

# **CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL- CURRENT TRENDS RELATING TO AIRCRAFT FINANCE AND ENFORCEMENT OF AIRCRAFT SECURITY.**

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## **Enforcement of Aircraft Security under the Convention The Nigerian Experience.**

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**- 1.0 -**

### **Preamble**

In approaching this paper, I would first present a summary of the purpose of the Convention as captioned in its preamble and progressively review past Treaties on rights and interests in aircraft to highlight those inadequacies that necessitated the passage of the Cape Town Convention.

The purpose of the Convention as set out in its preamble may be summarised as follows:

- To facilitate the acquisition and use of mobile equipment of high value or particular economic significance in an efficient manner;
- To facilitate asset-based financing and leasing transactions by establishing clear rules to govern them.
- To ensure that interest in mobile equipment are recognised and protected universally;
- To provide broad and mutual economic benefits for all interested parties;
- To establish rules that reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions;

- To take into consideration the objective and principles enunciated in existing Conventions relating to mobile equipment.

This paper is concerned with the legal framework established in the Convention and Protocol for the enforcement of aircraft security and how the various organs of the Nigerian State have fared so far in facilitating the broad objectives of the Convention.

**-2.0-**

## **BEFORE CAPE TOWN CONVENTION**

The scope of the earlier Conventions to serve as instruments for the enforcement of securities in aircraft by international convention parties was severely restricted as rights in aircraft were regulated by the domestic laws of the several contracting States. Under the Chicago Convention of 1944, Aircraft registries were established in each contracting State for the purpose of aircraft registration. The Geneva Convention made provision for the maintenance of separate register of security interest in aircraft by the authorities of the several Contracting State. The absence of a central registry and a universally binding international law meant that parties to aircraft transactions were always enmeshed in the complex issues of conflict of laws, when contemplating enforcement of securities.

Nigeria is signatory to the Convention on International Civil Aviation - the Chicago Convention of 1944. The Chicago Convention regulates the registration of air-frames, aircraft and helicopters and is part of our laws having been domesticated in the Civil Aviation Act 1964 Cap 51 LFN 1990.

The Convention on International Recognition of Rights in Aircraft-Geneva Convention was signed in 1948 to provide a regulatory regime for the international recognition of right in aircraft by contracting parties.

Thus Article I of Geneva Convention provides for the recognition by Contracting States of:-

- (a) Rights of property in aircraft;
- (b) Rights to acquire aircraft by purchase coupled with possession;
- (c) Rights to possession of aircraft under leases of six months or more;
- (d) Mortgages, hypothèques and similar rights in aircraft which are contractually created as security for payment of an indebtedness; were all recognised on the following conditions;

- (i) The rights must be constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and
- (ii) The rights are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.

In this regard, Section 31 of the Civil Aviation Act, 2006, vests the NCAA with functions including:

- (a) The registration of any aircraft in Nigeria and issuance to the owner thereof, of a certificate of registration; and
- (b) The establishment and maintenance of a system of register for recording the title to or any interest in any aircraft registered in Nigeria.

In the same vein, Regulations 4.2.1.5 and 4.2.1.6 of the Nigerian Civil Aviation Regulations 2009 provide for the maintenance of a registry of aircraft and a registry of Legal Interests in Aircraft showing proprietary rights, interests, liens and other dealings related to aircraft registered in Nigeria.

The Geneva Convention was domesticated in Nigeria by virtue of section 73(1) of the Civil Aviation Act 2006. The objectives of the Geneva Convention still did not address the challenges posed by the international structure of aircraft financing and operation by not providing a universally applicable regime of regulations.

## **2.1 Enforcement Of Aircraft Securities Before Cape Town**

### **Pre-Cape Town Registry**

Before the coming to force of the Civil Aviation Act, 2006, the Nigerian Civil Aviation Authority (Establishment) Act, 1999 regulated the functions of the NCAA, having been established to take over the functions of the Federal Civil Aviation Authority (FCAA), which had been the Federal organ vested with the statutory duty of implementing the objective of the Chicago Convention. The FCAA operated more or less as a department of the Ministry of Aviation as its instrument of establishment made no express provision for its autonomy. Apart from wet-leased aircraft, every aircraft operating in Nigeria had to be registered with the Nigerian registration mark (5N). Entries were made in the register of the names and addresses of the operators/Lessees and owners/Lessors, the make and Manufacturer's Serial Number (MSN), year of manufacture and other details of the aircraft.

A note was also made of any liens, mortgages or other security interest in the aircraft as were supplied to the registry since there was no separate registry for that purpose.

Owners and Lessors of aircraft were largely unsecured as there were no municipal laws or International Treaties for the perfection of interests in these very highly priced and exceedingly mobile objects. (A wide bodied aircraft could cost in excess of USD 200 million).

The system of registration was open to fraud and abuse and in some cases entries at the registry were falsified - *The African Trans Air Case*.

Repossession of aircraft in event of default was a nightmare to Owners/Lessors as they were often tied in needless litigation in local courts which, in some cases, lasted for years while their assets lay immobilised and wasted – *The Banax Case in PH*.

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## **The Convention on International Interests in Mobile Equipment (Cape Town Convention)**

The Convention makes specific provisions for leasing and taking security over aircraft, engines, helicopters, rail and space assets and further provide creditors with specific default remedies, including remedies in the event of insolvency of the debtor (operator). It establishes an international registry for the registration of International Interest in the category of mobile objects covered in the Convention.

### **3.1 Constitution of International Interests**

The Convention defines “International Interest” as an interest held by a creditor to which Article 2 applies.

Article 2 of the Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights. The categories are:

- (a) Airframes, aircraft engines and helicopters;
- (b) Railway rolling stock; and
- (c) Space assets

For the purpose of Aircraft Objects, an International Interest may be constituted in a uniquely identifiable airframe, aircraft engine and helicopter under Article 7, in any of the following ways:

- (a) Granting by a chargor under a security agreement;
- (b) Vesting in a person who is the conditional seller under a title reservation agreement; or
- (c) Vesting in a person who is the lessor under a leasing agreement.

Article 2:5 provides that an International Interest in an object extends to proceeds of that object.

An Aircraft Object to be registered as an International Interest must have at least one of the following attributes:

- An airframe (other than those used in military, custom or police services that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport at least eight (8) persons including crew; or goods in excess of 2750 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all related data, manuals and records.
- A helicopter that is type certified to transport at least five (5) persons including crew, or goods in excess of 450 kilograms.
- A jet propulsion aircraft engine with at least 1750 pounds of thrust or its equivalent.
- A turbine-powered or piston-powered aircraft engine with at least 550 rated take-off shaft horse power or its equivalent.

### **3.2. Written Agreement Provision**

Article 7 of the Convention provides that for an interest to be constituted as an international interest under the convention, the agreement creating or providing for the interest must be in writing and:

- Relate to an object of which the chargor, conditional seller or lessor has power to dispose;
- Enable the object to be identified in conformity with the Protocol; and
- In the case of a security agreement, enable the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

### **3.3 Domestication of the Cape Town Convention and Protocol**

On the 15<sup>th</sup> of November, 2006, the Civil Aviation Act 2006 was signed into law thereby effectively domesticating the Cape Town Convention and Protocol as part of the laws of Nigeria. Section 73 (2) of the Civil Aviation Act, 2006 provides as follows:

*“The provisions of the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment 2001 (the Cape Town Convention and Protocol) set out in the Fifth Schedule (a) and (b) respectively, shall from the commencement of this Act, have the force of law in Nigeria.”*

- 4.0-

## **PERFECTION AND PRIORITIES UNDER CAPE TOWN CONVENTION**

### **4.1 International Registry**

The Convention provides for the establishment of an International Registry. The perfection of International Interests in aircraft objects and the determination of priority of International Interests are accomplished through a system of on-line registration and search of the International Registry. The International Registry established in Dublin, Ireland is open to all party States for the registration of interests in aircraft objects.

It is supervised by the International Civil Aviation Organisation (ICAO) and is being operated out of Dublin, Ireland by Aviareto, a joint venture between Societe Internationale de Telecommunications Aeronotique (SITA), an air transport IT service provider, and the Irish government.

The International Registry is a web and notice-based electronic registry system, requiring no physical documentary filing, and operating 24 hours a day, 7 days a week. The registry is an “object-specific” registry, meaning that the registrations are made against and searched by criteria such as manufacturer, model, and serial number of an aircraft object.

The framework of regulations in the Convention is for the protection of the claims of registered interests only. In other words, only registered interests may be enforced under the Convention.

## ENFORCEMENT PROVISIONS

### 5.1 Extra – Judicial Provisions for the Enforcement of Aircraft Securities

Before the coming into force of the Cape Town Convention, there was no treaty regulating the process of repossession and export of aircraft in the event of default by “debtors”. In Nigeria, the process was entirely dependent on the Nigerian aircraft registry authority (the NCAA) and the judicial authorities and much was left to discretion. The Civil Aviation Act, the Nigerian Civil Aviation Regulations, the Admiralty Jurisdiction Act, the Admiralty Jurisdiction Procedure Rules and other extant laws made no mandatory provision to facilitate repossession within a stipulated time.

With the coming to force of the Cape Town Convention, specific enforcement provisions of the Convention are now incorporated in the Nigerian Civil Aviation Regulation, 2009.

Regulation 4.2.1.3(a) of the Nigerian Civil Aviation Regulations, 2009, makes clear provisions for the de-registration of an aircraft in the following circumstances among others:

*(2) If the holder of a valid de-registration Power of Attorney applies to the Authority for de-registration; and*

*(3) When the holder of a Certificate of Registration, owner or lessor or his duly authorized attorney applies in writing for de-registration of the aircraft from the Nigerian Register.*

The above provisions however, would still not result in the much needed efficiency in the process of aircraft repossession for the following reasons:

- Regulation 4.2.1.3(a)(6) gives the Authority the discretion to refuse de-registration if in its opinion, it will be in the public interest to do so.  
*[Question here is: (i) how do you define public interest and (ii) why should the execution of a lease between international parties be subject to a local authority’s decision as to what constitutes public interest.]*

- The regulation gives no time line for de-registration.

The Cape Town Convention has given force of international law to the Irrevocable Deregistration and Export Request Authorisation (IDERA). It has also provided clear mandatory time lines for deregistration upon notification of the authority and made clear provisions for Default Remedies and Interim Reliefs available to the creditor by order of the courts, with definite timelines within which such reliefs must be granted pending final determination.

## **5.2 Default Remedies – (Conditional Sales and Leases)**

Article IX(1) of the Protocol provides that in addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

- (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.

Article 10 in Chapter III of the Convention which is relevant to Conditional Sales and Leases provides that in the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, or as the case may be, may:

- (a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or*
- (b) apply for a court order authorising or directing either of these acts.*

## **5.3 Nigeria’s Declaration Under Article 54(2)**

The Federal Republic of Nigeria made a mandatory declaration under Article 54(2) in the following terms:

*“The Federal Republic of Nigeria declares that any remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised without court action and without leave of the court.”*

[This declaration was notified to UNIDROIT by the Government of the Federal Republic of Nigeria, as a subsequent declaration pursuant to Article 57(1) of the Convention, on 26 March 2007, and in accordance with Article 57(2) of the Convention it took effect on 1 October 2007.]

The import of this Declaration is that once the Lessor has filed an IDERA with the NCAA and the NCAA notified of the termination of the lease, the NCAA is obliged to de-register and afford all necessary clearance and assistance to the Lessor for the repossession and exportation of the aircraft without court action and without leave of the court.

#### **5.4 Irrevocable Deregistration and Export Request Authorisation (IDERA)**

Article IX(5) of the Protocol provides as follows:

*“The registry in a contracting state shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:*

*(a) the request is properly submitted by the authorised party under a recorded irrevocable de-registration and export request authorisation; and*

*(b) the authorised party certifies to the registry authority, if required by that authority, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.”*

It should be noted here that under the Protocol, the registry’s obligation to honour a request for deregistration and export request is **subject only to “any applicable safety laws and regulations”, and NOT subject to “public interest”** as provided in Regulations 4.2.1.3 (a)(6) of the Nigerian Civil Aviation Regulation, 2009.

#### **5.5 Time Limit for De-registration, Export and Physical Transfer of Aircraft Object.**

Article X(6) of the Protocol makes the following mandatory stipulations with regard to remedies in Article IX (1):

*(a) they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State not later than **five working days** after the creditor notifies such authorities that the relief*

*specified in Article IX (1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and*

*(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.*

## **5.6 Judicial Relief Pending Final Determination**

Article 13 of the Convention stipulates the nature of interim relief that courts of Contracting States may order for the benefit of the creditor, pending final determination of an action relating to an international object.

Subject to any declaration filed by a Contracting State, a creditor may request the court to make orders for any of the following relief:

- (a) preservation of the object and its value;
- (b) possession, control or custody of the object;
- (c) immobilization of the object; and
- (d) lease, or except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

Article X (2) of the Protocol provides that for the purpose of Article 13 (1) of the Convention, “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.

## **5.7 Nigeria’s Declaration in respect of Article X**

In respect of Article X of the Aircraft Protocol, Nigeria’s declaration lodged on the 26 March 2007 and effective on the 1 October, 2007, provides a time limit of not more than ten (10) calendar days in respect of remedies specified in Article 13 (1)(a), (b) and (c) of the Convention and not more than thirty (30) calendar days in respect of remedies specified in Articles 13(1)(d) and (e) of the Convention.

## **5.8. Jurisdiction**

Clear provisions are made in the Convention as to the Choice of Forum and the jurisdiction of courts of Contracting States to grant interim reliefs pending final determination of issues in Articles 42 and 43 of the Convention.

## **5.9. Choice of Forum**

Article 42 (1) provides that subject to Articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under the Convention, whether or not the chosen forum has connection with the parties or the transaction. It further provides that such jurisdiction shall be exclusive unless otherwise agreed between the parties. Article 42 (2) requires any agreement to vary the provision of Article 42(1) to be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.

## **5.10. Jurisdiction under Article 13**

Article 43 provides that the courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have jurisdiction to grant relief under Article 13(1) and (4) in respect of the object. It further states that a court has jurisdiction to grant interim reliefs under Article 13 even if the final determination of the claim will or may take place in a court of another Contracting State or arbitration.

**-6.0-**

## **IS CAPE TOWN AT WORK IN NIGERIA**

Having explored fairly extensively, the various provisions of the Convention for the recognition and protection of interest in aircraft objects and the enforcement of aircraft securities under the Convention, we would now examine how relevant authorities in Nigeria have so far implemented the provisions of the Convention.

### **6.1 Air Midwest Nigeria Limited Case**

The Air Midwest case provides a good case study of the working of Cape Convention in Nigeria as relevant provisions of the Convention and Protocol were put to test in the bid of the creditor to deregister, repossess and export its aircraft from Nigeria.

Air Midwest, a Nigerian operator contracted a lease of a Boeing 737-500 from Celestial Aviation Trading 21 Limited, a company registered in Ireland. Pursuant to the Cape Town Convention, the Lessor had lodged an IDERA duly executed in it's favour by the Lessee at the NCAA. The Lessee was in default and the Lessor sought to de-register and repossess the aircraft. The events that ensued were as follows:

(i) The NCAA was duly notified of the termination of the Lease and requested to de-register the aircraft and grant authorisation for its export from Nigeria. Under Article X(6) of the Protocol, it is mandatory for deregistration, repossession and export to be accomplished within five (5) working days but in this case, the aircraft was deregistered two (2) clear months after the request was served on the NCAA;

(ii) The creditor commenced action for the repossession of the aircraft in the Queen's Bench Division of the High Court in London (Forum of Choice);

(iii) Whereas, the Forum of Choice in the lease was the English Courts which had exclusive jurisdiction over the matter, the debtor brought a suit in the Federal High Court of Nigeria;

(iv) Whereas, interim preservative orders are only available to the creditor under the Convention, the lessee (debtor) filed an *ex-parte* application at the Federal High Court and was granted orders for the arrest and detention of the aircraft;

(v) The creditor filed a preliminary objection to the jurisdiction of the Federal High Court of Nigeria and a Motion for the discharge of the warrant of arrest, repossession and export of the aircraft pending the hearing on jurisdiction. Contrary to the stipulation in Article 43 of the Convention, the Court ruled that it would first dispose of the issue of jurisdiction.

(vi) Whereas, Article X stipulates a time limit of ten (10) calendar days for the granting of interim relief to the creditor, it took approximately six (6) months for the Court to order the discharge of the warrant of arrest and repossession of the aircraft on the grounds, inter alia, of lack jurisdiction.

(vii) Notwithstanding the court order for repossession, two directors of the debtor company invaded the tarmac and physically obstructed the aircraft to prevent its being towed to the hanger for inspection preparatory to exportation. In view of the severity of threats posed by the debtor (one director indeed threatened to blow up the aircraft), the airport police with men of the bomb disposal unit were invited.

(viii) Preliminary investigation revealed that the aircraft had been robbed of several vital components and the debtor refused to release the operational manuals and other record in its possession.

(ix) The English court granted judgment in favour of the creditor together with orders as to damages which were duly registered as a judgment of the Federal High Court of Nigeria for necessary enforcement.

(x) A motion by the debtor for extension of time to apply for the setting aside of the registration was recently adjourned to September, 2012, for hearing, approximately nine (9) months from the date it was filed.

**-7.0-**

## **CONCLUSION**

Now, in the light of the foregoing, what are the current trends relating to aircraft financing and enforcement of aircraft security in Nigeria? Has Cape Town come to Nigeria?

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