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Tracing the impact of Spain's ratification of the Cape Town Convention

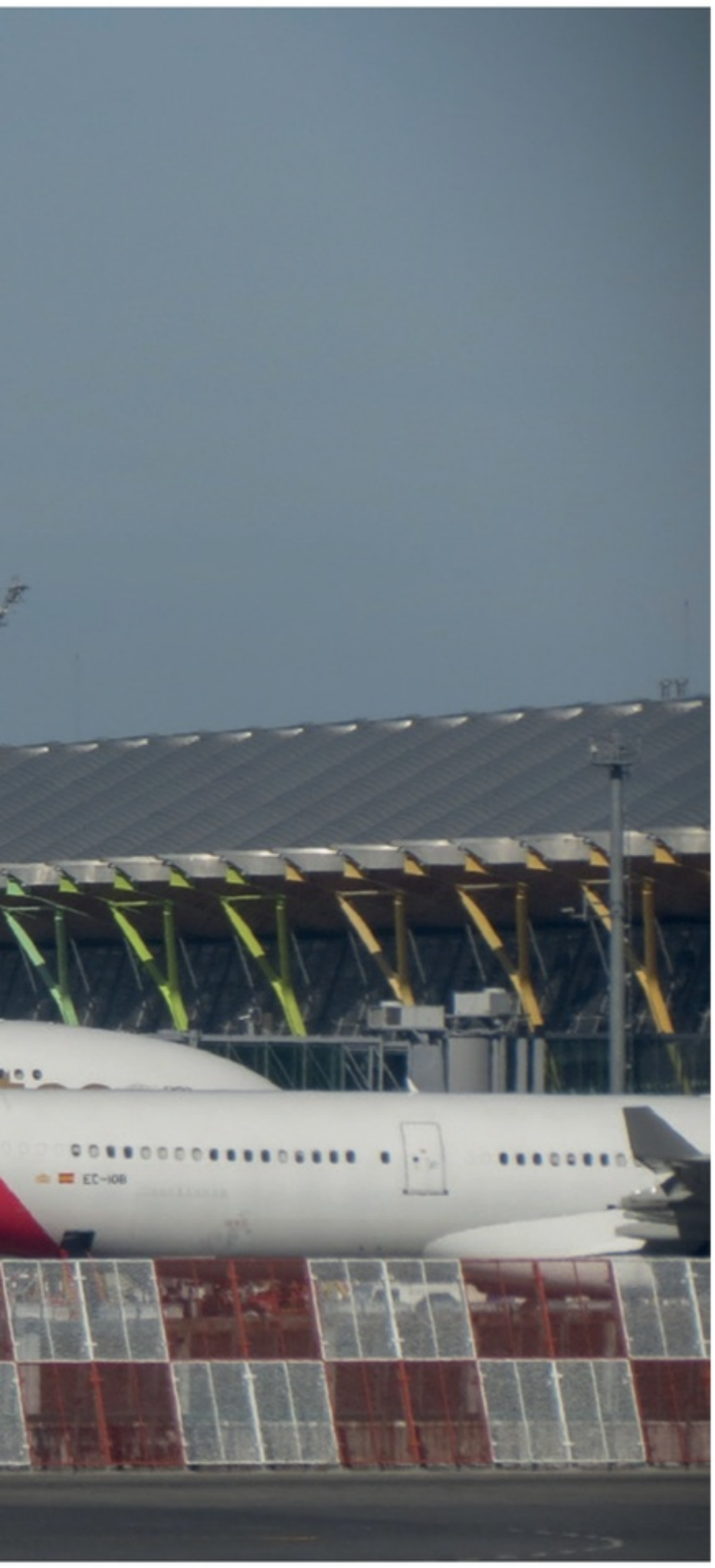
By Sergi Giménez, AUGUSTA ABOGADOS, Barcelona

More than two years have now elapsed since 1 March 2016, when the Aircraft Protocol of the 2001 Cape Town Convention entered into force in Spain. Back then we wrote a note in this very publication ("Spain About To Ratify Aircraft Protocol of Cape Town Convention", Airline Economics Aviation Law Yearbook 2016, page 38 http://viewer.zmags.com/publication/d483f038#/9556ccaa/40) that attempted to anticipate some of the challenges the ratification posed to the Spanish legal system. With the benefit of the practical experience gained during this period, it seems appropriate to review the subject and analyse which aspects are working well and identify those areas where improvement is still needed. To that end, it seems useful to follow the same order as in our initial article.

1. Ratification of the Aircraft Protocol – Spanish declarations

On 27 November 2015 the Kingdom of Spain formally submitted to UNIDROIT its accession to the Aircraft Protocol, which therefore entered into force in Spain on 1 March 2016. Together with its ratification, Spain made a number of declarations to both the Aircraft Protocol and the Cape Town Convention, two of which are worth noting: (i) in accordance with Article 18.5 of the Convention, the Spanish Movable Assets Registry was designated as the only authorizing entry point for the purposes of transmitting information to the International Registry relating to Spanish-registered airframes and helicopters, and (ii) while Spain generally rejected all self-help remedies contemplated in the Aircraft Protocol and in the Convention, it expressly accepted the validity and use of IDERAs as per Article XIII of the Aircraft Protocol.

Spain's ratification instrument was



complemented by a Resolution of the Directorate General of Registries and Notaries dated 29 February 2016 whereby certain procedural rules were approved (namely, the official forms to be used for the purposes of applying for entry codes to the International Registry and the official IDERA form in Spanish). So far, no further development legislation has been approved, which is causing some practical difficulties as we shall see.

2. Dual registry system

As explained in our previous article, since the late 60's Spain has a dual-registry system for aircraft: Spanish-registered aircraft historically had to be recorded at the Aircraft Matriculation Registry ("Registro de Matrícula de Aeronaves", a body which depends of the Spanish Air Safety Agency) and, only under certain circumstances, also at the Movable Assets Registry ("Registro de Bienes Muebles", a body which depends of the Ministry of Justice). In 2015 new Regulations for the Aircraft Matriculation Registry were passed, and on that occasion the Government lost a perfect opportunity to simplify the Spanish registration system and adapt it to the models of the more advanced –and neighbouring- jurisdictions: instead of establishing a single-registry system, it reinforced the dual-registry system and forced that all aircraft transactions be recorded at the Movable Assets Registry first. Until then, most transactions involving commercial aircraft were exempt from such registration, but this changed under the new Regulations and is causing some heavy additional bureaucracy and costs on operators and practitioners.

(a) Firstly, since the Movable Assets Registry has been designated as the sole authorizing entry point for international interests relating to Spanish-registered aircraft and helicopters, operators must apply for an "Authorizing Entry Point Code" ("AEP Code") before they can submit any international interests to the International Registry. In general terms, the procedure to obtain such AEP Codes is easy and inexpensive, but nevertheless a waiting period of up to 48 hours should be accounted for. This can sometimes impact the timing of transactions, particularly when last-minute changes are to be implemented.

(b) Secondly, under the 2015 Regulations it has become mandatory to record aircraft-related transactions such as leases, sales, novations, charges, etc. first with the Movable Assets Registry and then with the Aircraft Matriculation Registry. This can significantly impact the timing of the recordation of an international interest under the Cape Town Convention:

(i) Upon receipt of the documents which evidence the international interest (e.g., an aircraft operating lease along with the relevant certificate of acceptance, IDERA, etc.), the Movable Assets Registry analyses such documents to ensure their validity and conformity. This analysis is obviously conducted from the perspective of applicable Spanish law, which is quite formalistic in many aspects. After the first year of operation under this new system, it can be said that it happens quite frequently that the Movable Assets Registry rejects documents on the grounds of an alleged lack of formalities or even lack of clarity, due to it not being familiar with the complexity of these types of documents. Foreign lessors and financiers are often confused by this.

(ii) For so long as the transaction documents have not been recorded at the Movable Assets Registry, the Aircraft Matriculation Registry cannot issue the final registration marks for the aircraft. While it is of course possible to operate under the provisional registration marks given by the Aircraft Matriculation Registry, such marks expire after three months. Occasionally this period of time has been exceeded due to the pace of work at the Movable Assets Registry, which has obliged the parties to ask for extensions and engage in additional explanatory work. Although the Movable Assets Registry is becoming more and more familiar with aircraft transactions, and as a consequence the times for the review procedure are being shortened, this is not a situation that financiers, owners or lessors of aircraft objects look at favourably. What is clear nowadays is that operators are forced to face additional costs, because all documents submitted to the Movable Assets Registry require an official translation into Spanish and the fees of the Registry itself are calculated on the basis of the value of the transaction (which are usually high figures where commercial aircraft are involved).

(iii) The recordation of IDERAs is probably one of the most problematic areas. The interest of owners, financiers, lessors and the like mandates that IDERAs be recorded with the relevant national authority almost immediately, and this interest is clearly reflected in the Aircraft Protocol. However, the system imposed under the new Spanish rules requires that IDERAs are submitted firstly to the Movable Assets Registry; only after successful review of all the transaction documents will the Registrar allow the Aircraft Matriculation Registry to proceed with its part of the work, which includes the IDERA recordation. Since such review process can take weeks, it is clear that during the interim period between closing of the transaction and notice to the Aircraft Matriculation Registry, an IDERA will remain unregistered and hence unenforceable should the need arise. This seems to be in clear contradiction with the terms of the Convention and the Aircraft Protocol, and conversations are underway to find suitable alternatives.

(iv) A secondary issue affecting IDERAs relates to the formality requirements which the Movable Assets Registry attempts to impose. There is international consensus that an IDERA should be valid and enforceable as long as it meets the formalities foreseen in the Aircraft Protocol (essentially, written form and conformity to the template attached to the Aircraft Protocol). However, the Spanish registry has occasionally requested that the signatures on an IDERA be legalised by a Notary Public, a requirement that is not contemplated by the Convention or the Aircraft Protocol. From an international perspective, therefore, such requests should be rejected, although in practice operators often chose to oblige in the interest of speeding up the process.

(v) Finally, some doubts have arisen in connection with the "certified designees" foreseen under Article XIII.2 of the Aircraft Protocol. IDERAs are, according to this provision, transferrable by their beneficiary in favour of third parties. So far, applications to record this type of transfers have been rejected, mostly on the grounds that this type of legal institution is alien to Spanish law. It seems clear that some educational work will have to be undertaken in this connection.

3. Some pending legal challenges

In our initial paper we stated that Spain's legal system was facing a number of challenges before the terms of the Convention and the Aircraft Protocol could be fully implemented and accepted without reservations by the Courts. Some of these have been summarised above, but there are some further aspects which require development work.

(a) In addition to IDERAs, the Convention contemplates a number of self-help remedies that are available to owners and financiers of assets. However, under Spanish law self-help measures are strictly forbidden and may even be considered as a criminal offence; parties should seek their remedies in Court. This contradiction was solved through the Spanish accession instrument of October 2013, whereby it was declared that all remedies foreseen under the Convention can only be exercised with the prior authorisation of a judge. Spain does not allow creditors to use the self-help remedies of the Convention without first getting a judge's approval. The only exception to this prohibition is the acceptance of IDERAs, which have not been tested yet in practice.

(b) As happens with other jurisdictions, the remedies foreseen by the Convention for situations of bankruptcy must also be carefully analysed in the light of existing Spanish bankruptcy law, which is aligned with the European Insolvency Regulation. So far, Spain has made no declaration as to whether it chooses Alternative "A" or "B" as foreseen in the Convention. However, there are presently some ongoing works to amend the Spanish Insolvency Act 2003, and this would be a perfect opportunity to make such choice from a domestic law viewpoint. It is clear that choosing Alternative A would be the preferred course of action for the international aviation community, but some legal scholars argue that the super-privilege that the Convention attempts to give to creditors in insolvency situations may face resistance given the present political and social trend of reducing the privileges of secured creditors.

Hopefully some of the doubts and challenges described in this note will be clarified in the near future. Without a doubt, we will continue monitoring the situation and reporting on it.

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maintenance@iberia.es
Ph: +34 91 587 4827
Marketing: MROMarketing@iberia.es
iberiamaintenance.com