Registration of civil aircraft and the Cape Town Convention

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The Cape Town Convention on International Interests in Mobile Equipment ('the Convention'), complete with a set of Protocols (including the protocol on matters specific to aircraft equipment, 'the Aircraft Protocol') that require ratification for the Convention to take effect, creates an international security interest ("interest") that: (i) must be recognised in all Contracting States; (ii) can only be granted ("constituted") in property ("objects") listed in art. 2(3) (airframes, aircraft engines and helicopters, railway rolling stock and space assets); and (iii) extends to proceeds of eventual compensation. The objective pursued with the introduction of this new construct is to avoid the risk of cross-border discontinuity of security interests in the international arena, i.e. the risk of not being recognised abroad or of being recognised but with different attributes in each place.[1] That is why rules on recognition, in the context of insolvency proceedings, are also laid down in respect of such international security interests.

In this context and in line with the objectives of the Convention, an International Registry of Mobile Assets ('the International Registry') is created for each category of property included in a protocol; registration, however, is not a requirement to grant international security interests, but only for such to be payable in priority. Registration in respect of aircraft equipment ("assets") is in operation and is run by an Irish private company, under the supervision of the International Civil Aviation Organization. Essentially: (i) public recording is absent of examination, so the effect of such is not evidence of authentication, but merely enforceability of registered charges; (ii) the object of registration is not the debtor, but the chattel; (iii) it allows the creditor ("chargee") to keep his rank against third parties and to receive priority consideration against national security interests not registered in the International Registry or not covered by a declaration made by a Contracting State under art. 39; it also allows the registration of priority subordination agreements relating to security interests ("notices"); (iv) registration becomes effective from the moment it can be consulted. According to art. 18 of the Convention, the Registry's registration requirements shall be those set by the appropriate Protocol and by each Register's Rules ("regulations"). Sub-article 5 of the provision provides for the possibility of each Protocol providing that the Contracting State may designate in its territory one or more entities as entry points through which the information needed for registration shall or may be passed on to the International Registry, adding that "[a] Contracting State making such a designation may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry." The three Protocols to the Cape Town Convention envisage this possibility.

In this context, the sixth additional provision of Royal Decree 384/2015, of 22 May, approving the Register of Civil Aircraft's Rules, states that the Chattel Registry is the entry point to the International Registry.

The solution adopted by the Spanish legislature is not well suited to the requirements of the

[1] F.J. GÓMEZ GÁLLIGO/I. HEREDIA, "El Convenio de Ciudad del Cabo y su protocolo sobre bienes de equipo espacial", *Revista Crítica de Derecho Inmobiliario*, 2012, no. 731, p. 1416.

Convention and adopts a position that will not be favourable to the Spanish industry. Criticism mainly focuses on two issues: a) the obligation - or lack thereof – to use the national entry point and b) the role of such entry point.

Who must use the Spanish entry point?

From among the different options open to the Spanish legislature in determining the scope of the designated entry point, it has chosen to apply it only to aircraft registered in Spain (as evidenced by the requirement – under art. 10 of the Royal Decree – that the aircraft be registered with the Register of Civil Aircraft to be entered on the Chattel Registry) and not those relating to aircraft or aircraft parts of companies with their COMI in Spain or aircraft physically located in Spain at the time of granting of the security interest. Since not all aircraft registered in Spain are also subject to registration with the Chattel Registry, the Royal Decree is indirectly creating the obligation to register them if the intention is to grant in the same an international security interest that can be registered through the Spanish entry point.

Thus, security interests in aircraft not registered with the Spanish Register of Civil Aircraft cannot be entered on the International Registry through the Spanish entry points. But this statement does not seem to work in the other direction; i.e., it cannot be said that an aircraft registered in Spain cannot directly enter the International Registry or cannot to do so through national entry points, where permitted, other than the Spanish one.

Art. 19 of the Aircraft Protocol conceives national entry points as mere transmitters to the International Registry of the information required for registration of the international security interest ("*a Contracting State may at any time designate an entity or entities in its territory as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration [...]*") without adding additional data of relevance to the characteristics or the possible actions of those entry points. This article does expressly clarify two things: (i) such entry points cannot be designated for the registration of a notice of a national security interest under art. 40 of the Convention (non-consensual security interests) arising under the laws of another State and (ii) where the registerable security interest relates to aircraft engines, the use of entry points may be permitted, but not compelled.

Nowhere does art. 19 of the Protocol provide that States may impose national entry points on aircraft registered in their territory, to the extent that the security interests granted in them, even when subject to the laws of another State, must use national entry points to be registered with the International Registry. Certainly there are arguments that support this interpretation: if the second sub-article ("paragraph") states the impossibility of imposing the entry point on security interests in aircraft engines it is because, conversely, it does intend to allow such points to be imposed on the rest, i.e. when the security interest is not confined to the engine. One cannot conclude from this interpretation, however, that the place of registration criterion should determine registration with the International Registry through a particular national entry point, nor that art. 19 does not refer only to the limitation of "internal" entry points to the exclusion of registration through the entry points of other States.

However, the Official Commentary on the Cape Town Convention and Aircraft Protocol does seem to support this conclusion with arguments related to the drafting of the Convention and the system's coordination needs (discordances might arise if, together with the State of registration, others were to demand registration through their designated entry points)[2]. One could similarly interpret r. 12(2) and (6) of the Register of Civil Aircraft's Rules[3] while providing that a Contracting State may only designate a mandatory entry point with respect to registrations concerning airframes and helicopters of which it is the State of registration and/or registrations of prospective international security interests, prospective sales or prospective assignments of international security interests in an airframe or helicopter for which it has taken regulatory action to become the State of registration and that the International Registry will give electronic notice against a registration that is not effected through a direct entry point where use thereof is mandatory; or in accordance with the procedures required by an authenticating entry point.

[2] R. Goode, Official Commentary, Unidroit, Rome, 2002, pp. 228-229.

[3] http://www.icao.int/publications/pages/publication.aspx?docnum=9864.

However, none of the above leads to the conclusion that the State of registration can exclude an entry through entry points located in other States should they allow it.. The text of art. 19 of the Convention does not state anything in this respect and it is very dubious that the removal of a reference of such relevance, when the question was considered throughout the preparatory work, is owing to an oversight. Moreover, on the basis of the official commentary, the only thing clear is that States other than that of registration cannot require entry on the International Registry through their territory, but not that they cannot enable or permit such entry.

It also allows an interpretation on those lines of r. 12 of the Rules: the national entry point is required only within the national territory, without this limiting other States' possibilities of providing for registration with the International Registry, through the entry points they determine, of security interests in aircraft registered in other territories, and the "notice" to be given by the International Registry only refers to such circumstance.

What is the role of the entry point?

As noted, art. 19 of the Protocol does not seem to provide for anything other than transmission to the International Registry. The Official Commentary on the Convention takes this stand when it states that the Contracting State designating an entry point is free to add additional requirements, such as payment of a fee, which it considers necessary for the *transmission of data to the International Registry* (but not for other purposes), further adding that the State is bound by art. 26 of the Convention, according to which no person may be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by the chapter in which this article is inserted, which are none other than the procedures of the Convention and not those of any national legislation.

One must read r. 12 of the Rules from this perspective when it talks about relations with entry points and distinguishes between "authenticating entry points", which transmit or may transmit to the International Registry the information required for registration under the Convention and Protocol and "direct entry points" through which the information required for registration under the Convention and Protocol shall be or may be transmitted directly to the International Registry. The difference between the two can never allow "authenticating" entry points to exercise a control over the transmission of information that distorts the system created by the Convention and turns it into a "mutual recognition" system of sorts where each State determines the national registration requirements it deems fit and, thereby, the characteristics of security interests that must be recognised in all Contracting States. That is not the option under the Convention, which, as we have seen, creates *ex novo* a security interest with its own uniform regulation.

Beyond the doubts concerning the advisability of adopting a system of national entry points and not one of direct registration with the International Registry as chosen by most of the States that have ratified the Convention, there would be no other objections if the action of the Chattel Registry in relation to these issues were to conform with that provided for the International Registry, limiting itself to the transmission of information, as a direct entry point or, at the most, to the control strictly required in a registry where there is merely public recording without examination, if we regard it as an authenticating entry point, which the Royal Decree does not specify.

The Royal Decree adds nothing new on the material and formal conditions of registration with the International Registry, which are determined solely by the provisions of international texts. However, the sixth additional provision distinguishes between (a) international security interests and (b) security interests subject to Spanish law that are also registrable with an international registry.

Regarding the former, the registrar shall record the reservation of international priority in the appropriate international registry, in the terms and conditions laid down in the relevant Treaty and Protocol, only "*once the international security interest has been registered with the Chattel Registry, or in the filing entry where the reservation of priority over prospective security interests is provided for*". As such, the security interest must first be registered with the Spanish Registry, without determining what type of controls will be carried out for such registration, although we fear that they will go beyond what is required as by a registry such as the international one of mere public recording without examination. After this control, the examination of the security interest in the classic sense, by the national registrar, entry on the International Registry will be possible, this time without controls and requirements other than those provided by the international texts. The Royal Decree does not set out the conditions of registration

expressly, but this distinction between registration and subsequent communication seems to point in this direction.

With this system the Spanish legislator hinders the granting of international security, making it more cumbersome for aircraft registered in Spain and denying the system the necessary speed and flexibility. As things stand, companies need only reregister their aircraft in a State where the requirements are not as stringent to grant a security interest and thus have better access to finance. [The same system extends to non-international security interests that are subject to Spanish law and registerable with the International Registry, but in this case the system is hardly objectionable].

Probably the first thing one could contend in support of stricter control – true examination – by the chattel registrar is that neither the Convention, nor the Aircraft Protocol, nor the Register of Civil Aircraft's Rules expressly forbid a system where the national authenticating authority carries out an examination for registration with a national registry prior to transmission of the information required for registration with the international registry[4].

However, the absence of an express prohibition does not mean that the system is admissible. It is not so because it prevents fulfilment of the Convention's objectives in its creation of the international security interest and establishment of an International Registry. The "effectiveness"[5] of the treaty is thwarted if a system as the one proposed is admitted. The Convention aims to create an international security interest that is universally recognised and protected and to facilitate the flow and raising of mobile asset-backed financing (Explanatory Notes). As such, the role of national entry points must conform to the International Registry, and limit itself to a control that does not exceed the requirements of a recorder - notice, excluding examination, as we know it in Spanish registration law; in fact, a move from a register of *rights* to a record of *documents*.

Communication of priority rights and interests by the Spanish legislator

Finally, additional provision 6(c) of the Royal Decree, picking up on the provisions of art. 39 of the Convention, refers to the priority of rights and interests or category thereof over registrable international security interests in chattels located in Spain, even when the former have not been registered with the International Registry, that the Spanish legislator has declared in the instrument of accession, ratification or approval of the Treaty, Protocol or Rules.

Because, unlike other States, Spain has not made use of this declaration in its instrument of accession to the Convention (Official Journal of Spain [BOE] 238 of 4 October 2013), and if it does not do so upon ratification of the Aircraft Protocol, the priority of rights or interests over international security interests in the aircraft located (registered) in Spain may not be claimed.

[4] According to r. 5(3) of the Register of Civil Aircraft's Rules, the information required to effect the registration of an international security interest, a prospective international security interest, a notice of a national security interest, or a registerable non-contractual security interest is: a) the electronic signature of the person making the registration; b) the name of each of the named parties; c) the following information identifying the aerospace object: i) name of the manufacturer; ii) generic designation of the manufacturer's model; and iii) manufacturer's serial number assigned to the aerospace object; d) the expiry date of registration, if registration shall expire prior to requesting cancellation; e) in the case of an international security interest or prospective international security interest, the consent of the named parties, given by virtue of an authorisation; f) the email addresses of the people that the International Registry must send information notices to pursuant to r. 6; and g) if more than one creditor is included among the persons named, the name of the creditor with the exclusive right to consent to the cancellation of that registration.

[5] Vide I. HEREDIA, "La adhesión de España al Convenio de Ciudad del Cabo y sus consecuencias", La Ley Mercantil, no.1, April 2014. According to this author, the requirements art. 18(5) of the Convention allows national entry points are only those needed to guarantee observance of the procedures to which the Convention conditions registration with the International Registry (contained in Chapter V) and the levying service fees (p. 10).