

Cape Town Convention and Aircraft Protocol - CHINA

On 28 October 2008, China's legislative body approved the Cape Town Convention and Aircraft Protocol.

China must now provide its formal instrument of ratification to the Unidroit official depository, following which China's ratification of the Convention and the Protocol will take effect on the first day of the month following the expiration of three months after the deposit date. China is a target region for aircraft lessors and financiers and this development should be viewed positively by the market, particularly as China has adopted the "hard" insolvency regime for aircraft objects, with a waiting period of 60 days, as well as the Protocol's de-registration and export remedies. The Civil Aviation Administration of China (the "CAAC") will be a national designated entry point for Cape Town filings.

At of this date, China has not yet deposited this instrument, to the best of our knowledge. We will send a further alert once the effective date is confirmed. No further legislation is being contemplated as necessary to bring the Convention and Protocol into effect as a matter of Chinese national law.

With the aircraft market in China flourishing, it is important that financiers, lessors and operators active in the country familiarise themselves with the effects of the adopted Convention and Protocol.

Key issues in China's adoption of the Treaty

We attach links to two of our previous client briefings, which outline the main treaty provisions and the next steps to consider in transactions.

In addition, you should note the following key China-specific declarations (subject to local counsel advice):

- 1) The Convention and Protocol are applicable only to mainland China and will not apply to Hong Kong SAR and Macau SAR
- 2) The Convention and Protocol apply only to cross-border transactions and will not apply to domestic transactions (Article 50(1) of the Convention)
- 3) China will apply Alternative A (the "hard" version) of the Protocol insolvency regime (Article XI of the Protocol), specifying a "waiting period" of 60 days. Parties will be aware that adoption of this regime is one of the conditions to obtaining a discount to the base premium in export credit supported financings of aircraft under the OECD Sector Understanding (July 2007)

KEY ISSUES

Key Issues in China's adoption of the Treaty

Further information and advice

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- 4) Certain non-consensual rights or interests with priority over secured interests under Chinese law will rank ahead of a registered international interest, without the need for registration (Article 39(1)(a) of the Convention), including bankruptcy expenses, employees' wages, taxes arising before the mortgage or aircraft lien, salvage claims, claims for debts of common interests and for fees required for the safekeeping and maintenance of aircraft. State and other authorities' arrest and detention rights under Chinese law will not be affected (Article 39(1)(b) of the Convention).
- 5) China has adopted the Protocol's choice of law provisions (Article VIII), interim relief measures (Article X) and de-registration and export remedies (Article XIII), for aircraft objects. Adoption of Article XIII is another condition for the OECD discount mentioned above.
- 6) China has chosen to require any Convention remedies available on a "self-help" basis to be exercisable only with leave of the court. These include taking possession of the aircraft. China has also excluded the specific Convention remedy allowing a mortgagee to grant a lease of the aircraft when the aircraft is situated in China.
- 7) In respect of the Convention's interim relief measures, China has not accepted the Protocol provision allowing interested parties to exclude the court's power, when granting such interim relief, to impose any conditions to protect any interested persons.
- 8) China has also indicated that, for interim relief, the court of a Contracting State chosen by the parties shall be a court that has an "actual connection" to the dispute for example, the court in the jurisdiction where the aircraft is registered or where the debtor is located. Further, where a Chinese court is chosen in relation to aircraft leasing disputes, the Intermediate People's Court where the airlines' headquarters is located shall be the relevant court with jurisdiction under the Convention.
- 9) The Convention allows Contracting States to nominate national bodies as "designated entry points" ("DEPs") through which information relating to registrations shall or may be transmitted to the International Registry. China has nominated the CAAC as its DEP. However, it is currently uncertain whether Cape Town registrations for Chinese registered aircraft are to be submitted only via CAAC, (that is, it is the compulsory "access point" for Cape Town filings), or whether the parties also have the option of submitting such registrations directly to the International Registry via the IR electronic system. We expect the Chinese authorities to clarify this issue further in due course.

Further information and advice

Please call the contacts listed on this briefing, or any of your usual contacts in the Global Asset and Structured Finance Group at Clifford Chance, if you have any questions.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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