

**EXPLANATORY MEMORANDUM TO
THE INTERNATIONAL INTERESTS IN AIRCRAFT EQUIPMENT (CAPE TOWN
CONVENTION) REGULATIONS 2015**

2015 No. 912

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**
 - 2.1 The International Interests in Aircraft Equipment (Cape Town Convention Regulations) 2015 (“the Regulations”) implement the Convention on international interests in mobile equipment and Protocol thereto on matters specific to aircraft equipment and EU Council Decision 2009/370/EC on the accession of the European Community to the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 This memorandum contains information for the Joint Committee on Statutory Instruments.

 - 3.2 The Regulations are stated to apply in accordance with the provisions of Protocol Regulations made by the Supervisory Authority. These may change over time but as they are purely administrative in nature they do not require vires under paragraph 1A of Schedule 2 to the European Communities Act 1972. Further, they do not breach the rules against sub-delegation. They deal with the operation of the International Registry, the setting of fees, the supervision of the Registrar and the provision of a procedure for dealing with complaints concerning the operation of the Registry.

 - 3.3 The Regulations follow the text of the Convention and Protocol but depart from it in two areas on the basis of an error in the text identified in the Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on matters specific to Aircraft Equipment by Professor Roy Goode (as approved for distribution by Unidroit).

 - 3.4 The first occasion relates to regulation 16 (priority of competing interests) which implements article 29 of the Convention as modified by Article III and Article XIV of the Protocol. Regulation 16(3) follows the suggested interpretation in the Official Commentary on the basis that a literal reading of Article XIV.2 of the Protocol is against the intent and is wholly inconsistent with Article XIV.1 and Article 29(1) of the Convention. This is because it ignores the position of a buyer who has registered a prospective sale who would be postponed to another buyer or a creditor who registered subsequently but before the prospective sale had crystallised into an actual sale.

- 3.5 The second departure from the text occurs in regulation 31 (priority of competing assignments) which implements Article 35. The Official Commentary points out that Article 35.1 as drafted suggests it is the assignment of the associated rights that is registered, whereas such assignments are not registrable and article 35(1) should therefore be interpreted as if it read “and that international interest is registered”. Moreover Article 35 incorrectly requires references to a registered interest in Article 29 to be treated in two different ways: (1) as if they were references to an assignment of the associated rights and the related registered interest and (2) as if they were references to a registered assignment. This is ambiguous and it is the second meaning that applies. The intended effect, which, transposing from Article 29(1), is that a registered assignment has priority over a subsequently registered assignment and over an unregistered assignment.

4. Legislative Context

- 4.1 The Convention on international interests in mobile equipment and the Protocol thereto on matters specific to aircraft equipment (known as “the Cape Town Convention”) is an international private law treaty conducted under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organisation (ICAO). The treaty is a shared competency treaty with the EU. The EU acceded to the Convention and Protocol in 2009 and issued a Decision setting out how Member States should approach the areas of the treaty within the competence of the EU. The proposal was cleared by the Commons European Scrutiny Committee and the Select Committee on the European Union in 2009.
- 4.2 It was agreed that Member States could decide whether or not to ratify the Cape Town Convention. There is no EU Directive for ratification of the treaty. A number of areas of the Cape Town Convention are within the competence of the UK and the UK’s approach to these areas is set out below. A transposition note can be seen at annex A.
- 4.3 The European Union (Definition of Treaties) (Convention on International Interests in Mobile Equipment and its Protocol on matters specific to Aircraft Equipment) Order 2014 (S.I. 2014/1885) provides for the Cape Town Convention to be regarded as an EU Treaty as defined in section 1(2) of the European Communities Act 1972 (“the 1972 Act”), as a result of which these Regulations are made under section 2(2) of the 1972 Act.

5. Territorial Extent and Application

- 5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Minister of State for Business and Enterprise and Energy, Matthew Hancock, has made the following statement regarding Human Rights:

“In my view the provisions of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 are compatible with the Convention rights.”

7. Policy background

- 7.1 The Cape Town Convention aims to reduce the cost of raising finance for large, high value aircraft, helicopters and aircraft engines which routinely cross borders by reducing the risk to creditors of lending the finance to purchase or lease aircraft equipment. This is effected by providing for the international interest to be enforceable in any signatory jurisdiction and by granting remedies for creditors should a debtor default on their agreement, including the return of aircraft equipment on insolvency.
- 7.2 The Cape Town Convention only relates to aircraft equipment meeting the following criteria:
- aircraft which can carry at least eight people or 2,750 kilograms of cargo or
 - aircraft engines with thrust exceeding 1,750 pounds-force (7,800 N) or 550 horsepower (410 kW) or
 - helicopters carrying 5 or more passengers
- Light aircraft, such as those used by the general aviation community, are not covered by the Cape Town Convention. It does not extend to military, customs or police aircraft.
- 7.3 There are three accompanying protocols currently in existence – aircraft equipment; rolling railway stock and space objects. These Regulations only implement the Cape Town Convention as it relates to aircraft equipment. The Convention and the Protocol, although separate instruments, should be seen as one treaty as the Convention is only effective alongside a protocol and has no effect on its own.
- 7.4 The Cape Town Convention has two main provisions:
- (i) Providing for the creation, registration and prioritisation of an “international interest” (such as a mortgage or a lease)
 - (ii) Remedies available to creditors in the event of a default where an international interest exists
- 7.5 The Cape Town Convention contains a number of optional provisions which take the form of declarations, some of which fall within competence of the EU and some within the competence of the UK. The UK will adopt the approach set out in the EU Decision regarding matters within the competence of the EU. A consultation on how the UK should approach the optional provisions within the competence of the UK was held between June and August 2014. Further detail is set out below.
- 7.6 These Regulations affect airlines, aerospace manufacturers, asset finance lawyers and to a lesser extent insolvency practitioners. There has been widespread interest amongst the aerospace and aviation sectors and the aviation finance community in the ratification of the treaty by the UK.

- ***Consolidation***

- 7.7 Not applicable

8. Consultation outcome

- 8.1 A ten week consultation was held between June and August 2014 asking for views on how the UK should approach the optional provisions within UK competence. This followed a call for evidence in 2010 asking for views on whether the UK should ratify the Cape Town Convention.
- 8.2 29 responses were received to the consultation from aerospace manufacturers, airlines, asset finance lawyers and insolvency practitioners as well as trade bodies representing these groups and Eurocontrol, the EU wide body responsible for the collection of air navigation charges across Europe.
- 8.3 The majority of stakeholders supported the Government's proposed approach as a number of the optional provisions maintain remedies already available to creditors in the UK. The two areas which generated the majority of comments were:
- (i) Retention of non-consensual rights – this allows the Government and other public bodies to detain aircraft for debts owed for the provision of public services, such as non-payment of air navigation charges, a safety critical service. The majority of stakeholders raised concerns regarding the Civil Aviation Authority's ability to detain one aircraft to recover unpaid charges across the whole fleet, called the "*fleet lien*". However, a minority of stakeholders commented that the ability to collect unpaid charges is important as the charges fund the provision of air navigation charges across Europe, a safety critical service. The Government has decided to retain the ability to detain aircraft to recover unpaid charges for the provision of public services in order to fund air navigation services. If the Government cannot effectively collect unpaid charges, the funding gap is likely to be passed on to airlines that do pay their charges.
 - (ii) Whether the UK should require an insolvency practitioner in an administration or a voluntary arrangement either to return an aircraft or pay off defaults and agree to keep up with future repayments at the end of a specified waiting period. The majority of stakeholders supported the adoption of Alternative A in the UK with a waiting period of 60 days citing this as the most important provision economically for UK airlines. The Government is amending domestic insolvency law to adopt the provisions of Alternative A.
- 8.4 Following the consultation, the UK is intending to make the following declarations:

Convention

- (i) Article 39(1)(a) – Declaration that “all categories of non-consensual rights or interests (other than a non-consensual right to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside of insolvency proceedings”
- (ii) Article 39(1)(b) – Declaration that “the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider

- directly relating to those services in respect of that object or another object” are unaffected
- (iii) Article 39(4) – Rights or interests covered by the declaration under article 39(1)(a) “shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession”
 - (iv) Article 53 – The relevant courts with jurisdiction are the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland
 - (v) Article 54(2) – Declaration that “any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised without leave of the court”

Protocol

- (i) Article XXX(1) – Declaration that the UK will allow and recognise the use of an Irrevocable De-registration and Export Request Authorisation issued by a debtor.

In addition, the UK will adopt the provisions of “*Alternative A*” under Article XI of the Protocol. This requires an insolvency practitioner to either give up possession of an aircraft, helicopter or aircraft engine to a holder of an international interest after 60 days of an insolvency related event (or earlier if provided for under national law) or to cure all defaults and agree to keep up with on-going obligations under the agreement.

- 8.5 If the UK adopts a certain combination of declarations, UK airlines may be eligible to receive a discount of up to 10% from Export Credit Agencies (ECAs) (this is at the discretion of ECAs). The Government’s intention is to make the relevant declarations. This was supported by the majority of respondents to the consultation. However, since not all airlines are eligible for or will be granted export credit support, not all airlines will benefit from this reduction in the premium of export credit support.
- 8.6 A more detailed analysis of the consultation responses can be found in the response to the consultation and impact assessment published on 26th February 2015.

9. Guidance

- 9.1 The Department for Business, Innovation and Skills will publish guidance before the treaty comes into force to aid stakeholders in understanding the Regulations. The guidance will provide stakeholders with information on how to register international interests with the International Registry.

10. Impact

- 10.1 The impact on business is set out in detail in the Impact Assessment. These Regulations are expected to result in a zero net cost for business. It is not mandatory for businesses to use the provisions of the treaty and therefore business is only expected to use the provisions of the treaty if it is in their interests to do so. There is no expected impact on charities or the voluntary sector.

10.2 The impact on the public sector is set out in the Impact Assessment. There is an expected impact on the Civil Aviation Authority (CAA) of a reduction in income of £18,700-£140,250 per annum if businesses choose to register their interests with the International Registry rather than the National Register of Aircraft Mortgages maintained by the CAA.

10.3 The Impact Assessment is attached to this explanatory memorandum

11. Regulating small business

11.1 The legislation applies to small and micro business. Since the aim of the treaty is to reduce the cost to business of raising aircraft finance, excluding small and micro businesses from regulations to ratify the treaty would prevent them from benefitting from a reduction in the cost of finance. If small and micro businesses were excluded from these Regulations, they would pay a proportionately higher cost for aircraft finance compared with medium and large businesses. The number of small and micro businesses involved in the aircraft finance industry which would be affected by the Regulations is expected to be small.

12. Monitoring & review

12.1 There will be a period of 5 years, from the date that the Regulations are made, when the effect of the Regulations will be reviewed. The Secretary of State will conduct this review and produce a report, to lay before Parliament, that will review the objectives of the Regulations and detail to what extent those objectives have been met.

13. Contact

Hayley Gowen at the Department for Business, Innovation and Skills, Tel: 020 7215 6096 or email: Hayley.gowen@bis.gsi.gov.uk can answer any queries regarding the instrument.