

# Practitioners' Guide

## to the Cape Town Convention and the Aircraft Protocol

The Legal Advisory Panel of the Aviation Working Group

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# *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 institutionalisation 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 Cambridge Faculty of Law and the International Institute for the Unification of Private Law to establish the Cape Town Convention Academic Project ([www.ctcap.org](http://www.ctcap.org)) 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 (The Cape Town Convention 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 to the interpretation of and compliance with 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. On 29 February, 2020, AWG launched the Cape Town Convention Compliance Index (the “**Compliance Index**”). The Compliance Index is a large-scale AWG project to assess and monitor going forward the compliance record of contracting states with the Cape Town Convention. It assigns a score and category of likelihood of compliance to each contracting state for which AWG has sufficient data (expected to be most, if not all, contracting states) that is available publicly. The scoring takes into account, among other factors, implementation of the Cape Town Convention by way of legislation, rules and regulations and practical application of the Cape Town Convention in a particular contracting state (including court decisions, administrative actions and general experience reported by practitioners). 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.

The *Official Commentary, Fourth Edition*, prepared by Professor Sir Roy Goode and The Cape Town Convention Journal are two primary resources available to practitioners to better understand the underpinnings and purpose of the Cape Town Convention. This Guide is intended as a supplement to those resources for the benefit of practitioners who seek education and guidance on the terms of the Cape Town Convention and its impact on aviation 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 also 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 summarise 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 and explores the concept of “entry points”. 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, formerly of Vedder Price (Chicago) (and now General Counsel at ORIX Aviation in Dublin) 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 (New York), William Piels of Holland & Knight (San Francisco), Carrie Friesen-Meyers formerly of Holland & Knight (San Francisco), Carlos Sierra of Abogados Sierra (Mexico City), Ken Basch of Basch &

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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 which have properly ratified or acceded to the Cape Town Convention are referred to as “**Contracting States**”).<sup>1</sup> Central to the purpose of the Cape Town Convention is the enhancement and harmonisation of private laws in respect of the financing, leasing 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, prioritisation, 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 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 Cape Town 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>

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> The Official Commentary was mandated to

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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 [unidroit.org/status-2001capetown](http://unidroit.org/status-2001capetown).

<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*, Eighth Edition (2019) (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 [www.internationalregistry.aero/ir-web/downloadDocument?locale=en&pageSubTitle=-%20Documentation%20English](http://www.internationalregistry.aero/ir-web/downloadDocument?locale=en&pageSubTitle=-%20Documentation%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 Fourth ed. 2019) (hereinafter “**Goode**” or the “**Official Commentary**”). The Official Commentary is the fourth 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 revised several times, in part, in order to take account of the experiences of practitioners and the operation of the International Registry during the 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

be prepared in connection with the initial adoption of the Cape Town Convention<sup>5</sup> and is a critical resource for understanding the intent and purpose of the Cape Town Convention and while it is in no way binding on national courts, it remains the most authoritative guide on the terms and conditions of the Cape Town Convention. Sir Roy Goode's contribution towards the advancement of these aims cannot be overstated and the entire aviation finance community is greatly indebted to him for his careful, deliberate, comprehensive and thoughtful approach to the preparation of the Official Commentary.

## II. Convention Basics

The initial step in any Cape Town Convention analysis is to determine whether the specific rights created in a transaction fall within its scope.<sup>6</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) principles of interpretation, (ii) the specific items of equipment subject to the Cape Town Convention, (iii) the categories of transactions involving such aircraft objects for which benefits may be claimed under the Cape Town Convention, and (iv) the various rules and regulations relating to registrable interests and the priority thereof under the Cape Town Convention.

### A. Principles of Interpretation

The Convention, together with the Protocol, is intended to establish a regime of interests in aircraft objects that is applied uniformly in various contracting states, with variations among them available solely through explicit, transparent elections (or declarations) to “opt in” or “opt out” of certain of its provisions. In order to achieve the goal of uniformity, the Cape Town Convention establishes its own *sui generis* set of interests and corresponding definitions. The interests established by the Cape Town Convention have national law counterparts in many jurisdictions, and almost every transaction that falls within the scope of the Cape Town Convention will result in some overlapping treatment under the applicable national law which may be consistent with or different from the treatment under the Cape Town Convention. But national law has no bearing on whether a transaction falls within or outside the scope of the Cape Town Convention, or on how the Cape Town Convention should be applied and interpreted with respect to the interests it creates.

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clarification and commentary on the Convention, the Cape Town Convention Academic Project 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 Cape Town Convention Academic Project website ([www.ctcap.org](http://www.ctcap.org)).

<sup>5</sup> See Resolution 5 of the Diplomatic Conference to adopt Convention and Aircraft Protocol opened in Cape Town on 29 October 2001 under the joint auspices of UNIDROIT and ICAO at the invitation of the Government of South Africa, as adopted on 16 November 2001.

<sup>6</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) in order to determine whether a particular transaction or fact pattern falls within the scope of the Cape Town Convention.

Whenever a matter is expressly addressed by the terms of the Cape Town Convention, those terms govern, using the plain meaning of the operative text. In a number of cases, however, the Cape Town Convention refers expressly to “applicable law”, and in those instances the national law that is applicable to the circumstances, applying a conflict of laws analysis, will govern. Some matters will fall into a “gap” between an express treatment under the Cape Town Convention and an express reference to applicable law. The Cape Town Convention provides that any such matters are to be settled in accordance with the general principles on which the Cape Town Convention is based. And, it is only when the general principles of the Cape Town Convention fail to yield an outcome that a matter, not otherwise explicitly designated as being governed by applicable law, would be regarded as falling back to applicable law for analysis.<sup>7</sup>

## B. Aircraft Objects

The Cape Town Convention applies to airframes, aircraft engines and helicopters which constitute “**aircraft objects**.”<sup>8</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>9</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>10</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>11</sup>

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,

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<sup>7</sup> In an important article authored by Jeffrey Wool and Andrej Jonovic, they explored the concept of gap-filling and provided useful analysis to practitioners. Specifically, they suggested that:

(I) There should be a strong presumption on the enforceability of contract provisions even when the Convention is silent on a topic (the “party autonomy principle”);

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

(III) Terms should be implied, when needed, to provide further details related to the *sui generis* concepts and their legal implications (the “*sui generis* concept principle”); and

(IV) Governments may not impose conditions on or take action that would adversely affect basic CTC rights, including, without restriction, on matters on which the CTC is silent (the “no adverse effect principle”).

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

<sup>8</sup> Articles I(2)(c) and II(1) of the Protocol. Note that “aircraft” is not included in the definition of “aircraft object” although an aircraft itself would be composed of aircraft objects. Article I(2)(a) of the Protocol defines “aircraft” as “. . . either airframes with aircraft engines installed thereon or helicopters”.

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

<sup>10</sup> Article I(2)(b) of the Protocol.

<sup>11</sup> Article I(2)(l) of the Protocol.

including rotors) and all data, manuals and records relating thereto.<sup>12</sup> Aircraft engines (with the exception of helicopter engines which have a different treatment depending upon whether they are installed at the time an interest is created in such engine)<sup>13</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>14</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>15</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>16</sup>

**Practice Note:** Larger unmanned aircraft systems (“UAS” or drones) meeting the requirements of the Convention to qualify as an “airframe”, namely they are type-certified to transport goods in excess of 2,750 kilograms, would be covered by the Cape Town Convention and treated as aircraft objects.

## C. 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 interests created by or constituting security agreements, lease agreements and title reservation agreements relating to uniquely identifiable aircraft objects (known as “**international interests**”)<sup>17</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>18</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>19</sup>, such interests are accorded priority based upon the

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<sup>12</sup> Articles I(2)(b), I(2)(e) and I(2)(l) of the Protocol. See Section III.F. herein for a discussion on accessions to an aircraft object.

<sup>13</sup> See Section III.E. herein for a discussion regarding the treatment of helicopter engines.

<sup>14</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>15</sup> Article XIV(3) of the Protocol.

<sup>16</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 or interests 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 or interests in such items would be lost upon installation. See Article 29(7) of the Convention and GOODE at para. 2.227 (Unidroit 2019) and Section III.F. herein.

<sup>17</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.J. herein.

<sup>18</sup> Article VII of the Protocol.

<sup>19</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.H herein.

order of registration.<sup>20</sup> The Protocol extends certain provisions of the Convention to outright sales, enabling buyers to avail themselves of the registration facilities and priority provisions thereof.<sup>21</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>22</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>23</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>24</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>25</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>26</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>27</sup> Although a security instrument created over an aircraft object in accordance with applicable domestic law will (to the extent that the Cape Town Convention applies) inevitably be a “security agreement”, any agreement which complies with the definition and the other relevant provisions of the Cape Town Convention will also qualify as a security agreement, even if it is ineffective under the relevant applicable law to create security over that object (for example by reason of non-registration, failure to pay a tax or failure to comply with any other local law formality).

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

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<sup>20</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.

<sup>21</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. 5.74 (Unidroit 2019). 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* to determine the validity of any sale of an aircraft object.

<sup>22</sup> Article 29(2) of the Convention.

<sup>23</sup> Article XIV(2) of the Protocol.

<sup>24</sup> Article XX(4) of the Protocol.

<sup>25</sup> Article 2(2)(a) of the Convention.

<sup>26</sup> Article 1(ii) of the Convention.

<sup>27</sup> Non-consensual rights or interests (such as mechanics liens) 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.H. herein.

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>28</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 fulfilment of the condition or conditions stated in the agreement.<sup>29</sup>

(iii) vested in a person who is a lessor under a leasing agreement.<sup>30</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>31</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 categorise them) is determined by applying the Cape Town Convention's own definitions and autonomous rules of interpretation, and not by reference to national law.<sup>32</sup> Hence, the initial characterisation of whether the interest constitutes an "international interest" is prescribed by the Cape Town Convention itself.<sup>33</sup> This is an important consideration as certain jurisdictions, on the basis of applicable national law, may not recognise some or all of these types of arrangements. By virtue of the application of the Convention definitions (without regard to national law), the transaction would nonetheless fall within the Convention (and by extension, would be recognised by the applicable Contracting State). That said, the mere fact that national law would characterise 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 as an international interest under the Cape Town Convention.

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

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

<sup>30</sup> Article 2(2)(c) of the Convention.

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

<sup>32</sup> GOODE at para. 2.63 (Unidroit 2019).

<sup>33</sup> See Section III.C. herein for a discussion on the characterisation of an interest under applicable law.



**Example 1:** A consignment of goods to a retailer for sale would be outside the scope of the Cape Town Convention even if, under the applicable law, it were to be characterised or treated in a manner consistent with a secured transaction or a lease because it does not fall within one of the three Convention categories.<sup>34</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 characterised as a disguised sale to Lessee with a corresponding security interest granted in favour of Owner. Notwithstanding the local law characterisation, the Convention will apply its own, autonomous definitions to the interests it creates, and under the definitions found in the Convention this agreement would constitute both a “leasing agreement” and a “prospective sale”, but it would not constitute either a security agreement, a contract of sale or a present sale.

**Example 3:** Owner is organised and based in a Contracting State. Owner grants a security interest in favour of Lender in an aircraft object 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 recognised and has no legal effect. Notwithstanding this, the agreement would nonetheless constitute a security agreement for purposes of the Convention.

In addition to security agreements, title reservation agreements and leasing agreements, certain provisions of the Convention have been extended to include outright sales of aircraft objects, which are referred to as a “sale” and the related agreement, a “contract of sale”.<sup>35</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>36</sup> For purposes of the Convention, it is important to distinguish a contract of sale, which is an agreement to sell, from a sale, which is the actual transfer of ownership pursuant to a contract of sale. Any reference in the Convention to an “agreement to sell” shall, to the extent applicable, be considered a reference to the “contract of sale” (and any related reference to “international interest” is to be considered a reference to the actual “sale” and the applicable instrument or agreement pursuant to which such sale is effected). Sales must be for value (that is, a price but not necessarily a monetary price) to be covered by the Convention and the transfer for value must be pursuant to the contract of sale (so gifts would not be registrable sales) although any form of value suffices, including an exchange or barter.<sup>37</sup>

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

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<sup>34</sup> GOODE at para. 2.63 (Unidroit 2019).

<sup>35</sup> Article III of the Protocol.

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

<sup>37</sup> GOODE at para. 2.276 (Unidroit 2019).



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>38</sup> However, if by virtue of 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, the seller or lessor delivers a bill of sale in respect of the applicable aircraft object, such bill of sale would be considered a contract of sale and simultaneously a sale under that contract.<sup>39</sup>

**Example:** Buyer and Seller enter into a sale agreement with respect to multiple aircraft objects pursuant to which Seller will transfer title to Buyer upon delivery of the purchase price and other documentary closing conditions in exchange for delivery of a bill of sale with respect to each aircraft object. Under the Convention, the sale agreement would constitute a “contract of sale”, but delivery of the bill of sale itself would qualify as a “sale” and thus be registrable at the International Registry at such time (although the parties to the sale agreement could, upon entering into the sale agreement and subject to satisfaction of the other requirements of the Cape Town Convention, register a “prospective sale” on the International Registry).

A mere agreement to sell which complies with Article V of the Protocol is sufficient to constitute a contract of sale as well as a registrable prospective sale.<sup>40</sup> An agreement which is a contract effecting the outright sale of the applicable aircraft object in which the seller’s interest immediately passes to the buyer is a registrable sale.<sup>41</sup> Where the effect of the contract is to transfer ownership without further conditions having to be satisfied it also constitutes a sale. However, contracts of sale are not confined to contracts under which ownership passes to the buyer when the contract is made.<sup>42</sup> Contracts of sale are not as such regulated by the Convention at all, but formalities are prescribed for them by Article V of the Protocol, which parallels the provisions of Article 7 of the Convention relating to agreements creating or providing for an international interest. 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>43</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

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<sup>38</sup> GOODE at para. 2.63 (Unidroit 2019). The inclusion of a purchase option could nonetheless be registrable at the International Registry as a “prospective sale” (See Section II.I herein)

<sup>39</sup> GOODE at para. 4.43 (Unidroit 2019).

<sup>40</sup> See Section II.J. herein.

<sup>41</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>42</sup> There are many contracts of sale in which there is no reservation of title but the transfer of ownership is dependent on the fulfilment of conditions specified by the general law, for example, that where the goods referred to in the contract are not identified at the time of the contract and identification depends on some act of allocation (appropriation) by the seller or buyer ownership passes only when that act is performed. Until then there is merely a contract of sale, but once ownership has been transferred pursuant to the contract there is a sale. GOODE at para 4.16 (Unidroit 2019).

<sup>43</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. 3.20 (Unidroit 2019).

(assuming, of course, that each such transfer falls within the scope of the Cape Town Convention and all registrations relating to each title transfer shall have been made with the International Registry).

Recognising the realities of aviation 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>44</sup> However, this accommodation and the fact that title to many aircraft is held in a trust and transfers of the applicable aircraft objects are often effected through assignments and/or outright transfers of the beneficial interest in the applicable trust, do not, by themselves, impact the intended mechanisms and underpinnings of the Cape Town Convention. The beneficial interest created under the applicable trust and the transfers of such beneficial interests, whether by way of security, sale or otherwise, do not themselves fall within the Convention or the Protocol.<sup>45</sup>

**Practice Note.** Practitioners are urged to avoid making registrations in respect of any beneficial interest transfers, whether by way of security, sale or otherwise, as they create unnecessary confusion to third parties (as such transfers would unavoidably be referred to as “international interests” on the International Registry) and such transfers have no effect under the Cape Town Convention.

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

An international interest (security agreement, title reservation agreement or leasing 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>46</sup>
- (ii) it must relate to an aircraft object of which the chargor, conditional seller, lessor or seller, as applicable, has the power to dispose;<sup>47</sup>
- (iii) it must describe the applicable aircraft object by manufacturer’s serial number, name of manufacturer and generic model designation;<sup>48</sup> and

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<sup>44</sup> See Section IV.C. herein.

<sup>45</sup> GOODE at para. 3.83 (Unidroit 2019).

<sup>46</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>47</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>48</sup> Article 7(c) of the Convention, Article V(1)(c) of the Protocol and Article VII of the Protocol.

- (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>49</sup>

The creation of the international interest (including, for this purpose, a sale) is determined by the Cape Town Convention, and not by national law.<sup>50</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 or if the international interest is of a kind not known under such national law<sup>51</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 State.<sup>52</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. Furthermore, note that registration at the International Registry is not a prerequisite to the creation of an international interest. An unregistered interest may have effect under national law against parties, such as unsecured creditors. This changes the rule required to create a mortgage in several civil law jurisdictions (where registration would, absent the applicability of the Cape Town Convention, be required under national law in order to create a valid mortgage).

**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 the laws governing the *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 unless the *lex situs* recognises the agreement as creating a valid property interest. 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>53</sup>

## E. Power to Dispose

As previously discussed, one of the prerequisites to the constitution of a valid international interest or contract of sale covering an aircraft object is that the chargor, conditional seller, lessor

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<sup>49</sup> Article 7(d) of the Convention.

<sup>50</sup> GOODE at para. 4.75 (Unidroit 2019).

<sup>51</sup> GOODE at para. 4.75 (Unidroit 2019). 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 certain aspects relating to the validity of an agreement (including the effect of factors such as mistake or illegality). GOODE at para. 4.75 (Unidroit 2019). See also Section II.C. and Section III.C. herein for associated issues relating to the characterisation of an agreement.

<sup>52</sup> GOODE at para. 2.31 (Unidroit 2019). 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. 2.37 (Unidroit 2019).

<sup>53</sup> Article 6(3) of The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (UK).

or seller, as applicable, has the power to dispose of such aircraft object.<sup>54</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 or leases such aircraft object (this right is governed by the law applicable to the contract, trust instrument or other authorisation from which the right is derived<sup>55</sup>). A right to dispose exists whenever the party making the disposition (a) is the unencumbered owner of the object or (b) where not precluded by the terms of the agreement transfers to a third party a limited interest no greater than the interest than it holds itself or (c) if transferring a greater interest, does so with the authority of all those having a superior right. So it is not necessary that the chargor, conditional seller or lessor should be the owner of the object.<sup>56</sup>

**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.

As a *sui generis* term under the Cape Town Convention, “power to dispose” can, however, be controversial. 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 make. 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>57</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.<sup>58</sup>

The “power to dispose” can arise in two ways. First, a party may, by virtue of the applicable law governing a disposition (typically the *lex situs* of the object at the time of such disposition), have the power to dispose of an aircraft object. 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 to that effect. 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 authorise 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

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<sup>54</sup> See Section II.E. above, Article 7(b) of the Convention and Article V(1)(b) of the Protocol.

<sup>55</sup> GOODE at para. 4.78 (Unidroit 2019).

<sup>56</sup> GOODE at para. 2.83 (Unidroit 2019).

<sup>57</sup> GOODE at para. 4.77 (Unidroit 2019).

<sup>58</sup> GOODE at para. 2.82 (Unidroit 2019).

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>59</sup>

The power to dispose can also arise under the Cape Town Convention itself by virtue of its registration and priority rules. As stated in the Official Commentary<sup>60</sup>:

It is, for example, implicit in the Convention rules governing the registration and priority of the interest held by a conditional seller or lessor that the conditional buyer or lessee, if in possession, is to be considered as having a power to dispose, and thus to grant a security interest which, if registered before the interest of the conditional seller or lessor, will take priority over a security interest granted by the conditional seller or lessor, for if the position were otherwise there would be little point in making the interest of the conditional seller or lessor a registrable international interest and in providing (contrary to the general rule in national legal systems) that the priority of a registered interest is not affected by knowledge of an earlier unregistered interest... The whole purpose of the registration system is to give transparency as to the existence of international interests and other registrable interests and to avoid secret interests and to give priority to the holder of a registered interest even over an unregistered interest of which he has knowledge, a protection rarely given by domestic law.

For example, a conditional buyer or lessee, under a title reservation agreement or lease, respectively, constituting an international interest, if in possession with actual or constructive possession of the applicable aircraft object, would have an implied power to dispose of the applicable aircraft object in favour of a third party (and to give priority to such third party even over an unregistered interest of which he has knowledge); otherwise, as the Official Commentary suggests, 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>61</sup> The purpose of registering interests with the International Registry is to give the creditor protection against competing claims of third parties. The lessee or conditional buyer if in possession of an aircraft object with actual or constructive possession of that aircraft object therefore must then have an implied “power to dispose” because “dispose,” as used in the Cape Town

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<sup>59</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.

<sup>60</sup> GOODE at para. 4.78 (Unidroit 2019).

<sup>61</sup> GOODE at para. 4.78 (Unidroit 2019). See GOODE at para. 2.85 (Unidroit 2019) (It may be noted that a person lacking a right to dispose will not have a power to dispose under the Convention unless such person is in possession of the aircraft object, though such person may have such right or power under the applicable law).

Convention, could be interpreted to include all types of potential dispositions in a transaction between a creditor and a debtor.<sup>62</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 favour of Purchaser as agent on behalf of Seller. If, under applicable national 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 authorise 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. Seller thereafter sells the same aircraft object to Purchaser B. If it is determined, under applicable national law (e.g., 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>63</sup>

**Example 3:** Lessor leases an aircraft object to Lessee and delivers possession of the aircraft object to Lessee. Lessor and Lessee fail to register the international interest constituting the lease with the International Registry. Thereafter, Lessee, who at the time is in possession of such aircraft engines, 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 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, under the Cape Town Convention, its rights to quiet possession and use<sup>64</sup> for the duration of the sublease even if the lease between Lessor and Lessee is terminated. Note that if, under this fact pattern, Lessor and Lessee registered the interest constituting the lease, the later registration of any sale by Sublessee while it had possession of the aircraft object would not have an impact on the title of Lessor solely by virtue of the registration of such sale.

**Example 4:** Lessor leases an aircraft object to Lessee and delivers possession. Lessor and Lessee fail to register the international interest constituting the lease with the International Registry. Thereafter, Lessee sells the same aircraft object to Buyer. Lessee and Buyer register the sale with the International Registry. In this scenario, by virtue of the registration of the sale with the International Registry and the fact that Lessee has possession of the aircraft object at the time of such sale, the Buyer's interest would, under the Cape Town Convention, have priority over the Lessor's lease interest. The position would be otherwise if Lessee had sold the aircraft object before taking delivery of it under the lease.

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<sup>62</sup> *Id.* at para. 4.195.

<sup>63</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>64</sup> See Section II.R. herein.

**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 favour have been properly registered with the International Registry.

## F. Pre-Existing Rights or Interests

Unless a declaration is made by a Contracting State to the contrary,<sup>65</sup> the Cape Town Convention does not apply in such Contracting State to pre-existing rights or interests (which is defined in the Convention as rights or interests in an aircraft object which pre-date the effective date of the Cape Town Convention in the applicable jurisdiction)<sup>66</sup>, which retain the priority they enjoyed under the applicable law before such effective date of the Cape Town Convention.<sup>67</sup> Because 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 date when the State in which the debtor is situated became a Contracting State.<sup>68</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 and priority of such pre-existing right or interest depends solely upon the fulfillment of any perfection and/or notice requirements under the applicable law in effect at the time such interest was created. The “applicable law” in this instance is taken to mean the applicable domestic law as determined by the conflict of laws rules of the forum.<sup>69</sup>

A pre-existing right or interest is not limited to an agreement otherwise constituting an international interest (a lease, security agreement or title reservation agreement). Rather, any right or interest, 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. 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.

**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

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<sup>65</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>66</sup> Article 1(v) of the Convention.

<sup>67</sup> Article 60(1) of the Convention.

<sup>68</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.*

<sup>69</sup> GOODE at para. 2.312 (Unidroit 2019).



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 between Creditor 1 and Creditor 2 and the parties must look to the applicable law.

**Example 2:** Creditor 1 is the holder of a security interest granted by Owner in an aircraft engine and perfected under the laws of State 1 (which is not a Contracting State). Owner is organised 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. Owner 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 Owner, as creditor, and the Lessee, as debtor, is registered with the International Registry in March. Owner thereafter grants a second security interest on the engine to Creditor 2, which is similarly perfected under the laws of State 1. For purposes of determining priority in any Contracting State, the interest of Creditor 1 would (if recognised by the conflicts rules of such Contracting State) have priority over that of Owner, and the interest of Owner (as lessor under the lease) would (in all events under the Convention) have priority over that of Creditor 2.<sup>70</sup>

**Practice Note:** The priority of any pre-existing right or 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>71</sup>

If the parties to a pre-existing right or 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 with 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>72</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-existing rights or interests into registrable Cape Town Convention interests.<sup>73</sup>

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<sup>70</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>71</sup> GOODE at para. 2.309 (Unidroit 2019).

<sup>72</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>73</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 detailed 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, vol1, 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.



**Example:** Owner 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, Owner and Creditor nonetheless register an international interest with the International Registry in respect of such engine. Shortly after entering into the security agreement, Owner's jurisdiction of organisation becomes a Contracting State. In this scenario, the Cape Town Convention would not apply (unless the applicable Contracting State has made the declaration applying Article 60(3) of the Convention, as further discussed below) because at the time of conclusion of the security agreement, the Owner was not situated in a Contracting State. In order for the Cape Town Convention to apply in this scenario, Owner and Creditor would need to create a new international interest (for example, a second or junior lien on the engine).

Some practitioners have adopted a novel approach to addressing the issue of how to benefit a pre-existing right or interest with certain of the protections afforded by the Cape Town Convention without the need for a complete new set of transaction documents. This shorthand approach utilises an instrument commonly known as 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 potentially the issuance of an IDERA in support thereof.<sup>74</sup> The key distinction here is that this new AOSA 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 an entirely 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. Unlike the IDERA, the AOSA is not included in the Cape Town Convention and the use of an AOSA has not, to date, been tested. Some practitioners have questioned whether, in the case of operating leases, the grant by the lessee to the lessor of a security interest in the lessee's leasehold interest would give rise to an international interest. A form of AOSA can be found in Annex E hereto.

**Practice Note:** In addition to making Cape Town Convention remedies available to holders of pre-existing rights or interests, in particular, Alternative A, non-judicial advance relief and the IDERA provisions (subject to applicable Contracting State declarations), an AOSA also serves to minimise inconsistent treatment between similar aircraft in the debtor's fleet, some creditors protected by international interests and some who are not so protected.

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<sup>74</sup> “IDERAs” are Irrevocable De-Registration and Export Authorisations, explained in detail in Part V.B below.

A Contracting State may make a declaration under Article 60(1) (which declaration is controlled by the provisions of Article 60(3)), that the priority rules (but not any 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, only Canada and Mexico have made declarations under Article 60(1).

A pre-existing right or interest which is novated in favour of a creditor after the Effective Date of the Convention creates a new registrable international interest. However, if the pre-existing right or interest is transferred to the new creditor by way of assignment, that assignment would not be registrable. See Part K for a more in-depth discussion.

A declaration under Article 60(1) may be made at any time, but once made, it may not be modified or withdrawn.<sup>75</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>76</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 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>77</sup> In the absence of such a declaration, there would be no reason to register an interest at the International Registry in respect of any such pre-existing right or interest unless such registration would otherwise provide some other benefit (such as notice) under otherwise applicable local law.

## G. Acquisition of International Interests by Subrogation

Rights in aircraft objects may also be acquired by subrogation either under Article 9(4) of the Convention or under the applicable national law. A typical case where subrogation arises is when a surety for a debtor discharges the related debt. The national laws of many jurisdictions 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 true in any particular case is determined by the applicable law and not the Convention. Under Article 38 of the Convention, the rights of any subrogee are unaffected under the applicable law.<sup>78</sup> Article 9(4) of the Convention on the other hand (which states that an interested person<sup>79</sup> other than the debtor who discharges the debtor’s obligation in full is subrogated

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<sup>75</sup> GOODE at para. 4.361 (Unidroit 2019).

<sup>76</sup> Article 60(3) of the Convention.

<sup>77</sup> GOODE at paras. 2.309, 4.368 (Unidroit 2019).

<sup>78</sup> Article 38(1) of the Convention.

<sup>79</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.

to the right of the chargee) provides a Convention-based right of subrogation and is registrable accordingly.<sup>80</sup>

International interests acquired through legal or contractual subrogation (including, for this purpose, any subrogation right derived pursuant to Article 9(4) of the Convention) are registrable.<sup>81</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>82</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 recognises a right of subrogation for partial performance by a subrogee), the subrogee to first register the subrogation has priority over the other subrogee.<sup>83</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, the subrogated rights in favour of the subrogee 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>84</sup>

## H. Non-consensual Rights or Interests

The Cape Town Convention, specifically Articles 39 and 40, contemplates two forms of non-consensual rights or interests.<sup>85</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, under such laws, 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

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<sup>80</sup> Article 9(4) of the Convention. GOODE at para. 2.260. (Unidroit 2019).

<sup>81</sup> Article 16(1)(c) of the Convention; GOODE at paras. 2.119, 4.102 (Unidroit 2019). See Section IV.G below.

<sup>82</sup> GOODE at para. 2.260 (Unidroit 2019).

<sup>83</sup> GOODE at para. 2.260 (Unidroit 2019).

<sup>84</sup> GOODE at para. 4.266 (Unidroit 2019).

<sup>85</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. 4.278 and 4.293 (Unidroit 2019). In each case, in the context of non-consensual rights or interests, they are rights or interests conferred by the national law of the declaring Contracting State and not by agreement. GOODE at para. 2.278 (Unidroit 2019). Examples are non-consensual liens for unpaid repairs, unpaid wages, or unpaid air navigation charges. *Id.* at para. 4.280 (Unidroit 2019).

make modifications to its declaration under Articles 39 or 40 of the Convention at any time.<sup>86</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.<sup>87</sup>

**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 may 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 fact that a non-consensual right or interest can be registered without consent - for the obvious reason that there is no agreement and thus no party to an agreement - has led to abuse on the part of persons registering a non-consensual right or interest which is not covered by a declaration of a Contracting State and has prompted revisions to the Cape Town Regulations pursuant to which the International Registry requires certain checks against these types of registrations (see below).

The types of non-consensual rights and interests that may be declared can relate to both secured and unsecured claims.<sup>88</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

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<sup>86</sup> GOODE at paras. 4.286, 4.294 (Unidroit 2019).

<sup>87</sup> Article 39(1)(a) of the Convention; GOODE at paras. 2.264, 4.284 (Unidroit 2019),

<sup>88</sup> GOODE at para. 4.279 (Unidroit 2019).

current declaration.<sup>89</sup>

**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>90</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>91</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 organisation 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 (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).<sup>92</sup> 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 organisation 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>93</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 recognised.

**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 recognise it except insofar as their own conflict of laws rules requires them to do so.<sup>94</sup>

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

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<sup>89</sup> GOODE at paras. 2.266, 4.286, 4.288 (Unidroit 2019).

<sup>90</sup> GOODE at para. 2.263 (Unidroit 2019).

<sup>91</sup> *Id.*

<sup>92</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. GOODE at para. 4.281 (Unidroit 2019).

<sup>93</sup> GOODE at para. 4.281 (Unidroit 2019).

<sup>94</sup> GOODE at para. 2.268, 4.293 (Unidroit 2019).

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>95</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>96</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>97</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>98</sup>

There are special rules governing the registration of a non-consensual right or interest registrable under Article 40 of the Convention, since there have been several instances of registrations purportedly within Article 40 but in respect of which no declaration has been made by the relevant Contracting State, and these have necessitated applications to the Irish High Court for an order requiring the Registrar to remove the registration. Section 4 of the Cape Town Regulations accordingly provides that no administrator of a transacting user entity shall be entitled to register or amend the registration of a registrable non-consensual right or interest or issue an authorisation for such registration unless the administrator has first obtained approval from the Registrar for that purpose. Section 4.1 of the Cape Town Regulations provides that before giving such approval the Registrar must reasonably conclude, without undertaking specific legal analysis, that the administrator has the authority from his/her transacting user entity to make the certification and agreement required by Section 5.4(d) and (f) of the Cape Town Regulations respectively.

Section 5.4 of the Cape Town Regulations requires, among other things, the name of the Contracting State under whose laws the registrable non-consensual right or interest has been conferred, the category of such right or interest as listed in the Contracting State's declaration within which the right or interest being registered falls, the certification of the party named in the registration as the holder of the right or interest to which the registration relates that it has been validly conferred under the laws of that Contracting State, documentary evidence pertaining to the right or interest and the agreement of the party named in the registration as the holder of the registrable non-consensual right or interest to submit to the jurisdiction of the courts where the registrar has its centre of administration (i.e. the Irish High Court as regards aircraft objects) in relation to legal action under Article 44 of the Convention and accept liability for the registrar's

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<sup>95</sup> GOODE at para. 2.337 (Unidroit 2019).

<sup>96</sup> GOODE at para. 4.293 (Unidroit 2019).

<sup>97</sup> Article 40 of the Convention; GOODE at paras. 4.40, 4.294 (Unidroit 2019).

<sup>98</sup> GOODE at paras. 2.40(5), 2.273 (Unidroit 2019).

costs unless the registration is approved. Approvals are given on an individual basis. The Registrar is required to provide a copy of the documentary evidence referred to above to designated categories of interested party on request. However, the Registry is not equipped to investigate the veracity of filed documents, since this would be incompatible with a wholly automated electronic system. Moreover, Section 5.4(c) of the Cape Town Regulations does not require documentary evidence establishing the existence of the non-consensual right or interest, because this could entail an investigation which the International Registry is not equipped to perform. Hence the only requirement is that the documentary evidence “pertains to” the non-consensual right or interest, which would seem to signify no more than that the document indicates on its face that the right or interest exists. The non-consensual right or interest must, of course, fall within one of the categories of such interests covered by the declaration.

Under Section 8.3 of the Cape Town Regulations any person adversely affected by a unilateral registration who reasonably believes that the registration does not meet the requirements of the relevant Regulations may submit a complaint to the Registrar, and where such adverse effect is substantiated to its reasonable satisfaction the Registrar must proceed in accordance with Section 14.5 of the Cape Town Procedures. Finally, Section 10.10 of the Cape Town Procedures empowers the Registrar to suspend or revoke the approval, or disable or block the account, of a registered user entity’s administrator or user at any time where (among other things) there exists in the Registrar’s view a material risk of fraudulent registrations or other misuse.

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>99</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>100</sup>

**Practice Note:** It is important to note that a declaration under Article 39 provides only for a Contracting State to declare that certain non-consensual rights or interests arising, and which have priority, under its national laws shall have priority over registered and unregistered international interests under the Convention. The Convention does not provide any rights or remedies in relation to such non-consensual rights or interests. The priority, and enforcement of the priority, of a non-consensual right or interest declared by a declaring Contracting State as having priority over registered international interests is solely a matter of the national law of the declaring Contracting State (and the Convention may not be used as a vehicle to expand such preferred rights). The priority is not necessarily enforceable in another Contracting State unless, under the conflicts of laws rules in that other Contracting State, that other Contracting State is obliged to recognise and enforce the priority of the declared right or interest.<sup>101</sup> Similarly, that, while a declaration under Article 40 that certain non-

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<sup>99</sup> GOODE at para. 2.275 (Unidroit 2019).

<sup>100</sup> GOODE at para 4.293 (Unidroit 2019). For a further discussion on Article 39 and enforcement of remedies, see Section VI.H. herein.

<sup>101</sup> See *a/so* Section III.G. below in relation to non-convention interests and Section IV.F. below in relation to improperly registered “non-convention interests”.



consensual rights or interests may be registrable as if any such right or interest were an international interest and regulated accordingly, an Article 40 declaration does not provide any rights or enforcement remedies under the Convention except that such right or interest becomes subject to the Convention's registration process for purposes of determining the priority of such interest under the Convention in relation to international interests.<sup>102</sup>

## I. 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 (except for non-consensual rights or interests with respect to which a Contracting State has made a declaration under Article 39).<sup>103</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>104</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. Moreover, 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>105</sup>

Each of the following examples highlights the importance of registration to establish and preserve priority. It is important to recognise, however, that this priority (which is established pursuant to the terms of Article 29 of the Convention) is concerned only with the priority of registrable interests versus other interests, whether or not registrable, non-consensual rights or interests covered by a declaration by a Contracting State under Article 39(a)(1) of the Convention<sup>106</sup> or a pre-existing right or interest under Article 60 of the Convention.<sup>107</sup> In addition, the following examples assume the subject registrable interest was properly created and registered with the International Registry.<sup>108</sup>

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

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<sup>102</sup> GOODE at para 4.293 (Unidroit 2019).

<sup>103</sup> Article 29(1) and Article 39(1) of the Convention. See Section II.H. herein for a discussion on certain non-consensual interests which have priority without registration.

<sup>104</sup> Article 29(2) of the Convention.

<sup>105</sup> The Cape Town Convention also provides protection to conditional buyers and lessees who have registered their interests on the International Registry. 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 or lessor, as applicable. For a discussion regarding quiet possession and use rights, see Section II.Q. herein.

<sup>106</sup> See Section II.H herein.

<sup>107</sup> See Section II.F herein.

<sup>108</sup> See Section II.E herein.



**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 an international interest is registered in respect of such charge. Creditor takes its charge subject to Lessee's rights under the lease as prescribed under Article XVI of the Protocol (effectively, this means Lessee has quiet possession and use rights under the Cape Town Convention viz. the Creditor).<sup>109</sup>

**Example 3:** Seller sells an airframe to Buyer 1 (B1) and thereafter sells the same airframe to Buyer 2 (B2). Under applicable law, Seller retains the "power to dispose" over the airframe at the time of the sale to B2. No registration is made in respect of the sale in favour of B1 but Seller and B2 register a sale. B1 thereafter sells such airframe to Buyer 3 (B3) and a registration is made in respect of the sale in favour of B3. Because the sale to B2 is registered prior to the registration of B3's sale, B2 has priority over B3 (even though the sale to B2 occurred after the sale to B1). Both B2 and B3 have priority over B1.

**Example 4:** Seller sells an airframe to Buyer 1 (B1) and the parties do not register the sale. Later, B1 sells the airframe to Buyer 2 (B2). B1 and B2 register a sale. Thereafter, Seller sells the airframe to Buyer 3 (B3) (at a time when, under applicable law, Seller retains the "power to dispose" over the airframe) and a registration is made in respect of the sale to B3. Because the sale to B2 is registered prior to the registration of the sale to B3, 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 IN, OR SALE OF, AN AIRCRAFT OBJECT, MAY RESULT IN LOSS OF RIGHTS AND PRIORITY IN AND TO 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 favour of A and the second in favour 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 or occurred prior to the assignment to D. The registration of an assignment of an international interest is only relevant to establish priority as against other assignments from the same assignor and does not affect the priority of the underlying international interests.<sup>110</sup>

Any priority given by the Cape Town Convention to an interest in an aircraft object also extends to the proceeds of such object.<sup>111</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>112</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.

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<sup>109</sup> For a discussion of quiet possession and use rights, see Section II.R. herein.

<sup>110</sup> GoODE at para. 2.209 (Unidroit 2019). For further discussion on assignments, see Section II.K.

<sup>111</sup> Article 29(6) of the Convention.

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

As such, other applicable laws governing rights and interests in any such proceeds not covered by the Cape Town Convention should also be considered, and, to the extent applicable, be included in the drafting of the underlying documents and be made subject to perfection through local filings.

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>113</sup> In an insolvency proceeding, however, an international interest would be effective against the applicable debtor only so long as it is registered with the International Registry before the commencement of such proceedings<sup>114</sup> even if the international interest would otherwise be void for want of compliance with local law perfection requirements.<sup>115</sup> In other words, registration is a *de facto* 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 recognised and ranked ahead of the claims of unsecured creditors).<sup>116</sup> 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.

## J. 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 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>117</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 object upon the occurrence of such event.<sup>118</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

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<sup>113</sup> GOODE at para. 4.195 (Unidroit 2019).

<sup>114</sup> Article 30(1) of the Convention.

<sup>115</sup> GOODE at para. 4.217 (Unidroit 2019). 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>116</sup> Article 30(2) of the Convention.

<sup>117</sup> Article 1(y) of the Convention.

<sup>118</sup> GOODE at para. 2.61 (Unidroit 2019).

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>119</sup> A prospective international interest need not be provided for in writing.<sup>120</sup>

**Practice Note:** 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 prospective 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).

**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 sales 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 sale (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 sale registration to be ineffective to establish any priority.

If the stated event occurs, then an interest initially registered as a prospective international interest will automatically 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 of the Convention.<sup>121</sup> No additional registration is required when the international interest comes into being as a result of the stated event having occurred. Furthermore, Article III of the Protocol specifically extends the provisions relating to prospective international interests to cover prospective sales.<sup>122</sup>

**Practice Note:** Several major aircraft manufacturers refuse to consent to prospective registrations in connection with the sale of new aircraft. These manufacturers will only consent to the registration of a sale after they have received the sale proceeds for the related aircraft. In addition, if the applicable connecting factor in respect of an interest in an airframe is

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<sup>119</sup> GOODE at para. 4.35 (Unidroit 2019).

<sup>120</sup> GOODE at para. 2.61 (Unidroit 2019).

<sup>121</sup> Article 19(4) of the Convention.

<sup>122</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).

the result of the anticipated registration of such airframe in a Contracting State, a party's ability to register such interest at the International Registry may be limited if a registration requires an authorisation code from an authorised entry point (and such code may not be available until a registration mark is assigned to such airframe).<sup>123</sup>

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 as the priority search certificate will merely evidence that the creditor and the debtor have registered an international interest in the aircraft object.<sup>124</sup> Though for statistical purposes the registrant is required to state whether what is being registered is an international interest or a prospective international interest this is not a requirement of the regulations themselves, nor does the choice have a legal effect, so that an erroneous statement will not vitiate the registration.<sup>125</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.

## K. Assignments and Novations

### (I) ASSIGNMENTS.

Assignments relating to international interests are registrable under the Cape Town Convention;<sup>126</sup> however, such registrations of such assignments are confined to contractual assignments and not assignments by operation of law, such as assignments resulting from a statutory merger.<sup>127</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>128</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 other interests and priorities of the assignor therein.<sup>129</sup> The Cape Town

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<sup>123</sup> See Section V.A. herein.

<sup>124</sup> Article 22(3) of the Convention.

<sup>125</sup> Article 22(3) of the Convention.

<sup>126</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 paras. 2.239 and 4.262 (Unidroit 2019).

<sup>127</sup> GOODE at para. 2.243 (Unidroit 2019). 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. 2.230 (Unidroit 2019). 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 5.16 of the Cape Town Regulations.

<sup>128</sup> Article 1(b) of the Convention.

<sup>129</sup> Article 31(1) of the Convention.

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>130</sup> For 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, maintenance, return conditions or other operational requirements relating to the applicable aircraft object, all constitute associated rights.

**Practice Note:** An outright and absolute assignment or transfer 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. Instead, if a lessee were to absolutely assign or transfer its rights as lessee to a third party (such as pursuant to an AOSA) such assignment would give rise to the creation of a new international interest between the lessor and the assignee (as the new lessee) (as opposed to an assignment of the associated rights relating to the existing international interest) and new registrations should be effected with the international registry in order to establish priority.<sup>131</sup>

It should be noted that the definition of “assignment” purposefully focuses on assignments of associated rights, as opposed to international interests.<sup>132</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 an accessory to the obligation secured.<sup>133</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 other interests and priorities of the assignor under the Cape Town Convention, unless the parties otherwise agree.<sup>134</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 under the Cape Town Convention.<sup>135</sup>

**Practice Note:** In the case of a full and absolute 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>130</sup> Article 1(c) of the Convention. Note that only a creditor can hold and assign associated rights. GOODE at para. 4.225 (Unidroit 2019).

<sup>131</sup> This type of assignment is in contrast to a security assignment of lessee's rights, which can also constitute a separate registrable international interest. See Section II.F herein for a discussion of the use of the collateral assignment of a lessee's rights under a leasing agreement (pursuant to an AOSA) in order to allow the holder of a pre-existing right or interest to have the benefits of certain protections available under the Convention.

<sup>132</sup> See GOODE at para. 2.245 (Unidroit 2019). 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>133</sup> GOODE at para. 2.245 (Unidroit 2019).

<sup>134</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. 4.231 (Unidroit 2019). 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>135</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. 4.249 (Unidroit 2019).

“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 reservation 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>136</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>137</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>138</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>139</sup>

In addition, 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>140</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>141</sup> 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

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<sup>136</sup> GOODE at para. 4.12 (Unidroit 2019).

<sup>137</sup> GOODE at para. 4.228 (Unidroit 2019).

<sup>138</sup> GOODE at para. 2.242 (Unidroit 2019).

<sup>139</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>140</sup> Article 31(2) of the Convention; GOODE at para. 4.235 (Unidroit 2019).

<sup>141</sup> See GOODE at para. 4.235 (Unidroit 2019).

adversely affects the debtor (such debtor's consent may be a general consent and may be given in advance).<sup>142</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 favour 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, and Assignee and Creditor should register an assignment of such interests on the International Registry to protect Assignee's priority therein.

**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).

**Example 3:** Head Lessor leases an airframe to Lessee pursuant to a Head Lease and registers an international interest in respect of the Head Lease. Lessee subleases the airframe to Sublessee pursuant to a Sublease and registers an international interest in respect of the Sublease. Lessee then collaterally assigns its interest in the Sublease and all associated rights therein to head Lessor. Head Lessor then further collaterally assigns its interest in the Head Lease and the security assignment of the Sublease and all associated rights therein to its Lender. Head Lessor and Lessee should register the assignment of the international interest under the Sublease to Head Lessor, and then Head Lessor and Lender should register an assignment of that Lessee assignment of the international interest (in respect of the sublease) to Lender (along with an assignment of the Head Lease).

**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.

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

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<sup>142</sup> Article 31(2) of the Convention.



priority over any subsequently registered assignment and over an unregistered assignment.<sup>143</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>144</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, security agreement or lease such as default interest, break funding amounts, sums payable under indemnities and the like).<sup>145</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>146</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 its obligations under all such other contracts). The applicable loan agreement specifically recites that the obligations of the Debtor under the loan agreement are secured by a lien on the engine. Creditor registers its interest under the security agreement as an international interest and subsequently assigns its rights under the loan agreement, together with the international interest, by way of security first to Assignee 1 and second 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.

**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 (regardless of the order of any registration on the International Registry) because 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

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<sup>143</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>144</sup> Article 36(1) of the Convention.

<sup>145</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. 4.266 (Unidroit 2019).

<sup>146</sup> Article 36(3) of the Convention.



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>147</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>148</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>149</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 valid under the Cape Town Convention). In addition, an assignee of associated rights relating to an international interest may (and should) 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>150</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 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>151</sup>

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<sup>147</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. 4.247 (Unidroit 2019).

<sup>148</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. 5.79 (Unidroit 2019).

<sup>149</sup> Article 33(1) of the Convention.

<sup>150</sup> Section 5.6 of the Cape Town Regulations and GOODE at para. 2.239 (Unidroit 2019).

<sup>151</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 5.7 of the Cape Town Regulations allows for a "block" assignment pursuant to which all of the underlying interests evidenced by

**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 (for such extension period).

## (II) ASSIGNMENTS VS. NOVATIONS.

Contracts (and particularly leases) are often transferred between creditors and the legal basis by which the transfer is effected will usually depend on the applicable law of the underlying contract. Transfers are often effected either by a novation or by an assignment and assumption agreement. Different legal systems have different rules as to how a novation (or an assignment and assumption agreement) should be constituted and as to the effects of such a contract. 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>152</sup> The impact of the differing treatment can be substantial as, if a transaction 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 the transaction is 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.

**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

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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.

<sup>152</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 characterising the assignment, particularly when national laws differ so much on the point. GOODE at para. 2.53 (Unidroit 2019).

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 characterised under national law.<sup>153</sup>

The key difference is whether the existing rights of the creditor are transferred (which would constitute an assignment) or whether they are cancelled and replaced by new rights, albeit on substantially similar terms, in favour of the transferee (which would constitute a novation). It is instructive to compare the two template transfer documents prepared by the AWG<sup>154</sup>.

The first is an English law Aircraft Lease Novation and Amendment Agreement. This provides (amongst other things) at clause 2 that "the Lessee releases the Existing Lessor from the Existing Lessor's obligations, duties and liabilities to the Lessee under the Lease...." and that "the New Lessor agrees to assume the rights, obligations, duties and liabilities of the "Lessor" under the Lease arising from and including the Effective Time and to perform the obligations of the "Lessor" under the Lease...." There is no transfer of existing rights and obligations between the two lessors: rather the "Existing Lessor" is released from its obligations and the "New Lessor" agrees to assume identical obligations. This therefore is properly characterised as a novation under the Cape Town Convention and creates a new registrable international interest.

The second is a New York law Aircraft Lease Assignment, Assumption and Amendment Agreement. The operative clause (clause 2) here provides (amongst other things) that: "the Existing Lessor assigns to the New Lessor, and the New Lessor agrees to assume, the rights, obligations, duties and liabilities of the "Lessor" under the Lease arising from and including the Effective Time...". Here there is a transfer of existing rights and obligations and so this is properly characterised as an assignment under the Cape Town Convention and should be registered as an assignment of the existing international interest.

The key issue is the contractual effect of the transfer document – not its title or its governing law. It is quite possible for assignments to be governed by English law and for novations to be governed by New York law. It is, however, clear that the two template documents referred to above operate, respectively, as a novation agreement and as an assignment for the purposes of the Cape Town Convention.

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<sup>153</sup> GOODE at para. 2.54 (Unidroit 2019).

<sup>154</sup> See <http://www.awg.aero/project/gats/>.

Note that it is common in transfer documents (whether novations or assignments) for certain ancillary rights and obligations (for example in respect of pre-existing rights or continuing indemnities) to remain in force between the original lessor and the lessee. Whilst such provisions might affect the characterisation of the transfer agreement under the relevant applicable law, they are irrelevant in the context of the Cape Town Convention. The key question for these purposes is how the central rights and obligations – to lease and take on lease the aircraft object – are treated.

**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 assigns 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 characterisation that might be given under applicable national law. This is so whether or not the Owner and the Lessee separately agree that certain of the pre-existing contractual rights and obligations existing between them (for example in respect of continuing indemnities) should continue in force notwithstanding the transfer.

**Example 2:** Same facts as Example 1 except the transfer document is a three-party agreement amongst Owner, Lessee and Transferee whereby Owner and the Lessee release each other from their mutual rights and obligations under the existing lease agreement (with no assignment of associated rights) and the Transferee and the Lessee agree to be bound by substantially similar rights and obligations under a new lease agreement coming into effect by virtue of the execution of the transfer agreement. For purposes of the Cape Town Convention, this does not constitute an assignment, but rather the entry into a new lease agreement (which effectively discharges the existing international interest and requires the Lessee and the Transferee to register a new international interest with the International Registry in respect of the new lease agreement). This is so whether or not the Owner and the Lessee separately agree that certain of the pre-existing contractual rights and obligations existing between them (for example in respect of continuing indemnities) should continue in force notwithstanding the transfer.

## L. 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 otherwise applicable law 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. All that is needed to constitute an international interest in an aircraft object is an agreement which conforms to the simple requirements of Article 7 of the Convention and Article VII of the Aircraft Protocol. This is so whether or not the international interest has any counterpart in national law or fulfils the requirements for the creation of an interest under national law. In this sense the international interest is autonomous, being derived from the Convention itself. But whether an agreement exists at all and the time when an agreement comes into existence are to be

determined by the applicable law, which will thus govern questions such as capacity to contract, whether there was a meeting of the minds, the impact of illegality, and the like.<sup>155</sup> Further, as the Cape Town Convention is 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>156</sup> or, in the 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>157</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

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<sup>155</sup> GOODE at para. 2.79 (Unidroit 2019).

<sup>156</sup> See Section II.A. herein for a discussion on gap-filling provisions.

<sup>157</sup> Article 5(3) of the Convention.

rights (Article 31(3),(4));

- the priority of competing assignments of associated rights in cases falling outside 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));
- the range of non-consensual rights or interests provided by its law which are to have priority over a registered international interest (Article 39) or are to be registrable as if they were international rights or interests; and
- the priority of pre-existing rights and interests (Article 60(1)).”<sup>158</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

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<sup>158</sup> GOODE at para. 2.71 (Unidroit 2019).

creditor for any breach of the agreement under the applicable law in so far as that agreement relates to an aircraft object.”<sup>159</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 provision which allows the parties to an agreement to choose the substantive law to govern their contractual arrangements.<sup>160</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>161</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>162</sup>

**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>163</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>159</sup> GOODE at para. 3.24 (Unidroit 2019).

<sup>160</sup> Article VIII of the Protocol.

<sup>161</sup> GOODE at para. 3.25 (Unidroit 2019).

<sup>162</sup> Therefore, any contract incorporated by reference into any of the foregoing contracts is covered by the rules on choice of law.

<sup>163</sup> GOODE at para. 3.26 (Unidroit 2019).



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>164</sup>

The selected jurisdiction is exclusive.<sup>165</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>166</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 harmonise 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>167</sup> in respect of that aircraft object.<sup>168</sup> Further, jurisdiction to grant relief under Article 13(1)(d)<sup>169</sup> (and, where the Contracting State has made an opt-in declaration under Article XXX(2), Article 13(1)(e)<sup>170</sup>) may be exercised either (a) by the courts chosen by the parties; or (b) by the courts of a Contracting

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<sup>164</sup> Article 42(1) of the Convention.

<sup>165</sup> *Id.*

<sup>166</sup> GOODE at para. 4.296 (Unidroit 2019).

<sup>167</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>168</sup> Article 43(1) of the Convention.

<sup>169</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.

<sup>170</sup> Section 13(1)(3) of the Protocol covers advance relief in the form of a sale and application of proceeds therefrom. Article X of the Protocol.



State on the territory of which the debtor is situated<sup>171</sup>, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.<sup>172</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>173</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>174</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>175</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>176</sup>

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<sup>171</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>172</sup> Article 43(2) of the Convention. See Section VI.E(IV) herein for further discussion on jurisdictions for advance court relief pending final determination.

<sup>173</sup> Article XXI of the Protocol.

<sup>174</sup> Article 44 of the Convention.

<sup>175</sup> See Section IV.G herein for additional discussion regarding the jurisdiction of the Irish courts to make orders directing discharge of an interest.

<sup>176</sup> GOODE at para. 4.310 (Unidroit 2019). 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 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 charge 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. 4.312 (Unidroit 2019).

It is important to note that only proceedings against the Registrar fall within Article 44. Where there is a dispute between the parties to an agreement as to the validity of a registration, that dispute is not a matter that the courts in the Registrar's jurisdiction can adjudicate on unless (a) the parties have agreed to confer jurisdiction on those courts under Article 42 or (b) the case falls within the general jurisdiction of those courts, including within the EU, the rules contained in EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters and the 1988 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. This is because the Registrar is not a party of interest. Accordingly, it is necessary to further obtain an *in personam* order of a court of competent jurisdiction to require a registration to be discharged which order may then be enforced in proceedings against the Registrar. However, the Irish High Court in a number of cases brought before it, where no *in personam* order has been made, has taken a broad interpretation of Article 44(1) to assume general jurisdiction to make orders against the Registrar. The Irish High Court in those cases, has accepted that proceedings against a wrongful registrant fall within its general jurisdiction based on leave to accept service on the registrant outside the jurisdiction under Order 11 of the Rules of the Supreme Court to make an order *in personam* directing the registrant to procure discharge of the registration and, where this is not complied with, an order under Article 44(1) directing the Registrar to discharge the registration. Where the registrant has ceased to exist, the first stage is dispensed with.

## M. 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 charges, conditional sellers and lessors under Articles 12 and 13, as well as specific remedies for a chargee under Articles 8 and 9 and for a conditional seller or lessor under Article 10. 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>177</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 all 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>178</sup> Accordingly, the exercise

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<sup>177</sup> See Section VI for a discussion on Convention and Protocol Remedies.

<sup>178</sup> Article 14 of the Convention.

by a creditor 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>179</sup>

This is an important distinction, consistent with the primacy of the Convention over national substantive law as regards matters within its scope relating to the creation, enforcement, perfection and priority of interests in aircraft objects. Accordingly, Article 14 and local procedural law cannot be relied upon by courts or government agencies to impose onerous or inconsistent requirements that are inconsistent with the practical availability of Convention remedies. For example, if 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 non-judicial relief as permitted by the Cape Town Convention. Other procedural laws that conflict with the existence and availability of non-judicial remedies are also problematic, such as the imposition of undue administrative delays for access to airport facilities, ferry flight permits or air traffic control permissions, all of which render the effectiveness of declared remedies moot.

Similarly, with respect to the special judicial remedies for advance relief under Article 13, it would not be appropriate for a court to impose procedural rules in a way that precludes the creditor from obtaining the speedy relief at the very core of the substantive rights created under the Convention (assuming their application has not been excluded under an Article 55 declaration). Notably, the Cape Town Convention does not provide courts with any discretion to refuse an Article 13 order or to suspend the effectiveness of an order for a period to allow the default to be cured. In short, Article 14 does not allow courts to override Article 13 remedies on the basis of local procedures, such as those relating to preliminary injunctions or other local interim relief, including the imposition of standards of proof or legal defenses inconsistent with the Convention.

Finally, local 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.

## N. 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 or not it will apply

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<sup>179</sup> *Id.*

certain Articles of the Convention and the Protocol. Therefore, each Contracting 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>180</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 domestic 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 domestic laws determine whether certain aspects of local law will apply vis-à-vis the Cape Town Convention. These declarations are:

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<sup>180</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.

Convention 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].

**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 declarations that do not fit into any of the previously described categories is Convention Article 52 [Territorial units] and the corresponding Protocol Article XXIX [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, 43 or 50 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;
- (d) 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));
- (e) the Contracting State wishes to apply the Convention otherwise than to all its territorial units pursuant to Convention Article 52 and Protocol Article XXIX; or
- (f) it wishes to define the relevant court under Convention Article 53.<sup>181</sup>

## O. Amendments

The International Registry contains a feature that permits the registration of an amendment to a registered interest. The amendment function was established to provide users a way to correct ministerial errors in registration particulars and should be used only for that purpose (i.e., to correct errors in details pertaining to the relevant manufacturer, model, serial number, part name or type of registration).

If the amending document does not correct such errors, there is no need to make a registration of the amendment. The document may, however, create, sell, assign, or subordinate a right or

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<sup>181</sup> GOODE at para. 2.337 and (Unidroit 2019).

interest in an aircraft object which should be the subject of a new, independent registration (e.g., a new international interest, assignment of international interest, subordination of international interest, sale, etc.). If so, it should be registered as such, and not as an amendment.

The analysis should be clear and complete to ensure that the amending document does not result in unaddressed or unintended consequences under the Cape Town Convention. If, for example, an existing lease or security arrangement is so fundamentally altered that a new property right is created, then it is possible that a new international interest may have been created, in which case it should be the subject of a new registration in the form of a newly registered international interest. Furthermore, an amendment to an existing agreement may create an international interest which must be 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 or remain effective.

Examples of an amendment to an agreement creating or providing for an international interest which, without necessarily affecting the existing registration, may give rise to a new international interest (which will not be protected by the initial registration but is required to be separately registered) are the following:

- (1) the agreement is amended to add or substitute a new item of equipment; to increase a fractional interest in an aircraft object (e.g., from 5% to 10%) otherwise than by assignment or subrogation; to bring in a new party as grantee or grantor of a security interest, conditional sale or lease or to extend a security interest to an obligation not previously secured or a new obligation, e.g., the provision of additional finance;
- (2) a lease is extended or renewed. The extension or renewal of a lease creates a new registrable interest in favour of the lessor, and this is so even if the lease itself gives the lessee an option to extend or renew the lease, for the option may never be exercised and unless and until it is exercised the lessor has no existing international interest as regards the extension or renewal period. However, where the extension or renewal is provided for in the lease itself the lessor can register it as a prospective international interest from the outset, with no need to reregister when the extension or renewal takes effect, and if the lease provides for successive renewal periods, a single registration of a prospective international interest will cover all renewals; and
- (3) The rent under a lease characterised by the applicable law as a security agreement is increased by a subsequent agreement.<sup>182</sup>

The factor common to all the above amendments is that the original international interest is in some way enlarged, replaced or supplemented by a new interest or a new type of interest, to the potential

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<sup>182</sup> GOODE at para. 2.58 (Unidroit 2019).

detriment of intervening creditors whose interests will be thereby eroded. So it is important to effect registration of the new or varied international interest in order to preserve its priority. However, the original registration remains effective to the extent that the international interest to which it relates still subsists.

As noted above, not all amendments create or impact the related international interest in a way that requires a new registration or registrations. For example, the following amendments do not require new registrations because they do not create new registrable interests: (1) amendments with regard to the name change in notice information of a creditor or debtor<sup>183</sup>; (2) amendments changing the method of payment; and (3) amendments relating to the maintenance or insurance of an aircraft object. The key, then, is to analyse the terms of the amendment document in order to assess whether it creates new registrable interests and how it impacts the rights and interests created pursuant to the underlying agreement under the Cape Town Convention. For example, if an international interest is in some way granted, enlarged, replaced or supplemented by a new interest or a new type of interest, to the potential detriment of intervening creditors, then a new international interest should be registered in order to establish and maintain priority.<sup>184</sup> Similarly, if an existing international interest is assigned, subordinated or subrogated by the amending document, the appropriate corresponding registration (e.g., “assignment of international interest” or “subordination of international interest”) should be made on the International Registry. Key to this analysis is the recognition that failure to make the appropriate registrations with regard to the new interests created by a document, including an amendment, could have significant negative consequences, including the failure to establish priorities and rights emanating from the amendment document(s), regardless of their nomenclature.

In light of the above considerations, the registration of an amendment on the International Registry is rare. In addition to the fact that better registration options are normally available, the registration of an amendment is somewhat cumbersome and results in a more complex priority search certificate. Finally, in most instances, the registration of an amendment to correct substantive information (e.g., parties, description of equipment, type of registration) will result in a new date of priority and will not relate back to the date of the registration of the original interest.<sup>185</sup>

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<sup>183</sup> A change in name is not dealt with as an amendment but rather is effected under Section 5.16 of the Cape Town 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>184</sup> GOODE at para. 2.56 (Unidroit 2019). There are kinds of amendment which do not generate a new international interest because they do not change the terms or because any additional obligations they impose are secured or provided for by the international interest under the terms of the original agreement, for example, an amendment:

- (1) to record that a creditor or debtor has changed its name;
- (2) as to the amount, mode or time of payment under a security agreement or a related promissory note either without increasing the amount of the obligations secured or where any increase is already secured by the terms of the original agreement;
- (3) as to repair or insurance of the equipment;
- (4) to provide for a further advance which is already secured by the agreement or adjust the interest rate on an existing secured advance.

GOODE at para. 2.58 (Unidroit 2019).

<sup>185</sup> Section 5.13(a) of the Cape Town Regulations.



When presented with an amendment document, parties should take care to determine if a registrable interest (e.g., an international interest) was created by such amendment provisions. If an international interest is created in the amendment, the parties should register it as an international interest and not as an amendment.

**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. 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, though prior editions of the Official Commentary may have suggested that registration of a new international interest should be made in connection with each renewal period; the Official Commentary confirms that successive renewal periods can be covered by a single prospective international interest registered at the time of the original interest.

**Example 2:** Amendment which recharacterises 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, recharacterises the agreement from a lease agreement to a security agreement. As discussed in Sections II.C. and III.C. herein, one should use the autonomous definitions in the Cape Town Convention to characterise the effect of the amendment. If the amendment constitutes a new interest under those definitions, then a new registration is required.<sup>186</sup>

**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

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<sup>186</sup> Para. 2.56(1) and (3) of the Official Commentary give examples which look to applicable law in determining whether the amendments considered there constitute new interests, so some caution is warranted..



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>187</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 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 and 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 sale that should be registered (i.e., the parties should register the sale of 5% interest in and to the aircraft object from Seller to Buyer).

**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, and 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 favour 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).

## P. Subordinations

The Cape Town Convention recognises 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

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<sup>187</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. 4.79 (Unidroit 2019). 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. 4.79 (Unidroit 2019).

unregistered interest (whether pre-existing or subsequent).<sup>188</sup> In order for any such subordination to be effective against third parties, the subordination must be registered.<sup>189</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>190</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 enter into a security agreement in respect of such aircraft object and an international interest in respect of the security agreement is likewise registered. As the registration of the lease interest predates the registration of the security agreement interest, Lender's rights are subject to Lessee's right to quiet possession and use of the Aircraft.<sup>191</sup> Should Lender wish to have Lessor's international interest 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>192</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>193</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.

**Practice Note:** Some practitioners have sought to register purported subordinations, contained in deeds of priority, which, in fact, confirm the priorities established by the Cape Town Convention in any event. Such confirmatory registrations are not necessary and should be avoided.

## Q. National Interests Arising in Internal Transactions

A Contracting State can declare under Article 50(1) that the Cape Town Convention will not apply to internal transactions where the centre of the main interests of all of the parties to such

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<sup>188</sup> Article 29(5) of the Convention.

<sup>189</sup> Article 16(1)(e) of the Convention.

<sup>190</sup> Article 29(5) of the Convention.

<sup>191</sup> See Section II.I herein.

<sup>192</sup> GOODE at para. 2.220 (Unidroit 2019).

<sup>193</sup> GOODE at para. 2.221 (Unidroit 2019).

transaction is situated, and the relevant aircraft object is located,<sup>194</sup> in the same Contracting State<sup>195</sup> at the time of the conclusion of the contract.<sup>196</sup> As of January 1, 2019 only five Contracting States had made such a declaration: China, Mexico, Panama, Turkey and Ukraine.

Even though these transactions can be excluded from the Cape Town Convention, including most of the default provisions in Article III, the priority rules of the Cape Town Convention, rather than the laws of the Contracting 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>197</sup> The exclusion of national interests from the Convention's scheme of remedies while retaining the application of the Convention's rules for priority and perfection follows an internal logic.<sup>198</sup> The intention is to keep the relations between the contracting parties who are situated within the same Article 50 Contracting State a matter of that State's national law. At the same time, in relation to third parties, where questions of perfection and priority may arise, the national interests are meant to be subject to the rules established by the Convention.

**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 be excluded from the Convention, other than with respect to its regime for perfecting and prioritising interests. Thus, the lessor/creditor would not be entitled to avail itself of the remedies established by the Convention (so, for example, an IDERA issued by a lessee under a lease qualifying as an internal transaction would not have any effect under the Cape Town Convention although it may still have some legal effect under national law). Under some readings of the Convention such an exclusion may even extend to a related transaction that would otherwise create eligible Convention interests, such as a secured financing in which the lessor has granted a security interest in the aircraft and has made a security assignment of the lease to a lender who is situated outside of the Contracting State. Practitioners are cautioned accordingly and encouraged to assess the applicable national law remedies and the policies of the applicable registry with respect to the registration of an IDERA in these circumstances. The Official Commentary interprets the Convention as being applicable to the international interests created by such a financing. Further, the Official Commentary notes that where a transaction includes both national interests (in the example above, the lease) and international interests (in the example above, the

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<sup>194</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>195</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>196</sup> Article 50 of the Convention; GOODE at para. 2.304 (Unidroit 2019).

<sup>197</sup> GOODE at para. 2.40(3) (Unidroit 2019).

<sup>198</sup> GOODE at para 2.306 (Unidroit 2019).

security interest in the airframe and the engines), the parties may structure their agreements to permit the grant of an IDERA to the holder of the international interest (in the example above, the lender).<sup>199</sup>

## R. 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>200</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>201</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>202</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 characterised 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 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.

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<sup>199</sup> GOODE at para. 3.42 (Unidroit 2019). See also Illustration 56, GOODE at para. 4.334 (Unidroit 2019).

<sup>200</sup> Article 29(4)(b) of the Convention.

<sup>201</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. 3.111 (Unidroit 2019).

<sup>202</sup> Article XVI of the Protocol.

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 except that 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 (but the lease itself has not been terminated). 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 it 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 or subordinated 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 or subordinated without its consent.<sup>203</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 or subordinated without their prior consent.

## S. 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 residing in those nations.<sup>204</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 aircraft objects is critical to the effectiveness of the Cape Town Convention.<sup>205</sup> Central to any analysis of a transaction involving application of the Cape Town Convention is whether the applicable jurisdiction involved qualifies

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<sup>203</sup> GOODE at para. 2.215 (Unidroit 2019). 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.

<sup>204</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>205</sup> For a discussion on the interplay between the Cape Town Convention and national law, see Section II.L and Section III.H herein.

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>206</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>207</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.

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 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 prepares, and keeps up to date, an index monitoring and assessing compliance with the Cape Town Convention by Contracting States,<sup>208</sup> including national law implementation and practical application of the Convention, meaning how national courts and administrative authorities (such as, in respect of IDERAs, the civil aviation authorities) apply and enforce the treaty’s terms. Analyses of practical application of the Cape Town Convention by way of written judicial and administrative decisions are also undertaken by the AWG, as founder of the Cape Town Convention Academic Project (“**Project**”)<sup>209</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. The AWG (through its

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<sup>206</sup> Article 47 of the Convention.

<sup>207</sup> GOODE at para. 2.10 (Unidroit 2019).

<sup>208</sup> The AWG has prepared a Cape Town Convention Compliance Index to, among other things, monitor and assess compliance with the Cape Town Convention in each country that has ratified or acceded to the Convention. By ‘compliance’, AWG means that:

- (i) the Cape Town Convention is fully and effectively implemented,
- (ii) prevails over conflicting law, and
- (iii) is being interpreted and applied in accordance with its terms and intent.

The public version of the Cape Town Convention Compliance Index can be found at [\[link to Index E-Platform\]](#).

<sup>209</sup> The Project is a joint undertaking between the University of Cambridge and the University of Washington School of LawUnidroit which seeks to assist scholars, students, practicing lawyers, judges and other government officials, and industry by providing information on and education about the Convention.

Legal Advisory Panel) has created a form legal opinion (which can be found on Annex E to this Guide) designed to cover a variety of elements normally found in aircraft finance and leasing transactions and the interaction of these elements with the Cape Town Convention, including ratification and implementation of the Convention, registration of interests, priorities, applicable insolvency declarations and choice of law and forum provisions. The form opinion is a useful tool to cover most of the Cape Town Convention aspects arising on a transaction (although in many cases the opinion may be split amongst several law firms such as transaction counsel, counsel in the contracting state of each applicable debtor and, if applicable, counsel located in the state of registry of the applicable aircraft).

**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. Practitioners should recognise 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.

## T. Using the Cape Town Convention Compliance Index

AWG has developed a Cape Town Convention Compliance Index (the “**Compliance Index**”) to monitor and assess compliance by contracting states with their undertakings under the Cape Town Convention. The Compliance Index considers many factors, including national law implementation and practical application of, and experience with, the Cape Town Convention, and will provide a predictive assessment of a Contracting State’s likely future compliance. A parallel and equally significant goal of the Compliance Index is to incentivise future compliance by providing accurate, timely information to stakeholders, including the OECD, and communicating concrete proposals for improving compliance in the applicable contracting state.

The Compliance Index will be updated regularly at semi-annual intervals and, importantly, will be kept current between such semi-annual updates to reflect material developments that may increase or decrease scores, based on positive or negative state action (against the primacy and completeness standards).

The Compliance Index is available as a public index with final scores and categories (divided between contracting states that have made the qualifying declarations under the OECD’s ASU and Contracting States that have not made such qualifying declarations), as well as in more detailed per-country scorecards with annotations and variable scoring breakdowns for AWG members, governments, and select others. Such scorecards are also available for purchase by non-AWG members via a paid subscription to the Compliance Index e-platform at <https://ctc-compliance-index.awg.aero/>.



Scorecards are available in certified form (“**certified-for-transaction**” or “**CFT**” scorecards), confirming that, as of the date it is ordered, the scorecard it attaches for a specific Contracting State is the most up-to-date scorecard available. Depending on the subscription option, there will be a fee associated with each such order.

While there are many uses for the Compliance Index, for the purposes of this Guide, it can and should be reviewed as a risk assessment tool in Contracting States. As noted above, while not a substitute for case-specific local law advice, the Compliance Index, and in particular the detailed scorecards and annotations, is a valuable resource for practitioners on not only the *de jure* black-letter implementation of the Convention in a Contracting State, but also how the Convention has been *de facto* enforced and applied by relevant authorities, including courts and civil aviation authorities, as applicable, in such Contracting State.

**Practice Note:** Parties should consider using the CFT scorecard in transaction closings as an indication and baseline for Cape Town Convention compliance expectations in the applicable Contracting State, by including it as a condition precedent to delivery or closing. Additionally, a material change in the scorecard (such as a category downgrade) may be considered an adverse change in law with attendant consequences as negotiated between the parties.

## U. Global Aircraft Trading System

The Global Aircraft Trading System (GATS), and more specifically the online platform developed for GATS, provides a means to trade aircraft equipment electronically using owner trust structures.

Under a typical owner trust structure, a corporate services provider acts as the trustee of the trust and in such capacity holds ‘bare’ legal title to the aircraft equipment. The entirety of the economic benefit of the aircraft equipment (including the right to all proceeds generating by it), sometimes called the ‘beneficial interest’, is held by the beneficiary of the trust.

Thus, using the GATS online platform, owners of aircraft equipment can place it into a trust, and trade the aircraft equipment by transferring the beneficial interest in the trust to a new beneficiary, rather than transferring the aircraft equipment itself.

The sale or transfer of a beneficial interest in an owner trust (whether or not using the GATS online platform) is not a “sale” as defined in the Protocol because the transfer of the beneficial interest in the trust which holds an aircraft object is not a transfer of the aircraft object itself; nor is such transfer pursuant to a “contract of sale” because, similarly, the contract relates to the sale of the beneficial interest in the trust, and not the aircraft object itself.

Thus, the trading or transfer of aircraft equipment by way of transferring the beneficial interest in a trust holding that equipment, whether using the GATS online platform or otherwise, as discussed in Section II.C. above, is out of scope of the Cape Town Convention and any such transfer is not required to be registered on the International Registry as a sale.



### III. Applicability Of The Cape Town Convention

In Section II, we discussed the types of equipment (aircraft objects) which are subject to the 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 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 Section III) are summarised in a diagram attached hereto in Part I of Annex A.<sup>210</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.B. II.C. and II.D. The final requirements that must be satisfied are known as the “connecting factors”. The first connecting factor 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, 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>211</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

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<sup>210</sup> Additional examples demonstrating the applicability of the Cape Town Convention to specific transactional structures are included in Part II of Annex A.

<sup>211</sup> GOODE at para. 2.37 (Unidroit 2019).

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).

## (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>212</sup> 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). “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>213</sup>

**Practice Note:** Where an aircraft object is subject to the terms of a master agreement via 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 such aircraft object.

For purposes of the Cape Town Convention, a debtor is deemed to be “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>214</sup>

The purpose of having these several factors is to give maximum scope to the application of the Cape Town Convention.<sup>215</sup> The first two factors are objective and typically easy to 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

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<sup>212</sup> Article 3(1) of the Convention. 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. 4.62 (Unidroit 2019).

<sup>213</sup> Article 3(2) of the Convention.

<sup>214</sup> Article 4 of the Convention.

<sup>215</sup> GOODE at para. 4.63 (Unidroit 2019).

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 organised 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 notwithstanding the fact that its centre of administration and principal place of business are in a non-Contracting State.

**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 in 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 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).

It may also be useful for practitioners to include a representation in the relevant transaction agreements from the relevant party to the effect that the relevant party is or is not situated in a Contracting State for the purposes of the Convention.

## (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.<sup>216</sup> 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>217</sup> However, 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>218</sup> 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.<sup>219</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 would cover, 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>220</sup>

**Example:** 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, the parties cannot rely on the fact that the applicable sale agreement constitutes an “agreement for registration” although as the test is two pronged (that is, at the time of the conclusion of the agreement the airframe must either be registered or

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<sup>216</sup> Article IV(1) of the Protocol.

<sup>217</sup> GOODE at para. 3.17 (Unidroit 2019).

<sup>218</sup> *Id.*

<sup>219</sup> GOODE at para. 5.26 (Unidroit 2019). 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 65 (Unidroit 2019). 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. 3.17 (Unidroit 2019).

<sup>220</sup> GOODE at para. 3.17 (Unidroit 2019).

subject to an agreement to be registered in a Contracting State) the sale would nonetheless be subject to the Cape Town Convention as at the time of the sale the airframe is registered in a Contracting State.

A consequence of this additional connecting factor 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>221</sup>

## B. Partial Application of the Cape Town Convention

As previously discussed, the Cape Town Convention does not apply to international interests unless there is a connecting factor.<sup>222</sup> However, as noted above, some aircraft transactions may be comprised of multiple components, some of which would be covered by the Convention, depending upon the “debtors” involved and/or the state of registry for nationality purposes.

**Example 1:** Lessor, which is organised 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 favour of Lender.

In this example, the Cape Town Convention will apply only to the international interest created under the mortgage in favour 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 not apply to either (i) the sale from Seller because Seller is not situated in a Contracting State and the airframe is registered in a non-Contracting State, or (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 favour of Lender, and Lessor conveyed title to the applicable replaced engine to Lessee), the Cape Town Convention would apply to (i) the sale in respect of the replaced engine being conveyed from Lessor to Lessee, and (ii) 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 continue to 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),

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<sup>221</sup> See Section VI below.

<sup>222</sup> See Section III.A. above.

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).

**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. Characterisation

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>223</sup> As mentioned in Section II.C. 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>224</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 recognise any of the foregoing) is irrelevant to the determination of whether an international interest has, in fact, been created.

However, once it is established that an interest falls within one of the three categories specified above, its characterisation for the purposes of other 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>225</sup> While most 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 characterised 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

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<sup>223</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 characterisation issues, it is not discussed here.

<sup>224</sup> GOODE at para. 2.63 (Unidroit 2019).

<sup>225</sup> Article 2(4) of the Convention. See also GOODE at para. 2.63 (Unidroit 2019) 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 characterisation. 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)).

the rights and remedies (and 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 characterised as a lease. If, however, the lease agreement is, under applicable law of the forum state, recharacterised 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>226</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>227</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>228</sup> As the characterisation 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>229</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, 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

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<sup>226</sup> An interesting situation would arise if a lease agreement (constituting such under the Convention) would be recharacterised as a security agreement under the applicable law of the forum state 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>227</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 XXXX(1) of the Protocol).

<sup>228</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>229</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 characterisation 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.



growing portion of the aviation industry involves programs commonly referred to as “fractional programs,” in which companies lease or sell a specifically identified percentage or fractional interest in an aircraft object and then manage the operations for the purchasers and lessees.<sup>230</sup> For purposes of this discussion, references to a “fractional interest” in an aircraft object include any specific, undivided percentage interest in an aircraft object, regardless as to whether such interest results from a co-ownership arrangement, fractional program, or another agreement between parties to purchase, lease, or pledge less than a whole (i.e., 100%) interest in an aircraft object.

Although the registration of fractional interests in aircraft objects is not specifically addressed in the Cape Town Convention, there is no basis to conclude that the Cape Town Convention is limited to whole aircraft. The Official Commentary confirms that there is nothing in the Cape Town Convention that precludes a fractional interest from being registrable as a separate sale or international interest.<sup>231</sup>

The International Registry allows interested parties to specify a fractional interest in registrations affecting aircraft objects.<sup>232</sup> When registering an interest in an aircraft object, the International Registry system prompts the registering party to select “yes” or “no” as to whether the registration pertains to a fractional interest. The International Registry system defaults to a 100% interest unless the registering party selects “yes,” indicating that it will be making a fractional registration. This will cause the International Registry system to prompt the registering party to specify the relevant fractional interest, up to six decimal places.

**Example:** Seller (“S”) owns the entire aircraft object and sells an undivided twenty-five percent (25%) interest in the aircraft object to Purchaser (“P”). In making the relevant registration on the International Registry, the registry user who initiates the registration must be sure to: (i) select “yes” in response to the query regarding a fractional interest, and (ii) input “25.000000%,” in addition to the input of party names, country of registration, selection of the aircraft object, and any other details required by the International Registry system to complete the registration. The other party to the sale will receive an electronic notice from the International Registry and be given an opportunity to consent to the registration of a sale of an undivided 25.000000% fractional interest in the aircraft object. The consenting party must confirm that all information is correct before it gives its electronic consent (consenting parties should always review all relevant registration information carefully before providing an electronic consent, but this review takes on even more importance when consenting to the registration of a fractional interest). Finally, after the registration is complete, the parties should carefully review the relevant priority search certificate to confirm that it accurately reflects the fractional interest registration.

Each sale of, or international interest in, a fractional interest in an aircraft object is separately registrable as a distinct sale of a unique interest. Upon registration, each sale or international interest will be reflected on the relevant priority search certificate as a distinct and separate sale or

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<sup>230</sup> Applicable FAA Regulations governing fractional programs are found at 14 CFR § 91.1001 *et seq.*

<sup>231</sup> GOODE at para. 2.59 (Unidroit 2019).

<sup>232</sup> See Sections 5.14 and 5.15 of the Cape Town Regulations.



international interest in the aircraft object to the extent of the fractional interest identified in the registration.<sup>233</sup>

In most cases, priorities relating to fractional interests in aircraft objects are clear. Because each registration of a fractional interest creates a distinct and separate interest (whether as a sale or 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>234</sup> A priority conflict may arise when (a) the same party sells, leases or pledges the same or overlapping interests to multiple purchasers, lessees or creditors, or (b) parties who hold interests in the same aircraft object sell or pledge fractional interests that exceed a 100% interest in the 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>235</sup>

**Example:** Seller (“S”) is the owner of an entire aircraft object and sells an undivided 50% interest in that aircraft object to Purchaser 1 (“P-1”), which is registered on the International Registry. S then sells an undivided 75% interest in the same aircraft object to Purchaser 2 (“P-2”), which is also registered on the International Registry. In a dispute among S, P-1, and P-2, P-1 would have a first priority claim to its full 50% interest because it registered before the interest of P-2 was registered. P-2 would have a first priority claim to the remaining 50% interest in the aircraft object, while its claim to the additional 25% interest it purported to purchase would lose to the prior registration between S and P-1. P-1 and P-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 exceed an undivided 100% interest in the aircraft object. Likewise, debtors and creditors can register international interests in aircraft objects that exceed an undivided 100% interest in the aircraft object. In light of this, prior to closing, interested parties must carefully review the priority search certificates to determine that all interests are correctly registered or discharged and that registrations of fractional interests do not exceed 100% of the interest in the aircraft object.

While this ability to register interests that exceed 100% of an aircraft object causes 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 of 100% interests in the same aircraft object). Furthermore, this is consistent with the design of the International Registry system, which places

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<sup>233</sup> GOODE at para. 2.59 (Unidroit 2019).

<sup>234</sup> GOODE at paras. 2.45, 3.97 (Unidroit 2019).

<sup>235</sup> GOODE at para. 3.97 (Unidroit 2019).

the responsibility of ensuring the accuracy of registrations and interests on the parties making the registrations.

Once an aircraft object has been fractionally divided for sale, financing, and/or leasing, it is common for parties to continue to trade in fractional interests in that same aircraft object. Since each sale, finance, or lease is a distinct transaction, each should be the subject of a separate registration of a contract of sale or international interest that reflects the additional (or reduced) fractional interest in the aircraft object.<sup>236</sup>

**Example:** On Day 1, Seller (“S”) sells an undivided 25% interest in an aircraft object to Purchaser (“P”), which sale is registered on the International Registry. On Day 365, S then sells an additional undivided fifty percent (50%) interest in the same aircraft object to P. S and P should establish their rights and priorities under this latter transaction through the registration of an additional sale of an undivided 50% interest in the aircraft object. The priority search certificate obtained after the second registration will reflect the sale of a 25% interest in the aircraft object as of Day 1 and a sale of an additional 50% interest in the aircraft object as of Day 365, for a total fractional interest of 75% held by P.

The Official Commentary points out that some parties may be tempted to simply register an amendment to the original sale or international interest registration to reflect an increase or decrease in the interest sold or pledged (e.g., in the example above, registering an amendment to the Day 1 sale registration to reflect an undivided 75% interest in the aircraft object. However, the Commentary is clear that the registration of an amendment does not accurately reflect the substance and timing of what occurred and should not be used in this situation.

The registration of an amendment results in the modification of an existing registration, and, as a general rule, should be used only to correct errors in the original registration process (i.e., to reflect a change in the original information that was improperly registered, such as incorrect names or incorrect collateral descriptions), so it would not be the appropriate method to register a subsequent sale. Because the sale of an additional interest in the aircraft object is a separate and distinct transfer of a unique interest, a new sale registration is required.<sup>237</sup> The same principles are true with regard to an agreement (other than a contract of sale) between a debtor and creditor to increase or decrease the fractional interest covered by an international interest. All such transactions should be reflected through the registration of a new international interest and not by the registration of an amendment to an existing registration.<sup>238</sup>

Registration of an amendment to a sale or international interest could negatively impact the original priorities of the parties by impacting the date of perfection of rights (depending on what is being amended and how). Additionally, a creditor’s interest may be defeated by other claimants

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<sup>236</sup> Section 5.15(a) of the Cape Town Regulations.

<sup>237</sup> *Id.* See also GOODE at para. 2.179 (Unidroit 2019).

<sup>238</sup> GOODE at para. 2.180 (Unidroit 2019). Where the increase results from a further grant by the debtor, it represents a new interest which is separately registrable. *Id.*

because the subsequent registration of an amendment in an effort to give notice of a new interest, rather than the direct registration of that interest, may be considered invalid under the Treaty.<sup>239</sup>

Another scenario that may arise when dealing with fractional interests in aircraft objects involves partial discharges of previously registered international interests. This scenario is illustrated in the following example:

**Example:** Owner (“O”) owns 100% of an aircraft object and has granted a security interest in 100% of the aircraft object to Lender (“L”), all of which has been registered with the International Registry. O subsequently sells 20% of the aircraft object to Purchaser 1 (“P-1”) and another 20% to Purchaser 2 (“P-2”), both sales being free and clear of liens. L agrees to release its lien insofar as it pertains to the interests that were sold. L should register a partial discharge of a fractional interest relating to the amount of the fractional interests sold to P-1 and P-2. The International Registry system permits partial discharges of interests (in this case L could register two partial discharges, each covering an undivided 20% interest in the aircraft object, or one partial discharge covering an undivided 40% interest in the aircraft object). Simple enough.

Though the above scenario is straightforward, a challenge arises because the International Registry system does not provide a mechanical or systemic way to directly relate or connect the percentage of the international interest that has been partially discharged to the fractional interest that has been sold.<sup>240</sup> Care should be taken by the parties to obtain and maintain documentation that specifically confirms the direct relationship between a partial discharge and the corresponding fractional interest sale to which it relates.

## E. Helicopters and Helicopter Engines

Helicopters are included in the definition of “aircraft objects” as defined in the Protocol and, other than the size requirements,<sup>241</sup> the Protocol treats helicopters in the same manner as airframes. However, the treatment of helicopter engines under the Protocol is not as clear, and the Official Commentary discusses the interplay of the Protocol definitions of “aircraft,”<sup>242</sup> “aircraft engines,”<sup>243</sup> and “helicopters”<sup>244</sup> in reaching a conclusion as to how helicopter engines should be characterised and treated under the Cape Town Convention.

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<sup>239</sup> See GOODE at para. 2.164 (Unidroit 2019).

<sup>240</sup> This issue does not exist when dealing with the release of international interests against a whole aircraft object.

<sup>241</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>242</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>243</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>244</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.

Because the Cape Town Convention has no definition for “helicopter engines” and no apparent alternative treatment for 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. Other practitioners took the position that helicopter engines were included in the definition of “aircraft engines” and treated them accordingly. The Official Commentary, however, worked through a comprehensive analysis of the issue and came to the following conclusions:

- (i) a helicopter engine is an “aircraft engine” when it is not attached to a helicopter;<sup>245</sup>
- (ii) parties can make valid registrations against a specifically described helicopter engine during the time when it is not installed on a helicopter;
- (iii) when a helicopter engine is installed on a helicopter, the helicopter engine (a) becomes a component or an accessory of the helicopter and loses its characterisation as an “aircraft object,” (b) is subject to any existing or new registered interests against the helicopter on which it is installed (but only for the period of installation to such helicopter), (c) remains subject to the priorities established by any registrations made against such helicopter engine when it was not installed on any helicopter,<sup>246</sup> (d) is not capable of being the subject of a separately registered international interest during the time the helicopter engine is installed on such helicopter,<sup>247</sup> (e) is capable of being subjected to the registration of a prospective international interest (or prospective sale) which will be a valid registration against the helicopter engine upon the removal of the helicopter engine from the helicopter and will relate back to the time the prospective registration was completed;<sup>248</sup> and
- (iv) upon removal of the helicopter engine from the helicopter, the helicopter engine is free of any registrations that were made against the helicopter while the helicopter engine was installed on such helicopter.<sup>249</sup>

Consistent with the concepts discussed in sub-paragraphs (iii) and (iv) above, the Official Commentary suggests at least two options to address issues related to the perfection of rights and priorities in helicopter engines: (i) register an interest during a time when the helicopter engine is not installed on any helicopter and take the steps necessary to establish that the helicopter engine was not installed on a helicopter at the time of the registration, or (ii) register a prospective international interest in (or sale of) the installed engine which, immediately upon its removal from

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<sup>245</sup> GOODE at para. 3.9 (Unidroit 2019).

<sup>246</sup> *Id.* at para. 3.11.

<sup>247</sup> *Id.*

<sup>248</sup> GOODE para. 2.61 and 3.11 (Unidroit 2019).

<sup>249</sup> *Id.*

the helicopter, will become a current international interest (or sale), the priority of which relates back to the time the registration was originally made.<sup>250</sup> The priority of 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>251</sup>

Discussions regarding prospective registrations with regard to helicopter engines raise important questions about the nature of a prospective interest and the requirements related to making a valid prospective registration. The International Registry system is designed to require that parties identify their proposed registration (in this case an international interest) as a "current" or a "prospective" international interest.<sup>252</sup> That is, the parties physically making the registration must check a box as to whether the registration is "current" or "prospective" in nature. Given the discussion above, many practitioners chose to make two separate registrations against helicopter engines—first, a "current" registration, immediately followed by a "prospective" registration. While this was a workable solution, it has been the subject of much discussion and has led to multiple registrations which resulted in complicated and lengthy Priority Search Certificates.

This issue was addressed and clarified in the Official Commentary. First, the Official Commentary clarifies that a review of the Cape Town Convention and the applicable Cape Town Regulations leads to the conclusion that the requirement to identify an interest as "current" or "prospective" was and is for statistical purposes only and has no legal effect.<sup>253</sup> Instead, one must look to the facts and circumstances related to the interest being registered.<sup>254</sup> For example, if Debtor A grants a security interest and international interest in favour of Bank A, with no conditions other than closing the transaction, and all elements of an international interest are satisfied, then the registration is a current international interest regardless of whether the registering parties selected the box marked "international interest" or "prospective international interest" on the International Registry system.

On the other hand, if the agreement between a debtor and lender covers a security interest in a helicopter engine that is attached to a helicopter, then one of the elements of the formation of an international interest is missing, and the registration of such an interest is deemed a prospective international interest regardless of whether the registering parties selected the box marked "international interest" or "prospective international interest." Once the elements of an international interest are satisfied (e.g., when the helicopter engine is removed from the helicopter and the engine

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<sup>250</sup> *Id.*

<sup>251</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>252</sup> For example, the choice on the International Registry is to register an "international interest" or a "prospective international interest." For purposes of discussion, we sometimes refer to the international interest as the "current" international interest that is effective from the moment it is searchable on the International Registry.

<sup>253</sup> GOODE at para. 2.61 (Unidroit 2019).

<sup>254</sup> *Id.* at para. 2.40(2).

becomes an “aircraft object” over which the debtor now has the power to dispose), the interest becomes an international interest without any additional action by the relevant parties, and the perfection relates back to date the interest was first registered. This is the case whether the parties made the registration as an “international interest” or “prospective international interest.”

In light of the language in the Cape Town Convention and the additional analysis in the Official Commentary, practitioners should be comfortable with the registration of only one international interest and only one sale (assuming that is the intent of the parties) when dealing with a helicopter engine, regardless of the status of its installation. Having said that, care must be taken so that all parties understand the issue and agree to a proposed course of action with regard to creating a valid registration, whether current or prospective, in a helicopter engine.

Practitioners have explored other practical options relating to the creation and perfection of interests in helicopter engines, including:

- (i) prior to closing, inventory relevant engines to identify the helicopter on which each engine is installed and evaluate options, including removal of engines for the closing;
- (ii) parties 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);
- (iii) if multiple lenders/creditors/lessors are involved with a debtor owner or operator, the parties can enter into an inter-creditor agreement to identify engines and each party’s interest in and priority regarding relevant engines; and
- (iv) require a regularly scheduled inventory and report regarding helicopter engines and their installation status. Based on that information, determine if any additional releases or registrations or terminations should be made.

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 and Mortgagee enter into a security agreement that grants an international interest in a helicopter (“Helicopter A”) and the helicopter engine currently installed thereon, and grants a security interest in the helicopter and helicopter engine in favour of Mortgagee. At closing, the parties register an international interest, or prospective international interest, as applicable, from Owner in favour of Mortgagee against Helicopter A and a separate registration against Helicopter Engine A. Because Helicopter Engine A is attached to Helicopter A, it is considered a component of and included in the definition of a “helicopter.” Therefore, the registration against Helicopter A extends to Helicopter Engine A for the period of time Helicopter Engine A is installed on Helicopter A. The separate registration against Helicopter Engine A, made at a time when it is installed on Helicopter A, is not a valid current international interest registration against

Helicopter Engine A because it lacks the elements that compose an international interest<sup>255</sup> but it is deemed to be a prospective registration that will ripen into a valid international interest at the time Helicopter Engine A is removed from the Helicopter A regardless as to whether the original registration was designated as an “international interest” or “prospective international interest.”

**Practice Note:** The above example may or may not result in a first priority international interest in Helicopter Engine A in favour of the Mortgagee. The Mortgagee will take its interest in Helicopter Engine A subject to competing or conflicting registrations which were made against (i) Helicopter Engine A prior to its installation on Helicopter A, and (ii) Helicopter A, prior or subsequent to the installation of Helicopter Engine A. According to the Official Commentary, the pre-installation registration of an international interest or any other registrable 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>256</sup> But importantly, registration of an international interest in a helicopter that Helicopter Engine A was installed on at the time of registration would not survive the removal of Helicopter Engine A from that helicopter.

In light of the above, the Mortgagee will lose a priority battle with any party who has made a valid prior registration against Helicopter Engine A (i.e., at a time when it was not attached to any helicopter). If Helicopter Engine A remains installed on Helicopter A through the negotiation and closing of the transaction, the Mortgagee will also lose a priority battle against any party who has a prior registered interest in Helicopter A for as long as Helicopter Engine A is installed on Helicopter A. To avoid this result, provided that Helicopter Engine A is either installed on Helicopter A or uninstalled on any helicopter at the time of closing, the Mortgagee simply needs to conduct pre-closing searches with the International Registry, the relevant aviation authority and any applicable lien registry, covering Helicopter Engine A, but without the need to search for registrations with respect to any helicopter on which it was previously installed. If Helicopter Engine A is installed on a helicopter other than Helicopter A, the Mortgagee must also search with respect to that helicopter for competing international interest registrations. If those searches identify prior unreleased registrations against Helicopter Engine A or any helicopter to which it is currently attached, the parties should require a release of those registrations as part of closing (or otherwise agree to a suitable intercreditor arrangement).

The same is true for any party to a transaction involving helicopters and helicopter engines. Prior to a closing the parties must identify all helicopter engines and helicopters and their installation status/location. Parties should obtain (i) priority search certificates from the International Registry, and (ii) a registration and lien search for helicopters from the relevant aviation authority (as a general rule, aviation authorities do not track title to or liens on engines of any kind).<sup>257</sup> Diligence should be conducted to determine if any other searches are necessary or advisable (e.g., a PPSA search in Canada). Because the International Registry priority search certificates for helicopter

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<sup>255</sup> *Id.* at para. 2.61.

<sup>256</sup> GOODE at para. 3.11 (Unidroit 2019).

<sup>257</sup> The U.S. FAA is an exception. While the FAA does not track title to engines it is the repository for liens with a U.S. nexus against engines rated at greater than 550 horsepower.



engines can be complex, it is important to allocate the necessary time prior to closing to fully evaluate and understand the priority search certificates and obtain any required releases or discharges.

**Example:** Owner is obtaining a loan from Lender A with regard to Helicopter 1 which includes Engine. Lender A investigates the Engine's documentation and discovers that Engine is actually installed on a different helicopter, Helicopter 2. Lender B has a registered international interest against Helicopter 2. Although the priority search in respect of the Engine reveals no interests that have been registered against the Engine, the Engine's installation on Helicopter 2 automatically subjects the Engine to Lender B's international interest against Helicopter 2. One way for Lender A to obtain priority over Lender B in the Engine would be to require that the Engine be removed from Helicopter 2. Upon removal of the Engine, Owner would register an international interest in favour of Lender A with respect to the Engine. Absent such removal, Lender B's interest in Helicopter 2 (which includes the Engine) 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 with respect to the Engine).

## F. Accessions

Accessions of parts and other equipment and/or systems to aircraft are often challenging to address and often create complicated intercreditor relationships, particularly in default scenarios. The Cape Town Convention seeks to deal with accessions by carefully distinguishing between an "item" (such as spare parts, modules, computers, audio and visual equipment and the like)<sup>258</sup> and an "aircraft object". Article 29(7) of the Cape Town Convention<sup>259</sup> seeks to preserve the rights (under applicable law) that an owner or creditor of an "item" may have notwithstanding the installation<sup>260</sup> of such item on an aircraft object. The Cape Town Convention ensures that the interests of the owner or creditor of an "item", held prior to its installation on an "aircraft object", will not be affected by any international interests registered against the "aircraft object" on which it is installed (including any non-consensual rights or interest registered under Article 40 and any national interests under Article 50 notice of which has been registered in the International Registry). Thus, so long as the ownership or security interests an "item" are preserved under applicable law and not impacted by virtue of such installation, the Cape Town Convention will not interfere with such priority.

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<sup>258</sup> An "item", for these purposes, is anything which does not constitute an aircraft object.

<sup>259</sup> GOODE at para. 2.227-2.231 (Unidroit 2019). Article 29(7) of the Convention is replicated in Article XIV(4) of the Aircraft Protocol.

<sup>260</sup> The Convention importantly and intentionally uses the term "installed" as opposed to "incorporated" or "attached" (which are often used in the context of accession). By choosing the term "installed", the Convention effectively excludes only the widest concept of the accession doctrine and does not apply to items that are not merely installed but attached or incorporated. The Official Commentary seeks to address the distinction between these terms and the implication of such usage as follows:

The terms "installed", "incorporated" and "attached" are not defined but appears to be intended to denote different degrees of association between the accessory and the principal object. On this basis "installed" means that the accessory can be removed without any, or any significant, damage either to the object or to the accessory, while "incorporated" is at the other end of the spectrum, denoting an absorption of the accessory into the object such that the accessory loses its identity and "attached" refers to the intermediate position where the accessory retains its identity but cannot be detached without significant damage to the object or the accessory. GOODE at para. 2.231 (Unidroit 2019).

**Example:** An owner (“**Owner**”) of a wifi system obtains a loan from lender (“**Lender**”) to cover the costs associated with the production and installation of wifi systems across a fleet of aircraft. Lender has been granted a security interest over the wifi system to be installed in each of the aircraft. The wifi system is readily removable from the aircraft without damage to the aircraft or the system itself. It is clear that so long as Lender has perfected its security interest in the system under applicable law in advance of installation on the aircraft and local law would preserve such interest notwithstanding the installation of such system on the aircraft, Lender’s interest will not be affected by any interest registered or created against the applicable aircraft under the Cape Town Convention.

## G. 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.

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 or 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>261</sup>

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<sup>261</sup> See Section IV.F. below.

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>262</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 permissible 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>263</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 with any registration of a non-convention interest), and is 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>264</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>265</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

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<sup>262</sup> Article 1(dd) of the Convention; GOODE at para. 4.40 (Unidroit 2019).

<sup>263</sup> See Section II.H herein.

<sup>264</sup> GOODE at para. 4.293 (Unidroit 2019).

<sup>265</sup> GOODE at para. 2.40(4) (Unidroit 2019).

interest.<sup>266</sup> 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>267</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>268</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>269</sup>

## H. 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>270</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>271</sup> The declarations made by the EU at the time of its accession to the Cape Town Convention and Aircraft Protocol (“**EU Declarations**”), and the Council Regulations and European Parliament Regulations referred to in those declarations, affect the capacity of member states to make declarations under Cape Town Convention Article 55 (Modification of provisions regarding relief pending final determination) and Aircraft Protocol Article VIII (Choice of Law), Article X (Modification of provisions regarding relief pending final determination) and Article XI (Remedies on Insolvency) (“**Relevant Articles**”).

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:

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<sup>266</sup> The International Registry has implemented new requirements to making these types of registrations in an effort to reduce registrations not contemplated by Article 40. See Section II.H. herein.

<sup>267</sup> GOODE at para. 4.157 (Unidroit 2019).

<sup>268</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>269</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>270</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>271</sup> Council decision of 6 April 2009 (2009/3704/EC).

- 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.

Following the withdrawal of the United Kingdom from the European Union on 31<sup>st</sup> January, 2020:

- a) The United Kingdom is not bound by the EU Declarations; and
- b) The United Kingdom may make the declarations it sees fit under the Relevant Articles.

## I. 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 in 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 characterised as establishing an international choice of law rule. Broadly speaking, the Geneva Convention states agree that certain rights<sup>272</sup> recorded in the state of registry take priority over rights that are unrecorded or recorded in other jurisdictions.<sup>273</sup> The

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<sup>272</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.

<sup>273</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).

validity, enforceability and perfection of such Geneva Convention recognised 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 the 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:

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; and

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>274</sup>

Note that the 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 of Article XXIV. The Rome Convention was not widely adopted and, in any case, at 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 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.

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<sup>274</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.



## 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>275</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>276</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>277</sup>

The International Registry provides for the registration of interests as against particular uniquely identifiable aircraft objects rather than against parties to a transaction. Anyone upon paying the requisite search fee can perform searches with respect to aircraft objects (but not with respect to transaction parties). A search with respect to an aircraft object returns on a Priority Search Certificate, a list of all registrations (including registrations which have been discharged) with respect to the aircraft object.

Interests are registered electronically with the consent of the appropriate parties. With one exception,<sup>278</sup> no transaction documents are deposited with or accepted by the International Registry, which keeps administrative costs of the International Registry to a minimum, and protects the confidentiality of the terms of each transaction. This approach is in line with typical practice in a notice based registry, such as the International Registry. Because the International Registry is an electronic database searchable over the worldwide web,<sup>279</sup> a user must have a computer with internet access and the necessary software to access the International Registry. The search function of the International Registry is fully open to the public, but there are restrictions established by the Cape Town Regulations which are designed to ensure that only authorised users make registrations.<sup>280</sup>

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<sup>275</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>276</sup> Section 3.1 of the Cape Town Regulations.

<sup>277</sup> Section 3.4 of the Cape Town Regulations.

<sup>278</sup> See Section II.H. herein, which describes the registration process for RNCRI's.

<sup>279</sup> The web address is <https://www.internationalregistry.aero>.

<sup>280</sup> GOODE at para. 2.192 (Unidroit 2019). See also Section 4 of the Cape Town Regulations and Section 7 of the Cape Town Procedures.

## B. User Entities

### (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 must establish an account<sup>281</sup> 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>282</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 or make registrations on behalf of its TUE. The administrator of a TUE will also have the ability to authorise 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” (“**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 authorised 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 authorisation from a TUE to consent to or make 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 professional users of the PUE. The TUE may also revoke authorisations it has granted. Additionally, those holding such authorisations (i.e., a PUE and professional users) may renounce them. All authorisation 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” or “**RUs**”).

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

1. Establishing the Account. To establish an account (other than a guest account) with the International Registry, the prospective administrator of a prospective RUE must make an application online 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), 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

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<sup>281</sup> In this case we are referring to an account other than a guest account. The guest account, introduced in October 2019, is free and there is no vetting of the account, other than an automated verification of the email address. Therefore, this account can be used for searching but not for registering. TUE and PUE accounts, described in the text, are permitted to make registrations as their identity and contact details has been vetted.

<sup>282</sup> Section 2.1.20 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.*

which is stored locally on the computer<sup>283</sup> that the administrator will use to interact with the registry. The password will be used when electronically signing or making consents on the website.<sup>284</sup> The applicant must pay for the account and provide the International Registry with the following items by email: (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>285</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 same computer from which the original application was made and upon which the password was created).<sup>286</sup> 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. This will certainly include, at least, anti-virus and anti-spyware software; network and device level firewalls; regularly patched Operating Systems and the latest 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. Data back-ups are also recommended. Providing adequate security is mandatory and will require the skills of an information technology professional. Practitioners may consider adopting cyber security and information security standards such as ISO 27001 or the NIST cybersecurity framework.

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 only (although it is possible to transfer the keystore to another computer with support from a registry

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<sup>283</sup> Future versions of the International Registry may adopt a technologically different approach to storing these passwords, or may not store them at all, instead relying on a hash of the password stored in the cloud. The critical point is that access to the key used to sign transactions is controlled by the TUE or PUE and is not available to the Registrar.

<sup>284</sup> Currently, the International Registry offers a one year license costing \$200. Payment should be made on-line and by credit card.

<sup>285</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.

<sup>286</sup> Future versions of the system may not require the digital certificate to be downloaded onto the same computer, but as of 2019, this remains a requirement.

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. The time it can take to obtain a replacement digital certificate, as well as the cost involved, are why back-ups of the file containing the relevant private encryption keys and digital certificates are recommended.

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 authorise new TUs within the TUE to make registrations on its behalf with regard to specifically identified aircraft objects, (iii) electronically authorise 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 authorisations 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 (with one exception)<sup>287</sup> 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 authorisations 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>288</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. 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 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>287</sup> See Section II.H, which describes the registration process for RNCRIIs.

<sup>288</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.

The first approach involves a Transacting User Entity (TUE) making 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 the use of this approach is expected to become more common relative to the other two approaches.

The second approach involves a Professional User Entity (PUE) making registrations on behalf of one or more TUEs, having been authorised, on a per-object basis, by each such TUE.

Many of the larger aircraft-owning entities, such as airlines, prefer to use this standard Professional User Entity approach and authorise 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 transaction 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 for this reason. 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 coordinating role, the sequential nature of the International Registry can be a challenge for deals involving more than two parties. Launched as part of Generation II, the Closing Room™ feature has simplified the process by introducing the role of Coordinating Entity, which is often fulfilled by a PUE, but can be performed by anyone. This allows the Coordinating Entity to setup complex multi-party registrations all in one place where all participants in the transaction can review it in advance and consent if required.

The third approach involves a Professional Administrator (PA) making 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 the form of a TUE (where the administrator thereof is an employee) or of a PUE (where the administrator thereof is an agent). A “compromise” approach, which some saw as the best of both worlds, has since 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 authorise registrations on a per-object basis. However, there is a loss of control, as the PA is empowered on the International Registry system to make all registrations on behalf of the TUE. If a disagreement arises, the TUE, often through their nominated Back-Up Contact<sup>289</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 International Registry, 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 International Registry, that the firm providing the PA service has adequate insurance and expertise and that the PA has adequate information security (cybersecurity) in place which can be audited by the TUE. 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 International Registry 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. 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.

### 3. Controlled Entities

As discussed above, 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>290</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

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<sup>289</sup> This is a person appointed by the entity pursuant to Section 5.12 of the Cape Town Procedures.

<sup>290</sup> Section 2.1.7 of the Cape Town Regulations.

administrator for the “parent” TUE creates the account by following a few simple on-line instructions and paying the applicable fee.<sup>291</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. If an entity has been established on the International Registry as a Controlled Entity, it can be converted to a TUE by following the process on the International Registry website and paying the fee.

## C. Registration Process Overview.

### (I) 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<sup>TM</sup><sup>292</sup>. For purposes of the below discussion, registrations made on behalf of a TUE: (i) through its administrator, whether an employee or agent (ii) an authorised TU (iii) an authorised PUE administrator or (iv) an authorised PU, are collectively referred to herein as the “Registering Party” (“**RP**”).

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

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<sup>291</sup> GOODE at para. 5.33 (Unidroit 2019).

<sup>292</sup> The term Closing Room<sup>TM</sup> is a trade mark of Aviareto Limited.



## **MOR:**

In order to effect a registration using MOR, an RP 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. In the alternative, the RP can request and obtain authorisation from both TUE parties in advance, in which case the registration is complete upon entering the required data and making payment. Once all necessary consents are received by the International Registry system, the registration will automatically go live with no need for further action on behalf of the registering parties.

Registrations using MOR require the parties to coordinate and plan carefully when conducting a sequence of registrations. This is especially important so as to make sure that certain registrations go live before any subsequent registrations, which pertain to such previously-filed registrations, go live. For this reason, MOR may be best suited to transactions involving very few registrations, e.g., the sale of an aircraft where no financing is involved. For transactions involving several parties and several registrations, it may be wise to consider using the Closing Room™ feature.

## **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. The Coordinating Entity can enter registration data as it becomes available and the Closing Room™ folder serves as a repository for all data and consents provided. Prior to going live the registration data are referred to as pre-registrations. They have no legal standing as registrations and the Cape Town Regulations are very clear on that matter. The Closing Room™ folder can be adjusted over time. Once the Coordinating Entity is satisfied with the pre-registration data, the Closing Room™ folder is “locked” i.e. pre-registration data can no longer be altered. Once locked, the pre-registrations are available for review and consent by TUEs named in the Closing Room™ folder or one or more PUEs authorised by those TUEs either by logging into the Closing Room™ folder or through review of a Pre-Registration Report. Each Closing Room™ folder is assigned an ID number so that it can be easily located by parties to a specific transaction. AEP codes, if required, may be entered at this stage, or during initial population of the Closing Room™ folder. The final step to bring these pre-registrations live is to pay the registration fee and then release the pre-registrations. The benefits of this approach are that it (i) allows coordination, flexibility and changes while a transaction is being negotiated and (ii) allows the pre-registrations to be lined up in advance and brought live with one click when appropriate. YouTube

(<https://www.youtube.com/user/IntlRegistry>) and other video sharing sites contain explanatory material.

## (II) Object Identification:

The International Registry is a notice-based system and registration is made against a uniquely identified aircraft object (and not against the debtor). It is very important that the RP selects the proper aircraft object when seeking authorisations, making registrations and running International Registry searches. 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>293</sup> 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 ("**Provided object identification information**")<sup>294</sup> ), and such provided object identification information **must be used** where available.

Having each object available in the provided object identification information<sup>295</sup> (rather than manually inputting the relevant data) greatly reduces the chance for errors (which could invalidate a registration).<sup>296</sup> Sometimes, however, provided object identification information is not available for the aircraft object. In such situations, the party effecting the registration is permitted to manually insert (or "free text")<sup>297</sup> 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>298</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.

## (III) Authorisation

In order to make a registration, the RP must have authorisation from the TUE administrator (s) of the parties to the registration with respect to the specific aircraft object. Therefore, the first step for an RP is to ensure that it has authorisation to make the relevant registration. A TUE administrator

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<sup>293</sup> Section 5.3(c) of the Cape Town Regulations.

<sup>294</sup> Section 2.1.14 of the Cape Town Regulations.

<sup>295</sup> Historically "provided object identification information" has been referred to as information in the "drop-down menu" with respect to an aircraft object description. However, the data is not on a drop-down menu and the regulations refer to "Provided object identification information".

<sup>296</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 2.166 (Unidroit 2019).

<sup>297</sup> While those in the Industry may refer to "free-text" that term is not defined in the Regulations. In the Regulations free-text would encompass 2.1.14 "information submitted in a different format by the registering person".

<sup>298</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.

may either make a registration directly or authorise (i) a TU (ii) a PUE or (iii) a PU to do so.<sup>299</sup> Authorisations apply to specific aircraft objects only; an administrator cannot provide blanket authorisation to make registrations. To ensure a smooth transaction, authorisations should be put in place in advance of closing.

In requesting an authorisation, 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 (provided object identification information),<sup>300</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 RP has the option of entering the data directly, which is commonly referred to as a "free text" entry; however, as noted in Section IV.C. II., the use of free text entries should only be made when the 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 RP must note that many entities have similar names and it may be necessary to perform additional due diligence before selecting a particular entity. The RP should note that, given the global nature of the International Registry, a name may not be unique and information on where the entity 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 authorisation from an RP, the administrator should carefully review the notice to ensure that the RP 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 authorisations of PUEs to work on particular aircraft objects. This includes revoking authorisations after they are no longer necessary. There is no cost to revoking or approving authorisations, and accordingly there should be no impediment to

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<sup>299</sup> Special rules would apply if the applicable Contracting State designated an entity in its territory as a "direct entry point." See Section V.A. below for a discussion on entry points.

<sup>300</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.

keeping the authorisation list up to date. PUEs should also periodically prune their authorisation lists to renounce those that they will never use again.

#### (IV) Completing Registrations

Once the relevant authorisations are in place, the person initiating the registration must log on to the International Registry website, choose either MOR registration or a prepared Closing Room™ folder, 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 RP will also be required to enter the state of registry for the airframe or helicopter, and if applicable, the relevant unique authorisation code for States with an entry point.<sup>301</sup> Finally, the RP must decide whether to specify a lapse date for the relevant registration.<sup>302</sup> In practice, this feature of the registry system is almost never used and the practitioner is advised to use a lapse date only when appropriate, which is rare..

**Practice Note:** Entering the registration data is straightforward and at the end of the process the RP will be asked to confirm that the data is correct. Given the value of the assets in question and the permanency of the records on the International Registry, practitioners are advised to carefully check the data before confirming.

For most registrations, the consent of both parties is required. 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, but 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.<sup>303</sup> 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. Once the second party consents, the registration enters a queue to be processed after which the registration becomes complete and searchable on the International Registry; this process usually takes only a matter of seconds. 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).

When using the Closing Room™ feature, the registration(s) will “go live” (i.e., be searchable) after (i) all consents are received (ii) all registration data is entered, (iii) if applicable, all necessary AEP codes are entered, (iv) the pay and release button is selected and (v) payment is submitted.<sup>304</sup> .

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<sup>301</sup> See Section V.A. for a further discussion on such authorisation codes.

<sup>302</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.

<sup>303</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.

<sup>304</sup> 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 major credit card but not by debit card. Payment may also be made by prepaid credit which has been previously loaded on the system. This can be done by making a credit

**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.

As 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 International Registry system has been designed to manage these circumstances, there can be no guarantee that a registration will actually go live. Therefore, the RP (and any parties relying on the registration) should always search the International Registry after completing any registrations to ensure that the registration they consented to actually went live and that the applicable registrations have been made in the proper order to achieve the desired priorities.<sup>305</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. When using the Closing Room™ feature, there is a further responsibility (see section 7.4 of the Closing Room™ appendix to the Cape Town Regulations) on RUs 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. Any discrepancies discovered should be reported to the Registrar to be corrected per Section 5.17 of the Cape Town Regulations.

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.

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card pre-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.

<sup>305</sup> See Section IV.E. for a discussion on searches on the International Registry.

## (V) MAKING A REGISTRATION USING A DIRECT ENTRY POINT OR AN AUTHORISING ENTRY POINT.<sup>306</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 “authorising entry point”. Section V.A. provides information on the additional steps required to make a registration to the extent that an RU is required by the relevant Contracting State to use such a “direct entry point” or “authorising entry point”.<sup>307</sup>

## D. Agents, Trusts and Representative Capacities

It is common in aviation transactions to have one party act in a representative, trust or agency capacity (e.g., owner trustee, security trustee, collateral agent) for other parties though this practice may vary from one jurisdiction to another. The Cape Town Convention allows this common practice to continue with the intent to permit a person to take any action under the Convention, 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>308</sup>

This is particularly important in many civil law jurisdictions which prior to becoming Contracting States, as a general matter, did not recognise security trusts. By virtue of Article VI, an international interest under a security agreement granted in favour of a chargee as agent or trustee for bondholders or other creditors may be registered in the name of such chargee (it is not necessary to state the registrant’s capacity beyond requiring, in the case of registration of the trust as a controlled entity, an electronic assertion by the trustee that the trust is a controlled entity which the trustee manages or administers). 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<sup>309</sup>.

**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

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<sup>306</sup> See Section V.A. herein for a discussion on entry points.

<sup>307</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.

<sup>308</sup> Article VI of the Protocol.

<sup>309</sup> GOODE at para. 3.82 (Unidroit 2019).

and, as discussed below, the Official Commentary, the international interest can and should be registered in favour of “Bank,” and need not be registered in favour of “Bank, as Administrative Agent.” This is so even if, under the applicable law, the concept of an administrative agent is not recognised.

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 Town Convention because whether the registration is made in the name of “Bank” or “Bank, as Administrative Agent,” third parties are made aware of the existence of the international interest against an aircraft object. If necessary, 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.

Article VI applies where the trust has been validly constituted (and the trustee validly appointed) under its applicable law and where the trustee (or the agent or other representative) has actual or ostensible authority to take actions under the Cape Town Convention. The status of a duly appointed trustee, agent or other representative must be recognised in all Contracting States, whether or not, in the case of a trustee, their laws recognise the concept of a trust. Recognition of a valid trust involves acceptance of the title of a trustee duly appointed, the power of the trustee to exercise remedies, including repossession and sale, on behalf of the creditors and the status of trust assets as constituting a separate fund held for the beneficiaries and not available to the trustee’s creditors in the event of its insolvency<sup>310</sup>.

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 arises by an act of the parties (in which case it is registrable as an assignment) or by operation of law (in which case the transfer is outside the scope of the Convention)<sup>311</sup>

**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 in a consensual instrument its entire trust business to Trust Company 2, and Trust Company 2 succeeds to all of Trust Company 1’s rights and obligations. Such succession should be reflected on the International Registry as an assignment by Trust Company 1 to Trust Company 2 of such international interest.

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<sup>310</sup> Goode at para 3.82

<sup>311</sup> GOODE at para. 3.84 (Unidroit 2019).



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 trust property has been validly conveyed to the successor and whether the trust continues to be validly constituted in favour of the beneficiaries. However, the effect of the conveyance under the Cape Town Convention is to create an assignment of the original international interest and it should be registered as such.<sup>312</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 organisation, it should not be given any additional material or substantive consideration.

As discussed, 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>313</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>314</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 or representative 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>315</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>316</sup> and this may be one of

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<sup>312</sup> Goode at para 3.84

<sup>313</sup> Article VI of the Protocol.

<sup>314</sup> Article 1 of the Convention.

<sup>315</sup> GOODE at para. 5.33 (Unidroit 2019).

<sup>316</sup> See, e.g., the use of the word “agreement” in Article 17.3 of the Convention.

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 person is entitled to assert rights and interests under the [Cape Town] Convention.”<sup>317</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>318</sup>

## E. International Registry 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>319</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>320</sup>

In conducting searches it is important to understand that the search results will only reflect “searchable” registrations. As previously discussed, 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

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<sup>317</sup> Article VI of the Protocol.

<sup>318</sup> GOODE at para. 5.33 (Unidroit 2019).

<sup>319</sup> Article 22(2) of the Convention.

<sup>320</sup> Article 22(3) of the Convention, and Article III of the Protocol.

reflected on a priority search certificate).<sup>321</sup> Such registration, once searchable, is complete and will be effective as against third parties.<sup>322</sup>

There are two primary 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>323</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>324</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 aircraft object.

In contrast, an "informational search" is a search using only the aircraft object's manufacturer's serial number.<sup>325</sup> The International Registry developed the informational search at the request of the industry to address challenges created by the precise 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>326</sup> The International Registry website is designed to ensure a user cannot do a priority search without first doing the wider informational search (other than in the case of a search using a Closing Room™ folder ID or Self 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>327</sup> However, the use of the informational search is an important tool that allows the person conducting a priority search to be confident they have searched in the appropriate manner.

Unlike the priority search, the informational search will return a listing of aircraft objects, not registrations. The list returned will be all objects 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) that matches in whole or part the numeric serial number entered by the searching person. For instance, an informational search

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<sup>321</sup> GOODE at paras. 2.156 and 4.153 (Unidroit 2019).

<sup>322</sup> Articles 19(2) and (6) of the Convention and Article XX(1) of the Protocol.

<sup>323</sup> See Sections 7.1, 7.2 and 7.3 of the Cape Town Regulations.

<sup>324</sup> Section 7.1 of the Cape Town Regulations.

<sup>325</sup> Section 7.3 of the Cape Town Regulations.

<sup>326</sup> Section 13.2 of the Cape Town Procedures.

<sup>327</sup> Section 13.3 of the Cape Town Procedures.

against serial number “87410” will produce results pertaining to all aircraft objects that are included in any of the pre-populated manufacturer’s list or that have prior registrations and where the serial number matches or nearly matches 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 International Registry 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. Informational search data may be filtered by manufacturer name and/or by generic model designator.

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 chart will list the manufacturer, model designator, and manufacturer’s serial number, and note whether the applicable object is listed on the current International Registry manufacturer’s list and if a 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 “plus sign” next to each aircraft object, making payment and downloading the priority search certificates.

It should be emphasised 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, an RU 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>328</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>329</sup> It is available free of charge.

The International Registry also provides for three additional searches to assist practitioners in managing closings and RUs. First, a “registry user entity search” may be performed to search for a

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<sup>328</sup> Section 7.5 of the Cape Town Regulations.

<sup>329</sup> Section 7.5(b) of the Cape Town Regulations.

RUE identity information and contact details.<sup>330</sup> Such a search will also indicate whether the RUE has an active account on the International Registry and, therefore, it is helpful for practitioners to run such a search in advance of closings to help avoid potential delays that could arise from lapsed accounts that were previously unknown to the parties. Second, a “self-search” may be performed by the administrator of a particular TUE to search against that TUE (and its controlled entities) that will provide a list of all aircraft objects to which such TUE (and/or controlled entity) is a named party on the International Registry.<sup>331</sup> Third, Priority Searches can be run based on a Closing Room™ folder ID. Once a Closing Room™ folder has been concluded and the registrations released, the Coordinating Entity can enter the Closing Room™ folder ID and generate a set of priority searches that cover every object in the Closing Room™ folder. This is useful as it allows the Coordinating Entity to quickly generate a set of priority search certificates and confirm that all registrations are searchable and in the order intended.

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

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<sup>330</sup> Section 7.6 of the Cape Town Regulations.

<sup>331</sup> Section 7.7 of the Cape Town Regulations.

## PRIORITY SEARCH CERTIFICATE

Issued by the International Registry of International Interests in Aircraft Equipment

This certificate was created on 20 Dec 2019 at 10:35:58 GMT

Requested by: Clare F. Kelly of Aviareto Limited  
Beneficiary of Priority Search Certificate: Aviareto Limited

Search Criteria  
Manufacturer: BOMBARDIER  
Model Designation: CRJ-700  
Manufacturer's Serial Number: 10317

Certificate Number  
**1310233**

01 Dec 2010 17:07:23 GMT		File Number: 676334
Registration	<p>Type: Sale Fractional or Partial Interest: 100.0000000% Seller: Bombardier Inc. (sara.jason@aero.bombardier.com) Buyer: AMERICAN EAGLE AIRLINES, INC.* (rose.gacilos@aa.com)</p>	
01 Dec 2010 17:14:29 GMT		File Number: 676540
Registration	<p>Type: International Interest Fractional or Partial Interest: 100.0000000% Debtor: AMERICAN EAGLE AIRLINES, INC.* (rose.gacilos@aa.com) Creditor: Wells Fargo Bank Northwest, National Association, as Trustee* (aimée.b.johnson@wellsfargo.com) Right to Discharge Holder: Wells Fargo Trust Company, National Association, as Trustee* (aimée.b.johnson@wellsfargo.com)</p>	
09 Oct 2011 14:22:08 GMT		File Number: 761808
Registration	<p>Type: Sale Fractional or Partial Interest: 100.0000000% Seller: AMERICAN EAGLE AIRLINES, INC.* (rose.gacilos@aa.com) Buyer: American Airlines, Inc. (geraldine.lm@aa.com) Right to Discharge Holder: American Airlines, Inc. (geraldine.lm@aa.com)</p>	
09 Oct 2011 14:29:36 GMT		File Number: 761814
Registration	<p>Type: Assignment of an International Interest Interest being Assigned: 676540 Fractional or Partial Interest: 100.0000000% Assignor: AMERICAN EAGLE AIRLINES, INC.* (rose.gacilos@aa.com) Assignee: American Airlines, Inc. (geraldine.lm@aa.com) Right to Discharge Holder: American Airlines, Inc. (geraldine.lm@aa.com)</p>	
09 Oct 2011 14:35:13 GMT		File Number: 761820
Registration	<p>Type: International Interest Fractional or Partial Interest: 100.0000000% Debtor: American Airlines, Inc. (geraldine.lm@aa.com) Creditor: Wells Fargo Bank Northwest, National Association, as Trustee* (aimée.b.johnson@wellsfargo.com) Right to Discharge Holder: Wells Fargo Trust Company, National Association, as Trustee* (aimée.b.johnson@wellsfargo.com)</p>	

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Page 1 of 3

BOMBARDIER II CRJ-700 II 10317

09 Oct 2011 14:40:43 GMT		File Number: 761826
Registration	<p>Type: International Interest Fractional or Partial Interest: 100.0000000% Debtor: AMERICAN EAGLE AIRLINES, INC.* (rose.gacilos@aa.com) Creditor: American Airlines, Inc. (geraldine.lm@aa.com) Right to Discharge Holder: American Airlines, Inc. (geraldine.lm@aa.com)</p>	

### End of List

In conformity with Article 22(3) of the Cape Town Convention "International Interest" in this certificate denotes an interest which the creditor has acquired or intends to acquire and is not intended to indicate whether what is registered is an international interest or a prospective international interest. Similarly, with reference to Article 19(4) and 19(5) of the Cape Town Convention, "assignment" is not intended to indicate whether what is registered is an assignment or a prospective assignment, and, in conformity with Article III of the Aircraft Protocol, "sale" is not intended to indicate whether what is registered is a sale or a prospective sale.

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.

\*The International Registry was notified that this entity had a change of name within the meaning set out in the Regulations and Procedures for the International Registry.

Name Change History			
Entity Reference	Old Name	New Name	Date Changed on International Registry
0000009468	AMERICAN EAGLE AIRLINES, INC.	ENVOY AIR INC.	13-Feb-2015
0000006864	Wells Fargo Bank Northwest, National Association, as Trustee	Wells Fargo Trust Company, National Association, as Trustee	04-May-2018

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BOMBARDIER II CRJ-700 II 10317

### Supplementary Priority Search Information

This information table contains supplementary priority search information provided pursuant to Section 7.8 of the Regulations for the International Registry. Supplementary priority search information is provided for information purposes only to assist users in reviewing the registered information contained in the priority search certificate. **Users must review all registered information contained in the priority search certificate and not just the information contained in the supplementary priority search information.** In the case of inconsistency between the registered information contained in the priority search certificate and the supplementary priority search information, the registered information contained in the priority search certificate shall prevail. Any such inconsistency and any inaccuracy discovered should be reported to the Registrar within 72 hours of receipt of the priority search certificate by the user.

Date	Type	File Number	Fractional or Partial Interest	Fully Discharged	Discharged by File Number(s)	Date of Full Discharge
01 Dec 2010 17:07:23 GMT	Sale	676534	100.0000000%	-	-	-
01 Dec 2010 17:14:29 GMT	International Interest	676540	100.0000000%	-	-	-
09 Oct 2011 14:22:08 GMT	Sale	761808	100.0000000%	-	-	-
09 Oct 2011 14:29:36 GMT	Assignment of an International Interest	761814	100.0000000%	-	-	-
09 Oct 2011 14:35:13 GMT	International Interest	761820	100.0000000%	-	-	-
09 Oct 2011 14:40:43 GMT	International Interest	761826	100.0000000%	-	-	-

This document has been digitally signed by the Registrar and the signature has been filed.

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An example of an informational search is set out below:

INTERNATIONAL REGISTRY OF MOBILE ASSETS

MANAGE REGISTER SEARCH DOCUMENTATION

My Account

Search Registrations

1

2

3

4

Informational Search

Priority Search Details

Verify

Priority Search

Information

To perform an Informational Search on an object, please search by entering your MSN below.

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 International Registry Regulations, the use of **provided object identification information** (whether in making registrations or searches) or the [Supplemental Object Identification Materials](#) relating thereto, each provided by the manufacturers, is subject to the [Manufacturers' Disclaimer](#).

INTERNATIONAL REGISTRY OF MOBILE ASSETS

MANAGE REGISTER SEARCH DOCUMENTATION

My Account

Search Registrations

1

2

3

4

Informational Search

Priority Search Details

Verify

Priority Search

Information

CAN'T FIND OBJECT?

FILTER RESULTS	MSN	MANUFACTURER	MODEL	MATCHES CURRENT MANUFACTURER'S LIST	REGISTRATION EXISTS		SELECTED OBJECTS
<b>MANUFACTURER</b> <small>Reset</small>	10317	BOMBARDIER	CRJ-700	Yes	Yes	✓	<div> <div>10317</div> <div>BOMBARDIER</div> <div>CRJ-700</div> </div>
<input type="checkbox"/> BOMBARDIER (1)	10317	PRATT & WHITNEY CANADA	PT6A SERIES	Yes	No	+	
<input type="checkbox"/> CESSNA (3)	10317	ROLLS ROYCE	RB211 22	Yes	No	+	
<input type="checkbox"/> HONEYWELL (10)	10317	ROLLS ROYCE	TRENT1000	Yes	No	+	
<input type="checkbox"/> INTERNATIONAL AERO ENGINES (1)	110317	WILLIAMS INTERNATIONAL CO LLC	FJ44-2A	Yes	No	+	
<input type="checkbox"/> PRATT & WHITNEY CANADA (1)	410317	ROLLS ROYCE	T703	Yes	No	+	
<input type="checkbox"/> ROLL ROYCE (3)	P103170	HONEYWELL	TFE731 Series	Yes	Yes	+	
<input type="checkbox"/> WILLIAMS INTERNATIONAL CO LLC (1)	P103171	HONEYWELL	TFE731 Series	Yes	Yes	+	
	P103172	HONEYWELL	TFE731 Series	Yes	Yes	+	
	P103173	HONEYWELL	TFE731 Series	Yes	Yes	+	
<b>MODEL</b> <small>Reset</small>	P103174	HONEYWELL	TFE731 Series	Yes	Yes	+	
<input type="checkbox"/> 401 (1)	P103175	HONEYWELL	TFE731 Series	Yes	Yes	+	
<input type="checkbox"/> 441 (1)	P103176	HONEYWELL	TFE731 Series	Yes	Yes	+	
<input type="checkbox"/> 501 (1)	P103177	HONEYWELL	TFE731 Series	Yes	Yes	+	
<input type="checkbox"/> CRJ-700 (1)	P103178	HONEYWELL	TFE731 Series	Yes	No	+	
<input type="checkbox"/> FJ44-2A (1)	P103179	HONEYWELL	TFE731 Series	Yes	No	+	
<input type="checkbox"/> PT6A SERIES (1)	V10317	INTERNATIONAL AERO ENGINES	V2500-A5	Yes	Yes	+	
<input type="checkbox"/> RB211 22 (1)	401-0317	CESSNA	401	Yes	No	+	
<input type="checkbox"/> T703 (1)	441-0317	CESSNA	441	Yes	Yes	+	
<input type="checkbox"/> TFE731 Series (10)	501-0317	CESSNA	501	Yes	Yes	+	
<input type="checkbox"/> TRENT1000 (1)							
<input type="checkbox"/> V2500-A5 (1)							

Showing 1 to 20 of 20 results

1

2

Next

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

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Contracting State Search Certificate		Search Criteria: Ireland							
<p>Issued by  <b>International Registry for International Interests  In Mobile Equipment (Aircraft Equipment)</b></p>									
<p>This certificate was created on: 20 Dec 2019 at 20:12:19 GMT  Certificate Number: 16917  Requested By: Clare F. Kelly of Aviareto Limited  Beneficiary of Contracting State Search Certificate: Aviareto Limited  Search Criteria: Ireland</p>									
<p><u>Search Results</u>  Below is the list of instruments deposited by the above Contracting State, together with the date of deposit of each such instrument as advised by UNIDROIT, the depositary, in accordance with the Convention and the Protocol. Such instruments include (i) any declaration, including any designation of entry point, made at the time of the ratification, acceptance, approval or accession by the Contracting State; (ii) any subsequent declaration, including any designation, made by the Contracting State; (iii) any withdrawal of any such declaration; and (iv) any denunciation of the Convention or the Protocol by the Contracting State notified to the depositary.</p>									
<p><u>Instrument</u></p> <table border="0"> <tr> <td>Accession of Convention</td> <td></td> </tr> <tr> <td>Deposit Date:</td> <td>29 Jul 2005</td> </tr> <tr> <td>Effective Date:</td> <td>01 Mar 2006</td> </tr> </table>				Accession of Convention		Deposit Date:	29 Jul 2005	Effective Date:	01 Mar 2006
Accession of Convention									
Deposit Date:	29 Jul 2005								
Effective Date:	01 Mar 2006								
<p><u>Instrument</u></p> <table border="0"> <tr> <td>Accession of Protocol</td> <td></td> </tr> <tr> <td>Deposit Date:</td> <td>23 Aug 2005</td> </tr> <tr> <td>Effective Date:</td> <td>01 Mar 2006</td> </tr> </table>				Accession of Protocol		Deposit Date:	23 Aug 2005	Effective Date:	01 Mar 2006
Accession of Protocol									
Deposit Date:	23 Aug 2005								
Effective Date:	01 Mar 2006								
<p><u>Declaration</u></p> <table border="0"> <tr> <td>Convention:</td> <td>Arts. 39(1)(a)-(b), 54(2)</td> </tr> <tr> <td>Deposit Date:</td> <td>29 Jul 2005</td> </tr> <tr> <td>Effective Date:</td> <td>01 Mar 2006</td> </tr> </table>				Convention:	Arts. 39(1)(a)-(b), 54(2)	Deposit Date:	29 Jul 2005	Effective Date:	01 Mar 2006
Convention:	Arts. 39(1)(a)-(b), 54(2)								
Deposit Date:	29 Jul 2005								
Effective Date:	01 Mar 2006								
<p>(1) In accordance with Article 39 of the Cape Town Convention, it is declared:  (i) that when, under a law of the State, a non-consensual right or interest (other than a right or interest to which Article 40 of the Cape Town Convention applies) has priority over an interest in an object equivalent to that of the holder of a registered international interest, that right or interest has priority over a registered international interest, whether in or outside insolvency proceedings; and  (ii) that if:  (i) the State or any State entity, or  (ii) any intergovernmental organisation of which the State or any such entity is a member, or  (iii) any private provider, has provided a public service, nothing in that Convention affects the right of the State, entity, organisation or provider to arrest or detain, in accordance with the laws of the State, an object for the payment of amounts owed to the State or any such entity, organisation or provider for those services in respect of that object or another object.</p>									
<p>(2) In accordance with subarticle 2 of Article 54 of the Cape Town Convention, it is declared that a creditor who wishes to exercise a remedy that is available to the creditor under a provision of that Convention is not required to make an application to the High Court for leave to exercise that remedy unless the provision expressly requires the creditor to make such an application.</p>									
<p>This document has been digitally signed by the Registrar and the signature has been filed.  Page 1 of 2</p>		<p>This document has been digitally signed by the Registrar and the signature has been filed.  Page 2 of 2</p>							

## F. Discharging an Interest and Transfers of the Right to Discharge

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 aircraft object. In the normal course, parties routinely work together to discharge interests following the successful conclusion of a transaction; however, in contested situations, a 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>332</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>333</sup> Similarly, if there has been an incorrect registration, then the person in whose favour the registration was made must, without delay, procure its discharge or amendment.<sup>334</sup> A registration may only be discharged by, or with the written consent of, the party in

<sup>332</sup> GOODE at para. 2.181 (Unidroit 2019).

<sup>333</sup> Article 25(1) of the Convention.

<sup>334</sup> Article 25(4) of the Convention.

whose favour it was made.<sup>335</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 favour 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>336</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 favour 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>337</sup> If the party in whose favour 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>338</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 arises between the parties), 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>335</sup> Article 20(3) of the Convention.

<sup>336</sup> Section 5.8.2 of the Cape Town Regulations.

<sup>337</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>338</sup> Article 44(2) of the Convention.

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 aircraft object. In the normal course, parties routinely work together to discharge interests following the successful conclusion of a transaction; however, in contested situations, a 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>339</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>340</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>341</sup> A registration may only be discharged by, or with the written consent of, the party in whose favor it was made.<sup>342</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>343</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

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<sup>339</sup> GOODE at para. 2.181 (Unidroit 2019).

<sup>340</sup> Article 25(1) of the Convention.

<sup>341</sup> Article 25(4) of the Convention.

<sup>342</sup> Article 20(3) of the Convention.

<sup>343</sup> Section 5.8.2 of the Cape Town Regulations.

order.<sup>344</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>345</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 arises between the parties), 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.

An RU may make a transfer of the right to discharge on the International Registry website. The RU will select the transferor entity (current right to discharge holder) and the transferee entity (the new right to discharge holder) and must enter the relevant file numbers of each interest where the right to discharge is being transferred.

There are two important practice notes regarding the transfer of the right to discharge: (i) a lease international interest from a lessor to the lessor's lender and (ii) an international interest which is being assigned pursuant to an assignment agreement.

In the first instance, lenders often request that they are given the right to discharge on an international interest pertaining to a lease agreement where the debtor currently holds the right to discharge. However, the lessee in this situation may not feel comfortable with that approach as the right to discharge holder would be a party with which they have no contractual relationship. Some practitioners in this situation require that both the lessor and the lessee agree to the transfer of the right to discharge on the lease international interest to the lender. It is important to note that transferring the right to discharge is often seen more in non-US transactions whereas many lessees/debtors in US transactions will not allow the right to be transferred.

In the second instance, the original lessor assigns its rights under the lease agreement to the new lessor and it qualifies as an assignment (rather than a novation) under the Convention.

**Practice Note:** Unless otherwise agreed by the parties, it is always best practice to ensure that the assignee of any transfer of associated rights and international interests related thereto also be transferred the right to discharge with

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<sup>344</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>345</sup> Article 44(2) of the Convention.

respect to such international interest at the time such assignment is registered. This avoids practical issues that would arise if the assignor party continued to hold such right to discharge after its interests in the transaction have ceased.

## 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>346</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>347</sup>

Practice and some cases before the Irish court have revealed a gap in Article 25. Firstly, it envisages that only a debtor or an assignor is entitled to procure the discharge of a registration. It therefore excludes the holder of an international interest or indeed another party interested in the aircraft object from requesting discharge of a registration even though those persons often have a keener interest in the registration being discharged.<sup>348</sup> Furthermore, Article 25 does not include international interests created under a lease which by its nature expires after a period of time and ought to be discharged. A broad interpretation of Article 44(1) is required to fill these gaps.<sup>349</sup>

The Cape Town Convention itself does not prescribe remedies for improper or misleading registrations on the International Registry. A party seeking the removal of an improper or misleading registration can make an application to any court having competence under the rules of its own jurisdictions to make for an order *in personam* requiring the registrant to remove the registration. If the order is made by a court outside of Ireland, the Irish court can order the Registrar to discharge the registration either under Article 44(3) of the Cape Town Convention where the foreign court has jurisdiction under Article 42 (jurisdiction by agreement) or, where it does not have jurisdiction, under Article 44(1) to discharge the registration.<sup>350</sup>

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<sup>346</sup> Article 44(2) of the Convention.

<sup>347</sup> Article 44(3) of the Convention.

<sup>348</sup> For example, the owner of the aircraft object burdened with an expired registered sublease to which it is not a party.

<sup>349</sup> GOODE at para. 2.184 (Unidroit 2019).

<sup>350</sup> *Id.* at para. 2.171.

A number of cases have come before the Irish courts<sup>351</sup> out of which the interpretation and application of Article 44 has evolved and developed in a positive and pragmatic way to effectively implement the spirit and intention of the Convention. The Irish courts have implicitly taken a broad interpretation of Article 44(1) to fill the “gaps” in the Cape Town Convention to take jurisdiction to make an order which expediently removes “clogs” and/or incorrect or misleading registrations on the International Registry.

The majority of cases to date have involved wrongful unilateral registrations of purported non-consensual rights or interests under Article 40 of the Convention. The Regulations have been updated to minimise the likelihood of such incorrect and misleading registrations being made in the future.<sup>352</sup>

To date, only one application made to the Irish courts has fallen squarely within the jurisdiction of the Irish court under Article 44 of the Convention. Only two applications to the Irish court have been contested. In the contested cases, the respondents have submitted to the jurisdiction of the Irish courts by entering an appearance in the proceedings. Accordingly, the applicable Irish courts have not needed to consider whether they had jurisdiction under the Convention to make the orders sought by the applicant.<sup>353</sup>

In cases before the Irish courts, where its jurisdiction has not fallen squarely within a strict reading of Article 44 of the Convention either because (i) there was no party with the right to make a demand for discharge of a registration pursuant to Article 25 of the Convention (or there was no party willing to make the demand to discharge the registration) or (ii) there was no order of a court having jurisdiction under the Cape Town Convention ordering that the registration be discharged, the Irish courts have nonetheless taken jurisdiction to make the requisite orders.

In the case of applications in respect of which Article 25 did not or could not apply, the Irish court has implicitly interpreted its jurisdiction under Article 44(1) widely to give it jurisdiction to make the orders sought. In those cases, the relevant registered international interests were valid when registered. However, by virtue of expiration of the agreement by which the international interest had been created, the registration had become obsolete. The Irish court made the orders on the basis that the international interests had become incorrect and misleading when the underlying interest had ceased to exist. The obsolete registration accordingly constituted a “clog” on the owners

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<sup>351</sup> Other than two contested cases, see *Belair Holdings v. Etrole Holdings Limited and Aviareto Limited* [2015] IEHC 569 (26 March 2015) and *Unicredit Global Leasing Export GmbH v. Business Aviation Limited and Aviareto Limited* [2019] IECH 139 (6 March 2019), the Irish cases are unreported.

<sup>352</sup> See 11.G above. Regulation 5.4(f) of the Regulations expressly requires a registrant, as a condition to registration of the non-consensual right or interest, to submit to the jurisdiction of the Irish court. More recent cases have involved filings of valid international interests which by virtue of expiration of the underlying international interest have expired or become obsolete. In all but one case, the circumstances of the case have not fallen squarely within the jurisdiction of the Irish court under Articles 44(2) or 44(3) but the Irish court has interpreted Article 44(1) widely to use its general jurisdiction to make the requisite orders sought to remove the wrongful or obsolete filing from the IR thereby clearing clogs on the title to the relevant aircraft object.

<sup>353</sup> Although in *Unicredit Global Leasing Export GmbH v. Business Aviation Limited and Aviareto Limited* [2019] IECH 139, a contested application heard for the removal of three (3) registered purported non-consensual interests against an aircraft and engines, the judge referred to Regulation 5.4(f) of the Regulations whereby the first respondent had expressly submitted to the jurisdiction of the Irish court.

title to the relevant aircraft object inhibiting its ability to deal in the aircraft object and, as such, should be removed.

In other non-contested applications (principally relating to improperly registered purported non-consensual rights or interests under Article 40 of the Cape Town Convention), the Irish Court did not clearly and unequivocally have jurisdiction under Article 44 of the Cape Town Convention. In those cases, the Irish court has accepted arguments that it had jurisdiction over a foreign registrant under its general jurisdiction rules. Those rules give the court jurisdiction wherever leave is given for service of the proceedings on a foreign registrant to make an order *in personam* under Article 44(3) directing the wrongful registrant to remove an incorrect registration.<sup>354</sup> In some cases jurisdiction has been based on the fact that the improper or incorrect registration constituted a tort committed in Ireland. The tort being "slander on title" or "malicious falsehood" or misrepresentation under Irish law.<sup>355</sup> In other cases, jurisdiction has been taken based on the improper or incorrect registration constituting a nuisance or breach of contract committed within Ireland or on the fact that the relief sought is injunctive relief for something to be done in Ireland (removal of the improper or incorrect registration) or on the basis that the registrant is a necessary party to the proceedings to discharge the registration.<sup>356</sup> Where an *in personam* order made against the registrant under Article 44(3) is not complied with, an order is made under Article 44(1) directing the Registrar to discharge the improper or incorrect registration. In cases where the registrant has ceased to exist, the Article 44(3) order may be dispensed with and the application may be made directly under Article 44(1) to direct the Registrar to discharge the improper or incorrect registration.<sup>357</sup>

## V. Interaction With Aviation Authorities

Although the Cape Town Convention created 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 authorisation form, which the Protocol calls an Irrevocable De-registration and Export Authorisation (commonly known as an 'IDERA') that should be filed with, and recorded by, the local registry authority. The IDERA 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.

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<sup>354</sup> Order 11 Rules (f) and (g) of the Rules of the Superior Court.

<sup>355</sup> See II K(II) above.

<sup>356</sup> GOODE at paras. 2.171 and 2.282 (Unidroit 2019).

<sup>357</sup> *Id.* at para. 2.283.



## 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>358</sup> Although not expressly stated in the Cape Town Convention, designation of such entry point is only applicable to an airframe or a helicopter if the state of registry of such aircraft object made the relevant declaration. Otherwise duplications may occur.<sup>359</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).<sup>360</sup> Under the Chicago Convention 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 (and as such interest in respect of engines may always be made directly to the International Registry).<sup>361</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>362</sup>

Designated entry points must be in operation during working hours in the Contracting State.<sup>363</sup> An entry point may be designated either as an “authorising entry point” or a “direct entry point”. An “authorising entry point” is one that authorises transmissions of information required for registration under the Cape Town Convention to the International Registry. In this scenario, the entity designated as the authorising entry point provides the party seeking to effect a registration with a unique authorisation 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 authorisation code in such circumstances is mandatory. In contrast, 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.<sup>364</sup> There are currently no direct entry points, so no detail concerning the rules that would be applicable to them is provided in this Guide.

**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 authorising entry

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<sup>358</sup> Article 18(5) of the Convention.

<sup>359</sup> GOODE at para. 5.92 (Unidroit 2019).

<sup>360</sup> To date, those Contracting States which have made a declaration under this Article have made use of authorized entry points mandatory. GOODE at para. 5.89 (Unidroit 2019).

<sup>361</sup> Article XIX(2) of the Protocol.

<sup>362</sup> GOODE at para. 3.64 (Unidroit 2019).

<sup>363</sup> Article XX(4) of the Protocol.

<sup>364</sup> See Section 12.4 of the Cape Town Regulations.

point. In order for Lessor and Lessee to properly register an international interest in respect of the airframe with the International Registry, one of them must first obtain an authorisation code from the local aviation authority of Contracting State X, which must be included with such registration. With respect to the registration of the international interest of the engine the parties may effect the registration with the International Registry without the code because the use of the code is not applicable to engines.

**Example 2:** Lessor is entering into a lease of an airframe and an engine to Lessee. Lessee is not situated in a Contracting State, however, Lessee will sublease the airframe and engine to Sublessee, which is located in Contracting State Y and the airframe will be registered in Contracting State Y. At the time of ratification of the Cape Town Convention by Contracting State Y, Contracting State Y designated that its local aviation authority would constitute an authorising entry point. In order for Lessor and Lessee to properly register an international interest in respect of the airframe with the International Registry, one of them must first obtain an authorisation code from the local aviation authority of Contracting State Y, which must be included with such registration. With respect to the registration of the international interest of the engine, the parties may effect the registration of international interests arising under the sublease with the International Registry without any code because the use of a code does not apply to engines. The lease in these circumstances would not create international interests in the engine since the debtor (i.e., the Lessee) is not situated in a Contracting State.

**Example 3:** Utilising the same fact pattern as above Example 1 above except that the airframe is registered in Contracting State X while Lessee is situated in Contracting State Y. In this case, there are two connecting factors so the question would arise as to whether an authorisation code is required to register the international interest in respect of the airframe since by virtue of the Lessee being situated in a Contracting State, the Cape Town Convention would apply without regard to the fact that the airframe is registered in a Contracting State. While the Cape Town Convention and the Official Commentary are not clear on this point, it would seem that the proper approach would nonetheless be to get an authorisation code from Contracting State X prior to making any registration against the airframe. Any authorisation code required by Contracting State Y would, in this scenario, be ignored as authorisation codes are only applicable in the state of registry (see Section 12.2 of the Cape Town Regulations).

A Contracting State is free to add additional requirements for the use of its designated entry point, including charging reasonable fees. If these requirements are not satisfied, there is a material risk that the resulting registration will be invalid (unless the code is not available (Reg. 12.8) or if the resulting registration is in respect of a discharge (Reg. 5.8.4)).<sup>365</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 C hereto.

**Practice Note:** From time to time, situations arise in which a unique authorisation 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

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<sup>365</sup> See Section 12.7 of the Cape Town Regulations.

specifically provide that a registration is not invalid if an authorisation code is not obtainable under the procedures of the authorising entry point based on the facts of the related transaction.<sup>366</sup> As a practical matter the screen of the International Registry that requires inclusion of an authorisation has a box with the words “no code available”, which can be clicked in these circumstances. That box should not, however, be used if a code is available.

## 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.<sup>367</sup> 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
- (b) procure the **export** and **physical transfer** of the aircraft object from the territory in which it is situated [*emphasis added*]<sup>368</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.

Recognising the importance of these specific remedies, the drafters of the Cape Town Convention also provided, if the proper declaration is made<sup>369</sup>, for a standing instruction to the applicable registry authority<sup>370</sup> in a Contracting State to honour a request for de-registration and export of an aircraft if certain prerequisites are met.<sup>371</sup> Article XIII(2) of the Protocol provides that where the debtor has issued an irrevocable de-registration and export request authorisation

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<sup>366</sup> Section 12.8 of the Cape Town Regulations.

<sup>367</sup> For a discussion on the remedies generally available under the Cape Town Convention, see Section VI herein.

<sup>368</sup> Article IX(1) of the Protocol. Article IX(1)(a) of the Protocol is focused on aircraft (as opposed to aircraft objects) because only aircraft are registered. Of course, the Chicago Convention registration rules only apply to airframes, and not engines so it should be read to mean aircraft objects constituting airframes or helicopters. By contrast, the separate remedy of export and physical possession is given in respect of an aircraft object (as opposed to aircraft) and thus extends to engines (including uninstalled engines).

<sup>369</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>370</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>371</sup> Article XIII(1) of the Protocol.

(“**IDERA**”) “substantially”<sup>372</sup> in the form annexed to the Protocol and has submitted it for “recordation” to the registry authority, that IDERA shall be recorded.<sup>373</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>374</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>375</sup> An IDERA may not be revoked by the debtor without the written consent of the authorised party.

Article IX(1) of the Protocol provides the foundation for two separate and distinct Protocol-driven approaches for a financier to achieve de-registration and export of an aircraft in a default scenario, the conditions and terms of each varying somewhat depending upon which route is taken.<sup>376</sup> The first route (often referred to as the “**Court Route**”, via Article X(6) of the Protocol), is for the creditor to obtain relief pending final determination under Article 13 of the Convention from a court in the jurisdiction where the aircraft is registered (or, if the remedy being sought is solely export of the aircraft from a jurisdiction other than the jurisdiction of registry, the jurisdiction where the aircraft is located). The court order sought by the creditor would grant possession or control of the aircraft to the creditor or otherwise remove possession of the aircraft from the debtor in favour of, for example, a trustee or other third party. In this scenario, the creditor is entitled to have the remedies specified in the court order made available to it within five business days.<sup>377</sup> The other route, via Articles XIII and IX(5) and IX(6) of the Protocol, is available if the debtor provided an IDERA which was lodged with the requisite authorities, which must then co-operate expeditiously to de-register and export the subject aircraft (this route is known as the “**IDERA Route**”).

**Practice Note:** As a general matter, an IDERA should be provided by the party in whose name the applicable airframe or helicopter is registered or the party that would otherwise be entitled to de-register the airframe or helicopter. In an owner-based registry, this is usually the owner of the airframe or helicopter, however, in some jurisdictions this may be the operator. In an operator-based registry it will usually be the operator. Due to the specific nature of different registries local counsel advice should be sought to ensure that the IDERA is executed in a form that is acceptable to the State of Registration. 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

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<sup>372</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>373</sup> Article XIII(2) of the Protocol.

<sup>374</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>375</sup> Article XIII(3) of the Protocol.

<sup>376</sup> Although the Protocol itself establishes the foundation for each of the two routes to be described, the Official Commentary provided the needed clarity for the organisation and proper understanding of these specific remedial routes. See GOODE at paras. 3.31-3.37 and 5.47-5.50 (Unidroit 2019).

<sup>377</sup> Article X(6)(a) of the Protocol.

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 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>378</sup>, on the basis of the recorded IDERA. 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>379</sup> The IDERA form describes the aircraft as the applicable airframe or helicopter (in either case designated by make, model and serial number as well as registration mark) together with all “installed, incorporated or attached accessories, parts and equipment”, which presumably would include installed engines.<sup>380</sup>

**Practice Note:** Only the authorised party or its certified designee is entitled to seek de-registration and export of an airframe or helicopter.<sup>381</sup> 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. An IDERA should name a single authorised party. The text of IDERA contained in the Protocol refers to the authorised party or its delegate as the ‘sole person’ authorised to act. Naming more than one authorised party in an IDERA might cause confusion at the time of exercise of rights and might result in delays or even ineffectiveness. 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

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<sup>378</sup> GOODE at para. 3.37 (Unidroit 2019).

<sup>379</sup> Article XIII(4) of the Protocol.

<sup>380</sup> While under an IDERA the financier certainly has the right to export the airframe to which the unrelated engines maybe installed and therefore arguably the right to export those unrelated engines, the Cape Town Convention is perfectly clear that mere installation of such engines on the applicable airframe referred to in the IDERA confers no rights or interests in such engines to the financier (and care should be taken to protect the interests of the owner/financier of any such engine installed).

<sup>381</sup> As a condition to the exercise of any rights under an IDERA, the circumstances specified in Chapter III of the Convention, relating to default remedies, must exist (i.e., the applicable debtor must be in default). Article IX(1) of the Protocol. So unless and until the debtor is in default, the creditor is not entitled to act on the IDERA and the debtor retains the right to deregister the applicable airframe or helicopter. GOODE at para. 3.38(3) (Unidroit 2019).

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>382</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 request<sup>383</sup> from the authorised party, it is bound to effect de-registration and, to the extent within its authority, permit export of the applicable airframe or helicopter, in each case without the need for a court order and without regard to applicable safety laws and regulations. Exercise of this remedy is dependent upon the debtor's default but not on prior termination of the applicable agreement by the creditor or the fulfilment of any other conditions (except those prescribed in the Protocol) and is not conditioned upon the debtor having been divested of possession.<sup>384</sup>

**Practice Note:** In cases where the debtor alleges that it is not in default the registry is nonetheless obligated to honour an IDERA and de-register an aircraft and assist with export. Article 13(2) of the Convention allows courts to take measures to protect debtors in situations where the creditor's claim that a default had occurred eventually proves to be untrue.

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>385</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>386</sup>

It should be noted that an IDERA constitutes authorisation 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:** The remedies made available under Article IX(1) are subject to the requirement that applicable safety laws and regulations must be complied with and Article XIII(3) of the Protocol expressly provides that the authorised party (or its certified designee) may exercise its rights under an IDERA only in accordance with applicable aviation safety laws and regulations. The phrase "safety laws and regulations" is not defined in the Cape Town Convention but would logically

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<sup>382</sup> These model implementing regulations can be found at <http://www.awg.aero/projects/capetownconvention>.

<sup>383</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. See also *Wilmington Trust SP Services (Dublin) Limited v Directorate General of Civil Aviation*, a decision of the Delhi High Court relating to the obligation of the Indian Directorate Generale of Civil Aviation to deregister at the request of the authorized party name in a registered IDERA. The Delhi High Court also found that the authorized party was not obliged to procure that interests ranking in priority by virtue of Article 39 be discharged prior to exercising the IDERA.

<sup>384</sup> GOODE at para. 3.40 (Unidroit 2019).

<sup>385</sup> GOODE at para. 5.73 (Unidroit 2019). 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>386</sup> See GOODE at para. 3.39 (Unidroit 2019).

suggest compliance with, among other things, specific airworthiness rules and regulations governing the safe operation of an aircraft. Compliance with these rules and regulations makes practical sense in the context of the exercise of a remedy involving the export of an aircraft (as by definition the authorised party would need to move the aircraft) but makes little sense in the context of deregistration in isolation. The Official Commentary provides that it would not be proper for the applicable administrative authority to require production of documents relating to safety standards purely for the purpose of deregistration and aviation safety laws and regulations do not affect the remedy of deregistration.<sup>387</sup>

**Practice Note:** Care should be taken to avoid calling IDERAs “powers of attorney”. The IDERA is a new unique instrument created by the Protocol. Referring to IDERAs as “powers of attorney” might bring incorrect interpretations, for example in jurisdictions where powers of attorney cannot have unlimited durations. An IDERA’s duration is not limited in time.

## VI. Convention And Protocol Remedies

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 realise upon aircraft objects. 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 the potential applicability of Convention and Protocol remedies, the practitioner will need to know:

(i) whether an international interest or an assignment of the associated rights and such international interest (A) has been validly constituted with respect to an aircraft object, (B) meets all of the Convention formalities, (C) applies to both an airframe and engine or only to an airframe or engine, (D) 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 (E) has been registered with the International Registry and with what priority; and

(ii) whether such international interest will be characterised as a lease, title reservation agreement or security agreement under the applicable law.<sup>388</sup>

Both the Convention and the Protocol provide remedies upon default<sup>389</sup> with respect to aircraft objects that may be exercised by lessors, conditional sellers and secured parties in respect of

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<sup>387</sup> GOODE at paras. 3.44 and 5.73 (Unidroit 2019).

<sup>388</sup> The Official Commentary is essential to understanding the application of Convention and Protocol remedies in greater depth. It contains a specific comment on every single Article of the Convention and the Protocol. For a general summary, the practitioner is referred to Professor Goode’s “A Review of the Convention” in particular paras. 2.100 to 2.147 of the Official Commentary where he discusses the basic Convention default remedies and paras. 2.232 to 2.237 where he discusses the effect of the debtor’s insolvency. A 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. 3.30 to 3.49 of the Official Commentary where he discusses default remedies and introduces the IDERA and in paras. 3.117 to 3.140 where he discusses remedies on insolvency, including Alternative A.

<sup>389</sup> See discussion on defaults at Section VI.A(II).



international interests and by assignees of international interests, all in their roles as creditors. However, not all remedies in the Convention and Protocol are automatic as some basic Convention and Protocol remedies must be agreed by the debtor in order to be effective. This is because the drafters expected that parties would create their own remedies within the constraints discussed below, and flexibility was built into the Convention so that remedies may be modified by the parties.

The Convention remedies supplement rather than displace existing remedies in a particular jurisdiction except to the extent, if any, that existing remedies are inconsistent with certain “mandatory” provisions under the Convention that protect the debtor and other interested persons. These are discussed below in Section VI.A(iii) and (iv)<sup>390</sup> Moreover, the Convention does not displace local procedural rules except to the extent that such local procedures would be inconsistent with the non-judicial remedies declaration discussed below<sup>391</sup> or with the Alternative A or B declaration.

The practitioner should also use contractual choice of forum and choice of law provisions strategically to ensure the availability of Convention remedies. This includes being aware of jurisdictions where courts have previously failed to enforce Convention remedies by incorrect application of national conflicts rules or national substantive law.

Finally, it is important to focus on how the Convention and Protocol declarations made by different Contracting States could 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 authorisations, 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 F.

## 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 non-judicial and judicial remedies against the debtor, and rights against third parties holding an international interest subordinate to that of the

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<sup>390</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>391</sup> Article 14 of the Convention. GOODE at para. 4.117 (Unidroit 2019).

enforcing creditor.<sup>392</sup> For example, Article 8 of the Convention allows a chargee, in the event of default, to take possession or control of an object, sell or grant a lease of it and collect or receive any income arising from the management or use of that object. This possessory right represents a significant innovation of the Convention as it is a departure from traditional remedies of chargees in many civil law jurisdictions. Article 10 allows a conditional seller or lessor, in the event of default, to terminate a lease or conditional sale agreement and take possession or control of any object to which the agreement relates (it also allows the conditional seller or lessor to apply for a court order authorising or directing either of these acts). Article 11 specifies the meaning of default, allowing the debtor and creditor to define the events that give rise to Convention remedies. Article 13 of the Convention allows a creditor to request speedy return of collateral from a court pending final determination of any dispute when, for example, a debtor is disputing the creditor's right to exercise a repossession remedy under the Cape Town Convention, or the creditor cannot gain access to its collateral.

Given the sensitivity to non-judicial remedies in many jurisdictions, these remedies are only applicable without leave of the court where non-judicial remedies are specifically declared by the relevant Contracting State pursuant to Article 54(2). Some Contracting States, in particular civil law jurisdictions, have opted to require the judicial involvement in the exercise of many Convention remedies. These jurisdictions impose a greater burden on their respective judiciaries to correctly apply the terms of the Convention within the strict time periods that are set forth in the Convention. Requiring leave of the judiciary to exercise certain options, however, does not allow the court to vary the terms of the Convention, the Protocol or a Contracting State's Declarations.

#### (I) AGREEMENT OF THE DEBTOR TO REMEDIES.

Certain basic remedies are available only when the debtor has agreed. For example, the basic non-judicial remedies under Article 8 are available to a debtor only to the extent that the creditor has – at any time – agreed in writing to such remedies.<sup>393</sup> As a general matter, the agreement need not refer to specific remedies or provisions in the Convention<sup>394</sup>; rather, 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>395</sup>

**Practice Note:** As certain remedies discussed in this section require the debtor's agreement to be effective, the practitioner should evaluate whether mortgages, conditional sales, leases or other security agreements contain an

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<sup>392</sup> GOODE at paras. 4.78, 4.91, 4.245 and 4.248 (Unidroit 2019).

<sup>393</sup> GOODE at paras. 2.79, 4.81 (Unidroit 2019).

<sup>394</sup> GOODE at para. 2.79 (Unidroit 2019). 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>395</sup> *Id.*

agreement as to the applicability of Convention remedies at the outset of a deal or of a potential litigation and include such agreement wherever possible.

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>396</sup> However, certain remedies under the Protocol may have additional requirements to be exercisable, and the practitioner should exercise care in determining whether a particular 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>397</sup> On the other hand, Article X(5), which permits the exclusion of Article 13(2) (such that advance relief may be granted without necessity for posting by the creditor of a bond or other collateral), requires that a specific written agreement of the debtor waiving any requirement for a bond.<sup>398</sup> Even further, a sale and application of proceeds from a sale under Article X(3) requires specific reference to that remedy, but the agreement does not need to be in writing.<sup>399</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 recovery and disposition of aircraft objects) and Article 13 of the Convention (regarding advance relief pending final determination).<sup>400</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 or imply any kind of materiality standard for a default that is described or defined in an 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>401</sup> In other words, an event may be defined as a “default” even if no party caused or could have avoided the event.

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<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> Article 11(1) of the Convention.

<sup>401</sup> GOODE at para 4.113 (Unidroit 2019).

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>402</sup>

### (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>403</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 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. This includes claims for monetary damages, which are not governed by the Convention. Relief in the form of a pre-judgment attachment would also fall into this category and be subject to the “domestic rules of the law applicable by virtue of the rules of private international law of the forum State.”<sup>404</sup>

However, as noted above, these additional remedies are limited by certain mandatory default remedy provisions, which cannot be derogated from by courts in allowing the exercise of additional remedies, or by the parties in their agreements.<sup>405</sup>

### (IV) MANDATORY PROTECTIONS.

As a general matter, parties are free under the Convention to agree a set of contractual remedies which may exclude or vary any of the remedies provided by the Convention. However, the Convention (as extended by the Protocol) contains certain basic mandatory protections for debtors and third parties which limit the ability of a chargee to take certain actions, even if these actions are permitted under the applicable agreement or local law. The 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 is permitted only if the value of the satisfied obligations is commensurate with the value of the aircraft object (Article 9(3) of the Convention);

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<sup>402</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 2019).

<sup>403</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. 4.115 (Unidroit 2019).

<sup>404</sup> Article 5(3) of the Convention. Reference to domestic law was used to avoid renvoi issues. GOODE at para. 4.70 (Unidroit 2019). 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 2019).

<sup>405</sup> Article 15 of the Convention. GOODE at para. 4.128 (Unidroit 2019). Article IV(3) of the Protocol. GOODE at para. 5.27 (Unidroit 2019).

- a 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);
- 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>406</sup>
- prohibition on de-registering and exporting the aircraft without the consent of the holder of any prior registered interest registered on the International Registry (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 ten 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. Since the term 'commercially reasonable' is not expressly defined under the Convention, courts should always look at established commercial and international practices, along with industry standards and customary practices within the cross-border equipment financing and leasing industry. Due to the international nature of both the Convention and the financing of aircraft analogies to domestic law are rarely, if ever, relevant.<sup>407</sup>

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 violate the Convention and be manifestly unreasonable. 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.

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<sup>406</sup> GOODE at para. 4.124 (Unidroit 2019).

<sup>407</sup> Article 5(2) of the Convention; Goode at paras 4.67 – 4.71 (Unidroit 2019).

Repossession itself is a basic Convention remedy and is always commercially reasonable, even if repossession might cause an operator to cancel flights or go out of business. The reasonableness standard is applied to the manner of repossession, and not repossession itself.<sup>408</sup> In matters relating to the exercise of repossession remedies, practitioners should work to avoid violence or breach of the peace and use reasonable efforts to preserve the value of the recovered property and to mitigate the creditor's losses resulting from the default.

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 would generally provide for a claim for damages or other applicable relief. The Convention does not permit a court to block an impending non-judicial repossession or to violate the speedy relief provisions of the Convention pending a determination by the court as to whether or not the action is commercially reasonable.

**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. 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>409</sup> and 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>410</sup> Again, the intent of the Convention is that domestic practices not be relied on if there are “accepted international practices”.

## (V) DETERMINATION OF APPLICABLE REMEDIES BY CHARACTERISATION 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 characterisation of the agreements is determined by reference to applicable law.<sup>411</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 explains and gives several remedy scenarios depicting whether an agreement is a security agreement or a lease or title reservation agreement depending on the applicable law, which underscores the importance of this characterisation to the selection of a forum in which to seek remedies.

There are seven different clauses governing the forum for remedies under the Convention:

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<sup>408</sup> See footnote 429.

<sup>409</sup> GOODE at para. 4.93-94 (Unidroit 2019).

<sup>410</sup> GOODE at para. 5.53 (Unidroit 2019).

<sup>411</sup> Article 42 of the Convention. GOODE at para. 4.296 (Unidroit 2019).

- Forum chosen by agreement of parties, which shall be exclusive unless otherwise agreed,<sup>412</sup> except in the case of concurrent jurisdiction for speedy court relief under Article 13 as described below.<sup>413</sup>
- Forum of Contracting State where the aircraft object is located in the case of speedy court relief for repossession or disposition of the aircraft object as 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” 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>414</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>415</sup>
- Forum of the Contracting State that is the primary insolvency jurisdiction in the case of Alternative A and Alternative B remedies under Article XI of the Protocol.<sup>416</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>417</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>418</sup>
- Forum to be determined by a Contracting State where (a) the parties made no choice of forum or relief could not be obtained in such forum due to lack of a submission clause

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<sup>412</sup> *Id.*

<sup>413</sup> Article 43 (1) and (2) of the Convention. GOODE at para. 4.303 (Unidroit 2019).

<sup>414</sup> GOODE at para. 4.306 (Unidroit 2019).

<sup>415</sup> Article XXI of the Protocol.

<sup>416</sup> Article XI of the Protocol.

<sup>417</sup> Article I(2)(n) of the Protocol. The location of this jurisdiction is a presumption. GOODE at para. 5.15 (Unidroit 2019).

<sup>418</sup> Article XII of the Protocol.



and (b) where the claim is not for speedy court relief under Article 13, but is for an order under Articles 8, 9 or 10.<sup>419</sup>

See further discussion of speedy court relief forum clauses in Section VI.E(iv).

## (VI) CONTRACTUAL CHOICE OF LAW.

Article VIII(2) of the Protocol creates a mechanism which requires enforcement of 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). Because this results in the mandatory application of the chosen law without regard to the choice of law rules applicable in the forum states, it only applies where a Contracting State has made a declaration making this Article effective. To avoid issues around renvoi, the law selected is deemed to be the domestic law of the designated State, excluding its conflict of laws rules.

**Practice Note:** This Article VIII(2) on contractual choice of law can be helpful in an enforcement situation to confirm the enforceability of relevant documents.

This choice of law only applies as contractual matter between the parties, and does not override mandatory aspects of the law of the forum, such as proprietary rights possibly affecting third parties and rights of creditors in an insolvency scenario.

## (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 a court order is required to exercise “any remedy available to the creditor under any provision” of the Convention which does not required by the express terms of the Convention require application to the court.<sup>420</sup>

Whether a repossessing creditor may proceed against an aircraft object without permission of a court will therefore 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 such as “self help” 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 petitioning the court. 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

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<sup>419</sup> GOODE at para. 4.301 (Unidroit 2019).

<sup>420</sup> Article 54 of the Convention. GOODE at para. 4.343 (Unidroit 2019). 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.

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 (and, practically should obtain the advice of local counsel) before proceeding with a non-judicial remedy in a jurisdiction, even if that jurisdiction 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 in addition to general procedural law governing such matters as breach of the peace. The practitioner should proceed with good local advice and extreme caution in all cases of repossession using non-judicial remedies to be sure not to act contrary to any 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-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>421</sup>

**Practice Note:** Article 14 of the Convention provides that, subject to Article 54(2), extra-judicial remedies must be exercised in accordance with the procedural laws of the law of the jurisdiction where the remedy is to be exercised. However Article 14 is subject to Article 54(2) so it cannot be relied upon by courts to impose any court order (even a derivative requirement) where a Contracting State has declared that remedies are available without leave of the court under Article 54(2). 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>422</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>423</sup>

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<sup>421</sup> GOODE at para. 2.107 (Unidroit 2019).

<sup>422</sup> GOODE at para. 4.124 (Unidroit 2019).

<sup>423</sup> Article XXII(1) of the Protocol.

The waiver “must be in writing and contain a description of the aircraft object.”<sup>424</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>425</sup>

The Protocol provides that the waiver shall be effective to confer jurisdiction or to permit enforcement. As recognised by the Official Commentary, international law generally provides that waiver of immunity from suit does not constitute waiver of immunity from enforcement.<sup>426</sup> Thus, the instrument of waiver must be clear as to whether it addresses jurisdiction, enforcement, or both.

## (IX) REPRESENTATIVE CAPACITIES.

The use of agents and trustees in aircraft lease and finance transactions is so common that, as described earlier in Section IV.C, the Protocol expressly provided that agents, trustees and other entities acting in representative capacities could enter into security agreements, leases, title reservation agreements and sales of an aircraft object in those capacities, register international interests and sales and assert rights and interests under the Convention. This includes enforcement of those agreements and the exercise of default remedies under the Convention and the Protocol. The enforcement must be recognised in all Contracting States even if their national law does not recognise the institution of a trust or of an agent, but only so long as the agency agreement or the trust agreement and appointment of the agent or the trustee is valid under the law applicable to such appointment.<sup>427</sup>

## 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 authorising or directing either of those acts.<sup>428</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>429</sup> Unlike security agreements,

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<sup>424</sup> Article XXII(2) of the Protocol.

<sup>425</sup> GOODE at para. 5.105 (Unidroit 2019).

<sup>426</sup> *Id.*

<sup>427</sup> Goode at paras 3.82, 3.83, 5.33 and 5.35 Illustration 67 (Unidroit 2019).

<sup>428</sup> Article 10 of the Convention.

<sup>429</sup> GOODE at para. 4.109 (Unidroit 2019). 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. 4.93 (Unidroit 2019)), 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. 5.52 (Unidroit 2019). Repossession itself is always considered commercially reasonable, even if it has dire consequences for the debtor or the debtor’s customers. The commercially reasonable test is applied to the manner in which repossession may be exercised.

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>430</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>431</sup> See Section VI.G. on deregistration and export and Section V.B. on the IDERA.

## (I) TERMINATION AND REPOSSESSION.

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 authorise or direct such termination.<sup>432</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>433</sup>

**Practice Note:** Article XVI of the Protocol clarifies the Convention and provides more detail in regard to a lessee's or a sub-lessee's interests. The Official Commentary says in paragraph 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.R 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 authorise or direct such possession or control.<sup>434</sup>

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<sup>430</sup> GOODE at para. 4.111 (Unidroit 2019).

<sup>431</sup> Article IX of the Protocol.

<sup>432</sup> Article 10(a) and Article 10(b) of the Convention.

<sup>433</sup> GOODE at para. 4.110 (Unidroit 2019) 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 II.R. of this Guide (See also GOODE at paras. 3.108-16 (Unidroit 2019)). 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 free and clear of the applicable lessee's right of quiet enjoyment arising under the Cape Town Convention to make sure that the 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, GOODE at para. 2.216 (Unidroit 2019).

<sup>434</sup> Article 10(a) and Article 10(b) of the Convention.

As mentioned in VI.A above this is a significant innovation of the Convention in many civil law jurisdictions, which traditionally did not include possession as a remedy available to chargees.

## C. Remedies for Security Agreements

The Convention provides for the exercise of four remedies by the chargee upon default under a security agreement. In order to utilise any of the four remedies as extra-judicial remedies, the debtor must have provided its consent or agreement at any time. However, no consent is required for the chargee to apply for a court order, but 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>435</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 authorise or direct such possession or control.<sup>436</sup> As mentioned in VI.A above this is a significant innovation of the Convention in many civil law jurisdictions, which traditionally did not include possession as a remedy available to chargees.

### (II) SELL AIRCRAFT OBJECT.

The chargee may unless otherwise agreed between the parties<sup>437</sup>, sell any aircraft object upon reasonable notice to applicable interested persons or apply for a court order to authorise or direct such a sale.<sup>438</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>439</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>440</sup> and gives as examples a public auction and a competitive tender.<sup>441</sup>

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<sup>435</sup> Article 8(1) of the Convention.

<sup>436</sup> Article 8(1)(a) and Article 8(2) of the Convention.

<sup>437</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.

<sup>438</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. GOODE at para. 2.115 (Unidroit 2019).

<sup>439</sup> Article IX(4) of the Protocol.

<sup>440</sup> See the discussion of commercial reasonableness in Section VI.A.(IV) above.

<sup>441</sup> GOODE at para. 4.95 (Unidroit 2019).

**Practice Note:** A sale by the senior chargee overrides junior security interests, which then attach to the surplus proceeds (if any). 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>442</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 authorise or direct such a lease.<sup>443</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>444</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 authorise or direct the same.<sup>445</sup> The income or profits received by a chargee are required to be applied towards discharge of the amount of the secured obligation.<sup>446</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>447</sup>

**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>448</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

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<sup>442</sup> GOODE at para. 4.97 (Unidroit 2019).

<sup>443</sup> Article 8(1)(b) and Article 8(2) of the Convention.

<sup>444</sup> Article 54(1) of the Convention.

<sup>445</sup> Article 8(1)(c) and Article 8(2) of the Convention.

<sup>446</sup> Article 8(1)(c) and Article 8(2) of the Convention.

<sup>447</sup> Article 8(6) of the Convention.

<sup>448</sup> GOODE at para. 4.88 (Unidroit 2019).

of the secured obligation.<sup>449</sup> In contrast to all other remedies under the Convention, this agreement can be made only after a default has occurred.<sup>450</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>451</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 utilised 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 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 state. 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”

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<sup>449</sup> Article 9(1) of the Convention.

<sup>450</sup> GOODE at para. 4.99 (Unidroit 2019).

<sup>451</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. 4.100 (Unidroit 2019).



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 characterised by reference to concepts of municipal procedural law.”<sup>452</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>453</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 utilise other forms of interim relief that are permitted under the law of the applicable forum.<sup>454</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 following orders as the creditor requests”:

- (a) preservation of the object and its value;<sup>455</sup>
- (b) possession, control or custody of the object;<sup>456</sup>
- (c) immobilisation of the object;<sup>457</sup>
- (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom;<sup>458</sup>

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<sup>452</sup> GOODE at para. 2.126, note 17 (Unidroit 2019). It should be noted that while relief available under Article 13(1) is not “interim relief, the “advance relief” under Article 13(4) could include some or all of the relief available under Article 13(1). GOODE at para. 2.132 (Unidroit 2019).

<sup>453</sup> GOODE at para. 4.115 (Unidroit 2019).

<sup>454</sup> Article 13(4) of the Convention.

<sup>455</sup> Article 13(1)(a) of the Convention.

<sup>456</sup> Article 13(1)(b) of the Convention.

<sup>457</sup> Article 13(1)(c) of the Convention.

<sup>458</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. 4.117 (Unidroit 2019).

- (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>459</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>460</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<sup>461</sup>, as more fully described in the Practice Note below. 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>462</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>463</sup> or if the creditor fails to establish its claim, wholly or in part, on the final determination of the claim.<sup>464</sup> If the parties have agreed to permit the application of advance remedies, they may agree in writing to exclude the protections afforded to 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.

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>465</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>466</sup> Similarly, the requirement as to evidence of default should not be converted to a

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<sup>459</sup> Article X of the Protocol. GOODE at para. 5.58 (Unidroit 2019).

<sup>460</sup> Article X(6) of the Protocol.

<sup>461</sup> Article 13(1) of the Convention.

<sup>462</sup> Article 13(3) of the Convention. GOODE at paras. 2.115 to 2.120 (Unidroit 2019) as to the Convention concept of "interested persons".

<sup>463</sup> Article 13(2)(a) of the Convention.

<sup>464</sup> Article 13(2)(b) of the Convention.

<sup>465</sup> GOODE at para. 2.132 (Unidroit 2019).

<sup>466</sup> GOODE at paras. 4.118-119 (Unidroit 2019).

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>467</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 commercial reasonableness standard does not allow courts to ignore the validity of the remedies themselves, which are always considered commercially reasonable, regardless of the impact that they may have on the debtor.<sup>468</sup> 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>469</sup>

#### (IV) JURISDICTIONS FOR ADVANCE RELIEF.

As discussed in Section VI.A(V) above on choice of forum, the application for 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>470</sup> With some exceptions, the parties are free to confer jurisdiction by written agreement upon the courts of a Contracting State to the Convention.<sup>471</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>472</sup>
2. A forum that is the location of the aircraft object.<sup>473</sup> The courts of the forum where the aircraft object is located have 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>474</sup>

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<sup>467</sup> GOODE at para. 2.137 (Unidroit 2019).

<sup>468</sup> See footnote 429.

<sup>469</sup> GOODE at para. 4.120 (Unidroit 2019)

<sup>470</sup> GOODE at para 2.278 (Unidroit 2019).

<sup>471</sup> The parties may also agree that jurisdiction is to be non-exclusive under Article 42(1). GOODE at para. 2.278 (Unidroit 2019). 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>472</sup> Article 43 (1) and (2) of the Convention. GOODE at paras. 4.303-304 (Unidroit 2019) as to the *in personam* nature of this jurisdiction.

<sup>473</sup> GOODE at para. 2.281 (Unidroit 2019) as to the *in rem* nature of this jurisdiction.

<sup>474</sup> Article 43 (1) of the Convention. GOODE at paras. 4.303-305 (Unidroit 2019) as to the *in rem* nature of this jurisdiction.

3. A forum that is in the territory of which the debtor is situated.<sup>475</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>476</sup> Parties cannot exclude the application of this concurrent jurisdiction by agreement;<sup>477</sup> and
4. A forum that is the jurisdiction of the applicable aircraft or helicopter registry.<sup>478</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).<sup>479</sup>

**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 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>480</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 by Contracting States 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:

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<sup>475</sup> GOODE at para. 2.224 (Unidroit 2019).

<sup>476</sup> Article 43(2)(b) of the Convention. GOODE at paras. 4.303-04 (Unidroit 2019). See GOODE at 4.301 (Unidroit 2019) 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>477</sup> *Id.*

<sup>478</sup> Article XXI of the Protocol; GOODE at paras. 2.282-284, 3.144, 5.105 (Unidroit 2019).

<sup>479</sup> The European Union, for example, has made such a declaration and its Member States do not apply the rule on concurrent jurisdiction.

<sup>480</sup> GOODE at para. 4.302 (Unidroit 2019).

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.

The general rule under the Convention is that in the event of insolvency proceedings<sup>481</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>482</sup> and (b) the effectiveness, against a debtor subject to insolvency proceedings, of a registered non-consensual right or interest.<sup>483</sup> An unregistered international interest may nevertheless be effective under applicable non-Cape Town Convention law, as Section 30(1), which is not intended to invalidate the effectiveness of an international interest, but rather speaks to the validity of a registered international interest.<sup>484</sup>

The term “insolvency proceedings” is given an autonomous meaning under the Convention which does not depend upon or vary with national law; and it is intended to both be broad and to have a uniform effect across all Contracting States<sup>485</sup>.

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<sup>481</sup> Article 30(1) of the Convention.

<sup>482</sup> Article 37 of the Convention.

<sup>483</sup> Article 40 of the Convention.

<sup>484</sup> GOODE at para. 2.232 (Unidroit 2019).

<sup>485</sup> Annotation 1 to the 4<sup>th</sup> Edition of the Official Commentary, Release No. 1 dated June 21, 2020.

Practice Note: The term insolvency proceeding forms a part of, but should not be confused with, the definition of “insolvency-related event” in Article I(2)(m) of the Protocol. “Insolvency-related event” is used as a trigger for the application of all the provisions of Alternative A and Alternative B and 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>486</sup>

Although the Convention definition of “insolvency proceedings” follows familiar lines, and covers proceedings used for purposes of reorganisation or liquidation<sup>487</sup>, it is intended to encompass the broad variety of statutory approaches used in Contracting States to address the insolvency of a debtor. National law variations in insolvency regimes have no influence on the application of Article 30 of the Convention or Article XI of the Protocol, because in all cases the question of applicability turns on whether the insolvency process or regime, however described by national law, meets the definition established by the Convention.<sup>488</sup> Some jurisdictions provide for more limited procedures through which a distressed debtor may seek to modify or rearrange its obligations, described variously as “‘schemes of arrangement’, ‘voluntary arrangements’, or some similar term. Such arrangements fall within the definition of “insolvency proceedings” in the Convention where they are (a) formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company, (b) collective in that they are concluded on behalf of creditors generally or such classes of creditor as collectively represent a substantial part of the indebtedness, and (c) subject to control or supervision by a court, as is the case where a court acts to facilitate a statutory process, and where the court’s approval is required for its implementation.<sup>489</sup> A scheme of arrangement under English law between a debtor and one or more classes of its creditors made pursuant to sections 895-901 of the Companies Act 2006 is one example of the type of limited procedure that constitutes an insolvency proceeding for purposes of the Convention, provided that it occurs in the context of the debtor’s financial distress.

The term “insolvency administrator” is also defined in the Convention, and includes a debtor in possession if permitted under applicable insolvency law.<sup>490</sup> Here too the autonomous Convention meaning takes on great importance. It makes no difference whether, under a national insolvency

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<sup>486</sup> GOODE at para. 5.14 (Unidroit 2019).

<sup>487</sup> Article 1(l) and (k) of the Convention.

<sup>488</sup> GOODE at para 3.118.(Unidroit 2019)

<sup>489</sup> Id. at 486.

<sup>490</sup> Article 1(l) of the Convention.

regime, the term “administrator” is used or a role with the same or a similar name is provided for. The party in whom the authority to conduct the debtor’s reorganisation or liquidation (including the possessory authority over the aircraft) is vested, whether that is the debtor or someone else, is viewed under the Convention as the insolvency administrator because that is the person who has the ability, and therefore the obligation, to comply with the terms of Protocol Article XI.<sup>491</sup> Thus, the identity of the insolvency administrator for purposes of the Convention turns on the functions and authority conferred on the debtor or a different party under the national law insolvency regime, and not on the terms used in the particular statutory scheme.

The meaning of “effectiveness” is that the property interest represented by the international interest will be recognised and the creditor will have a claim against the asset itself, as a secured creditor, and will not be limited to a *pari pasu* sharing with other creditors.<sup>492</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>493</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 (or its assignee if the international interest has been assigned)<sup>494</sup> 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>495</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, which in many cases has been declared as “all types”).<sup>496</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.

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<sup>491</sup> Article 1(k) of the Convention.

<sup>492</sup> GOODE at para. 2.232 (Unidroit 2019).

<sup>493</sup> Article 30(3) of the Convention.

<sup>494</sup> Goode at para 3.122 (Unidroit 2019).

<sup>495</sup> Articles XI and XXX of the Protocol and GOODE at paras. 5.61-70 (Unidroit 2019).

<sup>496</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.



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>497</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. The factors relevant to determining whether a debtor’s centre of main interests differs from its statutory seat (or, if none, place where the debtor is incorporated or formed) crystallise upon the occurrence of an insolvency-related event, and are judged by reference to the facts that were visible to and could have been reasonably relied upon by creditors generally when dealing with the debtor.<sup>498</sup>

**Practice Notes.**<sup>499</sup>

(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>500</sup> In interpreting certain aspects of Alternative A, practitioners should take into account the leading jurisprudence on those issues under U.S. law.

(2) The term “centre of main interests” (COMI) was inspired by the same concept and terminology in European insolvency law.<sup>501</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>502</sup> More importantly, Annotation 2 to the Official Commentary, Fourth Edition, released 13 July 2020, notes that the presumption that a debtor’s COMI is its statutory seat or registered office is not easily displaced, and helpfully identifies, in the context of the aviation industry and by reference to the purposes of the Convention, the factors that are relevant and irrelevant to such a determination. As outlined in Annotation 2, the primary factors for determining a debtor’s COMI are: the location of the management team with whom the creditors conduct business in relation to its aircraft objects; the location of the primary base of operations for, and place where decisions relating to, its aircraft objects; and when applicable to debtor’s form of business, the jurisdiction from which the debtor derives its authority to operate its aircraft objects, and/or authority to operate its aircraft objects on particular routes. Factors that are not relevant to identifying a debtors COMI are: the state where the creditors of the debtor reside and from which they act; the terms of the agreement creating or providing for the relevant international interests, such as terms providing for payments in the currency of or to

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<sup>497</sup> Article XI(1) of the Protocol. GOODE at para. 5.15 (Unidroit 2019).

<sup>498</sup> Goode at para 3.123 (Unidroit 2019); Annotation 2 to the Official Commentary, Fourth Edition, released 13 July 2020, at paragraph 4.

<sup>499</sup> Article 5 of the Convention states that “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.” The two items listed in this Practice Note, while referring to the specific laws/interpretation of the designated jurisdiction, they are nonetheless consistent with the general principles of the Convention and provide essential gap-filling of the intention and meaning of the specified provisions.

<sup>500</sup> 11 U.S.C. § 1110

<sup>501</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>502</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).

a bank account in a particular state, submission to the jurisdiction of the courts of a particular state for the resolution of disputes, or application of the laws of a particular state as the governing law of the agreement; and the state where the agreement creating or providing for the relevant international interests is prepared and/or concluded.

(3) Notwithstanding the preceding comments regarding its source, Alternative A is autonomous law and must be interpreted first in accordance with its own express terms and second in furtherance of its purposes.<sup>503</sup> Thus, while reference to US Bankruptcy law and European law may be instructive, they should be afforded a less substantial interpretive weight than Alternative A's own terms and its purposes.

In the case of secondary insolvency proceedings in another Contracting State where an aircraft object is located, the courts of that Contracting State must apply the version of Article XI Alternative A selected by the declaration of the primary insolvency jurisdiction. However, this does not mean that the courts in the secondary insolvency proceeding must follow the court decisions made in the primary insolvency jurisdiction, but rather they must follow the declaration and waiting time period selected in the declaration by the Contracting State. This is dictated by Article XXX(4) of the Protocol.<sup>504</sup>

As Article XXX(4) states, all Contracting States are obligated to apply the Alternative A declarations of other Contracting States in applicable circumstances, and this Article XXX(4) obligation exists apart from any declaration that a Contracting State has made under Article XXX(1) to apply Article XII to cooperate with foreign courts and administrators in carrying out Article XI, which is described in Section VI II below. In particular, the obligation to apply the Alternative A declarations of other Contracting States can also occur in a primary insolvency proceeding in a Contracting State that has not elected to make an Alternative A declaration. This situation can arise where such a primary insolvency proceeding involves one or more debtors that are part of a corporate group but which individually may have a centre of main interest in a Contracting State that has made an Alternative A declaration. In that case, the primary insolvency jurisdiction must recognise and apply such Alternative A declaration in conformity with the strict waiting period contained in the declaration of the COMI Contracting State<sup>505</sup>. Following the concept described above in the Practice Note, the test for the COMI location would be the location of the conduct of business activity of the relevant debtor that is visible to creditors.<sup>506</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

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<sup>503</sup> Id. at 503.

<sup>504</sup> Goode at para 3.124 (Unidroit 2019).

<sup>505</sup> Annotation 2 to the Official Commentary, Fourth Edition, released 13 July 2020 at paragraph 5.

<sup>506</sup> Goode at para 3.123, last two sentences (Unidroit 2019).

the applicable agreement.<sup>507</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>508</sup> Insolvency administrators or courts that receive reports or petitions from creditors alleging that aircraft objects are not being properly maintained have an affirmative obligation to act quickly. Protocol Art XI(5)(a) of the Protocol is intended to avoid irreparable harm that could result from improper maintenance or actions of a financially distressed debtor that do not preserve the value and condition of the assets.

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>509</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 Understanding ("**ASU**").<sup>510</sup> Aside from the export credit fee discount that may be available under the OECD ASU, the Alternative A declaration also impacts the availability of and the cost of financing aircraft in a Contracting State.

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>511</sup> under the security agreement, title reservation

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<sup>507</sup> Article XI(5)(a) of the Protocol.

<sup>508</sup> GOODE at para. 5.70 (Unidroit 2019).

<sup>509</sup> Article I(2)(m) of the Protocol.

<sup>510</sup> The Aircraft Sector Understanding can be found at <http://www.oecd.org/tad/xcred/aircraftsectorunderstandings.htm>.

<sup>511</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.

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. Courts and practitioners should note that a second waiting period does not apply in respect of a default in the performance of such future obligations.<sup>512</sup> Alternative A requires strict adherence to the timetable, and courts are precluded from granting any extension of time for payment or other performance.<sup>513</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>514</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>515</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>516</sup> just as it must be taken to exclude the creditor’s remedies under Alternative A from the scope of the declaration under Article 54(2) requiring leave of court for the exercise of remedies in that Contracting State.<sup>517</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 overrides Article 14.<sup>518</sup> If court action is required to obtain possession in this scenario, then the applicable creditor should consider whether it needs to take judicial action during the waiting period to obtain a court order to agree to transfer possession to such creditor if all defaults are not cured by expiry of the waiting period.

(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

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<sup>512</sup> Article XI, Alternative A (2) and (7) of the Protocol.

<sup>513</sup> Article XI, Alternative A(9) of the Protocol; Goode at para 3.126 (Unidroit 2019).

<sup>514</sup> Article XI, Alternative A (8) of the Protocol.

<sup>515</sup> Article XI, Alternative A (12) of the Protocol.

<sup>516</sup> GOODE at paras. 5.66 and 4.124 (Unidroit 2019).

<sup>517</sup> Goode at para 3.126 (Unidroit 2019).

<sup>518</sup> GOODE at para. 3.126 (Unidroit 2019).

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>519</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 authorisations. 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, authorisation 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 under the OECD ASU to receive the maximum financing benefits available in respect of export credit financing. 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 the opportunity to take possession of the aircraft object in accordance with applicable law.<sup>520</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.

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<sup>519</sup> Article XIII(4) of the Protocol.

<sup>520</sup> Article XI, Alternative B (2) of the Protocol.

## (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.

Under the Cape Town Convention, the creditor may procure the deregistration of the aircraft provided that certain conditions are met.<sup>521</sup> First, the debtor must have agreed (at any time) to permit deregistration of the aircraft.<sup>522</sup> For example, the debtor may issue an authorisation (the IDERA) agreeing to the exercise of this remedy in accordance with the terms of Article XIII.<sup>523</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 honour 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 consent in writing.<sup>524</sup> The second condition may not be excluded by agreement.<sup>525</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.

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<sup>521</sup> Article IX(1)(a) of the Protocol.

<sup>522</sup> Article XIII of the Protocol. See Section V.B. for a discussion concerning the IDERA and certain conditions to its implementation.

<sup>523</sup> Article XIII of the Protocol. See Section V.B. for a discussion concerning the IDERA.

<sup>524</sup> Article IX(2) of the Protocol.

<sup>525</sup> Article IV(3) of the Protocol; GOODE at para. 5.46 (Unidroit 2019).

## (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>526</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>527</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 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>528</sup>

## H. Exercise of Remedies and Article 39 Non-consensual Rights or Interests

As discussed in Section II.H, 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 Contracting State’s laws and that it is covered by that Contracting State’s 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 or interest arises under the law of a Contracting State different than that in which

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<sup>526</sup> Article IX(1)(b) of the Protocol; GOODE at para. 5.45 (Unidroit 2019).

<sup>527</sup> GOODE at para. 5.45 (Unidroit 2019).

<sup>528</sup> Article IX(6) of the Protocol.



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. The other Contracting State in which enforcement is sought is not obliged to recognise the priority of a non-consensual right or interest of the declaring Contracting State unless the conflict of laws rules of that other Contracting State require it to recognise the priority of that non-consensual right or interest.<sup>529</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 Contracting State.<sup>530</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 Contracting State but typically depends on whether the aircraft object is still in the debtor's possession. 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 Contracting State.<sup>531</sup>

**Example 1:** A maintenance facility seeks to enforce a mechanic's lien against an aircraft in a Contracting State while a lessor attempts to enforce its rights in that 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 Contracting State will determine whether the maintenance facility is able to enforce its mechanic's lien. In particular, the law of the declaring Contracting 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 constituted by the mechanics lien would have attached and the lessor as holder of the registered international interest would have to respect the attached priority of the mechanics lien, once again to the extent required by the law of the declaring State.

Other non-consensual rights or interests, such as preferential claims for unpaid wages or for taxes, arise only on a debtor's insolvency. The priority of such rights or interests depends on the time of commencement of the relevant insolvency proceedings. If insolvency proceedings are

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<sup>529</sup> GOODE at para. 4.278 (Unidroit 2019). See example in GOODE at para 4.98 (Unidroit 2019).

<sup>530</sup> GOODE at para. 2.111 (Unidroit 2019).

<sup>531</sup> GOODE at para. 2.272 (Unidroit 2019).

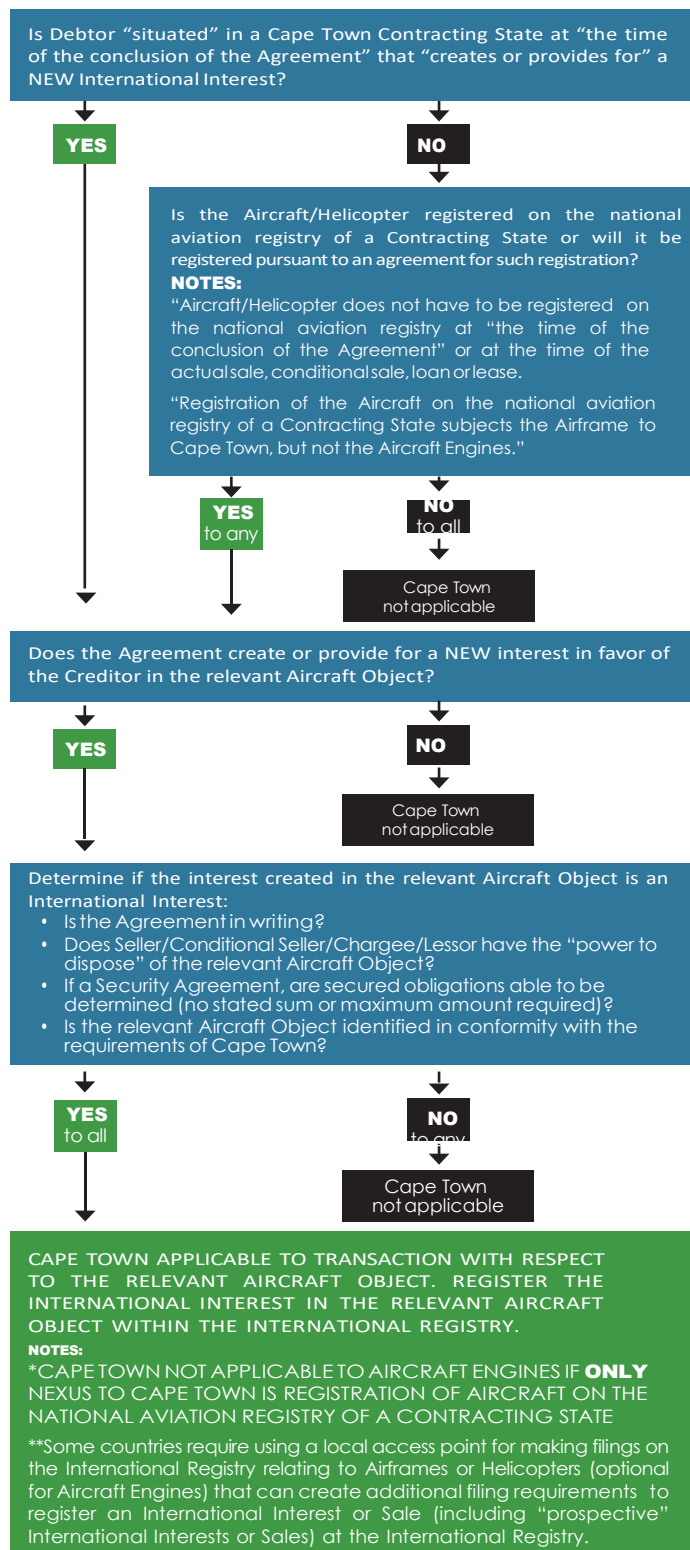
commenced in a declaring Contracting State before the holder of a registered international interest has enforced its rights against an aircraft object, the rules applicable to the insolvency proceedings will determine the priority and procedural position of the Article 39 non-consensual right or interest over the registered international interest. But as outlined at II.H above, the priority of the declared non-consensual right or interest is a matter of the national law of the declaring Contracting State. If the insolvency proceedings are commenced in a Contracting State other than the declaring Contracting State, the Contracting State in which the insolvency proceedings are commenced is not obliged to recognise the priority of the declared non-consensual right or interest unless and to the extent that under its conflict of laws rules it is obliged to recognise the priority of the non-consensual right or interest of the declaring Contracting State.<sup>532</sup>

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<sup>532</sup> GOODE at para. 2.272 (Unidroit 2019).

# 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
- 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:

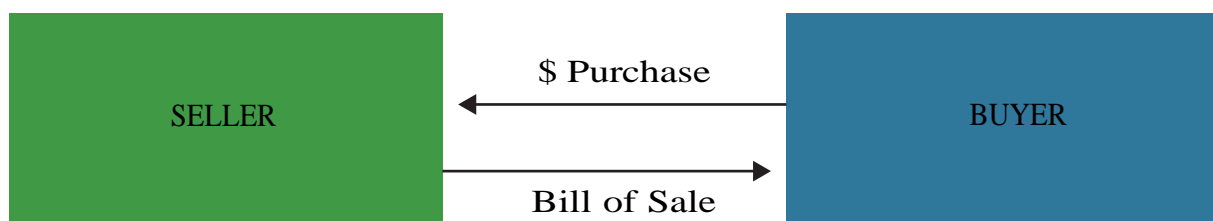
- Manufacturer's Name;
- Model Designation (general/generic name); and
- Manufacturer's Serial Number

## PART II: STRUCTURAL EXAMPLES<sup>533</sup>

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



### Cape Town Convention Application:

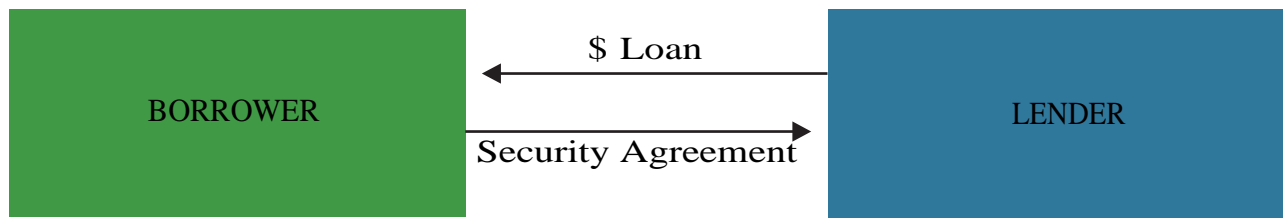
1. Does the Bill of Sale constitute a sale?
  - Yes, a bill of sale is a sale entitled to the benefits of the Convention (Article III of the Protocol)
2. Are sufficient connecting factors present?
  - Is the Seller situated in a Contracting State? (Article 4 of the Convention)

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<sup>533</sup> Examples in this Annex A are meant as general and generic examples of typical aviation finance structures typically encountered by practitioners. More in-depth and complex examples and specific case studies are available in the materials on the Cape Town Convention Academic Project website ([www.ctcap.org](http://www.ctcap.org)).

- 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 a registrable sale 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?
- 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 seller and Buyer as buyer

### SECURED LOAN FINANCING



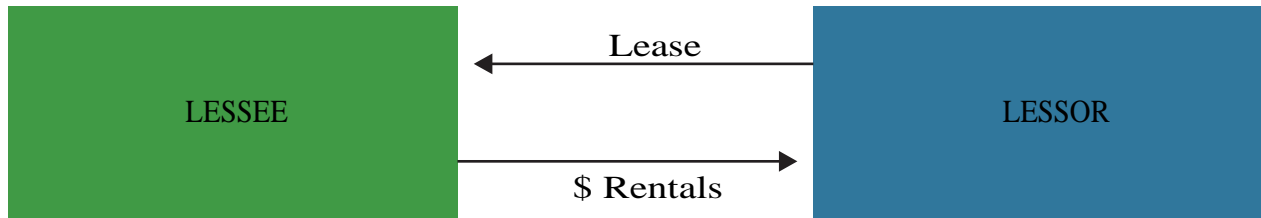
### Cape Town Conventions Application:

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 International Registry?

- 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



#### Cape Town Conventions 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)

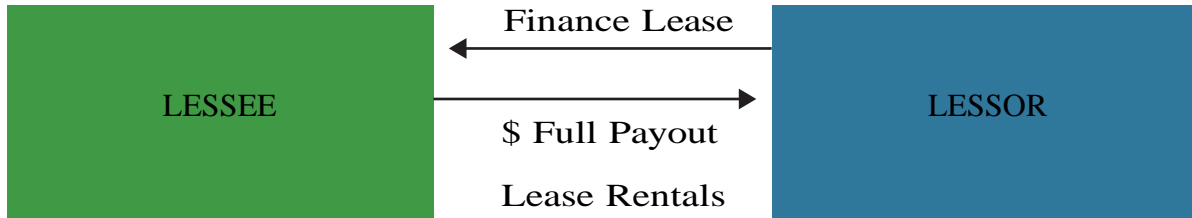
2. Are sufficient connecting factors present?

- 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 International Registry?

- 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

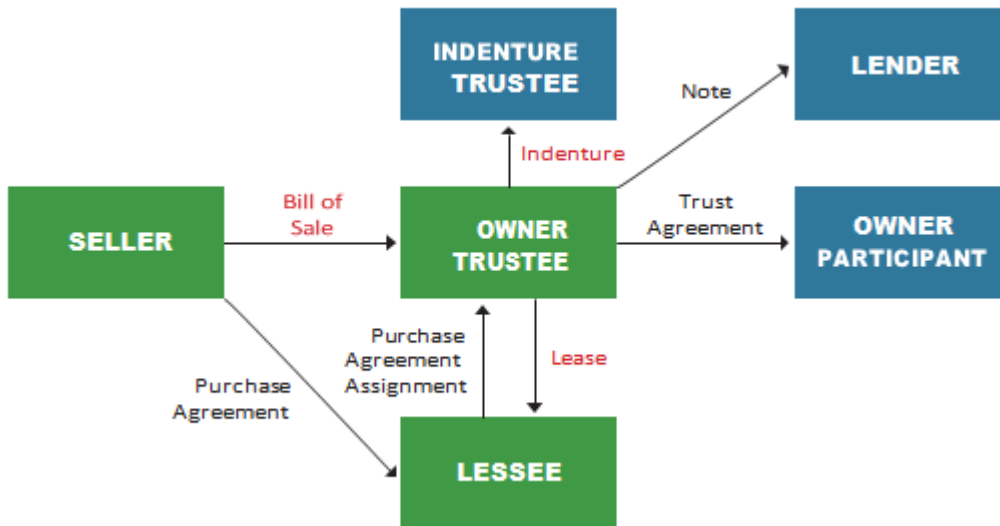


### Cape Town Convention Application:

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 recharacterised 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 International Registry?
  - 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



### Cape Town Convention Application:

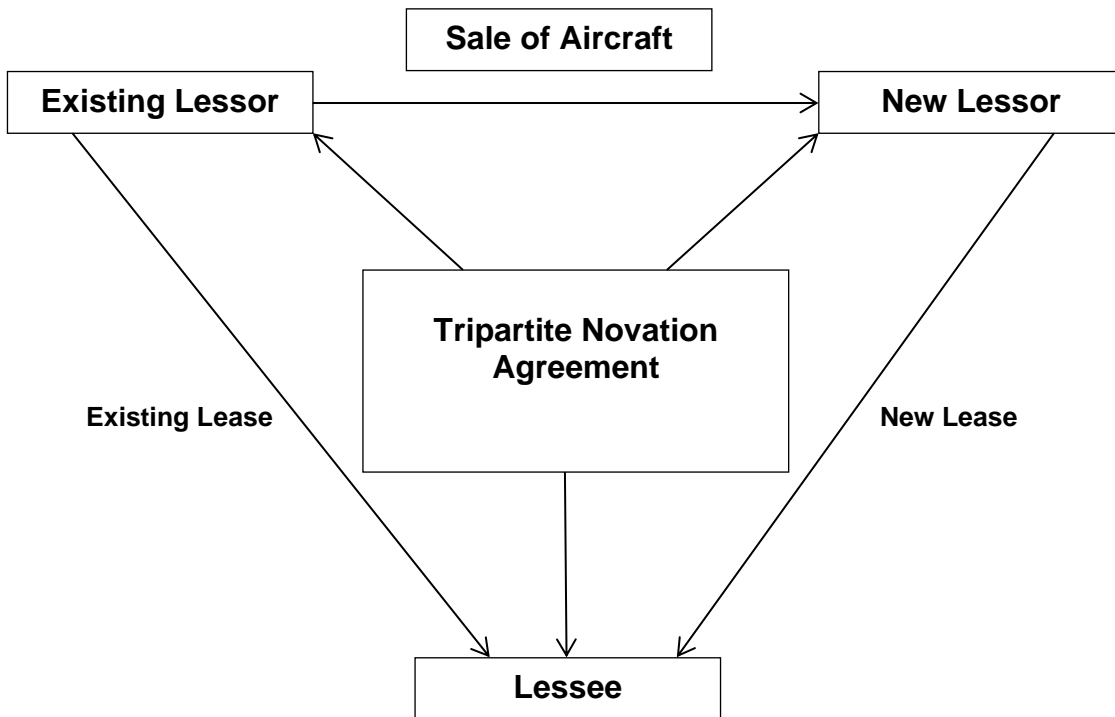
1. Does the Bill of Sale constitute a sale and do the Lease and Indenture constitute international interests?
  - See preceding pages of this Annex for analysis and discussion
  - The Indenture also provides for a collateral assignment of the Owner Trustee's rights in the Lease, which must comply with 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 International Registry?
  - 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 seller and Owner Trustee as buyer
  - International interest or prospective international interest with respect to the Indenture 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 with respect to the Lease 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 with respect to the Indenture in respect of each applicable aircraft object (Article 16 of the Convention) noting the Lease as the international interest assigned and naming the Owner Trustee as the assignor and the Indenture Trustee as the assignee<sup>534</sup>
4. What should be priority of registrations at the International Registry?
- Order of registrations at the International Registry 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 aircraft 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>534</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
- Existing Lessor, New Lessor and Lessee enter into a novation agreement in the form of the AWG English law Aircraft Lease Novation Agreement.
- Under English law, the Lease Novation would reconstitute the existing Lease as a new lease

### Cape Town Convention Application:

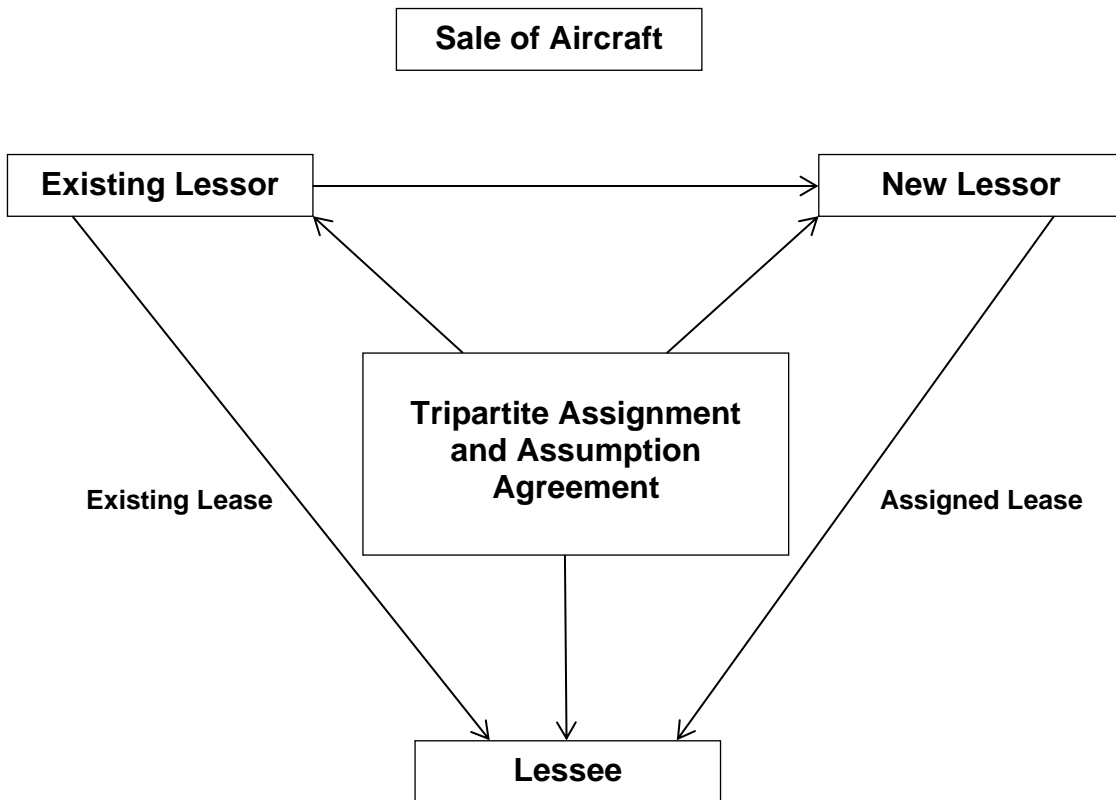
1. Does the Lease Novation create a new international interest?
  - Since the Existing Lessor is *released* from its rights and obligations under the existing lease, and the New Lessor agrees to assume substantially similar rights and obligations, this should be treated as a novation under the Cape Town Convention. This is so even if

the Existing Lessor and the Lessee agree that, notwithstanding the foregoing release and assumption, certain of their pre-existing rights will continue in force.

2. What registrations could be made on the International Registry?

- The existing international interests arising under the Lease in favour of the Existing Lessor in respect of each applicable aircraft object should be discharged. New international interests arising under the new Lease, constituted by the novation agreement, should be registered in favour of the New Lessor.

## LEASE ASSIGNMENT



### 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
- Existing Lessor, New Lessor and Lessee enter into an assignment and assumption agreement in the form of the AWG New York law Aircraft Lease Assignment, Assumption and Amendment Agreement
- Under New York law, that agreement would constitute an assignment of the existing Lease

### Cape Town Convention Application:

1. Does the Aircraft Lease Assignment, Assumption and Amendment Agreement create a new international interest?

- Since the Existing Lessor *transfers* its rights and obligations under the Existing Lease to the New Lessor, and the New Lessor agrees to assume substantially similar rights and obligations, this should be treated as an assignment under the Cape Town Convention.

2. What registrations could be made on the International Registry?

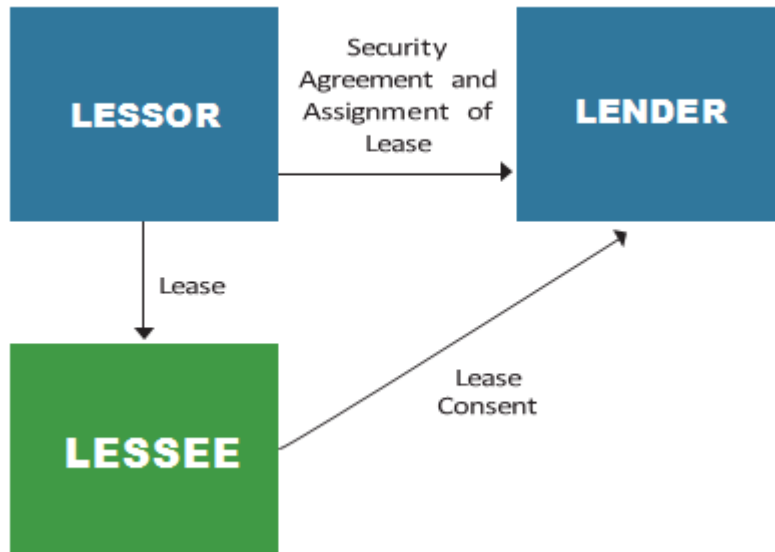
- Assignment of international interest in respect of each applicable aircraft object noting the Lease as the international interest assigned and naming the Existing Lessor as the assignor and New Lessor as the assignee<sup>535</sup>

***[Note: if there is any uncertainty as to whether the transfer document constitutes a novation agreement or an assignment for the purposes of the Cape Town Convention, many practitioners would, out of prudence, register both a new international interest and an assignment in respect of the Lease. No such uncertainty exists with the AWG templates.]***

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<sup>535</sup> As a precaution, many practitioners would nonetheless register a new international interest in respect of the assigned/novated Lease as well.

## 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

### Cape Town Convention 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 the Security Agreement
- The Assignment of 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 be covered by the Convention)
- The Convention would apply to the Assignment of Lease as it relates to the renewal term

3. What registrations could be made on the International Registry?

- At the outset of the transaction, an international interest with respect to the Security Agreement 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 with respect to the Lease 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

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.

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 as well as a listing of 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://awg.aero/project/cape-town-convention/#ratification-and-implementation>. This website should be the starting point for review.<sup>536</sup>

Special consideration should be given to Member States of the European Union. The EU's accession was as a regional economic integration organisation 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.

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<sup>536</sup> However, note that 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 on the above-cited UNIDROIT website.

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 that the Convention is to extend to all of its territorial units or only to one or more of 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 of insolvency proceedings.</p> <p>However, such priorities are not to be recognised by other Contracting States except to the extent otherwise recognised pursuant to such Contracting State's conflict of laws rules. Non-consensual rights or interests declared under Article 39(a) of the Convention are exclusive of any non-consensual rights or interests that may be declared by a Contracting State under Article 40 of the Convention.</p> <p><b>Relevant Contracting State:</b> State where the aircraft object is located at the time the non-consensual right or interest is sought to be exercised.</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>

Provision of the Cape Town Convention or Protocol	Declaration
	<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.
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><b>Relevant Contracting State:</b></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><b>Relevant Contracting State:</b></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><b>Relevant Contracting State:</b></i> State possessing territorial units (in which different systems of law are applicable) recognised 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</p>

Provision of the Cape Town Convention or Protocol	Declaration
	<p>purposes of any claim brought under the Cape Town Convention.</p> <p><b>Relevant Contracting State:</b> State with jurisdiction under the Convention (<i>lex fori</i>). See Articles 42 and 43 of the Convention.</p>
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><b>Relevant Contracting State:</b> 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><b>Relevant Contracting State:</b> 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>

Provision of the Cape Town Convention or Protocol	Declaration
	<p><b>Relevant Contracting State:</b> State where the debtor is situated, as defined in Article 60 of the Convention.</p>
<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><b>Relevant Contracting State:</b> State with jurisdiction under the Convention (lex fori). 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 co-operate with foreign courts and insolvency administrators.</p> <p><b>Relevant Contracting State:</b> 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 an irrevocable de-registration and export request authorisation shall be recorded and implemented by its registry authority and other administrative authorities.</p> <p><b>Relevant Contracting State:</b> “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>

Provision of the Cape Town <u>Convention or Protocol</u>	Declaration
	<b><i>Relevant Contracting State:</i></b> State in which such legal action is taken. See Article 43 of the Convention.



## Annex C: Entry Points – Summary Chart

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:

Albania	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.
Brazil	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.
People's Republic of China	People's Republic of China designated the Aircraft Rights Registry under the Civil Aviation Administration of China (CAAC) as the entry point.
Mexico	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.
Spain	Spain declared that the Movable Assets Registry is the authorising entry point which shall authorise the transfer to the International Registry of the information required for the registration in connection with

	airframes or helicopters registered or to be registered in the Spanish Aircraft Registry, and which may authorise the transmission of information in connection with aircraft engines.
Ukraine	State Aviation Administration of Ukraine is designated as the entry point for information.
United Arab Emirates	United Arab Emirates on 17 October 2011 declared that the Civil Aircraft Registry of the UAE General Civil Aviation Authority (“GCAA”) shall be the authorising 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.
United States of America	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.
Vietnam	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 D: 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:**

1. Opinion references to the Convention and to declarations thereunder and to standard documents reviewed and assumptions;
2. Constitution of International Interests and other interests under the Convention and the effects of Registration thereof;
3. Registration of International Interests, Assignments of Associated Rights, Sales and other interests and recordation of de-registration and export request authorisations;
4. Determination of priority under the Convention and of the effect of unregistered non-consensual interests;
5. Insolvency; and
6. Other opinions: choice of law, choice of forum and waiver of sovereign immunity.

## **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>537</sup>]]

The following terms [modify as appropriate] used in this opinion, “assignment”, “associated rights”, “contract of sale”, “creditor”, “debtor”, “Depositary”, “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>538</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>539</sup>. [Alternative: Defined terms used herein (whether or not capitalised) and not otherwise defined in this opinion may be used as defined in the Convention or the Regulations or Procedures 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>540</sup>

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<sup>537</sup> This can be used as an alternate shorter version of the first paragraph.

<sup>538</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>539</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.

<sup>540</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. 2.33 (Unidroit 2019). 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

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>541</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>542</sup>
- (b) The [Lease]/[Mortgage]/[Conditional Sale Agreement]/[Contract of Sale]/[Assignment] [also referred to herein as Transaction Documents]<sup>543</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 registration of an international interest in the “[Airframe]/[Engine]/[Helicopter]” on the International Registry and attached to this opinion as an exhibit;<sup>544</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 Depositary as having been declared by the relevant Contracting State;<sup>545</sup>
- (e) The De-registration and export request authorisation (the “**De-registration and export request authorisation**”) in connection with the Aircraft dated [ ] and a [search at]

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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>541</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>542</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>543</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.

<sup>544</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>545</sup> Article 23 of the Convention.

[official response from] the national aircraft registry authority, which has revealed that the authorisation has been recorded;<sup>546</sup> and/or

- (f) The [Subordination Agreement] dated [ ].<sup>547</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 Depositary 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>548</sup>

- (ii) (a) Alternative (A)<sup>549</sup>

the priority search certificate referred to herein and the certificate of the [registry authority] confirming recordation of the De-registration and export request authorisation 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.

- (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

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<sup>546</sup> Article XIII of the Protocol. The De registration and export request authorisation 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>547</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>548</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>549</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.

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 authorisation 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>550</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>551</sup>

AND/OR

[Contracting State] is [where the [Airframe] [Helicopter] is [or is agreed to be] registered].<sup>552</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>553</sup>
- (c) the [seller] has the power to dispose of the “[Airframe]/[Engine]/[Helicopter]” by way of sale pursuant to the [Contract of Sale].

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<sup>550</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. 2.79-80 (Unidroit 2019)). 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>551</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. 4.64 (Unidroit 2019)).

<sup>552</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>553</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. 2.10, 2.79-80, 4.79-4.80 (Unidroit 2019) 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.



## 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>554</sup>
- (e) [the minimum requirements stipulated in the definition of “[Airframe]/[Engine]/[Helicopter]” in the Convention have been fulfilled];<sup>555</sup>
- (f) [the “[Airframe]/[Engine]/[Helicopter]” is correctly identified and described by manufacturer’s serial number, name of manufacturer and generic model designation.<sup>556</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>557</sup>
- [(2) The [Lease]/[Conditional Sale Agreement] falls within the meaning of [leasing agreement]/[title reservation agreement] as defined in the Convention Text.<sup>558</sup>
- (B) The [Mortgage] falls within the meaning of security agreement as defined in the Convention.<sup>559</sup>]

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<sup>554</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>555</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>556</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. 3.23 and 5.98 (Unidroit 2019)).

<sup>557</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 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>558</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>559</sup> Article 1(ii) of the Convention. The Mortgage must enable the secured obligations to be determined; Article 7(d) of the Convention.



- (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>560</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>561</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>562</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>563</sup>
- (7) Upon the registration of the international interest under the [Lease]/[Conditional Sale 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>564</sup>

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<sup>560</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>561</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. 4.266 (Unidroit 2019)).

<sup>562</sup> Articles 31(1) and 32(2) of the Convention.

<sup>563</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. 2.248, 2.251 and 4.250 *et seq.* (Unidroit 2019).

<sup>564</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. 2.232 and 4.219 (Unidroit 2019). 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.

(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>565</sup>

### III. Registration of International Interests, Assignment of Associated Rights, Sales and Other Interests and Recordation of De-Registration and Export Request Authorisation

#### REGISTRATION ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section III and in addition to applicable standard assumptions in Section I] that:<sup>566</sup>

[(a) the Aircraft has been duly registered [or will be registered] on the aircraft register of [insert relevant Contracting State].<sup>567</sup>]

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<sup>565</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.

<sup>566</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. 2.90, 2.149, 4.137 and 4.153 (Unidroit 2019)). "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>567</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.

- (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>568</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>569</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>570</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>571</sup>
- (3) The irrevocable De-registration and export request authorisation is in the form required by the Convention and has been submitted for recordation to [recorded by] the [national aircraft registry authority].<sup>572</sup>

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<sup>568</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>569</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>570</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. 2.198 n.26 and 4.145 (Unidroit 2019).

<sup>571</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. 2.159 and 4.167 (Unidroit 2019)). Counsel will have to confirm that registration information in a 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>572</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.

## 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>573</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, approval or accession]; and<sup>574</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

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<sup>573</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.

<sup>574</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.

“[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>575</sup>

## OPINIONS:

### 1. Opinion on priority of [Mortgage]/[Conditional Sale]/[Lease]/[Contract of Sale]<sup>576</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>577</sup> [and] [the quiet enjoyment provisions set out in [the Transaction Documents]/[Subordination Agreement];]
- (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>578</sup>

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<sup>575</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>576</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:

Has there been any registered subordination? If so, the prior registration might not have priority.

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 reservation agreement. This point should be reflected in the opinion in Section IV(1) (i) and (ii).

<sup>577</sup> Article 29(4) of the Convention and Article XVI of the Protocol.

<sup>578</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.

- (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 organisation 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 favour of the [security trustee] with respect to the “[Airframe]/[Engine]/[Helicopter]”, the [security trustee] under the Assignment will have priority subject only to:<sup>579</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>580</sup>
- (ii) [(in relation to such international interests and such associated rights) the assignment dated 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>581</sup>

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<sup>579</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 collateralisation) 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>580</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.

<sup>581</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).

- (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 organisation 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 organisation 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>582</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 the applicable national law that it will apply the entirety of [Alternative A or Alternative B] of Article XI of the Protocol;<sup>583</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

<sup>582</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.

<sup>583</sup> The opinion may assume the insolvency declarations as in these assumptions (b) and (c) or may opine that these insolvency declarations have occurred.



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:

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>584</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 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

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<sup>584</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 reorganisation 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.



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>585</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>586</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>587</sup>
- (d) Assumptions required by counsel giving the opinion in the applicable Contracting State.

#### 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

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<sup>585</sup> Articles VIII and XXX(1) of the Protocol.

<sup>586</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. 3.25 and 5.42 (Unidroit 2019)).

<sup>587</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.

[exclusive]/[non-exclusive] jurisdiction in respect of any claim brought by either of them under the Convention will be recognised under the laws of [the applicable Contracting State].<sup>588</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>589</sup>

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<sup>588</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>589</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 E: 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>590</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>590</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 F: 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. B, C, D and E 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.C, E and K)
  - d. whether formalities were observed (Section II.D)
  - e. whether aircraft object qualifies (Section II.B)
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.S.

### 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.F, G, H and I 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.I.

2. Consider the effect of any amendments or novations that are made after the Cape Town Convention became effective in a Contracting State and also where the agreement in the original transaction was a pre-existing right or interest. See Sections II.F. K and N.
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.H) 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.H.
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.H and I as to effect, and see Sections II.H, 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 L.
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.N:
  - 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. Characterisation of the international interest. Determine, under the applicable law of the expected Contracting State forum for any litigation, whether the agreement would be characterised 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(VIII).
  - 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 proceedings, 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 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. Article XXX(4) imposes an obligation on the courts of all Contracting States, which may be relevant in primary or secondary insolvency proceeding States, to apply Alternative A in strict conformity with the Alternative A or B Declaration of the relevant primary insolvency jurisdiction. See Section VI.F (I)(1).
- f. 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.
- g. Contractual choice of law. See Section VI.A(VI).