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The interaction between Cape Town Convention repossession remedies and local procedural law: a civil law case study

Donald Gray, Jason MacIntyre and Jeffrey Wool*

* Mr Gray is head of the international aircraft financing practice at Blake, Cassels & Graydon LLP ('Blakes') (www.blakes.com), based in Toronto. He is also former chair and current member of the Executive Committee of the Legal Advisory Panel of the Aviation Working Group (www.awg.aero) and former Canadian delegate to the UNIDROIT/ICAO sessions that prepared the Cape Town Convention and Aircraft Protocol. Mr MacIntyre is a partner in Blakes Aviation Group, also based in Toronto. Mr Wool is secretary general, Aviation Working Group; head of aerospace law and policy, Freshfields Bruckhaus Deringer (www.freshfields.com); professor of global business law, University of Washington (www.law.washington.edu) and an associate faculty member, University of Oxford. He is also the executive director of the Cape Town Convention Academic Project, the general editor of the *Cape Town Convention Journal*, and the chair of the Advisory Board to the International Registry (Aircraft Protocol). The authors (1) dedicate this article to Professor Ronald Cuming of the University of Saskatchewan Faculty of Law, without whose innovative thinking 27 years ago the Cape Town Convention would not have come to be; (2) gratefully acknowledge the invaluable assistance of Sebastien Vilder, partner, and Simon Seida, senior associate, both in Blakes Aviation Group based in Montreal, Auriol Marasco, senior associate, and Lisha Li, associate, both in Blakes Aviation Group based in Toronto, and the tireless research of Jeffrey Hernaez, student-at-law in the Blakes Toronto office; (3) appreciate the thoughtful commentary of Ali Uysal, Chief Legal Counsel of Turkish Airlines, Professor Charles Mooney Jr of the University of Pennsylvania Law School, and Khaled Asfour of Ali Sharif Zu'Bi Advocates & Legal Consultants of Amman, Jordan, given when this article was originally presented at University of Oxford, 8 September 2015; and (4) have written this article in their personal capacities, not on behalf of organisations with whom they are affiliated.

The economic benefits of the Cape Town Convention and its Aircraft Protocol derive, in substantial part, from the availability of prompt and predictable repossession remedies in the case of default by a debtor. While the treaty sets out these substantive remedies with clarity, the texts contemplate, and practice requires, recourse to local procedural law to exercise them. In some jurisdictions, the treaty's remedies do not find direct and/or sufficiently defined supportive procedural law. That is to be expected given that the treaty contains sui generis concepts, creates new, often aircraft-specific, remedies, and may require contracting states to change their substantive law. This article examines three potential challenges, where such procedural law may be absent or limited. It then sets out a central case study, using the Canadian ratification of the treaty and its application to aircraft and engine repossessions in the Province of Québec, a civil law jurisdiction, as an example of how these gap-filling challenges may constructively be addressed. Finally, it draws broader implications and makes recommendations on the general principles, sources, and content of such gap-filling, and how contracting states might take affirmative action by enacting tailored procedural provisions to address such gaps.

1. Introduction

The Convention on International Interests in Mobile Equipment (the 'Convention') and the Protocol to the Convention on Matters Specific to Aircraft Equipment (the 'Protocol', together with the Convention, the 'Cape Town Convention', or, more concisely, the

‘CTC’¹ produce economic benefits to both creditors and debtors by reducing the risk of loss in aircraft financing and leasing transactions. That risk reduction is largely attributable to the availability of a clear set of time-bound remedies related to the repossession of aircraft and engines, permitting a creditor to promptly repossess and sell or redeploy valuable aircraft assets to offset unpaid contractual obligations, and to protect and preserve their value pending such sale or redeployment.

The CTC recognises that high value aircraft assets are rapidly deteriorating assets that require constant care and maintenance to protect and preserve their collateral value, and that prompt enforcement of remedies in a default scenario is often required to avoid severe depreciation of such value. Aircraft become ‘non-current’ and non-airworthy almost immediately if required daily maintenance, preservation and protection tasks are not performed.

In accordance with generally accepted principles of international law and the terms of the Convention, CTC remedies are to be exercised in conformity with local procedural law, subject to an overriding declaration as to whether leave of the court is required (the ‘Article 14 Rule’). This article addresses the meaning, effect, and implications of the Article 14 Rule, in particular when there is no or insufficiently defined local procedural law in support of the required CTC remedies. *Lacunae* (procedural gaps) of this kind should be expected: the CTC contains *sui generis* concepts, creates new, often aircraft asset specific, remedies, and may require contracting states to change their substantive laws. Gap-filling, therefore, is critical to addressing practicalities relating to the enforcement of remedies, and, in consequence, in determining the practical and substantive benefits of the treaty.

This article addresses these issues concretely through the mechanism of a case study. We examine three potential procedural gaps, those related to (1) the exercise of non-judicial

remedies, (2) relief pending final determination, and (3) de-registration and export via an IDERA (Topics I–III, respectively), in each case with reference to the CTC as ratified by Canada and applied in the Province of Québec, a civil law jurisdiction. We then suggest broader implications for, and make recommendations to, contracting states facing these or similar facts. We conclude by outlining general principles, sources, and content for the required gap-filling, and, placing things on more solid ground, include in the Annex to this article recommendations for tailored procedural provisions to fill such gaps.

More specifically, in Part 2, we set the stage by briefly summarising (1) the three remedies noted above, the Canadian implementation of the CTC and declarations pursuant thereto, the change to pre-CTC law relating thereto, and the existing local Québec and other Canadian procedural law and extent of *lacuna* to be filled, and (2) the CTC’s general approach to gap filling, with particular reference to the Article 14 Rule. Part 3 then sets out and resolves the case study. Part 4, and the Annex, address broader implications, principles of gap-filling, and recommendations for tailored procedural provisions.

2 Three remedies under the Cape Town Convention²

(a) Topic I: non-judicial remedies

(i) Applicable CTC rules

Article 8 (Remedies of chargee) of the Convention allows a chargee, in the event of default, to repossess the aircraft object, sell or grant a lease of it, and receive any income arising from the management or use of that object. Article 10 (Remedies of conditional seller or lessor) allows a conditional seller or lessor: (a) subject to any declaration that may be made by a contracting state under Article

¹ Each adopted in Cape Town, 16 November 2001.

² While this article focuses on the repossession remedies available under the CTC, it also covers the related, but separate, remedies of (i) relief pending final determination and (ii) de-registration and physical export.

54 (Declarations regarding remedies), to terminate the agreement and take possession or control of any object to which the agreement relates; or (b) to apply for a court order authorising or directing either of these acts. These Articles are silent on whether a repossession creditor (chargee, conditional seller, or lessor) must apply to the court in order to exercise these remedies. Whether a court order is necessary will depend upon the declarations made by the contracting state under Article 54(2) of the Convention, which is the only declaration in the Convention that is mandatory. A contracting state's instrument of ratification (including herein, accession) for the Protocol will not be accepted by UNIDROIT unless it has declared whether or not remedies under the Convention require leave of the court.³

Article 14 (Procedural requirements) of the Convention requires that the exercise of non-judicial remedies conform to local law procedural requirements. For example, if prior to the implementation of the CTC, local law in a contracting state did not permit the seizing of an aircraft without a juridical order and an administrative authorisation from the air authority and, after the implementation of the CTC, with the contracting state having made a declaration that leave of the court is not required for Article 8(1) remedies, then, in the event of a default, the creditor would be entitled to repossess the aircraft without first getting leave of the court in such contracting state, but may still need the administrative approval from the air authority.⁴

Remedies conferred by Article 8 are only exercisable if agreed to by the debtor or lessee at any time.⁵ The agreement does not need to be in writing and does not have to refer to the remedies specifically; it can be a general

agreement to all remedies under the Convention or at law.⁶

Article IX(3) of the Protocol, which governs all remedies available under the Convention in relation to aircraft objects, requires that all remedies be exercised in 'a commercially reasonable manner'. Whether an action is commercially reasonable is a finding of fact and will vary depending on the circumstances in each case. The Protocol specifies that a 'remedy is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable'.⁷ One can look at established commercial practice and accepted international practice, or industry standards and customary practices within the aircraft financing and leasing industry, as support for commercial reasonableness.⁸

Accordingly, any creditor looking to exercise non-judicial remedies will have to: *first*, determine that the contracting state has not declared otherwise under Article 54(2) of the Convention; *second*, confirm that the debtor has previously agreed to the non-judicial remedy that the creditor wishes to exercise, or to all remedies under the Convention or at law; *third*, ensure that it proceeds in a commercially reasonable manner in the exercise of the remedy, and *fourth*, ensure that it proceeds to enforce pursuant to applicable local procedural rules.

(ii) *Canadian implementation of the CTC and change to pre-CTC law in respect of non-judicial remedies*

Each country has internal rules on the implementation and effect of treaties and

⁶ Official Commentary (n 3) para 2.79.

⁷ Protocol, Article IX(3).

⁸ The Legal Advisory Panel of the Aviation, Working Group, *Practitioners' Guide to the Cape Town Convention and the Aircraft Protocol* (Aviation Working Group 2015) 142–43, <<http://www.awg.aero/assets/docs/Practitioner%20Guide%20070215.pdf>> accessed 24 September 2015; Official Commentary (n 3) para 5.51.

³ Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (hereinafter, 'Official Commentary') (3rd edn, UNIDROIT 2013) para 4.330.

⁴ *ibid* para 4.118.

⁵ Convention, Art 8(1).

when and the extent to which treaties have the force of law that prevails over conflicting national law. Canada is a dualist jurisdiction, where domestic law and treaty law operate on distinct planes. A treaty has no direct effect domestically until it is implemented by domestic legislation. In cases where Canadian domestic law is not in conformity with Canada's international obligations under a treaty, Canada may be in breach of international law; however, that has limited bearing on the rights of parties litigating in a Canadian court.

Additionally, Canada is a federalist state with the distribution of powers weighted towards the provinces. The highest-level courts of appeal in Canada have consistently upheld an expansive view of provincial powers and a narrow view of federal power under the Canadian Constitution. In Canada, the broad reading of the provincial property and civil rights power clause in the Canadian Constitution has given provinces the power to regulate contracts, which encompasses extensive regulation of property rights and the debtor-creditor relationship, although bankruptcy and insolvency and aeronautics remain federal powers. This means that Canada needed to pass federal legislation as well as provincial legislation in each province and territory in order to fully and properly adopt the CTC into its laws.

Canada's federal implementing legislation, the International Interests in Mobile Equipment (Aircraft Equipment) Act (Canada) (the 'Federal CTC Act'),⁹ directly mirrors the provisions contained in the CTC as a set of codified laws. Its implementation is clear and straightforward as it lays out the requirements for creating and registering an international interest, the rights available to creditors and debtors, the procedural requirements for exercising a remedy, and the establishment of priority rules through the International Registry. The statutory scheme contemplated in the

CTC is directly implemented at the national level and no further legislation is required.¹⁰ Although the Federal CTC Act states that the Convention and Protocol are to be interpreted together as a single instrument, Article 6.2 of such Act makes it clear that, in the event of inconsistency between the two, the Protocol prevails.

The Federal CTC Act became law on 24 February 2005, and provides that the Convention and the Protocol have force of law in Canada, except for Articles 47 to 62 of the Convention and Articles XXVI to XXXVII of the Protocol. Pursuant to this Act, a provision of the Convention or of the Protocol given force of law that is inconsistent with any other law, except certain federal statutes that mainly related to matters of criminal law, prevails to the extent of the inconsistency.

Canada's provincial and territorial implementing legislation, including Québec's An Act to Implement the 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 (the 'Québec CTC Act'),¹¹ are also codified laws as opposed to sets of general principles. Such legislation sets forth the same clauses as the Federal CTC Act. As with the Federal CTC Act, the Québec CTC Act gives force of law to Article 6.2 of the Convention that sets out the relationship between the Convention and the Protocol, giving the Protocol precedence in the event of inconsistency between the two.

The non-judicial remedies in the Convention largely codify the common law remedies already available in Canada's 12 common law provinces and territories. Such remedies were not available in Québec, the only civil law jurisdiction in Canada, prior to its implementation of the CTC.

⁹ SC 2005, c 3; Some provisions of this Act were not proclaimed into force until the enactment of the Jobs and Growth Act 2012, SC 2012, c 31, s 411 ('Jobs and Growth Act').

¹⁰ The level of detail and specificity in the Convention makes it a fully implementable legal regime. One aspect of that is the inclusion of an IDERA form (see Topic 3 in this Article).

¹¹ CQLR c M-35.1.2.1.

With the full implementation of the CTC within Canada as of 2014 (other than in New Brunswick, which has ratified the CTC and is waiting for the Federal government to make a declaration in respect of such ratification with UNIDROIT), the legal framework governing remedies available to aircraft financing and leasing parties under the CTC is now uniform across the country and provides contractual parties with enhanced options.

(iii) *Canada's declaration in respect of non-judicial remedies*

Canada's declaration provides as follows:

The Government of Canada also declares, in accordance with Article 54 of the Convention, that any remedy available to a creditor under any provision of the Convention, the exercise of which does not thereby require application to the court, may be exercised without leave of the court.¹²

(iv) *Content of local Canadian procedural law and extent of lacuna in respect of non-judicial remedies*

(A) *Procedural rules for non-judicial remedies in Canada's common law provinces.* In the Canadian jurisdictions that permit non-judicial remedies (also commonly referred to as 'self-help'), procedures have evolved to define the reasonable exercise of such remedies. These have been set out in legislation and court decisions. In summary, the generally accepted procedure is that (1) no violence can be used; (2) a 'breach of the peace' must be kept to a minimum, although this term has been difficult to define;¹³ (3) reasonable force can be used to enter public buildings such as a hangar or warehouse; and (4) applicable safety and security

rules must be followed. Under section 62(1) (a) of Ontario's Personal Property Security Act ('PPSA'), upon default under a security agreement, the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law.¹⁴ If the collateral is equipment (such as an aircraft or aircraft engine), then section 62(1)(b) of the PPSA allows the secured party to, 'in a reasonable manner, render such equipment unusable without removal thereof from the debtor's premises'.¹⁵ This statute is similar in the other Canadian provinces and territories, other than Québec.¹⁶ The Canadian legislation is modelled after the US Uniform Commercial Code ('UCC'),¹⁷ which Australia and New Zealand also followed.¹⁸

In exercising non-judicial remedies, there is Canadian judicial authority that a secured party may break a lock to access their collateral.¹⁹ Additionally, case law in Canada indicates that a secured creditor may enter a person's premises lawfully, but they may become a trespasser if they overstep their authority.²⁰

¹⁴ Personal Property Security Act, RSO 1990, c P 10, s 62(1)(a).

¹⁵ *ibid* s 62(1)(b).

¹⁶ Personal Property Security Act (BC, M, NB, NWT, Nu, PEI, S), s 58(2); (A), s 58(1); (NL, NS), s 59(2); (Y), s 56; in some Canadian PPSAs, rather than rendering equipment 'unusable' as is the case in Ontario, for example, the BC PPSA provides that: 'if the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate alternative storage facilities are not readily available, the secured party may seize or repossess the collateral without removing it from the debtor's premises in the same manner by which a sheriff may seize without removal, if the secured party's interest is perfected by registration' (s 58(2)(b)).

¹⁷ UCC § 9-609.

¹⁸ Personal Property Security Act 2009 (Aus), s 123 (1); New Zealand Personal Property Securities Act 1999 (NZ), 1999/126 s 109(1).

¹⁹ Cuming (n 13) 633; *Rayson v Graham* (1864) 15 UCCP 36; *Graham v Green* (1862) 10 NBR 330 (SC).

²⁰ *R v Doucette* (1960), 25 DLR (2d) 380 [13] (Ont CA).

¹² Declarations Lodged by Canada Under the Cape Town Convention, 29 January 2015 <<http://www.unidroit.org/depositary-2001capetown?id=1564>> ('Canada's Declarations') accessed 6 September 2015.

¹³ Frank Bennett, *Bennett on the PPSA (Ontario)* (3rd edn, LexisNexis Butterworths 2006) 115; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (2nd edn, Irwin Law 2012) 632 ('Cuming').

(B) *Procedural rules for non-judicial remedies in Québec.* While surrounded by at least 61 different jurisdictions in North America with well-developed procedural rules for the exercise of non-judicial remedies, Québec has historically not permitted such remedies, including in the context of equipment repossessions. Accordingly, while there are no procedural gaps elsewhere in Canada, there is a gap with respect to this remedy under Québec's civil law rules.

(b) Topic II: relief pending final determination

(i) Applicable CTC rules

Article 13 (Relief pending final determination) of the Convention, read together with Article X (Modification of provisions regarding relief pending final determination) of the Protocol, allows for 'speedy' relief by a creditor, pending final determination by a court. Unless otherwise declared by a contracting state, this provision allows a creditor, when its right to exercise a default remedy under the Convention is being disputed by its debtor, or it cannot gain access to its collateral, to request that the court make an order for (1) the preservation of the aircraft and its value, (2) possession, control or custody of the aircraft, (3) immobilisation of the aircraft, (4) lease or management of the aircraft and the income therefrom, and (5) if specifically agreed by the parties: (i) sale and application of proceeds therefrom, and (ii) de-registration of the aircraft and export and physical transfer of the aircraft object from the territory in which it is situated. Absent the CTC, such judicial proceedings, including appeals, could take years. Article 13, which creates a treaty-based, *sui generis* new right of action, is intended to prevent reduction in the value of the aircraft asset without prejudging the outcome of the dispute.²¹ The creditor must provide sufficient 'evidence' of default, and, when it does, the court *must* grant the requested treaty-based relief.

Article 13 of the Convention does not define 'speedy', but Article X of the Protocol permits

contracting states to do that in precise terms by declaration.²² Nor does that Convention provision set out the standard of proof for 'evidence' of default, although the Official Commentary provides useful guidance. As the purpose of this Article is to protect against the loss or the deterioration of the value of the collateral, and the financial position of the creditor pending final determination by a court, the standard of proof must be lower than that required in a case addressing the merits.²³

To date approximately half of the contracting states have made specific declarations regarding 'speedy'. Of those, most have set 10 calendar days as the deadline for a court order in respect of:

- (1) preservation of the object and its value;
- (2) possession, control or custody of the object; and/or
- (3) immobilisation of the object.

For transport category aircraft, the industry standard interval for which an aircraft not receiving any daily maintenance may remain 'current', before significant maintenance and cost is required to restore the aircraft to 'current' status, is five to seven calendar days. Given the time constraints of this interval, and that one of the most important purposes of the CTC is to preserve and protect the value of aircraft assets, expeditious judicial proceedings are essential. In that regard, the above-mentioned 10-day period should be viewed as a maximum period, and courts are encouraged to act within a shorter period.

Figure 1 illustrates how rapidly the costs escalate to return an aircraft to service if it has not received its required daily maintenance, preservation and protection tasks.²⁴

²² Article X of the Protocol specifies that 'speedy relief' describes a court order that is issued within such number of working days from the date of filing of the application for relief as specified in the declaration made by the contracting state in which the application is made.

²³ Official Commentary (n 3) para 2.106.

²⁴ Based upon ongoing empirical research being undertaken by the authors with industry sources.

²¹ Official Commentary (n 3) para 4.110.

Once the creditor has made a sufficient showing of default, unless overridden by application of a declaration under Article X(5) of the Protocol, the court may impose such terms as may be necessary to protect the debtor and other interested persons where the creditor, in implementing an order, fails to perform an obligation under the Convention or the creditor ultimately fails to establish its claim on the final determination by the court.²⁵ The court may also require the creditor to give notice to interested persons prior to making an order.²⁶ Aside from these two safeguards, if applicable, the court does *not* have discretionary power under the CTC to refuse a requested order or to suspend an order to allow the debtor time to cure any defaults.²⁷

As mentioned above, the court's discretion to impose such additional terms for the protection of the debtor and other interested person is excluded where (i) a contracting state has made a declaration in respect of Article (X)5 of the Protocol, which allows creditors, debtors and other interested parties to agree in writing that the court should not have such discretion, and (ii) the relevant parties have in fact agreed in writing to exclude such court discretion.²⁸

(ii) Change to pre-CTC Canadian law

As reviewed in section (b)(iv) below, there are precedents and well-developed principles for various forms of relief pending final determination in Canada, including under Québec civil law. The principal change to pre-CTC law in Canada was that, in Canada's declaration on this point, cited in section (b)(iii) below, Canada applied paragraph 5 of Article X of the Protocol such that the creditor and debtor, or any other interested person, may agree in writing to exclude the application of Article 13(2) of the Convention. Accordingly, debtors in many aircraft financing agreements

would not be entitled to court-imposed terms to protect their position if they had contractually agreed to such an exclusion. Interested parties, such as holders of mechanics' liens may or may not be entitled to such protections, depending upon the terms of their contracts.

(iii) Canada's declaration in respect of relief pending final determination

Canada's declaration under the Protocol provides:

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will apply paragraphs 3, 4 and 5 of Article X of the Protocol.²⁹

Canada made no declaration in respect of the definition of speedy relief in paragraph 2 of Article X.

(iv) Content of local Canadian procedural law and extent of lacuna in respect of relief pending final determination

Québec procedural law provides various forms of relief to protect the rights of parties, including creditors, during civil proceedings. These include entrusting property to a guardian (Art 737 CCP)³⁰ or ordering the judicial sequestration of property, i.e., its administration by a third party (Art 742 CCP). Moreover, Québec courts have inherent powers to issue *sui generis* orders to deal with unusual situations.³¹ In this context, Québec courts have regularly and quickly issued safeguard orders to preserve the rights of parties and of property during civil proceedings. In cases where Article 13 of the Convention applies, we expect Québec courts to rely on this provision and on their inherent powers to issue such urgent

²⁵ Convention, Art 13(2).

²⁶ *ibid* 13(3).

²⁷ Official Commentary (n 3) para 4.111.

²⁸ Protocol, Art XXX.

²⁹ Canada's Declarations.

³⁰ Code of Civil Procedure of Québec, CQLR, c C-25 ('CCP').

³¹ *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc* [2001] 2 SCR 743 [37].

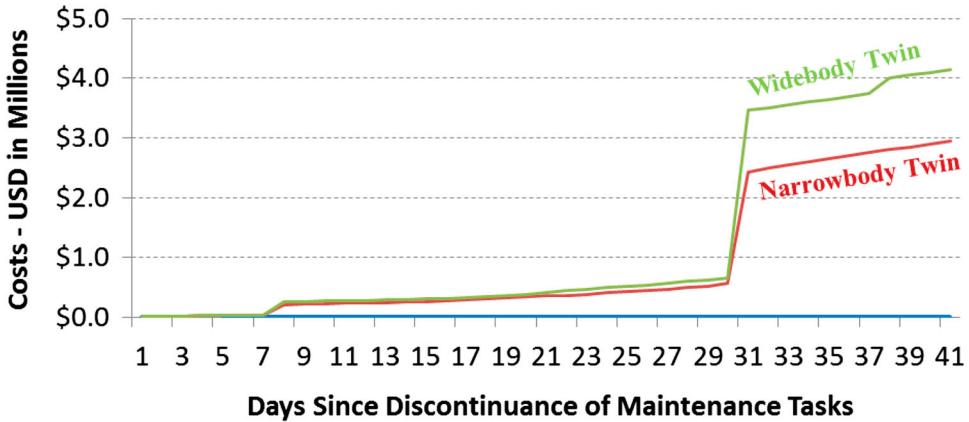


Figure 1. Technical costs for return to service of transport category aircraft for which maintenance tasks have been discontinued.

Note: Chart values represent:

- (i) estimated high level examples of typical inspection tasks to return a 15-year-old aircraft to service on the applicable dates, they do not cover discrepancies that will be discovered by these inspections which can often increase those costs by 100%+;
- (ii) recovery costs of an aircraft for which maintenance tasks have been discontinued, and there are many influencing factors that can result in varying figures, such as labour rates, age of the aircraft, past maintenance practices, training/experience of maintenance personnel, location (in a hangar or not with available tools, good lighting, power, manuals), environment;
- (iii) costs applicable to typical narrowbody twin-engined aircraft (such as B737-800 or A320-200) or widebody twin-engined aircraft (such as B767-300ER or A330-300); costs for typical widebody four engined aircraft, (such as A380 or B747-400), would be significantly higher;
- (iv) an assumption that the aircraft is abandoned by the airline and it is not receiving any maintenance, preservation or protection services; and
- (v) an assumption that the aircraft has not faced any asset stripping or part removals; the longer high value aircraft and engines remain unprotected, particularly in typical insolvency scenarios, the greater the probability that missing high value components will be encountered, the replacement of which will require incurring significant additional costs.

orders as may be required to preserve an aircraft and its value.

Under the Civil Code of Québec ('CCQ'), if a mechanic tries to seize equipment that it has repaired, the owner can offer a 'sufficient guarantee' to avoid the seizure, which is normally assessed as the full amount of the mechanic's claim.³²

³² *Service général d'auto Côté inc c. 2533-8369 Québec inc* [1989] RDJ 415 (QC CA).

Otherwise, there are a number of Canadian federal and provincial statutes that provide effective relief pending final determination, including (1) the aviation statutes³³ which

³³ The Airport Transfer (Miscellaneous Matters) Act, SC 1992, c 5 (the 'Airports Act') provides, in part, as follows:

9(3) Subject to subsection (4), except where otherwise directed by an order of a court, a designated airport authority is not required to release from detention an aircraft seized under subsection

privatised Canada's major airports and its air navigation services provider and permit immediate bonding and release of aircraft seized and detained for unpaid airport or air navigation charges, and (2) provincial statutes³⁴

(1) or (2) unless the amount in respect of which the seizure was made is paid. ... (4) A designated airport authority shall release from detention an aircraft seized under subsection (1) or (2) if a bond, suretyship or other security in a form satisfactory to the authority for the amount in respect of which the aircraft was seized is deposited with the authority.

The Civil Air Navigation Services Commercialization Act, SC 1996 c 20 ('CANSCA') provides, in part, as follows:

56(3) - The Corporation shall release from detention an aircraft seized under this section if (a) the amount in respect of which the seizure was made is paid; (b) a bond or other security in a form satisfactory to the Corporation for the amount in respect of which the seizure was made is deposited with the Corporation; or (c) an order of a court directs the Corporation to do so.

Canada 3000 Inc, Re; Inter-Canadian (1991) Inc (Trustee of) 2006 SCC 24 [73] held that: '(iii) under s. 9(3) of the Airports Act and s. 56(3)(c) of CANSCA, the court also has a discretion to limit the duration of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made; (iv) in any event, an authority that obtains an order under the detention provisions is required to release a detained aircraft upon payment of the outstanding amount or charges in respect of which the seizure was made or upon the provision of acceptable security therefor (ss. 9(3) and 9(4) of the Airports Act and ss. 56(1) and 56(3) of CANSCA).'

³⁴ An example is contained in Ontario's Repair and Storage Liens Act RSO 1990, c R25 which provides, in part, as follows:

24 (1) Where a lien is claimed under Part I (Possessory Liens) and the lien claimant refuses to surrender possession of the article to its owner or any other person entitled to it, and there is,
(a) a dispute ...
(c) ... the owner or other person lawfully entitled to the article may apply to the court in accordance

establishing detention rights for repair and storage liens.

In *Hamilton v 1262108 Ontario Inc (cob Metro-wide Auto Centre)*,³⁵ the Ontario Court of Appeal held that:

with the procedure set out in this section to have the dispute resolved and the article returned ...

(3) The application shall be in the required form and may include an offer of settlement.

(4) The applicant shall pay into court, or deposit security with the court in the amount of, the full amount claimed by the respondent but where the applicant includes an offer of settlement in the application, the applicant shall pay into court the amount offered in settlement and shall pay into court, or deposit security with the court for, the balance of the full amount claimed by the respondent and payments and deposits under this subsection shall be made to the credit of the application.

(5) ... the clerk or registrar of the court shall issue an initial certificate in the required form and under the seal of the court stating that the amount indicated therein, or security therefor, has been paid into or posted with the court to the credit of the application, and where applicable, indicating the portion of that amount that is offered in settlement of the dispute.

(6) The applicant shall give the initial certificate to the respondent who, within three days of receiving the initial certificate, shall release the article described therein to the applicant unless, within the three day period, the respondent files with the court a notice of objection in the required form.

(7) Where an objection has been filed with the court, the applicant may pay into court or post security with the court, to the credit of the application, the additional amount claimed as owing in the objection and where the additional amount has been paid into court or the additional security has been posted, the clerk or registrar shall issue a final certificate in the required form and under the seal of the court.

(8) The applicant shall give the final certificate to the respondent who, upon receiving the final certificate, shall release immediately the article described therein ... (13) Where the article is released to the applicant by the respondent ... the lien is discharged as a right against the article and becomes instead a charge upon the amount paid into court or the security posted with the court.

s. 24 [of the *RSLA*] provides an alternate procedure which is optional for an owner and *allows an owner an expeditious and speedy method of obtaining release* of the liened goods upon payment into court of all or part of the amount claimed without appearing in court for a hearing. Once the money has been paid into court and the goods have been obtained from the lien claimant, it is the lien claimant, and not the owner, who then must initiate an action under subsection 24(13) in order to obtain payment out of court of the disputed portion (which may be all) of the amount of the lien.³⁶

Accordingly, there are precedents and general principles for a Québec court to draw upon when issuing an order for relief pending final determination, including in respect of timeliness and evidence, so there is no meaningful procedural law gap in this area. However, gaps are created by Canada's declaration under Article X(5) of the Protocol, and its override, where applicable, of court authority to issue bonds, require guarantees, or the like, where the parties have agreed in writing to such exclusion.

(c) Topic III: de-registration and export via an IDERA

(i) Applicable CTC rules

Article IX (Modification of default remedies provisions) of the Protocol provides additional remedies for aircraft creditors. Where agreed to by the debtor and following default, a creditor may (1) deregister the aircraft, and (2) export and physically transfer the aircraft from the territory in which it is situated. In addition to exercising these remedies in accordance with local procedural law (which is an option), the treaty permits two declarations that provide substantial treaty-based procedural enhancements. First, the creditor can act with court authorisation under the above-described advance relief provisions. Secondly, a debtor may issue an IDERA in accordance with Article XIII (De-registration and export request authorisation) of the Protocol, which (a) irrevocably grants the 'authorised party'

(whether the creditor or another party granted the benefit of the IDERA, such as a financier or servicer) the right to request de-registration and export, and (b) places obligations on the civil aviation authority to honour such requests, and, with other applicable administrative authorities, to cooperate with and assist the authorised party in an expeditious manner. The Official Commentary refers to the latter as the 'IDERA Route' and we will use that phrase in this article.

The IDERA Route does not require a court order and is a standing direction in favour of the creditor filed with the applicable registry authority of the contracting state to honour a request for de-registration and export when the authorised party chooses to exercise this right. The Protocol contains a form IDERA that the parties should record with the applicable registry authority.

Under Article XIII(3), the authorised party named in the IDERA is the only party entitled to exercise the remedy of deregistration and export.

Once the above procedural requirements are fulfilled, the registry authority and other administrative authorities in the relevant contracting state are under an obligation to expeditiously coordinate with and assist the authorised party exercising its rights under either an IDERA or court order to deregister and export.³⁷ There is no discretion on the part of the air authority, once the procedural safeguards have been met, and no requirement for debtor agreement at the time of the creditor's exercise of such remedy, to allow the authorised party to proceed with deregistration and export. Article XIII(3) does specify, however, that this may only be done in accordance with applicable aviation safety laws and regulations.³⁸

³⁷ Protocol, Art XIII(4).

³⁸ Dean N Gerber and David R Walton 'De-registration and Export Remedies under the Cape Town Convention' (2014) 3 *Cape Town Convention Journal* 49 provides an insightful discussion on what 'applicable safety laws and regulations' means and also about the application of the IDERA remedies in general.

³⁵ 55 OR (3d) 19 (CA).

³⁶ *ibid* [13] (emphasis added).

(ii) *Canadian implementation and change to pre-CTC law in respect of de-registration and export*

In Canada, while the IDERA de-registration process is similar to pre-existing Canadian law, the obligation of applicable authorities to cooperate and assist with physical export from Canada is a new aspect of this remedy. The applicable registration authority in Canada is Transport Canada Aviation ('TCA'), which maintains the Canadian Civil Aircraft Register (the 'CCAR') established under the Aeronautics Act (Canada).

(iii) *Canada's declaration in respect of the IDERA*

Canada's declaration provides as follows:

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will comply with Article X(6) consistent with Canada's implementing legislation.³⁹

(iv) *Content of local Canadian procedural law and extent of lacuna*

TCA maintains the CCAR as an operator registry rather than an owner or title-based registry. Under pre-existing Canadian federal law, upon the valid repossession of a Canadian registered aircraft, the certificate of registration is automatically cancelled by virtue of the change of legal custody and control of the aircraft from the defaulting debtor to the enforcing creditor.⁴⁰ Otherwise, an aircraft will be de-registered upon the request of the 'registered owner' (i.e., the operator).

While no formal regulations exist in respect of repossession, TCA internal policy and practice has been to require evidence of such repossession, either by a court order authorising or approving the repossession, or an affidavit from the creditor confirming a valid repossession.

Because (1) the de-registration aspect of the IDERA process is similar to pre-existing

³⁹ Canada's Declarations.

⁴⁰ Canadian Aviation Regulations, SOR/96-43, ss 202.35 and 202.57.

practice, in that it constitutes both a request (pre-request in this case) of the registered owner and notice of repossession, and (2) the physical export provisions are contained within the Federal CTC Act itself, it was not considered necessary to amend Canada's aviation statutes or regulations to give effect to the IDERA process. Nevertheless, TCA felt it useful to produce an internal Staff Instruction (the 'IDERA SI') to CCAR staff confirming that CTC aircraft should be de-registered upon (a) notice by the authorised party in a valid IDERA of exercise of the IDERA remedy, and (b) a signed declaration from the authorised party, addressed to TCA, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.⁴¹

Specifically, the IDERA SI provides:

[TCA] is required to honour a request by the Authorised Party for de-registration solely on the basis of the recorded authorisation and without the need for a court order or the further consent of the owner/operator.⁴²

Accordingly, there is no material gap in Canada in the procedural rules applicable to the exercise of IDERA remedies. The position will likely be otherwise for most countries which did not have pre-CTC de-registration and export rules that approximated those in the treaty, including the need for prompt action and the ability for an airline to grant an irrevocable right of this type to another party.⁴³

⁴¹ Transport Canada, 'Staff Instruction: Registration of Aircraft Subject to an Irrevocable De-Registration and Export Request Authorisation according to the Cape Town Convention and Protocol' (October 2014).

⁴² Emphasis added.

⁴³ Although not relevant in the Canadian context where an aircraft must be deregistered following its repossession by a creditor, as in many jurisdictions, powers of attorney granted by Québec debtors can oftentimes be revoked, in particular following the commencement of insolvency proceedings. The grant of an IDERA as an authorisation (as opposed to a power of attorney) fills the gap arising as a result of the

3. The CTC approach to gap-filling, with particular reference to the Article 14 Rule

Before addressing the foregoing *lacunae* in the case study, the CTC's rule-setting hierarchy is summarised below, both in general and with reference to the Article 14 Rule, in each case in the Canadian context.

(a) *Gap-filling in general*

The CTC prevails over conflicting national law, and, where the former does not settle a question within its scope, the treaty first looks to the 'general principles' upon which it is based, and, absent such principles, to the 'applicable law'.

The first part of this three-part rule, the primacy of the CTC in case of direct conflict, is a principle of international law which is implemented into Canadian national law through Section 6(1)⁴⁴ of the Federal CTC Act (for matters within Federal competence) and corresponding sections in the various provincial acts (for matters within provincial competence). Québec, as will be discussed below, took a different approach to give the CTC

'irrevocability' issues relating to powers of attorney in many such jurisdictions.

⁴⁴ Section 6 provides in full as follows:

'6 (1) Subject to subsection (2), a provision of this Act or of the regulations, or a provision of the Convention or Aircraft Protocol given force of law by section 4, that is inconsistent with any other law prevails over the other law to the extent of the inconsistency.

Exception

(2) A provision referred to in any of the following paragraphs (a) to (f) that is inconsistent with a provision of this Act or of the regulations, or with a provision of the Convention or Aircraft Protocol given force of law by section 4, prevails over the provisions of this Act, the regulations, the Convention or the Aircraft Protocol to the extent of the inconsistency:

- (a) a provision of the *Controlled Drugs and Substances Act*;
- (b) a provision of Part II.1 or XII.2 or any of sections 487 to 490.01 and 490.1 to 490.9 of the *Criminal Code*;
- (c) a provision of the *Export and Import Permits Act*;
- (d) a provision of the *Special Economic Measures Act*;
- (e) a provision of the *United Nations Act*;
- (f) a provision of any regulations made for the purposes of a provision referred to in any of paragraphs (a) to (e).'

primacy. The primacy rule effectively displaces, for Topic I (Non-judicial Remedies), any requirement for leave of the court; for Topic II (Relief Pending Final Determination), conflicting otherwise applicable rules which would apply local law interim remedies procedures (for example, those permitting bonds and other guarantees), and, for Topic III (De-registration and Export via an IDERA), conflicting otherwise applicable law relating to de-registration and export. Topics II and III are *sui generis* treaty-based concepts, which, by definition, have no national law counterpart. The conflict is with pre-CTC national law which deals with the same subject matter (court action and de-registration and export).

The second part of this three-part rule, recourse to general principles on which the CTC is based, is the starting point in the gap-filling analysis. The authors take as a sound statement of the overarching general principles, and use the same in our analysis, those articulated by Wool and Jonovic:

- (I) There should be a strong presumption on the enforceability of contract provisions even when the Convention is silent on a topic⁴⁵

(the 'party autonomy principle');

- (II) Terms should be implied, when needed, that enhance transactional predictability and reflect international best practices in asset-based financing and leasing

(the 'asset-based financing and leasing principle');

- (III) Terms should be implied, when needed, to provide further details related to the *sui generis* concepts and their legal implications⁴⁶

⁴⁵ Official Commentary (n 3) para 2.9(9).

⁴⁶ Emphasis is on implying terms required by the Treaty rather than adding terms by reference to the applicable law, as that would undermine the intent, internal logic, and uniformity of such *sui generis* concepts. An example of this point is that Article 13 of the Convention is to be 'interpreted autonomously from any legal system', as persuasively argued in 'Advance Relief Under the Cape Town Convention and its Aircraft Protocol: A Comment on Gilles Cuniberti's Interpretive Proposal' (2013) 2 *Cape Town Convention Journal* 185 by Professor Anna Veneziano, deputy secretary general of UNIDROIT. That

(the ‘*sui generis* concept principle’); and

- (IV) Governments may not impose conditions on or take action that would adversely affect basic CTC rights, including, without restriction, on matters on which the CTC is silent

(the ‘no adverse effect principle’).⁴⁷

As Wool and Jonovic correctly conclude:

To illustrate just one of these general principles – (IV) above – the CTC must be viewed as *pre-empting national law rules that are incompatible with the Convention*, such as those that purport to:

- (A) place conditions on the ability to call defaults or exercise remedies, for example, by imposing or requiring a mandatory grace period;⁴⁸ and
- (B) add to the de-registration, export, and IDERA provisions by permitting the civil aviation authority to act in a quasi-judicial capacity and/or require the debtor’s consent to the exercise of IDERA rights.⁴⁹

The CTC must also imply terms regarding the standard for ‘reasonable’ action and timing, as set out in Article 8 of the Convention and Article IX(3) of the Aircraft Protocol, with deference to the other terms in those articles, and, beyond such terms, to contractually agreed standards, in line with general principle (I) above.

We would add a new (C) to the list above, which is an application of the ‘no adverse effect principle’, as follows:

- (C) place conditions on the ability of a creditor to repossess and/or immobilise an aircraft object without leave of the court by requiring (unless required by an Article 54(2) declaration) a court order or in any event a debtor consent.

The third part of this three-part rule, final recourse to the applicable law when a question

provision sets out a *sui generis* concept, not one linked to concepts of interim relief under applicable law.

⁴⁷ Jeffrey Wool and Andrej Jonovic, ‘The Relationship Between Transnational Commercial Law Treaties and National Law: A Framework as Applied to the Cape Town Convention’ (2013) 2 *Cape Town Convention Journal* 65, 74–75.

⁴⁸ Official Commentary (n 3) para 2.9(5).

⁴⁹ *ibid* para 3.36.

remains, has been criticised as presenting the risk of renationalisation of the CTC. This concern is reasonable, and counsels in favour of such a construction and application of national law which minimises, if not eliminates, direct conflicts with the CTC.

(b) Gap-filling as applied to the Article 14 Rule

Applying the gap-filling analysis to the Article 14 Rule, the rule itself is a harmonising one, save for Topic I (Non-judicial Remedies), where a contracting state’s declaration conflicts with its pre-CTC rule, such as in the case of Québec. Local law, in this case, local procedural law, is expressly applied in connection with the exercise of remedies. Despite the potential ambiguity as to what constitutes procedural law, a matter not addressed in the CTC or the Official Commentary,⁵⁰ and absent a direct conflict,⁵¹ the Article 14 Rule requires reference to local procedural law for the exercise of remedies. While the term ‘procedural law’ is often used only in the context of the rules applicable to court proceedings, the plain meaning of ‘procedural’ is ‘an established or official way of doing something [, or] a series of actions conducted in a certain order or manner’.⁵²

⁵⁰ The basic gap-filling rule, applied to the question of whether a matter is procedural versus substantive, results in a limited interpretation: procedural law in the CTC context is centred on the mechanics, driven by the need for clarity and timeliness, to permit the exercise of CTC remedies.

⁵¹ Such as Article III of the Protocol, overriding much de-registration and export-related procedural law, Article 13 of the Convention as modified by Article X of the Protocol, overriding much otherwise applicable interim-remedy-related procedural law, and Article IX, Alternative A, of the Protocol, overriding aspects of national insolvency-related procedural law.

⁵² *The Concise Oxford English Dictionary* (10th edn, Oxford University Press 2001) ‘purpose’; *Black’s Law Dictionary* (10th edn, West Group 2014) defines ‘procedure’ as: ‘1. A specific method or course of action. 2. The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution.’ As Professors Harris and Mooney point out in *Security Interests in Personal Property* (Foundation Press, 5th edn 2011), 608: ‘(2) What is a Breach of the Peace? Procedural Aspects of the

To the extent that local procedural law does not settle a procedural-type point related to remedies, as outlined in the *lacunae* above, attention turns to general principles. Since, by definition, there is no fall-back reference to applicable law (if there were, it would be covered by the rule itself), the general principles must be employed to fill in all gaps.

4. Analysis of a Québec civil law case study

(a) Preliminary notes: implementation of the CTC in Québec and interaction with Québec procedural law

As noted above, the Federal CTC Act was enacted on 24 February 2005. In part to avoid constitutional challenges, which are not uncommon in the field of aeronautics, the Government of Québec implemented the CTC and Protocol by adopting, in 2007, the Québec CTC Act.

While federal law, and the provincial law in all provinces and territories, except Québec, is derived from English common law, Québec provincial law was originally derived from the civil law system of France. The common law provinces and territories have enjoyed the right to self-help remedies, as contained in their various PPSAs, for a number of years. While various forms of relief pending final determination have long been available in Québec, non-judicial remedies have, historically, not been generally available in Québec, consistent with its civil law system.⁵³ When representatives of the various provinces met with the Government of Canada in the lead

up to finalising Canada's declarations under the CTC, the most important issue to be decided upon by Québec was whether, contrary to its civil law traditions, it would authorise non-judicial remedies for the limited purpose of enforcement against aircraft objects under the CTC. After consultations and careful deliberation, the Government of Québec authorised the Government of Canada to make a declaration under the CTC specifically authorising non-judicial remedies in Québec.⁵⁴

The Québec CTC Act is succinct. Its key features are that (1) the Convention and the Protocol have the force of law in Québec, (2) the Official Commentary approved by UNIDROIT may be used to interpret the Convention and the Protocol, and (3) the Québec government may make regulations to carry out the provisions of the Convention and the Protocol. Under rules of interpretation of legislation applicable in Québec, it is firmly established by case law that special legislation, such as the Québec CTC Act and the Québec CTC Regulation (as hereinafter defined), takes precedence over general legislation, including the rules of general application found in the CCQ, in the absence of an express contrary provision.⁵⁵

During the legislative process relating to the CTC, some lawmakers were critical of the provincial government using the power to make regulations to carry out the provisions of the CTC in Québec. They argued that certain provisions of the CTC produced substantive changes to the civil law of Québec and thus required amendments to the CCQ itself.⁵⁶

Breach-of-the-Peace Exception to Self-Help. Perhaps the results of cases like *Sione Machinery* can be understood best by viewing the breach of peace exception to self-help repossession as *procedural* in nature. The secured party is entitled to possession if, in fact, the debtor is in default. But the debtor can prevent self-help, and force the secured party to recover the collateral through judicial proceedings, *if* the debtor is able to control the circumstances so that self-help would constitute a breach of the peace.'

⁵³ Limited forms of self-help were available in Québec prior to the entry into force of the new CCQ on 1 January 1994.

⁵⁴ Canada's Declarations.

⁵⁵ See Pierre-André Côté, *The Interpretation of Legislation in Canada* (4th edn, Thomson Reuters 2011) 387.

⁵⁶ See e.g. Commission permanente des institutions, fascicule n° 2, 30 May 2007, 15:30, M Turp: 'Parce qu'il s'agit essentiellement de questions de droit civil, hein? Pour mettre en œuvre ce traité, là, nous, on doit adopter des dispositions qui sont de la nature de dispositions, de règles de notre droit civil. Et ce qui me préoccupe, c'est qu'on va faire du droit civil par règlement, là. Parce que la loi de mise en œuvre ne modifie pas,

Notwithstanding these concerns, to further implement the CTC, the Québec government adopted, in 2011, the Regulation for the carrying out of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment⁵⁷ (the ‘Québec CTC Regulation’). For the purpose of understanding the interaction of the CTC and local procedural law, there are two important features of the Québec CTC Regulation.

First, in conformity with the declaration lodged by Canada pursuant to Article 54 (Declarations regarding remedies) of the Convention, the Québec CTC Regulation specifically provides that ‘any remedy available to the creditor under any provision of the Convention which is not there expressed to require application to the court *may be exercised without leave of the court*’.⁵⁸ This mirrors Canada’s federal declaration in respect of Article 54.⁵⁹

Second, it provides that, under Articles 39(1) (a) and (2) of the CTC, a non-consensual right or interest existing under Québec law (legal hypothecs or prior claims), which would have priority over an interest equivalent to the

interest of the holder or a registered international interest, shall have priority to the same extent over a registered international interest. In effect, this means that the CTC does not increase the rank of an international interest in relation to prior claims or legal hypothecs that exist under Québec law. This is reflected in Canada’s CTC declarations in respect of Québec legal hypothecs and preferred claims, and is similar to Canada’s declaration in respect of Article 39(1)(a), that provides that

in accordance with Article 39(1)(a) of the [Convention], any non-consensual right or interest under Canadian law existing at the date of this declaration or created after that date, that has a priority over an interest in an object equivalent to that of the holder of a registered international interest, shall have priority to the same extent over such registered international interest, whether in or outside insolvency proceedings.⁶⁰

(b) Case study

For the purposes of this article we apply and analyse the following hypothetical fact pattern, which presents realistic elements in airline default and insolvency scenarios:

Facts:

- Clare Aircraft Leasing Limited (the ‘Lessor’), an aircraft lessor situated, for the purposes of the CTC, in Ireland, leased a Boeing 767 (‘Aircraft 1’), an Airbus 320 (‘Aircraft 2’) and one spare GE CF6 engine (the ‘Engine’ and together with Aircraft 1 and Aircraft 2, the ‘Collateral’)) to Air Montreal (the ‘Airline’), an airline situated, for the purposes of the CTC, in Canada.
- The lease agreement for the two aircraft (the ‘Lease’) was signed on 30 April 2013, after the date that the CTC came into force in Canada. The aggregate rent under the Lease was US\$1,000,000 per month.
- The lease agreement for the engine (the ‘Engine Lease’ and together with the

comme elle aurait pu le faire, le Code civil du Québec, en plusieurs de ses dispositions, de ses chapitres, par des ajouts dans le Code civil et dans le Code de procédure civile. Et pourquoi donc n’a-t-on pas choisi cette voie-là? Est-ce que je comprends que c’est pour que l’on puisse uniformiser avec les autres provinces, et la seule technique utile pour le faire, c’est la voie réglementaire?’ (UNOFFICIAL TRANSLATION: ‘Aren’t these essentially issues of civil law? To implement this treaty, we need to adopt provisions that are in the nature of provisions, rules of our civil law. And what I’m worried about is that we’ll be making civil law by regulation, right. Because the implementation statute does not modify, as it could have, the Civil Code of Québec, with many of its provisions, of its chapters, by additions to the Civil Code and the Code of Civil Procedure. And why did we not choose that method? Should I understand that it was because we needed uniformity with other provinces, and the only useful method to do so was to use regulation?’).

⁵⁷ CQLR c M-35.1.2.1, r 1.

⁵⁸ Emphasis added.

⁵⁹ *ibid.*

⁶⁰ Canada’s Declarations.

Lease, the ‘Leases’) was also signed on 30 April 2013.

- The Leases were made subject to Ontario law and contained customary default and termination provisions, including the right of the Lessor to enter the Airline’s premises and repossess collateral by immobilising it or removing it from such premises.
- In the Leases, the Airline also agreed to exclude the application of Article 13(2) of the CTC.
- The Leases were duly registered with the International Registry as first priority international interests. The Airline signed an IDERA for each Aircraft and filed the IDERAs with TCA.
- On 1 May 2015, the Airline failed to make a rent payment under each Lease when due, constituting an event of default under each Lease.
- On 1 June 2015, the Lessor served a notice of default on the Airline.
- On 2 June 2015, the Lessor made the decision to exercise non-judicial (self-help) remedies under Article 54(2) of the CTC in order to physically repossess the Collateral. It determined that Aircraft 1 and the Engine were located in Hangar 3 at Montreal Mirabel International Airport (‘YMX’) and that Aircraft 2 was located in Hangar 4 at YMX, where it was undergoing a C check performed by MRO Services Inc (‘MRO’), an unrelated third party.
- The Lessor engaged Québec Bailiff Co (the ‘Bailiff’), a bailiff located in Montreal, and Mirabel Handling Co (the ‘Handler’), a ground handler operating at YMX, with TCA airport security access to YMX, to physically repossess the Collateral at YMX.
- On 3 June 2015, the Handler, accompanied by the Bailiff, attended at Hangar 3. Upon finding the main door to Hangar 3 locked, and no hangar personnel in attendance, the Bailiff used a crowbar to pry open the door, damaging the door in the process. The Handler then entered Hangar 3 with the Bailiff, entered the aircraft and removed the aircraft certificates and log books, and then attached a tow bar to Aircraft 1 and towed it to the Handler’s facilities on the other side of the airport.
- The Handler then loaded the Engine onto a flatbed trailer and moved it to an off-site storage facility.
- The Airline ordered its security personnel to Hangar 4, where they, and MRO itself, prevented the Bailiff and the Handler from gaining access to Aircraft 2.
- On 4 June 2015, the Lessor requested an order from the Court under Article 13(1) of the Convention for speedy relief pending final determination of its claim to enforcement against Aircraft 2.
- Specifically, the Lessor requested an urgent order from the Court as follows:
 - (1) that the order for ‘speedy’ relief that it was entitled to should be given within five calendar days to ensure continued maintenance and preservation of the aircraft objects; and
 - (2) that Aircraft 2 be immediately returned to it so that it could be maintained, preserved and insured as quickly as possible so as to mitigate any losses incurred by it and, indirectly, by the Airline or its estate.
- As ‘evidence of default’, as required by Article 13(1), the Lessor filed a certificate of default with the Court, together with an affidavit, confirming that (i) default had occurred under the Leases (ii) notice of the default had been given to the Airline; and (iii) that the default had not been cured.
- On 6 June 2015, the Airline filed for bankruptcy protection (the ‘Insolvency Proceeding’) under applicable Canadian federal law, with the intention of restructuring its affairs and continuing its operations. The order issued by the Superior Court, Commercial Division (the ‘Bankruptcy Court’) in Montreal effectively

stayed all enforcement actions against the Airline to give it time to complete its restructuring.

- That same day, after unsuccessful negotiations with the Airline, the Lessor notified (1) TCA that it wished to exercise its rights as authorised party under the IDERA seeking deregistration of Aircraft 1 and cooperation with the physical export of Aircraft 1 and the Engine, and provided TCA with a signed declaration confirming that the holders of all registered interests ranking in priority to that of the Lessor have consented to the de-registration and export of Aircraft 1; and (2) the Airline's insolvency administrator (the 'Administrator') that it would not, under any circumstances, renegotiate the terms of the Lease for Aircraft 2, and that it expected to repossess Aircraft 2 not more than 60 days after commencement of the Insolvency Proceeding if the Airline did not cure all defaults under the Lease for Aircraft 2 and undertake to perform that Lease in future.
- On 6 June 2015, the Administrator requested an order from the Bankruptcy Court that:
 - (1) Aircraft 1 and the Engine were improperly repossessed, that the exercise of non-judicial remedies was contrary to the CCQ and that, accordingly, Aircraft 1 and the Engine should be returned to the Airline to be dealt with during the Insolvency Proceeding;
 - (2) the Lessor should pay damages for the damage to Hangar 3 and punitive damages for trespass and improper repossession of Aircraft 1 and the Engine; and
 - (3) the Collateral was essential to the Airline's continued operations and that, given that the fair market value of the rent for the Collateral had dropped to US \$500,000 per month, the court should order that the Lease be continued for the Collateral and amended by reducing the rent accordingly.

- On 7 June 2015, MRO requested an order from the Bankruptcy Court that:

- (1) it was entitled to a 'right of preference' (possessory mechanics' lien) under the CCQ in respect of Aircraft 2;
- (2) it was entitled to maintain possession of and/or sell Aircraft 2 if not paid in full; and
- (3) MRO's right to receive such payment takes priority over any rights and remedies that the Lessor may have under the IDERA or the Lease.

(c) Resolving main issues in the case study

(i) Topic I: non-judicial remedies: results and analysis

(A) Choice of law. Québec conflict of laws rules recognise choice of law clauses, and Canada declared 'in accordance with Article XXX [(Declarations relating to certain provisions)] of the Protocol, it will apply Article VIII [(Choice of law)] of the Protocol with regard to choice of law and such shall be applicable in Canada'.⁶¹ Québec courts will therefore apply Ontario law to the interpretation of the Leases (Art 3111 Para 1 CCQ).⁶²

(B) Québec procedural law. We consider how Québec law would apply to the Leases, especially when urgent remedies are sought, for three reasons. Under pre-CTC law: (i) in cases of emergency or serious inconvenience, Québec courts can apply Québec law provisionally to ensure the protection of a person's property (Art 3084 CCQ); (ii) Québec courts will apply Québec law, and not Ontario law, to procedural issues, as opposed to substantive ones (Art 3132 CCQ); and (iii) if Ontario law is not pleaded or its content is not established (usually by way of an expert report), Québec

⁶¹ *ibid.*

⁶² Our analysis does not extend to conflict of laws rules beyond those arising from a contractual choice of law clause.

courts will apply Québec law. The CTC and local procedural law do, however, interact, and, in some cases, the CTC rules conflict with pre-existing Québec law. Indeed, the Convention provides, in Article 14 (Procedural law), that any remedy provided by the CTC, including a remedy under Chapter III (Default remedies) of the Convention, is to be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised. As noted in the Official Commentary,

Article 14 takes effect subject to Article 54(2), so that if a contracting state has made a declaration under Article 54(2) stating that leave of the court is not required for the exercise of remedies which under the Convention do not require an application to the court this overrides any procedural requirement for leave that would otherwise apply.⁶³

(C) *Québec law on enforcement under leases relevant to the case study.* For non-CTC transactions, a contract of lease may be terminated in a variety of circumstances under Québec law. In the current case study, rescission would be the relevant method of termination. Rescission, a civil law concept, is the cancellation of a contract for the future only. In the case of a contract of lease, the lessor will, from the date of rescission, no longer provide enjoyment of the leased property, and the lessee, conversely, will no longer pay rent. Rescission does not affect the past obligations of the parties (Art 1606 Para 2 CCQ).

When a party has failed to perform one of its obligations under a contract, e.g., when a lessee fails to pay rent, it can be put in default (Arts 1594 *et seq* CCQ). Default can occur pursuant to the terms of the contract where the contract provides that lapse of time for performance constitutes a default, by a demand letter from the other party, or by operation of law where performance could only occur at a certain

time. This is consistent with Article 11 (Meaning of default) of the Convention, which, as noted below, is the prevailing rule under the treaty.

Although default by operation of law is effective, the usual practice to evidence default under a lease is for the lessor to send a demand letter or a notice of default offering a reasonable delay for the lessee to cure the default. Once a party is in default, the other party may validly and unilaterally rescind the contract, unless the default was minor and unrepeatable (Art 1604 CCQ). In such instances, the rescinding party will not be liable for damages resulting from the rescission.

As a general rule, a party is not entitled to rescind a contract in case of a minor default, unless it occurs repeatedly (Art 1604 Para 2 CCQ). Parties may not contract out of this rule. In addition, a general and implicit obligation of good faith exists under Québec law (Arts 6, 7 and 1375 CCQ). As a result, parties must act in good faith throughout the contractual process, i.e., when entering into a contract, when performing the contract and when terminating the contract. Accordingly, even if a lessor has the right to terminate a lease, it may not exercise this right with the intent of injuring the lessee or in an excessive or unreasonable manner.

In the specific case of a lease, failure to pay rent under pre-CTC Québec law is not a cause for rescission of the lease unless and until it causes a serious injury to the lessor (Art 1863 Para 1 CCQ). Moreover, when a lessor seeks rescission for non-payment, a lessee can avoid it by paying the rent, costs and interest owed (Art 1883 CCQ). Commercial parties may contract out of these two rules, but a lessor must ensure that this is done in explicit terms to avoid the risk of their application. The CTC, however, provides that '[t]he debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in [Chapter III]'.⁶⁴ It is only

⁶³ Official Commentary (n 3) 2.112 (emphasis added).

⁶⁴ Convention, Art 11(1).

‘[w]here the debtor and the creditor have not so agreed, that default for the purposes of [Chapter III] means a default which substantially deprives the creditor of what it is entitled to expect under the agreement’. One of the remedies specifically given to a lessor under Article 10 of the CTC is the right to ‘terminate the agreement and take possession or control of any object to which the agreement relates’. To the extent that Québec substantive law would apply to the Lease, which would only be the case if Québec was chosen as governing law, the CCQ provisions regarding minor defaults or serious injury to the lessor in respect of aircraft objects mentioned above would be superseded by virtue of the Québec CTC Act and Québec CTC Regulation. However, as mentioned, choice of law clauses, such as the one stipulating that the Lease is governed by Ontario law, are generally valid in Québec pursuant to the conflict of law rules found in the CCQ,⁶⁵ which are consistent with the declarations lodged by Canada under the CTC. Consequently, parties may also void the application of the aforementioned rules of resiliation found in the CCQ by including a choice of law clause selecting governing law outside of Québec in their contract of lease.

Before the 1994 reform of the CCQ, judicial resiliation was the norm, meaning that the resiliation of a lease could only lawfully be effected by applying to the Court. Since 1994, however, the non-judicial resiliation of a lease has been technically possible. According to the Québec Court of Appeal, however, judicial resiliation remains the general rule for leases.⁶⁶ To avoid having a lessee argue that a lease can only be terminated following a Court application, the wording of the lease should explicitly state that the lease is immediately terminated without court intervention if the lessee is in default and has not complied with a notice of default.

⁶⁵ Civil Code of Québec, CQLR c C-1991, Art 3111 para 1 (‘CCQ’).

⁶⁶ *Place fleur de Lys c. Tag’s Kiosque Inc* [1995] RJQ 1659 (QC CA).

Although non-judicial resiliation is now lawful in Québec, it does not follow that non-judicial revendication, i.e., repossession without Court authorisation, is lawful for non-CTC assets. If permitted in the lease itself, the lessor can resiliate the lease in case of default without Court intervention. The lessor, however, cannot repossess (or revendicate in civil law terminology) the leased property without Court intervention, unless the lessee consents at the time of repossession.⁶⁷ This civil law rule is, however, displaced by the implementation of the CTC in Québec for the limited purpose of the repossession of ‘aircraft objects’ in Québec. As noted in the Official Commentary,

where a Contacting State makes a declaration that the remedy is to be exercisable without leave of the court, this overrides any requirement in that States’ general law that requires such leave to be obtained ... the phrase ‘in conformity with the procedure prescribed ...’ does not allow a bar on self-help remedies to be invoked if the State in question has made no declaration requiring leave of the court.⁶⁸

Québec did not require, and Canada did not make, a declaration requiring leave of any court to exercise any remedies.

(D) *Non-judicial remedies under the CTC and Québec law.* The availability of non-judicial remedies by a lessor following default under a lease is now recognised in Québec through the combined effect of Article 10(a) of the Convention, Article 54(2) of the Convention, the declaration of the government of Canada regarding the remedies available under the CTC, and Section 1 Para. 6 of the Québec CTC Act.

Although non-judicial remedies are now tutorily available in Québec for applicable

⁶⁷ See Pierre-Gabriel Jobin, *La vente* (3rd edn, Yvon Blais 2007) para 251; Denys-Claude Lamontagne, *Droit de la vente* (3rd edn, Yvon Blais 2005) para 311.

⁶⁸ Official Commentary (n 3) para 2.81 (emphasis added).

aircraft objects, two factors may raise issues in respect of their use in practice: (1) Article 14 of the Convention which provides that '[s]ubject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised' and (2) the historical aversion of Québec civil law courts to non-judicial remedies.

On the first factor, since non-judicial remedies are not available in Québec in any context other than repossession of aircraft objects under the CTC, there are no rules of procedure in Québec to guide the exercise of non-judicial remedies and their limits, and in some civil law jurisdictions, improper exercise of non-judicial remedies can result in criminal sanctions.

On the second factor, although not expressly stated in the CCQ, Québec courts have held it to be 'evident' that non-judicial remedies are generally illegal in Québec pursuant to the rule that 'no one may take the law into his own hands'.⁶⁹ They consider non-judicial remedies to be alien to a civil law regime and a potential prelude to violence and abuse. Nevertheless, the 1991 decision of the Supreme Court of Canada (Canada's highest court of appeal) in *National Bank of Canada v Atomic Slipper*,⁷⁰ opened the door to a form of non-judicial remedy in Québec in limited circumstances.

According to the Court's reasoning in *Atomic Slipper*, a creditor who has a clear right to non-judicial remedies under a contract may take possession of the property at issue without Court authorisation *if the debtor does not oppose it*. The bank had the right, under the applicable loan agreements and statutory provisions, to take possession of the debtor's inventory in case of default. Following default and a

request by the bank, but without Court authorisation, the debtor grudgingly delivered his inventory to the bank. The debtor later argued that taking of possession without leave of the court was a legal nullity.

The Court reasoned as follows:

As to the rule that 'no one may take the law into his own hands', this does not apply to the creation or recognition of rights by one party in favour of another either by agreement or by his action, but to their forced execution at the will of one party without judicial authority. It is not contrary to public policy for a debtor to give his creditor the right to take possession in case of default.

...

There is thus nothing to prevent a bank taking possession of goods if it has acquired such a right by agreement and the debtor does not object. In that case, it does not have to seek leave of the court in order to realize on its security.⁷¹

The Court held, however, that in case of debtor opposition, leave of the court would be required regardless of the terms of the contract. The Court wrote: 'in the event of a dispute[,] authorisation from a court will be necessary to preserve social peace and avoid abuse and conflicts'.⁷² Québec authors have argued that *Atomic Slipper* should not be read as generally permitting non-judicial remedies in Québec.⁷³ Moreover, according to Québec case law, even when a non-judicial remedy is available, it must be used with 'prudence, diligence, and good faith'.⁷⁴

(E) *Québec law regarding legislative gaps*. Where Québec civil law does not provide an answer or any guidance with respect to a particular legal issue, it is permissible for Québec courts to consider foreign case law so long as the principles derived therefrom are consistent with the

⁶⁹ See e.g. *Ghaho c. Germain* 2013 QCCS 2604; see also CCQ (n 66) Art 1801, which provides as follows: 'Any clause by which a creditor, with a view to securing the performance of the obligation of his debtor, reserves the right to become the irrevocable owner of the property or to dispose of it is deemed not written.'

⁷⁰ [1991] SCR 1059 (*Atomic Slipper*).

⁷¹ *ibid* 1080–81.

⁷² *ibid* 1075.

⁷³ Pierre-Gabriel Jobin (n 68) para 268.

⁷⁴ *Markarian c. Marchés mondiaux CIBC Inc* 2006 QCCS 3314 [640].

general scheme of Québec law.⁷⁵ In addition, when interpreting an international treaty implemented by local legislation, a Québec court can validly rely on the interpretation given to this treaty by courts in other jurisdictions that have implemented this treaty, to the extent that this interpretation is not contrary to local law.⁷⁶ Moreover, the Québec CTC Act specially refers to the Official Commentary as a guide to interpretation of the CTC. Accordingly, we expect Québec courts to consider the Official Commentary and case law from other jurisdictions having implemented the CTC, including, in particular, other Canadian provinces.

(F) *Practical application of non-judicial remedies in Québec.* In practice, given the rule in *Atomic Slipper*, a lessor who is authorised by contract to take possession of an aircraft object without Court authorisation in case of default will have to decide whether (a) it attempts to exercise non-judicial remedies under the CTC, or (b) it obtains a writ of seizure in accordance with to pre-CTC practices.

Under option (a), under pre-CTC law, the lessor would typically send a bailiff and a representative with the notice of default previously sent to the lessee. The bailiff would then typically tell the lessee that the lessor is exercising its right to repossess the property and he or she would request that the representative be allowed to take possession of the property. If the lessee does not oppose the repossession, either by its consent, by indifference or by its absence, the bailiff and the representative would then typically physically repossess the property.

Given the absence of rules of procedure governing non-judicial remedies, the lessor's rights in case of lessee opposition are less clear. Taking

a conservative approach, since the bailiff would not be acting pursuant to a Court authorisation, he or she would not be entitled to use any force. The bailiff would typically prepare a report detailing the attempted repossession and the debtor's opposition. This report could then be used as evidence against the lessee.

The CTC, however, and, by extension, the Québec CTC Act and the Québec CTC Regulation, specifically override the right of a debtor in respect of aircraft objects to object to, and thereby prevent the exercise of, non-judicial remedies. When seeking to give full effect to the implementation of the CTC, the Lessor and the Bailiff would rely on Section 1 Para 6 of the Québec CTC Regulation, which provides that 'any remedy available to the creditor under any provision of the Convention which is not there expressed to require application to the court may be exercised without leave of the court'. In order to give effect to this provision, the Lessor and the Bailiff must be able to take reasonable measures to physically repossess the aircraft in the face of airline opposition. Such reasonable measures would need to be exercised in good faith with prudence and diligence; the Lessor and the Bailiff are not entitled to apply force to an individual. The *key conclusion*, however, is that the lack of existing procedural rules *cannot* be used to deprive a creditor of the remedy specifically given to it by the Governments of Canada and Québec to exercise non-judicial remedies.

Atomic Slipper provides a useful precedent for the limited extension of non-judicial remedies under the CCQ. The Québec CTC Act and the Québec CTC Regulation provide legislative approval for a further, albeit limited only to aircraft objects, extension of these remedies as required by the CTC.

Under option (b), the Lessor's lawyer could prepare a written requisition for a writ of seizure with a supporting affidavit from the Lessor's representative. This requisition could be prepared *de bene esse*, meaning that the Lessor would preserve the argument that it is procedurally unnecessary. In the present case

⁷⁵ *Caisse populaire des deux rives c Société mutuelle d'assurance contre l'incendie de la vallée du richelieu* [1990] 2 RCS 995, 1004.

⁷⁶ Ruth Sullivan, *Construction of Statutes* (6th edn, LexisNexis 2014) para 18.38.

study, the Lessor would have a clear right to seize the Collateral under the terms of the Leases and the provisions of the CTC as implemented in Québec. As such, the clerk of the Superior Court ought to issue a writ of seizure immediately upon being presented with the written requisition, without requiring the authorisation of a judge (Arts 734(1) and (5) and 735 CCP). Although the issuance of this writ will not require Court authorisation, its execution would not be considered non-judicial, since it will have been issued by a clerk of the Court.

(G) Procedural rules governing repossessions in Québec. In Québec, seizure of non-CTC equipment is effective once a writ of seizure has been served by the bailiff on the lessee and the bailiff has drafted minutes of seizure confirming that he or she has entrusted the seized items to the lessee or a guardian (Arts 583 and 590 CCP). The bailiff will describe the items seized in his or her minutes if he or she is able to personally identify them. As such, if the bailiff is personally able to see an aircraft and ascertain that it is indeed the aircraft described in the writ, he or she will draft the required minutes to make the seizure effective. Physical repossession by the bailiff is not required to make the seizure effective.

If non-CTC collateral is located in locked premises, as would be expected, the bailiff can obtain authorisation from the clerk of the Court to use all necessary means in the presence of two witnesses to seize the collateral (Art 582 CCP). 'All necessary means' should here be understood to mean the forced opening of locks and doors; it does not include applying force to an individual, which would constitute criminal assault. The clerk of the Court is likely to request signed minutes from the Bailiff indicating that the Collateral is locked or is in locked premises. Accordingly, to avoid alerting debtors of impending seizures, creditors should consider sending their bailiffs covertly to witness that the collateral is locked or in such premises. A

bailiff who has not obtained authorisation to use all necessary means may decline to act if the collateral is locked and the debtor does not give access thereto.

Prior to CTC implementation, such a seizure would require that the collateral be entrusted to a guardian, pending determination by the Superior Court that the lessor had the right to repossess it. Accordingly, the lessor would institute an action in revendication after seizing its property, thereby seeking confirmation from the Court that the seizure was valid and that it indeed owns the property. Such an action in revendication is now unnecessary for aircraft objects, given the provisions of the CTC and of Section 1 Para. 6 of the Québec CTC Regulation.

(H) Procedural rules governing repossessions in Canada. There is only a small body of law as to what actually constitutes an effective repossession of equipment in Canada.

The notable exception to this was the repossession by a lessor (AerCap) of a Boeing 767-300ER from Zoom Airlines, which was litigated against by some Canadian airport authorities that wished to assert seizure and repossession rights against Zoom for unpaid airport fees. This case went to the Alberta Court of Appeal, with leave to appeal to the Supreme Court of Canada being denied.⁷⁷

In that case, the lessor had its agent enter the aircraft at the gate and obtain physical possession of the certificates of registration and airworthiness, and aircraft log books. The aircraft was then towed by the agent to the agent's parking area on the opposite side of the airport. The airport authorities subsequently obtained a court order granting them seizure and detention rights against the aircraft, and, this occurring at Calgary Airport,

⁷⁷ *Calgary Airport Authority v AerCap Group Services Inc* (18 September 2008), Calgary 0801-10295 (QB) aff'd 2009 ABCA 306, leave to appeal to SCC refused, 33432 (10 March 2010).

they then physically blocked the aircraft with a large snowplough.

In the Zoom trial decision, the court noted that the airport authority rights extended to Zoom aircraft 'except any aircraft already repossessed by the titleholder prior to the [bankruptcy proceedings]'.⁷⁸

Accordingly, the issue at trial was whether the actions of the lessor constituted a completed repossession. The airport authorities asserted that such actions had not, in that, while the aircraft may have been physically repossessed, it remained registered to Zoom, as registered owner, as it had not then been removed from the CCAR.

The Court of Appeal affirmed the trial court's decision that

once Skyservice, as agent of AerCap, entered [the aircraft], taking the certificate of airworthiness, certificate of registration and log books ... this cancelled Zoom's registered ownership status and allowed AerCap to become the owner of [the aircraft] by taking complete responsibility for the operation and maintenance of the aircraft ... Further, AerCap became the operator of [the aircraft] when it was repossessed though Skyservice. Therefore, at the time of the detention order [in favour of the airport authorities], Zoom no longer 'owned or operated' the aircraft.⁷⁹

The Court went on to hold that 'in this case at the time of the detention order ... AerCap had already taken active steps to obtain legal control and custody. In fact, it had repossessed [the aircraft] and was, therefore its owner'.⁸⁰

(I) *Results.* While Court guidance or the enactment of rules of procedure governing non-judicial remedies in respect of aircraft objects will likely be necessary to clearly establish the applicable rules for non-judicial enforcement against aircraft objects in Québec, in order to give effect to what are now the clear and specifically authorised rights of such

⁷⁸ *Calgary Airport Authority v AerCap Group Services Inc* 2009 ABCA 306 [16].

⁷⁹ *ibid* [31].

⁸⁰ *ibid* [36].

enforcement against aircraft objects in Québec, a creditor should:

- (1) not require approval of any court or agency thereof in order to physically repossess aircraft objects upon a default of a debtor for the purposes of the CTC; a writ can also prove useful since the seizure could be made effective by its service on the lessee even in instances where physical repossession cannot be practically effected;
- (2) engage the services of a Québec bailiff, together with the services of a person with the applicable aviation security clearances and access to the applicable hangar, such as a ground handler, MRO or other airline operating at that airport, in order to seize and either disable or physically remove the aircraft from that hangar; and
- (3) exercise the repossession remedy with 'prudence, diligence and good faith'. The writers would interpret this to mean: (i) in compliance with TCA and airport safety and security regulations; (ii) not interfering with, or causing personal injury to, persons; (iii) using as little force, e.g., to break locks to the hangar or to the aircraft flight deck, as reasonably necessary; and (iv) avoiding disturbances of the peace. Such procedure is broadly consistent with the procedural rules existing in other jurisdictions where non-judicial remedies are permitted by law, and with the clearly defined objectives of the CTC itself.

(ii) *Topic II: relief pending final determination: results and analysis*

As noted above, Québec courts have experience in quickly issuing orders that would constitute relief pending final determination.

In this case, we expect that the Court would:

- (1) issue an order promptly, and would respect a lessor's submissions that

- preservation and maintenance would be required within five calendar days to avoid material depreciation of the aircraft objects;
- (2) protect MRO, but not the Airline, pursuant to Canada's Declaration in respect of Article 13(2), by requesting that a bond, guarantee or other security for the value of the MRO claim, or aircraft itself, respectively, would be required from the Lessor;⁸¹
 - (3) protect 'interested parties' by requiring that notice of the requested order be given to them; and
 - (4) require that the 'evidence of default' required under Article 13 of the CTC would take the form of an affidavit sworn by a knowledgeable representative of Lessor confirming the default and Lessor's request for relief, such as the risk of irreparable harm to Lessor's interests by way of material depreciation of its aircraft objects collateral.

(iii) *Topic III: de-registration and export via IDERA: results and analysis*

The IDERA Route remedies would be given effect exactly as intended in Québec without the necessity of court supervision. As MRO's rights would be given priority over the Lessor's rights, its claims would have to be paid or secured before Aircraft 2 could be physically exported from Canada.

(iv) *Additional items: insolvency; mechanics' liens*

(A) *Insolvency proceedings.* Insolvency law in Canada is principally governed by two federal statutes: *Bankruptcy and Insolvency Act*, RSC

1985, c B-3 ('BIA'); *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ('CCAA'). Since the Airline intends to restructure its affairs and to continue its operations, it is more likely that the Insolvency Proceeding will be pursued in accordance with the CCAA.⁸²

The CCAA, read in light of the case law interpreting it, allows Canadian courts to issue a broad stay of proceedings during the restructuring process. Such a stay will include terms preventing the termination of a contract, such as a lease, provided that rent is paid during the restructuring process.

In 2012, because of definitional difficulties in ensuring that the amendments to Canada's insolvency statutes remained completely consistent with Alternative A, the Government of Canada decided to simply declare Alternative A as is, on a standalone basis. In accordance with Article XXX of the Protocol, the Government of Canada declared 'that it will apply Article XI, Alternative A of the Protocol in its entirety to all types of insolvency proceedings ... and that the waiting period ... shall be sixty (60) calendar days'.⁸³

Just prior to the ratification of the CTC on 21 December 2012, the federal government adopted an omnibus statute, which had the effect of giving force of law to Article XI of the Protocol (by removing this article from the list of excluded provisions in Section 4(2) of the Federal CTC Act).⁸⁴

As now modified, the Federal CTC Act and Article XI, Alternative A, of the Protocol specifically override the authority of a Canadian court to issue a stay of proceedings in the context of a CCAA restructuring against a creditor which wishes to repossess an aircraft after the 60-day waiting period, subject to the debtor's right to cure and agree to perform the agreement, unamended.

⁸¹ Pursuant to Canada's declaration under Article XXX of the Protocol, the Lessor, the Lessee and/or MRO have the ability to contractually waive judicial discretion to require that any such protection be provided by the Lessor in the event of its exercise of extra-judicial remedies.

⁸² Virtually all airline insolvency proceedings in Canada that have involved an expressed intent to restructure have been commenced under the CCAA.

⁸³ Canada's Declarations.

⁸⁴ Jobs and Growth Act.

Further, even continuation of the 60-day waiting period is subject to the Airline's obligation during such waiting period to preserve the Aircraft's value and maintain its value in accordance with the Lease.⁸⁵

(B) *Right of preference/mechanics' liens.* The Québec civil law equivalent to a mechanics' lien is found at Article 1592 of the CCQ, which provides:

A party who, with the consent of the other party, has detention of property belonging to the latter has a right to retain it pending full payment of his claim against him, if the claim is exigible and is closely related to the property of which he has detention.

This right to retain property pending payment of a claim is broadly similar to the common law concept of mechanics' liens and constitutes a prior claim (Art 2651(3) CCQ), which allows the retaining party's claim to be preferred over all other creditors.

As mentioned above, the Québec CTC Regulation provides, in effect, that the CTC does not increase the rank of an interest in relation to prior claims or legal hypothecs that exist under Québec law. Relating more specifically to the case study in this article, Section 1 Para 3(1) of the Québec CTC Regulation provides: 'a prior claim will rank before an international interest registered in the International Registry established under the Convention and the Protocol, whether in or outside insolvency proceedings.' As a result, the claim of a party who retains property under Article 1592 of the CCQ will be preferred to international interests existing under the CTC.

Québec courts have strictly interpreted the terms 'belonging to the latter' at Article 1592 CCQ.⁸⁶ As such, the owner of the property must be a party to the contract pursuant to which the right to retain is being exercised. In other words, if the legal owner/lessor did not consent to the contract by which a lessee

remitted the property to another party, this other party will not have a right to retain it as against the owner.

4 Resolving the case study

In light of the foregoing analysis, and notwithstanding that the procedures for non-judicial remedies for aircraft objects have not yet been reviewed by the courts in Québec, the facts outlined in the case study should be resolved by the Court as follows:

- (1) The Lessor was entitled to elect to exercise a non-judicial remedy and seek to repossess the Collateral on 2 June 2015.
- (2) The Lessor was not required to obtain a court order or writ of seizure from the clerk of the Superior Court and an accompanying authorisation to use all means to seize a locked object.
- (3) The Lessor was entitled to relief pending further determination of its claims as requested by it. It would receive an order from the Court, within five calendar days, giving it possession of Aircraft 2. If the Court order was issued prior to the Insolvency Proceeding, it would provide protection for the Airline, MRO and other interested parties consistent with pre-CTC Québec law, subject to any contractual agreements that may have been reached amongst the Lessor, the Airline or MRO excluding court discretion to make such protection orders pursuant to Article X(5) of the Protocol. If not issued when the Insolvency Proceeding commenced, the Lessor would be entitled to rely upon the provisions referred to in (6) below.
- (4) Accordingly, the Administrator would fail in his first request, viz obtaining the return of Aircraft 1 and the Engine to the Airline.
- (5) Similarly, the Administrator would fail in his second request, viz obtaining damages for the illegal repossession of Aircraft 1 and the Engine.

⁸⁵ Art XI 5(a).

⁸⁶ See *Air Charters Inc c TSA Aviation Inc* 2005 QCCA 355.

- (6) The Administrator would also fail on his third request, viz continuation of the Lease with a reduced rent. At best, the Administrator could ask that the Airline retain possession of the Collateral, provided that it (i) cures all defaults under the Lease within 60 days, (ii) has agreed to perform all future obligations under the Lease, and (iii) preserves the aircraft and engines, and maintains them and their value in accordance with the Lease, all as required by Article XI (Remedies on insolvency), Alternative A, in the Protocol.
- (7) Accordingly, the Lessor would be entitled to have Aircraft 1 deregistered from the CCAR pursuant to the IDERA and to have the cooperation of TCA and other applicable government authorities in the physical export of Aircraft 1, provided that it obtains the required ferry permits to operate the aircraft out of Canadian airspace, subject to applicable safety laws.
- (8) MRO would be entitled to a right to retain Aircraft 2, provided that the Lessor was a party to the agreement pursuant to which MRO was performing the C check.
- (9) If MRO does have a right to retain Aircraft 2, it could maintain possession, even after the 60 day period referred to in (6) above, until paid in full. To avoid delays in repossession, the Lessor should offer a sufficient guarantee to retake possession from MRO.
- (10) If MRO does have a right to retain Aircraft 2, this right would constitute a prior claim, which would take priority over rights and remedies under the IDERA.
- (11) Accordingly, while Aircraft 2 could be deregistered pursuant to the IDERA, it could not be physically exported pursuant to the IDERA until the MRO claim was guaranteed or paid in full.
- (12) Once the MRO claim was dealt with, all applicable federal and Québec

authorities would be obligated under the IDERA to cooperate with the export and physical transfer of Aircraft 2 from Canada pursuant to the CTC.

On any challenge to the exercise of non-judicial remedies by Lessor, whether a Québec court would look to the intent of the CTC (including the requirement for party autonomy to elect non-judicial remedies) or international experience with non-judicial remedies in those jurisdictions where rules have been established to enable non-judicial remedies, the result should be the same, as outlined above.

5 Broader implications and recommendations

In this part, for each of the main topics, we set out general conclusions from the case study, then propose legislative text and action designed to minimise gaps in, and provide more predictability regarding, application of the Article 14 Rule in these three contexts:

(a) *Re Topic I: non-judicial remedies*

- While there are no procedural gaps in Canada's common law provinces/territories in respect of the exercise of non-judicial remedies relating to the repossession of aircraft, there is a material procedural gap on this remedy in Québec where no formal procedural rules currently exist on this subject.
- A court challenge in Québec against properly exercised non-judicial remedies in connection with an aircraft repossession in Québec should not succeed because of Québec's specific implementation of the CTC and Canada's declaration implementing non-judicial remedies.
- A Québec court should rely upon the CTC general principles for gap filling, including any one or all of the party autonomy principle, asset-based financing and leasing principle, *sui generis* concept principle, and no adverse effect principle. If a Québec

court relied upon its own gap-filling principles, by reference to the procedural rules developed in other Canadian jurisdictions to govern non-judicial repossessions of aircraft, the result would be the same.

(b) *Re Topic II: relief pending final determination*

- There is no substantive law gap in Canadian common law or Québec civil law on this issue.
- Québec Courts should quickly grant the relief order requested by a creditor in respect of aircraft objects under Article 13 of the Convention as modified by paragraphs 3, 4 and 5 of Article X of the Protocol.
- Whether a debtor would be entitled to protection under Article 13(2) of the Convention would, pursuant to paragraph 5 of Article X, depend upon whether such relief had been excluded by the agreement between the debtor and its creditor.
- Whether interested parties, such as mechanics' lien holders, would be entitled to protection under Article 13(2) of the Convention would, pursuant to paragraph 5 of Article X, depend upon whether such relief had been excluded by the agreement between such person and the creditor.

(c) *Re Topic III: de-registration and export remedies*

- There is no material gap in Canada, including in Québec, in respect of the exercise of IDERA remedies.
- TCA and other applicable federal/Québec administrative authorities should de-register the aircraft and, subject to any rights protected by Article 39 of the Convention, such as mechanics' liens, or the rights of an insolvency administrator to a stay of proceedings, subject to the 60 day rule imposed by Alternative A, should cooperate with the physical export of aircraft objects.

- In contracting states where procedural gaps in respect of these remedies do exist, procedural rules similar to those contained in the Annex to this article (or the model form of IDERA regulation attached to the Annex hereto) should be enacted or implied. Such a step complies with the CTC general principles for gap filling, including any one or all of the party autonomy principle, asset-based financing and leasing principle, *sui generis* concept principle, and no adverse effect principle.

6 Conclusion – and proposed model procedural regulations

Where there is a legislative or legal *lacuna* or gap regarding the matter addressed in this article, a contracting state should enact law to address the same. That would provide commercial predictability to transaction and other interested parties. We propose a model regulation⁸⁷ for that purpose in the Annex hereto, which (1) reflects the general principles on which the treaty is based, and (2) contains provisions that have worked in practice in the aviation context over the years. Absent such a regulation, the content in the Annex should be taken into account in judicial interpretation of the treaty, where these remedies are exercised.

Appendix A: Draft procedural provisions

Model Regulation to Give Effect to Certain Remedies Provided by the Cape Town Convention and Aircraft Protocol

1 Enforcement Through Non-Judicial Remedy of Repossession

⁸⁷ This model regulation would only cover non-judicial remedies in respect of (1) aircraft object repossessions, (2) orders for relief pending final determination, and (3) the IDERA remedy, and do not purport to deal with other available CTC or local law remedies.

- 1.1 Upon default under an agreement, a Creditor has, unless otherwise agreed, the right to take possession of the applicable aircraft object(s) by any method permitted by law,⁸⁸ including without limitation under the terms of the Cape Town Convention and its Aircraft Protocol, in a commercially reasonable manner, including (i) by physically removing the aircraft object(s) from a Debtor's premises, or (ii) by immobilising or rendering such aircraft object(s) unusable without removal thereof from that Debtor's premises.
- 1.2 In exercising the remedy outlined in Article 1.1, a Creditor (i) may use reasonable, but shall seek to use the minimum necessary, force to gain access to, immobilise, or remove the collateral; (ii) may not breach the peace; and (iii) must act in compliance with applicable aviation safety and security laws.⁸⁹
- 1.3 The remedy provided for in this Article 1 may be exercised without the leave of any court or administrative or judicial body, and no administrative body taking technical steps in furtherance of the foregoing may request a court order as a condition for such steps.
- 1.4 Where a court or administrative or judicial body (as applicable) determines that a Creditor has breached the peace in exercising the remedy outlined in Article 1.1, the repossession or other actions taken by the Creditor in respect of the applicable aircraft object (s) shall not be invalidated or rescinded, but shall entitle the Debtor to a claim in damages in accordance with applicable law, in respect of losses suffered on account of such breach.
For the purposes of this regulation, **'breach of the peace'** means (i) physical or threatened violence against any

person, or (ii) action from which physical harm to persons is reasonably foreseeable.⁹⁰

2 Relief Pending Final Determination

- 2.1 For the purposes of any relief sought by a creditor pursuant to Article 13(1) of the Convention, as modified Article X of the Protocol:

'speedy' means a Court order issued within five calendar days of the request therefor by the Creditor; and

'evidence of default' means a certificate, in the form or substantially in the form prescribed, by the creditor confirming that (a) it is a Creditor in respect of the applicable aircraft object; (b) a default has occurred under the agreement applicable to that aircraft object; (c) notice of such default has been given to the Debtor in respect of that aircraft object; and (d) such default has not been cured.

3 IDERA Remedies

The model form of IDERA Regulation, appended hereto,⁹¹ sets out the procedures applicable to the remedies of de-registration and export, exercised pursuant to the IDERA, under the Cape Town Convention and its Aircraft Protocol.

Appendix B: Model IDERA regulations

The Aviation Working Group has prepared a model form of IDERA regulation for suggested use by contracting states to the Cape Town Convention and its Aircraft Protocol that have made a declaration applying art XIII of the latter.

The Aviation Working Group may amend this model form in due course to address issues which may arise in practice.

⁸⁸ This provision does not preclude the use of an agent or administrative authority, authorised under applicable law, to facilitate a legal repossession, such as has been put in place in Turkey's implementation of the CTC.

⁸⁹ This provision recognises that, in most cases, an authorised agent with appropriate airport security clearances will be necessary to effect and/or assist with the physical repossession process.

⁹⁰ This definition is intended to address the essence of the concept of a breach of the peace but may require further refinement under applicable law.

⁹¹ An annotated version of that model form is attached for explanatory purposes. A clean version, which should be used in conjunction with our proposed regulation, may be found at www.awg.aero.

FIRST EDITION: NOVEMBER 2014

Model Implementing IDERA Regulation

1 Introduction

1.1 The purpose of this regulation⁹² is to provide procedures for (a) Recording and Cancelling an IDERA, and (b) De-Registering Aircraft and Exporting Aircraft Objects⁹³ under an IDERA.

1.2 This regulation applies to Aircraft registered in [*name of state*] and for purposes of 6.2.2 and 6.3.4 Aircraft Objects located in [*name of state*].

2 References

2.1 Authority

The [*name of relevant authority*] of [*name of state*] has authority to issue this regulation under [*cite relevant law or regulation*].

2.2 Effective Date

This regulation is effective on [*date*], provided that 4.2, 5, and 6 apply to an IDERA Recorded by the Registry Authority prior to that date.⁹⁴

2.3 Reference Documents

2.3.1 [relevant aviation law or regulation]

2.3.2 [specific, relevant law(s), or regulation(s) dealing with aircraft registration]

2.3.3 Convention on International Interests in Mobile Equipment, 2001.

2.3.4 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2001.

2.4 Canceled Documents

Without limiting 3.2, the following are canceled and superseded by this regulation: [*specify any regulations or other documents canceled or superseded by this regulation*].

2.5 Defined Terms

Terms used without definition in this regulation have the meanings given in the Treaty.

Aircraft: an airframe which is part of an aircraft, or a helicopter (i) registered or intended to be registered in the Registry, and (ii) to which the Treaty applies.

Applicant: an entity or person that has applied or is applying for the registration of an Aircraft in the Registry.

Authorised Party: an entity or person in favour of whom an IDERA has been issued.

Certified Designee: an entity or person named in a Designation as the certified designee under an IDERA.

Convention: Convention on International Interests in Mobile Equipment, 2001.

Declarations: the declarations lodged by [*name of state*] in connection with its [ratification of][accession to]⁹⁵ the Convention and Protocol.

De-Registration: [deletion][removal]⁹⁶ of the registration of an Aircraft from the Registry and promptly providing a certificate evidencing De-Registration to the Authorised Party or Certified Designee, as applicable.

Designation: a designation in the form of **Annex 2**.

Export: export and physical transfer of an Aircraft from the territory of [*name of state*].

⁹² In this Model Form, ‘regulation’ is used to describe the rules adopted by the civil aviation authority. This term should be adapted to local requirements, customs, and terminology: ‘circular,’ ‘directive,’ ‘advisory,’ ‘instruction’ or other term that best describes the form and process for the relevant authority to issue binding procedures applicable to the registration of aircraft in the state should be used.

⁹³ Under Article XIII of the Protocol, De-Registration and Export are separate and distinct remedies. While De-Registration from a nationality register would apply to the object registered in the nationality register, i.e. the Aircraft, the Export remedy applies to the broader category of Aircraft Objects and specifically includes engines.

⁹⁴ This regulation does not invalidate or otherwise affect a previously recorded IDERA; however, the procedures herein for specifying a new Certified Designee, revoking an IDERA or Designation, submitting a Request, and dealing with the obligations of the Registry Authority once a Request is submitted apply to an IDERA recorded prior to the effective date. The proviso in 2.2 may be omitted if this regulation is adopted at the time of Treaty implementation in the state and therefore if the Registry Authority has not previously accepted/recorded any IDERA.

⁹⁵ The correct terminology should be selected, depending upon the nature of the state’s adoption of the Treaty.

⁹⁶ The Protocol defines De-registration to mean ‘deletion or removal’ of an Aircraft from the Registry. The more appropriate of these terms in the local context should be used in this regulation.

IDERA: an Irrevocable De-Registration and Export Request Authorisation in the form of *Annex 1*.

Officer: of an entity is (i) a member of its board of directors, (ii) its chief executive, operating, financial or legal officer, (iii) a vice president, (iv) its secretary or an assistant secretary, (v) its treasurer or assistant treasurer, (vi) a member or general partner, (vii) a trustee or (v) any other person or entity whose signing authority is acceptable to the Registry Authority.

Protocol: Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2001.

Record: evidencing a document in permanent form for authoritative reproduction in the future and retaining that evidence in the registration file for an Aircraft to which the document relates.

Registry: [describe aircraft registry of the state].

Registry Authority: [name of the authority responsible for the registration of Aircraft in the Registry].

Related Engine: an engine to which the Treaty applies and which is identified by manufacturer's serial number in an IDERA.⁹⁷

Request: a request in the form of *Annex 3*.

Revocation: a revocation of an IDERA or

Designation, as the case may be, in the form of *Annex 4*.

Signature Authorisation: a document legally authorising execution of a document contemplated by this regulation, including, without restriction, a power of attorney signed by an Officer.

Treaty: the Convention, as modified by the Protocol and including the Declarations.

3 Background

3.1 [Name of state] is a Contracting State to the Convention and Protocol and made a Declaration under Article XXX(1) of the Protocol providing for the recording and enforcement of IDERA.

3.2 The Treaty has effect under the law of [name of state], prevailing over conflicting law.

3.3 In addition to other remedies available to a Creditor under the Treaty, an Authorised Party may, upon request made pursuant to an IDERA:

3.3.1 procure the De-Registration and Export of an Aircraft, and

3.3.2 procure the Export of any Related Engines.

3.4 Under the Treaty:

3.4.1 the Registry Authority shall Record a properly submitted IDERA;⁹⁸

3.4.2 the Registry Authority and other administrative authorities shall expeditiously co-operate with and assist an Authorised Party in the exercise of the De-registration and Export remedies;⁹⁹

3.4.3 the Registry Authority shall honour a request for De-registration made pursuant to an IDERA;¹⁰⁰ and

3.4.4 the Registry Authority and other administrative authorities shall honour a request for Export made pursuant to an IDERA, subject to applicable safety laws and regulations.¹⁰¹

4 IDERA Recordation

4.1 Recordation Requirements and Procedures

4.1.1 The Registry Authority will accept and Record an IDERA if that IDERA:

⁹⁷ Because engines may from time to time be removed from the Aircraft, the term Related Engine will be used in this regulation for the purpose of giving effect to the provisions of the Protocol which are intended to provide Export remedies for Aircraft Objects – it being understood that because the nationality registration regime does not apply to engines, De-Registration Remedies may only be provided with respect to Aircraft. If the Related Engines are in fact installed on the Aircraft at the time relevant under 6 of this regulation, then the distinction is without effect, as the De-Registration and Export remedies available for an Aircraft will cover the installed Related Engines; however, if one or more Related Engines are not installed at such time, then the provisions of 6 of this regulation which apply to Related Engines may be invoked by an Authorised Party or Certified Designee to obtain Export remedies. It is important to note, however, that each time an engine ceases to be a Related Engine under the mortgage, lease or installment sale contract for the Aircraft, and a replacement engine becomes a Related Engine, a new IDERA with corrected information will be required, necessitating a new Designation if relevant.

⁹⁸ See Art XIII(2) of the Protocol.

⁹⁹ See Art XIII(4) of the Protocol.

¹⁰⁰ See Arts IX(5) and XIII(4) of the Protocol.

¹⁰¹ See Arts IX(5) and XIII(4) of the Protocol.

- (a) is submitted in writing¹⁰² to the Registry Authority substantially in the form of *Annex 1*;¹⁰³
- (b) identifies an Aircraft registered or to be registered in the Registry; and
- (c) is signed in line with the requirements of *Annex 5* (i) by an Applicant, or, if an Applicant is not a natural person, an Officer of an Applicant, or (ii) under a Signature Authorisation.

4.1.2 If two copies of an IDERA are submitted to the Registry Authority, the Registry Authority will acknowledge receipt of that IDERA by executing one such copy and returning it.¹⁰⁴

4.1.3 The Registry Authority will (a) Record an IDERA submitted in line with 4.1.1 within five working days of receipt,¹⁰⁵ and (b) if requested by the Applicant, Authorised Party or Certified Designee, promptly confirm that Recordation is complete.

¹⁰² The Convention defines 'writing' in Art 1(nn).

¹⁰³ If the form of IDERA, Request, Designation, and Revocation are required to be submitted in a language other than English or French, a translation into one of these languages should be required as well.

¹⁰⁴ Simultaneous acknowledgement of receipt is essential given transactional practice. An efficient method would be for the Registry Authority to accept two original writings and immediately countersign one original writing on the signature block contained in the IDERA form and return it to the submitting party. However, acknowledgment could also be effected by (1) stamping a second hard copy of an IDERA 'received' and immediately returning it, or (2) such other method for simultaneous acknowledgment set out in the regulations. Alternatively, an IDERA meeting the requirements of 4.1.1 can be immediately Recorded when it is submitted. It should be noted that a Registry Authority may choose to permit or require that documents be submitted in electronic format and its acknowledgment may also take that form. In any case, if any of these other methods are intended to replace the Registry Authority's countersignature on a hard copy of an IDERA, this regulation must be modified to clearly provide that the Registry Authority's acknowledgment is effected by the chosen method.

¹⁰⁵ Articles X(6) and XI(8) of the Protocol, if applicable, set out a time period of no more than five working days to complete certain actions. For reasons of simplicity and consistency, a uniform period of five working days is provided here as well.

4.1.4 The Registry Authority will neither Record nor give any effect to an IDERA for an Aircraft if another Recorded IDERA for that Aircraft has not been revoked in line with 5.1.¹⁰⁶

4.1.5 If an IDERA is Recorded, an Authorised Party, or, if a Designation is also Recorded, its Certified Designee shall be the sole person authorised to deliver a Request and exercise the remedies specified in Article IX(1) of the Protocol pursuant to such IDERA.¹⁰⁷

4.2 Certified Designee

4.2.1 The Registry Authority will Record a Designation if:

- (a) it is submitted in writing to the Registry Authority substantially in the form of *Annex 2*;
- (b) it identifies a Recorded IDERA or an IDERA submitted with that Designation;
- (c) no other Designation is Recorded for the relevant IDERA, other than a Designation which has been revoked in line with 5.1;¹⁰⁸ and
- (d) it is signed in line with *Annex 5* (i) by the Authorised Party, or, if the Authorised Party is not a natural person, an Officer of the Authorised Party, or (ii) by the foregoing under a Signature Authorisation.

4.2.2 If two copies of a Designation are submitted to the Registry Authority, the Registry Authority will acknowledge receipt of that Designation by returning one copy, indicating in writing that it was 'received'.¹⁰⁹

4.2.3 The Registry Authority will (a) Record a Designation submitted in line with 4.2.1 within five working days, and (b) upon request from an Authorised Party or Certified Designee, promptly confirm that Recordation is complete.

5 Cancellation of an IDERA or Designation

5.1 An IDERA or Designation shall be revoked and be of no further effect if a Revocation:

- (a) is submitted in writing to the Registry Authority substantially in the form of *Annex 4*;
- (b) identifies a Recorded IDERA or Designation, as the case may be; and

¹⁰⁶ Only a single IDERA may be recorded and recognised for an Aircraft. See Official Commentary (n 3) para 3.35.

¹⁰⁷ See Art XIII(3) to the Protocol.

¹⁰⁸ This 'one Certified Designee only' approach is intended by the singular term used in Article XIII(3) of the Protocol.

¹⁰⁹ The points made in fn 13 above apply *mutatis mutandis*.

(c) is signed in line with *Annex 5* (i) in the case of an IDERA, by an Authorised Party, or, in the case of a Designation, by the Certified Designee¹¹⁰ and (ii) if the signatory to the Revocation is not a natural person, by an Officer of the foregoing or by the foregoing under a Signature Authorisation.

5.2 An Applicant shall have no power to issue a Revocation or otherwise revoke an IDERA or Designation.¹¹¹

5.3 If two copies of a Revocation are submitted to the Registry Authority, the Registry Authority will acknowledge receipt of that Revocation by returning one copy, indicating in writing that it was 'received'.¹¹²

5.4 The Registry Authority will (a) Record a Revocation submitted in line with 5.1 within five working days, and (b) upon request from an Applicant, Authorised Party or Certified Designee, promptly confirm that Recordation is complete.

5.5 Effect of Revocation

5.5.1 The Registry Authority will not accept a Request or take any other action relating to an IDERA that has been revoked in line with 5.1.

5.5.2 The Registry Authority will not accept a Request from a Certified Designee or take any other action on request of a Certified Designee under an IDERA if the Designation of that Certified Designee has been revoked in line with 5.1.

¹¹⁰ For simplicity's sake, this provision permits only a Certified Designee to revoke a Designation; the Authorised Party is not able to do so. The Convention does not address this point, however, and so if the Registry Authority wishes to provide the Authorised Party the option to revoke a Designation as well, clause (i) would be amended to read 'in the case of a Designation, either the Authorised Party or the Certified Designee ...'.

¹¹¹ See Art XIII(3) of the Protocol. See Official Commentary (n 3) para 3.34. Note that the administrative exception in Article XIII(3) – revocation by the Applicant with the *consent of the Authorised Party* – has not been included in this regulation since (1) it could lead to practical difficulties of proof and process, and, in any event (2) the approach taken in 5 of this regulation provides an efficient means of Revocation, thus alleviating the practical need for that administrative exception.

¹¹² The points made in fns 13 and 17 above apply *mutatis mutandis*.

5.5.3 The validity of an IDERA shall not be affected by revocation of a related Designation.

6 Deregistration and Export

6.1 A Request will be accepted by the Registry Authority if that Request:

6.1.1 is submitted in writing substantially in the form of *Annex 3*;¹¹³

6.1.2 identifies an IDERA Recorded in the Registry; and

6.1.3 is signed in line with *Annex 5* (i) by an Authorised Party or a Certified Designee, or, if the Authorised Party or Certified Designee is not a natural person, by an Officer thereof, or (b) by the foregoing under a Signature Authorisation.

6.2 The Registry Authority will honour each Request submitted in line with 6.1:

6.2.1 to the extent so requested, by (i) effecting the De-registration of the Aircraft, and (ii) taking all action within its power to effect or facilitate the Export of the Aircraft and any Related Engines.¹¹⁴

(a) expeditiously, and, in any case, no later than five working days following receipt of the Request; (b) without (i) the consent or approval of the Applicant or any other person or entity, (ii) any court¹¹⁵ or administrative or other order or decision of any kind, (iii) any need for the Registry Authority

¹¹³ Under Article IX(5)(b) of the Protocol, the Registry Authority *may or may not require* the Authorised Party to certify that any registered interests ranking in priority to that of the Authorised Party has been discharged or its holder has consented to the De-Registration and Export of the Aircraft. If it does, the requirement for that certification should be added as a new 6.1.4.

¹¹⁴ Honoring a Request may involve De-Registration, Export or both, depending upon circumstances. These are independent remedies and one is not conditioned on the other.

¹¹⁵ See Official Commentary (n 3) para 3.31 (The IDERA route 'does *not* involve a court order' [emphasis added].) That includes for a state requiring leave of the court in its declaration under 54(2) of the Convention. In short, IDERA-based remedies are intended to stand alone. If, despite that intent, a court order requirement is set out in this regulation in states making that declaration, that order must be limited to one under Article 13 of the Convention, granted within the timeframe set out in a declaration related to Article X of the Protocol, if made.

to investigate external facts,¹¹⁶ or (iv) imposing any additional requirements;¹¹⁷ and

(c) regardless of whether the Authorised Party or its Certified Designee is in possession of the Aircraft or Related Engine¹¹⁸ and notwithstanding that a Related Engine is not installed on the Aircraft.

6.2.2 in the context of Export remedies only, subject to applicable aviation safety laws and regulations.¹¹⁹ For purposes of this regulation, 'applicable aviation safety laws and regulations':

(a) with respect to Aircraft, are those which must be met under the laws of [*name of state*] to permit the operation in its airspace of an aircraft under a ferry or other special flight permit issued by the aviation authority of the state of registration of that aircraft ('**ferry flight rules**'); and

(b) do not include any requirement (i) for the issuance of an export certificate of airworthiness, or (ii) without limiting 6.3, for any documents in the possession of, or any action by, an operator of an aircraft.

6.3 A Request will have following additional effects:

6.3.1 To the extent within its reasonable control, the Authorised Party is responsible¹²⁰, promptly

following but not as a condition to the De-registration and Export of the Aircraft, for:

(a) removing or covering the Registry's nationality marks on the Aircraft;

(b) returning to the Registry Authority the original (i) certificate of registration for the Aircraft, and (ii) certificate of airworthiness for the Aircraft; and

(c) changing the Aircraft's transponder code so that it no longer indicates that such Aircraft is registered in [*name of state*].

6.3.2 Upon notice to the operator, the Aircraft may not be operated unless and until it is re-registered and can be lawfully operated under applicable airworthiness rules.

6.3.3 A Request with respect to an Aircraft will be honoured under 6.1 and 6.2 without regard to the identity of the engines and other equipment then installed on that Aircraft.¹²¹

6.3.4 Export remedies under 6.1 and 6.2 will be made available for any Related Engines which are not then installed on the Aircraft.¹²²

6.4 Without limiting the Registry Authority's authority to De-Register aircraft under applicable law, an Aircraft for which there is a Recorded IDERA may not be De-Registered on the request of the Applicant, unless that IDERA is the subject of a Revocation.¹²³

¹¹⁶ Remedies under an IDERA are intended to be 'purely documentary'. See Official Commentary (n 3) paras 3.36 and 5.48. That includes whether the Creditor has given notice to 'interested persons' as set out in Article IX(6) of the Convention, the failure of which results in liability under applicable law.

¹¹⁷ See Official Commentary (n 3) para 3.36.

¹¹⁸ *ibid* para 3.33.

¹¹⁹ As De-Registration ends a state's international obligations in respect of an Aircraft and has no operational implications, there is a strong presumption that compliance with national safety laws and regulations are not required, indeed do not apply, to that remedy. The same is the case for the remedy of Export where it is effectively a legal construct rather than operational (a deemed export), namely, where the Aircraft is then physically located outside the state. In short, the below discussed ferry flight rules are principally apposite to the remedy of Export where the aircraft is then located in the state.

¹²⁰ The Authorised Party's 'responsibility' is only meant to establish the responsibility as between the Authorised Party and the Registry Authority: the Applicant or a third party may have such responsibility contractually.

¹²¹ Under the Convention, 'aircraft' includes installed engines and equipment – it is not necessary for the Registry Authority to inquire whether the originally installed equipment is still attached to the Aircraft – that is for the interested parties to work out amongst themselves.

¹²² See Art IX(1)(b) of the Protocol, extending Export remedies to 'aircraft objects,' which includes engines.

¹²³ The use of the word 'sole' in Article XIII(3) of the Protocol and in clause (i) of the form of IDERA annexed to the Protocol was intended to prevent the Applicant from De-Registering an Aircraft for which an IDERA has been Recorded and this regulation is drafted to adopt that interpretation, in which case an Applicant may De-Register an Aircraft for which an IDERA has been Recorded by obtaining a Revocation from the Authorised Party or Certified Designee and submitting the Revocation to the Registry Authority with its own De-Registration request. In any case, the Registry Authority would always retain the authority to De-Register an Aircraft pursuant to its own regulations.

7 Assignments

Rights under the documents set out in this regulation may not be assigned except with the express consent of the Registry Authority.¹²⁴

8 Forms

8.1 Annex 1 – IDERA

8.2 Annex 2 – Designation

8.3 Annex 3 – De-Registration and Export Request

8.4 Annex 4 – Revocation

8.5 Annex 5 – Formalities

Annex 1

IDERA

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

The undersigned is the registered [operator] [owner]¹²⁵ of the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration number [number][mark] [insert registration number/mark], with the following Related Engines [insert description of engines, by model and manufacturer's serial number] (together with all installed, incorporated or attached accessories, parts and equipment, the 'Aircraft').

This instrument is an irrevocable de-registration and export request authorisation issued by the undersigned in favour of [insert name of creditor] (the 'Authorised Party') under the authority of Article XIII of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment. In accordance with that Article, the undersigned hereby requests:

- (i) recognition that the Authorised Party or the person it certifies as its designee is the sole person entitled to:
 - (a) procure the de-registration of the aircraft from the [insert the name of aircraft register] maintained by the [insert name of registry

¹²⁴ The effect of this provision is that, in the case of assignments in the underlying transactions or the sale of aircraft, existing IDERA and Designations cannot be transferred but must instead be revoked and new ones issued.

¹²⁵ Select the term that reflects the relevant national-ity registration criterion.

authority] for the purposes of Chapter III of the Convention on International Civil Aviation, signed at Chicago, on 7 December 1944, and

- (b) procure the export and physical transfer of the aircraft from [insert name of state]; and
- (ii) confirmation that the Authorised Party or the person it certifies as its designee (the 'Certified Designee') may take the action specified in clause (i) above on written demand without the consent of the undersigned and that, upon such demand, the authorities in [insert name of state] shall co-operate with the Authorised Party with a view to speedy completion of such action.

The rights in favour of the Authorised Party established by this instrument may not be revoked by the undersigned without the written consent of the Authorised Party.

Please acknowledge your agreement to this request and its terms by appropriate notation in the space provided below and lodging this instrument in [insert name of registry authority].

[insert name of operator / owner]

Agreed to and lodged this By: [insert name of signatory]
[insert date] Its: [insert title of signatory]

[insert relevant notational details]

Annex 2

Designation

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Designation Under Irrevocable De-Registration and Export Request Authorisation, dated [insert date of IDERA] by [insert name of operator/owner] for the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration number [number][mark] [insert registration number/mark] (the 'IDERA')

The undersigned is the Authorised Party (this and all other terms used in this Designation have the meanings given in the IDERA) under the IDERA.

Under 4.2 of [describe the regulation] the undersigned hereby designates [insert name of Certified Designee] as the 'Certified Designee' for all purposes of [describe regulation], effective immediately and until this Designation is revoked under 5.1 of [describe the regulation].

[insert name of Authorised Party]

Agreed to and lodged this By: [insert name of signatory]
[insert date] Its: [insert title of signatory]

[insert relevant notational details]

Annex 3

Request

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation, dated [insert date of IDERA] by [insert name of operator/owner] for the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration number [number][mark] [insert registration number/mark] (the 'IDERA')

Aircraft: [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration number [number][mark] [insert registration number/mark]

[Related Engines: [if relevant, insert description, by model and manufacturer's serial number]]

The undersigned is the [Authorised Party][Certified Designee] (this and all other terms used in this Designation have the meanings given in the IDERA) under the IDERA.

[The undersigned hereby certifies that all registered interests ranking in priority to that of the Authorised Party have been discharged or that the holders of such interests have consented to the [de-registration and export of the Aircraft][export of the Related Engine].]¹²⁶

Under 6 of [describe the regulation] the undersigned hereby requests as soon as practicable, and, in any case, within five working days [(i) de-registration of the Aircraft, with notice of such de-registration immediately thereafter sent to [insert name of state where the Aircraft is intended to be subsequently registered] and (ii) co-operation of the [insert name of Registry Authority] and other

administrative authorities in [insert name of state] in the export of the [Aircraft][Related Engine]¹²⁷ from [insert name of state].]¹²⁸

[insert name of Authorised Party/Certified Designee]

Agreed to and lodged this By: [insert name of signatory]
[insert date] Its: [insert title of signatory]

[insert relevant notational details]

Annex 4

Revocation

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation, dated [insert date of IDERA] by [insert name of operator/owner] for the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration number [number][mark] [insert registration number/mark] (the 'IDERA')

[if this is a revocation of a Designation, include: The Designation, dated [insert date of Designation] by [name of Authorised Party] designating [insert name of Certified Designee]

The undersigned is the [Authorised Party][Certified Designee] (this and all other terms used in this Revocation have the meanings given in the IDERA) under the [IDERA][Designation].

In line with 5.1 of [describe the regulation] the undersigned hereby revokes the [IDERA][Designation], effective immediately.

[insert name of Authorised Party]

Agreed to and lodged this By: [insert name of signatory]
[insert date] Its: [insert title of signatory]

[insert relevant notational details]

¹²⁶ This certification *may* be required by the Registry Authority under Article IX(5) of the Protocol. *If it is not* required, then the bracketed wording should be deleted from this form.

¹²⁷ If Export of one or more Related Engines (rather than an Aircraft) is sought, a reasonably detailed description of the Related Engine(s) should be provided.

¹²⁸ The Authorised Party or Certified Designee may request either (i) or (ii) or both – De-Registration and Export are separate and distinct remedies.

Annex 5

Formalities¹²⁹

1. A document that indicates it was signed in [name of state] will be accepted by the

Registry Authority without additional formalities.¹³⁰

2. A document that indicates it was signed outside [name of state] will be accepted by the Registry Authority if notarised locally and apostilled or legalised at a [name of state] embassy or consulate.¹³¹

¹²⁹ The purpose of this annex is set out any signature formalities the Registry Authority requires. In order to give effect to the Treaty provisions applicable to IDERA, which intend for the De-Registration and Export remedies to be made available expeditiously, any such formalities should be kept to a *minimum*.

¹³⁰ No special signing formalities should be required, and certainly none beyond that those applicable to other documents accepted by the Registry Authority.

¹³¹ Customary notarisation and legalisation process should be specified for documents signed outside the country.