

CTC in Europe: assessment of ratifications to date and implications of Brexit on the ratification by the UK

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Since the CTC first came into force in 2006, the rate of ratifications by European jurisdictions has dramatically accelerated. Seventeen jurisdictions forming part the European continent, including nine currently within the EU, are now Contracting States. Six of those have ratified within the past two years alone.

In ratifying the CTC, the EU has asserted competence in respect of those provisions regarding choice of law, jurisdiction and insolvency. That assertion, if correct, leaves the Member States unable to make declarations in respect of those matters and any ratification by a Member State will be effective in respect of those provisions of the CTC for which the EU does not have competence.

On 23 June 2016, a referendum in the United Kingdom on its continued membership of the EU resulted in a vote to leave. The departure of the UK from the EU raises the question of whether any further ratification is required from the UK, whether any new declarations will be required to be made by the UK and whether any new legislation will be required in the UK to ensure that the CTC remains in effect.

1 Introduction

In the ten years since the Convention on International Interests in Mobile Equipment (the 'Cape Town Convention') and the Protocol thereto on Matters Specific to Aircraft Equipment (the 'Protocol', and together the 'Convention') first came into force in 2006, they have been ratified by seventeen jurisdictions wholly or partly forming part of the European continent¹, of which nine are currently in the European Union² ('EU'). The EU has itself ratified the Convention as a 'Regional Economic Integration Organisation'.

This paper considers:

- (a) the ratification of the Convention by the EU;
- (b) the declarations made by each of the European Contracting States and their compliance or otherwise with the Qualifying Declarations³ under the Sector Understanding On Export Credits For Civil Aircraft of September, 2011 supplementary to The Arrangement On Officially Supported Export Credits ('ASU'); and

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Rasmus Mandøe Jensen and Mette Riber Rasmussen of Plesner, Denmark, Daniel Aquilina and Matthew Xerri of Ganado Advocates, Malta, Pál Sveinsson of Arntzen de Besche Advokatfirma AS, Norway, Maxim Astafiev, Deputy Director of Legal Support, S7 Group, Russia, Teresa Rodríguez de las Heras Ballell, Universidad Carlos III de Madrid, Spain, Henril Ossborn and Fredrik Christiansson of Advokatfirman Vinge KB, Sweden and Ivan Zievakov of Lexwell and Partners, Ukraine have all assisted with, and provided content for, this article. I am grateful for their invaluable assistance. Any errors are my responsibility.

¹ Albania, Belarus, Denmark, Gibraltar, Guernsey, Ireland, Latvia, Luxembourg, Malta, Norway, Russia, San Marino, Spain, Sweden, Turkey, Ukraine and the United Kingdom

² Denmark, Gibraltar, Ireland, Latvia, Luxembourg, Malta, Spain, Sweden and the United Kingdom

³ The 'Qualifying Declarations' are set out in Annex 1 to Appendix II to the ASU.

- (c) the ratification of the Convention by the United Kingdom ('UK').

On 23 June 2016, a referendum in the UK resulted in a vote to leave the European Union. This paper also considers the consequences of the UK's departure from the European Union ('Brexit') as regards its ratification of the Convention and its transposition into English law.

This article does not consider:

- (a) the ratification of the Convention by non-European dependencies of the United Kingdom (the Cayman Islands and, shortly, Bermuda) or the Netherlands (Aruba, the Caribbean Netherlands, Curaçao and Sint Maarten);
- (b) the imminent ratification of the Convention by the Isle of Man; or
- (c) Moldova (which has ratified the Cape Town Convention but not the Protocol).

2 The ratification of the Convention by the European Union

The EU ratified the Convention as a Regional Economic Integration Organisation ('REIO') on 29 April 2009 in accordance with Article 48 of the Cape Town Convention and Article XXVII (2) of the Protocol. Pursuant to those Articles:

- (a) the EU was entitled to ratify the Convention because it has competence over certain matters governed by it;
- (b) the EU has the rights and obligations of a Contracting State to the extent of that competence; and
- (c) the EU has made declarations⁴ (the 'EU Declarations') specifying the subject matter of that competence.

An important issue, discussed further in Section 5 below, is whether, the EU having established its competence over those matters, the Member States, when themselves individually ratifying the Convention, could have agreed to be bound by those provisions in their own right or whether their ratification extended only to the parts of the Convention in respect of which they retained competence.

The EU Declarations do not apply to Denmark which has negotiated an exemption from EU competence on the relevant subject areas as set out in the 'Protocol on the position of Denmark', which is annexed to the Treaty on European Union (the 'TEU'). The basis for Denmark's ratification of the Convention is, therefore, the same as for non-Member States.

In this section, I consider:

- (a) how the relative competences of the EU and the Member States are established under the relevant EU treaties;
- (b) the competences claimed by the EU in the EU Declarations; and
- (c) the actual declarations made by the EU as a consequence.

The division of competences between the EU and the Member States is set out in Part 1 of the Treaty on the Functioning of the European Union ('TFEU'). Competences may be either:

⁴ <http://www.unidroit.org/status-2001capetown?id=1658> and <http://www.unidroit.org/status-2001capetown-aircraft?id=1573>

- (a) exclusive competences, as set out in Article 3 TFEU. Exclusive competences include the customs union, competition policy, monetary policy for the Eurozone, the common fisheries policy and common commercial policy;
- (b) shared competences, as set out in Article 4 TFEU. Shared competences are extensive and include the areas of 'freedom, security and justice' (Article 4(j)), including:
 - (i) judicial co-operation in civil matters having cross-border implications (Article 81(1));
 - (ii) the mutual recognition and enforcement between Member States of judgments (Article 81.2(a)); and
 - (iii) the compatibility of rules applicable in Member States concerning conflict of laws and of jurisdiction (Article 81.2(c)); or
- (c) supporting competences, as set out Article 6 TFEU. These are areas where the EU may take action to support, co-ordinate or supplement the actions of Member States in areas such as industry, culture and tourism.

EU competences must also be exercised in accordance with the principles of subsidiarity and proportionality. The subsidiarity principle sets out that the EU should only act if the objectives of the proposed action cannot be sufficiently met by the Member States, and can be better achieved by the EU. The principle of proportionality is set out in Article 5(4)(1) TFEU which provides that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties.

The final rule determining the competence of the EU in any matter is Article 2(2) of TFEU which provides that the Member States may only legislate in an area of shared competence if the EU has not exercised its competence in that area (or if it has decided to cease exercising its competence).

The provisions of the Convention for which the EU claimed competence in the EU Declarations are matters of shared competence and, therefore, to the extent that the EU has already taken legislative action in respect of these, the Member States are unable independently to legislate for, or to make any declarations in respect of, those provisions.

In the EU Declarations, the EU specified that it had competence over matters (the 'EU Competences') which are the subject of:

- (a) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I')⁵;
- (b) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the 'Insolvency Regulation'); and
- (c) Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations ('Rome I'),

and, therefore, those provisions in the Convention dealing with such matters would take effect in the Member States in accordance with the EU Declarations at the same time as the Convention takes effect without the need for any further legislation. It follows that any subsequent ratification of the Convention by a Member State would not extend to these matters. I will consider this issue further, in the context of Brexit, in Section 5 below.

⁵ Since the date of the EU Declarations, Brussels I has been replaced by Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the 'Recast Brussels Regulation'). However, since all references to Brussels I in this paper relate to events before the date of the Recast Brussels Regulation, I have retained references to Brussels I and to the Articles of that Regulation.

The EU Declarations do not expressly specify which declarations required or permitted under the Convention fall to be made by the EU to the exclusion of the Member States as a consequence of the EU Competences. However, the EU did make a declaration under Article 55 of the Cape Town Convention (relating to relief pending final determination) to the effect that the Member States would only apply Articles 13 and 43 of the Cape Town Convention in accordance with Brussels I. It also declared that Article XXI of the Protocol (Modification of jurisdiction provisions) would not apply within the Member States, those issues again being reserved for Brussels I.

In respect of the Protocol, the EU expressly declined to make a declaration under any of:

- (a) Article XXX(1) concerning Article VIII (Choice of law);
- (b) Article XXX(2) as regards Article X (Modification of provisions regarding relief pending final determination);
- (c) Article XXX(3) as regards Article XI (Remedies on insolvency), whilst noting that the Member States 'keep their competence concerning the rules of substantive law concerning insolvency'; or
- (d) Article XXX(5) in respect of Article XXI (Modification of jurisdiction provisions).

The EU asserted its right to decide whether or not to make any declaration in respect of those Articles. That assertion of competence was based, in the case of Article XXX(1), on Rome I, in the case of Articles XXX(2) and (5) on Brussels I and, in the case of Article XXX(3), on the Insolvency Regulation. Consequently, the Member States, when ratifying the Protocol, are unable to make any declarations under those Articles. Whilst the declarations under Articles XXX(1), XXX(2) and XXX(5) clearly fall within the ambit of Rome I and Brussels I, the situation is less clear for that under Article XXX(3).

The question of where competence lies in respect of insolvency matters (and so, concretely, who is entitled to make a declaration under Article XXX(3) of the Protocol) is a complex one. Whilst the regulation and coordination of cross-border insolvency proceedings would be expected to fall within the category of judicial co-operation for the purposes of 4(j) TFEU (and so be shared competence), the issue is less clear for substantive insolvency law and domestic insolvency procedures where the principle of subsidiarity should prevail. The Insolvency Regulation itself does not address substantive insolvency laws relating (for example) to moratoria, such as those in Alternative A: rather it provides for recognition of jurisdiction and acceptance of proceedings. For example, the court of a Member State may no longer entertain insolvency proceedings in respect of entities whose centre of commercial interests is outside that Member State. It is therefore arguable that Article XI either:

- (a) is not EU Competence at all, on the basis of subsidiarity; or
- (b) even if it is shared competence, relates to substantive insolvency law - a matter on which the EU has not yet legislated, and so remains open for the Member States to address.

If the Member States do indeed retain their competence for rules of substantive law on insolvency as stated in the EU Declarations, that competence, by definition, extends not only to domestic legislation but also to the right to make a declaration under Article XXX(3). If, however, the EU is correct in asserting that a declaration under Article XXX(3) falls within an EU Competence, it necessarily follows from Article 2(2) TFEU that the Member States no longer have the right to legislate for Alternative A as a matter of substantive domestic law.

The better view is that, for the reasons stated above, the competence in respect of Alternative A remains with the Member States; that they are at liberty to make a declaration under Article XXX(3) or to amend their substantive insolvency laws; and that the approach taken by the EU on this issue is misguided.

In fact, apart from Luxembourg (which has made a declaration in respect of Alternative A), the Member States wishing to adopt Alternative A-style remedies have amended their substantive laws on insolvency to achieve this.

3 Summary of Ratifications

The seventeen European jurisdictions that have ratified the Convention can be divided into three categories:

- (a) those that are currently listed on the list maintained by the OECD in accordance with Appendix II to the ASU (the 'OECD List'), allowing for a discount from the minimum premium rate for export credits;
- (b) those that have ratified the Convention and made the Qualifying Declarations, but whose inclusion on the OECD List is yet to be agreed; and
- (c) those that have ratified the Convention but have not made the Qualifying Declarations.

Five European jurisdictions are on the OECD List: Luxembourg, Malta, Norway, Sweden and Turkey.

- (a) Luxembourg ratified the Convention in June 2008. Of the EU Member States that have ratified the Cape Town Convention, Luxembourg is the only one to have made a declaration under Article XXX(3) adopting Alternative A (the other Member States having opted either to amend their substantive laws appropriately or not to adopt the Alternative A regime). Notwithstanding the EU's claim to exclusive competence in respect of that declaration, Luxembourg's declaration should still be valid for the reasons set out in Section 2 above.

Prior to its ratification of the Cape Town Convention, Luxembourg was believed to be an 'engine accession' jurisdiction – that is one whose laws provided for title to an engine to vest in the owner of the airframe on which it is installed – and leases to its carriers were drafted on this basis. This regime conflicts with the notion of 'title tracking' guaranteed by the Convention under which international interests in engines remain effective in favour of the relevant creditor notwithstanding that engine's installation on a particular airframe. The conflict would have resulted in problems where engines were installed on airframes if the engines and airframes were subject to different leases dated before and after the Convention. One airline resolved these issues by re-executing all of their leases and security agreements following ratification, so bringing their entire fleet within the title-tracking regime of the Convention.

- (b) Malta ratified the Convention in October 2010. It has a relatively large number of aircraft on its registry.⁶ It is an increasingly important centre for service providers and for lessors and leasing structures.

The Maltese courts have recently considered the interaction between Brussels I and the Cape Town Convention.⁷ The particular question addressed related to the apparent conflict between the declarations made by a Member State under Article 39 of the Cape Town Convention and the obligations of that Member State under Article 33 of Brussels I, pursuant to which a Member State is required to recognise a judgment of another Member State without any special procedure being required. The conflict arises where the effect of Brussels I is to afford a third party a superior interest over the relevant aircraft equipment to that of the holder of a registered international interest, where that third party's interest is not of a category covered by the Article 39 declaration made by the forum state.

⁶ 227 at 20th July, 2016

⁷ *Aeroporto Catania S.p.A. vs ALS Irish Aircraft Leasing MSN 215 Limited u Wind Jet S.p.A*, Rikors Numru. 864/2012 and *Aeroporto Catania S.p.A vs Eden Irish Aircraft Leasing MSN 204 Limited u Wind Jet S.p.A*, Rikors Numru. 865/2012

The declaration by the EU under Article 55 of the Cape Town Convention reads: 'Pursuant to Article 55 of the Cape Town Convention, where the debtor is domiciled in the territory of a Member State of the Community, the Member States bound by [Brussels I] will apply Articles 13 and 43 of the Cape Town Convention for interim relief only in accordance with Article 31 of [Brussels I]....'. This addresses jurisdiction specifically: it does not prioritise Brussels 1 over the Convention generally.

The interplay between the Cape Town Convention and Brussels I has already been considered in this Journal⁸ and I will not repeat the arguments here. However it is worth considering the facts of the cases, the decisions reached by the Maltese court and their practical consequences.

Wind Jet SpA ('Lessee'), an Italian airline, was the operator of two Airbus A320 aircraft on lease from two Irish companies, Eden Irish Aircraft Leasing MSN 204 Limited and ALS Irish Aircraft Leasing MSN 215 Limited ('Lessors'). The aircraft were registered in Ireland and the Lessors consequently had registrable (and registered) international interests in respect of the airframes⁹. The Lessee entered into insolvency proceedings, owing €2.3m to Società Aeroporto Catania S.p.A ('Airport'). Those dues, under Italian law, resulted in a 'special privilege' over the aircraft in favour of the Airport, an attachment right *in rem* ranking above the interests of the legal owner of an aircraft. The Lessors terminated the Leases on the Lessee's default and flew the aircraft to Malta in an attempt to elude the Airport's claim.

Before the Italian courts, the Airport applied for, and obtained, an order for a precautionary arrest warrant, a *Sequestro Conservativo*, in respect of the aircraft under the Italian Navigation Code and the Italian Civil Procedure Code. By this order, the Airport was granted a right to detain the aircraft pending payment of the unpaid airport charges. On the basis of the *Sequestro Conservativo*, the Airport applied to the Maltese court for a precautionary warrant of arrest, citing Article 31 of Brussels I (which provides that: *Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter*).

The case is difficult. The Airport was asking the court for a Maltese precautionary warrant of arrest, founding the jurisdiction of the court on Article 31 of Brussels 1. However, Malta's declarations under Article 39 of the Cape Town Convention do not provide for the Airport's interests to be non-consensual rights or interests which have priority over a registered international interest. If, therefore, the Maltese court decided in favour of the Airport, it would be granting its claim priority over an international interest even though its interest is not of a category covered by the Maltese declaration. Conversely, a decision in favour of the Lessors would have been contrary to Articles 31 and 33 of Brussels 1. There is therefore an immediate apparent conflict between Brussels I and Article 39.

In the event, the Maltese court decided the issue in the Airport's favour so prioritising Brussels I over the Convention. The decision (which only analysed whether there was a *prima facie* case allowing the continued detention of the Aircraft) took account of the declaration made by the EU under Article 55 of the Cape Town Convention (although that declaration only addresses jurisdiction and has no bearing on the substance of Article 39) and of the fact that the Lessee and the Lessors were, under Italian law, jointly and severally liable for the charges due to the Airport.

The decision, if correct, reduces the degree to which commercial parties can rely on Article 39 declarations made by Member States: the priority which is supposed to be guaranteed by the Convention can be subverted by the enforcement of a court order of

⁸ Alan McCarthy & Marie O'Brien (2014) Article 13 of the Cape Town Convention and Article 31 of Regulation No. 44/2001—An EU Law Perspective, *Cape Town Convention Journal*, 3:1, 33-47, DOI: 10.5235/204976114814222449

⁹ In fact, under the Maltese law implementing the Convention, registration of international interests is permitted for both the airframe and the engines in these circumstances.

another Member State. Would the court have reached the same conclusion if the Lessors had previously entered into a security agreement in respect of the aircraft creating a registrable (and registered) international interest (which, if it did, would have the effect of subordinating the rights of the creditor to those of the Airport) or was the fact that, under Italian law, the Lessors were jointly liable with the Lessee determinative? Such a distinction is not contemplated by the Convention.

We may imagine a different scenario were, after flying the aircraft to Malta, the Lessors had sold them to purchasers who had then proceeded to register their sale. Would the Maltese courts have applied Brussels 1 in priority over the rights of the registered buyers? If the effect of the *Sequestro Conservativo* is to create a right in rem, it is difficult to see why not. But the application of this rule in these circumstances would serve to increase uncertainty in the transacting of contracts relating to aircraft.

It is important for buyers and creditors in respect of aircraft objects to understand that their rights are at risk in Contracting States from the claims of creditors even if those claims are not associated to rights in respect of which an Article 39 declaration has been made.

- (c) Norway ratified the Convention in December 2010. It is the registry state of two major airlines – Norwegian and (alongside Sweden and Denmark, which have both also ratified the Convention) SAS. As with Luxembourg, Norway has a pre-Convention engine accession regime but, unlike Luxembourg, taking into account the amount of affected equipment, it would be unreasonable for new leases and security agreements in respect of all Norwegian equipment to be executed. The registration of international interests over engines and the management of the airlines' fleet is therefore a sensitive issue from a documentary perspective.

Considering first, the pre-Cape Town Convention position: the Norwegian aircraft registry does not consider engines as separate assets. As a starting point, the engines on wing at the time of a sale should in most cases be the engines which are sold, as title to the engines passes to the buyer as part of the registration of transfer of title of the aircraft.

When the engine is off wing (and is considered more than temporarily de-installed), the engine would under Norwegian laws be regarded as a piece of movable property, and title passed by agreement (and perfected against third parties by subsequent physical delivery). If no such physical delivery took place, the sale and lease back of engines off wing was regarded as not legally possible in Norway, as the buyer/lessor would not have taken delivery of the engines off wing.

It is a presumption in the Norwegian Aviation Act that the registered owner of an aircraft also has title to the engines on wing. If an aircraft is sold, the engine serial numbers ("ESNs") are not included in the registration bill of sale and the ESNs are not registered. So in theory an engine belonging to a third party may be sold as part of the aircraft, even if it does not belong to the seller.

However, the Convention has been incorporated into Norwegian law by the passing of a short Act to the effect that the Convention should now be regarded as Norwegian law. The Norwegian Aviation Act has been amended to the effect that the Convention shall prevail as applicable over the provisions in the Aviation Act regulating registration of aircraft. However, given the recent ratification of the Convention by Norway, there is no settled practice yet as to how this matter is dealt with transactionally.

There is a registration fee of up to NK15,150 (approximately \$1,750 as July 2016) payable in respect of the registration of mortgages on the Norwegian Aircraft Register. Those fees are not payable in respect of security agreements constituted under the Convention.

It is notable that Norwegian has recently financed aircraft by means of Enhanced Equipment Trust Certificates (or similar instruments). Norway's inclusion on the OECD

List will have resulted in an increased appetite from institutional investors for Norwegian's paper.

- (d) Sweden ratified the Convention on 30 December 2015. It is interesting to contrast the consequences of ratification by Sweden and Norway. Whereas, in Norway, there are problems in the treatment of title to engines installed on airframes but only a relatively minor tax on registration of mortgages, the converse is true in Sweden. The law on title to engines installed on airframes is seen as being much more flexible than Norway's. However, Swedish aircraft mortgages carry a registration tax calculated at 1.00% of the secured debt making them economically prohibitive. There was initially some discussion as to whether mortgages needed to be registered on both the domestic registry and the International registry, which would have required payment of the tax. However, this year, transactions have been completed for Swedish registered aircraft, in which the creditors have relied exclusively on security agreements constituted under the Convention, to the exclusion of domestic Swedish law mortgages, so avoiding the requirement for the payment of the registration taxes. Initial questions as to how IDERAs would operate have also successfully been resolved.
- (e) Turkey ratified the Convention in August 2011. However, the registration of IDERAs with the Turkish Civil Aviation Authority was problematical until July 2014, when it revised a Directive on Implementation and Enforcement of the IDERA to provide greater clarity. Following that revision, Turkey was included on the OECD List.

It is notable that Turkish Airlines has used Enhanced Equipment Trust Certificates to finance aircraft recently, including in the Tokyo capital markets.

Six European jurisdictions have ratified the Convention and made the Qualifying Declarations but are not on the OECD List.

- (a) Denmark ratified the Convention in October 2015. No issues as to the implementation have been identified and its eligibility for inclusion on the OECD List is being evaluated.

As is the case with Norway, issues arise in connection with engine accession. Since the Convention has only been in force in Denmark since 1 February 2016 and due to the fact that rights registered prior to that date continue to be registered in the Danish National Register, we are yet to see any real consequences of the ratification.

The previous practice in Denmark as relates to title to engines installed on airframes was, that the security right in an aircraft, according to § 22 paragraph 1 of the Act on Registration of Rights to Aircraft (*flyregistreringsloven*), which implements Article XVI of the Geneva Convention on International Recognition of Rights in Aircraft, also includes the accessories placed in the aircraft - including engines. This right even continued to exist in a situation where the engine was temporarily separated from the aircraft. If the separation was permanent any security rights in the aircraft would then include any new (replacement) engine installed on the airframe. This remains the law in relation to all rights registered in the Danish National Register and in relation to any future rights registered in the Danish National Register.

If the aircraft is subject to the registration rules of the Convention, the rights cannot be registered in the Danish National Register according to the Danish national rules, but will instead have to be registered in the International Register under the Convention. This is to avoid any double registrations of rights.

This dual approach will cause problems where engines are installed on airframes where one of the items of equipment is subject to the Convention and the other is not. Given the recent ratification of the Convention by Denmark, a practical solution has yet to be established but it seems likely that the provisions of the Convention will prevail in respect of installations of engines on airframes which take place following its coming into force in Denmark. It will however be necessary to verify whether leases to Danish operators concluded pre-ratification accurately reflect the Convention's principles.

- (b) Guernsey ratified the Convention alongside the United Kingdom in November 2015. Although a Crown Dependency of the United Kingdom, Guernsey does not form part of the European Union. Accordingly, at the time of ratification, the United Kingdom made a series of declarations under the Convention for Guernsey in respect of matters for which the EU had claimed competence (see Section 2 above).

Guernsey hosts a significant aircraft register – the '2-register' – which hosts a number of corporate jets and off-lease lessor-owned aircraft. The commercial benefit to Guernsey of being included on the OECD List would probably be of a more general, confidence-boosting nature than the entitlement to a discount on export credit premia.

- (c) Russia originally ratified the Convention on 25 May 2011. At the time of that ratification Russia did not make any declarations under Articles VIII or XIII of the Protocol. That omission was rectified on 28 January 2013 when Russia lodged further declarations with Unidroit applying those Articles. Russia has therefore made the Qualifying Declarations.

However, Russia has not been included on the OECD List because of doubts as to the effectiveness of its implementation of the Convention into its laws (which implementation is required by paragraph 37(c) of Appendix II to the ASU). Those doubts arise from:

- (i) a lack of case law in Russia as to the application of the Convention in Russia as a consequence of the relatively few aircraft registered in Russia (but see comments on Transaero below);
- (ii) concerns as an ambiguity in the drafting of the declaration Russia made in respect of Article 39(1)(a) of the Cape Town Convention. The declaration refers to the different types of monetary claim which have priority over 'international interests' on insolvency. The ambiguity arises because 'international interests', as defined in the Convention, represent interests in the objects specified in the Convention rather than monetary claims. Since Article 39(1)(a) is intended to regulate the priority of different interests rather than monetary claims, the likely interpretation of this declaration will be that any interests securing those types of claim will have priority over 'international interests' in Russia but there is no certainty that that is indeed the interpretation a Russian court would apply. Whether or not these concerns are justified, they should not prevent Russia's inclusion on the OECD List as the relevant declaration is not a Qualifying Declaration; and
- (iii) problems which arose in connection with the export and customs clearance of certain aircraft operated by KrasAir in 2009 and 2010.¹⁰ It should be noted that these events arose prior to the ratification by Russia of the Convention. Some lawyers¹¹ believe that, following the Russian ratification of the Convention, any administrative arrest of the aircraft by the customs authorities in similar circumstances could be removed by the owner or mortgagee of the aircraft by court proceedings which might take up to six months.

Some comfort may be drawn from the letter of 18 February 2016 addressed by the General Director of Transaero Airlines to the Aviation Working Group confirming that, following the commencement of insolvency proceedings in respect of the airline, it intended to comply with its obligations under the Convention.¹² However, the application of the Convention by the courts, customs authorities and other state institutions of Russia in the context of those proceedings has not been tested.

- (d) San Marino ratified the Convention on 9 September 2014. It has the curious distinction of being the only Contracting State which does not possess an airport. It has, however,

¹⁰ For details of these cases, please see Ludwig Weber (2015) Public and private features of the Cape Town Convention, Cape Town Convention Journal, 4:1, 53-66, DOI: 10.1080/2049761X.2015.1102011

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¹² [http://www.awg.aero/assets/docs/letter-from-transaero-to-awg-\(eng\)-and-russia.pdf](http://www.awg.aero/assets/docs/letter-from-transaero-to-awg-(eng)-and-russia.pdf)

signed Article 83 *bis* agreements¹³ with Saudi Arabia, Lebanon and Nigeria, allowing aircraft registered in San Marino to be operated by entities holding Air Operator Certificates in these jurisdictions. No issues as to the implementation of the Convention by San Marino have been identified and its eligibility for inclusion on the OECD List is being evaluated.

- (e) Ukraine ratified the Convention on 31 July 2012 and made the Qualifying Declarations. It legislated for the Convention by the Law on Ratification of Treaty no 4904-VI dated 6 June 2012 (the 'Treaty Law'). By virtue of the Law on Ukraine's International Treaties No 1906-IV of 29 June 2004, the Treaty Law takes precedence over other laws of the Ukraine, except for the constitution. On 16 August 2013, the State Aviation Service of Ukraine ('SASU', the body authorized to apply the Convention in Ukraine) approved the Instruction on Provision of the Authorization Code for Access to the International Registry of International Interests in Mobile Aircraft Equipment and Registration of the Irrevocable Power to Apply for Deregistration and Export of the Mobile Aircraft Equipment. SASU also appointed a person in charge of issuing the authorization codes and providing liaison with the International Registry.

AeroSvit Airlines filed for bankruptcy in December 2012 but its lessors were able to repossess their aircraft and/or to transfer their leased aircraft to Ukraine International Airlines without the need for court intervention.

Since 2013, SASU has issued eighty-two authorisation codes and registered twenty-three IDERAs. However, the application of the Convention by SASU, the Courts and state institutions in Ukraine has not been tested.

- (f) The United Kingdom ratified the Convention on 27 July 2015. The ratification of the Convention by the United Kingdom is considered in detail in Section 4 below.

Six European jurisdictions have ratified the Convention and not made the Qualifying Declarations:

- (a) Albania ratified the Convention 30 October 2007 but made no declaration under Articles X or XI of the Protocol.
- (b) Belarus ratified the Convention on 28 June 2011 but made no declarations under Articles VIII, X, XI or XIII of the Protocol.
- (c) Gibraltar ratified the Convention alongside the United Kingdom in November 2015. It is a Crown Dependency of the United Kingdom and forms part of the EU. At the time of ratification, the United Kingdom made no declaration under Article XXX(3) of the Convention for Gibraltar and Gibraltar has not amended its insolvency laws to align with Article XI of the Protocol.

Gibraltar has no aviation authority and is not a jurisdiction commonly encountered in aircraft finance.

- (d) Ireland ratified the Convention on 29 July 2005. At the time of ratification, Ireland made no declaration under Article XI of the Protocol so the bankruptcy protection regime of examination (which is inconsistent with Alternative A) remained in force. However, the State Airports (Shannon Group) Act 2014 provides that the provisions of Alternative A may be implemented in Ireland by a ministerial order. No such ministerial order has yet been made. If and when it is made, Ireland will be able to make the further declarations required under the Convention to establish the Qualifying Declarations.
- (e) Latvia ratified the Convention on 8 February 2011 but did not make any declarations under the Protocol.

¹³ Agreements under Art 83 *bis* of the Chicago Convention on International Civil Aviation 1944

- (f) Spain ratified the Cape Town Convention in June 2013, but did not ratify the Protocol until November 2015.¹⁴ The Government of Spain made some additional declarations under the Cape Town Convention at the time that it ratified the Protocol, and these came into effect on 1 June 2016 in accordance with Article 57(2) of the Cape Town Convention. This paper considers the position in Spain as from that date, when the Convention, including those additional declarations became effective.

The implementation of the Convention by Spain has been particularly problematical because (i) Spain has not made the Qualifying Declarations, (ii) Spain has designated the *Registro Provincial de Bienes Muebles de Madrid* ('RBM') as its national entry point under Article XIX(1) of the Protocol and (iii) there has been confusion caused by the interaction between the RBM, the Aircraft Registry - the *Registro de Matriculas de Aeronaves* ('RMA') - and the International Registry.

Spain has failed to make the Qualifying Declarations because:

- (i) it has made a declaration under Article 54.2 of the Cape Town Convention to the effect that available remedies may be exercised only with leave of the court. This is a curious declaration in that non-judicial methods for enforcement of interests over tangible assets are otherwise available in Spain under the *Ley 5/2015 de la Jurisdiccion Voluntaria*;
- (ii) it has not made any declaration under Article XXX(2) of the Protocol in respect of Article X. Although the EU Declarations assert that this is a declaration of EU Competence but one which the EU has declined to make, that condition would be satisfied if the law of Spain is substantially similar to that set out in Article X and if the time periods in which the relevant remedies can be exercised in Spain reflect those specified in paragraph 2(e)(2) of Annex 1 to Appendix II to the ASU. That remains to be established; and
- (iii) it has neither made any declaration under Article XI of the Protocol nor amended its insolvency laws to reflect the terms of Alternative A.

Maybe rather curiously, Spain has declared that it will apply Article XIII of the Protocol relating to the use of IDERAs and that, in this case, its declaration under Article 54(2) of the Convention will not apply. The logical consequence of this declaration is that one can posit a situation where:

- (A) an aircraft is leased to a Spanish lessee and the lessor registers the resulting international interests over the airframe and the engines with the International Registry;
- (B) the lessee signs an IDERA designating the lessor as the authorised party and the IDERA is duly recorded by the RMA;
- (C) an event of default occurs under the lease;
- (D) the lessor is entitled to require the deregistration of the aircraft from the RMA (and presumably the RBM) without the need for judicial authorisation but does require a court order to exercise any of its other rights (for example, to repossess the aircraft).

Alone amongst the Contracting States that have made a declaration under Article XIX(1) of the Protocol, Spain has chosen not to designate its aircraft registry, the RMA, as its

¹⁴ For a detailed review of Spain's implementation of the Convention, please see RODRÍGUEZ DE LAS HERAS BALLELL, Teresa, 'Key points for the effective implementation of the Cape Town Convention: the accession of Spain to the Aircraft Protocol', *Uniform Law Review - Revue de droit uniforme*, 2016, pp. 1-30, doi: 10.1093/ulr/unw011

national entry point. The designation of the RBM – and the interplay between the RBM and the RMA - has caused significant procedural difficulties.

The RMA is the national aircraft register of Spain for the purposes of the Chicago Convention on International Civil Aviation 1944. Ownership, leases, liens and other interests over aircraft are capable of being recorded in the RMA: not as a means to perfection, but simply as a means of publicising the interests.

The RBM, on the other hand, is a register relating to ownership of, and various interests in, certain moveable assets, including aircraft. The registrar will refuse registration of any interests over an asset if ownership of that asset is not first registered. It is therefore necessary to comply with the formalities required to make this registration before any further registrations are made, for example those necessary for the international interests to be transmitted to the RMA or the International Registry.

Let us take as an example a lease of a Spanish-registered airframe to a Spanish operator. To be registered on the International Registry it will be necessary:

- (1) for the ownership of the airframe to be registered with the RBM;
- (2) for the lease to be registered with the RBM;
- (3) for that lease to be registered with the RMA;
- (4) for the RMB to issue an authorisation code for the lease; and
- (5) for the international interest constituted by the lease to be registered with the International Registry.

There are significant formalities required to be complied with as regards the initial four steps (including the notarisation and apostilling of the lease, the provision of a Spanish Taxpayer Reference Number (NIF) by the lessor to the RBM and the obtention of notarial certificates relating to the signatories, their capacity and due incorporation of the lessee).

Detailed regulations relating to the registrations (and to the registration of IDERAs) are yet to be published. There has been considerable debate as to whether the IDERA should be registered directly with the RMA or whether it should be registered with the RBM, as designated entry point, which would then transmit it to the RMA. In practice the latter course of action is being adopted.

In summary, it can be seen that the registration of international interests over Spanish-registered aircraft equipment is significantly more complicated than envisaged by the Convention and that these complexities are exacerbated by the triple registration system. The necessity for the aircraft to be registered with the RBM before the relevant authorisation codes are issued for the airframe permits the addition of significant requirements beyond those set out in the Convention.

4 Ratification of the Convention by the UK

The Convention was ratified by the UK on 27 July 2015 and came into force on 1 November of that year. Whether the Convention was fully ratified by the UK in its own capacity at that time, or only ratified to the extent of the UK's competences, the remainder having already been previously ratified on its behalf by the EU, is further discussed at Section 5 below.

The enabling legislation for the Convention (insofar as it relates to matters for which the UK retained competence) is The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the 'UK Regulations'). The UK Regulations are secondary legislation, that is legislation made by a person (normally, a Government minister: in this case the Secretary of State for the Department of Business, Innovation and Skills) to whom the British Parliament has delegated its democratic legislative mandate.

This means of legislating for the Convention has, as a consequence, certain constraints in the way in which the Regulations are able to amend other English laws currently in force.

The use of secondary legislation can be controversial constitutionally as it derogates from the general constitutional principle that it is for Parliament to enact legislation. Therefore, where Parliament has delegated these powers, the courts exercise great scrutiny to ensure that the relevant minister has not exceeded the powers delegated to him or her.

The enabling legislation relied on by the Government for the purposes of enacting the UK Regulations is section 2(2) of the European Communities Act 1972 ('ECA'), which permits the relevant Minister to use secondary legislation to 'make provision for the purpose of implementing any [EU obligation]of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised... or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above'.

The rights and obligations referred to in section 2(2) include those stemming from the 'EU Treaties'. Section 1(3) ECA states that 'If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the EU Treaties as herein defined, the Order shall be conclusive that it is to be so regarded'. That declaration was made, in respect of the Convention and the Protocol, by The European Union (Definition of Treaties) (Convention on International Interests in Mobile Equipment and Protocol thereto on matters specific to Aircraft Equipment) Order 2014. To the extent that that order is indeed conclusive, the right of the Government to use secondary legislation for the purposes of implementing the Convention and the Protocol is established.

The designation of the Convention as an EU Treaty resulted in those parts of the Convention which are EU Competences being directly applicable within the UK under section 2(1) of the ECA. There was therefore no need for the UK Regulations to address these matters: indeed, these being matters of shared competence on which the EU had already legislated, the UK is precluded from further legislating in these areas by Article 2.2 TFEU. This has not been fully respected: for example Regulation 42 of the UK Regulations (*Choice of Forum*) purports to implement Article 42 of the Cape Town Convention. The two provisions are not identical: for example the UK Regulations relate only to choice of the courts of any part of the United Kingdom to have jurisdiction in any particular instance and require the choice of forum to be made in writing. The provision of the Cape Town Convention is of more general application: the English courts would be obliged to accept the choice by the parties of the courts of any other Contracting State and that choice would not necessarily have to be made in writing. On these provisions, where there is a conflict, the Convention should prevail. Indeed, it is arguable that the corresponding provisions of the UK Regulations are ineffective by virtue of Article 2(2) TFEU.

The sensitivity of the Government to ensure that the UK Regulations fall within the delegated powers under the ECA, led to the UK Regulations being framed so as to ensure that any existing law was not revoked or otherwise modified in a way which would otherwise have required primary legislation. Thus (for example) the *lex situs* rule derived from the Blue Sky case¹⁵ remains in force unaltered as regards English law aircraft mortgages and charges. In that case, the court held that:

- (a) it is the laws of the physical location of an aircraft at the relevant time which determine whether a property interest, such as a mortgage, is effectively created over it;
- (b) if the aircraft is registered in a different jurisdiction to that of the *lex situs*, a mortgage which is valid under the laws of the state of registration but which is invalid under the domestic laws of the *lex situs* jurisdiction will be ineffective in England; and

¹⁵ Blue Sky One Limited and others v Mahan Air and another [2010] EWHC 631 (Comm)

- (c) English law will look only to the domestic laws of the *lex situs* jurisdiction without reference to its conflict of laws rules in deciding the issue of validity of the mortgage.

However, Regulation 6(3) of the UK Regulations makes it clear that the *lex situs* connection is not required for the purposes of creating an international interest. It is therefore possible for an international interest to be created over an aircraft object under an English law Cape Town Convention-compliant security agreement at a time when the aircraft object is situated outside England (or English airspace) even though it remains impossible to create an English law mortgage or charge over the aircraft object at such time.

The situation regarding sales is less clear. The common law rule in *Blue Sky* applies to sales to the same extent as it does to mortgages. However, whereas it is possible for the UK Regulations to create a new type of security interest to which the *lex situs* rule does not apply, that argument cannot be applied to sales. It is impossible to argue that the UK Regulations create a new type of sale since (unlike security) all sales are conceptually the same.

Regulation 6(3) states that '...the international interest has effect where the conditions of the Cape Town Convention and the Aircraft Protocol are satisfied (with no requirement to determine whether a proprietary right has been validly created or transferred pursuant to the common law *lex situs* rule).' That Regulation does not apply to sales. Regulation 38 (mirroring Article III of the Protocol) goes on to provide that 'Regulation 6 insofar as it implements Articles 3 and 4 of the Cape Town Convention' applies in relation to sales, but this does not impact on Regulation 6(3), which does not relate to the specified Articles.

The contrary argument is that Regulation 6(2) provides that 'These Regulations are subject to, and to be applied in accordance with the provisions of [the Convention]'. If the Convention does not require the *lex situs* rule to be satisfied for a sale to be effective, neither should the UK Regulations. It is necessary, therefore, to consider what conditions the Convention attaches to the effectiveness of a sale.

The formalities prescribed by Article V(1) of the Protocol in relation to a contract of sale do not refer to the *lex situs*, but this is not controversial. Under English law, the *lex situs* rule applies to the sale, not the contract of sale. There is some confusion throughout the Protocol between the terms 'sale' and 'contract of sale' but the Official Commentary confirms that the provisions of Article V(1) apply only to the former. Indeed, if it were otherwise, the commonly used mechanism of concluding a sale of an aircraft object by transferring possession of it to the buyer would not be valid under the Protocol because it was not in writing. The Protocol is therefore silent as to how a sale is effected and Regulation 6(2) does not assist.

There is also some confusion as to whether Section 859A of the Companies Act 2006 ('Companies Act') (which requires an English company to register certain charges created by it with Companies House) applies to security agreements. Such a requirement for registration as an additional formality to those set out in Article 7 of the Convention would be contrary to the principles of Convention. Paragraph 9 of Schedule 5 to the UK Regulations states that the registration requirements is 'not to apply to a charge which is an international interest'.

It is important to distinguish between an agreement creating an international interest which is also a charge and an agreement which creates an international interest and, separately, a charge. An example of the former would be where an English debtor charges an aircraft object situated in England in favour of a creditor. That charge would also be, and be the same as, an international interest and (it would seem) not be registrable by virtue of the aforesaid paragraph 9.

However, the agreement may be effective both to create an international interest for the purposes of the Convention and, separately, a charge under existing English law. For example, an English debtor may agree to grant an interest in the aircraft object to its creditor, when the aircraft object is situated outside England, and, in the same agreement, that that aircraft object shall be subject to a charge in favour of that creditor, effective from the first time it enters English airspace. Section 859 of the Companies Act would apply to the second limb of the agreement, which would consequently require registration.

Failure to register the charge would render it void against a liquidator, an administrator or a creditor of the debtor.¹⁶ It would not otherwise impact on the validity of the parallel international interest. However, when a charge becomes void, the money secured by it immediately becomes payable. So, failure to register the charge would accelerate the underlying loan, albeit secured by the valid international interest.

The distinction between an international interest and a charge may not always be clear and it is advisable to register any such interest in accordance with Section 859A of the Companies Act notwithstanding the provisions of paragraph 9 of Schedule 5 to the UK Regulations.

5 Consequences of Brexit

On 23 June 2016, a referendum held in the UK resulted in a vote to leave the EU by a margin of 52% to 48%. That referendum result is advisory and of no legal consequence, though it will be politically difficult for the government of the UK to ignore it. For the moment, the laws of the UK which are related to its membership of the EU (including the UK Regulations) are unaffected.

No jurisdiction has previously left the EU (although Greenland and Algeria left its predecessor, the EEC, and the status of St Barthélemy within the EU has been altered). The process for doing so and the legal and constitutional ramifications (including in relation to the departing state's rights and obligations under international treaties) are about to be tested for the first time.

The mechanism for the UK's exit from the EU is set out in Article 50 TEU which provides:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

Article 50.1 TEU is problematical for the UK which does not have a written constitution. The right of the UK Government to give the withdrawal notice required under Article 50(2) without the backing of an Act of Parliament is currently being challenged before the courts. A decision of the Supreme Court is expected at the end of 2016. It is therefore unlikely that the Article 50 notice will be given before 2017 with the actual date for withdrawal occurring two years after that.

Three principal questions need to be addressed in connection with Brexit and the Convention:

- (a) Does the UK need to re-ratify, or to amend its ratification of, the Convention?
- (b) Does the UK need to make any new declarations?
- (c) Will the UK Regulations remain in force following Brexit?

¹⁶ Section 859H Companies Act 2006.

The EU negotiates a range of agreements with third states or organisations, most commonly Association Agreements, Free Trade Agreements, Partnership and Cooperation Agreements and Economic Partnership Agreements. In this activity the EU must respect the limits of its competence. The EU has exclusive competence for many of these: they are agreements which the EU will have ratified and are binding all of the Member States, without the need for them to ratify them. There is no explicit law on what the effect of the ratification of such exclusive competence agreements will be as regards the UK following Brexit. The Vienna Convention on Succession of States in respect of Treaties of 1978 addresses treaties constituting an international organisation and treaties adopted within an international organisation but it does not address treaties adopted by an international organisation with third party states. It has, in any event, been ratified by very few states. The closest parallel would be to countries gaining independence which have historically not considered themselves bound by international treaties concluded by their previous ruling powers. This has been the case, for example, in Australia, South Africa, Ireland and the CIS. It therefore is safest to assume that, following Brexit, the UK will not continue to be bound by treaties exclusively concluded by the EU on its behalf.¹⁷

The Cape Town Convention is, however, a mixed agreement, that is one which has been ratified by both the EU and the participating Member States. There has been much discussion as to whether the UK would remain a party to mixed agreements following Brexit and, if so, on what terms.¹⁸ However much of that discussion has focused on the territorial coverage of the agreement being limited to the EU (and so not including the UK post-Brexit) or the definition of the Contracting States to that agreement as being the 'Member States' of the EU. These particular concerns are not relevant as regards the Convention.

As mentioned in Section 2 above, the EU Declarations relate to matters which are EU Competences and which, therefore, the UK could not address at the time of its ratification of the Convention. Following Brexit, does that mean that the UK's ratification of the Convention is of itself only effective to the extent of its competences at the time, or that its ratification is invalid, or can the other Contracting States rely on the UK's instrument of accession, ignore the detail of its relationship with the EU and assume full ratification by the UK? There are competing arguments:

- (a) The UK's instrument of accession makes no mention of the EU. It may be argued that it is not for the other Contracting States to establish on what basis the UK has agreed to be bound by the Convention. The UK has, on the face of the instrument of accession, agreed to be fully bound.
- (b) Following Brexit, the UK will not have made any declarations in respect of the matters covered by the EU Declarations. However, none of the declarations are compulsory. If the UK wishes to make new declarations in respect of those provisions (as it would need to in relation to Article 55 of the Cape Town Convention and Article XXI of the Protocol, where the references to Brussels I will no longer be correct), it may do so under Article 57(2) of the Cape Town Convention. However, failure to make any such additional declarations would not impact on the validity of the UK's ratification of the Convention.
- (c) Notwithstanding the above, there are parts of the Convention which are EU Competences and are not optional matters subject to declarations: for example, Articles 42, 44 and 45 of the Cape Town Convention. Having transferred its competence to the EU in respect of these matters, the UK had no power to be agreed to be bound by them at the time that it ratified the Convention. Therefore following Brexit, the UK's ratification of the Convention will at best be incomplete. An analogy may be drawn with Article 47 of the Vienna Convention on the Law of Treaties of 1969 ('Vienna Convention'):

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless

¹⁷ See Vaughne Miller and Arabella Lang: Brexit: how does the Article 50 process work? at [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library/intranet.parliament.uk/commons-library) | papers@parliament.uk | [@commonslibrary](https://twitter.com/commonslibrary)

¹⁸ See for example Dr Markus Gehring in EU Law Analysis, 6 March 2016, Brexit and EU-UK trade relations with third states.

the restriction was notified to the other negotiating States prior to his expressing such consent.

It would be reasonable to assume that:

- (i) the authority of the EU to express the consent of the UK to be bound by the Convention is subject to the restriction of the UK remaining a Member State;
- (ii) the authority of the UK to consent to be bound by the Convention is subject to the TFEU;

and those restrictions were expressly or impliedly notified the other negotiating states. Certainly, the other Member States party to the Convention would have been aware of them and the issues are clearly addressed in the EU Declarations. This argument would lead to the conclusion that the agreement by the UK, by virtue of its ratification of the Convention, to be bound by those areas of the Convention which are EU Competences will not be valid following Brexit.

- (d) If the effect of Brexit is that the UK withdraws from the parts of the Convention in respect of EU Competence, then that withdrawal may apply to the whole Convention, by analogy to Article 44 of the Vienna Convention.

A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

Article 59 of the Cape Town Convention and Article XXXV of the Protocol set out procedures for denunciation by a Contracting State. However, those procedures are not expressed to be exclusive and do not invalidate the argument that Brexit will lead to the withdrawal of the UK from the EU Treaties, whether exclusive or mixed.

There is therefore a likelihood that the UK will need to ratify the entire Convention anew to ensure that it remains a Contracting State following Brexit. At that time, it will need to consider the declarations it should make to achieve the Qualifying Declarations, given that those that relate to Articles VIII, X and XI are somewhat relaxed for Member States. It is to be hoped that, given the history of the UK's relationship with the Convention, the OECD would agree to treat the UK as if it remained a Member State for the purposes of giving effect to the Qualifying Declarations.

There are several hundred EU Treaties, both exclusive and mixed, and the UK will need to consider between now and the date of Brexit which of these it will choose to maintain and from which it will choose to withdraw. It is inconceivable that it will choose to withdraw from the Convention on the basis of Brexit alone. We will have to wait to see what procedures are adopted by the UK Government in agreement with international bodies to ensure that it remains bound by those EU Treaties which it wishes to maintain.

The principal legislative act that will be required to give effect to Brexit will be the repeal of the ECA. There is no settled law as to whether secondary legislation (such as the UK Regulations) can survive the repeal of the primary legislation under whose aegis the delegated powers were conferred on the relevant minister. However, the majority view (including the published view of the House of Commons Library)¹⁹ is that secondary legislation will automatically fail in the event that its sponsoring primary legislation is repealed unless the UK Parliament takes active steps to preserve it.

¹⁹ See Vaughne Miller and Arabella Lang: Brexit: how does the Article 50 process work? at www.parliament.uk/commons-library | intranet.parliament.uk/commons-library | papers@parliament.uk | [@commonslibrary](https://twitter.com/commonslibrary)

Parliament will therefore need to take active steps to preserve the enforceability of the UK Regulations at the time that the ECA is repealed. There are many thousands of statutory instruments currently in force in the United Kingdom whose legitimacy derives from European law. Although no announcement has yet been made by the Government, it is reasonable to suppose that the UK Parliament will seek to legislate so that all such statutory instruments are initially preserved, and subsequently decide which ones to repeal, rather than attempting immediately to identify the regulations it wishes to survive.

The effectiveness of the Convention in the UK, to the extent that it relates to EU Competences, is derived from section 2(1) of the ECA and the Convention's designation as an EU Treaty. The preservation of the UK Regulations will not be sufficient. Those parts of the Convention which are EU Competences will now be required to take effect as a matter of domestic law following the re-ratification of the Convention by the UK and the making of any new declarations. It will be clearer for the new Regulations, covering the entire Convention, to be based on the new powers conferred on the minister by the Act of Parliament repealing the ECA. These new Regulations would be substantially identical to the existing ones but would derive their legitimacy from the repealing Act rather than the ECA.

The UK will undergo a legislative upheaval over the next few years as it extricates itself from the EU. The process will be complex – particularly in situations where the EU framework relies on a necessary multilateral reciprocity, or where there is an EU regulator involved, or where there is doubt as to the UK's desire to continue to be subject to the relevant legislative regime. Fortunately, none of those considerations apply to the Convention. However, the volume of legislative activity required and the timetable within which it must be achieved is daunting.