

# **The Legal Regime for International Interests in Aircraft Equipment under the Cape Town Convention and Protocol**

케이프타운 협약 및 의정서 상 항공기 장비의  
국제담보권에 관한 법적 제도

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## I. Introduction

There is the need to acquire and use aircraft equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner.

There are recognizing the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them. Such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions.

Therefore, it needs to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection.

The Convention on International Interests in Mobile Equipment and its Aircraft Equipment Protocol were concluded at Cape Town on 16 November 2001. The entry into force of the Cape Town Convention and Protocol have occurred on 1 March 2006.

Hitherto, interests in mobile equipment of high unit value regularly crossing national boundaries have been exposed to the risk and uncertainty created by differences in national laws governing security and related interests.

The Cape Town Convention and Protocol provides an international legal regime for the creation, perfection and priority of security, title retention and leasing interests in aircraft equipment, which will be underpinned by an international registry.

The Cape Town Convention has been designed to apply to a range of types of high-value mobile equipment. It is a framework treaty that establishes core provisions which are capable of being modified by equipment-specific protocols in order to adapt the Convention's structure to the particular requirements of specific industries. The first protocol to have been developed is the Aircraft Protocol, which provides for the application of the Convention in relation to aircraft objects, and modifies the operation of the Convention (for example, the Convention's default remedies) to the particular requirements

of aircraft financing transactions. 1)

The purpose of this paper is to explain the objectives and principles of the Cape Town Convention and Protocol, to review the provisions and issues relating to the international interests in aircraft equipment and international registry for their protection under the Cape Town Convention and Protocol, and to review the issues on Korea's accession to the Cape Town Convention and Protocol.

## II. Objectives and Principles of the Cape Town Convention and Protocol

### 1. Objectives of the Cape Town Convention and Protocol

The primary aim of the Cape Town Convention is to increase the efficiency of financing high-value mobile equipment(e.g. aircraft objects, space objects, railway rolling stock. etc.). Because such equipment moves from jurisdiction to jurisdiction, and because not all jurisdictions provide equivalent recognition of creditor's rights, creditors face higher risks and this increases the cost of obtaining credit. The Convention is based on the principle that a sound legal framework that facilitates the creation, perfection and enforcement of security interests will provide confidence to lenders and institutional investors both within and outside the country concerned, and make it easier to attract domestic and foreign capital.

In fulfillment of this principle, the Convention establishes a sound, internationally-applicable legal regime for security, title retention and leasing interests: this will reduce the risks faced by creditors and thereby reduce the costs of financing high-value mobile equipment. Financiers will be able to assure themselves that their proprietary interests in a financed asset are

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1) UNIDROIT, International Interests in Mobile Equipment—Study LXXII, <http://www.unidroit.org/english/workprogramme/study072/main.htm>, 3 March 2007.

superior to all potential competing claims against that asset, and upon default will be able to promptly realize the value of that asset. In particular, the Convention provides for remedies in Contracting State jurisdictions to be capable of expeditious enforcement, and creates a regime for the priority of creditor's interests to be determined by reference to an electronic, notice-based international register, with priority to be established on a first-in time basis.

## 2. Principles of the Cape Town Convention and Protocol

The Convention is based on 5 underlying principles as follows:

(1) Practicality: the regime established by the Convention reflects the practical operation of modern financing transactions.

(2) Sensitivity to National Legal Cultures: The Convention allows Contracting States to lodge declarations to modify the operation of select provisions where those provisions would be incompatible with its principles of national law- this flexibility is particularly important to enable the regime established by the Convention to respond to domestic legal norms.

(3) Party Autonomy: the Convention assumes that parties to transactions involving high-value aircraft objects will be knowledgeable and expertly represented, and so permit maximum contractual flexibility.

(4) Predictability: the Convention establishes concise and clear rules for determining priority, thus reducing uncertainty.

(5) Transparency: the Convention provides for registration of international interests on an International Registry, which will be searchable by third parties and which will subordinate unregistered interests to holders of registered interests.<sup>2)</sup>

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2) Royston M. Goode, Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment, UNIDROIT, September, 2002, para.13.

### III. International Interests in Aircraft Equipment

#### 1. International Interests

The Consolidated Text of the Cape Town Convention and Protocol<sup>3)</sup> provides for the constitution and effects of an international interest in aircraft objects<sup>4)</sup> and associated rights.<sup>5)</sup> An international interests in aircraft objects is an interest, constituted under Article 10, in airframes<sup>6)</sup>, aircraft engines<sup>7)</sup> and helicopters<sup>8)</sup>: (a) granted by the chargor under a security agreement<sup>9)</sup>; (b)

- 3) For the purpose of this paper the Consolidated Text of the Cape Town Convention and Protocol means the Consolidated Text of the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment.
- 4) aircraft objects means airframes, aircraft engines and helicopters (Article 1(d) of the Consolidated Text of the Cape Town Convention and Protocol).
- 5) associated rights means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the aircraft object (Article 1(h) of the Consolidated Text of the Cape Town Convention and Protocol).
- 6) airframes means airframes (other than those used in military, customs and police services) that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport: (i) at least eight (8) persons including crew; or (ii) goods in excess of 2750 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto (Article 1 (f) of the Consolidated Text of the Cape Town Convention and Protocol).
- 7) aircraft engines means aircraft engines (other than these used in military, customs or police services) powered by jet propulsion or turbine or piston technology and: (i) in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent; and (ii) in the case of turbine-powered or piston-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent (Article 1 (c) of the Consolidated Text of the Cape Town Convention and Protocol).
- 8) helicopters means heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more poser-driven rotors on substantially vertical axes and which are type certified by the competent aviation authority to transport: (i) at least five(5) persons including crew; or (ii) goods in excess of 450 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (including rotors) all data, manuals and records relating thereto (Article 1 (v) of the Consolidated Text of the Cape Town Convention and Protocol).

vested in a person who is the conditional seller under a title reservation agreement<sup>10)</sup>, or (c) vested in a person who is the lessor under a leasing agreement<sup>11),12)</sup>

An interest is constituted as an international interest where the agreement creating or providing for the interest: (a) is in writing<sup>13)</sup>, (b) relates to an aircraft object of which the chargor, conditional seller or lessor has power to dispose; (c) enables the aircraft object to be identified: and (d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.<sup>14)</sup>

## 2. Default Remedies

### (1) Meaning of default

The debtor and creditor may at any time agree in writing as to the events that constitute a default. Where the debtor and the creditor have not so agreed, default means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.<sup>15)</sup>

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9) Security agreement means an agreement by which a chargor grants or agrees to grant to a charges an interest (including an ownership interest) in or over an aircraft object to secure the performance of an existing or future obligation of the chargor or a third person (Article 1 (vv) of the Consolidated Text of the Cape Town Convention and Protocol).

10) Title reservation agreement means an agreement for the sale of an aircraft object on terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement (Article 1 (ZZ) of the Consolidated Text of the Cape Town Convention and Protocol).

11) Leasing agreement means an agreement by which one person (the lessor) grants a right to possession or control of an aircraft object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment (Article 9 (dd) of the Consolidated Text of the Cape Town Convention and Protocol).

12) Article 2(1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

13) Writing means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record (Article 1 (bbb) of the Consolidated Text of the Cape Town Convention and Protocol).

14) Article 10 of the Consolidated Text of the Cape Town Convention and Protocol.

## **(2) Remedies of chargee**

In the event of default, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State, exercise any one or more of the following remedies: (a) take possession or control of any aircraft object charged to it; (b) sell or grant a lease of any such aircraft object; (c) collect or receive any income or profits arising from the management or use of any such aircraft object. The chargee may alternatively apply for a court order authorizing or directing any of the acts referred to in the preceding paragraph. A chargee proposing to sell or grant a lease of an aircraft object shall give reasonable prior notice<sup>16)</sup> in writing of the proposed sale or lease to: (a) interested persons; and (b) interested persons who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease. Any sum collected or received by the chargee as a result of exercise of any of the remedies shall be applied towards discharge of the amount of the secured obligations. Where the sums collected or received by the chargee as a result of the exercise of any remedy exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.<sup>17)</sup>

## **(3) Vesting of aircraft object in satisfaction; redemption**

At any time after default, the chargee and all the interested persons<sup>18)</sup> may

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15) Article 17 of the Consolidated Text of the Cape Town Convention and Protocol.

16) A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing reasonable prior notice (Article 12(4) of the Consolidated Text of the Cape Town Convention and Protocol).

17) Article 12 (1), (2), (3), (4), (5) of the Consolidated Text of the Cape Town Convention and Protocol.

18) interested persons means (i) the debtor; (ii) any guarantor; (iii) any other person having rights in or over the aircraft object (Article 1 (Z) of the

agree that ownership of (or any other interest of the chargor in) any aircraft object covered by the security interest<sup>19)</sup> shall vest in the chargee in or towards satisfaction of the secured obligations. The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any aircraft object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations. At any time after default and before sale of the charged aircraft object or the making of an order, the chargor or any interested person may discharge the security interest by paying in full the amount secured, subject to any lease granted by the chargee. Where, after such default, the payment of the amount secured is made in full by an interested person other than the debtor, that person is subrogated to the rights of the chargee<sup>20)</sup>.

#### **(4) Remedies of conditional seller or lessor**

In the event of default under a title reservation agreement or under a leasing agreement, the conditional seller or the lessor, as the case may be, may: (a) subject to any declaration that may be made by a Contracting State, terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or (b) apply for a court order authorizing or directing either of these acts.<sup>21)</sup>

#### **(5) Additional remedies of creditor**

In addition to the remedies specified in Article 12, 14, 16 and 20, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions: (a) procure the de-registration of the aircraft; and (b) procure the export and physical transfer of the aircraft object from the territory in which it is situated. The creditor shall not exercise

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Consolidated Text of the Cape Town Convention and Protocol).

19) security interest means an interest created by a security agreement (Article 1 (ww) of the Consolidated Text of the Cape Town Convention and Protocol).

20) Article 13 (1), (2), (4) of the Consolidated Text of the Cape Town Convention and Protocol.

21) Article 14 of the Consolidated Text of the Cape Town Convention and Protocol.



the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.<sup>22)</sup>

### **(6) Relief pending final determination**

Subject to any declaration by the Contracting State, the Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy<sup>23)</sup> relief in the form of such one or more of the following orders as the creditor requests: (a) preservation of the aircraft object and its value; (b) possession, control or custody of the aircraft object; (c) immobilization of the aircraft object; (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the aircraft object and the income therefrom; and (e) if at any time the debtor and creditor specifically agree, sale and application of proceeds therefrom. In making any order under paragraph 1 of this Article, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor: (a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention; or (b) fails to establish its claim, wholly or in part, on the final determination of that claim. The creditor and the debtor or any other interested person may agree in writing to exclude the application of the preceding paragraph. Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.<sup>24)</sup>

## **3. Remedies on Insolvency**

22) Article 15 (1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

23) speedy in the context of obtaining relief means within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made (Article 20 (2) of the Consolidated Text of the Cape Town Convention and Protocol).

24) Article 20 (1), (4), (5), (6) of the Consolidated Text of the Cape Town Convention and Protocol.

This Article applies only where a Contracting State that is the primary insolvency jurisdictions<sup>25)</sup> has made a declaration pursuant to Article 71 (3).<sup>26)</sup>

This Article provides two alternatives for the remedies on insolvency as follows.

**(1) Alternative A:**

Upon the occurrence of an insolvency-related event<sup>27)</sup>, the insolvency administrator<sup>28)</sup> or the debtor, as applicable, shall give possession of the aircraft object to the creditor no later than the earlier of (a) the end of the waiting period<sup>29)</sup>; and (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply. However, the insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings<sup>30)</sup> and has agreed to perform all future obligations under the

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25) primary insolvency jurisdiction means the Contracting State in which the center of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise (Article 1 (ii) of the Consolidated Text of the Cape Town Convention and Protocol).

26) Article 23 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

27) insolvency-related event means (i) the commencement of the insolvency proceedings; or (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under this Convention is prevented or suspended by law or State action (Article 1 (y) of the Consolidated Text of the Cape Town Convention and Protocol).

28) insolvency administrator means a person authorized to administer the reorganization or liquidation, including one authorized on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law (Article 1 (w) of the Consolidated Text of the Cape Town Convention and Protocol.); References in this Article to the insolvency administrator shall be to that person in its official, not in its personal, capacity (Article 23 (4) of the Consolidated Text of the Cape Town Convention and Protocol).

29) The waiting period shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction (Article 23 (3) of the Consolidated Text of the Cape Town Convention and Protocol).

agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.<sup>31)</sup>

**(2) Alternative B:**

Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in the declaration of a Contracting State pursuant to Article 71 (3) whether it will: (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or (b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.<sup>32)</sup>

**4. Assignments of International Interests**

**(1) Effects of assignment**

Except as otherwise agreed by the parties, and assignment of associated rights made in conformity with Article 45 also transfers to the assignee: (a) the related international interest; and (b) all the interests and priorities of the

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30) insolvency proceedings means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganization or liquidation (Article 1 (x) of the Consolidated Text of the Cape Town Convention and Protocol).

31) Article 23 Alternative A (2), (7) of the Consolidated Text of the Cape Town Convention and Protocol.

32) Article 23 Alternative B (2), (5) of the Consolidated Text of the Cape Town Convention and Protocol.

assignor under this Convention. Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph but not so as adversely to affect the debtor without its consent.<sup>33)</sup>

## **(2) Formal requirements of assignment**

An assignment of associated rights transfers the related international interest only if it: (a) is in writing; (b) enables the associated rights to be identified under the contract from which they arise; and (c) in the case of an assignment by way of security, enables the obligations secured by the assignment to be determined in accordance with this Convention but without the need to state a sum or maximum sum secured. An assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights are also assigned.<sup>34)</sup>

## **(3) Debtor's duty to assignee**

To the extent that associated rights and the related international interest have been transferred in accordance with Article 44 and 45, the debtor in relation to those rights and that interest is bound by the assignment and has a duty to make payment or give other performance to the assignee, if but only if: (a) debtor has been given notice of the assignment in writing by or with the authority of the assignor; (b) the notice identifies the associated rights; and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee. Irrespective of any other ground on which payment or performance by the debtor discharges the latter from liability, payment or performance shall be effective for this purpose if made in accordance with the preceding paragraph.<sup>35)</sup>

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33) Article 44 (1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

34) Article 45 (1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

35) Article 46 (1), (2) of the Consolidated Text of the Cape Town Convention and

## IV. International Registry Relating to International Interests in Aircraft Equipment

### 1. International Registry

An International Registry shall be established for registration<sup>36)</sup> of: (a) international interests, prospective international interests and registrable non-consensual rights and interests; (b) assignments and prospective assignments of international interests; (c) acquisitions of international interests by legal or contractual subrogations under the applicable law; (d) notices of national interests; and (e) subrogations of interests referred to in any of the preceding sub-paragraphs.<sup>37)</sup>

### 2. The Supervisory Authority and the Registrar

#### (1) The Supervisory Authority

There shall be a Supervisory Authority which shall be the international entity designated by a Resolution adopted by the Diplomatic Conference to Adopt a Mobile Equipment and an Aircraft Protocol. The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.<sup>38)</sup>

The Supervisory Authority shall: (a) establish or provide for the establishment of the International Registry; (b) appoint and dismiss the

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Protocol.

36) The term registration includes, where appropriate, an amendment, extension or discharge of a registration (Article 26 (2) of the Consolidated Text of the Cape Town Convention and Protocol).

37) Article 26 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

38) Article 27 (1), (3) of the Consolidated Text of the Cape Town Convention and Protocol.

Registrar; (c) ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar; (d) after consultation with the Contracting States, make or approve and ensure the publication of regulations dealing with the operation of the International Registry; (e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority; (f) supervise the Registrar and the operation of the International Registry; (g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit; (h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry; (i) do all thing necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention; and (j) report periodically to Contracting States concerning the discharge of its obligations under this Convention.<sup>39)</sup>

## **(2) The Registrar**

The first Registrar shall operate the International Registry for a period of five years from the date of entry into force of the Convention and the Protocol. Thereafter, the Registrar shall be appointed or reappointed at regular five-yearly intervals by the Supervisory Authority. The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to it by this Conventions and the regulations.<sup>40)</sup>

## **(3) Privileges and immunities of the Supervisory Authority and the Registrar**

The Supervisory Authority shall have international legal personality where not already possessing such personality. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and

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39) Article 27 (4) of the Consolidated Text of the Cape Town Convention and Protocol.

40) Article 28 (1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

administrative process as is provided under the rules applicable to them as an international entity or otherwise. The Supervisory Authority shall enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State<sup>41)</sup>. The assets, documents, data bases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.<sup>42)</sup>

#### (4) Liability of the Registrar

The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system except where the malfunction is caused by an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those related to back-up and systems security and working. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information nor for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry.<sup>43)</sup>

The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority in accordance with the provisions of this Convention. The amount of the insurance or financial guarantee referred to in the preceding paragraph shall, in respect of each event, not be less than the maximum value of an aircraft object as determined by the Supervisory Authority.<sup>44)</sup>

41) Host State means the State in which the Supervisory Authority is situated (Article 40 (3)(b) of the Consolidated Text of the Cape Town Convention and Protocol).

42) Article 40 (1), (2), (3), (4) of the Consolidated Text of the Cape Town Convention and Protocol.

43) Article 41 (1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

### **3. Modalities of registration**

#### **(1) Registration requirements**

In accordance with this Convention, the regulations shall specify the requirements, including the criteria for the identification for the aircraft object: (a) for effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 33); (b) for making searches and issuing search certificates; and, subject thereto, (c) for ensuring the confidentiality of information and documents of the International Registry other than information and documents relating to a registration. Where an interest registered as a prospective international interests becomes an international interests, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.<sup>45)</sup>

#### **(2) Validity and time of registration**

A registration shall be valid only if made in conformity with Article 33. A registration, if valid, shall be complete upon entry of the required information into the international Registry data base so as to be searchable. If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest provided that the registration was still current immediately before the international interest was constituted as provided by Article 10.<sup>46)</sup>

#### **(3) Consent to registration**

An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and

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44) Article 41 (4), (5) of the Consolidated Text of the Cape Town Convention and Protocol.

45) Article 31 (1), (3) of the Consolidated Text of the Cape Town Convention and Protocol.

46) Article 32 (1), (2), (4) of the Consolidated Text of the Cape Town Convention and Protocol.



any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other. A registration may be discharged by or with the consent in writing of the party in whose favour it was made.<sup>47)</sup>

#### **(4) Duration of registration**

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration. Registration of a contract of sale remains effective indefinitely. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.<sup>48)</sup>

#### **(5) Evidentiary value of certificates**

A document in the form prescribed by the regulations which purports to be a certificate issued by the international Registry is prima facie proof: (a) that it has been so issued; and (b) of the facts recited in it, including the date and time of a registration.<sup>49)</sup>

#### **(6) Discharge of registration**

Where the obligations giving rise to a registered interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration. Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or

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47) Article 33 (1), (3) of the Consolidated Text of the Cape Town Convention and Protocol.

48) Article 34 of the Consolidated Text of the Cape Town Convention and Protocol.

49) Article 37 of the Consolidated Text of the Cape Town Convention and Protocol.

assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.<sup>50)</sup>

## V. Issues on Korea's Accession to the Cape Town Convention and Protocol

### 1. Korean Legal Regime for Security Interest in Aircraft and its Registry

#### (1) Aircraft Mortgage Act

Korea has the Aircraft Mortgage Act as amended on December 13, 1997, of which purpose is to contribute to the sound development of aviation by promoting use of movable property as credit through the mortgage of aircraft s.<sup>51)</sup>

Aircraft mentioned in this Act means airplanes and helicopters which are registered in accordance with the Aviation Act.<sup>52)</sup>

#### (2) Contents of Mortgage

Aircraft may be used as the objects for establishing mortgages.<sup>53)</sup> Mortgages shall have priority rights over other creditors covering aircraft which debtors or third parties have an existing security interest without altering the possession of the aircraft.<sup>54)</sup>

#### (3) Registration of Mortgage

The acquisition, loss or change of mortgage shall not come into

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50) Article 38 (1), (2) of the Consolidated Text of the Cape Town Convention and Protocol.

51) Article 1 of the Aircraft Mortgage Act of Korea.

52) Article 2 of the Aircraft Mortgage Act of Korea.

53) Article 3 of the Aircraft Mortgage Act of Korea.

54) Article 4 of the Aircraft Mortgage Act of Korea.

effect if registration thereof is not made in the registration book of aircraft under the Aviation Act. Matters concerning the registration under the preceding paragraph shall be determined by the Presidential Decree.<sup>55)</sup>

#### **(4) Notification to Mortgagees**

In case the Minister of Construction and Transportation receives an application for the removal of a registration on the ground that a mortgaged aircraft falls under Article 12 (1) 3 of the Aviation Act or in case the owner of the aircraft fails to apply for the removal of the registration within the specified period after a notice is served in accordance with the provision of paragraph (2) of the same Article of the same Act, the Minister of Construction and Transportation shall without delay notify the mortgagee thereof.<sup>56)</sup>

#### **(5) Enforcement of Mortgage**

In case a mortgagee receives the notification pursuant to the preceding Article, he may immediately enforce his mortgage on the relevant aircraft. In case a mortgagee desires to enforce his mortgage pursuant to the preceding paragraph, he shall take the necessary procedures for such enforcement within three months after the date of the receipt of the notification as provided in the preceding Article. During the period during which the procedures for enforcing the mortgage may be taken under the preceding paragraph and until the enforcement thereof, the Minister of Construction and Transportation shall not take step to remove the registration on the relevant aircraft under the provisions of the Aviation Act. When a successful bidder at an auction becomes final, for those aircrafts under paragraph (1), the causes under Article 10 (1) 3 of the Aviation Act shall be deemed to have not taken place.<sup>57)</sup>

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55) Article 5 of the Aircraft Mortgage Act of Korea.

56) Article 6 of the Aircraft Mortgage Act of Korea.

## **2. Declaration relating to Certain Provisions of the Cape Town Convention and Protocol**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will apply any one or more of certain provisions of the Convention. A Contracting State may also declare that it will not apply certain provisions of the Convention.<sup>58)</sup>

It will be desirable that Korea, at the time of accession to the Convention, makes declarations relating to the following provisions of the Convention.

### **(1) Declaration regarding registrable non-consensual rights or interests (Article 53)**

A Contracting State may at any time in a declaration deposited with the Depository of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any aircraft object as if the right or interest were an international interest and shall be regulated accordingly.<sup>59)</sup>

Accordingly, it will be necessary that Korea makes an declaration relating to the list and contents of the non-consensual right or interest which shall be treated equally or preferentially with the international interest.<sup>60)</sup>

### **(2) Declaration regarding internal transactions (Article 66)**

A Contracting States may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of aircraft objects or some of them.<sup>61)</sup>

It is necessary that the internal transaction shall be treated

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57) Article 7 of the Aircraft Mortgage Act of Korea.

58) Article 70, 71, 72 of the Consolidated Text of the Cape Town Convention and Protocol

59) Article 53 of the Consolidated Text of the Cape Town Convention and Protocol.

60) Korean Ministry of Justice, Study on the Convention on International interests in Mobile Equipment, 2003, p. 138.

61) Article 66 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

specifically as it has a close connection with the national law order of the Contracting State. Accordingly, it will be desirable that Korea declares that the Convention shall not apply to an internal transaction.<sup>62)</sup>

### **(3) Declaration regarding determination of courts (Article 69)**

A Contracting State may, at the time of ratification, Acceptance, approval of, or accession to the Protocol, declare the relevant court or courts for the purpose of Article 1 and Chapter XI of this Convention.<sup>63)</sup>

Therefore, if the Contracting State declares a certain court, the court has jurisdiction in the Contracting State in respect of any claim brought under this Convention.

As any dispute relating to this Convention or the exercise of remedies require itself specialty and expertise, it will be desirable to designate a forum for dealing with it rather than to be dealt with tie by several courts.

Accordingly, it will be necessary that Korea declares the proper court for any claim brought under this Convention.<sup>64)</sup>

### **(4) Declaration regarding remedies (Article 70)**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged aircraft object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.<sup>65)</sup>

Considering that Korea is in a situation of a debtor power, it will be a heavy burden for the operation of airlines in Korea if the chargee shall grant a lease of the object.

Accordingly, it will be desirable that Korea declares that the chargee shall

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62) Korean Ministry of Justice, op. cit., p.139.

63) Article 69 of the Consolidated Text of the Cape Town Convention and Protocol.

64) Korean Ministry of Justice, op. cit., p.139.

65) Article 70 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

not grant a lease of the object in the territory of Korea.<sup>66)</sup>

A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.<sup>67)</sup>

As most remedies available to the creditor under this Convention do not need application to the court or their applications to the court are mostly optional, the creditor's situation will vary considerably according to whether or not the Contracting State declares.

Accordingly, considering that Korea is in a situation of a debtor power, it will be necessary that Korea declares that any remedy of the creditor shall require application to the court.<sup>68)</sup>

#### **(5) Declaration regarding relief pending final determination (Article 71 (2) and Article 20)**

Subject to any declaration that it may make under Article 71 (2), a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests: (a) preservation of the aircraft object and its value; (b) possession, control or custody of the aircraft object; (c) immobilization of the aircraft object; (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the aircraft object and the income therefrom; and (e) if at any time the debtor and the creditor specifically agree sale and application of proceeds therefrom.<sup>69)</sup>

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66) Korean Ministry of Justice, op. cit., pp.141-142.

67) Article 70 (2) of the Consolidated Text of the Cape Town Convention and Protocol.

68) Korean Ministry of Justice, op. cit., p.140.

69) Article 20 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 20 (1), (4), (6), and (8), wholly or in part; such declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.<sup>70)</sup>

As the substance of the interim relief provided under Article 20 is very broad, it seems that the interim relief might virtually play a role in place of the final determination.

Accordingly, considering that Korea is in a situation of a debtor power in most transaction, it will be necessary that Korea declares that the provisions regarding the interim relief will not be applied in Korea, because it might prevent that the debtor will lose the opportunity of defense as the interim relief becomes the final determination.<sup>71)</sup>

#### **(6) Declaration regarding choice of law (Article 71 (1) and Article 9)**

This Article applies only where a Contracting State has made a declaration pursuant to Article 71 (1). The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.<sup>72)</sup>

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will apply Article 9 of this Convention.<sup>73)</sup>

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70) Article 71 (2) of the Consolidated Text of the Cape Town Convention and Protocol.

71) Korean Ministry of Justice, op. cit., p.140.

72) Article 9 of the Consolidated Text of the Cape Town Convention and Protocol.

73) Article 71 (1) of the Consolidated Text of the Cape Town Convention and

The choice of the law by the parties is anxious to be concluded as the choice of law which is unilaterally unadvantageous for the debtor.

Accordingly, for the prevention of this conclusion, it will be necessary that Korea declares that the provision regarding the choice of law will not be applied in Korea.<sup>74)</sup>

### **(7) Declaration regarding insolvency assistance (Article 71 (1) and Article 24)**

This Article applies only where a Contracting State has made a declaration pursuant to Article 71 (1). The courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article 23.<sup>75)</sup>

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will apply Article 24 of this Convention.<sup>76)</sup>

If Korea declares the application of this provision, Korea should enact the new law that regulates the procedures in which co-operate with foreign courts or foreign insolvency administrators.

Accordingly, it will be desirable that first of all Korea declares that it will not apply this provision and declares that it will apply this provision after arranging the national laws.<sup>77)</sup>

### **(8) Declaration regarding remedies on insolvency (Article 71 (3) and Article 23)**

This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article 71 (3).<sup>78)</sup>

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Protocol.

74) Korean Ministry of Justice, op. cit., p.6.

75) Article 24 of the Consolidated Text of the Cape Town Convention and Protocol.

76) Article 71 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

77) Korean Ministry of Justice, op. cit., p.141.



Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of (a) the end of the waiting period; and (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.<sup>79)</sup>

Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article 71 (3) whether it will: (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or (b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law.<sup>80)</sup>

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will apply the entirety of Alternative A, or the entirety of Alternative B of Article 23 and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article 23.<sup>81)</sup>

Considering that Korea is mostly in a situation of the debtor of international interests, it will bring about an unfavorable result if the possession of the aircraft object which is a pivot of business shall be given to the creditor immediately after the occurrence of an insolvency-related event.

Accordingly, it will be desirable that Korea declares that it will not apply this provision.<sup>82)</sup>

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78) Article 23 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

79) Article 23 Alternative A (2) of the Consolidated Text of the Cape Town Convention and Protocol.

80) Article 23 Alternative B (2) of the Consolidated Text of the Cape Town Convention and Protocol.

81) Article 73 (3) of the Consolidated Text of the Cape Town Convention and Protocol.

**(9) Declaration regarding de-registration and export request authorization (Article 71 (1) and Article 25)**

This Article applies only where a Contracting State has made a declaration pursuant to Article 71 (1). Where the debtor has issued an irrevocable de-registration and export request authorization substantially in the form annexed to this Convention and has submitted such authorization for recordation to the registry authority, that authorization shall be recorded. The person in whose favour the authorization has been issued (the authorized party) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article 15 (1) and may do so only in accordance with the authorization and applicable aviation safety laws and regulations. Such authorization may not be revoked by the debtor without the consent in writing of the authorized party. The registry authority shall remove an authorization from the registry at the request of the authorized party.<sup>83)</sup>

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will apply Article 25 of this Convention.<sup>84)</sup>

If a de-registration and export request authorization has been issued, the authorized party can prevent actually the debtor from operating the aircraft through the de-registration of the nationality registration of the aircraft.

Accordingly, considering that the airlines of Korea are largely in a situation of the debtor, the exercise of the right by the authorized party will have an enormous effect upon the airline business of Korea. Therefore, it will be desirable that Korea declares that it will not apply this provision.<sup>85)</sup>

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82) Korean Ministry of Justice, op. cit., p.142.

83) Article 25 (1), (2), (3) of the Consolidated Text of the Cape Town Convention and Protocol.

84) Article 71 (1) of the Consolidated Text of the Cape Town Convention and Protocol.

85) Korean Ministry of Justice, op. cit., p.141.

## VI. Conclusion

The Cape Town Convention and Protocol provides an international legal regime for international interests in aircraft equipment and for the creation of an international registration system for their protection.

It has been estimated that such a regime could save very large sums of money annually in financing charges and open up to developing countries access to finance at reasonable cost.

Although the precise economic benefits of the Convention are difficult to predict exactly, a study undertaken during the development of the Convention estimated that the potential world-wide economic benefits of the Convention would be several billion dollars in relation to aircraft alone, with those economic benefits to be widely shared among airlines, manufacturers, and the national economics in which the airlines were located. In advance of the entry into force of the Convention and Aircraft Protocol, those economic benefits have already begun to be realized with the Export-Import Bank of the United States' announcement in August 2004 that it would offer a one-third reduction of its exposure fees to buyers of US large commercial aircraft in countries that sign, ratify and implement the Convention.<sup>86)</sup>

The author takes a view that it is necessary for Korea to accede to the Cape Town Convention and Protocol in the near future. However, it will be desirable that Korea, at the time of accession to the Convention, makes declarations relating to certain provisions of the Cape Town Convention and Protocol as follows: Article 53-Registrable non-consensual rights and interests; Article 66-Internal transaction; Article 69-Determination of courts; Article 70-Remedies; Article 71(2) and Article 20-Relief pending final determination; Article 71(1) and Article 9-Choice of law; Article 71(1) and Article 24-Insolvency assistances; Article 71(3) and Article 23-Remedies on insolvency; Article 71(1) and Article 25-De-registration and export request

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86) UNIDROIT, International Interests in Mobile Equipment—Study LXXII, <http://www.unidroit.org/english/workprogramme/study072/main.htm>, 3 March 2007.

authorization.

As the anticipated results of this paper, it will contribute to facilitate the financing of the acquisition and use of aircraft equipment in an efficient manner, and to save very large sums in financing charges, also the international interests in aircraft equipment will be recognized and protected universally.

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## Abstract

The Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment were adopted on 16 November 2001 at a diplomatic conference held in Cape Town under the joint auspices of UNIDROIT and ICAO. The entry into force of the Cape Town Convention and Protocol have occurred on 1 March 2006.

The Cape Town Convention and Protocol provides an international legal regime for the creation, perfection and priority of security, title retention and leasing interests in aircraft equipment, which will be underpinned by an international registry.

The purpose of this paper is to explain the objectives and principles of the Cape Town Convention and Protocol, to review the provisions relating to the international interests in aircraft equipment and international registry for their protection under the Cape Town Convention and Protocol, and to discuss the issues on Korea's accession to the Cape Town Convention and Protocol.

As the anticipated results of this paper, it will contribute to facilitate the financing of the acquisition and use of aircraft equipment of high value or particular economic significance in an efficient manner, and to save very large sums of money annually in financing charges, also the international interests in aircraft equipment will be recognized and protected universally.

**Key words:** Cape Town Convention and Protocol, Aircraft equipment, International interest, International registry, Legal regime

## 초 록

운송장비의 국제담보권에 관한 협약 및 항공기 장비에 특유한 사안에 관한 운송장비의 국제담보권 협약 의정서가 UNIDROIT 및 ICAO의 공동 후원 하에 케이프타운에서 개최된 외교회의에서 2001년 11월 16일 채택되었다. 케이프타운 협약 및 의정서는 2006년 3월 1일 발효되었다.

케이프 타운 협약 및 의정서는 국제등록에 의하여 지지 될 항공기 장비의 저당, 소유권유보 및 리스 담보권의 설정, 완성 및 우선권에 관한 국제 법적 제도를 규정하고 있다.

이 논문의 목적은 케이프타운 협약 및 의정서의 목적 및 원칙을 설명하고, 케이프타운 협약 및 의정서상 항공기 장비의 국제담보권 및 그들의 보호를 위한 국제등록에 관한 조항들을 검토하고, 그리고 한국의 케이프타운 협약 및 의정서 가입상의 문제점에 관하여 논의하는 것이다.

이 논문의 예상되는 결과로는, 효과적 방식으로 고가 또는 특히 경제적 중요성이 있는 항공기 장비의 취득 및 이용의 금융을 촉진하고, 매년 매우 많은 금액의 금융비용을 절약하는데 기여할 것이며, 또한 항공기 장비의 국제담보권이 전세계적으로 인정되고 보호될 것이다.

**주제어:** 케이프타운 협약 의정서, 항공기장비, 국제담보권, 국제등록, 법적제도