

ACCESION BY SPAIN TO THE AIRCRAFT PROTOCOL TO THE CAPE TOWN CONVENTION

Background and Purpose

On 1 February 2016, the Official Spanish State Gazette (“BOE”) published Spain’s accession to the Protocol on matters specific to aircraft equipment (the “Aircraft Protocol”) Convention on international interests in mobile equipment, known as the Cape Town Convention. This Aircraft Protocol came into effect on 1 March 2016.

After a long process which began in 2013, this accession entails the definitive integration of Spain into the legal framework on international security interests created by the Convention with respect to “aircraft objects” (i.e. airframes, aircraft engines and helicopters). This accession is set to become an extremely useful tool for facilitating the investment of foreign capital in Spain, which is one of the five leading European countries in the aviation market.

Investors in aircraft equipment seek to obtain legal certainty on the recovery of their credit rights (irrespective of whether these rights arise from the granting of financing *stricto sensu* or from leasing transactions). They also seek to gain legal certainty for the defence of their rights and interests over the high-value assets which are going to continue to be operated by their debtors and which regularly cross borders. More specifically, investors seek to guarantee that the enforcement of their rights and interests in a default scenario will not be affected by other security interests that might have been granted in accordance with local regimes or for any other reason.

For this purpose, the Convention has designed a homogeneous enforcement framework which protects and enhances commercial security and ownership interests in aircraft equipment, irrespective of the state in which the asset is located, by introducing a uniform and internationally recognised enforcement procedure. This procedure is more flexible and is faster than those set out under Spanish legislation and, in particular, by Spanish Civil Procedural Law (“Ley de Enjuiciamiento Civil”) and the Law of 16 December 1954 on Chattel Mortgages and Non-Possessory Pledges (“Ley de 16 de diciembre de 1954, sobre hipoteca mobiliaria y prenda sin desplazamiento de la posesión”).

However, the merits of the Cape Town Convention are not automatically achieved as a result of Spain acceding to the Aircraft Protocol. In fact, the practical application of said

instruments will be subject to the declarations made by Spain regarding Spain's accession to the Convention and the Aircraft Protocol.

The purpose of this informative note is to briefly explain how the protection framework established by the Cape Town Convention, which favours the beneficiaries of registered international security interests (i.e. chargees under security agreements, conditional sellers under title reservation agreements or lessors under leasing agreements), will be affected by Spain's declarations enabling or disabling certain provisions of the Convention and the Aircraft Protocol.

Re-possession of aircraft objects

With regard to the declarations made by Spain under the accession instrument to the Aircraft Protocol (which are supplementary to those made in the accession instrument to the Convention), it is particularly worth noting the declaration made pursuant to Article XXX(1). This declaration was aimed at clarifying and amending the significant deficiencies that arose in 2013 when Spain ratified the Cape Town Convention and subsequently acceded to the international interests' framework.

Pursuant to Article 54(2) of the Convention, Spain declared that all remedies made available to the creditor under the provisions of the Convention, including those which are not subject to a court authorisation under the said provisions, may only be exercised with leave of the court.

Having witnessed the difficulties that this declaration caused for the efficiency of the one of the great achievements of the Convention (i.e. the self-help measures granted in favour of the beneficiaries of international security interests in a default scenario), Spain has now shown flexibility on its original position.

In particular, this declaration will not be applicable to de-registration and export request authorisations, which will apply in Spain. Therefore, the person named in said authorisation (i.e. the authorised party) will be entitled to exercise the remedies specified in Article IX(1)¹ of the Aircraft Protocol in the event of enforcement. This means that it will not be necessary to obtain the authorisation of the Spanish court, as long as the performance of any such remedies is made in a commercially reasonable manner and the rights of third parties regarding the relevant assets are not affected by the repossession.

¹ Article IX(1) of the Aircraft Protocol states that in the event of default a creditor may, to the extent that the debtor has at any time so agreed: (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.

Competence

Spain has made declarations pursuant to Articles XIX(1) and XXIX of the Aircraft Protocol by means of which: (i) the Moveable Assets Registry (“Registro de Bienes Muebles”) has been designated the entry point through which all necessary information for the registration of any right or security interest over airframes or helicopters registered in Spain shall be transmitted to the International Registry; and (ii) it has been clarified that the authorities of Gibraltar shall be responsible for the implementation of the Aircraft Protocol within said territory.

Not registered rights

Spain has taken the opportunity to make new declarations pursuant to the Convention which set up restrictions on the priority of international security interests. Specifically, the holders of certain privileged rights are able to prevent a beneficiary of an international security interest from exercising its powers of “self-enforcement” (“autoejecución”) which were granted by the Convention.

In particular, Spain has made declarations pursuant to paragraphs (a) and (b) of Article 39(1) and pursuant to Article 40 of the Convention² aimed at regulating the priority of the following rights:

- (i) non-consensual rights and interests which under Spanish legislation are granted priority, will also have priority against international security interests both within and outside the context of insolvency proceedings regarding the debtor;
- (ii) rights held by Spanish public authorities or any other public entities (including, for these purposes, the private providers of public services directly related to aeronautical services and international organisations to which Spain is a party) in order to seize or detain aircraft objects, according to Spanish law, for the payment of amounts due to the State (e.g. levies or taxes associated with the provision of aviation services); and

In addition, Spain has declared, pursuant to Article 40 of the Convention that the following categories of non-consensual rights or interests shall be recordable under the Convention and shall be regulated as if they were international interests:

- (iii) rights held by an individual who has obtained a court order authorising the seizure of an aircraft object in partial or full compliance of a legal judgment;
- (iv) liens or other rights of a State entity relating to taxes or other unpaid charges.

² The declarations made by Spain pursuant to Articles 39(1), 40 and 53 of the Convention will take effect on 1 June 2016.

Jurisdiction

Lastly, Spain has declared, pursuant to article 53 of the Convention, that the relevant courts for the purposes of the enforcement of registered international interests shall be the competent courts and authorities according to Spanish legislation.

Despite this, we continue to proceed without an ad hoc legal procedure that permits the beneficiaries of international interests to request the necessary authorisation from the competent Spanish court or authority, in order to execute an international security interest.

This Note has been written by **Beatriz Menéndez**, lawyer of the banking and finance practice area. The information contained in this Informative Note is of a general nature and does not constitute legal advice.

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For further information:

Ander Valverde

Senior Lawyer
Banking & Finance Practice
avalverde@perezllorca.com

Tel: +34 91 423 67 25