

CTC Basics II: legal

- 1. Relationship between the Cape Town Convention and national law**
- 2. Implementation of, and compliance with, CTC**

**African regional event on the Cape Town Convention and its
Aircraft Protocol and cross border transferability of aircraft**

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Jeffrey Wool

Topics

- I. Introduction
- II. Treaty – national law framework
- III. Application of framework to the CTC
- IV. Specific points of intersection between CTC and national law
- V. Chart of implementation
- VI. Diagram on compliance

I. Introduction –

- Threshold point: critical importance of the risk-reducing ‘qualifying declarations’ under the OECD’s Aircraft Sector Understanding
 - Convention art 54(2)(w/non-judicial remedies) and/or Protocol art X (w/timetable), and
 - Protocol arts VIII, XI, alt A (w/timetable), and XIII
- Framework for understanding relationship between Treaties and national law
 - Treaties defined: modern substantive law instruments
- Application of the framework to the Convention and Aircraft Protocol (CTC)
- Impact on (1) transacting parties, and (2) governmental officials
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II. Treaty – National Law Framework

Framework built on five core questions:

- **Q1: Force of Law** - Under what conditions, and to what extent, do treaties have the force of law in contracting states thereto, separate from the international obligations incurred thereby?
- **Q2: Prevailing Nature of Treaties** – To what extent, and with what limitations, if any, do the terms of a Treaty, which have a force of law in a contracting state, prevail over conflicting law in that contracting state?
- **Q3: Scope of Treaties/Relevance of National Law** - To what extent do the substantive terms of a Treaty, which have the prevailing force of law in a contracting state, apply to a transaction covered thereby and what is the continuing relevance of national law in regulating such transactions?
- **Q4: Applicable Law** – To the extent that elements of national law in contracting state apply to covered transactions, what is the national law, the pertinent question often but not always being what is the relevant applicable law for these purposes?

II. Treaty – National Law Framework

Q1: Force of Law

- Application by national courts and administrative officials of the Treaty provisions as national law
- International obligations – necessary but not sufficient
- Force of law - determined by national law:
 - Monism
 - Dualism
 - Many system have elements of both

Q2: Prevailing Nature of Treaties

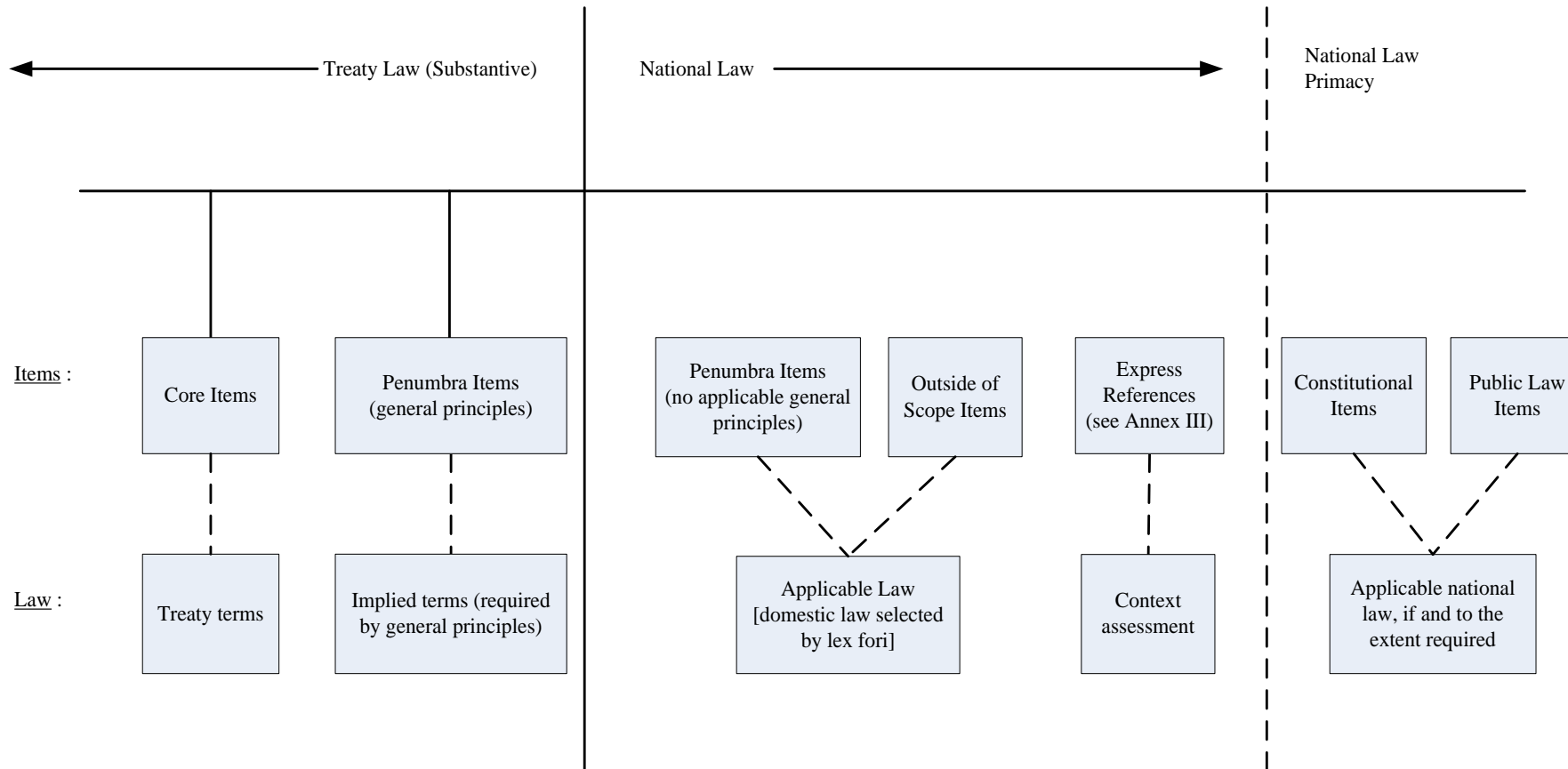
- Primacy of Treaty is often an incorrect assumption. Potential primacy issues in case of:
 - Insufficient implementation action
 - Adverse hierarchical rules
 - Public law elements
 - Constitutional type law

II. Treaty – National Law Framework

Q3: Scope of treaties/relevance of national law

- ‘Autonomous interpretation principle’ – avoid national concepts in interpretation, and focus on ‘the international character’ and ‘the need to promote uniformity in its application’
 - Transactions within core scope: connecting factor. Treaty terms apply
 - Related issues: interpreted in conformity with general principles of Treaty – gap-filling or autonomous interpretation principle
 - Issues outside of scope (or absent general principles): national law
 - Internal Treaty terms: Treaty expressly refers to national law

Depiction of treaty versus national law



II. Treaty – National Law Framework

Q4: Which National Law Applies

- Applicable Law – national law selected by the court with jurisdiction
- Which national / applicable law is content-specific

Q5: Application of Treaties/Non-Contracting States

- Some treaties (or parts thereof) apply to parties located in non-contracting states via rules of private international law of non-contracting states
- Esp. re mobile and intangible assets and via choice of law treaties
- Relevance of nature of implementation in referred-to law of contracting state

III. Application of the Treaty – National Framework to the CTC

Q1. Force of Law

- Few problems save in some cases with IDERAs (limited issues)
- Best international practice: rulemaking/procedural instructions

Q2:Prevailing Nature of Treaties

- Insufficient implementation action - examples
- Operation of adverse hierarchical rules: best practice – express language
- Public law impediments – limited practical impact
- Constitutional type law – primacy issue – flexibility in Article 54(2)

III. Application of the Treaty – National Framework to the CTC

Q3: Scope of Treaties/Relevance of National Law

- CTC is broad and displaces national law to the extent of inconsistencies (international law principle) where CTC has primacy
- Gap filling, Article 5: related items governed by CTC general principles – see next slide
- Related items w/o general principles / outside scope not governed by CTC – examples governed by applicable law
- Internal treaty terms – CTC express reference to national law – see part IV below

III. Application of the Treaty – National Framework to the CTC

The overarching general principles:

1. Strong presumption of enforceability of contract provisions even when Convention is silent on a topic
2. Terms to be implied, when needed, that enhance transactional predictability and reflect international best practices
3. Terms to be implied, when needed, to provide further details related to the sui generis concepts
4. Governments may not impose conditions on or take action that adversely affects basic CTC rights, including on matters on which CTC is silent

Example of principle 4:

- CTC pre-empts national law rules that are incompatible with the Convention, such as those that:
 - Place conditions on ability to call default or exercise remedies, e.g. mandatory grace period;
 - Add to the de-registration, export and IDERA provisions by permitting CAA to act in quasi judicial capacity and/or require debtor consent to exercise of IDERA

III. Application of the Treaty – National Framework to the CTC

Q4: Applicable Law

- National law specified by the court with jurisdiction. Additional rules / guidance is provided by CTC with respect to specific clauses and contexts.

Q5: Application of Treaties/Non-Contracting States

- CTC applies when:
 - Debtor/Seller situated in a contracting state.
 - Aircraft registered in a contracting state
- Non-contracting states might apply rules of the CTC via rules of private international law.
- Effect of (1) governing law clauses, (2) Geneva Convention of 1948, and (3) law specified by the court rule

IV. Specific points of intersection between CTC and national law

Section 2.9: Relationship of Convention to national law from the Official Commentary from Professor Sir Roy Goode

CTC applies to the exclusion of otherwise applicable law where the two conflict. However, it is not a comprehensive code and coexists with other sources of law:

- CTC deals with rights and obligations in private law and the enforcement of rights. Not intended to affect: criminal, tort or regulatory public law
- CTC supersedes 1948 Geneva Convention on international recognition of aircraft, the latter continues to apply with respect to rights and interests not covered by CTC
- CTC does not seek to cover the whole field of asset-based secured financing and leasing: some elements will be governed by national laws and the agreement of the parties
- CTC itself allows considerable scope for party agreement on a range of issues. i.e.- remedies and jurisdiction
- CTC provisions on termination of an agreement are not exhaustive, however, a Contracting State may not impose conditions in its private law incompatible with CTC

IV. Specific points of intersection between CTC and national law

Section 2.9: Relationship of Convention to national law from the Official Commentary from Professor Sir Roy Goode.

- CTC specifically refers certain issues to the applicable law
- Contracting state may make a declaration under Article 39 or Article 40 as to non-consensual rights or interests provided by its law
- Registration in the IR of interests which are not CTC interests or registrable non-consensual interests, though no effect under CTC; may suffice under applicable law to constitute notice and priority
- Matters governed by CTC may as well be controlled by contractual provisions even where CTC is silent
- CTC requires reference to the general principles underlying CTC, prior to the otherwise applicable law to fill gaps

IV. Specific points of intersection between CTC and national law

Section 3.23: The applicable law; choice of law from the Official Commentary from Professor Sir Roy Goode

Various provisions to the applicable law:

- Article VIII; subject to a declaration by Contracting State, parties are free to choose the law governing their relations
- Article XI, Alternative A, paragraph 5(b), unless and until the creditor is given opportunity to take possession of an aircraft object after an insolvency-related event, it is entitled to apply for any forms of interim relief available under applicable law
- Article XI, Alternative A, paragraph 11, the provision under paragraph 10 that no obligation of the debtor under the agreement may be modified without the creditor's consent, does not affect any authority of the insolvency administrator under applicable law to terminate the agreement

IV. Specific points of intersection between CTC and national law

Clauses requiring special attention:

- Article 5 of the Convention – interpretation and gap filing
- Article 14 of the Convention – procedural law governs remedies subject to mandatory declaration on whether or not leave of court is required
- Article 39 declaration – non consensual rights and interest and detention
- Article XIII of the Protocol – export of aircraft is subject to safety laws and regulations

V. Chart of Implementation

Ensuring proper declarations and implementation

Cape Town Treaty with Aircraft Protocol

Eligible for OECD Discount  Angola  Australia  Brazil  Canada  Ethiopia  Fiji  Indonesia  Jordan  Kazakhstan  Kenya  Luxembourg  Malaysia  Malta  Mongolia  Myanmar  New Zealand  Nigeria  Norway  Oman  Pakistan  Panama  Rwanda  Senegal  Singapore  Sweden  Tajikistan  Turkey  Vietnam	Awaiting OECD review <i>AWG, preliminary review on primacy</i>  Denmark  Ireland  United Kingdom <i>No AWG, preliminary review on primacy</i>  Cape Verde  Mozambique  Madagascar  Malawi  San Marino  Togo Awaiting entry into force and related action  Argentina	Qualifying declarations not adopted  Albania  Bahrain  Belarus  Bhutan  Cameroon  China  Colombia  Congo  Cuba  Egypt  Antilles  Kuwait  Latvia  Mexico  Romania  Spain  Saudi Arabia  Aruba  USA	Qualifying declarations, but implementation issues  Afghanistan  Bangladesh  India  Russia  South Africa  Tanzania  Ukraine  UAE
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VI. Diagrams on Compliance

Programs Potential sources of CTC non-compliance

