



REPUBLIC OF ZAMBIA

REPORT

OF THE

COMMITTEE ON TRANSPORT, WORKS AND SUPPLY

ON THE

**PROPOSAL TO RATIFY THE CAPE TOWN CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL
TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT FOR THE
FOURTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY**

Printed by the National Assembly of Zambia

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REPORT OF THE COMMITTEE ON TRANSPORT, WORKS AND SUPPLY ON THE PROPOSAL TO RATIFY THE CAPE TOWN CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT FOR THE FOURTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY

1.0 MEMBERSHIP OF THE COMMITTEE

The Committee consisted of Mr D M Syakalima, MP (Chairperson); Ms C C Kasanda, MP (Vice Chairperson); Mr P M W Daka, MP; Mr G G Zimba, MP; Mr R Lihefu, MP; Mr G S Sialubalo, MP; Ms G Katuta, MP; Mr Y Siwanzi, MP; Mr A C Mumba, MP; and Mr J Kabamba, MP.

The Honourable Mr Speaker
National Assembly
Parliament Buildings
LUSAKA

Sir,

The Committee has the honour to present its Report on the proposal to ratify the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (herein after referred to as the Cape Town Convention and Protocol).

2.0 FUNCTIONS OF THE COMMITTEE

Pursuant to Article 63 (2) (e) of the *Constitution of Zambia Chapter 1 of the Laws of Zambia*, as amended by *Act, No. 2 of 2016, section 5 (1) of the Ratification of International Agreements Act, No. 34 of 2016* and the National Assembly Standing Orders No. 158 and 159, the National Assembly is vested with the power to oversee the performance of Executive functions by, among other things, approving international agreements and treaties before they are acceded to or ratified. Thus, the Committee was mandated to consider submissions and make recommendations to the House on the proposal to ratify the Cape Town Convention and Protocol.

3.0 MEETINGS OF THE COMMITTEE

The Committee held six meetings to consider the Cape Town Convention and Protocol.

4.0 PROCEDURE ADOPTED BY THE COMMITTEE

In order to acquaint itself with the provisions and ramifications of the international instruments under consideration, the Committee sought both written and oral submissions from stakeholders. The stakeholders who appeared before the Committee are listed at Appendix II.

5.0 GENERAL BACKGROUND

The Convention on International Interests in Mobile Equipment, also known as the Cape Town Convention, is an international treaty intended to standardise transactions involving movable property. The treaty creates international standards for the registration of contracts of sale, security interests (liens), leases and conditional sales contracts, and various legal remedies for default in financing agreements, including repossession and the effect of particular states' bankruptcy laws. The Convention was also designed to create an international framework for the formation, registration, protection and enforcement of certain international interests in airframes, aircraft engines and helicopters.

The Convention and Protocol were the results of a diplomatic conference held in Cape Town, South Africa in 2001. The Cape Town Convention came into force on 1st April, 2004 and had been ratified by over seventy-seven countries. The Protocol on the other hand, came into force on 1st March, 2006, and applies to aircrafts which can carry at least eight people or 2,750 kilogrammes of cargo and helicopters carrying five or more passengers. The aircraft engine should have thrust of 1750 pounds force or five hundred and fifty horse power. The Convention and Protocol were read as one instrument. Within the SADC region, Eswatini, Zimbabwe, Namibia and Mozambique had acceded to the Convention while South Africa had ratified the Convention.

The Aircraft Protocol modified the Convention to meet the requirements of aircraft financing and leasing. The Aircraft Protocol also offered creditors additional remedies, including the ability to require the removal of an aircraft from the national civil aircraft register and export it.

Following the decision to establish a national airline in collaboration with Ethiopian Airlines as a strategic partner, the Government had found it necessary to ratify the Convention in order to draw benefits and also reduce the risks associated with the financing of aviation equipment. Ethiopian Airlines was one of the countries that had ratified the convention by 16th January, 2014.

6.0 OBJECTIVE OF THE CONVENTION

The objective of the Cape Town Convention and Protocol was to reduce the risks for creditors of aviation assets and consequently the borrowing costs to debtors. In other words, the main driver was to reduce the cost and increase the availability of financing for high value mobile equipment, including aircraft. Therefore, if Zambia signed and ratified this Convention and Protocol, the national airline and indeed other air operators in the country, would be protected against creditors and debtors in relation to their aviation assets.

7.0 PROVISIONS OF THE CONVENTION

7.1 Key Provisions

The Convention required contracting states to register international and prospective international interests in the International Registry, provided for what constituted an international interest, the remedies that were available to a party in case of default and the priority of interests. Further, the Convention and the Protocol outlined the insolvency

procedures available to debtors and the declarations that contracting states could make with regard to any provisions they chose to adopt or not.

Further, Articles 42 and 43 of the Convention provided for the jurisdiction of the courts of a contracting state chosen by parties to a transaction, in terms of the choice of forum.

7.1.1 How to Become a Party

According to Article 47, the Convention was closed for signature. It was, however, subject to ratification, acceptance or approval by signatory states. Further, the Convention was open to accession by any state which opted not to sign it. Once a state ratified, accepted, approved or acceded to the Convention, a formal instrument must be deposited with the Depository. The designated Depository was the International Institute for the Unification of Private Law (UNIDROIT) in Rome.

The Aircraft Protocol was also closed for signature. Article XXXVI of the Protocol, however, provided that states that had signed the Protocol shall ratify, accept, or approve it. Further, any State which did not sign the Protocol may accede to it. What was also important to note was that a State could not choose to be a party to the Protocol only, it also had to be a party to the Convention.

7.1.2 Reservations

The Convention made it clear that no reservations may be made to any provisions therein. However, state parties may declare that they do not consider themselves bound by certain provisions, in line with Article 56 of the Convention. Article XXXII of the Protocol was similarly drafted. Furthermore, under Article 58 of the Convention, a party could withdraw a declaration by notifying the Depository in writing. The withdrawal would take effect after six months.

7.1.3 Denunciation

Any Party may denounce the Convention and the Protocol by written notification to the Depository. However, such denunciation shall only take effect one year following the date on which the notification is received by the Depository as per Article 59 and Article XXXIV of the Convention and Protocol, respectively.

7.2 Specific Provisions of the Convention

Chapter I - Sphere of application and general provisions

Article 1 - Definitions

This Article provided for definitions in both the Convention and the Protocol.

Article 2 - The International Interest

International interests were the main focus of the Convention. These constituted rights held by a creditor to certain title, security and other rights in aircraft objects that could be registered at the International Registry. To be international interests, they must be given to a

lessor under a lease; a chargee under a security agreement or a lessor or seller under a conditional sale or hire purchase agreement. An example of an international interest is a mortgage or a lease. In terms of the Aircraft Protocol, the objects in which a contracting state could vest an interest included airframes, aircraft engines and helicopters.

Article 3 - Sphere of Application

This Article provided that the Convention applied when the debtor was situated in a contracting state at the time the agreement was concluded. The Convention would still apply even where the creditor was not a party thereto.

Article IV of the Protocol further extended this application of the Convention to helicopters, or airframes registered in an aircraft register of a contracting state.

Article 5 - Interpretation and Applicable Law

This Article provided that the Convention should be looked at holistically when being interpreted. In particular, one must look at the purpose as set out in the preamble, the international character of the Convention and the need to promote uniformity and predictability.

Article 6 - Relationship between the Convention and the Protocol

This Article provided that the Convention and the Protocol shall be read and interpreted as one instrument. Where any inconsistency existed, the Protocol shall prevail. This was because the Protocol had modifications to the Convention.

Chapter II - Constitution of an international interest

Article 7 - Formal requirements

This Article set out the criteria an interest must meet in order to be considered as an international interest. The requirements were that the agreement creating the interest must be in writing, must relate to an object which the creditor had the power to sell, and enable the object to be identified in conformity with the Protocol.

Chapter III - Default Remedies

This Chapter set out the various remedies that may be available to the creditor in case of any default by the debtor. These remedies would, however, be subject to consent by the debtor and any declarations outrightly made (Article 8). The transaction documents between creditor and debtor would, therefore, have to state what constituted a default and which events would give rise to these remedies (Article 11). In the absence of an agreement on what constituted a default, then any default that substantially deprived the creditor would be regarded as a default.

Further, a creditor may apply to court for speedy relief such as preservation, possession, immobilisation or lease of the object in terms of Article 13. Article 14 further stated that, subject to a declaration stating otherwise, any remedies provided for under this Chapter shall be exercised in conformity with the law of the place where the remedy is to be exercised.

Chapter IV - The International Registration System

Article 16 - The International Registry

This Article established the International Registry, for the registration of various interests and different categories of objects and associated rights. For purposes of chapters IV and V, the term registration included, where appropriate, an amendment, extension or discharge of a registration.

Article 17 - The Supervisory Authority and the Registrar

This Article established the Authority, as provided for in the Protocol, and set out the scope of duties to be handled by the Authority. Article XVII of the Protocol provided that the Supervisory Authority shall be the international entity designated to adopt a Mobile Equipment Convention and an Aircraft Protocol. It further stated that the Authority, its officers and employees shall have immunity from legal and administrative processes as provided by the applicable rules.

Chapter V - Other Matters Relating to Registration

This Chapter related to all aspects of the registration of interests, including registration requirements, consent to registration by either party, duration of registration, searches and deregistration.

Further, registered interests were ranked chronologically in the order they were received in the International Registry. Further, in terms of Article 22, any person would be able to conduct a search on any interest registered, by accessing the online registry.

Chapter VI - Privileges and immunities of the Supervisory Authority and the Registrar

Article 27 prescribed the immunities and privileges that the Supervisory Authority and its officers shall enjoy. Further, it gave the Supervisory Authority international legal personality, meaning the Authority had the capacity to sue and be sued in its own right, separate from its officers.

Chapter VII - Liability of the Registrar

This Chapter made the Registrar liable for compensatory damages for any loss suffered as a result of an error or omission of the Registrar or officers and employees of the Supervisory Authority. The Registrar shall however not be liable where information given for purposes of registration was inaccurate.

Chapter VIII - Effects of an international interest against third parties

Article 29 stated that a registered international interest had priority over a subsequently registered interest and over an unregistered interest, whether or not it was registrable. Article XIV of the Protocol modified the provisions on priority interests as regards outright buyers. In terms of the Convention, a buyer of an aircraft object acquired its interest in that object subject an interest registered at the time of its acquisition.

Insolvency

Generally, an international interest was recognised in insolvency proceedings against the debtor if registered prior to the commencement of the proceedings. This meant that a creditor could claim against the asset in order for the debtor to fulfill its obligations. An interest that was recognised under national law was also recognised under the Convention. In practice, it was therefore, advisable for creditors to register their interests in the aircraft objects with both the relevant national registry and the International Registry.

The Convention provided two regimes in insolvency cases, that is, alternative A (hard regime) or alternative B (soft regime). Where neither option was selected, the contracting state's national procedural rules would apply. Alternative A was intended to facilitate structured financing transactions. Under it, on an insolvency-related event, the debtor or insolvency practitioner must give possession of the aircraft object to the creditor no later than the earlier of:

- i. the end of the "waiting period" or
- ii. the date on which the creditor would ordinarily be entitled to take possession of the aircraft object.

During this waiting period, the aircraft object may be used, but it and its value must be preserved and maintained. Under the alternative B, the debtor or insolvency practitioner must give notice to the creditor within the waiting period stating whether it would either cure all defaults and perform all future obligations or give the creditor the opportunity to take possession of the aircraft. This made parties to transactions accountable in terms of honouring their obligations under the agreement.

Chapter IX - Assignments of Associated Rights and International Interests; Rights of Subrogation

This chapter related to various aspects of assignments including effects of assignment, formal requirements of assignment, the debtor's duty to the assignee, default remedies in respect of assignment by way of security, priority of competing assignments, assignee's priority with respect to associated rights, effects of assignor's insolvency and the rights of subrogation.

Chapter X - Rights or Interests Subject to Declarations by Contracting States

This chapter provided that a Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare generally or specifically, the rights having priority without registration such as those categories of non-consensual rights or interests which, under that State's law, have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest.

Further, a Contracting State may, at any time in a declaration deposited with the Depositary of the Protocol, list the categories of non-consensual rights or interests which shall be registrable under this Convention as regards any category of object as if the rights or interests were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.

Chapter XII - Jurisdiction

This Chapter stated that parties were free to choose the courts which would have jurisdiction in the event of a claim brought under this Convention, as long as the courts were located in a contracting state. The Committee, however, noted that Article 43 also gave the courts where the object was situated, jurisdiction to grant relief under Article 13.

As regards Article 44, only the courts of the place where the Registrar had its administrative centre shall have exclusive jurisdiction to award damages or any orders against the Registrar.

Chapter XIV - Final Provisions

This Chapter dealt with signature, ratification, acceptance, approval or accession of the Convention in Article 47. Article 49 stipulated when the Convention came into force. The Chapter also dealt with the various declarations that contracting states could make with regard to which provisions it would and would not adopt.

8.0 EXISTING LEGISLATION ADDRESSING SOME OF THE OBJECTIVES OF THE CONVENTION

The *Civil Aviation Act, No 5 of 2016* addressed some aspects of the Convention regarding the national airline. Further, the *Movable Property (Security Interest) Act, No 3 of 2016* and the *Hire Purchase Act, Chapter 399 of the Laws of Zambia* also addressed aspects of financing on credit.

9.0 CONCERNS FROM STAKEHOLDERS

The Committee interacted with various stakeholders with a view of broadening the consultative process on the Convention and Protocol. Almost all the stakeholders who appeared before the Committee welcomed the ratification of the convention. However, some of the stakeholders raised concerns as outlined below.

- i. some stakeholders were concerned that the convention appeared to be exceedingly skewed in favour of the creditors' interests and was, on the other hand, silent on the major benefits expected to accrue to the lessee or buyer, except discounts which may not be granted. They contended that Zambia, not being a manufacturer or lessor of aircraft would, therefore, be disadvantaged;
- ii. some stakeholders expressed the view that the ratification of the Convention and Protocol would open Zambia to unlimited forms of sales and leasing agreements resulting in the country being used as a conduit for registration and laundering of aircraft equipment meant for use in other jurisdictions, under the protection of the Convention. Further, the Committee heard that ratification of the Convention would encourage third party businesses that would withdraw their assets once they gained value, thereby leaving the local operators vulnerable or inconvenienced; and
- iii. some stakeholders also expressed concern that the consultation made by the government were inadequate except at international fora where few Zambian stakeholders were present.

In view of the above concerns, some of the stakeholders proposed that the ratification of the Convention and Protocol be put on hold to allow for further consultations and to allow stakeholders to analyse it.

10.0 BENEFITS OF RATIFYING THE CONVENTION

The Committee was informed that the ratification of the Convention and Protocol would benefit the contracting parties and Zambia in particular, in many ways, including the following:

- i. the convention and its attendant aircraft protocol would reduce the risks for creditors or financiers;
- ii. the Convention would facilitate a transparent legal mechanism for asset-based financing and leasing of large commercial aircraft and aircraft engines;
- iii. the Convention reduced the risk for financiers which in turn had a trickle-down effect of reducing borrowing costs for debtors;
- iv. the Registry was an internet based electronic database which would be highly beneficial to member states, aircraft operators and owners of the aircraft; and
- v. the Convention provided for a framework on the management of disputes.

On the other hand, maintaining the status quo by not signing and ratifying the Convention and Protocol would mean Zambia Airways and other local operators would forego the benefits provided by the Convention. Further, other airlines and operators may be reluctant to invest in Zambia as they would have no protection under the Convention and Protocol in the event of insolvency or dispute over ownership of the aircraft equipment.

11.0 SUBMISSION BY THE MINISTRY OF JUSTICE

The Committee was informed that to enable Zambia to accede to the Cape Town Convention and Protocol, the following amendments to domestic legislation would be required:

- i. *the Civil Aviation Act No 5 of 2016* would need to be amended to give the Cape Town Convention and Aircraft Protocol the force of law in Zambia. This was because the Cape Town Convention enabled states to make declarations opting in or out of various articles in the Convention and Protocol. The Act would, therefore, need to be amended to give effect to certain provisions of the Cape Town Convention and Protocol in accordance with the declarations Zambia makes at the time of accession, or in some cases afterwards. Further amendments to the Act may be required to resolve any inconsistencies between the Act and the requirements of the Cape Town Convention and Protocol relating to the registration and de-registration of aircraft;
- ii. regarding the *Movable Property (Security Interest) Act, No 3 of 2016*, situations may arise in which a secured party may wish to register its interest on the collateral register as well as the International Register. Amendments to the *Movable*

Property (Security Interest) Act would therefore, be necessary to clarify the relationship between the security interest under the Act and the Cape Town Convention; and

- iii. as for the *Corporate Insolvency Act No. 9 of 2017*, the Aircraft Protocol provided for insolvency remedies in the event of an insolvency relating aircraft objects. States were given an option of one of two procedures to apply in the event of a debtor's insolvency. It may be necessary, therefore, to review the *Corporate Insolvency Act* to ensure harmonisation with international obligations relating to insolvency arising in the aviation industry in Zambia.

Additionally, the Committee learnt that the Cape Town Convention and the Aircraft Protocol were not inconsistent with the Constitution.

12.0 COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

Having considered submissions from stakeholders that appeared before it, the Committee makes observations and recommendations as set out hereunder.

- i. the Committee takes note of the existing pieces of legislation that address the objectives of the Convention and Protocol. These are the *Civil Aviation Act, No. 5 of 2016*, the *Movable Property (Security Interest) Act, No. 3 of 2016* and the *Corporate Insolvency Act, No. 9 of 2017*. The Committee observes that the legislation was enacted before the ratification of the Cape Town Convention and Protocol and therefore, may not be speaking to the convention;

In this regard, the Committee recommends that the legislation should be thoroughly examined in order to ensure that it is not in conflict with the convention; and

- ii. the Committee also notes that despite its benefits and the Cape Town Convention and Protocol having come into force in 2004 and 2006 respectively, Zambia has not yet ratified it.

The Committee, therefore, recommends that the Government should accelerate the process of ratifying the Convention and Protocol in order for the country to enjoy its benefits and be in harmony with international standards.

The Committee further recommends that the House approves the proposal by the Executive to ratify the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment.

13.0 CONCLUSION

The Committee wishes to express its gratitude to all stakeholders who appeared before it and tendered both oral and written submissions; and to thank you, Mr Speaker and the Clerk of the National Assembly for your guidance and support throughout the Session.

We have the Honour to be, Sir, the Committee on Transport, works and Supply mandated to consider the proposal to ratify the Cape Town Convention and Protocol for the Fourth Session of the Twelfth National Assembly.

D M Syakalima, MP ;
(Chairperson)

Ms C C Kasanda, MP;
(Vice Chairperson)

Mr P M W Daka, MP;
(Member)
Mr G G Zimba, MP;
(Member)

Mr R Lihefu, MP;
(Member)

Mr G S Sialubalo, MP;
(Member)

Ms G Katuta, MP;
(Member)

Mr Y Siwanzi, MP;
(Member)

Mr A C Mumba, MP; and
(Member)

Mr J Kabamba, MP.
(Member)

D M Syakalima, MP ;
CHAIRPERSON

June 2020
LUSAKA

APPENDIX I

List of National Assembly Officers

Ms C Musonda, Principal Clerk of Committees
Mr F Nabulyato, Deputy Principal Clerk of Committees (SC)
Mr S Chiwota, Senior Committee Clerk (SC)
Ms C R Mulenga, Committee Clerk
Mr C Bulaya, Committee Clerk
Ms S Sakala, Legal Officer
Mr S Simushi, Intern
Mrs R M Kanyumbu, Typist
Ms M Kalonga, Typist
Mr M Kantumoya, Parliamentary Messenger

APPENDIX II

LIST OF WITNESSES

Ministry of Transport and Communication

Eng. M Lungu, Permanent Secretary
Mr G Lesa, Director General, Civil Aviation Authority (CAA)
Mr S Mbewe, Director Planning and Monitoring
Mr S K Nkandu, Legal Counsel, Civil Aviation Authority (CAA)

Ministry of Justice

Ms C Kaisala, Parliamentary Counsel

Ministry of Defence

Mr E L Zimba, Acting Permanent Secretary
Lt Col C Nhambota, Air Force Legal Counsel

Zambia Airways (2014) Limited

MR B Endeshaw, Chief Executive Officer
Mr R Misitala, Board Director

Law Association of Zambia (LAZ)

Mr M A Musukwa, Vice President
Mrs S C Mbulo, Research Advocate

Zambia Air Services Training Institute (ZASTI)

Mr B C Shingalili, Principal
Mr W Ngoma, Acting Vice Principal
Mr E Mwanza, Quality Manager

Zambia Airports Corporation Limited (ZACL)

Mr F Mondoloka, Managing Director
Mr A Phiri, Director, Air Services

Royal Air Charters

Mr E J Kalombe, Operations Manager

Mahogany Air

Dr J Belemu, Chief Executive Officer

Proflight Commuter Services

Mr C Kabalika, Company Secretary
Mr S Mweemba, Ground Operation Manager
Mr L P Lemba, Director, Industry Affairs