

# Practitioners' Guide

## to the Cape Town Convention and The Aircraft Protocol

The Legal Advisory Panel of the Aviation Working Group

Published September, 2015

# *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol*

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# Preface

This Practitioners' Guide to the Cape Town Convention and the Aircraft Protocol (the “**Guide**”) is the third in a series of guides addressing the practical issues arising in connection with the Cape Town Convention. It has been produced by the Legal Advisory Panel of the Aviation Working Group (the “**AWG**”), which is comprised of leading practitioners of international aviation finance law who are listed below. One chief purpose of the Legal Advisory Panel is to provide thought and support to the AWG on the implementation and institutionalization of the Cape Town Convention. The Legal Advisory Panel, along with the AWG, continues to be at the forefront of activity relating to legal issues arising under the Cape Town Convention. This Guide is being published in an electronic format (free of charge) so as to better serve the aviation finance community. As one of the main goals of this publication is to provide education about the Cape Town Convention and its usefulness in practice, the Legal Advisory Panel intends to regularly update this Guide so as to keep it current. This Guide is one of several initiatives established by the AWG in order to assist in the development, implementation and interpretation of the Cape Town Convention. The AWG has sponsored a partnership between the University of Oxford Faculty of Law and the University of Washington School of Law to establish the Cape Town Convention Academic Project which is designed to facilitate the academic study and assessment of the Cape Town Convention with a view towards enhancing the understanding and effective implementation of the treaty and advancing its aims. The main activities of the Cape Town Convention Academic Project are the establishment of a comprehensive database of primary and secondary materials on the Cape Town Convention, the creation of a journal publishing scholarly articles relating to the treaty, providing annotations to legal issues that arise in connection with interpreting the Cape Town Convention, providing academic conferences on the Cape Town Convention, providing instructional materials and providing economic assessments of its impact. Similarly, the AWG and the Legal Advisory Panel intend to make available regular reporting on, and analysis of, legal actions and administrative activity relating the interpretation and compliance of the Cape Town Convention in any of the ratifying jurisdictions so as to better inform the legal community and interested parties of these matters with the goal of better achieving uniform understanding of and compliance with the Cape Town Convention and its terms. It is intended that these initiatives should be considered in conjunction with this Guide so as to provide the most current and up to date thinking of the Legal Advisory Panel as well as the AWG on the important issues relating to the Cape Town Convention.

Aside from the *Official Commentary, Third Edition*, prepared by Professor Sir Roy Goode, very little has been written for the benefit of practitioners who seek education and guidance on the terms of the Cape Town Convention and its impact on aircraft finance transactions, particularly as it relates to its scope of application, the constitution and registration of international interests, the effects of registration (priority) and the availability and practical application of the remedies available thereunder. This Guide is intended to supplement, consolidate and update Volume 1

*(Contract Practices Under the Cape Town Convention)* and Volume 2 *(Advanced Contract and Opinion Practices Under the Cape Town Convention)* of the Cape Town Paper Series (both previously prepared by the Legal Advisory Panel) and seeks to summarize key aspects of the *Official Commentary*, along with the various regulations and procedures relating to the Cape Town Convention which have heretofore been published, as well as the shared experiences of the Legal Advisory Panel, in order to provide specific guidance and thought on these and related topics to the wider aviation finance community. This Guide also highlights what the Legal Advisory Panel considers to be best practices under the Cape Town Convention, which practices will likely evolve over time as experience with the Cape Town Convention further develops.

This Guide initially provides a summary of Cape Town Convention basics designed to provide practitioners with a brief primer on the requirements necessary to have an interest to which the Cape Town Convention applies. It also seeks to provide guidance in respect of the applicability of the Cape Town Convention in more complex circumstances such as in connection with multi-jurisdictional transactions and transactions involving fractional interests and helicopters. This Guide then provides a summary of specific requirements of the International Registry and some of the issues encountered in connection with the registration of interests. Further, this Guide explores other interests arising under the Cape Town Convention and the impact of assignment and novation, as well as possible subordination, as they relate to specific international interests. It reviews the impact of the Cape Town Convention on aviation authorities generally, explores the concept of “entry points” and describes the varying approaches taken to deal with IDERAs. Finally, it provides a summary of remedies available under the Cape Town Convention and their practical application.

Although the entire Legal Advisory Panel provided input and participated in the completion of this Guide, its primary authors consisted of a subgroup chaired by Dean Gerber of Vedder Price P.C. (Chicago) and included Catherine Duffy of A&L Goodbody (Dublin), Frank Polk of McAfee & Taft (Oklahoma City), Donald Gray of Blake, Cassels and Graydon LLP (Toronto), John Pritchard of Holland & Knight LLP (New York), William Piels of Holland & Knight LLP (San Francisco), Carlos Sierra of Sierra, Vázquez, Olivares, Molina (Mexico City) and Ken Basch of Basch & Rameh (Sao Paulo). Also contributing and providing invaluable insight and support for this Guide was Jeffrey Wool, secretary general of the Aviation Working Group.

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# I. Introduction to the Cape Town Convention

On November 16, 2001, at the conclusion of a diplomatic conference held in Cape Town, South Africa, 53 countries from around the world supported the adoption of two documents, namely the Convention on International Interests in Mobile Equipment (the “**Convention**”) and an associated Protocol to the Convention on Matters Specific to Aircraft Equipment (the “**Protocol**”). Since the adoption of the Convention, along with the Protocol (herein collectively referred to as the “**Cape Town Convention**”), a substantial majority of leading aviation countries have ratified or acceded to the Cape Town Convention (the countries are referred to as “**Contracting States**”).<sup>1</sup> Central to the purpose of the Cape Town Convention is the enhancement and harmonization of private laws in respect of the financing, lease and sale of mobile equipment. The Cape Town Convention is intended to give parties involved in such transactions greater confidence and predictability, principally through the establishment of a uniform set of rules guiding the constitution, protection, prioritization, and enforcement of certain rights in aircraft, aircraft engines and helicopters (referred to in the Cape Town Convention as “aircraft objects”). It alters the rules governing aircraft sales, leases and financing on a jurisdiction-by-jurisdiction basis by establishing a new international framework and providing for the creation of an International Registry (the “**International Registry**”) supervised by the International Civil Aviation Organization (“**ICAO**”).<sup>2</sup> The intent of the Convention is to establish primacy as regards matters within its scope relating to the creation, enforcement, perfection and priority of interests in aircraft objects. As such, to the extent applicable, it supersedes the Convention on the International Recognition of Rights in Aircraft signed in Geneva on June 19, 1948 (the “**Geneva Convention**”).<sup>3</sup>

Because the Cape Town Convention is still a fairly new treaty, practitioners have limited guidance on how to interpret and apply its complex terms. An official commentary relating to the Cape Town Convention was written by Professor Sir Roy Goode CBE, QC, Emeritus Professor of Law at the University of Oxford, to provide an authoritative guide for users, governments and courts.<sup>4</sup> This Guide is intended to supplement the Official Commentary in order to provide practical

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<sup>1</sup> The Convention and the Protocol entered into force on March 1, 2006 (which corresponds to the first day of the month following expiration of three months after the deposit of the eighth instrument of ratification or accession, as required by the Protocol). See Article 49(1) of the Convention and Article XXVIII(1) of the Protocol. For updated information and status concerning country ratification, visit the International Institute for the Unification of Private Law (“**Unidroit**”) website at [www.unidroit.org/status-2001capetown-aircraft](http://www.unidroit.org/status-2001capetown-aircraft).

<sup>2</sup> ICAO was appointed as the “Supervisory Authority” pursuant to Article 17(2)(d) of the Convention and Article XVIII of the Protocol. The Supervisory Authority is tasked with, among other things, the establishment of the International Registry and the publication of regulations dealing with the International Registry’s operation. ICAO has recently published the *Regulations and Procedures for the International Registry*, Sixth Edition (2014) (the Regulations shall be referred to herein as the “**Cape Town Regulations**”, and the Procedures shall be referred to herein as the “**Cape Town Procedures**”) which can be located at [https://www.internationalregistry.aero/ir-web/downloadDocument?locale=en&pageSubTitle=-Documentation English](https://www.internationalregistry.aero/ir-web/downloadDocument?locale=en&pageSubTitle=-Documentation%20English).

<sup>3</sup> The Cape Town Convention only supersedes the Geneva Convention as regards matters within its scope. With respect to rights or interests not covered or affected by the Cape Town Convention, the Geneva Convention remains applicable. Article XXIII of the Protocol. Although beyond the scope of this Guide, when dealing with Contracting States which are parties to both instruments, it is prudent not to neglect Geneva Convention considerations. See Section III.H.

<sup>4</sup> Sir Roy GOODE, Official Commentary (Unidroit Third ed. 2013) (hereinafter “**Goode**” or the “**Official Commentary**”). The Official Commentary is the third edition of the commentary prepared by Professor GOODE pursuant to a resolution adopted at the Diplomatic Convention that concurrently adopted the Cape Town Convention. The Official Commentary was, in part, revised in order to take account of the experiences of practitioners and the operation



assistance to practitioners who may be working with the terms of the Cape Town Convention. This Guide is not intended to be an exhaustive summary of all of the provisions contained in the Cape Town Convention (and the Official Commentary remains the primary source for such a summary). Rather, this Guide focuses on issues related to the Cape Town Convention which are likely to be encountered by legal practitioners in connection with aircraft sale, lease, finance and related transactions and seeks to provide better clarity, understanding and guidance to practitioners in connection therewith.

## II. Convention Basics

The initial step in any Cape Town Convention analysis is to determine whether the specific rights created in a particular situation fall within its scope.<sup>5</sup> To assist practitioners in this analysis, this section will provide a foundation of the basic structural aspects of the Cape Town Convention, including (i) the specific items of equipment (called “**aircraft objects**”) subject to the Cape Town Convention, (ii) the categories of transactions involving such aircraft objects for which benefits may be claimed under the Cape Town Convention, and (iii) the various rules and regulations relating to registrable interests and the priority thereof under the Cape Town Convention.

### A. Aircraft Objects

The Cape Town Convention only applies to airframes, aircraft engines and helicopters which constitute “aircraft objects.”<sup>6</sup> The three categories of aircraft objects are specifically described as follows:

- (i) “airframes” that are type-certified to transport at least eight (8) persons including crew or goods in excess of 2,750 kilograms;<sup>7</sup>
- (ii) “aircraft engines” having at least 1,750 pounds of thrust if jet propulsion powered or at least 550 rated take-off shaft horsepower if turbine-powered or piston-powered;<sup>8</sup> and
- (iii) “helicopters” that are type certified to transport at least five (5) persons including crew or goods in excess of 450 kilograms.<sup>9</sup>

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of the International Registry during the first few years following entry into force of the Cape Town Convention and addresses many of the issues arising during such period (and remains an essential source of interpretation and guidance in respect of the Cape Town Convention). For further clarification and commentary on the Convention, the Cape Town Convention Academic Project (which is a joint undertaking between the University of Oxford Faculty of Law and the University of Washington School of Law which seeks to assist scholars, students, practicing lawyers, judges and others by providing information on and education about the Convention) publishes annotations to the Official Commentary which provide another authoritative source for those seeking to understand and interpret the Convention. These annotations can be found on the Academic Project website ([www.ctcap.org](http://www.ctcap.org)).

<sup>5</sup> It is important to recognize that this clause needs to be considered in conjunction with Section III.A. (Sphere of Application and Connecting Factors) which must also be present in order for the applicable rights to fall within the scope of the Cape Town Convention.

<sup>6</sup> Articles I(2)(c) and II(1) of the Protocol.

<sup>7</sup> Article I(2)(e) of the Protocol.

<sup>8</sup> Article I(2)(b) of the Protocol.

<sup>9</sup> Article I(2)(l) of the Protocol.

Each of the foregoing includes all installed, incorporated or attached accessories, parts and equipment (in the case of airframes, other than aircraft engines; and in the case of helicopters, including rotors) and all data, manuals and records relating thereto.<sup>10</sup> Aircraft engines (with the exception of helicopter engines which have a different treatment depending upon whether or not they are installed at the time an interest is created in such engine)<sup>11</sup> are treated as distinct aircraft objects separate from airframes because they are highly valuable, independent units that are increasingly bought, sold, leased and financed separately from the specific airframes on which such engines may be installed from time to time.<sup>12</sup> As such, the Protocol specifically provides that ownership of, or an interest in, any such aircraft engine shall not be affected by its installation on or removal from an airframe.<sup>13</sup> In contrast to aircraft engines, the Protocol does not treat propellers or spare parts as separate and distinct aircraft objects eligible for treaty benefits.<sup>14</sup>

## B. International Interests and Contracts of Sale

Central to the purpose of the Cape Town Convention is the creation of the International Registry for the registration of “international interests” relating to aircraft objects. All security-type interests created by or subject to security agreements, lease agreements and title reservation agreements relating to uniquely identifiable aircraft objects (known as “**international interests**”)<sup>15</sup> may be recorded on the International Registry by reference to the manufacturer’s name, generic model designation and serial number with respect to such aircraft object.<sup>16</sup> Subject to certain declared super-priorities relating to non-consensual rights or interests (such as mechanics liens or liens arising due to unpaid air navigation charges)<sup>17</sup>, such interests are accorded priority based upon the order of registration.<sup>18</sup> The Protocol extends certain provisions of the Convention to outright sales,

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<sup>10</sup> Articles I(2)(b), I(2)(e) and I(2)(l) of the Protocol.

<sup>11</sup> An engine relating to a helicopter may constitute an “aircraft engine” within the meaning of the Cape Town Convention or alternatively an accessory of the helicopter, depending upon whether or not it is installed on a helicopter at the time an interest is created in such engine. See Section III.E. herein for a discussion regarding the treatment of helicopter engines.

<sup>12</sup> A number of jurisdictions have traditionally treated aircraft engines as accessories or accessions which become part of the airframe on which they are installed at any given time (in these jurisdictions, an aircraft engine is treated similar to any other part installed on or removed from an airframe). Financiers have typically addressed this issue (to the extent possible) by utilizing a “recognition of rights” arrangement amongst all of the owners and financiers of similar engines and compatible airframes, which generally provides for an explicit recognition of rights in specific engines among the potentially competing parties. The treatment of aircraft engines under the Cape Town Convention is intended to obviate the need for such arrangements. Helicopter engines (when installed), however, are treated differently, which could require a recognition of rights arrangement should the engine financier wish to protect its interest in such engine (see Section III.E. herein).

<sup>13</sup> Article XIV(3) of the Protocol.

<sup>14</sup> Aircraft objects are defined in the Protocol as including all components, but such components have no separate status under the Cape Town Convention and rights in them remain governed by applicable law. The Convention provides that any pre-existing rights in any such component (other than an aircraft object) are not lost by installation of the component on an aircraft object if, under the applicable law, those rights would continue to exist after installation. However, if under applicable law a doctrine of accession applies to vest title in installed items not constituting an aircraft object, such as engine modules, in the owner of such aircraft object, any pre-existing rights in such items would be lost upon installation. See Article 29(7) of the Convention and GOODE at para. 2.176 (Unidroit 2013).

<sup>15</sup> International interests may be either current or prospective. Articles 1(o) and 1(y) of the Convention. For a discussion on prospective international interests, see Section II.F. herein.

<sup>16</sup> Article VII of the Protocol.

<sup>17</sup> Such non-consensual rights or interests may be accorded priority without registration if covered by a declaration by a Contracting State under Article 39(1)(a). See Section II.G herein.

<sup>18</sup> Article 29(1) of the Convention. Registration with the International Registry has no effect on the registration of aircraft for nationality purposes under the Chicago Convention, which would continue to apply.

enabling buyers to avail themselves of the registration facilities and priority provisions thereof.<sup>19</sup> Failure to register an international interest renders such unregistered international interest junior to competing registered interests even if the unregistered interest was known to the holder of any registered interests at the time of such registration.<sup>20</sup> Similarly, the purchaser of an aircraft object takes its interest in such equipment subject to all interests of record on the International Registry.<sup>21</sup> The registration system is intended to be wholly automated and operative twenty-four hours a day, seven days a week, such that it may be searched at any time to determine the existence of interests related to specific aircraft objects.<sup>22</sup>

To constitute an “international interest” under the Cape Town Convention, such interest must relate to an aircraft object and be:

- (i) granted by a chargor under a security agreement;<sup>23</sup>

**Practice Note:**

A “security agreement” is defined as an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an aircraft object to secure the performance of any existing or future obligation of the chargor or a third person.<sup>24</sup> A security agreement can take the form of a security transfer of ownership, a charge which binds the object but leaves ownership with the debtor and a contractual lien in which the object is delivered to the creditor not initially as security but for some other purpose, such as storage or repair so that the contractual provision secures future obligations.<sup>25</sup> Some commentators have suggested that a grant of a security interest in the beneficial interest of a common law or statutory grantor trust which owns an aircraft object is tantamount to the grant of a security interest directly in such aircraft object by the trust itself (because it grants an “interest” in an aircraft object) and as such, the related beneficial interest security agreement should qualify as a “security agreement” for purposes of the Convention. However, the intent of the Convention is not to cover these types of grants in the definition of security agreement and the prevailing market practice is not to effect registrations on the International Registry in respect thereof.

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<sup>19</sup> Article III of the Protocol. While outright sales are not themselves international interests, their inclusion in the Convention allows parties to take advantage of the registration system to facilitate the protection and priority of outright buyers. See Article 29(3) of the Convention, Article XIV(2) of the Protocol, and Goode at para. 5.69 (Unidroit 2013). Like an international interest, the Protocol provides for a *sui generis* sale which for the most part is not dependent upon or derived from national law and therefore avoids the need for any reference to the *lex situs*.

<sup>20</sup> Article 29(2) of the Convention.

<sup>21</sup> Article XIV(2) of the Protocol.

<sup>22</sup> Article XX(4) of the Protocol.

<sup>23</sup> Article 2(2)(a) of the Convention.

<sup>24</sup> Article 1(ii) of the Convention.

<sup>25</sup> Non-consensual rights or interests do not fall within the definition of a security interest and are dealt with separately, specifically in Articles 39 and 40 of the Convention. See Section II.G herein.

It is often tempting for practitioners to include a reference to “international interest” in the actual granting clause of a security agreement (in effect suggesting that the debtor can “grant” an international interest on an aircraft object). This practice is unnecessary and without effect as the eligibility of a security agreement to qualify as an international interest requires only that the specific requirements of the Convention be satisfied (and the parties’ designation or grant of an interest as such or expression of intent with respect thereto should not impact any such analysis). If the parties nonetheless wish to evidence their intention to create an eligible international interest, a better approach is to merely add the phrase “thereby constituting an international interest” at the end of the granting clause.

(ii) vested in a person who is a conditional seller under a title reservation agreement;<sup>26</sup> or

**Practice Note:**

A “title reservation agreement” (often called a conditional sale agreement) is defined as an agreement for the sale of an aircraft object on terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement.<sup>27</sup>

(iii) vested in a person who is a lessor under a leasing agreement.<sup>28</sup>

**Practice Note:**

A “leasing agreement” is defined as an agreement by which one person (the lessor) grants a right to possession or control of an aircraft object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment.<sup>29</sup> A leasing agreement must be distinguished from a “wet lease” under which possession or control is retained by the lessor. An agreement of this kind is not a leasing agreement, but rather simply a contract, and as such it follows that a wet lease does not create an international interest.

Whether an interest falls within one of the three intentionally broad categories specified above (which are meant to capture most forms of leasehold, security interest and financing vehicles, regardless of how national law systems may categorize them) is determined by applying the Cape Town Convention’s own definitions and autonomous rules of interpretation, and not by

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<sup>26</sup> Article 2(2)(b) of the Convention.

<sup>27</sup> Article 1(II) of the Convention.

<sup>28</sup> Article 2(2)(c) of the Convention.

<sup>29</sup> Article 1(q) of the Convention.

reference to national law.<sup>30</sup> Hence, the initial characterization of whether the interest constitutes an “international interest” is prescribed by the Cape Town Convention itself.<sup>31</sup> This is an important consideration as certain jurisdictions, on the basis of applicable national law, may not recognize some or all of these types of agreements. By virtue of the application of the Convention definitions (without regard to national law), the transaction would nonetheless fall within the Convention. That said, the mere fact that national law would characterize an agreement as falling within one of these specific categories would be insufficient to give rise to an international interest if such agreement would not otherwise qualify.

**Example 1:**

A consignment of goods to a retailer for sale would normally be outside the scope of the Cape Town Convention even if, under the applicable law, it were to be characterized or treated in a manner consistent with a secured transaction or a lease because it does not technically fall within one of the three Convention categories.<sup>32</sup>

**Example 2:**

Owner leases an aircraft object to Lessee pursuant to a lease agreement. The lease agreement contains a purchase option at the end of the lease term whereby Lessee can acquire the ownership interest to the aircraft object for a nominal sum. Under applicable local law, the transaction would, at the outset, be characterized as a disguised sale to Lessee with a corresponding security interest granted in favor of Owner. Notwithstanding the local law characterization, the lease agreement would, in the first instance, nonetheless constitute a leasing agreement for purposes of the Convention.

**Example 3:**

Owner is organized and based in a Contracting State. Owner grants a security interest in favor of Lender in an aircraft object located in such Contracting State to secure performance by Owner of a loan made by Lender to Owner in order to permit Owner to acquire such aircraft object. Under the local law of Owner’s jurisdiction, the grant of security of this type is not recognized and has no legal effect. Notwithstanding this, the agreement would nonetheless constitute a security agreement for purposes of the Convention and as the connecting factors are otherwise present (and assuming the other formal requirements for a validly constituted international interest are satisfied), the agreement would be entitled to the protections available under the Convention.

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<sup>30</sup> GOODE at para. 2.51 (Unidroit 2013).

<sup>31</sup> See Section III.C. herein for a discussion on the characterization of an interest under applicable law.

<sup>32</sup> GOODE at para. 2.51 (Unidroit 2013).

Although a “contract of sale” may not fit into one of the three categories set forth above, certain provisions are extended to include such an interest.<sup>33</sup>

**Practice Note:**

A “contract of sale” is defined as a contract for the sale of an aircraft object by a seller to a buyer (but which is not one of the three agreements referred to above otherwise constituting an international interest).<sup>34</sup> For purposes of the Convention, it is important to distinguish a contract of sale, which is merely an agreement to sell, from a sale, which is the actual transfer of ownership. As such, the actual interest (which corresponds to an international interest), would be a “sale” and not a “contract of sale”.

The definition of “contract of sale” specifically excludes any agreement that would otherwise constitute an international interest. For example, a conditional sale agreement would qualify as an international interest on the basis that it is a “title reservation agreement”; therefore, it would not constitute a contract of sale under the Cape Town Convention. Similarly, a lease would qualify as an international interest on the basis that it is a “leasing agreement” and would not be a contract of sale even if it contains a purchase option for a nominal amount.<sup>35</sup> However, the buyer’s completion of payment and fulfilment of other title transfer provisions under a title reservation agreement and the lessee’s exercise of an option to purchase in a lease bring a contract of sale into existence and simultaneously a sale under that contract.<sup>36</sup>

A mere agreement to sell is insufficient to constitute a contract of sale (although it may give rise to a registrable prospective sale).<sup>37</sup> Rather, the agreement must be a contract effecting the outright sale of the applicable aircraft object in which the seller’s interest immediately passes to buyer.<sup>38</sup> The extension of the Cape Town Convention to cover sales of this type enables buyers to obtain the benefit of the registration system and the related priority rules and avoids any *lex situs* problems relating to the transfer.<sup>39</sup> Although the International Registry is not, *per se*, a title registry, the inclusion of contracts of sale has the added benefit of providing, over time, a searchable listing giving notice of the various title transfers of the relevant aircraft object over the course of its life (assuming, of course, that each such transfer falls within the scope of the Cape Town Convention and

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<sup>33</sup> Article III of the Protocol.

<sup>34</sup> Article 1(g) of the Convention.

<sup>35</sup> GOODE at para. 2.51 (Unidroit 2013).

<sup>36</sup> GOODE at para. 4.39 (Unidroit 2013).

<sup>37</sup> See Section II.F. herein.

<sup>38</sup> In general, a bill of sale would give rise to a registrable interest whereas a purchase and sale agreement governing the delivery of such bill of sale would not (although in such a case, the purchase and sale agreement may give rise to a registrable prospective sale).

<sup>39</sup> Like an international interest and an assignment of an international interest under the Cape Town Convention, the provisions relating to a contract of sale provide for a *sui generis* sale which is not dependent upon or derived from national law and thus avoids the need for any reference to the *lex situs* of the applicable aircraft object. GOODE at para. 3.19 (Unidroit 2013).

all registrations relating to each title transfer shall have been made with the International Registry).

Recognizing the realities of aircraft finance transactions, the Cape Town Convention specifically provides that a person may enter into an agreement, or register an interest, in an agency, trust or other representative capacity and in these cases that person is entitled to assert rights and interests under the Convention. This effectively allows for the continued use of agent banks, owner trustees and collateral/security trustees.<sup>40</sup>

## C. Formal Requirements for an International Interest and Contract of Sale

An international interest (security agreement, leasing agreement or title reservation agreement) or contract of sale must meet certain formalities in order to be validly constituted for purposes of the Cape Town Convention, namely:

- (i) it must be in writing;<sup>41</sup>
- (ii) it must relate to an aircraft object of which the chargor, conditional seller, lessor or seller, as applicable, has power to dispose;<sup>42</sup>
- (iii) it must describe the applicable aircraft object by manufacturer's serial number, name of manufacturer and generic model designation;<sup>43</sup> and
- (iv) in the case of a security agreement, it must enable the secured obligations to be determined (although the agreement need not state a sum or maximum sum secured).<sup>44</sup>

The creation of the international interest (including, for this purpose, a contract of sale) is determined by the Cape Town Convention, and not by national law.<sup>45</sup> Thus, an international interest comes into existence when the above conditions are met, even if (i) these conditions would not be sufficient to create a lease, security interest, conditional sale or sale under otherwise applicable national law and even if the international interest is of a kind not known under such national law<sup>46</sup>, and (ii) the rules of private international law of the applicable Contracting State would otherwise lead to the application of the law of a non-Contracting

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<sup>40</sup> See Section IV.C. herein.

<sup>41</sup> Article 7(a) of the Convention and Article V(1)(a) of the Protocol. A "writing" includes electronic records of information. Article 1(nn) of the Convention.

<sup>42</sup> Article 7(b) of the Convention and Article V(1)(b) of the Protocol. See Section II.D. for a further discussion regarding the "power to dispose."

<sup>43</sup> Article 7(c) of the Convention, Article V(1)(c) of the Protocol and Article VII of the Protocol.

<sup>44</sup> Article 7(d) of the Convention.

<sup>45</sup> GOODE at para. 4.69 (Unidroit 2013).

<sup>46</sup> GOODE at para. 4.69 (Unidroit 2013). However, the applicable law (that is, the domestic rules of the law applicable by virtue of the rules of private international law of the forum state) continues to govern traditional contract law matters including capacity to contract and validity of an agreement (including the effect of factors such as mistake or illegality). GOODE at para. 4.69 (Unidroit 2013). See also Section II.B. and Section III.C. herein for associated issues relating to the characterization of an agreement.

State.<sup>47</sup> No other condition (for example, as to the effectiveness of security under the *lex situs*, the payment of any documentary or registration tax or duty or the identity or nationality of the creditor) needs to be satisfied for an interest to constitute an international interest. Note that registration at the International Registry is not a prerequisite to the creation of an international interest. This changes the rule required to create a mortgage in several civil law jurisdictions (where registration would be required under national law in order to create a valid mortgage). The registration under the Convention is merely designed to give notice of such international interest to third parties (and thereby establish priority).<sup>48</sup>

**Practice Note:**

This principle is well illustrated by the ratification of the Cape Town Convention by the United Kingdom. Under the private international laws of England (and those of many other common law countries) it is *lex situs* of an aircraft object which determines whether a property interest, such as a mortgage, is effectively created over it. Therefore, a mortgage cannot be created over an aircraft under domestic English law when it is situated outside England or English airspace. However, the legislation in the United Kingdom implementing the Cape Town Convention has made it clear that the international interest is an autonomous interest which has effect “with no requirement to determine whether a proprietary right has been validly created or transferred pursuant to the common law *lex situs* rule”.<sup>49</sup> Consequently, it is possible, to the extent that the Cape Town Convention applies, to create an international interest by way of a security agreement over aircraft objects under English law irrespective of the physical location of the relevant asset.

## D. Power to Dispose

As previously discussed, one of the pre-requisites to the constitution of a valid international interest or contract of sale covering an aircraft object is that the chargor, conditional seller, lessor or seller, as applicable, has the power to dispose of such aircraft object.<sup>50</sup> The word “dispose” includes every type of disposition whether by sale, lease or conditional sale or by way of security. A “power to dispose” includes a right of disposition, such as where the actual owner of an aircraft object sells such object.

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<sup>47</sup> GOODE at para. 2.25 (Unidroit 2013). The Convention may also be applied in a non-Contracting State whose conflict of laws rules lead to the application of the law of a Contracting State. GOODE at para. 2.30 (Unidroit 2013).

<sup>48</sup> GOODE at para. 4.67 (Unidroit 2013).

<sup>49</sup> Article 6(3) of The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (UK).

<sup>50</sup> See Section II.C. above, Article 7(b) of the Convention and Article V(1)(b) of the Protocol.



**Example:**

The owner of an aircraft object sells such aircraft object to a purchaser. In this case, the owner clearly has the “power to dispose.” The same would be true if the owner leased such aircraft object to a lessee.

However, the use of the term “power,” as opposed to “right,” indicates that the Cape Town Convention was drafted to capture dispositions beyond those dispositions in which the disposing party had the proper authority to dispose.<sup>51</sup> Thus, an unauthorised disposition of an aircraft object may nevertheless be effective to pass ownership or some other interest because of a rule of law (as discussed below) to that effect (e.g., where an agent, without actual authority, but within the scope of its apparent authority, disposes of its principal’s property). The “power to dispose” is meant, therefore, to include the ability of a transferor to “transfer a better title than the transferor itself possesses”<sup>52</sup> and would cover all cases where, a party has the ability to make a disposition which is binding on the owner even if the owner has not authorised it. There is no need for the seller, lessor, conditional seller or grantor to be the owner of an aircraft object in order to have the power to dispose of such object.

The power to dispose can arise either under the applicable national law or under the Cape Town Convention itself by virtue of its registration and priority rules.<sup>53</sup> National law may provide numerous ways in which a party may make a disposition which is binding on an owner or subordinates a senior interest even if the owner or party holding the more senior interest did not authorize it. For example, the apparent authority of an agent (acting outside his actual authority) to sell or lease an aircraft object may, under applicable national law, satisfy the test concerning the power to dispose. Similarly, if, under applicable national law, a sale of an aircraft object to a “bona fide” purchaser would override the owner’s title (in the case of an outright disposition) or would have priority over a prior interest, then the seller/transferor would, under the Cape Town Convention, have sufficient power to dispose.<sup>54</sup>

**Example 1:**

Seller appoints Agent (who is in the business of selling aircraft objects) to arrange for the sale of Seller’s engine. Agent arranges a sale of such engine with Purchaser and executes a bill of sale in favor of Purchaser as agent on behalf of Seller. If, under applicable national

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<sup>51</sup> GOODE at para. 4.71 (Unidroit 2013).

<sup>52</sup> GOODE at para. 2.65 (Unidroit 2013).

<sup>53</sup> GOODE at para. 4.72 (Unidroit 2013).

<sup>54</sup> Many legal systems regard the possession of goods by certain categories of parties (e.g., those who regularly sell or lease goods of that type) as implying a right of the person in possession to transfer good title to third parties, even though the person in possession does not hold title itself.

law, by virtue of the implied authority granted to Agent by Seller, Agent would have the ability to convey title to such engine to Purchaser, then such sale would satisfy the “power to dispose” requirement under the Cape Town Convention, even if Seller did not authorize the sale.

**Example 2:**

Seller (who is in the business of selling and leasing aircraft objects) sells an aircraft object to Purchaser A but retains possession of such aircraft object (and no registration of such sale is made on the International Registry). Seller thereafter sells the same aircraft object to Purchaser B. If it is determined, under applicable national law (say because Seller was a merchant in the business of selling aircraft), that Purchaser B would take its rights in such aircraft object free of the prior sale between Seller and Purchaser A (because Seller retained possession of the aircraft following the initial sale to Purchaser A), then, for purposes of the Cape Town Convention, the Seller is deemed to have the “power to dispose” of the aircraft object (even though it clearly did not have the right to dispose of it).<sup>55</sup>

The power to dispose is also implicit in the Cape Town Convention rules governing registration and priority.<sup>56</sup> For example, a conditional buyer or lessee, under a title reservation agreement or lease, respectively, constituting an international interest would have an implied power to dispose of the applicable aircraft object in favor of a third party; otherwise, there would be little point in making each of the interests of the conditional seller or lessor in these scenarios registrable interests which enjoy the protections (principally the priority rules) afforded by the Cape Town Convention.<sup>57</sup>

**Example 1:**

Lessor leases an aircraft object to Lessee. Lessor and Lessee fail to register the international interest constituting the lease with the International Registry. Thereafter, Lessee subleases the same aircraft object to Sublessee (whether or not such sublease is permitted under the lease). Lessee and Sublessee register the international interest constituting such sublease

<sup>55</sup> This example presupposes that Seller and Purchaser A did not register appropriate international interests in respect of the aircraft object. Had such arrangements been made (prior to any corresponding registration by Seller and Purchaser B), then Purchaser A's interest in the aircraft object would be protected under the priority rules of the Cape Town Convention, Article 29(4) of the Convention.

<sup>56</sup> See Section II.H. herein.

<sup>57</sup> GOODE at para. 4.72 (Unidroit 2013). The reasoning in the Official Commentary is very similar to the reasoning followed by the U.S. Supreme Court in *Philko Aviation v. Shackel*, 462 U.S. 406 (1983), in holding that every transfer of title to an aircraft must be evidenced by an instrument, and every such instrument must be recorded before it can affect the rights of innocent third parties who had recorded their title with the FAA. The purpose of registering interests with the International Registry is to give the creditor protection against competing claims of third parties. *Id.* at para. 4.186. The lessee or conditional buyer of an aircraft object has an implied “power to dispose” because “dispose,” as used in the Cape Town Convention, could be interpreted to include all types of potential dispositions in a transaction between a creditor and a debtor.

with the International Registry. In this scenario, by virtue of the registration of the sublease interest with the International Registry, the sublease interest would, under the Cape Town Convention, have priority over the Lessor's lease interest. As such, Sublessee would retain its rights to quiet possession and use for the duration of the sublease even if the lease between Lessor and Lessee is terminated.

**Example 2:**

For a more troubling example, consider the same facts as in Example 1 above but assume that instead of entering into a sublease, Lessee purports to sell the applicable aircraft object to Purchaser and the corresponding contract of sale is properly registered with the International Registry. In this scenario, by virtue of the registration of the contract of sale with the International Registry, Purchaser would take its interest over that of Lessor (as the priority rules provide that a purchaser of an aircraft object who has registered its interest in such aircraft object has priority over any other unregistered interests).<sup>58</sup> If Lessor and Lessee had registered the international interest relating to the lease prior to the purported sale to Purchaser by Lessee, then Lessor would have been protected from such purported sale under the Cape Town Convention priority rules.<sup>59</sup>

**CAUTION:**

THE FAILURE TO REGISTER AN INTERNATIONAL INTEREST MAY RESULT IN LOSS OF TITLE TO THE AFFECTED AIRCRAFT OBJECT.

The key principle here is that the priority rules, particularly as they relate to leasing agreements and title reservation agreements, would make little sense if the debtors under these agreements did not inherently have a power to dispose (and in these instances, the lessor or conditional seller achieves protection by arranging appropriate registration with the International Registry). In this context, the word “dispose” covers every form of disposition encompassed within the power and relevant to the transaction between the debtor and the creditor, whether taking the form of a grant of a security interest, a sale (whether under a title reservation agreement or an outright sale) or a lease.<sup>60</sup>

In a situation where title to an aircraft object is held in a trust, the power of disposal by the

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<sup>58</sup> See Section II.H. herein.

<sup>59</sup> GOODE at para. 4.72 (Unidroit 2013). This result is consistent with further discussion in the Commentary which recites: However, a lessee, as has been seen, has a power to dispose for the purposes of the [Cape Town] Convention ... and this includes a power to grant a sub-lease, whether or not the lessee has a right to do so under the terms of the head lease. It follows that a sub-lessee can invoke Article 29(4) to secure protection against the head lessor where the sub-lessor's international interest was registered before the registration of the head lessor's international interest. GOODE at para. 4.186 (Unidroit 2013).

<sup>60</sup> GOODE at para. 4.72 (Unidroit 2013).

applicable trustee depends upon applicable law and, within the limits permitted by applicable law, on the terms of the instrument under which the trustee is appointed. For purposes of the Convention, the power to dispose relates to the legal right, not the beneficial interest, so that the power to dispose will be held by the trustee, and not the beneficiary of the trust.<sup>61</sup>

**Practice Note:**

The safest, surest way for a creditor to protect its interest in these scenarios is to ensure that all potential interests in its favor have been properly registered with the International Registry.

## E. Pre-Existing Rights or Interests

Unless a declaration is made by a Contracting State to the contrary,<sup>62</sup> the Cape Town Convention does not apply in such Contracting State to pre-existing rights or interests (meaning, rights or interests in an aircraft object which pre-date the effective date of the Cape Town Convention in the applicable jurisdiction), which retain the priority they enjoyed under the applicable law before the effective date of the Cape Town Convention.<sup>63</sup> Since the applicable law in effect prior to the effective date will have no concept of an international interest, the priority given to a pre-existing right or interest is over the equivalent international interest. The “effective date” means, in relation to a debtor, the later of the time: (1) when the Cape Town Convention entered into force (this date has obviously already occurred) or (2) when the State in which the debtor is situated became a Contracting State.<sup>64</sup> If a pre-existing right or interest exists, there would be no need (either technical or legal) under the Cape Town Convention for such interest to be registered with the International Registry or for any other steps to be taken following the effective date of the Cape Town Convention in the relevant Contracting State.

A pre-existing right or interest is not limited to an agreement otherwise constituting an international interest (a lease, security agreement or title retention agreement). Rather, any right or interest over an object, including non-consensual rights or interests, can constitute pre-existing rights or interests so long as such right or interest is in or over an aircraft object.

Article 60(1) of the Cape Town Convention effectively preserves pre-Convention priority in or on an aircraft object without the need to register (assuming no declaration has been made under Article 60(3) of the Convention). That priority depends upon the fulfillment of any

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<sup>61</sup> GOODE at para. 2.67 (Unidroit 2013).

<sup>62</sup> A Contracting State may, in its declaration, specify a date, not earlier than three years after the date on which the declaration becomes effective, when the Convention and the Protocol will be applicable, for the purposes of determining priority, including the protection of any existing priority, to pre-existing rights or interests. Article 60(3) of the Convention.

<sup>63</sup> Article 60(1) of the Convention.

<sup>64</sup> Article 60(2)(a) of the Convention. Under this Article, the rule for determining where a debtor is situated is narrower than the rule set out in Article 4. Article 60(2)(a) sets out a single test for this purpose (specifically, the debtor is situated in the State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business (or if it has no principal place of business, its habitual residence). *Id.*

perfection requirements under the applicable law in effect at the applicable time. This article does not confine the concept of pre-existing interests to one arising under the laws of a State that has become a Contracting State so even a pre-existing interest arising under the laws of a non-Contracting State can fall within Article 60(1) if the applicable debtor is thereafter situated in a Contracting State.

What is preserved by Article 60(1) is the existing priority of the pre-existing right or interest under the applicable law. The “applicable law” in this instance is taken to mean the applicable law as determined by the conflict rules of the forum (i.e., the applicable domestic law).<sup>65</sup>

As provided in the Official Commentary:

The purpose of Article 60(1) is to enable the holder of a pre-existing right or interest to retain its priority under the applicable law over subsequently registered international interests without having to re-perfect the pre-existing right or interest by registration in the International Registry. Conversely, the priority given to a registered international interest over an unregistered interest under Article 29(1) must, where the latter is a pre-existing right or interest, be read as confined to a pre-existing right or interest created or arising after registration of the international interest.<sup>66</sup>

**Example 1:**

State 1 is a Contracting State. Prior to the effective date of the Convention in State 1, Debtor had granted a security interest in an engine to Creditor 1 to secure a loan. The applicable security agreement was perfected under the laws of State 1. Following the effective date of the Convention in State 1, Debtor grants a second lien on the engine to Creditor 2, and an international interest is registered in the International Registry. Article 29(1) of the Convention does not apply to determine priority in this situation and the parties must look to the applicable law.

**Example 2:**

Creditor 1 is the holder of a security interest granted by Debtor in an aircraft engine and perfected under the laws of State 1 (which is not a Contracting State). Debtor is organized in State 1 (and is not otherwise situated in a Contracting State). The security interest in the engine is perfected under the laws of State 1 in February. Debtor leases the engine to Lessee (who is situated in State 2, which is a Contracting State) in March. The international interest in respect of the lease, listing the Debtor, as secured party, and the Lessee, as debtor, is registered with the International Registry in March. Debtor thereafter grants a second security interest on the engine to Creditor 2 which is similarly perfected under the

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<sup>65</sup> GOODE at para. 2.252 (Unidroit 2013).

<sup>66</sup> GOODE at para. 2.250 (Unidroit 2013).

laws of State 1. For purposes of determining priority in any Contracting State, the interest of Creditor 1 would (if recognized by the conflicts rules of such Contracting State) have priority over that of Debtor, and the interest of Debtor (as lessor under the lease) would (in all events under the Convention) have priority over that of Creditor 2.<sup>67</sup>

**Practice Note:**

The priority of any pre-existing interest over a registered international interest is confined to a right or interest created or arising prior to the registration of such international interest.<sup>68</sup>

If the parties to a pre-existing interest wish to have the Cape Town Convention apply to a particular transaction, such parties must take steps to effectively reconstitute such right or interest in conformity the requirements of the Convention following the applicable effective date. of the Convention in the applicable Contracting State. There are differing views on how this can be best accomplished.<sup>69</sup> Certainly, the creation of a new international interest (such as entering into a new security agreement or lease on comparable terms for the remaining transaction term) following the applicable effective date would achieve the desired result. In certain cases, however, this may be difficult to achieve due to other considerations, such as required governmental approvals, central bank license interests, tax or accounting treatment, bankruptcy preference issues and the like. Considerable costs may also be incurred in connection with the creation of new interests. In most situations, a benefits and burdens analysis would be the best approach to determine whether to reconstitute pre-effective date interests into registrable Cape Town Convention interests.<sup>70</sup>

**Example:**

Debtor is not situated in a Contracting State at the time it enters into a security agreement with Creditor in respect of an engine which constitutes an aircraft object. At the time of closing, Debtor and Creditor nonetheless register an international interest with the International Registry in respect of such engine. Shortly after entering into the security

<sup>67</sup> In this scenario, Lessee's right to quiet possession and use would prevail over Creditor 2's security interest (as provided in Article 29(4) of the Convention and Article XVI of the Protocol) but similarly any such rights viz. Creditor 1 would need to be determined in accordance with the applicable law.

<sup>68</sup> GOODE at para. 2.250 (Unidroit 2013).

<sup>69</sup> While parties to a transaction entered into prior to the effective date of the Cape Town Convention in the applicable jurisdiction could, at the outset, agree in the documentation that such transaction shall constitute an international interest following the effective date of the Cape Town Convention in such jurisdiction, it is doubtful such a provision would have the desired effect.

<sup>70</sup> Similarly, it is possible that certain changes to a pre-existing right or interest are of such degree that they constitute the creation of an international interest or new international interest which would need to be registered in the International Registry in order to achieve priority against competing interests. For a good discussion on dealing with problems associated with preexisting interests, see THE LEGAL ADVISORY PANEL OF THE AVIATION WORKING GROUP CONTRACT PRACTICES UNDER THE CAPE TOWN CONVENTION: CAPE TOWN PAPERS SERIES, VOL. 1, 413 (2004) (also commonly known as the "Purple Book"). See also Section II.N herein dealing with amendments which could, potentially, give rise to new international interests.

agreement, Debtor's jurisdiction of organization ratifies and properly implements the Cape Town Convention and becomes a Contracting State. In this scenario, the Cape Town Convention would not apply since at the time of conclusion of the security agreement, the Debtor was not situated in a Contracting State. In order for the Cape Town Convention to apply in this scenario, Debtor and Creditor would need to create a new international interest (for example, a second or junior lien on the engine).

More recently, parties have utilized a newly created instrument (called an “**Aircraft Object Security Agreement**” or “**AOSA**”), which could be issued by each type of Convention debtor, namely, a chargor, conditional buyer or lessee, in order to create a new international interest that would benefit the existing creditor by triggering the Convention and permitting, among other things, registration of such interest with the International Registry and issuance of an IDERA in support thereof. The key distinction here is that the new instrument does not cause the existing pre-effective date interest to convert itself into a registrable Cape Town Convention interest. Rather, the AOSA is a new instrument that provides the applicable creditor with a new international interest (subject to any intervening interests). The AOSA constitutes (i) in the case of a chargor, a second charge over its interest in the applicable aircraft object, (ii) in the case of a conditional buyer, a grant of security over its equity of redemption (the effective equivalent of a second charge), and (iii) in the case of a lessee, a grant of a security interest over its leasehold interest. In each case, the AOSA would qualify as an international interest and would therefore be eligible for the protections afforded under the Cape Town Convention. In particular, an international interest created by an AOSA, subject to applicable Contracting State declarations, would benefit from the Alternative A, IDERA and the non-judicial remedy provisions of the Cape Town Convention. A form AOSA can be found on Annex F hereto.

**Practice Note:**

In addition to making Cape Town Convention remedies available to holders of pre-existing interests, in particular, Alternative A, advance relief and the IDERA provisions (subject to applicable Contracting State declarations), an AOSA also serves to minimize discriminatory treatment between similar aircraft in the debtor's fleet, some protected as international interest and some that would otherwise not be so protected.

A Contracting State may make a declaration under Article 60(1) (which declaration is controlled by the provisions of Article 60(3)), the effect of which is that the priority rules (but not the other provisions) of the Convention would apply to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State which

becomes a Contracting State. As of the publication date of this Guide, no Contracting State has made a declaration under Article 60(1).

**Practice Note:**

“Effective date of the Convention” in relation to a debtor refers to the latter of the date on which the Cape Town Convention came into force and the date on which the State in which the debtor is situated under Article 60(2)(b) became a party to the Cape Town Convention.<sup>71</sup>

A declaration under Article 60(1) may be made at any time, but once made, it may not be modified or withdrawn.<sup>72</sup> The date specified in the declaration on which it becomes effective may not be less than three years following the date on which the Cape Town Convention becomes effective in the applicable Contracting State.<sup>73</sup> After the lapse of the relevant period, the priority rules (but no other provisions) of the Cape Town Convention, to the extent of the declaration, apply to pre-existing rights or interests arising under an agreement concluded while the debtor was situated (see above) in the declaring State. To preserve its priority with respect to subsequently registered rights and interests and unregistered rights and interests and to retain its existing priority, these pre-existing rights or interests should be “re-perfected” by registration with the International Registry.<sup>74</sup> In the absence of such a declaration, notice of pre-existing rights or interests may be registered as a precaution or to obtain certain other notice benefits which may be available under otherwise applicable local law.

## F. Acquisition of International Interests by Subrogation

Rights may be acquired by subrogation either under Article 9(4) of the Cape Town Convention or under the applicable national law. A typical case where subrogation arises would be where a surety for a debtor discharges the related debt. Many national laws provide that in such a case the surety acquires the creditor’s interest and all the other rights of the creditor under the agreement. Whether this is so in any particular case is determined by the applicable law and not the Convention (except in cases set out in Section 9(4) of the Convention). Under Article 38 of the Convention, the rights of any subrogee are unaffected under the applicable law.<sup>75</sup> Section 9(4) of the Convention on the other hand (which states that an interested person<sup>76</sup> other than the debtor who discharges the debtor’s obligation in full is subrogated to the right of the chargee)

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<sup>71</sup> Article 60(1) of the Convention; GOODE at para. 2.250 (Unidroit 2013).

<sup>72</sup> GOODE at para. 4.348 (Unidroit 2013).

<sup>73</sup> Article 60(3) of the Convention.

<sup>74</sup> GOODE at paras. 2.250, 4.354 (Unidroit 2013).

<sup>75</sup> Article 38(1) of the Convention.

<sup>76</sup> See Article 1 of the Convention for the definition of “interested person”. There is obvious potential overlap between the terms of Article 38 of the Convention and the coverage of Article 9(4) depending upon the terms of the applicable law.



provides a Convention-based right of subrogation and is registrable accordingly.<sup>77</sup>

International interests acquired through legal or contractual subrogation are registrable.<sup>78</sup> Under the Cape Town Convention, a subrogee's priority rights are similar to those of an assignee. Thus, regardless of whether a subrogee has registered its interest, the subrogee will have priority over a junior international interest<sup>79</sup> or the subrogee of a junior international interest. In situations where two subrogees are given rights over the same international interest by the same party (e.g. where applicable law recognizes a right of subrogation for partial performance by a subrogee), the subrogee to first register the subrogation has priority over the other subrogee.<sup>80</sup> A prospective right of subrogation (such as the right of a guarantor under an executory guaranty) is not a registrable interest. Thus, subrogees may not validly register their interests until the right of subrogation has arisen.

#### Practice Note:

In order to protect the rights of any subrogee, an assignment of the subrogor's international interest should be registered at the International Registry, even if it is unclear whether a competing subrogated interest exists.

A subrogee may also contract to subordinate its interests to the holder of a competing international interest; the subordination is binding on the parties but must be registered before other interests are registered for it to be binding on third parties.<sup>81</sup>

## G. Non-consensual Interests

The Cape Town Convention, specifically Articles 39 and 40, contemplates two forms of non-consensual rights or interests.<sup>82</sup> The first type of non-consensual rights or interests are those non-consensual rights or interests created by the laws of a Contracting State which have priority, without registration, over registered interests in an aircraft object equivalent to that of the holder of registered international interest and with respect to which a Contracting State has made a declaration under Article 39. The second type (referred to as registrable non-consensual rights or interests) are non-consensual rights or interests which are registrable by virtue of a declaration made by a Contracting State under Article 40. A Contracting State may make modifications to its

<sup>77</sup> Article 9(4) of the Convention. GOODE at para. 2.207. (Unidroit 2013).

<sup>78</sup> Article 16(1)(c) of the Convention; GOODE at paras. 2.91, 4.95 (Unidroit 2013).

<sup>79</sup> GOODE at para. 2.207 (Unidroit 2013).

<sup>80</sup> GOODE at para. 2.207 (Unidroit 2013).

<sup>81</sup> GOODE at para. 4.266 (Unidroit 2013).

<sup>82</sup> "Interest" refers to a right *in rem* (or property right), whereas "right" is a broader term including *jus ad rem* personal right. GOODE at paras. 4.269, 4.282 (Unidroit 2013). Examples are non-consensual liens for unpaid repairs, unpaid wages, or unpaid air navigation charges. *Id.* at para. 4.271.

declaration under Articles 39 or 40 of the Convention at any time.<sup>83</sup>

Non-consensual rights or interests with respect to which a Contracting State has made a declaration under Article 39 have priority (to the extent provided under applicable local law), without registration, over registered international interests, as well as unregistered international and other interests. In order for a non-consensual right or interest to have the benefit of the priority offered under Article 39, the applicable Contracting State must in its declaration, specify the type of non-consensual right or interest that has such priority under its laws and such declaration must be made before the competing international interest is registered in order to have priority over such competing international interests. A Contracting State does not need to specifically name each type of non-consensual right or interest for such right or interest to retain its priority; rather, the State can make a general declaration stating that all non-consensual rights or interests which, under applicable local law, would have, without regard to the Cape Town Convention, priority over competing interests, would also have priority over competing international interests.<sup>84</sup> Such declaration cannot, however, be used to expand such preferred rights beyond those which under the existing national law of such Contracting State have priority without registration over an interest equivalent to that of a holder of an international interest. The priority conferred by Article 39(1)(a) over a registered international interest is a priority given under the law of the declaring Contracting State and not under the Convention and as such it is not entitled to recognition in another State except to the extent provided by such State's own conflict of laws rules.

**Practice Note:**

To the extent a creditor has the benefit of an Article 39 interest (which provides priority without registration), no registration on the International Registry is required to establish and protect priority. While it would be tempting for a creditor to effect such a registration on a unilateral basis (much the same way that an interest under Article 40 is registered), in these instances no registration should be made as such registration is without effect under the Convention.

The types of non-consensual rights and interests that may be declared can relate to both secured and unsecured claims.<sup>85</sup> A Contracting State may also include any future changes or additions to the categories of non-consensual rights and interests in its current declaration, so that any subsequent change in national law will not require a new declaration or changes to the current declaration.<sup>86</sup>

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<sup>83</sup> GOODE at paras. 4.277, 4.283 (Unidroit 2013).

<sup>84</sup> Article 39(1)(a) of the Convention; GOODE at paras. 2.217, 4.270 (Unidroit 2013).

<sup>85</sup> GOODE at para. 4.270 (Unidroit 2013).

<sup>86</sup> GOODE at para. 4.279 (Unidroit 2013).

**Practice Note:**

A right or interest created by agreement of the parties is not a non-consensual right or interest even if entry into the agreement requires approval of the court, such as a debtor-in-possession facility entered into in connection with a debtor's insolvency proceedings.<sup>87</sup> Rights to arrest or detention conferred on a party (such as an air navigation authority) by contract fall outside Article 39(1)(a) and depend for their protection on a declaration made by a Contracting State under Article 39(1)(b).<sup>88</sup>

As part of any financing transaction, in addition to obtaining priority search certificates with respect to the relevant aircraft objects, the creditor should also obtain a contracting state certificate to determine what non-consensual rights could have priority without registration, as well as conducting searches in the state of the debtor to determine if there are any pre-existing liens.

A Contracting State may also declare that, under its laws, the State or State entity, intergovernmental organization or other private provider of public services retains its right to arrest or detain an aircraft object for unpaid amounts associated with services rendered with respect to that aircraft object or another aircraft object<sup>89</sup> (e.g., a Contracting State may declare that its aviation authority has the right to detain an aircraft for unpaid air navigation charges due in respect of services rendered for that aircraft or another aircraft in the same fleet). Article 39(1)(b) of the Convention does not create rights to arrest or detain aircraft objects, it merely provides a vehicle for a Contracting State to preserve such rights as may be available under national law. As an intergovernmental or private organization is not in any position to make declarations under the Convention, it must rely on the applicable Contracting State to make such declarations in order to preserve such right.<sup>90</sup> The priority of a lien or right of detention covered by Article 39(1)(b) applies only while the aircraft object is in the Contracting State making the applicable declaration or in another Contracting State under whose conflict of laws rules the lien or right of detention is recognized.

**Practice Note:**

As is the case under Article 39(1)(a), a declaration under Article 39(1)(b) does not confer a Convention-based right of arrest or detention entitled to recognition in other Contracting States. Rather, it takes effect solely under the national law of such State and other Contracting States are under no obligation to recognize it except insofar as their own conflict of laws rules requires them to do so.<sup>91</sup>

<sup>87</sup> GOODE at para. 2.210 (Unidroit 2013).

<sup>88</sup> Id.

<sup>89</sup> Article 39(1)(b) of the Convention. Alternatively, rights of arrest or detention given by the law of a State for payment of amounts due to the provider of public services, e.g., to arrest or detain an aircraft for unpaid air navigation charges, could be covered by a declaration under Article 39(1)(a) if given priority under the relevant national law over interests equivalent to that of the holder of a registered international interest.

<sup>90</sup> GOODE at para. 4.273 (Unidroit 2013).

<sup>91</sup> GOODE at para. 2.216 (Unidroit 2013).

Article 39(1)(b) confers rights of arrest or detention of an object for sums due in respect of that aircraft object “or another object”. Any declaration which seeks to include the language in respect of another aircraft object is only valid if the laws of the applicable Contracting State permit arrest or detention of an object for services relating to another object (and a Contracting State should be careful not to make a declaration under Article 39(1)(b) covering services in relation to an object other than that detained unless the law of that State permits it).<sup>92</sup>

Non-consensual rights or interests with respect to which a Contracting State has made a declaration under Article 40 have priority over registered international interests only if such non-consensual rights or interests are registered.<sup>93</sup> Article 40 permits a Contracting State to extend the application of the Cape Town Convention, allowing declared categories of non-consensual rights or interests to be registered as if they were international interests.<sup>94</sup> If a registrable non-consensual right or interest is registered, it will be treated like a registered international interest and it would have priority over any later registered interests and unregistered interests.<sup>95</sup>

The non-consensual rights and interests covered by a declaration under Article 39 and the registrable non-consensual rights and interests covered by a declaration under Article 40 are mutually exclusive.<sup>96</sup> If a Contracting State fails to make a declaration under Article 39 or Article 40, then the non-consensual rights and interests created under the national law of that Contracting State will not have priority over registered international interests.<sup>97</sup>

## H. Effects of Registration of an International Interest – Priority Rules

Under the Cape Town Convention, a registered interest has priority over all other subsequently registered interests and over unregistered interests.<sup>98</sup> This priority rule applies even if the registered interest was acquired or registered with actual knowledge of the existence of an unregistered interest.<sup>99</sup> The foregoing rule is intended to avoid factual disputes as to whether a second creditor did or did not know of an earlier, but unregistered, interest. Because the registration provisions of the Cape Town Convention also cover outright sales of aircraft objects, only a buyer of an aircraft object who has registered the sale in accordance with the Protocol takes free from a subsequently registered interest.<sup>100</sup>

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<sup>92</sup> GOODE at para. 2.276 (Unidroit 2013).

<sup>93</sup> GOODE at para. 4.282 (Unidroit 2013).

<sup>94</sup> Article 40 of the Convention; GOODE at paras. 4.36, 4.283 (Unidroit 2013).

<sup>95</sup> GOODE at paras. 2.33(5), 2.219 (Unidroit 2013).

<sup>96</sup> GOODE at para. 2.220 (Unidroit 2013).

<sup>97</sup> GOODE at para. 4.282 (Unidroit 2013). For a further discussion on Article 39 and enforcement of remedies, see Section VI.H herein.

<sup>98</sup> Article 29(1) of the Convention. This provision is subject to the specific declarations made by a Contracting State which may allow certain categories of non-consensual rights or interests to have, under such State's law, priority over a registered interest in an aircraft object. Article 39(1) of the Convention. See Section II.G. herein for a discussion on certain non-consensual interests which have priority without registration.

<sup>99</sup> Article 29(2) of the Convention.

<sup>100</sup> The Cape Town Convention also provides protection to conditional buyers and lessees. Article 29(4)(b) of the Convention provides that the conditional buyer or lessee takes free from the interest of a chargee not registered prior to the registration of the international interest held by its conditional seller

Each of the following examples highlights the importance of registration in order to establish and preserve priority. It is important to recognize, however, that this priority (which is established pursuant to the terms of Article 29 of the Convention) is concerned only with the priority of Convention interests (principally international interests and registrable non-consensual rights or interests) viz. other interests, whether or not registrable, but does not impact the special priority rules relating to non-consensual rights or interests covered by a declaration by a Contracting State under Article 39(a)(1) of the Convention<sup>101</sup> or a pre-existing right or interest under Article 60 of the Convention.<sup>102</sup> In addition, the following examples assume the Convention interest was properly created and registered with the International Registry.<sup>103</sup>

**Example 1:**

Debtor grants a charge (security interest) over an airframe to Creditor 1 (C1) on February 1 and thereafter grants a charge over the same airframe to Creditor 2 (C2) on March 1. The international interest in favor of C2 is registered with the International Registry before the international interest in favor of C1 is registered. Under the Cape Town Convention, C2 has priority over C1, even if C2 knew of the prior charge in favor of C1.

**Example 2:**

Lessor leases an airframe to Lessee and an international interest is registered in respect of such lease. Lessor thereafter charges the airframe to Creditor, and such interest is registered. Creditor takes its charge subject to Lessee's registered international interest in the lease (effectively, this means Lessee has quiet possession and use rights under the Cape Town Convention).<sup>104</sup>

**Example 3:**

Seller sells an airframe to Buyer 1 (B1) and thereafter sells the same airframe to Buyer 2 (B2). No registration is made in respect of the contract of sale in favor of B1 but Seller and B2 register a contract of sale. B1 thereafter sells such airframe to Buyer 3 (B3) and a registration is made in respect of the contract of sale in favor of B3. Because the sale to B2 is registered prior to the registration of B3's contract of sale, B2 would have priority over B3 (even though the sale to B2 occurred after the sale to B1).

**Example 4:**

Seller sells an airframe to Buyer 1 (B1) and the parties do not register the sale. Later, B1

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or lessor, as applicable. For a discussion regarding quiet possession and use rights, see Section II.Q. herein.

<sup>101</sup> See Section II.G herein.

<sup>102</sup> See Section II.E herein.

<sup>103</sup> See Section II.D herein.

<sup>104</sup> For a discussion of quiet possession and use rights, see Section II.Q. herein.

sells the airframe to Buyer 2 (B2). B1 and B2 register a contract of sale. Thereafter, Seller sells the airframe to Buyer 3 (B3) and a registration is made in respect of the contract of sale in favor of B3. Because the sale to B2 is registered prior to the registration of B3's interest, B2 would have priority over B3 (even though the original sale from Seller to B1 was not registered).

**CAUTION:**

THE FAILURE TO REGISTER AN INTERNATIONAL INTEREST MAY RESULT IN LOSS OF OWNERSHIP OF THE AFFECTED AIRCRAFT OBJECT.

**Practice Note:**

A transferred or assigned interest retains its original priority, and therefore, the priority of a transferee or assignee relates back to its transferor or assignor. For example, if two international interests are registered over the same aircraft object, the first in favor of A and the second in favor of B, and then A assigns its interest to C and B assigns its interest to D, C has priority over D, whether or not the assignment to C was registered.<sup>105</sup> The registration of an assignment of an international interest is only relevant to establish priority as against other assignments and does not affect the priority of the underlying international interests.

Any priority given by the Cape Town Convention to an interest in an aircraft object extends to the proceeds of such object.<sup>106</sup> "Proceeds", for purposes of the Convention, is narrowly defined as money or non-money proceeds of an aircraft object arising from the total or partial loss or physical destruction of such object or its total or partial confiscation, condemnation or requisition.<sup>107</sup> General proceeds, such as receivables arising from the sale of an aircraft object subject to an international interest, are not considered proceeds for purposes of the Cape Town Convention. As such, traditional commercial laws (for instance, the Uniform Commercial Code in the United States or the Personal Property Security Act in Canada) governing rights and interests in any such proceeds to the extent not covered by the Cape Town Convention should be considered.

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<sup>105</sup> However, it is advisable for C to register such assignment in order to protect itself against a second assignment of the same interest by A. Goode at para. 2.160 (Unidroit 2013). For further discussion on assignments, see Section II.J.

<sup>106</sup> Article 29(6) of the Convention.

<sup>107</sup> Article 1(w) of the Convention.

### Practice Note:

In practice it is often debated as to whether UCC or PPSA financing statements (or similar instruments) should be filed in connection with a particular transaction which is otherwise governed by the Cape Town Convention. Certainly if there is other collateral not covered by the Convention, such filings are not only warranted, but necessary to perfect a security interest. Even if an aircraft object is the only collateral which is subject to the applicable lien, it is generally thought that such filings should nonetheless be made in order to protect a financier's rights in respect of the broader category of proceeds.

Outside of certain insolvency scenarios, registration of an international interest is not necessary to protect the creditor against its own debtor, so the fact that a chargee or lessor fails to register its international interest should not in any way affect such party's rights against its chargor or lessee.<sup>108</sup> An international interest would be effective in insolvency proceedings against a debtor so long as it is registered with the International Registry before the commencement of such proceedings<sup>109</sup> even if the international interest would otherwise be void for want of compliance with local law perfection requirements.<sup>110</sup> In other words, registration is a safe harbor. However, this rule is not intended to suggest that an unregistered international interest would automatically be ineffective under the applicable law, as Article 30(2) of the Convention expressly states that nothing in the Convention impairs the effectiveness of an international interest in the insolvency proceeding of a debtor where such international interest is effective under applicable law (i.e., such interest would be recognized and ranked ahead of the claims of unsecured creditors).<sup>111</sup>

## I. Prospective International Interests and Prospective Sales

A prospective international interest is an interest in an aircraft object that is intended to be created as an international interest upon the occurrence of a stated future event (which may include the debtor's acquisition of an interest in the aircraft object or registration of the airframe in a Contracting State).<sup>112</sup> Although the occurrence of the stated event does not need to be certain, parties merely contemplating the grant of an international interest in the future is not sufficient to give rise to a prospective international interest; rather, there must be real negotiations relating to a uniquely identified aircraft object with an intent to create an international interest in such aircraft

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<sup>108</sup> GOODE at para. 4.186 (Unidroit 2013).

<sup>109</sup> Article 30(1) of the Convention.

<sup>110</sup> GOODE at para. 4.208 (Unidroit 2013). Care should be taken, however, as the rule set forth in Article 30(1) of the Convention does not override applicable law relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors. Article 30(3)(a) of the Convention.

<sup>111</sup> Article 30(2) of the Convention. Article 30(2) is a rule of validation, not of invalidation. So if, under applicable law an interest is effective in a bankruptcy/insolvency context to protect the rights of a creditor even without registration under the Cape Town Convention, then such unregistered interest would continue to have the same effect under applicable law following the commencement of such proceedings.

<sup>112</sup> Article 1(y) of the Convention.

object upon the occurrence of such event.<sup>113</sup> Accordingly, the mere intention of two parties to create an international interest in an unidentified aircraft object at some point in the future is not sufficient to give rise to a prospective international interest. The aircraft object must either be in existence or have reached the stage of manufacture at which it can be seen to be equipment of a type falling within the Cape Town Convention and uniquely identifiable so as to distinguish it from other such equipment including, for example, when a serial number is assigned by its manufacturer.<sup>114</sup> A prospective international interest need not be provided for in writing.<sup>115</sup>

**Example:**

A prospective Seller and Buyer sign a letter of intent providing for a non-binding commitment on the part of Seller to sell to Buyer one of several engines (all of the same type, to be selected by Seller at some point in the future). Seller and Buyer register prospective international interests in respect of each of the possible engines for sale. While the letter of intent may demonstrate sufficient intent of the parties to warrant the registration of a prospective international interest (even though it was non-binding in nature), the fact that the parties had not, at the time of registration, identified the specific engine to be subject to such sale would cause the related prospective international interest registration to be ineffective.

If the stated event occurs, then an interest initially registered as a prospective international interest will become an international interest and it will be treated as registered from the time of registration of the prospective international interest, provided that such registration was still current immediately before the international interest was constituted under Article 7.<sup>116</sup> No additional registration is required when the international interest comes into being (for example, when the documents are signed and the transaction is completed (assuming this is the stated event)). Furthermore, Article III of the Protocol specifically extends the provisions relating to prospective international interests to cover prospective sales.<sup>117</sup>

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<sup>113</sup> GOODE at para. 2.49 (Unidroit 2013). The Cape Town Convention is quite vague in terms of what constitutes negotiations sufficient to support the creation of a prospective international interest. As such, the practice has developed in many cases of only registering such proposed interests a few days in advance of an actual closing (although with sufficient foresight, and consent of the debtor/seller to permit registration against it, the parties could certainly register such interest well in advance of that so long as the particular aircraft object is specifically identified and already exists and the parties have the requisite intent to create such international interest based upon specific negotiations and/or explicit agreement upon the occurrence of a stated event).

<sup>114</sup> GOODE at para. 4.31 (Unidroit 2013).

<sup>115</sup> GOODE at para. 2.49 (Unidroit 2013).

<sup>116</sup> Article 19(4) of the Convention.

<sup>117</sup> Article III of the Protocol. The efficacy of a registration of a prospective international interest or sale may nonetheless be impacted by applicable national law. For airframes registered in the United States, for example, the transaction contemplated by the prospective international interest or sale must be consummated (and final documentation must be filed with the U.S. Federal Aviation Administration) within 60 days of filing the notice of such interest in order for the prospective international interest or sale to remain valid. 49 U.S.C. § 44,107(e)(2)(B). This requirement puts a limitation on the availability of prospective registrations in the context of U.S.-registered aircraft as in the event that the actual documents are not filed with the FAA by the end of the 60-day period, the prospective registration would cease to be valid. This requirement is at odds with the terms and spirit of the Convention and creates a potential conflict between the Convention (which presumably would find the interest valid and effective) and national law (which might call into question the validity of such interest).



### Practice Note:

Several major aircraft manufacturers refuse to consent to prospective registrations in connection with the sale of new aircraft. These manufacturers only consent to the registration of a contract of sale after they have received the sale proceeds for the related aircraft.

It is important to note that a person searching the International Registry will not be able to differentiate between an international interest and a prospective international interest because the search certificate will merely evidence that the creditor named in it has acquired or intends to acquire an international interest in the aircraft object.<sup>118</sup> In either case, the applicable searching party has received notice that it may not have the desired priority and must therefore make further inquiries.

## J. Assignments and Novations

### ASSIGNMENTS

Assignments relating to international interests are registrable under the Cape Town Convention;<sup>119</sup> however, such assignments are confined to contractual assignments and do not include assignments by operation of law, such as assignments resulting from a statutory merger.<sup>120</sup> The Cape Town Convention defines “assignment” broadly as:

“a contract which, whether by way of security or otherwise, confers on the assignee associated rights with or without a transfer of the related international interest.”<sup>121</sup>

The general rule under the Cape Town Convention is that an assignment (which includes transfers, charges and pledges) of associated rights also transfers to the assignee the related international interest and all interests and priorities of the assignor.<sup>122</sup> The Cape Town Convention defines “associated right” to mean rights to payment or other performance of certain obligations by a debtor under an agreement that is secured by or associated with the aircraft object.<sup>123</sup> For

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<sup>118</sup> Article 22(3) of the Convention.

<sup>119</sup> Article 16(1)(b) of the Convention. This is true even if the international interest itself is not registered, however, such an assignee may risk subordination (including in the event where a holder of a subsequent international interest registers such interest and thereby obtains priority over the unregistered interest). See GOODE at para. 2.196 and 4.253 (Unidroit 2013).

<sup>120</sup> GOODE at para. 2.187 (Unidroit 2013). Forms of transfer by operation of law other than subrogation, for example, transfers resulting from a statutory merger of a creditor and another corporation into a new entity to which the applicable international interest passes under applicable law, are outside both the registration provisions governing assignment and the priority rule in Article 3.5 governing the priority of competing assignments because the definition of “assignment” in Article 1(b) is limited to contractual assignments. GOODE at para. 2.136 (Unidroit 2013). Transfers resulting from a merger where the existing debtor is not the surviving entity would not be treated as an assignment. Rather, in that case the International Registry would treat the merger as a “change of name” and the Registry would have a separate means of updating the registry to reflect the debtor under its new name. See Section 5.14 of the Cape Town Regulations.

<sup>121</sup> Article 1(b) of the Convention.

<sup>122</sup> Article 31(1) of the Convention.

<sup>123</sup> Article 1(c) of the Convention. Note that only a creditor can hold and assign associated rights. GOODE at para. 4.216 (Unidroit 2013).

example, the right to repayment of a loan or rentals under a lease as well as rights to other forms of performance, such as insurance or maintenance requirements relating to the applicable aircraft object, all constitute associated rights.

**Practice Note:**

An outright assignment by a lessee of its rights under a lease is not an assignment of associated rights within the Cape Town Convention, nor is such assignment registrable as such. If a lessee were to absolutely assign its rights as lessee to a third party, such assignment would give rise to the creation of a new international interest between the lessor and the assignee (as opposed to an assignment of the existing international interest) and new registrations should be effected with the international registry in order to establish priority.<sup>124</sup>

It should be noted that the definition of “assignment” purposefully focuses on assignments of associated rights, as opposed to international interests.<sup>125</sup> The Cape Town Convention, following the position of most major legal systems, adopts an approach which is consistent with the view that a security interest is accessory to the obligation secured.<sup>126</sup> As such, an assignment of associated rights made in conformity with the formalities set out below also transfers to the assignee the related international interest and all of the interests and priorities of the assignor under the Cape Town Convention, unless the parties otherwise agree.<sup>127</sup> While it is open to the parties to agree to assign the associated rights without transferring the related international interest, a purported assignment of an international interest under a security agreement without the inclusion of some or all of the associated rights is not valid.<sup>128</sup>

**Practice Note:**

In the case of a full assignment, it is advisable to include in the assignment agreement a statement that all associated rights are being assigned to the assignee.

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<sup>124</sup> This type of assignment is in contrast to a security assignment of lessee's rights, which can constitute a separate registrable international interest. See Section II.E herein for a discussion of the use of the collateral assignment of a lessee's rights under a leasing agreement in order to allow the holder of a pre-existing interest to have the benefits of certain protections available under the Convention.

<sup>125</sup> See *GOODE* at para. 2.189 (Unidroit 2013). A purported assignment of an international interest, without any related associated rights, would therefore be of limited, if any, value, and if the assigned international interest relates to a security agreement, such assignment is invalid from the outset. Article 32(2) of the Convention.

<sup>126</sup> *GOODE* at para. 2.189 (Unidroit 2013).

<sup>127</sup> Article 31(1) of the Convention. Nothing precludes the parties to an agreement which constitutes an international interest from allowing an assignment of the associated rights without a transfer of the applicable international interest. For example, an assignment of future rights to the payment of installments under a retention of title agreement may be made without a transfer of the aircraft object to which the agreement relates. *GOODE* at para. 4.222 (Unidroit 2013). However, the Cape Town Convention does not apply to an assignment of associated rights that is divorced from the related international interest. Article 32(3) of the Convention. It is important to recognize, however, that a registered assignee of associated rights coupled with an international interest has priority over an assignee of associated rights in isolation from the international interest. Article 35 of the Convention.

<sup>128</sup> Article 32(2) of the Convention. Such an assignment is not valid because the function of a security agreement is to secure payment or performance of certain obligations, and if the international interest is held by a chargee to whom none of the secured rights have been assigned, then such security interest is not securing anything. *GOODE* at para. 4.240 (Unidroit 2013).

“Associated Rights” can include rights to performance by the debtor or a third party under another contract, provided that (a) the debtor has undertaken in the agreement (e.g. security agreement, leasing agreement or title retention agreement) to perform (or procure performance) under such other contract, and (b) the rights to such performance are secured by or associated with the object to which such agreement relates (such as when a security agreement secures indebtedness owing under another contract).<sup>129</sup> But rights to performance under other contracts are not associated rights in relation to the applicable agreement merely because they are secured by or associated with the object to which the agreement relates.<sup>130</sup> Rather, “associated rights” are confined to the obligations of the debtor itself under the agreement to the extent that the debtor specifically undertakes performance (or agrees to procure the performance) of those obligations in such agreement.<sup>131</sup>

**Practice Note:**

When dealing with obligations contained in a separate or unrelated contract (such as when a loan agreement is entered into but the security interest in an aircraft object is granted in a separate security agreement in order to secure such loan obligations), it is important to include in the applicable agreement constituting an international interest a specific undertaking from the debtor to perform such obligations as well as a statement in such separate or unrelated contract that the obligations contained therein are secured by or associated with the applicable aircraft object. Failure to do so does not invalidate the arrangement as between the debtor and the original creditor, but could impact the effectiveness of any assignment of such obligations such that they would not be considered associated rights and therefore, would not be covered under the Cape Town Convention (by virtue of not being “associated” with the related international interest).<sup>132</sup>

A partial assignment of associated rights is permitted under the Cape Town Convention (e.g., an assignor and assignee may agree to an assignment of some future installments or rentals rather than all future installments or rentals).<sup>133</sup> In situations involving partial assignments, the Cape Town Convention leaves it to the parties to agree on their respective rights concerning the related international interest, provided that, in the absence of a specific agreement, applicable law would govern the respective rights of the assignor and the assignee in respect of such international interest.<sup>134</sup>

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<sup>129</sup> GOODE at para. 4.9 (Unidroit 2013).

<sup>130</sup> GOODE at para. 4.219 (Unidroit 2013).

<sup>131</sup> GOODE at para. 2.186 (Unidroit 2013).

<sup>132</sup> See Article 31 of the Convention. The provisions of the Cape Town Convention dealing with the assignment of associated rights (and in particular, the rules dealing with competing assignees) are quite complex and detailed and are well beyond the scope and general nature of this Guide.

<sup>133</sup> Article 31(2) of the Convention; GOODE at para. 4.226 (Unidroit 2013).

<sup>134</sup> See GOODE at para. 4.226 (Unidroit 2013).

For example, the assignor and the assignee could decide who would be entitled to exercise rights and remedies in respect of the applicable international interest against the debtor. However, the debtor's consent is required if any such agreement between the assignor and assignee adversely affects the debtor (such debtor's consent may be a general consent and may be given in advance).<sup>135</sup>

**Example 1:**

Pursuant to a loan agreement, Creditor advances funds to Debtor for the purchase of an aircraft engine, and Debtor in a separate security agreement grants Creditor a security interest in such engine to secure Debtor's obligations under the loan agreement (and such security agreement has a specific undertaking by Debtor to perform its obligations under the loan agreement). Creditor thereafter assigns its rights under the loan agreement (which are associated rights) to Assignee by way of an outright assignment. The effect of the assignment is to transfer to Assignee not only the associated rights but also, in the absence of an agreement to the contrary, the international interest in favor of Creditor. In such case, Assignee would be entitled to be the registered assignee of the international interest, enjoying the same priority as that previously enjoyed by Creditor.

**Example 2:**

Same facts as Example 1, except that the security interest secures not only Debtor's obligations under the loan agreement but also all other contracts between Debtor and Creditor. Debtor also undertakes in the security agreement to not only perform its obligations under the loan agreement but also under such other contracts. If Creditor subsequently makes a further loan to Debtor under a new loan agreement, Creditor's associated rights include its right to repayment under the second loan agreement, so that if Creditor assigns all or any portion of either loan agreement to Assignee, such assignment would constitute a partial assignment of the associated rights such that Article 31(2) of the Convention applies and it is for Creditor and Assignee to agree their respective rights concerning the applicable international interest (failing that, the determination of the respective rights of Creditor and Assignee is determined by applicable national law).

**Practice Note:**

It is inappropriate to deal with an assignment of an international interest simply by amending the original registration so as to replace the name of the assignor with that of the assignee. This is misleading and conceals the fact that an assignment has been made.<sup>136</sup>

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<sup>135</sup> Article 31(2) of the Convention.

<sup>136</sup> GOODE at para. 2.148 (Unidroit 2013).

The priority rules governing competing assignments of associated rights generally follow the “first in time” rule which provides that an assignment registered with the International Registry has priority over any subsequently registered assignment and over an unregistered assignment.<sup>137</sup> This priority rule is, however, qualified in two significant ways. In general terms, the rules provide that an assignee of associated rights (and, thus, the related international interest) only has priority (as provided in the Cape Town Convention) over another assignee of such associated rights (i) if the contract under which the associated rights arise states that they are secured by or associated with the aircraft object; and (ii) to the extent that the associated rights are “related to” an aircraft object.<sup>138</sup> For purposes of the Convention, associated rights are related to an aircraft object where they represent payment of the price of the aircraft object, the advance of a loan for the purchase of that aircraft object or the rental of an aircraft object under the title reservation agreement, security agreement or lease agreement, as applicable (together with other related obligations arising under the applicable title reservation agreement, loan agreement or lease such as default interest, break funding amounts, sums payable under indemnities and the like).<sup>139</sup> In a situation where associated rights do not comply with the foregoing, the priority of competing assignments is determined by applicable national law (and not the Cape Town Convention).<sup>140</sup>

**Example 1:**

Creditor advances money to Debtor for the purchase of an engine and takes a security interest in the engine under a security agreement to secure repayment of the advance and all other obligations of Debtor to Creditor under any agreement or other contract entered into between them (and Debtor agrees in the applicable security agreement to perform also its obligations under all such other contracts). The applicable loan agreement specifically recites that the obligations of the Debtor under the loan are secured by a lien on the engine. Creditor registers its interest as an international interest and subsequently assigns its rights under the loan, together with the international interest, by way of security first to Assignee 1 and secondly to Assignee 2. The priority of the competing assignments to Assignee 1 and Assignee 2 is determined by the order of registration since both conditions of Article 36(1) are fulfilled.

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<sup>137</sup> Article 35(1) of the Convention. Since the definition of “assignment” in Article 1(b) of the Convention is limited to contractual assignments, it is the applicable law, and not Article 29 of the Convention, which determines the priority between a contractual assignee and an assignee by operation of law.

<sup>138</sup> Article 36(1) of the Convention.

<sup>139</sup> Article 36(2) of the Convention. For a complete list of such associated rights, see Article 36(2) of the Convention. The purpose of this restriction is to avoid giving the assignee a priority to rights to payment which, though secured on an aircraft object, are unrelated to its acquisition or rental or the purchase of another object, as, for example, an advance on the security of the equipment already acquired by the chargor with its own or a third party's funds. *GOODE* at para. 4.257 (Unidroit 2013).

<sup>140</sup> Article 36(3) of the Convention.

### Example 2:

Same facts as in Example 1 except in lieu of serving as an advance to allow the Debtor to purchase the engine, the loan is for Debtor's general corporate purposes. In this case, the Convention does not determine priority as between Assignee 1 and Assignee 2 since the advance is for general purposes and is not "related" to an aircraft object. Accordingly, the priority between the assignees is governed by applicable law.

The Cape Town Convention removes otherwise applicable conflict of laws issues in connection with any assignment of associated rights, including the creation of a security interest in associated rights. In this regard it is analogous to removing the *lex situs* issues for international interests and contracts of sale. The formal requirements for the constitution of an assignment of associated rights that also transfers the related international interest are similar to the requirements for the creation of an international interest, namely, the assignment must: (1) be in writing, (2) enable the associated rights to be identified under the contract from which they arise, and (3) in the case of an assignment by way of security, enable the obligations secured by the assignment to be determined (but without the need to state a sum or maximum sum secured).<sup>141</sup> The Protocol adds a requirement that the debtor must have consented in writing to such assignment (although such consent may be given in advance and need not identify the assignee).<sup>142</sup> In any event, the debtor must be given notice of the assignment in writing by or with authority of the assignor and the notice must specifically identify the applicable associated rights.<sup>143</sup> There is no requirement that the assignor of any associated rights be situated in a Contracting State (the assignment is required to be registered to establish priority even though a separate international interest involving the assignor (acting as a debtor) would not otherwise be covered by the Cape Town Convention). In addition, an assignee of associated rights relating to an international interest may register the assignment with the International Registry irrespective of whether or not the subject international interest has itself been registered (in order to secure priority in respect of such assignment).<sup>144</sup>

### Example 1:

Owner is the owner and lessor of an aircraft object leased to Lessee. Owner and Lessee register the international interest in respect of the lease. Thereafter, Owner assigns its rights under the lease to Assignee by way of an outright assignment. The effect of the

<sup>141</sup> Article 32(1) of the Convention. These requirements track the formal requirements of an international interest except that "associated rights" must be identified instead of the "aircraft object" which is already identified. GOODE at para. 4.238 (Unidroit 2013).

<sup>142</sup> Article XV of the Protocol. The debtor's consent is required only for the purpose of its duty of performance to the assignee and as such it is not a prerequisite to the effectiveness of the assignment as between the assignor and assignee. GOODE at para. 5.76 (Unidroit 2013).

<sup>143</sup> Article 33(1) of the Convention.

<sup>144</sup> Section 5.5 of the Cape Town Regulations and GOODE at para. 2.146 (Unidroit 2013).

assignment is to transfer to Assignee not only the associated rights (e.g., the performance by the Lessee of its obligations under the Lease) but also, in the absence of an agreement to the contrary, the international interest previously vested in Owner. In order to protect Assignee's interest in such rights as against subsequent transferees of Owner, Owner and Assignee should register an assignment of such international interest with the International Registry.

**Example 2:**

Assuming the same facts as Example 1 above, except assume the original international interest in the lease was not registered by Owner and Lessee. In this scenario, Assignee is entitled to have the assignment registered, regardless of the fact that the assigned international interest has not been registered. An assignee of an unregistered international interest which registers its assignment has priority (with respect to the unregistered international interest) over any subsequent assignee of such international interest from Owner.<sup>145</sup>

**Practice Note:**

Care should always be taken to be sure the record at the International Registry is updated to reflect any assignment of an international interest (even if the underlying documentation may arguably suggest otherwise). For example, in a situation where a lease of an aircraft is extended, the Convention provides that a new international interest is created in respect of the extension period. As such, the lessee, as debtor, and the lessor, as secured party, would need to register such interest in order to establish priority in respect of the lease agreement (for the extension period). If the applicable lessor had financed the aircraft, and originally executed a security agreement conveying, as collateral security, all of its rights in the original lease agreement including any extension thereof, the lessor, as assignor, and the lender, as assignee, would register an assignment of the international interest in respect of the original lease agreement at the outset of the term in order to protect the lender's interest. Notwithstanding the fact that the lender's underlying security covers both the original lease term and the extended lease term, since the Convention would treat the two terms under the lease agreement as separate interests, an assignment of the lease registration made in respect of the extension term would similarly need to be made at the International Registry in order to properly protect the lender's rights.

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<sup>145</sup> When registering an assignment of an international interest, the International Registry will request the file number of such international interest. If such international interest has not previously been registered, then the party effecting such assignment should select "None" from the drop-down box entitled "File Number". Thereafter, the International Registry will allow the party assigning such interest to manually provide a description of the interest being so assigned. Section 5.6 of the Cape Town Regulations allows for a "block" assignment pursuant to which all of the underlying interests evidenced by registrations on the International Registry in which an assignor is a named party may be assigned to a designated assignee (with consent given by such assignee) which should ease the administrative burden associated with assignments on the International Registry.

## ASSIGNMENTS VS. NOVATIONS

An outright assignment, as opposed to a collateral assignment, in many jurisdictions may, depending upon whether or not the assignor is released from some or all of its obligations in the underlying agreements, be characterized as a novation (in effect the termination of the existing contractual arrangement and entry into force of a new contract between the underlying obligor and the assignee of the rights). In other legal systems, such an arrangement would be viewed merely as an assignment (often referred to as an “assignment and assumption”).<sup>146</sup> For purposes of the Cape Town Convention however, whether a transaction is an assignment or a novation is to be determined from its nature as a matter of interpretation of the Convention and without reference to applicable law.<sup>147</sup>

### Practice Note:

The Official Commentary provides significant guidance to assist practitioners in navigating the maze of assignments vs. novations:

“Assignments” as defined in Article 1(b) of the Convention, involves the conferment of associated rights on the assignee. The essence of assignment is thus the transfer of creditor’s rights. It is clear that a new agreement between all three parties – debtor, creditor and assignee – which replaces the original agreement is not an assignment but a novation. It is also clear that a transaction in which the creditor simply transfers its associated rights and the related international interest without reference to its obligations is an assignment. But there are also hybrid transactions in which the creditor assigns its rights under the agreement and also, with the consent of the debtor, transfers its obligations, wholly or in part. Such a transaction is an assignment for purposes of the Convention, whether or not the elements of the transactions relating to the creditor’s obligations result in characterisation of the agreement as a novation under national law. This is because the Convention’s definition of “assignment” is independent of national law, and if **an agreement has the effect of transferring associated rights from the creditor to another person it will be an assignment for purposes of the Convention no matter how the transaction as a whole is characterized under national law.** [emphasis added]<sup>148</sup>

<sup>146</sup> The impact of the differing treatment can be substantial as if an assignment is treated as a novation it would require the debtor and the assignee to register a new interest at the International Registry (since the existing interest would no longer be effective) whereas if such assignment was in the nature of an assignment and assumption of the existing interest, then an assignment would need to be registered and the existing interest would remain effective.

<sup>147</sup> This is necessary to preserve the unity of the Cape Town Convention because a new agreement for an international interest (which would be the effect of a novation) is separately registrable, so that specific requirement for registration would affect third parties and therefore could not be left to depend on the law governing or characterizing the assignment, particularly when national laws differ so much on the point. GOODE at para. 2.43 (Unidroit 2013).

<sup>148</sup> GOODE at para. 2.44 (Unidroit 2013).



**Example 1:**

Owner leases an engine to Lessee under a lease agreement. The lease is properly registered in the International Registry as an international interest. Subsequently, Owner transfers its interest as lessor to Transferee. By virtue of the transfer, Owner transfers all of its rights, and is released of all obligations, in each case arising from and after the date of transfer (with Transferee accepting such rights and agreeing to assume all obligations relating to the period from and after the date of transfer). For purposes of the Convention this amounts to an assignment, and not a new (novated) agreement, and this is regardless of any different characterization that might be given under applicable national law. Had the transfer to Transferee resulted in Owner no longer holding any rights or obligations under the lease agreement (including corresponding releases by Owner and Lessee in respect of all obligations under the Lease), it would for purposes of the Convention amount to a new agreement which would have the effect of discharging the existing international interest and would constitute a new international interest requiring separate registration as such.

**Example 2:**

Same facts as Example 1 except the transfer document to Transferee is a three-party agreement amongst Owner, Lessee and Transferee whereby the existing lease agreement is explicitly terminated (with no assignment of associated rights) and a new lease agreement is deemed entered into among Transferee and Lessee (with Owner ceasing to hold any rights or obligations in respect of such new lease agreement). For purposes of the Convention, this does not constitute an assignment but rather entry into a new lease agreement (which effectively discharges the existing international interest and would require Lessee and Transferee to register a new international interest with the International Registry in respect of the new lease agreement).

## K. Choice of Law and Jurisdiction

### (I) CHOICE OF LAW.

One of the purposes of the Convention is to provide uniform rules which make it unnecessary to resort to the conflict of laws on matters within the scope of those rules, such as the creation, registration, enforcement and priority of international interests and the assignment of associated rights. The Cape Town Convention is, however, not a fully self-contained codification. Questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which the Convention is based<sup>149</sup> or, in the

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<sup>149</sup> Although these so-called “gap filling” principles are not set out in the Convention itself, they were very well articulated in J. Wool and A. Jonovic, “The relationship between transnational commercial treaties and national law – A framework as applied to the Cape Town Convention”, (2013) 1 *Cape Town*

absence of such principles, in conformity with the applicable law. As such, certain questions concerning matters within its scope not set out in the Convention itself (or otherwise agreed to by the parties) have to be resolved by domestic substantive law (i.e., the applicable law). In this context, the “applicable law” means the domestic rules of the law applicable by virtue of the rules of private international law of the forum state.<sup>150</sup> The Convention thus does not itself contain a uniform conflict of laws rule but rather designates the applicable law by making reference to the private international rules of the forum state.

The applicable law is referred to in numerous places in the Convention and the Protocol as well as in the Official Commentary. As Professor Goode points out in the Official Commentary:

“The Convention expressly leaves it to the applicable law to determine:

- whether an agreement falling within Article 2(2) is to be recharacterised and the time when it is considered made;
- what remedies are available in addition to those provided by the Convention (Article 12);
- what procedure must be followed in the exercise of remedies (Article 14), subject, however, to the mandatory declaration under Article 54(2) as to whether the leave of the court is required where not so provided by the Convention;
- acquisitions of international interests by legal or contractual subrogations for the purpose of registration (Article 16(1)(c));
- the continuance, upon installation on an object, of rights in an item (other than an object) created prior to installation (Article 29(7)(a));
- the creation, after removal from an object, of rights in an item (other than an object) previously installed on the object (Article 29(7)(b));
- the effectiveness in the debtor’s insolvency of an international interest not registered in the International Registry (Article 30(2));
- the defences and rights of set-off available to a debtor against an assignee of associated rights (Article 31(3),(4));
- the priority of competing assignments of associated rights in cases falling outside

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*Conventional Journal* 65, 74-75 as follows:

1. There should be a strong presumption on the enforceability of contract provisions even when the Convention is silent on a topic.
2. Terms should be implied, when needed, that enhance transactional predictability and reflect international best practices in asset-based financing and leasing.
3. Terms should be implied, when needed, to provide further details related to the *sui generis* concepts and their legal implications.
4. 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.

<sup>150</sup> Article 5(3) of the Convention.

Article 36(1) and (2) (Article 36(3));

- the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law (Article 38(1), and see Article 50(3)); and

the priority of pre-existing rights and interests (Article 60(1)).”<sup>151</sup>

He goes on to provide, with respect to the Protocol, that:

“Like the Convention the Aircraft Protocol contains various provisions referring matters to the applicable law. These are as follows:

- Under Article VIII, subject to a declaration by a Contracting State, the parties are free to choose the law governing their relations inter se.
- Under Article XI, Alternative A, paragraph 5(b), unless and until the creditor is given the opportunity to take possession of an aircraft object after the occurrence of an insolvency-related event, it is entitled to apply for any other forms of interim relief available under the applicable law.
- Under Article XI, Alternative A, paragraph 11, the provision in paragraph 10 that no obligations of the debtor under the agreement may be modified without the creditor’s consent does not affect any authority of the insolvency administrator under the applicable law to terminate the agreement.
- Article XI, Alternative B, provides in paragraph 2(b) that upon the occurrence of an insolvency-related event the insolvency administrator or the debtor, as applicable, is to give the creditor the opportunity to take possession in accordance with the applicable law.
- Paragraph 3 of Alternative B provides that the applicable law may permit the court to require the taking of any additional step or the provision of any additional guarantee.
- Under Article XVI(2), nothing in the Convention or Protocol affects the liability of the creditor for any breach of the agreement under the applicable law in so far as that agreement relates to an aircraft object.”<sup>152</sup>

In each of these cases, the applicable law would need to be determined by national substantive law rules in accordance with the applicable choice of law provisions and the rules of the forum state.

The Protocol further complements this approach by introducing a uniform conflict of laws

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<sup>151</sup> GOODE at para. 2.58 (Unidroit 2013).

<sup>152</sup> GOODE at para. 3.23 (Unidroit 2013).

provision which allows the parties to an agreement to choose the substantive law to govern their contractual arrangements.<sup>153</sup> By virtue of Article VIII of the Protocol, which applies only where a Contracting State has made a declaration under Article XXX(1) of the Protocol, the parties to an agreement or a related guarantee contract or subordination agreement or contract of sale are free to choose the law to govern their contractual rights and obligations, wholly or in part, and unless otherwise agreed their choice is taken to be a reference to the domestic rules of law of the designated State (i.e. excluding its conflict of laws rules). This choice must be respected by the courts of a Contracting State. In such a Contracting State the choice of law by the parties is not open to attack on grounds that might otherwise have been available, for example that the chosen law has no connection with the parties or the subject-matter of the transaction or that the transaction is a wholly domestic transaction involving no foreign element.<sup>154</sup> The rationale behind the rule is to give the parties to a transaction the power to choose the law applicable to their contractual rights and obligations to the extent they are connected to a transaction covered by the Convention.<sup>155</sup> The law selected is deemed to be the domestic law of the designated state, excluding its conflict of laws rules (which avoids problems of renvoi).

**Practice Note:**

The choice of a foreign law is effective to displace rules of the *lex fori* which are mandatory in the sense of being incapable of exclusion by agreement of the parties if the *lex fori* applies but are not considered so important as to impose them on contracts governed by a foreign law. Examples of mandatory rules which can be excluded by a choice of law clause are rules governing the validity of a contract or the enforceability of penalty clauses and other restrictions on amounts payable. However, Article VIII of the Protocol will not displace the overriding mandatory rules of the *lex fori*; that is, rules which apply regardless of the otherwise applicable law (for example, export control limitations or economic sanctions). But such rules do not in any way limit the freedom of the parties to choose the applicable law, they merely preclude the selected law from being applied in a manner inconsistent with the overriding rules.<sup>156</sup>

## (II) JURISDICTION.

In light of the foregoing, the applicable jurisdiction which constitutes the forum for any proceeding involving the Cape Town Convention could have a sizable impact on the outcome.

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<sup>153</sup> Article VIII of the Protocol.

<sup>154</sup> GOODE at para. 3.24 (Unidroit 2013).

<sup>155</sup> Therefore, any contract incorporated by reference into any of the foregoing contracts is covered by the rules on choice of law.

<sup>156</sup> GOODE at para. 3.25 (Unidroit 2013).

Article 42 of the Convention grants the parties to a transaction under the Convention the possibility of choosing the courts of a Contracting State as the forum. Specifically, Article 42 provides that:

“...the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction.”<sup>157</sup>

The selected jurisdiction is exclusive.<sup>158</sup> It is, however, open to the parties to agree that the jurisdiction selected is to be non-exclusive. Where exclusive, the provision precludes courts of other Contracting States from accepting or asserting jurisdiction. Article 42 is concerned with choice of jurisdiction by parties to a “transaction”, a term which is not defined in the Convention but should be considered as covering not only an agreement treating or providing for an international interest but any other contract falling within the scope of the Convention, including a subordination agreement, an assignment and a contractual subrogation.<sup>159</sup> The chosen forum need not have a connection with the case or the transaction.

**Practice Note:**

The parties to a transaction should always seek to harmonize the jurisdictional provisions with the applicable laws chosen by the parties to govern the transaction (for good order and predictability of application, they should be a common Contracting State). By choosing a single Contracting State as the exclusive jurisdiction for the forum to hear disputes (whose governing substantive laws will also apply) the parties can be better assured that the applicable law chosen to interpret the agreements and govern rights and obligations are consistent and will be applied accordingly.

The provisions of Article 42 are, however, subject to Article 43. Article 43 itself is broken into two parts. The first provides that the courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the subject aircraft object is situated have jurisdiction to grant relief under Article 13(1)(a), (b), (c) of the Convention<sup>160</sup> in respect of that aircraft object.<sup>161</sup> Further, jurisdiction to grant relief under Article 13(1)(d)<sup>162</sup> (and, where the

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<sup>157</sup> Article 42(1) of the Convention.

<sup>158</sup> *Id.*

<sup>159</sup> GOODE at para. 4.285 (Unidroit 2013).

<sup>160</sup> Section 13(1)(a), (b) and (c) covers advance relief in the form of:  
(a) preservation of the aircraft object and its value;  
(b) possession, control or custody of the aircraft object; and  
(c) immobilisation of the aircraft object.

<sup>161</sup> Article 43(1) of the Convention.

<sup>162</sup> Section 13(1)(d) of the Protocol covers advance relief in the form of a lease or, except where covered by sub-paragraphs 13(1)(a) to (c), management of the aircraft object and the income therefrom.

Contracting State has made an opt-in declaration under Article XXX(2), Article 13(1)(e)<sup>163</sup>) may be exercised either (a) by the courts chosen by the parties; or (b) by the courts of a Contracting State on the territory of which the debtor is situated<sup>164</sup>, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.<sup>165</sup> The jurisdiction granted by Article 43 is concurrent with the jurisdiction of the courts chosen by the parties. Thus, the exclusive jurisdiction of the courts chosen by the parties under Article 42 turns into concurrent jurisdiction as far as advance relief under Article 43 is concerned.

The exclusive jurisdiction provided by Article 42 of the Convention is further expanded pursuant to Article XXI of the Protocol which provides that for the purposes of Article 43 of the Convention (i.e., to make orders under Article 13 of the Convention (speedy judicial relief)) a court of a Contracting State also has jurisdiction where the subject aircraft object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of registry.<sup>166</sup>

The final Convention provision which addresses jurisdiction relates to jurisdiction conferred on the courts of the State in which the Registrar has its centre of administration. Specifically, Article 44 of the Convention provides that the courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.<sup>167</sup> Article 44(2) and (3) make specific provision for the following awards and orders against the Registrar:

- (a) awards under Article 28 for payment of compensatory damages for errors, omissions and system malfunction;
- (b) orders under Article 44(2) directing the Registrar to discharge a registration where the discharge is one to which a debtor is entitled under Article 25(1) or an intending debtor or intending assignor is entitled under Article 25(2) and the creditor fails to take the necessary action or has ceased to exist or cannot be found;<sup>168</sup> and
- (c) orders under Article 44(3) to amend or discharge a registration following the failure of the registrant to comply with an order of a foreign court having jurisdiction under the Convention or, in the case of a national interest, a court of competent jurisdiction, directing the registrant to effect the amendment or discharge of the registration.<sup>169</sup>

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<sup>163</sup> Section 13(1)(e) of the Protocol covers advance relief in the form of a sale and application of proceeds therefrom. Article X of the Protocol.

<sup>164</sup> The Convention does not explicitly define the place where the debtor is situated for purposes of Article 43 of the Protocol, however it would seem that the formulation set forth in Article 4 of the Convention would be utilized in this instance.

<sup>165</sup> Article 43(2) of the Convention. See Section IV.E(iv) herein for further discussion on jurisdictions for advance court relief pending final determination.

<sup>166</sup> Article XXI of the Protocol.

<sup>167</sup> Article 44 of the Convention.

<sup>168</sup> See Section IV.G herein for additional discussion regarding the jurisdiction of the Irish courts to make orders directing the discharge of an interest.

<sup>169</sup> GOODE at para. 4.299 (Unidroit 2013). There are, however, situations which might not specifically fall into Article 44 which nonetheless should be actionable. For example, Article 44(2) requires an application by the debtor or intending debtor to procure discharge of a registration and does not

## L. Procedural Rules of a Contracting State

The Cape Town Convention provides a uniform set of rules to create an international interest. The Convention further provides a basic set of default remedies for a chargee (Articles 8 and 9), a conditional seller or lessor (Article 10) and any of them (Articles 12 and 13). In principle, all the foregoing remedies which do not refer to a court may be exercised by non-judicial means or by recourse to the courts, as the creditor chooses, subject, in the case of non-judicial remedies, to the election by the applicable Contracting State of the declaration under Article 54(2) of the Convention to allow any remedy which under the Convention does not require application to the court to be exercised without leave of the court. As will be discussed,<sup>170</sup> Article 13 of the Convention provides another form of *sui generis* Convention relief in the form of advance relief which allows the creditor, subject again to the applicable Contracting State having made the requisite declaration, speedy relief pending final determination by a court on the merits of a claim. In these instances, Article 14 of the Convention specifically provides that any such remedy must be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.<sup>171</sup> It is imperative to note that the exercise by a creditor of all of these rights and remedies bestowed by the Convention will be subject to the procedural law, but not substantive law, of the place of exercise.<sup>172</sup> This is an important distinction. So if, for example, a Contracting State has made the relevant declaration under Article 54(2) to allow exercise of remedies without leave of court, the creditor cannot be required to institute proceedings to enforce a remedy (which the Convention does not mandate as requiring court action) even if a particular jurisdiction lacks sufficient procedural rules to accommodate advance relief as permitted by the Cape Town Convention. However, procedural rules which impact the validity of a document need not be adhered to since the Convention itself provides the specific requirements for validity of an instrument. As such, specific local law requirements which address the validity of a document, as opposed to a procedural requirement, such as registering an official translation of the underlying agreement, the ratification of the authenticity of signatures before a public notary and the certification of the capacity of the parties involved which are often found in civil law jurisdictions, should not impact the validity of a properly created international interest.

## M. Declarations

The Cape Town Convention is not a “one size fits all” package. Rather, the Convention and the Protocol provide a Contracting State the opportunity to declare whether it will apply certain

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extend to an application by other interested parties, for example, an intending assignor who has invoked Article 25(2) of the Convention or a junior chargee who wishes to have a satisfied senior recorded charge discharged. As such, the Official Commentary suggests that Article 44(1) should be interpreted broadly such that the courts of the Registrar’s jurisdiction should have a residual power, on application of any person who has obtained an *in personam* order, to direct the Registrar to amend or discharge an improper, incorrect or residual registration. GOODE at para. 4.301 (Unidroit 2013).

<sup>170</sup> See Section VI for a discussion on Convention and Protocol Remedies.

<sup>171</sup> Article 14 of the Convention.

<sup>172</sup> *Id.*

Articles of the Convention and the Protocol. Therefore, each State has a choice then to adopt the Convention and the Protocol in whatever manner it deems best. However, to date, the declarations selected by each of the Contracting States have, for the most part, been relatively consistent.<sup>173</sup>

**Practice Note:**

A thorough analysis of the declarations made by a Contracting State is required to obtain an understanding of the rights of the parties to a transaction in that Contracting State. As a Contracting State has the right to modify its declarations at any time (with prospective application), it is advisable to obtain an updated Contracting State certificate in connection with each new transaction.

Declarations under the Cape Town Convention fall into five categories: (a) mandatory declarations, (b) opt-in declarations, (c) opt-out declarations, (d) declarations relating to a Contracting State’s own laws and (e) other declarations.

Mandatory declarations must be made at the time a Contracting State (or Regional Economic Integration Organisation) ratifies the Cape Town Convention. The mandatory declarations are: Convention Article 54(2) [Availability of extra-judicial remedies] and Protocol Article XXX(2) [Relief pending final determination] (in the case of a “Contracting State”), and Convention Article 48(2) [Regional Economic Integration Organisations] and Protocol Article XXVII(2) [Regional Economic Integration Organisations] (in the case of a Regional Economic Integration Organisation).

Opt-in declarations are declarations which must be made by a Contracting State in order for a particular Article of the Cape Town Convention to apply to that Contracting State. The opt-in declarations are: Convention Article 60(1) [Pre-existing rights or interests], Protocol Articles VIII [Choice of law], X [Relief pending final determination], XI [Remedies on insolvency], XII [Insolvency assistance] and XIII [De-registration and export request authorisation].

Opt-out declarations are declarations which must be made by a Contracting State in order for a particular Article of the Cape Town Convention to *not* apply to that Contracting State. The opt-out declarations are: Convention Articles 8(1)(b) [Remedies], 9(1) [Vesting of object in satisfaction], 13 [Relief pending final determination], 43 [Jurisdiction] and 50 [Internal transactions] and Protocol Articles XXI [Modification of jurisdiction provisions] and XXIV(2) [Relationship with the *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft*].

Declarations relating to a Contracting State’s own laws determine whether certain aspects of local law will apply *vis-à-vis* the Cape Town Convention. These declarations are: Convention

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<sup>173</sup> Part of the reason behind the similarities in declarations made by the various Contracting States stems from the OECD’s Sector Understanding on Export Credits for Civil Aircraft (1 September 2011) or “ASU”. The ASU requires five specific “qualifying declarations” be made (and three specific declarations not be made) by a Contracting State in order for transactions to be potentially eligible for discounted export credit agency financing. By virtue of this designation, the qualifying declarations have become a benchmark to determine the sufficiency of a specific country’s declarations.



Articles 39 [Rights having priority without registration], 40 [Registrable non-consensual rights or interests] and 53 [Determination of courts] and Protocol Articles XIX [Designated entry points] and XXIX [Territorial units].

**Practice Note:**

It is important to understand declarations made by a Contracting State relating to that Contracting State's laws since such declarations determine, *inter alia*, whether a non-consensual right or interest can take priority over a registered international interest.

The sole declaration that does not fit into any of the previously described categories is Convention Article 52 [Territorial units].

The effect of the declaration system is that a Contracting State *must* make a declaration if:

- (a) it wishes to adopt the opt-in provisions of Convention Article 60 or under Protocol Articles VIII, X, XI, XII or XIII;
- (b) it wishes to use one of the opt-out provisions to exclude a provision, wholly or partly, i.e. under Convention Articles 8(1)(b) (as to leases), 9(1), 10, 13 or 43 or under Protocol Articles XXI or XXIV(2);
- (c) it wishes to make a declaration related to its own laws, i.e. under Convention Articles 39, 40 or 53;
- (c) the declaration is mandatory, i.e. under Convention Articles 48(2) and 54(2) or under Protocol Articles XXVII(2) and XXX(2) (where a declaration is made under Protocol Article X(2));
- (d) the Contracting State wishes to apply the Convention otherwise than to all its territorial units pursuant to Article 52; or
- (e) it wishes to define the relevant court under Convention Article 53.<sup>174</sup>

## N. Amendments

Care should be taken any time an existing agreement involving an aircraft object is amended to ensure that such actions do not have unaddressed and/or unintended consequences under the Cape Town Convention. If, for example, an existing lease or security arrangement is so fundamentally altered such that a new property right is created, then it is possible that a new international interest may similarly have been created. Furthermore, an amendment to an existing agreement (not otherwise constituting an international interest) may create an international interest which must be

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<sup>174</sup> GOODE at para. 2.276 and (Unidroit 2013).

registered in order to protect an interested party's rights. In each of these scenarios, care should be taken to ensure that the proper registrations in respect of the applicable interest have been made and/or remain effective.

Not all amendments impact the related international interest. For example, the following amendments do not require new registrations because they do not create new international interests: (1) amendments to record a creditor's or debtor's name change<sup>175</sup>; (2) amendments changing the method of payment; and (3) amendments relating to the maintenance or insurance of an aircraft object.<sup>176</sup> The key, then, is to analyze each amendment in order to assess its impact on the underlying agreement under the Cape Town Convention. If an international interest is in some way enlarged, replaced or supplemented by a new interest or a new type of interest, to the potential detriment of intervening creditors, then a new interest should be registered in order to establish and maintain priority.<sup>177</sup> Key to this analysis is the recognition that an original international interest registration may cease to remain effective even though the agreement to which it relates still subsists.

#### **Example 1:**

Amendment which creates an international interest. Lessor and Lessee entered into a lease agreement in respect of an aircraft object. Lessee is situated in a Contracting State but the lease agreement was entered into prior to the effective date of the Cape Town Convention in such Contracting State. Subsequent to the Cape Town Convention coming into effect in such Contracting State, Lessor and Lessee amend the lease agreement to extend the term of the lease agreement. Although at the time of the conclusion of the original lease agreement the Cape Town Convention did not apply, by virtue of the lease extension, a new international interest has been created in respect of the lease agreement (as it relates to the extension period) and should be registered.<sup>178</sup> This would be the case even if the lease itself gives Lessee the option to extend or renew.

#### **Practice Note:**

If the lease agreement provides for successive renewal periods, a registration of a new international interest should be made in connection with each renewal period.

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<sup>175</sup> A change in name is not dealt with as an amendment but rather is effected under Section 5.14 of the Regulations. This provision covers a situation where an entity has changed its name or the applicable registered interest has become vested in a new entity either by merger or otherwise by operation of law. This process should also be used to correct any errors in a name.

<sup>176</sup> GOODE at para. 2.43 (Unidroit 2013). For a chart listing various amendments and their likely effect on a registered international interest, see Annex C hereto.

<sup>177</sup> GOODE at para. 2.45 (Unidroit 2013).

<sup>178</sup> See Annex C hereto which also lists a variety of amendments which may cause a pre-existing (non-Cape Town Convention) interest to become an international interest.

**Example 2:**

Amendment which recharacterizes an international interest. Lessor and Lessee entered into a lease agreement in respect of an aircraft object. Lessee is situated in a Contracting State and an international interest is registered with the International Registry covering such aircraft object naming Lessee as the debtor and Lessor as the creditor. Lessor and Lessee thereafter amend the lease agreement to provide Lessee with a bargain purchase option which, pursuant to applicable local law, recharacterizes the agreement from a lease agreement to a security agreement. As discussed in Sections II.B and III.C. herein, the agreement would, in the first instance, continue to constitute a lease agreement for purposes of determining the applicability of the Cape Town Convention. The international interest registered in respect of the lease agreement should continue to be effective (although depending upon the applicable forum, the available remedial rights under the Cape Town Convention may be altered). If, however, the original lease agreement constituted a pre-existing interest (for instance because it was entered into prior to the effective date of the Convention in the applicable jurisdiction) such that the Cape Town Convention was inapplicable to it, then in that case a new international interest should be registered at the time of the amendment to avoid any potential lapse of priority.

**Example 3:**

Amendment which adds collateral and changes granting clause. Owner and Lender enter into a security agreement in respect of an aircraft object. Owner is situated in a Contracting State and an international interest is registered with the International Registry covering such aircraft object and naming Owner as the debtor and Lender as the creditor. Owner and Lender thereafter amend the security agreement to add additional aircraft objects to the collateral pool and to expand the secured obligations in the granting clause to cover new obligations. The addition of collateral to the collateral pool (to the extent constituting aircraft objects) creates new international interests in respect of such additional collateral and each new international interest should be registered. In addition, the expansion of the secured obligations may create a new international interest in respect of the original aircraft object covered by the security agreement and so it would be prudent to effect a new registration.<sup>179</sup>

**Example 4:**

Amendment to Lease Agreement which increases rental obligation. Lessee and Lessor enter into a lease agreement in respect of an aircraft object. Lessee is situated in a Contracting

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<sup>179</sup> To constitute an international interest, the secured obligations must be determinable in a security agreement; thus it is prudent to register a new international interest when the secured obligations are specifically stated in the security agreement and are thereafter changed. GOODE at para. 4.73 (Unidroit 2013). If, however, a security agreement states its secured obligations generally (i.e., it recites that it secures “all obligations owed by debtor to creditor under all contracts, now or in the future”), then all secured obligations can, for purposes of the Cape Town Convention, be determined and as such the requirements of Article 7(1)(d) of the Convention have been satisfied. GOODE at para. 4.73 (Unidroit 2013).

State and an international interest is registered with the International Registry covering such aircraft object and naming Lessee as the debtor and Lessor as the creditor. Lessee and Lessor thereafter amend the lease agreement to increase the monthly rental payments. Unlike a security agreement (where the Convention requires that the security agreement must enable the secured obligations to be determined), there is no obligation under the Cape Town Convention for a lease agreement to recite the rental obligations or specifically provide for how the rentals are to be determined and as such any amendment to the rents would not require any further registration or have any impact on existing registrations.

**Example 5:**

Amendment that increases a fractional interest in an aircraft object that is acquired by means other than assignment or subrogation. Buyer and Seller enter into an agreement to purchase a 15% interest in an aircraft object. Seller is situated in a Contracting State, thus, Buyer and Seller register the contract of sale in respect of the 15% interest in the aircraft object with the International Registry. Later, Buyer and Seller amend the agreement to increase the interest in the aircraft object to 20%. This increase in the fractional interest in an aircraft object creates a new international interest that should be registered (in respect of the additional 5%).

**Example 6:**

Amendment that adds a new chargee under a security agreement. Owner and Lender A enter into a security agreement in respect of an aircraft object. Owner is situated in a Contracting State, thus, an international interest is registered with the International Registry covering such aircraft object. Later, Owner and Lender A amend the security agreement to add Lender B as an additional grantee. The addition of a new grantee of a security interest creates a new international interest (in favor of Lender B) that should be registered.

**Practice Note:**

There are obviously numerous permutations and combinations that one can consider in terms of what would or may give rise to a new or altered international interest and as the Cape Town Convention has not, to date, been tested on virtually any of these possibilities, the prudent approach adopted by many practitioners would be to register a new interest (particularly because there is little harm in registering an interest when a registration is not required but potential serious harm in not registering an interest that should have been registered).

## O. Subordinations

The Cape Town Convention recognizes that holders of registered international interests may contractually agree to alter the priority of their interests; the holder of a superior interest may subordinate its interest to the interest of a holder of a subsequently registered interest or an unregistered interest (whether pre-existing or subsequent).<sup>180</sup> In order to bind third parties to any such subordination, the subordination must be registered.<sup>181</sup> The holder of a registered interest benefiting from the subordination of a superior interest would, by registering the subordination, protect its priority and bind any subsequent assignee of the subordinated interest.<sup>182</sup>

### Example:

Lessor and Lessee entered into a lease agreement in respect of an aircraft object. An international interest is registered at the International Registry in respect of the lease. Thereafter, Lessor and Lender A enter into a security agreement in respect of such aircraft object and a suitable international interest in respect of the security agreement is likewise registered. As the lease interest predates the security agreement interest, Lender A's rights are subject to Lessee's right to quiet possession and use of the Aircraft.<sup>183</sup> Should Lender A wish to have Lessee's interests subordinated, the parties would need to register a subordination of the lease interest to the interest of the security agreement.

A subordination of an interest may be registered even if the interest to be subordinated has not itself been registered (although, typically, the failure to register an interest would itself result in subordination thereby rendering a subordination arrangement unnecessary).<sup>184</sup>

Note, however, that while not expressly stated in the Cape Town Convention, a debtor cannot register an international interest to assert priority over its own creditor in a manner inconsistent with the rights it has granted to its creditor regardless of whether there is a formal subordination agreement.<sup>185</sup> For example, a conditional seller who registers its interest in an aircraft object and then secures the financing of that aircraft object by granting a mortgage to a financier, cannot assert priority of its interest over that of the financier regardless of whether the interest created by the mortgage is itself registered.

## P. National Interests Arising in Internal Transactions

A Contracting State can declare under Article 50(1) that the Cape Town Convention will not

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<sup>180</sup> Article 29(5) of the Convention.

<sup>181</sup> Article 16(1)(e) of the Convention.

<sup>182</sup> Article 29(5) of the Convention.

<sup>183</sup> See Section II.H herein.

<sup>184</sup> GOODE at para. 2.170 (Unidroit 2013).

<sup>185</sup> GOODE at para. 2.171 (Unidroit 2013).

apply to internal transactions where the centre of the main interests of all of the parties to such transaction is situated, and the relevant aircraft object is located,<sup>186</sup> in the same Contracting State<sup>187</sup> at the time of the conclusion of the contract.<sup>188</sup>

Even though these transactions can be excluded from the Cape Town Convention, including most of the default provisions in Chapter III, the priority rules of the Cape Town Convention, rather than the laws of the State, still apply to them. Furthermore, even though the interest registered under a national registration system itself cannot be registered for purposes of the Cape Town Convention, notice of the internal transaction can and should be registered. Registering notice of the internal transaction gives it the same priority treatment as a registered international interest.<sup>189</sup>

#### Practice Note:

If a Contracting State has made the applicable declaration under Article 50, an internal transaction (for example, a lease from a lessor to lessee, both of whom have their respective centres of main interest in such Contracting State) would have limited protections under the Convention. Under a strict reading of the Convention, that would be the case even if other parts of the related transaction (such as an associated debt facility) otherwise create eligible Convention interests and the transaction is intended as an integrated, structured finance facility (an “**integrated financing transaction**”). The effect of having an internal transaction is that an IDERA would not be effective to provide the rights and remedies otherwise given to valid international interests and the protections otherwise available under Article XI and the general Convention remedies would be unavailable. Nothing would prevent a Contracting State that made that declaration, however, from interpreting the provision more broadly in an integrated financing transaction, so as to record an IDERA and apply Article XI and the Convention remedies. Yet that would, in effect, be a policy decision to enforce such provisions under national law, not under the strict terms of the Convention, though the effect may be substantially the same. Practitioners are advised to presume non-applicability of these provisions in an internal transaction (including an integrated financing transaction), yet consider the position thereon of any Contracting State that made a declaration under Article 50.

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<sup>186</sup> Article IV(2) of the Protocol specifies the location for purposes of an internal transaction: an airframe is located in the State of registry of the aircraft of which it is a part; an aircraft engine is located in the State of registry of the aircraft on which it is installed or, if it is not installed on an aircraft, where it is physically located; and a helicopter is located in its State of registry.

<sup>187</sup> In a Contracting State which has territorial units in which different systems of law are applicable and has made a declaration under Article 52 of the Convention which has the effect of excluding the application of the Cape Town Convention to one or more of those territorial units, a transaction will not be an internal transaction unless the centre of the main interests of all the parties is situated and the aircraft object is located in the same territorial unit and the territorial unit is one to which the Cape Town Convention applies.

<sup>188</sup> Article 50 of the Convention; GOODE at para. 2.246 (Unidroit 2013).

<sup>189</sup> GOODE at para. 2.33(3) (Unidroit 2013).

## Q. Quiet Possession and Use

Article 29(4)(b) of the Convention provides that a conditional buyer or lessee of an aircraft object acquires its interest in such aircraft object free from any interest not registered prior to the registration of the international interest held by its conditional seller or lessor, as applicable.<sup>190</sup> This rule is designed to protect the integrity of the registration system so while a conditional buyer or lessee does not itself possess a registrable interest, it can rely on the registration of its conditional seller or lessor. Article XVI of the Protocol further elaborates on the rights of a debtor and effectively establishes a quiet possession rule (which should be regarded as a supplemental priority rule), which provides that, in the absence of a default, a debtor is entitled to the quiet possession and use<sup>191</sup> of the applicable aircraft object in accordance with the applicable agreement as against its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4).<sup>192</sup> The right to quiet possession and use is intended to protect a debtor not only from physical seizure of an aircraft object but also disablement of such object, restriction of access to such object and similar events. A creditor, however, is only liable for interference for which it is directly or indirectly responsible.

### Practice Note:

Article 29(4) of the Convention and Article XVI of the Protocol apply only to conditional buyers or lessees. As a result, in situations where an agreement is properly characterized as a security agreement, the protections afforded by these clauses would not be available.

Thus, while a conditional buyer or lessee does not itself possess a registrable interest, it can rely on the registration of its conditional sale agreement or lease agreement, as applicable, in order to protect its right of quiet possession and use as against third parties who may subsequently register an interest. The basic principle of these clauses is that parties are not affected by any purported right, lien or other such interest which is not searchable at the time on the International Registry.

### Example 1:

Lessor and Lessee enter into a lease in respect of an aircraft object. Lessee is situated in a Contracting State and an international interest is registered with the International Registry covering such aircraft object naming Lessee as the debtor and Lessor as the creditor. Thereafter, Lessor enters into a back-leveraging financing and grants a lien on the aircraft

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<sup>190</sup> Article 29(4)(b) of the Convention.

<sup>191</sup> Although the term “quiet possession and use” is not defined in the Cape Town Convention, it is certainly reasonable to conclude that this concept is akin to “quiet enjoyment.” The Official Commentary provides that the concept of quiet possession “denotes freedom from interference with the debtor’s possession, use or enjoyment of the aircraft object.” GOODE at para. 3.98 (Unidroit 2013).

<sup>192</sup> Article XVI of the Protocol.

object pursuant to a security agreement (along with an assignment of the lease) to Lender. Lessor and Lender register an international interest in respect of the aircraft object naming Lessor as debtor and the Lender as the creditor. Lessor also assigns the associated rights (and related international interest) in respect of the lease to Lender (and such interests are registered with the International Registry). Assuming Lessee is not in default under the lease and Lessee has not otherwise agreed to subordinate the interest in respect of the lease to that of the security agreement, then Lender would, following a subsequent breach by Lessor of the back-leveraging financing, be entitled to exercise remedies against Lessor so long as the exercise of such remedies does not disturb Lessee's quiet possession and use of the aircraft object.

**Example 2:**

Same facts as Example 1. During the term of the lease, and prior to Lessor's default under its financing, the international interest in respect of the lease is discharged. In this instance, Lender would, following Lessor's breach of the back-leveraging financing, be entitled to exercise remedies against Lessor and, since its interest in the aircraft object has priority to that of Lessee (due to the discharge), Lender would be entitled to disturb Lessee's quiet possession and use of the aircraft object (unless is has otherwise contracted with Lessee not to do so).

**Practice Note:**

As the registration of an international interest in respect of a conditional sale agreement or lease may be discharged solely by the holder of the right to discharge (i.e., the conditional seller or lessor, as applicable, or, in certain cases, a creditor thereof), the derivative protection afforded the conditional buyer or lessee as against third parties in such situation may be extinguished without its consent.<sup>193</sup> It is therefore prudent practice for conditional buyers and lessees to have a contractual commitment that the applicable interests, while still valid, will not be discharged without their prior consent.

## R. Implementation

Historically, international law has been primarily concerned with rights of nations *vis à vis* each other (or those affecting international organisations), and not the rights of individuals or other entities

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<sup>193</sup> GOODE at para. 2.165 (Unidroit 2013). The Official Commentary suggests that:

"[t]his may seem hard on the debtor but is necessary in order to protect the fundamental principle of the International Registry system that third parties should be affected by a registrable interest, and thus of any derivative protection conferred by Article 29(4), only so long as the interest remains registered." *Id.*

For a discussion on the discharge of international interests, see Section IV.F. herein.



residing in those nations.<sup>194</sup> Increasingly, however, international law has moved towards rules that govern the rights of individuals and other entities. The Cape Town Convention is representative of this shift in international law. The purpose of the Cape Town Convention is to create greater consistency and predictability in matters related to aircraft sales, leases and financing by establishing clear, predictable and uniform rules that would govern the conduct of debtors and creditors in various states. Therefore, the relationship between the terms of the Cape Town Convention and the existing local laws governing rights in covered objects is critical to the effectiveness of the Cape Town Convention.<sup>195</sup> Central to any analysis of a transaction involving application of the Cape Town Convention is whether the applicable jurisdiction involved qualifies as a Contracting State. The initial determination centers on whether such jurisdiction has properly ratified, accepted, approved or acceded to the terms of the Convention. This is effected by the deposit of a formal instrument to that effect with the International Institute for the Unification of Private Law (UNIDROIT).<sup>196</sup> But the mere deposit of such instrument with Unidroit may be insufficient, in and of itself, to properly implement the Cape Town Convention in such jurisdiction. By its terms the Convention must apply to the exclusion of otherwise applicable domestic law. However it is not a comprehensive code and therefore coexists with other sources of law where no such conflict is present.<sup>197</sup> Tantamount to the success of the Cape Town Convention is proper implementation in each Contracting State. For present purposes, “implementation” means that the Convention and the Protocol (1) have the force of law in the Contracting State (i.e., a national court would be compelled to apply the Cape Town Convention), and (2) have priority over or supersede any conflicting law in such Contracting State. Failure to achieve either of the foregoing greatly diminishes the benefits intended to be afforded by the Cape Town Convention.

Under the legal systems of numerous countries, the Convention and Protocol obtain the force of national law coincident with such countries’ ratification. In many countries, international treaties constitute the highest form of law (with the exception of constitutional law), and, thus, their legal force is not dependent upon national implementing law. Rather, they take “direct effect” or have “direct application” in such countries upon ratification. In other countries, some form of implementing legislation is required to incorporate or transform these international legal instruments into national law. In these countries, it may be necessary to ensure the primacy of the incorporated or transformed terms, including in respect of subsequent national law.<sup>198</sup>

As with the implementation of any treaty or law, local law advice is critically important. Such advice should come from practitioners well-versed in both commercial and aviation law and treaty practice in the country. Without proper implementation, questions and issues may remain, which ultimately

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<sup>194</sup> Somewhat confusingly given a different meaning in the related lexicon of conflict of laws, such international law relating to the relationships of individuals and other private entities across national borders is commonly referred to as “private international law”.

<sup>195</sup> For a discussion on the interplay between the Cape Town Convention and national law, see Section II.K and Section III.G herein.

<sup>196</sup> Article 47 of the Convention.

<sup>197</sup> GOODE at para. 2.9 (Unidroit 2013).

<sup>198</sup> The AWG has put together resources to guide prospective Contracting States through the ratification and implementation process. These materials can be found on the AWG website ([www.awg.aero](http://www.awg.aero)), and are referred to on the website as “Implementation Resource Materials”.

could defeat the very consistency and predictability the Cape Town Convention seeks to provide and result in the Contracting State not achieving the benefits of the Cape Town Convention. The AWG has undertaken a major project to obtain information on and assess national law implementation<sup>199</sup>, and, as founder of the Cape Town Convention Academic Project (“**Project**”)<sup>200</sup>, the related matter of the manner in which the Cape Town Convention is “applied” in practice, meaning, how national courts and administrative authorities (such as, in respect of IDERAs, the civil aviation authorities) apply and enforce the treaty’s terms.<sup>201</sup> Results of the Project’s work can be found at [www.ctcap.org](http://www.ctcap.org). The work of the AWG and the Project, while not a substitute for timely advice from qualified attorneys, provides tremendous guidance for practitioners seeking to determine the status of the implementation of the Cape Town Convention in any particular jurisdiction.

#### Practice Note:

It is not uncommon to request a legal opinion in connection with a transaction involving the Cape Town Convention from local counsel practicing in the applicable Contracting State stating that such Contracting State has properly implemented the Cape Town Convention.<sup>202</sup> Practitioners should recognize that these types of opinions may prove challenging to give, particularly in those jurisdictions which have more recently ratified the treaty, given the broad and far-reaching aspects of the Convention. It is likely that such issues will, in many jurisdictions, remain unsettled pending resolution either through further legislative action or judicial determination.

## III. Applicability Of The Cape Town Convention

In Section II, we discussed the types of equipment (aircraft objects) which are subject to the

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<sup>199</sup> The AWG has undertaken a project to summarize whether each country that has ratified or acceded to the Cape Town Convention has effectively implemented it. By ‘effective implementation’, AWG means that:

- (i) a strong, commercially oriented set of declarations were made by a country when ratifying or acceding to the Cape Town Convention, and
- (ii) the Cape Town Convention has force of law, and to the extent of any conflict, prevails over other law, in that country.

A summary of AWG’s results can be found at <http://www.awg.aero/assets/docs/CTC%20Summary%20Chart%20-%20Final%20Draft.pdf>.

<sup>200</sup> The Project is a joint undertaking between the University of Oxford Faculty of Law and the University of Washington School of Law which seeks to assist scholars, students, practicing lawyers, judges and other government officials, and industry by providing information on and education about the Convention.

<sup>201</sup> While the Project is engaged in numerous activities, one of its core goals is the development of a comprehensive, digitized, and searchable repository of primary and secondary materials on the Cape Town Convention, the preparatory work leading to its adoption, its implementation in national law, and relevant case law and administrative action. In particular, the Project has established individual databases designed to assist in the area of compliance with the Convention through increased transparency. One database reports any judicial action involving the Cape Town Convention which has been taken. Another database contains reports on administrative and other non-judicial activity related to the Cape Town Convention. The materials it contains are provided by parties involved in the transaction, their counsel, or the government that sought or took such action. Each of these databases can be found on the Project’s website.

<sup>202</sup> See The Legal Advisory Panel of the Aviation Working Group Advanced Contract and Opinion Practices Under the Cape Town Convention: Cape Town Papers Series, Vol. 2 (2008) (also commonly known as the “**Green Book**”). A copy of the annotated form legal opinion from the Green Book is attached as Annex E hereto. Such opinion is, at the time of this writing, being revised and updated and a new form opinion will soon be created to replace the form currently set out on Annex E.

Cape Town Convention as well as the various agreements that fall within its scope (e.g., lease agreements, security agreements, title reservation agreements, bills of sale, assignment and assumption agreements and subordination agreements) and the corresponding interests under the Cape Town Convention created by such agreements. This section will review additional factors relevant to the applicability of the Cape Town Convention to a transaction (often referred to as “connecting factors”), such as the legal location of the debtor (in Convention terminology, where the debtor is “situated”) and, in some cases, the type of aircraft object (airframes and helicopters) and where it is registered or intended to be registered for nationality purposes. It will also review rules relating to fractional interests in aircraft objects. Finally, it will consider specific issues relating to the implementation of the Cape Town Convention in a particular jurisdiction and the transition rules relating to such implementation. The basic rules established under the Cape Town Convention to determine its applicability (which are covered in Section II and this III) are summarized in a diagram attached hereto in Part I of Annex A.<sup>203</sup>

## A. Sphere of Application and Connecting Factors

The Cape Town Convention is applicable to a particular transaction, or certain aspects of a transaction, only if certain prerequisites have been satisfied. Several of these requirements have been discussed above in Sections II.A, II.B, and II.C. The final requirements that must be satisfied are known as the “connecting factors”. The first connecting factor is applicable to all aircraft objects (airframes, aircraft engines and helicopters) and is based on where the debtor is “situated” when the relevant agreement is “concluded.” The other two connecting factors are based on where an airframe or helicopter is registered, or intended to be registered, for nationality purposes (i.e., its State of registration or intended State of registration).

Should these conditions be satisfied (including the connecting factors described herein), the Cape Town Convention would apply in a Contracting State even if its rules of private international law would otherwise lead to the application of the law of a non-Contracting State. Further, the Convention may also be applied in a non-Contracting State whose conflict of laws rules would lead to the application of the law of a Contracting State.<sup>204</sup> Parties to a contract not otherwise sufficiently connected to the Cape Town Convention may not, however, opt into the Convention (and thereby obtain all the benefits afforded to a debtor and creditor thereunder) by choosing it as the applicable governing law of a contract, since conflict of law rules generally require that a choice of law relates to a national legal system (although as between two parties, they could certainly choose to incorporate into their agreement as contractual terms those portions of the Convention relating to contractual rights and remedies, but such agreement would only bind third parties in the same fashion as if the Convention did not apply).

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<sup>203</sup> Additional examples demonstrating the applicability of the Cape Town Convention to specific transactional structures are included in Part II of Annex A.

<sup>204</sup> GOODE at para. 2.30 (Unidroit 2013).

## (I) SITUATION OF THE DEBTOR IN A CONTRACTING STATE.

The Cape Town Convention applies when, at the time of the “conclusion of the agreement” creating or providing for an international interest in, or sale of, an aircraft object, the debtor is situated in a Contracting State.<sup>205</sup> “Debtor” means the lessee under a lease agreement, the grantor or chargor under a security agreement or mortgage, the conditional buyer under a title reservation agreement, or the seller under a contract of sale. The location (or situation) of the creditor (generally the counter-party to the debtor) is not relevant to the applicability of the Cape Town Convention.<sup>206</sup>

### Practice Note:

Where an aircraft object may be subjected to the terms of a master agreement pursuant to the execution and delivery of a supplement, the time of the “conclusion of the agreement” is the time at which the supplement relating to such aircraft object is “concluded” and not the date of the master agreement. If the master agreement is concluded at a time when the debtor is situated in a non-Contracting State but the debtor later becomes situated in a Contracting State and then executes and delivers a supplement for an aircraft object, the Cape Town Convention would be applicable to the master agreement as supplemented by such supplement as it covers the aircraft object. Thus, practitioners must always be mindful of the scenario in which a debtor moves from a non-Contracting State to a Contracting State after execution of a master agreement but prior to execution of the supplement.

For purposes of the Cape Town Convention, a debtor is deemed situated in a Contracting State if any one of the following factors is applicable:

- (i) it is incorporated or formed under the laws of a Contracting State;
- (ii) its registered or statutory seat is located in a Contracting State;
- (iii) its centre of administration is located in a Contracting State; or
- (iv) its principal place of business is located in a Contracting State.<sup>207</sup>

The purpose of having these several factors is to give maximum scope to the application of the Cape Town Convention.<sup>208</sup> The first two factors are objective and typically easy to

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<sup>205</sup> Article 3(1) of the Convention. The term “conclusion” and the phrase “conclusion of the agreement” are not defined in the Convention and are not discussed extensively in the Official Commentary; however, the term and the phrase are generally considered to mean the effective date of the agreement (e.g., when the agreement is signed, delivered and enforceable under applicable law). The Cape Town Convention does not cease to apply after execution merely because the debtor moves to a non-Contracting State (and conversely, the Cape Town Convention does not become applicable to an agreement merely because the debtor becomes situated in a Contracting State after entering into such agreement). GOODE at para. 4.56 (Unidroit 2013).

<sup>206</sup> Article 3(2) of the Convention.

<sup>207</sup> Article 4 of the Convention.

<sup>208</sup> GOODE at para. 4.57 (Unidroit 2013).

ascertain (usually, one may look to the applicable public records to determine whether an entity is incorporated, formed, registered or has a statutory seat in a specific jurisdiction). The latter two factors are subjective and more challenging to ascertain with certainty, particularly when dealing with large, multinational companies that carry on business in several jurisdictions through various subsidiaries or affiliated companies. The “centre of administration” of an entity typically corresponds to the place where the company’s head office functions are performed and control is exercised. Both the centre of administration and principal place of business tests, are fact-based determinations requiring a specific analysis of the debtor and where various aspects of its business are located (e.g., offices, assets, officers, directors, employees, and customers, as well as management, administrative and accounting functions) including the amount of control exerted by any parent company.

**Example 1:**

Owner (which is a special purpose entity) is incorporated and formed under the laws of a non-Contracting State (“**State 1**”), and enters into a financing arrangement with Lender to fund Owner’s acquisition of an aircraft. To secure the loan, Owner grants Lender a security interest in the aircraft pursuant to a security agreement. Owner is wholly owned by Parent, which is organized and situated in a Contracting State (“**State 2**”). Owner has no business other than to own the aircraft and lease it to a third party airline. Furthermore Owner has no employees or assets located in State 1. Its “office” in State 1 is an address shared by many special purpose entities. Moreover, essentially all of the management, accounting and administrative functions with regard to Owner take place at the offices of Parent – in State 2. For purposes of the Cape Town Convention, Owner would be deemed situated in a Contracting State as it has its centre of administration in State 2, a Contracting State (notwithstanding the fact that Owner is incorporated and formed in a non-Contracting State).

**Example 2:**

Lessee is incorporated and formed under the laws of a Contracting State, but has its centre of administration and principal place of business in a non-Contracting State. Lessee leases an aircraft from Lessor (also situated in a non-Contracting State). For purposes of the Cape Town Convention, Lessee would be deemed situated in a Contracting State as it was incorporated and formed under the laws of a Contracting State.

In Example 1 above, for purposes of the Cape Town Convention, Owner would be considered as having its principal place of business and centre of administration in State 2, a Contracting State. As such the Cape Town Convention is applicable to the security interest (international interest) created by the security agreement between Owner and Lender, so Owner and Lender must register

the international interest in the aircraft object with the International Registry in order to establish Lender's priority in the aircraft object. Likewise, under Example 2 above, the international interest created in the aircraft object pursuant to the Lease is subject to the Cape Town Convention due to the fact that Lessee is "situated" in a Contracting State. Therefore, Lessor and Lessee must register the international interest in the aircraft object with the International Registry in order to establish their rights and priorities in the aircraft object and to protect Lessor from the wrongful disposition of the aircraft by Lessee.

**Practice Note:**

Under the tests set forth in Article 4 of the Convention, a debtor may be "situated" in multiple jurisdictions. If any of those jurisdictions is a Contracting State, the Cape Town Convention is applicable to agreements executed and delivered by that debtor with regard to an aircraft object and applicable registrations should be made on the International Registry. Although such registrations may have limited impact a non-Contracting State, if the Cape Town Convention is applicable to certain interests and those interests have been registered, the registrations and the Cape Town Convention should be given effect if the aircraft is located in a Contracting State at the time of exercise of any remedies against it under the applicable security agreement or if the applicable conflicts of laws rules would otherwise apply the Cape Town Convention in such non-Contracting State.

When determining where a debtor is situated one must conduct a reasonable amount of diligence to determine if any of the connecting factors are satisfied. If any of the tests are met, then the debtor is deemed to be 'situated' in a Contracting State and the appropriate registrations must be made on the International Registry to establish priorities and protect owner, lessor and/or lender from the wrongful disposition of the aircraft objects. When dealing with an entity having (i) one of its principal offices, (ii) senior officers with significant decision-making authority, and/or (iii) primary operations in a Contracting State, it would be prudent to consider such entity as being situated in a Contracting State for purposes of the Cape Town Convention (even if it is ultimately determined that the Convention does not apply).

**(II) STATE OF REGISTRATION IS, OR IS INTENDED TO BE,  
A CONTRACTING STATE.**

The Protocol provides that the Cape Town Convention shall also apply in relation to an airframe or a helicopter, if such airframe or helicopter is, at the "time of conclusion" of the applicable agreement, registered or is subject to an agreement to be registered in a national aircraft registry of a Contracting State. Once that connecting factor is established, a subsequent de-registration

from the original state of registry and re-registration in another registry would not impact the continued effectiveness of such connecting factor.<sup>209</sup> This alternative connecting factor does not apply to aircraft engines, for which there is no nationality registration. Where such nationality registration is made pursuant to an agreement for the future nationality registration of the airframe or helicopter, such nationality registration is deemed to have been effected at the time the agreement creating a registrable interest was concluded.<sup>210</sup> As a result, the connecting factor to the Cape Town Convention is satisfied and the parties should make the applicable registrations on the International Registry. This provision covers, for example, agreements that specify that an airframe is to be registered in the national register of the applicable Contracting State when it is completed or delivered by the applicable manufacturer or imported by a debtor.<sup>211</sup>

**Example:**

To illustrate this potential re-registration issue, suppose an airframe is registered on the national registry of Country A, which is a Contracting State. Seller is not situated in a Contracting State. However, pursuant to the applicable sale agreement the parties agreed that the airframe will be re-registered in Country B, which is not a Contracting State. Because Country B is not a Contracting State, this connecting factor cannot be used to apply the Cape Town Convention to the transaction.

A consequence of this additional connecting factor (in respect of an airframe) is that, in certain circumstances, the Cape Town Convention will apply to the international interest covering an airframe but not its related engines (unless, with respect to such engines, the debtor is situated in a Contracting State). In these situations, it is important to consider the various implications, including what Cape Town Convention rights and remedies may be available in respect of the subject airframe but not its related engines.<sup>212</sup>

## B. Partial Application of the Cape Town Convention

The Cape Town Convention does not apply to international interests unless there is a connecting

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<sup>209</sup> Article IV(1) of the Protocol. See also GOODE at para. 3.16 (Unidroit 2013).

<sup>210</sup> *Id.* The “agreement for registration” connecting factor is intended to address the situation where registration (referring to a Chicago Convention nationality registration) is to occur post-closing, thereby allowing the Cape Town Convention to apply using this connecting factor notwithstanding that the aircraft is not yet technically registered in the applicable Contracting State at the time the agreement is entered into. GOODE at para. 5.26 (Unidroit 2013). Based upon the intent of this provision, it would seem that the requirement for an “agreement for registration” should be satisfied by any agreement which simply recites that the applicable aircraft will be registered in a particular Contracting State. GOODE at para. 5.28, Illustration 58 (Unidroit 2013). GOODE points out that the agreement for registration can be contained in any agreement, including a security agreement, title reservation agreement or leasing agreement or an entirely separate agreement (such as a purchase agreement). “No formalities are prescribed for the agreement for registration, which may be in writing or oral or implied, though it must be an agreement which has contractual force.” GOODE at para. 3.16 (Unidroit 2013).

<sup>211</sup> GOODE at para. 3.16 (Unidroit 2013).

<sup>212</sup> See Section VI below.

factor.<sup>213</sup> However, as noted above, some aircraft transactions may be comprised of multiple components, some of which would be covered by the Convention, depending on the “debtors” involved and/or the state of registry for nationality purposes.

**Example 1:**

Lessor, which is organized under the laws of a Contracting State, buys an aircraft from Seller, which is not situated in a Contracting State. Lessor then leases the aircraft to Lessee, which is not situated in a Contracting State. The aircraft is registered in a non-Contracting State. Lessor finances the cost of acquiring the aircraft with a financier and secures the financing with a mortgage over the aircraft in favor of Lender.

In this example, the Cape Town Convention will apply only to the international interest created under the mortgage in favor of Lender with regard to the airframe and engines based on the fact that the Lessor (the debtor under the mortgage) is situated in a Contracting State. The Cape Town Convention will apply to neither (i) the sale from Seller because Seller is not situated in a Contracting State and the airframe is registered in a non-Contracting State, nor (ii) the lease because Lessee is not situated in a Contracting State and the airframe is registered in a non-Contracting State.

If, thereafter, one of the engines subject to the lease was swapped (pursuant to which Lessee conveyed title to a replacement engine to Lessor, the replacement engine is subjected to the mortgage by Lessor in favor of Lender, and Lessor conveyed title to the applicable replaced engine to Lessee), the Cape Town Convention would apply (i) to the contract of sale in respect of the replaced engine being conveyed from Lessor to Lessee, and (ii) to the international interest created pursuant to the mortgage in respect of the replacement engine. In both instances the connecting factor is that the “debtor” (i.e., Lessor, as seller of the replaced engine to Lessee and as grantor/chargor of an international interest in the replacement engine to Lender), is situated in a Contracting State at the time the agreements are concluded.

In this example, if the airframe was registered in a Contracting State at the time the relevant agreements were concluded, the Cape Town Convention would apply to the international interest created pursuant to the mortgage in respect of the airframe and engines (as the connecting factor regarding the location of the debtor is satisfied), but also to the contract of sale from Seller to Lessor and the lease between Lessor and Lessee, insofar as each related to the airframe but not the engines (since the connecting factor relates to the registration of the airframe and the “debtor” under both of those components of the transaction is not situated in a Contracting State at the time the relevant agreements were concluded).

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<sup>213</sup> See Section III.A. above.



### Example 2:

Lessor leases an aircraft to Lessee. Lessee is not situated in a Contracting State. Lessee further subleases the aircraft to Sublessee, who is also not situated in a Contracting State. The aircraft, however, is registered in a Contracting State. In this example, the Cape Town Convention would apply to the international interest created by the lease and the sublease, but only in respect of the airframe (and not the related engines). If Lessee (or Sublessee) were situated in a Contracting State, the Cape Town Convention would apply to the international interest created by the lease (or the sublease) in respect of the airframe and related engines.

## C. Characterization

As stated above, in order to come within the scope of the Cape Town Convention, an interest in an aircraft object must fall within one of the three categories of international interests (namely, (i) a title reservation agreement, (ii) a lease agreement or (iii) a security agreement).<sup>214</sup> As mentioned in Section II.B. herein, whether an interest falls into a category is determined by applying the Cape Town Convention’s own definitions and autonomous rules of interpretation, and not by reference to national law.<sup>215</sup> The fact that national law may define a lease agreement, security agreement or title reservation agreement differently than the Cape Town Convention (or indeed, may not even recognize the foregoing) is irrelevant to the determination of whether an international interest has, in fact, been created.

Once it is established that an interest falls within one of the three categories specified above, its characterization for the purposes of subsequent provisions of the Cape Town Convention is determined by “applicable law” (that is, the domestic rules of the law applicable by virtue of the rules of private international law of the forum state or *lex fori*).<sup>216</sup> While most of the provisions of the Cape Town Convention apply equally to the three forms of agreement listed in clauses (i), (ii) and (iii) above, how an interest is characterized is important in the context of certain provisions of the Cape Town Convention, primarily those pertaining to remedies. For example, an agreement which comes within the Cape Town Convention’s definition of a “*leasing agreement*” but which would be treated under the applicable law of the forum State as an agreement creating a security interest, will carry the rights and remedies (and

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<sup>214</sup> As discussed, a sale of an aircraft object also falls within the scope of the Cape Town Convention (per Article III of the Protocol); however, because an outright sale of an aircraft object should not have characterization issues, it is not discussed here.

<sup>215</sup> GOODE at para. 2.51 (Unidroit 2013).

<sup>216</sup> Article 2(4) of the Convention. See also GOODE at para. 2.51 (Unidroit 2013) which states:

Most legal systems outside North America distinguish sharply between security agreements and title-retention and leasing agreements, treating a conditional seller or lessor as the full owner. By contrast, in the United States, Canada, New Zealand and, more recently, Australia, the law adopts a functional and economic approach, treating title reservation agreements and certain leasing agreements as forms of security and the title of the conditional seller or lessor as limited to a security interest. Given these widely contrasting approaches it was recognized at an early stage that it would not be possible to reach agreement on a uniform [Cape Town] Convention characterization. Accordingly the solution adopted was to leave this to be dealt with under the applicable domestic law as determined by the rules of private international law of the forum State (Articles 2(4), 5(2), (3)).

related obligations) applicable to a “*security agreement*” under the Cape Town Convention.

**Example:**

Lessor leases an aircraft to Lessee (who is situated in a Contracting State) pursuant to a lease agreement and such agreement contains an option to purchase the aircraft at the end of the lease term for a nominal sum. Since the applicable agreement satisfies the requirements for a lease agreement (and assuming all other requirements for coverage under the Cape Town Convention are met), such agreement would constitute an international interest. If Lessee defaults under the lease agreement, the remedies available to Lessor would be governed by Article 10 of the Convention (remedies of conditional sellers and lessors) if, under the domestic rules of the law applicable by virtue of the rules of private international law of the forum state, such agreement would be characterized as a lease. If, however, the lease agreement is, under applicable law of the forum state, recharacterized as a security agreement, applicable remedies would be governed by Articles 8 and 9 of the Convention (dealing with remedies of a chargee or secured party) in lieu of those available in Article 10 of the Convention.<sup>217</sup>

Care should be taken when negotiating the applicable law and forum selection provisions in transactions affected by the Cape Town Convention. Consistent with the Cape Town Convention’s goal of allowing considerable party autonomy on a range of issues, including default remedies and jurisdiction, the parties to a transaction may choose (i) the applicable law,<sup>218</sup> and (ii) the exclusive jurisdiction of the courts of any Contracting State (pursuant to Article 42 of the Convention) in respect of any claim brought under the Cape Town Convention, regardless of whether or not the chosen forum has a connection with the parties or the transaction (such provision is intended to override contrary national law).<sup>219</sup> As the characterization issues in a particular transaction may rely heavily on the *lex fori*, this selection should be considered carefully as it could, as demonstrated above, have material ramifications in terms of the exercise of rights and remedies.<sup>220</sup>

## D. Fractional and Multiple Party Interests

It is not uncommon for two or more parties to acquire an aircraft object jointly as co-owners,

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<sup>217</sup> An interesting situation would arise if a lease agreement (constituting such under the Convention) would be recharacterized as a security agreement under the applicable law of the forum but such security agreement would not qualify as a security agreement under the Convention for failure to satisfy all of the formal requirements for a security agreement under Article 7 (specifically the failure to enable the secured obligations to be determined). While an unlikely scenario, the better view is that such agreement should still have the benefit of the Convention as a security agreement.

<sup>218</sup> The Protocol provides that parties to an agreement may agree on the law that is to govern their contractual rights and obligations. The choice of law selected by the parties is deemed to be the domestic law of the designated State, excluding its conflict of law rules. Article VIII of the Protocol (but only if a Contracting State has made a declaration pursuant to Article XXX(1) of the Protocol).

<sup>219</sup> Article 42 of the Convention provides that the forum selected is exclusive unless otherwise agreed by the parties. For additional discussion concerning forum selection, see Section VI.A(v) herein.

<sup>220</sup> It is possible that a particular jurisdiction would be incapable of recharacterising a particular interest because the applicable laws simply do not recognize any such interest (for instance, a jurisdiction may not have the concept of a security interest). In these situations, the application of the characterization provisions would be uncertain and, as such, it is incumbent upon the parties, by virtue of the forum selection provisions in the agreements, to make certain that they have selected an appropriate jurisdiction which would give greater effect to the intent of the parties.

and in many cases, the documentation will clearly specify the fractional or undivided percentage interest held by each party. Likewise, a lessor, lessee or lender may lease or take a security interest in an undivided percentage or fractional interest in an aircraft object. Moreover, an important and growing portion of the aviation industry involves programs commonly referred to as “fractional programs,” in which companies lease or sell specifically identified percentages or fractional interests in aircraft objects and then manage the operations for the purchasers and lessees. For purposes of this discussion, we will refer to any type of specifically identified percentage interest in an aircraft object as a “fractional interest.”

Although the registration of fractional interests in aircraft objects is not specifically addressed in the Cape Town Convention, that is not a reason to conclude that the Cape Town Convention only applies to whole interests in aircraft objects. This concept has been embraced by the Official Commentary, which states that there is nothing in the Cape Town Convention to preclude a fractional interest from being registrable as a separate international interest.<sup>221</sup>

Currently, the International Registry allows interested parties to specify a fractional interest in registrations affecting aircraft objects.<sup>222</sup> The process for registering a fractional interest is similar to a registration encompassing the entire aircraft object, except that the user must specifically identify the relevant fractional interest. When registering an interest in an aircraft object, the International Registry system defaults to a 100% interest. To the extent a registry user desires to register a fractional interest in the aircraft object, it must select that option and specify the fractional interest, up to six decimal places.

**Example:**

Seller sells an undivided twenty-five percent (25%) interest in an aircraft object to Purchaser. The registry user who initiates the registration must first select “fractional interest” and then select “25.000000%.” The other party to the sale consents in the normal way (consenting parties should always review all of the information pertaining to the registration before providing an electronic consent, but this review takes on even more importance when consenting to the registration of a fractional interest). When the parties obtain a priority search certificate for the relevant aircraft object, the certificate will show the registered sale as covering an undivided 25.000000% interest in the aircraft object.

Each sale of a fractional interest in an aircraft object is separately registrable as a distinct sale of a unique interest. In turn, creditors (i.e., lenders, lessors and sellers under a title reservation

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<sup>221</sup> GOODE at para. 2.47 (Unidroit 2013).

<sup>222</sup> The original design of the International Registry did not allow parties to specify a fractional interest in an aircraft object when registering their interest; however, based on input from the aviation industry, Aviareto Limited (the current Registrar of the International Registry (“**Aviareto**”)) worked quickly to update the registration process, and ICAO (as Supervisory Authority) took prompt action to amend the Cape Town Regulations. See Sections 5.12 and 5.13 of the Cape Town Regulations.

agreement) may also register international interests in fractional interests in aircraft objects by following the same procedure as discussed above. Upon registration, each such international interest is a distinct and separate international interest in an aircraft object to the extent of the fractional interest identified in the registration.<sup>223</sup>

With one exception (discussed below), the priorities relating to fractional interests are clear. Because each registration of a fractional interest creates a distinct and separate interest (whether as a sale or as an international interest), the holders of these registrations are not normally in a priority conflict; each party holds its interest *pari passu* with the other interest holders.<sup>224</sup> A priority conflict may arise when (a) the same party sells, leases or pledges the same or overlapping interests to multiple purchasers or creditors, or (b) parties who hold interests in the same aircraft object, sell or pledge fractional interests that exceed a 100% interest in an aircraft object. In most cases, the resulting priority conflicts will be resolved based on the order in which the interests were registered with the International Registry.<sup>225</sup>

**Example:**

Seller is the owner of an entire aircraft object and sells an undivided fifty percent (50%) interest in such aircraft object to Purchaser 1, who registers that interest on the International Registry. Seller then sells an undivided seventy-five percent (75%) interest in the same aircraft object to Purchaser 2, who also registers its interest. Purchaser 1 is entitled to its full 50% interest because it registered before Purchaser 2. Purchaser 2 is entitled to the remaining 50% interest, despite registering a 75% interest. Purchaser 1 and Purchaser 2 hold their 50% interests *pari passu*.

The preceding paragraph highlights an important issue with regard to fractional registrations. While the International Registry has created a simple system that allows the registration of fractional interests in aircraft objects, the system does not limit the amount of fractional registrations which can be made with regard to an aircraft object. For example, a seller can register multiple sales of fractional interests in an aircraft object to multiple purchasers that can exceed an undivided 100% interest in the aircraft object. Likewise, debtors and creditors can register international interests in aircraft objects that can also exceed an undivided 100% interest in the aircraft object. In light of this, purchasers and creditors must carefully review the priority search certificates to determine that all fractional interests are correctly registered and that registrations of fractional interests do not exceed 100% of the interest in the aircraft object.

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<sup>223</sup> GOODE at para. 2.47 (Unidroit 2013).

<sup>224</sup> GOODE at paras. 2.38, 3.82 (Unidroit 2013).

<sup>225</sup> GOODE at para. 3.82 (Unidroit 2013).

While the ability to register interests that exceed 100% of an aircraft object has created concern for some users, it is no different than what parties can do with regard to whole interests in aircraft objects (i.e., the International Registry system will not stop a party from making multiple registrations of sales or international interests in the same aircraft object). Furthermore, this is consistent with the design of the International Registry system, which places the responsibility of ensuring the accuracy of the registrations on the parties making the registrations.

It is common for a party to acquire additional fractional interests, or to reduce the amount of its fractional interest, in an aircraft object. Since each of these are distinct transactions, each should be the subject of a separate registration of a contract of sale that reflects the additional fractional interest in the aircraft object.<sup>226</sup>

**Example:**

Seller first sells an undivided twenty-five percent (25%) interest in an aircraft object to Purchaser, which is registered on the International Registry. Seller then sells an additional undivided fifty percent (50%) interest in the same aircraft object to Purchaser. The parties should establish their rights and priorities under this transaction through the registration of an additional contract of sale in the amount of an undivided fifty percent (50%) interest in the aircraft object.

As a result of the two registrations described in the above example, a priority search certificate for the aircraft object would reflect two separate registrations of a contract of sale, the first covering the sale from Seller to Purchaser of an undivided twenty-five percent (25%) interest and the second covering the sale from Seller to Purchaser of an undivided fifty percent (50%) interest in the aircraft object. An examination of the priority search certificate would result in the conclusion that Purchaser was the purchaser of an aggregate undivided seventy-five percent (75%) interest in the aircraft object.

Some parties may be tempted to simply register an amendment to the original contract of sale to reflect the new aggregate amount of Purchaser's interest in the aircraft object (i.e., continuing the example above, an undivided seventy-five percent (75%) interest). However, an amendment is the modification of an existing registration, and is generally only used to correct errors in the original registration process (i.e., to reflect a change in the original information that was improperly registered), so it would not be the appropriate method to register a subsequent sale. Because the new sale is a separate and distinct transfer of a unique interest, a new contract of sale registration

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<sup>226</sup> Section 5.13(a) of the Cape Town Regulations.

is required.<sup>227</sup> The same principles are true with regard to an agreement (other than a contract of sale) between a debtor and creditor to increase the fractional interest covered by an international interest. All such matters should be reflected through the registration of a new international interest and not by amending an existing registration.<sup>228</sup>

## E. Helicopters

Helicopters are “aircraft objects” as defined in the Protocol and, other than the size requirements,<sup>229</sup> the Protocol treats helicopters in the same manner as airframes. However, the treatment of helicopter engines under the Protocol is not quite as clear, and the Official Commentary discusses the interplay of the Protocol definitions of “aircraft,”<sup>230</sup> “aircraft engines,”<sup>231</sup> and “helicopters”<sup>232</sup> in reaching a conclusion as to how helicopter engines should be characterized and treated under the Cape Town Convention.

Because there is no defined term for “helicopter engines” and no apparent alternative treatment of such engines, many practitioners initially took the position that helicopter engines were not “aircraft objects” and that interests in helicopter engines were to be perfected under applicable local law. The Official Commentary, however, worked through a comprehensive analysis of helicopter engines and came to the following conclusions:

- (i) a helicopter engine is an “aircraft engine” when it is not attached to a helicopter;<sup>233</sup> but
- (ii) when a helicopter engine is installed on a helicopter, the helicopter engine becomes a component or an accessory of the helicopter and, subsequently, loses the characterization as an “aircraft object,” but any registered pre-installation international interests with respect to such helicopter engine retain their priority.<sup>234</sup>

The Official Commentary further states that while a helicopter engine is installed on a helicopter it is:

- (i) subject to any liens or registrations that already cover such helicopter or that are made

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<sup>227</sup> *Id.* See also GOODE at para. 2.137 (Unidroit 2013).

<sup>228</sup> GOODE at para. 2.138 (Unidroit 2013). Where the increase results from a further grant by the debtor, it represents a new interest which is separately registrable. *Id.*

<sup>229</sup> Under the Protocol, a helicopter must be capable of transporting (i) at least five (5) persons, including crew; or (ii) goods in excess of 450 kilograms. Article I(2)(l) of the Protocol.

<sup>230</sup> “Aircraft” means “aircraft as defined for purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters.” Article I(2)(a) of the Protocol.

<sup>231</sup> “Aircraft Engines” means “aircraft engines (other than those used in military, customs or police services) powered by jet propulsion or turbine or piston technology . . . , together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data manuals and records relating thereto.” Article I(2)(b) of the Protocol.

<sup>232</sup> “Helicopter” means “heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes . . . , together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto.” Article I(2)(1) of the Protocol.

<sup>233</sup> GOODE at para. 3.8 (Unidroit 2013).

<sup>234</sup> *Id.* at para. 3.10.

when the engine is on such helicopter; and

- (ii) not capable of being the subject of the registration of a separate international interest, other than such international interests which were registered prior to such installation.<sup>235</sup>

Consistent with the foregoing analysis, the Official Commentary cautions against registering an international interest with regard to a helicopter engine while it is installed on a helicopter and then relying on this registration to be effective when the helicopter engine is removed from such helicopter.<sup>236</sup> A practical solution suggested in the Official Commentary is to register a prospective international interest in (or sale of) the installed engine which, immediately upon its removal from the helicopter, will become an international interest (or contract of sale) the priority of which will relate back to the time the registration was originally made.<sup>237</sup> Any such interest, when properly registered, would survive any subsequent installation on a helicopter and the creditor's rights would be and remain protected.<sup>238</sup> In the alternative, parties can agree to make a new registration at any time the engine is removed from the helicopter (i.e., when the engine is considered a separate aircraft object).<sup>239</sup>

While there are divergent views in the aviation community as to the treatment of helicopter engines in the Official Commentary, the registration of prospective international interests with respect to an engine while it is installed on a helicopter should provide the desired comfort to ensure the creditor's interests are adequately protected following the removal of such engine.

**Example:**

Owner of a helicopter and the helicopter engine currently installed thereon, grants a security interest in the helicopter and helicopter engine in favor of Mortgagee. The security agreement provides for a current international interest and an international interest that will come into being when the engine is removed from the helicopter (i.e., a prospective international interest). At closing, the parties register an international interest from Owner in favor of Mortgagee against both the helicopter and helicopter engine and, in addition, the parties register a prospective international interest from Owner in favor of Mortgagee against the helicopter engine only.

The scenario above is a relatively clean solution as long as such engine is not subject to

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Article XIV(3) of the Protocol provides that ownership of or another right or interest in an aircraft engine is not affected by its installation on an aircraft (and this interest is not subjected to the provisions of Article 29(7) of the Convention since those provisions are confined to items which are not "objects").

<sup>239</sup> *Id.* GOODE also states that the parties need to enter into a new agreement to cover this scenario; however, parties should be able to address these matters in the original agreement.

competing or conflicting registrations which were made against the engine prior to its installation on a helicopter. That is because the registration of an international interest against a helicopter engine will continue to enjoy the full benefits of the Cape Town Convention, including preservation of priority, after installation even though it thereupon ceases to be an “object” (and such rights and priority are preserved even after its subsequent removal).<sup>240</sup>

**Example:**

Owner is obtaining a loan from Lender A with regard to helicopter sn 123 which includes helicopter engine esn XYZ. Lender A investigates the engine’s documentation and discovers that helicopter engine esn XYZ is actually installed on a different helicopter, helicopter sn 456. Lender B has a registered international interest against helicopter sn 456. Although the priority search in respect of engine esn XYZ reveals no interests that have been registered against engine esn XYZ, such engine’s installation on helicopter sn 456 automatically subjects engine esn XYZ to Lender B’s international interest against helicopter sn 456. One way for Lender A to obtain priority over Lender B in engine esn XYZ would be to require that engine esn XYZ be removed from helicopter sn 456. Upon removal of helicopter engine esn XYZ, Owner would register an international interest in favor of Lender A in and to engine esn XYZ. Absent such removal, Lender B’s interest in helicopter sn 456 (which includes engine esn XYZ) would prevail. In the alternative, Lender A and Lender B could address the issue in an intercreditor agreement whereby Lender B agreed to subordinate its interest to that of Lender A (in which case the parties should register a subordination with the International Registry).

## F. Non-Convention Interests

It is important to note that, while not all (or even any) interests in a particular transaction will constitute “international interests” under the Cape Town Convention, registrations may nonetheless be made in respect of those non-Cape Town Convention interests (“**non-convention interests**”) with the International Registry. This is primarily done with a view to putting third parties on notice of the existence of the non-convention interest. However, while registering a non-convention interest may, depending on what constitutes “notice” under the applicable law, put a third party on actual or constructive notice of the existence of a non-convention interest, registration with the International Registry will not afford such non-convention interest any of the protections, priorities or remedies available to an “international interest” under the Cape Town Convention. Furthermore, where such a non-convention interest must be perfected under applicable law and such perfection has not occurred, registration with the International Registry will likely not provide a “cure” for non-perfection.

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<sup>240</sup> GOODE at para. 3.10 (Unidroit 2013).



The extent to which a court will regard such a registration as putting third parties on notice of a non-convention interest will largely depend upon what constitutes effective notice to third parties under applicable law such that a third party on notice of the registered non-convention interest may lose priority to that interest. For example, in some jurisdictions actual notice must be given in order to affect the interests of third parties. In others, constructive notice will be required to constitute effective notice such that a third party who has not conducted a search but ought reasonably to have conducted a search is deemed to be on notice of the non-convention interest.

Where parties to a transaction agree to register non-convention interests, there is a danger of confusion over which registrations against a particular aircraft object constitute “international interests” under the Cape Town Convention and which do not because the International Registry itself does not identify and distinguish particular interests as being eligible international interests. It is therefore prudent to clearly identify in transaction documentation and legal opinions delivered in connection therewith, which of the registered interests are “international interests” and which are not. Parties registering non-convention interests on the International Registry need to be mindful of their obligations to discharge those interests at the appropriate time.<sup>241</sup>

A distinction must be drawn between the consensual registration of a non-convention interest, which is the focus of the preceding discussion, and the unilateral registration of a non-consensual right or interest that falls outside of the Convention because the underlying interest is falsely claimed, or because the interest, while validly claimed, is not a “registrable non-consensual right or interest”.<sup>242</sup> While the former is a consensual act that is unlikely to evoke controversy or adversely impact anyone’s interests, the latter constitutes a unilateral assertion of claim against title or other interest, and may be expected to invite a defense or counter-claim and could attract liability as a tort.

In order to be a registrable non-consensual right or interest – thus subjecting that type of interest to the Convention’s registry system and priorities – the underlying interest must arise under the laws of a Contracting State that has made an election under Article 40 of the Convention. To date very few types of interest have been addressed in this fashion by Contracting States other than judgment liens and tax liens. So the nature of registrable non-consensual interests today is reasonably narrow. Once a Contracting State establishes a category of interest as a registrable non-consensual right or interest, registration is required in order for the interest to establish its priority as against other registrable interests.<sup>243</sup>

In contrast, many forms of non-consensual interests may arise under national law that are not made subject to an Article 40 declaration, and all of these would be non-convention interests. Any registration of such an interest is invalid for all purposes of the Convention (as is the case

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<sup>241</sup> See Section IV.F. below.

<sup>242</sup> Article 1(dd) of the Convention; GOODE at para. 4.36 (Unidroit 2013).

<sup>243</sup> See Section II.G. above.

with any registration of a non-convention interest), and unlikely to produce any notice benefits under national law because the registration is too misleading to give third parties notice of the underlying right or interest. Such a registration misleads third parties (including the affected debtor) as to the nature of the underlying right or interest, as well as its priority and effect. The registration is misleading as to its nature because the information reflected on a priority search certificate will imply that the underlying right or interest is within one of the categories listed by the relevant Contracting State's Article 40 declaration, when it is not.<sup>244</sup> The registration is misleading as to the priority and effect that the right or interest would be afforded since the appearance of the registration on a priority search certificate implies that priority is tied to the time of registration, when its priority is instead established by national law and is unrelated to the registration in any way.<sup>245</sup>

Practitioners should exercise caution and diligence if asked to register a non-consensual right or interest to ensure that the underlying interest constitutes a registrable non-consensual right or interest. In most cases this may be readily determined by review of the underlying court order or tax levy, and noting that the court or agency is situated in a Contracting State that has made an Article 40 declaration covering the relevant interest. Unlike the consensual registration of a non-convention interest, which requires the agreement of the creditor and the debtor and is therefore unlikely to injure anyone's interests,<sup>246</sup> registration of a non-consensual right or interest amounts to an adverse claim against title, and unless it is based on a valid right or interest may well constitute an actionable tort, such as slander of title.<sup>247</sup> A practitioner who knowingly assists in such a registration could be exposed to claims by the affected parties or to disciplinary charges for violation of applicable codes of ethical conduct.<sup>248</sup>

## G. Regional Economic Integration Organisations

The Cape Town Convention does not just envisage accession by sovereign states but also accession by a Regional Economic Integration Organisation (**REIO**) made up of sovereign states where such REIO has competence over certain matters governed by the Cape Town Convention.<sup>249</sup>

At the date of writing, the European Union is the only REIO to have acceded to the Cape Town Convention and Aircraft Protocol.<sup>250</sup> The declarations made by the EU at the time of its

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<sup>244</sup> GOODE at para. 4.282 (Unidroit 2013).

<sup>245</sup> GOODE at para. 2.33(4) (Unidroit 2013).

<sup>246</sup> GOODE at para. 4.148 (Unidroit 2013).

<sup>247</sup> *Transfin v. Stream Aero Investments SA and Aviareto Limited* (Irish High Court – unreported) 13 May 2013; see also RESTATEMENT (SECOND) OF TORTS § 623A.

<sup>248</sup> *Transfin v. Stream Aero Investments SA and Aviareto Limited* (Irish High Court – unreported) 13 May 2013; also, any one or all of the American Bar Association's Model Rules 4.1 (relating to false statements by an attorney), 4.4 (relating to an attorney using means that have no purpose other than to burden a third person) or 8.4(c) (relating to attorney conduct that involves dishonesty or misrepresentation) could be cited as a basis for a disciplinary charge in a proper case.

<sup>249</sup> See Article 48 of the Cape Town Convention. Note that under Article 48.2, an REIO has to make a declaration at the time of the signature specifying the matters governed by the Cape Town Convention in respect of which it has competence.

<sup>250</sup> Council decision of 6 April 2009 (2009/3704/EC).

accession to the Cape Town Convention and Aircraft Protocol, and the Council Regulations and European Parliament Regulations referred to in those declarations, affect the capacity of member states to make declarations under Aircraft Protocol Article VIII (Choice of Law), Article X (Modification of provisions regarding relief pending final determination) and Article XI (Remedies on Insolvency).

It was concluded at the Unidroit Seminar – the European Community and the Cape Town Convention – held in Rome on 26 November 2000 that the effect of the EU declarations was that, under EU law, an EU Member State who has ratified the Cape Town Convention and Aircraft Protocol:

- would neither be able to make a declaration under Aircraft Protocol Article VIII, nor amend its national laws on the subject of Article VIII.
- cannot make declarations under Aircraft Protocol Articles X and XI but could, if it chooses to do so, amend its substantive national law to produce the same substantive outcomes as if a declaration under Articles X and XI had been made; and
- can make all other declarations available to be made by a contracting state under the terms of the Cape Town Convention and the Aircraft Protocol.

It is of note that, breach by an EU Member State of the requirements of the EU declarations is a breach of EU law only and not a breach of the Cape Town Convention itself. It is a matter solely for the EU to take steps to secure compliance by its member states in the event that a declaration is deposited by a member state in contravention of the Council’s Decision.

## H. Relationship with Other Treaties

The Protocol expressly addresses the relationship between the Cape Town Convention and three other treaties: (i) the Convention on the International Recognition of Rights in Aircraft signed at Geneva on 19 June 1948 (the “**Geneva Convention**”); (ii) the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft signed at Rome on 29 May 1933 (the “**Rome Convention**”); and (iii) the UNIDROIT Convention on International Financial Leasing signed at Ottawa on 28 May 1988 (the “**International Financial Leasing Convention**”). As a practical matter, the Geneva Convention is by far the most important of the three.

### (I) GENEVA CONVENTION.

The Geneva Convention may be characterized as establishing an international choice of law rule. Broadly speaking, the Geneva Convention states agree that certain rights<sup>251</sup> recorded in the

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<sup>251</sup> To qualify as a right within the scope of the Geneva Convention, the following criteria must be satisfied: (i) the right in the aircraft must be any one of a “right of property”, a right of possession coupled with a purchase right, a lease of six months or more or a mortgage or similar right; (ii) the right must be “regularly recorded in a public registry” in the state of registry; and (iii) the interest must be constituted in accordance with the law of the state of registry.

state of registry take priority over rights that are unrecorded or recorded in other jurisdictions.<sup>252</sup> The validity, enforceability and perfection of such Geneva Convention recognized rights are all governed by the law of the state of registry.

Because the Geneva Convention has been adopted by eighty-nine countries, and its application turns solely on the place of aircraft registry, while application of Cape Town Convention may be based on either the place of aircraft registry or where the debtor may be situated, there are many situations in which both the Cape Town Convention and the Geneva Convention may be applicable. A priority conflict may arise in a case where one creditor, who has taken all appropriate steps to register its interests in accordance with the Geneva Convention, competes for priority against another creditor who has registered its interests under the Cape Town Convention, raising the question of which of the treaties should be given priority.

Fortunately, Article XXIII of the Protocol establishes a priority rule that applies where both the Geneva Convention and the Cape Town Convention cover a particular interest and the priority issue is presented in a forum jurisdiction that is a party to both such treaties. In that case, the applicable Cape Town Convention Contracting State is required to give priority to the Cape Town Convention whenever one of its courts is the forum for a dispute.

It is possible to render such potential conflicts moot. No conflict arises if the parties follow the rules of both treaties by making all the registrations that are advisable under the law of the jurisdiction in which the aircraft is registered and under the Cape Town Convention, if the transaction has a connection to a jurisdiction that has adopted the Cape Town Convention.

**Practice Note:**

As a general rule, if an aircraft is on the registry of a country that has adopted the Geneva Convention, it is advisable to follow the country of registry requirements for constituting and registering a lease or a security interest (so long as there is no significant burden or cost for doing so) and also to follow the Cape Town Convention requirements for registering any interests that constitute international interests. Of course, such an approach is equally advisable when the jurisdiction of registry is not a party to the Geneva Convention.

There are at least three reasons to follow this approach to registrations regardless of any analysis as to which treaty, the Geneva Convention or the Cape Town Convention, will be given priority in the particular circumstances:

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<sup>252</sup> There are a number of matters addressed by the Geneva Convention that differ from the Cape Town Convention but are beyond the scope of this discussion. Although Article XXIII of the Protocol establishes the priority of the Cape Town Convention over the Geneva Convention when the two conflict, such matters could nonetheless prove important in a number of circumstances. These include: (i) definition of and the priority accorded to certain types of non-consensual rights and interests; (ii) limitations on period for which accrued interest may be secured; (iii) the effect of knowledge of the competing interest; (iv) the procedures applicable to foreclosure; and (v) differing treatment of an engine depending upon whether the engine is deemed a spare part that is maintained for temporary installation on various aircraft or instead is a part of a particular aircraft (whether or not installed).

- 1) There is typically no disadvantage to completing all potentially applicable registrations.
- 2) Completing all potentially applicable registrations ensures that third parties are discouraged from challenging the creditor's rights on the basis that a required registration was not completed.
- 3) Choice of law rules are forum specific. It may be difficult or impossible to predict the forum in which a battle over the priority of conflicting interests will arise.<sup>253</sup>

Note that applicability of the Cape Town Convention priority rule is limited to cases involving a conflict of law that is litigated in a Cape Town Convention Contracting State and which involves an interest that has been validly constituted and registered under the Cape Town Convention. Whether the Cape Town Convention priority rule or the Geneva Convention priority rule will apply at all depends upon whether the forum that is ruling on the question is a party to neither, both or just one of such treaties, and whether the competing interests were constituted and registered in accordance with neither, one or both of such treaties. If a particular state is signatory to both the Cape Town Convention and the Geneva Convention, the Geneva Convention (even though it has been superseded as described above) would nonetheless provide a benefit in situations where specific competing interests arise under another Geneva Convention jurisdiction which is not also a Cape Town Convention jurisdiction (in this case the Geneva Convention would complement the Cape Town Convention where the applicable law is that of such Contracting State to the Cape Town Convention, since for purposes of the Geneva Convention the law of a contracting state party to the Geneva Convention will then include the law incorporating the Cape Town Convention).

## **(II) ROME CONVENTION.**

The Rome Convention establishes certain limitations on the rights of private parties to arrest and detain aircraft, and thus where applicable would conflict with certain of the remedies created under the Cape Town Convention. As between two Contracting States, Article XXIV of the Protocol provides that the Rome Convention is superseded in its entirety (and not only as to matters that are inconsistent with the Cape Town Convention) unless the forum Contracting State has opted out Article XXIV. The Rome Convention was not widely adopted and, in any case, through the date of publication of this Guide none of the Contracting States have made an opt out declaration under Article XXIV.

## **(III) UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING.**

The UNIDROIT Convention on International Financial Leasing (Ottawa, 1988) establishes certain substantive rights of a lessor and a lessee in certain leasing transaction between persons

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<sup>253</sup> The potential jurisdictions in which a matter may be litigated include the place of the debtor, the place of one or the other of the two competing creditors, the place where the aircraft is located at the relevant time, or the place where the aircraft is registered. The number of possible forums is therefore more than four, and potentially a very large number because an aircraft may be present in most any jurisdiction from time to time. Thus it may not be possible to determine whether the forum will be one that follows the Geneva Convention or the Cape Town Convention.

who have places of business in different countries. As between two Contracting States, Article XXV of the Protocol provides that such Convention is superseded in its entirety (and not only as to matters that are inconsistent with the Cape Town Convention). There is no ability for a Contracting State to opt out of Article XXV of the Protocol.

## IV. Registering An Interest

One of the essential features of the Cape Town Convention is the establishment of the International Registry, a central online registry of interests in aircraft objects. This section will provide an overview of the International Registry, some of its technical features, and the variety of users and entities which may make use of the registry. This section also explores the various search features of the registry and the requirements for discharging a registered interest.

### A. International Registry

The International Registry is an electronic web-based system, operated by Aviareto<sup>254</sup> as Registrar, established pursuant to the Cape Town Regulations as the facility for effecting and searching registrations created under the Cape Town Convention.<sup>255</sup> It is available for use seven days a week on a twenty-four hour basis except for limited periods during which it may be closed as necessary for maintenance, technical upgrades or other special circumstances.<sup>256</sup>

The International Registry provides for the registration of interests as against particular uniquely identifiable aircraft objects rather than against parties to a transaction. Registry users can perform searches with respect to aircraft objects (but not with respect to transaction parties), which searches will list all registrations (including registrations which have been discharged) with respect to said objects.

Interests are registered electronically with the consent of the appropriate parties. No documents are deposited with the International Registry, which keeps administrative costs of the International Registry to a minimum, and protects the confidentiality of the terms of each transaction. Because the International Registry is an electronic database searchable over the worldwide web,<sup>257</sup> a user must have a computer with internet access and the necessary software to access the International Registry (primarily an up-to-date browser and Java). The search function of the International Registry is fully open to the public, but there are restrictions established by the Cape Town

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<sup>254</sup> Aviareto Limited, based in Dublin, Ireland, is a joint venture of the Irish government and SITA. In June 2014, the Council of ICAO opted to reappoint Aviareto to operate the International Registry for a third five year term from 2016 to 2021.

<sup>255</sup> Section 3.1 of the Cape Town Regulations.

<sup>256</sup> Section 3.4 of the Cape Town Regulations.

<sup>257</sup> The web address is <https://www.internationalregistry.aero>.

Regulations which are designed to ensure that only authorised users make registrations.<sup>258</sup>

## B. User Entities and the Registration Process

### (I) INTRODUCTION AND DEFINITIONS.

A prerequisite to registration of an interest is that each party to the transaction or agreement giving rise to said interest establish an account with the International Registry. A legal entity or an individual with an account on the International Registry, for purposes of being a named party in a registration, is referred to as a “transacting user entity” (“TUE”).<sup>259</sup> When undertaking the process of establishing an account, a prospective TUE must appoint an “administrator” – an individual who will have, *inter alia*, the authority to consent to registrations on behalf of its TUE. The administrator of a TUE will also have the ability to authorize other employees of the TUE (referred to as a “transacting user” (“TU”)) or an employee (each a “professional user” or “PU”) of a “professional user entity” (a “PUE”) to consent to registrations on behalf of such TUE. A PUE is a firm or other grouping of persons providing professional services to a TUE, typically a law firm or other company that assists TUEs in making registrations on the International Registry when it is authorized to do so. A prospective PUE must establish an account with the International Registry in order to act in such capacity and must also appoint an administrator who may further approve professional users within that PUE. A professional user or PU is typically an employee, contractor or agent of a PUE. The PUE administrator and all professional users may request authorization from a TUE to consent to registrations on behalf of such TUE. The TUE receiving such requests may reject them, approve them for the individual in question or for all or some members of the PUE. The TUE may also revoke authorisations it has granted. Additionally, those holding such authorizations (i.e., a PUE and professional users) may renounce them. All authorization requests, approvals, rejections, and renunciations are done electronically.

TUEs and PUEs are together referred to as “registry user entities” (“RUEs”); TUs and PUs are together referred to as “registry users” (“RUs”).

### (II) ESTABLISHING AN ACCOUNT; APPOINTMENT OF ADMINISTRATORS.

1. Establishing the Account. To establish an account with the International Registry, the prospective administrator of a prospective RUE must make an application on-line at, and follow the instructions on, the International Registry website. The applicant must provide the legal name, entity type (e.g., corporation, limited liability company, etc.), address and state of incorporation or formation of the prospective RUE and his or her own legal name, phone number, email address, job title, date of birth and address, and must create a password which

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<sup>258</sup> GOODE at para. 2.146 (Unidroit 2013). See also Section 4 of the Cape Town Regulations and Section 7 of the Cape Town Procedures.

<sup>259</sup> Section 2.1.17 of the Cape Town Regulations. A “transacting user” means an individual employee, member, or partner of a TUE or an affiliate of that entity. *Id.*

is stored locally on the computer that the administrator will use to interact with the registry. The password will be used when digitally signing or making consents on the website.<sup>260</sup> The applicant must pay for the account and provide the International Registry with the following items by email (preferred) or by fax: (x) evidence of its existence, such as a certificate of formation or good standing and (y) Certificate of Entitlement to Act (“CEA”) in a form prescribed by the International Registry, which must be on the letterhead of the applicant and signed by a person who has authority to act for the applicant. The CEA is the official appointment of both the administrator and a “back-up contact”<sup>261</sup> for the entity.

An official at the International Registry will verify, according to the standards set forth in the Cape Town Regulations, that (i) the entity exists and its contact details are accurate, (ii) the proposed administrator and back-up contact may be contacted at the email addresses and phone numbers provided by the administrator and (iii) the CEA form nominates such individuals to act in these roles on behalf of the entity. This account vetting is carried out by phone and email and typically takes one or two business days once all documentation has been received. Once vetting is successfully completed, the registry official approves the account and sends to the administrator an email containing a link to its digital certificate. The administrator must download the digital certificate into the same keystore associated with the password previously created (i.e., the certificate must be downloaded onto the computer from which the original application was made and upon which the password was created). The keystore also contains the private key for the administrator. The private key and password are never transmitted to the International Registry.

**Practice Note:**

Due to the electronic nature of the International Registry, it is vital that all computers and networks from which the registry is accessed are adequately secured. Best practice is the standard and that will certainly include, at least, anti-virus and anti-spyware software; network and device level firewalls; regularly patched Operating Systems, Browser and the latest Java software; adequate access control at the operating system level and sound security practices such as not sharing passwords. For machines that leave the office, encryption is a must. Backups are also recommended. Providing adequate security is mandatory and will require the skills of a professional in the field.

The administrator should carefully choose the specific computer that will house the keystore, because the administrator will be able to interact with the International Registry from that computer

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<sup>260</sup> Currently, the International Registry offers a one year license costing \$200 (the International Registry previously offered a 5 year license but this option was terminated). Payment should be made on-line and by credit card.

<sup>261</sup> Section 5.12 of the Procedures under the Cape Town Regulations requires a RU to appoint a “back-up contact” in order to assist should a security breach occur which could reasonably be expected to result in unauthorised access to and use of the International Registry. As part of the application process, the applicant will need to provide the name, email address, phone number and job title of the back-up contact to the International Registry.



only (although it is possible to transfer the keystore to another computer with support from a registry official). If the computer that holds a digital certificate is damaged or otherwise inoperable, the applicable user will have to contact the International Registry to obtain a replacement digital certificate at a cost of \$10. The use of a digital certificate in order to effect registrations on the International Registry is password protected but the International Registry does not have access to the password, so if it is lost a replacement digital certificate will be needed. However, in many cases, a keystore contains several digital certificates each of which costs \$10 to replace whether the PC is lost or the password forgotten.

2. The Administrator. The administrator is the individual who typically conducts the business and communication between a RUE and the International Registry.

The administrator of a TUE can take the following actions: (i) make any and all registrations on behalf of a TUE, (ii) electronically authorize new TUs within the TUE to make registrations on its behalf with regard to specifically identified aircraft objects, (iii) electronically authorize PUs to make registrations on behalf of the TUE with regard to specifically identified aircraft objects, (iv) manage the International Registry account and communicate with the International Registry on various issues, and (v) revoke authorizations of TUs and PUs.

The administrator of a PUE can take the following actions: (i) make any and all registrations on behalf of a TUE when so authorised with regard to specifically identified aircraft objects, (ii) electronically approve PUs from within the entity, who can then make registrations on behalf of a TUE if authorised to do so with regard to specifically identified aircraft objects, (iii) manage the PUE International Registry account and communicate with the International Registry on various issues, and (iv) revoke the account and hence the authorizations of PUs.

The administrator must be an individual, but need not be an employee of the TUE or PUE for which he or she acts in such capacity.<sup>262</sup> To act in such capacity, civil law jurisdictions require appointment via a formal mandate, which is in its civil law nature revocable. Thus, ensuring the properly authorised capacity of the administrator of a PUE or TUE is imperative to avoid issues of legality, capacity and registration. The administrator must be an individual, but need not be an employee of the TUE or PUE for which he or she acts in such capacity. The administrator therefore acts on the basis of a mandate (i.e. as agent) granted by a TUE or PUE. One should however be aware that particularly in civil law jurisdictions, a mandate is generally revocable (by the entity granting the mandate) by its nature. Furthermore, bankruptcy is generally another instance in which a mandate is considered to be revoked in some civil law jurisdictions. This may therefore give rise to ‘capacity’ issues of the administrator on acting on behalf of the said TUE or PUE and the relevant parties should therefore confirm that the said administrator does not cease, as a result of bankruptcy, to have capacity to act on behalf of the said TUE or PUE at all relevant times.

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<sup>262</sup> While the establishment and maintenance of an account is relatively easy, many registry users have opted instead to engage law firms or other service companies to assist in establishing the TUE account and to act as an administrator for the TUE.

**Practice Note:**

There are three main approaches to using the International Registry. The practical realities of how the International Registry system works, combined with the nature of the organisation wishing to make registrations, shapes the approach taken.

A. Transacting User Entity (TUE) makes registrations directly through an employee or legal advisor, *i.e.*, a directly controlled administrator

A TUE may appoint an administrator, often an employee or a legal advisor, to make registrations directly on the International Registry. The benefits of this approach are control, speed and reduced costs. This approach is often used in simpler transactions that are well within the professional capabilities of the TUE in question. As the International Registry becomes simpler to use, and with the introduction of Generation II, the use of this approach is expected to become more common relative to the other two approaches.

B. Professional User Entity (PUE) makes registrations on behalf of one or more TUEs, having been authorized, on a per-object basis, by each such TUE

Many of the larger aircraft-owning firms, such as airlines, prefer to use this standard Professional User Entity approach and authorize a PUE to make registrations on their behalf on a per-object basis. This works well for them as they have in-house legal expertise, and often engage legal advice on structuring a deal and then use the PUEs to co-ordinate the registrations.

One key benefit of using PUEs is that they can co-ordinate a complex set of registrations. Several TUEs sometimes appoint the same PUE to make registrations. This allows the parties to agree on the order and details of the registrations and the PUE can execute the registrations on the International Registry as required. Without that co-ordinating role, the sequential nature of the International Registry can be a challenge for deals involving more than two parties. The Closing Room in Generation II (discussed on the following pages) will help to resolve this co-ordination problem and may, therefore, affect the PUE business. However, it is the Registrar's role to make the International Registry as efficient as possible and, as we have seen previously, the industry will adapt and may use the system in ways which are not now foreseen. The Closing Room will require the services of a nominated Coordinating Entity and it is likely that this duty will fall to PUEs due to their independence and their trustworthiness.

C. Professional Administrator (PA) makes registrations directly on behalf of a TUE having being contracted to do so, *i.e.*, controlled through a contract for professional administration services

When the International Registry went live in 2006, it was anticipated that entities wishing to be named parties in registrations would take either approach A or B above. A “compromise” approach, which some saw as the best of both worlds, developed whereby entities established TUE accounts but appointed what could best be described as Professional Administrators (PAs) to administer these accounts.

The term “Professional Administrator” is not an official one and it is not found in the Cape Town Regulations and Procedures. When we use this term here we refer to a professional, appointed as administrator for an entity but who is not an employee of or legal advisor to, that entity. A PA represents the entity solely for the purposes of making registrations on the International Registry and sometimes also for making local filings, for example with the Federal Aviation Administration in the United States of America.

Several firms, particularly in Oklahoma (USA), have developed a line of business where they provide PA services to hundreds, and in some cases thousands, of TUEs. The TUE agrees to a contract with the firm providing the service and confirms to the Registrar that the PA is entitled to act as administrator for their TUE. This means that the TUE does not have to authorize registrations on a per-object basis. However, there is a loss of control, as the PA is empowered on the IR system to make all registrations on behalf of the TUE. If a disagreement arises, the TUE, often through their nominated Back-Up Contact<sup>263</sup>, can request that the account be disabled and can then appoint a replacement administrator.

If a TUE decides to use a PA, it should satisfy itself that it has adequate contractual protection covering, *inter alia*, how the PA will manage and use the account on the IR, that the process for instructing the PA to make registrations is formally agreed, that the PA is required to inform it of any notices it receives from the IR and that the firm providing the PA service has adequate insurance and expertise. It may also be useful to include arrangements in the contract for the PA to assist in transferring the account to another administrator if necessary, to ensure that the PA will comply with the Cape Town Regulations and Procedures and, most importantly, will maintain a secure IT infrastructure (including anti-virus, anti-spam and backup of the digital certificate).

One useful and free way of ensuring that the TUE is informed of registrations as they are being made is to require the PA to add the TUE email address to the notification list for each registration it makes. This ensures that many of the IR notices will come directly to the TUE as well as to its PA. It may also be useful to appoint the Back-Up Contact from within the ranks of the TUE, allowing direct control over the account in the case of a disagreement.

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<sup>263</sup> This is a person appointed by the entity pursuant to Section 5.12 of the Cape Town Procedures.

It is important to ensure that arrangements have been agreed, including who pays, when a PA leaves the employment of the firm providing PA services as there is a fee for replacing an administrator. The decision to use a PA should not be taken lightly, although it has proved successful for many TUEs when managed properly.

### **(III) REGISTRATION PROCESS OVERVIEW.**

There are two methods of making registrations and either can be used. The first, using features referred to as Multiple Object registration (MOR) and the second using features referred to as the Closing Room (CR).

#### **MOR:**

In order to effect a registration using MOR, a TUE (by and through its administrator, an authorised a TU or an authorised PUE administrator or an authorised PU) must begin the creation of a new registration by entering the required data in the appropriate electronic form with the International Registry and consenting to it. The registration can be applied to multiple objects, hence the name MOR. Once this has been accomplished and the applicable fee has been paid, the other TUE party to such interest(s) will be given notice that a registration(s) has been initiated and will have 36 hours in which to consent.

#### **CR:**

The Closing Room is a sophisticated feature, made available on the International Registry in May 2015, which is well described in an Appendix to the Cape Town Regulations. Essentially, it permits a Coordinating Entity to preposition registration data for multiple registrations and for multiple objects into a file. Prior to going live these are referred to as pre-registrations. They have no legal standing as registrations and the Cape Town Regulations are very clear on that matter. This file can be worked on and adjusted over time. Once all of the parties are satisfied with the pre-registration data, the CR is 'Locked' i.e. pre-registration data can no longer be altered. Once locked, the pre-registrations are available for consent by the parties or anyone authorised by the parties. AEP codes, if required, may be entered at this stage, or earlier. The final step to bring these pre-registrations live is to pay and then release the pre-registrations. The benefits of this approach are that it allows coordination, flexibility and changes while a deal is being negotiated and allows the pre-registrations to be lined up in advance and brought live with one click when appropriate. The CR feature is complex and should only be used by those who are fully aware of its operation. There is video material provided by the International Registry on YouTube (<https://www.youtube.com/user/IntlRegistry>) and on other video sharing sites.

#### **Object Identification:**

Much of the data for a registration is available via electronic information relating to the aircraft

object provided by the International Registry website (“**Registry Description**”), and such Registry Description **must be used** where available.<sup>264</sup> This data includes the Manufacturer, Generic Model Designator<sup>265</sup> and Manufacturer Serial Number (MSN) of the applicable aircraft objects and the names of the TUEs who are the parties to registrations.<sup>266</sup> Once the registration is searchable, it is complete and the Registrar automatically provides prompt electronic notification of registration to the named parties and the registering person.<sup>267</sup> The registering party and all parties to the registration should then search their own registration to confirm its accuracy. All registrations with respect to an aircraft object are set forth in a priority search certificate available from the registry.

#### (IV) THE REGISTRATION PROCESS.

A TUE administrator may either make a registration directly or authorize a TU or an administrator or PU of a PUE to do so.<sup>268</sup>

TUs and PUs may make registrations in respect of an object by requesting authorization from, and being granted authorization by, the TUE administrator of the parties to the registration. Such authorizations apply to specific aircraft objects only as an administrator cannot provide a TU or PU with blanket authorization to make registrations. Therefore, the first step for an International Registry user is to ensure that it has authorization to make the relevant registration. For PUs, there is a “request authorization” function on the website through which he/she can request permission from a TUE administrator to “work on” (i.e., submit registrations with respect to) a particular aircraft object. When a PU has requested and received authorization from the administrator of each TUE party to a particular interest, the PU may register that interest without the need for further consent from such TUEs.

In requesting an authorization, the critical elements are: (i) selecting the correct aircraft object identifier (manufacturer, generic model and manufacturer’s serial number) in the correct format and (ii) selecting the correct TUE. In the case of clause (i) above, where the data is supplied via the Registry Description,<sup>269</sup> that data should, if correct, be used (and Section 5.1 of the Cape Town Regulations makes such use mandatory where available). Where such data is not available, the user has the option of entering the data directly, which is commonly referred to as a “free text” entry; however, as noted in Section IV.H., the use of free text entries should only be made when the

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<sup>264</sup> See Section IV.G. below, and, in particular, Section 5.1 of the Cape Town Regulations.

<sup>265</sup> The Convention and the Protocol, together with the regulations related thereto, specifically contemplate the use of “generic model designations” as opposed to model designations specific to a particular party (so, for example, a “737 322” airframe is identified by the generic form “737 300”). See Article 7(c) of the Convention; Article V(1)(c) of the Protocol. See *also* Section 5 of the Cape Town Regulations. This is consistent with the Cape Town Convention’s basic intent of universality and simplicity.

<sup>266</sup> While information can be entered manually (that is, not from the Registry Description), this practice is highly discouraged as it could lead to inaccurate or misleading registrations or searches, which is not the desired effect under the Cape Town Convention.

<sup>267</sup> Section 6.2 of the Cape Town Regulations.

<sup>268</sup> Special rules would apply if the applicable Contracting State designated an entity in its territory as a “direct entry point.” See Section VI.A. below for a discussion on entry points.

<sup>269</sup> The Registry Descriptions included on the International Registry are populated from information provided by manufacturers, who routinely update such information. When new equipment is manufactured and is to be delivered the manufacturer will typically ensure that the equipment can be found on the Registry. In situations where the new equipment is not listed, it is a preferred practice to enlist the help of manufacturer in order to update the information available on the International Registry as opposed to free-texting the relevant information.

information is not available through the Registry Description as the use of a free text description increases the risk of inaccuracy and hence the risk that the intended registration will not be given proper effect. A registration made using an incorrect or incomplete aircraft object identifier may allow a subsequent registration covering the correctly identified aircraft object to take priority over a prior registration covering the incorrectly identified aircraft object. The practitioner must therefore be very careful to identify an aircraft object correctly.

With respect to the selection of the correct entity for a registration, the user must note that many entities have similar names and it may be necessary to perform additional due diligence before selecting a particular entity. The user should note that a name may not be unique and information on where the firm is registered or situated may be necessary to select the correct entity. Moreover, in dealing with a trust or trustee, where names can be both similar and lengthy, and the subject of abbreviation, it is essential to confirm as much information as possible about the name and to carefully review all of the information on the website to be certain the correct entity is selected.

When a TUE administrator receives notice of a request for authorization from a TU or PUE, the administrator should carefully review the notice to ensure that the requesting party selected the correct aircraft object identifier as this will be the aircraft object upon which the registrations will be made. The TUE administrator should also carefully manage authorizations of PUEs to work on particular aircraft objects. This includes renouncing authorizations after they are no longer necessary. There is no cost to renouncing or approving authorizations, and accordingly there should be no impediment to keeping the authorization list up to date.

Once the relevant authorizations are in place, the person initiating the registration must log on to the International Registry website, select the aircraft object, the type of registration to be made, and the parties to the registration and pay the registration fee.

When entering the registration data the user will also be required to enter the state of registry for the airframe or helicopter, and if applicable, the relevant unique authorization code for States with an entry point.<sup>270</sup> Finally, the user must decide whether to specify a lapse date for the relevant registration.<sup>271</sup> In practice, this feature of the registry system is almost never used and the practitioner is advised to use a lapse date only in rare circumstances.

**Practice Note:**

Entering the registration data is straightforward and at the end of the process you will be asked to confirm that the data is correct. Given the value of the assets in question and the

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<sup>270</sup> See Section V.A. for a further discussion on such authorization codes.

<sup>271</sup> Practitioners generally do not specify a lapse date given that registrations can be easily discharged upon the termination or maturity of the relevant transaction. To the extent that the parties do specify a particular lapse date, the parties will need to monitor such date during the life of the transaction to the extent that the termination date or maturity date of the relevant agreement is amended or modified in the future, in which case a new registration may be necessary.

permanency of the records on the International Registry, you are advised to carefully check the data before confirming.

For most registrations, the consent of both parties is required, so, in the case of the MOR process, when the first party completes the entry of the registration data, pays the registration fee and indicates its consent, the registration goes into a “pending” state and it is not yet reflected on the International Registry. The registration will “go live” (i.e., be searchable) only when consented to by the second party (see important caveat below about technical problems which could arise between the time of final consent and the registration going live).<sup>272</sup> For some registrations only one consent is required (e.g., a discharge will go live immediately when consented to by the party holding the sole right to discharge). In the case of the Closing Room process, the registration(s) will “go live” (i.e., be searchable) after all consents are received, all registration data is entered, all necessary AEP codes are entered, payment is made and the release button is clicked. (See important caveat below about technical problems which could arise between the time of final consent and the registration going live.)

Payment is processed when the registration is initiated (in the case of MOR) or released (in the case of CR) and can be made by credit card (Visa, Master Card or Amex) but not by debit card. Payment may also be made by prepaid credit which has been loaded on the system. This can be done by making a credit card payment, such funds then being available to all users of that entity through the use of a PIN. Alternatively, for larger amounts, a wire transfer can be arranged with registry officials.

For registrations requiring a second consent using the MOR process, the second party will be sent an email notifying it that a registration has been initiated and that it has 36 hours in which to consent. A registry user can use the “consent area/consent to a registration” function on the website to review the registration data and provide its consent. Again, the user should check the data carefully with a particular emphasis on the aircraft object identifier, the type of registration and the parties. Once the second party consents, the registration enters a queue to be processed before the registration is complete and searchable on the International Registry; this process usually takes only a matter of seconds.

**Practice Note:**

Technical problems may arise between the time of final consent and the registration going live. The only way to confirm that a registration has gone live and is searchable is to perform a search with respect to the relevant aircraft object and review the priority search certificate.

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<sup>272</sup> A registration takes effect at the time it is searchable. For a discussion on when a registration become searchable, see Section IV.E. below.

All computer systems suffer failures. It is possible that the International Registry will suffer a failure when a registration which is just about to go live has not yet been deposited into the registration database. Once the registration actually makes it to the registration database it is the role of the Registrar to ensure that the data does not change and is stored indefinitely. However, should the International Registry fail just before a registration goes live there is no guarantee that, upon restoration of the system, the registration will be processed. It is also possible, but less likely, that a bug in the process to make a registration live will occur and that a registration might not be properly processed and may fail. While the system has been designed to manage these circumstances, there can be no guarantee that a registration will actually go live. Therefore, the user should always search the International Registry to ensure that the registration they consented to actually went live and that the applicable registrations have been made in the proper order in order to achieve the desired priorities.<sup>273</sup> This is the only guarantee that a registration went live and is searchable. Even an email from the system stating that the registration has been completed is not adequate proof of a valid registration. With the CR process, there is a further responsibility (see section 7.4 of the Closing Room appendix to the Cape Town Regulations) on users of the IR to verify that all registrations have gone live as intended by comparing, within 72 hours, the pre-registration report provided at time of locking and the priority search certificates.

From a Cape Town Convention perspective (consistent with most civil law and common law jurisdictions), the general rule is that registration gives one ranking *erga omnes* and it is therefore one's responsibility to ascertain that proper registration has actually taken place in order to obtain ranking. The lack of registration or the effects of the failure of a computer system such that an entry does not go "live" should not nullify the interests created between the parties, but neither will it prejudice third parties who register interests while these interests are unregistered or before these unregistered interests are subsequently registered. See Section II.H.

## **(V) MAKING A REGISTRATION USING A DIRECT ENTRY POINT OR AN AUTHORIZING ENTRY POINT.<sup>274</sup>**

As noted in Section V.A., a Contracting State may designate an entity in its territory as the entry point through which the information required for registration of an international interest may be transmitted to the International Registry (in lieu of transmittal to the International Registry directly), either through a "direct entry point" or an "authorizing entry point". Section V.A. provides information on the additional steps required to make a registration to the extent that a user is required by the relevant Contracting State to use such a "direct entry point" or "authorizing entry point".<sup>275</sup>

A detailed overview of the registration process is illustrated in the user manual which is located

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<sup>273</sup> See Section IV.E. for a discussion on searches on the International Registry.

<sup>274</sup> See Section VI.A. herein for a discussion on entry points.

<sup>275</sup> There are currently no direct entry points. Previously, the United Arab Emirates had made the declaration to utilize a direct entry point but subsequently re-designated its entry point as an authorizing entry point on the grounds of efficiency and practicality.



on the International Registry website (<https://www.internationalregistry.aero>). Also, a set of videos are available on YouTube demonstrating how to make a registration, search, apply for an account and generally how to use the key features of the website (<https://www.youtube.com/user/IntlRegistry>).

The manual provides detailed descriptions of the steps that can be performed by users of the International Registry, including screen images.

## C. Agents, Trusts and Representative Capacities

It is common in aviation transactions to have one party act in a representative, trust or agency capacity for other parties (e.g., owner trustee, security trustee, collateral agent, etc.) though these may vary from one jurisdiction to another. The Cape Town Convention broadly allows this common practice to continue with the intent to permit a person to take any action under the Convention such as entering into an agreement, enforcing an agreement or registering an interest, whether as agent, trustee or in some other capacity. Article VI of the Protocol specifically provides:

### Article VI – Representative Capacities

A person may enter into an agreement or a sale, and register an international interest in, or a sale of, an aircraft object, in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the [Cape Town] Convention.<sup>276</sup>

This is particularly noteworthy for many civil law jurisdictions which prior to becoming a Contracting State, as a general matter, did not recognize security trusts. As such, an international interest under security agreement granted in favor of an agent or trustee for bondholders or other creditors in the name of the agent or trustee as chargee may be registered in the name of such agent or trustee (it is not necessary to state the registrant’s capacity<sup>277</sup>). Article VI precludes the party against whom rights and remedies are taken from contending that the agent or trustee has no standing under local law to do so.

#### Example:

Bank enters into a security agreement as a secured party in its capacity as administrative agent for several lenders. “Bank” is already an approved TUE on the International Registry. Relying on the language of Article VI of the Protocol and, as discussed below, the Official Commentary, the international interest can and should be registered in favor of “Bank,” and need not be registered in favor of “Bank, as Administrative Agent.”

This is a logical position and consistent with industry practice, and there is no requirement in the Protocol to the contrary. Such a registration provides sufficient notice under the Cape

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<sup>276</sup> Article VI of the Protocol.

<sup>277</sup> GOODE at para. 3.71 (Unidroit 2013).

Town Convention because whether the registration is made in the name of “Bank” or “Bank, as Administrative Agent,” third parties are aware of the existence of the international interest against an aircraft object. Such third parties are charged with making further investigation at which time they would be made aware of the capacity in which “Bank” took such international interest. Nevertheless, one should also be aware that in civil law countries the absence of a designation as to one’s capacity will result in personal, not fiduciary, responsibility, with this having potential impact on matters such as set-off and enforcement between the parties.

The Protocol is also silent on what should happen in situations where a bank or trust company has taken an international interest in an agency, trust or representative capacity and is later replaced in such capacity. The key question is whether the replacement of such bank or trust company gives rise to the creation of a new international interest. One should here be aware that in civil law jurisdictions the change in either of the secured party or of the debtor may give rise to the discharge of all or part of the security interests, thus giving rise to the need for the creation of new security interests and consequent international interests.

**Example:**

Trust Company 1, not in its individual capacity but solely as Owner Trustee, enters into a security agreement with Secured Party pursuant to which it grants a security interest to Secured Party in an aircraft object. Thereafter, Trust Company 1 conveys its entire trust business to Trust Company 2, pursuant to which Trust Company 2 succeeds to all of Trust Company 1’s rights and obligations. Unless the underlying transaction documentation or applicable law would indicate that such arrangement would give rise to a new grant of security, such succession should be treated on the International Registry as an assignment by Trust Company 1 by Trust Company 2 of such international interest.

In such circumstances, it will be necessary to look to the terms of the documentation appointing or replacing such bank or trust company to ascertain whether, as a matter of applicable law, the successor assumes all of the rights and interests of such bank or trust company in such capacity. Further, the documentation creating the international interest should be reviewed to confirm that the international interest was created in favor of such bank or trust company in such capacity, together with its successors and assigns. If, under applicable law, the successor does assume such rights and interests and the international interest has been created in favor of the bank in such capacity as well as its successors and assigns, then assuming there are no other changes to the documentation that might give rise to a new international interest<sup>278</sup> a broad interpretation of Article VI<sup>279</sup> would

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<sup>278</sup> See Section II.J. herein.

<sup>279</sup> GOODE at paras. 3.71, 5.33 (Unidroit 2013).

suggest that a new registration is not required.<sup>280</sup>

As a matter of practice in the United States, when a trustee in a trust capacity engages in business in which interests are to be registered with the International Registry, such trustee would often reflect such capacity when establishing a transacting user account on the International Registry (so, for example, the TU would be listed as “Bank, as owner trustee”). This should not be interpreted as anything other than a preference of trust attorneys and advisors or a method of assisting parties with the mechanical aspects of completing registrations on the International Registry. While establishing an account that includes the capacity of a party may assist in managing a deal checklist and it may reflect an individual’s style of organization, it should not be given any additional material or substantive consideration.

Article VI of the Protocol contemplates that a person may enter into an agreement or a sale and register an international interest or a sale of an aircraft object in a representative capacity.<sup>281</sup> This language is somewhat limited in that an “agreement” is a defined term that includes a security agreement, leasing agreement or title reservation agreement.<sup>282</sup> Thus, for example, the definition of an agreement may not include an assignment or subordination of the same. Likewise, the language in question does not specifically include registrations of assignments and subordinations (among other registrations). This language notwithstanding, there is no indication in the drafting history of the Protocol, or in any other source of information on the Protocol, of any intent to limit the rights of a party who takes in an agency capacity. The Official Commentary addresses this when it states:

“This provision must be interpreted broadly. The intent is to permit a person to take any action under the [Cape Town] Convention . . . in a representative capacity, whether as agent, trustee or in some other representative capacity. A narrow reading of this Article would lead to illogical results . . .”<sup>283</sup>

It should also be noted that the Convention and Protocol occasionally use the word “agreement” when it is clearly not intended to refer to the defined term,<sup>284</sup> and this may be one of those cases. It can also be argued that when used in this context, agreement includes any amendment, assignment, subordination or subrogation of the same.

Having allowed a person to enter into agreements and register international interests in a representative capacity, Article VI of the Protocol goes on to provide that: “[i]n such case, that

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<sup>280</sup> Since it is likely that the original agent, trustee or representative would enter into an assignment and assumption agreement in order to effect the transfer of its rights and interests to the successor, it would be essential to register an assignment of such predecessor’s rights with the International Registry.

<sup>281</sup> Article VI of the Protocol.

<sup>282</sup> Article 1 of the Convention.

<sup>283</sup> GOODE at para. 5.33 (Unidroit 2013).

<sup>284</sup> See, e.g., the use of the word “agreement” in Article 17.3 of the Convention.

person is entitled to assert rights and interests under the [Cape Town] Convention.”<sup>285</sup> This language appears absolute, but the rights of the representative party to take actions to assert rights and remedies on behalf of its beneficiaries are governed by the relevant agreements; the language in Article VI does not appear to alter that fact but, instead, is intended to prohibit the party against whom the remedies are asserted from taking the position that the agent has no standing to assert such rights.<sup>286</sup>

## D. Use of Controlled Entities

As previously discussed, a party must establish an account with the International Registry as a TUE in order to make registrations against aircraft objects. Once a TUE has established an account on the International Registry, it may use its account to establish additional accounts for related companies if they fit within the definition of a controlled entity. A “controlled entity” is defined as “a business entity, trust or association of any kind, however established, with capacity to be a named party in registrations, where a transacting user entity electronically asserts that it controls, manages or administers that business entity, trust or association.”<sup>287</sup> The advantage to using a controlled entity is that its account with the International Registry can be established in a matter of minutes. The administrator for the “parent” TUE creates the account by following a few simple on-line instructions and paying the applicable fee.<sup>288</sup>

Whether a TUE can correctly assert that it controls, manages or administers the company is the key to determining if such company is a “controlled entity”. While a party may be willing to make a common sense determination that a company “controls and manages” another company, this may be incorrect, legally or factually. Additionally, this conclusion may be contrary to positions that have been (or will be) taken for tax and/or accounting purposes or contrary to representations and warranties contained in leases or loan agreements. Because the issue of control can be complicated and fact-dependent, it is unlikely that an attorney will be willing to render an opinion with regard to the creation or validity of the controlled entity account; this may be a significant factor in closing a transaction with a controlled entity.

A “controlled entity” account should not be used as a means to avoid the more stringent, and potentially more time consuming, process of establishing a stand-alone TUE. Creating a controlled entity which does not qualify as one may impact the validity of any registrations made by such entity as they are in violation of the Regulations. Parties should be vigilant to confirm as soon as practicable that the accounts of all parties to a transaction have been properly created and established.

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<sup>285</sup> Article VI of the Protocol.

<sup>286</sup> GOODE at para. 5.33 (Unidroit 2013).

<sup>287</sup> Section 2.1.7 of the Cape Town Regulations. As originally implemented, the Cape Town Regulations (First Edition) did not include “controlled entities.” Instead, the Cape Town Regulations (First Edition) provided for the use of a “special purpose entity,” which was narrowly defined and created confusion as to whether a company qualified as a special purpose entity. Consequently, the revised Cape Town Regulations replaced the term “special purpose entity” with “controlled entity,” in an effort to simplify and clarify the concept.

<sup>288</sup> Section 4.3(a) of the Cape Town Regulations.

## E. IR Searches

A search of the International Registry is normally conducted prior to a closing to identify existing registrations against a specific aircraft object and after a closing to confirm the new registrations are searchable, thus establishing the intended priorities under the Cape Town Convention. The “priority search certificate” provided by the International Registry is a reflection of the official records of the International Registry with regard to an aircraft object. The priority search certificate sets forth the information relating to any registrations against a particular aircraft object, together with the date and time such registration was made, or it will confirm that no such registrations have been made with regard to such aircraft object.<sup>289</sup> Any registrations with respect to an aircraft object will be listed in chronological order on the priority search certificate. Although the priority search certificate specifies the type of interest registered with respect to an aircraft object, it will not state whether such interest was registered as an international interest or a prospective international interest.<sup>290</sup>

In conducting searches it is important to understand that the search results will only reflect “searchable” registrations. A registration takes effect not from the time of transmission of the data to or receipt of the data by the International Registry, but from the time the registration is searchable (or has gone “live”). A registration is searchable at the time the International Registry has assigned it a sequentially ordered file number and such number and related information may be accessed at the International Registry (that is, when the registration is reflected on a priority search certificate).<sup>291</sup> Such registration, once searchable, is complete and will be effective as against third parties.<sup>292</sup>

There are two types of searches with respect to an aircraft object that one may make on the International Registry: (a) a priority search, and (b) an informational search.<sup>293</sup> A priority search occurs when a search of the International Registry is performed against a manufacturer’s name, generic model designation and serial number.<sup>294</sup> A priority search, however, will only return information with regard to those registrations made against the exact information entered for the particular aircraft object. For instance, if a registration is made against an engine with a model designation of “XXXX”, a priority search using the model “XXX-X” would not reveal such registration. The person conducting a priority search must carefully consider the proper searching criteria, and it may be necessary to perform multiple priority searches to assure that there are no prior registrations against a particular

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<sup>289</sup> Article 22(2) of the Convention.

<sup>290</sup> Article 22(3) of the Convention, and Article III of the Protocol.

<sup>291</sup> GOODE at 2.123 and 4.144 (Unidroit 2013).

<sup>292</sup> Articles 19(2) and (6) of the Convention and Article XX(1) of the Protocol.

<sup>293</sup> See Sections 7.1, 7.2 and 7.3 of the Cape Town Regulations.

<sup>294</sup> Section 7.1 of the Cape Town Regulations.

aircraft object. The use of the “informational search” discussed below is an important tool that allows the person conducting a priority search to be confident they have searched in the appropriate manner.

An “informational search” is a search using only the aircraft object’s manufacturer’s serial number.<sup>295</sup> The International Registry developed the informational search at the request of the industry to address challenges created by the restricted nature of the priority search. An informational search is a preliminary search function that allows the searcher to determine what priority searches should be conducted.<sup>296</sup> The International Registry website is designed to ensure a user cannot do a priority search without first doing the wider informational search. For that reason and to encourage its use, an informational search is free to all. It is important to note that the informational search does not produce a priority search certificate and it is not considered an official search; the International Registry is not liable for the contents of the informational search and it cannot be relied on in lieu of a priority search certificate.<sup>297</sup>

Unlike the priority search, the informational search will produce a listing of any aircraft object that matches in whole or part the numeric serial number of an aircraft object identified in the pre-populated manufacturer’s list as well as any aircraft object that has been the subject of a prior registration (whether such registration was made using the manufacturer’s list or by free-text). For instance, an informational search for prior registrations against an aircraft engine with serial number “87410” will produce results pertaining to all aircraft objects that are included in the pre-populated manufacturer’s list or that have prior registrations against aircraft objects with variations on the serial number that was entered. In this example the informational search would identify aircraft objects bearing serial numbers “87410”, “874102”, “P87410”, “687410”, etc. The search algorithm is described in the FAQ section of the website.

An informational search will produce all search results and will order the search results based on how closely they match the serial number entered, placing any exact matches at the top of the results list. The search results will identify the total number of aircraft objects matching or having some variation of the serial number entered and will be displayed ten (10) objects per page. Informational search data may be filtered by manufacturer name or by generic model designator using partial or full data.

The informational search results conveniently provide a chart of those specific aircraft objects that are on the International Registry manufacturer’s list or that have prior registrations. The

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<sup>295</sup> Section 7.3 of the Cape Town Regulations.

<sup>296</sup> Section 13.2 of the Cape Town Procedures.

<sup>297</sup> Section 13.3 of the Cape Town Procedures.

chart will list the manufacturer, model designator, and manufacturer’s serial number, and note whether the applicable object is listed on the International Registry manufacturer’s list and if a current registration exists against the object. The searcher then uses this information to obtain the appropriate priority search certificates through a relatively seamless system of clicking a box, making payment and downloading the priority search certificates.

It should be emphasized that an informational search alone is not sufficient to properly establish the status of the records of the International Registry with regard to an aircraft object. The informational search should only be used to gather information to allow a party to make the necessary priority searches and obtain the appropriate priority search certificate, which is the official reflection of the records of the International Registry. The registrar has helpfully provided videos, published on YouTube showing how searches are conducted (<https://www.youtube.com/user/IntlRegistry>).

In addition to searches related to aircraft objects, a registry user may also perform a “Contracting State search” to determine certain particulars relating to a Contracting State’s status with regard to the Cape Town Convention.<sup>298</sup> A “Contracting State search” produces a “Contracting State search certificate” that lists such Contracting State’s effective date of ratification, acceptance, approval or accession of the Convention and the Protocol, and each declaration or designation, and withdrawal thereof, by such Contracting State.<sup>299</sup> It is free.

An example of a priority search certificate is set out below:

<p><b>Priority Search Certificate</b>                  Issued by  <b>The International Registry for International Interests                  In Mobile Equipment (Aircraft Equipment)</b></p>		<p><u>Search Criteria</u>                  Manufacturer: BOMBARDIER                  Model designation: CRJ-700                  Manufacturer's serial number: 10317</p>
<p>This certificate was created on 01 Dec 2010 at 17:19:13 GMT                  Certificate Number: 13153448                  Requested by: Kelly Wood of Crowe &amp; Dunlevy, P.C.                  Beneficiary of Priority Search Certificate: Crowe &amp; Dunlevy</p>		<p><u>Search Results</u>                  The International Registry system is designed to use percentages with a maximum of six decimal places when recording fractional and partial interests in aircraft objects e.g. 12.123456%. Please consider that certain fractions cannot be fully represented within six decimal places. Percentages shown are of the full aircraft object.</p>
<p><u>Search Criteria</u>                  Manufacturer: BOMBARDIER                  Model designation: CRJ-700                  Manufacturer's serial number: 10317</p>		<p><u>Search Results</u>                  The International Registry system is designed to use percentages with a maximum of six decimal places when recording fractional and partial interests in aircraft objects e.g. 12.123456%. Please consider that certain fractions cannot be fully represented within six decimal places. Percentages shown are of the full aircraft object.</p>
<p><u>Date/time</u>                  01DEC2010                  17:07:23 GMT</p>	<p><u>Details of Interest</u>  <u>Registration</u>                  Type: Contract of Sale                  File number: 676534                  Fractional or Partial Interest: 100.0000000%                  Debtor:                  AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILOS@AA.COM                  Creditor:                  Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.l.orton@wellsfargo.com                  Right to Discharge Holder:                  Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.l.orton@wellsfargo.com</p>	<p><u>Date/time</u>                  01DEC2010                  17:14:29 GMT</p> <p><u>Details of Interest</u>  <u>Registration</u>                  Type: International Interest                  File number: 676540                  Fractional or Partial Interest: 100.0000000%                  Debtor:                  AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILOS@AA.COM                  Creditor:                  Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.l.orton@wellsfargo.com                  Right to Discharge Holder:                  Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.l.orton@wellsfargo.com</p> <p>End of List</p>
<p>This document has been digitally signed by the Registrar and the signature has been filed.</p> <p style="text-align: right;">Page 1 of 2</p>		<p>This document has been digitally signed by the Registrar and the signature has been filed.</p> <p style="text-align: right;">Page 2 of 2</p>

<sup>298</sup> Section 7.5 of the Cape Town Regulations.

<sup>299</sup> Section 7.5(b) of the Cape Town Regulations.

An example of an informational search is set out below:

INTERNATIONAL REGISTRY OF MOBILE ASSETS Entity : Atlanta Airline  
 Sub : TFC\_A00006300100

**Informational Search**

MSN:  Search

To perform a priority search on any object, please select from the list below and add to the priority search list.  
 If you cannot find the object you are searching for in the Informational Search Listing you can add it by clicking [here](#).

Filter

<input checked="" type="checkbox"/> MSN	Manufacturer	Model	Matches Manufacturers' Current List	Registration Exists
<input checked="" type="checkbox"/> P87410	HONEYWELL	TFE731 Series	Yes	Yes

Showing 1 to 1 of 1 results [First](#) [Previous](#) [Next](#) [Last](#)

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The mechanism used by the International Registry to search for an object based on the serial number you enter (the Search Algorithm) is described in the FAQs.  
 In line with Section 5.2 of the Regulations, the use of **aircraft object information** (whether in making registration or searches) or the **descriptive documents** relating thereto each provided by manufacturers is subject to the [Manufacturer Disclaimer](#)

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**Search Registrations**

Informational Search

<input type="checkbox"/> MSN	Manufacturer	Model	Matches Manufacturers' Current List	Registration Exists
<input checked="" type="checkbox"/> P87410	HONEYWELL	TFE731 Series	Yes	Yes
<input type="checkbox"/> 874102	CFM	CFM56-7	Yes	No
<input type="checkbox"/> 874103	CFM	CFM56-7	Yes	Yes
<input type="checkbox"/> 874104	CFM	CFM56-7	Yes	Yes
<input type="checkbox"/> 874105	CFM	CFM56-7	Yes	No
<input type="checkbox"/> 874106	CFM	CFM56-7	Yes	No
<input type="checkbox"/> 874107	CFM	CFM56-7	Yes	No
<input type="checkbox"/> 874108	CFM	CFM56-7	Yes	No
<input type="checkbox"/> 874109	CFM	CFM56-7	Yes	No
<input type="checkbox"/> 687410	PRATT & WHITNEY	JT8D STD	Yes	No

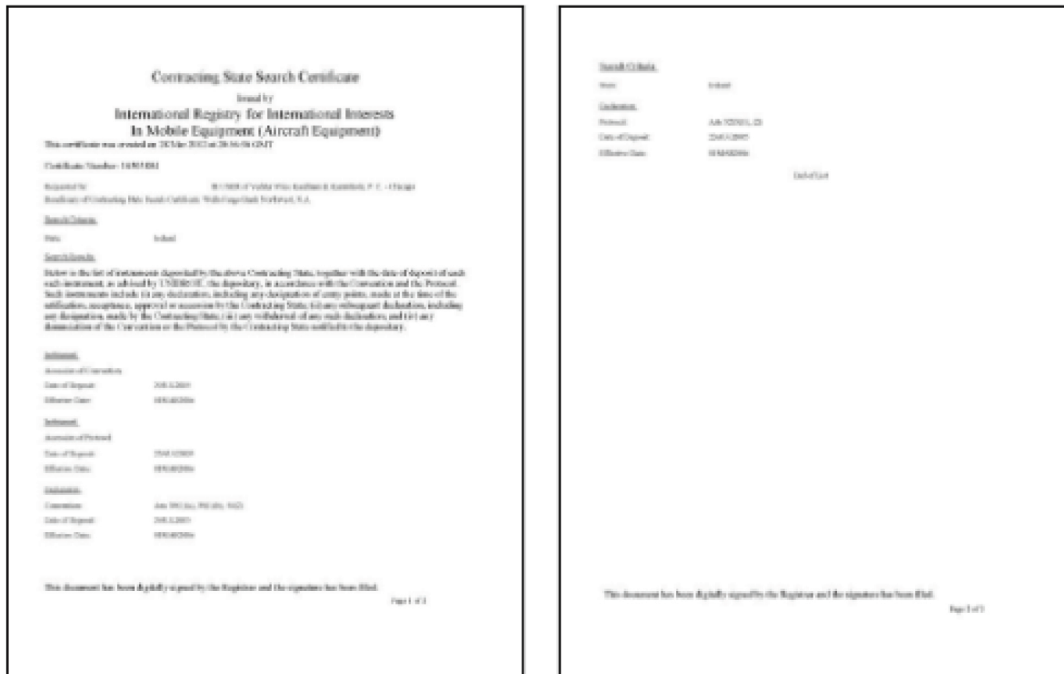
Showing 1 to 10 of 10 entries

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An example of a Contracting State search certificate is set out below:



## F. Discharging an Interest

Discharge of an interest on the International Registry is important in that if, following the termination of a transaction, the registry is not updated accordingly, the applicable debtor may find existing non-current registrations an impediment to a future financing and/or sale of the applicable object. In the normal course, parties routinely work together to discharge interests following the successful conclusion of a transaction. However, in contested situations, discharge may be more difficult to achieve. International interests must be discharged when they are no longer effective (i.e., when a person no longer owes any obligations under an agreement or in the case of registration of a prospective international interest or a prospective assignment of an international interest, the intending creditor or assignee has not given value or contracted to give value).<sup>300</sup> If the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, then the holder of the interest must procure the discharge of the registration.<sup>301</sup> Similarly, if there has been an incorrect registration, then the person in whose favor the registration was made must, without delay, procure its discharge or amendment.<sup>302</sup> A registration may only be discharged by or with the written consent of the party in

<sup>300</sup> Goode at 2.139 (Unidroit 2013).

<sup>301</sup> Article 25(1) of the Convention.

<sup>302</sup> Article 25(4) of the Convention.

whose favor it was made.<sup>303</sup> With respect to a security agreement, a title reservation agreement or a lease agreement, the consent must come from the chargee, conditional seller or lessor, respectively. A party in whose favor a registration was made may further transfer the right to consent to the discharge of such registration, in which case such transferee shall have the sole right to consent to such discharge.<sup>304</sup>

**Example:**

Lessor leases an airframe to Lessee and an international interest is registered in respect of such lease. Lessor thereafter charges the airframe to Creditor, and such interest is registered along with an assignment of the associated rights comprised of the lease. In connection with such assignment, Lessor transfers its right to discharge the registration made in respect of such lease to Creditor. Thereafter, Creditor has the sole right to consent to the discharge of such registration.

If a party is under a duty to discharge an interest but fails to do so, the Registrar cannot take a position amongst competing parties or engage in judgments as to whether an application for a registration is defective. If the party in whose favor the interest was made exists but refuses to discharge the registration, the debtor should seek to obtain a court order having jurisdiction under the Cape Town Convention requiring such discharge and if such order is not adhered to, said party may seek an order of the court of the place in which the Registrar has its centre of administration (currently Ireland) which shall direct the Registrar to take such steps as will give effect to that order.<sup>305</sup> If the party in whose favor the interest was made no longer exists or cannot be found for purposes of obtaining an order, the court of the place in which the Registrar has its centre of administration has exclusive jurisdiction to make an order directing the Registrar to discharge the registration.<sup>306</sup>

Due to the long life expectancy of aircraft, there will most certainly be situations where, for a variety of reasons (e.g., a party ceasing to exist or an adversarial relationship), an interest cannot be discharged without seeking redress from the courts. In these situations, the cost of effecting a discharge would most likely be significant. Due to the high likelihood of these types of scenarios occurring in the future, it is essential that the aviation finance markets take a practical view of these vestigial registrations. With proper due diligence and appropriate indemnification, the mere existence of an undischarged registration should not, in and of itself, be the determinative factor as to whether a transaction should be undertaken or act as an impediment to closing such transaction (indeed, with proper indemnities and/or title insurance, for example, the risks arising from such old registrations may be negated).

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<sup>303</sup> Article 20(3) of the Convention.

<sup>304</sup> Section 5.7.2 of the Cape Town Regulations.

<sup>305</sup> Article 44(3) of the Convention. For a discussion regarding the jurisdiction of the Irish courts to make orders against the Registrar, see Section IV.G herein.

<sup>306</sup> Article 44(2) of the Convention.

## G. Jurisdiction of the Irish Courts to Make Orders Directing the Registrar to Discharge an Interest

Article 44(1) of the Cape Town Convention gives the Irish courts (being the Court of the place in which the Registrar has its centre of administration) exclusive jurisdiction to award damages or make orders against the Registrar. Articles 44(2) and 44(3) of the Convention provide for the specific circumstances in which the Irish courts may make an order directing the Registrar to discharge a registered interest. These are (A) where a party has failed to comply with a demand made under Article 25 of the Convention to register a discharge and that party has ceased to exist or cannot be found for the purposes of enabling an order to be made against it requiring it to procure the discharge of the registration<sup>307</sup> and (B) where a party has failed to comply with an order of a court having jurisdiction under the Cape Town Convention requiring that party to procure the amendment or discharge of the registration.<sup>308</sup>

To date, only three cases have come before the Irish courts. The first was straightforward and fell squarely within Article 44(3) of the Convention. In that case,<sup>309</sup> the parties to the proceedings were US corporations and the registration in question related to a US registered aircraft. The Defendant had registered a purported registrable non-consensual interest against the aircraft and its engines in circumstances where it had no interest in the aircraft at the time the registrations were made. A Minnesota Court had declared the non-consensual registrations invalid – on 18 February 2010. The Defendant failed to comply with the Minnesota Court Order. The Applicant issued proceedings in Ireland seeking an order of the Irish High Court ordering the Defendant to procure the discharge of the registrations. Less than 2 months after the proceedings had been issued, the Irish court made the order against the Defendant. The Order further provided that, if the Defendant did not discharge the registrations within 21 days of perfection of the Court Order and had made no appeal within that time, the Registrar was to discharge the registrations. In addition, the Defendant was ordered to pay the costs of both the applicant and the International Registry.

The second case<sup>310</sup> was less straightforward. It did not fall squarely within either Article 44(2) or Article 44(3). In that case, a Panamanian company claiming a registrable non-consensual interest in an aircraft owned by a Russian corporation in respect of commission allegedly due on the sale of an aircraft, registered its purported interest in March 2013. Neither Panama nor Russia had made a declaration under Article 40 of the Cape Town Convention. Accordingly, there was no valid basis for registering the interest as no registrable non-consensual interest did or could have existed. The Applicant having served a demand under Article 25(4) of the Convention on the Defendant to remove the registration and the Defendant having failed to do so, the Applicant sought an order of

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<sup>307</sup> Article 44(2) of the Convention.

<sup>308</sup> Article 44(3) of the Convention.

<sup>309</sup> *PNC Equipment Finance LLC v. Aviareto Limited and Link Aviation LLC* (unreported).

<sup>310</sup> *Transfin-M v. Stream Aero Investments SA and Aviareto Limited* (unreported).

the Irish High Court ordering the Defendant to discharge the registration and, failing that, directing the Registrar to discharge it.

Unlike the first case, no foreign Court Order had been obtained in any jurisdiction regarding the validity of the registered interest so it did not fall within Article 44(3). Furthermore, the Defendant had not ceased to exist so the Irish Court's jurisdiction under Article 44(2) did not apply. Accordingly, the Irish courts needed to find a basis on which they were entitled to accept jurisdiction to make the requisite order. The question to be considered was whether the Irish court could assume jurisdiction to make an order of discharge against the Registrar in circumstances other than those falling squarely within the terms of Articles 44(2) and/or 44(3). The argument was made that, where the Convention is silent on the question of jurisdiction then the ordinary rules of private international law apply so that proceedings can be brought in any forum where the courts will assume jurisdiction in respect of the proceedings whether on the basis of the domicile of the Defendant, the subject matter of the proceedings or otherwise. The Irish High Court accepted jurisdiction under the Rules of the Superior Courts 1986<sup>311</sup> on the basis that the action was based on torts committed in Ireland (namely: slander on title, malicious falsehood and misrepresentation by maintaining an invalid registration on the International Registry located in Ireland). On 11 April 2013, the Commercial Court of the High Court granted an Order for service on the proceedings on the Defendant giving it eight days from the date of service to enter an Appearance. One month later, on 13 May 2013 (there being no Appearance or response from the Defendant) the Commercial Court granted the relief sought by the Applicant ordering the Defendant to procure the discharge of registration failing which the Registrar was ordered to discharge the interest.

There were a number of unusual features in this case. First, it was the first case to be heard by the Commercial Court of the High Court in Ireland using the fast track process.<sup>312</sup> Second, it extended acceptance of jurisdiction by the Irish courts largely based on the fact that the International Registry is located in Ireland. Thirdly, in addition to the order directing the Registrar to discharge the registration, punitive awards were made against the Defendant ordering it to pay both the Applicant's and the International Registry's costs and permitting the applicant to pursue a claim for damages.

The third case<sup>313</sup> was the first contested case in Ireland. Like the second case, it did not fall squarely within either Article 44(2) or Article 44(3). However, in the third case the Defendant made an appearance and argued its case. Accordingly, the Court did not have to find a basis on which to accept jurisdiction.

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<sup>311</sup> Articles 11(f) and 11(g) of the Convention.

<sup>312</sup> Under Order 63A of the Rules of the Superior Courts 1986 (SI 15 of 1986) in Ireland as inserted by S.I. No. 31/2008 - Rules of the Superior Courts (Cape Town Convention) 2008, "commercial proceedings" over which the Commercial Court of the Irish High Court has jurisdiction includes "any proceedings by or against the Registrar (within the meaning of Article 1 of the Cape Town Convention) in connection with any function exercised or exercisable by the Registrar under the Cape Town Convention or the Aircraft Protocol (each as defined in section 3 of the International Interests in Mobile Equipment (Cape Town Convention) Act 2005) or any regulations or procedures made thereunder". The Commercial Court provides a "fast track" process for commercial law matters having a monetary value in excess of €1,000,000. Any proceedings against Aviareto can be brought on an expedited basis as well.

<sup>313</sup> *Belair Holdings Ltd. v. Etole Holdings Limited and Aviareto Limited* (Irish High Court 26 March 2014)

In the third case, the Defendant (a British Virgin Islands company) registered a purported “registrable non-consensual interest” in an aircraft registered in the Cayman Islands and owned by the Applicant (a Cayman Islands company), in respect of a letter of intent relating to the sale of the aircraft to the Defendant which the Applicant claimed had lapsed due to failure to meet the conditions of the letter of intent. The substantive proceedings as to the commercial dispute relating to the letter of intent were issued in New York and subsequently Connecticut. The Applicant had served a demand on the Defendant to remove the registration under Article 25(4) of the Convention within 24 hours. The Applicant made an ex parte application to the Irish High Court to serve proceedings on the Defendant to seek an order of the Irish High Court requiring the Defendant to procure discharge of the wrongful registration of a non-consensual interest under Article 40 of the Convention on the basis that the Defendant did not have a valid registrable non-consensual right or interest in the aircraft or, indeed, any right or interest in the aircraft. The Defendant sought to justify its registration on the basis that the US was a Contracting State and that the negotiation of the Letter of Intent had been conducted by an agent in the US.

Just over two months after the registration of the purported registrable non-consensual interest, the Irish High Court through its Commercial Court division made an order under Article 44 of the Convention ordering the Defendant to discharge an invalid registration of a non-consensual interest within three weeks of the order and, failing that, directing the Registrar under Article 44(3) to discharge the registration. The Court concluded that no valid registrable non-consensual interest existed because no Contracting State with any arguable connection to the dealings between the parties had lodged an Article 40 declaration (the Applicant being situate in British Virgin Islands; the Defendant being situate in Cayman Islands; and the aircraft being registered in Cayman Islands none of which, at the time, were Contracting States). Accordingly, the Court concluded that the conditions of applicability of the Convention had not been met.

## H. Registry Descriptions and Free-Texting

The International Registry is a notice-based system and registration is made against a uniquely identified aircraft object (and not against the debtor). The information required to effect a proper registration, as it relates to the identification of an aircraft object, is (i) manufacturer’s name, (ii) manufacturer’s generic model designation, and (iii) manufacturer’s serial number assigned to such aircraft object.<sup>314</sup> The International Registry allows the user making a registration to select information pertaining to a specific aircraft object (specifically, the manufacturer, model designation and serial number) from the descriptions provided on the registry.

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<sup>314</sup> Section 5.3(c) of the Cape Town Regulations.

An example of how the Registry Descriptions operate is set out below:

**Search**

MSN:

**Filter**

<input checked="" type="checkbox"/>	MSN	Manufacturer	Model	Type
<input checked="" type="checkbox"/>	49980	McDONNELL DOUGLAS	MD-80-88	AIRFRAME

Showing 1 to 1 of 1 results

The mechanism used by the International Registry to search for an object based on the serial number you enter (the Search Algorithm) is described in the FAQs.

In line with Section 5.2 of the Regulations, the use of *aircraft object information* (whether in making registration or searches) or the *descriptive documents* relating thereto each provided by manufacturers is subject to the [Manufacturer Disclaimer](#)

## SELECT ENTITY TO REQUEST AUTHORISATION FORM

Home
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### Request Authorisations

**Select Entities**

To select the entity or entities you wish to request authorisation from select the 'Entity Search' icon below.

<input checked="" type="checkbox"/>	Entity Name	Address	Country	Administrator	Status
<input checked="" type="checkbox"/>	Alaska USA Federal Credit Union	500 W. 36th Ave. Suite 400, Anchorage, AK 99503	United States	Vilma Chavez	APPROVED

Showing 1 to 1 of 1 entries

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### Request Authorisations

Confirm your authorisation request and submit.

**Confirm Selection**

Entity Name	Manufacturer	Model	MSN	Type	Status
Alaska USA Federal Credit Union	McDONNELL DOUGLAS	MD-80-88	49980	AIRFRAME	

Showing 1 to 1 of 1 entries

Having each object available in the Registry Description (rather than manually inputting the relevant data) greatly reduces the chance for errors (which could invalidate a registration).<sup>315</sup> Sometimes, however, a particular aircraft object may not be listed in the drop-down menu. In such situations, the party effecting the registration is permitted to manually insert (or “free text”) such information.

**Practice Note:**

The utmost care should be taken whenever manual insertions of this type are made as the use of the electronic information provided by the International Registry is mandatory and, where so provided, is the sole means of satisfying the identification criteria on the International Registry.<sup>316</sup> Practitioners have found that generally speaking, when the relevant manufacturer is advised that a specific aircraft object is not listed in the relevant Registry Descriptions, such manufacturer is able to coordinate with the International Registry in order to include such aircraft object in the relevant Registry Descriptions in a timely manner.

## V. Interaction With Aviation Authorities

Although the Cape Town Convention contemplates the creation of a separate International Registry for purposes of establishing the priority mechanism for international interests, there are a few areas in which the local aviation authorities or other applicable local entities continue to play vital roles in the workings of the Cape Town Convention. This section will discuss entry points through which a Contracting State may elect to designate a local entity as the vehicle through which information is transmitted to the International Registry. This section will also discuss the Cape Town Convention’s establishment of a new authorization form that should be filed with, and recorded by, the local registry authority. This form is intended to establish a clear set of rules pursuant to which an authorised party can, as part of its remedial rights, procure the de-registration and export of an aircraft.

### A. Entry Points

The Cape Town Convention provides that a Contracting State may designate an entity in its territory as the entry point through which the information required for registration of an international interest may be transmitted to the International Registry (in lieu of transmittal to the International Registry directly).<sup>317</sup> Although not expressly stated in the Cape Town

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<sup>315</sup> Whether or not an error invalidates a registration depends upon its gravity and the extent to which it is likely that a person acting in reliance on erroneous data would be reasonably misled. GOODE at 2.131 (Unidroit 2013).

<sup>316</sup> Section 5.1 of the Cape Town Regulations. Explanatory text has been included on the International Registry to advise that the use of the Registry Descriptions is mandatory unless the aircraft object being registered does not appear in the Registry Descriptions.

<sup>317</sup> Article 18(5) of the Convention.

Convention, designation of such entry point is only applicable to an airframe or a helicopter if the declaration is made by the state that is the state of registry of such aircraft object (otherwise duplications may occur).<sup>318</sup> Depending on the applicable Contracting State, use of the designated entry point may be optional or compulsory (except in the case of aircraft engines). There is no system of nationality registration in respect of aircraft engines, so the use of the designated entry point cannot be made compulsory with respect to registrations on aircraft engines.<sup>319</sup> No such designation may be made in relation to registrable non-consensual rights or interests arising under the laws of another Contracting State.<sup>320</sup>

Designated entry points must be in operation during working hours in the Contracting State.<sup>321</sup> An entry point may be designated either as an “authorizing entry point” or a “direct entry point”. An “authorizing entry point” is one that authorizes transmissions of information required for registration under the Cape Town Convention to the International Registry. In this scenario, the entity designated as the authorizing entry point provides the party seeking to effect a registration with a unique authorization code, which is required to be included with the information submitted to the International Registry in order to properly effect a registration of an interest. The inclusion of the authorization code in such circumstances is mandatory. A “direct entry point” is one through which information is directly transmitted to the International Registry by the designated entity, rather than the transaction party seeking to effect such registration, automatically and without any need for further authorization or action by such transaction party.<sup>322</sup>

#### **Example 1:**

Lessor is entering into a lease of an airframe and an engine to Lessee. Lessee is situated in Contracting State X and the airframe will be registered in Contracting State X. At the time of ratification of the Cape Town Convention by Contracting State X, Contracting State X designated that its local aviation authority would constitute an authorizing entry point. In order for Lessor and Lessee to properly register an international interest in respect of the airframe with the International Registry, they must first obtain an authorization code from the local aviation authority, which must be included with such registration. With respect to the registration of the international interest in respect of the engine, the parties may either seek to obtain an authorization code from the local aviation authority or, alternatively, may effect the registration with the International Registry without the code because the use of the code in this case is not mandatory.

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<sup>318</sup> GOODE at para. 5.87 (Unidroit 2008).

<sup>319</sup> Article XIX(2) of the Protocol.

<sup>320</sup> GOODE at para. 3.37 (Unidroit 2008).

<sup>321</sup> Article XX(4) of the Protocol.

<sup>322</sup> See Section 12.4 of the Cape Town Regulations. There are currently no direct entry points. Previously, the United Arab Emirates had made the declaration to utilize a direct entry point but subsequently re-designated its entry point as an authorizing entry point on the grounds of efficiency and practicality.



### Example 2:

Utilizing the same fact pattern as above except that Contracting State X opted to designate its local aviation authority as a direct entry point. In this case, Lessor and Lessee would submit the applicable information pertaining to the international interest in respect of the airframe to the local aviation authority and they would be required to take no further steps, as the local aviation authority would transmit such information directly to the International Registry. Again, as utilization of the designated entry point for registration of the international interest in respect of engines cannot be made compulsory, the parties are free to effect such registration directly with the International Registry or through such direct entry point.

A Contracting State is free to add additional requirements for the use of its designated entry point, including charging fees. If these requirements are not satisfied, there is a material risk that the resulting registration will be invalid.<sup>323</sup> Additionally, a registration effected in violation of the prescribed entry point is invalid. For a summary of the Contracting States that have, to date, each made a declaration designating an entity as an entry point, see Annex D hereto.

### Practice Note:

From time to time, situations arise in which a unique authorization code may not be available (for example, the discharge of a registration where the registration was made prior to the entry point coming into effect or the affected airframe is no longer registered in the entry point country). To address these situations, the Cape Town Regulations specifically provide that a registration is not invalid if an authorization code is not obtainable under the procedures of the authorizing entry point based on the facts of the related transaction.<sup>324</sup>

## B. IDERA

De-registration and export of an aircraft object from an operator's jurisdiction can often be a time-consuming, expensive and, at times, uncertain exercise. In recognition of the difficulties often encountered in obtaining timely de-registration and export of an aircraft in a default context, the aircraft default remedies available under the Protocol were expanded to include provisions dealing with de-registration and export. Specifically, Article IX(1) of the Protocol provides that in addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed:

- (a) procure the **de-registration** of the aircraft; and

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<sup>323</sup> See Section 12.7 of the Cape Town Regulations.

<sup>324</sup> Section 12.8 of the Cape Town Regulations.

- (b) procure the **export and physical transfer** of the aircraft object from the territory in which it is situated [*emphasis added*]<sup>325</sup>

The purpose of these additional remedies is to allow a creditor to remove the aircraft from the debtor's control and place it in the control of the creditor. In the case of de-registration, the remedy also permits a subsequent (i) remarketing of the aircraft, so as to complete enforcement, and (ii) re-registration in accordance with the terms of the Chicago Convention.

Recognizing the importance of these specific remedies, the drafters of the Cape Town Convention also provided, if the proper declaration is made<sup>326</sup>, for a standing instruction to the applicable registry authority<sup>327</sup> in a Contracting State to honour a request for de-registration and export of an aircraft if certain prerequisites are met.<sup>328</sup> In this scenario, Article XIII(2) of the Protocol provides that where the debtor has issued an irrevocable de-registration and export request authorisation (“IDERA”) “substantially”<sup>329</sup> in the form annexed to the Protocol and has submitted it for “recordation” to the registry authority, that IDERA shall be recorded.<sup>330</sup> Article XIII(3) of the Protocol goes on to provide that the person in whose favour an IDERA has been issued (the “**authorised party**”) or its certified designee<sup>331</sup> shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the IDERA and applicable aviation safety laws and regulations.<sup>332</sup> An IDERA may not be revoked by the debtor without the written consent of the authorised party.

#### Practice Note:

As a general matter, an IDERA should be provided by the party in whose name the applicable aircraft object is registered. In an owner-based registry, this should be the owner of the aircraft object, and in an operator-based registry it should be the operator. Although there is some obvious linkage between an IDERA and a specific international interest, the IDERA form itself does not specifically refer to any particular international interest. Rather, it is inherent in the wording of the IDERA that the authorised party (or its certified designee) shall have the benefit of a proper international interest and that in connection therewith the

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<sup>325</sup> Article IX(1) of the Protocol.

<sup>326</sup> This declaration is one of the “qualifying declarations” required for a state to be entitled to the maximum financing benefits available in respect of export credit financing provided under the OECD Aircraft Section Understanding.

<sup>327</sup> In this context, “registry authority” means the national authority with responsibility for the registration and de-registration of an aircraft in accordance with the Chicago Convention. Article I(2)(o) of the Protocol.

<sup>328</sup> Article XIII(1) of the Protocol.

<sup>329</sup> A Contracting State which has made the applicable declaration to allow for IDERA's would violate the treaty provisions if it were to materially alter the form itself as a requirement to its recordation and/or effectiveness in such State. Similarly, issuers and/or recipients of IDERA's are cautioned against making any changes to the applicable IDERA form prescribed as any such changes could potentially impact the effectiveness of such IDERA.

<sup>330</sup> Article XIII(2) of the Protocol.

<sup>331</sup> The term “certified designee” is not defined in the Cape Town Convention. It is generally considered to mean any party designated by the named authorised party as acting as an agent for such authorised party. Care should be taken when a creditor seeks to authorize a certified designee to be sure the requirements set forth by the applicable registry authority for such designation have been satisfied.

<sup>332</sup> Article XIII(3) of the Protocol.

debtor shall have agreed to the remedies of de-registration and export (and the applicable authority shall be entitled to rely upon the form for such purposes). As such, if the debtor and creditor were to have an existing international interest which for whatever reason is replaced with a subsequent international interest (for instance, in connection with an extension of a lease agreement), the parties should not need to replace the existing IDERA of record with the applicable registry authority with another IDERA between the same parties (as there would be no benefit to updating the registry authority's record in that instance).

Use of an IDERA provides for a standing direction to the applicable registry authority to honour a request for de-registration and export if certain prerequisites are met. The relevant registry authority is required to enforce the remedies of de-registration and export upon the request of the authorised party, without the need for a court order<sup>333</sup>, on the basis of the recorded IDERA.<sup>334</sup> In addition, such registry authority and other administrative authorities in the applicable Contracting State must expeditiously co-operate with and assist the authorised party in the exercise of remedies permitted by the Protocol, including application for relief pending final determination.<sup>335</sup>

**Practice Note:**

Only the authorised party or its certified designee is entitled to seek de-registration and export of an aircraft (to the exclusion even of the applicable debtor). An assignee of the authorised party cannot exercise any rights under an IDERA unless such assignee is a certified designee of such authorised party in respect of its rights thereunder or, alternatively, a new IDERA is executed in favour of such assignee. It is not uncommon for a Contracting State, particularly at the time the Cape Town Convention first becomes effective in such jurisdiction, to lack sufficient regulations to effectively address the variety of issues which typically arise in connection with the implementation of a suitable recordation system which complies with the requirements of the Convention and the Regulations. In an effort to provide guidance in this area, the AWG has published a set of model implementing regulations addressing the variety of issues which need to be addressed by those Contracting States which have made the declaration under Article XIII of the Protocol.<sup>336</sup>

The de-registration mechanism is intended to establish a clear set of rules which do not involve the exercise of discretion by officials at the registry authority. Once a registry authority receives a

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<sup>333</sup> GOODE at para. 3.31 (Unidroit 2013).

<sup>334</sup> Article IX(5) of the Protocol.

<sup>335</sup> Article XIII(4) of the Protocol.

<sup>336</sup> These regulations can be found at <http://www.awg.aero/assets/docs/IDERA%20Regulation%20-%20AWG%20Model%20-%20%20FINAL%20NOV2014X.pdf>.

request from the authorised party, it is bound to effect de-registration and, to the extent within its authority, permit export of the applicable aircraft, in each case without the need for a court order, but subject to applicable safety laws and regulations.<sup>337</sup>

These provisions are only applicable where a Contracting State has made a declaration to that effect. The failure of a Contracting State to make such a declaration does not mean that de-registration and export remedies are unavailable to creditors, but rather that the process for exercising such remedies will be determined by the procedural law of the state of registry rather than the Cape Town Convention.<sup>338</sup> Such procedures may include the provisions of, and time tables in, Article X of the Protocol if the applicable Contracting State has made the appropriate declaration to apply these provisions.<sup>339</sup>

It should be noted that an IDERA constitutes authorization by a debtor to export an aircraft from its state of registry, but not to any particular jurisdiction. For example, a creditor validly exercising its rights under an IDERA may, nonetheless, be prohibited from exporting the relevant aircraft object to states that are barred under that state of registry's export control laws.

#### Practice Note:

As noted above, Article IX(5) of the Protocol requires the registry authority in a Contracting State "subject to any applicable safety laws and regulations" to honor a properly submitted request for de-registration and export. "Safety laws and regulations" is not defined in the Protocol, nor in the Convention, but it is intended that the foregoing requirement apply only to the exercise of export remedies as opposed to de-registration, since the former involves actual movement of the aircraft while the latter relates to the documentary issue of registration.<sup>340</sup> The Official Commentary provides useful guidance here:

"...the duty to honour the IDERA is subject to any applicable safety laws and regulations (Article XIII(3)). These will normally be applicable only [emphasis added] to export and physical delivery, not to de-registration. The IDERA route is intended to be purely documentary; the purpose is to dispense with the need for the authority to investigate any external facts."<sup>341</sup>

<sup>337</sup> If the registry authority requires, such a request must also contain a certification that prior ranking registered interests, if any, have been discharged or that the holders thereof have consented to such de-registration and export. See Article IX(5)(b) of the Protocol.

<sup>338</sup> GOODE at para. 5.68 (Unidroit 2013). For a more complete listing of the IDERA requirements of the jurisdictions that have made the applicable declaration, see <http://www.awg.aero/projects/capetownconvention/>.

<sup>339</sup> See GOODE at para. 3.32 (Unidroit 2013).

<sup>340</sup> For a good discussion of the meaning of "aviation safety laws and regulations", see Dean N. Gerber & David R. Walton (2014) "De-registration and Export Remedies under the Cape Town Convention", Cape Town Convention Journal, 3:1, 49-68.

<sup>341</sup> GOODE at para. 3.36 (Unidroit 2013).

## VI. Convention And Protocol Remedies

This Section on remedies builds on and does not repeat the prior Sections in this Guide. Those prior Sections should be referred to frequently if background is needed when reading this Section. When examining potential remedies, the practitioner will need to know (i) whether an international interest or an assignment of the associated rights and such international interest has been validly constituted with respect to an aircraft object, meets all the Convention formalities, applies to both an airframe and engine or only to an airframe or engine, has been concluded after the Protocol came into effect in the relevant jurisdiction or amended, novated or otherwise after the Protocol came into effect, and has been registered on the International Registry and with what priority and (ii) whether such international interest will be characterized as a lease, title reservation agreement or security agreement under the applicable law.<sup>342</sup>

As an introduction, it should be noted that both the Convention and the Protocol provide remedies upon default<sup>343</sup> with respect to aircraft objects that may be exercised by lessors, conditional sellers and secured parties in respect of international interests in their favor and by assignees of international interests, all in their roles as creditors. A core purpose of the Convention is to create greater certainty that, upon default, creditors can swiftly, but in a commercially reasonable manner, exercise their remedies to repossess, deregister and export, if applicable, and sell or otherwise realize upon aircraft objects. Not all remedies in the Convention are automatic. Practitioners should note that some of basic remedies must be agreed by the debtor in order to be effective. Such remedies usually are included in typical forms of leases, conditional sale agreements and security agreements and are consistent with aircraft default remedies provided for by major international legal regimes. The drafters expected that parties would create their own remedies within constraints discussed below, and flexibility is built into the Convention so that remedies may be modified by the parties.

The Convention remedies will supplement rather than displace existing remedies in a jurisdiction except to the extent, if any, that existing remedies are inconsistent with certain “mandatory” provisions under the Convention discussed below in Section VI.A(iii) and (iv) that protect the debtor and other interested persons.<sup>344</sup> Moreover, the Convention does not displace local procedures except that such local procedures are modified by the non-judicial remedies declaration discussed below<sup>345</sup> and by the Alternative A or B declaration.

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<sup>342</sup> The Official Commentary is essential to understanding the remedies in greater depth. There is a comment specifically on every single Article of the Convention and the Protocol. For a more general summary earlier in the Official Commentary, the practitioner is referred to Professor Goode’s “A Review of the Convention” in paras. 2.78 to 2.114 of the Official Commentary where he discusses the basic Convention default remedies and in paras. 2.179 to 2.184 where he discusses the effect of insolvency. The general summary of the important Protocol additions and modifications to the Convention remedies is found in Professor Goode’s “A Review of the Aircraft Protocol” in paras. 3.29 to 3.33 of the Official Commentary where he discusses default remedies and introduces the IDERA and in paras. 3.102 to 3.117 where he discusses remedies on insolvency, including Alternative A.

<sup>343</sup> See discussion on defaults at Section VI.A(ii).

<sup>344</sup> Understanding the Convention concept of “interested persons” is critical to ensuring that notices are given at appropriate times. Professor Goode’s Convention Default Remedies review in paras. 2.87 to 2.92 of the Official Commentary provides extensive discussion of the categories of “interested persons” and others who have given notice to the creditor.

<sup>345</sup> Article 14 of the Convention. GOODE at para. 4.117 (Unidroit 2013).

The practitioner should also use choice of forum provisions (as well as choice of contractual law) to support the choice of forum and submission to jurisdiction clauses to maximize the opportunity in the best forum to use Convention remedies.

Finally, it is important to focus on how the Convention and Protocol declarations by different Contracting States change and expand the availability of the creditor's remedies. Key declarations include those with respect to remedies without leave of court (non-judicial remedies), the terms of speedy advance court relief, irrevocable deregistration and export request authorizations, contractual choice of law and, most importantly, the insolvency provisions (when elected by Contracting States) which require return of aircraft objects where defaults are not cured and in which other Contracting States have declared agreement to cooperate in enforcement actions to effect such return. For a good summary checklist of Cape Town Convention-related steps a practitioner should consider in a remedy situation, see Annex G.

## A. Default Remedy Basics

Articles 8 to 15 of the Convention and Articles IX to XIII of the Protocol set forth the default remedies of conditional sellers, lessors, and chargees under the agreements creating international interests, and Article 34 of the Convention applies such default remedies for the benefit of assignees (for security) of international interests. The focus is on remedies against the debtor and rights against third parties holding an international interest subordinate to that of the enforcing creditor.<sup>346</sup>

### (I) AGREEMENT OF THE DEBTOR TO REMEDIES

Certain basic remedies are available only when the debtor has agreed. For example, the basic remedies under Article 8 are available to a debtor only to the extent that the creditor has – at any time – agreed to such remedies.<sup>347</sup> As a general matter, the agreement need not refer to specific remedies or provisions in the Convention.<sup>348</sup> The Official Commentary points out that this can be accomplished with a general agreement between the parties that “all remedies under the Convention” shall apply.<sup>349</sup>

#### Practice Note:

As certain remedies discussed in this section require the debtor's agreement to be effective, the practitioner should consider this point when reviewing mortgages, conditional sales, leases and other security agreements at the outset of a deal or of a potential litigation.

<sup>346</sup> GOODE at paras. 4.78 4.91, 4.245 4.248 (Unidroit 2013).

<sup>347</sup> GOODE at paras. 2.79, 4.81 (Unidroit 2013).

<sup>348</sup> GOODE at para. 2.79 (Unidroit 2013). As a general matter, the agreement need not even be in writing although this would be highly unusual and as a general matter should never be relied upon.

<sup>349</sup> *Id.*

Any general reference to the Convention will also provide for application of remedies under the Protocol by operation of Article 6(1), which mandates that the Convention and the Protocol be read and interpreted as a single document.<sup>350</sup> However, certain remedies under the Protocol may have additional requirements to be exercisable, and the practitioner should exercise care in determining whether a remedy is available. On the one hand, de-registration and export under Article IX(1) need not be specified and is invoked by a general agreement to “all remedies under the Convention.”<sup>351</sup> On the other hand, Article X(5), which permits the exclusion of Article 13(2), requires that the agreement must be in writing.<sup>352</sup> Even further, the sale and application of proceeds from the sale under Article X(3) requires specific reference to that remedy, but the agreement does not need to be in writing.<sup>353</sup>

## (II) DEFAULT.

All remedies under the Convention (other than the insolvency remedies) are predicated on the existence of a default. Article 11 of the Convention provides that the debtor and 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 Articles 8 to 10 of the Convention regarding final recovery and disposition of aircraft objects and Article 13 of the Convention regarding advance relief pending determination.<sup>354</sup> Virtually all financing and leasing transactions define defaults and as a result in most such transactions there should be no need to change the agreements to meet this condition.

### Practice Note:

Article 11(1) does not prescribe any kind of materiality standard for a default where the default is described or defined in an agreement, and as a result there is no such materiality qualification so long as there is a binding agreement. As the Official Commentary notes, the “events” that may constitute defaults or otherwise give rise to rights and remedies may include “non-default events reflecting the allocation of risk, whether internal (such as the debtor’s insolvency) or external (such as adverse changes in taxation law)....[and] paragraph 1 [of Article 11] establishes the binding nature of such an agreement.”<sup>355</sup>

However, where there is no such agreement, “default” is defined as a default which substantially deprives the creditor of what it is entitled to expect under the agreement.<sup>356</sup>

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<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Article 11(1) of the Convention.

<sup>355</sup> GOODE at para 4.106 (Unidroit 2013).

<sup>356</sup> Article 11(2) of the Convention. It is possible that if Article 11(2) applies, however, that a delay in payment may not be deemed a “default” unless, for instance, it was clear from the terms of the agreement that the creditor attached importance to punctual payment or the delay is substantial, persistent, or intentional. GOODE at para. 4.107 (Unidroit 2013).

### (III) REMEDIES OUTSIDE THE CAPE TOWN CONVENTION.

In addition to the remedies under the Cape Town Convention described in this Section VI, all additional remedies<sup>357</sup> permitted by applicable law (including any remedies agreed upon by the parties) may be exercised by the creditors to the extent they are not inconsistent with the mandatory provisions for remedies in the Cape Town Convention set forth in Article 15 of the Convention as supplemented and amended by Article IV(3) of the Protocol, which are listed in Section VI.A(iv) below. The use of a remedy such as pre-judgment attachment would fall into this category and be subject to the local substantive law requirements of the jurisdiction in which the aircraft object is located. See the discussion under Section VI.E. below relating to advance court relief under Article 13 of the Convention. The above reference to applicable law for additional remedies means the “domestic rules of the law applicable by virtue of the rules of private international law of the forum State.”<sup>358</sup>

It is a general limiting principle of the party autonomy of the Convention that these mandatory provisions not only limit any conflicting aspects of additional non-Convention remedies in a Contracting State but also that they expressly limit which Convention remedies can be derogated from and excluded by agreement of the parties.<sup>359</sup>

### (IV) MANDATORY DEFAULT REMEDY PROVISIONS.

The default remedy provisions that cannot be changed by agreement of the parties are as follows:

- application of proceeds of sale or of other disposition by chargee (Article 8(5) of the Convention);
- application of surplus proceeds (Article 8(6) of the Convention);
- vesting of a charged aircraft object in the chargee by court order permitted only if the value of the satisfied obligations is commensurate with the value of the aircraft object (Article 9(3) of the Convention);
- debtor’s right to redeem the aircraft object by payment prior to sale or court-ordered vesting of the object (Article 9(4) of the Convention);
- court-imposed terms for advance judicial relief (Article 13(2) of the Convention) subject to the parties’ right to exclude the application of this right by written agreement (Article X(5) of the Protocol);

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<sup>357</sup> Article 12 of the Convention. The Official Commentary notes that such remedies include the right to payment of accrued sums, damages for breach of the agreement (including liquidated damages, so far as these are recoverable under the applicable law), interest, and specific performance of non-monetary obligations. GOODE at para. 4.108 (Unidroit 2013).

<sup>358</sup> Article 5(3) of the Convention. Reference to domestic law was used to avoid *renvoi* issues. GOODE at para. 4.64 (Unidroit 2013). The practitioner should be familiar with applicable domestic rules as any substantive remedies outside the Convention could be governed by the law governing the parties’ contract or by the law of the forum. GOODE at para. 2.94 (Unidroit 2013).

<sup>359</sup> Article 15 of the Convention. GOODE at para. 4.120 (Unidroit 2013). Article IV(3) of the Protocol. GOODE at para. 5.27 (Unidroit 2013).



- exercise of remedies provided by the Convention being in conformity with the procedure prescribed by the law of the place of exercise (Article 14 of the Convention); provided, that if the Contracting State where the remedies are being exercised has declared that remedies could be exercised without leave of court, non-judicial remedies supersede inconsistent local procedure;<sup>360</sup>
- prohibition on de-registering and exporting the aircraft without the consent of any prior registered interest holder (Article IX(1)-(2) of the Protocol);
- any remedy given by the Convention being exercised in a commercially reasonable manner (Article IX(3) of the Protocol); provided a remedy is deemed to be exercised in a commercially reasonable manner if exercised in conformity with the provisions of the parties' agreement except where such provision is manifestly unreasonable; and
- minimum of 10 working days prior notice to the debtor and other interested persons of a proposed sale or lease in order to satisfy "reasonable prior notice". (Article IX(4) of the Protocol).

Whether a repossessing creditor has proceeded in a commercially reasonable manner will be a question of fact and depend on the circumstances in each case. Proceeding in accordance with the agreement between the parties is deemed to be commercially reasonable, so long as the remedy being used and provided for in the agreement is not itself manifestly unreasonable. For instance, an agreement between the parties allowing the creditor to sell an aircraft at a private sale without prior notice to the owner or other interested parties would be manifestly unreasonable (in addition to violating the Convention). The Convention does not address the method to be used in the sale of an aircraft object, and since both public auctions and private sales of aircraft have been employed by the industry, either may be held to be commercially reasonable. All aspects of the disposition of the aircraft object would be subject to scrutiny, including the method, manner, time, place and other terms of the sale.

Paragraphs 2.234-2.235 of the Official Commentary point out that the effect of a failure to comply with a mandatory provision of the Convention, such as proceeding in a commercially reasonable manner, is left to the law of the Contracting State which could provide for a claim for damages or a suit for injunctive relief.

**Practice Note:**

The manifestly unreasonable standard for an agreed remedy clause to be deemed commercially reasonable applies to all remedies under the Convention and the Protocol. Article 6(1) of the Convention provides that the Convention "and the Protocol shall be read

<sup>360</sup> GOODE at para. 4.117 (Unidroit 2013).

and interpreted together as a single instrument.” The Official Commentary points out that “the phrase ‘manifestly unreasonable’ is a signal to the courts that they should not lightly disturb the bargain made by the parties”.<sup>361</sup> The Official Commentary further looks to “established commercial practice” and “accepted international practice” as being relevant to whether a provision would “normally be regarded as not manifestly unreasonable”. Such industry standards and customary wording in international aircraft financing and leasing contracts should be used to support decisions as to what is commercially reasonable throughout the remedies under the Convention and the Protocol.<sup>362</sup>

## **(V) DETERMINATION OF APPLICABLE REMEDIES BY CHARACTERIZATION OF THE INTERNATIONAL INTEREST AND CHOICE OF FORUM.**

Remedies under Article 10 of the Convention apply to leases and title reservation agreements, and remedies under Articles 8 and 9 apply to security agreements. The characterization of the agreements is determined by reference to applicable law.<sup>363</sup> As noted in paragraph VI.A(iii) above and the footnotes thereto, “applicable law” means the domestic law applied by the forum. Section III.C of this Guide, entitled “Characterization,” explains and gives several remedy situation examples of such an analysis of whether the lease or title reservation agreement is a security agreement under applicable law or is a lease or title reservation agreement depending on the applicable law and underscores the importance of this characterization to the selection of a forum in which to take remedies.

There are seven different clauses governing the forum for remedies under the Convention:

- Forum chosen by agreement of parties, which shall be exclusive unless otherwise agreed<sup>364</sup> and, except in the case of speedy court relief, for the concurrent jurisdiction of the courts where the aircraft object is situated or where the debtor is situated.<sup>365</sup>
- Forum of Contracting State where the aircraft object is located in the case of the forms of speedy court relief specified in Article 13(1)(a), (b) and (c) and Article 13(4) of the Convention.
- Forum of Contracting State where the debtor is situated in the case of speedy court relief specified in Article 13(1)(d) and Article 13(4) of the Convention, but with the enforceability of that relief limited to that Contracting State. Although the term “situated”

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<sup>361</sup> GOODE at para. 4.86-87 (Unidroit 2013).

<sup>362</sup> GOODE at para. 5.51 (Unidroit 2013).

<sup>363</sup> Article 42 of the Convention. GOODE at para. 4.285 (Unidroit 2013).

<sup>364</sup> Article 42 of the Convention. GOODE at para. 4.285 (Unidroit 2013).

<sup>365</sup> Article 43 (1) and (2) of the Convention. GOODE at para. 4.292 (Unidroit 2013).

in Article 43 has not been defined, Professor Goode notes that there is no reason why a court should not rely on the Article 4(1) definition of where a debtor is “situated”.<sup>366</sup>

- Forum of a Contracting State that is the state of registry in the case of speedy court relief concerning an airframe or helicopter registered in that registry.<sup>367</sup>
- Forum of the Contracting State that is the primary insolvency jurisdiction in case of Alternative A and Alternative B remedies under Article XI of the Protocol.<sup>368</sup> The primary insolvency jurisdiction is that “in which the centre of the debtor’s main interests is situated, which for this purpose shall be deemed to be the place of the debtor’s statutory seat, or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise”.<sup>369</sup>
- Forum of the Contracting State where the aircraft object is located would also have jurisdiction in the case of the insolvency assistance to the primary insolvency jurisdiction in carrying out the provisions of the Alternative A and B under Article IX of the Protocol if declared by such Contracting State.<sup>370</sup>
- Forum to be determined by a Contracting State where the parties made no choice of forum could not be obtained in such forum due to lack of a submission clause or where the claim is not for speedy court relief under Article 13, but is for an order under Articles 8, 9 or 10.<sup>371</sup>

See further discussion of speedy court relief forum clauses in Section VI.E(iv)(d).

## **(VI) CONTRACTUAL CHOICE OF LAW.**

Article VIII (2) of the Protocol, which validates the parties’ choice of law in a lease, title reservation or security agreement or in a contract of sale, or in a related guarantee contract or subordination agreement to govern their contractual rights and obligations (as well as other contracts incorporated by reference into any of the foregoing so as to become terms of them), either wholly or in part, only applies where a Contracting State has made a declaration making this Article effective. The law chosen is the domestic rules of law of the designated State or territorial unit unless otherwise agreed.

This Article on contractual choice of law can be very helpful in an enforcement situation to confirm the enforceability of relevant documents and has already been used in Mexican

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<sup>366</sup> GOODE at para. 4.295 (Unidroit 2013).

<sup>367</sup> Article XXI of the Protocol.

<sup>368</sup> Article XI of the Protocol.

<sup>369</sup> Article I(2)(n) of the Protocol. The location of this jurisdiction is a presumption. GOODE at para. 5.15 (Unidroit 2013).

<sup>370</sup> Article XII of the Protocol.

<sup>371</sup> GOODE at para. 4.290 (Unidroit 2013).

proceedings to support assertions as to the governing law in filed litigation papers.

This is only an ability to agree on the contractual law and not on the proprietary law that is applicable to the validity of a lease, title reservation or security agreement or of a contract of sale. Proprietary rights prospectively affect third parties and rights of creditors in an insolvency scenario and are not impacted by this Article.

## **(VII) NON-JUDICIAL REMEDIES**

The leave of court declaration under Article 54(2) of the Convention is the only declaration in the Convention that is mandatory. The initial Protocol ratification will not be accepted by Unidroit, the legal Depositary, unless the Contracting State has declared whether or not “any remedy available to the creditor under any provision” of the Convention which is not required in the express terms of the Convention “to require application to the court may be exercised only with leave of the court”.<sup>372</sup>

Whether a repossessing creditor may proceed against an aircraft object without permission of a court will depend on the declarations made by the Contracting State under Article 54(2) of the Convention. In other words, if the local law would permit the use of non-judicial remedies in seizing an aircraft, and the Contracting State did not change that law in its declarations when adopting the Convention, the Convention would permit the repossession and sale of an aircraft object without going to court for assistance. Similarly, if a jurisdiction would not otherwise permit exercise of non-judicial remedies but the applicable jurisdiction is a Contracting State having made the appropriate declaration under Article 54(2) to allow exercise of such remedies, then such creditor cannot be required to institute proceedings to enforce a remedy (which the Convention does not mandate as requiring court action) even if a particular jurisdiction lacks sufficient procedural rules to accommodate such relief. The practitioner, therefore, must check the current declarations of the Contracting State shown on the Unidroit website before proceeding with a non-judicial remedy in a jurisdiction that would otherwise permit it.

Of course, seizing a commercial aircraft in most airports without a court order will be quite challenging, and local administrative regulations must still be observed. The practitioner should proceed with good advice and extreme caution in this regard and in all cases of repossession using non-judicial remedies be sure not to act contrary to local law. Exercising such remedies without breaching the peace while an aircraft is in storage or maintenance is also a possible avenue where non-judicial remedies are available.

The use of non-judicial remedies will be subject to the same requirements of commercial reasonableness as any other remedy under the Cape Town Convention, and the text of the non-

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<sup>372</sup> Article 54 of the Convention. Goode at para. 4.330 (Unidroit 2013). Contracting States that permit non-judicial remedies state that such remedies “may be exercised without leave of the court or other court action” or words to similar effect.

judicial remedy set forth in the remedy clauses can help support meeting this requirement where it is not manifestly unreasonable as provided in Article IX(3) of the Protocol.

The rules on the availability of a non-judicial course of action under Article 54(2) do not apply to remedies outside the Convention, which are discussed in Section VI.A(iii) above.<sup>373</sup>

**Practice Note:**

Taking remedies as a non-judicial matter is a substantive right of the creditor. This distinction from the laws of procedure that must be followed as a mandatory principle (as noted in Section VI A (iv) above) is underscored by the way in which Article 14 requiring remedies to be exercised in conformity with local procedure begins with the phrase “subject to Article 54(2)”. The Official Commentary says that Article 14 “is concerned with procedure, not with substantive law, and therefore does not affect the exercise of non-judicial remedies under Article 8 except in a Contracting State which has made a declaration under Article 54(2) requiring leave of the court”. Where a declaration is made permitting exercise of non-judicial remedies, the creditor cannot be required to go to a court to exercise its remedies. The Official Commentary goes on to say that “other procedural law may be applicable, for example, a legal requirement that an administrative approval [such as an airport authority] must be obtained”.<sup>374</sup>

## (VIII) WAIVER OF SOVEREIGN IMMUNITY.

Article XXII of the Protocol provides that a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention, which include the courts of a Contracting State chosen by the parties and the courts of the Contracting State in the territory of which the debtor is situated, is binding.<sup>375</sup>

The waiver “must be in writing and contain a description of the aircraft object.”<sup>376</sup> The Protocol is silent as to how much detail is required for the description. The Official Commentary states that the description need not be the waiver clause itself that contains a description of the aircraft object but rather the instrument of waiver.<sup>377</sup> In order to avoid ambiguity, however, it may be prudent to reference the aircraft object in the waiver clause itself.

The Protocol provides that the waiver shall be effective to confer jurisdiction or to permit enforcement. As recognized by the Official Commentary, international law generally provides that

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<sup>373</sup> GOODE at para. 2.81 (Unidroit 2013).

<sup>374</sup> GOODE at para. 4.117 (Unidroit 2013).

<sup>375</sup> Article XXII(1) of the Protocol.

<sup>376</sup> Article XXII(2) of the Protocol.

<sup>377</sup> GOODE at para. 5.100 (Unidroit 2013).

waiver of immunity from suit does not constitute waiver of immunity from enforcement.<sup>378</sup> Thus, the instrument of waiver must be clear as to whether it addresses jurisdiction, enforcement, or both.

## B. Remedies under Lease Agreements and Title Reservation Agreements

Upon default under a title reservation agreement or under a lease agreement (in each case that is not a security agreement), Article 10 of the Convention provides two remedies to the conditional seller or lessor: (1) terminate the agreement and take possession or control or (2) apply for a court order authorizing or directing either of those acts.<sup>379</sup> These are ultimately the only necessary remedies for lease agreements and title reservation agreements (that are not security agreements) because the conditional seller or lessor is the owner of the object.<sup>380</sup> Unlike security agreements, these remedies are available without any special agreement by the debtor. The remedies may be exercised without a court order except so far as stated otherwise in a declaration made by the Contracting State under Article 54(2).<sup>381</sup>

In addition, Article IX of the Protocol provides two other remedies applicable to a repossession action: (1) deregistration of an aircraft and (2) export and physical transfer of an aircraft object to a different territory.<sup>382</sup> See Section VI.G. on deregistration and export and Section V.B. on the IDERA.

### (I) TERMINATION.

The conditional seller or lessor may terminate the title reservation agreement or lease agreement with respect to any aircraft object to which such agreement relates or apply for a court order to authorize or direct such termination.<sup>383</sup> However, in the case of a sub-interest, if the sub-lessor has registered its international interest before the head lessor registers its interest and the sub-lessee has not registered a subordination of its interest or otherwise agreed, the sub-lessee will be protected under Article XVI of the Protocol from such termination and repossession. If the sub-lessor has not so registered its interest prior to the registration of the interest of the head lessor, unless otherwise agreed, the effect of termination of a title reservation agreement or leasing agreement on the sub-interest will be determined by applicable law and the terms of the head agreement.<sup>384</sup>

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<sup>378</sup> *Id.*

<sup>379</sup> Article 10 of the Convention.

<sup>380</sup> GOODE at para. 4.102 (Unidroit 2013). While the Official Commentary notes as to Article 10 of the Convention that there is no requirement of “commercial reasonableness” in connection with these activities because the creditor is simply exercising its right to recover its own property (GOODE at para. 4.86 (Unidroit 2013)), this was changed by the Protocol. The Protocol at Article IX (3) overrides the commercial reasonableness clause in Article 8(3) of the Convention as to aircraft objects and expressly covers “all remedies given by the Convention”. See GOODE at para. 5.50 (Unidroit 2013).

<sup>381</sup> GOODE at para. 4.104 (Unidroit 2013).

<sup>382</sup> Article IX of the Protocol.

<sup>383</sup> Article 10(a) and Article 10(b) of the Convention.

<sup>384</sup> GOODE at para. 4.103 (Unidroit 2013) which is a comment on Article 10. Whether a lessee has a right of quiet enjoyment is further addressed in Article XVI of the Protocol and in Section V.F of this Guide (See *also*, GOODE at paras. 3.93-3.101). As a general rule, the Convention’s priority rule (first to file has priority) will govern whether a lessee has such a right against a lender to the lessor or another assignee of the lease. In other words, if the lease containing a right of quiet enjoyment is registered as an international interest before the mortgage, the lessee will have a right of quiet enjoyment under the Convention. So it is important for a lender who wishes a lease to be subordinate to its right to repossess a leased aircraft to make sure that the

**Practice Note:**

Article XVI of the Protocol essentially clarifies the Convention and provides more detail in regard to a lessee's or a sub-lessee's interests. The Official Commentary says in para 5.75 that Article XVI establishing a quiet possession regime for 'debtors' "can properly be regarded as itself a supplemental priority rule that can be varied by subordination agreement" registrable under Article 16(1)(e). See Section II.Q above for practitioner guidance on a lessee's rights of quiet enjoyment.

## **(II) POSSESSION OR CONTROL.**

The conditional seller or lessor may take possession or control of any aircraft object to which such agreement relates or apply for a court order to authorize or direct such possession or control.<sup>385</sup>

### **C. Remedies for Security Agreements**

The Convention provides for the exercise of four remedies by the chargee upon default. In order to utilize any of the four remedies as extra-judicial remedies, the debtor must have provided its consent or agreement at any time. No consent is required for the chargee to apply for a court order. Each of the remedies is subject to any declaration that may be made by a Contracting State under Article 54, which permits remedies without leave of court.<sup>386</sup> The Protocol provides for the remedies of deregistration of the aircraft and export/physical transfer of an aircraft object. Finally, Article 9 of the Convention provides, under certain circumstances, that the ownership of any object covered by the security interest may vest in the chargee in or towards satisfaction of the secured obligations.

## **(I) POSSESSION OR CONTROL.**

The chargee may take possession or control of any aircraft object charged to it or apply for a court order to authorize or direct such possession or control.<sup>387</sup>

## **(II) SELL AIRCRAFT OBJECT.**

The chargee may unless otherwise agreed between the parties<sup>388</sup>, sell any aircraft object upon reasonable notice to applicable interested persons or apply for a court order to authorize or direct

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mortgage is registered on the International Registry first. It is, of course, also possible to subordinate the rights of the lessee by the registration of a subordination agreement. For a discussion of quiet enjoyment in a subleasing context, see *Goode* at para. 2.166 (Unidroit 2013).

<sup>385</sup> Article 10(a) and Article 10(b) of the Convention.

<sup>386</sup> Article 8(1) of the Convention.

<sup>387</sup> Article 8(1)(a) and Article 8(2) of the Convention.

<sup>388</sup> For example, an owner-lessor and lender-mortgagee might agree that the lender will not sell the aircraft without exercising remedies under the lease in order to prevent the lender from "squeezing out" the equity.

such a sale.<sup>389</sup> The Convention and Protocol do not require that the chargee have possession of an aircraft object before effecting a sale. Ten or more working days' written notice is considered reasonable notice of sale, although the debtor and chargee may agree to a longer period.<sup>390</sup> The Official Commentary notes that the chargee itself is not precluded from purchasing the aircraft object provided that the sale is conducted in a commercially reasonable manner<sup>391</sup> and gives as examples a public auction and a competitive tender.<sup>392</sup>

**Practice Note:**

A sale by the senior chargee overrides junior security interests, which then attach to the surplus proceeds. A sale by a junior chargee takes effect subject to a senior registered security interest unless the interest is released or the senior creditor is paid in full.<sup>393</sup>

### **(III) GRANT LEASE IN THE AIRCRAFT OBJECT.**

The chargee may grant a lease in any aircraft object or apply for a court order to authorize or direct such a lease.<sup>394</sup> The same notice provisions apply as with respect to a sale. This provision is subject to Article 54(1), which provides that a Contracting State may declare that while the charged object is situated within its territory the chargee shall not grant a lease of the aircraft object in that territory.<sup>395</sup> The practitioner should take note that this restriction would no longer apply if the chargee took possession of the aircraft object and relocated it to a jurisdiction in which this limitation did not apply.

### **(IV) COLLECT OR RECEIVE INCOME OR PROFITS.**

The chargee may collect or receive any income or profits arising from the management or use of the aircraft object or apply for a court order to authorize or direct the same.<sup>396</sup> The income or profits received by a chargee are required to be applied towards discharge of the amount of the secured obligation.<sup>397</sup> The chargee is obligated to distribute any remaining surplus among holders of subordinate interests which have been registered or of which the creditor has been given notice, in order of priority, and any remaining surplus must be paid to the debtor.<sup>398</sup>

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<sup>389</sup> Article 8(1)(b), Article 8(2), and Article 8(4) of the Convention. "Interested Persons" are specified in Article 1(m) of the Convention. See GOODE at para. 2.87 (Unidroit 2013).

<sup>390</sup> Article IX(4) of the Protocol.

<sup>391</sup> See the discussion of commercial reasonableness in Section VI.A.(iv) above.

<sup>392</sup> GOODE at para. 4.88 (Unidroit 2013). See the last sentence of Comment 4.88.

<sup>393</sup> GOODE at para. 4.90 (Unidroit 2013).

<sup>394</sup> Article 8(1)(b) and Article 8(2) of the Convention.

<sup>395</sup> Article 54(1) of the Convention.

<sup>396</sup> Article 8(1)(c) and Article 8(2) of the Convention.

<sup>397</sup> Article 8(1)(c) and Article 8(2) of the Convention.

<sup>398</sup> Article 8(6) of the Convention.



**Practice Note:**

The Official Commentary points out that the remedies are also exercisable against a conditional buyer or lessee from the debtor whose interest is subordinate to that of the creditor because the creditor's international interest was registered before the debtor registered its international interest. Thus, the creditor is entitled, among other things, to seek payment of the rental income due to the debtor from a third-party lessee.<sup>399</sup>

## **(V) VESTING OF OBJECT.**

At any time after default as provided in Article 11 of the Convention, the creditor, the debtor and all other interested persons may agree that ownership of (or any other interest of the debtor in) any aircraft object covered by the security interest shall vest in the creditor in or towards satisfaction of the secured obligation.<sup>400</sup> In contrast to all other remedies under the Convention, this agreement can be made only after a default has occurred.<sup>401</sup> Alternatively, a court may order such vesting of ownership, but only if the amount of the secured obligations to be satisfied are commensurate with the value of the aircraft object after taking into account any payment to be made by the creditor or any interested persons.<sup>402</sup>

## **D. Remedies Under Assignments**

Article 34 of the Convention brings the application of these same remedies available under Articles 8 (Remedies of Chargee), 9 (Vesting of Object in Satisfaction; Redemption), 11 (Meaning of Default), 12 (Additional Remedies), 13 (Relief Pending Final Determination), and 14 (Procedural Requirements) to defaults by the assignor under the assignment of associated rights and the related international interest and to the enforcement of remedies under such assignment as a security interest.

## **E. Advance Court Relief Pending Final Determination**

Article 13 of the Convention, as modified by Article X of the Protocol (as more fully discussed in subsections E(i), (ii) and (iii) below) sets forth speedy court remedies upon default that may be utilized with respect to aircraft objects by a creditor in advance of final determination of the merits of its claim in the same or another forum. In tandem with those provisions, Article 43 of the Convention, as modified by Article XXI of the Protocol (as more fully discussed in subsection E(iv) below), sets forth rules on court jurisdictions where application can be made for such Convention

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<sup>399</sup> GOODE at para. 4.81 (Unidroit 2013).

<sup>400</sup> Article 9(1) of the Convention.

<sup>401</sup> GOODE at para. 4.92 (Unidroit 2013).

<sup>402</sup> Article 9(2) and Article 9(3) of the Convention. The Article 9(3) restrictions on vesting of charged object are mandatory and cannot be excluded or varied by agreement. GOODE at para. 4.93 (Unidroit 2013).

created speedy remedies as well as other prejudgment remedies available under national laws. The extent to which these provisions will apply in a given Contracting State will depend on what opt-out and opt-in declarations (as more fully discussed in subsection E(v) below) any such Contracting State has made with respect to either or both of the relief provisions and the jurisdiction provisions which are so tied together.

### **(I) DISTINCTION BETWEEN CONVENTION ADVANCE COURT RELIEF AND NATIONAL FORMS OF INTERIM RELIEF.**

The “speedy relief” described in Article 13(1) is a Convention created relief and is distinct from any “interim relief” that may also be available under the laws of the forum. Article 13(4) expressly states that “the availability of forms of interim relief other than those set out” in Article 13(1) are not limited by the Convention. The Official Commentary refers to the relief pending final determination as “advance relief” for brevity and says that the words “interim relief” were “intentionally avoided in the heading to Article 13 and in Article 13(1) so as to make clear that the relief is a *sui generis* Convention relief and should not be characterized by reference to concepts of municipal procedural law.<sup>403</sup> Any “advance relief” is available to the creditor only to the extent that the debtor has agreed to such relief. The Official Commentary further points out that Article 13 “builds on forms of relief pending final determination . . . . commonly available in national legal systems, but it is to be interpreted in accordance with the Convention, not by reference to national law (see Paragraph 2.98).”<sup>404</sup>

### **(II) FORMS OF ADVANCE COURT RELIEF.**

Unless otherwise declared by the Contracting State, Article 13 of the Convention and Article X of the Protocol provide for what is called “speedy relief,” under which the creditor has the right to obtain certain court orders prior to judgment “to the extent that the debtor has at any time so agreed”. This means that the relevant agreement should expressly provide for such remedies as most security agreements, title reservation agreements and leases do. “Speedy” means a court order is to be issued within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

As noted in subsection E(i) above, Article 13 of the Convention allows the creditor to utilize other forms of interim relief that are permitted under the law of the applicable forum.<sup>405</sup> Thus, the list of speedy court remedies provided by the Convention and Protocol may not be exhaustive of all of the advance remedies available to the creditor. The speedy relief expressly provided by the Convention and Protocol for agreement by the parties are “in the form of such one or more of the

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<sup>403</sup> GOODE at para. 2.98, note 14 (Unidroit 2013). It should be noted that while relief available under Article 13(1) is not “interim relief, the “interim relief” under Article 13(4) could include some or all of the relief available under Article 13(1). GOODE at para. 2.104 (Unidroit 2013).

<sup>404</sup> GOODE at para. 4.108 (Unidroit 2013).

<sup>405</sup> Article 13(4) of the Convention.

following orders as the creditor requests”:

- (a) preservation of the object and its value;<sup>406</sup>
- (b) possession, control or custody of the object;<sup>407</sup>
- (c) immobilization of the object;<sup>408</sup>
- (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom;<sup>409</sup>
- (e) sale and application of proceeds therefrom (if opted-in), provided that at any time the debtor and creditor have specifically agreed (which the Official Commentary notes does not need to be in writing).<sup>410</sup>; and
- (f) by virtue of having made the declaration under Article XXX(2) of the Protocol, the remedies of de-registration and export as set out in Article IX(1) of the Protocol.<sup>411</sup>

### (III) CONDITIONS TO ADVANCE RELIEF.

In order to obtain speedy court relief in one of the above forms, the creditor must provide evidence to the court of the debtor’s default as more fully described in the Practice Note below.<sup>412</sup> The court has the discretion to require notice of the creditor’s request for relief to be given to the interested persons as defined in Article 1(m) of the Convention.<sup>413</sup> Under Article 13(2) of the Convention, the court may impose terms, such as an undertaking or bond from the creditor, to protect the debtor or the holder of a non-consensual right or interest and to protect other interested persons in the event that the creditor fails to perform an obligation under the Convention or Protocol<sup>414</sup> or if the creditor fails to establish its claim, wholly or in part, on the final determination of the claim.<sup>415</sup> If the parties have agreed to permit the application of advance remedies, they may agree in writing to exclude the protections afforded the debtor under that Article 13(2) of the Convention. This ability to exclude Article 13(2) is permitted by virtue of Article X(5) of the Protocol unless Article X(5) was not contained in the forum Contracting State’s declarations opting in to Article X of the Protocol as more fully discussed in subsection E (v) below.

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<sup>406</sup> Article 13(1)(a) of the Convention.

<sup>407</sup> Article 13(1)(b) of the Convention.

<sup>408</sup> Article 13(1)(c) of the Convention.

<sup>409</sup> Article 13(1)(d) of the Convention. The Commentary notes that “the chargee cannot obtain an order for management of the object as well as an order under sub-paragraph (a), (b) or (c)”. GOODE at para. 4.110 (Unidroit 2013).

<sup>410</sup> Article X of the Protocol. GOODE at para. 5.54 (Unidroit 2013).

<sup>411</sup> Article X(6) of the Protocol.

<sup>412</sup> Article 13(1) of the Convention.

<sup>413</sup> Article 13(3) of the Convention. See GOODE at paras. 2.87 to 2.92 (Unidroit 2013) as to the Convention concept of “interested persons”.

<sup>414</sup> Article 13(2)(a) of the Convention.

<sup>415</sup> Article 13(2)(b) of the Convention.

By its nature, advance relief “disturbs what would be the debtor’s right absent default and does not purport to preserve the *status quo*.”<sup>416</sup> If the debtor prevails on a claim against the creditor, the debtor will have a right to compensation or other relief under terms imposed by the court.

**Practice Note:**

When applying for speedy relief, the practitioner must be sure that the creditor “adduces evidence of default of the debtor” to the extent needed to satisfy the court that such evidence exists. Article 13(1) does not state that the existence of a default must be proved. Once the court is satisfied that such evidence exists, and subject to any terms that the Court may impose in its order to protect the debtor under Article 13(2) (unless excluded by agreement as described above), the Official Commentary has pointed out that the court has no discretionary power to refuse a requested order or to suspend an order for advance relief.<sup>417</sup> Similarly, the requirement as to evidence of default should not be converted to a requirement of giving evidence of irreparable harm. Article 13(1) does not provide for judicial discretion to reduce harm. Nor is the court concerned with considerations such as whether harm to the creditor outweighs harm to the debtor.<sup>418</sup> However, if the creditor does cause harm to the debtor due to a breach of the agreement creating the international interest, then the creditor may be liable to the debtor or other relevant interested person under applicable law pursuant to Article XVI(2) of the Protocol. Furthermore, Article IX(3) of the Protocol makes clear that the concept of commercial reasonableness as to the manner of exercising remedies still applies. The Official Commentary states that Article 13 “does not dispense with the duty of the chargee to act in a commercially reasonable manner...for example, in the way it makes a sale pursuant to the order of the court”.<sup>419</sup>

#### **(IV) JURISDICTIONS FOR ADVANCE RELIEF.**

As discussed in Section VI.A(v) above on choice of forum, the application for the Convention created advance court relief and any application for other forms of national interim relief can, depending on any opt-outs, be brought in one of four jurisdictions (which may be concurrent and may be the same forum). These four jurisdictions are:

1. A forum chosen by the parties.<sup>420</sup> With some exception, the parties are free to confer jurisdiction by written agreement upon the courts of a Contracting State to the

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<sup>416</sup> GOODE at para. 2.104 (Unidroit 2013).

<sup>417</sup> GOODE at paras. 4.111-4.112 (Unidroit 2013).

<sup>418</sup> GOODE at para. 2.107 (Unidroit 2013).

<sup>419</sup> GOODE at para. 4.113 (Unidroit 2013).

<sup>420</sup> GOODE at para 2.223 (Unidroit 2013).

Convention.<sup>421</sup> There is no requirement that the chosen forum have some connection to the parties or to the underlying transaction to the agreement. The parties' ability to choose a forum does not apply to the non-exclusive provisions for advance relief under Article 13 or the making of orders against the Registrar by a court not in the place where the Registrar has its center of administration;<sup>422</sup>

2. A forum that is the location of the aircraft object.<sup>423</sup> The courts of the forum where the aircraft object is located has concurrent jurisdiction with the courts of the forum chosen by the parties to consider requests of advance relief by creditors (other than for relief in the form of lease or management of the object pursuant to Article 13(1)(d)). Parties cannot exclude the application of this concurrent jurisdiction by agreement;<sup>424</sup>
3. A forum that is in the territory of which the debtor is situated.<sup>425</sup> The courts of the forum where the debtor is situated has concurrent jurisdiction with the courts of the forum chosen by the parties where the relief sought (a) is in the form of lease or management of the object pursuant to Article 13(1) (d) or (b) is a form of national interim relief that shares the in personam nature of the Article 13(1)(d) relief or is other relief “not in respect of the object, as for example, a claim for an interim payment by the debtor towards alleged arrears.”<sup>426</sup> Parties cannot exclude the application of this concurrent jurisdiction by agreement;<sup>427</sup> and
4. A forum that is the jurisdiction of the applicable aircraft or helicopter registry.<sup>428</sup> Article XXI of the Protocol modifies the Convention to provide that the forum of the registry has concurrent jurisdiction to grant advance relief under Article 13. Contracting States may opt-out of the alternative forum through a declaration pursuant to Article XXX(5). The European Union, for instance, has made such a declaration and its Member States do not apply the rule on concurrent jurisdiction.

#### Practice Note:

The Official Commentary in its discussion of in rem versus in personam jurisdiction and concurrent jurisdiction gives substantial aid for litigation approaches in the Official

<sup>421</sup> The parties may also agree that jurisdiction is to be non-exclusive under Article 42(1). GOODE at para. 2.223 (Unidroit 2013). Any questions as to the validity of a jurisdiction clause in an agreement which falls outside of Article 42 is determined under the applicable rules of private international law of the forum. *Id.*

<sup>422</sup> Article 43 (1) and (2) of the Convention. GOODE at paras. 4.292-293 (Unidroit 2013) as to the in personam nature of this jurisdiction.

<sup>423</sup> GOODE at para. 2.225 (Unidroit 2013) as to the in rem nature of this jurisdiction.

<sup>424</sup> Article 43 (1) of the Convention. GOODE at paras. 4.292-294 (Unidroit 2013) as to the in rem nature of this jurisdiction.

<sup>425</sup> GOODE at para. 2.224 (Unidroit 2013).

<sup>426</sup> Article 43(2)(b) of the Convention. GOODE at paras. 4.292-293 (Unidroit 2013). See GOODE at 4.290 (Unidroit 2013) as to the point that “situated” should be construed to be the same test as in Article 4(1) for the purpose of this in personam jurisdiction.

<sup>427</sup> Article 43(2)(b) of the Convention. GOODE at paras. 4.292-293 (Unidroit 2013). See GOODE at 4.290 (Unidroit 2013) as to the point that “situated” should be construed to be the same test as in Article 4(1) for the purpose of this in personam jurisdiction.

<sup>428</sup> Article XXI of the Protocol; GOODE at paras. 2.226-228, 3.124, 5.98-99 (Unidroit 2013).

Commentary paragraphs noted in the footnotes to the four jurisdictions described above. It also puts a focus on Article 43(3) of the Convention, which provides that a court has such jurisdiction for Convention advance relief or other national interim relief even if the final determination of the claim will or may take place in a court of another Contracting State or by arbitration. The Official Commentary adds that there is “no reason why the courts of a Contracting State should not be able to grant relief under Article 13” even if final determination on the claim would be made by a non-Contracting State.<sup>429</sup>

## **(V) VARIATION BY DECLARATION.**

No declarations are needed from a Contracting State in order for Article 13 of the Convention on advance relief and for Article 43 of the Convention on jurisdiction to be effective. A Contracting State may declare opt-outs under Article 55 of the Convention for either or both of Articles 13 (Advance Relief) and 43 (Jurisdiction) in whole or in part and under which conditions. There have been some opt-outs made and thus Article 55 can be relevant in some jurisdictions.

Article X of the Protocol adds opt-ins to Article 13 and 43 of the Convention, and these opt-ins may be declared under Article XXX(2) wholly or in part. These opt-ins are:

1. Article X(2) specifying the number of days by which speedy relief must be so ordered by a court;
2. Article X(3) and (4) adding the relief of Article 13(1)(e) on sale and application of proceeds and permitting such relief to be sought in the jurisdictions where the debtor is situated;
3. Article X(5) allowing the debtor and creditor to agree to exclude the application of Article 13(2) of the Convention under which a court may impose additional terms on the granting of an order for speedy relief; and
4. Article X(6) specifying when the remedies of de-registration and export must be made available and providing that the applicable authorities must expeditiously cooperate with and assist the creditor in the exercise of such remedies.

Finally, Article XXI of the Protocol added to the Convention Article 43 jurisdictions the jurisdiction of an airframe or helicopter registry, while Article XXX(5) permits a Contracting State to opt-out of such jurisdiction wholly or in part.

## **F. Insolvency and Alternatives A and B**

### **(I) INSOLVENCY IN GENERAL.**

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<sup>429</sup> GOODE at para. 4.291 (Unidroit 2013).

The general rule under the Convention is that in the event of insolvency proceedings<sup>430</sup> against a debtor, an international interest is effective if it was registered against the debtor prior to the commencement of the proceedings. This principle extends to (a) the effectiveness of the assignment of an international interest if the assignor is subject to insolvency proceedings, but the assignment was registered prior to the commencement of the proceedings<sup>431</sup> and (b) the effectiveness, against a debtor subject to insolvency proceedings, of a registered non-consensual right or interest.<sup>432</sup> An unregistered international interest may nevertheless be effective under applicable non-Cape Town Convention law, as Section 30(1) is not intended to invalidate the effectiveness of an international interest, but rather speaks to the validity of a registered international interest.<sup>433</sup>

The terms “insolvency proceedings” and “insolvency administrator” are defined in the Convention along familiar lines to cover proceedings used for purposes of reorganization or liquidation.<sup>434</sup> Therefore, as used in the Convention and the Protocol, these terms are not limited to a reorganization. The term “insolvency administrator” includes a debtor in possession if permitted under applicable insolvency law.<sup>435</sup>

**Practice Note:**

These terms should not be confused with the definition of “insolvency-related event” in Article I(2)(m) of the Protocol. “Insolvency-related event” is used only as a trigger for the time periods in Alternative A and Alternative B of Article XI of the Protocol, and it means either (i) the commencement of insolvency proceedings, or (ii) the declared intention to suspend or the actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or state action. The Official Commentary notes that clause (ii) was required for two reasons. One reason is that some countries’ airlines are not eligible for insolvency proceedings. Another reason is the basic intent to trigger the Alternatives A and B time periods “where there are financial problems and State action or law (whether made or taken before or after a declared intention to suspend payment) prevents application of the remedies under the Convention.”<sup>436</sup>

The meaning of “effectiveness” is that the property interest represented by the international interest will be recognized and the creditor will have a claim against the asset itself, as a secured

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<sup>430</sup> Article 30(1) of the Convention.

<sup>431</sup> Article 37 of the Convention.

<sup>432</sup> Article 40 of the Convention.

<sup>433</sup> GOODE at para. 2.179 (Unidroit 2013).

<sup>434</sup> Article 1(l) and (k) of the Convention.

<sup>435</sup> Article 1(k) of the Convention.

<sup>436</sup> GOODE at para. 5.14 (Unidroit 2013).

creditor, and will not be limited to a *pari pasu* sharing with other creditors.<sup>437</sup>

The general rule under the Convention outlined above does not override applicable rules of law relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors, or rules of procedure relating to the enforcement of rights to property under the control or supervision of the insolvency administrator.<sup>438</sup> See, however, the following section regarding rights under Article XI of the Protocol that (if applicable) override such enforcement-related rights of an insolvency administrator to the extent provided therein.

### **1. Protocol Article XI – Remedies on Insolvency – Alternatives A and B.**

The Protocol provides in Articles XI and XXX an opportunity for Contracting States to establish a special insolvency regime to govern creditors’ rights in relation to aircraft objects, with the effect that, within a specified and binding time limit (waiting period) the creditor either (a) recovers the aircraft object (Alternative A), or (b) obtains from the debtor or the insolvency administrator the curing of all past defaults and a commitment to perform the debtor’s future obligations.<sup>439</sup> The details of these rules vary depending on whether a Contracting State declares pursuant to Article XXX(3) of the Protocol that it will apply Alternative A or Alternative B of Article XI of the Protocol (which will then apply to the types of insolvency proceedings specified by the Contracting State in its declaration).<sup>440</sup> A Contracting State may decide to make no such declaration, in which case neither Alternative will be applicable and the status quo in that jurisdiction would continue.

Article XI applies only where a Contracting State that is the “primary insolvency jurisdiction” of a debtor has made the applicable declaration and there has been an insolvency-related event as discussed in the Practice Note in Section VI. F(1) above.<sup>441</sup> The primary insolvency jurisdiction of a person is where the centre of its main interests is situated, with a rebuttable presumption that it is the place of its statutory seat or, if none, the place of its incorporation or formation.

#### **Practice Notes:**

(1) The concept of a stay limitation or waiting period in respect of aircraft is drawn from Section 1110 of the United States Bankruptcy Code.<sup>442</sup> In interpreting certain aspects of Alternative A, practitioners should take into account the leading jurisprudence on those issues under U.S. law.

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<sup>437</sup> GOODE at para. 2.179 (Unidroit 2013).

<sup>438</sup> Article 30(3) of the Convention.

<sup>439</sup> Articles XI and XXX of the Protocol and GOODE at paras. 5.57-5.66 (Unidroit 2013).

<sup>440</sup> Article XXX(3) of the Protocol. Under Article XXX(3) of the Protocol, a Contracting State electing to apply Alternative A or B must apply the entirety of that Alternative.

<sup>441</sup> Article XI(1) of the Protocol. GOODE at para. 5.15 (Unidroit 2013).

<sup>442</sup> 11 U.S.C. §1110.



(2) The term “centre of main interests” (COMI) was inspired by the same concept and terminology in European insolvency law.<sup>443</sup> Similar to Article XI, that law does not define the COMI but establishes a rebuttable presumption that the registered office is the COMI. In interpreting this aspect of Article XI, practitioners should take into account the leading jurisprudence under European law, particularly that of the European Court of Justice.<sup>444</sup>

Alternative A requires that, as a condition to the continuing stay during the designated waiting period, the debtor or its insolvency administrator, shall (i) preserve and maintain the aircraft object pursuant to the applicable agreement; and (ii) maintain the value of the aircraft object pursuant to the applicable agreement.<sup>445</sup> These provisions are intended to ensure that the debtor, or its insolvency administrator, takes active steps to preserve the condition and value of the collateral during the period that the creditor cannot have access to it. Specifically, these provisions ensure that the aircraft objects receive proper maintenance and are not subjected to prejudicial component swapping, asset stripping, etc.<sup>446</sup> Alternative B contains no such protections.

Alternatives A and B, when applicable pursuant to a Contracting State’s declaration, relate to the occurrence of an “insolvency-related event”, a term added by the Protocol that includes not only actual insolvency proceedings, but also a situation in which (i) there has been a declared intention to suspend or actual suspension of payments by the debtor and (ii) the creditor’s right to institute insolvency proceedings against the debtor or to take remedies under the Convention has been prevented or suspended by law or state action.<sup>447</sup>

As a practical matter, the obligation of the registry and other applicable authorities to assist in the prompt de-registration and export of the aircraft objects does not mean that non-consensual liens that are preserved by a Contracting State declaration under Article 39 may not need to be discharged by a creditor seeking to exercise such remedies.

## **2. Alternative A.**

Alternative A is one of the most important, if not the most important, of the qualifying declarations that a Contracting State must make in order to be entitled to the maximum financing benefits made available for export credit financing provided under the OECD Aircraft Sector

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<sup>443</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) which reformed the former European Regulation on Insolvency proceedings (EC) 1346/2000.

<sup>444</sup> See, in particular, *In re Eurofood IFSC Ltd* [2006] (the presumption can only be rebutted if factors which are both objective and ascertainable by third parties lead to the conclusion that the COMI is not in the same location as the registered office) and *In re Susanne Staubitz-Schreiber* [2006] (the COMI is determined with reference to the facts present on the date of the application to commence the insolvency proceedings).

<sup>445</sup> Article XI(5)(a) of the Protocol.

<sup>446</sup> GOODE at para. 5.66 (UNIDROIT 2013).

<sup>447</sup> Article I(2)(m) of the Protocol.

Understanding.<sup>448</sup> Aside from the export credit fee discount that may be available under the OECD ASU, Alternative A is also one of the most important, if not the most important, of the declarations that a Contracting State may make in order to increase the availability of and reduce the cost of financing for aircraft in its jurisdiction generally.

Alternative A is the preferred declaration because it requires the debtor, no later than the earlier of (a) the end of the waiting period specified by the Contracting State that is the primary insolvency jurisdiction and that has adopted Alternative A or (b) the date on which the creditor would be entitled to possession if the Convention and Aircraft Protocol did not apply, to either (x) give possession of the aircraft object to the creditor<sup>449</sup> under the security agreement, title reservation agreement or lease or (y) cure all defaults other than a default constituted by the opening of insolvency proceedings, and agree to perform all future obligations under the agreement. A practitioner should note that a second waiting period does not apply in respect of a default in the performance of such future obligations.<sup>450</sup> Furthermore, unless and until the creditor is given the opportunity to take possession of the aircraft object, the insolvency administrator or debtor must preserve the aircraft object and maintain it and its value in accordance with the agreement and the creditor shall be entitled to apply for any other forms of interim relief available under applicable law. In addition, the remedies of de-registration and export of the aircraft are required to be made available on an expedited basis (no later than five working days) by the aircraft registry authority and the applicable administrative authorities of a Contracting State, which opts into Alternative A, in conformity with applicable aviation safety laws and regulations.<sup>451</sup> Alternative A adds a special provision that only those non-consensual rights or interests covered by a declaration under Article 39(1) of the Convention have priority over registered interests in insolvency proceedings.<sup>452</sup>

#### Practice Notes:

(1) The remedy requiring the insolvency administrator or debtor to give possession of the aircraft object to a creditor under Alternative A by a certain date specified in paragraph 2 of Article XI cannot be delayed by “any order or action which prevents or delays the exercise of remedies after expiry of the waiting period”.<sup>453</sup> Local law procedures required pursuant to Article 14 of the Convention cannot be used to delay the remedy of recovery of the aircraft object and records because the Protocol provision here

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<sup>448</sup> The Aircraft Sector Understanding can be found at <http://www.oecd.org/tad/xcred/aircraftsectorunderstandings.htm>.

<sup>449</sup> Note that this is a direct obligation to give possession, not only a right of the creditor to exercise such remedies as may exist under applicable law.

<sup>450</sup> Article XI, Alternative A (2) and (7) of the Protocol.

<sup>451</sup> Article XI, Alternative A (8) of the Protocol.

<sup>452</sup> Article XI, Alternative A (12) of the Protocol.

<sup>453</sup> GOODE at paras. 5.62 and 4.117 (Unidroit 2013).

overrides Article 14.<sup>454</sup> If court action is required to obtain possession in this scenario, then the applicable creditor should take action during the waiting period to get a court order to agree to transfer possession to such creditor if all defaults are not cured by expiry of the waiting period.<sup>455</sup>

(2) Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which would modify the obligations of the debtor without the creditor's consent. Accordingly, under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of a security interest over an aircraft object, or vary the terms of the agreement, without the consent of the creditor, nor would provisions of national insolvency law providing for an automatic stay pending reorganisation be operative beyond the declared waiting period. The effect of Alternative A is to displace Article 30(3)(b) of the Convention.

(3) Article XIII(4) of the Protocol provides that "other administrative authorities" in Contracting States shall co-operate expeditiously with and assist the authorised party in the exercise of the remedies specified in Article IX.<sup>456</sup> This clause provides additional assurances to creditors that export remedies will be honoured, particularly as it is common for governmental authorities other than the aircraft registrar to have responsibility for export authorizations. In this regard, the reference to "other administrative authorities" should be viewed broadly to include governmental bodies and administrative agencies having authority to grant export clearances, export licenses, air navigation clearances and any other administrative license, consent, authorization or other approval necessary to export an aircraft from the relevant jurisdiction.

To date, most Contracting States have declared Alternative A.

### **3. Alternative B.**

Alternative B is considered much less useful to creditors than Alternative A and is not a permitted declaration (to receive the maximum financing benefits available in respect of export credit financing) under the OECD ASU. Alternative B provides that there shall be a time specified in the declaration after which the insolvent debtor, upon request of the creditor, must give notice that it will either (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations under the agreement, or (b) give the creditor

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<sup>454</sup> GOODE at para. 3.106 (Unidroit 2013).

<sup>455</sup> Where a Contracting State has made a declaration adopting Alternative A, the requirements to conform with the procedures prescribed by local law as set out in Article 14 of the Protocol are effectively excluded. GOODE at para. 4.117 (Unidroit 2013).

<sup>456</sup> Article XIII(4) of the Protocol.

the opportunity to take possession of the aircraft object in accordance with applicable law.<sup>457</sup> If the insolvent debtor does not give such notice or if the debtor notifies the creditor that it will give the creditor the opportunity to take possession of the aircraft but fails to do so, it is then within the discretion of the court in the relevant insolvency jurisdiction to decide whether or not to permit the creditor to take possession of the aircraft object and, if so, to decide upon the terms and conditions to be applicable to such taking of possession. Alternative B is, in effect, similar to existing local law in many jurisdictions.

To date, Mexico is the only Contracting State to declare Alternative B. The Mexico declaration stated that the waiting period is the period agreed by the parties in the agreement creating the international interest. Therefore, the remedies clause or other agreement clause between the parties must provide guidance as to the waiting period.

## **(II) COOPERATION OF FOREIGN COURTS IN CARRYING OUT ALTERNATIVES A AND B.**

Article XII of the Protocol provides that the courts of the Contracting State where an aircraft object is located will cooperate to the maximum extent possible with foreign courts and insolvency administrators in carrying out the provisions of Article XI Alternatives A or B. This insolvency cooperation clause is only applicable if declared by a Contracting State pursuant to Article XXX(1) of the Protocol. This is a separate declaration from a declaration as to Article XI Alternatives A or B so that, for example, a Contracting State may elect Alternative A or B but not elect to commit to cooperation with foreign proceedings implementing Alternative A or B.

## **G. Deregistration and Export of Aircraft**

### **(I) DEREGISTRATION OF AIRCRAFT.**

The creditor may procure the deregistration of the aircraft provided that certain conditions are met.<sup>458</sup> First, the debtor must have agreed (at any time) to permit deregistration of the aircraft.<sup>459</sup> The debtor may issue an authorization (the IDERA) agreeing to the exercise of this remedy in accordance with the terms of Article XIII.<sup>460</sup> Where a Contracting State is the state of registry and has opted in to Article XIII of the Protocol, the Registry authority is bound to honor it (under Article X(6)) and it and other administrative authorities are required to expeditiously co-operate with and assist the party authorised in the IDERA in the exercise of this remedy. Second, the holder of a registered interest ranking in priority to that of the creditor must have provided

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<sup>457</sup> Article XI, Alternative B (2) of the Protocol.

<sup>458</sup> Article IX(1)(a) of the Protocol.

<sup>459</sup> Article XIII of the Protocol. See Section V.B. for a discussion concerning the IDERA and certain conditions to its implementation.

<sup>460</sup> Article XIII of the Protocol. See Section V.B. for a discussion concerning the IDERA.

consent in writing.<sup>461</sup> The second condition may not be excluded by agreement.<sup>462</sup>

**Practice Note:**

The provisions relating to deregistration and export are complex, as various articles are interrelated and may apply based on the facts of the case. They should all be consulted and assessed. First, Protocol Article IX establishes the substantive right as between the parties to the transaction where so agreed, then qualifies that right where senior interests are registered. Secondly, Protocol Article XIII significantly strengthens the right, provides a streamlined and non-discretionary procedure for its exercise, and (together with Protocol Article IX(5)) binds the state of registry to cooperate, subject to applicable aviation safety laws and regulations. Thirdly, Protocol Article XI, Alternative A (Insolvency) sets out a timetable, and operates independently of Protocol Article XIII. Finally, there is a potential interaction, at least in the non-insolvency context and/or where Article XIII does not apply, with the applicable procedure for exercising remedies (see Convention Article 54(2)) and the provisions for giving notice to interested parties in connection therewith.

## **(II) EXPORT AND PHYSICAL TRANSFER OF AIRCRAFT OBJECT.**

The creditor may procure the export and physical transfer of the aircraft object from the territory in which it is situated.<sup>463</sup> It is important to note that this is a remedy permitting export and physical transfer *from* its existing territory – it is not a right to export to any particular jurisdiction, which jurisdiction may be prohibited by a Contracting State’s export control restrictions. The same conditions applicable to de-registration of aircraft above are applicable here. The creditor may change the nationality of an aircraft and have the aircraft moved to the State of nationality or any other State subject to any applicable safety laws and regulations.<sup>464</sup>

While the use of the IDERA in the context of de-registration is limited to the applicable airframe, when considered in an export scenario, its scope expands to include the broader aircraft. It remains unclear whether the scope of the IDERA could include the physical export of an uninstalled engine or an engine installed on an unrelated airframe, unless such rights are otherwise available to the authorised party (or its certified designee) under applicable law.

## **(III) CHARGEES.**

A chargee seeking to exercise the rights of deregistration, export and physical transfer referred

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<sup>461</sup> Article IX(2) of the Protocol.

<sup>462</sup> Article IV(3) of the Protocol; GOODE at para. 5.44 (Unidroit 2013).

<sup>463</sup> Article IX(1)(b) of the Protocol; GOODE at para. 5.43 (Unidroit 2013).

<sup>464</sup> GOODE at para. 5.43 (Unidroit 2013).

to in paragraphs 1 and 2 above, otherwise than pursuant to a court order, must give reasonable prior notice thereof to interested persons specified in Article 1(m)(i) and (ii) (basically the Debtor and the Guarantor) of the Convention, and interested persons specified in Article 1(m)(iii) (any other person having rights in or over the object) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.<sup>465</sup>

## H. Exercise of Remedies and Article 39 Non-consensual Rights or Interests

As discussed in Section II.G, determining whether a non-consensual right or interest has priority requires a determination of (1) whether there is an enforceable non-consensual right or interest and (2) whether in the Contracting State the non-consensual right or interest has priority over interests equivalent to the registered international interest under that State's laws that it is covered by the declaration. In an enforcement where the law being considered is the law of the forum, and assuming a valid non-consensual right or interest with clear priority, the inquiry would rest on whether the international interest was registered first or whether the non-consensual right or interest declaration became effective first. But, where the asserted non-consensual right of interest arises under the law of a State different than that in which enforcement is sought, the Convention does not apply because the non-consensual right or interest declaration was made solely by the one State for use within its own national law as it applies to international interests. It is therefore not entitled to recognition in another Contracting State unless the conflict of laws rules of that State so require it.<sup>466</sup>

For enforcement purposes, the key inquiry is under what conditions and when the priority of a right or an interest covered under Article 39 attaches under the law of the declaring State.<sup>467</sup> The Official Commentary notes that, in the non-insolvency context, Article 39 rights will almost always take the form of a lien or a right of arrest or detention. Exercise of such a right is governed by the law of the declaring State. Where the aircraft object is still in the debtor's possession, the Article 39 priority will not be exercisable against the holder of a registered interest that has already availed itself of an enforcement remedy over the aircraft object. But, if the holder of the Article 39 right or interest has taken possession of the aircraft object or has exercised a right to arrest or detain it before the exercise of the enforcement remedy, the attached priority of that right or interest must be respected by the holder of the registered international interest to the extent required by the law of the declaring State.<sup>468</sup>

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<sup>465</sup> Article IX(6) of the Protocol.

<sup>466</sup> GOODE at para. 4.269 (Unidroit 2013).

<sup>467</sup> GOODE at para. 2.83 (Unidroit 2013).

<sup>468</sup> GOODE at para. 2.218 (Unidroit 2013).

**Example 1:**

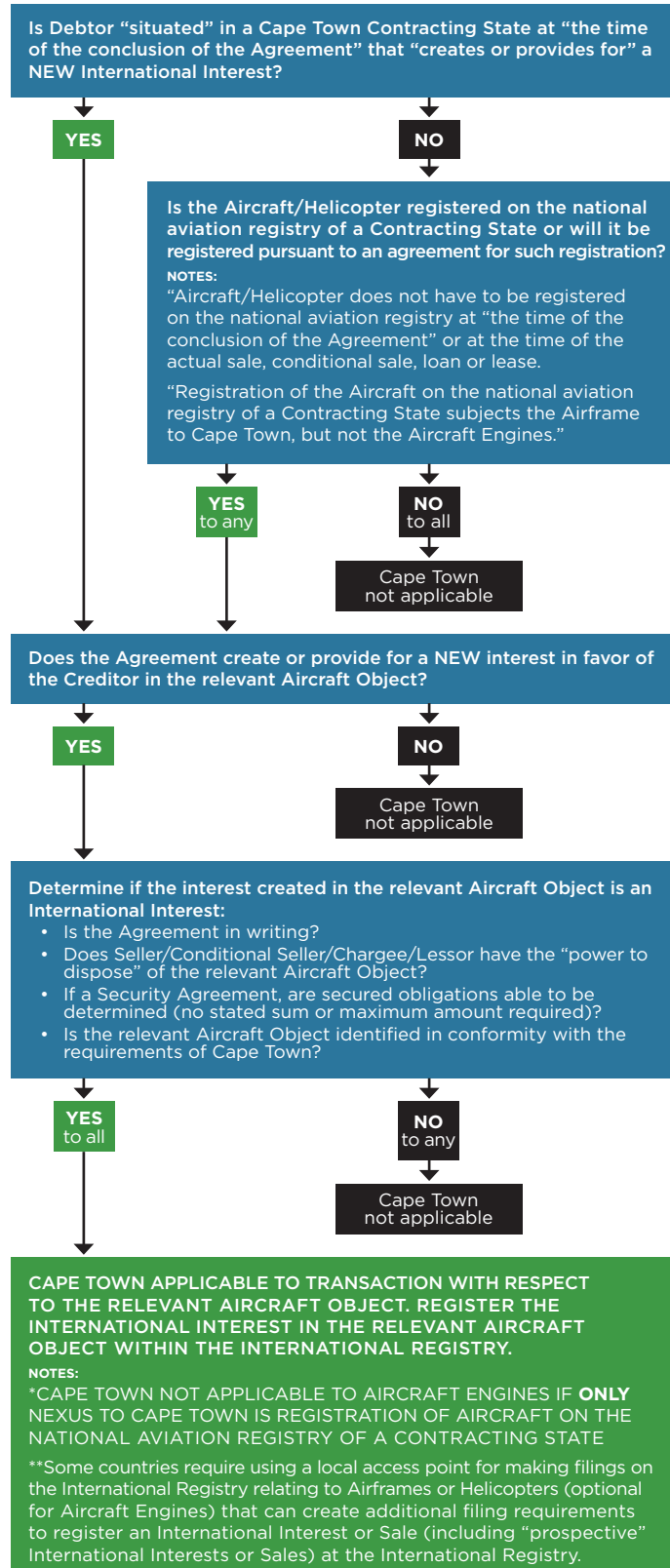
A maintenance facility seeks to enforce a mechanic's lien against an aircraft in the Contracting State while a lessor attempts to enforce its rights in the Contracting State to repossess the aircraft. If the lessor has 'already availed itself of an enforcement remedy over the aircraft object', then the law of the declaring State will determine whether the maintenance facility is unable to enforce its mechanic's lien. In particular, the law of the declaring State will need to determine to what extent the enforcement remedy will need to have progressed in order for the mechanic's lien to become subordinate and be required to respect the interest of the lessor who is the holder of a registered international interest.

**Example 2:**

If the fact situation in Example 1 were reversed and the mechanic's lien had been enforced against the aircraft object, then the right or interest would have attached and the holder of the registered international interest would have to respect such attached priority, once again to the extent required by the law of the declaring State.

# Annex A: Cape Town Applicability

## PART I: CAPE TOWN CONVENTION TRANSACTION FLOWCHART



### CERTAIN TERMS EXPLAINED

#### Debtor is “situated” in a Contracting State if:

- Debtor is incorporated or formed under the law of a Contracting State;
- Debtor’s registered office or statutory seat is located in a Contracting State;
- Debtor’s center of administration is located in a Contracting State;
- Debtor’s place of business is located in a Contracting State (if Debtor has more than one place of business, this refers to its principal place of business, if Debtor does not have a place of business, this refers to Debtor’s habitual residence).

#### Debtor in a transaction:

- Sale = Seller
- Conditional Sale = Conditional Buyer
- Security Agreement = Chargor/Mortgagor
- Lease = Lessee

#### Creditor in a transaction:

- Sale = Buyer
- Conditional Sale = Conditional Seller
- Security Agreement = Chargee/Mortgagee/Secured Party
- Lease = Lessor

#### Agreement:

- Contract of Sale (the actual title transfer document)
- Title Reservation (Conditional Sale) Agreement (US State laws treat Title Reservation Agreements as Security Agreements)
- Security Agreement
- Lease Agreement

#### Aircraft Objects:

- Airframe = type certified by the relevant aviation authority to transport at least 8 persons (including crew) or goods in excess of 2750 kg
- Aircraft Engine = powered by either jet propulsion, turbine or piston that have at least 1750 lbs of thrust or the equivalent (for jet engines) or at least 550 rated take-off shaft horsepower or the equivalent (for the turbine or piston engines)
- Helicopter = type certified by the relevant aviation authority to transport at least 5 persons (including crew) or goods in excess of 450 kg

\*Propellers are not covered under Cape Town although their related engines are. Aircraft Objects used in military, customs or police services are not covered under Cape Town.

#### Aircraft Object Identification:

- Manufacturer’s Name;
- Model Designation (general/generic name); and
- Manufacturer’s Serial Number

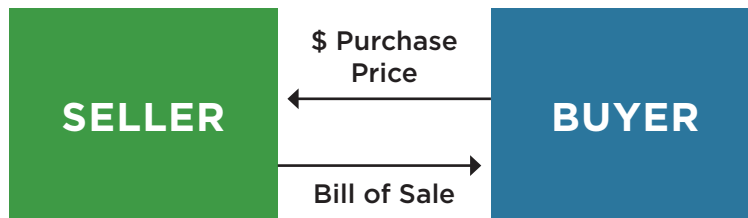


## PART II: STRUCTURAL EXAMPLES

For purposes of the following examples, assume:

- Unless otherwise specified, the applicable aircraft object consists of an aircraft comprised of an airframe and two aircraft engines, each satisfying the requirements set forth in Article 1 of the Protocol
- The applicable aircraft object is uniquely identifiable as required by Article 2(2) of the Convention
- Each applicable agreement is constituted in accordance with the formalities prescribed by Articles 2(2) and 7 of the Convention (and, if applicable, Article 32 of the Convention and Article V of the Protocol)
- The determination of whether a particular debtor is situated in a Contracting State is made at the time of the conclusion of the relevant agreement
- Any assignment of any associated rights also assigns the related international interest

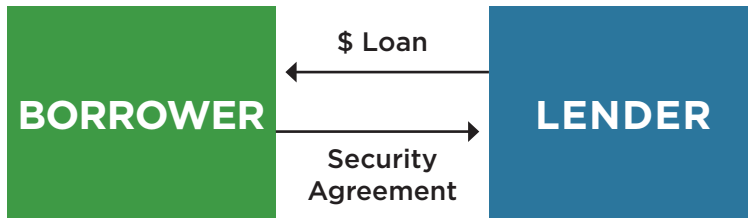
## AIRCRAFT SALE



### CTC Application:

1. Does the Bill of Sale constitute a contract of sale?
  - Yes, a bill of sale is a contract of sale entitled to the benefits of the Convention (Article III of the Protocol)
2. Are sufficient connecting factors present?
  - Is the Seller situated in a Contracting State? (Article 4 of the Convention)
  - If Seller is not situated in a Contracting State, is the aircraft object a helicopter or an airframe pertaining to an aircraft which is registered in an aircraft register of a Contracting State which is the state of registry? (Article IV of the Protocol)
    - Even if at the execution of the Bill of Sale the applicable helicopter or airframe shall not be so registered, the Bill of Sale would nonetheless constitute an “agreement for registration”, and therefore give rise to an international interest in respect of such helicopter or airframe, if it provides that such aircraft object will be registered in a Contracting State (Article IV of the Protocol)
3. Assuming the answers to 1 and 2 above are yes, what registrations could be made on the IR?
  - Contract of sale or prospective sale in respect of each applicable aircraft object (Article 16 of the Convention and Article III of the Protocol) naming the Seller as debtor and Buyer as creditor

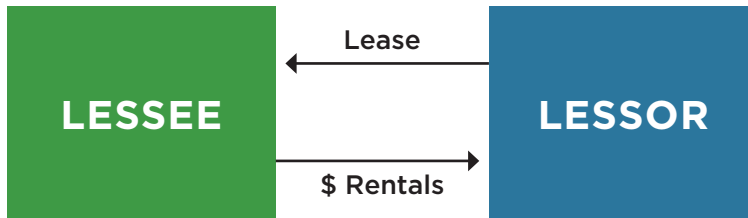
## SECURED LOAN FINANCING



### CTC Application:

1. Does the Security Agreement constitute an international interest?
  - Must comply with the definition of “security agreement” contained in the Convention (Article 1 of the Convention)
2. Are sufficient connecting factors present?
  - Is the Borrower situated in a Contracting State? (Article 4 of the Convention)
  - If Borrower is not situated in a Contracting State, is the aircraft object a helicopter or an airframe pertaining to an aircraft that is registered in an aircraft register of a Contracting State that is the state of registry? (Article IV of the Protocol)
    - Even if at the execution of the Security Agreement the applicable helicopter or airframe shall not be so registered, the Security Agreement would nonetheless constitute an “agreement for registration”, and therefore give rise to an international interest in respect of such helicopter or airframe, if it provides that such aircraft object will be registered in a Contracting State (Article IV of the Protocol)
3. Assuming the answers to 1 and 2 above are yes, what registrations could be made on the IR?
  - International interest or prospective international interest in respect of each applicable aircraft object (Article 16 of the Convention) naming the Borrower as the debtor and Lender as the creditor

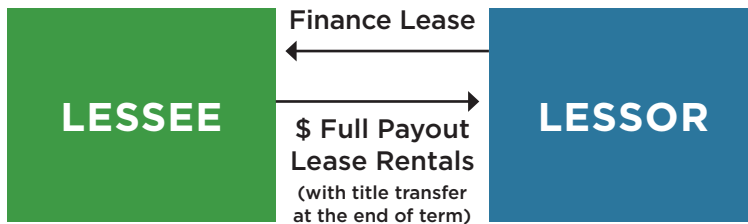
## OPERATING LEASE



### CTC Application:

1. Does the Lease constitute an international interest?
  - Must comply with the definition of “lease agreement” contained in the Convention (Article 1 of the Convention)
2. Are sufficient connecting factors present?
  - Is the Lessee situated in a Contracting State? (Article 4 of the Convention)
  - If Lessee is not situated in a Contracting State, is the aircraft object a helicopter or an airframe pertaining to an aircraft that is registered in an aircraft register of a Contracting State that is the state of registry? (Article IV of the Protocol)
    - Even if at the execution of the Lease the applicable helicopter or airframe shall not be so registered, the Lease would nonetheless constitute an “agreement for registration”, and therefore give rise to an international interest in respect of such helicopter or airframe, if it provides that such aircraft object will be registered in a Contracting State (Article IV of the Protocol)
3. Assuming the answers to 1 and 2 above are yes, what registrations could be made on the IR?
  - International interest or prospective international interest in respect of each applicable aircraft object (Article 16 of the Convention) naming the Lessee as debtor and the Lessor as creditor

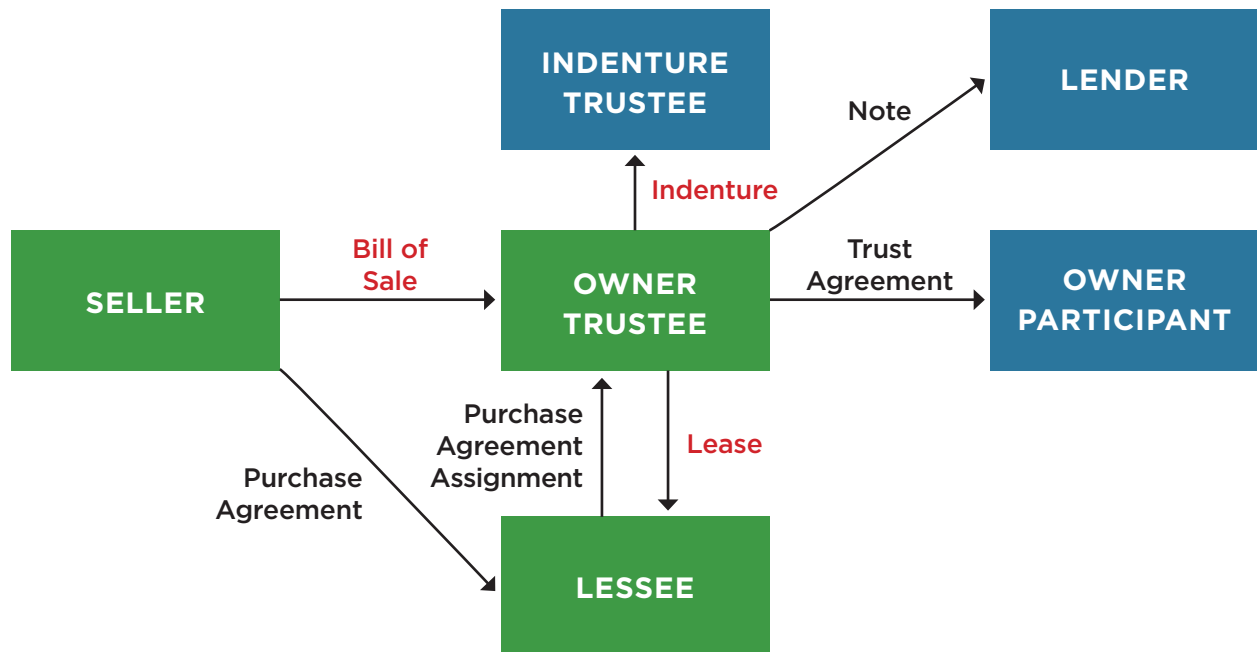
## FINANCE LEASE FINANCING



### CTC Application:

1. Does the Lease constitute an international interest?
  - Must comply with the definition of “lease agreement” contained in the Convention (Article 1 of the Convention)
  - Even though under the applicable law in certain jurisdictions the Finance Lease would be recharacterized as a security agreement, for purposes of the Convention (other than in the context of the exercise of remedies), the Finance Lease remains a lease agreement
2. Are sufficient connecting factors present?
  - Is the Lessee situated in a Contracting State? (Article 4 of the Convention)
  - If Lessee is not situated in a Contracting State, is the aircraft object a helicopter or an airframe pertaining to an aircraft that is registered in an aircraft register of a Contracting State that is the state of registry? (Article IV of the Protocol)
    - Even if at the execution of the Lease the applicable helicopter or airframe shall not be so registered, the Lease would nonetheless constitute an “agreement for registration”, and therefore give rise to an international interest in respect of such helicopter or airframe, if it provides that such aircraft object will be registered in a Contracting State (Article IV of the Protocol)
3. Assuming the answers to 1 and 2 above are yes, what registrations could be made on the IR?
  - International interest or prospective international interest in respect of each applicable aircraft object (Article 16 of the Convention) naming the Lessee as debtor and the Lessor as creditor

## LEVERAGED LEASE



### CTC Application:

1. Does the Bill of Sale constitute a contract of sale and do the Lease and Indenture constitute international interests?
  - See preceding pages of this Annex for analysis and discussion
  - The Indenture also provides for a collateral assignment of the Owner Trustee's rights in the Lease, which must comply with the definition of "assignment" contained in the Convention (Article 1 of the Convention)
2. Are sufficient connecting factors present?
  - See preceding pages of this Annex for analysis and discussion
  - For purpose of collateral assignment of the Lease, the Owner Trustee need not be situated in a Contracting State in order to have an effective assignment
3. What registrations should be made on the IR?
  - Sale or prospective sale in respect of each applicable aircraft object (Article 16 of the Convention and Article III of the Protocol) naming the Seller as debtor and Owner Trustee as creditor
  - International interest or prospective international interest in respect of each applicable aircraft object (Article 16 of the Convention) naming the Owner Trustee as the debtor

and the Indenture Trustee as the creditor

- International interest or prospective international interest in respect of each applicable aircraft object (Article 16 of the Convention) naming the Lessee as debtor and the Owner Trustee as creditor

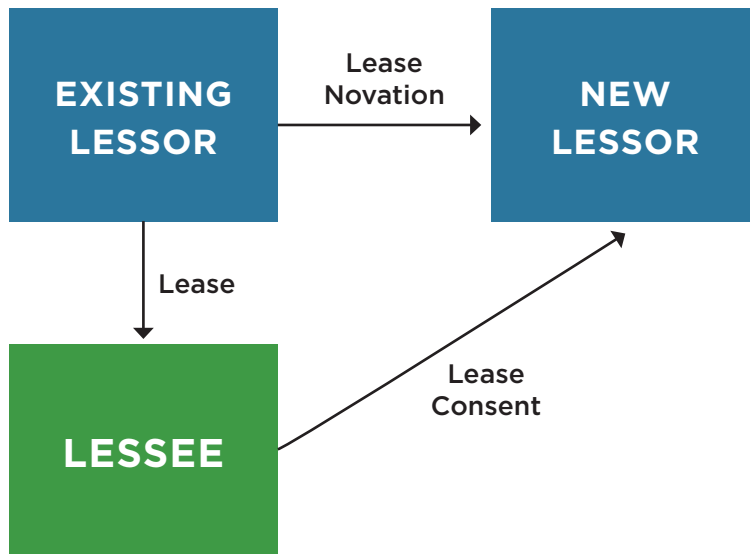
Assignment of international interest in respect of each applicable aircraft object (Article 16 of the Convention) noting the Lease as the international assigned naming the Owner Trustee as the assignor and the Indenture Trustee as the assignee<sup>469</sup>

4. What should be priority of registrations at the IR?
  - Order of registrations at the IR will determine rights in the applicable aircraft object (Article 29(1) of the Convention)
  - Quiet possession and use (Art 29(4) of the Convention and Article XVI of the Protocol)
    - A conditional buyer or lessee acquires its interest in or right over that object subject to any interest registered prior to the registration of the international interest held by its conditional seller or lessor
5. Neither the Trust Agreement nor the Purchase Agreement is an eligible agreement and therefore no interest should be registered in respect of either thereof

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<sup>469</sup> In connection with the assignment, the Lessor should also assign the right to discharge the international interest in respect of the Lease to the Indenture Trustee.

## LEASE NOVATION



### Assumptions:

- Lessee is situated in a Contracting State
- Existing Lease qualified as an international interest and applicable registrations in respect of the airframe and engines were made at the International Registry naming the Lessee as debtor and the Existing Lessor as creditor
- Lease Novation provides for the assignment by Existing Lessor of all rights and obligations of “Lessor” under the Lease for the period from and after the effective date under the novation
- Under local law, the Lease Novation would reconstitute the existing Lease as a new lease

### CTC Application:

1. Does the Lease Novation create a new international interest?
  - Since the Existing Lessor retains certain rights and obligations in respect of the Lease, the Novation should be treated as an assignment under the Convention (even though under applicable local law, the treatment would be otherwise)
2. What registrations could be made on the IR?

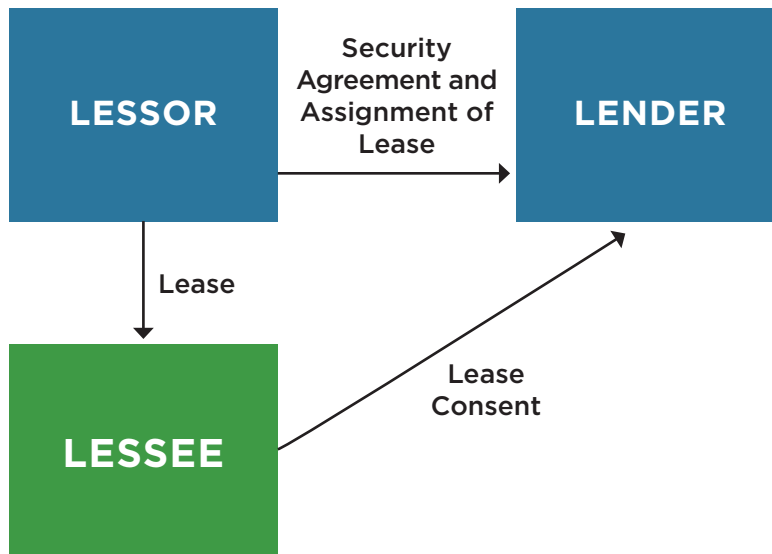
Assignment of international interest in respect of each applicable aircraft object noting the Lease as the international interest assigned naming the Existing Lessor as the assignor and New Lessor as the assignee<sup>470</sup>

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<sup>470</sup> As a precaution, many practitioners would nonetheless register a new international interest in respect of the Lease



## EXTENSION OF PRE-CAPE TOWN LEASE AGREEMENT



### Assumptions:

- At the time of the conclusion of the lease of an aircraft, the Lessee was not situated in a Contracting State but during the base term of the Lease, the Lessee's jurisdiction of incorporation became a Contracting State
- At the time of the conclusion of the Security Agreement and Assignment of Lease, the Lessor was situated in a Contracting State.
- The aircraft is registered in Lessee's jurisdiction of incorporation
- At the end of the base term of the Lease, the Lessor and the Lessee agreed to a Lease extension for the renewal term

### CTC Application:

1. Does the Convention apply to the Lease?
  - At the time of the conclusion of the Lease, the debtor was not situated in a Contracting State (Article 3 of the Convention) and as such, the Convention does not apply to the base term. Since the Aircraft is not registered in a Contracting State at the time the Lease was entered into, there would be no alternative connecting factor available (Article IV of the Protocol).
  - The Convention would apply to the renewal term under the Lease
2. Does the Convention apply to the Security Agreement and Assignment of Lease

- At the time of conclusion of the Security Agreement and Assignment of Lease, the Lessor is situated in a Contracting State and so the Convention applies with respect to the security interest in the aircraft granted by Lessor to Lender pursuant to this document
  - The assignment of the Lease, however, would not initially be subject to the Convention since the underlying international interest (the Lease) is not within the sphere of application at the time of conclusion of that document (and so a corresponding assignment of the related associated rights would similarly not covered by the Convention)
  - The Convention would apply to the assignment of the Lease as it relates to the renewal term
3. What registrations could be made on the IR?
- At the outset of the transaction, an international interest in respect of each applicable aircraft object naming the Lessor as debtor and the Lender as creditor
  - At the time of renewal of the lease term, an international interest in respect of each applicable aircraft object naming the Lessee as debtor and the Lessor as creditor
  - At the time of the renewal of the lease term, as assignment of international interest in respect of each applicable aircraft object noting the Lease as the international interest assigned naming the Lessor as the assignor and the Lender as the assignee

## Annex B: Contracting State Declarations

This Annex provides basic information on the system of declarations under the Convention and Protocol. Declarations modify the effect of these instruments, and thus are critical to assessing the applicable legal rules in many situations.

This Annex lists a number of possible declarations. It also notes which Contracting State's declaration is relevant in the transactional, enforcement and dispute resolution contexts.

### Practice Note:

In assessing the impact of declarations, it is essential to understand which of a Contracting State's declarations is relevant to a specific aspect. While most aspects are straight-forward, a few give rise to conflict of laws issues.

For a summary of the declarations made by each Contracting State, including a summary chart on the insolvency declaration (Alternative A of the Protocol) as well as a listing of the Contracting States that have made the qualifying declarations under the Sector Understanding on Export Credits for Civil Aircraft (1 February 2011), see the Aviation Working Group's website at <http://www.awg.aero/projects/capetownconvention/>. This website should be the starting point for review.<sup>471</sup>

Special consideration should be given to Member States of the European Union. The EU's accession was as a regional economic integration organization pursuant to Article 48 of the Convention, not a Contracting State, and only in respect of the areas in which it has competence. Member States of the EU must still individually ratify the Cape Town Convention to become Contracting States for its purposes to give it full effect. Specifically, the declarations made by the EU under the Cape Town Convention affect the capacity of EU Member States to make declarations under Articles VIII, X and XI of the Protocol (however, their capacity to make the other declarations under the Cape Town Convention are not affected). EU Member States are neither permitted to make the declaration under Article VIII (*Choice of Law*) of the Protocol nor amend their national law on the subject of Article VIII. While EU members are not permitted to make the declarations under Articles X (*Modification of Provisions regarding Relief Pending Final Determination*) and XI (*Remedies on Insolvency*) of the Protocol, they permitted to amend their national law to have the same substantive effect as if the relevant declaration had been made by that EU Member State.

If a Contracting State has territorial units in which different systems of law are applicable, Article 52 of the Convention provides that the applicable Contracting State may declare

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<sup>471</sup> The AWG website does not provide a number of important details about the declarations. Reference should be made to the complete list of declarations made on the UNIDROIT website ([www.unidroit.org](http://www.unidroit.org)). Reference should also be made to UNIDROIT's helpful Declarations Memorandum, UNIDROIT 2010, DC9/DEP – Doc.1 Rev 3 (the "**Declarations Memorandum**"), which can also be found the above-cited UNIDROIT website.

that the Convention is to extend to all of its territorial units or only to one or more them. Where a Contracting State so extends the Convention to one or more of its territorial units, declarations permitted under the Convention may be made in respect of each such territorial unit and may differ from one another. If a Contracting State has not made such a declaration, the Convention applies to all territorial units of that State.

## LIST OF DECLARATIONS

**Note:** The list below is not exhaustive of all possible declarations that may be made.

Provision of the Cape Town Convention or Protocol	Declaration
opt-in declaration under Article 39 of Convention	<p><b>Non-consensual rights and interests</b></p>
	<p>The Contracting State may declare that certain categories of non-consensual rights or interests have priority under its law over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings. However, such priorities are not to be recognized by other Contracting States except to the extent otherwise recognized pursuant to such Contracting State’s conflict of laws rules.</p> <p><i>Relevant Contracting State:</i> State under whose laws a non-consensual interest arises.</p> <p>These could include, for example,</p> <p><b>(a)</b> a right or interest in respect of an aircraft arising from (i) salvage, (ii) damage done by that aircraft, and (iii) repair and storage of that aircraft; and/or</p> <p><b>(b)</b> liens in favour of any state entity relating to unpaid taxes or other charges directly related to the use of that aircraft and owed by the owner of the aircraft.</p>

Provision of the Cape Town Convention or Protocol	Declaration
opt-in declaration under Article 40 of Convention	<p><b>Registrable non-consensual rights and interests</b></p> <p>The Contracting State may declare that certain categories of non-consensual rights or interests shall be registrable under the Cape Town Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly.</p> <p><i>Relevant Contracting State:</i> State under whose laws a non-consensual interest arises.</p>
opt-out declaration under Article 50 of Convention	<p><b>Internal transactions</b></p> <p>The Contracting State may declare that the Cape Town Convention shall not apply to internal transactions.</p> <p><i>Relevant Contracting State:</i> State in which center of the main interests of all parties to a transaction is located, where the aircraft object is located, and where interest arising under that transaction has been registered in a national registry, as set out in Article 1(n) of the Convention.</p>
declaration under Article 52 of Convention	<p><b>Territorial units</b></p> <p>The Contracting State may declare that the Cape Town Convention is to apply to all its territorial units.</p> <p><i>Relevant Contracting State:</i> State possessing territorial units (in which different systems of law are applicable) recognized under international law.</p>
declaration under Article 53 of Convention	<p><b>Relevant courts</b></p> <p>The Contracting State may declare which of the courts within its jurisdiction are the relevant courts for the purposes of any claim brought under the Cape Town Convention.</p> <p><i>Relevant Contracting State:</i> State with jurisdiction under the Convention (<i>lex fori</i>). See Articles 42 and 43 of the Convention.</p>

Provision of the Cape Town Convention or Protocol	Declaration
opt-out declaration under Article 54(1) of Convention	<p><b>Leasing by chargees</b></p> <p>The Contracting State may declare that a chargee may not lease an aircraft on its territory.</p> <p><i>Relevant Contracting State:</i> State where remedies are exercised, which, depending on circumstances and the remedy selected, will be the State where the aircraft object is located or where the debtor is situated, as defined in Article 4 of the Convention.</p>
mandatory declaration under Article 54(2) of Convention	<p><b>Role of Court in Remedies</b></p> <p>The Contracting State must declare whether any remedies available to the creditor under the Cape Town Convention that are not expressed under the relevant provision of the Cape Town Convention to require application to the court, may be exercised without court action and without leave of the court.</p> <p><i>Relevant Contracting State:</i> State where remedies are exercised, which, depending on circumstances and the remedy selected, will be the State where the aircraft object is located or where the debtor is situated, as defined in Article 4 of the Convention.</p>
opt-in declaration under Article 60 of Convention	<p><b>Transitional Provisions</b></p> <p>The Contracting State may declare that the Cape Town Convention applies to pre-existing rights and interests and may fix a date after which such pre-existing rights and interests will lose priority if not registered.</p> <p><i>Relevant Contracting State:</i> State where the debtor is situated, as defined in Article 60 of the Convention.</p>

Provision of the Cape Town Convention or Protocol	Declaration
<p>opt-in declaration under Article XXX(1) in respect of Article VIII of Protocol</p>	<p><b>Choice of law</b></p> <p>The Contracting State may declare that the parties to an agreement may choose the governing law.</p> <p><i>Relevant Contracting State:</i> State with jurisdiction under the Convention (<i>lex fori</i>). See Articles 42 and 43 of the Convention.</p>
<p>opt-in declaration under Article XXX(1) in respect of Article XII of Protocol</p>	<p><b>Insolvency assistance</b></p> <p>The Contracting State may declare that its courts will cooperate with foreign courts and insolvency administrators.</p> <p><i>Relevant Contracting State:</i> State in which an aircraft object is located and which is <u>not</u> the “primary insolvency jurisdiction”, as defined in Article 1(n) of the Convention (center of main interest), as a debtor.</p>
<p>opt-in declaration under Article XXX(1) in respect of Article XIII of Protocol</p>	<p><b>De-registration and export</b></p> <p>The Contracting State may declare that a de-registration and export request authorization shall be recorded and implemented by its registry authority and other administrative authorities.</p> <p><i>Relevant Contracting State:</i> “State of registry”, as defined in Article 1(p) of the Protocol (State of Chicago Convention nationality).</p>
<p>opt-in declaration under Article XXX(2) in respect of Article X(2) of Protocol</p>	<p><b>Relief Pending Final Determination</b></p> <p>The Contracting State may declare whether it will apply Article X(2) of the Protocol in its entirety and, if so, specify the number of working days within which relief pending final determination can be obtained from its courts.</p> <p><i>Relevant Contracting State:</i> State in which such legal action is taken. See Article 43 of the Convention.</p>

<p>opt-in declaration under Article XXX(3) in respect of Article XI of Protocol</p>	<p><b>Substantive Insolvency</b></p> <p>The Contracting State may declare whether it will apply Article XI, Alternative A or Alternative B of the Cape Town Convention to all types of insolvency proceedings and, in the case of Alternative A, shall specify the waiting period</p> <p><b><i>Relevant Contracting State:</i></b> State that is the “primary insolvency jurisdiction”, as defined in Article 1(n) of the Convention (center of main interest), as a debtor.</p>
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## Annex C: Amendments Summary Chart

Whenever amendments are made to a lease agreement, security agreement or title reservation agreement, care should be taken to ensure that any Cape Town Convention ramifications are considered.<sup>472</sup> The principal consideration in these scenarios is whether the changes resulting from the amendment could give rise to the creation of a new international interest for purposes of the Cape Town Convention (thereby requiring additional registrations in order to retain priority).<sup>473</sup>

The general principle is that there would need to have been a new grant of a lease, title reservation agreement or security as a result of such amendment. The following examples illustrate this principle.

Type of change to an existing transaction	If the applicable international interest is a lease agreement:	If the applicable international interest is a security agreement or title reservation agreement:
Change of creditor		
– by operation of law	no	no
– assignment	no	no
– novation (which does not constitute an assignment under the Convention) <sup>474</sup>	yes	yes
Change of debtor		
– by operation of law	no	no
– assignment	yes	yes
Change of payments		
– method	no	no
– timing or amount	maybe (see note 1)	maybe (see notes 1 and 3)

<sup>472</sup> The same analysis would apply in the situation where the initial agreement is executed prior to the coming into force of the Cape Town Convention in the applicable jurisdiction but the amendment occurs thereafter.

<sup>473</sup> See Section II.N. for additional discussion on whether a particular amendment gives rise to the creation of a new international interest, including examples in respect thereof.

<sup>474</sup> See Section II.J. for a discussion regarding the treatment of assignments and novations.

Type of change to an existing transaction	If the applicable international interest is a lease agreement:	If the applicable international interest is a security agreement or title reservation agreement:
– Change of terms relating to leasing/subleasing of aircraft objects	no	no
Change of geographical limits	no	no
Reduction of term	no (see note 2)	no
Extension of term <sup>475</sup>	yes (but only for the period of the extension)	yes
Addition or removal of a purchase option	no (see note 2)	N/A
Addition or substitution of collateral consisting of aircraft objects <sup>476</sup>	yes	yes
Increase in fractional interest in an aircraft object that is acquired by means other than assignment or subrogation <sup>477</sup>	yes	yes
Extension of a security interest to a previously unsecured obligation	N/A	yes (see note 3)
Change relating to insurance of any aircraft object	no	no
Change relating to maintenance of any aircraft object	no	no

<sup>475</sup> See “Example 1” in Section II.N.

<sup>476</sup> See “Example 4” in Section II.N.

<sup>477</sup> See “Example 5” in Section II.N.

## NOTES:

1. A change in the timing or amount of payment would not normally give rise to the creation of a new international interest. See “Example 4” in Section II.N. Care should be taken, however, to ensure that the changes made to the applicable transaction are not so fundamental that a new property right is created in which case a new international interest may similarly be created. For example, moving a payment date from the 1st day of a month to the 15th day of a month would not so alter the fundamental nature of a transaction so as to give rise to the creation of a new international interest. Similarly, the rescheduling of payments in connection with a work-out or restructuring should not give rise to the creation of a new international interest. If, however, a payment stream is so fundamentally altered so as to give rise to a new or different underlying agreement (in effect, the replacement of the existing arrangement with a new lease agreement, security agreement or title reservation agreement), then the prudent course would be to treat such an amendment as creating a new international interest (and new registrations should be made with the International Registry). The purpose of registration is to give notice of the existence of an interest. As the registration of an international interest does not identify the category of international interest to which the registration relates or any of its underlying information (other than the identity of the debtor and creditor and the specific aircraft object to which it relates), parties effecting a search of the International Registry are then required to inquire of the registering debtor or creditor in order to obtain more information about the applicable interest (and the corresponding associated rights). It stands to reason then that so long as a change would not make such prior notice (and any concomitant inquiry) so misleading as to impact the rights of third parties who effected such a search, no additional registration would be required.
2. The mere addition or removal of a purchase option should not give rise to the creation of a new international interest. As discussed in Section III.C. of the Guide, whether an interest falls into a specific category of “international interest” is determined by applying the Cape Town Convention’s own definitions and autonomous rules. Even if the addition or removal of a purchase option would, under applicable law, cause a recharacterization of such transaction, such recharacterization should not alter this initial characterization and the corresponding registration made in the International Registry.
3. If a security agreement only specifically recites the obligations secured and does not include some general statement to the effect that the secured indebtedness includes “all obligations owed by debtor to creditor under all contracts”, then any change to such amounts would give rise to the creation of a new international interest.<sup>478</sup>

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<sup>478</sup> See “Example 2” in Section II.M.

## Annex D: Entry Points – Summary Chart

During the development of the Convention and the Protocol, it emerged that certain provisions (for example, provisions permitting the exercise of extra-judicial remedies) could be inconsistent with principles inherent to some legal systems. Contracting States were accordingly given the opportunity for declarations to be made to such provisions of the Convention and the Protocol, which are inconsistent with the legal scenario of their respective countries. This is provided to enable the benefits of the Convention and the Protocol to be made widely available.

Article XIX(1) of the Protocol deals with designated entry points and envisages that a Contracting State may at any time designate an entity or entities in its territory as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration. Such designation may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of aircraft objects.

The following Contracting States have made declarations to provide for an entry point. The specifics of each particular entry point by such contracting states are separately dealt with below:

<p><b>Albania</b></p>	<p>Albania declared the General Directorate of Civil Aviation (DGCA) to be the entry point at which information required for registration in respect of airframes or helicopters pertaining to civil aircraft of the Republic of Albania or aircraft to become a civil aircraft of the Republic of Albania shall be transmitted, and in respect of aircraft engines may be transmitted, to the International Registry, in accordance with procedures established under Albanian Civil Aviation law.</p>
<p><b>Brazil</b></p>	<p>The Federal Republic of Brazil declared that the National Civil Aviation Agency, acting through the Brazilian Aeronautical Registry, shall be the entry point from which there shall be transmitted, and in the case of aircraft engines, may be transmitted, to the International Registry information related to international transactions with respect to airframes pertaining to civil aircraft, helicopters or civil aircraft registered in the Republic of Brazil.</p>
<p><b>People’s Republic of China</b></p>	<p>People’s Republic of China designated the Aircraft Rights Registry under the Civil Aviation Administration of China (CAAC) as the entry point.</p>

<b>Mexico</b>	The Mexican Aeronautical Registry is the entry point to the International Registry for the United Mexican States for the registration of airframes or helicopters pertaining to aircraft becoming a civil aircraft of the United Mexican States and in respect to the aircraft engines of a Mexican aircraft.
<b>Ukraine</b>	State Aviation Administration of Ukraine is designated as the entry point for information.
<b>United Arab Emirates</b>	United Arab Emirates on 17 October 2011 declared that the Civil Aircraft Registry of the UAE General Civil Aviation Authority (“GCAA”) shall be the authorizing entry point at which information required for registration in respect of airframes or helicopters to civil aircraft of the United Arab Emirates or aircraft to become a civil aircraft of the United Arab Emirates shall be transmitted, and in respect of aircraft engines may be transmitted, to the International Registry.
<b>United States of America</b>	United States of America declared the Federal Aviation Administration to be the entry point at which information required for registration in respect of airframes or helicopters pertaining to civil aircraft of the United States or aircraft to become a civil aircraft of the United States are to be transmitted, and in respect of aircraft engines may be transmitted, to the International Registry, in compliance with the United States Code and Code of Federal Regulations and in accordance with procedures established under United States law.
<b>Vietnam</b>	The Socialist Republic of Vietnam declared the Civil Aviation Administration in its territory as the entry point through which there shall be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or a right or interest under Article 40 of the Convention in either case arising under the laws of another State, and other than information required for registration in respect of aircraft engines.

# ANNEX E:<sup>479</sup> ANNOTATED FORM OF CAPE TOWN CONVENTION/AIRCRAFT PROTOCOL LEGAL OPINION

This is a generic form of annotated legal opinion that contains elements applicable to many transactions where the Convention is relevant.

The opinion is divided into six sections. The first section proposes references to Convention definitions and declarations thereunder to be used in the opinion. Each of the following five sections includes the relevant assumptions and opinions for that section. Some points are mentioned under both “Assumptions” and “Opinions” as there will be individual differences in this regard, i.e., in some legal opinions a statement might constitute an assumption and in others a core legal opinion. One law firm can issue the entire opinion, however in many instances separate law firms will issue different sections of the opinion. The opinion will complement other transactional opinions.

## **The six sections are:**

- I. Opinion references to the Convention and to declarations thereunder and to standard documents reviewed and assumptions;
- II. Constitution of International Interests and other interests under the Convention and the effects of Registration thereof;
- III. Registration of International Interests, Assignments of Associated Rights, Sales and other interests and recordation of de-registration and export request authorizations;
- IV. Determination of priority under the Convention and of the effect of unregistered non-consensual interests;
- V. Insolvency; and
- VI. Other opinions: choice of law, choice of forum and waiver of sovereign immunity.

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<sup>479</sup> Reproduced, with permission, from THE LEGAL ADVISORY PANEL OF THE AVIATION WORKING GROUP ADVANCED CONTRACT AND OPINION PRACTICES UNDER THE CAPE TOWN CONVENTION: CAPE TOWN PAPERS SERIES, VOL. 2 (2008). Opinion practice with regard to the Cape Town Convention has advanced considerably since this form opinion was first published and as such a major undertaking of the Legal Advisory Panel of the AWG will be to review and update this form opinion for the next update of this Practitioners' Guide.

## I. Opinion References To The Cape Town Convention And To Declarations Thereunder And To Standard Documents Reviewed And Standard Assumptions

### DEFINITIONS AND RECITALS:

For the purpose of this opinion, the following terms shall have the following definitions: The Convention and the Aviation Protocol respectively mean the Convention on International Interests in Mobile Equipment signed in Cape Town on 16 November 2001 (“**Convention**” and references to the Convention will include the Aviation Protocol as appropriate) and the Protocol to the Convention on Matters Specific to Aircraft Equipment (“**Aviation Protocol**”) adopted by the Secretariats of International Civil Aviation Organization (“**ICAO**”) and the International Institute for the Unification of Private Law (“**UNIDROIT**”), and adopted pursuant to Resolution No. 1 of the Final Act of the Diplomatic Conference to adopt the Convention and the Aviation Protocol under the auspices of ICAO and UNIDROIT at Cape Town from 29 October to 16 November 2001. The Convention and the Aviation Protocol are read and interpreted together as a single document as required by Article 6(1) of the Convention and reference to the Convention in this opinion includes the Aviation Protocol. [Insert local jurisdiction’s statutory and regulatory references as appropriate.]

[Alternative: For the purpose of this opinion, the “**Convention**” means the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on Matters Specific to Aircraft Equipment (the “**Aviation Protocol**”) as in effect in any “**Contracting State**” to which reference is made. [Insert local country statutory and regulatory references as appropriate.<sup>480</sup>]]

The following terms [modify as appropriate] used in this opinion, “assignment”, “associated rights”, “contract of sale”, “creditor”, “debtor”, “Depository”, “International Registry”, “international interest”, “leasing agreement”, “prospective assignment”, “prospective international interest”, “prospective sale”, “Registrar”, “registry authority”, “sale”, “security agreement” and “title reservation agreement”, shall have the meaning given to them in (or, as appropriate, shall be construed in accordance with) the Convention.<sup>481</sup> “Contracting State” shall mean those countries which have ratified or adhered to the Convention; “Contracting State search certificate” and “priority search certificate” shall have the meaning given to each of them in the Regulations issued by the Supervisory Authority pursuant to Article 17 of the Convention and Article XVII of the Protocol<sup>482</sup>. [Alternative: Defined terms used herein (whether or not capitalized) and not otherwise defined in this opinion may be used as defined in the Convention or the Regulations or Procedures

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<sup>480</sup> This can be used as an alternate shorter version of the first paragraph.

<sup>481</sup> This approach aids opinion givers and recipients. Most defined terms in the Convention (e.g. “international interest”, “sale”, “assignment” etc.) are not capitalized. “Contracting State”, while not defined in the Convention, is given its accepted meaning in international law.

<sup>482</sup> If the opinion giver does not wish to specify each of the Convention definitions used in the opinion, the alternative of simple reference to the Convention and Cape Town Regulations for definitions has been supplied.

issued by the Supervisory Authority for the International Registry pursuant to Article 17 of the Convention and Article XVII of the Protocol.]

### **STANDARD OPINION:**

According to the Contracting State search certificate for [country X] issued by the Registrar on [date] at [time], [country X] is a Contracting State and, as the Contracting State, [country X] has made the declarations with respect to the Convention or the Aviation Protocol listed on such Contracting State search certificate.<sup>483</sup>

We are admitted to practice law in [name of jurisdiction] and the opinions given herein are based upon the Convention as in effect on the date hereof in [name of such jurisdiction or another jurisdiction as the opinion giver decides].<sup>484</sup>

### **STANDARD DOCUMENTS REVIEWED:**

The following documents have been reviewed for the purposes of issuing this opinion [choose as applicable]:

- (a) Evidence of registration of the [Airframe] [Helicopter] in [the national aircraft registry of a Contracting State];<sup>485</sup>
- (b) The [Lease]/[Mortgage]/[Conditional Sale Agreement]/[Contract of Sale]/[Assignment] [also referred to herein as Transaction Documents]<sup>486</sup> dated [ between [ ] and [ ] covering the “[Airframe]/[Engine]/[Helicopter]”;
- (c) The Priority Search Certificate issued by the Registrar on [date] at [time] covering registrations describing the “[Airframe]/[Engine]/[Helicopter]”, which includes the

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<sup>483</sup> Identifying a relevant Contracting State will be crucial for any opinion on the Convention. In order for the Convention to apply, either (i) the debtor will be situated in a Contracting State at the time of the conclusion of the agreement creating or providing for the international interest, or (ii) the agreement will relate to a helicopter or an aircraft registered or to be registered in an aircraft register of a Contracting State. See Article 3 of the Convention and Article IV of the Protocol. See GOODE at para. 2.19 (Unidroit 2008). In some situations, the Convention may apply to one part of a transaction but not to another. For example, with regard to an engine, the Convention might apply so that a mortgage of the engine is an international interest because the debtor is situated in a Contracting State. However, the Convention might not apply to a lease of the same engine by the debtor since it might not be an international interest if the lessee is not situated in a Contracting State at the time of conclusion of the lease. See CAPE TOWN PAPER SERIES, VOL. 1, 2.

Each of Articles 8, 10, 13, 14, 39, 40, 50, 52, 53, 54, 57, 58 and 60 of the Convention and Articles VIII, X, XI, XII, XIII, XXIV, XXIX and XXXIII of the Protocol has different effect depending upon declarations in respect of the non-mandatory provisions of the Convention. Clients and opinion recipients may want confirmation in the opinion as to the scope of the Convention's coverage of a particular transaction and as to what these declarations are, subject only to the accuracy, completeness and current status of any source used to identify the relevant declarations.

<sup>484</sup> Law firms may give an opinion on the Convention as a matter of international law even though they are not counsel in the jurisdiction of any particular Contracting State. A legal opinion should cover the law of the Contracting State where the aircraft is registered (see Article IV(1) of the Protocol) and also, if not the same, where the debtor is situated as that is the other basis for applying the Convention (see Article 3(1) of the Convention and Article IV(2) of the Protocol).

<sup>485</sup> This evidence may be used if the basis for the Convention to be applicable is Article IV(1) of the Protocol, i.e., the registration of a helicopter or an aircraft in a Contracting State, and if giving an opinion in regard to registration of the national aircraft registry. See further comments under Section III (b). If the basis for the Convention to be applicable is an agreement to register the aircraft in a national registry of a Contracting State, the opinion given may have to assume that the registration of the aircraft will occur.

<sup>486</sup> The Convention uses and defines the terms in this paragraph all in lower case: leasing agreement, title reservation agreement, security agreement, contract of sale and assignment. For descriptive purposes in this form opinion, the form refers to each relevant actual transaction document by using initial capitals for the corresponding type of document.



registration of an international interest in the “[Airframe]/[Engine]/[Helicopter]” on the International Registry and attached to this opinion as an exhibit;<sup>487</sup>

- (d) The Contracting State search certificate issued by the Registrar on [date] at [time] describing declarations, withdrawals of declarations and categories of non-consensual right or interest, in each case communicated to the Registrar by UNIDROIT as the Depository as having been declared by the relevant Contracting State;<sup>488</sup>
- (e) The De-registration and export request authorization (the “**De-registration and export request authorization**”) in connection with the Aircraft dated [ ] and a [search at [official response from] the national aircraft registry authority, which has revealed that the authorization has been recorded;<sup>489</sup> and/or
- (f) The [Subordination Agreement] dated [ ].<sup>490</sup>

### STANDARD ASSUMPTIONS:

We have assumed for purposes of our opinions set forth below that:

- (i) the Contracting State search certificate description of declarations, withdrawals of declarations and categories of non-consensual right or interest communicated to the Registrar by UNIDROIT as the Depository as having been declared by any Contracting State, and the date on which each such declaration or withdrawal of declaration is recorded, are accurate in all respects.<sup>491</sup>
- (ii) (a) Alternative (A)<sup>492</sup>  
the priority search certificate referred to herein and the certificate of the [registry authority] confirming recordation of the De-registration and export request authorization are accurate in all respects and the electronic International Registry system is accurate and complete, free from any malfunctions and there have not been any errors or omissions by the International Registry staff or by the aircraft registry authority staff. Any opinion as to record filings is based on information received from the International Registry as of the date of the priority search certificate.

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<sup>487</sup> Articles 22(2) and 24 of the Convention. This will be used if giving any registration of interests opinion under Section III. These certificates may be obtained beforehand if a prospective international interest was filed or otherwise they need to be obtained immediately after the closing of the transaction when all relevant interests have been registered. See comments on prospective registration under Section III (c) of this opinion.

<sup>488</sup> Article 23 of the Convention.

<sup>489</sup> Article XIII of the Protocol. The De registration and export request authorization is not governed by a national law. Since it is based on the Convention itself, an opinion needs to be given. See the opinion in Section III(3). The certification of the registry authority that this has been recorded is different from the online International Registry priority search certificate.

<sup>490</sup> Article 29(b) of the Convention. The subordination contemplated by the transaction might not be stated in a separate document but it still must be registered to be effective against third parties under the Convention.

<sup>491</sup> A Contracting State search certificate showing the Contracting State's relevant declarations should be obtained from the Registrar and provided with the opinion.

<sup>492</sup> Most of these assumptions relate to the accuracy of the priority search certificates and are relevant to the determination of priority below, but they have some relevance to registration of interests, assignments and sales.

(b) Alternative (B)

the information contained in any priority search certificate referred to herein is accurate in all respects;

the information in a priority search certificate has not been altered since the date of such priority search certificate;

each priority search certificate contains all the registered information and data on the International Registry in connection with the “[Airframe]/[Engine]/[Helicopter]” to which it relates;

all of the registrations indicated on any priority search certificates referred to herein relate to “international interests”, “assignments”, “sales” and/or “subordinations of interests” that are fully and properly constituted and fully created for the purposes of the Convention [other than] [list any prospective registrations made in connection with the transaction that is being opined upon that are known by the opining lawyer]; and

the information contained in the certificate of the [aircraft registry authority] as to recordation of the De-registration and export request authorization is accurate in all respects and has not been altered since the date of such certificate.

## II. Constitution of International Interests and Other Interests Under the Convention and the Effects of Registration Thereof<sup>493</sup>

### ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section II and in addition to applicable standard assumptions in Section I] that:

- (a) at the time of conclusion of the [insert the name of the Transaction Document], [insert the name of the Contracting State] is the jurisdiction [under which law the debtor is incorporated or formed]/[where the debtor has its registered office or statutory seat]/[where the debtor has its centre of administration]/[where the debtor has its place of business]<sup>494</sup>

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<sup>493</sup> All that is needed to constitute an international interest is an agreement which conforms to the requirements of Article 7 of the Convention. This is so whether or not the international interest has any counterpart in national laws or fulfils the requirements for the creation of an interest under national law since the international interest derives from the Convention itself. Whether the agreement exists at all is to be determined by the applicable law, while the formal requirements for constituting the international interests are determined by the Convention (GOODE at para. 2.42 (Unidroit 2008)). The same is true with respect to a contract of sale or an assignment of associated rights under Article V of the Protocol or Article 32 of the Convention, as the case may be.

<sup>494</sup> It may not be obvious how to define the time of conclusion of an agreement under Article 3(1) of the Convention. This is because the actual Transaction Document may have been executed before the Convention or a particular relevant declaration came into effect in a relevant jurisdiction while the international interest may have been constituted by a closing occurring after the Convention or declaration came into effect. An opinion could be given on these points by local counsel where the debtor is incorporated or formed or where the debtor has its registered office or statutory seat. The terms “statutory seat” and “registered office” are equivalents used in different jurisdictions and international instruments (See GOODE at para. 4.58 (Unidroit 2008)).

## AND/OR

[Contracting State] is [where the [Airframe] [Helicopter] is [or is agreed to be] registered.<sup>495</sup>

- (b) the [lessor]/[conditional seller]/[chargor] has the power to dispose of the “[Airframe]/[Engine]/[Helicopter]” by way of the [Lease]/[Conditional Sale Agreement]/[Mortgage].<sup>496</sup>
- (c) the [seller] has the power to dispose of the “[Airframe]/[Engine]/[Helicopter]” by way of sale pursuant to the [Contract of Sale].

## FURTHER POSSIBLE ASSUMPTIONS:

- (d) the [insert the name of the Transaction Document under which the international interest is based] is a [leasing agreement/a title reservation agreement/a security agreement] with respect to the “[Airframe]/[Engine]/[Helicopter]” as determined by [the applicable law];<sup>497</sup>
- (e) [the minimum requirements stipulated in the definition of “[Airframe]/[Engine]/[Helicopter]” in the Convention have been fulfilled;]<sup>498</sup>
- (f) [the “[Airframe]/[Engine]/[Helicopter]” is correctly identified and described by manufacturer’s serial number, name of manufacturer and generic model designation.]<sup>499</sup>

## OPINIONS:

- (1) The [Lease]/[Conditional Sale Agreement]/[Mortgage] is effective to constitute an international interest as defined in the Convention in the “[Airframe]/[Engine]/[Helicopter]”.<sup>500</sup>

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<sup>495</sup> These are all alternative elements available for the Convention to apply under Articles 3 and 4 of the Convention. Either the aircraft or helicopter is, or is agreed to be, registered in a Contracting State or, at the time of conclusion of the relevant transaction document, the debtor is situated in a Contracting State.

<sup>496</sup> Article 7 of the Convention and Article V of the Protocol. This assumption is required since the power to dispose is a matter of fact and applicable law that could be difficult to determine. A local opinion will probably be obtained. See *GOODE* at paras. 2.7, 2.42, 4.71-4.72 (Unidroit 2008) on “Power to Dispose”. The assumption or opinion as to power to dispose of the Aircraft Object would encompass having rights in the Aircraft Object of which to dispose.

<sup>497</sup> Articles 2(4) and 7 of the Convention. This may be a necessary assumption for lawyers in some jurisdictions. One approach to the opinion that an international interest has been constituted in some jurisdictions is to determine that the agreement will fit at least one of the categories in this assumption (leasing agreement, title reservation or security agreement) without deciding which one. In other jurisdictions an opinion may be given as to the applicable category of agreement, which would be determined under the applicable law. See further comments under Opinions Section II (1) and (2).

<sup>498</sup> Articles I(2)(a), I(2)(e) and I(2)(l) of the Protocol. The equipment specifications meeting or exceeding the minimum requirements in the Convention will be specified in detail in most Transaction Documents and the representations in acceptance certificates or supplements should be sufficient for counsel to omit this assumption.

<sup>499</sup> Article VII of the Protocol and the Cape Town Regulations. The reference to model designation is to the generic model designation and not to a model designation specific to a particular owner or operator (*GOODE* at paras. 3.21 and 5.95 (Unidroit 2008)).

<sup>500</sup> Articles 2, 7, 31-34 of the Convention and Articles V, VII and XV of the Protocol. This opinion can be given provided that (i) the opining lawyer has identified that the agreement falls within any one of the categories of documents that can constitute an international interest and (ii) the formal requirements in Article 7 of the Convention have been fulfilled, i.e., that (w) the international interest is based on a written agreement, (x) the agreement enables the [Airframe]/[Engine]/[Helicopter] to be identified and they meet the minimum equipment size requirements under Articles I(2)(b), I(2)(e), I(2)(l), and I(2)(w) of the Protocol [the chargor]/[conditional seller]/[lessor] has the power to dispose of the [Airframe]/[Engine]/[Helicopter] and (z) in the case of a Mortgage, that the secured obligations can be determined. The requirement under (i) might be determined to be met without deciding which of the three categories is met, might be a stated assumption (see Assumption II (d) above) or might be a separate opinion (see alternative Opinion

- (2) (A) The [Lease]/[Conditional Sale Agreement] falls within the meaning of [leasing agreement]/[title reservation agreement] as defined in the Convention Text.<sup>501</sup>
- (B) The [Mortgage] falls within the meaning of security agreement as defined in the Convention.<sup>502</sup>
- (3) The Contract of Sale is effective to be a contract of sale as defined in the Convention with respect to the “[Airframe]/[Engine]/[Helicopter]” and to transfer the interest of the seller in the “[Airframe]/[Engine]/[Helicopter]” to the buyer according to its terms.<sup>503</sup>
- (4) The [Assignment] is effective as [an absolute assignment of associated rights]/[a partial assignment of associated rights]/[an assignment of associated rights by way of security] under the Convention in connection with the [Transaction Document] and transfers the related international interest under the Convention.<sup>504</sup>
- (5) The [Assignment] is effective to transfer to the [Assignee] the international interests relating to the “[Airframe]/[Engine]/[Helicopter]” constituted in favour of the [Assignor] and to transfer [some/all] related associated rights and all the rights, interests and priorities of the [Assignor] under the Convention in relation to such international interests,<sup>505</sup>
- [(6) The [debtor] is bound by the assignment described in [(4)/(5)] and has a duty to make payments [or give other performance] to the [Assignee] under the [Transaction Document];<sup>506</sup>
- (7) Upon the registration of the international interest under the [Lease]/[Conditional Sale

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II (2)). The requirements under (ii) (w), (x) and (z) are based on the Transaction Documents or any additional certificates needed to complete due diligence for the opinion and (ii) (y) can be based on a stated assumption if necessary (see Assumption II(b) and(c)). Article VII of the Protocol and the Cape Town Regulations specify the correct equipment identification.

<sup>501</sup> Articles 1 and 2(4) of the Convention and Articles I and III of the Protocol. See Assumption II (d). This will not be a standard opinion in every jurisdiction and will depend on the applicable local law opinion. The typical enforceability opinion under the applicable law (as identified in the Transaction Document) could opine that the document fits at least one of the categories of leasing agreement, title reservation agreement or security agreement. See CAPE TOWN PAPER SERIES, VOL. 1, 9. This could avoid the issue of opining as to whether a lease is a true lease or as to which of these Convention categories should apply. However, in some instances, the opining lawyer may be requested to opine on which one of the categories the document falls within since there are differences in the remedies that are available under the Convention for each of these categories.

<sup>502</sup> Article 1(ii) of the Convention. The Mortgage must enable the secured obligations to be determined; Article 7(d) of the Convention.

<sup>503</sup> Articles 1(a) and (g) and Article V of the Protocol. Note that the contract of sale referred to in the Convention is the actual title transfer document and, depending upon the governing law, may be the purchase agreement and/or the bill of sale. This opinion can be given provided that the formal requirements in Article V of the Protocol have been fulfilled, i.e., that (i) the sale is based on a written agreement, (ii) the agreement enables the [Airframe]/[Engine]/[Helicopter] to be properly identified and (iii) the [seller] has the power to dispose of the [Airframe]/[Engine]/[Helicopter]. The requirements under (i) and (ii) are based on assumptions which may not need to be stated as they are implied assumptions, and (iii) is based on a stated assumption, see Assumption II (c) above.

<sup>504</sup> Article 31 of the Convention. The only term defined in the Convention is assignment. This opinion can be given provided that the formal requirements in Article 32 of the Convention have been fulfilled, i.e., that (i) the assignment is based on a written agreement, (ii) the associated rights can be identified under the contract when they arise, and (iii) in case of an assignment by way of security, secured obligations can be determined. Article 36(1)(a) of the Convention provides that the relevant Transaction Document needs to state that the associated rights are secured by or associated with the [Airframe]/[Engine]/[Helicopter] for the priority rules of the Convention to be applicable in relation to a contract containing associated rights. The opining lawyer will have to make sure that this requirement is fulfilled. If this is difficult to verify, appropriate assumptions should be made to that extent. Further, Article 36 (2) of the Convention contains a qualification that restricts the priority right of associated rights to object-related rights because the associated rights being assigned under the Assignment must consist of rights to payment or performance that relate to matters as set out in Articles 36(2)(a) to (e) of the Convention. The purpose of this restriction is to avoid giving the assignee a Convention priority to rights to payment which, though secured by an [Airframe]/[Engine]/[Helicopter], are unrelated to the acquisition or rental or the purchase of such object. The Convention is not concerned with priorities between two assignees of non-object-related associated rights (GOODE at para. 4.252 (Unidroit 2008)).

<sup>505</sup> Articles 31(1) and 32(2) of the Convention.

<sup>506</sup> Article 33 (1) of the Convention and Article XV of the Protocol. This opinion may not be common, but it can be given provided that the debtor has been given notice of the assignment in writing by or with the authority of the assignor, the notice identifies the associated rights, and the debtor has given its consent in writing (which may be given in advance and need not identify the assignee). GOODE at paras. 2.127, 2.130 and 4.236 et seq. (Unidroit 2008).

Agreement]/[Mortgage],

the international interest will be effective against third parties in any Contracting State under the Convention.

**And/Or**

no further filing is required or advisable under the Convention for the international interest to be effective against third parties.<sup>507</sup>

- (8) Upon the registration of the sale under the Contract of Sale,

the Contract of Sale will be effective against third parties in any Contracting State under the Convention.

**And/Or**

no further filing is required or advisable under the Convention for the Contract of Sale to be effective against third parties.

- (9) Upon the registration of the assignment of associated rights under the [Assignment],

the [Assignment] will be effective against third parties in any Contracting State under the Convention.

**And/Or**

no further filing is required or advisable under the Convention for the [Assignment] to be effective against third parties.

- (10) Upon the registration of the [Subordination] under the [Subordination Agreement] of [international interest B] to [international interest A], by or with the consent in writing of [the person whose interest has been subordinated], [international interest A] would have priority over [international interest B] under the Convention.<sup>508</sup>

### III. Registration of International Interests, Assignment of Associated Rights, Sales and Other Interests and Recordation of De-Registration and Export Request Authorization

#### REGISTRATION ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section III and in

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<sup>507</sup> This parallels existing opinion practice as to what the effect of a proper filing would be upon the actual registration at the International Registry. The word "perfection" is not used in the Convention or in this form opinion. The word "effective" is used in Article 30 of the Convention. On this point, see *GOODE* at paras. 2.120 and 4.209 (Unidroit 2008). The counsel giving this opinion might not also give the opinion on registration described in Section III or priority described in Section IV. Either a Convention opinion giver or a local law opinion may also opine that no further filing is required or advisable to protect the creditor's international interest or assignment against third parties in a particular Contracting State.

<sup>508</sup> Articles 18(1)(a) and 20(2) of the Convention. This opinion may be given here as part of the Section II opinion or in a Section IV priority opinion.

addition to applicable standard assumptions in Section I] that.<sup>509</sup>

- [(a) the Aircraft has been duly registered [or will be registered] on the aircraft register of [insert relevant Contracting State].<sup>510</sup>
- (b) (i) the prospective [international interest]/[sale]/[assignment] has become an [international interest]/[sale]/[assignment] upon the occurrence of [describe a stated event], and
- (ii) the information referred to in the prospective registration is still current immediately before the [international interest]/[sale]/[assignment] was constituted.<sup>511</sup>

## OPINIONS:

- (1) The Aircraft was registered on the national aircraft register of [insert the relevant Contracting State], which is a Contracting State for the purposes of the Convention, on [insert date].<sup>512</sup>
- (2) The [international interest]/[prospective international interest]/ [contract of sale]/ [prospective sale]/[assignment of associated rights]/[prospective assignment] related to [insert the relevant Transaction Documents] and the necessary consents<sup>513</sup> to permit [registration] [discharge] have been registered with the International Registry in accordance with the Convention as of [the date and time of registration of international interest, sale or assignment shown on the priority search certificate] [or insert date and time in the opinion, which may be the date and time of the prospective registration].<sup>514</sup>

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<sup>509</sup> This Section is about the registration of interests, assignments and sales. "Registration is not an element in the constitution of an international interest; it is merely a perfection requirement in order to give public notice of the interest and to preserve the holder's priority. Conversely, registration of a purported international interest which does not in fact exist has no legal effect." (GOODE at paras. 2.43, 2.69, 4.126 and 4.142 (Unidroit 2008)). "Perfection" is a non-convention term even though it is used in this text and in the Commentary. Like most perfection concepts, registration of an interest is a condition to its effectiveness against third parties. In some Contracting States that have declared that their local aircraft registry is the entry point for registration of interests with the International Registry, after filing a prospective international interest and when it becomes an international interest, one may have to file actual documents under the local rules.

<sup>510</sup> Local counsel would opine on the aircraft registration. This assumption is only applicable when the basis for the Convention to be applicable is Article IV(1) of the Protocol, i.e., the registration of a helicopter or an aircraft. Thus, the assumption can be left out when the applicability of the Convention is based on the fact that the debtor is situated in a Contracting State (in accordance with Article 3(1) and (4) of the Convention). It should also be noted that Article IV(1) of the Protocol can only bring airframes and not engines within the scope of the Convention.

<sup>511</sup> Articles 16(1)(a) and 19(4) of the Convention and Article III of the Protocol. Some counsel might have sufficient evidence to be able to delete these assumptions, i.e., that the stated event has occurred and that the registration is still current. It is also possible that the "stated event" could be specifically defined in some opinions.

<sup>512</sup> This opinion would be required where Article IV(1) of the Protocol is the basis for the Convention to be applicable or where the aircraft registry in the Contracting State has been designated as an entry point under Article 18(5) of the Convention and Article XIX of the Protocol for transmittal of information for registration. This opinion would be given by local counsel.

<sup>513</sup> Articles 18(1)(a), 20(1) and 20(3) of the Convention. Note that whether a consent has been duly and validly given is not determined by the simple registration of a consent for purposes of Article 18(1)(a) of the Convention. Under Article 20 of the Convention, a consent is an absolute requirement for the International Registry to effect a registration of international interests, assignments, sales, subordinations and discharges (Article 20(1)(a) of the Convention). This difference is important since the Registrar is not obliged to enquire whether a consent to register is valid (Article 18(2) of the Convention). See further opinion stated under Section III (2) herein and GOODE at paras. 2.99 n.2 and 4.134 (Unidroit 2008).

<sup>514</sup> Articles 19 and 20 of the Convention basically set out the requirements and principles for the validity of the registration. The opining lawyer must ensure that the necessary written consents have been obtained in accordance with Article 20 of the Convention. A person searching the International Registry will not be able to differentiate between a prospective interest and an international interest. This concept should facilitate the closing of transactions by permitted pre-filings (GOODE at paras. 2.115 and 4.156 (Unidroit 2008)). Counsel will have to confirm that registration information in a

- (3) The irrevocable De-registration and export request authorization is in the form required by the Convention and has been submitted for recordation to [recorded by] the [national aircraft registry authority].<sup>515</sup>

## IV. Determination of Priority Under the Convention and of the Effect of Unregistered Non-Consensual Interests

### ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section IV and in addition to applicable standard assumptions in Section I] that:<sup>516</sup>

- (i) all of the registrations indicated on the priority search certificates relate to international interests, assignments, sales and/or subordinations of interests that are fully and properly constituted and fully created for the purposes of the Convention [other than] [list any prospective registrations made in connection with the transaction that is being opined upon that are known by the opining lawyer];
- (ii) there has been no subordination or variation of any priority other than pursuant to any subordination indicated on the priority search certificates;
- (iii) [if applicable] under Article 39(1)(a) [and (4)] of the Convention and as evidenced by a Contracting State search certificate, the Contracting State of the debtor or other chosen entity has declared those categories of non-consensual rights or interests that, under [the Contracting State]’s law, have priority over an interest in an “[Airframe]/[Engine]/[Helicopter]” equivalent to that of [the holder of the registered international interest] and over [the registered international interest], and [at the time of ratification, acceptance, approval of, or accession to the Protocol], has declared that the non-consensual rights or interests in an “[Airframe]/[Engine]/[Helicopter]” covered by such categories have priority over [a registered international interest] against an “[Airframe]/[Engine]/[Helicopter]” prior to [the date of such ratification, acceptance,

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prospective international interest is still accurate when it becomes an actual international interest, and if that is the case there will be no need for further registrations (Article 18(3) of the Convention).

<sup>515</sup> Article XIII(2) of the Protocol. This opinion only applies if the Contracting State has made a declaration pursuant to Article XXX(1) of the Protocol. This opinion may depend on the issuance of separate regulations by the Contracting State as to recording at the local aircraft registry as opposed to registration in order to determine that recordation has occurred.

<sup>516</sup> Priority in the context of the Convention means the ranking of competing interests in airframes, aircraft engines and helicopters and the casualty proceeds thereof. These competing interests include (i) the international interest created under a security agreement, (ii) a title reservation agreement or a leasing agreement; (iii) the assignment of associated rights; (iv) the assignment of any of the foregoing; and (v) the sale interest (record title) which is transferred under a contract of sale. As an example, consider a typical deal counsel and filing counsel approach to filing. A deal counsel legal opinion in some countries might address security interest creation and perfection in concept but not address actual filing and does not usually state who is entitled to priority. The special filing counsel opinion does cover actual filing and does state who has priority on the aircraft registry. The analysis here will fit that separation of opinion elements or other approaches. If an opinion is required as to priority, the preparer of the opinion must review the priority search certificate for earlier interests. Further, an opinion regarding priority requires additional assumptions, such as: 1. the validity, priority or enforceability of a pre existing interest under applicable law before the effective date of the Convention; and 2. the recognition of the perfection of such pre existing right or interest as against third parties under applicable law.

approval or accession]; and<sup>517</sup>

- (iv) [if applicable] under Article 39(1)(b) of the Convention and as evidenced by a Contracting State search certificate as to the Contracting State of the debtor or other chosen entity, the Contracting State has declared that nothing in the Convention shall affect the right of [the Contracting State, state entity, intergovernmental organisation or other private provider of public services named in the declaration] to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] “[Airframe]/[Engine]/[Helicopter]”.<sup>518</sup>

## OPINIONS:

### 1. Opinion on priority of [Mortgage]/[Conditional Sale]/[Lease]/[Contract of Sale]<sup>519</sup>

Based upon the priority search certificates [and the Subordination Agreement] and the existing Transaction Documents and in accordance with the Convention, the rights and interests of the [insert relevant party] with respect to the “[Airframe]/[Engine]/[Helicopter]” pursuant to the [international interest]/[sale]/[assignment] constituted under the [insert relevant Transaction Document] will be subject only to:

- (i) the rights and interests of any persons who are evidenced as having a registration in relation to an “[Airframe]/[Engine]/[Helicopter]” that is prior to the [international interest]/[sale]/[assignment] on the priority search certificates;
- (ii) the rights and interests of the [Lessee]/[Sublessee] in the “[Airframe]/[Engine]/[Helicopter]” pursuant to the Convention<sup>520</sup> [and] [the quiet enjoyment provisions set out in [the Transaction Documents]/[Subordination Agreement];]

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<sup>517</sup> Article 39(1)(a), (4) of the Convention. A local law opinion as to particular non-consensual interests and whether they would have priority over an international interest under local law may be necessary to reach any conclusion as to priority.

<sup>518</sup> Article 39(1)(b) of the Convention. Local law advice as to the rights to arrest or detain may be necessary if this is a concern.

<sup>519</sup> Article 29 of the Convention and Article XIV of the Protocol. Rather than talking about priority as such, the draft opinion sets out the interests to which the Mortgage/Conditional Sale/Lease/Contract of Sale could be subject. Note that in a typical aircraft financing the security trustee and banks would ensure that there is no such prior registration (which is not subordinated to the [international interest]/[sale]/[assignment]), and that any registration suggesting otherwise is discharged prior to closing. Thus, typically, this opinion should contain no exceptions. However, if there is any such prior registration evidenced on the priority search certificate, the opining lawyer needs to further consider the following points:

(1) Has there been any registered subordination? If so, the prior registration might not have priority.

(2) Does such prior registration relate to an interest vested in the debtor (i.e., the [Mortgagor]/[Lessee]/[Conditional Buyer]) of the [Mortgagee]/[Lessor]/[Conditional Seller]? This might, for instance, be a sale registration that the Mortgagee has made in relation to the contract of sale pursuant to which the Mortgagor obtained title in the [Airframe]/[Engine]/[Helicopter], or it might be registrations that the Mortgagor may have made in relation to any international interests vested in it pursuant to a leasing agreement it has entered into, or this might arise in relation to a registration of international interests under a sublease that the Lessee has granted. As Article 29 of the Convention and Article XIV of the Protocol could not have been meant to allow a debtor to take priority over its own creditor, such prior registrations should not be construed as having priority over the international interests. However, it should be noted that though such prior registrations would not confer priority on the debtor vis-à-vis its creditor, if such prior registrations are not subordinated and the subordination registered they could, potentially, confer quiet enjoyment rights (under Article 29(4) of the Convention and Article XVI of the Protocol) on a conditional buyer or lessee relying on such prior registration of the international interests constituted by its lease/title retention agreement. This point should be reflected in the opinion in Section IV(1) (i) and (ii).

<sup>520</sup> Article 29(4) of the Convention and Article XVI of the Protocol.



- (iii) a pre-existing right or interest which enjoyed under the applicable law before the effective date of the Convention a priority greater than an international interest constituted under the [insert the relevant Transaction Document], provided that if the Convention is applicable to such pre-existing right or interest, the priority of such pre-existing right or interest will only be retained if it is registered on the International Registry within the time frame specified by the relevant Contracting State.<sup>521</sup>
- (iv) [If an assumption has been made with regard to Article 39(1)(a) and (4) of the Convention of,] the non-consensual rights or interests included in those categories covered by [the Contracting State]’s declaration [at the time of ratification, acceptance, approval of, or accession to the Protocol] that under [the Contracting State]’s law have priority over an interest registered against an “[Airframe]/[Engine]/[Helicopter]” prior to [the date of such ratification, acceptance approval or accession]; and
- (v) any declarations that [the Contracting State] may make in the future [under Article 39(1) (b) of the Convention] with respect to the right of [the Contracting State, State entity, intergovernmental organization or other private provider of public services] to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] [Airframe]/[Engine]/[Helicopter].

## 2. Opinion on priority of [the Assignment]

Based upon the priority search certificate [and the Subordination Agreement] [and the relevant Assignment] and in accordance with the Convention, the assignment of associated rights in favor of the [security trustee] with respect to the “[Airframe]/[Engine]/[Helicopter]”, the [security trustee] under the Assignment will have priority subject only to:<sup>522</sup>

- (i) [(in relation to such international interests) any interests and rights (the “other international interests”) in relation to which the original holder of the assigned international interest was the debtor, unless such other international interest was registered on the International Registry prior to the conclusion of the Assignment;]<sup>523</sup>
- (ii) [(in relation to such international interests and such associated rights) the assignment dated

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<sup>521</sup> Articles 60(1) and 60(2) of the Convention. This paragraph (iii) deals with pre-Convention interests which (depending on the declarations made under Article 60(3) of the Convention) may not be revealed on the priority search certificates.

<sup>522</sup> Articles 29 and 35 of the Convention and Article XIV of the Protocol. Rather than talking about priority as such, the opinion sets out the interests (both in relation to the international interests and/or the associated rights) to which the Assignment could be subject. This opinion would be relevant if the banks/security trustee wanted to know the priority of their interests in the [Airframe]/[Engine]/[Helicopter] pursuant to any international interests and associated rights transferred by the Assignment. The opinion limits itself to existing Transaction Documents. Thus assignments of future documents (which could fall into the area of cross collateralization) are not opined upon, as one cannot presently check if such future documents comply with the Convention requirements that activate the Convention’s assignment priority rules (e.g. see Article 36(1)(a) of the Convention). The opining lawyer should adapt the above wording to suit the specifics of the transaction (e.g. to reflect whether there is a Subordination Agreement varying the priority of various assignments).

<sup>523</sup> This opinion reflects the fact that irrespective of the time of registration of an assignment, Article 35(1) of the Convention does not allow an assignment to gain any greater priority in the [Airframe]/[Engine]/[Helicopter] than the international interests that were assigned had.

\_\_\_ between [X] and [Y]] which also relates to such associated rights and international interests, and which has priority over the Assignment [due to its prior registration on the International Registry]/[pursuant to the terms of the [Subordination Agreement]],<sup>524</sup>

- (iii) [If an assumption has been made with regard to Article 39(1)(a) and (4) of the Convention,] the non-consensual rights or interests included in those categories covered by [the Contracting State]’s declaration [at the time of ratification, acceptance, approval of, or accession to the Protocol] that under [the Contracting State]’s law have priority over an interest registered against an “[Airframe]/[Engine]/[Helicopter]” prior to [the date of such ratification, acceptance approval or accession];
- (iv) [If an assumption has been made with regard to Article 39(1)(b) of the Convention,] the right of [the Contracting State, State entity, intergovernmental organization or other private provider of public services] described in the [Contracting State]’s declaration to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] “[Airframe]/[Engine]/[Helicopter]”; and
- (v) any declarations that [the Contracting State] may make in the future [under Article 39(1) (b) of the Convention] with respect to the right of [the Contracting State, State entity, intergovernmental organization or other private provider of public services] to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] [Airframe]/[Engine]/Helicopter.]

## V. Insolvency [Based on Declaration]

### ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section V and in addition to applicable standard assumptions in Section I] that:

- (a) [Contracting State] is the debtor’s primary insolvency jurisdiction as defined in the Convention;<sup>525</sup>
- [(b) [Contracting State that is the primary insolvency jurisdiction of the debtor] has made a declaration under Article XXX(3) of the Protocol or has enacted such provisions under

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<sup>524</sup> This opinion requires the opining lawyer to consider whether there are any competing assignments of the same international interests and associated rights which may have priority over the Assignment. The wording should be adapted accordingly. Typically there should not be another such assignment in a single-tier structure. Obviously in a two-tier leasing structure there could be more than one security assignment in the structure, and this will have to be considered in rendering the opinion (though it is hoped that such assignments will be registered in the intended order or subordinated in the intended order).

<sup>525</sup> Under the Convention, the “primary insolvency jurisdiction” is the Contracting State in which the centre of the debtor’s main interests is situated. Furthermore, the centre of the debtor’s main interest is deemed to be the place of the debtor’s statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise. Article I(2)(n) of the Protocol. A local law opinion on this point could be given.

the applicable national law that it will apply the entirety of [Alternative A or Alternative B] of Article XI of the Protocol;<sup>526]</sup>

- (c) [[Contracting State that has adopted Alternative A] has declared a waiting period of [\_\_\_\_\_] under Article XI(2) (Alternative A) of the Protocol or has enacted such provisions under the applicable national law as one of the time limitations within which the insolvency administrator or the debtor, as applicable, shall give possession of the Aircraft Object to the creditor;]

OR

- (c) [[Contracting State that has adopted Alternative B or has enacted such provisions under the applicable national law] has declared a period of [\_\_\_\_\_] as the time within which the insolvency administrator or the debtor, as applicable, upon request of the creditor, shall give notice to the creditor whether it will cure all defaults and agree to perform all future obligations under the agreement and related transaction documents as specified under Alternative B or give the creditor the opportunity to take possession of the Aircraft Object, in accordance with the applicable law.]

#### OPINIONS:

- (1) If an insolvency-related event of the type set forth in the declaration of [the Contracting State of the debtor's primary insolvency jurisdiction] occurs with respect to [the debtor], [the creditor] under the [Lease]/[Conditional Sale Agreement]/[Mortgage] will be entitled to the benefits of [Alternative A] [Alternative B] of Article XI of the Protocol in [such primary insolvency jurisdiction].<sup>527</sup>[, and]
- (a) [[Contracting State that has adopted Alternative A] has declared the waiting period (after the insolvency-related event) of \_\_\_ days under Article XI(2) (Alternative A) of the Protocol, and the insolvency administrator or the debtor, as applicable, must give possession of the Aircraft Object to the creditor, no later than earlier of (i) the end of such waiting period and (ii) the date on which the creditor would be entitled to possession of

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<sup>526</sup> The opinion may assume the insolvency declarations as in these assumptions (b) and (c) or may opine that these insolvency declarations have occurred.

<sup>527</sup> Article XI of the Protocol. The insolvency provisions of Article XI of the Protocol only apply where a Contracting State has made a declaration under Article XXX(3) of the Protocol that it will apply either the entirety of Alternative A or the entirety of Alternative B under Article XI of the Protocol, and the types of insolvency proceedings to which it will apply either alternative. Thus, an opinion under Article XI of the Protocol must encompass a determination as to the result of a Contracting State's having made such a declaration and as to the rights and obligations of the parties to an agreement under such a declaration in particular types of insolvency proceedings. If no declaration has been made, the opinion will be the same as it was prior to the Convention. Inevitably, the opinion must look to the International Registry for a Contracting State search certificate showing a declaration by the Contracting State that is the primary insolvency jurisdiction to determine the types of proceedings to which either alternative applies (Article XXX(3) of the Protocol) and to state that the courts of the Contracting State will apply Article XI of the Protocol in conformity with the declaration by the Contracting State (Article XXX(4) of the Protocol). The types of insolvency proceedings to which the Contracting State could apply either Alternative A or Alternative B under Article XXX(3) of the Protocol include bankruptcy, liquidation or other collective judicial or administrative proceedings in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganization and liquidation. Article 1(1) of the Convention. A local law opinion should be given to specify the nature and effect of the types of proceedings that a declaration under Article XI of the Protocol by the Contracting State has included with respect to Alternative A or Alternative B of Article XI of the Protocol.

the Aircraft Object on an earlier date under applicable law if Article XI of the Protocol did not apply.]

OR

- [(a) [[Contracting State that has adopted Alternative B] has declared the period (after the insolvency-related event) of [\_\_\_\_\_] as the time within which the insolvency administrator or the debtor, as applicable, upon request of the creditor, must give notice to the creditor whether it will cure all defaults and agree to perform the future obligations under the agreement and related transaction documents as specified under Article XI(2) (Alternative B) of the Protocol or give the creditor the opportunity to take possession of the Aircraft Object, in accordance with the applicable law.]

## VI. Other Opinions: Choice of Law, Choice of Forum, Waiver of Sovereign Immunity

### CHOICE OF LAW [BASED ON DECLARATION]

#### **ASSUMPTIONS:**

- (a) [The Contracting State] has, at the time of ratification, acceptance, approval of, or accession to the Aviation Protocol, declared that it will apply Article VIII of the Protocol.<sup>528</sup>
- (b) Assumptions required by counsel giving the opinion in the applicable Contracting State.

#### **OPINIONS:**

The law of [insert name of country] as chosen by the parties to govern [insert the relevant Transaction Documents] in whole or in part will be upheld as a valid choice of law with respect to the contractual rights and obligations of the parties under such agreements in any action in the courts of [the Contracting State].<sup>529</sup>

### CHOICE OF FORUM

#### **ASSUMPTIONS:**

- (c) Any written agreement with regard to choice of forum is concluded in accordance with the formal requirements of the law of the chosen forum.<sup>530</sup>
- (d) Assumptions required by counsel giving the opinion in the applicable Contracting State.

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<sup>528</sup> Articles VIII and XXX(1) of the Protocol.

<sup>529</sup> Article VIII of the Protocol. This opinion only applies if the Contracting State has made a declaration pursuant to Article XXX(1) of the Protocol. Further, the parties' choice of law is limited to contractual rights and obligations and is thus not applicable regarding rights affecting third parties (Goode at paras. 3.22 and 5.40 (Unidroit 2008)).

<sup>530</sup> Article 42(2) of the Convention. The attorney issuing the opinion is most likely from the forum chosen by the parties and could include this statement as an opinion instead of an assumption. Otherwise, a lawyer of the chosen forum could issue an opinion on this point.

## OPINIONS:

The written agreement between [insert the name of the parties] contained in [insert the relevant Transaction Document] that the courts of [the relevant forum Contracting State] are to have [exclusive]/[non-exclusive] jurisdiction in respect of any claim brought by either of them under the Convention will be recognized under the laws of [the applicable Contracting State].<sup>531</sup>

## WAIVER OF SOVEREIGN IMMUNITY

### ASSUMPTIONS:

- (e) For the purposes of the waiver of sovereign immunity, the jurisdiction where the sovereign entity is located is a Contracting State.
- (f) Any written agreement waiving sovereign immunity is concluded in accordance with the formal requirements of the jurisdiction in which the applicable sovereign is located.
- (g) Assumptions required by counsel giving the opinion in the applicable Contracting State.

### OPINIONS:

Pursuant to the written waiver of sovereign immunity between the parties, the [name of party waiving sovereign immunity] is not entitled to sovereign immunity from jurisdiction in connection with the Transaction Documents to which it is a party in the courts of the Contracting State chosen by the parties pursuant to the Convention, the courts of the Contracting State where the “[Airframe]/[Engine]/[Helicopter]” is situated or in which the Aircraft is registered or the courts of the Contracting State where the debtor is situated, in each case with respect to such claims or requests for relief as are specified in the Articles 42 and 43 of the Convention, respectively, or relating to enforcement of rights and interests relating to the “[Airframe]/[Engine]/[Helicopter]”.<sup>532</sup>

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<sup>531</sup> Article 42(1) of the Convention. The jurisdiction agreed to by the parties is exclusive unless otherwise agreed between the parties. The opinion regarding choice of forum under Article 42 of the Convention is subject to Articles 43 and 44 of the Convention. Under Article 43 of the Convention, the courts of the forum chosen by the parties under Article 42(1) of the Convention and the courts of the Contracting State on the territory of which the [Airframe]/[Engine]/[Helicopter] is situated or in which the aircraft is registered have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(8) of the Convention (“**Relief pending final determination**”). Jurisdiction to grant other relief under Article 13(1)(d) and (e) of the Convention and under Article 13(8) of the Convention may be exercised by: (a) the courts chosen by the parties; or (b) the courts of a Contracting State where the debtor is situated which is enforceable only in the Contracting State. Article 43(2) of the Convention.

<sup>532</sup> Article XXII of the Protocol. In order to make this opinion, the opining lawyer must confirm that the waiver of sovereign immunity from jurisdiction of the courts specified in Articles 42 and 43 of the Convention is in writing and contains a description of the [Airframe]/[Engine]/[Helicopter]. The opinion may be given by counsel in the Contracting State in which the applicable sovereign is located despite the absence of a local statute on waiver of sovereign immunity since the Convention should override national law.

# Annex F: Aircraft Objects Security Agreement [MSN[\_\_\_]]

This Aircraft Objects Security Agreement, dated as of [\_\_\_\_\_],

## BETWEEN:

- (1) [\_\_\_\_\_] (“Debtor”); and
- (2) [\_\_\_\_\_] (“Creditor”),

## WITNESSES THAT WHEREAS:

- A. Debtor and Creditor are party to the agreements set out in **Schedule A** (as amended, supplemented, restated or replaced from time to time, the “**Existing Agreements**”);
- B. To secure the payment and performance of the Secured Obligations, Debtor has agreed to grant to Creditor the Security Interests with respect to the Collateral in accordance with the terms of this Agreement; and
- [C. Pursuant to [Section [*Further Assurances*]] of the [specify Existing Agreement], Debtor has agreed to take such actions as Creditor may require to ensure that Creditor is entitled to the benefits of the Cape Town Convention as adopted by [*insert jurisdiction*].]

**NOW, THEREFORE**, for good and valuable consideration, the receipt and adequacy of which are acknowledged by Debtor, Debtor agrees with and in favour of Creditor as follows:

1. **Definitions.** In this Agreement the following terms have the following meanings:
  - (a) “**Cape Town Convention**” means the “Convention” and the “Aircraft Protocol”, as such terms are defined in the [*insert reference to implementing legislation*].
  - (b) “**Collateral**” means the aircraft objects set out in **Schedule A** to this Agreement.
  - (c) “**Secured Obligations**” means all present and future indebtedness, liabilities and obligations of any and every kind, nature and description (whether direct or indirect, joint or several, absolute or contingent, matured or unmatured) of Debtor to Creditor under, in connection with or with respect to this Agreement and all Existing Agreements, and any unpaid balance thereof.
  - (d) “**Security Interests**” means the security interests created by Debtor in favour of Creditor under this Agreement.

2. **Grant of Security Interests**<sup>533</sup>. As general and continuing collateral security for the due payment and performance of the Secured Obligations relating to each Existing Agreement, which obligations are hereby restated herein as if set out in full, Debtor mortgages and charges to Creditor, and grants to Creditor a security interest in, all right, [title] and interest of Debtor in and to the Collateral associated with such Existing Agreement as set out in **Schedule A** to this Agreement.
3. **Attachment**. Debtor confirms that value has been given by Creditor to Debtor, that Debtor has rights in the Collateral existing at the date of this Agreement and that Debtor and Creditor have not agreed to postpone the time for attachment of the Security Interests to any of the Collateral.
4. **Cape Town Convention**. Without limitation to any existing rights of Creditor pursuant to the Existing Agreements, the purpose of this Agreement is to ensure that the Security Interests in the Collateral are international interests as defined in and subject to the Cape Town Convention and that Creditor shall be entitled to the benefits of “Alternative A” (as defined in the Cape Town Convention) and all other rights and remedies available to a “creditor” under the Cape Town Convention.
5. **Registration**. Debtor shall take all such steps as Creditor may request that are necessary or advisable to ensure that the international interests created hereunder in respect of the Collateral (and any assignments thereof) are duly registered with the International Registry (as defined in the Cape Town Convention).
6. **Default**. Any “default” or “event of default” howsoever described in any Existing Agreement and any breach by Debtor of this Agreement shall constitute a default under this Agreement. Following the occurrence of any such default, Creditor shall be entitled to exercise the rights and remedies set forth in [Section [\_\_]] of the [specify Existing Agreement] as if such provisions were set out in full herein. The provisions of [Section [Maintenance] and [Redelivery]] of the [specify Existing Agreement] [and of [Section [Release of Security for replaced parts/engines] of the [specify Existing Agreement]] shall also apply to this Agreement as if such provisions were set out in full herein.
7. **IDERA**. Debtor shall promptly execute and deliver an Irrevocable Deregistration and Export Request and Authorisation in favour of [Creditor/Lender] in the form attached hereto as **Schedule B** (the “IDERA”) and shall file the IDERA with [insert reference to relevant Aviation Authority]. Debtor shall not take any action, or fail to take any action, which action or failure may cause such IDERA to cease to be in full force and effect or to be revoked, withdrawn or suspended at any time prior to the full and indefeasible repayment of the Secured Obligations.

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<sup>533</sup> Confirm that existing security agreements do not prohibit the granting of additional security interests

8. **Additional Security.** This Agreement is in addition to, and not in substitution for, any and all other security previously delivered by Debtor or any other Person to Creditor, all of which other security shall remain in full force and effect.
9. **Governing Law; Attornment.** This Agreement shall be governed by and construed in accordance with the laws of the [ ] and the parties irrevocably submit and attorn to the non-exclusive jurisdiction of the courts of such province.
10. **Electronic Signature.** Delivery of an executed signature page to this Agreement by Debtor by facsimile or other electronic form of transmission shall be as effective as delivery by Debtor of a manually executed copy of this Agreement by Debtor.
11. **[Assignment.** Creditor has assigned this Agreement and all of its rights hereunder to [lender] (by way of security) and Debtor hereby expressly consents to such assignment.]

*[signature page follows]*



**IN WITNESS WHEREOF**, the undersigned have caused this Agreement to be duly executed as of the date first written above.

**[FULL LEGAL NAME OF DEBTOR]**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**[FULL LEGAL NAME OF CREDITOR]**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

# Schedule A To Aircraft Objects Security Agreement [MSN\_\_\_\_\_]

Existing Agreement(s)	Aircraft Objects associated with such Existing Agreement(s)		
	Manufacturer/ Model	Generic Model	Manufacturer's Serial Number

# SCHEDULE B TO AIRCRAFT OBJECTS SECURITY AGREEMENT [MSN\_\_\_\_\_]

FORM OF IDERA

# ANNEX G: CHECKLIST OF CAPE TOWN CONVENTION-RELATED STEPS IN A REMEDY SITUATION

## Initial Cape Town Convention Related Steps in a Remedy Situation

The following is an overview of steps that the practitioner should consider in a remedy situation.

### A. DOES THE CAPE TOWN CONVENTION APPLY?

1. Review the parties, the aircraft registration, the airframe, engine and helicopter specifications and the agreements or the contracts of sale to determine if the Cape Town Convention applied at the inception of the transaction in a Contracting State to any such agreement or contract of sale. *See* Sections II.A, B, C and D and III.A and B.

*Determine:*

- a. where debtor was situated at time agreement was entered (use all definition possibilities) (Sections III.A and B)
  - b. where aircraft or helicopter was registered (Section III.A)
  - c. whether an international interest, a contract of sale or an assignment has been constituted (Sections II.B, D and J)
  - d. whether formalities were observed (Section II.C)
  - e. whether aircraft object qualifies (Section II.A)
2. Consider whether the Cape Town Convention is fully implemented and in full force and effect in a Contracting State if that State is relevant to the remedy situation. *See* Section II.R.

### B. PRIORITIES, OTHER RIGHTS OR INTERESTS, AND INTERESTED PERSONS.

1. Conduct searches on the International Registry as to each aircraft object. *See* Section IV. Determine whether all necessary registrations been made on the International Registry and what are the priority positions of the parties and any other third-party rights or interests under the Convention. *See* Sections II.E, F and G and H and IV. Do not forget to consider if the Contracting State is also a Geneva Convention country and if so filings to perfect interests thereunder (as well as remedy provisions thereunder). *See* Section III.H.
2. Consider the effect of any amendments or novations that are made after the Cape Town Convention became effective in a State and also where the agreement in the original

transaction was a pre-existing interest. *See* Sections IIE, J and M.

3. Are there Declarations as to non-consensual rights or interests that have priority without registration pursuant to Convention Article 39 in any relevant Contracting State where the aircraft object is or may be located, and, if so, confirm whether they are valid (*See* Section II.G) by virtue of there being a local law priority for such right or interest against interests that are equivalent to an international interest. Make the same analysis as to Article 39(1)(b) rights to arrest or detain the aircraft object and as to whether they are valid under local law. *See* Section II.G.
4. If there are registrations of non-consensual rights or interests, has there been a valid Declaration under Convention Article 40 in the relevant Contracting State? *See* Sections II.G and H as to effect, and *see* Sections II.G, IV.F and G as to removal of non-consensual rights or interests that are not validly registered.
5. If a non-consensual right or interest under Article 39 exists, consider whether timing of enforcement in the relevant Contracting State is affected because priority of a previously attached or enforced right may need to be respected under the laws of the State. *See* Section VI.H.
6. Attempt to identify who may be “interested persons” that will need to be notified when taking certain remedies. *See* Section VI (Introduction).

#### **C. CAPE TOWN CONVENTION MANDATORY REMEDY PROVISIONS.**

1. All remedies are to be taken in a commercially reasonable manner. *See* Section VI.A(iv).
2. Local procedures continue to apply except for Alternative A and B and non-judicial remedies. *See* Section VI. (Introduction).
3. The foregoing provisions described in 1 and 2 and all other mandatory provisions cannot be excluded by the parties from the exercise of remedies whether they are Cape Town Convention remedies or additional remedies at law. *See* Section VI.A(iii) and (iv).

#### **D. CONSIDERATION OF WHERE TO BRING REMEDIES AND WHAT REMEDIES MAY BE AVAILABLE.**

1. Forum. Consider each available forum for advance relief and for all other remedy purposes. *See* Sections VI.A(v) and VI.E(iv), and Sections II.A and K.
2. Determine contractual choice of law and whether supported by a Declaration as to choice of law in the applicable Contracting State being considered as a forum. *See* Section VI.A(vi).
3. Categories of remedies available to a creditor to the extent of applicable Declarations (*See* Section II.M:

- a. non-judicial remedies (Section VI.A(vii)),
  - b. advance relief (Section VI.E),
  - c. basic remedies of termination and repossession under leases and title reservation agreements (Section VI.B),
  - d. basic remedies for security agreements (Section VI.C),
  - e. basic remedies under assignments (Section VI.D),
  - f. additional remedies under applicable law to the extent not inconsistent with mandatory provisions (Section VI.A(iii) and (iv)), and
  - g. insolvency alternatives A and B (Section VI.F).
4. Characterization of the international interest. Determine, under the applicable law of the expected Contracting State forum for any litigation, whether the agreement would be characterized a security agreement or a lease or title reservation agreement. *See* Sections VI.A(v) and III.C. If not clear, then analyze the remedies for that agreement under both alternative sets of remedies.
  5. Consider the additional remedies available under applicable law outside of the Convention to Convention remedies since a creditor may apply each of such remedies (*See* Section VI.A(iii)) to the extent not inconsistent with the mandatory provisions referenced in Section VI.A(iv).
  6. Review the Declarations in each relevant Contracting State, including the following key Declarations providing or supporting remedies:
    - a. Non-judicial remedies (whether any of remedies require leave of court). *See* Section VI.A(vii).
    - b. Advance relief remedies (whether and to what extent and time periods expedited advance relief remedies apply). This includes Declarations as to time limits on court, as to whether the debtor can waive the right to have the court set bonds or other undertakings as protection for the debtor when ordering advance relief (*see* Section VI.E(iii)), and as to whether the advance relief of leasing out the aircraft object while awaiting final resolution of the permanent remedies is available. *See* Section VI.E.
    - c. Alternative A or B. In an insolvency context, determine if either Alternative has been selected (only Mexico has declared Alternative B as of the date of this guide) and what time period has been declared, and then determine when the time period has been or could be triggered to begin. *See* Section VI.F.
    - d. Cooperation of courts in other Contracting States in enforcing Alternative A or B. *See* Section VI.F.(ii).

- e. IDERA. Look at actual regulations at the aircraft registry concerning the IDERA, if any, for any procedural or other requirements and confirm that the IDERA has been recorded. *See* Sections VI.G and V.B.
- f. Contractual choice of law. *See* Section VI.A(vi).