Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment: should Spain ratify it and how?

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Spain's accession (Official Journal of Spain [abbrev. BOE] of 4 October 2013) to the Cape Town Convention (the "Convention") was not given enough thought and attention, to the extent that even joint consideration by concerned ministerial departments was neglected. The fact that accession was put on standby because Spain failed to sign any of the supplementary protocols – effectively depriving the Convention of subject matter – is proof of the aforementioned heedlessness.

Spain's declaration under art. 54(2) of the Convention – which all States had to make one way or the other – according to which a creditor (chargee) who adduces evidence of default by a debtor (charger) may *not* obtain interim or enforcement remedies without leave of the court, is also an indication of the lack of awareness as to the Convention's limits and possibilities.

When signing the Aircraft Protocol, if such is the intention of the Spanish Government, greater care must be taken as substantial changes to the Spanish legal system are necessary to give effect to the Protocol and to eliminate systemic contradictions. *At the very least*, the following must be amended:

— The Civil Procedure Act (abbrev. LEC) or the future In Re Jurisdiction Act because Spanish procedural law (outside the insolvency framework) does not envisage court orders to authorise or direct self-help remedies as provided in arts. 8, 9 and 10 of the Convention.

— Arts. 38-41 of the Chattel Mortgage Act (abbrev. LHMPSD).

— A good number of provisions of the Air Navigation Act (abbrev. LNA), including arts. 12, 18, 19, 29, 30, 130, 131 and 133. New rules regulating the Register of Aircraft are currently underway to replace the 1969 Decree and bring domestic legislation into conformity with the Convention.

— The Insolvency Act (abbrev. LCON), as it would be *convenient* to record therein the decisions to be taken upon acceptance of art. XI of the Protocol.

More importantly, however, the Spanish Government should ponder the reasons that render the ratification advisable and the consequences thereof. It requires weighing up legislative policy options:

— Because the aviation market is not a market with systemic risk.

— Because it would create a privileged island within our insolvency system (with or without reason) for aircraft financiers.

— Because other debtors or corporate financiers of equipment under another category could perhaps claim the same treatment.

— Because it is important or not to maintain the Spanish nationality of certain aeronautical companies.

Finally, the Spanish Government should bear in mind that not all options opened by the Protocol will be acceptable to the finance industry, which has made public the terms under which aeronautical companies of countries that have acceded to the Protocol may be financed with a discount on the premium chargeable.

Spain should only be interested in ratifying the Protocol to the extent that there are airlines that have their centre of main interests (COMI) on Spanish soil. Otherwise, it would be pointless to ratify the Protocol for the sole purpose of applying the Cape Town Convention *en masse* to aircraft or aircraft parts registered in Spain, simply (if such a thing were to be possible), or located in Spain at the time of concluding the security interest agreement or at the time of enforcement.

"Governing law"

The Convention does not determine which is the law governing the security instrument, in addition, of course, to the Convention itself. This uncertainty results from arts. 3, 4, 5(3), 12 and 30(2). Art. 3 is not a governing law provision and merely prescribes when the Convention applies (where the debtor is located in a Contracting State at the time of signing the contract), while art. 4 defines four alternative locations, each of which can claim that the debtor is situated therein. These two articles are not governing law provisions because they do not serve to determine (1) when the Convention applies in the manner ratified by Spain, (2) when the Protocol applies in the manner ratified by Spain and (3) when the rest of Spanish law applies.

According to art. 10(2) of the Civil Code and art. IV(2) of the Protocol, aeronautical equipment subject to the Protocol is located in the State of registry of the aircraft. Consequently, the law of this State shall be regarded as "governing law" within the meaning of the Convention. In addition, an aircraft thus registered is deemed a "Spanish" aircraft (arts. 16 and 17 LNA), although this (odd) characterisation is neither a requirement nor a consequence imposed by either the Convention or the Protocol.

Nonetheless, under the laws currently in force there is no necessary correlation between "Spanish aircraft" and aircraft belonging to an airline which has its COMI (or a permanent establishment) in Spain. Moreover, the registration of aircraft owned by non-Spanish firms (notwithstanding art. 7 of the Decree of 13 March 1969), as well as aircraft of Spanish companies that have their COMI outside Spain is possible (cf. arts. 18 and 19 LNA).

The above does not preclude remaining Spanish aerospace regulations from applying to foreign aircraft physically located in Spain under the *lex rei sitae* rule (art. 7 LNA).

Having made these preliminary remarks, by acceding to the Protocol and, where appropriate, by producing supplementary "ancillary" legislation, the Spanish State should have it clear:

— That the insolvency rules of the Protocol are applied according to the "governing law" criteria of insolvency law. That is, *basically* to aeronautical companies having their COMI in Spain or, with the limitations of territorial proceedings, those which have an "establishment" here.

— That the (non-insolvency) "procedural" rules - for example, those relating to the remedies under arts. 8, 9 and 10 of the Convention or IX of the Protocol and eventually included in the "ancillary" rule - apply territorially, according to the Spanish jurisdiction's scope of sovereignty and irrespective of the company's COMI and where the aircraft or security interest is registered.

— That the rules that are strictly *in rem* are governed by art. 10 of the Civil Code and apply to aircraft registered in Spain. Art. 18 LNA should be amended (like art. 7 of the Decree of 13 March 1969), because theoretically it affords the inadmissible possibility of registering in Spain aircraft that are also registered in another jurisdiction against the prohibition of the Chicago Convention on International Civil Aviation 1944. Spain should choose a registration rule confining this possibility to aeronautical companies that have their COMI or a permanent establishment in Spain. Something else which should also be clarified in the LNA is whether aircraft belonging to aeronautical companies not domiciled in Spain can be specifically registered with the Spanish Register of Aircraft and, conversely, whether aircraft belonging to a Spanish airline can be registered abroad.

Restrictions imposed by Spain's accession to the Convention

The most important constraint is the declaration under art. 54(2) of the Convention, according to which "any remedy available to the creditor….. may be exercised only with leave of the court". This restriction also extends to the power to lease any such object, although Spain has not made a declaration in respect of art. 54(1).

Fortunately, this declaration will have scarce impact on the Protocol, at least as regards the *specific*

remedies under the Protocol, although it may have a significant one on the default remedies under Chapter III of the Convention, to which the creditor may have recourse by virtue of art. IX(1) of the Protocol. Indeed, the declaration provided in art. 54(2) of the Convention does not prevent the holder of a security interest from procuring the deregistration of the aircraft, under the terms of art. IX(1) and (5) of the Protocol, without requiring a court's authorisation. Nor does the declaration affect the full application of art. X(6) of the Protocol, provided that Spain has chosen to accept this provision. Nor does Spain's declaration prevent opting for the insolvency alternative A of art. XI of the Protocol, because none of the remedies for preservation of the creditor's right envisaged thereunder consist of enforcement or taking possession on the creditor's own authority. Nor does the declaration affect the content of Alternative B, since none of the measures provided thereunder consist of enforcement or taking possession on the creditor's own authority. The same applies to (the debtor's) authorisation to request deregistration and export, referred to in art. XIII.

Spain has to decide whether to make use of the "entry point" privilege under art. 18(5) of the Convention and art. XIX of the Protocol. But then a law would need to specify the scope of such designated (exclusive) entry point. In theory, it could be (1) for aircraft and aircraft parts of companies with their COMI in Spain; (2) for aircraft physically located in Spain at the time of granting of the security; (3) for aircraft registered in Spain. Furthermore, Spain must specify by an act of parliament whether, in respect of aircraft or aircraft parts of companies with their COMI in Spain, security interests under the Convention may only be granted through the Spanish entry point or also in another country party to the Convention. Art. XIX(2) of the Protocol does not allow Spain to opt for the latter possibility in respect of aircraft engines.

If Spain has jurisdiction pursuant to art. 18(5) of the Convention to determine material and formal conditions of entry on the International Registry of the security instrument (*it is our opinion that it does not*), those material and formal requirements of registrable security instruments would have to be specified by an act of parliament -amending the Air Navigation Act or the Chattel Mortgage Act. The Protocol only contains a limit to the discretion of the State's legislature in art. VII.

If Spain decides to sign the Protocol, it will have to determine in *another act of parliament* what is the limit of the examination permitted to the person responsible for the Spanish entry point. Especially if this responsibility falls to the corps of Land and Company Registrars.

Spain can still make the declaration under art. 39 of the Convention, concerning the number and categories of rights or security interests ranking in priority, within or without insolvency proceedings, to security interests registered with the International Registry. But if it does not, the Government needs to be aware of the fact that it must simultaneously amend arts. 41 LHMPSD and 133 LNA. Even if it does, an amendment of such provisions is consistent with the new prospect of international security interests, because there is a potential conflict between "priorities" born from the aircraft's operation (which can be carried out by a lessee) and from security interests (eventually those under the Convention) granted by the owner.

Spain can no longer declare that the Convention--Protocol shall not apply to internal transactions (art. 50 of the Convention), excepting the limit that art. 57 of the Convention imposes on subsequent declarations.

Options under the Protocol

More so than the Convention, the Protocol is largely an instrument "*a la carte*". Contracting States have various levels of commitment available, and in some respects, the opt-out / opt-in possibility refers to substantial aspects of the regulation.

Arts. IX and XI of the Protocol contain two substantive provisions of the instrument. The application of both provisions is not subject to an express declaration of the acceding State and its application cannot be excluded by such State making a specific declaration. But with the latter, the State has wide discretion regarding its internal application (cf. art. XXX(3)).

Art. XI contains two insolvency-related alternatives, from amongst which Spain must choose, pursuant to art. XXX(3). In Alternative A, the debtor's insolvency administrator of the debtor shall "give possession" of the aircraft object to the creditor by the time specified in para. 2. If Spain opts for this alternative, it must declare what is the waiting period or stay of enforcement period. An implicit referral to the default time limit of art. 56 LCON will not suffice. Alternative A may be chosen by Spain without fear of the declaration made pursuant to art. 54(2) of the Convention, because such declaration should

not prevent recognition in Spain of the insolvency administrator's authority to directly proceed with delivery, without the need of obtaining a court's authorisation to do so. The same can be said of the delivery-up remedy in Alternative B of art. XI. Likewise, art. XI(5) may be applied in Spain without compromising the declaration under art. 54(2) of the Convention.

The above decision requires weighing up legislative policy options. Either the Spanish legislature agrees to favour financiers in order to give the aircraft an expeditious exit from the insolvent's assets available for distribution, at the expense of any other security interests subject to insolvency proceedings, or it decides that there is no substantial reason to give preference to the insolvency-related rules for these creditors upon the insolvency of a company that is not subject to systemic risks.

Art. VIII (choice of law) makes its application conditional on Spain choosing such application upon accession or later. The provision does not contain a critical rule since the possibility of opting for contract law applicable to the security interest is recognised in the Rome I Regulation, and the subject matter is outside the jurisdiction of the State's legislature.

The application of art. X is subject to a positive declaration of the acceding State, because the residual rule is non-application (interim injunctive relief). In particular, Spain must make a declaration (a commitment) regarding the number of days it will take the creditor to obtain the relief pending final determination to which art. 13(1) of the Convention refers. Both art. 13(1) of the Convention and art. X(2) and (3) of the Protocol are not restricted by the Spanish declaration pursuant to art. 54(2) of the Convention.

Spain should opt positively in favour of the application of art. XII (insolvency assistance between States).

Although Art. XIII is another of the core provisions (authorisation by the debtor to deregister and export the aircraft), the rule requires a positive declaration. Nor is the content of this provision compromised by the declaration under art. 54(2) of the Convention.

Spain must decide whether or not to waive sovereign immunity according to the terms of art. XXII.

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