

# Judicial Guide

## to the Cape Town Convention and the Aircraft Protocol

The Legal Advisory Panel of the  
Aviation Working Group  
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# Judicial Guide to the Cape Town Convention and the Aircraft Protocol

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## 1 Purpose of Guide

- (a) This Guide relates to the Convention On International Interests In Mobile Equipment (the **Convention**) and the Protocol Thereto On Matters Specific To Aircraft Objects (the **Protocol**, the Convention and the Protocol being together referred to as the **CTC**).<sup>1</sup> It has been produced by the Legal Advisory Panel (**LAP**) of the Aviation Working Group (the **AWG2 which is comprised of law firms who are leading practitioners of international aviation leasing and finance law in the jurisdictions which have ratified the CTC.<sup>3</sup>**
- (b) This Guide is intended to assist:
  - (i) judges dealing with the application in their national courts of the CTC; and
  - (ii) practitioners preparing pleadings in disputes before their national courts where the CTC is relevant.
- (c) This Guide provides a short summary of the CTC. It is of necessity high level and not exhaustive. Detailed and authoritative consideration of the CTC is to be found in the 5<sup>th</sup> edition of the Official Commentary to the CTC prepared by Professor Sir Roy Goode (the **OC**).<sup>4</sup> In the event of any conflict between this Guide and the OC, the latter prevails.
- (d) It is intended that a supplement to this Guide be prepared for each Contracting State explaining how the requirements of the CTC can best be met in proceedings brought before the courts of that state.
- (e) Expressions which are defined in Article 1 of the Convention or Article I of the Protocol have the same meanings when used in this Guide and are italicised when they first appear.

## 2 Introduction to the CTC

- (a) The principal objective of the CTC is to facilitate the efficient financing and leasing of *aircraft objects*. The CTC system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for aircraft objects that has previously been unavailable or available only at relatively high cost. A sound, internationally adopted legal regime for security, title-retention and leasing interests will encourage the provision of finance and leasing and reduce its cost. This is because the greater security offered to creditors and lessors by such a regime will lower the risk of loss, enhance the credit rating of loan and leasing receivables secured on such equipment, and enable national export credit guarantee institutions providing coverage against loss to reduce the exposure fees they charge.<sup>5</sup>
- (b) The CTC is designed to fulfil five key objectives:
  - (i) To facilitate the acquisition and financing of economically important items of equipment, specifically, aircraft objects by providing for the creation of an *international interest* which will be recognised in all Contracting States;

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<sup>1</sup> References to “Cape Town Convention” or the “CTC” in this Guide should be interpreted as references to the Convention and the Protocol read together.

<sup>2</sup> The AWG is a not for profit legal entity comprised of major aviation manufacturers, leasing companies and financial institutions, originally formed in 1994 at UNIDROIT’s request to assist in the development of what became the Cape Town Convention. The Group’s statutory objectives are to contribute to the development and acceptance of policies, laws and regulations which facilitate advanced international aviation and leasing transactions and which address inefficiencies in relation to such transactions.

<sup>3</sup> The membership of the Legal Advisory Panel can be found [here](#).

<sup>4</sup> See paragraph 3.

<sup>5</sup> Paragraph 2.1 OC.

- (ii) To provide the *creditor* with a range of basic default and insolvency-related remedies and, where there is evidence of *default*, a means of obtaining speedy relief pending final determination of its claim on the merits;
- (iii) To establish an electronic international registry for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and creditors in the debtor's insolvency;
- (iv) To ensure that the particular needs of the industry sector concerned are met; and
- (v) By these means to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs and credit insurance premiums to the advantage of all interested parties.<sup>6</sup>

### **3 The Official Commentary**

- (a) At the time the CTC was adopted by the Diplomatic Conference in 2001, the Conference requested that an Official Commentary be prepared by Professor Sir Roy Goode, Chairman of the drafting committee that produced the text of the CTC. That OC is now in its fifth edition. It is an authoritative text and has a highly persuasive status as far as national courts are concerned particularly since it results from extensive consultation with negotiating governments, the International Civil Aviation Organisation, and participating observer organisations. It has been, and continues to be, relied on heavily by a wide range of industry participants, legal practitioners, aviation authorities, and national courts. The OC can be purchased [here](#).
- (b) The OC is a substantial publication, running to 900 pages. To help parties navigate the OC, the AWG has produced the Principles-Based Guide to the Official Commentary (**PBG**). The PBG is a topical index to the OC, and a summary of the basic principles discussed in the OC, to be used as a resource for practitioners and courts to locate the relevant passages of the OC. In this Guide, where substantive matters under the CTC are addressed, they are footnoted by a reference to the relevant provision of the PBG which in turn cross-references the pertinent passages of the OC. The PBG can be accessed [here](#).

### **4 International interests and sales<sup>7</sup>**

- (a) One of the key objectives of the CTC is to facilitate the acquisition and financing of aircraft objects by providing for the creation of an international interest which will be recognised in all Contracting States. The creation of an international interest is the foundation on which the CTC is applied. The CTC defines an international interest in aircraft object as being an interest:
  - (i) granted by a *chargor* under a *security agreement*;
  - (ii) vested in a person who is the *conditional seller* under a *title reservation agreement*; or
  - (iii) vested in a person who is the *lessor* under a *leasing agreement*.
- (b) Article III of the Protocol extends the provisions of the Convention to *contracts of sale, sales and prospective sales*.

### **5 Interpretation, primacy and relationship with applicable law<sup>8</sup>**

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<sup>6</sup> Paragraph 2.6 OC.

<sup>7</sup> Paragraphs 1.2.2 and 2.4 PBG.

<sup>8</sup> Paragraph 3 PBG.

- (a) Except as provided below, the CTC provisions are to be accorded an autonomous interpretation and should be construed according to the intention of the Contracting States as expressed in the text, promoting the objectives of uniformity and predictability and the purposes set out in the preamble, not according to the canons of interpretation of national law. This is clear from Article 5(1) and (2) of the Convention and reflects the general rule of interpretation laid down in Article 31(1) of the Vienna Convention on the Law of Treaties 1969, whose interpretative rules now form part of customary international law. Questions concerning matters governed by the CTC which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.
- (b) The recitals to the Convention state its purposes and have interpretive implications. They are further developed in the Convention and are summarised in this paragraph 5 and paragraphs 8, 9 and 10. They constitute the source of the general principles contemplated by Article 5(2) of the Convention. They read as follows:

**THE STATES PARTIES TO THIS CONVENTION,**

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,

HAVE AGREED upon the [CTC].

- (c) The CTC is binding upon the Contracting States and must be performed by them in good faith. A Contracting State may not invoke the provisions of its internal law as justification for its failure to perform the CTC.<sup>9</sup> Once the Convention is in force for a Contracting State it is obliged to ensure that where under the law of the State international conventions are not self-executing the State's domestic law and its courts and administrative bodies give effect to all the provisions of the Convention other than those which were the subject of a permitted opt-out by declaration or were dependent on an opt-in by declaration which the Contracting State decided not to make.<sup>10</sup>
- (d) Only if a question relating to matters governed by the CTC cannot be determined either from its express provisions or in conformity with the general principles on which it is based is it legitimate to refer to the applicable law. But national law should be resorted to only as a last resort and on matters that cannot be resolved by a purposive interpretation of the CTC or recourse to the general principles underlying its provisions.<sup>11</sup>

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<sup>9</sup> Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

<sup>10</sup> Paragraph 2.10 OC.

<sup>11</sup> Paragraph 2.28 OC.

- (e) The CTC applies to the exclusion of otherwise applicable law where the two conflict.<sup>12</sup>
- (f) Recourse to the otherwise applicable law is permitted in (and only in) two cases:
  - (i) matters which the CTC expressly refers to the applicable law. These are exhaustively set out in paragraph 2.72 OC and include such matters as what procedures must be followed in the exercise of remedies and what remedies are available to a creditor additional to those provided by CTC; and
  - (ii) other matters which are not addressed by the CTC and cannot be determined from the general principles on which it is based. These include such matters as the time at which the agreement is to be considered concluded and the scope and effects of assignments by operation of law. These are addressed in paragraph 2.73 OC.
- (g) Under Article 14 of the Convention, any remedy provided by the Convention is to be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.<sup>13</sup> However:
  - (i) Article 14 takes effect subject to Article 54(2) of the Convention. If a Contracting State has made a declaration under Article 54(2) stating that leave of the court is not required for the exercise of remedies which under the Convention do not require an application to the court, this overrides any procedural requirement under applicable law for leave that would otherwise apply;
  - (ii) Article 14 is also implicitly but necessarily subject to the CTC's own procedural rules for the exercise of remedies as set out in Articles 8(4) and 9(3) of the Convention and Articles IX to XIII of the Protocol;
  - (iii) In a Contracting State the procedural law to be applied in accordance with Article 14 must be applied in a manner that is compatible with the substantive provisions of the CTC. For example, procedural law must not be utilised to undermine the substantive remedies given by Articles 8 to 10 of the Convention or Article XI of the Protocol;<sup>14</sup> and
  - (iv) As mentioned in sub-paragraph (c) above, Contracting States are obliged to ensure that where under the law of the State international conventions are not self-executing the State's domestic law and its courts and administrative bodies give effect to all the provisions of the Convention other than those which were the subject of a permitted opt-out by declaration or were dependent on an opt-in by declaration which a Contracting State decided not to make.
- (h) It is the duty of a Contracting State to ensure that for the infringement of any right created by the CTC an adequate remedy is available, whether it be damages, the payment of liquidated damages or the grant of an injunction.<sup>15</sup>
  - (i) The timetables set out in the CTC are mandatory and are not variable at the discretion of the relevant court or by otherwise applicable law.<sup>16</sup>
  - (j) CTC provisions on the constitution and registration of international interests, and priority among competing interests, are mandatory and may not be modified or supplemented by national law.

## 6 Structure of the CTC

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<sup>12</sup> Paragraph 2.10 OC.

<sup>13</sup> Paragraph 2.144 et seq. OC.

<sup>14</sup> Paragraph 4.5.2 PBG.

<sup>15</sup> Paragraph 2.26 OC.

<sup>16</sup> Paragraph 3.139 OC.

- (a) Article 3 of the Convention and Article IV of the Protocol set out the sphere of application of CTC.<sup>17</sup> The CTC applies:
    - (i) when, at the time of the conclusion of the *agreement* creating or providing for the *international interest*, the *debtor* is situated in a Contracting State; and
    - (ii) in relation to a *helicopter*, or to an *airframe* pertaining to an *aircraft*, registered in an *aircraft register* of a Contracting State which is the *State of registry*, and where such registration is made pursuant to an agreement for registration of the aircraft it is deemed to have been effected at the time of the *agreement*.
  - (b) Article 7 of the Convention sets out the formal requirements for the constitution of an international interest.<sup>18</sup> These are that agreement creating or providing for the interest:
    - (i) is in writing;
    - (ii) relates to an object of which the chargor, conditional seller or lessor has power to dispose;
    - (iii) enables the object to be identified in conformity with the Protocol; and
    - (iv) in the case of a security agreement, enables secured obligations to be determined, but without the need to state a sum or maximum sum secured.<sup>19</sup>
- Article V of the Protocol sets out the formal requirements for the constitution of a contract of sale which are that:
- (A) is in writing;
  - (B) relates to an aircraft object of which the seller has power to dispose; and
  - (C) enables the aircraft object to be identified in conformity with the Protocol (by reference to its manufacturer's serial number).
- (c) Chapter III (Articles 8 to 15) of the Convention set out remedies which are available to creditors in respect of international interests. These are supplemented by Articles IX to XIII of the Protocol. These are considered in more detail below.
  - (d) Chapters IV to VII of the Convention deal with various matters relating to the International Registry. Note that priority search certificate in the prescribed which purports to be issued by the International Registry is *prima facie* proof (a) that it has been so issued and (b) of the facts recited in it, including the date and time of registration. Accordingly a creditor seeking to establish its priority position need do no more in the first instance than produce the certificate of registration.
  - (e) Chapter VIII deals with the effect of an international interest as against third parties (including during *insolvency proceedings* against a debtor) and, particularly the priority of competing interests. It is modified in part by Articles XI and XIV of the Protocol.
  - (f) Chapter IX of the Convention deals with assignments of international interests. It is modified in part by Article XV of the Protocol.
  - (g) Chapter X of the Convention deals with *non-consensual rights or interests*.

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<sup>17</sup> Paragraph 1.2.4 PBG.

<sup>18</sup> Paragraph 1.2.3 PBG.

<sup>19</sup> For a detailed consideration of these formalities, see paragraphs 2.79 et seq. OC.

- (h) Chapter XI of the Convention permits its extension to sales and prospective sales of aircraft objects, as has been effected by the Protocol.
- (i) Chapter XII of the Convention and Articles VIII, XXI and XXII of the Protocol deal with matters relating to jurisdiction of the courts, choice of law and sovereign immunity and are further considered below.
- (j) Articles 54 to 58 of the Convention and XXX to XXXIV of the Protocol deal with certain matters relating to declarations made by Contracting States and are further considered below.
- (k) The remaining provisions of the Convention and of the Protocol deal with miscellaneous matters with which this Guide is not concerned.

## 7 System of Declarations<sup>20</sup>

- (a) The CTC is not a treaty imposed as a rigidly uniform regime across Contracting States. An important element of the CTC is the system of declarations allowing a Contracting State either:
  - (i) to make choices that will preserve adherence to its own fundamental legal philosophy: for example, a rule against the exercise of non-judicial remedies (sometimes called self-help remedies), or
  - (ii) to apply the autonomous rules of the CTC, to the exclusion of otherwise applicable national law, in this specific context.

Where the CTC expressly permits (and only there), a Contracting State may make a declaration applying (or dis-applying) specific provisions of the CTC.<sup>21</sup> These declarations may be made by a Contracting State at the time of its ratification of the Protocol or subsequently in accordance with Articles 57 and XXXIII of, respectively, the Convention and the Protocol. The terms of declarations, once made, are binding to the same extent as any other of the CTC provisions and must be enforced as such by the courts of the relevant Contracting State.

- (b) Declarations are of five kinds:
  - (i) opt-in declarations, which are declarations which a Contracting State is required to make if a particular provision of the CTC is to have effect within that State;
  - (ii) opt-out declarations, which are declarations a Contracting State is required to make in order to exclude the application of a particular CTC provision in that State or the availability of extra-judicial relief.
  - (iii) declarations relating to a Contracting State's own laws, which give effect to such laws within the framework of the CTC;
  - (iv) mandatory declarations, the most important of which is a declaration under Article 54(2) of the Convention as to whether remedies may be exercised only with leave of the court, and
  - (v) one other declaration, as to whether the CTC applies to one or more territorial units of the relevant Contracting State.
- (c) Declarations are to be distinguished from reservations. A reservation is a unilateral declaration by a State purporting to exclude or modify the legal effect of certain provisions

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<sup>20</sup> Paragraph 1.3 PBG.

<sup>21</sup> There are specific rules relating to declarations made by or in respect of member states of the European Union which are not considered here.

of a Treaty in their application to the reserving State (Article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969). Reservations under the CTC are prohibited by Articles 56(1) and XXXII(1) of, respectively, the Convention and the Protocol.

- (d) The Annex to this Guide contains a list of all the declarations which a Contracting State may make and the categorisation of each such declaration. Each Contracting State's supplement to this Guide will analyse the declarations made by that Contracting State.

## 8 Remedies<sup>22</sup>

- (a) Chapter III of the Convention grants certain remedies to a creditor holding an international interest in the event of default. A debtor and a creditor may at any time agree in writing as to the events that constitute a default. Such an agreement is binding.<sup>23</sup>
- (b) The remedies granted to a creditor by the Convention include:
- (i) In the case of a default under a security agreement, the right:
    - (A) to take possession or control of the object charged to it;
    - (B) to sell or grant a lease of any such object; and
  - (ii) In the case of a default under a title reservation agreement or a lease, the right to terminate the agreement and take possession or control of the relevant object.

In addition, in both cases, a creditor has the right to apply for a court order authorising or directing the exercise of such remedies even if leave of a court is not required.

- (c) The right of a creditor to exercise any remedies described in paragraph (b) is subject to any declaration that may have been made by the relevant Contracting State under Article 54 of the Convention. In particular, if the relevant Contracting State has made a declaration under Article 54(2) of the Convention to the effect that any remedy available to a creditor under any provision of the CTC which is not expressed in the Convention to require application to a court may be exercised only with leave of the court, then the leave of the court for the exercise of that remedy must be obtained.
- (d) Conversely, if the relevant Contracting State has not made any declaration under Article 54(2) of the Convention, a creditor need not obtain the leave of the court for the exercise of the remedy. This has priority over any inconsistent rules of procedure applicable under Article 14 of the Convention.
- (e) For the purposes of Article 54(2) of the Convention, the relevant declaration is that of the Contracting State in which the remedy is sought to be exercised.

## 9 Advance relief<sup>24</sup>

- (a) Article 13 of the Convention requires a Contracting State to ensure that a creditor who adduces evidence of default by a debtor may, pending final determination of its claim and to the extent that a debtor has at any time so agreed, obtain from a court speedy relief (which in CTC terminology is known as "advance relief") in the form of such one or more of the following orders as a creditor requests:
- (i) preservation of the object and its value;

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<sup>22</sup> Paragraph 4 PBG.

<sup>23</sup> The Protocol provides for additional remedies in respect of the de-registration and export of aircraft and aircraft objects. These are considered further in paragraph 10.

<sup>24</sup> Paragraph 5.6 PBG.

- (ii) possession, control or custody of the object;
- (iii) immobilisation of the object; and
- (iv) lease or, except where covered by sub-paragraphs (i) to (iii), management of the object and the income therefrom.

In addition, where the relevant Contracting State has made the corresponding declaration under Article XXX(2) of the Protocol, Article X(3) of the Protocol provides that, if a debtor and a creditor shall have agreed, a creditor may obtain an order for the sale of the aircraft object and the application of proceeds therefrom.

- (b) Article 13 only applies where a Contracting State in which the remedy is sought to be exercised has not excluded it by a declaration under Article 55 of the Convention. Article X(2) of the Protocol defines “speedy” as meaning “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”.
- (c) Articles 42 and 43 of the Convention and Article XXI of the Protocol determine which courts have jurisdiction to grant an order under Article 13. See paragraph 12 below.
- (d) To the extent it applies, Article 13 is mandatory. Advance relief is a *sui generis* CTC remedy and should not be characterised by reference to concepts of national procedural law. Once a creditor has adduced evidence of the default, a court has no discretion to refuse the order for which a creditor has applied or to suspend the order for a period to allow a debtor time to discharge any arrears outstanding, and the fact that the grant of an order for speedy relief would not allow a debtor time to remedy its default is irrelevant, as is the balance of convenience between creditor and debtor.
- (e) Although Article 13 is mandatory, in making an order for advance relief, a court may under Article 13(2) impose such terms as it considers necessary to protect the *interested persons* in the event that a creditor:
  - (i) in implementing any order granting such relief fails to perform any of its obligations to the debtor under CTC, or
  - (ii) fails to establish its claim, wholly or in part, on the final determination of that claim (for example, a court could as a condition of making the order require a creditor to undertake to compensate a debtor for any loss suffered by a debtor in consequence of the order if a creditor’s claim is ultimately unsuccessful and require this to be reinforced by a guarantee or performance bond from a third party).

Any such terms imposed by a court must be compatible with the substantive provisions of the CTC. They must not undermine the substantive remedies given by Article 13 of the Convention.

Article X(5) of the Protocol allows the debtor and the creditor to agree in writing to exclude the application of Article 13(2) of the Convention. That agreement is binding on courts.

- (f) The courts of other Contracting States have a duty to recognise orders under Article 13 of the Convention made by a court having jurisdiction under Articles 42 and 43 of the Convention (see paragraph 12). The procedure for giving effect to such orders (where necessary) is a matter to be determined by the law of the jurisdiction in which the remedy is sought to be exercised (Article 14 of the Convention). However:
  - (i) Article 13 of the Convention is paramount in that an order by a court which has jurisdiction to make an order under Article 13 must be respected by other courts exercising jurisdiction under Article 14; and

- (ii) Contracting States are obliged to ensure that where under the law of the State international conventions are not self-executing the State's domestic law (including its procedural law) and its courts and administrative bodies give effect to all the provisions of the Convention, including Article 13.

## 10 De-registration and Export<sup>25</sup>

- (a) Article IX of the Protocol affords a creditor two further remedies to those given in the Convention in the event of default by a debtor: namely de-registration of an aircraft and export and physical transfer of an aircraft object from the territory where it is situated.
- (b) It is open to a creditor to procure the remedies in Article IX in conformity with the procedural requirements of the laws of the State of registry. Where Alternative A applies (see paragraph 11). Article XI.8(a) of the Protocol requires the remedies available under Article IX(I) of the Protocol to be made available by the registry authority and administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which a creditor notifies such authorities that it is entitled to procure those remedies in accordance with the CTC.
- (c) Alternatively, there are two routes to securing de-registration and export under the Protocol:
  - (i) The first (the **court route**), via Article X(6) of the Protocol, is for a creditor to obtain either:
    - (A) an order for advance relief under Article 13 from a court in the jurisdiction where the aircraft is registered, or
    - (B) equivalent relief from a foreign court with jurisdiction under the CTC, recognised by a court of the State of registry;

and, in either case, notify the registry and other administrative authorities of the grant of the order. The remedies must then be made available within five working days.
  - (ii) The second (the **IDERA route**), via Articles XIII and IX(5) and (6) of the Protocol, is for a creditor to procure from a debtor an irrevocable de-registration and export request authorisation (IDERA) substantially in the form of the Annex to the Protocol and lodge this with the relevant authorities. The registry authority is then required, without any need to receive a court order, to honour a request for de-registration and export from the party authorised in the IDERA (or its certified designee). The IDERA route is intended to be extra-judicial and purely documentary, dispensing with the need for a regulatory authority to investigate external facts.
- (d) It is the duty of a Contracting State to ensure that under its domestic law all State organs or organisations authorized by the State to effect or facilitate de-registration and export and physical delivery, for example export agencies, are precluded from impeding, by action or inaction, the implementation of the Protocol provisions on de-registration and export, including by requiring a procedure where a creditor cannot exercise these remedies directly without the co-operation of a debtor.
- (e) Whether a creditor follows the court route or the IDERA route it is first necessary that a Contracting State shall have made a declaration applying the relevant Article – under Article XXX(2) applying Article X or under Article XXX(1) applying Article XIII. A debtor must have agreed to the additional remedies and must be in default. Signing an IDERA satisfies the requirement that a debtor must have agreed to the remedies that arise from IDERA. There is no need for a debtor to provide a new agreement at the time of enforcement of remedies.

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<sup>25</sup> Paragraph 5.5 PBG.

## 11 Insolvency<sup>26</sup>

- (a) Article 30(1) of the Convention sets out the general rule, which is that in *insolvency proceedings* against a debtor an international interest is effective if registered prior to the commencement of the insolvency proceedings. “Effective” means that the property interest will be recognised and a holder of an international interest will have a claim against an asset for obligations owed, and will not be limited to a *pari passu* sharing with unsecured creditors.
- (b) Article 30(3)(a) provides that Article 30(1) does not protect a registered international interest against rules of law relating to the avoidance of preferences and transfers in fraud of creditors (**clawback**). What constitutes a clawback is left to applicable insolvency law. However, other rules of insolvency law, such as the invalidation of security interests not duly registered under the law of an insolvency jurisdiction, cannot be invoked against an international interest registered before the commencement of the insolvency proceedings.
- (c) Under Article 30(3)(b) of the Convention, nothing in Article 30 affects rules of insolvency procedure relating to the enforcement of rights to property under the control or supervision of an insolvency administrator, for example, rules which, with a view to facilitating a reorganisation of a debtor, suspend or restrict enforcement of a security interest, such as a moratorium or stay. But in a Contracting State which has made a declaration under Alternative A of Article XI of the Protocol, Article 30(3)(b) does not apply, being overridden by those provisions.
- (d) Article XI of the Protocol introduces special remedies on a debtor’s insolvency in relation to aircraft objects designed to strengthen a creditor’s position vis-à-vis the insolvency administrator or a debtor on the occurrence of an *insolvency-related event*. Article XI must be applied in any Contracting State where a debtor is subject to an insolvency proceeding and three other conditions are satisfied:
  - (i) a Contracting State that is the *primary insolvency jurisdiction* for a debtor has made a declaration pursuant to Article XXX(3), stating that it will apply either Alternative A or Alternative B of Article XI,
  - (ii) an insolvency-related event has occurred; and
  - (iii) a debtor is holding an aircraft object in, or subject to the insolvency laws of, the forum.
- (e) The expressions “insolvency proceedings”, “insolvency-related event” and “primary insolvency jurisdiction” are defined in the CTC and must be interpreted in accordance with such definitions and the rules of interpretation of the CTC, not according to the canons of interpretation of national law.<sup>27</sup>

The remainder of this paragraph 11 is predicated on the assumption that a Contracting State that is the primary insolvency jurisdiction has made a declaration stating that it will apply Alternative A.

- (f) Paragraphs 2 and 7 of Article XI, Alternative A, of the Protocol require an *insolvency administrator* or a debtor, as applicable, upon the occurrence of an *insolvency-related event*, either:
  - (i) to give possession of the relevant aircraft object to a creditor within the earlier of a waiting period specified in the relevant Contracting State’s declaration and the date

<sup>26</sup> Paragraph 7 PBG.

<sup>27</sup> For a full discussion of the meaning of these expressions, see the provisions of the OC referred to in paragraphs 7.1.1, 7.2.4 and 7.2.6 of the PBG.

on which a creditor would otherwise be entitled to possession under applicable law;  
or

- (ii) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement, which includes obligations under other transaction documents.

If an insolvency administrator or a debtor fails to give up possession after a creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A a creditor can apply for and is entitled to obtain speedily a court order requiring the insolvency administrator or the debtor to give possession of the aircraft object to the creditor.

- (g) Alternative A requires strict adherence to the timetable and a court is precluded from granting any extension of time for payment or other performance (although parties may themselves agree to such extension or variation).
- (h) Alternative A removes, for aircraft objects, the preservation of a court's powers under Article 30(3)(b) of the Convention. Thus under Alternative A a court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditor's rights or remedies. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its national law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with Alternative A.
- (i) the courts of Contracting States must apply Article XI in conformity with the declaration made by the Contracting State which is a primary insolvency jurisdiction of a debtor. Therefore, if insolvency proceedings are instituted in Contracting State A (which has not made a declaration applying Alternative A) in respect of a debtor which has its primary insolvency jurisdiction in Contracting State B (which has made such a declaration), the courts of Contracting State A must apply Alternative A as declared by Contracting State B.

## 12 Governing law, jurisdiction and immunity<sup>28</sup>

- (a) Article VIII of the Protocol permits the parties to an agreement, or a contract of sale to agree on the law which is to govern their contractual rights and obligations, wholly or in part. This Article applies only where a Contracting State has made a declaration agreeing to apply it pursuant to Article XXX(1) of the Protocol. Any restrictions on party choice under the national law of the relevant Contracting State (such as excluding the selection of the law of a State which has no connection with the parties or the transaction or where all the elements of the transaction are situated in a single State) do not apply. The parties' choice must be respected in all Contracting States that have made the relevant declaration.
- (b) Except in relation to the grant of advance relief under Article 13, exclusive jurisdiction for any claim brought under the Convention is given to the courts of a Contracting State chosen by the parties to a transaction except where they agree that the jurisdiction is to be non-exclusive (Article 42(1) of the Convention). Exclusive jurisdiction clauses within Article 42(1) may be symmetric, that is, binding on both parties, or asymmetric, binding on one party (typically the debtor) while giving the other party (typically the creditor) the option to bring proceedings elsewhere. As regards asymmetric jurisdiction clauses the words 'unless otherwise agreed between the parties' in Article 43 are to be construed as meaning 'to the extent otherwise agreed between the parties' so that the selected jurisdiction is non-exclusive as regards the party having the option but exclusive as regards the other party.
- (c) In addition to the jurisdiction of the courts of a Contracting State chosen by the parties, the following courts have jurisdiction to grant advance relief under Articles 43 of the Convention and XXI of the Protocol:

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<sup>28</sup> Paragraph 9 PBG.

- (i) For advance relief under Article 13(1)(a), (b), (c) and Article 13(4) of the Convention, the courts of a Contracting State either (A) on the territory of which the relevant aircraft object is situated or (B) which is the State of registry for the helicopter or airframe pertaining to an aircraft; and
  - (ii) For advance relief under Article 13(1)(d) and Article 13(4) of the Convention, the courts of the Contracting State on the territory of which the debtor is situated.
- (d) A court having exclusive jurisdiction under the Convention may not decline it on the ground of *forum non conveniens*. Where the parties have conferred exclusive jurisdiction on the courts of a Contracting State, then (subject as expressly stated above) the courts of other Contracting States must decline the jurisdiction over the claim in question.
- (e) Article XXII of the Protocol provides that a waiver of sovereign immunity by a party is effective, if it is in a writing and contains a description of the relevant aircraft object. The waiver may relate to immunity from jurisdiction, enforcement or both.

## ANNEX TO JUDICIAL GUIDE TO THE CAPE TOWN CONVENTION AND THE AIRCRAFT PROTOCOL

### **Matrix of Declarations permitted under the Convention and Aircraft Protocol**

References are to the Convention (“**C-Art.**”) and Aircraft Protocol (“**P-Art.**”).

**Explanatory Notes:** (1) Opt-out provisions are those provisions that apply *unless* a declaration is made. Opt-in provisions are those provisions that *apply only if* a declaration is made. Whether a provision is opt-in or opt-out is noted under column B. (2) All declarations under the Convention as it relates to aircraft objects are made at or after the time of ratification, acceptance, approval of, or accession to the Aircraft Protocol. All declarations other than those under Article 60 may be modified or replaced by a subsequent declaration or be withdrawn.

| <b>A. Art. 56 of Convention authorises declarations under Article:</b> | <b>B. Headings</b>  | <b>C. Defined by or related to Article</b>                |
|--|---|---|
| 1.   | C-Art. 39<br><br>Rights having priority without registration ( <u>Opt-in</u> )<br><br>(non-consensual rights and interests) | C-Art. 1(s)   |
| 2.   | C-Art. 40<br><br>Registrable non-consensual rights or interests ( <u>Opt-in</u> )   | C-Art. 1(s)   |
| 3.   | C-Art. 50<br><br>Internal transactions ( <u>Opt-out</u> )   | C-Art. 1(n), (r )   |
| 4.   | C-Art. 52(1)<br><br>Territorial Units ( <u>Opt-in</u> )   | P-Art. XXIX<br><br>(same topic; thus must be consistent)  |
| 5.   | C-Art. 53<br><br>Determination of courts ( <u>Opt-in</u> )  | C-Art. 1(h)   |
| 6.   | C-Art. 54 (1)<br><br>Preventing lease as remedy ( <u>Opt-out</u> )  | C-Art. 8(1)(b)  |
| 7.   | C-Art. 54 (2)<br><br>Remedy – Leave of Court ( <u>mandatory declaration</u> )   | C-Arts 8, 9(1) and 10                                     |
| 8.   | C-Art. 55<br><br>Declarations regarding relief pending final determination of a claim ( <u>Opt-out</u> )                    | C-Arts. 13 and 43 (See also P-Art. X)                     |
| 9.   | C-Art. 60(1)-(3)<br><br>Transitional Provisions ( <u>Opt-in</u> )<br><br>(Declaration may not be modified or withdrawn)     | C-Art. 1(v)   |
| 10.<br>.   | C-Art. 48(2)<br><br>Regional Economic Integration Organisations   | P-Art. XXVII<br><br>(same topic; thus must be consistent) |

|     | <b>A. Article XXXII<br/>of the Protocol<br/>authorises:</b> | <b>B. Headings</b>   | <b>C. Relates to<br/>Article</b>                      |
|-----|---|--|---|
| 11. | P-Art. VIII   | Contractual Choice of Law ( <u>Opt-in</u> )  | P-Art. XXX(1)   |
| 12. | P-Art. X  | Modification of provisions regarding relief pending final determination of a claim ( <u>Opt-in</u> )   | P-Art. XXX(2); C-Art. 13                              |
| 13. | P-Art. XI   | Remedies on Insolvency ( <u>Opt-in</u> )   | P-Art. XXX(3); C-Art. 1(l) and P-Arts. I(2)(m),(n)    |
| 14. | P-Art. XII  | Insolvency Assistance ( <u>Opt-in</u> )  | P-Arts. XXX(1); XI                                    |
| 15. | P-Art. XIII(1)  | De-registration and export request authorisation ( <u>Opt-in</u> )   | P-Art. IX(1) and (5)                                  |
| 16. | P-Art. XIX  | Designated entry points ( <u>Opt-in</u> )  | C-Art. 18(5)  |
| 17. | P-Art. XXIV(2)  | Relationship with the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (Rome Convention of 1933) ( <u>Opt-in</u> ) | C-Art. 54(2)  |
| 18. | P-Art. XXVII  | Regional Economic Integration Organisations  | C-Art. 48(2)<br>(same topic; thus must be consistent) |
| 19. | P-Art. XXIX   | Territorial Units ( <u>Opt-in</u> )  | C-Art 52(1)<br>(same topic; thus must be consistent)  |
| 20. | P-Art. XXX(5)   | Declarations relating to certain provisions (modification of jurisdiction rules) ( <u>Opt-out</u> )  | P-Art. XXI  |