

## TAKING FLIGHT FROM CAPE TOWN: INCREASING ACCESS TO AIRCRAFT FINANCING

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### 1. INTRODUCTION

The need and demand for world travel has drastically risen over the last few decades<sup>1</sup> with developed and emerging markets alike scrambling to fill it. One of the largest obstacles has been for companies to secure financing for new aircraft. Following more than a decade of research, world experts created the Convention on International Interests in Mobile Equipment<sup>2</sup> (the “Cape Town Convention”) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment<sup>3</sup> (the “Aircraft Protocol”) in 2001, which have since been ratified by sixty<sup>4</sup> and fifty-four<sup>5</sup> states, respectively. These

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<sup>1</sup> In 2010 alone, global air travel was up nearly eight percent, with regions such as China and the Middle East seeing at least twenty percent growth. Martha White, *How can America's Biggest Exporter get Foreign Airlines to buy More Planes? And What can the U.S. Government do to Help?*, SLATE (Nov. 1, 2010, 10:30 AM), [http://www.slate.com/articles/business/exports/2010/11/the\\_boeing\\_co.html](http://www.slate.com/articles/business/exports/2010/11/the_boeing_co.html).

<sup>2</sup> Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. TREATY DOC. NO. 108-10 (2003), 2307 U.N.T.S. 285 [hereinafter Cape Town Convention].

<sup>3</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, S. TREATY DOC. NO. 108-10 (2003) [hereinafter Aircraft Protocol].

<sup>4</sup> *Status of the Convention on International Interests in Mobile Equipment*, UNIDROIT, <http://www.unidroit.org/status-2001capetown> [hereinafter UNIDROIT Status of the Convention].

<sup>5</sup> *Status of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, UNIDROIT, <http://www.unidroit.org/status-2001capetown-aircraft> (last visited Apr. 29, 2014) [hereinafter UNIDROIT Status of the Protocol].

two treaties established an asset-based international registry, whereby all international security interests in an aircraft can be registered if the debtor is situated in a member state.<sup>6</sup> This registry also has the benefit of establishing international priority in an aircraft.<sup>7</sup> The Cape Town Convention and Aircraft Protocol also provide for basic remedies and enforcement and stipulate which country's laws would apply in cases of default.<sup>8</sup> All of these factors lead to more transparency in the industry, which, in theory, will make financing much easier to secure.

In this Comment, I argue that the Cape Town Convention and Aircraft Protocol, as they continue to be implemented, are increasing access to capital and lowering the cost of aircraft financing around the world, but with the largest and most positive impact centered on emerging markets, such as the United Arab Emirates. This lower cost of debt is increasing countries' capability to expand their fleet size and is thereby boosting manufacturer's sales as well. The two treaties are therefore fulfilling their purpose, but still need to be promoted and implemented in non-member states.

This Comment is organized into several sections to explain how the Cape Town Convention and Aircraft Protocol are changing the environment for aircraft finance. Section 2 describes the aircraft finance climate leading up to the creation of the two treaties, particularly outlining the structural and legal barriers to cost-effective finance options, and how the Cape Town Convention and Aircraft Protocol sought to remedy those problems. Section 3 discusses various incentives that states and institutions implemented to entice more states to sign the treaties. Section 4 briefly explores the global quantitative and qualitative effects of the treaty as a whole and then presents a case study of how the Cape Town Convention and Aircraft Protocol have affected the ability of key players in the United Arab Emirates to secure aircraft financing. Finally, concluding remarks will discuss the overall effects of the two treaties.

## 2. LEADING UP TO CAPE TOWN

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<sup>6</sup> See Cape Town Convention, *supra* note 2, at art. 16; Aircraft Protocol, *supra* note 3, at ch. 3.

<sup>7</sup> Cape Town Convention, *supra* note 2, at art. 29.

<sup>8</sup> *Id.* at art. 8-15.

### 2.1. Economic Issues

Aircraft are extremely expensive and thus very difficult to finance. Boeing and Airbus jets range from around \$70 million to \$400 million<sup>9</sup> with a median price of about \$200 million per plane. During the 1980s and 1990s, not only was the price of a plane, let alone a whole fleet of aircraft, nearly prohibitive, but the fact that aircraft are mobile and move throughout many jurisdictions made it very difficult to determine the rights of debtors and creditors at any one time, presenting extra risks to potential lenders.<sup>10</sup>

One way for lenders to mitigate their risk exposure is through asset-based financing and obtaining a priority security interest. Asset-based lending differs from traditional bank loans in that the lender is less concerned about the borrower's historical cash flows and is more concerned about the debtor's borrowing base assets and what assets will be securing the loan. A security interest in the assets is a type of property interest that gives the holder of the interest certain preferential rights regarding the disposition of the secured assets.

Asset-based lending arrangements encourage creditors to offer more capital than other arrangements. Evidence of this comes from the vast swell of loaned capital in the 1950s, which followed the enactment of Article 9 of the Uniform Commercial Code.<sup>11</sup> Highly secured transactions arguably increase the level of credit to the private sector from about thirty percent of GDP to sixty percent of GDP<sup>12</sup> and decrease the cost of credit, with borrowers in

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<sup>9</sup> See *Commercial Airplanes: Jet Prices*, BOEING, <http://www.boeing.com/commercial/prices/index.html> (last visited Jan. 29, 2013) (listing the average Boeing jet prices); Press Release, Airbus, New Airbus Aircraft List Prices for 2013 (Jan. 17, 2013), available at <http://www.airbus.com/presscentre/pressreleases/press-release-detail/detail/new-airbus-aircraft-list-prices-for-2013/> (listing the average Airbus jet prices).

<sup>10</sup> See Colin Thaine, *Security Interests in Aircraft and Spare Parts I: England and Wales*, 15 INT'L BUS. LAW. 167, 169 (1987) ("The possibility of a financier's security interest being completely ignored by the courts of a jurisdiction where the aircraft happens to be when the security interest becomes enforceable is a spectre to haunt lenders, while the fact that there will be claims . . . which will take priority over the security interest is to be accepted with resignation.").

<sup>11</sup> Mark J. Sundahl, *The "Cape Town Approach": A New Method of Making International Law*, 44 COLUM. J. TRANSNAT'L L. 339, 345 (2006) (crediting Article 9 as a major reason for the American post-war boom).

<sup>12</sup> Mehnaz Safavian, Heywood Fleisig & Jevgenijs Steinbuks, *Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance*, VIEWPOINT: PUB.

industrial countries qualifying for nine times the amount of credit as their counterparts without collateral.<sup>13</sup> Furthermore, experts recognize these benefits particularly in the aircraft industry as evidenced by the fact that the Organisation for Economic Co-operation and Development's ("OECD") most recent Aircraft Sector Understanding only allows member states' credit agencies to provide export credits for non-asset backed transactions if they charge a higher minimum surcharge and, in the case of non-sovereign transactions, if they cap the value of official support to \$15 million.<sup>14</sup>

Despite the recognized benefits of asset-based lending, many developing countries still do not have an asset-based finance framework, making it difficult for new and existing airlines to obtain capital unless they can secure a sovereign guarantee. Sovereign guarantees, however, are also problematic because many developing nations do not have good credit scores and thus any loans the airlines can get would still be very expensive.<sup>15</sup> Not only that, but having the domestic government back low-credit airlines, lowers the overall credit rating of the country's government<sup>16</sup> leading to other economic issues.

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POL'Y FOR THE PRIVATE SECTOR, Mar. 2006, at 1, 3 fig.4 available at [https://openknowledge.worldbank.org/bitstream/handle/10986/11190/360790\\_Viewpoint1an1Fleisig1Steinbuks.pdf?sequence=1](https://openknowledge.worldbank.org/bitstream/handle/10986/11190/360790_Viewpoint1an1Fleisig1Steinbuks.pdf?sequence=1).

<sup>13</sup> Alejandro Alvarez de la Campa, *Increasing Access to Credit Through Reforming Secured Transactions in the MENA Region* 6 (The World Bank, Policy Research Working Paper No. 5613, Mar. 2011), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IB/2011/03/24/000158349\\_20110324112706/Rendered/PDF/WPS5613.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IB/2011/03/24/000158349_20110324112706/Rendered/PDF/WPS5613.pdf).

<sup>14</sup> OECD, *Sector Understanding on Export Credits for Civil Aircraft*, TAD/ASU(2011)1, at 33-34 (Sept. 1, 2011).

<sup>15</sup> See Anthony Saunders, Anand Srinivasan, Ingo Walter & Jeffrey Wool, *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT'L ECON. L. 309, 335 n.78 (1999) (noting that "even direct sovereign credit support of such airlines, is no assurance of low-cost financing").

<sup>16</sup> See Anthony Saunders, Anand Srinivasan & Ingo Walter, *Innovation in International Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention* 31-32 (Mar. 29, 2006) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=894027](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894027) (commenting on the Cape Town Convention's spillover benefits to governments whose balance sheets had previously been burdened with sovereign guarantees to domestic airlines). See also Lorne S. Clark, *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines*, 69 J. AIR L. & COM. 3, 17 (2004) (discussing how the Cape Town Convention is a "win-win"

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Furthermore, even in countries which permit asset-based lending, it has historically been difficult for creditors of new loans to determine whether or not other creditors already had a security interest in a given aircraft. The Chicago Convention of 1944 sought to mitigate this problem by requiring all its signatory states to establish some form of national registration system for aircraft.<sup>17</sup> However, these national registries were not always well maintained nor did they readily provide lenders with access to all the information they would need in one location. The U.K. Aircraft National Registry, for instance, only maintained a record “of aircraft nationality and not of title to or rights over an aircraft and furthermore [was] not open to public inspection” meaning that a creditor in a conditional sale transaction could be unprotected if a third party purchaser was able to rely on the English law principle of *nemo dat quod non habet*.<sup>18</sup> The national registration systems’ lack of accessibility led to increased transaction costs for lenders who could not be sure of superior claims to an aircraft.

The climate of the late 1980s and through the 1990s was one of both adequate supply and increased demand for new aircraft, but there was not sufficient access to cheap capital to exploit such favorable market conditions. Manufacturers generally prefer not to lease their own aircraft,<sup>19</sup> and since buyers and potential lessors did not have the desired funding, airlines weren’t able to obtain as many new aircraft as they desired. This upset manufacturers who felt the need to recoup their R&D costs from having just developed

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scenario for airlines, manufacturers, financial institutions, governments, and passengers).

<sup>17</sup> Convention on International Civil Aviation art. 16–21, Dec. 7, 1944, 61 Stat. 1180.

<sup>18</sup> Thaine, *supra* note 10, at 171. *Nemo dat quod non habet* means ‘no one can give that which he does not have’ and in practice prohibits an aircraft purchaser from acquiring title from someone who did not himself have title.

<sup>19</sup> Interview with Max Horsley, former Boeing financial analyst, in Phila., Pa. (Nov. 13, 2012). Although manufacturers prefer to not lease their planes, as planes sales contribute to liquidity more than plane leases, many manufacturers do maintain leasing and financing arms. For instance Boeing’s subsidiary Boeing Capital has a portfolio of approximately \$4.1 billion comprised of 270 commercial planes. *Aircraft Financial Services*, BOEING, <http://www.boeing.com/bcc/sitemap/af.html> (last visited Jan. 30, 2013). This \$4.1 billion portfolio is dwarfed, however, by Boeing’s \$52.9 billion revenues from commercial airplane sales for fiscal year 2013. Boeing Co., Annual Report (Form 10-K) 17 (Feb. 14, 2014).

newer, bigger, more fuel efficient planes.<sup>20</sup> There was consequently a huge push from manufacturers to find a solution to this capital shortage.<sup>21</sup>

## 2.2. Legal Issues

Many national legal regimes were and remain inadequate to support secure, asset-based financing, prohibiting some transactions and causing others to be much more expensive.<sup>22</sup> A recent World Bank study reports that less than fifty percent of private entities in the developing world have any access to credit, let alone sufficient credit.<sup>23</sup> To support the requirements of modern finance, countries must structurally allow for:

- (1) a non-possessory security interest, (2) clear priority rules coupled with a public registration system to establish priority, (3) prompt enforcement measures for the creditor marked by the ability of the creditor to take possession of and sell the collateral upon the debtor's default without a court order, and (4) the ability of a secured creditor to enforce a security interest despite the debtor's bankruptcy.<sup>24</sup>

Even countries that are generally thought to have good legal systems fell short of the requisite system for secured transactions.<sup>25</sup> For instance, Germany, like the United Kingdom, did not have a public registry that both provided notice and established priority.<sup>26</sup> Another shortcoming is evident in Bolivia's registry, which is chronological and thus requires a potential creditor to search the entire registry to discover any superior claims.<sup>27</sup> India also fails to

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<sup>20</sup> Sundahl, *supra* note 11, at 350-51 (referencing the new Boeing 787 Dreamliner and Airbus A380).

<sup>21</sup> *Id.*

<sup>22</sup> Charles W. Mooney, Jr., Introduction to the Cape Town Convention and the Aircraft Protocol: (One or Two Class Module for Law School Courses on International Business Transactions or International Financial Law) 12 (2012) (unpublished manuscript) (on file with author).

<sup>23</sup> Alvarez de la Campa, *supra* note 13, at 5.

<sup>24</sup> Sundahl, *supra* note 11, at 345.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

meet all of the requirements because it effectively requires a court order for repossession, which can be a lengthy process and nullify any value of a security interest.<sup>28</sup>

These problems were often not rectified due to the inexperience of local lawyers, scholars, and others who might otherwise have the capacity to bring about legal reform in their home countries regarding global transactions.<sup>29</sup> One potential solution to that problem could be to emulate the securities laws of another country.<sup>30</sup> However, that is much easier said than done as it does not take into consideration the unique circumstances of the host country or that the borrowed law may itself be in need of amendment.<sup>31</sup> Due to all of these discrepancies in securities laws and the lack of clear solutions, a study performed by the United Nations Commission on International Trade Law (“UNCITRAL”) recommended that UNCITRAL “consider the necessity . . . of framing rules in this field on an international level, especially for the international movement of goods subject to security interests.”<sup>32</sup>

The UNCITRAL study characterized the vast discrepancies in law as the “most prevalent problem” regarding security interests.<sup>33</sup> It further noted that most securities statutes were adopted prior to World War II and were consequently “not well suited to current

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<sup>27</sup> Heywood Fleisig, *The Power of Collateral*, VIEWPOINT: PUB. POL’Y FOR THE PRIVATE SECTOR, THE WORLD BANK, April 1995, at 1, 1, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11674/multi0page.pdf?sequence=1>.

<sup>28</sup> See Sundahl, *supra* note 11, at 346 (noting India’s lack of key elements that are needed for modern secured transaction law).

<sup>29</sup> See Sandeep Gopalan, *Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol*, 29 N.C. J. INT’L L. & COM. REG. 61, 64 (2003) (recognizing lawyers’ and scholars’ inexperience with open-market transactions as a barrier to reform).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 64–65.

<sup>32</sup> *Report of the Secretary-General: Study on Security Interests*, [1977] 8 Y.B. Int’l Trade L. Comm’n 173, U.N. Doc. A/CN.9/131. It should be noted that Drobnig was describing securities laws as a whole and in fact made several exclusions from his study (including aircraft) to limit the scope of his research. *Id.* That being said, this study is still useful as it is informative of the general securities’ market climate of the time.

<sup>33</sup> Ronald C.C. Cuming, *International Regulation of Aspects of Security Interests in Mobile Equipment*, 1 UNIF. L. REV. 63, 125 (1990).

patterns of trade and finance.”<sup>34</sup> The obscure, slow, and expensive processes that most creditors would have to go through in case of default drastically impeded creditors’ ability to efficiently resolve any disputes regarding recognition or enforcement of security interests,<sup>35</sup> leading to creditor uncertainty and high information costs.

In addition to the registration and priority issues, creditors also struggled to know what law would control their security interests at any given time, given the fact that aircraft are mobile. The traditional approach to such a problem was to apply the law of the *lex situs*, or the law of the location where the security interest was first created.<sup>36</sup> However, the *lex situs* approach is problematic when applied to mobile equipment because the location where the security interest was created is often “casual or fortuitous” and it is “only a matter of chance that the security interest . . . will be given sufficient recognition in [a] new *situs*.”<sup>37</sup> The Geneva Convention on the International Recognition of Rights in Aircraft solved this problem for its member states by deeming the country of registration as to nationality as the permanent *situs* of an aircraft.<sup>38</sup> However, it should be noted that “both the country where the aircraft is registered *and* the country where the owner or financier is enforcing its rights must be parties to the Convention before there is any benefit.”<sup>39</sup> There are currently eighty-nine countries that benefit from this rule by being party to the Geneva Convention.<sup>40</sup>

These risks regarding priority, notice, and enforceability made creditors less willing to offer financing for expensive mobile equipment, such as aircraft, than they otherwise would have been if the securities laws were more favorable and transparent. Despite the great need for unification, in 1980 UNCITRAL concluded that

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<sup>34</sup> *Id.*

<sup>35</sup> See Gopalan, *supra* note 29, at 62 (discussing the results of a survey of national securities laws).

<sup>36</sup> Thaine, *supra* note 10, at 168.

<sup>37</sup> Cuming, *supra* note 33, at 141.

<sup>38</sup> Convention on the International Recognition of Rights in Aircraft art. II(2), June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847.

<sup>39</sup> Thaine, *supra* note 10, at 168.

<sup>40</sup> For a list of member states, see the depositary’s website at [http://www.icao.int/secretariat/legal/List%20of%20Parties/Geneva\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Geneva_EN.pdf).

the area of law was too complex and that unification “was in all likelihood unattainable. . . . [and] that no further work should at present be carried out . . . and that the [issue] should no longer be accorded priority.”<sup>41</sup>

### 2.3. Solutions

Almost a decade later, most countries still had not reformed their domestic securities laws and the aforementioned economic and legal problems persisted. Following the 1988 International Institute for the Unification of Private Law (“UNIDROIT”) conference regarding the UNIDROIT Conventions on International Financial Leasing<sup>42</sup> and International Factoring,<sup>43</sup> UNIDROIT authorized Professor Ronald Cuming of the University of Saskatchewan to investigate the commercial need for a multilateral treaty regarding secured transactions in movable property.<sup>44</sup> The scope of the study was limited to movable equipment because movable equipment is not widely held by consumers or small businesses, and thus any potential treaty could avoid contending with public policy issues.<sup>45</sup> Moreover, there was a greater need for laws regulating movable equipment because very high value equipment (such as aircraft, train cars, etc.) is often moved across international borders, creating the aforementioned impediments to creditors having their rights recognized and enforced.<sup>46</sup> It was also widely believed that a more encompassing treaty would likely fail due to competing interests.<sup>47</sup> Cuming’s study, as well as a subsequent Working Group Report, indicated there was an

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<sup>41</sup> See *Report of the United Nations Commission on International Trade Law on the Work of Its Thirteenth Session*, [1980] 11 Y.B. Int’l Trade L. Comm’n 10-11, U.N. Doc. A/35/17.

<sup>42</sup> For the complete text, see UNIDROIT Convention on International Financial Leasing, May, 28, 1988, 27 I.L.M. 931.

<sup>43</sup> For the complete text, see UNIDROIT Convention on International Factoring, May, 28, 1988, 27 I.L.M. 943.

<sup>44</sup> Cuming, *supra* note 33, at 63-67.

<sup>45</sup> See Sundahl, *supra* note 11, at 349 (noting the enforcement of security interests against “vulnerable parties”—i.e. consumers and small business—as a contentious public policy issue). Sundahl notes that “broad public policy issues continue[d] to pose diplomatic challenges to the adoption of the Cape Town Convention, particularly with respect to space assets.” *Id.* at n.35.

<sup>46</sup> *Id.* at 349.

<sup>47</sup> Cuming, *supra* note 33, at 69.

immediate need for the unification of law and that such a convention would be feasible.<sup>48</sup> Although some scholarly work has suggested that the principal goal of this Convention was to further solve the *lex situs* issue,<sup>49</sup> a more scrutinizing look at the then current economic environment and the absence of adequate legal reform suggests that the Convention was in fact an attempt by the international arena to reform domestic securities and bankruptcy laws, regarding certain large-scale movable goods, that countries were not reforming on their own.

Over the course of a decade, negotiations stalled regarding some types of mobile equipment;<sup>50</sup> however, UNIDRIOT allowed the aircraft industry to forge onward independent of other industries. Thus the Cape Town Convention acts as an umbrella agreement which only comes into force as separate, but related, agreements are reached regarding each type of mobile equipment. The Cape Town Convention and each Protocol should be interpreted as a single instrument, with the Protocols controlling in the event of any inconsistencies.<sup>51</sup> The Aircraft Protocol was the first of the protocols to be signed<sup>52</sup> and has since been followed by the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock<sup>53</sup> in 2007 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets in 2012.<sup>54</sup>

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<sup>48</sup> *Id.* at 185–91; Sundahl, *supra* note 11, at 348–49.

<sup>49</sup> See generally Gopalan, *supra* note 29, at 61–64; Angie Boliver, Comment, *Square Pegs in a Round Hole? The Effects of the 2006 Cape Town Treaty Implementation and its Impact on Fractional Jet Ownership*, 72 J. AIR L. & COM. 529, 532–533 (2007) (describing the *lex situs* issue and how the Cape Town Convention was meant to rectify it).

<sup>50</sup> Sundahl, *supra* note 11, at 350.

<sup>51</sup> See Cape Town Convention, *supra* note 2, at art. 6 (“To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.”).

<sup>52</sup> The Aircraft Protocol was signed November 16, 2001, while the Rail Protocol and Space Protocol were signed February 23, 2007 and March 9, 2012, respectively.

<sup>53</sup> For full text, see Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, *opened for signature* Feb. 23, 2007, available at <http://www.unidroit.org/instruments/security-interests/rail-protocol>. The Rail Protocol has not yet entered into force.

<sup>54</sup> For full text, see Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, *opened for signature* Mar. 9,

The planning of the Cape Town Convention was unique not only because it allowed each industry (aircraft, rail, and space) to tailor international law to its specific needs, but also because diplomats and policy leaders actively engaged key industry participants. The International Air Transport Association (“IATA”), an international trade group of about 240 airlines;<sup>55</sup> the Aviation Workers Group (“AWG”), a conglomeration of aviation manufacturers, lessors, and financiers, including Boeing and Airbus; and the International Civil Aviation Organization (“ICAO”), a United Nations agency that aids in the development of international air transport, all participated in the Cape Town Convention negotiations.<sup>56</sup>

Through these extensive negotiations, the delegates sought to enhance economic benefits for all parties involved. Their method can be divided into four separate goals, namely to 1) infuse consistency and predictability into aircraft sales by creating uniform rules to govern creditors and debtors in contracting states, 2) create greater certainty that, upon default, creditors can swiftly exercise their remedies, 3) allow for more party autonomy, and 4) ensure that the treaty would be fully implemented.

### 2.3.1. Consistency and Predictability

To provide consistency and predictability to creditor claims, the Cape Town Convention created an International Registry wherein creditors can register all whole and fractional “international interests,” “prospective international interests,” and “registrable non-consensual rights and interests”<sup>57</sup> in aircraft.<sup>58</sup> These registrations are organized by manufacturer name, model, and serial number,<sup>59</sup> essentially creating an asset-based registration

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2012, available at <http://www.unidroit.org/instruments/security-interests/space-protocol>. The Space Protocol has not yet entered into force.

<sup>55</sup> *Fact Sheet: IATA – International Air Transport Association*, IATA, [http://www.iata.org/pressroom/facts\\_figures/fact\\_sheets/Pages/iata.aspx](http://www.iata.org/pressroom/facts_figures/fact_sheets/Pages/iata.aspx) (last updated Dec. 2013).

<sup>56</sup> Sundahl, *supra* note 11, at 350–54 (describing the entities that took part in the Convention negotiations).

<sup>57</sup> Cape Town Convention, *supra* note 2, at art. 16(1)(a).

<sup>58</sup> Aircraft Protocol, *supra* note 3, at art. III (incorporating the “interests” listed in the Cape Town Convention into the Aircraft Protocol).

<sup>59</sup> Aircraft Protocol, *supra* note 3, at art. VII (listing which characteristics of the aircraft must be described for registration purposes).

to mirror the asset-based financing of aircraft. Asset-based registration is a novel concept for many countries of the world which often register security interests either chronologically<sup>60</sup> or by debtor name.<sup>61</sup> Priority is established on a first to file basis.<sup>62</sup> This International Registry, although physically located in Ireland, is fully automated online and searchable by the public twenty-four hours a day, seven days a week.<sup>63</sup> The Cape Town Convention also provides predictability for debtors and lessees who are guaranteed quiet possession of the aircraft in the absence of default.<sup>64</sup>

### 2.3.2. Risk Mitigation Through Default Remedies

Additionally, the Cape Town Convention addresses risks of loss that creditors used to face by affirming that a creditor, subject to agreement by the debtor and any declaration made by a Contracting State, has four remedies upon default: repossession, sale or lease of the aircraft, collection of income or profits related to the aircraft,<sup>65</sup> and de-registration and export of the aircraft.<sup>66</sup> A creditor may even use self-help to repossess an aircraft without a court order, as long as it is not contrary to local law and the Contracting State did not pronounce in its declarations that non-judicially mandated self-help is unavailable.<sup>67</sup> Furthermore, if the

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<sup>60</sup> See Fleisig, *supra* note 27, at 2 (noting Bolivia as one country which registers security interests chronologically).

<sup>61</sup> U.C.C. § 9-519(c) (indicating that registration can be by debtor name).

<sup>62</sup> Cape Town Convention, *supra* note 2, at art. 29.

<sup>63</sup> The International Registry of Mobile Assets can be accessed at <https://www.internationalregistry.aero/irWeb/>.

<sup>64</sup> Aircraft Protocol, *supra* note 3, at art. XVI.

<sup>65</sup> Cape Town Convention, *supra* note 2, at art. 8.

<sup>66</sup> Aircraft Protocol, *supra* note 3, at art. IX.

<sup>67</sup> LEGAL ADVISORY PANEL OF THE AVIATION WORKING GRP., PRACTITIONER'S GUIDE TO THE CAPE TOWN CONVENTION AND THE AIRCRAFT PROTOCOL 108 (2011), available at <http://www.vedderprice.com/files/Publication/cae8e9fa-3b15-4220-b5ec-82ca407147bc/Presentation/PublicationAttachment/74f40f00-43da-42d8-8451aa7fe485e6a5/Practitioners%20Guide%20to%20the%20Cape%20Town%20Convention%20and%20the%20Aircraft%20Protocol.pdf> (postulating on the legality of various acts under the CTC). It is unlikely that a creditor would use self-help to repossess an aircraft as it is often logistically very difficult to fly away with a debtor's plane, however it is not unheard of. See generally Stephen Joiner, *Grab the Airplane and Go*, AIR & SPACE MAG., May 2010, <http://www.airspacemag.com/history-of-flight/Grab-the-Airplane-and-Go.html>.

creditor is required to go to court, the Cape Town Convention ensures it that it can obtain “speedy relief” from the court, pending final determination of its claim.<sup>68</sup> Not only does the Cape Town Convention provide effective remedies for creditors, but it also protects the debtor by ensuring the debtor’s quiet possession of the aircraft absent default<sup>69</sup> and by making some default provisions mandatory, such as allowing the debtor to discharge the security interest by paying in full after default and before the sale of the aircraft by the creditor.<sup>70</sup>

### 2.3.3. Provide for Party Autonomy

Although the Cape Town Convention somewhat limits party autonomy through the imposition of a few mandatory rules governing instances of payment default,<sup>71</sup> it is generally malleable and permits parties to treat its provisions as default provisions that can be contracted around. For example, Article VIII(3) of the Aircraft Protocol prescribes as a default that the parties’ contract will be governed by the law of the designated State, while Article VIII(2) permits parties to stipulate a different choice of law for their contract.<sup>72</sup> The AWG asserts that this choice of law freedom has already proven useful and has been “used in Mexican proceedings to support assertions as to the governing law in filed litigation papers.”<sup>73</sup> Additionally, the Cape Town Convention allows parties to agree as to what constitutes a default<sup>74</sup> and to any other type of remedy permitted by applicable law, as long as it is not inconsistent with any of the mandatory provisions of the

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<sup>68</sup> Cape Town Convention, *supra* note 2, at art. 13.

<sup>69</sup> See Aircraft Protocol, *supra* note 3, at art. XVI(1). See also Colin L. Powell, Letter of Submittal, S. TREATY DOC. NO. 108-10, at 15-16 (2003) (“Recognition of quiet possession rights, absent the Protocol, are less certain in some jurisdictions, and are important for airline and other users.”).

<sup>70</sup> Cape Town Convention, *supra* note 2, at art. 9(4). For the full range of mandatory default requirements, with only a few exceptions as listed in the Aircraft Protocol at art. 8(3), see Cape Town Convention, *supra* note 2, at art. 15.

<sup>71</sup> See *id.*

<sup>72</sup> Aircraft Protocol, *supra* note 3, at art. VIII.

<sup>73</sup> LEGAL ADVISORY PANEL OF THE AVIATION WORKING GRP., *supra* note 67, at 107.

<sup>74</sup> Cape Town Convention, *supra* note 2, at art. 11.

Convention.<sup>75</sup> This autonomy is an important facet of the Cape Town Convention as it empowers creditors by permitting them to mitigate their risks and thereby freeing them to offer more capital.

#### 2.3.4. Ensure Implementation of the Treaties

For the Cape Town Convention and Aircraft Protocol to positively influence the aviation market, they need to be fully implemented. In many countries, treaties take “direct effect” in that country upon ratification, although some countries require independent legislation to “incorporate” treaties into their national law.<sup>76</sup> The AWG, one of the key industry participants in the Cape Town Convention negotiations, asserts that the treaties must “(1) have the force of law in the Contracting States (i.e. a national court would be compelled to apply the Cape Town Convention), and (2) have priority over or supersede any conflicting law in such Contracting States.”<sup>77</sup> The Cape Town Convention represents part of a new shift in international law to create treaties that govern individual parties’ rights *vis a vis* other foreign individual parties, as opposed to nations rights against other nations.<sup>78</sup> This shift is important to note as it accentuates the need for full implementation. In order for creditors to have more consistency, predictability, and clarity of their rights, they depend on their rights being fully enforceable in each Member State, meaning that the other goals of the Cape Town Convention and Protocols cannot be achieved unless each State takes all necessary steps to fully implement the treaties.

### 3. INCENTIVES TO SIGN

The Cape Town Convention and Aircraft Protocol were signed in the wake of the September 11th terrorist attacks,<sup>79</sup> which

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<sup>75</sup> *Id.* at art. 12. The Official Commentary of the Cape Town Convention provides more detail as to what form these additional remedies may take, such as: breach of contract damages, interest, specific performance, etc. See generally SIR ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT: OFFICIAL COMMENTARY (rev. ed. 2008).

<sup>76</sup> LEGAL ADVISORY PANEL OF THE AVIATION WORKING GRP., *supra* note 67, at 47.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Cape Town Convention, *supra* note 2 (signed November 16, 2001); Aircraft Protocol, *supra* note 3 (signed November 16, 2001).

devastated the aviation industry emotionally, publicly, and monetarily. Aircraft orders were significantly down until about 2005.<sup>80</sup>

### 3.1. Monetary Incentives

Perhaps partially in response to a Boeing lobby of the U.S. government to stimulate their depressed growth and more importantly due to the perceived economic benefits of the ratification of the Cape Town Convention and Aircraft Protocol<sup>81</sup>, the U.S. Export-Import Bank announced in 2003 that it would offer a one-third reduction of its exposure fee for foreign buyers of U.S. commercial aircraft who were subject to the Cape Town Convention, pushing the minimum exposure fee as low as two percent.<sup>82</sup> This exposure fee reduction was repeatedly renewed through 2010,<sup>83</sup> and many airlines, particularly in developing

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<sup>80</sup> Custom reports showing Boeing aircraft orders can be created and downloaded from <http://active.boeing.com/commercial/orders/index.cfm?content=userdefinedselection.cfm&pageid=m15527>.

<sup>81</sup> Press Release, Export-Import Bank of the United States, Ex-Im Bank Extends Offer of Reduced Exposure Fee Through December 2010 for Buyers in Countries Implementing the Cape Town Treaty (Sept. 27, 2007), *available at* <http://www.exim.gov/newsandevents/releases/2007/ex-im-bank-extends-offer-of-reduced-exposure-fee-through-december-2010-for-buyers-in-countries-implementing-the-cape.cfm> (quoting the Ex-Im Bank Chairman and President as saying, "By extending our offer to reduce our exposure fee through 2010, Ex-Im Bank is reaffirming our commitment to the Cape Town Treaty. We firmly believe that this treaty and the international registry will result in greater predictability for aircraft financiers by significantly reducing the legal risks associated with cross-border, asset-backed aircraft financings and leases," and the Ex-Im Bank Vice President of Transportation as saying, "The Cape Town Treaty will expand sources of aircraft financing, increase the amount of financing and lower the cost for airlines. In turn, the lower financing cost will help airlines expand their fleets and buy more new aircraft, thereby supporting jobs in the aerospace industry").

<sup>82</sup> Press Release, Export-Import Bank of the United States, Ex-Im Bank Offers One-Third Reduction on its Exposure Fee on Export Financing for U.S. Large Commercial Aircraft (Jan. 31, 2003), *available at* <http://www.exim.gov/newsandevents/releases/2006andprior/2003/ex-im-bank-offers-one-third-reduction-of-its-exposure-fee-on-export-financing-for-u-s-large-commercial-aircraft.cfm>.

<sup>83</sup> Press Release, Export-Import Bank of the United States, Ex-Im Bank Renews Offer of One-Third Exposure Fee Reduction on Export Financing of U.S. Large Commercial Aircraft (Aug. 20, 2004), *available at* <http://www.exim.gov/newsandevents/releases/2006andprior/2004/ex-im-bank-renews-offer-of-one-third-exposure-fee-reduction-on-export-financing-of-u-s-large-commercial-aircraft.cfm>; Press Release, Export-Import Bank of the United States, Ex-Im Bank

countries, took advantage of it.<sup>84</sup> The U.S. Export-Import Bank eventually exchanged its self-assessed rate reduction for the Aircraft Sector Understandings (“ASU”) of 2007 and 2011 which act as “gentlemen’s agreements” among the OECD countries and stipulate the most favorable financial terms that an official export credit agency can offer.<sup>85</sup> The recent 2011 ASU permits export credit agencies to provide up to a ten percent discount from the applicable premium rate for qualifying Cape Town Convention

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Extends Favorable Financing of Major Aviation Purchases to Buyers in Countries Implementing Cape Town Treaty (Jul. 14, 2005), *available at* <http://www.exim.gov/newsandevents/releases/2006andprior/2005/ex-im-bank-extends-favorable-financing-of-major-aviation-purchases-to-buyers-in-countries-implementing-cape-town-treaty.cfm>; Press Release, Export-Import Bank of the United States, Ex-Im Bank Extends Offer of Reduced Exposure Fee Through March 2007 for Buyers in Countries Implementing the Cape Town Treaty (Sept. 7, 2006), *available at* <http://www.exim.gov/newsandevents/releases/2006andprior/2006/ex-im-bank-extends-offer-of-reduced-exposure-fee-through-march-2007-for-buyers-in-countries-implementing-the-cape-town.cfm>; Press Release, Export-Import Bank of the United States, Ex-Im Bank Extends Offer of Reduced Exposure Fee Through September 2007 for Buyers in Countries Implementing the Cape Town Treaty (Mar. 30, 2007), *available at* <http://www.exim.gov/newsandevents/releases/2007/ex-im-bank-extends-offer-of-reduced-exposure-fee-through-september-2007-for-buyers-in-countries-implementing-the-cape.cfm>; Press Release (Sept. 27, 2007), *supra* note 81.

<sup>84</sup> See Press Release, Export-Import Bank of the United States, Ex-Im Bank Approves Over \$1 Billion to Support Exports of Boeing 737-900ER Aircraft to Indonesia’s Lion Air (Apr. 3, 2009), *available at* <http://www.exim.gov/newsandevents/releases/2009/ex-im-bank-approves-over-1-billion-to-support-exports-of-boeing-737-900er-aircraft-to-indonesias-lion-air.cfm> (noting that eight countries, as of April 3, 2009, had taken advantage of the reduced exposure fee offered to countries who have ratified and implemented the Convention, including Angola, Ethiopia, Indonesia, Kenya, Oman, Pakistan, Panama, and Senegal); Press Release, Export-Import Bank of the United States, Ex-Im Bank Supports Aerospace Exports to Ethiopian Airlines, Signer of Cape Town Treaty (Dec. 16, 2003), *available at* <http://www.exim.gov/newsandevents/releases/2006andprior/2003/ex-im-bank-supports-aerospace-exports-to-ethiopian-airlines-signer-of-capetown-treaty-espao-ol.cfm> (announcing Ethiopian Airlines as the second country to ratify the Cape town Convention and the first country to take advantage of the reduced exposure fee).

<sup>85</sup> See generally ORG. FOR ECON. CO-OPERATION & DEV., SECTOR UNDERSTANDING ON EXPORT CREDITS FOR CIVIL AIRCRAFT 1 (2011) [hereinafter ASU]. See also Angel Gurría, OECD Secretary-General, Remarks at the Signing of the ASU 2007 in Rio de Janeiro (Jul. 30, 2007), *available at* <http://www.oecd.org/fr/general/aircraftsectorunderstandingonexportcreditsforcivilaircraft-remarksmadebyangelgurriaduringthesigningceremonyinbrazil.htm> (commenting on the significance and purpose of the new ASU).

Member States.<sup>86</sup> This discount rate provides a greater benefit to countries with low credit ratings as opposed to high credit ratings by a spread of about two percent in upfront costs.<sup>87</sup>

### 3.2. Socio-political Incentives

The AWG continues to promote the ratification and implementation of the Cape Town Convention around the world. In this regard, the AWG currently provides funding to the Cape Town Convention Academic Project, a joint collaboration between Oxford University and the University of Washington, intended to assess the benefits of the Cape Town Convention and enhance the understanding and implementation of it.<sup>88</sup> The AWG also works in collaboration with other entities to host seminars on understanding and implementing the Cape Town Convention in the host country.<sup>89</sup> To the extent that the AWG or this Academic Project have political influence, they will likely influence other countries.

Furthermore, as more countries sign the Cape Town Convention and Aircraft Protocol, other countries may experience peer pressure to sign as well. Additionally, aircraft manufacturers and financiers actively participated in the creation of the Cape Town Convention and support it.<sup>90</sup> Acquiescing to the terms partially negotiated by manufacturers and financiers will assuredly enhance purchasers' and governments' relationships with those parties. Furthermore, as one of the United States' largest exporters, Boeing enjoys a degree of influence within the U.S. Export-Import Bank, which provides loans and guarantees for a variety of U.S. exports.<sup>91</sup> This influence, although limited and indirect may, given the right circumstances, influence the Export-Import Bank's

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<sup>86</sup> ASU, *supra* note 85, at 30.

<sup>87</sup> AVIATION WORKING GRP., EXPLANATORY POWERPOINT: 2011 AIRCRAFT SECTOR Understanding - OVERVIEW AND SUMMARY 9, *available at* <http://www.awg.aero/projects/exportcreditrules/>.

<sup>88</sup> *Cape Town Convention Academic Project*, AVIATION WORKING GRP., <http://www.awg.aero/projects/capetownconvention> (last visited Jan. 31, 2013).

<sup>89</sup> *Upcoming and Recent Cape Town Convention Events*, AVIATION WORKING GRP., <http://www.awg.aero/projects/capetownconvention> (last visited Jan. 31, 2013).

<sup>90</sup> See Sundahl, *supra* note 11, at 350-54.

<sup>91</sup> See *About Us*, EXPORT IMPORT BANK OF THE UNITED STATES, <http://www.exim.gov/about/whatwedo/keyindustries/index.cfm> (last visited Feb. 6, 2014).

decision to make a loan to another country or the terms of a loan. The Export-Import Bank and its counterpart export credit agencies in other countries play a pivotal role in aircraft finance. Notably, during the recent recession and debt crisis, export credit agencies "increased their support for new aircraft from approximately 15–20 percent of total deliveries to 30–40 percent."<sup>92</sup> Ratifying the Cape Town Convention may help countries promote more business and a better relationship with foreign export credit agencies.

#### 4. EFFECTS OF THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL

##### 4.1. *General Effects*

Both Boeing and Airbus' current market outlooks for the period of 2013–2032 foresee about a five percent annual growth at a cost of over \$4 trillion, up from previous projections.<sup>93</sup> Airbus' outlook particularly acknowledged that emerging markets would represent fifty percent of new aircraft demand over the next twenty years.<sup>94</sup> Consequently, emerging markets are also the markets most in need of low-cost financing. As emerging markets acknowledge their own internal demand and realize that their own legal institutions are inadequate to support such demand, they seem to be ratifying the Convention at an increasing rate.<sup>95</sup>

Even though the Cape Town Convention is still relatively young, some form of its financial impact should be observable because "[f]inancial markets tend to be highly sensitive to regulatory changes."<sup>96</sup> A few professors have attempted to model the financial impact of the Cape Town Convention. It should be

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<sup>92</sup> Dean N. Gerber, *The 2011 Aircraft Sector Understanding: Calming the Turbulent Skies*, 24 AIR & SPACE LAW 1, 1 (2011).

<sup>93</sup> JOHN LEAHY, AIRBUS, GLOBAL MARKET FORECAST 2013-2032, at 2, 13 (2013), available at [http://www.airbus.com/company/market/forecast/?eID=dam\\_frontend\\_push&docID=33621](http://www.airbus.com/company/market/forecast/?eID=dam_frontend_push&docID=33621); Current Market Outlook 2013-2032, BOEING, <http://www.boeing.com/boeing/commercial/cmo/> (last visited Jan. 8, 2014).

<sup>94</sup> Leahy, *supra* note 93, at 8.

<sup>95</sup> Within the last two years alone, Bahrain, Belarus, Brazil, Canada, Congo, Fiji, Kuwait, Madagascar, Malawi, Mozambique, Myanmar, Togo, and Ukraine have all ratified the Aircraft Protocol and Cape Town Convention. See UNIDROIT Status of the Convention, *supra* note 4; UNIDROIT Status of the Protocol, *supra* note 5.

<sup>96</sup> Saunders et al., *supra* note 16, at 2.

noted that a quantitative financial impact analysis is complicated by the confidential nature of most financial transactions and that it is additionally difficult to establish a direct causation to any one thing, such as the Cape Town Convention, due to the complex structure of capital markets. Nonetheless, Professors Saunders, Srinivasan, and Walter attempted a financial impact analysis using standard interest rate benchmarks and found that upon adopting the Cape Town Convention and Aircraft Protocol, the average country in their analysis would aggregately save between \$7.6 billion and \$11.1 billion over a twenty-year period.<sup>97</sup> They further estimated that countries that ratified and implemented the Cape Town Convention and Aircraft Protocol would save between thirteen and twenty percent per dollar of principal borrowed on interest.<sup>98</sup> Professor Linetsky also conducted a statistical analysis and concluded that shorter repossession delays due to the Cape Town Convention could reduce the loss-given-default to a creditor on an aircraft loan by twenty-five to thirty percent.<sup>99</sup> He estimated that such a risk reduction would result in risk spreads for airlines, with airlines with low credit ratings benefiting the most.<sup>100</sup> He further concluded that borrowers with below a BBB- rating would experience between a one and two notch credit rating upgrade, which parallels the upgrade benefits witnessed in the United States following the enactment of Bankruptcy Code § 1110 due to the protections it provides to creditors.<sup>101</sup>

All of these statistics sound good on paper, but it is still uncertain how the Cape Town Convention and Aircraft Protocol will affect the markets in practice as there have not been many cases of default generally, and even fewer that have gone to court.

The Kingfisher incident is an exception. Following several late and non-payment of dues, the Indian Directorate General of Civil Aviation (“DGCA”) suspended Kingfisher Airlines’ license to continue operations in 2013<sup>102</sup> and, despite India’s ratification of

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<sup>97</sup> *Id.* at 30-31.

<sup>98</sup> *Id.* at 31.

<sup>99</sup> Vadim Linetsky, *Economic Benefits of the Cape Town Treaty 2* (Oct. 18, 2009) (unpublished manuscript), available at <http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 13.

<sup>102</sup> Anindya Upadhyay, *Govt Scraps Kingfisher’s Local Slots, International Flying Rights*, *ECON. TIMES* (Feb. 25, 2013), <http://economictimes.indiatimes.com/>

the Cape Town Convention in 2008, tax authorities impounded some of the aircraft<sup>103</sup> and the DGCA refused to deregister certain aircraft.<sup>104</sup> Germany's DVB Bank, the world's largest aircraft financier, filed suit against the DGCA and Kingfisher Airlines, demanding that two of its planes be deregistered.<sup>105</sup> Prior to the *DVB Aviation Finance* judgment, issued on April 8, 2013,<sup>106</sup> there was some skepticism regarding if and how the Delhi High Court would apply the Cape Town Convention, as the two aircraft in question were financed before India ratified the Cape Town Convention<sup>107</sup> and thus it was unclear whether the court would find the treaty to apply retroactively to transactions. This skepticism was apparently well founded as the Indian court did not so much as mention the Cape Town Convention in its opinion. However, in what may be viewed as a pragmatic judgment, the Delhi High Court did issue a writ of mandamus ordering the DGCA to de-register the aircraft and Kingfisher Airlines to furnish all necessary documents to DVB.<sup>108</sup>

However, even this small victory for the Indian aircraft financing market may be short-lived as a subsequent appeal of a separate, but factually similar, case completely disregarded an aircraft lessor's arguments for the application of the Cape Town Convention and instead issued an unfavorable judgment based on

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news/news-by-industry/transportation/airlines/-aviation/govt-scrap-kingfishers-local-slots-international-flying-rights/articleshow\_opt/18675785.cms.

<sup>103</sup> See Disha Kanwar, *ILFC Wants Aircraft Returned*, BUS. STANDARD (Dec. 21, 2012), [http://www.business-standard.com/article/companies/ilfc-wants-aircraft-returned-112122100120\\_1.html](http://www.business-standard.com/article/companies/ilfc-wants-aircraft-returned-112122100120_1.html) (quoting a civil aviation ministry official as saying, "[w]e will talk to tax authorities as . . . [the] Central Board of Excise and Customs can't impound planes leased to Kingfisher under the Cape Town convention").

<sup>104</sup> Andrea Rothman & Karthikeyan Sundaram, *ILFC Says Six Airbus A320s of Kingfisher 'Held Hostage'*, BLOOMBERG (Jan. 22, 2013, 9:11 AM), <http://www.bloomberg.com/news/2013-01-22/ilfc-says-six-airbus-a320s-of-kingfisher-held-hostage-.html>.

<sup>105</sup> Satish John & Anindya Upadhyay, *DVB Bank, World's Largest Aircraft Financier Drags DGCA to Court*, ECON. TIMES (Dec. 20, 2012, 4:24 AM), [http://articles.economictimes.indiatimes.com/2012-12-20/news/35933822\\_1\\_dvb-bank-aircraft-kingfisher-airlines](http://articles.economictimes.indiatimes.com/2012-12-20/news/35933822_1_dvb-bank-aircraft-kingfisher-airlines).

<sup>106</sup> *DVB Aviation Finance Asia PTE Ltd. v. Directorate General of Civil Aviation*, W.P. (C) 7661/2012 & CM No. 4208/2013 (Apr. 8, 2013) (Del.) [India], available at [http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=70783&yr=2013](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=70783&yr=2013).

<sup>107</sup> Rothman & Sundaram, *supra* note 104.

<sup>108</sup> *DVB Aviation*, CM No. 4208/2013, ¶ 11.

domestic laws. In *Directorate of Revenue Intelligence v. Corporate Air Craft Funding Co. LLC*, published May 10, 2013, the court held that the original jurisdiction judge had “erroneously issue[d] a Writ of Mandamus directing DGCA to de-register the aircraft” and stated that under domestic law “[n]ormally a Court would not direct a statutory authority [such as the DGCA] to exercise its discretion in a particular manner.”<sup>109</sup> The court then left it up to the DGCA to make a “reasoned decision” of whether or not to de-register the aircraft within four weeks of the lessor making written submission to support its application for de-registration.<sup>110</sup> Not only is the court further slowing down what should be a speedy process<sup>111</sup> by giving the DGCA an additional four weeks to resolve an already prolonged issue (the aircraft under dispute had been grounded for the past three years), but by blatantly refusing to address the lessor’s arguments regarding the applicability of the Cape Town Convention the court created additional risks and costs for the aircraft finance market as a whole.

India’s to-date in-adherence to the Cape Town Convention has drastically hurt its budding airline industry by scaring off future and current investors. Experts have recently reported that aircraft lessors are now “demand[ing] a premium to cover risks” in India and that they are “insisting on a one-year security deposit instead of the usual three-month cover in addition to a commitment to hire the aircraft for as long as nine years.”<sup>112</sup> These costs are being felt directly by various Indian airlines. Jet Airways, one of India’s main airlines, witnessed a jump of thirty-one percent in aircraft

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<sup>109</sup> *Directorate of Revenue Intelligence v. Corporate Air Craft Funding Co.*, LPA 226/2013 ¶ 22 (May 10, 2013) (Del.) [India].

<sup>110</sup> *Id.* ¶ 24.

<sup>111</sup> It is interesting to compare this three-year long process of aircraft de-registration in India with a much speedier process that occurred with regard to the Hungarian flagship carrier Malév which bankrupted in 2012. Although Hungary is not a party to the Cape Town Convention, Malév Airlines nevertheless upheld agreement terms requiring speedy relief for its main lessor, U.S.-based International Lease Finance Corporation, by beginning to return its fleet of aircraft to the lessor within hours of the airline’s announcement of its dissolution. See rkinga, *Malév Aircraft Find New Home in Ireland*, BUDAPEST TIMES (Feb. 10, 2012), <http://budapesttimes.hu/2012/02/10/malev-aircraft-find-new-home-in-ireland/>.

<sup>112</sup> Karthikeyan Sundaram, *Kingfisher Default Said to Raise Airline Costs: Corporate India*, BLOOMBERG (Sep. 20, 2013, 7:00 AM), <http://www.bloomberg.com/news/2013-09-19/kingfisher-default-said-to-raise-airline-costs-corporate-india.html>.

leasing costs for its June 30, 2013 quarter, as compared to the previous year's costs, and SpiceJet Ltd. witnessed a sixteen percent jump for the same period.<sup>113</sup> The Indian government is now considering easing some of its rules and policies to "ensure leasing companies are able to take possession of aircraft without any hurdles" and to "underscor[e] the supremacy of the Cape Town Convention over Indian laws."<sup>114</sup>

#### 4.2. Case Study of the United Arab Emirates

##### 4.2.1. The Legal Framework

The United Arab Emirates' (the "UAE") domestic legal framework regarding aircraft financing, creditors' rights, and bankruptcy are still being developed. This situation makes the UAE a prime country to study to see effects of the treaty. The UAE's securities and bankruptcy legal structure is primarily governed by the UAE Federal Commercial Transactions Law No. 18 of 1993 (Commercial Transactions Law) and the UAE Companies Law No. 8 of 1984 (Commercial Companies Law). Both of these laws are relatively untested, as many companies settle creditor claims out of court,<sup>115</sup> and thus a lot of uncertainty remains regarding legal interpretation and processes, including how long proceedings may take and how the court will exercise its discretion. In addition to this uncertainty, creditors may also have reason to be wary as the World Bank ranked the UAE 101st globally in terms of ease of recovering debt and noted that the recovery rate was only 29.4 cents on the U.S. dollar.<sup>116</sup> The UAE has been working since 2009 to revise its outdated insolvency laws and to make the legal environment friendlier to both debtors and creditors.<sup>117</sup> The Ministry of Finance finally submitted a completed draft to the legislative council in December 2013, but it is unclear

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> UAE Bankruptcy Law Draft May be Delayed Until End 2013, REUTERS (Dec. 5 2012, 8:25 AM), <http://www.reuters.com/article/2012/12/05/emirates-bankruptcy-idUSL5E8N54WC20121205>.

<sup>116</sup> Tom Arnold, *Bankruptcy Law to Bring FDI Boost*, THE NATIONAL, Feb. 1 2013, <http://www.thenational.ae/thenationalconversation/industry-insights/economics/bankruptcy-law-to-bring-fdi-boost>.

<sup>117</sup> UAE Bankruptcy Law Draft, *supra* note 114.

how long the council will review the draft and when or if it will be enacted.<sup>118</sup>

Not only do creditors experience difficulties generally, but aircraft financing presents its own unique problems because UAE law does not directly address either “the creation of mortgages over aircraft or the creation of a separate register of mortgages or other rights over aircraft.”<sup>119</sup> Despite this, lawyers have asserted that because “UAE law does classify an aircraft as a ‘movable asset’ and since the Commercial Code specifically provides for mortgages over movable assets, the generally accepted (although untested) view is that it is possible to create a valid security interest over an aircraft”<sup>120</sup> if certain requirements are met. Additionally, although the UAE’s General Civil Aviation Council does accept original copies of aircraft mortgages and keeps them on file, it does not have a public searchable registry for mortgages or other security interests in aircraft, making it difficult for potential creditors to determine priority interests in the aircraft.<sup>121</sup> Furthermore, the UAE General Civil Aviation Council had a historic practice of issuing letters of undertaking that it would not de-register or sell an aircraft without “the consent of certain specified parties, such as the owner, the lessor or a mortgagee.”<sup>122</sup> This practice exposed creditors, holding aircraft mortgages registered with the General Civil Aviation Council, to the risk that in an event of default they may be blocked from de-registering or selling the aircraft if a specified party withheld its consent or if there was an on-going dispute regarding the aircraft.<sup>123</sup> Finally, UAE law does not dictate priority rankings for competing security

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<sup>118</sup> John Everington, *UAE Makes Progress on New Insolvency Laws*, THE NATIONAL, Dec. 21, 2013, <http://www.thenational.ae/business/industry-insights/economics/uae-makes-progress-on-new-insolvency-laws>.

<sup>119</sup> Peter Caley, *The United Arab Emirates and the Cape Town Convention*, AIRFINANCE J., Mar. 2009, at 1, 1.

<sup>120</sup> *Id.* (emphasis added). See also Civil Aviation Law, Fed. Law No. 20 of 1991 art. 5(1) (UAE) (“An aircraft is movable property . . . .”); Commercial Transactions Law, Fed. Law No. 18 of 1993 art. 164 (UAE) (“A commercial mortgage is that which is contracted on movable property in security of a commercial debt.”).

<sup>121</sup> Caley, *supra* note 118, at 2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

interests, leaving creditors uncertain as to whether they would actually be able to recover their claim.<sup>124</sup>

Following the UAE's ratification of the Cape Town Convention and Aircraft Protocol on August 1, 2008,<sup>125</sup> some of these issues have been resolved. For instance, creditors can now register their security interests in aircraft in the International Registry<sup>126</sup> and search the International Registry for prior claims.<sup>127</sup> The Cape Town Convention assures creditors that their registered interest has "priority over any other interest subsequently registered and over an unregistered interest."<sup>128</sup> However, creditors should bear in mind that some non-consensual rights or interests may still take precedence over their interests such as "liens in favour of airlines workers for unpaid wages . . . ; liens . . . relating to unpaid taxes . . . [; and] liens in favour of repairers of an [aircraft]."<sup>129</sup> Concerning the de-registration issue, the UAE made a declaration pursuant to Article XXX(1) of the Aircraft Protocol<sup>130</sup> meaning that the General Civil Aviation Council will now, in principle, de-register an aircraft immediately if an Irrevocable De-Registration and Export Request Authorisation ("IDERA") regarding that aircraft has been filed with it. De-registration would be allowed regardless of whether there was an on-going dispute over the aircraft, which is contrary to previous UAE law.<sup>131</sup> Despite all of these elucidations, it is still unclear how quickly a creditor would be able to exercise his remedies under the Cape Town Convention, as the UAE declared that any available remedies may only be exercised with leave of the court.<sup>132</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> See *supra* notes 4 and 5 and accompanying texts.

<sup>126</sup> Cape Town Convention, *supra* note 2, at arts. 18–20.

<sup>127</sup> *Id.* at art. 22.

<sup>128</sup> *Id.* at art. 29(1).

<sup>129</sup> Declarations Lodged by the United Arab Emirates Under the Cape Town Convention at the Time of the Deposit of its Instrument of Accession in Respect Thereof, *Form No. 1 (Specific Opt-in Declarations Under Article 39(1)(a))*, Aug. 1, 2008, available at <http://www.unidroit.org/component/content/article?id=494:declarations-lodged-by-the-united-arab-emirates-under-the-cape-town-convention-at-the-time-of-the-deposit-of-its-instrument-of-accession-in-respect-thereof> [hereinafter *Declarations*].

<sup>130</sup> UNIDROIT Status of the Protocol, *supra* note 5.

<sup>131</sup> Caley, *supra* note 118, at 2.

<sup>132</sup> *Declarations*, *supra* note 128.

The UAE also adopted Alternative A of the Aircraft Protocol and set the waiting period to sixty days.<sup>133</sup> Alternative A states that upon an insolvency-related event the creditor or lessor will either be given possession of the aircraft or all obligations regarding it will be settled no later than the end of the waiting period.<sup>134</sup> Alternative A and the UAE's sixty day waiting period were based on and are substantially similar to § 1110 of the U.S. Federal Bankruptcy Code.<sup>135</sup> However, Alternative A, as applied in the UAE, is still untested, and thus it remains unclear whether it truly will be implemented in the same manner as U.S. § 1110.

#### 4.2.2. Airlines and Financing

The UAE has two major airlines—Etihad, which was founded in 2003 and is owned by the government of Abu Dhabi,<sup>136</sup> and Emirates, which began in 1985 and is owned by the government of Dubai—and a few smaller airlines.<sup>137</sup> The Cape Town Convention and Aircraft Protocol entered into force in the UAE August 1, 2008.<sup>138</sup> That same year, Etihad executives attended the Farnborough International Air Show and placed the largest aircraft order in aviation history at that time, with 100 firm orders, 55 options, and 50 purchase rights.<sup>139</sup> In 2008, Etihad only had 42 aircraft.<sup>140</sup> It now has 83 aircraft with 76 more deliveries

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<sup>133</sup> *Id.* Alternative A is the stronger and less discretionary of the two options and provides the creditor and the airline with “a clear timetable during which they can negotiate the return or retention of the aircraft.” Jeffrey Wool & Andrew Littlejohns, *Cape Town Treaty in the European Context: The Case for Alternative A, Article XI of the Aircraft Protocol*, AIRFINANCE ANNUAL, 2007/2008, at 1, 1, available at <http://www.awg.aero/assets/docs/capetowntreatyinthe%20europeancontext.pdf>.

<sup>134</sup> Aircraft Protocol, *supra* note 3, at art. XI.

<sup>135</sup> See 11 U.S.C. § 1110 (2006) (granting a secured party “the right to take possession [of the aircraft] and to enforce [its] other rights and remedies” if the debt obligation is not cured within 60 days).

<sup>136</sup> *About Us*, ETIHAD AIRWAYS, <http://www.etihadairways.com/en-us/about-us/> (last visited Feb. 16, 2014).

<sup>137</sup> *The Emirates Story*, EMIRATES, [http://www.emirates.com/us/english/about/the\\_emirates\\_story.aspx](http://www.emirates.com/us/english/about/the_emirates_story.aspx) (last visited Feb. 16, 2014).

<sup>138</sup> UNIDROIT Status of the Protocol, *supra* note 5.

<sup>139</sup> *Our Story: Our History*, ETIHAD AIRWAYS, <http://www.etihad.com/en/about-us/our-story/> (last visited Feb. 16, 2014).

<sup>140</sup> *Facts and Figures*, ETIHAD AIRWAYS, Issue 7, Sept. 2009, at 1, 8, available at [http://www.etihadmediacentre.com/assets/89327434/files/Corporate\\_Facts\\_and\\_figures-English.pdf](http://www.etihadmediacentre.com/assets/89327434/files/Corporate_Facts_and_figures-English.pdf).

anticipated by 2020.<sup>141</sup> Etihad's large order was strategically placed at a time when it would be able to take advantage of the U.S. Export-Import Bank's reduced fee reduction. Although there have been many accusations that Etihad, along with the other UAE national carriers, receives subsidies and sovereign guarantees from their local governments, Etihad CEO James Hogan affirms that the airline raises debt entirely on its own, including from the U.S. Export-Import Bank and a syndicate of forty other banks.<sup>142</sup>

Emirates Airlines was less fortunate in terms of taking advantage of the U.S. Export-Import Bank's self-imposed fee reduction incentive as it had just placed a large order in 2007,<sup>143</sup> and its subsequent large order in 2010 occurred after the Export-Import Bank's self-imposed fee reduction incentive lapsed.<sup>144</sup> Furthermore, the UAE has not fully complied with all of the ASU requirements that would allow it to receive the premium rate reductions post-2010;<sup>145</sup> Emirates was thus unable to take advantage of that perk as well. However, just because Emirates has not benefited from these 'advertised' perks does not mean it has not benefited from the UAE being a party to the Cape Town Convention and Aircraft Protocol.

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<sup>141</sup> ETIHAD AIRWAYS, FAST FACTS AND FIGURES Q3/2013, at 4 (2013), available at <http://www.etihad.com/Documents/PDFs/Corporate%20profile/Fast%20facts/Q3-2013-en.pdf>.

<sup>142</sup> See Cathy Buyck, *Interview: Etihad CEO James Hogan*, AIR TRANSPORT WORLD (Jan. 1, 2012), <http://atwonline.com/airline-finance-data/article/interview-etihad-ceo-james-hogan-0103> (quoting CEO James Hogan as stating "we don't get any form of subsidy; we get no letters of comfort or sovereign guarantees and we have to raise debt ourselves," and "only 15% of Etihad's aircraft financing is sourced from export credit guarantees, with the remainder financed in the commercial, leasing and Islamic markets").

<sup>143</sup> See Terry Maxon, *Emirates Places a Really Big Airplane Order*, DALLAS NEWS BUS. (Nov. 11, 2007, 10:57 AM), <http://aviationblog.dallasnews.com/2007/11/emirates-places-a-really-big-a.html/> (noting that Emirates Airlines signed contracts to purchase "\$34.9 billion MSRP worth of airplanes" in 2007).

<sup>144</sup> See Alex Delmar-Morgan, *Boeing Snares Huge Jet Order*, WALL ST. J. (Nov. 13, 2011), <http://online.wsj.com/article/SB10001424052970204323904577035442261606210.html> (reporting that Emirates placed the "largest commercial aircraft order in Boeing Co.'s history" in 2010).

<sup>145</sup> *Aircraft Sector Understanding: Cape Town Convention (CTC) Contracting Parties Qualifying for a CTC Discount*, OECD, <http://www.oecd.org/tad/exportcredits/ctc.htm> (last updated Nov. 16, 2012) (explaining that the "Aircraft Sector Understanding (ASU) provides for a discount from the minimum premium rate in the case a state fulfills [certain] conditions," and listing the states that qualify for the Cape Town Convention discount).

In 2012, Emirates closed a deal to lease four new Airbus A380-861s from Doric Nimrod Air Finance Alpha Limited.<sup>146</sup> Doric Alpha in turn needed financing to purchase those planes and successfully issued the first non-U.S. airline Enhanced Equipment Trust Certificates (“EETC”). This EETC was also the first of its kind to rely on the Cape Town Convention as opposed to § 1110 of the U.S. Bankruptcy Code.<sup>147</sup> EETCs are multi-tranche certificates, or bonds, issued by a trustee to investors.<sup>148</sup> Each tranche has a different risk-reward profile, with the senior certificates receiving a much higher credit rating.<sup>149</sup> The funds raised are used to buy the aircraft, which is then leased to the airline that ordered it.<sup>150</sup> Doric Alpha issued Class A and Class B Pass Through Certificates which Moody’s rated as A3 and Baa3 respectively.<sup>151</sup>

Moody’s considered five things in its assessment:

(i) the credit quality of the Lessee, Emirates; (ii) Moody’s opinion of the collateral protection of the Notes; (iii) the applicability of the Cape Town Convention . . . ; (iv) the credit support provided by the liquidity facilities; and (v) certain favorable characteristics of the Notes.<sup>152</sup>

Moody’s approvingly noted that the operating leases and equipment notes would be subject to the Cape Town Convention, yet it expressed concern over the absence of precedent for enforcement actions brought under the Convention in the UAE.<sup>153</sup>

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<sup>146</sup> Global Credit Research, *Rating Action: Moody’s Assigns A3 Rating to A-tranche of Doric Nimrod Air Finance Alpha’s 2012-1 EETC*, MOODY’S INVESTORS SERVICE (Jun. 21, 2012), [https://www.moodys.com/research/Moodys-assigns-A3-rating-to-A-tranche-of-Doric-Nimrod--PR\\_248921](https://www.moodys.com/research/Moodys-assigns-A3-rating-to-A-tranche-of-Doric-Nimrod--PR_248921).

<sup>147</sup> Press Release, DORIC, Award for Doric Alpha EETC (Jan. 29, 2013), available at [http://www.doric.com/fileadmin/Doric\\_Asset\\_Finance/Press\\_Releases/130129\\_doric\\_pressrelease\\_EETC\\_award.pdf](http://www.doric.com/fileadmin/Doric_Asset_Finance/Press_Releases/130129_doric_pressrelease_EETC_award.pdf).

<sup>148</sup> See PETER S. MORRELL, AIRLINE FINANCE 212 (3rd ed. 2007) (defining and explaining the nature of EETCs).

<sup>149</sup> Global Credit Research, *supra* note 145.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* The magazine Airline Economics noted that, “the A tranche was awarded with the highest rating post-financial crisis to any EETC, [so] Moody’s must have been confident in the quality of the lessee [Emirates] and the extent of the airline’s disclosure.” Victoria Tozer-Pennington, *No Limits*, AIRLINE ECON., Sept.–Oct. 2012, at 20, 22.

<sup>152</sup> Global Credit Research, *supra* note 145.

<sup>153</sup> *Id.*

However, after diligent consultation and analysis, Moody's extrapolated that Doric Alpha *would* be able to recover the aircraft in the event of default, mainly because of Dubai law's general respect for property rights.<sup>154</sup> This perception was largely based on a Clifford Chance legal opinion that "shows that . . . Alternative A of the Protocol is good and effective law in the UAE."<sup>155</sup> The Clifford Chance opinion also assured Moody's and investors that

although many aspects of Cape Town have not yet been tested in the UAE, there are other elements of Cape Town that have, such as the implementation of the use of IDERAs by the General Civil Aviation Authority in the UAE. Moreover, the fact that the UAE has adopted other international conventions, such as the Montreal Convention, in a manner that was applied consistently with the actual wording of the law as adopted in the UAE, showed precedent that the UAE has been true to its word.<sup>156</sup>

Moody's further analogized Dubai's potential future treatment of the Cape Town Convention to its treatment of the Dubai World restructuring and expressed its opinion that Dubai had adopted the Convention in good faith.<sup>157</sup>

Dubai World is the main investment vehicle for the emirate of Dubai. With the drastic fall in property values during 2009, Dubai World requested a six-month standstill from all creditors regarding its \$26 billion debt.<sup>158</sup> Some feared that this delay could lead to the largest government default since the 2001 Argentine debt crisis.<sup>159</sup> However, these fears were eventually assuaged when the Dubai government expressed its "keen interest . . . in preserving the

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<sup>154</sup> *Id.*

<sup>155</sup> Tozer-Pennington, *supra* note 150, at 24.

<sup>156</sup> *Id.*

<sup>157</sup> Global Credit Research, *supra* note 145.

<sup>158</sup> *Dubai World Announces Restructuring Plans*, GULFNEWS.COM (Dec. 1, 2009), <http://gulfnews.com/business/general/dubai-world-announces-restructuring-plans-1.542850>.

<sup>159</sup> *Could Dubai World's Debt Default Spark a Crisis in the Middle East and Beyond?*, KNOWLEDGE@WHARTON (Dec. 9, 2009), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2399>.

rights of Dubai World creditors<sup>160</sup> and issued Decree No. 57 of 2009, creating new insolvency regulations specifically for a Dubai World restructuring based on the laws of the Dubai International Financial Center and elements of U.S. Chapter 11.<sup>161</sup> Decree No. 57 of 2009 effectively eliminated a lot of the precedential uncertainty of UAE federal laws No. 18 of 1993 and No. 8 of 1984 and also offered much more favorable terms to Dubai World's creditors. This swift change in law represents the UAE's commitment to fostering an environment capable of attracting investors and suggests that, were Emirates to default, its creditors would still be treated well, without the hassle that DVB and other aircraft lessors have experienced in trying to recover their investments from India.

The capital markets do indeed view ratification of the Cape Town Convention and Aircraft Protocol as risk-mitigating factors and are accounting for that in credit ratings and interest rates. That is why the A tranche for the Doric Alpha and Emirates' 2012 deal received the highest of any EETC ratings post-financial crisis<sup>162</sup> and why the transaction was three times oversubscribed.<sup>163</sup> A year later, Doric Alpha and Emirates were able to secure an equally favorable credit rating for the acquisition of four more aircraft based on a similar Moody's analysis.<sup>164</sup>

## 5. CONCLUSION

Even with the recent recession, it still seems that more companies have cheaper and easier access to aircraft financing. The Cape Town Convention seems to be having a disproportionately positive effect on emerging market Member States,<sup>165</sup> where the demand for aircraft is increasing at a steeper

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<sup>160</sup> *Special Court for Dubai World Disputes*, KHALEEJ TIMES (Dec. 14, 2009), [http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/theuae/2009/December/theuae\\_December395.xml&section=theuae](http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/theuae/2009/December/theuae_December395.xml&section=theuae).

<sup>161</sup> *Bankruptcy and Corporate Rescue in the UAE: Overview and Observations*, LINKLATERS (July 15, 2010), <http://www.linklaters.com/Publications/Publication2051Newsletter/20100708/Pages/Bankruptcyandcorporaterescue.aspx>.

<sup>162</sup> Tozer-Pennington, *supra* note 150, at 22.

<sup>163</sup> Tozer-Pennington, *supra* note 150, at 20.

<sup>164</sup> *Rating Action: Moody's Rates DNA Alpha's EETC, Class A at A3, Class B at Baa3*, MOODY'S (June 24, 2013), [https://www.moody.com/research/Moodys-rates-DNA-Alphas-EETC-Class-A-at-A3-Class-PR\\_275801](https://www.moody.com/research/Moodys-rates-DNA-Alphas-EETC-Class-A-at-A3-Class-PR_275801).

<sup>165</sup> See generally Saunders et al., *supra* note 16.

rate and where the access to capital has been historically lower. The UAE in particular ratified the treaty just prior to placing one of the largest orders in aviation history, allowing Etihad to take advantage of the lower-cost debt.<sup>166</sup> Emirates has also successfully participated in the issuance of the first non-U.S. airline EETCs, largely due to the Cape Town Convention. Concerns regarding how local courts will interpret and uphold the treaty are becoming more imminent, as evidenced by the increasing costs to Indian airlines of aircraft leasing. However, this does not seem to toll the failure of Cape Town. Jamie Bullen, a senior reporter for the *Airfinance Journal*, noted that “peer pressure, potential loss of cheaper export credit financing and conventions in leases and financing . . . may make this less of an issue for many in the industry.”<sup>167</sup> Other countries have observed the Kingfisher fiasco and are well aware of the consequences of not abiding by treaty’s terms. India itself has begun considering legal reforms to ensure more forceful implementation of the treaty and that its terms supersede domestic laws. As more countries ratify and implement the Cape Town Convention and Aircraft Protocol, there will likely be an enormous cost savings at the world level, benefiting aircraft manufacturers with higher sales, airlines with cheaper debt to buy and lease aircraft, and the common passenger with increased ability to travel.

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<sup>166</sup> See *Etihad Places Order for up to 205 Aircraft*, ETIHAD AIRWAYS (July 14, 2008), [http://www.etihadmediacentre.com/file.php?f\\_ID=555](http://www.etihadmediacentre.com/file.php?f_ID=555).

<sup>167</sup> Jamie Bullen, *Cape Town’s Momentum*, AIRFINANCE J., Issue 256, Nov. 2012, at 248, 248.