to the CTC and the selected case law. In addition, sources such as intergovernmental documents, articles from law journals and other documents related to the topic will be used.

The case law used in this case study consists of the Spice Jet case in India from year 2015.[46] This case addresses the application of the IDERA and specifically de-registration of aircraft in an operational lease transaction.[47] This case is interesting from two perspectives. Firstly, because it is a leasing case. Leasing is the form of a financing in the aviation sector that is growing over other financing forms. GE Commercial Aviation Services, the largest lessor in 2018, owns almost 2000 aircraft. The company leases aircraft to more than 250 air carriers in over 75 countries.[48] Similarly, over 85% of commercial aircraft in the US are leased.[49] Secondly, operational lease transactions are specifically interesting because of the risks associated to it. As ownership is not necessarily transferred at the end of the lease term to the air carrier, the lessor carries all the risks. These risks are connected to the value of the aircraft when returned back to the lessor.[50] If the lessee also fails to uphold its lease rentals and the aircraft and the lessee is in another

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[44] Epstein – King 2002, p. 3.
[45] Argyrou 2017, p. 103–104.
[46] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015). These two cases were dealt with jointly.
[47] There is a known ruling by Delhi High Court; Corporate Aircraft Funding Company LLC v Union of India & Ors (Wp(C) 792/2012). In this case the issue dealt with IDERA and possible arrest of aircraft. However, in this case the aircraft was located outside the jurisdiction of India. The ruling on case DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation, WP(C) 7661/2012. This case also known as the "Kingfisher Case" dealt with de-registration of leased aircraft. In this case the CTC did not apply.
[48] Berk – DeMarzo 2020, p. 925.
[49] *Ibid*.
[50] Morrell 2013, p. 246.

jurisdiction, the situation may get further complicated for the lessor. While aircraft financing is an important topic and a key premise for the creation of the CTC, this thesis will not address the topic separately.

To achieve the objectives of the research question some understanding of the CTC treaty is essential. The parts discussed under the CTC rules are the advance rules under the Convention and the remedies under the Aircraft Protocol. The latter covers the application of the IDERA as a route or the use of court as another option. In addition, the International Registry for registering interests on aircraft objectives as a part of the CTC will be included. This asset-based registry provides for a priority order on the international interest and thus becomes critical when a creditor exercises its rights. This part will be mainly descriptive although official commentary notes will be discussed to understand the intention of the drafters. The rules on insolvency should the debtor file for bankruptcy are outside the scope of this thesis.

1.4 Structure of the research

The remaining sections are structured as follows. The first section discusses the International asset-based registry that was formed when the CTC entered into force. Having harmonized rules at international level to establish priority for an international interest in an aircraft objective becomes important when establishing the rights of the creditors. There are a few exceptions to priority rules that are not consensual in type. Such non-censual rights are connected to declarations made by states and will be included in the discussion. The section will be concluded discussing the established International Registrar responsible for the facilitation of the international interests.

The second section will review the speedy relief rules available for the creditors within the meaning of default. It is key to minimize risks in case of a default and the recourse to the creditor should be effective. Time in this context plays a crucial role. The two routes available for the creditor will be discussed. The first option available is with the leave of court. The second and less time consuming is the remedy available without court intervention, the IDERA route. The IDERA rules require for the state to de-register the aircraft so it can be re-registered in another state as announced by the creditor. Rules on registration of aircraft, its nationality, and the safety aspects of repositioning an aircraft is regulated in the Chicago Convention. The discussion on these topics will conclude the second section.

This will be followed by the case law from India. To put the case into its proper context I will in this part first discuss the accession by India of the Convention and Protocol. This covers the declarations made by India. This will be followed on how international treaties, such as the CTC are implemented and given effect in the domestic law. The next section will discuss the rules when interpreting international treaties such as the CTC. This will be followed by a summary of the facts relating to the case study involving default of leasing payments by Spice Jet Limited (SpiceJet) in India to its lessors and the issue in terms of the IDERA. [51] The case summary includes the facts leading up to the filing of the claims with the Delhi High Court, the arguments by the petitioners and the respondents and lastly the rational and the ruling by the court.

The fourth part consists of an analysis of the case study. The section is concluded with a discussion on the results and on the used methodology. In this part, I will also be making my own comments.

The paper is concluded with a discussion and possible topics for further research in the context of the CTC.

[51] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).

2. INTERNATIONAL REGISTRY

Historically, prior to the CTC, there were no substantive rules in place at international level to address how security interests[52] would be protected or rights in equipment in terms of title-retention. The rules that were to be found in International Conventions were mostly confined to cover a recognition of rights under the law of the nationality where the aircraft is registered.[53]

The third paragraph of the preamble of the Convention, when the CTC entered into force 2006, states the need to safeguard interests at international level through recognition and protection.[54] With the CTC, an internet based International Registry, (IR) was established to facilitate registrations of international interests.[55] This is the core of the Convention providing for harmonized rules in the international field for as to the "creation, perfection and priority" for an international interest in a moveable equipment.[56] These three harmonized rules will be discussed next. This will be followed by a discussion on certain exceptions to the priority rights being non-consensual in type. This part is finalized with a general discussion on the International Registry, (IR) and the liability and jurisdiction of the Registrar.

2.1. Creating an international interest

The rules of the Convention become applicable if the debtor at the time of closing the contract is located in a state that has ratified the CTC.[57] Another option is that the agreement is being concluded applicable to e.g. an airframe being part of an registered aircraft in a Contracting State. This state shall also be the State of registry.[58] There are three forms of international interests based on the type of creditor.[59] The international registry is not an ownership register. This applies for international interest that are leases.[60] In addition to fulfilling the requirement

[52] Pending the legal system there are various definitions on what a security interest is. In general, it may be viewed as "a security interest involving a grant of a right in a property by an obligor (the debtor) to an obligee (the creditor) to secure or ensure that the obligor performs its obligation.". See e.g. Gullifer 2013, p. 3.
[53] Goode 2003, p. 10.
[54] Convention, Preamble.
[55] Convention, Article 16.
[56] Goode 2013, para 4.3.
[57] Convention, Article 3 (1).
[58] Protocol, Article IV (1).
[59] Convention, Article 2(2). The three forms are secured creditor, conditional seller, and lessor. The area of focus of this thesis is on lessors. The word creditor and lessor will be used interchangeably.
[60] Goode 2003, p. 11.

of Art. 2(2) of the Convention there are certain form requirements when creating an international interest. The contract must be in writing, be related to an object that is identifiable as per the requirements of the Protocol.[61] Additionally, the creditor must have a right to dispose the object.[62]An international interest is defined as an "interest in a mobile equipment" fulfilling the form requirements as per Article 7 of the CTC. Furthermore, the interest is created in an object that is "uniquely identifiable".[63] In an aviation context those objects are "airframes, aircraft engines and helicopters".[64] This would mean that an aircraft is not an object in this context. In addition, the creation is not extended towards the debtor but to property, which is an identifiable aircraft object thus asset based.[65]

2.2 Perfection of an international interest

Perfection refers to "a process of giving third parties notice of the security interest's existence that can be accomplished by various means, such as registration, possession or control".[66] Apart from the creation of an international interest, the IR offers a possibility for the creditors to register the international interest. This serves as mechanism to indicate to third parties that an interest exists and also to determine their priority. Registration (or perfection) as such is not a prerequisite under the Convention. However, it is the only approach available for a creditor to get a priority status and thus protection.[67] A registration by a creditor would require the consent of the debtor.[68]

A notice of a registered interest tells a possible future creditor wishing to e.g. grant a loan to a debtor of already existing interests in the object. The registration does not however offer for any guarantees that such an international interest de facto exists. A searcher can request for a certificate that is issued by the facilitator of the IR providing information of a creditor as having "acquired or intends to acquire an international interest".[69] The information provided in the

[61] Protocol, Article V (1).
[62] Convention, Article 7.
[63] Convention, Article 2 (2).
[64] Convention, Article 2 (3a) and Protocol Article I (c).
[65] Goode 2013, para 4.121.
[66] Gullifer 2013, p. 77–80.
[67] Saidova 2018, p. 51, 136.
[68] Convention, Article 20 (1).
[69] Convention, Article 22 (1,3).

certificate will include contact details of existing creditors in order to contact the existing creditors for additional information.[70] In addition, a registration does not guarantee that the constitution of the international interest has followed the form of Article 7 of the Convention. If form is not followed, then the registration would not be effective. An example is when parties are negotiating the contract and the international interest has been registered as a prospective international interest. In case the parties do not conclude a contract, then the registration cannot be valid.[71] In order to enforce measures against a debtor, a prerequisite is that the international interest is effective and has been registered in line with the rules of the Convention.[72]

From a practical aspect the information required to be filed on the international interest is limited. It needs to fulfill the criteria of searching.[73] A registration does not require submission of contractual documentation or other papers related to the transaction. Manufacturer data such as manufacturer's name, serial number of the aircraft object and model is adequate to fulfill the criteria of searching and thus make an aircraft object identifiable, uniquely so.[74] In order to minimize the possibility of filling out the required information wrong, the IR has established a cooperation procedure with the manufacturers. As serial numbers of an aircraft object can be a lengthy set of numbers it was decided that the manufacturer would in advance file the manufacturers data into the registry. When a creditor registers an object, he/she is required to start the process by searching for the serial number and by the use of a dropdown list then select the correct object. This reduces the possibility of making an error when making a registration.[75] According to statistics, the registration system has since IR became operational up to August of 2016 had 82 500 registrations involving aircraft transactions at a value between half to one trillion USD. In addition, during the same period there has been 906 000 searches.[76] There are no recordings of claims as to the functionality of the system in terms of errors.[77]

[70] Saidova 2018, p. 89.
[71] *Ibid*. p. 89.
[72] Convention, Article 30.
[73] Protocol, Article XX (1).
[74] Protocol, Article VII.
[75] Goode 2018, p. 143–144, 152.
[76] *Ibid*. p. 140.
[77] *Ibid*. p. 141.

2.3 Priority rules on an international interest

The basic rule holds that when an international interest is registered in the IR it has international priority over any subsequent registration or interest that remain unregistered regardless if the "first-mentioned" interest holder was aware of it. The interest becomes effective at the point in time when it can be searched in the system of the IR.[78] The time between entering the information as to the information becoming searchable is reduced as the IR itself is internet based.[79] The underlying idea of the basic rule on priority is to prevent factual disputes between registered and unregistered interests on the same object, even if the latter had an earlier interest.[80] Another view is connected to the costs associated with a transaction. Searching for information on priority in the IR as opposed to making time consuming enquires reduces transaction costs.[81]

A very common practice in aircraft financing is that of holding a fractional interest. Holding a fractional interest in an aircraft object is not covered in the Convention. The main reason is that these interests are not competing on priority. This requires that the fractions add up to 100%. Should the interests be beyond 100% then the priority rules apply.[82] Another issue in terms of the basic priority rule, not directly found in the Convention or the Protocol but can be retrieved from "the general legal principles" is that a debtor cannot misuse the basic priority rule of the Convention by registering its interest prior to its own creditor. The general legal principle holds that "a person cannot act inconsistently with the obligations he has undertaken to another to the detriment of that other".[83] A practical example of this could be a leasing transaction involving a head lessor, the creditor and a sub-lessor, the debtor whereas the sub-lessor makes a sub-lease to a lessee. If the sub-lessor registers its interest prior to that of its creditor it would act inconsistently with its obligations undertaken.[84]

The basic rule of priority holds exceptions. Article 29 covers the priority order of interests, the main category, that would compete, e.g. a registerable and an unregistrable interest.[85] There are

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[78] Convention, Article 29 (1-2).
[79] Saidova 2018, p. 122.
[80] Aviation working group (AWG). The Legal Advisory Panel of the Aviation Working Group. Practitioners' guide to the Cape Town Convention and the Aircraft Protocol, 2020. http://www.awg.aero/project/cape-town-convention/ (Visited on 15.07.2020) AWG 2020 A, p. 28.
[81] Goode 2012, p. 97.
[82] *Ibid*. p. 103.
[83] *Ibid*. p. 100.
[84] *Ibid*. p. 100.
[85] Convention, Article 29.

other groups of interests and rights that have a special position with a set of its own rules. These are the non-consensual rights or interest, which will be discussed next.

2.4 Non-consensual rights or interests

The Convention recognizes two different categories of non-consensual rights or interests (NCRI). Both do require a declaration by the Contracting State.[86] The non-consensual rights or interests under Article 39 do not require registration in the IR. These are defined as "a right or an interest conferred under the law of the Contracting State… to secure the performance of an obligation…to a State, State entity or an intergovernmental or private organisation."[87] Such declaration retrieved from the domestic law of the Contracting State may be general or specific.[88] These type of rights and interest have a priority over any registered international interest. While Article 29 does not mention NCRIs as competing interests, Article 1 (mm) of the Convention excludes interest applicable under Article 39 as unregistered interests.[89] An example of such a non-consensual right or interest would be liens for example repair of aircraft or warehouse liens. The underlying idea is that if an aircraft has been maintained it has also kept or increased the commercial value. It would not be fair if only the creditor profits from it. Other categories of liens are employee groups that should receive salaries that have not been paid.[90] A known category of NCRI is the charges due from the European Organization for the Safety of Air Navigation (EUROCONTROL). This intergovernmental type of charges can be declared as long such rules follows from the domestic law of the Contracting State. Article 39(2) provides for the right to arrest or detain an aircraft objective to collect any amounts due to an intergovernmental organization such as EUROCONTROL or provider of public services that is private.[91] UK, India and Ireland are examples of states having made declarations.[92] A NCRI is searchable in the International Registry. This provides for the opportunity for the creditor to assess the risk associated with a debtor. Uncertainty for creditors will be the case if the state

[86] Convention, Article 39–40.
[87] Convention, Article 1 (s).
[88] Goode 2013, para 4.264–4.265.
[89] Convention, Article 1 (mm), Article 29.
[90] Goode 2012, p. 100.
[91] Goode 2013, para 4.266.
[92] Convention status. Available at http://www.unidroit.org/status-2001capetown (Visited on 9.11.2019).

has made use of Article 39(4). This allows for priority to a NCRI over an international interest by the use of the option of back dating before the actual ratification.[93]

The second category consists of non-consensual interests or rights that are registerable in the IR even though they are not an international interest per se.[94] The objective is to receive a status of priority. This category would be regarded as an international interest that is registered.[95] These NCRI declarations are category specific. An example of such declaration is taxes that have not been paid.[96] Lastly, if a state does not declare a NCRI under any of the two permitted Articles, the basic rules on priority will apply.[97]

The inclusion of the articles on NCRIs[98] into the Convention were key already in the drafting phase. To avoid uncertainty for creditors by maximizing the information available in a particular jurisdiction makes the legal risks known. This will secure correct pricing of the transaction.[99] Lessors, in particular operating lessors, run a risk, in the case of a lease default.[100] If there are unpaid debt by the lessee, of non-consensual type for the lessor to pay, the value of the investment will be negatively affected. Furthermore, possible delays in connection with getting the aircraft objectives repossessed due to arrest will add to the losses of the investment.[101]

Many states apply possessory liens[102] in its domestic legal system.[103] The rationale behind this historical concept grew out of the need to conveniently make sure workmen were paid. This was particularly important in times when the bargaining power for workmen was not high.[104] Many of these general liens are no longer in use with the modernization of the economy and commercial business.[105] The aviation specific liens originate from the concept of general liens

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[93] Saidova 2018, p. 102.
[94] Convention, Article 40.
[95] Goode 2012, p. 100.
[96] Goode 2013, para 4.276.
[97] *Ibid*. para 4.277.
[98] Convention, Article 39–40.
[99] Pritchard – Lloyd 2013, p.10–11.
[100] *Ibid*. p. 13. In an operating lease the aircraft objectives are returned upon the end of the term. The objectives are then typically leased to another lessee or sold to fully cover investment costs and its return.
[101] *Ibid*. p.13.
[102] "Possessory liens" is the concept used in common law countries. The "right of retention" is used in civil law countries. McBain 2006/2007, p. 3. I will use the term "possessory liens" in this thesis.
[103] *Ibid*. p. 3.
[104] *Ibid*. p. 3–5.
[105] Pritchard – Lloyd 2013, p. 6.

of goods and equipment but also from maritime where the port in England had the right to detain a ship for e.g. damage caused by a foreign ship.[106]

The NCRI Article 39 of the Convention establishes an exception to the objectives of the Cape Town Convention namely to protect creditors through an international system providing for a priority order.[107] On the other hand a system where states declare and make NCRIs known provides for transparency. Creditors can assess the financial risks and price such risk accordingly. Article 39 would also provide protection of international interests as it is made clear that only NCRIs derived from the domestic law of the state qualifies as an NCRI.[108]

2.5 The International Registrar

The Registrar of the IR is established in Ireland where its database is located. The system started its operations as the CTC instruments came into force. The system is internet based and available for use on 24/7 basis. It is public and free. The searches available for free have limitations as to how much information one could search. This is due to security.[109] Apart from the IR being regulated by the CTC there are also specific Regulations and Procedures for the IR.[110] These Regulations and Procedures provide for operational rules from a practical point of view.[111] The Registrar is selected and may be discharged by the Supervisory Authority. The term is five years. This body also has the overall responsibility for supervision and monitoring activities of the Registrar.[112] The appointed body is the Council of ICAO.[113] The Registrar is currently located in Ireland and operated by Aviareto Ltd.[114] The Registrar is "liable for compensatory damages for loss….directly resulting from an error or omission of the registrar and its officers and employees". The IR is also liable in case the IR system malfunctions. This is not absolute, if the cause was due to "an event of an inevitable and irresistible nature".[115] The Registrar is bound to secure insurance to cover for the liabilities as laid down in Article 28.[116]

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[106]The Merchant Shipping Act 1894, section 688 at p. 270. "Power to arrest foreign ship that has occasioned damage."
[107] Pritchard – Lloyd 2013, p. 13.
[108] *Ibid*. p. 13–14.
[109] Saidova 2018, p. 11, p. 77.
[110] *Ibid*. p. 11.
[111] ICAO 2016.
[112] Convention, Article 17.
[113] Goode 2013, para 4.126.
[114] Saidova 2018, p. 77. For further information see www.aviareto.aero.
[115] Convention, Article 28 (1).
[116] Convention, Article 28 (4).

Any orders against the Registrar shall be made to the Courts of Dublin having exclusive jurisdiction.[117]

[117] Convention, Article 44.

3. EXPEDITED RELIEF RULES

The fifth section of the Preamble brings forward the fundamental point of the underlying idea of asset-based financing and leasing principles namely relief rules that can be exercised in a speedy fashion in case of debtor's default. In order for the debtor to have access to wider sources of finance at a reduced financing cost, the risks associated with possible defaults by the debtor, should be minimized. In its decision to finance an aircraft object, the creditor should be able to rely on an "effective recourse" to the aircraft object and its worth should the debtor fail to fulfill its part of the agreement. [118] Time is of an essence. In essence, two factors are vital to reduce the risk related to the assessment of a creditor. First, the remedies available should be applicable without the leave of court referred as "self-help". As a second factor, in case of a court involvement, the proceedings should have a cap where maximum time is known beforehand. This is also referred to as speedy relief rule.[119]

The speedy relief rules available by the CTC will be discussed next. I will divide this section by first defining default. This will be followed by a discussion on remedies and particularly on the speedy relief available by the Convention. The rules on jurisdiction are discussed in this context. The next section discusses the basic remedies in terms of deregistration and export of aircraft available by the Protocol. The two routes available are considered. The routes are the court route and the IDERA route, without the leave of court. In this context also the safety laws and regulations in terms of exporting or repositioning an aircraft will be considered. The last part discusses the concept of re-registration of an aircraft. The rules for re-registration are found in the Chicago Convention.

3.1 The meaning of default

The parties to a contract can establish what type of events are to be considered as a default. This can be done at any time provided it is in writing. There are a variety of examples that parties use to define default *inter partes*. In the High Court case of England and Wales failing to pay rentals for aircraft under a lease constituted a default.[120] In another case in the US failing to

[118] Goode 2013, para 4.5.
[119] Saunders – Walter 1998, p. 12.
[120] Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd. [2010] EWHC 185 (Comm).

maintain an aircraft resulting in the loss of airworthiness constituted a default.[121] Being late on delivering a leased aircraft back to lessor is another example constituting default.[122] Another type of default would be the failure to obtain insurance and secure correct party as recipient of compensation. This becomes critical if the aircraft has an event such as an accident.[123]

In the case parties do not define default in the agreement, the Convention offers a definition where a default is an event "which substantially deprives the creditor of what it is entitled to expect under the agreement".[124] The definition provided by the Convention raises two questions; what can a creditor "expect under the agreement" as well as when is a creditor considered to be "substantially deprived"? One view is that the definition of the expectations of a creditor should be in line with the obligations of the debtor's performance as indicated in the contract. Those obligations should sum up to the expectations of the creditor.[125] Another way could be that of the objectives of entering into an agreement in the first place. Such objectives would again amount to the expectations of the creditor under the agreement. When such objectives exist, it would make it easier to determine if a breach of a term constitutes substantial deprivation of the creditor under the agreement.[126] Put it more broadly, the objectives in terms of the expectation of the creditor under the agreement should simply be for the creditor to receive payments and interest for the security interest or aircraft objective.

When determining the second question of the creditor being substantially deprived, contemplating negative consequences could be of assistance. A breach of a term that is fundamental under the agreement e.g. a high probability of the debt not being repaid or severe damage to an aircraft objective could be considered as substantially depriving the creditor and thus constituting a default as defined in the Article 11 of the Convention.[127] Another view would be to decide what a reasonable person can anticipate under a contract as a creditor. An example could be for the debtor to fail in having insurance coverage in place for the aircraft during the entire period of the contract. Would a few days without proper coverage due to failure of renewal substan-

[121] Burton S. Davis, Iii, Appellant, v. American Jet Leasing, Inc.; St. Louis Flight Systems, Inc.; John Stone; and David A. Stone, Appellees, 864 F.2d 612 (8th Cir. 1988).
[122] Pindell Ltd & Anor v AirAsia Bhd. [2010] EWHC 2516 (Comm).
[123] Center Capital Corporation v. National Union Fire Insurance Co. of Pittsburgh, No. 1:2009cv00471 - Document 36 (D. Idaho 2010).
[124] Convention, Article 11.
[125] Saidova 2018, p. 180 – 181.
[126] *Ibid.*
[127] *Ibid.* p. 181–182.

tially deprive the creditor? A reasonable man could expect coverage throughout the entire period of contract. An aircraft does not necessarily need to have an accident when operating. It could be damaged e.g. on the ground resulting in high repair costs.[128]

3.2 Remedies under the Convention

The default remedies available under the Convention are divided into two categories based on the type of a creditor. The first category is composed of secured creditors and the basic remedies available to enforce its international interest.[129] The second category of creditors are those considered owning the aircraft object. This category would consist of lessors and conditional sellers. The remedy to be enforced would be to "take possession or control" of the object. A lessor could in the event of default terminate the contract.[130] Article 54 (2) of the Convention requires all states to make a declaration if any of the remedies available by the Convention must only be enforced with a decision from a court. This is a mandatory declaration.[131] This declaration is related to the procedural requirements of the CTC.[132] Article 14 reinforces the universal rule on law of the forum when interpreting international conventions in terms of procedures.[133] If a state declares that the CTC remedies may be used without the leave of court then the domestic law of the state should reflect the made declaration.[134]

3.2.1 Advance relief under Article 13

If a debtor disagrees with the right of a creditor to enforce its remedy, court proceedings may be initiated to decide on the disagreement. Resolving the dispute and receiving a final decision on such dispute may take long time. This comes at cost for the creditor who cannot make income on the aircraft objects. The aircraft objects will reduce in value as years go by. Furthermore, if the aircraft objects are not properly maintained there will be additional loses for the creditor.[135] To avoid possible losses that can be significant in economic terms, the Convention provides for relief rules available in the interim as waiting for a final decision. Application of Article 13 provides for the creditor to seek speedy relief from a court if it "adduces evidence"

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[128] *Ibid*. p.183–184.
[129] Convention, Article 8–9. These remedies will not be discussed here as outside of the scope of the thesis.
[130] Convention, Article 10.
[131] Convention, Article 54(2).
[132] Convention, Article. 14.
[133] Cuniberti 2012, p. 80.
[134] Gray – MacIntyre – Wool 2015, p. 18.
[135] Goode 2013, para 4.108.

of a default by the debtor.[136] The Convention is silent on the meaning of such evidence. The interpretation requirement is procedural and to be solved according to the procedures of the domestic law.[137] There are various methods of relief available for the creditor to seek. The creditor may ask for getting the objectives in its" possession and control".[138] The Convention does not quantify the term speedy as to how quickly a relief should be made available. Reference is found under the Protocol.[139] States may declare to apply the court route under Article X. If the state chooses to do so it shall state how many working days a relief considered "speedy" would be.[140] Most of the states define the amount of working days applicable for Article 13 (1)(b) in the Convention to be 10 days. This is calculating from the time of the filing, by the creditor with the court.[141]

The number of 10 days correlates to the fact that an aircraft left without technical maintenance starts deteriorating in condition and value after 5-7 days. This can lead to the fact that the aircraft lose its airworthiness and cannot fly. This could be the case if the debtor no longer can afford to maintain the aircraft as per the industry standard. It will create additional cost for the creditor to do recovery of the asset. The 10-day limit is an absolute maximum for an aircraft to be left without maintenance. Figure 1 on the next page, shows in principal, the costs to recover the aircraft based on days an aircraft is left without maintenance.[142] The court route that is connected to the advance relief under Article 13 will be discussed more in depth in section 3.3.

[136] Convention, Article 13 (1).
[137] Convention, Article 14.
[138] Convention, Article 13 (1) (b). Other available speedy reliefs under Art. 13 are not relevant for the purpose of this case study.
[139] Protocol, Article X (2).
[140] Protocol, Article XXX (2).
[141] Protocol Declarations, Article XXX (2). Available at https://www.unidroit.org/depositary-2001capetown-aircraft?id=450 (Visited on 6.3.2020).
[142] Gray – MacIntyre – Wool 2015, p. 22, 24. The graph is used to only illustrate the correlation of aircraft maintenance in relation to cost and time (days)) if failing to serve the aircraft. For deeper interpretation of the graph see Gray – MacIntyre – Wool 2015, p. 24.

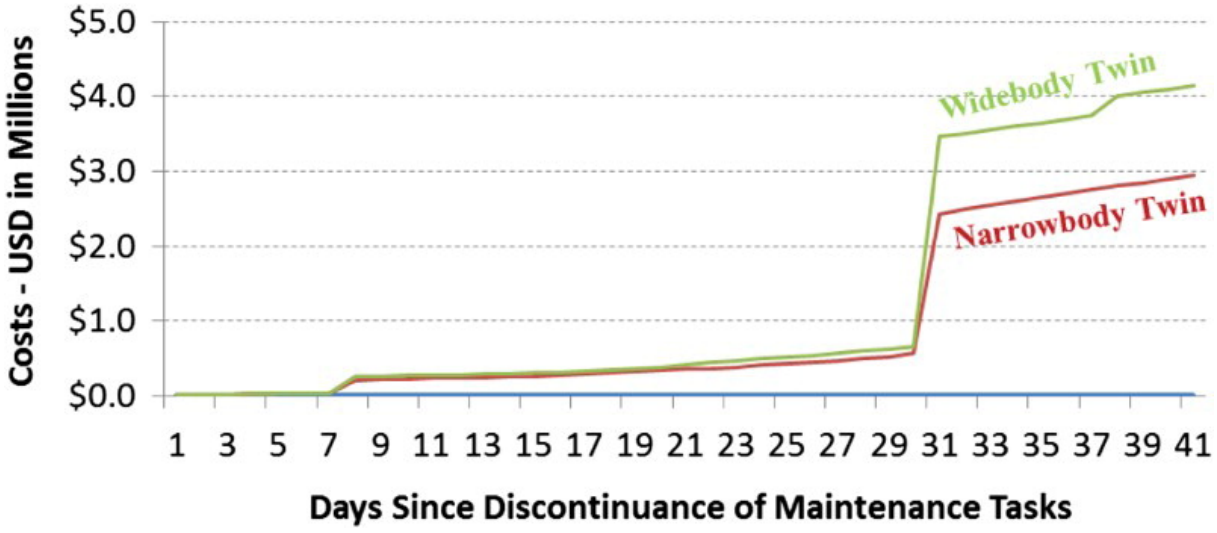

Figure 1: Correlation of aircraft maintenance in relation to cost and time (days) if failing to serve the aircraft

3.2.2 Jurisdiction

Article 42 of the Convention holds that jurisdiction chosen by the "parties to a transaction" is exclusive in terms of courts of a Contracting State.[143] The term "transaction" lacks definition but according to the commentary notes it should include the actual contract of the international interest and additional agreements that are within the scope of the instrument.[144] This general jurisdiction clause on party autonomy has a few exemptions.

The first applies to Contracting States and interim reliefs under Article 13 when waiting for final decision.[145] Courts chosen by parties being a Contracting State as above and courts in the territory where the object is located have jurisdiction to award a relief under Article 13 (1)(b).[146] The Convention does not take a position whether the final claim may be decided by a court in a state not being party to the CTC. There would be no rationale as to why courts of a CTC state should not be able to grant the relief under Article 13 in such a situation. The type of the relief is connected to the object itself and thus *in rem* in nature.[147] Rules on *in rem* remedies have to ultimately be resolved in a state where the aircraft objects are located. It is therefore reasonable

[143] Convention, Article 42.
[144] Goode 2013, para 4.280.
[145] Convention, Article 43 (1).
[146] Convention, Article 43 (1).
[147] Goode 2013, para 4.287–4.288.

that a territory where the aircraft object is located also has jurisdiction for advance relief. This benefits the creditors to have the remedies available under Article 13 in a speedy fashion.[148]

The second exemption is connected to a Contracting State also being the State of registry. The Protocol specifies that the State of Registration of an aircraft has jurisdiction in terms of an airframe if it is connected to granting an interim relief as stipulated in Article 43 of the Convention.[149] This exemption can however be out ruled if the parties have agreed on exclusive jurisdiction as per the general jurisdiction clause of the Convention.[150] The concept of State of registry will be discussed in the last part of this chapter in connection to the re-registration of the aircraft.

A state may make a declaration as to not apply Article 13 of the Convention in its entirety or in partial. Such declaration should be made in connection with Article 43 on "Jurisdiction under Article 13" applying it in part or fully.[151] If the states chooses to do so, it shall provide if it offers alternative speedy remedies to be applied. If applied only partly the state shall specify those remedies.[152] If a state decide to make such a declaration it should be consequent in its submission. If a declaration is made applicable for Article 13 then a declaration should likewise be made for Article 43.[153]

3.3 Remedies under the Protocol

Apart from the remedies available under the Convention, there are remedies available under the Protocol. The Protocol addresses remedies in terms of de-registration and export of aircraft.[154] The default remedies under the Protocol expands on the remedies available in the Convention. These remedies do not require a declaration by a state[155] The Protocol offers two routes as to how the default remedies could be operationalized. These routes under the Protocol do require a declaration by the state. The routes are as follows. The first option is the court route.[156] The

[148] Cuniberti 2012, p.92.
[149] Protocol, Article XXI.
[150] Convention, Article 42.
[151] Convention, Article 55.
[152] *Ibid*.
[153] Goode 2013, para 4.292.
[154] Protocol, Chapter II.
[155] Protocol, Article IX (1).
[156] Protocol, Article XXX (2).

second option is the IDERA-route.[157] The basic remedies of the Protocol will be discussed next. This will be followed by a discussion on the two available routes.

3.3.1 Deregistration and export remedies

In essence, Article IX (1) provides for general rules on how to secure de-registration of aircraft as well as the procurement of the export and physical transfer of aircraft object.[158] The idea behind these rules, when drafting the CTC, was to shift control from debtor to creditor.[159] The first part of the rule uses the term aircraft and the second part the term aircraft object. In reality a de-registration is connected to an airframe and not an aircraft as per the rules of the Chicago Convention.[160] On the other hand export and physical transfer of aircraft objects should be read to cover the airframe but also uninstalled engines to it.[161] Article IX does not require a declaration by a state. It rather depends on the agreement between the parties which can be changed at any time.[162] Article IX (1) does not imply that there should be a specific order how these remedies are set out in practice. The remedies can also be used independently. If for example the new debtor is located in the Contracting State where the aircraft is located, the need for export would obviously not be there but only the de-registration.[163]

There is a risk for the creditor when there is a lack of a declaration by the state to allow for the court or IDERA option. To address this, creditors typically make the use of a Power of Attorney (PoA) as part of the transaction documents. Nevertheless, if a specific route has not been declared by a state, difficulty may arise in terms of the administrative procedures to proceed with a de-registration or export in practice. There is nothing in the Protocol that would not allow an IDERA to be submitted regardless of the fact that the state has chosen not to make a declaration applying the IDERA route. The authority responsible for registration in a Contracting State shall recognize a request for deregistration if certain requirements are fulfilled.[164] The authorized party (the creditor) may use the IDERA form provided the submission is correctly done.[165]

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[157] Protocol, Article XIII.
[158] Protocol, Article IX (1).
[159] Gerber – Walton 2014, p. 53.
[160] Protocol, Article IX (1a). The Chicago rules will be discussed in the next section in connection with re-registration.
[161] Gerber – Walton 2014, p. 53.
[162] Protocol, Article IX (1).
[163] Gerber – Walton 2014, p. 60. The de-registration discussed here is a separate procedure and should not be confused with the de-registration of the International Registry on an international interest.
[164] Protocol, Article IX (5).
[165] Protocol, Article IX (5a).

Furthermore the authorized party making the request should if requested by the authority responsible confirm that any interest ranking in priority to that of the authorized party have either been cleared or there is a written consent.[166] Finally any request for de-registration and export of an aircraft is bound to follow relevant safety laws and regulations.[167]

3.3.2 Court route

The court route in the Protocol is directly connected with the rules of advance relief under the Convention. To make use of the remedies available under the Protocol, the creditor must have an interim decision by a court for a relief remedy under Article 13(1).[168] Such judicial relief is typically set by states to be given within 10 days.[169] Apart from the declaration required by the state in terms of the Convention, the state is required to opt-in and make a declaration of the Protocol.[170] The consequence of the declaration will create two obligations for the authorities responsible for de-registration and export.[171] The first sets a limit of 5 working days for the authorities responsible for registration to allow the creditor to procure the remedies. The five days are calculated at the time when the notification has been made by the creditor specifying the remedies that has been granted under Article 13(1). This obligation refers to the rules on de-registration as the clause specifies the authority as a registry authority.[172] The second obligation is related to cooperation and assistance by applicable authorities to the creditor in a speedy fashion following applicable laws and regulations related to safety.[173] The first obligation relates to a process being "purely documentary" where the objective is to be able to proceed with de-registration without any examination by the authority. The last obligation relates to remedies in terms of export and/or physical transfer of aircraft.[174]

There is one exemption where the court route cannot be used. There is a mandatory clause associated to the default remedies under the Protocol. Remedies shall not be applied if there are any interests registered that would have a higher priority than that of the creditor. This requires

[166] Protocol, Article IX (5b).
[167] Protocol, Article IX (5).
[168] *Ibid*. p. 60.
[169] Protocol Declarations, Article XXX (2).
[170] Convention, Article 54(2). Protocol, Article XXX (2).
[171] Protocol, Article X(6).
[172] Protocol, Article X(6a).
[173] Protocol, Article X(6b).
[174] Goode 2013, para 3.36.

a consent prior the exercise of the remedies by the holder of the higher-ranking interest. It shall be in writing.[175]

3.3.3 IDERA route

The second option for the creditor is to exercise its rights in terms of remedies using the "IDERA route". The Protocol has an Annex with a sample form of the IDERA.[176] This remedy can be exercised without the leave of court as a self-help. The application of the IDERA do require default by the debtor as specified in the Convention or by the parties.[177] To use this standing direction a declaration by the state in conformity with Article XXX (1) of the Protocol must be made.[178] There are detailed rules in terms of the application of an IDERA by a Contracting State which will be discussed next. This will be followed by a discussion on the content of the IDERA form. Lastly this part will end with a discussion on the rules for exercising the IDERA route.

First, to use the standing direction of IDERA, it requires for the debtor to have authorized so.[179] The creditor named as "the authorized party" or its "certified designee" can exercise the execution of the de-registration and the export remedies within the scope of the IDERA. This is the sole party to do so.[180] The term "sole" refers to exclusivity in terms of the right to execute on the remedies. The authorized party is the single point of contact in this context for the authority of the State of registry. There is no need to have a decision from the court.[181] Typically the creditor requires the IDERA to be completed by the debtor as part of the documents of the transaction.[182] Secondly, the IDERA form cannot be changed "substantially" as to how it is set out in the Protocol.[183] That would risk the effectiveness of the form if a state made changes that are material. Material changes in this context refers to the intent of the rules as laid out in the IDERA form of the CTC. An example would be changes where the effectiveness of the IDERA is weakened by generating additional conditions. Changes in substantive terms of the IDERA would also be viewed as not being in line with the objectives and the intention of the rules for the IDERA as set out in the Protocol.[184] Lastly, the authorization by the debtor, the IDERA,

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[175] Protocol, Article IX (2).
[176] Protocol, Form of IDERA as an Annex referred to in Article XIII.
[177] Goode 2013, para 3.34.
[178] Protocol, Article XIII (1).
[179] Protocol, Article XIII (2).
[180] Protocol, Article XIII (3).
[181] Gerber – Walton 2014, p. 57.
[182] Goode 2013, para 3.34.
[183] Protocol, Article XIII (2).
[184] Gerber – Walton 2014, p. 66.

shall be submitted to the authority of registry who will record it.[185] The rule specifically refers to an authority responsible for registration and excludes authorities in general. This would mean that the IDERA does not have an extraterritorial effect and can only be processed by the state where the aircraft is registered. Also, to enable registrations, the Contracting State having made this declaration must have a system in place that facilitates such registration records.[186] Should the debtor wish to withdraw the IDERA, a written consent by "the authorized party" (creditor) is required. Such withdrawal is to be filed with the authority responsible for the registry.[187]

Apart from information on the authorized party, the "undersigned" (debtor) and the authority responsible for registry, the data filled out in the IDERA form includes name, model and manufacturer for an airframe.[188] In addition to unique registration marks it also covers "…all installed, incorporated or attached accessories…".[189] This would mean that for de-registration purposes the aircraft object is the airframe. If the authorized party requests an export then the scope expands to cover the installed engines on the airframe, an aircraft. In a situation when the authorized party requests export of an aircraft, the installed engines on the aircraft may be owned by another creditor. This would not extend any rights or interests to the authorized party in terms of the installed engines. It is advisable that the creditor of the engines be consulted before executing export of the aircraft under the IDERA. Given the fact that the exercising of the IDERA is connected to a time factor to preserve the value of the aircraft, there might not be time to consult the creditor of the engines. The presumption in most times would be that it is for the benefit for all creditors holding an interest to have the aircraft relocated to a more neutral state.[190]

When the authorized party submits a request to enforce the IDERA remedies, the authority is required to honor such a request. There are two criteria that must be fulfilled by the authorized party.[191] Firstly, the submission by the authorized party must refer to an IDERA that has been registered by the authority.[192] The reference is set to the authorized party to enforce the remedies

[185] Protocol, Article XIII (2).
[186] Gerber – Walton 2014, p. 56, 61.
[187] Protocol, Article XIII (3).
[188] Protocol, Form of IDERA as an Annex referred to in Article XIII.
[189] *Ibid*.
[190] Gerber – Walton 2014, p. 57–58.
[191] Protocol, Article IX (5).
[192] Protocol, Article IX (5) (a).

and there can only be one existing IDERA that specifies the aircraft object.[193] Secondly, if required by the authority, the authorized party must submit a certificate on a priority ranking on the interest specified in the IDERA. Such certificate shall show that higher ranking interest holders have given permission to enforce the remedies and that any debts have been cleared if applicable.[194] The authority may not enforce further conditions such as getting an approval from the debtor. Also, even if the state has declared the application of NCRI and the possibility for seizing an aircraft under Art. 39 (1)(b) of the Convention it should be noted that the de-registration of the aircraft may still be processed. Obviously, a detained aircraft could not be exported and relocated to another state until possible dues are settled.[195] The authorized party has a duty to respect the priority rules of interests. If there is a priority ranking higher such as a NCRI under Art. 39 (1) (a) the authorized party has a duty to provide for a certificate indicating that the remedies are consented, or dues have been paid.[196]

3.3.4 Safety laws and regulations

For the remedial tools under the Protocol to be effective, the concept of "safety laws and regulations" need to be addressed. The phrase as per "applicable safety laws and regulations" is mentioned several times in the Protocol.[197] There is no definition as to how safety laws and regulations are defined in the instruments. Reference is found under the Official Commentary. In this context the rules on safety are referred to apply only when an aircraft is to be exported and physically flown. It would not apply to the deregistration of the aircraft which is "purely documentary"[198] This is in line with the definition of "de-registration of the aircraft" in the Protocol which refers to "deletion or removal of the registration of the aircraft from its aircraft register" as per the Chicago Convention.[199] Consequently the State of registry should not impose aviation safety rules if a creditor enforces its right to have an aircraft de-registered. There are various views of the national aviation authorities how this is operationalized and a variety of instructions in place. The instructions from the Irish Aviation Authority (IAA), if for example, an IDERA request for de-registration is submitted, extends to include many conditions. The authorized party shall return the certificate for the aircraft that have been issued by the

[193] Goode 2013, para 3.35–3.36.
[194] Protocol, Article IX (5) (b).
[195] Goode 2013, para 3.36.
[196] *Ibid*. para 3.37.
[197] Protocol, Article IX (5), X (6) (b), XIII (3).
[198] Goode 2013, para 3.36.
[199] Protocol, Article I (2) (i). The concept of registration under the Chicago Convention will be discussed in the next section 3.4.

IAA, remove marks on the aircraft such as registration etc. Such "mandatory requirements" are time consuming for the authorized party who wishes to have the aircraft de-registered as a documentary process in a speedy fashion.[200] The Canadian aviation authority on the other hand instructs the authorized party for example to remove national marks of the aircraft *only* if the same is to be flown out of the jurisdiction. The later view is in line with the Official Commentary of the Protocol.[201]

Safety aspects become relevant when an aircraft is to be exported and flown out of a state. The aircraft must be airworthy. The certificate of airworthiness issued for an aircraft confirms airworthiness of that individual aircraft. It can be revoked by the authority in the State of registry if the safety standards are not met and the aircraft is not safe to operate.[202] The remedy in the Protocol of exporting and transferring an aircraft is from a legal dimension a request to move property of the creditor to another state in a lawful way. The only duty for the authority is to assist the creditor in securing such transfer is done in a safe manner.[203] This duty applies regardless whether the creditor is using the court-route or the IDERA-route.[204] There is no need by the applicable authority to establish additional safety procedures for the aircraft to be repositioned to another state. As a matter of fact, an aircraft performing a so-called ferry flight, meaning a flight without any commercial guests and only air crew typically have different safety standards as opposed to a commercial flight. The requirements in terms of airworthiness are different and yet it is safe to operate the aircraft.[205]

3.4 Re-registration of aircraft

As already discussed in the previous section de-registration as a remedy under the Protocol becomes a challenge when actually enforced in a state responsible for the registration. One reason for the challenge is the fact that registration rules for aircraft applied by the aviation authorities are found under another instrument, the Chicago Convention.[206] It does provide for

[200] See Gerber – Walton 2014, p. 62-64 for examples on measures required by the aviation authorities in relation to de-registration.
[201] *Ibid*. p. 63.
[202] *Ibid*. p. 62.
[203] *Ibid*. p. 62–63.
[204] Protocol, Article X (6) (b) and Annex to Protocol (IDERA-form).
[205] Gerber – Walton 2014, p. 64.
[206] Chicago Convention, Chapter III.

rules on registration as well as requirements for re-registration.[207] The instrument does not mention the term de-registration, the Protocol of the CTC does referring de-registration to the Chicago Convention.[208] The purpose and objectives of the Chicago Convention will be discussed next. This will be followed by a discussion on the nationality rules applicable for aircraft registration. This part is ended with the rules of Article 83bis of the Chicago Convention offering for temporary rules where monitoring by a State of registration may be transferred to state of operation and thus avoiding re-registration of aircraft.

3.4.1 Chicago Convention

Chicago Convention is one of the oldest public law instruments within the field of international aviation. Concluded during the second World War and entered into force in 1949 it has the most ratifications of all international aviation instruments.[209] The treaty of its time has peaceful intents amongst the states promoting collaboration. Furthermore, it balances on one hand for a development of a safe aviation environment but yet in an economically sound way.[210] The treaty provided for the creation of the International Civil Aviation Organization (ICAO) under the UN.[211] The main focus of the ICAO today is to develop International Standard and Recommend Practices (SARP) for the global aviation industry.[212] Such standards become a part of the Annexes of the Chicago Convention. There are currently 19 Annexes.[213] The Annexes are technical in nature and cover topics such as airworthiness, crew licensing, search and rescue in case of an accident, safety management, aircraft registration etc.[214] These topics are safety related and in line with the objectives of the ICAO under the Chicago Convention.[215] The objectives related to economic aims have been left to other organization and therefore it may be argued that ICAO has not been able to fully operate as initially intended by the drafters of the Chicago Convention.[216]

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[207] *Ibid*. Article 17, 19.
[208] Protocol, Article I (2i) define "de-registration" as follows; "de-registration of the aircraft means deletion or removal of the registration of the aircraft from its aircraft registration in accordance with the Chicago Convention"
[209] ICAO A. Available at https://www.icao.int/secretariat/legal/LEB%20Treaty%20Collection%20Documents/composite_table.pdf (Visited on 29.3.2020).
[210] Chicago Convention, Preamble.
[211] *Ibid*. Article 43.
[212] ICAO B. Available at https://www.icao.int/about-icao/Pages/default.aspx (Visited on 31.03.2020).
[213] ICAO C. Available at https://www.icao.int/about-icao/AirNavigationCommission/Pages/how-icao-develops-standards.aspx (Visited on 31.03.2020).
[214] Chicago Convention, Article 37.
[215] *Ibid*. Article 44.
[216] White 2005, p. 58. Economic aspects e.g. tariff setting has been left to other organizations, such as IATA, presenting the air carriers. Such economic aspects are outside the scope of this thesis.

3.4.2 Nationality of aircraft

An aircraft is subject to registration and will bear the nationality of the state where registered.[217] This has implications from a safety perspective. The State of registry will be responsible for issuing a certificate of airworthiness.[218] The state in question is responsible to maintain oversight so that safety goals for the registered aircraft are achieved.[219] An aircraft can only be registered validly in one state at a time. Such registration can be replaced and registered in another state. [220] This article precludes dual registration but allows for shift of registration to another state.[221] Holding one state responsible at a time is efficient from a safety perspective.[222] Although safety is the focus of the Chicago Convention, it could be argued that even though not explicit a re-registration of an aircraft from one state to another entails a de-registration by default from a CTC dimension.[223] Article 19 provides for the governance of registration stating that registration or reregistration to another state shall be made according to the domestic laws of the state.[224] ICAO does not provide any guidance on the process of registration but requires for the State of registration to make information available in terms of ownership and registration. Such information shall be provided to ICAO or another state on request.[225]

There are different approaches to facilitate registration pending national law. Registration of aircraft by a state may be based on ownership or be operator specific or a combination of both. States impose their own rules on ownership of aircraft when registered.[226] The rule e.g. in the US requires the owner of an aircraft to be a citizen of the US.[227] Registration is only possible for non-US companies or non-citizens under specific conditions.[228] India has less strict provisions on ownership of aircraft than the US. Here ownership can be held by non-Indian citizens

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[217] Chicago Convention, Article 17.
[218] *Ibid*. Article 31.
[219] King 2016, p. 661–662.
[220] Chicago Convention. Article 18.
[221] *Ibid*.
[222] King 2016, p. 662.
[223] *Ibid*. p. 666–667.
[224] Chicago Convention. Article 19.
[225] *Ibid*. Article 21.
[226] The rules on ownership of aircraft should not be confused with the rules on ownership of airlines. Many States do impose an ownership criteria of majority shares to be held with the State or its citizens of the State of registration. Chicago Convention does not address this. The ownership and control rules for EU citizens and Member States are e.g. found under Article 4 of Regulation (EC) No 1008/2008. Such rule is typically connected to obtaining an Operating License. This is outside the scope of the thesis.
[227] FAA 2020. Available at https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/register_aircraft/ (Visited on 4.4.2020).
[228] *Ibid*. Such conditions are not within the scope of this thesis.

e.g. a lessor located in another jurisdiction. Here the registration of aircraft requires information on both owner and operator such as in a leasing situation.[229]

3.4.3 Article 83bis

To address the need of facilitating the leasing market an amendment was made to the Chicago Convention in October of 1980.[230] Article 83bis entered into force on 20th of June 1997.[231] The rationality behind was to ensure operational safety of aircraft in a scenario where the "State of Registry" differs with the "State of the Operator".[232] In essence Article 83bis provides for a possibility where some operational duties can be transferred from the state where the aircraft is registered to the state where the aircraft is operated. This way the activities involving safe operation of aircraft can be better monitored.[233] The activities that may be transferred relate to licensing of the radio and crew.[234] It also refers to the activity of providing the certificate of airworthiness and the provision on the "rules of the air".[235] A prerequisite to transfer the previously mentioned duties between the states require an agreement with the two states. Such agreement shall be filed with the ICAO to become effective.[236]

The need to make use of Article 83bis could occur in situations such as "lease, charter or interchange" where operator and owner of aircraft are located in different jurisdiction.[237] According to the circular guidance of the ICAO, the recommendation for setting the time period for the agreement between the states should be consistent with the time period in the underlying commercial agreement e.g. lease.[238]

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[229] DGCA (Government of India Civil Aviation Department). Application for registration of aircraft. Available at https://dgca.gov.in/digigov-portal/?page=jsp/dgca/InventoryList/RegulationGuidance/Forms/CA28.pdf (Visited on 13.4.2020).
[230] Article 83bis (Protocol relating to an amendment to the Convention on International Civil Aviation) (adopted 6 October 1980, entered into force 20 June 1997) (Article 83bis). There are currently 176 States that have ratified the instrument. See. ICAO A (Composite table).
[231] *Ibid*.
[232] ICAO 2003, p. 4. The Chicago Convention defines "State of Registry as the State on whose register the aircraft is entered. It defines "State of the Operator as the State in which the operator's principal place of business is located or, if there is no such place of business, the operator's permanent residence.
[233] *Ibid*.
[234] Chicago Convention, Article 30, Article 32 (a).
[235] *Ibid*. Article 12, Article 30.
[236] Article 83bis.
[237] *Ibid*.
[238] ICAO 2003, p. 7.

4. CASE STUDY

In this part, I will first discuss the accession of the Convention and Protocol by India. This includes the declarations made by India and how the CTC is implemented and given effect in the domestic law of India. The next section will discuss the rules when interpreting international treaties such as the CTC. This will be followed by a summary of the facts relating to the case study involving default of leasing payments by Spice Jet Limited (SpiceJet) in India to its lessors and the issue of de-registration of aircraft objectives. [239] This includes the facts leading up to the filing of claims with the Delhi High Court, the arguments by the petitioners and the respondents and lastly the rational and the ruling by the Court.

4.1 Accession by India

India acceded to the Convention and the to the Protocol on March 31st of 2008. The CTC entered into force 01.07.2008. [240] India made declarations both under the Convention and the Protocol.[241] Amongst the declarations in terms of the Convention made by India, is the specific declarations under Article 39(1)(a) covering non-consensual rights or interests that would have a priority in its domestic law. The categories declared covers liens for unpaid salaries of airline employees, taxes and charges associated to the use of the aircraft object and maintenance of same as far as such performance would add value to the aircraft object post fact a declared default.[242] Article 39(1)(b) covers the declaration on the general right to arrest or detain an aircraft objective or another aircraft object to secure payments due to governmental organizations having rendered services in terms of the fleet.[243] UNIDROIT provides for model forms for states, which India has made use of, when making the declarations. This should eliminate possible non-compliance with the terms of the CTC. [244] India has chosen not to make declarations in terms of Article 39 (2) and 39(4) of the Convention. These declarations would cover non-consensual rights and interests in the past and the latter occurring in the future.[245]

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[239] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015). The cases were dealt with by the court jointly.
[240] Convention Status. Protocol Status.
[241] *Ibid*. The declarations reviewed in this thesis are only those having relevance for the case study in question.
[242] Convention Status. Form No.1 Specific declaration under Article 39(1)(a).
[243] *Ibid*. Form No.4 General declaration under Article 39 (1)(b).
[244] Pritchard – Lloyd 2013, p. 220.
[245] Convention, Article 39 (2,4).

India also declared for registrable non-consensual rights or interest under Article 40 that are registrable. This covers wages for airlines employees and unpaid taxes similar to Article 39 (1)(a) with the exception on timeline. The registrable category under Article 40 applies for those categories of non-consensual rights to have occurred before the time of a declared default.[246] Article 40 also includes the lien of a judgement creditor.[247] Finally the only mandatory declaration of the Convention refers to procedural requirements where India has opted-in allowing for remedies available to creditors where court action is not necessary be exercised without court proceedings.[248]

The declarations made by India under the Protocol includes the opt-in on speedy relief rules.[249] The timeline as to when a creditor could obtain relief is set to 10 working days.[250] This would mean that e.g. a lessor could take possession and control of an aircraft object within 10 working days applied from the date when relief has been filed.[251] India also made a declaration of Article XIII allowing for the use of the IDERA.[252] Lastly it declared under Article XXX(1) on the choice of law opting-in for party autonomy on the law to regulate rights and obligations in contract.[253]

In 2018, ten years after the CTC entered into force, a CTC Act was proposed as part of its implementation of the CTC.[254] India has usually been viewed as a dualist state in terms of how it is obtaining international law into its legislation. However, in reality it seems it is a combination of dualism and monism.[255] Courts in India tend to apply international law treaties without necessary have been formally derived from its domestic law. Such laws could have been brought into national law using various routes.[256] In fact a combination of characteristics of both monist and dualist legal systems is very common. Specifically, in aviation there is a need to lay down operational rules. This could be e.g. rules on how to de-register an aircraft.[257]

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[246] *Ibid*. Form No.6. Declaration under Article 40.
[247] *Ibid*.
[248] *Ibid*. Form No. 13 Mandatory declaration under Article 54(2).
[249] *Protocol*, Article X.
[250] Protocol Status. Form No.21 Declaration under Article XXX (2) in respect of Article X providing for the application of the entirety of Article X.
[251] Convention, Article 13(2). Protocol, Article X (2).
[252] Protocol Status. Form No. 27 Declaration under Article XXX (1) in respect of Article XIII
[253] Protocol, Article VIII.
[254] Government of India 2018.
[255] Chandra 2017, p. 25, 30.
[256] *Ibid*. p. 26. The various ways of how India obtains international law into its domestic legal system is outside the scope of this thesis.
[257] Wool 2017, p. 10.

4.2 Rules of treaty interpretation

Article 5 of the Convention provides guidance on the rules of treaty interpretation.[258] Article 5(1) specifies that interpretation is to be in line with the preamble of the Convention, namely to "promote uniformity and predictability".[259] This is in line with international private law treaties as e.g. provided for in Article 7(1) of the CISG. [260] Interpretation shall be autonomous based on the definitions and concepts as provided by the treaty itself. [261] Article 5(1) serves as guidance to domestic courts to avoid the use of concepts in its interpretation that are domestic. [262] Article 5(2) of the Convention is a standard clause used in international private law treaties.[263] If the treaty itself does not provide the rules of interpretation then the mechanism of "gap-filling" shall be primarily on the "general principles" as laid out in the Preamble of the Convention.[264] Only as a third option will national law of the state be applied.[265]

4.3 Case SpiceJet

Facts leading up to the claims involved lessors, Awas 39423 Ireland Ltd. & Ors and Wilmington Trust SP Services. (the "Petitioners") that had entered into separate leasing agreements with the Indian airline SpiceJet Limited during 2012 and 2013.[266] Below are the key facts resulting to claims filed with the Delhi High Court.[267]

- When the lessors and SpiceJet had entered into agreements two documents were executed by SpiceJet: the IDPOA (Irrevocable De-Registration Power of Attorney) and the IDERA.
- The Director General of Civil Aviation (DGCA) issued a COR (Certificate of Registration) for all the aircraft objects, which meant that the objects had been entered into the Indian Civil Aviation Register (ICAR).

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[258] Convention, Article 5.
[259] *Ibid*. Article 5(1).
[260] CISG, Article 7 (1).
[261] McKendrick 2016, p. 979–980.
[262] Goode 2013, para 4.62.
[263] McKendrick 2016, p. 981.
[264] Goode 2013, para 4.63. These principles are "prompt enforcement, visibility in transactions through registration in the International Registry and clear priority together with predictability and party autonomy".
[265] Convention, Article 5(2).
[266] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015). Case 871/2015 involved three petitioners; Awas 39423, 39424 and 39427. Case 747/2015 involved one petitioner.
[267] *Ibid*.

The chart presents more detailed information about the documents and dates involving the six Boeing 737 lease aircraft.

Case	Model	Registra-tion	Lease agree-ment date	IDPOA date	IDERA date	COR
871/2015	B 737	VT-SGZ	30.04.2012	30.04.2012	30.04.2012	14.05.2012
871/2015	B 737	VT-SZA	22.05.2012	24.05.2012	24.05.2012	04.06.2012
871/2015	B 737	VT-SZB	17.10.2012	23.10.2012	18.10.2012	29.10.2012
747/2015	B 737	VT-SZI	07.08.2013	03.10.2013	03.10.2013	14.10.2013
747/2015	B 737	VT-SZJ	07.08.2013	24.01.2014	24.01.2014	03.02.2014
747/2015	B 737	VT-SZK	07.08.2013	21.05.2014	21.05.2014	25.05.2014

Regarding the first three aircraft objects (case number WP(C) 871/2015) SpiceJet failed to pay basic and supplemental rentals as agreed in the lease agreement.[268]

- On 18.12.2014 the lessors sent default notices to SpiceJet including, inter alia, termination of the lease and request to immediately return the aircraft objects with all the necessary documents.
- On 19.12.2014 the petitioners contacted DGCA because SpiceJet did not comply with the default notices' orders. They asked the DGCA in writing to contact SpiceJet and order them to ground the aircraft objects and return them to a location mentioned in the default notice.
- On 26.12.2014 the lessors requested the DGCA to de-register the aircraft objects from the ICAR and to issue an "Export Certificate of Airworthiness", since SpiceJet continued to operate the aircraft objects even if the lease agreements had earlier been terminated.
- On 29.12.2014 a third communication was made by the lessors to the DGCA with the same information as there were no response to the earlier request.
- On 29.12.2014 the lessors received a request from the DGCA including, inter alia, a request to submit the COR in original, an application for issuance of "Export Certificate of Airworthiness and a confirmation on de-activation of "Mode S transponder".[269]

[268] *Ibid*.

[269] Mode S is defined as a Secondary Surveillance Radar process that allows selective interrogation of aircraft according to the unique 24-bit address assigned to each aircraft. ICAO has standardized this form. All States are allocated their own codes. When an aircraft is exported to a new state it will receive a new code from the applicable

- On 02.01.2015 the lessors answered the DGCA via letter stating that the COR in original was available with the operator SpiceJet and that the Mode S was usually deactivated after deregistration. Furthermore, there was no need to issue an Export Certificate of Airworthiness for all three aircraft as two were to be grounded and remain in India.[270]
- On 09.01.2015 the lessors forwarded the following documentation to the DGCA: A copy of the IDERA as the authorized party. A search certificate on priority interest confirming that the lessor was the only "registered interest holder" in terms of the aircraft objectives. Lastly the lessors enclosed "consent letters" received by both owners and mortgagees. Reference was made to the upcoming amendment of the Aircraft Rules. [271]This led to the fact that DGCA wrote a letter to SpiceJet the same day and asked the air carrier to surrender the COR and de-activate the Mode S transponder to be able to de-register the aircraft objects from ICAR.
- SpiceJet didn't surrender the COR and the DGCA didn't de-register the aircraft objects. Against this background, the lessors decided therefore to file a petition to the High Court in New Delhi.

The lessor for the last three aircraft objects (case number WP(C) 747/2015) also held three separate lease agreements with SpiceJet. Similarly, SpiceJet failed to pay rentals for the lease of the aircraft objectives.[272]

- On 10.12.2014 a notice of the default was issued. The aircraft objects were to be returned within 5 days from the notice and be repositioned to Singapore by SpiceJet.
- On 19.12.2014 the lessor notified SpiceJet of termination of contracts via mail. Furthermore, it contacted the DGCA informing of the termination with lessee with attached documents of the termination letter, COR, Certificate of Airworthiness, IDERA and IDPOA. The lessor also confirmed that there were no suits directed from airports in India (private or public) in terms of the applicable aircraft objects.

State. See Mode S. Available at https://www.skybrary.aero/index.php/Mode_S#Description (Visited on 04.05.2020).

[270] A few days later on 08.01.2015 an additional letter was sent by the lessors to the DGCA stating that also the third aircraft was to remain grounded in India and not be repositioned in another State.

[271] An amendment for the Aircraft Rules 1937 (Aircraft Rules) was proposed. Under Rule 30 of said rules there were changes proposed to regulate the use of IDERA and appointment of the Central Government as an authority to perform the cancellation of the registration.

[272] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).

- On 30.12.2014 the lessor requested the DGCA to de-register the aircraft objects from ICAR since SpiceJet failed to act as requested to return the aircraft objects. The lessor also informed that costs borne by repositioning the aircraft objectives to Singapore would be paid by the lessor.
- On 09.01.2015 the lessor sent a remainder to the DGCA referring to earlier communication. It also informed of a meeting held with the Deputy Director of Airworthiness. During that meeting the lessor had received information that when the IDERA form is received by the DGCA the pertaining aircraft objectives would be de-registered within five days. Reference was also made to the proposed amendment of Aircraft Rules.[273] The same day another mail was sent to the DGCA providing for the original IDERA and a certificate on priority in terms of being the only holder of a registered interest. Consequently, the DGCA sent a mail to SpiceJet asking to surrender the COR and de-activate "Mode S transponder".
- On 12.01.2015 a follow-up mail on the request was sent to DGCA urging to get the de-registration of the relevant aircraft objectives completed. A copy was also forwarded to SpiceJet.
- On 16.01.2015 the lessor contacted via mail the DGCA with the same requests.
- Similarly, as with the other three aircraft objects, SpiceJet didn't surrender the COR and DGCA didn't take any further action. Therefore, the petitioner referred the matter to the High Court in New Delhi.
- On 20.01.2015 a counter affidavit was filed by SpiceJet. Nothing was filed by the DGCA.

During quarter 1 of 2015 arguments of the parties in the joint case were heard by the Court and 05.03.2015 was reserved for judgement of the two cases. The arguments of the petitioners and respondents will be broadly discussed next.[274]

- In the case the petitioners from the first case WP(C) 871/2015 argued that the lease agreement had been terminated and the IDERA had been presented to the DGCA. This

[273] An amendment for the Aircraft Rules 1937 (Aircraft Rules) was proposed. Under Rule 30 of said rules there were changes proposed to regulate the use of IDERA and appointment of the Central Government as an authority to perform the cancellation of the registration.

[274] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).

had triggered the remedies available under the Protocol and the Convention.[275] There were no other holders of registered interest in the aircraft objects and therefore according to the provisions permitted to the de-registration of the aircraft objects. The petitioners did submit these documents on 09.01.2015, which means that the DGCA should have de-registered the aircraft objects.

- The petitioners also argued that India's declarations under Article 39 of the Convention regarding NCRIs didn't affect the right to seek the de-registration of the aircraft objects.[276] This because the liens had not been registered. Reliance was placed on the declarations made by India applicable for Article 40.[277] The effectiveness of liens defined in clause 39(c) of the Convention regarding repairers of aircraft depends on the value added to the aircraft objects, regardless of not being registered.
- Petitioners also reviewed the domestic aviation rules. According to Article 30 (6) (iv) of the Aircraft Rules, when the DGCA was informed that the lease is terminated, then the aircraft objects shall be de-registered from the register ICAR.[278]Article 30 was amended 09.02.2015.[279] The amendment states that an aircraft in Indian aircraft registry where the CTC applies, "*shall be cancelled by the Central Government*", as per the Protocol if a request of IDERA is received by its holder. The application shall be received prior to expire of the lease together with the following documents: IDERA and a certificate declaring that all registered interests have been cleared or that the holders of the interests have agreed to the de-registration and export of the aircraft objects.[280]
- The petitioners from the second case WP(C) 747/2015 supported the arguments made in the first case but added that they were only interested in acquiring the de-registration of the aircraft objects.

Similar to the petitioners, the respondent for SpiceJet reviewed the applicable legislation to buttress his position. The following arguments were made:

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[275] Protocol, Article IX. Convention, Chapter III.
[276] Convention, Article 39 on non-consensual rights or interests not requiring registration. Declaration made under Form 1 by India.
[277] Convention, Article 40 on registrable NCRIs. Declaration made under Form 6 by India.
[278] The Aircraft Rules 1937 (Amended February 17, 2011) (The Aircraft Rules). Available at https://www.prsindia.org/uploads/media/Civil%20Aviation%20bill/Aircraft%20Rules,%201937.pdf (Visited on 06.05.2020).
[279] Ministry of Civil Aviation 2015. Available at https://www.civilaviation.gov.in/sites/default/files/moca_003416.pdf (Visited on 06.05.2020).
[280] *Ibid*.

- The respondent, SpiceJet, argued that the petitioners can't be granted reliefs since there are contested questions of fact in this case.
- The petitioners are holding with them security deposits that are greater than the claims.
- A competent court should establish if the right to terminate the leasing agreements for the aircraft objectives exists.
- On 22.01.2015 the Government of India had approved a restructuring plan filed by SpiceJet including changes in its ownership, management and control. If the petitioners were to be allowed to repossess the six aircraft, it would harm the restructuring plan. This would have consequences on the public interest affecting future staffing and customers who already held itineraries with SpiceJet.
- The responder for SpiceJet also argued that de-registration could only occur when claims related to the NCRIs are settled in line with the declaration under the Convention.[281] SpiceJet had a debt amounting to Rs 1,580 Crores to various creditors. [282] Therefore, a de-registration to the DGCA cannot be instructed before NCRI claims are settled.
- The respondent for the DGCA argued that the DGCA has the power to de-register an aircraft according to Rule 30 of the Aircraft Rules. When exercising this power, the DGCA must consider any liens on the aircraft objects.

Based on the facts and arguments of the joint case whether the petitioners have the right to seek de-registration of the aircraft objects below is the ruling of the Court with its rational.[283]

- The parties can agree on what constitutes a default.[284] Failing to pay rentals prompts a "termination event" not disputed by the parties. The remedies available are found in the Convention and the Protocol.[285]The availability of remedies is based on the mandatory declaration by India allowing for remedies be exercised without court proceedings.[286] The declaration by India on allowing the use of the IDERA triggers the responsibility of authorities in a Contracting State to "expeditiously co-operate with and assist the

[281] Convention, Article 39.
[282] Amongst the creditors were the Airport Authority of India, Private and International Airports, the Tax Authorities, employees etc. These creditor groups constitute groups that would have priority under Article 39 of the Convention as declared by India.
[283] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[284] Convention, Article 11(1).
[285] Convention, Article 10, 13, the Court Route & Protocol Article IX, the IDERA-Route-
[286] Convention, Article 54(2).

authorized party in the exercise of the remedies" as per Article IX.[287] The authorities "shall… honor a request for de-registration and export" if two criteria are met.[288]

- The first criteria are met as SpiceJet has issued IDERAs in favor of the various lessors for the aircraft objects of the six aircraft and those have been filed with the DGCA.[289] The petitioners have submitted the IDERAs requesting de-registration be provoked.[290] This does not require the leave of court.[291]
- The second criteria refer to ranking and priority of international interests. The authorized party shall establish proof that international interest having higher priority have either been discharged or have agreed to the de-registration and export.[292] This is disputed by the parties in terms of the existence of NCRIs under Article 39 of the Convention that would rank higher in priority than the ranking of the petitioners. Such NCRIs are derived from the national law and would have a priority under the same without being registered.[293] The respondent of the DGCA argued that due to the existence of liens a de-registration could not be completed. The DGCA had not examined the matter of municipal laws and could not inform under which laws DGCA has liens to be enforced. The scope of lien is regulated by domestic laws and not by the CTC. According to the Court "de-registering of aircraft is not, in my opinion, hampered by the existence of liens, if any, under the Municipal Law of the Contracting State".
- Under Article 30 of the Aircraft Rules before the amendment of Feb 9th of 2015 it is stated that a COR shall in case of a lease be valid.[294] If a lease is terminated it is no longer in force and *may be cancelled* by the DGCA.[295] According to the Court the word *may* must be read as *shall.* The rationale behind is that under the same subclause where an aircraft "may be cancelled" are examples of fraudulent activities eg providing information in terms of the aircraft that is not true or an aircraft that have been destroyed. In such examples an aircraft shall be de-registered.[296] The DGCA do not have discretion to refuse a de-registration.

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[287] Protocol, Article XIII (4).
[288] Protocol, Article IX (5).
[289] Protocol, Article XIII (2).
[290] Protocol, Article IX (5)(1).
[291] Protocol, Article IX (5).
[292] Protocol, Article IX (5)(2).
[293] Convention, Article 39. Article 1mm of the Convention defines an "unregistered interest as a consensual or non-consensual right or interest (other than an interest to which Article 39 applies) …".
[294] The Aircraft Rules, Rule 30(6)(1).
[295] *Ibid*. Rule 30 (6)(iv)
[296] *Ibid*.

- The same is confirmed in the amendment of Aircraft Rule where in Article 30 (7) reference is made to the CTC and the requirement of the DGCA to cancel a registration upon an application of IDERA, by its holder, provided with the documents as per the Protocol Article IX (5) (a-b).[297] According to the same rule, governmental agencies shall have a right to arrest aircraft objects under domestic laws as to receive any amounts due to governmental or private agencies. Such debt shall be linked to services provided in relation to the aircraft object.[298]
- The submissions rejected by the Court includes the requirement of procuring an IDERA application within five working days. Such requirement is related to the requirement associated to the speedy relief in the Convention.[299] Furthermore in terms of the arguments made under the NCRIs under Article 39 & 40 of the Convention.[300] It was noted that the Articles deal with different categories of NCRIs; registrable and non-registrable. The separate categories have consequences for priority, and it should not be confused.[301]
- The last submission being rejected concerned the question how a de-registration would affect public interest and customer bookings on future flights. The Court emphasized that it is more important that India is committed to honor its obligations under the CTC as an interest of the public.

Based on the rational above the Court ruled the following: DGCA are to de-register the aircraft objectives. To grant relief for the petitioners to export the aircraft objectives a decision may be needed on the NCRI liens under the domestic law by the DGCA. DGCA was not able to provide this information to the Court. A decision on the NCRI lien by the DGCA is to be provided to the Court within two weeks.[302]

[297] Ministry of Civil Aviation 2015.
[298] *Ibid*.
[299] Convention, Article 13 (1-3).
[300] Convention, Article 39, 40.
[301] *Ibid*.
[302] Convention, Article 39(1).

5 ANALYSIS AND RESULTS

In this part I will first analyze the judgement and address the key problems and possible solutions in the case. The key areas include firstly the primary issue which is the exercise of deregistration as part of the scope of the IDERA. Secondly, I will address the questions of the NCRIs that arose in the case. The last key area to be analyzed, will be on the application of the CTC. This part will be concluded with a discussion of the results.

5.1 Analysis

5.1.1 The IDERA

The main question at hand for the court to resolve was if the petitioners had the right to obtain de-registration of the six aircraft in the case.[303] This was a consequence of the debtor having failed on rental payments for the aircraft leading to termination of the lease agreements. The occurred defaults were within the meaning of Art. 11 (1) of the Convention.[304]

India has in its mandatory declaration of Art. 54 (2) declared that a creditor may seek remedies without the leave of court.[305] Furthermore, India has opted-in and accepts the use of IDERA, as a route. [306] The procedure of IDERA of the CTC is reflected in the Domestic Law of India.[307] These are found in the Airport Rules of India amended in February of 2015.[308] The remedies available in this case for the lessors are according to the IX (5) of the Protocol to secure a de-registration and possible repositioning of the aircraft outside of the jurisdiction.[309] The process of de-registration is the responsibility of the DGCA in India where the Central Government of India performs the cancellation. In this case such request had not been met as DGCA requested to have the original COR handed in. Such original is held by the debtor. This raises questions.

First of all, the judge rightfully acknowledges that the issue is about de-registration under the IDERA route. This should not be confused with the speedy relief under the Convention which

[303] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[304] Convention, Article 11 (1).
[305] Convention, Article 54(2).
[306] Protocol, Art. XIII.
[307] Aircraft Rules.
[308] Ministry of Civil Aviation 2015.
[309] Protocol, Article IX (5).

could be the other option as a route that be used unless the state has opted out.[310] Why should there be a request to turn in the original COR of the aircraft? This should in my opinion not be necessary. The original COR is a document that must be placed onboard the aircraft. As it is located onboard the aircraft, it is consequently held by the air carrier, the debtor. If the air carrier is not cooperative and refuses to submit the COR upon request, like in this case, then the process of the IDERA automatically stops. An activation of an IDERA procedure does not require the consent of the air carrier. The debtor approves the use of the IDERA when it authorizes the IDERA along with the other transaction documents.[311] The aviation authority responsible for registration can revoke the COR in its registry and then communicate this action to the debtor. Consequently, the debtor can no longer operate the aircraft. This process should in my opinion be accomplished in a few days. In line with Goode's commentary, the process is "purely documentary". [312] In this case the paper exercise took more than 3 months when the judgement was delivered. Here, the judge rightfully ordered a right to have the aircraft deregistered. The DGCA cannot use its discretion and it is not in line with the duty of the aviation authority to "expeditiously co-operate" as required in the Protocol.[313] For the creditor this is obviously a loss of income due to this type of a long delay.

Secondly, according to the Aircraft Rules 1937, referred in the case, Rule 30 (1) provides for the requirements of the COR.[314] According to the rules foreign ownership of aircraft is permitted. In the event the aircraft is leased both the lessor and lessee must be registrants of the COR.[315] This becomes problematic specifically like in this case. Typically, there is no intention in an operational lease to transfer ownership of aircraft to the lessee.[316] Is it necessary to have both parties as registrants to issue a COR?[317] In many states only the owner is required to be

[310] Convention, Article 13.
[311] Protocol, Article XIII.
[312] Goode 2013, para 3.36.
[313] Protocol, Article XIII (3).
[314] The Aircraft Rules, Rule 30 (1).
[315] *Ibid.*
[316] Morrell 2013, p. 246.
[317] The COR should not be confused with the Air Operators Certificate (AOC) which is the license for the air carrier to operate its flights regardless of ownership of the aircraft. An AOC is defined according to Annex 6 of the Chicago Convention as "a certificate authorizing an operator to carry out specified commercial air transport operations." This is issued to the air carrier by the State of registry unless the duty has been transferred under Art. 83bis in the Chicago Convention.

the registrant, so called owner based registration. Such states include e.g. the Nordic countries.[318] The question of the type of the system has relevance from a CTC perspective when deregistering an aircraft.[319] If the registration system is based on ownership of aircraft, then automatically there is much more control for the "true" owner in terms of deregistering an aircraft.[320] It becomes evident in this case how the type of system chosen for registration creates challenges for the lessor located in another jurisdiction away from the operator. One could argue that the need of IDERA is not there when the COR is ownership based. There would of course still be a need to repossess the aircraft from the lessee. For this purpose, there is a default remedy under the Convention subject to mandatory declaration of Art. 54(2) of the Convention.[321]

The concept of the COR is a product of a public law instrument, the Chicago Convention. [322] There are rules on registration and re-registration, but not on deregistration. In addition, the requirement on the COR process is left to domestic law.[323] There will consequently be various processes.[324] I would argue that the Chicago Convention is aligned with the CTC when the registration is ownership based. Re-registration is permitted according to Art 18 which also prohibits dual registration.[325] The lessor could establish a contact to the new state where it wishes to reregister its aircraft. When the aircraft has been reregistered the registration in the original State of registry would consequently no longer be valid as the aircraft can only be validly registered in one state.[326] In this case as the registration is based on both the owner and the operator such transfer of registration according to Art. 19 would be challenging given the uncooperative environment.[327]

Another solution to avoid the request of the original COR by the DGCA would be to make use of Article 83bis.[328] Both Ireland and India are parties to the treaty.[329] While this public international law instrument aims to facilitate activities of safety character for aircraft it would have

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[318] Pillsbury Law 2018. Available at https://www.pillsburylaw.com/images/content/1/2/v7/120554/BOOK-World-Aircraft-Repossession-Index-Third-Edition.pdf (Visited on 15.7.2020). See e.g. p. 118 for Norway, p. 143 for Sweden.
[319] The actual de-registration form, the IDERA form of the Protocol requires to select if the "undersigned" is the owner or operator as per the type of criteria applied by the registration system of the State.
[320] Gerber – Walton 2014, p. 51.
[321] Convention, Article 10 (a).
[322] Chicago Convention, Article 17–18.
[323] Chicago Convention.
[324] *Ibid*. Article 19.
[325] *Ibid*. Article 18.
[326] *Ibid.*
[327] *Ibid.* Article 19.
[328] Article 83bis.
[329] ICAO A.

implications for commercial aviation, such like in this case.[330] From a lessor point of view, making use of Article 83bis allows for the owner to keep an aircraft registered in its home country while the actual operator, the lessee is located in another state. This would provide flexibility for the owner and consequently reduce the risk in the cross-border lease transaction.[331] And yet the important activities from a safety point of view would be transferred to the State of the operator and be regulated and monitored by the aviation authority locally.[332]

Article 83bis is in my opinion a very useful option and the added value of this procedure is under estimated. It is in practice used in shorter term leasing arrangement. This way most of the oversight and safety monitoring of the aircraft remains with the State of registry. It is a time saving process for all involved parties. Article 83bis could be used more in long term leasing transactions. It could mitigate some of the risk, like in this situation, when the risk for the creditor is higher. This would of course not solve the problem of getting the aircraft repossessed and exported. These are activities that can in practice be very demanding and time consuming. They are not comparable to the paper exercise of deregistration. The process of repossession and export will also require a good working relation between the creditor and the DGCA. If this relationship is not optimal, the state involvement, between the State of the operator and the State of registration, borne out of the Article 83 bis process, can be an advantage for the creditor.

5.1.2 Non-consensual rights and interests

The second issue disputed by the parties was the existence of liens under the Convention.[333] In this case the respondent of SpiceJet argued that there were dues towards state authorities and employees of the air carrier that should be paid by the lessors before a deregistration could be initiated[334]. Such liens are declared by India.[335] None of the respondents could provide reference to what Domestic Law be applied for outstanding taxes and dues.[336] Declarations by a state on a NCRI is a direct consequence of such NCRI also existing in the domestic law of the state.

[330] ICAO 2003, p. 7.
[331] King 2016, p. 677–678.
[332] Chicago Convention, Article 12, 30-32a.
[333] Convention, Article 39–40.
[334] Convention, Article 39 (1).
[335] Convention Status.
[336] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).

This criterion is clear, and the Convention should not be used to broaden the scope of rights or interests.[337]

The issue of NCRIs are complicated and it does not make it easier when there was lack of clear reference to the Domestic Law of India where such liens are to be found. Reviewing the Indian declaration under Art 39 (1) of the Convention on salaries towards employees the following is stated; *"liens in favour of airline employees…. since the time of a* ***declared default****….*[338] In this case the air carrier had not at the time declared bankruptcy.[339]

Furthermore, all the aircraft were held by SpiceJet and not the lessors. According to the Official Commentary the liens and dues of NCRI are not enforceable in a case when the lessors are not in possession of the aircraft. The lessors have "already availed itself of an enforcement remedy over the aircraft object". Should however the aircraft e.g. have been arrested prior to the enforcement remedy having been exercised, then the lessor must respect the priority order where the NCRI liens under Art. 39 would prevail as set out in the Domestic Law.[340] In this case the judge clearly stated the following; "de-registering of aircraft is not, in my opinion, hampered by the existence of liens, if any, under the Municipal Law of the Contracting State".[341]

The judge correctly outlines the application of Art. 39. In his ruling he gives the respondent of DGCA two weeks to provide for a reference as to what Municipal Law be applicable for the liens in this case before the aircraft can be exported. Why this procedure of two weeks? One reason could be political where there is an interest to try to save or protect the domestic airline and provide some extra time. Given the facts in the case such additional time is in my opinion not necessary and not in line with the CTC on "expeditious cooperation".[342] DGCA has had all the time to provide references of liens in the Domestic Law. It is just prolonging the process further. As a matter of fact, in my opinion, a lessor should be more willing to pay outstanding dues to get the get the aircraft in its possession and possibly flown out of the jurisdiction. The liens are not comparable to the high cost of the aircraft. In addition, the aircraft needs continued maintenance. In this case the air carrier was in a weak financial position having failed to pay various creditors. In such a situation there is always a risk whether the air carrier can uphold a

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[337] Goode 2013, para 4.265.
[338] Convention Status.
[339] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[340] Goode 2019, para 2.272.
[341] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[342] Protocol, Article XIII (4).

proper level of maintenance to aircraft. The lessor would be in a better position to do so and also has an interest to preserve the value of the aircraft.

It would also not be uncommon for lessors to closely monitor the financial performance of the leaseholders. If the financial performance of the air carrier gets very poor there is always a possibility for the parties to renegotiate the conditions of leasing rentals. Such measures may prevent an air carrier ultimately from filing for insolvency. Many lessors also remain in contact with major service providers of the air carriers. Eurocontrol is a good example of such contact. If a lessor is made aware of delayed payments by an air carrier it could be wiser for the lessor to settle those payments over the risk to have the aircraft arrested e.g. at London Heathrow.

This case clearly shows the unfairness of the NCRI concept and fits ill with the aviation industry of today. Compared to the historical background and reasons for the NCRIs, the aviation industry has modernized. First of all, airlines tend to use leasing more as a form of financing compared to owning the aircraft. It would be fair to attach a NCRI requirement for the creditors of the airline when aircraft is also owned by the airline. This could e.g. cover liens such as salaries of the employees having performed work on the aircraft, but also various agency costs connected to the operation of the aircraft. Such costs are unfair if the owner is not the air carrier. Specifically, in operating leases, like this case, the lessor is held accountable for costs accrued by the air carrier in its commercial operations.[343] In all fairness, the cost of upholding the value of the aircraft in connection to maintenance should be absorbed by the lessor.[344] An interesting proposal could be to establish a pool for the operating lessors where a maximum liability, " a cap" is set for the participating lessors in the pool. Such pool could be funded as part of a deposit in the leasing transaction.[345]

Secondly, India also applies fleet liens.[346] An arrest can be made if there are outstanding governmental dues. The declaration of India under Art. 39 (1) (b) specifies that the arrest may be "*in respect of that object or another aircraft object*". [347] Suppose in this case the aviation authorities would have arrested one aircraft (A) in line with the declaration of Art. 39 (1) (b) that belongs to lessor (AA) but the reason for the arrest is because of unpaid charges on aircraft (B) owned by (BB) and yet the charges are borne by the air carrier operating the aircraft for reward.

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[343] Pritchard – Lloyd 2013, p. 29.
[344] *Ibid.* p. 30.
[345] *Ibid.* p. 31.
[346] Convention Status.
[347] *Ibid*. (ii) Form No. 4 (General Declaration under Article 39(1)(b)).

In line with Pritchard and Jones, this made sense when the airline owned all the aircraft, but not when there are leasing agreements and not necessary with the same third party.[348]

Thirdly, due to the environmental change within the industry such as the deregulation there has been also changes in terms of state ownership as states are no longer the primary owners of air carriers. Airlines should not be treated as utilities, being part of the ownership regime of the state, that can provide subsidies. Due to this structural change the industry is more volatile. Bankruptcies or other restructure activities are more common. With this new type of ownership, the liens generate less fairness and certainty for these sources.[349]

Lastly, there is a lack of the use of modern technology at least for some type of navigational charges. Similarly, to toll roads for cars where charging for tolls occurs at shorter and regular intervals by the use of technology connected to the car registry also the aviation industry could make use of likewise technology. This would limit the high amount of accumulated costs that the NCRIs traditionally been based on. It is also in the best interest of creditors such as lessors to have info in the early phase if payments are not made promptly to other creditors. Such practice fosters good financial practice in general.[350] As a matter of fact, there are already airports that use technological solutions to register various airport charges. There are for example tolls in place similar to car tolls. When an aircraft lands to its destination it passes a toll during its taxi to its parking position. This toll records information on the aircraft that can be used for invoicing purposes. There are also initiatives on using the passenger boarding automates at boarding gates to record passenger charges, such as e.g. security costs. When a passenger boards it automatically registers those passenger related costs. Finally, technology reduces transaction costs. A good example is the internet-based IR system where international interests are created and protected. It is global, available around the clock and inexpensive due to low transaction costs. It is constructed in a technologically wise way to minimize the possibility of human error.

5.1.3 Application of the Cape Town Convention

For a Contracting State to be effectively compliant with the CTC the following requirements must be fulfilled. The state should make certain the CTC has priority oven any conflicting laws and has the force of domestic law. In addition, the application of the operative terms of the CTC

[348] Pritchard – Lloyd 2013, p. 30.
[349] *Ibid*. p. 29.
[350] *Ibid*. p. 30.

are to be used in full and correctly. This applies to proceedings and disagreements in reference to the scope of the CTC.[351] Art. 5 of the Convention provides for the rules of interpretation.[352]

In this case, the judge very clearly brings forward the fact that the Court upholds to the obligations India has committed itself to when acceding to the CTC.[353] This is evident for example when the Court expresses the importance of the CTC in comparison to the public interest in connection to the argument brought forward by respondents in terms of lost air fares for passengers in case of de-registration.[354] The Court makes reference to the Rule 30 (7) of the Aircraft Rules of 1937 as an obligation under the CTC treaty.[355] In this case there was not a conflict between the domestic rules and the CTC. According to a summary statement issued by a local law firm, should there have been a conflict, then the domestic laws would have supremacy. This would be the conclusion provided the domestic rules are clear and the doctrine of harmonious construction has been applied.[356]

It becomes evident in this case, that the incorporation of the IDERA rules in the Aircraft Rules had just been implemented.[357] This is seven years after the treaty actually entered into force.[358] Furthermore the CTC had not received the status of law as a proposal was passed in 2018, three years post this case.[359] The Cape Town Convention Bill of 2018 has up to date not received the status of law. A reference check to this statement may be retrieved in the OECD "Cape Town list" under the Aircraft Sector Understanding (ASU).[360] The list provides for states having made so called "qualifying declarations" which would provide for a CTC discount in connection to financing of aircraft as per Art. 36. of the ASU.[361] India is one of the states on the "Cape Town list". India has made its declarations in line with the required qualifications. These declarations

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[351] AWG 2020 B. Available at http://awg.aero/project/cape-town-convention/#compliance-with-the-cape-town-convention (Visited on 15.07.2020).
[352] Convention, Article 5.
[353] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[354] *Ibid*.
[355] *Ibid*.
[356] Rajinder Narain & Co, p. 2. Available at http://ctcap.org/wp-content/uploads/2020/03/National-Implementation-Material-India-Country-Summary-Note.pdf (Visited on 06.07.2020).
[357] Ministry of Civil Aviation 2015.
[358] Convention Status. Protocol Status.
[359] Government of India.
[360] OECD. List of States qualifying for the reduction of the minimum premium rates referred to in Article 36 of Appendix II of the ASU. http://www.oecd.org/trade/topics/export-credits/documents/oecd-export-credits-prevailing-cape-town-list-asu.pdf (Visited on 15.7.2020)
[361] OECD 2011 See Art. 36 of Appendix II.

of the CTC are creditor friendly.[362] As a second step the state must also have fully implemented the CTC into its national legislation. This has not been confirmed by the OECD in the case of India. Consequently, India is not eligible for discounts under the "Cape Town list".[363] India acceded to the instruments in 2008 and the CTC entered into force 01.07.2008. [364] Twelve years is in my opinion a long time.

Apart from the discussed shortcomings it may be concluded that the Court has correctly ruled in this case. The case is an important judicial precedent in India. I would argue that the DGCA will not likely challenge an IDERA request by a lessor in the future. However as long as India is not effectively compliant with the CTC there is an underlying risk for creditors. Another dimension to the risk is the fact that there is not a system in the international legal environment to resolve issues when states do not fulfill its obligations. The cost is transferred to the creditors. Such cost will be added to future leasing costs and all the air carriers in the jurisdiction may suffer. The end user will ultimately bear the cost in the price of the airline ticket.

To address the creditor risks and provide for a sustainable platform for global aircraft financing, the legal advisory panel of the AWG has made a set of tools available for support.[365] These tools are aimed at providing assistance but also education given the complexity of the instrument. The target group is the practitioners but also government officials in Contracting States and other key stakeholders.[366] One recent initiative introduced in February of 2020 is the Cape Town Convention Compliance Index (Compliance Index).[367] The purpose of this risk assessment tool is to provide guidance on future compliance by states. This predictive assessment is based on the compliance by the Contracting States of the CTC. The sum of variables in the assessment results in a total score for the country.[368] In the calculation half of the weight is put on two variables. Those are "de jure compliance" and "de facto compliance".[369] The first one relates to effective implementation of the CTC. The latter is focused on the application and the

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[362] There is a specific instruction issued by the OECD as to what articles are critical for a state to either opt-in or opt-out as to qualify under the Cape Town list. Those requirements are outside the scope of this thesis.
[363] OECD.
[364] Convention Status. Protocol Status.
[365] AWG 2020 A.
[366] *Ibid.* p. IV.
[367] *Ibid*. p. 54.
[368] *Ibid*. p. 54–55.
[369] AWG Aero A, p. 3–4. There are six different variables used in the model. I will not discuss all the variables and the calculation model applied in the methodology is outside the scope of this thesis. Available at https://ctc-compliance-index.awg.aero/CTC%20Compliance%20Index%20-%20Methodology.pdf.(Visited on 15.07.2020).

enforcement of the instrument. This covers case law, administrative precedent and practice as communicated by experts.[370]

The current CTC compliance score for India is 69. The scoring range is between 20 -100, where 100 is the highest.[371] India is assessed at a "medium probability level". This indicates the probability that "the terms of the CTC will be substantially complied with". [372] The index is public, updated twice a year and may be updated more often if there have been developments that would have consequences for the score.[373] The system is not replacing local know how in law, but serves as a good complement.

In my opinion, a tool like this is good. The scores are public. This creates transparency. It could be viewed as having a dimension of a blaming and shaming aspect, but the score is not static. A Contracting State has a possibility to act and improve its score. As the application and enforcement of this complex instrument is left to national aviation authorities and courts it becomes vital to have support available. The AWG offers education to governments of the Contracting States in order to gain knowledge and be in better position to apply and enforce the instrument.

5.2 Results

The main objective of this thesis has been to examine the main legal issues associated with the exercising of creditor rights under the CTC when the debtor defaults in its rental payments for the lease of aircraft. The ultimate test of the instrument is when the debtor fails in payments or becomes insolvent and the creditor wants to exercise its rights to have the aircraft repossessed.[374] The underlying hypothesis is that states are given the freedom when ratifying to opt-in or opt-out on critical rules of the CTC.[375] The expectation would therefore be that creditors financing aircraft in a CTC jurisdiction could rely on the declarations voluntarily made by the states in the event of a default of the debtor. The research question that I aimed to answer is as

[370] *Ibid*. p. 3.
[371] AWG Aero B. Amongst the countries scoring with "very high" probability is e.g. Australia, Canada, Norway, Sweden. Available at https://ctc-compliance-index.awg.aero/index (Visited on 15.07.2020).
[372] *Ibid*.
[373] AWG 2020 A, p. 54. There are different versions and subscriptions of the compliance index. The public version is free of charge.
[374] Saidova 2018, p. 167.
[375] Convention, Article 54-55 and Protocol, Article XXX.

follows: Does the CTC provide an effective platform for the aviation industry to facilitate global aircraft financing?

Yes, the results of the analysis of the case study indicate so. First of all, the first finding relates to the discretion used by the DGCA of India in terms of exercising the IDERA. This is one of the most fundamental provisions of the CTC to assure a sustainable platform of global aircraft financing. It cannot be reversed. The rules are clear and uniform.[376] There are no grey areas where discretion could be exercised. In this case the Delhi High Court had to resolve this. The national legal system self-corrected itself and adjudicated this issue correctly.[377] Secondly, the de-registration as a concept is a process under the Chicago Convention and relates to the COR.[378] The concept of registration and re-registration is regulated. There is no mention of deregistration.[379] This gap has consequences for the CTC.

The second finding deals with liens. While one of the core principles of the CTC is to provide a harmonized system to safeguard interests at international level there are exceptions. This was important already in the early drafting phase important to the drafters of the CTC to include the articles on the NCRIs. In this way the legal risks are made known. In this case study it was evident that there were no liens that could have been imposed on the lessors. Liens as concept is an inherent risk for the creditor, not only in India, but in any state having declared this right.[380] To secure a sustainable platform of global aircraft financing that is effective it is vital to seek a balance between the international treaty and domestic laws. Liens serve as a good example of seeking such balance. As a matter of fact, most of the Contracting States, 63 states have made a declaration under Article 39 (1).[381] Yet, law is a product of its time. The aviation industry has changed, and the application of liens can create unfairness. It becomes a key to promote such changes from a policy perspective. The policy guidance for states in connection to declarations made under Article 39 (1) as provided by Pritchard and Lloyd is noteworthy.[382]

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[376] Protocol, Article XIII

[377] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).

[378] Chicago Convention, Article 17–18.

[379] Protocol, Article I (2) (i) define deregistration of the aircraft as a "deletion or removal of the registration of the aircraft from its aircraft registration" and refers back to the Chicago Convention.

[380] Convention, Article 39.

[381] Convention Declaration. Available at https://www.unidroit.org/status/141-instruments/security-interests/cape-town-convention-mobile-equipment-2001/depositary/declarations-by-article/438-article-39-1-declarations-deposited-under-the-cape-town-convention-on-international-interests-in-mobile-equipment (Visited on 14.11.2020). There are currently 82 States that have ratified the Convention. Convention Status.

[382] Pritchard, John & David Lloyd. Analysis of Non-Consensual rights and interests under Article 39 of the Cape Town Convention. Cape Town Convention Journal, Vol. 2. Issue 1. (2013) p. 29.

The third finding relates to the application of the CTC by the Court. The Court upholds the CTC rules in the case and applies the operative terms fully and accurately. This case is a judicial precedence in India, and the DGCA in India will most likely not challenge the rules of IDERA again.[383] The case study should however be viewed in the light that India continues not to be effectively compliant to the CTC as the CTC does not have the status of law.[384] There are mechanisms in place to address this. Firstly, India is not on the "Cape Town list" under the OECD and does not consequently qualify for discount under the ASU for financing of aircraft.[385] Secondly, apart from education, the legal advisory panel of the AWG provides a tool measuring the compliance of a state, the Compliance Index.[386] The importance of having a platform where support is available to the Contracting States is in my opinion a signal of a practice that promotes sustainability and yet effectiveness is achieved by having clear rules on the implementation of the instrument. In line with Wool, the economic benefits available for the stakeholders in the Contracting State reflects the willingness of the state to make its declaration in a creditor friendly way.[387]

The results need to be discussed from a methodological perspective. Both "de jure compliance" and "de facto compliance" compose half of the weight (50%) and are of equal importance in the risk model, the compliance index, facilitated by the AWG.[388] Similarly, empirical legal research, "law in practice" as a case study provide important insight of the real world while "law on paper" is focused on doctrinal research. Both paths complement each other.[389] Qualitative studies, such as a case study, as a research method has both strengths and weaknesses. Both the reliability and the validity of the study are considerations that should be addressed.[390] One weakness in terms of the validity of the case study relates to the researcher bias when choosing the case study. In this case there were some important criteria. First of all, the case itself. It touches upon a central topic of the CTC namely the IDERA. Finding a case that deals with a fundamental rule of the CTC was important to effectively be able to discuss the research question. IDERA is also discussed amongst legal scholars resulting in the availability of academic

[383] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[384] AWG Aero 2020 B.
[385] OECD.
[386] AWG 2020 A. p. 54.
[387] Wool 1997, p. 49–50.
[388] AWG Aero A, p. 3–4.
[389] Epstein – King 2002, p. 3.
[390] Argyrou 2017, p. 103–104.

material of high quality.[391] A second criteria in the selection process was the language. This includes the actual case law and related domestic laws. All these documents are available in English.[392] Language was a concern to try to avoid for errors based on translation. No research method, be it quantitative or qualitative, can eliminate bias and errors. Such paradigm solution does not exist.[393] Being aware and focus on the researcher bias during the design and writing process will contribute towards a more objective outcome of the study.[394]

Reliability is another methodological aspect considered being a weakness in a case study. This is based on the fact that you cannot generalize and thus contribute to scientific development. [395] This is correct, it is difficult to generalize but that is not the purpose of a case study. The strength is to add knowledge based on the actual context. [396] Replication is another aspect considered a weakness in a case study. It would not be possible to replicate as the study only becomes an example of many. Another person completing the same case study would most likely arrive at a set of different results.[397] The same argument applies for replication as for generalization. The purpose is not to reach the same scientific conclusion.[398] Webley summarizes the methodology of a case study very well. "Case study is a study of a phenomenon in itself rather than a means through which to view the whole world." [399]

Lastly, looking at the effectiveness of the CTC from a general point of view as a platform to facilitate global aircraft financing it may be concluded. The CTC is according to Coyle one of the most successful international commercial treaties being based on uniform substantive rules. It effectively deals with legal uncertainty. When such a treaty is ratified by many states it reaches the stage of being "truly international law" The uniform rules become the shared rules regardless of Contracting State. [400] This may not suit all types of commercial sectors.[401] I would argue it does for the global aviation industry. First of all, there are very few manufacturers of

[391] See e.g. Gerber – Walton 2014, Goode 2012, Gray – MacIntyre – Wool 2015 and Honnebier 2017.
[392] See Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilming-ton Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015) and the Aircraft Rules.
[393] Norris 1997, p.173.
[394] *Ibid.*
[395] Argyrou 2017, p. 103–104.
[396] *Ibid.* p. 104.
[397] *Ibid.* p. 103.
[398] *Ibid.* p. 104.
[399] Webley 2016, p. 2-5.
[400] Coyle 2011, p. 358-359.
[401] Coyle 2011, p. 357.

airframes and engines in the world. Secondly lessors are typically clustered in certain geographic areas of the world. Yet most of the nations do have air carriers that operate aircraft under the AOC of that state. Cross border transactions of these expensive mobile assets are inevitable. To protect the creditors, a set of harmonized substantive rules on property, are needed. In line with the CISG[402] which is considered to be "the greatest legislative achievement aimed at harmonizing private commercial law" the CTC also seems to have achieved a good stand.[403] The fact that the Protocol has been ratified by 79 states since 2006 speaks for itself.[404]

[402] Convention on Contracts for the International Sale of Goods on 11 April 1980. (entered into force January 1, 1988) (CISG).
[403] Coyle 2011, p. 359.
[404] Protocol Status and United Nations. Convention on Contracts for the International Sale of Goods. Status. https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (Visited on 11.11.2020) (CISG Status) There are 94 States that have ratified the CISG.

6. CONCLUSION

The objective of this thesis has been to explore the key legal problems associated with the exercising of the creditor rights in case the debtor defaults on its leasing payments of aircraft under the CTC. When a creditor decides to lease an aircraft object, it should be able to rely on an "effective recourse" to the aircraft object and its worth in case of default.[405] Time is of an essence. Two factors are key to reduce the risk related to the assessment by a creditor. First, the remedies available should be applicable as "self-help", such as an IDERA.[406] Second, in case of a court involvement, there should be a maximum time as a cap defined, which is known beforehand.[407] This type of a court involvement with the leave of court is referred to as speedy relief rule.[408] Typically states declare such maximum time to be 10 days.[409] The maximum time of 10 days relates to the maintenance and oversight of aircraft. Aircraft starts to deteriorate in condition after 5-7 days if left without maintenance.[410] This is the core of the CTC , to have the aircraft repossessed in case of default.[411] The idea behind the rules is to shift control from debtor to creditor.[412]

The underlying hypothesis is that a state is given the freedom to choose on how it wants to apply the rules of the CTC in its jurisdiction. There is only one mandatory declaration in the Convention, where the Contracting State declares, if a creditor may seek remedies without the leave of court[413]. A state has the possibility to make declaration on the critical rules when ratifying the instrument.[414] This includes firstly the rules on speedy relief in the interim ruled by a court while waiting for the final determination of a case.[415] Secondly, it also covers the possibility to declare the exercise of the de-registration and export request authorization (IDERA).[416] When a state opts-in on the IDERA rules it also effectively rules out the possibility for the use of discretion by national aviation authorities and courts. The expectation would therefore be that a creditor financing aircraft in a CTC jurisdiction can rely on the declarations voluntarily

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[405] Goode 2013, para 4.5.
[406] Protocol, Article XIII.
[407] Saunders – Walter 1998, p. 12.
[408] Convention, Article 13.
[409] Protocol Declarations, Article XXX (2).
[410] Gray – MacIntyre – Wool 2015, p.22,24.
[411] Convention, Article 10, Protocol Article (IX-X), (XIII).
[412] Gerber – Walton 2014. p. 53.
[413] Convention, Article 54(2).
[414] Convention, Article 54-55. Protocol, Article XXX.
[415] Convention, Article 55.
[416] Protocol, Article XXX (1).

made by the state in the event of a default of the debtor. The research question was as follows; Does the CTC provide an effective platform for the aviation industry to facilitate global aircraft financing?

The results in this case study indicate so. The case from 2015 is based on the case law of the Spice Jet case in India.[417] The case addressed the application of the IDERA and specifically de-registration of aircraft in an operational lease transaction.[418] The core issue is related to the discretion used by the DGCA of India for six aircraft in terms of exercising deregistration as part of the IDERA. The rules are clear and uniform.[419] If a state has opted-in for allowing the use of IDERA there are simply no grey areas where discretion could be exercised.[420] In this case the Delhi High Court resolved it and the national legal system self-corrected the matter. The issue of deregistration was adjudicated correctly. The Court upheld the CTC rules and applied its operative terms fully and accurately.[421] The case is a judicial precedence in India. The DGCA in India will most likely not challenge the rules of IDERA again. This judicial precedence should be viewed in the light of the fact that India continues not to be effectively compliant to the CTC. [422] The CTC in India does not have the status of law.[423] There is no international legal system in place to resolve issues when a state does not fulfill its obligations under the CTC.[424] The application and the enforcement of the CTC is left to national authorities and courts.[425] It therefore becomes important with other types of mechanisms, such as the support of the AWG.[426]

One such mechanism would be education provided by the AWG.[427] The CTC is a complex instrument consisting of 99 Articles.[428] Education is offered by AWG to Contracting States and

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[417] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015). The cases were heard jointly.
[418] *Ibid.*
[419] Protocol, Article.
[420] Protocol, Article IX (5) (a-b). The only two requirements are that the authority is the State of registry of the object of the IDERA and that the authorized party has submitted a certificate on a priority ranking on the interest as specified in the IDERA, if requested by the aviation authority.
[421] Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (Wp(C) 871/2015) and Wilmington Trust SP Limited v Directorate General of Civil Aviation & Anr (Wp(C) 747/2015).
[422] AWG 2020 B.
[423] Government of India.
[424] CTC.
[425] *Ibid.*
[426] AWG 2020 A. p. 54.
[427] *Ibid.* p.54-55.
[428] Goode 2003, p-10.

other stakeholders.[429] AWG has also recently established a new tool assessing risks associated to the compliance of a state, the Compliance Index. This tool provides an assessment, in a predictive fashion on future compliance by states.[430] Having a platform such as the AWG promotes in my opinion sustainability. Effectiveness is yet achieved by having uniform and clear rules on the implementation of the instrument. A second mechanism is the financial market. It will correct failures post facto by adding a risk premium to transaction. Such correction could consequently apply for all air carriers that have their principal place of business in that state.

Before the CTC, there were no uniform and substantive rules in place at international level to address how security interests would be protected or rights in equipment in terms of title-retention. The international rules that exsisted were mostly confined to cover a recognition of rights under the domestic law of the nationality where such aircraft is registered.[431] The CTC specifically states the need to safeguard interests at international level through recognition and protection.[432] With the CTC, an internet based International Registry, (IR) was established to facilitate registrations of international interests.[433] The international registry is not an ownership register. This applies for international interest that are leases.[434] The basic rule holds that when an international interest is validly registered in the IR it becomes effective. It has an international priority over any subsequent registration or interest that remain unregistered.[435] There is an exception to the priority system of international interests, namely the NCRI. [436]

The inclusion of the articles on the NCRI[437] as part of the Convention was important already in the drafting phase. To avoid uncertainty for creditors by maximizing the information available in a particular jurisdiction makes the legal risks known. This provides an opportunity for the creditor to secure correct pricing of the transaction.[438] Lessors, in particular operating lessors, run a risk, in the case of a lease default.[439] India applies both liens and fleet liens.[440] A validly

[429] AWG 2020 A p. 54-55.
[430] *Ibid*.
[431] Goode 2003, p. 10.
[432] Convention, Preamble.
[433] Convention, Article 16.
[434] Goode 2003, p. 11.
[435] Convention, Article 29.
[436] Convention, Article 1 (s).
[437] Convention, Article 39–40.
[438] Pritchard – Lloyd 2013, p.10–11.
[439] *Ibid*. p. 13.
[440] Convention Status.

registered international interests would be protected in case the lien declared under the Convention is not derived from the domestic law of the state.[441]

In this case study, the unfairness of the NCRI as a concept, became evident. Although liens were in this case never applied, it raises concerns. Liens fit ill with the modern aviation industry of today. Airlines tend to use leasing more as a form of financing compared to owning the aircraft.[442] Specifically, in operating leases, the lessor becomes accountable for charges accrued by the air carrier in its commercial operation of the aircraft.[443] It is however fair that the lessor absorbs costs for upholding the value of the aircraft in connection to maintenance.[444] Most of the Contracting States have made declarations under Article 39 (1) and do apply liens.[445] Pritchard and Lloyd provide valuable policy guidance for states in connection to liens and fleet liens.[446]

An aircraft is subject to registration and will bear the nationality of the state where it is registered.[447] Holding one state responsible at a time is efficient from a safety perspective.[448] ICAO is the safety standard setter for the global aviation. The de-registration of an aircraft is as a concept a process under the Chicago Convention and relates to the COR. [449] The Chicago Convention regulates registration and re-registration of aircraft. There is no mention of deregistration in the Chicago Convention.[450] There are different approaches to facilitate registration pending national law. Registration of aircraft by a state may be based on ownership or be operator specific or a combination of both. States impose their own rules on registration of aircraft.[451] India applies the combination of both.[452] A registration system based on ownership of aircraft benefits the creditors as there is much more control for the "true" owner in terms of deregistration of aircraft.[453] Any other system may have consequences for the CTC. The delay in the

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[441] *Ibid*. p. 13–14.
[442] Berk – DeMarzo 2020 p. 925.
[443] Pritchard – Lloyd 2013, p. 29.
[444] *Ibid.* p. 30.
[445] Convention Status.
[446] Pritchard, John & David Lloyd. Analysis of Non-Consensual rights and interests under Article 39 of the Cape Town Convention. Cape Town Convention Journal, Vol. 2. Issue 1. (2013) p.29.
[447] Chicago Convention, Article 17.
[448] King 2016, p. 662.
[449] Chicago Convention, Article 17–18.
[450] Protocol, Article I (2) (i) define deregistration of the aircraft as a "deletion or removal of the registration of the aircraft from its aircraft registration" and refers back to the Chicago Convention.
[451] Chicago Convention, Article 19.
[452] The Aircraft Rules, Rule 30 (1).
[453] Gerber – Walton 2014, p. 51.

deregistration process has an economic impact for the creditors. Such cost will be reflected in the future pricing of operational leasing transactions.

It could be argued that even though not explicitly stated, a reregistration of an aircraft from one state to another under the Chicago Convention entails a deregistration by default viewed from a CTC standpoint.[454] ICAO has previously facilitated the process of Art 83bis with good results. ICAO could similarly take the lead and provide solutions and best practice in order to close the gap between registration and reregistration. This would further enhance the global aircraft financing as an effective platform for the aviation industry.

For the remedial tools under the Protocol to be effective, the concept of "safety laws and regulations" becomes important when an aircraft is to be exported and physically flown out of a jurisdiction.[455] The rules of safety would not apply to the deregistration of the aircraft which is "purely documentary"[456] Safety has relevance as the aircraft must be airworthy. The certificate of airworthiness issued for an aircraft confirms the airworthiness of that particular aircraft.[457] The remedy in the Protocol of exporting and transferring an aircraft is from a legal dimension a request to move property of the creditor to another state in a lawful way.[458] This duty has no relevance as to what route the creditor is using, be it the court-route or the IDERA-route.[459]

Lastly, for consideration, the exporting and physically flying an aircraft to a new jurisdiction is an interesting area. The legal dimension is clear; "a request to move property of the creditor to another state in a lawful way".[460] The question becomes interesting as to what requirements are needed to actually move that property. This is an area where there is little research or case law. And yet there are risks for the creditor, especially, if the working environment between the creditor and the airline (debtor) and possibly also the aviation authority is non-cooperative. One important risk relates to the maintenance records of the aircraft. Such records are held with the airline or its service providers and are necessary for the aircraft to be airworthy. Maintenance records make up the value of the aircraft. Simply put, without the records the aircraft has no value. No other air carrier can fly the aircraft because it will not be airworthy. Securing the

[454] King 2016, p. 666–667.
[455] Goode 2013, para 3.36.
[456] *Ibid.*
[457] Gerber – Walton 2014, p. 62.
[458] *Ibid*. p. 62–63.
[459] Protocol, Article X (6) (b) and Annex to Protocol (IDERA-form).
[460] Gerber – Walton 2014, p.62–63.

process for the creditor to have the maintenance records in its possession, if an aircraft is to be exported to another state, could be an interesting scope for future research.

ANNEXES

FORM OF IRREVOCABLE DE-REGISTRATION AND EXPORT REQUEST AUTHORISATION

Annex referred to in Article XIII

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

The undersigned is the registered [operator] [owner]* of the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturers serial number [insert manufacturer's serial number] and registration [number] [mark] [insert registration number/mark] (together with all installed, incorporated or attached accessories, parts and equipment, the "aircraft").

This instrument is an irrevocable de-registration and export request authorisation issued by the undersigned in favour of [insert name of creditor] ("the authorised party") under the authority of Article XIII of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment. In accordance with that Article, the undersigned hereby requests:

(i) recognition that the authorised party or the person it certifies as its designee is the sole person entitled to:

(a) procure the de-registration of the aircraft from the [insert name of aircraft register] maintained by the [insert name of registry authority] for the purposes of Chapter III of the Convention on International Civil Aviation, signed at Chicago, on 7 December 1944, and

(b) procure the export and physical transfer of the aircraft from [insert name of country]; and

(ii) confirmation that the authorised party or the person it certifies as its designee may take the action specified in clause (i) above on written demand without the consent of the undersigned and that, upon such demand, the authorities in [insert name of country] shall co-operate with the authorised party with a view to the speedy completion of such action.

The rights in favour of the authorised party established by this instrument may not be revoked by the undersigned without the written consent of the authorised party.

Please acknowledge your agreement to this request and its terms by appropriate notation in the space provided below and lodging this instrument in [insert name of registry authority].

[insert name of operator/owner]

_____

Agreed to and lodged this

[insert date]

By: [insert name of signatory]

Its: [insert title of signatory]

_____

[insert relevant notational details]

_____

* Select the term that reflects the relevant nationality registration criterion