

**Annex 4 – Chapter-by-Chapter Technical Summary of the  
Cape Town Convention & Aircraft Protocol<sup>1\*\*</sup>**

**I. CITATIONS**

Citations to the Cape Town Convention (“**Convention**”) are to “**C–Art \_\_**” and citations to the Aircraft Equipment Protocol thereto (“**Aircraft Protocol**”) are to “**P–Art \_\_.**”

**II. PURPOSE OF THE CONVENTION**

The Preamble sets out the basic purposes of the Convention. First and foremost, the Convention seeks to facilitate the financing of high value mobile equipment, thereby producing a range of important economic benefits. It does so by embodying the basic principles underlying asset-based financing and leasing, which are modern and efficient transactions that minimise risk. As financing is a condition to the acquisition of newer, safer equipment, the Convention may also aid in the upgrade safety and navigation capabilities. Given the nature of parties to these transactions, party autonomy is emphasized. An international financing registry is created to support the legal framework for such transactions. The Convention does not impact the provisions of the Chicago Convention.

**III. SUMMARY OF THE CONVENTION**

**A. Chapter I: “Sphere of application and general provisions”**

**A.1** Chapter 1 consists of Articles 1 through 6; it covers generally the matters indicated by its title. Article 1 is the definitional section. It needs no separate treatment here inasmuch as the definitions will be mentioned as they become relevant to this technical summary. Unless otherwise noted, terms first appearing in quotation marks below are defined in Article 1.

**A.2** Article 2 is the first of the provisions that deal with the scope of the Convention. The Convention applies to an “international interest” in one of three types of objects: (i) “airframes, aircraft engines and helicopters,” (ii) “railway rolling stock,” and (iii) “space assets,” but *only* if the type of objects are designated in a Protocol (*i.e.*, the Convention cannot apply to any type of object on a standalone basis in the absence of a Protocol covering that type of object). C–Art. 2(2), (3). (These three types of objects are not defined in the Convention, although the aircraft-related terms are defined in the Aircraft Protocol, discussed below.) There are, in turn, three classifications of international interests, each created by one of three types of “agreement”: international interests (i) granted by a “chargor” in favor of a “chargee” under a “security agreement,” (ii) held by a “conditional seller” under a “title reservation agreement” between the conditional seller and a “conditional buyer,” and (iii) held by a “lessor” under a “leasing agreement” between the lessor and a “lessee” (these terms that also cover a sub-lessee, sub-lease, and a sub-lessor, respectively). C–Art 2(2). An international interest also extends to “proceeds” of an object. C–Art 2(5). “Proceeds” is narrowly defined to include only proceeds arising out of an object’s total or partial loss, destruction, confiscation, condemnation, or requisition. C–Art 1(w).

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<sup>1</sup> The initial draft of this Technical Summary was prepared by Professor Charles Mooney, who kindly permitted AWG to make certain modifications that the latter thought were appropriate. This document, being descriptive with minimal editorial comment, does not address the matters included in the Official Commentary, prepared by the Chairman of the Diplomatic Conference’s Drafting Committee, Sir Roy Goode, pursuant to Resolution 5 of the Final Act of that Conference.

**A.3** Under Article 3 the Convention applies if the “debtor” (*i.e.*, the chargor, conditional buyer, or lessee, as the case may be) is situated (*i.e.*, located) in a Contracting State at the time that the relevant agreement is concluded. C–Art 3(1). The location of the “creditor” (*i.e.*, the chargee, conditional seller, or lessor) has no bearing on the Convention’s applicability, however. C–Art 3(2). Article 4, then, specifies where a debtor is situated. There are four possibilities for a debtor’s situation, which are not necessarily mutually exclusive. It follows that a debtor may be situated in several Contracting States (up to four). C–Art 4(1). The four possible situations are the Contracting States (i) under whose law the debtor is incorporated or formed, (ii) in which the debtor has its registered office or statutory seat, (iii) in which it has its centre of administration, or registered office or statutory seat, or (iv) in which the debtor has its place of business. C–Art 4(1). (If a debtor has more than one place of business, its place of business is its principal place of business. C–Art 4(2).) Providing that a debtor may have multiple locations for this purpose expands the potential scope of the Convention.

**A.4** The Convention is to be interpreted and applied in accordance with its purposes, reflected by its preamble, and so as to promote uniformity and predictability. C–Art 5(1), (2). Its principles are supplemented by the “applicable law,” which consists of the domestic rules applicable under the rules of private international law. C–Art 5(3). A special rule applies when a State contains several territorial units. C–Art 5(4).

Article 6 addresses the unique two–instrument structure of the Convention and a Protocol. C–Art 6(1). The Convention and the Protocol must be read and interpreted as a single instrument, but, in case of inconsistencies, the Protocol controls. C–Art 6(1), (2).

## **B. Chapter II: “Constitution of an international interest”**

**B.1** Chapter II consists of a single article, Article 7, that sets forth the formal requisites for the creation of an international interest. There are four criteria.

**B.2** First, the relevant agreement must be in “writing.” “Writing” is defined in Article 1 to include not only traditional paper records but other records as well, such as electronic records. Second, the relevant object must be one that the person creating the international interest the chargor, conditional seller, or lessor–“has power to dispose.” In other words, while the international interest, as such, is *sui generis* (*i.e.*, is not dependent upon national law), the property rights existing *prior* to the creation of the international interest, derived from the relevant rules under the applicable law, remain important. **To illustrate, a thief, having stolen an engine, could not grant international interest for that a stolen object.** Third and Fourth, the agreement must enable both the object and, in the case of a security agreement, the secured obligations to be identified.

## **C. Chapter III: “Default remedies”**

**C.1** Chapter III, consisting of Articles 8 through 15, addresses the remedies of a creditor following a default. Under Article 11a debtor and a creditor are free to agree as to what constitutes a default for purposes of Chapter III. C–Art 11(1). That agreement, if made, is binding. If the parties do not so agree, a default is an occurrence that “substantially deprives the creditor of what it is entitled to expect under the agreement.” C–Art 11(2).

**C.2** Article 8 covers the basic remedies of a chargee under a security agreement. On default the chargee is entitled to obtain possession of the object, sell or lease the object, and collect income or profits from the object, or to apply to a court for an order relating to these remedies. C–Art 8(1), (2). The chargee must exercise the remedies “in a commercially reasonable manner” and it must give reasonable notice of a sale or lease to the debtor and other specified “interested persons.” There is a strong presumption that the contractually

agreed standard is commercially reasonable. C–Art 8(3). Amounts collected by the chargee in exercising these remedies are to be applied to the secured obligations and the chargee must distribute any excess recoveries to holders of junior interests and then to the chargor. C–Art 8(5), (6).

**C.3** Article 9 deals with three other aspects of enforcement by a chargor. First, the chargee, the debtor, and all other interested persons may agree, or a court may order, that ownership in the object will vest in the chargee in satisfaction of some or all of the secured obligations. C–Art 9(1), (2). In the case of a court order, however, the court must ensure that the secured obligations satisfied are “commensurate with the value of the object.” C–Art 9(3). Second, at any time before a sale of an object under Article 8 or an order vesting ownership in the chargee under Article 9, the chargor or any interested person is entitled to discharge the chargee’s security interest by paying in full the secured obligations. C–Art 9(4). Third, the interest of the chargor passing on a sale under Article 8 or a vesting under Article 9 is free from any other interest that is subordinate to the chargee’s interest. C–Art 9(5); *see* C–Art 29 (priorities).

**C.4** Article 10 addresses the remedies of a lessor and a conditional seller. On default these creditors are entitled to terminate the relevant agreement and to obtain possession or control of the object. C–Art 10(a). They also may seek an order from a court to enforce these remedies. C–Art 10(b). These remedies are considerably less detailed and narrower in scope than the remedies afforded a chargee under Articles 8 and 9. This reflects the enormous variety of approaches taken in different jurisdictions for enforcement of leasing agreements and title reservation agreements. Other remedies are left to the agreement of the parties and the applicable law. C–Art 12.

**C.5** Article 13 requires a Contracting State to ensure that following a default a creditor can obtain from a court “speedy relief pending a final determination of the creditor’s claim. C–Art 13(1). The form of the relief may involve one or more of (i) “preservation of the object and its value,” (ii) “possession, control or custody of the object,” (iii) “immobilisation of the object,” and (iv) “lease ... or management of the object and the income.” *Id.* In ordering relief under Article 13(1) a court may make orders to protect the debtor or other interested persons in case the creditor requesting relief fails to perform its obligations or fails to establish its claim on final determination. C–Art 13(2). Article 55 provides substantial flexibility for a Contracting State in this context. Under that article, a Contracting State may declare, at the time it becomes a party to the Convention, that it will not apply Article 13, in whole or in part.

**C.6** Article 14 establishes the principle that, subject to Article 54(2), remedies under the Convention must be exercised in accordance with the procedural law of the location of exercise. Under Article 54(2), however, Contracting State shall declare whether any Convention remedies otherwise not requiring judicial action may be exercised only with court approval.

**C.7** Additional remedies may be exercised under the applicable law or by agreement of the parties, unless the remedies are inconsistent with the mandatory provisions of Chapter II specified in C–Art 15. C–Art 12. Although Article 15 generally permits parties to “derogate from or vary the effect” of the Convention’s provisions, it also establishes some mandatory provisions that may not be waived or varied: C–Arts 8(3)–(6) (chargor protections in sales and leases); 9(3) (chargor protection in vesting by court order), (4) (chargor’s and interested persons’ rights of redemption); 13(2) (protective court orders in relief pending final determination); and 14 (applicability of local procedural law).

## **D. Chapter IV: “The international registration system”**

**D.1** Chapter IV outlines the nature and structure of the international registration system. The registration system will provide the lynchpin of the Convention’s priority scheme (see the discussion of Chapter VII, below). Article 16 identifies the various types of registrations that may be made in the system: (i) international interests, “prospective international interests” (see the discussion of Article 18 and 19, below), and “registrable non-consensual rights and interests” (see the discussion of Article 40, below); (ii) assignments and prospective assignments of international interests (see the discussion of Chapter IX, below); (iii) other acquisitions of international interests under applicable law (e.g., by subrogation) (see the discussion of Article 38, below); (iv) “notices of a national interest,” (see the discussion of Article 50, below); and (v) subordinations of the various other interests that may be registered. C–Art 16(1). Amendments, extensions, and discharges of registrations also may be registered. C–Art 16(3). It is contemplated that there will be different and separate registries for different types of objects and “associated rights” under separate Protocols. C-Art 16(2).

**D.2** Chapter 17 addresses the general structure and operation of the International Registry. The registry will be established and overseen by a Supervisory Authority, as provided in a Protocol. C–Art 17(1). Among other duties, the Supervisory Authority will publish regulations relating to operation of the registry and appoint and supervise the Registrar, the entity that actually will operate the registry. C–Art 17(1), (5).

## **E. Chapter V: “Other matters relating to registration”**

**E.1** Chapter V provides details on the operation of the International Registry as it relates to registration of interests, although much is left for the Protocol and the regulations.

**E.2** Article 18 addresses the requirements of registration. It defers to the Protocol and the regulations to specify the requirements for identifying an object, effecting registrations, searching the electronic registry, and ensuring internal confidentiality. C–Art 18(1). Although the consent of each party to a registration is required under Article 20, the Registrar is not required to investigate or determine whether a required consent actually has been given. C–Art 18(2). However, there must be provision made for prior electronic transmission to the Registry of consents required by Article 20. C–Art 18(1). If a prospective interest is registered that later becomes an international interest, no further action is required (assuming the information contained in the prospective interest registration is sufficient). C–Art 18(3). The Registrar enters registrations into its records in the order of receipt. C–Art 18(4). A Protocol may designate national entry points for international registrations as well. C–Art 18(5).

**E.3** Article 19 contains important rules relating to the validity and timing of registrations, concepts that are crucial for the operation and application of the Convention’s priority rules. A registration is valid only if the required consents of the relevant party(ies) are obtained as required by Article 20 (e.g., under Article 20, an international interest may be validly registered by the debtor or the creditor only with the consent of the other). C–Art 18(1); 20(1). A valid registration is complete when the Registrar has entered the registration information into the registry so that the information is searchable, and it is searchable when it has been assigned a file number and the information is stored and can be accessed. C–Art 19(2), (3). Prospective interests that have become international interests (e.g., because the formal requisites for creating the interest have been satisfied) are treated as registered from the time that the prospective interest was registered. C–Art 19(4). In addition to these general rules, the Protocol will prescribe the criteria for the searchability of a registration.

C-Art 19(6). Once made, a registration is effective indefinitely until it is discharged, unless the registration information itself specifies another period. C–Art 21.

**E.4** Also central to the Convention’s priority rules is the ability to search the International Registry to identify the registrations, if any, that may have been made with respect to an object. A search may be made by *any* person. C–Art 22(1). Although the Convention contemplates that a searches will be requested on the basis of an identified object description (as opposed to, *e.g.*, the name of a debtor), the details are left to the Protocol and regulations for the most part. C–Art 22(1), (2). Upon request, the Registrar is required to issue a search certificate indicating the registrations relating to a particular object or indicating that the International Registry contains no information concerning that object. C–Art 22(2). However, a search certificate will not indicate whether or not an interest registered is or was a prospective interest. C–Art 22(3).

**E.5** Upon satisfaction of the obligations secured by a registered security interest or non-consensual right or interest, or a “national interest” covered by a registered notice, the holder of the interest must cause the registration to be discharged. C–Art 25(1), (3). The creditor named in a registered prospective interest or registered prospective assignment of an interest likewise must promptly procure a discharge of the registration if demanded by the prospective debtor before the prospective interest has ripened into an interest. C–Art 25(2). Similarly, the creditor named in a wrongful or incorrect registration must promptly cause the registration to be discharged or amended. C–Art 25(4).

**E.6** The Registrar is required to maintain a searchable list of declarations made by Contracting States relating to non-consensual rights or interests under Articles 39 and 40. C-Art 23. Certificates issued by the Registrar pursuant to the regulations are *prima facie* proof of issuance and the facts recited in a certificate. C–Art 24.

**E.7** Access to the International Registry’s registration and search facilities may not be denied to any person except upon failure to comply with procedures established in Chapter V. C–Art 26.

## **F. Chapter VI: “Privileges and immunities of the Supervisory Authority and the Registrar”**

**F.1** The Supervisory Authority has international legal personality and (as specified in the Protocol) the Supervisory Authority and its officers and employees are immune from legal or administrative process. C–Art 27(1), (2). Except as waived by the Supervisory Authority, its assets, documents, etc. also enjoy that immunity as well as immunity from seizure, subject to the right of a claimant against the Registrar to information and documents needed to pursue the claim. C–Art 27(4), (6).

**F.2** The Supervisory Authority also may enjoy immunity from taxes and other privileges as provided by agreement with the host state in which it is located. C–Art 27(3).

## **G. Chapter VII: “Liability of the Registrar”**

**G.1** Article 28 establishes the basis of liability of the Registrar: compensatory damages may be awarded for its errors and omissions and system malfunctions, subject to reduction for damage caused or contributed to by an injured person. C–Art 28(1), (3).

**G.2** However, the Registrar’s liability is subject to excuse for “event[s] of an inevitable and irresistible nature” that could not have been prevented by applicable best practices. C-Art

28(1). It also is not liable for factual inaccuracies in registration information or for acts and circumstances arising before it receives registration information. C–Art 28(2).

**G.3** The Registrar must obtain insurance or a financial guarantee covering its liability as determined by the Supervisory Authority under the Protocol. C–Art 28(4).

## **H. Chapter VIII: “Effects of an international interest as against third parties”**

**H.1** Article 29 contains the Convention’s basic priority rules. A registered interest enjoys priority over later–registered or unregistered interests, without any regard to whether the holder of the earlier–registered interest had knowledge of a conflicting interest. C–Art 29(1), (2). Similarly, a buyer of an object takes it subject to registered interests and free of unregistered interests, without regard to the buyer’s knowledge of the unregistered interest. C–Art 29(3).

**H.2** A conditional buyer under a title reservation agreement and a lessee under a leasing agreement takes its interest subject to an interest registered before its conditional seller or lessor registered its interest, but free of other interests–again without regard to the state of the conditional buyer’s or lessee’s knowledge. C–Art 29(4). The holders of competing interests or rights may vary (*i.e.*, subordinate) their priorities by agreement. C–Art 29(5). (The priority enjoyed by an assignee of a subordinated interest is addressed below in the discussion of assignment priorities under Articles 35 and 36.)

**H.3** The priority afforded under Article 29 also extends to proceeds. C–Art 29(6).

**H.4** Article 29(7) deals with items that are not objects and that are installed on an object. The Convention does not affect a person’s rights in an item that existed before installation on an object if those rights continue after installation under the applicable law. C–Art 29(7)(a). Similarly, after installation the Convention does not prevent the creation of rights in the installed item if the rights may be created under the applicable law. C–Art 29(7)(b).

**H.5** Under Article 30 an interest that is registered in the International Registry is effective in a debtor’s “insolvency proceedings.” C–Art 30(1). However, Article 30 does not affect insolvency avoidance powers (*i.e.*, preferential transfers or transfers in fraud of creditors). C–Art 30(3). Moreover, that article does not affect an international interest that is effective in insolvency proceedings under the applicable law. C–Art 30(2).

## **I. Chapter IX: “Assignments of associated rights and international interests; rights of subrogation”**

**I.1** Chapter IX of the Convention deals with the effect, formal requirements, and priority of assignments of associated rights and related international interests. It also deals with subrogation and subordination of priority.

**I.2** “Assignment” is defined to include any contract that transfers (whether or not for security) associated rights (whether or not in connection with a transfer of a related international interest). C–Art 1(b). “Associated rights” are defined as “all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object.” C–Art 1(c).

**I.3** Article 31(1) provides that except as otherwise agreed an assignment of associated rights (if it conforms with the formalities of Article 32) transfers to the assignee the related international interest as well as the assignor’s interests and priorities. Applicable law governs the defenses and rights of set–off available to the debtor as against the assignee. C–Art 31(3).

However, the debtor may waive its defenses and set-off rights other than those arising from fraudulent acts. C–Art 31(4).

**I.4** Article 31(2) permits partial assignments of an assignor’s associated rights and permits the parties to agree as to their respective rights in the related international interest following a partial assignment. However, a partial assignment may not adversely affect the debtor absent its consent. *Id.*

**I.5** Article 32(1) establishes the formal requisites for the effectiveness of the assignment of associated rights and the related international interest. These requirements parallel those provided in Article 7, discussed above, for the creation of international interests (i.e., writing, identification of associated rights, and determination of obligations secured for an assignment as security). But an assignment of an international interest in the absence of an assignment of at least some related associated rights is not valid. C–Art 32(2). Conversely, an assignment of associated rights that is ineffective to transfer the related international interest is not governed by the Convention but is governed instead by the applicable law. C–Art 32(3). Upon an effective assignment (C–Arts 31,32), the debtor has a duty to make payment or render other performance to the assignee if the debtor has been given notice of the assignment in writing, by the assignor (or with its authority), and the notice identifies the associated rights assigned. C–Art 33(1). Under Article 34, the default remedies available to an assignee under an assignment for security follow, *mutatis mutandis*, the rules applicable to the enforcement of an international interest.

**I.6** With two exceptions, the priority rules for competing assignments of associated rights are straightforward. In the case of competing assignments of associated rights, if at least one of the assignments also assigns the related international interest and that assignment is registered, the provisions of Article 29 apply *mutatis mutandis* (i.e., a registered assignment has priority over unregistered assignments and subsequent assignments). C–Art 35. The exceptions are found in Article 36. First, the Article 35 priority rule applies only when the contract under which the associated rights arise itself states that the associated rights are secured by or related to the object. C–Art 36(1). Second, the priority of the first registered assignment is afforded only to the extent that the associated rights relate to a financing of an object as provided in Article 36(2) (i.e., the associated rights are purchase-money obligations, obligations for the payment of the price and rentals of objects, obligations ancillary to those obligations, or other obligations in the related financing documents incorporated by reference). C–Art 36(2). Priority in other cases is left to the applicable law. C–Art 36(3). Article 38(2) permits parties to vary (i.e., subordinate) priorities along the lines provided by article 29(5), discussed above.

**I.7** Article 30 applies to insolvency proceedings against an assignor as if the references to the debtor were references to the assignor. C–Art 37. Rights of legal or contractual subrogation generally are unaffected. C–Art 38).

## **J. Chapter X: “Rights or interests subject to declarations by Contracting States”**

**J.1** Article 39 addresses the types of “non-consensual right or interest” that will have priority over an international interest. Article 39(1) permits a Contracting State to make a declaration, at any time, with respect to certain types of non-consensual right or interest. The subject of a declaration must be a non-consensual right or interest that, under the Contracting State’s law, has priority over an interest that is equivalent to the interest of a holder of a registered international interest. C–Art 39(1)(a). As to such a non-consensual right or interest, the Contracting State may declare at any time that the right or interest has priority over a registered international interest. *Id.* Subject to one exception, the priority afforded a right or interest by a declaration applies only if the declaration is deposited before the conflicting

international interest is registered. C–Art 39(3). Under the exception, a Contracting State may declare (at the time it becomes a party to the Convention) that the types of non–consensual rights or interests covered by a declaration under Article 39(a) have priority over international interests registered before the Contracting State became a party to the Convention. C–Art 39(4).

**J.2** Article 39(1)(b) deals with rights to arrest or detain objects under the law of a Contracting State for payment of amounts due for the provision of public services. The Contracting State may at any time declare that these rights of arrest or detention in favor of a provider of public services are not affected by the Convention. C–Art 39(1)(b).

**J.3** Article 40 addresses other types of non–consensual rights or interests. Under this article a Contracting State may at any time declare the types of non–consensual right or interest that are to be registrable under the Convention. C–Art 40. These registrable rights and interests are to be treated as international interests under the Convention. *Id.*

## **K. Chapter XI: “Application of the Convention to Sales”**

Chapter XI consists of Article 41, which provides that a Protocol may provide that the Convention applies to a “sale” or “prospective sale.”

## **L. Chapter XII: “Jurisdiction”**

**L.1** Article 42 deals with the parties’ choice of a forum for claims brought under the Convention. Under that article the courts of a Contracting State chosen by the parties have jurisdiction over those claims, even if the chosen forum has no connection to the parties or the transaction involved. C–Art 42(1). The jurisdiction is exclusive unless otherwise agreed. To be effective, the parties’ agreement must be in writing or comply with the formalities of the law of the chosen forum. C–Art 42(2).

**L.2** Article 43 covers jurisdiction to grant relief pending final resolution under Article 13. Jurisdiction to grant relief under Article 13(1)(a) (preservation), (b) (possession), (c) (immobilisation), and (4) (other interim relief not limited) is vested in courts of a Contracting State (i) chosen by the parties and (ii) in which the relevant object is located. C–Art 43(1). Jurisdiction to grant relief under Article 13(1)(d) (lease or management) and (4) (other interim relief not limited) is vested either in courts (i) chosen by the parties or (ii) of a Contracting State in which the debtor is located. C–Art 43(2). Jurisdiction is effectively conferred under Article 43(1) and (2) even if the final determination of a claim will be determined in a court of another Contracting State or by arbitration.

**L.3** Article 44 addresses jurisdiction to make orders against the Registrar and related matters. Exclusive jurisdiction to award damages or orders against the Registrar is conferred on the courts of the jurisdiction in which the Registrar’s center of administration is located. C–Art 44(1). Those courts also have exclusive jurisdiction to order the Registrar to discharge a registration when a person that has ceased to exist or cannot be located has failed to discharge the registration in response to a demand under Article 25. C–Art 44(2). Similarly, if a person is ordered to discharge or amend a registration and fails to do so, those courts have jurisdiction to order the Registrar to give effect to the order against that person. C–Art 44(3). Finally, except as provided in Article 44, no court may make orders, judgments, or rulings against the Registrar. C–Art 44(4).

**L.4** Chapter XII does not apply to insolvency proceedings. C–Art 45.

**M. Chapter XIII: “Relationship with other Conventions”**

**M.1** The convention prevails over the *United Nations Convention on the Assignment of Receivables in International Trade*, open for signature in New York on 12 December 2001, with respect to receivables that are associated rights related to international interests in aircraft objects, railway rolling stock, and space assets. C–Art 45bis.

**M.2** Determination of the relationship between the Convention and the *UNIDROIT Convention on International Financial Leasing*, signed at Ottawa on 28 May 1988, is left to the Protocol. C–Art 46.

**N. Chapter XIV: “Final provisions”**

**N.1** The Convention opened for signature in Cape Town on 16 November 2001 and will remain open for signature until it enters into force. C–Art 47(1); *see* C–Art 49 (entry into force). The Convention may be ratified, accepted, or approved by signatory States and a State may accede to it at any time, in each case by depositing a formal instrument with the Depositary. C–Art 47(2) – (4); C–Art 62 (Depositary). Article 48 contains provisions for a Regional Economic Integration Organization constituted by sovereign States to become parties to the Convention. The Convention enters into force three months after the deposit of the third instrument of ratification, acceptance, approval, or accession, but only with respect to a category of object covered by a Protocol and effective only when the Protocol enters into force and only as between States that are parties to both the Convention and that Protocol. C–Art 49(1). Following entry into force the Convention enters into force for other States three months after a State deposits its instrument with respect to the Convention and the Protocol. C–Art 49(2).

**N.2** Under Article 50, at the time a Contracting State becomes a party to a Protocol it may declare that the Convention does not apply to an “internal transaction” with respect to that State and as to some or all of the types of objects covered by the Protocol. C–Art 50(1). However, a “national interest” created in connection with an internal transaction nonetheless is subject to the principal registration and priority rules of the Convention and Protocol even if a declaration is made under Article 50(1). C–Art 50(2), (3).

**N.3** Article 51 deals with future Protocols. Although under Article 2(3) the scope of the Convention appears to be limited to Protocols covering airframes, aircraft engines, and helicopters, railway rolling stock, and space assets, Article 51 establishes procedures for Protocols dealing with other types of equipment.

**N.4** Article 52 permits a Contracting State to declare that the Convention will extend to fewer than all of the State’s territorial units. C–Art 51(1). That article also details the effects of such a declaration.

**N.5** Article 1 and Chapter XII of the Convention make reference to courts of a Contracting State. Article 53 permits a Contracting State to declare the appropriate court or courts for these purposes at the time it becomes a party to the Convention.

**N.6** The Convention contemplates three types of declarations relating to remedies at the time it becomes a party to the Convention. First, a Contracting State may declare that a chargee may not enter into a lease of an object while the object is located in that Contracting State. C–Art 54(1). Second, it shall declare whether or not creditors’ remedies not otherwise requiring judicial approval may be exercised only with court approval. C–Art 54(2). Third, it may declare that it will not apply Article 13 (relief pending final determination) or Article 43 (jurisdiction for relief under Article 13), in each case either wholly or in part. C–Art 55.

**N.7** Articles 56 through 59 and Article 62 are standard and straightforward final provisions for a convention of this type. These articles deal with reservations and declarations (Article 56), subsequent declarations (Article 57), withdrawal of declarations (Article 58), denunciations (Article 59), and the depository (which is UNIDROIT) and its functions (Article 62). Yet one element of Articles 57–59 is of note: existing interests arising prior to a subsequent declaration, a withdrawal of a declaration, or a denunciation remains protected, i.e., are unaffected by the action.

**N.8** Article 60 contains the Convention’s transitional provisions. The baseline rule is that the Convention does not apply to a “pre-existing right or interest,” defined in Article I(v) as an interest in an object existing before the “effective date,” as further defined in Article 60(2)(a). However, a Contracting State may declare that the Convention and a Protocol will apply to pre-existing rights or interests, but only for the purpose of determining priority and preservation of pre-existing priorities. C–Art 60(1), (3). The application to pre-existing rights or interests under a declaration may not occur earlier than three years after the effective date of the Convention and the relevant Protocol. C–Art 60(3).

**N.9** Article 61 deals with review conferences, amendments, and related matters. The Depository is required to prepare reports on how the Convention regime has performed in practice. C–Art 61(1). Upon the request of not less than twenty-five per cent of Contracting States a review conference will be convened. C–Art 61(2). Amendments require approval of two-thirds of the Contracting States parties to the Convention and the relevant Protocol. C–Art 61(3), (4).

#### **IV. SUMMARY OF THE AIRCRAFT PROTOCOL**

##### **A. Chapter I: “Sphere of application and general provisions”**

**A.1** Chapter I consists of Articles I through VIII; it covers generally the matters indicated by its title. Article I is the definitional section. It needs no separate treatment here inasmuch as the definitions will be mentioned, as they become relevant to this summary. Unless otherwise noted, terms first appearing in quotation marks below are defined in Article I.

**A.2** Article II provides that the Convention applies to “aircraft objects.” Under Article III, the principal provisions of the Convention apply to sales under contracts of sale. Article IV deals with sphere of application. Article IV(1) adds a new connecting factor in addition to the location of a debtor in a Contracting State (Convention Articles 3(1) and 4). The Convention applies if an object is a “helicopter” or an “airframe” pertaining to an “aircraft” and is registered in the “aircraft registry” (*i.e.*, under the “Chicago Convention”) of a Contracting State that is the “State of registry.” P–Art IV(1). Article IV(2) sets forth criteria for determining the location of an airframe, aircraft engine, or helicopter for purposes of the definition of “internal transaction” in Article 1 of the Convention. Parties may agree to exclude the application of Article XI (remedies on insolvency, discussed below). P–Art IV(3).

**A.3** Article V(1) specifies the formalities for an effective contract of sale; they are substantially the same as for the creation of international interests under Article 7 of the Convention (writing, power to dispose, and identification of an aircraft object). A contract of sale transfers the seller’s interest in an aircraft object to the buyer. P–Art V(2). Registrations of contracts of sale are effective indefinitely; in effect, the International Registry serves as a title registry that preserves the chain of title. Registrations of prospective contracts of sale, however, are effective until discharged or until any expiry date specified in the registration. P–Art V(3).

**A.4** Persons acting in a representative capacity may be parties to transactions under the Convention and Aircraft Protocol. P–Art VI.

**A.5** A description of an aircraft object is sufficient if it contains the manufacturer’s serial number, the name of the manufacturer, and the model of the object. P–Art VII.

**A.6** Under Article VIII parties are free to agree as to the substantive, domestic governing law applicable to their contractual rights and obligations. P–Art VIII(2), (3). However, Article VIII applies only if a Contracting State has so declared with respect to its courts. P–Art VIII(1); XXX(1). A forum court that is in a Contracting State that has not so declared is not obliged to apply Article VIII.

**B. Chapter II: “Default remedies, priorities and assignments”**

**B.1** Chapter II modifies the Convention in several important respects.

**B.2** Article IX supplements and modifies several of the Convention’s basic default remedies provisions. New remedies of de–registration of an aircraft and procurement of export of an aircraft have been added. These remedies may be exercised only with the consent of holders of registered interests that are senior to the interest of the enforcing creditor and with reasonable prior notice in writing to certain interested persons. P–Art IX(1), (2), (6). A “registry authority” in a Contracting State is obliged to honor a request for de–registration and export by an authorized party if an irrevocable de–registration and export authorization has been recorded in the State’s aircraft registry and the requesting party certifies that all senior interests have been discharged or have consented to the de–registration and export. P–Art IX(5); *see* P–Art XIII (de–registration and export request authorization).

**B.3** Article IX(3) applies to all remedies relating to an aircraft object (including lessor and conditional seller remedies). It supplants Convention Article 8(3), which applies only to chargee remedies. Convention remedies must be exercised in a commercially reasonable manner. P–Art IX(3). However, the exercise of a remedy under a provision of the relevant agreement is commercially reasonable unless the provision is itself “manifestly unreasonable,” a strong presumption *Id.* Ten or more working days’ notice of a proposed sale or lease is “reasonable prior notice under Convention Article 8(4).” P–Art IX(4).

**B.4** Article X contains modifications of the Convention’s provisions relating to relief pending final determination–Convention Articles 13 and 43, discussed above. (Recall that under Article 55 a Contracting State may declare, at the time it becomes a party to the Convention, that it will not apply Article 13, in whole or in part.) A Contracting State may declare, at the time it becomes a party, that it will apply Article X in whole or in part, and if it does not so declare Article X is not applicable in the courts of that State. P–Arts X(1); XXX(2). A Contracting State may, in its declaration, specify the number of working days following an application for relief within which relief will be “speedy” under Convention Article 13(1) (subject to applicable safety laws and regulations). P–Art X(2), (7); XXX(2). In addition to the relief specified in Convention Article 13(1), if agreed by a debtor and creditor a court may order relief by way of sale and application of proceeds of sale, and a buyer will take free of interests junior to the enforcing creditor’s interest. P–Art X(3), (4). A debtor, creditor, and another interested person may agree to exclude the protective provisions of Convention Article 13(2). P–Art X(5). As to the remedies of de–registration and export under Article IX(1), discussed above, a registry authority must act within five working days following notification of the relevant order and must cooperate with and assist the creditor in exercising these remedies (subject to applicable safety laws and regulations). P–Art X(6), (7).

**B.5** Article XI deals with remedies on insolvency of a debtor. It applies only if (i) a Contracting State is the “primary insolvency jurisdiction,” as defined in Article I(n), and (ii) that State has made a declaration under Article XXX(3). P–Art XI(1). Article XI contains two alternative sets of insolvency remedies. A Contracting State may declare, at the time it becomes a party, that it will apply the whole of Alternative A or Alternative B in insolvency proceedings, or it may specify the respective types of insolvency proceedings to which it will apply the whole of either alternative. P–Art XXX(3). Each alternative is triggered by an “insolvency-related event,” as defined in Article I(m), such as the commencement of “insolvency proceedings,” as defined in Convention Article

**B.6** Alternative A represents the “stronger” and less discretionary set of insolvency remedies. A key concept in Alternative A is the requirement that the “insolvency administrator” (defined in Convention Article I(k)) or debtor (as applicable) give possession of an aircraft object to a creditor no later than the expiration of the “waiting period” or, if earlier, the date on which the creditor otherwise would be entitled to possession of the object absent the application of Article XI. P–Art XI(2) (Alternative A). A Contracting State must specify the length of the waiting period in its declaration under Article XXX(3). P–Art XI(3) (Alternative A). Until the creditor obtains possession the insolvency administrator or debtor (as applicable) is required to preserve and maintain the object. P–Art XI(5) (Alternative A). If by the end of the applicable period the insolvency administrator or debtor (as applicable) has cured all (non-insolvency) defaults and agreed to perform all future obligations under the agreement, the insolvency administrator or debtor (as applicable) may retain possession of the object. P–Art XI(7) (Alternative A). But upon a second default the creditor may exercise its remedies and no second waiting period will be applicable. *Id.* No obligations of a creditor may be involuntarily restructured. P–Art IX(10). A creditor also is entitled to pursue its de-registration and export remedies under Article IX(1) in insolvency proceedings. P–Art X(8) (Alternative A).

**B.7** Under Alternative B, the “softer” version of insolvency remedies, upon the creditor’s request the insolvency administrator or debtor (as applicable) must notify the creditor whether the insolvency administrator or debtor (as applicable) will cure all defaults, agree to perform future obligations, and permit the creditor to take possession of the object in accordance with applicable law. P–Art X(2) (Alternative B). The time within which the insolvency administrator or debtor (as applicable) must notify the creditor is to be specified in the Contracting State’s declaration under Article XXX(3). *Id.* Absent the insolvency administrator’s or debtor’s (as applicable) giving of a notification under paragraph (2), or if the insolvency administrator or debtor (as applicable) has declared that it will give possession of the object to the creditor but fails to do so, the court may permit the creditor to take possession on the terms that the court orders. P–Art XI(5) (Alternative B).

**B.8** Article XII obliges the courts of Contracting States to cooperate with foreign courts and foreign insolvency administrators in effecting the provisions of Article XI. P–Art XII(2). However, it applies only if a Contracting State has made a declaration under Article XXX(1). P–Art XII(1); XXX(1).

**B.9** Article XIII applies only if a Contracting State has made a declaration under Article XXX(1). P–Art XIII(1); XXX(1). A Contracting State’s registry authority is required to record an irrevocable de-registration and export request authorization (in the form attached to the Protocol) that is submitted to it for recordation. P–Art XIII(2). The authorized party under the authorization is the only person (i) entitled to exercise remedies under Article IX(1) and in accordance with the authorization and (ii) to request removal of the authorization from the registry. P–Art XIII(3). The debtor may not revoke an authorization without the authorized party’s written consent. *Id.* A Contracting State’s registry authority and other agencies must

cooperate with and assist an authorized party in exercising the Article IX remedies. P–Art XIII(4).

**B.10** Article XIV modifies the Convention’s priority rules. Article XIV(1) and (2) deal with the priority of buyers and are necessary by virtue of the Protocol’s application to sales and the possibility of registration of contracts of sales. A buyer under a registered sale (*i.e.*, the relevant contract of sale to the buyer has been registered) takes free of subsequently registered and unregistered interests without regard to the buyer’s knowledge. P–Art XIV(1). But all buyers take subject to previously registered interests. P–Art XIV(2). Ownership of or other rights or interests in an aircraft engine are not affected by its installation on or removal from an aircraft. P–Art XIV(3).

**B.11** Article XV modifies the Convention’s assignment–related provisions in one respect. A debtor is not obliged to pay or otherwise render performance to an assignee unless the debtor has consented in writing to the assignment. P–Art XV.

**B.12** Article XVI contains important provisions for the protection of the interests of debtors. Unless the debtor is in default the debtor is entitled to quiet possession and use of an object as against specified persons. P–Art XVI(1). These persons are the creditor and others who hold interests from which the debtor takes free under Convention Article 29(4) or Protocol Article XIV(1), subject to any contrary agreement by the debtor, which, if made, is binding. P–Art XVI(1(a)). The debtor also is entitled to quiet possession and use as against the holder of an interest to which the debtor’s interest is subject, but only to the extent that the holder has so agreed. P–Art XVI(1(b)). Finally, the Convention does not affect any liability of a creditor under the applicable law for breach of the agreement in respect of an aircraft object. P–Art XVI(2).

### **C. Chapter III: “The Supervisory Authority and the Registrar”**

**C.1** Chapter III supplements and modifies the Convention’s provisions relating to the Supervisory Authority, the Registrar, and the International Registry. Pursuant to Article XVII(1) and XVIII, the Cape Town diplomatic conference designated ICAO as the Supervisory Authority and created a Preparatory Commission consisting of 20 States to serve as the interim Supervisory Authority, under ICAO’s guidance, for the purpose of selecting the initial Registrar and developing the regulations. Article XVII also provides for convening a Conference of Signatory and Contracting States to appoint a replacement Supervisory Authority, privileges and immunities of the Supervisory Authority, the appointment of a commission of experts to assist the Supervisory Authority, and for five–year terms for the Registrar. P–Art XVII(2)–(5).

**C.2** As contemplated by Article 17(5) of the Convention, discussed above, a Contracting State may designate a national entry point or national entry points within its territory through which international registrations may or (except as to aircraft engines) must be made. P–Art XIX(1), (2). For example, the United States could designate the aircraft registry at the FAA as the designated entry point for civil aircraft of the United States.

**C.3** Article XX contains several modifications of the Conventions provisions relating to the International Registry. Pursuant to Article 19(6) of the Convention, Article XX(1) provides that the International Registry’s search criteria for aircraft objects are the name of the manufacturer, the manufacturer’s serial number, and the model, as supplemented by the regulations. For purposes of Convention Article 25(2), Article XX(2) specifies five working days following demand as the period within which the holder of a registered prospective international interest or assignment must discharge the registration. Fees to be charged by the International Registry under Convention Article 17(2)(h) must be calculated on a cost–

recovery basis. P–Art XX(3). The International Registry will be operated on a twenty–four hour basis. P–Art XX(4). The insurance or financial guarantee to be maintained by the Registrar under Convention Article 28(4) must be sufficient to cover the maximum value of an aircraft as determined by the Supervisory Authority, although the Registrar is permitted to obtain coverage as well for losses for which the Registrar is not liable. P–Art XX(5), (6).

#### **D. Chapter IV: “Jurisdiction”**

**D.1** For purposes of Convention, Article 43 (jurisdiction for interim relief) provides, subject to Convention Article 42 (choice of forum), that the courts of a Contracting State that is the State of registry for a helicopter or airframe also have jurisdiction. P–Art XXI.

**D.2** A waiver of sovereign immunity from jurisdiction of courts specified in Convention Articles 42 or 43 is effective if it is in writing and contains a description of the aircraft object. P–Art XXII(1), (2).

#### **E. Chapter V: “Relationship with other conventions”**

**E.1** For Contracting States that are parties to the *Convention on the International Recognition of Rights in Aircraft*, signed at Geneva on 19 June 1948, the Convention supersedes that convention with respect to aircraft and aircraft objects, except as to rights or interests not “covered or affected” by the Convention, a small category given the scope of the Convention.

**E.2** For Contracting States that are parties to the *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft*, signed at Rome on 29 May 1933, the Convention also supersedes that convention with respect to aircraft. P–Art XXIV(1). However, a Contracting State may, at the time it becomes a party to the Convention, declare that it will not apply Article XXIV. P–Art XXIV(2). In addition, the Convention supersedes the *UNIDROIT Convention on International Financial Leasing*, signed at Ottawa on 28 May 1988, with respect to aircraft objects.

#### **F. Chapter V: “Final provisions”**

**F.1** Most of the Protocol’s Final Provisions follow closely the corresponding provisions in the Convention, discussed above, including Articles XXVI (signature, ratification, acceptance, approval, or accession), XXVII (Regional Economic Integration Organization), XXVIII (entry into force), XXIX (territorial units), XXXII (reservations and declarations), XXXIII (subsequent declarations), XXXIV (withdrawal of declarations), XXXV (denunciations), XXXVI (review conferences, amendments, and related matters), and XXXVII (depository and its functions). However, under Article XXXIII, entry into force of the Protocol requires ratification, acceptance, approval, or accession to the Protocol by eight states (as opposed to a possible number of three, as specified in Convention Article 49). Article XXX deals with declarations under Articles VIII (choice of law), X (relief pending final determination), XI (remedies on insolvency), XII (insolvency assistance), XIII (de–registration and export request authorization), and XXI (jurisdiction). These declarations are discussed above in connection with those articles.

**F.2** Declarations made under the Convention are deemed made under the Protocol, unless otherwise stated. P–Art XXXI.