REMEDIES UNDER CAPE TOWN CONVENTION: EASING AIRCRAFT FINANCING NORMS

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Abstract

Aircraft equipment and engine financing has traditionally been extremely tumultuous. Airlines have often filed for bankruptcy, saddled with huge operating costs especially as a result of fluctuating fuel prices, costly planes and poor availability of financing. Apprehending the urgent need for a stable, clear and uniform legal approach towards aircraft financing, International Air Transport Association and Aviation Working Group chanced upon an opportunity offered by UNIDROIT to come up with a new regulatory regime creating, recognizing and enforcing security interests in high-value mobile equipments. Result of this deliberation was the Convention of International Interests in Mobile Equipment (the Cape Town Convention) concluded in Cape Town on November 16, 2001, and entered into force on March 1st, 2006. The Cape Town Convention regulates three categories of mobile equipment through specific Protocols- Aircraft Equipment and Engines, Space Assets and Railway Rolling Stock. The present paper focuses upon remedies available to 'aircraft objects' covered under the Protocol on Matters Specific to Aircraft Equipment to gauge how it fares in alleviating aircraft financing amidst midst of allegation of being tilted towards protection of interests of the creditor rather than the debtor.

Introduction

Aircraft equipment and engine financing has traditionally been extremely tumultuous. Airlines have often filed for bankruptcy as they are saddled with huge operating costs especially fluctuating fuel prices, costly planes and poor availability of financing. Creditors have been sceptical towards

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aircraft financing on two accounts. Firstly, the huge financial requirement with cost of aircraft equipments and engines running into millions of dollars and the difficulty faced by lenders to provide adequate security for it, and secondly, resistance to recovery and repossession of an aircraft equipment upon default. Recovery and aircraft repossession can be mired in legal complexities arising under foreign jurisdiction if the aircraft at the time of default happens to be in some country other than the State of registration, or where the debtor, to avoid repossession parks the aircraft in some jurisdiction, not keen upon enforcing the legal agreement between the creditor or debtor on grounds of public policy or being against its domestic laws. Recovery and repossession could also be hit by domestic or applicable bankruptcy norms. The mobile nature of aircraft equipment makes it difficult to predict legal entanglements arising upon enforcement of default remedies. Often hard negotiated agreements would seem lost in complex conflict of law norms. Application of *lex situs* (law of the place where the property is situated) upon aircraft equipment's clubbed under the general head of movable property, made it difficult to avoid conflict of law norms. All this affected creditor confidence and found reflection in fewer financing options and higher financing costs, which undoubtedly was extremely detrimental to the aviation sector. The situation seemed grave when taken in the context of the projected growth figures for aviation sector.

Apprehending the urgent need for a stable, clear and uniform legal approach towards aircraft financing, International Air Transport Association (IATA), a trade association of the world's airlines and Aviation Working Group (AWG), an international industry group formed by Airbus and Boeing, chanced upon an opportunity offered by the International Institute for the Unification of Private Law to come up with a new regulatory regime creating, recognizing and enforcing security interests in high value mobile equipments. Result of this deliberation was the Convention of International Interests in Mobile Equipment (hereinafter Convention) concluded in Cape Town on November 16, 2001, and entered into force on March 1st, 2006. The Convention regulates three categories of mobile equipment through specific Protocols. These are Aircraft Equipment and Engines, Space Assets and Railway Rolling Stock. For the purpose of this article, only Aircraft Objects covered under the Protocol on Matters Specific to Aircraft Equipment and Engines will be discussed. Three specific categories of Aircraft Objects come under its scope. These are airframes (type-certified to transport at least eight persons including crew or goods in excess of 2,750 kilograms), aircraft engines (having minimum of 1,750 pounds of thrust if jet propulsion powered or minimum of 550

rated take-off shaft horsepower if turbine-powered or piston- powered) and helicopters (type certified to transport at least five persons including crew or goods in excess of 450 kilograms).[1] Protocols supersede the Cape Town Convention in case of any inconsistency.

The Convention and the Protocol which entered into force along with it established a new and novel regulatory regime. The Convention and the Protocol lay down norms for creation, recognition, and enforcement of security interests in aircraft equipments and engines. Moving over, prescribing conflict of law norms as done under the Convention on the International Recognition of Rights in Aircraft (1948 Geneva Convention), the Convention and the Protocol lay down new substantive law. This was done as various studies pointed to extreme divergence and variance in treatment of security interest in common and civil law countries. Harmonization and national legal reform seemed difficult and formulation and adoption of a new legal regime was thought best. This was especially so as nature of the sector was international and regulatory norms had to rise above national law vagaries.

Inspired by Article 9 of the American Uniform Commercial Code governing secured transactions in personal property, Convention and Protocol create a new and international system of secured financing law. Introducing the concept of international interest, security interests recognized in all contracting State parties, and having them register electronically in an open access International Registry, it ensures actual realization of remedies agreed upon by the parties. Providing security over the risk of trampling of perceived remedies under hard negotiated agreements getting struck in local legal and procedural provisions, it supports the quest for a robust legal system fuelling growth of aviation sector, a key contributor in global economy supporting 3.5% of global GDP, generating 62.7 million jobs and over 2.7 trillion dollars in economic impact.[2] Electronic international registry establishes priority of interests allowing aircraft financiers, lessors and other interested parties to be able to ascertain and search status of their interest. Applicable to aircraft registered in a contracting State or upon debtor's presence in a contracting State at the time of conclusion

[1]Articles I (2) (e), (b) and (I) of the Protocol. Article I(c) of the Protocol defines 'aircraft objects' to include airframes, aircraft engines and helicopters.

[2] ATAG publishes an Annual Report in 2016 titled, 'Aviation: Benefits Beyond Borders' highlighting the role of aviation sector to global economy, https://aviationbenefits.org/media/149668/abbb2016_full_a4_web.pdf

of the agreement,[3] creating the international interest, it makes location of creditor insignificant. The International Convention is also unique for being able to truly unlock the monetary potential of these assets while promoting asset-based financing. Even the structure- a base Convention and equipment specific Protocol, Protocol superseding Convention, is advanced and novel thought. Wide array of remedies available adds to its substance. Of the remedies available, the single most winning point is provisions on de-registration and export of aircraft, helicopters and aircraft engines upon default.

Remedies under the Cape Town Convention and Protocol

Provisions on registration of international interests and remedies lie at the heart of the Convention. Sir Roy Goode in the Official Commentary to the Convention notes that: "The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously."[4] One of the five key objectives to be fulfilled by the Convention is to provide creditor with basic default and insolvency-related remedies[5]. Remedial measures listed under the Convention and the Protocol is remarkable in two respects. First, because of the efficient enforcement mechanism incorporated under the Convention and the Aircraft Protocol and secondly, the wide line-up of judicial and self-help remedies provided for. This is more so if compares with the inadequate redundant Geneva Convention, which merely laid down conflict of law provisions with very few remedial measures.

It would be pertinent to point out that the drafters of the Convention had to do a balancing act between common and civil law approach to allowable remedies. Keeping the commercial exigencies in mind, remedies under the Convention and the Protocol borrowed more from the common law system permitting self-help remedies. However, the system was sensitive to civil law traditions letting countries to opt-out of extra- judicial remedies and routing

[3] Article 4 of the Convention provides that a debtor is situated in a Contracting State (a) under the law of which it is incorporated or formed, (b) where it has its registered office or statutory seat, (c) where it has its centre of administration, or (d) where it has its place of business, or if more than one, its principal place of business, or if none its habitual residence.

[4] Official Commentary, Para 2 (78).

[5] Second objective listed under Para 2 (6) of Official Commentary reads as 'To provide the creditor with a range of basic default and insolvency- related remedies and, where there is evidence of default, a means of obtaining speedy relief pending final determination of its claim on the merits.'

the same through court. To amplify the reach of the Convention, registration is not insisted upon for exercising remedies under the Convention. Even otherwise, registration is crucial for determining priority and not remedial competence.

The Convention under Article 2 regulates three kinds of international interest in uniquely identifiable objects. These are interests of a chargor under a security agreement, interests of conditional seller under a title reservation agreement and those vested in lessors under a leasing agreement. Accordingly, the default remedies listed under the Convention and the Protocol provide separate set of remedies for a chargee claiming under a security agreement and for sellers or lessors under a title reservation agreement or a leasing agreement. This differentiation is also required as protection required to be accorded to a chargee is greater having only a secured interest in the equipment than that required of a lessor or a conditional seller who might be owners or stand in the position of owner's *vis- à-vis* the conditional buyer or the lessee. Ownership rights give them a better standing.

Chapter III of the Convention titled 'Default remedies' (Article 8-15) along with Article IX, X, XI and XIII of the Aircraft Protocol (Chapter II) contain the necessary provisions laying down remedies available under the Convention and the Protocol. The Convention and the Protocol provisions have to be read and interpreted together as a single instrument and in case of any inconsistency, as per Article 6, the equipment specific Protocol prevails.

Default Remedies of Chargee:

Default remedies for chargee are elaborated under Article 8 of the Convention. Article 8 provides three remedies to chargee. These are, taking possession of the aircraft object charged; selling or leasing-off of the aircraft object and lastly managing the aircraft object and drawing income from it.

For exercise of remedies available under Article 8, consent of the chargor is a necessary requirement. Consent is a necessary procedural requirement for most provisions under the Convention and the Protocol and is insisted upon also for exercise of remedies. It is open to the chargor to give limited consent or insist upon additional procedural compliances before or for exercise of the remedies allowed under Article 8. Thus, extent of chargor's consent under Article 8 streamlines the remedies available. All these remedies can be exercised either with or without court assistance. Only in case the remedies are exercised with court assistance, consent of the charger is not necessary.

Article 8(3) further provides that all remedies available under Article 8 have to be exercised in a commercially reasonable manner. What is commercially reasonable can be defined in the agreement itself. Article 8(3) elaborates that a remedy is deemed to be exercised in a commercially reasonable manner if it is exercised in conformity with the provisions of the security agreement. This rule can be over-ridden if the provisions in the security agreement appear to be 'manifestly unreasonable.' Whether a provision contained in the security agreement is 'manifestly unreasonable' has to be decided by a court of law on a case-to-casebasis.

While commercial agreements differ in their use of terminology for laying down contractual rights and duties, obligations are widely described in terms of 'best efforts,' 'Reasonable efforts' and 'commercially reasonable efforts'. E. Jane Sidnell and Christopher P. Knight, have rightly pointed out that while 'best efforts' would mean 'no stones left unturned', 'reasonable efforts' would mean 'some stones reasonably left unturned', 'commercially reasonable' is more in terms of procuring the correct value and can be less demanding than 'best efforts' and 'reasonable efforts.'[6] A two-test formula was laid down in *Copp* V. *Medi-Dent Services, a division of Norex Leasing Inc, and Piccininni*,[7] for determining 'commercial reasonableness' of a transaction. Firstly, the creditor has to act in good faith and secondly, the creditor must take reasonable efforts to ensure that proper value of the collateral is obtained. The 'more stringent' second requirement had to be observed for a transaction to be 'commercially reasonable.'[8]In *The Williams Cos., Inc. v. Energy Transfer Equity, L.P., et al*.[9], Delaware Supreme Court affirming the judgment of the Court of Chancery observed that 'commercially reasonable efforts' and 'reasonable best efforts' impose an affirmative duty to help ensure performance rather than a negative duty of not obstructing performance. Parties become obliged to take all reasonable steps necessary to close the

[6] E. Jane Sidnell & Christopher P. Knight, "*Best Efforts"- "Reasonable Efforts"- "Commer cially Reasonable Efforts"- What Do These Terms Mean?*, MONDAQ (June 11th, 2010), http://www.mondaq.com/canada/x/102510/Contract+Law/Best+Efforts+Reasonable+Efforts+Commercially+Reasonable+Efforts+What+Do+These+Terms+Mean, See also, D.C. Toedt III, *Commercially Reasonable Efforts,* IACCM (Jan 18th, 2019), https://journal.iaccm.com/contracting-excellence-journal/commercially-reasonable-efforts.

[7] 3 O.R. (3d) 570 (1991).

[8] In this case, lack of publication of sale and non-procurement of expert opinion on value of the collateral made it a private transaction displeasing requirements of 'commercial reasonableness.'

[9] Williams Companies, Inc. v. Energy Transfer Equity, L.P Supr., No. 330 (2016), http://law.justia.com/cases/delaware/supreme-court/2017/330-2016.html

transaction. Further, in case of breach of this obligation, the burden of proof is on the breaching party to show that the breach was not responsible for failure of thetransaction.[10]

Obligation cast under Article 8(3) to exercise remedies available under Article 8(1) or Article 13 in a commercially reasonable manner, cannot be varied by agreement between the parties. Article 15 of the Convention makes compliance with Article 8(3) mandatory. Article IX (3) of the Aircraft Protocol overrides Article 8(3) of the Convention. Article IV (3) of Aircraft Protocol again makes compliance with Article IX (3) compulsory with no provision for exclusion by agreement. Replacement of Article 8 (3) of the Convention with Article IX (3) of the Protocol enlarges the scope of application of 'commercial reasonableness' obligation. While Article 8 (3) of the Convention is applicable only to security agreements, Article IX (3) is applicable upon all remedies available under Aircraft Protocol. This enlarged scope of application does not extend to include associated rights themselves.

What constitutes 'default' or triggers remedies available under the Convention and the Protocol can be agreed upon by the parties. Article 11 of the Convention allows the parties to chalk out the 'events that constitute a default'. In absence of such an agreement in writing, a default should be able to substantially deprive a creditor of its entitlements under the agreement. Standard events of default include, non-payment of rent or any other amount due usually within thirty days of receipt of notice about the same from the other party, failure to maintain the aircraft in accordance with the terms of the agreement, non-compliance with insurance provisions or usage and operation conditions as defined by the agreement, creation of prohibited liens, commencement of bankruptcy, insolvency or other similar proceedings, failure to return the aircraft as per agreed time and conditions or breach of any other provision agreed between the parties. While the remedies available under the Convention and the Protocol will vary upon whether the remedies are claimed as a chargee, conditional seller or lessor, the Convention under Article 2(4) allows 'characterization' of the agreement. Once, it is settled that the interest will be regulated by the Convention, the nature of the interest and then the related incidents to it can be determined by the domestic law. Thus depending upon the domestic law of the forum, the interest of the conditional seller and lessor can be treated as full owner or as a security interest.

[10]Proposed acquisition by Energy Transfer Equity of The Williams Companies (a public company) was allowed to be terminated on grounds of non-observance of a merger condition requiring delivery of a tax opinion.

As discussed, default remedies allow chargee to sell or lease the aircraft object. In case, the chargee wants to exercise this right, Article 8(4) of the Convention obliges chargee to publicize the intended sale or lease. A written notice of the proposed sale or lease has to be given to 'interested persons'. As to who constitute, 'interested persons', Article I (m) defines it to include three categories of participants. These are firstly, the debtor,[11] secondly, issuers of suretyship and demand guarantees, standby letters of credit and any other forms of credit insurance and lastly, 'any other person having rights in or over the object' The last category is very sweeping and can encompass holders of other registered or unregistered charges, buyers, conditional buyers and lessees, holders of non-consensual rights or interests under Article 39, registrable non-consensual rights or interests under Article 40, national interest's notice of which has been registered under Article 20 (6) and unregistrable interests falling outside Article 39.[12]

Article 8 (4) warrants for 'reasonable prior notice' and Article IX (4) of the Aircraft Protocol specifies 'reasonable' as ten or more working days prior to the proposed sale or lease of the aircraft object. A longer notice period can be demanded if an agreement to that effect has been reached upon by the chargee and chargor or guarantor. The idea behind asking for compulsory notice of ten or more working days is to allow chargee's having superior rights in terms of priority to interpose. Even if chargee having superior right allows other chargee to institute default remedies, sums collected or received upon exercise of remedies under Article 8 have to be first used towards satisfaction of superior rights before the executing chargee can claim his own dues. Articles 8 (5) and 8 (6) also authorizes the chargee to deduct reasonable costs incurred in exercise of remedies provided under Article 8. Any surplus, if left, has to be distributed amongst registered holders of subsequently ranking interests or interest holders who give notice to chargee, in their order of priority. Chargor gets any surplus left after distribution. Provisions of Articles 8(3) to 8(6) are mandatory and any derogation by agreement is prohibited under Article15.

Article 9 details out the procedure for implementing rights available under Article 8. Under Article 9 (1), ownership of an object subject to security

[11]Article 1 (j) of the Convention elucidates 'debtor' to mean a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement and also 'a person whose interest in an object is burdened by a registrable non-consensual right or interest'

[12]Official Commentary at Para 2 (87) (3).

interest can vest in the chargee upon default by chargor. Right provided under Article 9 (1) is wide enough to cover ownership or any other interest of the chargor in an object subject to security interest. The right can vest in the chargee either upon court direction or by agreement between chargee and all interested persons. In case, court orders vesting of right in chargee, the same can be ordered only if the amount of secured liability is comparable to value of the object. The Convention is silent upon any parameters to decide upon the value of the object or proportionality of the value of the object *vis-a-vis* the secured debt. In case the valuation or proportionality of object vested to the amount of debt due is challenged, national courts might apply domestic commercial law principles to decide upon the aforesaid. The test of 'commercial reasonableness' can also be employed.

It is open to the chargor or any interested person to discharge the liability, anytime before sale of the charged object. Discharge by any interested person other than the debtor subrogates such interested person to the debtor's position. The Convention is also hush upon stipulation of any prior notice to chargor before discharge of the secured obligation by an interested person. Official Commentary in Para 2.90 points out that unlike Article 8(4), interested persons need not give notice of their interests to chargee. Thus, theoretically, it is possible that both chargee and chargor might not be aware of the entire transaction. In case chargee has leased the object, discharge of liability will not affect the lease. A major difference between remedies exercisable under Article 8 and vesting of object under Article 9 is that while under Article 8, surplus amount left after discharge of all secured obligations lies with the debtor; vesting of an object does not make the creditor obliged to the debtor for any surplus amount left after satisfaction of all monetary obligations.

Post-default, the primary concern of creditor is repossession of the aircraft. Allowing the debtor to hold on to the aircraft or aircraft object post-default exposes the creditor to multiple risks. The creditor fears removal of the aircraft or aircraft object to a hostile jurisdiction. Moreover, repossession would be the first step towards revenue generation. Going by the fact that most airlines lease their aircraft, lessors on default will want to rent the aircraft to new customers. Also, as aircraft require regular maintenance, quick repossession helps to prevent depreciation of the value of aircraft due to poor maintenance. Though all standard aircraft lease agreements obligate the lessee to maintain the aircraft and keep it in good operating condition, compliance upon default nosedives. Creditors want to avoid such situations and treasure repossession as the best remedy. Keeping in mind these practical exigencies, Article IX

of the Protocol provides two additional remedies of de-registration and export and physical transfer of the aircraft. Article IX ensures that in case of default, creditor is able to successfully deploy the aircraft or aircraft object elsewhere. Since de-registration of the aircraft, defined in the Protocol under Article 1(i) as 'deletion or removal of the registration of the aircraft from its aircraft register in accordance with the Chicago Convention' is necessary for re-registration of the aircraft in another territory as per Chicago Convention, Article IX provides for de-registration of the aircraft prior to its export and physical transfer.[13]

The remedy of de-registration and export of aircraft and aircraft objects can be exercised in two ways. The first is in the form of a self-help method and secondly, *via* court assistance.

i) Self Help Remedy:

Additional remedy of de-registration and export of aircraft and aircraft objects provided for under Article IX (1) can be executed under Article IX (5), (6) and Article XIII. Article IX (5) (a) obliges registry authorities in Contracting States to honor request for de-registration and export submitted under a recorded Irrevocable Deregistration and Export Request Authorization (IDERA). Official Commentary offers a very useful definition of IDERA. It defines it as an authorization by the debtor for three purposes, firstly, recognizing a named authorized party as the 'sole person entitled to procure the de-registration of an aircraft from the register maintained by the registry authority and its export and physical transfer from the country where the register is maintained'; secondly, 'to confirm that the authorised party or its designee' can take the above-mentioned action 'on written demand without the debtor's consent' and lastly, to record the IDERA in its registry.

For an IDERA to be issued, all registered interests having priority over the interest of the IDERA holder (authorized party) should have been discharged or should have given their consent to the de-registration and export.[14] Further, under Article IX (6), chargee has to give notice of the proposed de-registration

[13] An essential requirement for registration of an aircraft in any country will be production of a certificate of deregistration. For example, Civil Aviation Requirements, Section 2 (3.5), issued on September 10th, 1998 by Director General of Civil Aviation (DGCA, India) ask for customs clearance certificate/bill of entry of aircraft; proof of sale or lease of the aircraft; copy of import license; certificate of deregistration from the previous registering authority along with other documents for registration of the aircraft in India.

[14] Article IX (5) (b) of the Protocol.

and export to all interested persons specified in Article 1(m)(i), (ii) and (iii) of the Convention. Article XIII takes care of registry authorities in Contracting States. Article XIII (2) provides that in case the debtor issues an irrevocable de-registration and export request authorization and wants the same to be recorded, the registry authority should record it. Once recorded, authorization cannot be revoked except with the consent in writing of the person in whose favor authorization has been issued.[15]Article XIII (4) further necessitates the registry authorities and administrative authorities in Contracting States to support and assist the authorized party in exercise of remedies specified in Article IX.

General practice now is to get a De-registration Power of Attorney (DPoA) and IDERA from the debtor at the time of entering into the agreement. While general power of attorney is revocable by the party issuing it, and DPoA and IDERA once issued are irrevocable, domestic laws at times do allow revocation of DPoA through court (for example in Egypt). Execution of DPoA and IDERA takes away the discretion of Contracting States to decide upon de-registration and export and transfer of aircraft but States will usually insist upon clearance of outstanding debt due to public authorities before de-registration. Further, physical export and transfer is subject to 'applicable safety laws and regulations.'

The Convention and the Protocol shy of giving a time limit for execution of IDERAs but it is expected that the provision has to be executed at the earliest. A case in point in this regard is India. Post the Kingfisher fiasco when DGCA refused to deregister the aircraft upon request by lessor, the Aircraft Rules, 1937 were amended. The new law mandates de-registration of an aircraft within five days of receipt of an application by an IDERA holder.[16] In this particular case, de-registration request by the creditors, DVB Bank and the International Lease Finance Corporation was challenged by Kingfishers claiming ownership rights, stalling the de-registration process. The lessors approached the High Court of Delhi which directed DGCA to deregister the aircraft. Consequential to the legal dispute was the mounting international pressure on India. Apprehensive about being viewed as a risky jurisdiction by global financiers and drying up of funds to aviation sector, amendments

[15] Article XIII (3) of the Protocol.

[16] Rule 30(7) reads as: 'The registration of an aircraft registered in India, to which the provisions of the Cape Town Convention or Cape Town Protocol apply, shall be cancelled by the Central Government, within five working days, if an application is received from IDERA Holder prior to expiry of the lease.' A new provision was also inserted under Rule 32A facilitating export of aircraft.

were brought fixing time limit for de-registration through IDERA[17]. India's case serves as a good example to highlight how commercial actualities will force contracting States to act promptly on obligations under the Convention.

ii) Court Assistance:

Court assistance can be sought under Article 13(1) of the Convention and Article X (6) of the Protocol. Article 13(1) of the Convention provides for relief pending final determination (interim remedies) upon default by a debtor. Relief which can be sought by the creditor include request for preservation of aircraft and aircraft object; possession, control or custody of the object; immobilization of the object and lease or management of the object and its income. This relief can either be sought from State of registry or from some foreign court to be implemented in the State of registry. Once the creditor gets an order under Article 13(1) of the Convention, the same can be implemented under Article X (6) of the Protocol within five working days.

iii) Default Remedies of Conditional Seller or Lessor:

Article 10 of the Convention provides for default remedies of conditional seller or lesser. The remedies available to conditional seller or lesser are not as detailed as that of a chargee as the conditional seller or lesser has a superior right and the Convention naturally allows for termination of the Agreement and possession or control of the object. The conditional sellers or lessors might be entitled to more exhaustive remedies available to chargee in case the applicable law characterizes the conditional sale agreement or leasing agreement as a security agreement. Rights available under Article 10 can be exercised either with the leave of the court or as self-help remedies if a Contracting State has made the relevant declaration. Once the conditional seller or lesser regains possession of the object, the conditional seller or lesser is free to use or employ the object in anymanner.

iv) Additional Remedies:

Over and above the remedies provided, it is open to the contracting parties to have assistance of additional remedies either allowed under the applicable law (*lexfori*) or agreed upon by the parties. Additional remedies extend to both substantive and procedural remedies. As one of the key objectives of the Convention and Protocol is party autonomy and flexibility, Article

[17] The amendments were notified on March 28th, 2017, http://egazette.nic.in/WriteReadData/2017/175050.pdf

12 allows contracting parties to model their agreement to their best interest. While the Convention strives for uniformity, recognition is given to remedies available under the forum besides laying down the procedure to be followed in exercise of remedies. These additional remedies should not be contrary to the mandatory provisions of the Convention (Article15).

Relief pending final pending determination of the creditor's claim

A very demanding provision under the Convention is Article 13 providing for relief pending final determination of the creditor's claim. Official Commentary refers to it as 'advance relief' and clarifies that Article 13 did not use the heading 'interim relief' to assert that 'the relief is a Conference relief and should not be characterized by reference to concepts of municipal procedural law.'[18] In fact, Article 13 (4) allows parallel existence of interim remedies obtainable under applicable law. Article 13 is not a mandatory provision and is subject to declaration by Contracting State under Article 55. So, it is open for a State to completely exclude the application of Article 13 or to modify it to suit its domestic sensibilities. Even if a Contracting State has made a favorable declaration under Article 55, extent of relief available under Article 13 is subject to consent of the debtor.

In case, the debtor agrees, the creditor can apply to a court for 'speedy relief' and seek for remedies under the Convention. These are order for preservation of the object and its value; possession, control or custody of the object; immobilization of the object and lease and management of the object and itsincome.[19]

In addition to these Convention remedies, the Aircraft Protocol contains additional remedies. Article X of the Protocol titled as 'Modification of provisions regarding relief pending final determination,' brings in substantial changes. Article X (3) introduces additional remedies of sale and application of proceeds of sale. Article X (2) of the Aircraft Protocol enumerates that the State has to particularize the number of working days within which remedy will be provided. This would be relevant for defining 'speedy relief' under Article 13. Moreover, the protection accorded to debtor and other interested parties under Article 13(2) of the Convention can be excluded by an agreement in writing under Article X (5). Lastly, it reiterates that remedies under Article IX (1) pertaining to de-registration of aircraft and export and physical transfer of the aircraft object has to be done within five days of

[18] *Supra* note 14.

[19] Article 13 (1)(a)-(d), Cape Town Convention.

notification by the creditor to registry and other administrative authorities.

The extent of the remedies available shows it to be quite exhaustive and in fact comparable to remedies of chargee under Article 8 of the Convention. The primary difference between the remedies under the two provisions is that while remedies provided under Article 8 can be exercised through self-help, in case the parties agree to that; remedies available under Article 13 are exercisable with the leave of the court if the Contracting State does not opt-out from the provisions of the Article. Even when the creditor applies to the Court, the orders have to be granted upon proof of default. Court does not have flexibility to tune the remedies according to the facts of the case.

A related provision is Article 43 which gives court of the Contracting State in whose territory the object is situated and the court agreed upon the parties, jurisdiction to grant relief under Article 13(1) (a), (b), (c) and Article 13(4). Remedy of lease or management of the object can be sought before court chosen by the parties or court of the Contracting State where debtor is located. Advance relief under Article 13 can be given by a court other than the court hearing the substantive case. As this is an interim relief, ideally it will be subject to final determination. However, in case of exercise of remedy of sale, financial compensation is the only possible remedy.

Conclusion

Aviation financing has come a long way through successful implementation of the Convention and the Protocol. Moving from bare conflict of law provisions, the Convention and the Protocol have laid down new substantive law. Unlocking asset-based financing; it has discreetly reformed domestic laws. The success story of the Convention also flows from the tremendous industry participation and the focused approach to an individual sector (aviation) rather than dealing with all sorts of high-value mobile objects. Any international law treaty is as good as its remedies. The Convention has brought tremendous innovation in the remedies available and the method for exercise of the same. Dividing the remedies into two basic categories, firstly, those available to chargee who need better protection and those available to conditional sellers and lessors who have superior rights, it has simplified the provisions. The extent of remedies available is extremely practical and well thought of. Moreover, a time-bound approach gives the provisions its real strength. Provisions have been made exhaustive by inclusion of advance remedies which are in the nature of *sui generis* Convention based interim remedies and due accommodation given to local remedies available under the

lexfori. The gamut of rights available under the Convention and theProtocol seem tilted to protect more the interests of the creditor rather than the debtor. While this may seem harsh, it is commercial realities which drive the show. Summing up, the Convention and the Protocol has done much to redefine aircraft financing norms and is by far the most successful international treaty.