

Practitioners' Guide to The Cape Town Convention and The Aircraft Protocol

The Legal Advisory Panel of the
Aviation Working Group

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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 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 composed of leading practitioners of international aviation finance law who are listed below. The main purpose of the Legal Advisory Panel is to provide thoughts and support to the AWG on the implementation and institutionalization of the Cape Town Convention. The Legal Advisory Panel, along with the Aviation Working Group, 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. In addition, the Legal Advisory Panel contemplates providing periodic updates of recent developments concerning the Cape Town Convention (the main purpose of the updates is to highlight issues surrounding the actual application of the Cape Town Convention and the implications arising from such application). It is intended that these updates should be read in conjunction with this Guide so as to provide the most current and up to date thinking of the Legal Advisory Panel as well as the AWG on the important issues relating to the Cape Town Convention.

Aside from the *Official Commentary, Revised Edition*, prepared by Professor Sir Roy Goode, very little has been written for the benefit of practitioners who seek education and guidance on the terms of the Cape Town Convention and its impact on aircraft finance transactions, particularly as it relates to its scope of application, the constitution and registration

of international interests, the effects of registration (priority) and the availability and practical application of the remedies available thereunder. This Guide is intended to supplement, consolidate and update Volume 1 (*Contract Practices Under the Cape Town Convention*) and Volume 2 (*Advanced Contract and Opinion Practices Under the Cape Town Convention*) of the Cape Town Paper Series (both previously prepared by the Legal Advisory Panel) and seeks to summarize the *Official Commentary*, along with the various regulations and procedures which have heretofore been published, as well as the shared experiences of the Legal Advisory Panel in order to provide specific guidance and thoughts on these and related topics to the wider community. This Guide also indicates what the Legal Advisory Panel considers to be best practices under the Cape Town Convention, although certainly best practices will evolve over time.

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. Then it provides a summary of specific requirements of the International Registry and some of the issues encountered in connection with the actual registration of interests. Thereafter, this Guide explores other interests arising under the Cape Town Convention and the impact of assignment and novation, as well as possible subordination, as they relate to specific international interests. It reviews the impact of the Cape Town Convention on aviation authorities generally, explores the concept of “entry points” and describes the varying approaches taken to deal with IDERA’s. 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 headed by Dean Gerber of Vedder Price P.C. (Chicago) and included Catherine Duffy of A&L Goodbody (Dublin), Helfried Schwarz of Milbank, Tweed, Hadley & McCloy LLP (New York), Frank Polk of McAfee & Taft (Oklahoma City) and Amna Al Jallaf of Al Jallaf & Co (Dubai). Also contributing and providing invaluable insight and support for this Guide were Jeffrey Wool, secretary general of the Aviation Working Group (on secondment from Freshfields Bruckhaus Deringer (London)) and Donald Gray of Blake, Cassels and Graydon LLP (Toronto) and John Pritchard of Holland & Knight LLP (New York), who chaired the Legal Advisory Panel during its work on this Guide. John Pritchard also coordinated work on the remedies section with Payson Coleman of Pillsbury Winthrop Shaw Pittman LLP (New York) and Rory Kelleher of Sidley Austin LLP (New York). A few others not on the Panel provided input, namely Sir Roy Goode (Oxford), John Atwood (Unidroit), Rob Cowan (Aviareto), Joshua Gentner (Vedder Price), James Lambe (Vedder Price) and William Piels (Holland & Knight).

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PRACTITIONERS' GUIDE TO THE CAPE TOWN CONVENTION AND THE AIRCRAFT PROTOCOL

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**”), over 30 countries have ratified or acceded to the Cape Town Convention (the “**Contracting States**”).¹ Central to the purpose of the Cape Town Convention is the enhancement and harmonization of private laws in respect of the financing, lease and sale of mobile equipment. The Cape Town Convention is intended to give parties involved in such transactions greater confidence and predictability, principally through the establishment of a uniform set of rules guiding the constitution, protection, prioritization, and enforcement of certain rights in aircraft and aircraft engines. It alters the rules governing aircraft sales, leases and financing on a jurisdiction-by-jurisdiction basis by establishing a new

¹ 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. The Convention itself only requires three ratifications in order to enter into force but even then comes into force only as regards a category of object to which a protocol applies and then only when such protocol has come into force (with the result being that the Convention came into force when the Protocol came into force). Since entry into force in March, 2006, over 25 additional countries have further ratified or acceded to the Convention and the Protocol. *See* Article 49(2) of the Convention and Article XXVIII(2) of the Protocol for requirements relating to additional ratifications and accessions. For updated information and status concerning country ratification, visit the International Institute for the Unification of Private Law (“**Unidroit**”) website at www.unidroit.org/english/implement/i-2001-convention.pdf.

international framework and providing for the creation of an International Registry (the “**International Registry**”) to be supervised by the International Civil Aviation Organization (“**ICAO**”).² The intent of the Convention is to establish primacy as regards matters within its scope relating to the creation, enforcement, perfection and priority of interests in aircraft. As such, to the extent applicable, it supercedes the Convention on the International Recognition of Rights in Aircraft signed in Geneva on June 19, 1948 (the “**Geneva Convention**”).³

Because the Cape Town Convention is still a fairly new treaty, practitioners often have limited guidance on how to interpret and apply its complex terms. An official commentary relating to the Cape Town Convention (the “**Commentary**”) 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.⁴ This Guide is intended to supplement the Commentary in order to provide practical assistance to practitioners who may be working with

² 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, Fourth Edition (2010)* (the “**Cape Town Regulations**”).

³ 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, it 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.

⁴ Sir Roy Goode, *Official Commentary* (Unidroit rev. ed. 2008) (hereinafter “**GOODE**” or the “**Official Commentary**”). The Official Commentary is a revised edition which replaced the commentary initially prepared by Professor Goode pursuant to a resolution adopted at the Diplomatic Convention that concurrently adopted the Cape Town Convention. The Official Commentary was, in part, revised in order to take account of the experiences of practitioners and the operation of the International Registry during the first few years following entry into force of the Cape Town Convention and addresses many of the issues raised during such period (and remains an essential source of interpretation and guidance in respect of the Cape Town Convention).

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

II. CONVENTION BASICS

The initial step in any Cape Town Convention analysis is to determine whether the specific rights created in a particular situation fall within its scope. This section will review the basic coverage of the Cape Town Convention, including the specific items (called “aircraft objects”) which are subject to the Cape Town Convention, the categories of transactions (security agreement, title reservation (conditional sales) agreement or lease agreement as well as contracts of sale) which benefit from the rights and remedies codified by the Cape Town Convention, and the various rules relating to registrable interests and priority under the Cape Town Convention.

A. Aircraft Objects

In order to be subject to the Cape Town Convention, the international interest must relate to an “aircraft object,” which is defined in the Protocol to include the following:

(i) airframes that are type-certified to transport at least eight persons including crew or goods in excess of 2,750 kilograms;⁵

(ii) engines having at least 1,750 pounds of thrust if jet propulsion and at least 550 rated take-off shaft horsepower if turbine-powered or piston-powered;⁶ and

⁵ Article I(2)(e) of the Protocol.

⁶ Article I(b) of the Protocol.

(iii) helicopters that are type certified to transport at least five persons including crew or goods in excess of 450 kilograms.⁷

Each of the foregoing includes all installed, incorporated or attached accessories, parts and equipment (in the case of airframes, other than engines) and all data, manuals and records relating thereto. Aircraft engines under the Cape Town Convention (with the possible exception of engines installed on helicopters)⁸ are treated separately from airframes since they are highly valuable independent units and are increasingly dealt with and financed separately.⁹ The Protocol specifically provides that ownership of or an interest in any such engine shall not be affected by its installation on or removal from an airframe.¹⁰ The Protocol does not deal with propellers or spare parts as separate objects against which international interests can be created.

B. International Interests

Central to the purpose of the Cape Town Convention is the creation of the International Registry for aircraft objects. All security-type interests created by or subject to security agreements, lease agreements and title reservation agreements relating to aircraft objects (known

⁷ Article I(1) of the Protocol.

⁸ It is not entirely clear whether an engine installed on a helicopter constitutes an “aircraft engine” within the meaning of the Cape Town Convention or rather an accessory of the helicopter. *See* Section III.E. herein for a discussion regarding the treatment of helicopter engines.

⁹ A number of jurisdictions have traditionally treated engines as accessories or accessions which become part of the airframe on which they are installed at any given time (in these jurisdictions, an engine is treated as if it is any other part installed on or removed from an aircraft). Financiers have typically dealt with this type of legal system (to the extent possible) by requiring some sort of recognition of rights arrangement amongst all of the owners and financiers of similar engines and compatible airframes, which provides for an explicit recognition of rights in specific engines among the potentially competing parties. Where ratified, the treatment of engines under the Cape Town Convention would obviate the need for such arrangements. Helicopter engines (if installed), however, could well have a different treatment (*See* Section III.E. herein).

¹⁰ Article XIV(3) of the Protocol.

as “international interests”), both current and prospective,¹¹ may be recorded on the International Registry by reference to the manufacturer’s name, the manufacturer’s generic model and the manufacturer’s serial number with respect to such aircraft object and, subject to certain declared local priorities arising by law (not contract), such interests are accorded priority based upon the order of registration.¹² The Protocol extends certain provisions of the Convention to outright sales, enabling buyers to avail themselves of the registration facilities and priority provisions.¹³ Failure to register an international interest would render such international interest junior to competing registered interests (even if the earlier unregistered interest was known to the holder of the registered interest at the time of registration).¹⁴ Similarly, the purchaser of an aircraft object would take its interest in such equipment subject to all interests of record on the International Registry. The registration system is intended to be wholly automated and operative twenty-four hours a day, seven days a week. It is intended that the International Registry may be searched at any time to determine the existence of interests affected by or related to aircraft objects.¹⁵

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

¹¹ For a discussion on prospective international interests, *see* Section II.F. herein.

¹² 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.

¹³ Article III of the Protocol. While outright sales are not themselves international interests, their inclusion 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. 5.71 (Unidroit 2008).

¹⁴ Article 29 of the Convention.

¹⁵ Article XX(4) of the Protocol.

register its international interest should not in any way affect such party's rights against its chargor or lessee. An international interest would be effective in insolvency proceedings against a debtor so long as it is registered with the International Registry prior to the commencement of such proceedings¹⁶ (this would be so even if the international interest would otherwise be void for want of compliance with local law perfection requirements).¹⁷ This rule is not intended to suggest that an unregistered international interest would automatically be ineffective under the applicable law. On the contrary, Article 30(2) of the Convention expressly states that nothing in the Convention impairs the effectiveness of an international interest in the insolvency proceeding of a debtor where such international interest is effective under applicable law (i.e., such interest would be recognized and ranked ahead of the claims of unsecured creditors).¹⁸

For an "international interest" to be valid, such international interest must relate to an aircraft object and be:

- (i) granted by a chargor under a security agreement;¹⁹

¹⁶ Article 30(1) of the Convention.

¹⁷ GOODE at para. 4.207 (Unidroit 2008).

¹⁸ Article 30(2) of the Convention. For example, if, under applicable bankruptcy law a bankruptcy trustee (or a "debtor-in-possession") may step into the shoes of and use the state law subordinating power of a creditor with a judicial lien to avoid any security interest that would have been subordinate to the judicial lien creditor by virtue of not having been perfected, then such unregistered international interest would not be effective under the Cape Town Convention following the commencement of such proceedings.

¹⁹ Article 2(2)(a) of the Convention.

PRACTICE NOTE: A “SECURITY AGREEMENT” IS DEFINED AS AN AGREEMENT BY WHICH A CHARGOR GRANTS OR AGREES TO GRANT TO A CHARGEЕ 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.²⁰ IT HAS ALSO BEEN SUGGESTED THAT A GRANT OF A SECURITY INTEREST IN THE BENEFICIAL INTEREST OF A COMMON LAW OR STATUTORY GRANTOR TRUST WHICH OWNS AN AIRCRAFT IS TANTAMOUNT TO THE GRANT OF A SECURITY INTEREST DIRECTLY ON SUCH AIRCRAFT BY THE TRUST ITSELF (BECAUSE IT GRANTS AN “INTEREST” IN AN AIRCRAFT OBJECT) AND AS SUCH, THE RELATED BENEFICIAL INTEREST SECURITY AGREEMENT SHOULD QUALIFY AS A “SECURITY AGREEMENT” FOR PURPOSES OF THE CONVENTION. THE INTENT OF THE CONVENTION IS NOT TO COVER THESE TYPES OF GRANTS IN THE DEFINITION OF SECURITY AGREEMENT AND THE PREVAILING MARKET PRACTICE IS NOT TO EFFECT REGISTRATIONS ON THE INTERNATIONAL REGISTRY IN RESPECT THEREOF.

(ii) vested in a person who is a conditional seller under a title reservation agreement;²¹ or

PRACTICE NOTE: A “TITLE RESERVATION AGREEMENT” IS DEFINED AS AN AGREEMENT FOR THE SALE OF AN AIRCRAFT OBJECT ON TERMS THAT OWNERSHIP DOES NOT PASS UNTIL FULFILLMENT OF THE CONDITION OR CONDITIONS STATED IN THE AGREEMENT.²²

(iii) vested in a person who is a lessor under a leasing agreement.²³

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.²⁴

²⁰ Article 1(ii) of the Convention. It is often tempting for practitioners to include a reference to “international interest” in the granting clause of a security agreement, normally as part of the grant of security. This practice is unnecessary and without effect. The eligibility of a security agreement to qualify as an international interest requires only that the specific requirements of the Convention be satisfied.

²¹ Article 2(2)(b) of the Convention.

²² Article 1(II) of the Convention.

²³ Article 2(2)(c) of the Convention.

²⁴ Article 1(q) of the Convention.

In order to fall within the scope of the Cape Town Convention, an interest must satisfy one of the three intentionally broad categories specified above (these categories are meant to capture most forms of leasehold and security interests). Whether an interest falls within one of the three categories is determined by applying the Cape Town Convention’s own definitions and autonomous rules of interpretation, and not by reference to national law.²⁵ Hence, the initial characterization of whether the interest constitutes an “international interest” is prescribed by the Cape Town Convention itself.²⁶

Example: A consignment of goods to a retailer for sale would normally be outside the scope of the Cape Town Convention even if, under the applicable law, it were to be characterized or treated in a manner consistent with a secured transaction or a lease because it does not technically fall within a Convention category.²⁷

Even though an interest, specifically a “contract of sale,” may not fit into one of the three categories set forth above, certain provisions, such as the priority rules, are extended to include such an interest.²⁸

PRACTICE NOTE: A “CONTRACT OF SALE” IS DEFINED UNDER THE CAPE TOWN CONVENTION TO MEAN 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).²⁹

The definition of “contract of sale” specifically excludes any agreement that would constitute an international interest. For example, a conditional sale agreement would qualify as

²⁵ GOODE at para. 2.36 (Unidroit 2008).

²⁶ See Section III.C. herein for a discussion on the characterization of an interest under applicable law.

²⁷ GOODE at para. 2.36 (Unidroit 2008).

²⁸ Article III of the Protocol.

²⁹ Article 1(g) of the Convention.

an international interest on the basis that is a “title reservation agreement”; it would not therefore constitute a contract of sale under the Cape Town Convention. Similarly, a lease would qualify as an international interest on the basis that it is a “leasing agreement” and would not be a contract of sale even if it contains a bargain purchase option that, under applicable law, would cause the lease to be recharacterized as a sale with an accompanying security interest.

A mere agreement to sell is insufficient to constitute a contract of sale (although it may give rise to a registrable prospective sale).³⁰ Rather, the agreement must be a contract effecting the outright sale of the applicable aircraft object in which the seller’s interest immediately passes from seller to buyer.³¹ 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.³² Although the International Registry is not, *per se*, a title registry, the inclusion of contracts of sale has the added benefit of providing, over time, a searchable listing giving notice of the various title transfers of the relevant aircraft object over the course of its life (assuming, of course, that each such transfer falls within the scope of the Cape Town Convention).

³⁰ See Section II.F. herein.

³¹ In general, a bill of sale would give rise to a registrable interest whereas the 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).

³² 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, for the most part, 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. 2.36 (Unidroit 2008).

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

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

- (i) it must be in writing;³³
- (ii) it must relate to an aircraft object of which the chargor, conditional seller, lessor or seller, as applicable, has power to dispose;³⁴
- (iii) it must describe the applicable aircraft object by manufacturer's serial number, name of manufacturer and generic model designation;³⁵ and
- (iv) in the case of a security agreement, it must enable the secured obligations to be determined (although the agreement need not state a sum or maximum sum secured).³⁶

The creation of the international interest (including, for this purpose, a contract of sale) is determined by the Cape Town Convention, and not by local law. Thus, an international interest comes into existence when the above conditions are met, even if these conditions would not be sufficient to create a lease, security interest, conditional sale or sale under otherwise applicable law and even if the international interest is of a kind not known under local law.³⁷ No other

³³ 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.

³⁴ 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."

³⁵ Article 7(c) of the Convention, Article V(1)(c) of the Protocol and Article VII of the Protocol.

³⁶ Article 7(d) of the Convention.

³⁷ GOODE at para. 4.69 (Unidroit 2008). However, the applicable law (that is, the domestic rules of the law applicable by virtue of the rules of private international law of the forum state) continues to govern traditional contract law matters including capacity to contract and validity of an agreement (including the effect of factors such as mistake or illegality). GOODE at para. 4.69

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.

D. Power to Dispose

One of the pre-requisites to the constitution of a valid international interest or contract of sale covering an aircraft object is that the chargor, conditional seller, lessor or seller, as applicable, has the power to dispose of such aircraft object.³⁸ The word “dispose” includes every type of disposition whether by sale, lease, conditional sale or a disposition by way of security. A “power to dispose” includes a right of disposition, such as where the actual owner of an aircraft object sells such object.

Example: The Owner of an aircraft object sells such aircraft object to a Purchaser. In this case, the Owner clearly has the “power to dispose.” The same would be true if the Owner leased such aircraft object to a Lessee.

However, the use of the term “power,” as opposed to “right,” indicates that the Cape Town Convention was drafted to capture dispositions beyond those dispositions in which the disposing party had the authority to dispose.³⁹ In other words, an unauthorized 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 (e.g., where an agent, without proper authority, disposes of its principal’s property). The “power to dispose” is meant, then, to include the ability of a transferor to “transfer a better title than the transferor itself possesses”⁴⁰ and would cover all cases where,

(Unidroit 2008). *See also* Section II.B. and Section III.C. herein for associated issues relating to the characterization of an agreement.

³⁸ *See* Section II.C. above and Article 7(b) of the Convention and Article V(1)(b) of the Protocol.

³⁹ GOODE at para. 4.71 (Unidroit 2008).

⁴⁰ GOODE at para. 2.42(2) (Unidroit 2008).

under applicable law, a party has the ability to make a disposition which is binding on the owner even if the owner has not authorized it.

The power to dispose can arise either under the applicable national law or under the Cape Town Convention itself.⁴¹ National law may provide numerous ways in which a party may obtain the power to dispose. For example, apparent authority of an agent to sell or the power of a lessee of an aircraft object under the lease to either sell or lease such aircraft object may, under applicable national law, satisfy the test concerning the power to dispose.

Example: *Lessor (who is in the business of selling and leasing aircraft objects) leases an aircraft object to Lessee A. Lessor thereafter, and in violation of the terms of its lease with Lessee A, leases the same aircraft object to Lessee B. If it is determined, under applicable national law, that Lessee B would take its rights in such aircraft object under its lease free of the existing lease contract between Lessor and Lessee A, then, for purposes of the Cape Town Convention, the Lessor 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).*⁴²

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

⁴¹ GOODE at para. 4.72 (Unidroit 2008).

⁴² This example presupposes that Lessor and Lessee A did not register appropriate international interests in respect of the aircraft object. Had such arrangements been made (prior to any corresponding registration by Lessor and Lessee B), then Lessee A’s interest in the aircraft object would be protected. Article 29(4) of the Convention. In addition, Lessee A’s quiet enjoyment rights would be respected regardless of the fact that Lessor had the “power to dispose.” See Section V.F. herein for a discussion on quiet possession and use.

Town Convention.⁴³ The word dispose covers every form of disposition encompassed within the power and relevant to the transaction between the debtor and the creditor, whether taking the form of a grant of a security interest, a sale under a title reservation agreement or lease.⁴⁴

Example 1: *Lessor leases an aircraft object to Lessee. Lessor and Lessee fail to register the international interest constituting the lease with the International Registry. Lessee thereafter, in violation of the terms of its lease with Lessor, subleases the same aircraft object to Sublessee. 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 interest (in effect, the Sublessee would retain its quiet enjoyment rights for the duration of the sublease even if the lease between Lessor and Lessee may be terminated).*

Example 2: *For a more difficult example, consider the same facts as in Example 1 above but assume that instead of entering into a sublease, Lessee purports to sell the applicable aircraft object to Purchaser (and the corresponding contract of sale is properly registered with the International Registry). In this scenario, by virtue of the registration of the contract of sale with the International Registry, Purchaser may well take its interest over that of Lessor (as the priority rules provide that a purchaser of an aircraft object who has registered its interest in such aircraft object has priority over any other unregistered interests⁴⁵) assuming Lessee has a "power to dispose" arising under the Cape Town Convention,⁴⁶ which would allow it to sell the aircraft object to a third party. If Lessor and Lessee had registered their leasehold interest prior to the purported sale to Purchaser by Lessee, then no such priority could have arisen.⁴⁷*

⁴³ GOODE at para. 4.72 (Unidroit 2008). The purpose of registering interests with the International Registry is to give the creditor protection against competing claims of third parties. *Id.* at para. 4.184. The lessee or conditional buyer of an aircraft object has an implied "power to dispose" because "dispose," as used in the Cape Town Convention, could be interpreted to include all types of potential dispositions in a transaction between a creditor and a debtor.

⁴⁴ *Id.*

⁴⁵ See Section II.E. herein.

⁴⁶ GOODE at para. 4.71 (Unidroit 2008).

⁴⁷ GOODE at para. 4.72 (Unidroit 2008). This result is consistent with further discussion in the Commentary which recites:

However, a lessee, as has been seen, has a power to dispose for the purposes of the [Cape Town] Convention...and this includes a power to grant a sub-lease, whether or not the lessee has a right to do so under the terms of the head lease. It follows that a sub-lessee

PRACTICE NOTE: A NUMBER OF PRACTITIONERS ARE OF THE VIEW THAT A CREDITOR SHOULD NOT CONSENT TO A REGISTRATION BY ITS DEBTOR SUCH AS A LESSEE THAT WOULD GIVE THE DEBTOR PRIORITY OVER THE RIGHT OF THE LESSOR (THE OWNER), EVEN IF THE INTEREST IN THE APPLICABLE LEASE IS NOT DULY REGISTERED. HOWEVER, THE SAFEST, SUREST WAY FOR A CREDITOR TO PROTECT ITS INTEREST IN THESE SCENARIOS IS TO ENSURE THAT ALL POTENTIAL INTERESTS IN ITS FAVOR HAVE BEEN PROPERLY REGISTERED WITH THE INTERNATIONAL REGISTRY.

E. Effects of Registration of an International Interest – Priority Rules

Under the Cape Town Convention, a registered interest has priority over any other subsequently registered interests and over unregistered interests.⁴⁸ This priority rule applies even if the registered interest was acquired or registered with actual knowledge of the existence of an unregistered interest.⁴⁹ The foregoing rule is intended to avoid factual disputes as to whether a second creditor did or did not know of an earlier interest. Because the registration provisions of the Cape Town Convention also cover outright sales of aircraft objects, only a buyer of an aircraft object who has registered the sale in accordance with the Protocol takes free from a subsequently registered interest.⁵⁰

can invoke Article 29(4) to secure protection against the head lessor where the sub-lessor's international interest was registered before the registration of the head lessor's international interest. GOODE at para. 4.184 (Unidroit 2008).

⁴⁸ Article 29(1) of the Convention. This provision is subject to the specific declarations made by a Contracting State which may allow certain categories of non-consensual rights or interests to have, under such State's law, priority over a registered interest in an aircraft object. Article 39(1) of the Convention. *See* Section V.C. herein for a discussion on certain non-consensual interests which have priority without registration.

⁴⁹ Article 29(2) of the Convention.

⁵⁰ The Cape Town Convention also provides protection to conditional buyers and lessees. Article 29(4)(b) of the Convention provides that the conditional buyer or lessee takes free from the interest of a chargee not registered prior to the registration of the international interest held by its conditional seller or lessor, as applicable. For a discussion regarding quiet possession and use rights, *see* Section V.F. herein.

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

Example 2: Lessor leases an airframe to Lessee and an international interest is registered in respect of such lease. Lessor thereafter charges the airframe to Creditor, and such interest is registered. Creditor takes its charge subject to Lessee's registered international interest in the lease (effectively, this means Lessee has quiet possession and use rights under the Cape Town Convention).⁵¹

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

Example 4: Seller sells an airframe to Buyer 1 (B1) and the parties do not register the sale. Later, B1 sells the airframe to Buyer 2 (B2). B1 and B2 register a contract of sale. Seller later sells the airframe to Buyer 3 (B3) and a registration is made in respect of the contract of sale in favor of B3. Because the sale to B2 is registered prior to the registration of B3's interest, B2 would have priority over B3 (even though the original sale from Seller to B1 was not registered).

PRACTICE NOTE: A TRANSFERRED OR ASSIGNED INTEREST RETAINS ITS ORIGINAL PRIORITY AND THEREFORE THE PRIORITY OF A TRANSFEREE OR ASSIGNEE IS THAT OF ITS TRANSFEROR OR ASSIGNOR. FOR EXAMPLE, IF TWO INTERNATIONAL INTERESTS ARE REGISTERED OVER THE SAME OBJECT, THE FIRST IN FAVOR OF A AND THE SECOND IN FAVOR OF B, AND 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.⁵²

A Contracting State, however, may declare that⁵³ certain categories of non-consensual rights or interests (excluding those that are specifically registrable in accordance with the terms

⁵¹ For a discussion of quiet possession and use rights, see Section V.F. herein.

⁵² GOODE at para. 2.104 (Unidroit 2008). For a discussion on assignments, see Section II.G. and Section V.A. herein.

⁵³ For a summary of the key declarations made by each Contracting State, see Annex II.

of the Cape Town Convention)⁵⁴ may be entitled to priority without registration over a registered international interest, provided such declaration does not purport to expand rights beyond those afforded under national law.⁵⁵

F. Prospective International Interests and Prospective Sales

A prospective international interest is an interest in an aircraft object that is intended to be created as an international interest upon the occurrence of a stated future event (which may include the debtor's acquisition of an interest in the aircraft object or registration of the airframe in a contracting state).⁵⁶ Although the occurrence of the event does not need to be certain, parties contemplating the grant of an international interest in the future is not enough to give rise to a prospective international interest. There must be real negotiations relating to a uniquely identified object with an intent to create an international interest in such object upon the occurrence of such event.⁵⁷ 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. 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 identifiable so as to

⁵⁴ See Section V.C. herein.

⁵⁵ Article 39(1)(a) of the Convention. See also Annex II.

⁵⁶ Article 1(y) of the Convention.

⁵⁷ GOODE at para. 2.35 (Unidroit 2008). 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 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 object is specifically identified and the requisite intent, based upon specific negotiations and/or agreement of the parties, to create such international interest, upon the occurrence of a stated event, exists).

distinguish it from other such equipment including, for example, when a serial number is assigned by its manufacturer.⁵⁸ Similar principles apply to prospective sales.

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

If the stated event occurs, then an interest initially registered as a prospective international interest will become an international interest and it will be treated as registered from the time of registration of the prospective international interest, provided that such registration was still current immediately before the international interest was constituted under Article 7.⁵⁹ No additional registration is required when the international interest comes into being (for example, when the documents are signed and the transaction is completed (assuming this to be the stated event)). Furthermore, Article III of the Protocol extends the provisions relating to prospective international interests to cover prospective sales.⁶⁰

⁵⁸ GOODE at para. 4.31 (Unidroit 2008).

⁵⁹ Article 19(4) of the Convention.

⁶⁰ The efficacy of a registration of a prospective international interest or sale may be impacted by applicable local 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 registration in order for the prospective international interest or sale to remain valid. This requirement puts an obvious limitation on the availability of prospective registrations in the context of U.S.-registered aircraft as, if the actual documents are not filed with the FAA by the end of the 60-day period, the prospective registration would not be valid.

PRACTICE NOTE: SEVERAL MAJOR AIRCRAFT MANUFACTURERS REFUSE TO CONSENT TO PROSPECTIVE REGISTRATIONS IN CONNECTION WITH THE SALE OF NEW AIRCRAFT. THESE MANUFACTURERS ONLY CONSENT TO THE REGISTRATION OF A CONTRACT OF SALE AFTER THEY HAVE RECEIVED THE SALE PROCEEDS FOR THE RELATED AIRCRAFT. A POSSIBLE EXCEPTION TO THIS POSITION CONCERNS PRE-DELIVERY PAYMENT FINANCING.

It is important to note that a person searching the International Registry will not be able to differentiate between an international interest and a prospective international interest because the search certificate will merely state that the creditor named in it has acquired or intends to acquire an international interest in the aircraft object.⁶¹ In either case, the applicable searching party has received notice that it may not have the desired priority and must therefore make further inquiries.

G. Assignments

Assignments relating to international interests are registrable under the Cape Town Convention (such assignments are confined to contractual assignments and do not include assignments by operation of law, such as assignments resulting from a statutory merger.)⁶² 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.”⁶³

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

⁶¹ Article 22(3) of the Convention.

⁶² Section 5.6 of the Cape Town Regulations allows for a “block” assignment pursuant to which all of the underlying interests evidenced by registrations on the International Registry in which an assignor is a named party may be assigned to a designated assignee (with consent given by such assignee).

⁶³ Article 1(b) of the Convention.

international interest and all interests and priorities of the assignor.⁶⁴ The Cape Town Convention defines “associated right” to mean rights to payment or other performance of certain obligations by a debtor under an agreement that is secured by or associated with the aircraft object.⁶⁵ For example, the right to repayment of a loan as well as rights to other forms of performance, such as insurance or maintenance requirements relating to the applicable object, all constitute associated rights. The definition of “assignment” focuses on assignments of associated rights, as opposed to international interests.⁶⁶ The Cape Town Convention, following the position seen in most major legal systems, adopts an approach which is consistent with the view that a security interest is accessory to the obligation secured.⁶⁷ As such, an assignment of associated rights made in conformity with the formalities set out below also transfers to the assignee the related international interest and all of the interests and priorities of the assignor under the Cape Town Convention, unless the parties otherwise agree.⁶⁸ While it is open to the parties to agree to assign the associated rights without transferring the related international

⁶⁴ Article 31(1) of the Convention.

⁶⁵ Article 1(c) of the Convention.

⁶⁶ 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.

⁶⁷ GOODE at para. 2.125 (Unidroit 2008).

⁶⁸ GOODE at para. 2.125 (Unidroit 2008). 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 object to which the agreement relates. However, the Cape Town Convention does not apply to an assignment of associated rights that is divorced from the related international interest. GOODE at para. 4.221 (Unidroit 2008).

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.⁶⁹

“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 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).⁷⁰ 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. Rather, “associated rights” are confined to the obligations of the debtor itself under the agreement and as such requires that the debtor undertakes performance (or agrees to procure the performance) of those obligations in the applicable agreement.

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), 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 CROSS-COLLATERALIZATION OBLIGATIONS IN THAT THEY WOULD NOT BE CONSIDERED

⁶⁹ 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. 4.235 (Unidroit 2008).

⁷⁰ GOODE at para. 4.9 (Unidroit 2008).

ASSOCIATED RIGHTS AND THEREFORE, WOULD NOT BE COVERED UNDER THE CAPE TOWN CONVENTION.⁷¹

Example 1: *Creditor advances funds to Debtor for the purchase of an aircraft engine, and Debtor gives Creditor a security interest in such engine to secure Debtor's obligations under the loan agreement. Creditor thereafter assigns its rights under the loan agreement (which are associated rights) to Assignee by way of an outright assignment. The effect of the assignment is to transfer to Assignee not only the associated rights but also, in the absence of an agreement to the contrary, the international interest in favor of Creditor. In such case, Assignee would be entitled to be the registered assignee of the international interest, enjoying the same priority as that previously enjoyed by Creditor.*

Example 2: *Same facts as Example 1, except that the security interest secures not only Debtor's obligations under the loan agreement but also any other contract 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, and such assignment is registered, Assignee is protected and has priority as against any subsequent assignee (meaning, the security is enforceable for the entirety of the secured obligations due and owing to it before any subsequent assignee could resort to the aircraft engine for payment of sums due to it).*

⁷¹ 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. 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. For purposes of the Convention, associated rights are related to an aircraft object where they represent payment of the price of the aircraft object, the advance of a loan for the purchase of that aircraft object or the rental of an aircraft object under the title reservation agreement, security agreement or lease agreement, as applicable (together with other related obligations arising under the applicable title reservation agreement, loan agreement or lease such as default interest, break funding amounts, sums payable under indemnities and the like). Article 36 of the Convention. In a situation where associated rights do not comply with the foregoing, the priority of competing assignments is determined by applicable law (and not the Cape Town Convention).

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 rather than all future installments).⁷² 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. For example, the assignor and the assignee could decide who would be entitled to exercise rights and remedies in respect of the applicable international interest against the debtor. However, the debtor's consent is required if any such agreement between the assignor and assignee adversely affects the debtor (the debtor's consent may be a general consent and may be given in advance).⁷³

The priority rules governing competing assignments of associated rights generally follow the "first in time" rule.⁷⁴ This priority rule is, however, qualified in two ways: first, by requiring that the contract under which the associated rights arise state that they are secured by or associated with the aircraft object;⁷⁵ and, second, by restricting the priority to certain associated rights relating to the applicable financing.⁷⁶

The Cape Town Convention removes otherwise applicable conflict of laws issues in connection with creation of the security interest in associated rights. In this regard it is

⁷² Article 31(2) of the Convention; GOODE at para. 4.225 (Unidroit 2008).

⁷³ *Id.*

⁷⁴ Article 35 of the Convention.

⁷⁵ Article 36(1)(a) of the Convention.

⁷⁶ 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. 4.252 (Unidroit 2008).

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 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).⁷⁷ The Protocol added 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).⁷⁸ 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 associated rights.⁷⁹ There is no requirement that the assignor of any associated rights be situated in a Contracting State (such an assignment is required to be registered to establish priority even though a separate international interest involving the assignor (acting as a debtor) would not otherwise be covered by the Cape Town Convention). In addition, an assignee of associated rights relating to an international interest may register the assignment with the International Registry irrespective of whether or not the subject international interest has itself been registered (in order to secure priority in respect of such assignment).⁸⁰

⁷⁷ Article 32(1) of the Convention.

⁷⁸ 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. 5.75 (Unidroit 2008).

⁷⁹ Article 33(1) of the Convention.

⁸⁰ Section 5.6 of the Cape Town Regulations.

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 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.*

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.*

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 arrangements that fall within its scope (international interests). This section will review a variety of additional factors, such as the legal location of the applicable debtor (in Convention terminology, where the debtor is “situated”) and, in some cases, the nature of the aircraft object, which also needs to be considered when determining the applicability of the Cape Town Convention to a transaction. It will also review key rules relating to fractional interests in aircraft objects and helicopters. 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 Sections II and III) are summarized in a diagram attached hereto as Annex I.

A. Connecting Factors

Care must be taken to ensure that the prerequisites (often referred to as “connecting factors”) are present when determining whether the terms of and protections afforded by the Cape Town Convention apply to a particular transaction. In the absence of a connecting factor, the Cape Town Convention will not apply although precautionary notice registrations may still be made in the international registry. For aircraft objects, there are two ways in which a transaction may satisfy the connecting factor requirements. The first involves the nature of the debtor (specifically, where it is “situated”) and the second, for certain aircraft objects, relates to its State of registration.

Situation of the debtor in a Contracting State.

The Cape Town Convention applies when, at the time of the “conclusion of the agreement”⁸¹ creating or providing for an international interest in an aircraft object, the debtor (that is, the lessee, the chargor or the conditional buyer (under an agreement) or seller (under a contract of sale) is situated in a Contracting State.⁸² The fact that a creditor (or a buyer under a contract of sale) is situated in a non-Contracting State does not affect the applicability of the Cape Town Convention.⁸³ Rather, the Cape Town Convention will only apply if the lessee (in

⁸¹ The relevant time for determining whether this requirement is satisfied is at the time the agreement is made. If the debtor is then situated in a Contracting State, the requirement is met, and the Cape Town Convention does not cease to apply merely because the debtor moves to a non-Contracting State (and conversely, the Cape Town Convention does not become applicable merely because the debtor becomes situated in a Contracting State after entering into the agreement). GOODE at para. 4.56 (Unidroit 2008). When using a master agreement whereby an aircraft object becomes subject to its terms upon execution of a supplement thereto (whereby the terms of the applicable agreement become applicable to such aircraft object) the time of the “conclusion of the agreement” would be the time at which the supplement is entered into.

⁸² Article 3(1) of the Convention.

⁸³ Article 3(2) of the Convention.

the case of a lease agreement), the chargor (in the case of a security agreement), the conditional buyer (in the case of a title reservation agreement), or the seller (in the case of a contract of sale), is “situated” in a Contracting State. A debtor is deemed situated in a Contracting State if:

- (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 center of administration is located in a Contracting State; or
- (iv) its principal place of business is located in a Contracting State.⁸⁴

The purpose of this wide range of factors is to give maximum scope to the application of the Cape Town Convention.⁸⁵ The first two factors (set out in clauses (i) and (ii) above) are typically fairly easy to ascertain (usually, one only need look to the local authorities or governing bodies to determine whether an entity is duly formed and validly existing). The latter two factors can often be more difficult to determine with certainty, particularly when dealing with large, multinational corporations that have offices and carry on business in several distinct jurisdictions. The “centre of administration” of an entity typically corresponds to the place where the debtor conducts the administration of its interests on a regular basis. This factor, along with the factor in respect of the principal place of business of a debtor, are factually-based determinations and each requires a specific analysis of the particular debtor and its business operations.

***Example 1:** Owner (which is a special purpose entity) is organized under the laws of a non-Contracting State and enters into a financing arrangement with a 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 another entity duly organized and located in a Contracting State. All of the*

⁸⁴ Article 4 of the Convention.

⁸⁵ GOODE at para. 4.57 (Unidroit 2008).

documentation relating to Owner is located and all decisions concerning the administration of Owner are made in such Contracting State. For purposes of the Cape Town Convention, Owner would be deemed situated in a Contracting State as it has its centre of administration in a Contracting State (notwithstanding the fact that Owner is organized in a non-Contracting State).⁸⁶

Example 2: *Lessee is organized under the laws of a Contracting State but has its principal place of business in a non-Contracting State. Lessee leases an aircraft from Lessor (also situated in a non-Contracting State). In this situation, Lessee would be deemed situated in a Contracting State as it is organized under the laws of a Contracting State.*

Thus, in Example 1 above, the Cape Town Convention would apply to the security interest (international interest) created by the security agreement between the Owner and Lender, so the Owner and Lender must register the international interest in the aircraft object with the International Registry in order to establish the Lender's priority in the aircraft object. Likewise, under Example 2 above, Lessee is "situated" in a Contracting State and thus, the international interest in the Lease is subject to the Cape Town Convention; Lessor and Lessee must register the international interest in the aircraft object with the International Registry in order to establish their rights and priorities in the aircraft object and to protect Lessor from the wrongful disposition of the aircraft by Lessee.

PRACTICE NOTE: 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.

State of Registration Is 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

⁸⁶ Although registration of the applicable international interest with the International Registry might have limited impact in the state where the Owner is organized, the Cape Town Convention would apply and would be given effect in the context of the exercise of remedies if the aircraft is subsequently located in a Contracting State at the relevant time of exercise.

applicable agreement, registered or agreed to be registered in an aircraft registry of a Contracting State (and a subsequent re-registration from the original state of registry would not impact the continued effectiveness of such connecting factor).⁸⁷ Where such registration is made pursuant to an agreement for the future registration of the airframe or helicopter, it (i.e., the nationality registration of the airframe or the helicopter) is deemed to have been effected at the time of the agreement. This alternative connecting factor does not apply to aircraft engines, for which there is no nationality registration.⁸⁸ This provision covers, for example, agreements that specify that an airframe is to be registered in the national register of the applicable Contracting State when it is completed or delivered by the applicable manufacturer or imported by a debtor.⁸⁹ A consequence of this additional connecting factor (in respect of an airframe) is that there is a possibility that the Cape Town Convention will apply to the international interest covering an airframe but not its related engines (unless, with respect to such engines, another connecting factor, such as the place of incorporation of the debtor, is available). In these situations, it is important to consider the various implications such as what Cape Town Convention rights and remedies may be available in respect of the subject airframe but not its related engines.

⁸⁷ Article IV(1) of the Protocol.

⁸⁸ *Id.* The inclusion of the provision dealing with “agreement for registration” is intended to address the situation where registration (referring to a Chicago Convention nationality registration) is to occur post-closing, thereby allowing the Cape Town Convention to apply using this connecting factor notwithstanding that the aircraft is not yet technically registered in the applicable Contracting State at the time the agreement is entered into. GOODE at para. 5.25 (Unidroit 2008). Based upon the intent of this provision, it would seem that any agreement that simply recites that the applicable aircraft will be registered in a particular Contracting State should constitute an “agreement for registration.”

⁸⁹ GOODE at para. 3.15 (Unidroit 2008). It is generally considered that a bona fide agreement (contract) providing for registration of the aircraft is required in order to take advantage of this additional connecting factor.

B. Partial Application of the Cape Town Convention

The Cape Town Convention does not apply to international interests unless there is a connecting factor.⁹⁰ However, some international aircraft transactions may be comprised of multiple transactions, such that some agreements in the transaction would each constitute an “international interest” and some would not, because, of the “debtors” involved, only some are situated in a Contracting State.

Example 1: *Lessor, which is organized under the laws of a Contracting State, buys an aircraft from Seller, which is not situated in a Contracting State. Lessor then leases the aircraft to Lessee, which is not situated in a Contracting State. The aircraft is registered in a non-Contracting State. Lessor finances the cost of acquiring the aircraft with a financier and secures the financing with a mortgage over the aircraft.*

In this example, the Cape Town Convention will apply only to the international interest created under the mortgage 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 (i) the sale from Seller because Seller is not situated in a Contracting State and the airframe is registered in a non-Contracting State, nor (ii) the lease because Lessee is not situated in a Contracting State and the airframe is registered in a non-Contracting State.

If thereafter one of the engines subject to the lease was swapped (pursuant to which the Lessee conveyed title to a replacement engine to Lessor and Lessor thereafter conveyed title to the applicable leased engine to Lessee) the Cape Town Convention would apply (i) to the contract of sale in respect of the replaced engine, and (ii) to the international interest created pursuant to the mortgage in respect of the replacement engine.

In this example, if the airframe was registered in a Contracting State, the Cape Town Convention would apply (i) 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) and (ii) to the contract of sale and the lease 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).*

⁹⁰ See Section III.A. above.

C. Characterization

As stated above, in order to come within the scope of the Cape Town Convention, an interest 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). As mentioned in Section II.B. herein, whether an interest falls into a category is determined by applying the Cape Town Convention's own definitions and autonomous rules of interpretation, and not by reference to national law.⁹¹ The fact that national law may define a lease agreement, security agreement or title reservation agreement differently than the Cape Town Convention (or indeed, may not even recognize the foregoing) is irrelevant to the determination of whether an international interest has, in fact, been created.

Once it is established that an interest falls within one of the three categories specified above, its characterization for the purposes of subsequent provisions of the Cape Town Convention is determined by applicable law (that is, the domestic rules of the law applicable by virtue of the rules of private international law of the forum state or *lex fori*).⁹² While most of the provisions of the Cape Town Convention apply equally to the three forms of agreement listed in clauses (i), (ii) and (iii) above, how an interest is characterized is important in the context of

⁹¹ GOODE at para. 2.36 (Unidroit 2008).

⁹² Article 2(4) of the Convention. *See also* GOODE at para. 2.36 (Unidroit 2008) 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 and more recently New Zealand, 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 recognised at an early stage that it would not be possible to reach agreement on a uniform [Cape Town] Convention characterization. Accordingly the solution adopted was to leave this to be dealt with under the applicable domestic law as determined by the rules of private international law of the forum State.

certain provisions of the Cape Town Convention, such as those pertaining to remedies. For example, an agreement which comes within the Cape Town Convention’s definition of a “*leasing agreement*” but which under the applicable law of the forum State creates a security interest, will carry the rights and remedies (and related obligations) applicable to a “*security agreement*” under the Cape Town Convention.

Example: Lessor leases an aircraft to Lessee 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, however, the lease agreement is, under applicable law, recharacterized as a security agreement, applicable remedies would be governed by Article 8 of the Convention (dealing with remedies of a chargee or secured party) in lieu of those available in Article 10 of the Convention.

Care should be taken when negotiating forum selection provisions in transactions affected by the Cape Town Convention. Article 42 of the Convention, consistent with the Cape Town Convention’s goal of allowing considerable party autonomy on a range of issues, including default remedies and jurisdiction, allows the parties to a transaction to choose the exclusive jurisdiction of the courts of any Contracting State 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).⁹³ As the characterization issues in a particular transaction may rely heavily on the

⁹³ Article 42 of the Convention provides that the forum selected is exclusive unless otherwise agreed by the parties. This provision overrides contrary national law. For additional discussion concerning forum selection, see Section VII.A(iv) herein. A related rule applies in respect of the choice of law to govern the contractual arrangements between parties to an international interest. The Cape Town Convention provides that parties to an agreement may agree on the law which is to govern their contractual rights and obligations. Article VIII of the Protocol. The choice of law selected by the parties is deemed to be the domestic law of the designated State, excluding

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.⁹⁴

D. Fractional 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 lender or a lessor may lease or take a security interest in an undivided percentage or fractional interest in an aircraft object. Moreover, an important and growing portion of the aviation industry are “fractional programs” which are programs in which companies lease or sell specifically identified percentages or fractional interests in aircraft objects and then manage the operations for the purchasers and lessees. For purposes of this discussion, we will refer to any type of specifically identified percentage interest in an aircraft object as a “fractional interest.”

Although the registration of fractional interests in aircraft objects is not specifically addressed in the Cape Town Convention, that is not a reason to conclude that the Cape Town Convention only applies to whole interests in aircraft objects. This concept has been embraced by the Official Commentary, which states that there is nothing in the Cape Town Convention to preclude a fractional interest from being registrable as a separate international interest.⁹⁵

its conflict of law rules (which would avoid any problems of *renvoi*). As such, choice of law is limited to contractual rights and obligations.

⁹⁴ It is possible that a particular jurisdiction would be incapable of recharacterizing a particular interest because the applicable laws simply do not recognize any such interest (for instance, a jurisdiction may not have the concept of a security interest). In these situations, the application of the characterization provisions would be uncertain and as such, it is incumbent upon the parties, by virtue of the forum selection provisions in the agreements, to make certain that they have selected an appropriate jurisdiction which would give greater effect to the intent of the parties.

⁹⁵ GOODE at para. 2.33 (Unidroit 2008).

The original design of the International Registry did not allow parties to specify a fractional interest in an aircraft object when registering their interest. Based on input from lenders, lessors, manufacturers, fractional programs and attorneys, it was clear that there was a need for the ability to register fractional interests in aircraft objects. Aviareto Limited⁹⁶ worked quickly to update the registration process and ICAO as Supervisory Authority took prompt action to amend the Cape Town Regulations.⁹⁷ By June 2007, the International Registry allowed interested parties to specify a fractional interest in registrations affecting aircraft objects.

The process for registering a fractional interest is similar to a registration encompassing the entire aircraft object, except that the user must specifically identify the relevant fractional interest. When registering an interest in an aircraft object, the International Registry system defaults to a 100% interest; to the extent a registry user desires to register a fractional interest in the aircraft object, it must select that option and specify the fractional interest, up to six decimal places.⁹⁸

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

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

⁹⁶ Aviareto Limited is the current Registrar of the International Registry.

⁹⁷ Section 5.14 of the Cape Town Regulations.

⁹⁸ Section 5.14 of the Cape Town Regulations.

reservation agreement) may also register international interests in fractional interests in aircraft objects by following the same protocol as discussed above. Upon registration, each such international interest is a distinct and separate international interest in an aircraft object to the extent of the fractional interest identified in the registration.⁹⁹

With one exception (discussed below), the priorities relating to fractional interests are clear. Because each registration of a fractional interest creates a distinct and separate interest (whether as a sale or as an international interest), the holders of these registrations are not normally in a priority conflict; each party holds its interest *pari passu* with the other interest holders.¹⁰⁰ A priority conflict may arise when (a) the same party sells, leases or pledges the same or overlapping interests to multiple purchasers or creditors, or (b) parties who hold interests in the same aircraft object, sell or pledge fractional interests that exceed a 100% interest in an aircraft object. In most cases, the resulting priority conflicts will be resolved based on the order in which the interests were registered with the International Registry.¹⁰¹

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 an aircraft object to multiple purchasers that can exceed an undivided 100% interest in the aircraft object. Likewise, debtors and creditors can register international interests in aircraft objects that can also greatly exceed an undivided 100% interest

⁹⁹ GOODE at para. 2.33 (Unidroit 2008).

¹⁰⁰ GOODE at paras. 2.28, 3.55 (Unidroit 2008).

¹⁰¹ GOODE at para. 3.55 (Unidroit 2008).

in the aircraft object. In light of this, purchasers and creditors must carefully review the priority search certificates to determine if the fractional interests are correctly registered and that registrations relating to the aircraft object do not exceed 100% of the interest in the aircraft object.

While this ability to register interests in an aircraft object that exceed 100% initially concerned some users, it is no different than what parties can do with regard to whole interests in aircraft objects (i.e., the International Registry will not stop a party from making multiple registrations of sales or international interests in the same aircraft object). Furthermore, this is consistent with the design of the International Registry system, which places the responsibility of ensuring the accuracy of the registrations on the parties making the registrations. Finally, this approach is substantially similar to those found under most national legal systems (assuming those national legal systems even allow registrations of fractional interests).

It is common for a party to acquire additional fractional interests, or to reduce the amount of its fractional interest, in an aircraft object. Since each of these are distinct transactions, each should be the subject of a separate registration of a contract of sale that reflects the additional fractional interest in the aircraft object.¹⁰²

Example: Continuing with the scenario in the preceding example, Seller sells an additional undivided fifty percent (50%) interest in the aircraft object to Purchaser. The parties should establish their rights and priorities under this transaction through the registration of an additional contract of sale in the amount of an undivided fifty percent (50%) interest in the aircraft object.

As a result of the two registrations described in the above examples, a priority search certificate for the aircraft object would reflect two separate registrations of a contract of sale, the first covering the sale from Seller to Purchaser of an undivided twenty-five percent (25%)

¹⁰² Section 5.15(a) of the Cape Town Regulations.

interest and the second covering the sale from Seller to Purchaser of an undivided fifty percent (50%) interest in the aircraft object. An examination of the priority search certificate would result in the conclusion that Purchaser was the purchaser of an aggregate undivided seventy-five percent (75%) interest in the aircraft object.

Some parties may be tempted to simply register an amendment to the original contract of sale to reflect the new aggregate amount of Purchaser's interest in the aircraft object (e.g., continuing the example above, an undivided seventy-five percent (75%) interest). However, an amendment is the modification of an existing registration, and is generally only used to correct errors in the original registration process (i.e., to reflect a change in the original information that was improperly registered), so it would not be the appropriate method to register a subsequent sale. Because the new sale is a separate and distinct transfer of a unique interest, a new contract of sale registration is required (the registration of an amendment would not be appropriate).¹⁰³

The same principles are true with regard to an agreement (other than a contract of sale) between a debtor and creditor to increase the fractional interest covered by an international interest – all such matters should be reflected through the registration of a new international interest covering the additional fractional interest in the aircraft object and not by way of amendments to an existing registration.¹⁰⁴

¹⁰³ *Id.* See also GOODE at para. 2.85 (Unidroit 2008).

¹⁰⁴ GOODE at para. 2.86 (Unidroit 2008). “Where the increase results from a further grant by the debtor it represents a new interest which is separately registrable.” *Id.*

E. Helicopters

Helicopters are “aircraft objects” as defined in the Protocol, and other than the size requirements,¹⁰⁵ the Protocol treats helicopters in the same way as it treats airframes. An interplay of Protocol definitions of “aircraft,”¹⁰⁶ “aircraft engines,”¹⁰⁷ and “helicopters”¹⁰⁸ is used by the Official Commentary to describe how helicopters and helicopter engines should be characterized and treated under the Cape Town Convention.

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

(i) a helicopter engine is an “aircraft engine” when it is not attached to a helicopter;¹⁰⁹ and

¹⁰⁵ 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.

¹⁰⁶ “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.

¹⁰⁷ “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.

¹⁰⁸ “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.

¹⁰⁹ GOODE at para. 3.8 (Unidroit 2008).

(ii) when a helicopter engine is installed on a helicopter, the helicopter engine becomes a component or an accessory of the helicopter, and subsequently, loses the characterization as an “aircraft object.”¹¹⁰

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

(iii) subject to any liens or registrations that already cover such helicopter or that are made when the engine is on such helicopter; and

(iv) not capable of being the subject of the registration of a separate international interest.¹¹¹

The Official Commentary has a rather extensive analysis as to how these concepts can be applied to helicopter engines, which can be summarized as follows: (i) the registration of a sale or international interest relating to a helicopter engine is only effective if it is made at a time when such engine is not installed on a helicopter, (ii) any registrations made against helicopter engines at a time when an engine is not attached to a helicopter would not be affected by its subsequent installation on a helicopter, and (iii) any registration made against a helicopter would also cover a helicopter engine installed thereon at the time of the registration, but only for so long as such engine is attached to such helicopter.¹¹² The Official Commentary cautions against registering an international interest against a helicopter engine while it is installed on a helicopter and then relying on this registration when the helicopter engine is removed from the helicopter. Rather, the recommended approach is to complete a new registration when such engine is

¹¹⁰ *Id.* at para. 3.10.

¹¹¹ *Id.*

¹¹² *Id.*

removed from the helicopter; this new registration will be considered an effective registration of the interests in the engines.¹¹³

PRACTICE NOTE: THE OFFICIAL COMMENTARY RECOGNIZED THAT ENTERING INTO A NEW AGREEMENT AND REGISTERING A NEW INTERNATIONAL INTEREST EVERY TIME A HELICOPTER ENGINE IS REMOVED FROM A HELICOPTER IS IMPRACTICAL AND SUGGESTED A SOLUTION. THE ORIGINAL AGREEMENT (I.E., SECURITY AGREEMENT, LEASE AGREEMENT OR TITLE RESERVATION AGREEMENT) AMONG THE PARTIES SHOULD CONTEMPLATE THE EXISTENCE AND REGISTRATION AT CLOSING OF BOTH A CURRENT AND PROSPECTIVE SALE OR INTERNATIONAL INTEREST AGAINST THE HELICOPTER ENGINE. IF THE ENGINE IS NOT ATTACHED TO THE HELICOPTER AT THE TIME OF THE CLOSING, THE CURRENT REGISTRATION MADE AT THE TIME OF THE CLOSING IS EFFECTIVE. ALTERNATIVELY, IF THE ENGINE IS ATTACHED TO THE HELICOPTER AT THE TIME OF THE CLOSING, EVEN THOUGH THE REGISTRATION AGAINST THE SPECIFIC ENGINE WILL NOT BE EFFECTIVE, THE REGISTRATION AGAINST THE HELICOPTER WILL ALSO COVER THE ENGINE. WHEN THE ENGINE IS REMOVED FROM THE HELICOPTER, THE PROSPECTIVE REGISTRATION WILL BECOME EFFECTIVE AGAINST THE ENGINE AND THE PRIORITY RELATES BACK TO THE TIME OF THE REGISTRATION OF THE PROSPECTIVE INTERNATIONAL INTEREST WHICH OCCURRED AT THE TIME OF THE INITIAL CLOSING.¹¹⁴

While there are divergent views in the aviation community as to the treatment of helicopter engines in the Official Commentary, the registration of the prospective international interest would provide the desired comfort to ensure the financier's interests are adequately protected. As a result, irrespective of the differing opinions as to the treatment of helicopter engines by the Official Commentary, the registration of both an international interest and a prospective international interest against a helicopter engine would provide security in the event the Official Commentary's interpretation is held to be correct.

Example: *Owner of a helicopter and the helicopter engine currently installed thereon, grants a security interest in the helicopter and helicopter engine in favor of Mortgagee. The security agreement provides for a current international interest and an international interest that will come into being when the engine is removed from the helicopter (i.e., a*

¹¹³ *Id.* GOODE also states that the parties would need to enter into a new agreement to cover this; however, parties should be able to cover these alternative scenarios in the original agreement.

¹¹⁴ *Id.*

prospective international interest). At closing, the parties register an international interest from Owner in favor of Mortgagee against both the helicopter and helicopter engine, and in addition, the parties register a prospective international interest from Owner in favor of Mortgagee against the helicopter engine only.

The scenario above works as long as the engines involved are not installed on helicopters that are subject to competing or conflicting registrations. That is, because the registration of an international interest against a helicopter will be deemed to extend to any engine that is attached to such helicopter at the time of the registration, a prudent purchaser or lender must determine if the relevant engine is installed on any helicopter that may be the subject of a competing registration. If so, the purchaser or lender may require that the engine be removed from the helicopters with the competing registration so that the closing can occur and registrations can be made against the engine that is part of the transaction. For example, a potential lender or purchaser may want to send a representative to the location of the closing to confirm the location of the engine. Alternatively, a purchaser or lender may require additional documentation (i.e., engine log books and/or other records) pertaining to the relevant engines to determine which helicopter(s) the engine has been installed on and the dates of such installation.

Example: *Owner is obtaining a loan from Lender A with regard to helicopter sn 123 (which includes helicopter engine esn XYZ). Lender A investigates the engine's documentation and discovers that helicopter engine esn XYZ is actually installed on a different helicopter, helicopter sn 456. Although the priority search in respect of engine esn XYZ reveals no interests, such engine's installation on helicopter sn 456 automatically provides rights in such engine to the applicable financier/owner of such helicopter (due to such engine's installation thereon). Lender A obtains a priority search with regard to helicopter sn 456 and discovers that helicopter sn 456 is subject to a lien and an international interest in favor of Lender B. The only way for Lender A to obtain priority over Lender B in such engine would require such engine to be removed from helicopter sn 456. Upon removal of helicopter engine esn XYZ, Owner would register an international interest in favor of Lender A in and to engine esn XYZ. Absent such removal, Lender B's interest in helicopter sn 456 (which includes engine esn XYZ) would prevail.*

F. Transition Rules

Unless a declaration is made by a Contracting State to the contrary,¹¹⁵ the Cape Town Convention does not apply in such Contracting State to pre-existing rights or interests, which retain the priority they enjoyed under the applicable law before the effective date of the Cape Town Convention.¹¹⁶ The “effective date” means, in relation to a debtor, the later of the time: (1) when the Cape Town Convention and the Protocol entered into force in the Contracting State or (2) when the state in which the debtor is situated became a Contracting State.¹¹⁷ 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 restated with the International Registry or for any other steps to be taken following the effective date of the Cape Town Convention in such Contracting State. If the parties to a pre-existing interest wish to have the Cape Town Convention apply to a particular transaction, such parties must take steps to effectively reconstitute such right or interest following the applicable effective date. There are differing views on how this can be best accomplished.¹¹⁸ 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,

¹¹⁵ 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.

¹¹⁶ Article 60(1) of the Convention.

¹¹⁷ Article 60(2)(a) of the Convention.

¹¹⁸ 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 remains uncertain whether such a provision would have the desired effect under the Cape Town Convention.

however, this may be difficult due to 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 approach would be the best approach to determine whether to reconstitute pre-effective date interests into registrable Cape Town Convention interests.¹¹⁹

***Example:** Debtor is not situated in a Contracting State at the time it enters into a security agreement with Creditor in respect of an engine which constitutes an aircraft object. At the time of closing, Debtor and Creditor nonetheless register an international interest with the International Registry in respect of such engine. Shortly after entering into the security agreement, Debtor's jurisdiction of organization ratifies the Cape Town Convention and becomes a Contracting State. In this scenario, the Cape Town Convention would not apply since at the time of conclusion of the agreement, the Debtor was not situated in a Contracting State. In order for the Cape Town Convention to apply in this scenario, Debtor and Lender would need to create a new international interest (for example, a junior lien on the engine).*

G. Non-Convention Interests

It is important to note that while not all (or even any) interests in a particular transaction may be covered by the protections afforded by the Cape Town Convention, an interest affecting an aircraft object may nonetheless be registered with the International Registry. While such interests may not benefit from the protections, priority and remedies granted to international interests under the Cape Town Convention, such registration may nonetheless provide significant practical benefits to the parties (such as effective notice under applicable laws to third parties of such interest).

¹¹⁹ Similarly, it is possible that certain changes to a pre-existing right or interest are of such degree that they constitute the creation of an international interest or new international interest which would need to be registered in the International Registry in order to achieve priority against competing interests. For a good discussion on dealing with problems associated with preexisting interests, see THE LEGAL ADVISORY PANEL OF THE AVIATION WORKING GROUP CONTRACT PRACTICES UNDER THE CAPE TOWN CONVENTION: CAPE TOWN PAPERS SERIES, VOL. 1, 4-13 (2004) (also commonly known as the “**Purple Book**”). See also Section V.A. herein dealing with amendments which could, potentially, give rise to new international interests.

H. Implementation

Historically, international law has been primarily concerned with rights of nations *vis a vis* each other (or those affecting international organizations), and not the rights of individuals or other entities residing in those nations.¹²⁰ Increasingly, however, international law has moved towards rules that govern the rights of individuals and other entities. The Cape Town Convention is representative of this shift in international law. The purpose of the Cape Town Convention is to create greater consistency and predictability in matters related to aircraft sales, leases and financing by establishing clear, predictable and uniform rules that would govern the conduct of debtors and creditors in various states. Therefore, the relationship between the terms of the Cape Town Convention and the existing local laws governing rights in covered objects is critical to the effectiveness of the Cape Town Convention. It is essential that the terms of the Cape Town Convention are fully “implemented”, for present purposes meaning that they (1) have the force of law in the Contracting States (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 States.

Under the legal systems of numerous countries, the Convention and Protocol obtain the force of national law coincident with such country’s ratification. In many (though not all) countries, international treaties constitute the highest form of law (with the exception of constitutional law), and, thus, their legal force is not dependent upon national implementing law. Rather, they take “direct effect” or have “direct application” in that country upon ratification. In other countries, some form of implementing legislation is required to “incorporate” or “transform” these international legal instruments into national law. In these countries, it may be

¹²⁰ Somewhat confusingly given a different meaning in the related lexicon of conflict of laws, such international law is commonly referred to as “private international law”.

necessary to ensure the primacy of the incorporated or transformed terms, including in respect of subsequent national law.

As with the implementation of any 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.¹²¹

PRACTICE NOTE: IT IS COMMON 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.¹²² TO DATE, THERE HAVE BEEN SOME INSTANCES WHERE COUNSEL IN CERTAIN JURISDICTIONS HAVE HAD SOME DIFFICULTY PROVIDING THIS COMFORT, DUE PRINCIPALLY TO THE FACT THAT THEY BELIEVED AT THE TIME THAT CERTAIN IMPLEMENTING LEGISLATION WAS REQUIRED IN ORDER TO GIVE SUPREMACY TO THE TERMS OF THE CAPE TOWN CONVENTION. SUCH ISSUES ARE BOUND TO OCCUR WITH THE IMPLEMENTATION OF A TREATY AS BROAD AND FAR-REACHING AS THE CAPE TOWN CONVENTION. IT IS LIKELY THAT SUCH ISSUES WILL REMAIN UNSETTLED IN SUCH JURISDICTIONS PENDING RESOLUTION EITHER THROUGH THE LEGISLATIVE PROCESS OR JUDICIAL DETERMINATION.

¹²¹ The AWG has undertaken a major project to obtain information on and assess national law implementation, and the related matter of the manner in which the Cape Town Convention is “applied” in practice, meaning, how national courts and administrative authorities (such as, in respect of IDERAs, the civil aviation authorities) apply and enforce the treaty’s terms. Results of the AWG’s work are expected to be posted on its website (www.awg.aero) in due course. In addition, the Legal Advisory Panel plans to issue periodic reports on such application, with particular reference to Section VII herein on Cape Town Convention remedies.

¹²² For a good summary of legal opinion issues in connection with transactions involving the Cape Town Convention, see THE LEGAL ADVISORY PANEL OF THE AVIATION WORKING GROUP ADVANCED CONTRACT AND OPINION PRACTICES UNDER THE CAPE TOWN CONVENTION: CAPE TOWN PAPERS SERIES, VOL. 2 (2008) (also commonly known as the “**Green Book**”). A copy of the annotated form legal opinion from the Green Book is attached as Annex VI hereto.

IV. REGISTERING AN INTEREST

One of the essential features of the Cape Town Convention is the establishment of an International Registry which is a central registry for the purposes of registering applicable interests in aircraft objects. This section will provide an overview of the 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 Registry¹²³

The International Registry for “aircraft objects” (“**International Registry**”) is an electronic web-based system that is located in Dublin, Ireland, and is operated by the Registrar, Aviareto Limited.¹²⁴ The International Registry, established by the Supervisory Authority¹²⁵ under the Cape Town Convention, is the facility for effecting and searching registrations created pursuant to the Cape Town Convention.¹²⁶ It provides a mechanism to determine the priority of registrations made against a specific aircraft object. The Protocol requires the centralized

¹²³ While beyond the current scope of the Guide, it is noteworthy that the Registrar is developing materially enhanced registry functions, mainly designed to align registration and transaction closing processes. These enhancements, loosely referred to as “Generation 2”, are planned for development and implementation in phases over the next few years, subject to the approval of the Supervisory Authority. The enhancements will not affect the overarching principles discussed herein, but they will affect many details (and will require certain changes to the Cape Town Regulations). The Legal Advisory Panel plans to issue appropriate materials explaining Generation 2 changes, as and when relevant to practitioners.

¹²⁴ In October 2009, the Council of ICAO opted to reappoint Aviareto Limited to operate the International Registry for a second five year term from 2011 to 2016.

¹²⁵ The Supervisory Authority is the International Civil Aviation Organization.

¹²⁶ Section 3.1 of the Cape Town Regulations.

functions of the International Registry to be operated and administered seven days a week on a twenty-four hour basis.¹²⁷

The system is “object specific” (i.e., asset-based), meaning registrations are performed against an “aircraft object.” In turn, searches are made against “aircraft objects” and (for purposes of determining priority) cannot be made against debtors or other parties to a transaction. In an asset-based registry such as the International Registry, the most critical task is to properly identify the aircraft object in question.¹²⁸

“Interests” in aircraft objects are registered electronically on the International Registry with the consent of the appropriate parties. No documents are deposited with the International Registry, therefore, the International Registry system is intended to be a “notice” system in that users, by obtaining a priority search certificate against a specific aircraft object, are given notice of an asserted specific interest in an aircraft object and the identity of the parties to that registered interest.¹²⁹ This is a significant distinction from a document-based registry or filing system which allows parties to obtain and examine documents which have formed the basis of a transaction. Instead, under the system established by the Cape Town Convention, interested parties must examine the priority search certificate issued by the International Registry to determine what interests are claimed in an aircraft object and who has made the claim. The interested party must then conduct whatever diligence it deems necessary to confirm or

¹²⁷ Article XX(4) of the Protocol. The exceptions being such time as the International Registry may not be available due to maintenance or other unforeseen circumstances.

¹²⁸ See Section VI.A. herein. The Cape Town Convention requires the use of “generic” model designations. Section 5.4(c)(iii) of the Cape Town Regulations. See also Section IV.B.(iii) herein.

¹²⁹ See Section IV.E. herein. A user cannot rely on the system-generated emails which purport to confirm that a registration has been made but rather must rely on actually searching the registry.

otherwise deal with such interests. This keeps administrative costs of the International Registry to a minimum, and protects the confidentiality of the terms of each transaction. Because the International Registry is an electronic database searchable over the worldwide web,¹³⁰ a user must have an internet connected computer and the necessary software to access the International Registry (primarily a browser and Java). While the search function of the International Registry is fully open to the public, understandably, there are several restrictions established by the Cape Town Regulations for the International Registry to ensure that only authorized users are permitted to make registrations.¹³¹

B. Registry User Entities, Transacting User Entities and Professional User Entities (RUES, TUES and PUES) and the Registration Process

(i) Introduction and Definitions. In order to “register” notice of an interest with the International Registry, each party to the interest must first establish an account with the International Registry as a transacting user entity (“TUE”). Registrations of interests in aircraft objects are then accomplished electronically (i.e., data entry onto the website of the International Registry and consent given by way of digital signatures utilizing Public Key Infrastructure (PKI) technology and Digital Certificates). The primary entity which makes registrations on the International Registry is known as a TUE, which is a legal entity, natural person, or more than one of the foregoing acting jointly, intending to be a named party in one or more registrations.¹³² While accounts are established in the name of individuals and entities, the actual process of

¹³⁰ The web address is <https://www.internationalregistry.aero>.

¹³¹ GOODE at para. 2.94 (Unidroit 2008). *See also* Section 4 of the Regulations under the Cape Town Regulations and Section 7 of the Procedures under the Cape Town Regulations.

¹³² Section 2.1.15 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.*

registrations can be taken only by individuals. There are three classes of individuals who can act for a TUE: (x) an individual “administrator” of the TUE (the establishment of an administrator is discussed in paragraph (ii) below), (y) a transacting user (“TU”) which is an individual employee, member or partner of a TUE or an affiliate of a TUE, and (z) a professional user (“PU”), which is an individual employee, member or partner of a professional user entity (discussed below).

The other type of entity which can establish an account on the International Registry is a professional user entity (“PUE”), which is a firm or other grouping of persons providing professional services to TUEs. A PUE is typically a law firm or other company that assists TUEs in making registrations on the International Registry when authorized to do so. Similar to a TUE, the PUE, once established, must act through individuals. There are two classes of individuals who can take action on behalf of a PUE: (x) an individual “administrator” of the PUE, which will be discussed below, and (y) a PU.

A registry user entity (“RUE”) can be either a TUE or a PUE and a registry user (“RU”) can be either a TU or a PU.¹³³

(ii) Establishing an Account; Appointment of Administrators.

1. Establishing the Account. As noted above, no party can access the International Registry for purposes of making a registration until it has established an account as either a TUE or a PUE. An account is established by making an application on-line at, and following the instructions on, the International Registry website. Each entity on the system must have an administrator to make registrations on its behalf, to approve other users and to authorize other users to make registrations on behalf of such entity. The person who applies to

¹³³ The use of the acronyms RUE, TUE, PUE, RU and PU has become quite prevalent by practitioners in connection with the use of the International Registry.

establish the entity's account must be the proposed administrator (an "administrator" which is defined as an individual with authority to act on behalf of a RUE on administrative matters dealing with the International Registry).¹³⁴ When applying for an account, the applicant must provide the legal name of the entity and its address. The applicant must also provide his or her own (i.e., the administrator's) phone number and email address and create a password which is known only to such individual and which is stored locally on the computer to be used to make registrations. The password will be used when digitally signing or making consents on the website.¹³⁵ The applicant must pay for the account and provide the International Registry with the following items by email (preferred) or by fax: (x) evidence of its existence such as a certificate of formation or good standing and (y) Certificate of Entitlement to Act ("CEA") in a form prescribed by the International Registry, which must be on the letterhead of the applicant and signed by a person who has authority to act for the applicant. The CEA is the official appointment of both the administrator and a "back-up contact"¹³⁶ for the entity.

A registry 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

¹³⁴ Section 2.1.1 of the Cape Town Regulations.

¹³⁵ Currently, the International Registry offers a one year license in the amount of \$200 (the International Registry previously permitted users to obtain a 5-year license but this option was recently terminated). Payment should be made on-line and by credit card.

¹³⁶ Section 5.12 of the Procedures under the Cape Town Regulations requires a registry user to appoint a "back-up contact" in order to assist should a security breach occur which could reasonably be expected to result in unauthorized access to and use of the International Registry.

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 an email is automatically sent to the administrator containing a link to its digital certificate. The administrator must download this certificate into the same keystore¹³⁷ which stores the password previously created (i.e., the certificate must be downloaded onto the computer from which the original application was made and upon which the password was created). The keystore also contains the private key for the administrator. The private key and password are never transmitted to the International Registry.

The restrictions placed on the digital certificate requires the administrator (and each related registry user) to carefully consider the specific computer/work station to be used to interact with the International Registry as such interactions can only be made from the specific computer housing the keystore. It is possible to transfer the keystore to another computer with support from a Registry official and it is also possible, indeed recommended, to back-up this critical file.¹³⁸ A digital certificate may be transferred from one computer to another only with assistance from the helpdesk at the International Registry. 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 new digital certificate which may cost as much as the original digital certificate (i.e., \$200 for a one year license). The use of a digital certificate in order to effect registrations on the International Registry is also password protected but the International

¹³⁷ A “keystore” is an encrypted file protected by the password entered by the user upon application, located on the user’s computer which stores the user’s digital certificate and private key.

¹³⁸ 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.

Registry does not have access to the password, so if it is lost, the applicable user must disable and reestablish the account (which may cost as much as the original digital certificate).

2. The Administrator. The administrator is the individual who in almost all cases conducts the business and communication between a RUE (i.e., TUE or a PUE) and the International Registry. Also, the administrator of a RUE has the power to make any and all registrations on behalf of a RUE. Section 5 of the Procedures under the Cape Town Regulations provides further details on the functions of the administrator.

The administrator of a TUE can take the following actions: (i) make any and all registrations on behalf of a TUE, (ii) electronically authorize transacting users to make registrations on behalf of the TUE, with regard to specifically identified aircraft objects, (iii) electronically authorize professional user entities (“**PUE’s**”) 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 appointments designated in (ii) and (iii) above.

The administrator of a PUE can take the following actions: (i) make any and all registrations when a PUE has been designated to make registrations for a TUE, with regard to specifically identified aircraft objects, (ii) electronically approve professional users within the PUE group, and such professional users can then make registrations on behalf of a TUE which has appointed the PUE to make registrations, 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 appointments designated in (ii) above.¹³⁹

The administrator must be an individual, but he or she does not have to be an employee of the TUE or PUE for which he or she is an administrator.

(iii) Registration Process Overview.

In order to effect a registration, a TUE (by and through its administrator or a professional user authorized on its behalf) 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. Once this has been accomplished and the applicable fee has been paid, the other party or parties to such interest will be given notice that a registration has been initiated and will have 36 hours in which to consent. Much of the data for a registration is available via a “drop down” or “look-up” list on the International Registry website, and critically, such “drop down” list **must be used** where available.¹⁴⁰ This data includes make, generic model designation¹⁴¹ and serial number of the applicable aircraft objects and the names of the TUEs who are the parties to registrations.¹⁴² Once all parties have consented to the registration, it is complete and the

¹³⁹ The rules governing the making of a registration and authorizing others to do so also apply to transferring the right to discharge an interest.

¹⁴⁰ See Section IV.G. below, and, in particular, Section 5.1 of the Cape Town Regulations.

¹⁴¹ The Convention and the Protocol, together with the regulations related thereto, specifically contemplate the use of “generic model designations” as opposed to the use of a model designation specific to a particular party (so, for example, instead of “737-322” airframe, the Cape Town Convention would use the generic form “737-300”). See Article 7(c) of the Convention; Article V(1)(c) of the Protocol. See also Section 5 of the Cape Town Regulations. This is consistent with the Cape Town Convention’s basic intent of universality and simplicity.

¹⁴² While information can be entered manually (that is, not from the “drop down” boxes), this practice is highly discouraged as it could lead to inaccurate or misleading registrations or searches, which is not the desired effect under the Cape Town Convention.

Registrar automatically provides prompt electronic notification of registration to the named parties and the registering person.¹⁴³ The registering party should then search its own registration to ensure that all is in order, with the relevant registration being documented in a priority search certificate.

(iv) The Registration Process.

A user intending to make a registration must be authorized to do so. A TUE administrator is authorized to make registrations for the TUE based upon the CEA form submitted at the time of account set-up. The TUE administrator will either make a registration directly or authorize a registry user or professional user to do so.¹⁴⁴ The TUE administrator uses a “manage authorization” function on the website for the purpose of managing other users.

All other users (i.e., registry users and professional users) are allowed to make registrations if they first request authorization and are subsequently authorized by the TUE administrator. The authorizations apply to a specific aircraft object and must be requested for each aircraft object on which the user intends to make a registration. Therefore, the first step for an International Registry user is to ensure that it has authorization to make the relevant registration. For professional users, there is a “request authorization” function on the website that will enable the professional user to become authorized to make registrations on a particular aircraft object.

In requesting an authorization, the critical elements are: (i) selecting the correct aircraft object identifier (make, generic model and manufacturer’s serial number) in the correct format and (ii) selecting the correct TUE or controlled entity. In the case of clause (i) above, where the

¹⁴³ Section 6.2 of the Cape Town Regulations.

¹⁴⁴ Special rules would apply if the applicable Contracting State designated an entity in its territory as a “direct entry point.” See Section VI.A. below for a discussion on entry points.

data is supplied by the manufacturer via the “drop down” list, that data should be used and Section 5.1 of the Cape Town Regulations makes such use mandatory where available. Where such data is not available, the user has the option of entering the data directly, which is commonly referred to as a “free text” entry; however, as noted in Section IV.G., the use of free text entries should only be made when the information is not available through the drop down list and the use of a free text description increases the risk that the registration will not be given proper effect. A registration that is made using an incorrect or incomplete aircraft object identifier may allow a subsequent registration covering the correctly identified aircraft object to take priority over a prior registration covering the incorrectly identified aircraft object. The practitioner must therefore be very careful to identify an aircraft object correctly.

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

When a TUE administrator receives notice of a request for authorization from a professional user or a registry user, the administrator should carefully review the notice to ensure that the requesting party selected the correct aircraft object identifier as this will be the aircraft object upon which the registrations will be made. The TUE administrator should also carefully manage authorizations of PUEs to work on particular aircraft objects. This includes revoking

authorizations after they are no longer necessary. There is no cost to revoking or approving authorizations, and accordingly there should be no impediment to keeping the authorization list to a minimum.

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

When entering the registration data the user will also be required to enter the State of Registry for the airframe, and if applicable, the relevant unique authorization code for states with a direct entry point.¹⁴⁵ Finally, the user must decide whether to specify a lapse date for the relevant registration.¹⁴⁶ In practice, this feature of the registry system is almost never used and the practitioner is advised to use a lapse date only in rare circumstances.

PRACTICE NOTE: ENTERING THE REGISTRATION DATA IS STRAIGHTFORWARD AND AT THE END OF THE PROCESS YOU WILL BE ASKED TO CONFIRM THAT THE DATA IS CORRECT. GIVEN THE VALUE OF THE ASSETS IN QUESTION AND THE PERMANENCY OF THE RECORDS ON THE INTERNATIONAL REGISTRY, YOU ARE ADVISED TO CAREFULLY CHECK THE DATA BEFORE CONSENTING.

For most registrations the consent of both parties is required, so when the first party completes the entry of the registration data, pays the registration fee and indicates its consent, the registration goes into a pending state and it is not reflected on the International Registry. The registration will “go live” (i.e., be searchable) only when consented to by the second party.¹⁴⁷

¹⁴⁵ See Section VI.A. for a further discussion on such authorization codes.

¹⁴⁶ Practitioners generally do not specify a lapse date in 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.

¹⁴⁷ A registration takes effect at the time it is searchable. For a discussion on when a registration become searchable, see Section IV.E. below.

For some registrations only one consent is required (e.g., a discharge will go live immediately when consented to by the discharging party (see important caveat below about technical problems which could arise between the time of final consent and the registration going live).

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

For registrations requiring a second consent, the second party will receive an email notifying such party that a registration has been initiated and that it has 36 hours to consent. A registry user can use the “list interest with status/give consent” function on the website to review the registration data and provide its consent. Again, the user should check the data carefully with a particular emphasis on the aircraft object identifier, the type of registration and the parties. Clearly all data is critical and must be reviewed before a user consents to a registration. Once the second party consents, the registration enters a queue to be processed before the registration is complete and searchable on the International Registry; however, in normal circumstances this process takes only a matter of seconds.

PRACTICE NOTE: TECHNICAL PROBLEMS MAY ARISE BETWEEN THE TIME OF FINAL CONSENT AND THE REGISTRATION GOING LIVE. THE ONLY WAY TO CONFIRM THAT A REGISTRATION HAS GONE LIVE AND IS SEARCHABLE IS TO REVIEW THE PRIORITY SEARCH CERTIFICATE IN RESPECT OF THE RELEVANT AIRCRAFT OBJECT.

All computer systems suffer failures. It is possible, in fact likely, that the International Registry will suffer a failure when a registration which is just about to go live has not yet been deposited into the registration database. Once the registration actually makes it to the

registration database it is the role of the Registrar to ensure that the data does not change and is stored indefinitely. However, should the International Registry fail just before a registration goes live there is no guarantee that, upon restoration of the system, the registration will be processed. It is also possible, but less likely, that a bug in the process to make a registration live will occur and that a registration might not be properly processed and may fail. While the system has been designed to manage these circumstances, there can be no guarantee that a registration will actually go live. Therefore, the user should always search the International Registry to ensure that the registration they consented to actually went live.¹⁴⁸ 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.

(v) Making a registration using a direct entry point or an authorizing entry point.¹⁴⁹

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

A detailed overview of the registration process is illustrated in the user manual which can be located on the International Registry website (<https://www.internationalregistry.aero>). The

¹⁴⁸ See Section IV.E. for a discussion on searches on the International Registry.

¹⁴⁹ See Section VI.A. herein for a discussion on entry points.

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

C. Agents, Trusts and Representative Capacities

It is common in aviation transactions to have one party act in a representative, trust or agency capacity for other parties, e.g., owner trustee, trustee, security trustee, collateral agent, agent, and similar iterations. Article VI of the Protocol recognizes this fact and 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.¹⁵⁰

Nevertheless, in practice, questions arise as to (i) whether an entity that is acting in an agency capacity must identify that capacity when establishing an account and becoming an approved user on the International Registry and (ii) whether registrations made on the International Registry must reflect that agency capacity.

Example: Bank enters into a security agreement as secured party in its capacity as administrative agent for several lenders under the underlying financing documents. “Bank” is already an approved user on the International Registry. Relying on the language of Article VI to the Protocol, the international interest is registered in favor of “Bank,” instead of “Bank, as Administrative Agent.”

While the Protocol is silent on this issue, the Official Commentary clarifies the issue by stating, “[i]t is not necessary to state the registrant’s capacity.”¹⁵¹ This is a logical position and consistent with industry practice; and there is no requirement in the Protocol to the contrary.

¹⁵⁰ Article VI of the Protocol.

¹⁵¹ GOODE at para. 3.46 (Unidroit 2008).

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 aware of the international interest against an aircraft object. Such third parties are charged with making further investigation at which time they would be made aware of the capacity in which bank took the international interest.

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. 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 the law applicable to such documentation, the successor assumes all of the rights and interests of such bank or trust company in such capacity. Further, the documentation creating the international interest should be reviewed to confirm that the international interest was created in favor of such bank or trust company in such capacity, its successors and assigns. If, under applicable law, the successor agent, trustee or representative, as applicable, does assume such rights and interests and the international interest has been created in favor of the bank in such capacity, its successors and assigns, then assuming there are no other changes to the documentation that might give rise to a new international interest,¹⁵² and interpreting Article VI broadly¹⁵³ a new registration is not required.¹⁵⁴

¹⁵² See Section V.A. herein.

¹⁵³ GOODE at paras. 3.46, 5.33 (Unidroit 2008).

¹⁵⁴ Since it is likely that the existing agent, trustee or representative, as applicable, would enter into some form of assignment and assumption arrangement in order to effect the assumption by the successor of the various rights and interest of its predecessor, the prudent course would nonetheless be to register an assignment of such predecessor’s rights with the International Registry.

Nevertheless, the practice has developed in the United States for trustees who are acquiring an aircraft through a contract of sale to reflect such capacity when establishing a transacting user account on the International Registry. This should not be interpreted as anything other than a preference of trust attorneys and advisors or a method of assisting parties with the mechanical aspects of completing registrations on the International Registry. While establishing an account that includes the capacity of a party may assist in managing a deal checklist and it may reflect an individual's style of organization, it should not be given any additional material or substantive consideration.

Article VI of the Protocol contemplates that a person may enter into an agreement or a sale and register an international interest or a sale of an aircraft object in a representative capacity.¹⁵⁵ This language is somewhat limited in that an "agreement" is a defined term that includes a security agreement, leasing agreement or title reservation agreement.¹⁵⁶ 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). Notwithstanding this language, there is no indication in the drafting history of the Protocol, or in any other source of information on the Protocol, of any intent to limit the rights of a party who takes in an agency capacity. The Official Commentary addresses this when it states:

"This provision must be interpreted broadly. The intent is to permit a person to take any action under the [Cape Town] Convention . . . in a representative capacity,

¹⁵⁵ Article VI of the Protocol.

¹⁵⁶ Article 1 of the Convention.

whether as agent, trustee or in some other representative capacity. A narrow reading of this Article would lead to illogical results . . .”¹⁵⁷

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,¹⁵⁸ and this may be one of those cases. It can also be argued that when used in this context, agreement includes any amendment, assignment, subordination or subrogation of the same.

The final issue with regard to taking interests in a trust, agency or other representative capacity is the following language in Article VI of the Protocol: “. . . [i]n such case, that person is entitled to assert rights and interests under the [Cape Town] Convention.” 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.¹⁵⁹

D. Use of Controlled Entities

As previously discussed, a party must establish an account with the International Registry in order to make registrations against aircraft objects. Once a transacting user entity 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

¹⁵⁷ GOODE at para. 5.33 (Unidroit 2008).

¹⁵⁸ *See, e.g.*, the use of the word “agreement” in Article 17.3 of the Convention.

¹⁵⁹ GOODE at para. 5.33 (Unidroit 2008).

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.”¹⁶⁰ The advantage to using a controlled entity is that its account with the International Registry can be established in a matter of minutes. The administrator for the “parent” transacting user entity creates the account by following a few simple on-line instructions and paying the applicable fee.¹⁶¹

Whether a transacting user entity can correctly assert that it controls, manages or administers the company is the key to determining if such company is a “controlled entity” of a transacting user 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 taken for tax and 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.

In addition, there are unresolved issues with regard to the management of a controlled entity account on the International Registry. Once a controlled entity account has been established, the International Registry does not allow the controlled entity to change the type of

¹⁶⁰ Section 2.1.6 of the Cape Town Regulations. As originally implemented, the Cape Town Regulations (First Edition) did not include “controlled entities.” Instead, the Cape Town Regulations provided for the use of a “special purpose entity,” which was narrowly defined and created confusion as to whether a company qualified as a special purpose entity. Consequently, the revised Cape Town Regulations replaced “special purpose entity” with “controlled entity,” in an effort to simplify and clarify the concept.

¹⁶¹ Section 4.1 of the Cape Town Regulations.

account from controlled entity account to a transacting user entity account.¹⁶² Therefore, if the relationship between the “parent” and the “controlled entity” changes (for example, through a merger, corporate restructuring or sale) such that the “parent” transacting user entity no longer controls, manages or administers the controlled entity, then the controlled entity no longer falls within the definition of a controlled entity, but the International Registry will not allow the account to be changed from a controlled entity account to an independent transacting user entity account. Among other things, this means that the controlled entity account is still managed by the administrator for the (former) parent transacting user entity, which may no longer have any relationship to the controlled entity. It is unclear whether the controlled entity account remains valid after it no longer qualifies as a controlled entity.

If a controlled entity no longer fits the definition and the International Registry will not allow the type of account to be changed, then the next logical option is to apply to the International Registry to establish a new account as an independent transacting user entity. This is not easily done because the International Registry correctly does not allow two registry user accounts to have the exact same name.

Example: *An Owner creates a subsidiary, XYZ Corp., to purchase an aircraft object. Owner has control and management of XYZ Corp., such that XYZ Corp. qualifies as a “controlled entity.” Owner takes the appropriate steps to establish XYZ Corp. as a controlled entity account on the International Registry (once this is done the account for XYZ Corp. appears on the system as if it were an account for a transacting user entity). XYZ Corp. purchases an interest in an aircraft object and registers (i) a sale from a Seller to XYZ Corp., and (ii) an international interest by XYZ Corp., as debtor in favor of a Lender. Owner merges with another company and spins off XYZ Corp. as an independent company. As a result, XYZ Corp. no longer qualifies as a controlled entity, but the current system will not allow XYZ Corp. to change its account from a controlled entity account to a standard transacting user entity account, and it will not allow XYZ*

¹⁶² However, the Registrar expects to make significant changes to the management of controlled entity accounts. These changes may allow (x) a TUE to transfer control of a controlled entity account to another TUE and (y) a controlled entity account to be converted to a TUE.

Corp. to establish a new account in its name because there is already an account on the International Registry with that name. The alternatives are to do nothing and maintain an account status that may no longer be valid or to make an application to establish a new account using a modified name for XYZ Corp., subject to approval by the International Registry.

As mentioned in the above scenario, a former controlled entity can establish a transacting user entity account by adding additional information (for example, the name “XYZ Corp. (A Delaware Corporation),” would probably be acceptable to the International Registry), but having two similarly named accounts, such as “XYZ Corp.,” the controlled entity, and “XYZ Corp. (A Delaware Corporation),” is not ideal and can be confusing.

PRACTICE NOTE: TO AVOID THIS CONFUSION, THE ACCOUNT FOR THE FORMER CONTROLLED ENTITY SHOULD BE DISABLED AT THE SAME TIME THE NEW ACCOUNT IS ESTABLISHED; HOWEVER, IF THE CONTROLLED ENTITY IS A PARTY TO ANY OUTSTANDING REGISTRATIONS THAT MAY REQUIRE THE CONSENT OF THE CONTROLLED ENTITY TO AMEND, ASSIGN OR DISCHARGE SAME, THEN THE CONTROLLED ENTITY ACCOUNT SHOULD BE KEPT CURRENT UNTIL THE OBLIGATIONS PERTAINING TO THOSE REGISTRATIONS HAVE BEEN SATISFIED AND/OR DISCHARGED (I.E., UNTIL THE CONTROLLED ENTITY ACCOUNT IS NO LONGER NEEDED). FOR EXAMPLE, IF THE CONTROLLED ENTITY IS A CREDITOR IN CONNECTION WITH A REGISTERED INTERNATIONAL INTEREST OR A BUYER IN CONNECTION WITH A REGISTERED CONTRACT OF SALE, THEN THE CONTROLLED ENTITY WOULD NEED TO MAINTAIN ITS APPROVED STATUS ON THE INTERNATIONAL REGISTRY TO BE ABLE TO REGISTER AN ASSIGNMENT OR DISCHARGE OF THE INTERNATIONAL INTEREST OR TO REGISTER A SALE OF THE AIRCRAFT OBJECT, NOTWITHSTANDING THE CONCERNS OUTLINED ABOVE.

Parties have misused the “controlled entity” function in a variety of ways. Some companies that are completely unrelated to the controlled entity have claimed to be a parent of a “controlled entity.” Other parties have tried to use the controlled entity option in an effort to correct errors that were made when establishing an account in the name of a transacting user entity. Most of these abuses result from the pressure to quickly establish an account (or to correct an already established account) so that a deal can close. For all these reasons, parties should be vigilant to confirm that the accounts of all parties to a transaction have been properly created and established.

These problems can be eliminated if parties are willing to simply forego the use of “controlled entities” when establishing accounts and, instead, take the time and make the effort (both of which are minimal) to create an independent account in the name of a transacting user entity.¹⁶³

E. IR Searches

A search of the International Registry is normally conducted prior to a closing to identify existing registrations against an 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 will set forth the information relating to a prior registration or registrations against a particular aircraft object, or it will confirm that no registrations have been made with regard to an aircraft object.¹⁶⁴ The information in relation to registrations will be listed in chronological order. A priority search certificate will not state whether an interest was registered as a prospective interest.¹⁶⁵

In conducting searches it is important to understand that the search results will only reflect “searchable” registrations. A registration takes effect not from the time of transmission of the data to or receipt of the data by the International Registry, but from the time the registration is searchable (sometime referred to herein as “live”). A registration is searchable at the time when the International Registry has assigned a sequentially ordered file (including a registration

¹⁶³ It should be noted that the introduction of new software on the International Registry by the Registrar, likely to occur in 2011, may allow for more flexible use of the controlled entity.

¹⁶⁴ Article 22(2) of the Convention.

¹⁶⁵ Article 22(3) of the Convention, and Article III of the Protocol.

number) and such number and related information may be accessed at the International Registry (that is, when the registration is reflected on a priority search certificate).¹⁶⁶ Such information is searchable for purposes of determining whether a registration is complete and the intended priorities have been established against third parties.¹⁶⁷

Searches of the International Registry are performed against a manufacturer's name, generic model designation, serial number and object type.¹⁶⁸ A search for registration information using the preceding criteria is called a "priority search".¹⁶⁹ A priority search, however, will 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 the prior 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 there are no prior registrations against a particular aircraft object. The use of the "information search" discussed below is an important tool that allows the person conducting a priority search to be confident they have searched in the appropriate manner.

An "informational search" was developed by the IR at the request of the industry to address the challenges created by the restricted nature of the priority search. It is a preliminary search function which allows the searcher to determine what priority searches should be

¹⁶⁶ GOODE at para. 4.142 (Unidroit 2008).

¹⁶⁷ Articles 19(2) and (6) of the Convention and Article XX(1) of the Protocol.

¹⁶⁸ Section 7.1 of the Cape Town Regulations.

¹⁶⁹ Section 7.2 of the Cape Town Regulations.

conducted.¹⁷⁰ The information search does not result in the production of a priority search certificate, the International Registry is not liable for the contents of the contents of the informational search and it should not be relied on in lieu of a priority search certificate.¹⁷¹ The informational search is based primarily on a search of the system based on the object type and all or part of an object's manufacturer's serial number. Unlike the priority search, the informational search will produce a listing of any aircraft object that matches in whole or part the numeric serial number of an aircraft object identified in the pre-populated manufacturers' drop-down list as well as any aircraft object that has been the subject of a prior registration (whether such registration was made using the drop-down list or by free-text). For instance, a search for prior registrations against an aircraft engine (object type) with serial number "87410" will produce results pertaining to aircraft engines that are included in the pre-populated manufacturer drop-down list or that have prior registrations on aircraft engines with variations on the serial number that was entered. In this example the informational search would identify aircraft engines bearing , bearing serial numbers "87410", "874102", "P87410", "687410", etc.

An informational search will only reflect results with regard to a maximum of 50 items, and will provide a notice if there are additional aircraft objects. In this instance, the searcher must conduct a second informational search using additional criteria, such as the manufacturer or model designation, to narrow the focus of the search. The additional information does not result in the exclusion of aircraft objects from the original search, but it will cause the search results to be ordered so that the aircraft objects with similar manufacturer or model designations will be listed first. It is also possible to enter part of a manufacturer or model designation, such as the

¹⁷⁰ Section 13.2 of the Cape Town Regulations

¹⁷¹ Section 13.3 of the Cape Town Regulations

first letter of the name of the manufacturer or model rather than the full name or model designation. In addition, it is possible to perform an exact match informational search which will limit the results to those with the exact serial number being searched within a particular object type.

The informational search results conveniently provide a chart of those specific aircraft objects that are on the manufacturer's drop down list or that have prior registrations within the object type that match the search criteria. The chart will list the manufacturer, model designator, manufacturer's serial number and object type, and note whether the applicable object is listed on the manufacturer's drop down list and if a current registration exists against the object. The searcher then uses this information to obtain the appropriate priority search certificates through a relatively seamless system of clicking a box, making payment and downloading the priority search certificates.

It should be emphasized that an informational search alone is not sufficient to properly establish the status of the records of the International Registry with regard to an aircraft object. The informational search should only be used to gather information to allow a party to make the necessary priority searches and obtain the appropriate priority search certificate, which is the official reflection of the records of the International Registry. A registry user may also perform a "country" search which is a search for all of a particular Contracting State's declarations and designations and withdrawals thereof on the International Registry website.¹⁷²

¹⁷² Section 7.5 of the Cape Town Regulations. *See* Annex II for a summary of key declarations made by individual Contracting States.

An example of an informational search is set out below:



- Home
- User Area
- Registration Area
- Search the Registry
- Fees and Payment Options
- Documentation and Information
 - Arabic
 - Chinese
 - English
 - French
 - Russian
 - Spanish
- FAQs (Frequently Asked Questions)
- Contact Us
- Annual Statistical Report
- Help

- Log-in: Scott D McCreary
McAfee & Taft A Professional Corporation
- Logout

Search Registrations

Manufacturer's Serial Number	<input type="text" value="P87410"/>	Exact MSN match only <input type="checkbox"/>
(Mandatory)		
Manufacturer	<input type="text"/>	Aircraft Object Type
	AIRBUS ATR BAE SYSTEMS BEECH AIRCRAFT CORPORATIO BEECHCRAFT-HAWKER CORPOF	Airframe <input type="checkbox"/>
Model Designation	<input type="text"/>	Engine <input checked="" type="checkbox"/>
		Helicopter <input type="checkbox"/>
Beneficiary of Priority Search:	<input type="text"/>	
<input type="button" value="Informational Search"/> <input type="button" value="Cancel"/>		

By entering this site you acknowledge and agree to all terms and conditions stated herein



- Home
- User Area
- Registration Area
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- Documentation and Information
 - Arabic
 - Chinese
 - English
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 - Spanish
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- Contact Us
- Annual Statistical Report
- Help
- Log-in: Scott D McCreary
McAfee & Taft A Professional Corporation
- Logout

Search Registrations

Informational Search

Manufacturer	Model Designator	Manufacturer's Serial Number	Object Type	Matches current Manufacturer List	Registration Exists	Select
CFM	CFM56-7	874102	ENGINE	YES	NO	<input type="checkbox"/>
CFM	CFM56-7	874103	ENGINE	YES	YES	<input type="checkbox"/>
CFM	CFM56-7	874104	ENGINE	YES	YES	<input type="checkbox"/>
CFM	CFM56-7	874105	ENGINE	YES	NO	<input type="checkbox"/>
CFM	CFM56-7	874106	ENGINE	YES	NO	<input type="checkbox"/>
CFM	CFM56-7	874107	ENGINE	YES	NO	<input type="checkbox"/>
CFM	CFM56-7	874108	ENGINE	YES	NO	<input type="checkbox"/>
CFM	CFM56-7	874109	ENGINE	YES	NO	<input type="checkbox"/>
HONEYWELL	TFE731 Series	P87410	ENGINE	YES	YES	<input type="checkbox"/>
PRATT & WHITNEY	JT8D STD	687410	ENGINE	YES	NO	<input type="checkbox"/>

If the object you are seeking is not in the returned list above you may still obtain a Priority Search Certificate as follows

1. Return to the first search screen
2. Enter the full object details i.e. Manufacturer, Model Designator, Serial Number and object type.
3. Ensure that the format used is as provided by the manufacturer to the IR for similar objects.
4. Request an informational search and follow the subsequent instructions

By entering this site you acknowledge and agree to all **terms and conditions** stated herein

Manufacturer	Model Designator	Manufacturer's Serial Number	Matches current Manufacturer list	Registration Exists
CFM	CFM56-7	874102	YES	NO
CFM	CFM56-7	874103	YES	YES
CFM	CFM56-7	874104	YES	YES
CFM	CFM56-7	874105	YES	NO
CFM	CFM56-7	874106	YES	NO
CFM	CFM56-7	874107	YES	NO
CFM	CFM56-7	874108	YES	NO
CFM	CFM56-7	874109	YES	NO
HONEYWELL	TFE731 Series	P87410	YES	YES
PRATT & WHITNEY	JT8D STD	687410	YES	NO

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

<p style="text-align: center;">Priority Search Certificate Issued by The International Registry for International Interests In Mobile Equipment (Aircraft Equipment)</p> <p>This certificate was created on 01 Dec 2010 at 17:19:13 GMT Certificate Number: 13153448 Requested by: Kelly Wood of Crowe & Dunlevy, P.C. Beneficiary of Priority Search Certificate: Crowe & Dunlevy</p> <p>Search Criteria Manufacturer: BOMBARDIER Model designation: CRJ-700 Manufacturer's serial number: 10317</p> <p>Search Results</p> <p>The International Registry system is designed to use percentages with a maximum of six decimal places when recording fractional and partial interests in aircraft objects e.g. 12.123456%. Please consider that certain fractions cannot be fully represented within six decimal places. Percentages shown are of the full aircraft object.</p> <table border="0"> <thead> <tr> <th>Date/time</th> <th>Details of Interest</th> </tr> </thead> <tbody> <tr> <td>01DEC2010 17:07:23 GMT</td> <td> <p><u>Registration</u> Type: Contract of Sale File number: 676534 Fractional or Partial Interest: 100.0000000%</p></td> </tr> <tr> <td></td> <td> <p>Seller: Bombardier Inc. Contact details: francis.jecomte@aero.bombardier.com</p> <p>Buyer: AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILLOS@AA.COM</p> </td> </tr> </tbody> </table> <p style="text-align: right;">Page 1 of 2</p> <p style="font-size: small;">This document has been digitally signed by the Registrar and the signature has been filed.</p>	Date/time	Details of Interest	01DEC2010 17:07:23 GMT	<p><u>Registration</u> Type: Contract of Sale File number: 676534 Fractional or Partial Interest: 100.0000000%</p>		<p>Seller: Bombardier Inc. Contact details: francis.jecomte@aero.bombardier.com</p> <p>Buyer: AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILLOS@AA.COM</p>	<p>Search Criteria Manufacturer: BOMBARDIER Model designation: CRJ-700 Manufacturer's serial number: 10317</p> <p>Search Results</p> <p>The International Registry system is designed to use percentages with a maximum of six decimal places when recording fractional and partial interests in aircraft objects e.g. 12.123456%. Please consider that certain fractions cannot be fully represented within six decimal places. Percentages shown are of the full aircraft object.</p> <table border="0"> <thead> <tr> <th>Date/time</th> <th>Details of Interest</th> </tr> </thead> <tbody> <tr> <td>01DEC2010 17:14:29 GMT</td> <td> <p><u>Registration</u> Type: International Interest File number: 676540 Fractional or Partial Interest: 100.0000000%</p></td> </tr> <tr> <td></td> <td> <p>Debtor: AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILLOS@AA.COM</p> <p>Creditor: Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.lorton@wellsfargo.com Right to Discharge Holder: Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.lorton@wellsfargo.com</p> </td> </tr> <tr> <td></td> <td style="text-align: center;">End of List</td> </tr> </tbody> </table> <p style="text-align: right;">Page 2 of 2</p> <p style="font-size: small;">This document has been digitally signed by the Registrar and the signature has been filed.</p>	Date/time	Details of Interest	01DEC2010 17:14:29 GMT	<p><u>Registration</u> Type: International Interest File number: 676540 Fractional or Partial Interest: 100.0000000%</p>		<p>Debtor: AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILLOS@AA.COM</p> <p>Creditor: Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.lorton@wellsfargo.com Right to Discharge Holder: Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.lorton@wellsfargo.com</p>		End of List
Date/time	Details of Interest														
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01DEC2010 17:14:29 GMT	<p><u>Registration</u> Type: International Interest File number: 676540 Fractional or Partial Interest: 100.0000000%</p>														
	<p>Debtor: AMERICAN EAGLE AIRLINES, INC. Contact details: ROSE.GACILLOS@AA.COM</p> <p>Creditor: Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.lorton@wellsfargo.com Right to Discharge Holder: Wells Fargo Bank Northwest, National Association, as Trustee Contact details: val.lorton@wellsfargo.com</p>														
	End of List														

F. Discharging an Interest

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). 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 after written demand by the debtor delivered to or received by such

holder at the address stated in such registration.¹⁷³ 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 after written demand by the debtor.¹⁷⁴ A registration may only be discharged by or with the written consent of the party in whose favor it was made.¹⁷⁵ 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.¹⁷⁶

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

¹⁷³ Article 25(1) of the Convention.

¹⁷⁴ Article 25(4) of the Convention.

¹⁷⁵ Article 20(3) of the Convention.

¹⁷⁶ Section 5.8.2 of the Cape Town Regulations.

effect to that order.¹⁷⁷ 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.¹⁷⁸

Due to the long life expectancy of aircraft, there will most certainly be situations where, for a variety of reasons (e.g., a party ceasing to exist or an adversarial relationship), an interest cannot be discharged without seeking redress to 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.

G. Drop-Downs and Free-Texting

The International Registry is a notice-based system and registration is made against a uniquely identified aircraft object (and not against the debtor). The information required to


¹⁷⁷ Article 44(3) of the Convention. Under Order 63A of the Rules of the Superior Courts 1986 (SI 15 of 1986) in Ireland as inserted by S.I No.31/2008 - Rules of the Superior Courts (Cape Town Convention) 2008 “commercial proceedings” over which the Commercial Court of the Irish High Court has jurisdiction includes “any proceedings by or against the Registrar (within the meaning of Article 1 of the Cape Town Convention) in connection with any function exercised or exercisable by the Registrar under the Cape Town Convention or the Aircraft Protocol (each as defined in section 3 of the International Interests in Mobile Equipment (Cape Town Convention) Act 2005) or any regulations or procedures made thereunder” . The Commercial Court provides a “fast track” process for commercial law matters having a monetary value in excess of €1,000,000. Any proceedings against Aviareto can be brought on an expedited basis as well.

¹⁷⁸ Article 44(2) of the Convention.

effect a proper registration, as it relates to the identification of an aircraft object, is (i) the type of object, (ii) manufacturer's name, (iii) manufacturer's generic model designation, and (iv) manufacturer's serial number assigned to such aircraft object.¹⁷⁹ The International Registry requires the user making a registration to select information pertaining to a specific aircraft object (specifically, the manufacturer, model designation and serial number) from the drop-down list of options provided on the registry.

¹⁷⁹ Section 5.4(c) of the Cape Town Regulations.

An example of how the “drop-down” menus operate.



Home
User Area
Register or Consent to Interest
Search the Registry
Fees and Payment Options
Documentation and Information
Arabic
Chinese
English
French
Russian
Spanish
FAQs (Frequently Asked Questions)
Contact Us
Annual Statistical Report
Help
Log-in:
Logout

Request Authorisation to work on Aircraft Objects

Use the data provided to the International Registry by the manufacturers to select aircraft object.

If the required aircraft object is not present in the data provided on the International Registry system, you may use free text to create a new object on the system. Make sure to review all available information and use the same format and case. For example, BOEING, model 747-300, serial number A11111 is not the same object as Boeing, model 747/300, serial number a11111.

Please note that informational search is free if you wish to research MSN object data.

Manufacturer:

AIRBUS
ATR
BAE SYSTEMS
BEECH AIRCRAFT CORPORATION
BEECHCRAFT-HAWKER CORPORAT

Model Designator:

DC-10-10
DC-10-15
DC-10-30
DC-10-40
DC-8-11

Manufacturer's Serial Number:

Aircraft Objects

Lookup Serial Number

MSN lookup

Transacting User Entities

Use of electronic information provided by the International Registry relating to the aircraft object is

By having each object available in the drop-down list (rather than manually inputting the relevant data), it greatly reduces the chance for errors (which could invalidate a registration).¹⁸⁰ Sometimes, however, a particular aircraft object may not be listed in the drop-down menu. In such situations, the party effecting the registration is permitted to manually insert (or “free text”) such information.

PRACTICE NOTE: THE UTMOST CARE SHOULD BE TAKEN WHENEVER MANUAL INSERTIONS OF THIS TYPE ARE MADE AS THE USE OF THE ELECTRONIC INFORMATION PROVIDED BY THE INTERNATIONAL REGISTRY IS MANDATORY AND, WHERE SO PROVIDED, IS THE SOLE MEANS OF SATISFYING THE IDENTIFICATION CRITERIA ON THE INTERNATIONAL REGISTRY.¹⁸¹ PRACTITIONERS HAVE FOUND THAT GENERALLY SPEAKING, WHEN THE RELEVANT MANUFACTURER IS ADVISED THAT A SPECIFIC AIRCRAFT OBJECT IS NOT LISTED IN THE RELEVANT DROP-DOWN MENU, SUCH MANUFACTURER IS ABLE TO COORDINATE WITH THE INTERNATIONAL REGISTRY IN ORDER TO INCLUDE SUCH AIRCRAFT OBJECT IN THE RELEVANT DROP-DOWN MENU IN A TIMELY MANNER.

V. OTHER INTERESTS

This section will address a variety of interests and situations which may create or impact a registered interest, such as amendments and novations, subordinations and non-consensual interests. It will also highlight Cape Town Convention provisions dealing with pre-existing interests as well as national interests. Finally, this section will provide a brief discussion of a lessee’s right to quiet use and possession of an aircraft object.

A. Amendments and Novations

Care should be taken any time an existing agreement involving an aircraft object is amended, assigned and/or novated to ensure that such actions do not have unaddressed

¹⁸⁰ 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 para. 2.81 (Unidroit 2008).

¹⁸¹ Section 5.1 of the Cape Town Regulations. Explanatory text has been included on the International Registry to advise that the use of the drop-down lists is mandatory unless the aircraft object being registered does not appear in the drop-down list.

consequences under the Cape Town Convention. If, for example, an existing security agreement is so fundamentally altered such that it would constitute a refinancing under applicable law, then it is likely a new international interest will have been created. Furthermore, an amendment to an existing agreement (not otherwise constituting an international interest) may create an international interest which must be registered in order to protect an interested party's rights. An amendment may also recharacterize the nature of a transaction such that under applicable law, the property interests originally created thereunder are fundamentally altered (such recharacterization may not require alteration or re-registration of an international interest that has already been registered, but it could impact the remedial rights available to a party).¹⁸² Similarly, an assignment of an agreement by a creditor (which would typically be viewed under the Cape Town Convention as an assignment of associated rights by such creditor, thereby giving rise to an assignment of the related international interest) should be carefully considered because if such assignment constitutes a novation,¹⁸³ then it is likely that a new international interest has been created. In each of these cases, the failure to properly register an international interest, when so

¹⁸² See Section III.C. herein.

¹⁸³ The assignment of rights or interests under an agreement does not normally create a new international interest, it merely transfers the existing international interest. By contrast, a "novation" of an agreement (which is generally considered to be the substitution of a new contract for an old one by virtue of the substitution of one party in a contract with another party, regardless of whether it is accompanied by the alteration of the terms of the applicable agreement) results in a new international interest. A novation, as opposed to an assignment, is typically characterized by a release of the substituted party from all obligations under the subject contract or a substantial alteration of such obligations so as to constitute new obligations. The consequences or characterization of a novation are, however, determined by the relevant local law. As such, if, under applicable local law, an assignment containing a release of the assignor under the agreement is treated as a novation, then the transactions surrounding such assignment should, for purposes of the Cape Town Convention, be considered as giving rise to the creation of a new international interest. GOODE at para. 2.32 (Unidroit 2008).

required, would leave the applicable financier without its requisite priority.¹⁸⁴ Not all amendments impact the related international interest. For example, the following amendments do not require new registrations because they do not create new international interests: (1) amendments to record a creditor's or debtor's name change; (2) amendments changing the method of payment; (3) amendments relating to the maintenance or insurance of an aircraft object; and (4) amendments to a lease agreement granting a lessee a purchase option where the amendment does not change the characterization of the agreement under applicable law.¹⁸⁵ The key, then, is to analyze each change in order to assess its impact under the Cape Town Convention.

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. Following ratification of the Cape Town Convention by 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.¹⁸⁶

Example 2. Amendment which recharacterizes an international interest. Lessor and Lessee entered into a lease agreement in respect of an aircraft object. Lessee is situated in a Contracting State and an international interest is registered with the International Registry covering such aircraft object naming Lessee as the debtor and Lessor as the creditor. Lessor and Lessee thereafter amend the lease agreement to provide Lessee with

¹⁸⁴ An assignment by a debtor of its rights and obligations under an agreement would typically always be viewed as a novation with the substitution of a new debtor for the old debtor and as such should be treated as creating a new international interest. This scenario is different from a situation involving a name change, for example, where a simple amendment of the existing registration at the International Registry (to reflect the new name) would suffice to protect the applicable creditor.

¹⁸⁵ GOODE at para. 2.32 (Unidroit 2008). For a chart listing various amendments and their likely effect on a registered international interest, see Annex III hereto.

¹⁸⁶ See Annex III hereto which lists a variety of amendments which may cause a pre-existing (non-Cape Town Convention) interest to become an international interest.

a bargain purchase option which, pursuant to applicable law, recharacterizes the agreement from a lease agreement to a security agreement. As discussed in Section III.C. herein, the agreement would, in the first instance, continue to constitute a lease agreement for purposes of determining the applicability of the Cape Town Convention. The international interest registered in respect of the lease agreement should continue to be effective. It remains unclear whether, under the Cape Town Convention, the execution of the amendment would give rise to the creation of a new international interest (as opposed to the continuation of the existing interest) by virtue of the recharacterization of the agreement, therefore, it would be prudent to register a new international interest in respect of the agreement, as amended (because the nature of the interest has changed).

Example 3. *Assignment which constitutes a novation. Lessor and Lessee 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 naming Lessee as the debtor and Lessor as the creditor. Later, Lessor, Lessee and Assignee enter into an assignment pursuant to which Lessor assigns all of its rights in the applicable lease agreement to Assignee (and pursuant to which Lessor is released from all obligations under such lease agreement). If this scenario constitutes, under applicable law, a novation of the lease agreement, then for purposes of the Cape Town Convention, a new international interest is created and should be registered with the International Registry, naming Lessee as the debtor and Assignee as the creditor.*

PRACTICE NOTE: BECAUSE IT MAY BE UNCLEAR AS TO WHETHER AN OUTRIGHT ASSIGNMENT (OFTEN REFERRED TO AS AN “ASSIGNMENT AND ASSUMPTION”) CONSTITUTES A NOVATION, THE ASSIGNEE SHOULD, IN ADDITION TO REGISTERING THE ASSIGNMENT OF THE EXISTING INTERNATIONAL INTEREST IN FAVOR OF THE ASSIGNEE, SEEK TO HAVE A NEW INTERNATIONAL INTEREST REGISTERED WITH THE LESSEE.

Example 4. *Amendment which adds collateral and changes granting clause. Lessor and Lender enter into a security agreement in respect of an aircraft object. Lessor is situated in a Contracting State and an international interest is registered with the International Registry covering such aircraft object and naming Lessor as the debtor and Lender as the creditor. Lessor 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 collateral and each new international interest should be registered. In addition, the expansion of the secured obligations may create a new international interest in respect of the original aircraft object covered by the security agreement and so, it would be prudent to effect a new registration.¹⁸⁷*

¹⁸⁷ To constitute an international interest, the secured obligations must be determinable in a security agreement; thus it is prudent to register a new international interest when the secured obligations are specifically stated in the security agreement and are thereafter changed. GOODE at para. 4.73 (Unidroit 2008). If, however, a security agreement states its secured obligations

Example 5. Amendment that increases a fractional interest in an aircraft object that is acquired by means other than assignment or subrogation. Buyer and Seller enter into an agreement to purchase a 15% interest in an aircraft object. Seller is situated in a Contracting State, thus, Buyer and Seller register the 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 by 20%. This increase in the fractional interest in an aircraft object creates a new international interest that should be registered.

Example 6. Amendment that adds a new chargor or chargee of a security interest, conditional sale or lease. Lessor and Lender A enter into a security agreement in respect of an aircraft object. Lessor is situated in a Contracting State, thus, an international interest is registered with the International Registry, covering such aircraft object. Later, Lessor 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 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 REVISION TO A NEW OR ALTERED INTERNATIONAL INTEREST AND AS THE CAPE TOWN CONVENTION HAS NOT, TO DATE, BEEN TESTED ON ALL 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).

B. Subordinations

The Cape Town Convention recognizes that holders of registered international interests may contractually agree to alter the priority of their interests; the holder of a superior interest may subordinate its interest to the interest of a holder of a subsequently registered interest or of an unregistered interest (whether pre-existing or subsequent).¹⁸⁸ In order to effect such a subordination, the subordination must be registered.¹⁸⁹ The holder of a registered interest

generally (i.e., it recites that it secures “all obligations owed by debtor to creditor under all contracts, now or in the future”), then all secured obligations can, for purposes of the Cape Town Convention, be determined and as such the requirements of Article 7(1)(d) of the Convention have been satisfied. GOODE at para. 4.73 (Unidroit 2008).

¹⁸⁸ Article 29(5) of the Convention.

¹⁸⁹ Article 16(1)(e) of the Convention.

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.¹⁹⁰

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 agreement unnecessary).¹⁹¹

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.¹⁹² 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 the financier, cannot assert priority of its interest over that of the financier regardless of whether the interest created by the mortgage is itself registered.

C. Non-consensual Interests

The Cape Town Convention, specifically Articles 39 and 40, contemplates two forms of non-consensual rights or interests.¹⁹³ The first type of non-consensual rights or interests are those non-consensual rights or interests created by the law of a Contracting State which have priority, without registration, over an interest in an object equivalent to that of the holder of registered international interest and with respect to which a Contracting State has made a

¹⁹⁰ Article 29(5) of the Convention.

¹⁹¹ GOODE at para. 2.112 (Unidroit 2008).

¹⁹² GOODE at para. 2.113 (Unidroit 2008).

¹⁹³ “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. 4.264, 4.276 (Unidroit 2008). Examples are non-consensual liens for unpaid repairs, unpaid wages, or unpaid air navigation charges. *Id.* at para. 4.266.

declaration under Article 39 (but not under Article 40). 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.

Non-consensual rights or interests with respect to which a Contracting State has made a declaration under Article 39 have priority, without registration, over registered international interests, as well as unregistered international and other interests. Although the Contracting State must state the specific 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, 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.¹⁹⁴ The Cape Town Convention may not be used as a vehicle to expand such preferred rights beyond that which is already permitted by applicable local law (without regard to the Cape Town Convention); however, such rights may be retained or restricted.¹⁹⁵

The types of non-consensual rights and interests that may be declared can relate to both secured and unsecured claims.¹⁹⁶ 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

¹⁹⁴ Article 39(1)(a) of the Convention; GOODE at paras. 2.152, 4.265 (Unidroit 2008).

¹⁹⁵ GOODE at para. 4.265 (Unidroit 2008).

¹⁹⁶ GOODE at para. 4.265 (Unidroit 2008).

current declaration.¹⁹⁷ A Contracting State is free to make modifications to its declaration under Article 39 of the Convention.¹⁹⁸

A Contracting State can also declare that, under its laws, the State or State entity, intergovernmental organization or other private provider of public services retains its right to arrest or detain an aircraft object for unpaid amounts associated with services rendered with respect to that aircraft object or another aircraft object¹⁹⁹ (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). An intergovernmental or private organization may not make declarations, nor may a Contracting State make a declaration relating to obligations owing to any such organization which do not attract the right to arrest or detain an aircraft object under the applicable local law of such Contracting State.²⁰⁰

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. Article 40 permits a Contracting State to expand the application of the Cape Town Convention, allowing specified categories of non-consensual rights or interests to be registered as if they were international interests.²⁰¹

¹⁹⁷ GOODE at para. 4.274 (Unidroit 2008).

¹⁹⁸ GOODE at para. 4.272 (Unidroit 2008).

¹⁹⁹ Article 39(1)(b) of the Convention. As this is a saving clause, the words “or other objects” should be deleted, or, if not deleted, should have no effect, if, as is the case of most states, national law does not provide for a fleet lien.

²⁰⁰ GOODE at para. 4.268 (Unidroit 2008).

²⁰¹ Article 40 of the Convention; GOODE at paras. 4.36, 4.276 (Unidroit 2008).

PRACTICE NOTE: A “REGISTRABLE NON-CONSENSUAL RIGHT OR INTEREST” IS “A NON-CONSENSUAL RIGHT OR INTEREST REGISTRABLE PURSUANT TO A DECLARATION DEPOSITED UNDER ARTICLE 40.”²⁰²

If a registrable non-consensual right or interest is actually registered, it would be treated like a registered international interest and it would have priority over any later registered interests and unregistered interests.²⁰³ A Contracting State may also change its declaration under Article 40.²⁰⁴

The registrable non-consensual rights and interests covered by a declaration under Article 40 and the non-consensual rights and interests covered by a declaration under Article 39 are mutually exclusive.²⁰⁵ 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 law of that Contracting State will not have priority over registered international interests.

D. Other Registrable Rights or Interests

(i) Pre-Existing Rights or Interests.

Pre-existing rights or interests, which are rights or interests of any kind in or over an aircraft object created or arising before the effective date of the Cape Town Convention in a Contracting State, are outside the scope of the Cape Town Convention and retain their priority under the applicable law unless the Contracting State makes a declaration under Article 60(1) to the contrary.²⁰⁶

²⁰² Article 1(dd) of the Convention.

²⁰³ GOODE at paras. 2.23(5), 2.153 (Unidroit 2008).

²⁰⁴ GOODE at para. 4.278 (Unidroit 2008).

²⁰⁵ GOODE at para. 2.154 (Unidroit 2008).

²⁰⁶ *See* Section III.F. herein and Article 60(1) of the Convention; GOODE at para. 2.172 (Unidroit 2008).

PRACTICE NOTE: “EFFECTIVE DATE OF THE CONVENTION” IN RELATION TO A DEBTOR REFERS TO THE LATTER OF THE DATE ON WHICH THE CAPE TOWN CONVENTION CAME INTO FORCE AND THE DATE ON WHICH THE STATE IN WHICH THE DEBTOR IS SITUATED UNDER ARTICLE 60(2)(B)²⁰⁷ BECAME A PARTY TO THE CAPE TOWN CONVENTION.²⁰⁸

A declaration under Article 60(1) may be made at any time, but once made, it may not be modified or withdrawn.²⁰⁹ 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.²¹⁰ 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.²¹¹ In the absence of such a declaration, notice of pre-existing rights or interests may be registered as a precaution or to obtain certain purchaser benefits.

(ii) Acquisition of international interests by legal or contractual subrogation under applicable law.

²⁰⁷ The debtor’s situation is determined by 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 place of business, its habitual residence. Article 4 does not apply in this context and the law of the Contracting State under which the debtor is incorporated or formed or where it has its registered office or statutory seat is not relevant.

²⁰⁸ Article 60(1) of the Convention; GOODE at para. 2.172 (Unidroit 2008).

²⁰⁹ GOODE at para. 4.343 (Unidroit 2008).

²¹⁰ Article 60(3) of the Convention.

²¹¹ GOODE at paras. 2.172, 4.349 (Unidroit 2008).

Subrogation occurs when a surety, guarantor, insurer or other third party (referred to as subrogee) pays off the secured obligations of a debtor owing to a creditor and thereby acquires the rights of the creditor. Rights may be acquired by subrogation either under Article 9(4) of the Cape Town Convention or under the applicable law. International interests acquired through legal or contractual subrogation are registrable.²¹² Under the Cape Town Convention, a subrogee's priority rights are identical 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 or the subrogee of a junior international interest.²¹³ In situations where two subrogees are given rights over the same international interest by the same party, the subrogee to first register the subrogation has priority over the other subrogee.²¹⁴

The Cape Town Convention does not affect a Contracting State's applicable law on subrogation; national law may determine the scope of the subrogee's acquired rights and interests.²¹⁵ Many national laws allow the subrogee to take the place of the previous creditor whose debt it has discharged, giving the subrogee the latter's interest and rights, including its priority rights.²¹⁶ If a subrogee acquires a former creditor's rights in an international interest through its national law, then those rights are also registrable.²¹⁷

²¹² Article 16(1)(c) of the Convention; GOODE at paras. 2.56, 4.94 (Unidroit 2008).

²¹³ GOODE at para. 2.145 (Unidroit 2008).

²¹⁴ GOODE at para. 2.145 (Unidroit 2008).

²¹⁵ GOODE at para. 2.145 (Unidroit 2008).

²¹⁶ GOODE at paras. 2.145, 4.260 (Unidroit 2008).

²¹⁷ GOODE at para. 4.260 (Unidroit 2008).

A subrogee may also contract to subordinate its interests to the holder of a competing international interest; the subordination must be registered before other interests are registered for it to be binding on the parties and third parties.²¹⁸

E. 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 transaction is situated, and the relevant aircraft object is located,²¹⁹ in the same Contracting State²²⁰ at the time of the conclusion of the contract.²²¹

PRACTICE NOTE: AN INTERNAL TRANSACTION MUST BE REGISTERED IN THE NATIONAL REGISTRY OF THE STATE AND THE MAIN INTERESTS OF THE PARTIES AND THE AIRCRAFT OBJECT INVOLVED MUST BE LOCATED IN THAT STATE.²²² WHILE THE CAPE TOWN CONVENTION WOULD NOT APPLY TO DEFAULT REMEDIES THEREUNDER (WHERE THE STATE MADE SUCH A DECLARATION), A NOTICE OF THE RESULTING NATIONAL INTEREST WOULD STILL NEED TO BE REGISTERED IN THE INTERNATIONAL REGISTRY TO PROTECT AGAINST THE RISK OF COMPETING CREDITORS.

Even though these transactions can be excluded from the Cape Town Convention, including most of the default provisions in Chapter III, the priority rules of the Cape Town

²¹⁸ GOODE at para. 4.261 (Unidroit 2008).

²¹⁹ 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.

²²⁰ 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.

²²¹ Article 50 of the Convention; GOODE at para. 2.168 (Unidroit 2008).

²²² GOODE at para. 2.168 (Unidroit 2008).

Convention, rather than the laws of the State, still apply to them. Furthermore, even though the interest registered under a national registration system itself cannot be registered for purposes of the Cape Town Convention, notice of the internal transaction can be registered. Registering notice of the internal transaction gives it the same priority treatment as a registered international interest.²²³

F. Quiet Possession and Use

Article 29(4)(b) of the Convention provides that the conditional buyer or lessee takes free from the interest of a chargee who has not registered such interest prior to the registration of the international interest held by its conditional seller or lessor, as applicable.²²⁴ Article XVI of the Protocol further 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 use²²⁵ 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).²²⁶

PRACTICE NOTE: ARTICLE 29(4) AND ARTICLE XVI APPLY ONLY TO CONDITIONAL BUYERS OR LESSEES. AS A RESULT, IN SITUATIONS WHERE AN AGREEMENT IS PROPERLY CHARACTERIZED AS A SECURITY AGREEMENT, THE PROTECTIONS AFFORDED BY THESE CLAUSES WOULD NOT BE AVAILABLE.

Thus, while a conditional buyer or lessee does not itself possess a registrable interest, it can rely on the registration of its conditional seller or lessor, as applicable, in order to protect its

²²³ GOODE at para. 2.23(3) (Unidroit 2008).

²²⁴ Article 29(4)(b) of the Convention.

²²⁵ 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.”

²²⁶ Article XVI of the Protocol.

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 on the International Registry.

PRACTICE NOTE: AS THE REGISTRATION OF THE INTEREST IN THE RELATED CONDITIONAL SALE AGREEMENT OR LEASE MAY BE DISCHARGED SOLELY BY THE HOLDER OF THE RIGHT TO DISCHARGE, THE DERIVATIVE PROTECTION AFFORDED THE CONDITIONAL BUYER OR LESSEE AS AGAINST THIRD PARTIES IN SUCH SITUATION MAY BE EXTINGUISHED WITHOUT ITS CONSENT.²²⁷ IT IS THEREFORE PRUDENT PRACTICE FOR CONDITIONAL BUYERS AND LESSEES TO HAVE A CONTRACTUAL COMMITMENT THAT THE APPLICABLE INTERESTS, WHILE STILL VALID, WILL NOT BE DISCHARGED WITHOUT THEIR PRIOR CONSENT.

VI. INTERACTION WITH AVIATION AUTHORITIES

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

²²⁷ GOODE at para. 2.108 (Unidroit 2008). 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.

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).²²⁸ Although not expressly stated in the Cape Town Convention, designation of such entry point may only be made if, in relation to an airframe or a helicopter, the declaration is made by the state that is the state of registry of such aircraft object (otherwise duplications may occur).²²⁹ Depending on the applicable Contracting State, use of the designated entry point may be optional or compulsory (except in the case of aircraft engines). There is no system of nationality registration in respect of aircraft engines so the use of the designated entry point cannot be made compulsory.²³⁰ No such designation may be made in relation to registrable non-consensual rights or interests arising under the laws of another Contracting State.²³¹ If a Contracting State designates an entry point, it may specify the requirements, if any, to be satisfied before registration is transmitted to the International Registry.²³² If these conditions are not satisfied, there is a material risk that the resulting registration will be invalid.

Designated entry points must be in operation during working hours in the Contracting State. An entry point may be designated either as an “authorizing entry point” or a “direct entry

²²⁸ Article 18(5) of the Convention.

²²⁹ GOODE at para. 5.87 (Unidroit 2008).

²³⁰ Article XIX(2) of the Protocol.

²³¹ GOODE at para. 3.37 (Unidroit 2008).

²³² Article 18(5) of the Convention.

point”. An “authorizing entry point” is one which effectively authorizes transmissions of information required for registration under the Cape Town Convention to the International Registry. In this scenario, the entity designated as the authorizing entry point provides the party seeking to effect a registration with authorization (in the form of a unique authorization code) which is required to be included with the information submitted to the International Registry in order to properly effect a registration of an interest. The inclusion of the authorization code in such circumstances is mandatory. A “direct entry point” is one through which information is directly transmitted to the International Registry by the designated entity automatically and without any need for authorization.²³³

Example 1: *Lessor is entering into a lease of an airframe and an engine to Lessee. Lessee is situated in Contracting State X and the airframe will be registered in Contracting State X. At the time of ratification of the Cape Town Convention by Contracting State X, Contracting State X designated that its local aviation authority would constitute an authorizing entry point and it also elected to have such local aviation authority as the compulsory entry point for transmission of registration information to the International Registry in respect of airframes. In order for Lessor and Lessee to properly register its international interest in the airframe with the International Registry, it must first obtain an authorization code from the local aviation authority, which must be included with such registration. With respect to the registration of the international interest in respect of the engine, the parties may either seek to obtain an authorization code from the local aviation authority or, alternatively, may effect the registration with the International Registry without the code because the use of the code in this case is not mandatory.*

Example 2: *Utilizing the same fact pattern as above except that Contracting State X opted to designate its local aviation authority as a direct entry point. In this case, Lessor and Lessee would submit the applicable information pertaining to the international interest in respect of the airframe to the local aviation authority and they would be required to take no further steps: the local aviation authority would transmit such information directly to the International Registry. Again, as registration of the international interest in respect of engines cannot be made compulsory, the parties are free to effect such registration directly with the International Registry or through such direct entry point.*

²³³ See Section 12.4 of the Cape Town Regulations. To date, the only Contracting State which has designated an entity as a direct entry point is the United Arab Emirates.

An entry point may not be designated for the registration of a notice of a national interest, or of a non-consensual right or interest, arising under the laws of another state. A Contracting State is free to add additional requirements for the use of its designated entry point, including charging fees, but no person can be denied access to the registration and search facilities of the International Registry on any ground other than for failure to comply with the procedure specified in Chapter V of the Cape Town Convention.²³⁴ A registration effected in violation of the prescribed entry point is invalid.²³⁵ For a summary of the Contracting States that have, to date, each made a declaration designating an entity as an entry point, see Annex IV hereto.

PRACTICE NOTE: FROM TIME TO TIME, SITUATIONS ARISE IN WHICH A UNIQUE AUTHORIZATION CODE MAY NOT BE AVAILABLE (FOR EXAMPLE, THE DISCHARGE OF A REGISTRATION WHERE THE REGISTRATION WAS MADE PRIOR TO THE ENTRY POINT COMING INTO EFFECT OR THE AFFECTED AIRFRAME IS NO LONGER REGISTERED IN THE ENTRY POINT COUNTRY). TO ADDRESS THESE SITUATIONS, THE CAPE TOWN REGULATIONS SPECIFICALLY PROVIDE THAT A REGISTRATION IS NOT INVALID IF AN AUTHORIZATION CODE IS NOT OBTAINABLE UNDER THE PROCEDURES OF THE AUTHORIZING ENTRY POINT BASED ON THE FACTS OF THE RELATED TRANSACTION.²³⁶

B. IDERA

A provision providing for the de-registration and export of the aircraft, in the context of a default and the exercise of remedies, is included under the Cape Town Convention.²³⁷ An additional provision was added to the Protocol that was designed to establish a clear set of rules that would not entail the exercise of any discretion by the relevant local aviation authorities in connection with the de-registration process.²³⁸ The Protocol sets out in an annex thereto a form

²³⁴ Article 26 of the Convention.

²³⁵ See Section 12.7 of the Cape Town Regulations.

²³⁶ Section 12.8 of the Cape Town Regulations.

²³⁷ Article IX(1) of the Protocol.

²³⁸ Article XIII of the Protocol.

of irrevocable deregistration and export request authorization—essentially an authorization which gives a designated party the authority to seek deregistration and export of the aircraft object (also known as an “IDERA”). The debtor must complete this form and submit the completed form to the applicable civil authority for recordation.²³⁹ By virtue of the debtor’s submission of the authorization, the person in whose favor the authorization has been issued (that is, the creditor) or its certified designee²⁴⁰ becomes entitled (and is the only person entitled) to procure the de-registration and export of the aircraft in accordance with the terms of the authorization (subject to applicable safety laws and regulations).²⁴¹ An assignee of the creditor cannot exercise any rights under an IDERA unless such assignee is a certified designee of the creditor in respect of its rights thereunder (alternatively, and perhaps more typically, a new IDERA is executed in favor of such assignee). An authorization, once given, may not be revoked by the debtor without the written consent of the authorized party.²⁴² The relevant aviation authority is required to enforce the remedies of de-registration and export at the request

²³⁹ *Id.* Note, that the IDERA is to be filed for recordation with the applicable aviation authority where the aircraft is registered and not at the International Registry.

²⁴⁰ Care should be taken when a creditor seeks to authorize a certified designee (to act on its behalf under an IDERA) to be sure the requirements set forth by the applicable civil aviation authority for such designation have been satisfied.

²⁴¹ Article XIII(3) of the Protocol. Care should be taken to ensure the IDERA is provided by the party in whose name the applicable aircraft is registered. In jurisdictions like the United States, for example, where registration is made in the name of an owner, the issuance of an IDERA should be made by the owner of the applicable aircraft. Depending on the circumstances, the IDERA should not necessarily be issued by the operator of the applicable aircraft. Notwithstanding the issuance of an IDERA, as a condition to honoring any de-registration and export request, the authorized party must certify that all registered interests ranking in priority to that of the creditor in whose favor the IDERA has been issued have been discharged (or that the holders of such interests have consented to such deregistration and export). Article IX(5) of the Protocol.

²⁴² *Id.*

of the authorized party, without the need for a court order, on the basis of the recorded authorization.²⁴³ In addition, registry authority and other administrative authorities in the applicable Contracting State must expeditiously co-operate with and assist the authorized party in the exercise of remedies permitted by the Protocol, including application for relief pending final determination.²⁴⁴

These provisions are only applicable where a Contracting State has made a declaration to the effect that it wishes said provisions to be applicable. 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.²⁴⁵ See Annex V hereto which summarizes the IDERA requirements of the jurisdictions that have made the applicable declaration.

It should be noted that an IDERA constitutes authorization by a debtor to export an aircraft from its state of registry not to any particular jurisdiction such as states that may be prohibited under that state of registry's export control laws.

VII. CONVENTION AND PROTOCOL REMEDIES

This Section on remedies builds on and does not repeat the prior Sections in this Guide. These prior Sections should be referred to frequently if background is needed when reading this Section. When examining potential remedies, the practitioner will need to know (i) whether an international interest or an assignment of the associated rights and such international interest has

²⁴³ Article XIII(4) of the Protocol.

²⁴⁴ *Id.*

²⁴⁵ GOODE at para. 5.68 (Unidroit 2008).

been validly constituted with respect to an aircraft object, meets all the Convention formalities, applies to both an airframe and engines or only one of them, has been concluded after the Protocol came into effect in the relevant jurisdiction or amended, novated or otherwise after the Protocol came into effect, and has been registered on the International Registry and with what priority and (ii) whether such international interest will be characterized as a lease, title reservation agreement or security agreement under the applicable law.²⁴⁶

As an introduction, it should be noted that both the Convention and the Protocol provide remedies upon default with respect to aircraft objects that may be exercised by lessors, conditional sellers and secured parties in respect of international interests in their favor and by assignees of international interests, all in their roles as creditors. A core purpose of the Cape Town 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 extract, if applicable, and sell or otherwise realize upon aircraft objects. Not all remedies in the Cape Town Convention are automatic. Practitioners should note that some of basic remedies must be agreed by the debtor in order to be effective. Such remedies usually are already agreed in typical forms of leases, conditional sale agreements and security agreements and are consistent with aircraft default remedies provided for by major international legal regimes. The drafters expected

²⁴⁶ The Official Commentary is essential to understanding the remedies in greater depth. There is a comment specifically on every single Article of the Convention and the Protocol. For a more general summary earlier in the Official Commentary, the practitioner is referred to Professor Goode's "Review of the Convention" in paras. 2.49 to 2.66 of the Official Commentary where he discusses the basic Convention default remedies and in paras. 2.120 to 2.122 where he discusses the effect of insolvency. The general summary of the important Protocol additions and modifications to the Convention remedies is found in Professor Goode's "Review of the Protocol" in paras. 3.23 to 3.29 of the Official Commentary where he discusses default remedies and introduces the IDERA and in paras. 3.60 to 3.70 where he discusses remedies on insolvency, including Alternative A.

that parties would create their own remedies within constraints discussed below, and flexibility is built into the Cape Town Convention so that remedies may be modified by the parties.

The Cape Town Convention remedies will supplement and not displace existing remedies in a jurisdiction except to the extent that existing remedies are inconsistent with certain “mandatory” provisions under the Cape Town Convention discussed below that protect the debtor and other interested persons.²⁴⁷ Moreover, the Cape Town Convention does not displace local procedures except that such local procedures would be modified by the non-judicial remedies declaration discussed below²⁴⁸ and by the Alternative A or B declaration.

As noted above in relation to the use of the prior Sections of this Guide, to determine which basic remedies apply, the practitioner will need to analyze the characterization under applicable law of the international interest as a lease, a title reservation agreement or a security agreement. The practitioner should also use choice of forum provisions (as well as choice of contractual law) to support the choice of forum and submission to jurisdiction clauses to maximize the opportunity in the best forum to use Cape Town Convention remedies.

Finally, it is important to focus on how the Convention and Protocol declarations by different Contracting States change and expand the availability of the creditor’s remedies. Key declarations include those with respect to remedies without leave of court (extra judicial remedies and self-help), the terms of speedy advance court relief, irrevocable deregistration and export request authorizations, contractual choice of law and, most importantly, the insolvency provisions (when elected by Contracting States) which require return of aircraft objects where

²⁴⁷ 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. 2.54 to 2.57 of the Official Commentary provides extensive discussion of the categories of “interested persons” and others who have given notice to the creditor.

²⁴⁸ Article 14 of the Convention. GOODE at para. 4.114-115 (Unidroit 2008).

defaults are not cured and in which other Contracting States have declared agreement to cooperate in enforcement actions to effect such return.

A. Default Remedy Basics

Articles 8 to 15 of the Convention and Articles IX to XIII of the Protocol set forth the default remedies of conditional sellers, lessors, and chargees under the agreements creating international interests, and Article 34 of the Convention applies such default remedies for the benefit of assignees (for security) of international interests. The focus is on remedies against the debtor and rights against third parties holding an international interest subordinate to that of the enforcing creditor.²⁴⁹

(i) Default.

All remedies under the Cape Town Convention (other than the insolvency remedies) are predicated on the existence of a default. Article 11 of the Convention provides that the debtor and creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 of the Convention regarding final recovery and disposition of aircraft objects and Article 13 of the Convention regarding advance relief pending determination.²⁵⁰ 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.

²⁴⁹ GOODE at paras. 4.77-4.90, 4.240-4.243 (Unidroit 2008).

²⁵⁰ Article 11(1) of the Convention.

PRACTICE NOTE: ARTICLE 11(1) DOES NOT PRESCRIBE ANY KIND OF MATERIALITY STANDARD FOR A DEFAULT WHERE THE DEFAULT IS DESCRIBED OR DEFINED IN AN AGREEMENT, AND AS A RESULT THERE IS NO SUCH MATERIALITY QUALIFICATION SO LONG AS THERE IS A BINDING AGREEMENT. AS THE 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] [P]ARAGRAPH 1 [OF ARTICLE 11] ESTABLISHES THE BINDING NATURE OF SUCH AN AGREEMENT.”²⁵¹

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.²⁵²

(ii) Remedies Outside the Cape Town Convention.

In addition to the remedies under the Cape Town Convention described in this Section VII, all additional remedies²⁵³ permitted by applicable law (including any remedies agreed upon by the parties) may be exercised by the creditors to the extent they are not inconsistent with the mandatory provisions for remedies in the Cape Town Convention set forth in Article 15 of the Convention as supplemented and amended by Article IV(3) of the Protocol. The use of a remedy such as pre-judgment attachment would fall into this category and be subject to the local substantive law requirements of the jurisdiction in which the aircraft object is located. See the discussion under Section VII.E. below relating to advance court relief under Article 13 of the Convention. The above reference to applicable law for additional remedies means the “domestic

²⁵¹ GOODE at para 4.104 (Unidroit 2008).

²⁵² 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. 4.105 (Unidroit 2008).

²⁵³ 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. 4.106 (Unidroit 2008).

rules of the law applicable by virtue of the rules of private international law of the forum State.”²⁵⁴

It is a general limiting principle of the party autonomy of the Convention that these mandatory provisions not only limit any conflicting aspects of additional non-Convention remedies in a Contracting State but also that they expressly limit which Convention remedies can be derogated from and excluded by agreement of the parties.²⁵⁵

(iii) Mandatory Default Remedy Provisions.

The default remedy provisions that cannot be changed by agreement of the parties are as follows:

- application of proceeds of sale or of other disposition by chargee (Article 8(5) of the Convention);
- application of surplus proceeds (Article 8(6) of the Convention);
- vesting of a charged aircraft object in the chargee by court order permitted only if the value of the satisfied obligations is commensurate with the value of the aircraft object (Article 9(3) of the Convention);
- debtor’s right to redeem the aircraft object by payment prior to sale or court-ordered vesting of the object (Article 9(4) of the Convention);
- court-imposed terms for advance judicial relief (Article 13(2) of the Convention) subject to the parties’ right to exclude the application of this right by written agreement (Article X(5) of the Protocol);
- 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, self-help remedies should supersede inconsistent local procedure;²⁵⁶

²⁵⁴ Article 5(3) of the Convention. Reference to domestic law was used to avoid *renvoi* issues. Goode at para. 4.64 (Unidroit 2008).

²⁵⁵ Article 15 of the Convention. GOODE at para. 4.118 (Unidroit 2008). Article IV(3) of the Protocol. GOODE at para. 5.27 (Unidroit 2008).

²⁵⁶ GOODE at para. 4.114 (Unidroit 2008).

- prohibition on de-registering and exporting the aircraft without the consent of any prior registered interest holder (Article IX(1)-(2) of the Protocol);
- any remedy given by the Convention being exercised in a commercially reasonable manner (Article IX(3) of the Protocol); provided a remedy is deemed to be exercised in a commercially reasonable manner if exercised in conformity with the provisions of the parties' agreement except where such provision is manifestly unreasonable; and
- minimum of 10 working days prior notice to the debtor and other interested persons of a proposed sale or lease in order to satisfy "reasonable prior notice". (Article IX(4) of the Protocol).

Whether a repossessing creditor has proceeded in a commercially reasonable manner will be a question of fact and depend on the circumstances in each case. Proceeding in accordance with the agreement between the parties is deemed to be commercially reasonable, so long as the remedy being used and provided for in the agreement is not itself manifestly unreasonable. For instance, an agreement between the parties allowing the creditor to sell an aircraft at a private sale without prior notice to the owner or other interested parties would be manifestly unreasonable (in addition to violating the Convention). The Convention does not address the method to be used in the sale of an aircraft object, and since both public auctions and private sales of aircraft have been employed by the industry, either may be held to be commercially reasonable. All aspects of the disposition of the aircraft object would be subject to scrutiny, including the method, manner, time, place and other terms of the sale.

Paragraphs 2.159-2.160 of the Official Commentary point out that the effect of a failure to comply with a mandatory provision of the Convention, such as proceeding in a commercially reasonable manner, is left to the law of the Contracting State which could provide for a claim for damages or a suit for injunctive relief.

PRACTICE NOTE: THE MANIFESTLY UNREASONABLE STANDARD FOR AN AGREED REMEDY CLAUSE TO BE DEEMED COMMERCIALY REASONABLE APPLIES TO ALL REMEDIES UNDER THE CONVENTION AND THE PROTOCOL. ARTICLE 6(1) OF THE CONVENTION PROVIDES THAT THE CONVENTION “AND THE PROTOCOL SHALL BE READ AND INTERPRETED TOGETHER AS A SINGLE INSTRUMENT.” THE 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”.²⁵⁷ THE COMMENTARY FURTHER LOOKS TO “ESTABLISHED COMMERCIAL PRACTICE” AND “ACCEPTED INTERNATIONAL PRACTICE” AS BEING RELEVANT TO WHETHER A PROVISION WOULD “NORMALLY BE REGARDED AS NOT MANIFESTLY UNREASONABLE”. SUCH INDUSTRY STANDARDS AND CUSTOMARY WORDING IN INTERNATIONAL AIRCRAFT FINANCING AND LEASING CONTRACTS SHOULD BE USED TO SUPPORT DECISIONS AS TO WHAT IS COMMERCIALY REASONABLE THROUGHOUT THE REMEDIES UNDER THE CONVENTION AND THE PROTOCOL.²⁵⁸

(iv) Determination of Applicable Remedies and Choice of Forum.

Remedies under Article 10 of the Convention apply to leases and title reservation agreements, and remedies under Articles 8 and 9 apply to security agreements. The characterization of the agreements is determined by reference to applicable law.²⁵⁹ As noted in paragraph VII.A(ii) above and the footnotes thereto, “applicable law” means the domestic law applied by virtue of the conflicts rules of the forum. Section III.C of this Guide, entitled “Characterization,” explains and gives several remedy situation examples of such an analysis of whether the lease or title reservation agreement is a security agreement under applicable law or is a lease or title reservation agreement depending on the applicable law and underscores the importance of this characterization to the selection of a forum in which to take remedies.

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

²⁵⁷ GOODE at para. 4.85-6 (Unidroit 2008).

²⁵⁸ GOODE at para. 5.46 (Unidroit 2008).

²⁵⁹ Article 42 of the Convention. GOODE at para. 4.280 (Unidroit 2008).

- Forum chosen by agreement of parties, which shall be exclusive unless otherwise agreed²⁶⁰ and, except in the case of speedy court relief, for the concurrent jurisdiction of the courts where the aircraft object is situated or where the debtor is situated.²⁶¹
- Forum of Contracting State where the aircraft object is located in the case of the forms of speedy court relief specified in Article 13(1)(a), (b) and (c) and Article 13(4) of the Convention.
- Forum of Contracting State where the debtor is situated in the case of speedy court relief specified in Article 13(1)(d) and Article 13(4) of the Convention, but with the enforceability of that relief limited to that Contracting State. Although the term “situated” 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”.²⁶²
- 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.²⁶³
- Forum of the Contracting State that is the primary insolvency jurisdiction in case of Alternative A and Alternative B remedies under Article XI of the Protocol.²⁶⁴ 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”.²⁶⁵
- 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.²⁶⁶
- Forum to be determined by a Contracting State or by a non-Contracting State where the parties made no choice of forum or jurisdiction could not be obtained in such forum due

²⁶⁰ Article 42 of the Convention. GOODE at para. 4.280 (Unidroit 2008).

²⁶¹ Article 43 (1) and (2) of the Convention. GOODE at para. 4.287 (Unidroit 2008).

²⁶² GOODE at para. 4.290 (Unidroit 2008).

²⁶³ Article XXI of the Protocol.

²⁶⁴ Article XI of the Protocol.

²⁶⁵ Article I(2)(n) of the Protocol. The location of this jurisdiction is a presumption. GOODE at para. 5.13 (Unidroit 2008).

²⁶⁶ Article XII of the Protocol.

to lack of a submission clause or where the claim is not for speedy court relief under Article 13, but is for an order under Articles 8, 9 or 10.²⁶⁷

(v) Contractual Choice of Law.

Article VIII (2) of the Protocol, which validates the parties' choice of law in a lease, title reservation or security agreement or in a contract of sale, or in a related guarantee contract or subordination agreement to govern their contractual rights and obligations, either wholly or in part, only applies where a Contracting State has made a declaration making this Article effective. The law chosen is the domestic rules of law of the designated State or territorial unit unless otherwise agreed.

This Article on contractual choice of law can be very helpful in an enforcement situation to confirm the enforceability of relevant documents and has already been used in Mexican proceedings to support assertions as to the governing law in filed litigation papers.

It is important to note this is only an ability to agree on the contractual law and not on the proprietary law that is applicable to the validity of a lease, title reservation or security agreement or of a contract of sale. For example, if one is doing a characterization analysis as discussed in paragraph VI.A.(iv) above, one must look to the domestic law determined by the conflicts of law rules of the forum as the applicable law for deciding on whether the lease or title reservation agreement is a security agreement or not and thus what remedy type one looks to below in paragraphs VII.B. for leases and title reservation agreements and VII.C for security agreements.

It is also helpful to realize in difficult characterization situations that, even if one cannot readily determine how the applicable law characterizes the agreement, if all the formalities and connecting factors of the Cape Town Convention are otherwise met an international interest will exist and all of the remedies and rights with respect to that international interest will apply. The

²⁶⁷ GOODE at para. 4.285 (Unidroit 2008).

practitioner would need to proceed carefully where there are requirements contained in the remedies in respect of security agreements that would make a difference if compliance is not met.

(vi) 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 in Rome unless the Contracting State has declared whether or not “any remedy available to the creditor under any provision” of the Cape Town Convention which is not required in the express terms of the Cape Town Convention “to require application to the court may be exercised only with leave of the court”.

Whether a repossessing creditor or lessor may proceed against an aircraft object without permission of a court will depend on (i) the local law where the aircraft object is located, and (ii) as stated, 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 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 going to court for assistance. The practitioner, therefore, must check the current declarations of the Contracting State shown on the Unidroit website before proceeding with a self-help remedy in a jurisdiction that would otherwise permit it.

Of course, seizing a commercial aircraft in most airports without a court order will be quite challenging, and local administrative regulations must still be observed. The practitioner should proceed with good advice and extreme caution in this regard and in all cases of repossession using self-help be sure not to act contrary to local law. Exercising such remedies

without breaching the peace while an aircraft is in storage or maintenance is also a possible avenue where self-help is 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.

PRACTICE NOTE: TAKING REMEDIES AS A NON-JUDICIAL MATTER IS A SUBSTANTIVE RIGHT OF THE CREDITOR. THIS DISTINCTION FROM THE LAWS OF PROCEDURE THAT MUST BE FOLLOWED AS A MANDATORY PRINCIPLE (AS NOTED IN SECTION VII A (III) ABOVE) IS UNDERSCORED BY THE WAY IN WHICH ARTICLE 14 REQUIRING REMEDIES TO BE EXERCISED IN CONFORMITY WITH LOCAL PROCEDURE BEGINS WITH THE PHRASE “SUBJECT TO ARTICLE 54(2)”. THE COMMENTARY SAYS THAT ARTICLE 14 “IS CONCERNED WITH PROCEDURE, NOT WITH SUBSTANTIVE LAW, AND THEREFORE DOES NOT AFFECT THE EXERCISE OF NON-JUDICIAL REMEDIES UNDER ARTICLE 8 EXCEPT IN A CONTRACTING STATE WHICH HAS MADE A DECLARATION UNDER ARTICLE 54(2) REQUIRING LEAVE OF THE COURT”. WHERE A DECLARATION IS MADE PERMITTING EXERCISE OF NON-JUDICIAL REMEDIES, THE CREDITOR CANNOT BE REQUIRED TO GO TO A COURT TO EXERCISE ITS REMEDIES. THE 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”.²⁶⁸

(vii) Waiver of Sovereign Immunity.

Article XII 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.²⁶⁹

²⁶⁸ GOODE at para. 4.114 (Unidroit 2008).

²⁶⁹ Article XXII(1) of the Protocol.

The waiver “must be in writing and contain a description of the aircraft object.”²⁷⁰ The Protocol is silent as to how much detail is required for the description. The 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.²⁷¹ In order to avoid ambiguity, however, it may be prudent to reference the aircraft object in the waiver clause itself.

The Protocol provides that the waiver shall be effective to confer jurisdiction or to permit enforcement. As recognized by the Commentary, international law generally provides that waiver of immunity from suit does not constitute waiver of immunity from enforcement.²⁷² Thus, the instrument of waiver must be clear as to whether it addresses jurisdiction, enforcement, or both.

B. Remedies under Lease Agreements and Title Reservation Agreements

Upon default under a title reservation agreement or under a lease agreement (in each case that is not a security agreement), Article 10 of the Convention provides two remedies to the conditional seller or lessor: termination and possession or control.²⁷³ 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.²⁷⁴ Unlike

²⁷⁰ Article XXII(2) of the Protocol.

²⁷¹ GOODE at para. 5.102 (Unidroit 2008).

²⁷² *Id.*

²⁷³ Article 10 of the Convention.

²⁷⁴ GOODE at para. 4.101 (Unidroit 2008). 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. 4.85 (Unidroit 2008)), 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

security agreements, these remedies are available without any special agreement by the debtor. The remedies may be exercised without a court order except so far as stated otherwise in a declaration made by the Contracting State under Article 54(2).²⁷⁵

In addition, Article IX of the Protocol provides two other remedies applicable to a repossession action: deregistration of an aircraft and export and physical transfer of an aircraft object to a different territory.²⁷⁶ See Section VII.G. on deregistration and export and Section VI.B. on the IDERA.

1. Termination.

The conditional seller or lessor may terminate the title reservation agreement or lease agreement with respect to any aircraft object to which such agreement relates or apply for a court order to authorize or direct such termination.²⁷⁷ 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

aircraft objects and expressly covers “any remedy given by the Convention in relation to an aircraft object”. See GOODE at para. 5.46 (Unidroit 2008).

²⁷⁵ GOODE at para. 4.103 (Unidroit 2008).

²⁷⁶ Article IX of the Protocol.

²⁷⁷ Article 10(a) and Article 10(b) of the Convention.

agreement or leasing agreement on the sub-interest will be determined by applicable law and the terms of the head agreement.²⁷⁸

PRACTICE NOTE: ARTICLE XVI OF THE PROTOCOL ESSENTIALLY CLARIFIES THE CONVENTION AND PROVIDES MORE DETAIL IN REGARD TO A LESSEE’S OR A SUB-LESSEE’S INTERESTS. THE OFFICIAL COMMENTARY SAYS IN PARA 5.77 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).

2. Possession or Control.

The conditional seller or lessor may take possession or control of any aircraft object to which such agreement relates or apply for a court order to authorize or direct such possession or control.²⁷⁹

C. Remedies for Security Agreements

The Convention provides for the exercise of four remedies by the chargee upon default. In order to utilize any of the four remedies as extra-judicial remedies, the debtor must have provided its consent or agreement in writing at any time. No consent is required for the chargee to apply for a court order. Each of the remedies is subject to any declaration that may be made by a Contracting State under Article 54, which permits remedies without leave of court.²⁸⁰ The

²⁷⁸ GOODE at para. 4.102 (Unidroit 2008) which is a comment on Article 10. Whether a lessee has a right of quiet enjoyment is further addressed in Article XVI of the Protocol and in Section V.F of this Guide (*See also*, GOODE at paras. 3.74-3.79). As a general rule, the Convention’s priority rule (first to file has priority) will govern whether a lessee has such a right against a lender to the lessor or another assignee of the lease. In other words, if the lease containing a right of quiet enjoyment is registered as an international interest before the mortgage, the lessee will have a right of quiet enjoyment under the Convention. So it is important for a lender who wishes a lease to be subordinate to its right to repossess a leased aircraft to make sure that the 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.

²⁷⁹ Article 10(a) and Article 10(b) of the Convention.

²⁸⁰ Article 8(1) of the Convention.

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.

1. Possession or control.

The chargee may take possession or control of any aircraft object charged to it or apply for a court order to authorize or direct such possession or control.²⁸¹

2. Sell aircraft object.

The chargee may unless otherwise agreed between the parties²⁸², sell any aircraft object upon reasonable notice to applicable interested persons or apply for a court order to authorize or direct such a sale.²⁸³ 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.²⁸⁴ 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 manner²⁸⁵ and gives as examples a public auction²⁸⁵ and a competitive tender.²⁸⁶

²⁸¹ Article 8(1)(a) and Article 8(2) of the Convention.

²⁸² 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.

²⁸³ Article 8(1)(b), Article 8(2), and Article 8(4) of the Convention. “Interested Persons” are specified in Article 1(m) of the Convention. *See* GOODE at para. 2.54 (Unidroit 2008).

²⁸⁴ Article IX(4) of the Protocol.

²⁸⁵ *See* the discussion of commercial reasonableness in Section VII.A.(iii) above.

²⁸⁶ GOODE at para. 4.87 (Unidroit 2008). *See* the last sentence of Comment 4.87.

PRACTICE NOTE: A SALE BY THE SENIOR CHARGEЕ OVERRIDES JUNIOR SECURITY INTERESTS, WHICH THEN ATTACH TO THE PROCEEDS. A SALE BY A JUNIOR CHARGEЕ TAKES EFFECT SUBJECT TO A SENIOR REGISTERED SECURITY INTEREST UNLESS THE INTEREST IS RELEASED OR THE SENIOR CREDITOR IS PAID IN FULL²⁸⁷

3. Grant lease in the aircraft object.

The chargee may grant a lease in any aircraft object or apply for a court order to authorize or direct such a lease.²⁸⁸ 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.²⁸⁹ 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.

4. Collect or receive income or profits.

The chargee may collect or receive any income or profits arising from the management or use of the aircraft object or apply for a court order to authorize or direct the same.²⁹⁰ The income or profits received by a chargee are required to be applied towards discharge of the amount of the secured obligation.²⁹¹ 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.²⁹²

²⁸⁷ GOODE at para. 4.89 (Unidroit 2008).

²⁸⁸ Article 8(1)(b) and Article 8(2) of the Convention.

²⁸⁹ Article 54(1) of the Convention.

²⁹⁰ Article 8(1)(c) and Article 8(2) of the Convention.

²⁹¹ Article 8(1)(c) and Article 8(2) of the Convention.

²⁹² Article 8(6) of the Convention.

PRACTICE NOTE: THE 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 LESSEE²⁹³

5. Vesting of object.

At any time after default as provided in Article 11 of the Convention, the creditor, the debtor and all other interested persons may agree that ownership of (or any other interest of the debtor in) any aircraft object covered by the security interest shall vest in the creditor in or towards satisfaction of the secured obligation.²⁹⁴ In contrast to all other remedies under the Convention, this agreement can be made only after a default has occurred.²⁹⁵ 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.²⁹⁶

D. Remedies under Assignments

Article 34 of the Cape Town 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

²⁹³ GOODE at para. 4.80 (Unidroit 2008).

²⁹⁴ Article 9(1) of the Convention.

²⁹⁵ GOODE at para. 4.91 (Unidroit 2008).

²⁹⁶ 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. 4.92 (Unidroit 2008).

assignment of associated rights and the related international interest and to the enforcement of remedies under such assignment as a security interest.

E. Advance Court Relief Pending Final Determination

Article 13 of the Convention, as modified by Article X of the Protocol (as more fully discussed in subsections E(i), (ii) and (iii) below) sets forth speedy court remedies upon default that may be utilized with respect to aircraft objects by a creditor in advance of final determination of the merits of its claim in the same or another forum. In tandem with those provisions, Article 43 of the Convention, as modified by Article XXI of the Protocol (as more fully discussed in subsection E(iv) below) sets forth rules on court jurisdictions where application can be made for such Convention created speedy remedies as well as other prejudgment remedies available under national laws. The extent to which these provisions will apply in a given Contracting State will depend on what opt-out and opt-in declarations (as more fully discussed in subsection E(v) below) any such Contracting State has made with respect to either or both of the relief provisions and the jurisdiction provisions which are so tied together.

(i) Distinction between Convention Advance Court Relief and National Forms of Interim Relief.

The “speedy relief” described in Article 13(1) is a Convention created relief and is distinct from any “interim relief” that may also be available under the laws of the forum. Article 13(4) expressly states that “the availability of forms of interim relief other than those set out” in Article 13(1) are not limited by the Convention. The Commentary refers to the relief pending final determination as “advance relief” for brevity and says that the words “interim relief” were “intentionally avoided in the heading to Article 13 and in Article 13(1) so as to make clear that the relief is a Convention relief and should not be characterized by reference to concepts of

municipal procedural law²⁹⁷. The 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 2.60).”²⁹⁸

(ii) Forms of Advance Court Relief

Unless otherwise declared by the Contracting State, Article 13 of the Convention and Article X of the Protocol provide for what is called “speedy relief,” under which the creditor has the right to obtain certain court orders prior to judgment “to the extent that the debtor has at any time so agreed”. This means that the relevant agreement should expressly provide for such remedies as most security agreements, title reservation agreements and leases do. “Speedy” means a court order is to be issued within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

As noted in subsection E(i) above, Article 13 of the Convention allows the creditor to utilize other forms of interim relief that are permitted under the law of the applicable forum.²⁹⁹ 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”:

²⁹⁷ GOODE at para. 2.60, note 16 (Unidroit 2008).

²⁹⁸ GOODE at para. 4.108 (Unidroit 2008).

²⁹⁹ Article 13(4) of the Convention.

- (a) preservation of the object and its value;³⁰⁰
 - (b) possession, control or custody of the object;³⁰¹
 - (c) immobilization of the object;³⁰²
 - (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom,³⁰³ and
 - (e) sale and application of proceeds therefrom (if opted-in), provided that at any time the debtor and creditor have specifically agreed (which the Commentary notes does not need to be in writing).³⁰⁴
- (iii) Conditions to Advance Relief

In order to obtain speedy court relief in one of the above forms, the creditor must provide evidence to the court of the debtor's default as more fully described in the Practice Note below.³⁰⁵ 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.³⁰⁶ 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

³⁰⁰ Article 13(1)(a) of the Convention.

³⁰¹ Article 13(1)(b) of the Convention.

³⁰² Article 13(1)(c) of the Convention.

³⁰³ 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. 4.108 (Unidroit 2008).

³⁰⁴ Article X of the Protocol. GOODE at para. 5.51 (Unidroit 2008).

³⁰⁵ Article 13(1) of the Convention.

³⁰⁶ Article 13(3) of the Convention. See GOODE at paras. 2.54 to 2.57 (Unidroit 2008) as to the Convention concept of "interested persons".

Convention or Protocol³⁰⁷ or if the creditor fails to establish its claim, wholly or in part, on the final determination of the claim.³⁰⁸ If the parties have agreed to permit the application of advance remedies, they may agree in writing to exclude the protections afforded the debtor under that Article 13(2) of the Convention. This ability to exclude Article 13(2) is permitted by virtue of Article X(5) of the Protocol unless Article X(5) was not contained in the forum Contracting State's declarations opting in to Article X of the Protocol as more fully discussed in subsection E (v) below.

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 COMMENTARY HAS POINTED OUT THAT THE COURT HAS NO DISCRETIONARY POWER TO REFUSE A REQUESTED ORDER OR TO SUSPEND AN ORDER FOR INTERIM RELIEF.³⁰⁹ SIMILARLY, THE REQUIREMENT AS TO EVIDENCE OF DEFAULT SHOULD NOT BE CONVERTED TO A REQUIREMENT OF GIVING EVIDENCE OF IRREPARABLE HARM. ARTICLE 13(1) DOES NOT PROVIDE FOR JUDICIAL DISCRETION TO REDUCE HARM. 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 COMMENTARY STATES THAT ARTICLE 13 “DOES NOT DISPENSE WITH THE DUTY OF THE CHARGE TO ACT IN A COMMERCIALY REASONABLE MANNER...FOR EXAMPLE, IN THE WAY IT MAKES A SALE PURSUANT TO THE ORDER OF THE COURT”.³¹⁰

³⁰⁷ Article 13(2)(a) of the Convention.

³⁰⁸ Article 13(2)(b) of the Convention.

³⁰⁹ GOODE at paras. 4.109-4.110 (Unidroit 2008).

³¹⁰ GOODE at para. 4.111 (Unidroit 2008)

(iv) Jurisdictions for Advance Relief

As discussed in Section VIIA(iv) above on choice of forum, the application for the Convention created advance court relief and any application for other forms of national interim relief can, depending on any opt-outs, be brought in one of four jurisdictions (which may be concurrent and may be the same forum). These four jurisdictions are:

1. a forum chosen by the parties;³¹¹
2. a forum that is the location of the aircraft object (other than for relief in the form of lease or management of the object pursuant to Article 13(1)(d));³¹²
3. a forum that is in the territory of which the debtor is situated if 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”³¹³
4. a forum that is the jurisdiction of the applicable aircraft or helicopter registry.³¹⁴

³¹¹ Article 43 (1) and (2) of the Convention. GOODE at paras. 4.287-288 (Unidroit 2008) as to the in personam nature of this jurisdiction.

³¹² Article 43 (1) of the Convention. GOODE at paras. 4.287-289 (Unidroit 2008) as to the in rem nature of this jurisdiction.

³¹³ Article 43(2)(b) of the Convention. GOODE at paras. 4.287-288 (Unidroit 2008). See GOODE at 4.290 (Unidroit 2008) 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.

³¹⁴ Article XXI of the Protocol.

PRACTICE NOTE: THE COMMENTARY IN ITS DISCUSSION OF IN REM VERSUS IN PERSONAM JURISDICTION AND CONCURRENT JURISDICTION GIVES SUBSTANTIAL AID FOR LITIGATION APPROACHES IN THE COMMENTARY PARAGRAPHS NOTED IN THE FOOTNOTES TO THE FOUR JURISDICTIONS DESCRIBED ABOVE. IT ALSO PUTS A FOCUS ON ARTICLE 43(3) OF THE CONVENTION, WHICH PROVIDES THAT A COURT HAS SUCH JURISDICTION FOR CONVENTION ADVANCE RELIEF OR OTHER NATIONAL INTERIM RELIEF EVEN IF THE FINAL DETERMINATION OF THE CLAIM WILL OR MAY TAKE PLACE IN A COURT OF ANOTHER CONTRACTING STATE OR BY ARBITRATION. THE 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.³¹⁵

(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 and 43 in whole or in part and under which conditions. There have been some opt-outs made and thus Article 55 can be relevant in some jurisdictions.

Article X of the Protocol adds opt-ins to Article 13 and 43 of the Convention, and these opt-ins may be declared under Article XXX(2) wholly or in part. These opt-ins are:

1. Article X(2) specifying the number of days by which speedy relief must be so ordered by a court;

2. Article X(3) and (4) adding the relief of Article 13(1)(e) on sale and application of proceeds and permitting such relief to be sought in the jurisdictions where the debtor is situated; and

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.

³¹⁵ GOODE at para. 4.291 (Unidroit 2008).

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

1. Insolvency in General.

The general rule under the Cape Town Convention is that in the event of insolvency proceedings against a debtor, an international interest is effective if it was registered against the debtor prior to the commencement of the proceedings.³¹⁶ This principle extends to (a) the effectiveness against an assignor of an international interest if the assignor is subject to insolvency proceedings but the assignment to an assignee was registered prior to the commencement of the proceedings³¹⁷ and (b) the effectiveness, against a debtor subject to insolvency proceedings, of a registered non-consensual right or interest.³¹⁸ An unregistered international interest may nevertheless be effective under applicable non-Cape Town Convention law.³¹⁹

The terms “insolvency proceedings” and “insolvency administrator” are defined in the Cape Town Convention along familiar lines to be used for purposes of reorganization or liquidation.³²⁰ Therefore, as used in the Convention and the Protocol, these terms are not limited

³¹⁶ Article 30(1) of the Convention.

³¹⁷ Article 37 of the Convention.

³¹⁸ Article 40 of the Convention.

³¹⁹ GOODE at para. 2.120 (Unidroit 2008).

³²⁰ Article 1(l) and (k) of the Convention.

to a reorganization. The term “insolvency administrator” includes a debtor in possession if permitted under applicable law.³²¹

PRACTICE NOTE: THESE TERMS SHOULD NOT BE CONFUSED WITH THE DEFINITION OF “INSOLVENCY-RELATED EVENT” IN ARTICLE I(2)(M) OF THE PROTOCOL. “INSOLVENCY-RELATED EVENT” IS USED ONLY AS A TRIGGER FOR THE TIME PERIODS IN ALTERNATIVE A AND ALTERNATIVE B OF ARTICLE XI OF THE PROTOCOL, AND IT MEANS EITHER (I) THE COMMENCEMENT OF INSOLVENCY PROCEEDINGS, OR (II) THE DECLARED INTENTION TO SUSPEND OR THE ACTUAL SUSPENSION OF PAYMENTS BY THE DEBTOR WHERE THE CREDITOR’S RIGHT TO INSTITUTE INSOLVENCY PROCEEDINGS AGAINST THE DEBTOR OR TO EXERCISE REMEDIES UNDER THE CONVENTION IS PREVENTED OR SUSPENDED BY LAW OR STATE ACTION. THE 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.”³²²

The meaning of effectiveness is that the property interest represented by the international interest will be recognized and the creditor will have a claim against the asset, with appropriate ranking against other holders of international interests and other creditors.³²³

The general rule under the Cape Town 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.³²⁴ See, however, the following section regarding rights under Article XI of the Protocol that (if applicable) override such rights of an insolvency administrator to the extent provided therein.

³²¹ Article 1(k) of the Convention.

³²² GOODE at para. 5.12 (Unidroit 2008).

³²³ GOODE at para. 2.120 (Unidroit 2008).

³²⁴ Article 30(3) of the Convention.

2. 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 limit³²⁵ the creditor either (a) secures recovery of the aircraft object (Alternative A) or has the opportunity to request the debtor, and if the debtor does not act, the court in its discretion, for the right to take possession of the aircraft under applicable law (Alternative B), 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.³²⁶ 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).³²⁷ A Contracting State may decide to make no such declaration, in which case neither Alternative will be applicable.

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 subsection F(1) above.³²⁸ 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 the statutory seat or, if none, the place of incorporation or formation.

³²⁵ See Part II to Annex II for the waiting periods selected by Contracting States to date.

³²⁶ Articles XI and XXX of the Protocol and GOODE at paras. 5.55-5.66 (Unidroit 2008).

³²⁷ 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.

³²⁸ Article XI(1) of the Protocol. GOODE at para. 5.13 (Unidroit 2008).

PRACTICE NOTE: THE TERM “CENTRE OF MAIN INTERESTS” (COMI) WAS INSPIRED BY THE SAME CONCEPT AND TERMINOLOGY IN EUROPEAN INSOLVENCY LAW.³²⁹ 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, PRACTITIONER’S SHOULD TAKE INTO ACCOUNT THE LEADING JURISPRUDENCE UNDER EUROPEAN LAW, PARTICULARLY THAT OF THE EUROPEAN COURT OF JUSTICE.³³⁰

Alternative A and Alternative B, when applicable pursuant to a Contracting State’s declaration, relate to a situation of an “insolvency-related event”, a term added by the Protocol that includes not only actual insolvency proceedings, but also a situation in which there has been (i) 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.³³¹

3. Alternative A.

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

³²⁹ Council regulation (EC) No. 1346/2000 of 29 may 2000 on insolvency proceedings, Article 3(1). These concepts were carried forward from 1995 EC Convention on Insolvency Proceedings, which did not enter into force on account of non-ratification by the United Kingdom.

³³⁰ 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).

³³¹ Article I(2)(m) of the Protocol.

(x) give possession of the aircraft object to the creditor³³² under the security agreement, title reservation agreement or lease or (y) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations under the agreement. A practitioner should note that a second waiting period does not apply in respect of a default in the performance of such future obligations.³³³ 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 by the aircraft registry authority and administrative authorities of a Contracting State which opts into Alternative A.³³⁴ Alternative A adds a special provision³³⁵ 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.³³⁵

³³² 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.

³³³ Article XI, Alternative A (2) and (7) of the Protocol.

³³⁴ Article XI, Alternative A (8) of the Protocol.

³³⁵ Article XI, Alternative A (12) of the Protocol.

PRACTICE NOTE: THE REMEDY REQUIRING THE INSOLVENCY ADMINISTRATOR OR DEBTOR TO GIVE POSSESSION OF THE AIRCRAFT OBJECT TO THE 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”.³³⁶ AS A RESULT, 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.

To date, most Contracting States have declared Alternative A.³³⁷

4. Alternative B.

Alternative B is considered much less useful to creditors than Alternative A. 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.³³⁸ 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.

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

³³⁶ GOODE at paras. 5.60 and 4.115 (Unidroit 2008).

³³⁷ Part II to Annex II.

³³⁸ Article XI, Alternative B (2) of the Protocol.

creating the international interest. Therefore, the remedies clause or other agreement clause between the parties must provide guidance as to the waiting period.

(i) 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

1. Deregistration of aircraft.

The creditor may procure the deregistration of the aircraft provided that certain conditions are met.³³⁹ First, the debtor must have agreed (at any time) to permit deregistration of the aircraft.³⁴⁰ In cases where a Contracting State is the state of registry and has opted in to Article XIII of the Protocol, the debtor may issue an authorization (the IDERA) agreeing to the exercise of this remedy in accordance with the terms of Article XIII.³⁴¹ Second, the holder of a registered interest ranking in priority to that of the creditor must have provided consent in writing.³⁴² The second condition may not be excluded by agreement.³⁴³

³³⁹ Article IX(1)(a) of the Protocol.

³⁴⁰ Article XIII of the Protocol. *See* Section VI.B. for a discussion concerning the IDERA and certain conditions to its implementation.

³⁴¹ Article XIII of the Protocol. *See* Section VI.B. for a discussion concerning the IDERA.

³⁴² Article IX(2) of the Protocol.

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 APPEARS TO OPERATE 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.

2. 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.³⁴⁴ This is not a right to export to any particular jurisdiction, which jurisdiction may be prohibited by a contracting states 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 export control restrictions.³⁴⁵

3. Chargees.

A chargee seeking to exercise the rights of deregistration, export and physical transfer referred to in paragraphs 1 and 2 above must give reasonable prior notice thereof to interested persons specified in Article 1(m)(i) and (ii) of the Convention and interested persons specified in

³⁴³ Article IV(3) of the Protocol; GOODE at para. 5.44 (Unidroit 2008).

³⁴⁴ Article IX(1)(b) of the Protocol; GOODE at para. 5.43 (Unidroit 2008).

³⁴⁵ GOODE at para. 5.43 (Unidroit 2008).

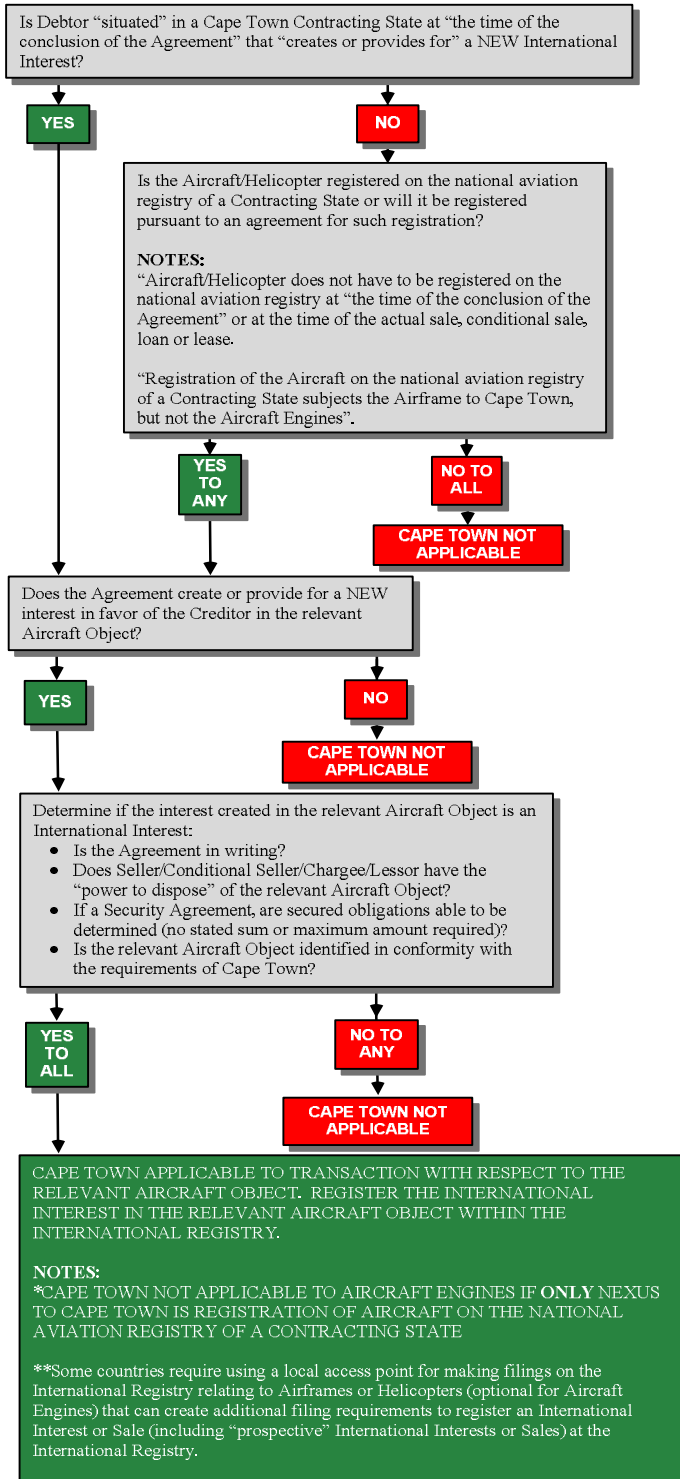
Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.³⁴⁶

³⁴⁶ Article IX(6) of the Protocol.

ANNEX A

CAPE TOWN APPLICABILITY

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; or
- Debtor's place of business is located in a Contracting State (if Debtor has more than one place of business, this refers to its principal place of business; if Debtor does not have a place of business, this refers to Debtor's habitual residence).

Debtor in a transaction:

- Sale = Seller
- Conditional Sale = Conditional Buyer
- Security Agreement = Chargor/Mortgagor
- Lease = Lessee

Creditor in a transaction:

- Sale = Buyer
- Conditional Sale = Conditional Seller
- Security Agreement = Chargee/Mortgagee/Secured Party
- Lease = Lessor

Agreement

- Contract of Sale (the actual title transfer document)
- Title Reservation (Conditional Sale) Agreement (US State laws treat Title Reservation Agreements as Security Agreements)
- Security Agreement
- Lease Agreement

Aircraft Objects:

- Airframe = type certified by the relevant aviation authority to transport at least 8 persons (including crew) or goods in excess of 2750 kg
- Aircraft Engine = powered by either jet propulsion, turbine or piston that have at least 1750 lbs of thrust or the equivalent (for jet engines) or at least 550 rated take-off shaft horsepower or the equivalent (for the turbine or piston engines)
- Helicopter = type certified by the relevant aviation authority to transport at least 5 persons (including crew) or goods in excess of 450 kg

*Propellers are not covered under Cape Town although their related engines are. Aircraft Objects used in military, customs or police services are not covered under Cape Town.

Aircraft Object Identification:

- Manufacturer's Name;
- Model Designation (general/generic name); and
- Manufacturer's Serial Number

ANNEX B

CONTRACTING STATE DECLARATIONS

This Annex provides basic information on the system of declarations under the Convention and Protocol, with specific focus on the declarations made by Contracting States. Declarations modify the effect of these instruments, and thus are critical to assessing the applicable legal rules in many situations.

Part I of this Annex will list a number of possible declarations. It will also note 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.

Part II of this Annex comprises a chart indicating which declarations were made by each Contracting State. This a simple chart which should be the starting point for review.

In fact, it 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).³⁴⁷ Part II also includes a specific summary chart on the critically important substantive insolvency declaration, Article XI of the Protocol.

Part III provides more information on the five key declarations that, as a whole, constitute “**qualifying declarations**” under the Sector Understanding on Export Credits for Civil Aircraft (1 February 2011).

Part III also sets out a list of Contracting States that have made qualifying declarations.

Special consideration should be given to Member States of the European Union. The EU's accession was as a regional economic integration organization pursuant to Article 48 of the Convention, not a Contracting State, and only in respect of the areas in which it has competence. Member States of the EU must still individually ratify the Cape Town Convention to become Contracting States for its purposes to give it full effect. Specifically, the declarations made by the EU under the Cape Town Convention affect the capacity of EU Member States to make declarations under Articles VIII, X and XI of the Protocol (however, their capacity to make the other declarations under the Cape Town Convention are not affected). EU Member States are neither permitted to make the declaration under Article VIII (*Choice of Law*) of the Protocol nor amend their national law on the subject of Article VIII. While EU members are not permitted to

³⁴⁷ Reference should also be made to UNIDROIT's helpful Declarations Memorandum, UNIDROIT 2010, DC9/DEP – Doc.1 Rev 3 (the “**Declarations Memorandum**”), which can also be found the above-cited UNIDROIT website.

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.

Part I. List of Declarations

NOTE: The list below is not exhaustive of all possible declarations which may be made.

<p align="center"><u>Provision of the Cape Town Convention or Protocol</u></p>	<p align="center"><u>Declaration</u></p>
<p>opt-in declaration under Article 39 of Convention</p>	<p>Non-consensual rights and interests</p>
	<p>The Contracting State may declare that certain categories of non-consensual rights or interests have priority under its law over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings.</p> <p><i>Relevant Contracting State:</i> State under whose laws a non-consensual interest arises.</p> <p>These could include, for example,</p> <p>(a) a right or interest in respect of an aircraft arising from (i) salvage, (ii) damage done by that aircraft, and (iii) repair and storage of that aircraft; and/or</p> <p>(b) liens in favour of any state entity relating to unpaid taxes or other charges directly related to the use of that aircraft and owed by the owner of the aircraft.</p>

<u>Provision of the Cape Town Convention or Protocol</u>	<u>Declaration</u>
opt-in declaration under Article 40 of Convention	<p>Registrable non-consensual rights and interests</p> <p>The Contracting State may declare that certain categories of non-consensual rights or interests shall be registrable under the Cape Town Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly.</p> <p><i>Relevant Contracting State:</i> State under whose laws a non-consensual interest arises.</p>
opt-out declaration under Article 50 of Convention	<p>Internal transactions</p> <p>The Contracting State may declare that the Cape Town Convention shall not apply to internal transactions.</p> <p><i>Relevant Contracting State:</i> State in which center of the main interests of all parties to a transaction is located, where the aircraft object is located, and where interest arising under that transaction has been registered in a national registry, as set out in Article 1(n) of the Convention.</p>
declaration under Article 52 of Convention	<p>Territorial units</p> <p>The Contracting State may declare that the Cape Town Convention is to apply to all its territorial units.</p> <p><i>Relevant Contracting State:</i> State possessing territorial units (in which different systems of law are applicable) recognized under international law.</p>
declaration under Article 53 of Convention	<p>Relevant courts</p> <p>The Contracting State may declare which of the courts within its jurisdiction are the relevant courts for the purposes of any claim brought under the Cape Town Convention.</p>

<u>Provision of the Cape Town Convention or Protocol</u>	<u>Declaration</u>
	<i>Relevant Contracting State:</i> State with jurisdiction under the Convention (<i>lex fori</i>). See Articles 42 and 43 of the Convention.
opt-out declaration under Article 54(1) of Convention	<p>Leasing by chargees</p> <p>The Contracting State may declare that a chargee may not lease an aircraft on its territory.</p> <p><i>Relevant Contracting State:</i> State where remedies are exercised, which, depending on circumstances and the remedy selected, will be the State where the aircraft object is located or where the debtor is situated, as defined in Article 4 of the Convention.</p>
mandatory declaration under Article 54(2) of Convention	<p>Role of Court in Remedies</p> <p>The Contracting State must declare whether any remedies available to the creditor under the Cape Town Convention which are not expressed under the relevant provision of the Cape Town Convention to require application to the court, may be exercised without court action and without leave of the court.</p> <p><i>Relevant Contracting State:</i> State where remedies are exercised, which, depending on circumstances and the remedy selected, will be the State where the aircraft object is located or where the debtor is situated, as defined in Article 4 of the Convention.</p>

<p align="center"><u>Provision of the Cape Town Convention or Protocol</u></p>	<p align="center"><u>Declaration</u></p>
<p>opt-in declaration under Article 60 of Convention</p>	<p>Transitional Provisions</p> <p>The Contracting State may declare that the Cape Town Convention applies to pre-existing rights and interests and may fix a date after which such pre-existing rights and interests will lose priority if not registered.</p> <p><i>Relevant Contracting State:</i> State where the debtor is situated, as defined in Article 60 of the Convention.</p>
<p>opt-in declaration under Article XXX(1) in respect of Article VIII of Protocol</p>	<p>Choice of law</p> <p>The Contracting State may declare that the parties to an agreement may choose the governing law.</p> <p><i>Relevant Contracting State:</i> State with jurisdiction under the Convention (<i>lex fori</i>). See Articles 42 and 43 of the Convention.</p>
<p>opt-in declaration under Article XXX(1) in respect of Article XII of Protocol</p>	<p>Insolvency assistance</p> <p>The Contracting State may declare that its courts will co-operate with foreign courts and insolvency administrators.</p> <p><i>Relevant Contracting State:</i> State in which an aircraft object is located and which is <u>not</u> the “primary insolvency jurisdiction”, as defined in Article 1(n) of the Convention (center of main interest), as a debtor.</p>
<p>opt-in declaration under Article XXX(1) in respect of Article XIII of Protocol</p>	<p>De-registration and export</p> <p>The Contracting State may declare that a de-registration and export request authorisation shall be recorded and implemented by its registry authority and other administrative authorities.</p> <p><i>Relevant Contracting State:</i> “State of registry”, as defined in Article 1(p) of the Protocol (State of Chicago Convention nationality).</p>

<p align="center"><u>Provision of the Cape Town Convention or Protocol</u></p>	<p align="center"><u>Declaration</u></p>
<p>opt-in declaration under Article XXX(2) in respect of Article X(2) of Protocol</p>	<p>Relief Pending Final Determination</p> <p>The Contracting State may declare whether it will apply Article X(2) of the Protocol in its entirety and, if so, specify the number of working days within which relief pending final determination can be obtained from its courts.</p> <p><i>Relevant Contracting State:</i> State in which such legal action is taken. See Article 43 of the Convention.</p>
<p>opt-in declaration under Article XXX(3) in respect of Article XI of Protocol</p>	<p>Substantive Insolvency</p> <p>The Contracting State may declare whether it will apply Article XI, Alternative A or Alternative B of the Cape Town Convention to all types of insolvency proceedings and, in the case of Alternative A, shall specify the waiting period</p> <p><i>Relevant Contracting State:</i> State which is the “primary insolvency jurisdiction”, as defined in Article 1(n) of the Convention (center of main interest), as a debtor.</p>

PART II. CONTRACTING STATE DECLARATIONS

Declaration	Afghanistan	Albania	Angola	Bangladesh	Cameroon	Cape Verde	China	Colombia	Cuba	Ethiopia	European Community	India	Indonesia	Ireland	Jordan	Kazakhstan	Kenya	Latvia
Convention Article 39(1)	IN	IN	IN	IN	IN	IN	IN	IN		IN		IN	IN	IN	IN	IN	IN	
Convention Article 39(4)							IN									IN		
Convention Article 40	IN		IN	IN	IN	IN	IN			IN		IN	IN			IN	IN	
Convention Article 50							OUT											
Convention Article 52(1)	Other			Other								Other						
Convention Article 53	IN			IN	IN	IN	IN					IN	IN			IN	IN	
Convention Article 54 (1)							OUT											
Convention Article 54 (2)	NJR	NJR	NJR	NJR	NJR	NJR	CRT	CRT	CRT	NJR		NJR	NJR	NJR	NJR	NJR	NJR	NJR
Convention Article 60(1)-(3)																		
Protocol Article XXX(1) Applying Article VIII (Choice of Law)	IN	IN	IN	IN		IN	IN	IN		IN		IN	IN	IN	IN	IN	IN	
Protocol Article XXX(1) Applying Article XII (Insolvency Assistance)	IN	IN	IN	IN		IN	IN	IN		IN		IN	IN	IN	IN	IN	IN	
Protocol Article XXX(1) Applying Article XIII (De- registration and export request authorization)	IN	IN	IN	IN		IN	IN			IN		IN	IN	IN	IN	IN	IN	
Applying Article X(2))	IN		IN	IN		IN	IN	IN		IN		IN	IN		IN	IN	IN	
Protocol Article XXX(3)	IN		IN	IN		IN	IN	IN		IN		IN	IN		IN	IN	IN	

Declaration	Luxembourg	Malaysia	Malta	Mexico	Mongolia	The Kingdom of Netherlands	New Zealand	Nigeria	Norway	Oman	Pakistan	Panama	Rwanda	Saudi Arabia	Senegal	Singapore	South Africa	UAE	United Republic of Tanzania	USA
Convention Article 39(1)		IN	IN	IN	IN	IN	IN	IN	IN	IN	IN	IN	IN		IN	IN	IN	IN		IN
Convention Article 39(4)			IN								IN	IN				IN				
Convention Article 40		IN	IN					IN	IN	IN	IN		IN		IN		IN	IN		
Convention Article 50				OUT								OUT								
Convention Article 52(1)						IN	Other			Other	Other		Other		Other			Other		
Convention Article 53	IN	IN	IN	IN	IN	IN	IN	IN		IN	IN	IN	IN		IN	IN		IN		
Convention Article 54 (1)																				
Convention Article 54 (2)	NJR	NJR	NJR	CRT	NJR	NJR	NJR	NJR	NJR	NJR	NJR	NJR	NJR	NJR	NJR	NJR	NJR	CRT	NJR	NJR
Convention Article 60(1)-(3)				IN																
Protocol Article XXX(1) Applying Article VIII (Choice of Law)	IN	IN		IN	IN	IN	IN	IN	IN	IN	IN	IN	IN		IN	IN	IN	IN	IN	IN
Protocol Article XXX(1) Applying Article XII (Insolvency Assistance)	IN	IN			IN	IN	IN	IN	IN	IN	IN	IN	IN		IN	IN	IN	IN	IN	IN
Protocol Article XXX(1) Applying Article XIII (De-registration and export request authorization)	IN	IN	IN		IN	IN	IN	IN	IN	IN	IN	IN	IN		IN	IN	IN	IN	IN	IN
Protocol Article XXX(2) Applying Article X(2)	IN	IN			IN	IN		IN		IN	IN	IN	IN		IN		IN	IN	IN	
Protocol Article XXX(3)	IN	IN		IN	IN		IN	IN	IN	IN	IN	IN	IN		IN	IN	IN	IN	IN	

NOTE: A Contracting State may be a member of a regional economic integration organisation that has signed, accepted, or approved, or acceded to, the Convention (pursuant to Article 48 of the Convention) and the Protocol (pursuant to Article XXVII of the Protocol), and the internal arrangements of that organisation may affect the capacity of the Contracting State to make a declaration in relation to a particular article (for

example, the European Union (EU)). In certain cases, however, they may amend their national law to reflect the terms of the underlying provision which was the subject of the declaration. See, in particular, the introduction to Part III of this Annex.

INSOLVENCY DECLARATION

COUNTRY	Protocol Article XI Alternative A	Protocol Article XI Alternative B	Waiting Period Declared for Purposes of Protocol Article XI(3) (days unless otherwise stated)	Amended National Insolvency Law
Afghanistan	X		60	
Angola	X		60	
Bangladesh	X		60	
Cape Verde	X		60	
China	X		60	
Colombia	X		60	
Cuba				
Ethiopia	X		30 working days	
India	X		2 calendar months	
Indonesia	X		60	
Ireland				No
Jordan	X		60	
Kazakhstan	X		60	
Kenya	X		60	
Luxembourg	X		60	
Malaysia	X		40 working days	
Malta				
Mexico		X	the time period expressed by the parties	
Mongolia	X		60 working days	
Kingdom of The Netherlands				
New Zealand	X		60	
Nigeria	X		30	
Norway	X		60	
Oman	X		60	

COUNTRY	Protocol Article XI Alternative A	Protocol Article XI Alternative B	Waiting Period Declared for Purposes of Protocol Article XI(3) (days unless otherwise stated)	Amended National Insolvency Law
Pakistan	X		60	
Panama	X		60	
Rwanda	X		60	
Saudi Arabia				
Senegal	X		30	
Singapore	X		30	
South Africa	X		30	
UAE	X		60	
United Republic of Tanzania	X		30	
United States of America				No

The declarations made by the European Union (EU) under the Convention and the Protocol prevent Contracting States who are EU Member States from making the insolvency declaration but does not prevent an EU Member State from amending its national insolvency laws to have the same effect as if the declaration had been made.

PART III. ASU QUALIFYING DECLARATIONS

Under the Sector Understanding on Export Credits for Civil Aircraft (1 February 2011) (the “ASU”), a “**Cape Town Discount**” is available if the operator (or, if different and in certain cases, the borrower) is situated in a Contracting State included in a eligibility list (the “**Cape Town List**”). The decision to include a country on the Cape Town List is made by the ASU Participants (and as otherwise set out in the ASU), but the standard is that such Contracting State (1) has made a set of “*qualifying declarations*”, and (2) has appropriately implemented that Convention and Protocol, including the qualifying declarations, in its national law (“*proper implementation*”).

In this Part, the question of qualifying declarations is addressed. **N.B.: Neither this Part nor any other section in the Guide addresses (a) the matter of proper implementation, or (b) which Contracting States are or should be on the Cape Town List.** Thus, this Part should not be viewed as a suggestion on whether the Cape Town Discount is or should be available.

In consultation with counsel in each Contracting State, AWG is separately assessing, in addition to the qualifying declarations (in line with this Part), the matter of proper implementation. It is also informing the ASU Participants of its view on which Contracting States should be on the Cape Town List.

More specifically, in section A of this Part the content and requirements of the qualifying declarations is set out. That consists of which declarations must be made (Section A.1), which may not be made (Section A.2), and special rules applicable to EU Member States in light EU rules on competence (Section A.3). Section B is a chart identifying which Contracting States have made qualifying declarations, it being understood, as noted above, that such listing does not suggest or imply eligibility for the Cape Town Discount.

A.1 Declarations which must be made

Protocol Article XXX(3) applying the entirety of Alternative A under Article XI (Remedies on Insolvency) with a waiting period of no more than 60 calendar days.

Protocol Article XXX(1) applying Article XIII(1) (De-registration request and export request authorisation)

Protocol Article XXX(1) applying Article VIII (Choice of Law)

EITHER

Convention Article 54(2) that any remedies available to a creditor under the Convention which are not expressed under the relevant provisions of the Convention to require application to a court may be exercised without leave of the Court.

OR

Protocol Article XXX(2) applying Article X of the Protocol in its entirety and that the number of working days to be used for the purposes of the time-limit laid down in Article X(2) of the Protocol shall be in respect of:

1. the remedies specified in Articles 13(1)(a),(b) and (c) of the Convention (preservation of the aircraft objects and their value; possession; control or custody of the aircraft objects; and immobilization of the aircraft objects), not more than 10 calendar days.
2. the remedies specified in Articles 13(1)(d) and (e) of the Convention (lease or management of the Aircraft objects and the income therefrom and sale and application of proceeds from the aircraft equipment), not more than 30 calendar days.

A.2. Declarations which must not have been made

Convention Article 55 opting out of Article 13 or Article 43 of the Convention unless the Contracting State has made the declaration under Convention Article 54(2) that any remedies available to a creditor under the Convention which are not expressed under the relevant provisions of the Convention to require application to a court may be exercised without leave of the court.

Protocol Article XXXII opting out of Protocol Article XXIV which provides that the Convention for a Contracting State that is a party to the *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft* signed at Rome on 29 May 1933, supersedes that Convention as it relates to aircraft, as defined in the Protocol.

Convention Article 54(1) preventing lease as a remedy.

A.3 Special Rules on Qualifying Declarations by EU Member States and implementation in light of the EU rules and competences

The ASU contains certain special rules on qualifying declarations by EU Member States and implementation in light of EU rules and competences.

These are addressed in the context of the chart set out as section B, with the following annotations, where indicated:

* The internal arrangements of the EU and the declarations made by the EU under the Protocol prohibit its member states from making a declaration under Protocol Article VIII. However, for the purposes of the ASU and the Qualifying Declarations made thereunder, the terms of the Rome I Regulation are considered (and agreed by the ASU participants) to be “substantially similar” to Protocol Article VIII, the applicable standard as set out in Article 4 of Annex I of Appendix III to the ASU. See guidance given in Annex III of the UNIDROIT Summary Report.

** The internal arrangements of the EU and the declarations made by the EU under the Protocol prohibit its member states from making a declaration under Protocol Article XI. However, an EU member state may amend its national law to “reflect the terms” of Protocol Article XI, the applicable standard (Alternative A with a maximum 60 calendar day waiting period) under Article 4 of Annex I of Appendix III to the ASU. See guidance given in Annex III of the UNIDROIT Summary Report.

*** The internal arrangements of the EU and the declarations made by the EU under the Treaty prohibit its member states from making a declaration under Convention Article 13 and Protocol Article X. However, an EU member state may amend its national law such that together with EU law (the Brussels I Regulation), it is “substantially similar” to Protocol Article X, the applicable standard under Article 4 of Annex I of Appendix III to the ASU. See guidance given in Annex III of the UNIDROIT Summary Report.

For purposes of the foregoing, see defined terms set forth below:

Brussels I Regulation means Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Rome I Regulation means EC Regulation 593/2008 on the Law Applicable to Contractual Obligations.

UNIDROIT Summary Report means the summary report prepared by the UNIDROIT Secretariat in June 2010 in respect of the seminar held in Rome on 26 November 2009 entitled “The European Community and the Cape Town Convention”.

B. Contracting States which have made the Qualifying Declarations*

Country	Did the country make Qualifying Declarations under the ASU?
<p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	
<p>Afghanistan</p> <p>Date of accession: 25 July 2006</p> <p>Date of entry into force: 1 November 2006</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Albania</p> <p>Date of accession: 30 October 2007</p> <p>Date of entry into force: 1 February 2008</p>	<p>No</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (not made)</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Angola</p> <p>Date of accession: 30 April 2006</p> <p>Date of entry into force: 1 August 2008</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Bangladesh</p> <p>Date of accession: 15 December 2008</p> <p>Date of entry into force: 1 April 2009</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Cameroon</p> <p>Date of accession: 19 April 2011</p> <p>Date of entry into force: 1 August 2011</p>	<p>NO</p> <p><u>Protocol Article VIII</u> – (not made)</p> <p><u>Protocol Article XI</u> – (not made)</p> <p><u>Protocol Article XIII</u> – (not made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p>
<p>Cape Verde</p> <p>Date of accession: 26 September 2007</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 January 2008</p>	<p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>China</p> <p>Date of ratification: 3 February 2009</p> <p>Date of entry into force: 1 June 2009</p>	<p>No</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – leave of court required</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made a prohibited declaration under Article 3 of Annex I of Appendix III to the ASU in respect of Convention Article 54(1)</p>
<p>Colombia</p> <p>Date of accession: 19 February 2007</p> <p>Date of entry into force: 1 June 2007</p>	<p>No</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 days</p> <p><u>Protocol Article XIII</u> (not made)</p> <p><u>Convention Article 54(2)</u> – leave of court required</p> <p><u>Protocol Art X</u> (made) - 30 days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Cuba</p> <p>Date of ratification: 28 January 2009</p>	<p>No</p> <p><u>Protocol Article VIII</u> (not made)</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 May 2009</p>	<p><u>Protocol Article XI</u> (not made)</p> <p><u>Protocol Article XIII</u> (not made)</p> <p><u>Convention Article 54(2)</u> – leave of Tribunal required</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Ethiopia</p> <p>Date of ratification: 21 November 2003</p> <p>Date of entry into force: 1 March 2006</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 30 working days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 5/20 working days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Gabon</p> <p>Date of accession: 16 April 2010</p> <p>Date of entry into force: 1 August 2010</p>	<p>No</p> <p><u>Protocol Article VIII</u> (not made)</p> <p><u>Protocol Article XI</u> (not made)</p> <p><u>Protocol Article XIII</u> (not made)</p> <p><u>Convention Article 54(2)</u> (not made)</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>India</p> <p>Date of accession: 31 March 2008</p>	<p>Yes</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 July 2008</p>	<p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 2 calendar months</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 working days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Indonesia</p> <p>Date of accession: 16 March 2007</p> <p>Date of entry into force: 1 July 2007</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Ireland</p> <p>Date of accession: 29 July 2005</p> <p>Date of entry into force: 1 March 2006</p>	<p>No</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (not made) – national law not amended to reflect the terms of declaration</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (partially made and not requiring 10/30 calendar days)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Jordan</p> <p>Date of ratification: 31 August 2010</p> <p>Date of entry into force: 1 December 2010</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Kazakhstan</p> <p>Date of accession: 21 January 2009</p> <p>Date of entry into force: 15 March 2011</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Kenya</p> <p>Date of ratification: 13 October 2006</p> <p>Date of entry into force: 1 February 2007</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Latvia</p> <p>Date of accession: 8 February 2011</p> <p>Date of entry into force: 1 June 2011</p>	<p>NO</p> <p><u>Protocol Article VIII</u> – (not made)</p> <p><u>Protocol Article XI</u> – (not made)</p> <p><u>Protocol Article XIII</u> – (not made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p>
<p>Luxembourg</p> <p>Date of accession: 27 June 2008</p> <p>Date of entry into force: 1 October 2008</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 10/30 days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Malaysia</p> <p>Date of accession: 2 November 2005</p> <p>Date of entry into force: 1 March 2006</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 40 working days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 working days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Malta</p> <p>Date of accession: 1 October 2010</p>	<p>Yes</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 February 2011</p>	<p><u>Protocol Article VIII</u>* (not made as not permissible - the terms of the Rome I Regulation are considered (and agreed by the ASU participants to be) “substantially similar”)</p> <p><u>Protocol Article XI</u>* * (not made as not permissible - national law amended to reflect the terms of declaration by article 23 of the First Schedule to the Aircraft Registration Act) – Alt A – 30 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u>* * * (not made as not permissible – national law amended to reflect the terms of declaration by article 20 of the First Schedule to the Aircraft Registration Act) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Mexico</p> <p>Date of accession: 31 July 2007</p> <p>Date of entry into force: 1 November 2007</p>	<p>No</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> – <u>Alt B</u> – and further qualified</p> <p><u>Protocol Article XIII</u> (not made)</p> <p><u>Convention Article 54(2)</u> – leave of court required</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Mongolia</p> <p>Date of accession: 19 October 2006</p>	<p>No</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 February 2007</p>	<p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 working days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 10/30 working days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Kingdom of the Netherlands (only for the Netherlands Antilles and Aruba)</p> <p>Date of accession: 17 May 2010</p> <p>Date of entry into force: 1 September 2010</p>	<p>No</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (not made)</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>New Zealand</p> <p>Date of accession: 20 July 2010</p> <p>Date of entry into force: 1 November 2010</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made a declaration prohibited under Article 3 of Annex I of Appendix III to the ASU in respect of Convention Article 55 but not problematic since also made a Qualifying Declaration under Convention Article 54(2)</p>
<p>Nigeria</p> <p>Date of ratification: 16 December 2003</p>	<p>Yes</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 March 2006</p>	<p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 30 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Norway</p> <p>Date of accession: 20 December 2010</p> <p>Date of entry into force: 1 April 2011</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made a declaration prohibited under Article 3 of Annex I of Appendix III to the ASU in respect of Convention Article 55 but also made a Qualifying Declaration under Convention Article 54(2)</p>
<p>Oman</p> <p>Date of accession: 21 March 2005</p> <p>Date of entry into force: 1 March 2006</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Pakistan</p> <p>Date of accession: 22 January 2004</p>	<p>Yes</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of entry into force: 1 March 2006</p>	<p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Panama</p> <p>Date of ratification: 28 July 2003</p> <p>Date of entry into force: 1 March 2006</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Rwanda</p> <p>Date of accession: 28 January 2010</p> <p>Date of entry into force: 1 May 2010</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Saudi Arabia</p>	<p>No</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accession</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of ratification: 27 June 2008</p> <p>Date of entry into force: 1 October 2008</p>	<p><u>Protocol Article VIII</u> (not made)</p> <p><u>Protocol Article XI</u> (not made)</p> <p><u>Protocol Article XIII</u> (not made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Senegal</p> <p>Date of ratification: 9 January 2006</p> <p>Date of entry into force: 1 May 2006</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 30 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>Singapore</p> <p>Date of accession: 28 January 2009</p> <p>Date of entry into force: 1 May 2009</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 30 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (not made)</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>South Africa</p>	<p>Yes</p>

<p style="text-align: center;">Country</p> <p>Date of ratification/accesion</p> <p>Date of entry into force of the Cape Town Convention</p>	<p style="text-align: center;">Did the country make Qualifying Declarations under the ASU?</p>
<p>Date of ratification: 18 January 2007</p> <p>Date of entry into force: 1 May 2007</p>	<p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 30 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) – 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>United Arab Emirates</p> <p>Date of accession: 29 April 2008</p> <p>Date of entry into force: 1 August 2008</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 60 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – leave of court required</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>United Republic of Tanzania</p> <p>Date of ratification: 30 January 2009</p> <p>Date of entry into force: 1 May 2009</p>	<p>Yes</p> <p><u>Protocol Article VIII</u> (made)</p> <p><u>Protocol Article XI</u> (made) – Alt A – 30 calendar days</p> <p><u>Protocol Article XIII</u> (made)</p> <p><u>Convention Article 54(2)</u> – non judicial remedies permitted</p> <p><u>Protocol Art X</u> (made) - 10/30 calendar days</p> <p>Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU</p>
<p>United States of America</p>	<p>No</p>

Country	Did the country make Qualifying Declarations under the ASU?
Date of ratification/accession Date of entry into force of the Cape Town Convention	Protocol Article VIII (made) Protocol Article XI (not made) Protocol Article XIII (made) Convention Article 54(2) – non judicial remedies permitted in accordance with United States law Protocol Art X (not made) Made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU

*** Note that the foregoing list is based solely upon a review of the declarations lodged with UNIDROIT. No assessment is made herein with respect to the implementation of the Cape Town Convention in a particular Contracting State and its relationship with national law.**

Agreement of satisfaction of the specific eligibility requirements necessary for Cape Town Convention discounts pursuant to the ASU is determined solely by ASU participants.

ADDITIONAL NOTE: Mongolia's only issue was that its declaration under Part XI, Alternative A was expressed in working days, not calendar days.

ANNEX C

AMENDMENTS SUMMARY CHART

Whenever amendments are made to a lease agreement, security agreement or title reservation agreement, care should be taken to ensure that any Cape Town Convention ramifications are considered.³⁴⁸ The principal consideration in these scenarios is whether the changes resulting from the amendment could give rise to the creation of a new international interest for purposes of the Cape Town Convention (thereby requiring additional registrations in order to obtain priority).³⁴⁹

The general principle is that there would need to have been a new grant of a lease, title reservation agreement or security as a result of such amendment. The following examples illustrate this principle.

Type of change to an existing transaction	If the applicable international interest is a lease agreement:	If the applicable international interest is a security agreement or title reservation agreement:
Change of creditor		
- assignment (other than an assignment constituting a novation)	no	no
- assignment (constituting a novation) ³⁵⁰	yes	yes
Change of debtor		
- by operation of law	no	no
- assignment	yes	yes
Change of payments		

³⁴⁸ The same analysis would apply in the situation where the initial agreement is executed prior to the coming into force of the Cape Town Convention in the applicable jurisdiction but the amendment occurs thereafter.

³⁴⁹ See Section V.A. for additional discussion on whether a particular amendment gives rise to the creation of a new international interest, including examples in respect thereof.

³⁵⁰ See “Example 3” in Section V.A.

Type of change to an existing transaction	If the applicable international interest is a lease agreement:	If the applicable international interest is a security agreement or title reservation agreement:
- method	no	no
- timing or amount	maybe (see note 1)	maybe (see note 1)
Change of terms relating to leasing/subleasing of aircraft objects	no (but a sublease may itself constitute an international interest)	no (but a lease may itself constitute an international interest)
Change of geographical limits	no	no
Reduction of term	no (see note 2)	no
Extension of term ³⁵¹	yes (but only for the period of the extension)	yes
Addition or removal of a purchase option	no (see note 2)	N/A
Addition or substitution of collateral consisting of aircraft objects ³⁵²	yes	yes
Increase in fractional interest in an aircraft object that is acquired by means other than assignment or subrogation ³⁵³	yes	yes
Extension of a security interest to a previously unsecured obligation	N/A	yes (see note 3)
Change relating to insurance of any aircraft object	no	no
Change relating to maintenance of any aircraft object	no	no

³⁵¹ See “Example 1” in Section V.A.

³⁵² See “Example 4” in Section V.A.

³⁵³ See “Example 5” in Section V.A.

Notes:

1. A change in the timing or amount of payment would not normally give rise to the creation of a new international interest. Care should be taken, however, to ensure that the changes made to the applicable transaction are not so substantive or transformative so as to give rise to a new international interest. For example, moving a payment date from the 1st day of a month to the 15th day of a month would not so alter the fundamental nature of a transaction so as to give rise to the creation of a new international interest. Similarly, the rescheduling of payments in connection with a work-out or restructuring should not give rise to the creation of a new international interest. If, however, a payment stream is so fundamentally altered so as to give rise to a new or different underlying agreement (in effect, the replacement of the existing arrangement with a new lease agreement, security agreement or title reservation agreement), then the prudent course would be to treat such an amendment as creating a new international interest (and new registrations should be made with the International Registry). The whole purpose of registration is to give notice of the existence of an interest. As the registration of an international interest does not identify the category of international interest to which the registration relates or any of its underlying information (other than the identity of the debtor and creditor and the specific aircraft object to which it relates), parties effecting a search of the International Registry are then required to inquire of the registering debtor or creditor in order to obtain more information about the applicable interest (and the corresponding associated rights). It stands to reason then that so long as a change would not make such prior notice (and any concomitant inquiry) so misleading as to impact the rights of third parties who effected such a search, no additional registration would be required.

2. The mere addition or removal of a purchase option should not give rise to the creation of a new international interest. As discussed in Section III.C. of the Guide, whether an interest falls into a specific category of “international interest” is determined by applying the Cape Town Convention’s own definitions and autonomous rules. Even if the addition or removal of a purchase option would, under applicable law, cause a recharacterization of such transaction, such recharacterization should not alter this initial characterization and the corresponding registration made in the International Registry.

3. If a security agreement only specifically recites the obligations secured and does not include some general statement to the effect that the secured indebtedness includes “all obligations owed by debtor to creditor under all contracts”, then any change to such amounts would give rise to the creation of a new international interest.³⁵⁴

³⁵⁴ See “Example 2” in Section V.A.

ANNEX D

ENTRY POINTS – SUMMARY CHART

During the development of the Convention and the Protocol, it emerged that certain provisions (for example, provisions permitting the exercise of extra-judicial remedies) could be inconsistent with principles inherent to some legal systems. Contracting States were accordingly given the opportunity for declarations to be made to such provisions of the Convention and the Protocol, which are inconsistent with the legal scenario of their respective countries. This is provided to enable the benefits of the Convention and the Protocol to be made widely available.

Article XIX(1) of the Protocol deals with designated entry points and envisages that a Contracting State may at any time designate an entity or entities in its territory as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration. Such designation may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of aircraft objects.

The following Contracting States have made declarations to provide for an entry point. The specifics of each particular entry point by such contracting states are separately dealt with below:

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.
People's Republic of China	People's Republic of China designates the Aircraft Rights Registry under the Civil Aviation Administration of China (CAAC) as the entry point.

Mexico	The Mexican Aeronautical Record is the entry point to the International Registry of the United Mexican States for registration in respect of airframes or helicopters pertaining to aircraft or aircrafts to become a civil aircraft of the United Mexican States and in respect of aircraft engines.
United Arab Emirates	United Arab Emirates declared that the General Civil Aviation Authority (“GCAA”), acting through its Aircraft Registry (Dubai/Abu Dhabi) and/or Ince Al Jallaf & Co. (Dubai) as published by the GCAA, shall be the entry point(s) 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 to 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.

ANNEX E

IDERA INFORMATION – SUMMARY CHART

The following chart sets forth certain rules and procedures pertaining to the IDERA as implemented in each of the Contracting States which have made the declaration required by Article XIII of the Protocol.³⁵⁵

³⁵⁵ At the time of publication of this Guide, the AWG was still gathering pertinent information from the applicable aviation authorities in each Contracting State making the Article XIII declaration. This chart will be updated as such information is received.

United States

Which national authority or authorities have responsibility for the recording of, and regulating the use of, IDERAs?	FAA Civil Aviation Registry, Aircraft Registration Branch (the "FAA").
Is there a specific form of the IDERA required under national law?	It must be substantially in the form annexed to the Protocol.
Is the national system of aircraft registration based on the owner or operator of an aircraft? Should the owner or operator execute the IDERA?	The US register is based on the owner of the aircraft. Only the owner should execute the IDERA.
What are the procedures for recording an IDERA and what documentation is required?	Submission of IDERA to the FAA.
Are there fees associated with the recording of an IDERA?	No.
In what language must the IDERA be submitted?	English.
Can the application to record an IDERA be made prior to the aircraft being registered?	No.
Can more than one IDERA be recorded in respect of a single aircraft?	Yes.
What is the procedure and documents required for parties to remove or discharge a recorded IDERA?	No specific form of release is required.
What are the procedures for the enforcement of an IDERA?	The authorized party must submit a written request to deregister the aircraft for export stating the country to which the aircraft will be exported.

Tanzania

Which national authority or authorities have responsibility for the recording of, and regulating the use of, IDERAs?	Tanzania Civil Aviation Authority.
Is there a specific form of the IDERA required under national law?	No.
Is the national system of aircraft registration based on the owner or operator of an aircraft? Should the owner or operator execute the IDERA?	The Tanzania registry is based on both the owner and the operator. IDERAs should be executed by the owner and the operator.
What are the procedures for recording an IDERA and what documentation is required?	N/A. Tanzania is not currently recording IDERAs.
Are there fees associated with the recording of an IDERA?	N/A. Tanzania is not currently recording IDERAs.
In what language must the IDERA be submitted?	N/A. Tanzania is not currently recording IDERAs.
Can the application to record an IDERA be made prior to the aircraft being registered?	N/A. Tanzania is not currently recording IDERAs.
Can more than one IDERA be recorded in respect of a single aircraft?	N/A. Tanzania is not currently recording IDERAs.
What is the procedure and documents required for parties to remove or discharge a recorded IDERA?	N/A. Tanzania is not currently recording IDERAs.
What are the procedures for the enforcement of an IDERA?	N/A. Tanzania is not currently recording IDERAs.

Emirates

Which national authority or authorities have responsibility for the recording of, and regulating the use of, IDERAs?	General Civil Aviation Authority (the “GCAA”).
Is there a specific form of the IDERA required under national law?	It must be substantially in the form annexed to the Protocol.
Is the national system of aircraft registration based on the owner or operator of an aircraft? Should the owner or operator execute the IDERA?	The UAE registry is based on the operator. The IDERA should be executed by the operator.
What are the procedures for recording an IDERA and what documentation is required?	Submission of the IDERA to the GCAA.
Are there fees associated with the recording of an IDERA?	No.
In what language must the IDERA be submitted?	Arabic or English.
Can the application to record an IDERA be made prior to the aircraft being registered?	No.
Can more than one IDERA be recorded in respect of a single aircraft?	Unknown.
What is the procedure and documents required for parties to remove or discharge a recorded IDERA?	To remove or discharge an IDERA, a request must be submitted by the authorized party or its designee along with a Power of Attorney and evidence of the title of the signatory.
What are the procedures for the enforcement of an IDERA?	The IDERA may only be enforced by the authorized party or its designee. The GCAA requires proof of title of the signatory.

Pakistan

Which national authority or authorities have responsibility for the recording of, and regulating the use of, IDERAs?	Civil Aviation Authority (the “CAA”).
Is there a specific form of the IDERA required under national law?	It must be substantially in the form annexed to the Protocol.
Is the national system of aircraft registration based on the owner or operator of an aircraft? Should the owner or operator execute the IDERA?	The Pakistani registry is based on the operator. The IDERA should be executed by the operator.
What are the procedures for recording an IDERA and what documentation is required?	An IDERA is lodged with the CAA in favor of the creditor/authorized party through an application. If the IDERA is executed abroad it must be notarized and legalized by the consulate.
Are there fees associated with the recording of an IDERA?	Yes, US\$65.
In what language must the IDERA be submitted?	English.
Can the application to record an IDERA be made prior to the aircraft being registered?	No.
Can more than one IDERA be recorded in respect of a single aircraft?	No.
What is the procedure and documents required for parties to remove or discharge a recorded IDERA?	An application may be made to the CAA to remove or discharge a recorded IDERA.
What are the procedures for the enforcement of an IDERA?	Deregistration may be effected by applying to the CAA in writing together with the submission of the original certificate of registration with its back side filled in and the certificate of airworthiness.

New Zealand

Which national authority or authorities have responsibility for the recording of, and regulating the use of, IDERAs?	The Civil Aviation Authority of New Zealand (the “CAANZ”).
Is there a specific form of the IDERA required under national law?	It must be substantially in the form annexed to the Protocol.
Is the national system of aircraft registration based on the owner or operator of an aircraft? Should the owner or operator execute the IDERA?	The New Zealand register is based on the operator. The IDERA should be executed by the operator.
What are the procedures for recording an IDERA and what documentation is required?	The debtor submitting an IDERA must be the holder of the certificate of registration for the aircraft.
Are there fees associated with the recording of an IDERA?	Yes, but the amount of the fee has not been determined at this time.
In what language must the IDERA be submitted?	English.
Can the application to record an IDERA be made prior to the aircraft being registered?	Yes, it is possible for an application to be received while the aircraft is in the process of being registered.
Can more than one IDERA be recorded in respect of a single aircraft?	The CAANZ may allow this, but only the beneficiary of the first recorded IDERA would have the right to deregister.
What is the procedure and documents required for parties to remove or discharge a recorded IDERA?	There must be a removal request by the authorized party or its designee, or, if by the debtor, proof of the written consent of the authorized party.
What are the procedures for the enforcement of an IDERA?	The authorized party must submit a de-registration request to the director of the CAANZ.

ANNEX F³⁵⁶

ANNOTATED FORM OF CAPE TOWN CONVENTION/ AIRCRAFT PROTOCOL LEGAL OPINION

This set of forms consists of a generic form of annotated legal opinion which contains the elements which could be applied to the circumstances of many transactions where the Convention is relevant.

The opinion is divided into six sections. The first section proposes references to Convention definitions and declarations thereunder to be used in the opinion. Each of the following five sections includes the relevant assumptions and opinions for that section. Some points are mentioned under both “Assumptions” and “Opinions” as there will be individual differences in this regard, i.e., in some legal opinions a statement might constitute an assumption and in others a core legal opinion. One law firm can issue the entire opinion, however in many instances separate law firms will issue different sections of the opinion. The opinion will complement other transactional opinions.

The six sections are:

- I. Opinion references to the Convention and to declarations thereunder and to standard documents reviewed and assumptions;
- II. Constitution of International Interests and other interests under the Convention and the effects of Registration thereof;
- III. Registration of International Interests, Assignments of Associated Rights, Sales and other interests and recordation of de-registration and export request authorizations;
- IV. Determination of priority under the Convention and of the effect of unregistered non-consensual interests;
- V. Insolvency; and
- VI. Other opinions: choice of law, choice of forum and waiver of sovereign immunity.

³⁵⁶ Reproduced, with permission, from THE LEGAL ADVISORY PANEL OF THE AVIATION WORKING GROUP ADVANCED CONTRACT AND OPINION PRACTICES UNDER THE CAPE TOWN CONVENTION: CAPE TOWN PAPERS SERIES, VOL. 2 (2008).

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 Organisation (“**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.³⁵⁷]]

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.³⁵⁸ “**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 Protocol³⁵⁹. [Alternative: Defined terms used herein (whether or not capitalized) and not otherwise defined in this opinion

³⁵⁷ This can be used as an alternate shorter version of the first paragraph.

³⁵⁸ 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.

³⁵⁹ 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.

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.³⁶⁰

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].³⁶¹

³⁶⁰ Identifying a relevant Contracting State will be crucial for any opinion on the Convention. In order for the Convention to apply, either (i) the debtor will be situated in a Contracting State at the time of the conclusion of the agreement creating or providing for the international interest, or (ii) the agreement will relate to a helicopter or an aircraft registered or to be registered in an aircraft register of a Contracting State. *See* Article 3 of the Convention and Article IV of the Protocol. *See* GOODE at para. 2.19 (Unidroit 2008). In some situations, the Convention may apply to one part of a transaction but not to another. For example, with regard to an engine, the Convention might apply so that a mortgage of the engine is an international interest because the debtor is situated in a Contracting State. However, the Convention might not apply to a lease of the same engine by the debtor since it might not be an international interest if the lessee is not situated in a Contracting State at the time of conclusion of the lease. *See* CAPE TOWN PAPER SERIES, VOL. 1, 2.

Each of Articles 8, 10, 13, 14, 39, 40, 50, 52, 53, 54, 57, 58 and 60 of the Convention and Articles VIII, X, XI, XII, XIII, XXIV, XXIX and XXXIII of the Protocol has different effect depending upon declarations in respect of the non-mandatory provisions of the Convention. Clients and opinion recipients may want confirmation in the opinion as to the scope of the Convention's coverage of a particular transaction and as to what these declarations are, subject only to the accuracy, completeness and current status of any source used to identify the relevant declarations.

³⁶¹ 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).

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];³⁶²
- (b) The [Lease]/[Mortgage]/[Conditional Sale Agreement]/[Contract of Sale]/[Assignment] [also referred to herein as Transaction Documents]³⁶³ 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;³⁶⁴
- (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;³⁶⁵
- (e) The De-registration and export request authorisation (the “**De-registration and export request authorisation**”) in connection with the Aircraft dated [] and a

³⁶² 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.

³⁶³ 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.

³⁶⁴ 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.

³⁶⁵ Article 23 of the Convention.

[search at] [official response from] the national aircraft registry authority, which has revealed that the authorization has been recorded;³⁶⁶ and/or

- (f) The [Subordination Agreement] dated [].³⁶⁷

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.³⁶⁸

- (ii) (a) Alternative (A)³⁶⁹

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;

³⁶⁶ Article XIII of the Protocol. The De-registration and export request authorization is not governed by a national law. Since it is based on the Convention itself, an opinion needs to be given. See the opinion in Section III(3). The certification of the registry authority that this has been recorded is different from the online International Registry priority search certificate.

³⁶⁷ 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.

³⁶⁸ A Contracting State search certificate showing the Contracting State's relevant declarations should be obtained from the Registrar and provided with the opinion.

³⁶⁹ 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.

the information in a priority search certificate has not been altered since the date of such priority search certificate;

each priority search certificate contains all the registered information and data on the International Registry in connection with the “[Airframe]/[Engine]/[Helicopter]” to which it relates;

all of the registrations indicated on any priority search certificates referred to herein relate to “international interests”, “assignments”, “sales” and/or “subordinations of interests” that are fully and properly constituted and fully created for the purposes of the Convention [other than] [list any prospective registrations made in connection with the transaction that is being opined upon that are known by the opining lawyer]; and

the information contained in the certificate of the [aircraft registry authority] as to recordation of the De-registration and export request 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 THEREOF³⁷⁰

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]³⁷¹

³⁷⁰ All that is needed to constitute an international interest is an agreement which conforms to the requirements of Article 7 of the Convention. This is so whether or not the international interest has any counterpart in national laws or fulfils the requirements for the creation of an interest under national law since the international interest derives from the Convention itself. Whether the agreement exists at all is to be determined by the applicable law, while the formal requirements for constituting the international interests are determined by the Convention (GOODE at para. 2.42 (Unidroit 2008)). The same is true with respect to a contract of sale or an assignment of associated rights under Article V of the Protocol or Article 32 of the Convention, as the case may be.

³⁷¹ 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

AND/OR

[Contracting State] is [where the [Airframe] [Helicopter] is [or is agreed to be] registered.³⁷²

- (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].³⁷³
- (c) the [seller] has the power to dispose of the “[Airframe]/[Engine]/[Helicopter]” by way of sale pursuant to the [Contract of Sale].

FURTHER POSSIBLE ASSUMPTIONS:

- (d) the [insert the name of the Transaction Document under which the international interest is based] is a [leasing agreement/a title reservation agreement/a security agreement] with respect to the “[Airframe]/[Engine]/[Helicopter]” as determined by [the applicable law];³⁷⁴
- (e) [the minimum requirements stipulated in the definition of “[Airframe]/[Engine]/[Helicopter]” in the Convention have been fulfilled;³⁷⁵]

by local counsel where the debtor is incorporated or formed or where the debtor has its registered office or statutory seat. The terms “statutory seat” and “registered office” are equivalents used in different jurisdictions and international instruments (*See* GOODE at para. 4.58 (Unidroit 2008)).

³⁷² 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.

³⁷³ Article 7 of the Convention and Article V of the Protocol. This assumption is required since the power to dispose is a matter of fact and applicable law that could be difficult to determine. A local opinion will probably be obtained. *See* GOODE at paras. 2.7, 2.42, 4.71-4.72 (Unidroit 2008) on “Power to Dispose”. The assumption or opinion as to power to dispose of the Aircraft Object would encompass having rights in the Aircraft Object of which to dispose.

³⁷⁴ 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).

³⁷⁵ 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

- (f) [the “[Airframe]/[Engine]/[Helicopter]” is correctly identified and described by manufacturer’s serial number, name of manufacturer and generic model designation.³⁷⁶]

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]”.³⁷⁷
- (2) (A) The [Lease]/[Conditional Sale Agreement] falls within the meaning of [leasing agreement]/[title reservation agreement] as defined in the Convention Text.³⁷⁸

Transaction Documents and the representations in acceptance certificates or supplements should be sufficient for counsel to omit this assumption.

³⁷⁶ Article VII of the Protocol and the Cape Town Regulations. The reference to model designation is to the generic model designation and not to a model designation specific to a particular owner or operator (GOODE at paras. 3.21 and 5.95 (Unidroit 2008)).

³⁷⁷ 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.

³⁷⁸ 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

- (B) The [Mortgage] falls within the meaning of security agreement as defined in the Convention.^{379]}
- (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.³⁸⁰
- (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.³⁸¹

document falls within since there are differences in the remedies that are available under the Convention for each of these categories.

³⁷⁹ Article 1(ii) of the Convention. The Mortgage must enable the secured obligations to be determined; Article 7(d) of the Convention.

³⁸⁰ 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.

³⁸¹ 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

- (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;³⁸²
- [(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];³⁸³
- (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.³⁸⁴

- (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.

priorities between two assignees of non-object-related associated rights (GOODE at para. 4.252 (Unidroit 2008)).

³⁸² Articles 31(1) and 32(2) of the Convention.

³⁸³ Article 33 (1) of the Convention and Article XV of the Protocol. This opinion may not be common, but it can be given provided that the debtor has been given notice of the assignment in writing by or with the authority of the assignor, the notice identifies the associated rights, and the debtor has given its consent in writing (which may be given in advance and need not identify the assignee). GOODE at paras. 2.127, 2.130 and 4.236 et seq. (Unidroit 2008).

³⁸⁴ This parallels existing opinion practice as to what the effect of a proper filing would be upon the actual registration at the International Registry. The word “perfection” is not used in the Convention or in this form opinion. The word “effective” is used in Article 30 of the Convention. On this point, see GOODE at paras. 2.120 and 4.209 (Unidroit 2008). The counsel giving this opinion might not also give the opinion on registration described in Section III or priority described in Section IV. Either a Convention opinion giver or a local law opinion may also opine that no further filing is required or advisable to protect the creditor’s international interest or assignment against third parties in a particular Contracting State.

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.³⁸⁵

³⁸⁵ 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.

III. REGISTRATION OF INTERNATIONAL INTERESTS, ASSIGNMENT OF ASSOCIATED RIGHTS, SALES AND OTHER INTERESTS AND RECORDATION OF DE-REGISTRATION AND EXPORT REQUEST AUTHORIZATION

Registration

ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section III and in addition to applicable standard assumptions in Section I] that:³⁸⁶

- (a) the Aircraft has been duly registered [or will be registered] on the aircraft register of [insert relevant Contracting State].³⁸⁷
- (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.³⁸⁸

³⁸⁶ This Section is about the registration of interests, assignments and sales. “Registration is not an element in the constitution of an international interest; it is merely a perfection requirement in order to give public notice of the interest and to preserve the holder’s priority. Conversely, registration of a purported international interest which does not in fact exist has no legal effect.” (GOODE at paras. 2.43, 2.69, 4.126 and 4.142 (Unidroit 2008)). “Perfection” is a non-convention term even though it is used in this text and in the Commentary. Like most perfection concepts, registration of an interest is a condition to its effectiveness against third parties. In some Contracting States that have declared that their local aircraft registry is the entry point for registration of interests with the International Registry, after filing a prospective international interest and when it becomes an international interest, one may have to file actual documents under the local rules.

³⁸⁷ 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.

³⁸⁸ 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.

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].³⁸⁹
- (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 consents³⁹⁰ 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].³⁹¹
- (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].³⁹²

³⁸⁹ 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.

³⁹⁰ Articles 18(1)(a), 20(1) and 20(3) of the Convention. Note that whether a consent has been duly and validly given is not determined by the simple registration of a consent for purposes of Article 18(1)(a) of the Convention. Under Article 20 of the Convention, a consent is an absolute requirement for the International Registry to effect a registration of international interests, assignments, sales, subordinations and discharges (Article 20(1)(a) of the Convention). This difference is important since the Registrar is not obliged to enquire whether a consent to register is valid (Article 18(2) of the Convention). See further opinion stated under Section III (2) herein and GOODE at paras. 2.99 n.2 and 4.134 (Unidroit 2008).

³⁹¹ Articles 19 and 20 of the Convention basically set out the requirements and principles for the validity of the registration. The opining lawyer must ensure that the necessary written consents have been obtained in accordance with Article 20 of the Convention. A person searching the International Registry will not be able to differentiate between a prospective interest and an international interest. This concept should facilitate the closing of transactions by permitted pre-filings (GOODE at paras. 2.115 and 4.156 (Unidroit 2008)). Counsel will have to confirm that registration information in a 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).

³⁹² 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

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:³⁹³

- (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

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.

³⁹³ 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.

“[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]; and³⁹⁴

- (iv) [if applicable] under Article 39(1)(b) of the Convention and as evidenced by a Contracting State search certificate as to the Contracting State of the debtor or other chosen entity, the Contracting State has declared that nothing in the Convention shall affect the right of [the Contracting State, state entity, intergovernmental organisation or other private provider of public services named in the declaration] to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] “[Airframe]/[Engine]/[Helicopter]”.³⁹⁵

³⁹⁴ 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.

³⁹⁵ 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.

OPINIONS:

Opinion on priority of [Mortgage]/[Conditional Sale]/[Lease]/[Contract of Sale]³⁹⁶

1. 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 Convention³⁹⁷ [and] [the quiet

³⁹⁶ Article 29 of the Convention and Article XIV of the Protocol. Rather than talking about priority as such, the draft opinion sets out the interests to which the Mortgage/Conditional Sale/Lease/Contract of Sale could be subject. Note that in a typical aircraft financing the security trustee and banks would ensure that there is no such prior registration (which is not subordinated to the [international interest]/[sale]/[assignment]), and that any registration suggesting otherwise is discharged prior to closing. Thus, typically, this opinion should contain no exceptions. However, if there is any such prior registration evidenced on the priority search certificate, the opining lawyer needs to further consider the following points:

(1) Has there been any registered subordination? If so, the prior registration might not have priority.

(2) Does such prior registration relate to an interest vested in the debtor (i.e., the [Mortgagor]/[Lessee]/[Conditional Buyer]) of the [Mortgagee]/[Lessor]/[Conditional Seller]? This might, for instance, be a sale registration that the Mortgagee has made in relation to the contract of sale pursuant to which the Mortgagor obtained title in the [Airframe]/[Engine]/[Helicopter], or it might be registrations that the Mortgagor may have made in relation to any international interests vested in it pursuant to a leasing agreement it has entered into, or this might arise in relation to a registration of international interests under a sublease that the Lessee has granted. As Article 29 of the Convention and Article XIV of the Protocol could not have been meant to allow a debtor to take priority over its own creditor, such prior registrations should not be construed as having priority over the international interests. However, it should be noted that though such prior registrations would not confer priority on the debtor vis-à-vis its creditor, if such prior registrations are not subordinated and the subordination registered they could, potentially, confer quiet enjoyment rights (under Article 29(4) of the Convention and Article XVI of the Protocol) on a conditional buyer or lessee relying on such prior registration of the international interests constituted by its lease/title retention agreement. This point should be reflected in the opinion in Section IV(1) (i) and (ii).

³⁹⁷ Article 29(4) of the Convention and Article XVI of the Protocol.

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.³⁹⁸
- (iv) [If an assumption has been made with regard to Article 39(1)(a) and (4) of the Convention of,] the non-consensual rights or interests included in those categories covered by [the Contracting State]'s declaration [at the time of ratification, acceptance, approval of, or accession to the Protocol] that under [the Contracting State]'s law have priority over an interest registered against an “[Airframe]/[Engine]/[Helicopter]” prior to [the date of such ratification, acceptance approval or accession]; and
- (v) any declarations that [the Contracting State] may make in the future [under Article 39(1)(b) of the Convention] with respect to the right of [the Contracting State, State entity, intergovernmental organization or other private provider of public services] to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] [Airframe]/[Engine]/[Helicopter].

Opinion on priority of [the Assignment]

2. Based upon the priority search certificate [and the Subordination Agreement] [and the relevant Assignment] and in accordance with the Convention, the assignment of associated rights in favor of the [security trustee] with respect to the “[Airframe]/[Engine]/[Helicopter]”, the [security trustee] under the Assignment will have priority subject only to:³⁹⁹

³⁹⁸ 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.

³⁹⁹ 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

- (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;]⁴⁰⁰
- (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]];⁴⁰¹
- (iii) [If an assumption has been made with regard to Article 39(1)(a) and (4) of the Convention,] the non-consensual rights or interests included in those categories covered by [the Contracting State]’s declaration [at the time of ratification, acceptance, approval of, or accession to the Protocol] that under [the Contracting State]’s law have priority over an interest registered against an “[Airframe]/[Engine]/[Helicopter]” prior to [the date of such ratification, acceptance approval or accession];
- (iv) [If an assumption has been made with regard to Article 39(1)(b) of the Convention,] the right of [the Contracting State, State entity, intergovernmental organization or other private provider of public services] described in the [Contracting State]’s declaration to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] “[Airframe]/[Engine]/[Helicopter]”; and
- (v) any declarations that [the Contracting State] may make in the future [under Article 39(1)(b) of the Convention] with respect to the right of [the Contracting

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).

⁴⁰⁰ 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.

⁴⁰¹ 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).

State, State entity, intergovernmental organization or other private provider of public services] to arrest or detain an “[Airframe]/[Engine]/[Helicopter]” under the laws of [the Contracting State] for payment of amounts owed relating to those services in respect of that [or another] [Airframe]/[Engine]/[Helicopter].]

V. INSOLVENCY [BASED ON DECLARATION]

ASSUMPTIONS:

We have assumed for the purpose of our opinions set forth below [in this Section V and in addition to applicable standard assumptions in Section I] that:

- (a) [Contracting State] is the debtor’s primary insolvency jurisdiction as defined in the Convention;⁴⁰²
- [(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;⁴⁰³
- [(c) [[Contracting State that has adopted Alternative A] has declared a waiting period of [_____] under Article XI(2) (Alternative A) of the Protocol or has enacted such provisions under the applicable national law as one of the time limitations within which the insolvency administrator or the debtor, as applicable, shall give possession of the Aircraft Object to the creditor;]

OR

- [(c) [[Contracting State that has adopted Alternative B or has enacted such provisions under the applicable national law] has declared a period of [_____] as the time within which the insolvency administrator or the debtor, as applicable, upon request of the creditor, shall give notice to the creditor whether it will cure all defaults and agree to perform all future obligations under the agreement and related transaction documents as specified under Alternative B or give the creditor the opportunity to take possession of the Aircraft Object, in accordance with the applicable law.]

⁴⁰² 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.

⁴⁰³ The opinion may assume the insolvency declarations as in these assumptions (b) and (c) or may opine that these insolvency declarations have occurred.

OPINIONS:

(1) If an insolvency-related event of the type set forth in the declaration of [the Contracting State of the debtor's primary insolvency jurisdiction] occurs with respect to [the debtor], [the creditor] under the [Lease]/[Conditional Sale Agreement]/[Mortgage] will be entitled to the benefits of [Alternative A] [Alternative B] of Article XI of the Protocol in [such primary insolvency jurisdiction].⁴⁰⁴[, 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 agreement and related transaction

⁴⁰⁴ Article XI of the Protocol. The insolvency provisions of Article XI of the Protocol only apply where a Contracting State has made a declaration under Article XXX(3) of the Protocol that it will apply either the entirety of Alternative A or the entirety of Alternative B under Article XI of the Protocol, and the types of insolvency proceedings to which it will apply either alternative. Thus, an opinion under Article XI of the Protocol must encompass a determination as to the result of a Contracting State's having made such a declaration and as to the rights and obligations of the parties to an agreement under such a declaration in particular types of insolvency proceedings. If no declaration has been made, the opinion will be the same as it was prior to the Convention. Inevitably, the opinion must look to the International Registry for a Contracting State search certificate showing a declaration by the Contracting State that is the primary insolvency jurisdiction to determine the types of proceedings to which either alternative applies (Article XXX (3) of the Protocol) and to state that the courts of the Contracting State will apply Article XI of the Protocol in conformity with the declaration by the Contracting State (Article XXX(4) of the Protocol). The types of insolvency proceedings to which the Contracting State could apply either Alternative A or Alternative B under Article XXX(3) of the Protocol include bankruptcy, liquidation or other collective judicial or administrative proceedings in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganization and liquidation. Article 1(1) of the Convention. A local law opinion should be given to specify the nature and effect of the types of proceedings that a declaration under Article XI of the Protocol by the Contracting State has included with respect to Alternative A or Alternative B of Article XI of the Protocol.

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.⁴⁰⁵
- (b) Assumptions required by counsel giving the opinion in the applicable Contracting State.

OPINIONS:

- (1) 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].⁴⁰⁶

Choice of forum

ASSUMPTIONS:

- (a) Any written agreement with regard to choice of forum is concluded in accordance with the formal requirements of the law of the chosen forum.⁴⁰⁷
- (b) Assumptions required by counsel giving the opinion in the applicable Contracting State.

⁴⁰⁵ Articles VIII and XXX(1) of the Protocol.

⁴⁰⁶ Article VIII of the Protocol. This opinion only applies if the Contracting State has made a declaration pursuant to Article XXX(1) of the Protocol. Further, the parties' choice of law is limited to contractual rights and obligations and is thus not applicable regarding rights affecting third parties (GOODE at paras. 3.22 and 5.40 (Unidroit 2008)).

⁴⁰⁷ Article 42(2) of the Convention. The attorney issuing the opinion is most likely from the forum chosen by the parties and could include this statement as an opinion instead of an assumption. Otherwise, a lawyer of the chosen forum could issue an opinion on this point.

OPINIONS:

The written agreement between [insert the name of the parties] contained in [insert the relevant Transaction Document] that the courts of [the relevant forum Contracting State] are to have [exclusive]/[non-exclusive] jurisdiction in respect of any claim brought by either of them under the Convention will be recognized under the laws of [the applicable Contracting State].⁴⁰⁸

Waiver of Sovereign Immunity

ASSUMPTIONS:

- (a) For the purposes of the waiver of sovereign immunity, the jurisdiction where the sovereign entity is located is a Contracting State.
- (b) Any written agreement waiving sovereign immunity is concluded in accordance with the formal requirements of the jurisdiction in which the applicable sovereign is located.
- (c) 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,

⁴⁰⁸ 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.

respectively, or relating to enforcement of rights and interests relating to the “[Airframe]/[Engine]/[Helicopter]”.⁴⁰⁹

⁴⁰⁹ 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.