

THE ACCESSION OF THE STATE OF QATAR TO THE CAPE TOWN CONVENTION

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WHAT IS THE CAPE TOWN CONVENTION?

The Convention on International Interests in Mobile Equipment (the Cape Town Convention) was introduced with the principal objective of facilitating, at a global level, the efficient financing and leasing of airframes, helicopters, and aircraft engines (Aircraft). Prior to the introduction of the Cape Town Convention, creditors often had difficulty obtaining secure and enforceable rights in an event of default scenario, due to the moveable nature of Aircraft. The Cape Town Convention brought a greater degree of certainty, as it established an internationally adopted legal regime with standardized remedies and clear insolvency practices. The regime now plays a key role in facilitating the acquisition and financing of Aircraft by reducing transaction risk and enhancing commercial predictability, which ultimately results in reduced costs for all parties involved.

The State of Qatar acceded to the Cape Town Convention on 8 January 2020 and by virtue of Emiri Decree Number 52 of 2020, published under the Official Gazette issue No.12 dated 16 July 2020, the Cape Town Convention is enforceable under Qatari national law as of 16 June 2020. This article seeks to consider the principal legal and practical implications of their accession, as well as the economic benefits for entities operating in the State of Qatar.

THE BENEFITS OF THE STATE OF QATAR'S ACCESSION TO THE CAPE TOWN CONVENTION

The Cape Town Convention aims to reduce risk and provide broad and mutual economic benefits for all interested parties by establishing:

1. An internationally recognized system of “international interests” establishing clear rules governing Aircraft transactions; and
2. A standardized set of remedies in the event of a default, affording creditors more certainty of remedy and repossession.

Standardized remedies

Having standardized remedies is particularly important for creditors because, upon default, Aircraft become extremely high-value, nonperforming assets that may drop in value quickly if improperly maintained. The standardized remedies that are available under the Cape Town Convention in an event of default by a debtor include: (1) taking possession or control of the Aircraft, (2) the sale or granting a lease of the Aircraft, and (3) collecting or receiving any income or profits arising from the management or use of the Aircraft. It is crucial that

the creditor (or similarly interested party) has adequate and readily enforceable default remedies that can be utilized expeditiously on an event of default, and the State of Qatar's accession to the Cape Town Convention now affords creditors access to such remedies.

The standardized remedies under the regime undoubtedly reduce the level of risk for creditors, as they offer predictable, transparent solutions. This reduces the risk profile of Aircraft transactions in the State of Qatar and enables creditors to offer reduced financing costs, thereby increasing the accessibility of Aircraft financing.

Insolvency proceedings

A key benefit that the State of Qatar's accession to the Cape Town Convention affords creditors is greater protection in insolvency proceedings. Under the Aircraft Protocol to the Cape Town Convention (the Protocol), each contracting state has the option to make a declaration and choose between two alternatives that will guide the insolvency process relating to Aircraft - "Alternative A" and "Alternative B". The State of Qatar has adopted "Alternative A" which provides various advantages to the secured creditor, as it provides more in-depth protection than would otherwise be available, both pre-accession and under the "Alternative B" regime.

Under "Alternative A," on the occurrence of an insolvency-related event, there will be a 60-day waiting period for an asset to be returned to the creditor or for the relevant default to be cured. It is important to note that there is also an automatic obligation on the debtor to preserve the Aircraft and maintain it and its value. This provides creditors a defined timetable as to when they can retake possession of the Aircraft and ultimately brings certainty, speed and reduced costs to the repossession process. As a result of this reduced risk in the transaction, this can equate to reduced funding costs for an airline or aircraft operator. A number of contracting states have been added to the list of countries that qualify for Cape Town Convention discounts in line with the OECD's Aircraft Sector Understanding (ASU). The ASU is an OECD agreement whereby airlines from contracting states to the Cape Town Convention may be eligible for a discount of up to 10 percent on the premium of export finance provided by Export Credit Agencies. By adopting the "Alternative A" regime, the State of Qatar has asserted its commitment to the Aircraft leasing and financing industry and has brought its insolvency regime for Aircraft in line with many other jurisdictions, including that of Ireland, the United Kingdom, and the United States of America.

Irrevocable Deregistration and Export Request Authorization (IDERA)

The State of Qatar has made a declaration under Article XXX(1) in respect of the Protocol that its aircraft registry and the Qatar Civil Aviation Authority will allow the holder of a valid IDERA to de-register and export an aircraft from its territory on a default. This is another integral component of the overall suite of remedies afforded to a creditor by the Cape Town Convention, as any delay in achieving deregistration can frustrate any remarketing effort and incur additional legal costs.

WHAT DECLARATIONS HAS THE STATE OF QATAR MADE?

A principal objective of the Cape Town Convention is to balance the need for an internationally recognized and effective regime with the autonomy of the contracting state. As such, the Cape Town Convention incorporates a declaration-based system, whereby the contracting state can choose which parts will be incorporated. This declarations-based system addresses the three principal concerns of contracting states: (1) the protection of national interests, (2) preservation of legal traditions, and (3) control over public policy concerns.

The declarations that have been made by the State of Qatar are listed below.

Declaration under Article 39.1(a)

The Cape Town Convention allows contracting states to declare categories of nonconsensual rights or interests which under the contracting state's law have priority over a registered international interest. The State of Qatar has elected that the following nonconsensual rights will have priority:

- The right to seize equipment for the benefit of employees of an air carrier following the nonpayment of salaries starting from the date of the announcement of a breach of the contract for financing or leasing the subject;
- The right to seize equipment, rights, or rights of an entity affiliated with the State of Qatar following taxes or unpaid fees from the date of the announcement of a breach of contract to finance or lease the subject matter of the right; and
- The right to seize equipment for the benefit of someone who repairs something and keeps it in their possession by handing it over, in return for the services, what it has been accomplished and the added value tax of that object.

The rights listed above will not need to be registered in order for them to take priority and, additionally, rights that fall within these categories that predate the State of Qatar acceding to the Cape Town Convention will also be treated as a priority interest.

Declaration under Article 39.1(b)

Through its declaration under Article 39.1(b), the State of Qatar reserved the right of an entity affiliated with the State of Qatar, an intergovernmental organization, or any other private body that is concerned with public services to withhold or detain anything in accordance with its laws in order to pay amounts due to the State of Qatar. Notably, any state-owned airlines are likely to benefit from this declaration, as they may be regarded as “an entity affiliated with the state.”

Declaration under Article 40

Article 40 concerns nonconsensual rights or interests that may be registered under the Cape Town Convention. The State of Qatar has specified that the following nonconsensual rights can be registered as if they were an international guarantee and must be regulated accordingly:

- The rights of a person holding a court order allowing the seizure of something belonging to an airplane in implementation of a court ruling;
- The right to pensions for the benefit of employees when the pending salaries are not paid before the announcement of the breach of a contract to finance or lease the subject of the right;
- The right to seize equipment or other rights for a state entity related to taxes or unpaid fees prior to the date of the announcement of the breach of a contract for financing or leasing the subject of the right; and
- All other nonconsensual rights and guarantees related to unsatisfaction that, under the law of the State of Qatar, have priority over the rights of those with a guaranteed debt.

The significance of this for businesses based in the State of Qatar is that the nonconsensual rights and interests listed above will benefit from the same regime as international interests under the Cape Town Convention.

Declaration under Article 53

Under Article 53, the State of Qatar has elected that local courts in the State of Qatar will have primary jurisdiction over any Cape Town Convention matter.¹

Declaration under Article 54(2)

Article 54(2) of the Cape Town Convention requires a contracting state to make a declaration as to whether remedies may be exercised only with leave of the court. The State of Qatar has declared that any remedies available to a creditor under the agreement may be made without a lawsuit and without court permission, unless expressly required by a provision to make such an application. In practice, this is extremely beneficial for creditors and other related parties, as they are able to exercise the remedies available under the Cape Town Convention without the permission of the courts.

THE IMPACT OF THE STATE OF QATAR ACCEDING TO THE CAPE TOWN CONVENTION

Accession to the Cape Town Convention will undoubtedly result in the State of Qatar being viewed as a favorable jurisdiction for Aircraft financing. It brings a greater level of predictability through standardized remedies and transparent insolvency practices for businesses based in the State of Qatar, as well as other international entities that are considering the most beneficial jurisdiction from which to operate. Airlines operating in the State of Qatar and other industry-related players can also benefit from access to the Qatar Financial Centre (the QFC), one of the world's leading onshore financial centers. Benefits for businesses that choose to establish themselves within the QFC include: (1) an attractive tax environment that includes 100 percent repatriation of profits and no withholding, dividends, or transaction tax; (2) the ability to trade in any currency; (3) and access to an English common law based judicial and regulatory regime that further enhances the desirability of operating from the QFC.

It is, of course, important to note that to benefit from this system, the international interests must be validly created under the treaty and interested parties must be diligent in meeting the requirements of the Cape Town Convention. Additionally, pre-existing interests that existed before the State of Qatar's accession will not benefit from the regime. It should be further highlighted that in order for airlines based in the State of Qatar to benefit from the increased availability and lower cost of financing, the Cape Town Convention must be robustly implemented. For example, to qualify for the discounts on the premium of export finance provided by Export Credit Agencies under the ASU, the contracting state must demonstrate that it has fully implemented the Cape Town Convention (including the qualifying declarations) into its laws and regulations in such a way that the Cape Town Convention commitments are appropriately translated into national law.

The provisions set out in the Cape Town Convention ultimately lower the cost and increase the availability of Aircraft financing. The resulting increased levels of legal predictability that should follow the implementation of the Cape Town Convention, coupled with access to the QFC, will certainly make the State of Qatar a more desirable jurisdiction and offer comfort and reassurance to creditors and other interested parties in this sector.

FOOTNOTES

¹ Note: this is based on K&L Gates' interpretation of the State of Qatar's declaration that primary jurisdiction would sit with the "total courts."

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