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## Cape Town Convention Academic Project

Facilitating the study of the Convention on International Interests in Mobile Equipment

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# **Supplemental materials relating to the open discussion on CTC and cross-border insolvency**

CTC Academic Project – 5<sup>th</sup> Conference

13-14 September 2016

Oxford

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## **CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT**

### **Article 1 — Definitions**

(k) “insolvency administrator” means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;

(l) “insolvency proceedings” means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation;

### **Article 5 — Interpretation and applicable law**

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

### **Article 14 — Procedural requirements**

Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

### **Article 30 — Effects of insolvency**

1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.

3. Nothing in this Article affects:

- (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors;
- or

(b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

### **Article 37 — Effects of assignor’s insolvency**

The provisions of Article 30 apply to insolvency proceedings against the assignor as if references to the debtor were references to the assignor.

### **Article 54 — Declarations regarding remedies**

2. A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court

### **Article 60 — Transitional provisions**

1. Unless otherwise declared by a Contracting State at any time, the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.

2. For the purposes of Article 1(v) and of determining priority under this Convention:

(a) “effective date of this Convention” means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later; and

(b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.

**PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN  
MOBIL EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT**

2. In this Protocol the following terms are employed with the meanings set out below:

(m) “insolvency-related event” means:

(i) the commencement of the insolvency proceedings; or

(ii) the declared intention to suspend or 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;

(n) “primary insolvency jurisdiction” means the Contracting State 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;

**Article XI — Remedies on insolvency**

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).

*Alternative A*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

4. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. With regard to the remedies in Article IX(1):

(a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

13. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

#### *Alternative B*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXX(3) whether it will:

(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 and related transaction documents; or

(b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law.

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.

## **Article XII — Insolvency assistance**

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

2. The courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.

**OFFICIAL COMMENTARY**

law; it lays down a positive rule that such rights are not affected by the aircraft engine's installation on or removal from the airframe.

2.178. Article XIV(3) of the Aircraft Protocol contains a special rule for aircraft engines. Ownership of or another right or interest in an aircraft engine is not affected by its installation on or removal from an aircraft, so that (in contrast to the position under Article 29(7)) this is the case even if under the applicable law the engine would otherwise have passed to the owner of the airframe by a rule of accession.

### **Effect of the debtor's insolvency**

2.179. The general rule is that in insolvency proceedings against the debtor (see Article 1(l) and paragraph 4.18 for the definition of "insolvency proceedings") an international interest is effective if registered prior to the commencement of the proceedings (Article 30(1)). This, of course, presupposes that the insolvency proceedings have been opened in a Contracting State, which need not, however, be the same Contracting State as that under the law of which the international interest was created. Proceedings "against the debtor" would seem to include proceedings initiated by the debtor itself, e.g. for its own winding-up or administration, since these are in effect proceedings by the debtor against itself. The protection given by Article 30(1) extends to non-consensual rights or interests registered under Article 40 (see paragraph 2.219). "Effective" means that the property interest will be recognised and the holder of the international interest will have a claim against the asset for obligations owed, and will not be limited to a *pari passu* sharing with unsecured creditors. However this provision does not impair the effectiveness of an international interest which is effective under the applicable law (Article 30(2)). In other words, the rule in Article 30(1) is a rule of validity, not of invalidity. The applicable law under conflict of laws rules is generally taken to be the law of the situation of the object (*lex situs, lex rei sitae*) at the time of commencement of the insolvency proceedings. If under the applicable law the international interest is effective in the insolvency even if it has not been registered prior to the commencement of the insolvency proceedings, or, indeed, at all, then its efficacy in those proceedings is not affected by Article 30. Given that an international interest is the creature of the Convention, not of national law, which will usually have nothing to say about international

interests as such, Article 30(2) is to be treated as referring to the category of interest under domestic law corresponding to the category of international interest constituted under the Convention. The concept of equivalence already features in Article 39(1)(a) of the Convention.

2.180. The fact that an unregistered interest valid under the *lex situs* is entitled to recognition in the insolvency proceedings as having been duly perfected does not mean that it is immune from avoidance under rules of the insolvency law. The position is simply that the insolvency court has to accept as a starting point that an interest perfected under the applicable law was duly perfected. It remains liable to avoidance on any ground applicable under the insolvency law, not merely as a preference or a transaction in fraud of creditors as specified in Article 30(3)(a). In this respect an unregistered international interest perfected under the applicable law is more vulnerable under insolvency law than a registered international interest (see paragraph 2.183).

2.181. A non-consensual right or interest covered by a declaration under Article 39 has priority over a registered international interest, whether in or outside insolvency proceedings (Article 39(1)(a)) and *a fortiori* has priority over an unregistered interest (see paragraph 2.214). Accordingly the insolvency of the debtor does not affect the priority of the non-consensual right or interest where the insolvency proceedings are opened in a Contracting State.

2.182. Under Article 30(3(a)) the general rule in Article 30(1) does not protect a registered international interest from rules of law relating to the avoidance of preferences and transfers in fraud of creditors. Article 30(3) does not say what constitutes a preference or a transfer in fraud of creditors. That is left to the applicable insolvency law, which also determines what defences are available to a claim by the insolvency administrator resulting from a transaction void or voidable as a preference or a transfer in fraud of creditors (for example, that the person against whom the claim is made acquired its interest in good faith and for value from the original transferee). Other rules of insolvency law of a Contracting State, such as the invalidation of security interests not duly registered under the law of the insolvency jurisdiction, or the rule that a payment (other than a preference or transaction in fraud of creditors) is void if made for past value during a prescribed period (*période suspecte*) before the commencement of the insolvency proceedings, cannot be invoked against an international interest registered before the commencement of the insolvency

proceedings. On the other hand it is left to the applicable insolvency law to determine when those proceedings are deemed to have commenced (Article 1(d)). This leaves open the possibility that a registered international interest may be invalidated where under the applicable insolvency law the commencement of insolvency proceedings is made retrospective, e.g. to the time of presentation of a petition to the court for a winding-up order or, under the so-called “zero hour” rule, to the first moment (“zero hour”) of the day on which the insolvency proceedings commenced, and that time precedes the registration of the international interest. Moreover, the courts of a non-Contracting State are free to apply any grounds of avoidance provided by that State’s insolvency law. This is true also of the courts of a Contracting State if the international interest was not registered prior to the commencement of insolvency proceedings.

2.183. Under Article 30(3)(b) nothing in Article 30 affects rules of insolvency procedure relating to the enforcement of rights to property under the control or supervision of an insolvency administrator, for example, rules which, with a view to facilitating a reorganisation of the debtor, suspend or restrict enforcement of a security interest. But in a Contracting State which has made a declaration under Alternative A of the insolvency provisions of the relevant Protocol<sup>24</sup> Article 30(3)(b) does not apply, being overridden by those provisions. Article 30(3)(b) is solely concerned to preserve restraints imposed by the relevant insolvency law on the ability of the creditor to enforce its international interest against the object to which that interest relates. The pursuit of purely personal claims by the creditor, e.g. for sums due under the agreement, is not subject to any Convention rules and is governed by the ordinary rules of the applicable insolvency law. “Insolvency administrator” includes a debtor in possession if permitted by the applicable insolvency law (Article 1(k)).

2.184. The Convention does not deal with insolvency jurisdiction. That is a matter for national law, including the EC Insolvency Regulation for Member States of the European Union and, in States that have implemented it, the

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<sup>24</sup> Aircraft Protocol, Article XI; Luxembourg Protocol, Article IX; Space Protocol, Article XXI. Under EU law Member States of the European Union are not permitted to make a declaration under Article XI of the Aircraft Protocol but are free to achieve the same result through domestic legislation. See paragraph 3.118.

provisions of the UNCITRAL Model Law on Cross-Border Insolvency relating to the recognition of and support for foreign insolvency proceedings. However, Article XI of the Aircraft Protocol contains provisions for the enforcement of creditors' rights in insolvency under a declaration made by the Contracting State that is the primary insolvency jurisdiction as defined by Article I(2)(n) of the Protocol (see paragraphs 3.102 *et seq.*).

### **Assignment of associated rights**

2.185. Chapter IX of the Convention deals with the effect, formal requirements and priority of assignments of associated rights and related international interests, and with subrogation. "Associated rights" are defined in Article 1(c) as all rights to payment or other performance by a debtor under an agreement ("agreement A") which are secured by or associated with the object. It follows from this definition that only a creditor can assign associated rights. So an assignment by a lessee of its rights under a lease is not an assignment of associated rights within the Convention, nor is such an assignment registrable, though if the lessee has granted a sub-lease then as sub-lessor it is a creditor and the assignment of its rights as sub-lessor will be an assignment of associated rights carrying with it an assignment of the sub-lessor's international interest (Article 31(1)) which will be registrable under Article 16(1)(b)).

2.186. It also follows from the definition that associated rights do not include (a) rights to performance by a third party or (b) rights to performance by the debtor under another contract or engagement ("agreement B", which might consist merely of a promissory note), unless in either case the debtor is liable under agreement A to perform the obligations of the third party or of itself imposed by agreement B. However, it is not necessary for agreement A to refer specifically to agreement B. It suffices that the obligations secured by agreement A include those arising under other agreements or promissory notes. So where agreement A secures payment of all past and future advances and the debtor undertakes to repay such advances, the rights to repayment of loans made under agreement B (whether made earlier or later than agreement A) constitute associated rights under agreement A even though agreement B is not referred to in agreement A. This is relevant to many secured loan transactions, where the primary payment obligation is contained not in the security agreement but in a separate loan agreement; nevertheless the creditor's rights

the Supervisory Authority or with suppliers of goods and services, will be determined by the jurisdictional rules of the State in which the Registrar has its centre of administration. The same applies to claims *by* the Registrar, for which the Convention makes no provision but which could conceivably arise, such as claims for the recovery of unpaid fees. In recognition of the importance of expedition in cases in which the Registrar is involved rules of court in Ireland, where the Registrar of the International Registry for aircraft objects has its centre of administration, permit proceedings by or against the Registrar to be brought in the Commercial Court in Dublin, a division of the Irish High Court which provides an efficient and expeditious procedure for the hearing of commercial claims (Rules of the Superior Courts (Cape Town Convention) 2008, S.I. No. 31 of 2008, Order 81A). In *Transfin-M Ltd v Stream Aero Investments SA and Aviareto Ltd* (above, n. 27), where the first defendant had wrongfully registered a non-consensual right or interest not covered by any declaration by a Contracting State under Article 40, the plaintiff sought an order from the High Court requiring the first defendant to procure discharge of the registration. The High Court held that it had jurisdiction under Order 11(f) and (g) of the Rules because the action was founded on torts committed within the jurisdiction (namely slander of title, malicious falsehood and misrepresentation) and that the order sought constituted an injunction to restrain something to be done within the jurisdiction. The High Court accordingly gave leave to serve proceedings on the first defendant outside the jurisdiction and subsequently ordered the first defendant to procure discharge of the registration, failing which the second defendant was ordered to make the discharge. This case shows that although Article 44(3) of the Convention contemplates that the *inter partes* order will normally be made by a court outside the Registrar's jurisdiction, there is no reason why the Irish High Court could not itself make the order for discharge and then enforce it under Article 44(3).

#### *Insolvency proceedings*

2.229. Chapter XII confers no jurisdiction in relation to insolvency proceedings, which are a matter for the jurisdictional rules applicable in the place where the insolvency proceedings are brought. This leaves Contracting States which have adopted the 1997 UNCITRAL Model Law on Cross-Border Insolvency Proceedings free to apply its provisions without being affected by the jurisdiction rules of the Convention. But see paragraph 2.184.

2.230. In applying Articles 42 and 43 it is necessary to have regard to Article 52(5) where the relevant Contracting State has made a declaration which has the effect of excluding from the Convention one or more territorial units in which different systems of law are applicable with reference to a Contracting State. In such a case the debtor is not considered to be situated, or the object to be located, in a Contracting State, if situated or located in a territorial unit excluded by such a declaration.

### **Declarations as to invalidity of registration**

2.231. The fact that only courts within the territory where the Registrar has its centre of administration can make orders against the Registrar does not, of course, mean that other courts have no power, in proceedings between transacting parties, to make orders declaring a registration concerning one of them to be of no effect, for example because the purported international interest was not in fact an international interest or because the requisite consent to registration was not given. On the contrary, it is essential to the proper functioning of the Convention provisions that courts having jurisdiction to do so, whether by agreement of the parties under Article 42(1) or under their own jurisdiction rules, should be free to rule on the validity of registrations in order to arrive at a proper decision. As a corollary, a court of competent jurisdiction can order a party to procure discharge of the invalid registration. But an order declaring a registration to be of no effect and ordering procurement of its discharge operates only as between the parties and does not commit the Registrar to give effect to the order, though if a party against whom an order is made requiring it to procure discharge of the registration fails to do so the other party or the court itself may request a court of the place in which the Registrar has its centre of administration to direct the Registrar to discharge the registration (Article 44(3)).

### **Jurisdiction within the European Union**

2.232. Article 55 of the Convention empowers a Contracting State to disapply the provisions of Article 13 or Article 43, wholly or in part, and provides that any such declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied. Pursuant to Article 55 the European

Community, as a Regional Economic Integration Organisation treated as a Contracting State under Article 48 of the Convention, made a declaration that where the debtor is domiciled in the territory of an EC State (now an EU State), Member States bound by Council Regulation (EC) 44/2001 (Brussels I), dealing with jurisdiction and enforcement of judgments, will apply Articles 13 and 43 for interim relief only in accordance with Article 31 of that Regulation. Article 31 provides that application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under the Regulation, the courts of another Member State have jurisdiction as to the substance of the matter. For this purpose Article 31 is to be applied as interpreted by the European Court of Justice in the context of Article 24 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the substance of which is reproduced in Brussels I. The effect of the declaration is that a court will have jurisdiction under Article 31, and its decision on provisional measures will qualify for mutual recognition by other Member States under Article 33 and enforcement under Article 38, only if (a) the decision makes it clear that it is founded on jurisdiction under Article 31, not under its national law,<sup>28</sup> and (b) either the court has jurisdiction as to the substance of the case or the relief that is granted constitutes provisional, including protective, measures within the meaning of Article 31.

2.233. However, the impact of the EC declaration under Article 55 is quite limited. First, it does not apply at all to cases where the debtor is not domiciled in the territory of an EC (now EU) Member State. Secondly, Article 31 of Brussels I is not engaged where the court asked to grant provisional measures is also the court having jurisdiction over the substance of the case. Thirdly, it leaves courts of a Member State free to apply that State's own rules governing provisional measures independently of Article 31 and leaves courts of other Member States free to apply rules of recognition and enforcement available under their national law independently of Articles 33 and 38. So the overall effect of the EC declaration in relation to Articles 13 and 43 of the Convention is that a court of a Member State is free to make an order granting advance relief which falls outside the scope of Article 31 but unless the court also has

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<sup>28</sup> This is one of the rulings of the European Court of Justice in Case C-99/96, *Hans-Hermann Mietz v. Intership Yachting Sneek BV* [1999] ECR I-2277, paragraphs 55-56.

jurisdiction as to the substance of the case such an order will qualify for recognition and enforcement in another Member State only to the extent that such State's national law so provides independently of Articles 33 and 38 of Brussels I. Finally, nothing prevents a Member State from amending its national law to reflect the terms of Article 13 of the Convention and Article X of the Aircraft Protocol, as has been done.

### **Remedies for breach of Convention obligations**

2.234. The creditor's Convention remedies in the event of default by the debtor in performance of its obligations under the agreement have been discussed earlier (paragraphs 2.78 *et seq.*). A quite separate question is the treatment of default in performance of the provisions of the Convention itself. Leaving on one side errors and omissions by the Registrar of the International Registry (see paragraph 2.153) there are two groups of cases to be considered. The first relates to a breach of a Convention provision by a party to the agreement,<sup>29</sup> the second to a breach by a Contracting State.

#### *Breach of a Convention provision by a party to an agreement*

2.235. Examples of breach of a Convention provision by a party to an agreement are the following:

- (1) A chargee's failure to exercise Convention remedies in a commercially reasonable manner as required by Article 8(3).
- (2) A chargee's failure to give prior notice in writing to interested parties of a proposed sale or lease as required by Article 8(4).
- (3) A chargee's failure to distribute a surplus resulting from sale in accordance with Article 8(6).

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<sup>29</sup> This is convenient shorthand to denote breach of national law implementing the Convention. Parties to an agreement are not, of course, parties to the Convention and cannot commit a breach of the Convention as such.

- (4) Registration or discharge of registration of an international interest without the consent of the party whose consent is required under Article 20 or when the interest was never validly created or discharged.
- (5) Failure of the holder of an international interest or prospective international interest to procure discharge of a registration as required by Article 25.
- (6) Interference with the quiet possession of a debtor by a chargee subordinated to the debtor under Article 29(4)(b).
- (7) Breach by the debtor of its duty to make payment to an assignee as required by Article 33.

Apart from Article 44, which provides for orders against the Registrar in cases within (5) above (without, however, addressing the position of the defaulting party), the Convention does not itself prescribe the remedies for breaches of the above provisions. Where the applicable law is that of a Contracting State these will simply constitute breaches of that State's law and will attract whatever remedies that law provides, which could include payment of an amount due, damages for loss suffered through the breach, a restitutionary remedy, specific performance or injunctive relief.

*Breach of Convention by a Contracting State*

2.236. More difficult is the case where the breach is by a Contracting State. Once the Convention is in force for a Contracting State it is, of course, obliged to ensure that its domestic law gives effect to all the provisions of the Convention other than those which were the subject of a permitted opt-out by declaration or were dependent on an opt-in by declaration which the Contracting State decided not to make. Apart from this there is only one provision of the Convention<sup>30</sup> which imposes positive obligations on a Contracting State, namely Article 13, which requires a Contracting State, except as otherwise provided by Article 55, to ensure that a creditor who adduces evidence of default by the debtor is granted speedy judicial relief pending final

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<sup>30</sup> As to the various duties imposed on a Contracting State by the Aircraft Protocol, see paragraph 3.127.

determination of the creditor's claim. Several other important obligations are imposed on Contracting States under the Aircraft Protocol, namely the provision for timely advance relief (Article X(2)), timely relief on insolvency (Article XI, Alternative A), insolvency assistance (Article XII) and de-registration and export (Article XIII). While this is a developing field of law, the traditional view has been that a private party cannot normally assert treaty rights direct against a Contracting State unless the treaty so provides but must invoke diplomatic protection, that is, seek to have the Contracting State of which it is a national pursue a remedy on its behalf. Since the above-mentioned provisions do not empower a creditor affected by the breach to assert rights direct against the defaulting Contracting State, the creditor must invoke the aid of the State of which it is a national to take up the issue on its behalf. That State is not under an obligation to do so, since the exercise of diplomatic protection is the prerogative of the State, not the person on whose behalf it is acting. In practice complaints by a national are pursued through informal channels.

### **Relationship with other Conventions**

2.237. Article 45 *bis*<sup>31</sup> provides that the Convention is to prevail over the UN Convention on the Assignment of Receivables in International Trade. This simply makes explicit what was implicit in Article 38(1) of the UN Convention. The main potential cause of conflict lies in Article 36 of the present Convention, relating to the priority of assignments of associated rights. However, as noted above, Article 36 is limited in scope and in relation to associated rights the two Conventions adopt broadly similar concepts. The relationship between the Convention and the 1988 UNIDROIT Convention on International Financial Leasing (“the Leasing Convention”) is left to the Protocol.<sup>32</sup>

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<sup>31</sup> Inserted subsequent to the diplomatic Conference pursuant to an Annex approved by the Conference. The Annex does not form part of the published documents, its effect being exhausted after the insertion was made.

<sup>32</sup> See Article XXV of the Aircraft Protocol superseding the Leasing Convention as regards aircraft objects.

### **Final provisions**

2.238. Chapter XIV of the Convention sets out final provisions. Some of these are standard, others reflect special elements and objectives of the Convention, including the two-instrument structure and the prospect of future Protocols. The latter are briefly examined in the following paragraphs.

### **Regional Economic Integration Organisations**

2.239. The Convention is open for signature, acceptance, approval or accession, not only by sovereign States (whether or not they were negotiating States, that is, States involved in the negotiation and adoption of the Convention) but also by a Regional Economic Integration Organisation (“REIO”) which is constituted by sovereign States and has competence over certain matters governed by the Convention (Article 48). A particular example is the European Community, now the European Union, which was involved in negotiations over the text at the diplomatic Conference in relation to the provisions on which the Community claims exclusive external competence, notably jurisdiction under the Regulation on jurisdiction and judgments (“Brussels I” – see paragraphs 2.232, 4.287) and insolvency under the Insolvency Regulation (see paragraphs 2.184, 4.10, 4.311). Under Article 48 of the Convention any Regional International Economic Organisation has to make a declaration at the time of signature specifying the matters governed by the Convention in respect of which competence has been transferred to that Organisation.

2.240. Where the number of States is relevant in the Convention, the Regional Economic Integration Organization does not count as a Contracting State in addition to its Member States which are Contracting States. So the European Union, though in general treated as if it were a Contracting State or State Party, is not included in any count of the number of ratifications or in the computation of the twenty-five per cent of States Parties entitled to request a Review Conference under Article 61. Similar provisions are contained in Article XXVII of the Aircraft Protocol.

2.241. The only REIO that has so far taken advantage of Article 48 is the European Community, which acceded to the Convention and Aircraft Protocol on 28 April 2009 pursuant to a Council Decision of 6 April 2009

(2009/370/EC) and the Luxembourg Protocol on 10 December 2009 pursuant to a Council Decision of 30 November 2009 (2009/940/EC). The EC asserted competence over the provisions relating to choice of law (governed within the EC by the Rome Regulation, otherwise known as Rome I), jurisdiction (governed within the EC by the Brussels Regulation, otherwise known as Brussels I) and the insolvency provisions of the Aircraft Protocol (said to be subject to the Insolvency Regulation<sup>33</sup>). The effect of the Community's accession is to allow Member States of the European Union to ratify the Convention and Aircraft Protocol but does not commit them to do so, since most of the provisions of these instruments fall outside the competence of the EU. Annex II of the Council's Decision precludes Member States other than Denmark from applying the Convention and Protocol otherwise than in accordance with EC Regulations. However, that is a matter internal to the EU and has no effect at the international plane, so that UNIDROIT as Depositary is obliged to accept instruments deposited in conformity with the Convention and Protocol even if they are in a form incompatible with the Council's Decision. In such a case it is for the Commission to take steps to secure compliance by the Member States concerned. The declaration deposited by the EC under the Convention states that the Community will not make any of the declarations permitted under the Convention except for a declaration under Article 55, as to which see paragraph 2.267. Accordingly the EC has made no declaration under Articles 39 (priority of non-registrable non-consensual rights or interests), 40 (registrable non-consensual rights or interests), 50 (internal transactions), 52 (territorial units), 53 (determination of courts), 54 (declarations concerning remedies), 57 (subsequent declarations), 58 (withdrawal of declarations) and 60 (transitional provisions). However, this does not affect the ability of Member States of what is now the European Union to make declarations under the above Articles, since all of these deal with matters outside the competence of the EU, which in relation to the Convention is confined to questions of jurisdiction. The declaration also states that the Member States keep their competence concerning the rules of substantive law as regards insolvency, though a separate EC declaration under the Aircraft Protocol precludes Member States from making a declaration

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<sup>33</sup> This was controversial but Member States agreed not to contest it on the condition that it was made clear that they retained their competence over substantive insolvency law. See further paragraphs 3.118-3.119.

under Article XI. Neither declaration applies to territories of Member States in which the Treaty establishing the European Community does not apply, for example, the Channel Islands.

2.242. Ratification by the EC/EU on matters within its competence neither binds nor entitles Member States to ratify as to those matters, for under international law a State cannot ratify part only of a treaty except so far as the treaty itself so provides.

### **Entry into force; controlling effect of Protocol**

2.243. The Convention itself requires only three ratifications. Article 49 provides for entry into force on the first day of the month following the expiration of three months after the date of deposit of the third instrument of ratification but only, as regards a category of objects to which a Protocol applies, as from the time of entry into force of the Protocol. The third instrument of ratification was deposited by Nigeria on 16 December 2003, so that the Convention would have come into force on 1 April 2004 had a Protocol been in force at that time. However, this was not the case. Accordingly 1 April 2004 has no significance for the purpose of entry into force of the Convention.

2.244. There are a few provisions that are not object-related. They include Article 47 (signature, ratification, etc.), Article 48 (Regional Economic Integration Organisations), Article 51 (arrangements for extension to future Protocols), Article 52 (territorial units), Article 59 (denunciations), and Article 62 (Depositary and its functions). These final clauses came into force on 16 November 2001 pursuant to Article 24(4) of the Vienna Convention. The rest of the Convention entered into force, though only as regards aircraft objects, on 1 March 2006, the date of entry into force of the Aircraft Protocol (which required eight ratifications), and has effect subject to the terms of that Protocol. So the provisions of Article 49 requiring three ratifications serve only to make it clear that the Convention itself must be ratified, not merely the Protocol, a point emphasised by Article XXVI(5) of the Aircraft Protocol, Article XXI(5) of the Luxembourg Protocol and Article XXXVI(5) of the Space Protocol, all of which provide that a State may not become a party to the Protocol without becoming a party to the Convention. On the other hand it is open to a State to accede to the Convention without acceding to the Protocol,

persons” as required by Article IX(6)(a) and (b) and (ii) either to obtain the consent of the registered higher-ranking creditors to the de-registration and export or to discharge the debts owed to such creditors.

### **Insolvent debtor**

3.38. Where the debtor is insolvent and a Contracting State has made a declaration applying Alternative A of Article XI, then if (a) the additional remedies have become exercisable via one of these two routes, (b) the creditor has become entitled to possession under paragraph 2 of Alternative A, and (c) the creditor notifies the relevant authorities that it is entitled to procure the above remedies in accordance with the Convention, they must make such remedies available within five working days and must expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations (Article XI, Alternative A, paragraph 8). As discussed above, the process to be followed by the authorities is purely documentary, dispensing with the need for the authority to investigate external facts.

### **Modification of Convention provisions on remedies**

3.39. The Aircraft Protocol modifies the Convention in various respects to give greater certainty for the parties.

#### *(1) Exclusion of Article 8(3)*

Article IX(3) replaces Article 8(3) of the Convention with a more general duty of commercial reasonableness. This cannot be excluded by agreement (Article IV(3)). The duty imposed on a chargee to exercise remedies in a commercially reasonable manner is extended to cover all remedies in relation to aircraft objects and thus to embrace not only remedies of the creditor under the security agreement but those conferred on the assignee of associated rights *qua* transferee of the international interest under Article 34 but not remedies in relation to the associated rights themselves. But a remedy given in relation to an aircraft object is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement

under the title reservation agreement or through exercise of the option to purchase its right of quiet possession *qua* conditional buyer or lessee will come to an end and it will become subordinated to a registered chargee.

3.99. The right of quiet possession of a conditional buyer or lessee as against a chargee where the interest of the conditional seller or lessor was registered before registration of the charge is brought to an end by subsequent discharge of the former registration (see paragraph 2.165), though the conditional buyer or lessee may still have a remedy against the conditional seller or lessor in the event of interference with its quiet possession.

3.100. Under Article XVI(2) nothing in the Convention or the Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to the aircraft object. So if the agreement makes the creditor's right to possession after default dependent on the fulfilment of certain conditions, for example, failure to comply with a default notice requiring a breach to be remedied within a specified time, and the creditor repossesses the aircraft object when those conditions have not been fulfilled, the fact that the creditor would otherwise have been entitled to possession under the Convention does not preclude a claim by the debtor for breach of its right to possession under the applicable law.

3.101. The debtor's right of quiet possession under Article XVI(1) as against a person other than its creditor, e.g. a chargee, in effect constitutes a priority rule. See further paragraph 3.94.

### **Remedies on insolvency**

3.102. Article XI introduces special rules in relation to aircraft objects designed to strengthen the creditor's position vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event, that is, (i) the commencement of insolvency proceedings against the debtor, or (ii) the debtor's declared intention to suspend or actual suspension of payments where the creditor's right to institute insolvency proceedings or to exercise remedies under the Convention is suspended by law or State action (Article I(2)(m)). "Insolvency proceedings" means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or

supervision by a court for the purposes of reorganisation or liquidation (Convention, Article 1(l)). “Court” generally means a court of law or an administrative or arbitral tribunal established by a Contracting State (Article 1(h)) but in regard to arbitral tribunals this is a case where the context otherwise requires, since such tribunals do not normally control or supervise a debtor for the above purposes. It is open to a Contracting State to declare the relevant “court” or “courts” for the purpose of Article 1 (Article 53). “Insolvency administrator” is defined by Article 1(k) of the Convention as a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable law. The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices.

3.103. Article XI, which in the event of an assignment of the international interest can be invoked by the assignee, applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3). “Primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests is situated, which is deemed to be the place of the debtor’s statutory seat or, if none, the place where the debtor is incorporated or formed, unless proved otherwise (Article I(2)(n)). Where such a Contracting State has made a declaration applying Article XI the fact that the aircraft in question is registered in another Contracting State which has not made such a declaration does not affect the application of Article XI in the declaring State.

3.104. A Contracting State may elect to make a declaration applying Alternative A or Alternative B or it may make no declaration at all, in which case its existing insolvency law will continue to apply. Even where a Contracting State has made a declaration under Article XXX(3) it is open to the parties to exclude the application of Article XI by agreement in writing (Article IV(3)), but they cannot vary it, only exclude it in its entirety (see paragraph 5.27. This is because each of the alternative options for which a Contracting State may make a declaration has to be adopted in its entirety if it is to be adopted at all (see below). Under Article XXX(4) of the Protocol the courts of Contracting States (i.e. Contracting States other than the COMI Contracting State) are required to apply Article XI in conformity with the declaration made by the Contracting State which is the primary jurisdiction. So if there are secondary insolvency proceedings in another Contracting State

relating to an aircraft object situated in that State the courts of that State must apply the version of Article XI selected by a declaration of the Contracting State of primary jurisdiction.

3.105. Two alternative versions of Article XI, Alternative A and Alternative B, are offered. It is open to a Contracting State to adopt one of these, though only in its entirety (Article XXX(3)), or to adopt neither and simply continue to apply its ordinary domestic law. To date, with one exception, every Contracting State making a declaration has opted for Alternative A.

*Alternative A*

3.106. The “hard”, or rule-based, version, Alternative A, is specifically designed to meet the requirements of advanced structured financing, including international capital market financing structures. Paragraphs 2 and 7 require the insolvency administrator or the debtor, as applicable, either (a) to give possession within the earlier of a waiting period specified in a Contracting State’s declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement, which includes obligations under other transaction documents (e.g. a loan agreement) incorporated by reference in such agreement. If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A the creditor can apply for and is entitled to obtain speedily a court order requiring the insolvency administrator or the debtor to give possession of the aircraft object. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9). The following points arise under paragraph 2 of Alternative A:

*“Insolvency administrator or the debtor, as applicable”*

3.107. The phrase “insolvency administrator or the debtor, as applicable” covers three situations. The first concerns cases within Article I(2)(m)(ii) of the Protocol, that is, where there are no insolvency proceedings and the insolvency-related event consists of the declared intention to suspend or actual

suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or exercise remedies under the Convention is prevented or suspended by law or State action. In such a case there is no insolvency administrator and it is the debtor itself upon which the duties fall. The second involves cases within Article I(2)(m)(i) where there is a gap between the commencement of the insolvency and the appointment of the insolvency administrator. During that gap the debtor again is the party responsible. Of course, the debtor's freedom of action may be circumscribed by the *lex concursus*. The third situation is where the estate is being administered in insolvency proceedings by a debtor in possession if permitted by the applicable insolvency law. The debtor is then its own insolvency administrator.

*“Waiting period”*

3.108. The waiting period begins on the occurrence of an insolvency-related event as defined by Article I(2)(m) and is the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

*“The date on which the creditor would be entitled to possession if this Article did not apply”*

3.109. This must be interpreted as referring to a right to possession arising after the occurrence of an insolvency-related event as defined by Article I(2)(m). The underlying premise is that such commencement causes a stay on the creditor's right to possession. However, where there is no stay, whether because (a) the insolvency-related event is not the commencement of proceedings but the declaration of an intended suspension of payment, (b) the relevant insolvency law does not impose a stay, (c) any stay imposed is lifted during the waiting period, or (d) the aircraft object does not form part of the debtor's estate under the applicable insolvency law (which could, for example, be because it is held under a title reservation agreement or a leasing agreement), the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 2(b) of Alternative A of Article XI(1) is to be interpreted as if it read “would be entitled, or becomes entitled, to possession of the aircraft object notwithstanding the insolvency proceedings or other insolvency-related event”. The insolvency administrator or the debtor can only avoid loss of the right to possession if it has cured all defaults, other than a default cured by the opening of insolvency proceedings, by the earlier of the expiry of the waiting period and the accrual or resumption

of the creditor's right to possession and has within the same time agreed to perform all future obligations under the agreement, including obligations under other contracts incorporated by reference into the agreement.

3.110. Unless and until the creditor is given the opportunity to take possession the insolvency administrator or the debtor, as applicable, must preserve the aircraft object and maintain it and its value in accordance with the agreement, but may use the aircraft object under arrangements designed to preserve and maintain it and its value. This would seem to include earning income from continued operation of the aircraft object. Meanwhile the creditor for its part is entitled to apply for any other forms of interim relief available under the applicable law (Alternative A, paragraph 5(b)). What constitutes interim relief varies with the applicable law. In a number of jurisdictions any form of relief which is considered appropriate before a final determination has been made on the merits qualifies as interim relief, so that in those jurisdictions sale of the object to which the proceedings relate can be ordered by way of interim relief, whereas other jurisdictions look to the finality of what is ordered and consider sale to be an irrevocable act and therefore inappropriate for interim relief. A court in a Contracting State before which interim relief is sought will thus apply its own law in deciding whether a particular remedy qualifies as interim relief. What constitutes the applicable law is to be determined by the rules of private international law of the forum State (Article 5(3)), and the availability of interim relief will usually be regarded as procedural in character and therefore governed by the *lex fori*. Where the insolvency-related event is the commencement of the insolvency proceedings the forum State will almost invariably be the State in which the proceedings are opened and the *lex concursus* will apply. A separate rule applies as regards advance relief under Article 13 of the Convention in that sale and the application of the proceeds of sale are made available as a form of relief under that Article if at any time the debtor and the creditor specifically agree (Protocol, Article X(3)).

3.111. The power to grant the creditor interim relief under paragraph 5(b) of Alternative A of Article XI in a Contracting State that has made a declaration applying Alternative A does not affect the ordinary jurisdiction of an insolvency court, even in a Contracting State which has not made such a declaration, to grant such interim relief as its law allows. Where insolvency proceedings are opened in one Contracting State the jurisdiction of the courts

of another Contracting State to grant interim relief may, of course, be circumscribed by rules of the latter State's law requiring it to recognise the exclusive jurisdiction of the insolvency court of the former State, as where both Contracting States have adopted the UNCITRAL Model Law on Cross-Border Insolvency or both are Member States of the European Union and as such are required to apply the EC Insolvency Regulation.

3.112. Paragraphs 9 and 10 of Alternative A preclude the court from preventing or delaying the exercise of the creditor's remedies beyond the above time-period and from modifying the debtor's obligations without the creditor's consent. In effect this removes, for aircraft objects, the preservation of the court's powers under Article 30(3)(b) of the Convention (see paragraph 2.183). Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors' rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9. Similarly, any provisions of domestic law modifying or empowering a court to modify the debtor's obligations must be disapplied where these would conflict with paragraph 10. Though paragraph 10 only precludes modification of the debtor's obligations under "the agreement", that is, the security agreement, title reservation agreement or leasing agreement relating to the aircraft object, and says nothing about security assignments of debtor's rights, it must be intended to cover these as well, particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditor's remedies permitted by the Convention or Protocol, applies to all remedies, not merely those relating to the aircraft object. But the insolvency administrator remains entitled to terminate the agreement where so allowed by the applicable law (Alternative A, paragraph 11), that is, the law governing the agreement.

3.113. The creditor's protection under Alternative A is further strengthened by a provision that no rights or interests, except for non-consensual rights or interests of a category covered by a declaration under Article 39(1), are to have priority over registered interests (Alternative A, paragraph 12). That makes explicit what is implicit in Articles 29 and 30(2) of the Convention, namely that

rules of insolvency law – for example, those giving priority to various categories of preferential debt such as claims for taxes or unpaid wages – cannot be applied to displace the priority of a registered international interest.

*Alternative B*

3.114. The “soft”, or discretion-based, version, Alternative B, requires the insolvency administrator or the debtor, as applicable, upon the creditor’s request and within the period specified in the declaration of the Contracting State, to state whether it will cure all defaults and perform all future obligations under the agreement and related transaction documents or give the creditor the opportunity to take possession of the aircraft object in accordance with the applicable law (Alternative B, paragraph 2). “Related transaction documents” is not defined but would cover all documents, other than the agreement itself, which impose obligations in respect of the transaction, for example, obligations embodied in any separate loan agreement or in a promissory note given in respect of it. The right to take possession may be given either by the agreement, in which case it is the law governing the agreement that will be the applicable law, or by the procedural rules of the forum, in which case the applicable law will be the *lex fori*.

3.115. Unlike the hard rule in Alternative A which requires performance of all the debtor’s obligations, including cure of all prior defaults other than the insolvency itself, under Alternative B the applicable law may condition the creditor’s rights. In particular, if the insolvency administrator does not give the required statement or give up possession after stating it will do so, the applicable law may “permit the court to require the taking of any additional step or the provision of any additional guarantee” (Alternative B, paragraph 3). This wording is infelicitous in that it does not indicate what is meant by “additional step”, there being no mention in paragraph 2 of any prior step such as an order for possession, nor is it clear why paragraph 3 purports to provide what the applicable law may do, that being, one would have thought, a matter for the applicable law itself. The intended effect of paragraph 3 appears to be that the court may permit the creditor to take possession upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee permitted by the applicable law. This would allow the court, if so empowered by the applicable law, to require the creditor to furnish a guarantee against loss suffered by the debtor as the result

of the order if on the substantive hearing the creditor's claim were to prove unsuccessful. Since such relief is essentially procedural, so that the applicable law is the *lex fori*, it is not clear why any reference to the applicable law is necessary.

3.116. Compared with Alternative A the creditor's rights are qualified in three significant respects. First, the insolvency administrator does not have to take action to cure all defaults or give the creditor an opportunity to take possession; it merely has to give notice to the creditor whether it will do either of these things. Second, if the insolvency administrator does not give the required notice or if, having declared it will give the creditor the opportunity to take possession, it fails to do so, the creditor cannot exercise self-help but must apply to the court for leave to take possession and if leave is granted conditions may be imposed. So under the "soft" version of Article XI the court's discretion is substituted for the creditor's entitlement to take possession. Pending the court's decision regarding the claim and the international interest the aircraft object may not be sold (Alternative B, paragraph 6). Third, Alternative B contains no equivalent to paragraph 12 of Alternative A that no rights or interests, other than non-consensual rights or interests covered by a declaration under Article 39, are to have priority over registered interests. Only one Contracting State has so far opted for Alternative B.

*Non-consensual rights or interests*

3.117. Neither Alternative A nor Alternative B deals with the enforcement rights of the holder of a non-consensual right or interest covered by a declaration under Article 30.

**The insolvency provisions and Member States of the European Union**

3.118. A special situation exists for Member States of the European Union. This is because the duty of cooperation imposed on Member States by EU law precludes them from concluding international agreements deviating from the position adopted by the EU. In its decision of 6 April 2009 the Council of what was then the European Community decided to make no declaration under Article XXX(3) of the Aircraft Protocol as to the adoption of either Alternative A or Alternative B, while declaring that Member States kept their

competence regarding rules of substantive law as regards insolvency. The only reason for the EC's concern with the insolvency provisions of the Convention and Protocol was to ensure that nothing affected the Insolvency Regulation, which is primarily a conflict of laws convention. If the EC had made a declaration applying Alternative A or Alternative B all Member States of the EU choosing to ratify the Convention and Protocol would have had to make the same declaration, whereas it had been agreed with Member States that each should be free to go its own way. The result is that Member States are not permitted by EU law to make any declaration applying Article XI but they remain free either to retain their own substantive insolvency law without amendment or to reproduce the effects of Alternative A or Alternative B by domestic legislation.

3.119. The position taken by what is now the EU operates only at the level of domestic law within the EU. Accordingly while as a matter of EU law a declaration made by a Member State may be invalid, this is of no relevance on the international plane, so that the Depositary is required to accept declarations deposited in accordance with the Convention and Protocol even if they are void under EU law. The European Court of Justice has itself recognised on several occasions that the EC/EU is bound by international law, so that ratification of an international instrument in a form which breaches EU law can be dealt with only within the confines of EU law itself, for example, by steps to compel the offending Member State to exercise its power under the Convention or Protocol to withdraw or amend the offending declaration.

### **Insolvency assistance**

3.120. Article XII provides that the courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI. The phrase "in accordance with the law of the Contracting State" means "so far as not incompatible with". It is not necessary that the Contracting State's law should provide for co-operation; it is sufficient that it does not preclude it from being given. Whether in any particular case the Contracting State's law is a barrier to co-operation depends partly on any relevant legislation and partly on the judicial policy of its courts in cases of similar kind. Regard must also be

had to the 1997 UNCITRAL Model Law on Cross-Border Insolvency in Contracting States that have adopted the Model Law.

### **Assignment of associated rights**

3.121. Article XV introduces into Article 33(1) of the Convention a new subparagraph (c) making it necessary for the debtor to give its consent to an assignment of associated rights. In contrast to the usual rule regarding consents such a consent does not have to be communicated electronically to the International Registry, being outside the scope of Article 18(1)(a).

3.122. The debtor's consent to an assignment is not usually required by national laws on assignment of claims but is designed to avoid disputes as to the efficacy of an assignment. That consent, however, may be given in advance and may be general in nature. The thinking is that, in exchange for a clear consent requirement, the debtor is bound to the assignment without qualification. Nevertheless some qualification is necessary. For example, if the debtor receives two notices of assignment from different assignees covering associated rights and the international interest it is inconceivable that a court would order the debtor to make payment twice. The debtor's proper course is to invoke local procedural rules governing the debtor's duty in such a case.

### **Assignment of unregistered interest**

3.123. The assignee of an international interest is entitled to have it registered, whether or not the assigned international interest has itself been registered, in order to secure a measure of priority for its assignment. See paragraph 2.197.

### **Jurisdiction**

3.124. Article XXI confers on courts of the Contracting State which is the State of registry of an aircraft concurrent jurisdiction to grant advance relief under Article 13. However, this will not apply where a court has exclusive jurisdiction by party agreement under Article 42, nor will it confer jurisdiction to entertain a claim against the Registrar. Moreover, Article XXX(5) empowers a Contracting State to make a declaration excluding the alternative ground of jurisdiction provided by Article XXI. The European Community (now the

however, implicit in the Convention that the designated body is one which fulfils judicial or quasi-judicial functions.

4.15. “creditor” – the term is used to denote the person to whom obligations are owed under an agreement where the relevant provision of the Convention does not distinguish between one form of agreement (e.g. a security agreement) and another (e.g. a title reservation agreement or leasing agreement). See, for example, Articles 3(2), 11 and 13. “Creditor” includes an assignee or other successor in title. It does not, however, include the holder of a non-consensual right or interest under Article 39 or a registrable non-consensual right or interest under Article 40. Such a holder is covered by the definition of “interested persons” in Article 1(m). See paragraphs 4.19, 2.33(5), 2.87. Under Article III of the Aircraft Protocol “creditor” includes a buyer under a contract of sale.

4.16. “debtor” – primarily the person who owes obligations under an agreement. In legal systems which recognise the concept of assignment of contract, where with the consent of the creditor both the benefit and the burden of the contract are assigned – “debtor” includes a transferee of the debtor’s obligations. “Debtor” also includes a person whose interest in an object is burdened by a registrable non-consensual right or interest within Article 40 of the Convention. The only provisions to which this limb of the definition is relevant are Articles 8(4), 9(3) and (4) and 13(3) relating to “interested persons”, which are defined in Article 1(m) in terms which include the debtor. See paragraphs 2.33(5), 2.87. Under Article III of the Aircraft Protocol “debtor” includes a seller under a contract of sale.

4.17. “insolvency administrator” – a person authorised to administer the reorganisation or liquidation, i.e. in an insolvency proceeding as defined by the next paragraph. The term is a neutral one covering persons designated in various ways in national insolvency systems, for example, trustee in bankruptcy, liquidator, provisional liquidator, administrator. The inclusion of a “debtor in possession” reflects the bankruptcy laws of some States by which the conduct of the business of an insolvent debtor undergoing reorganisation is authorised to be left in the hands of its management. A person not authorised in a collective insolvency proceeding, for example, one appointed by a secured creditor under the terms of a security agreement or by a group of

creditors under an informal workout arrangement, is not an insolvency administrator for the purposes of the Convention.

4.18. “insolvency proceedings” – this phrase covers all forms of collective proceeding in which the debtor’s assets are subject to control or supervision by a court for the purposes of reorganisation in insolvency or liquidation. National legal systems classify such proceedings in different ways. Some distinguish between bankruptcy (in the sense of individual insolvency proceedings) and liquidation or winding-up (in the sense of insolvency proceedings involving companies); some distinguish insolvency (meaning a failure to fulfil civil law debt obligations) from bankruptcy (meaning a failure to perform payment obligations arising from commercial dealings), some distinguish judicial from administrative insolvency proceedings. All these are covered by the definition in Article 1(l) so long as:

- (1) the proceeding is a collective proceeding, as opposed to an enforcement remedy primarily available to a particular creditor, such as receivership;
- (2) the debtor’s assets and affairs are subject to control or supervision by a court (which as defined in Article 1(h) includes a State administrative tribunal), as opposed to control solely by the debtor and its creditors in an informal moratorium or “workout”; and
- (3) the purpose of the control or supervision is either:
  - (a) reorganisation of the debtor, namely a reordering of its affairs with a view to its restoration to profitable trading or to improving the position of creditors on a subsequent liquidation; or
  - (b) immediate liquidation, involving collection and realisation of the debtor’s assets and distribution of the proceeds among creditors in accordance with the relevant insolvency law.

4.19. “interested persons” – the definition of “interested persons” is relevant to denote the persons who (a) have to be notified under Article 8(4) of an intended sale or lease of the charged object by the chargee or (b) in the absence of a court order, have to give their consent under Article 9(1) to the vesting of the object in the chargee in satisfaction of the debt or (c) are required by the

installation in the aircraft and that if the applicable law so provides S's interest in the spare parts continues notwithstanding their incorporation into the aircraft engine and their subsequent removal.

### **Article 30 — Effects of insolvency**

- 1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.**
- 2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.**
- 3. Nothing in this Article affects:**
  - (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or**
  - (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.**

#### **Comment**

4.208. An international interest is in principle effective in insolvency proceedings against the debtor if registered in the International Registry prior to the commencement of the insolvency proceedings, that is, the time at which those proceedings are deemed to commence under the applicable insolvency law (Article 1(d)). This is so even if the international interest would otherwise be void for want of compliance with local perfection requirements.

4.209. The effect of Articles 40 and 50(2) is that the protection given by paragraph 1 of the present Article extends to registered non-consensual rights or interests and to national interests protected by notice on the International Registry, in either case where the registration was effected prior to the

commencement of the insolvency proceedings and was in conformity with the Convention.

4.210. By paragraph 2 even an international interest not so registered may be effective under the applicable law. In other words, paragraph 1 provides a rule of validation, not of invalidation. In this context “that interest” means the interest as recognised by the applicable law, not the international interest as such, which is the creation of the Convention, not of the applicable law. “Effective” means that the international interest will be recognised as proprietary in nature and therefore in principle rank ahead of the claims of unsecured creditors. So an effective international interest may not be set aside or subordinated for the benefit of the debtor, the insolvency administrator or the estate, or other claimants, except as provided by Article 30(3) (see paragraph 4.211). “Applicable law” means the domestic law determined by the rules of private international law of the forum State (Article 5(3)), which in this case is the insolvency forum. The conflicts rule almost invariably applied to determine the acquisition of rights in tangible movables is the *lex situs (lex rei sitae)*, the situation of the asset at the relevant dealing or event, which in this case is the commencement of the insolvency proceedings. Where the insolvency jurisdiction is that of a State which is a Contracting State the law of which adopts this conflict rule then if at the above time the asset was situated in a State other than that in which the insolvency proceedings have been commenced and an interest equivalent to the international interest was duly perfected under the law of that State even though not registered in the International Registry, it will be treated as perfected for the purpose of the insolvency proceedings. In other words, Article 30(1) does not disturb the status of an interest perfected under the applicable law and this status will be respected in the insolvency. That reflects the general principle that the starting point of insolvency law is to respect pre-insolvency entitlements. However, the insolvency jurisdiction remains entitled to apply any rules of its own insolvency law rendering perfected interests void or liable to be set aside, and in this case, unlike that of the registered international interest, any grounds of avoidance may be applied, not merely avoidance as a preference or a transaction in fraud of creditors. See Illustration 30, paragraph 4.214.

4.211. Paragraph 3 preserves the effect of certain specific rules of insolvency law, namely those relating to the avoidance of preferences (see paragraph 4.212) and transfers in fraud of creditors, and of rules of insolvency procedure

designed to limit the enforcement of security or other property rights in the interests of the general body of creditors, for example, by imposing an automatic stay on the enforcement of security and other *in rem* rights in order to facilitate a reorganisation (see paragraph 4.213 and Illustration 31, paragraph 4.215). However, in relation to aircraft objects paragraph 3 gives way to Article XI, Alternative A, paragraphs 9 and 10, in a Contracting State which has made a declaration applying Alternative A, with the effect that in such a case no stay or other impediment to the exercise of the creditor's remedies may be imposed.

4.212. Article 30(3)(a) is confined to the avoidance of preferences and transfers in fraud of creditors. It follows that other grounds of avoidance that would ordinarily be applicable cannot be invoked to impeach an international interest effective under Article 30(1), though they can as regards an interest effective only under Article 30(2) (see paragraph 4.210). Similarly the international interest cannot be subordinated to another right or interest under the insolvency law unless that other right or interest is a non-consensual right or interest covered by a declaration under Article 39(1)(a) deposited prior to the registration of the international interest (Article 39(3)) or is a right of arrest or detention preserved under Article 39(1)(b). However, it is for the applicable insolvency law to determine what constitutes a preference or a transaction in fraud of creditors and also the time at which the insolvency proceedings are deemed to have commenced (see Article 1(d)).

4.213. Article 30(3)(b) states that nothing in the Article affects rules of procedure relating to the enforcement of rights to property under the control or supervision of the insolvency administrator, which for this purpose includes a debtor in possession if permitted by the applicable insolvency law (Article 1(k)). So it remains open to courts of the insolvency jurisdiction to apply rules which restrict or suspend the enforcement of security, the institution of proceedings against the debtor, and the like, in order, for example, to preserve the debtor's business or its value for the benefit of all creditors. However, as regards aircraft objects Alternative A of Article XI of the Aircraft Protocol, where applicable, overrides such rules and thus displaces Article 30(3)(b).

4.214. *Illustration 30*

In January C1 advances 3 million euro to D on the security of an airframe and registers its security interest as an international interest. In September C2, an unsecured creditor of D for a loan of 1 million euro, is concerned that D may be on the verge of insolvency, takes a charge on another aircraft engine also situated in Ruritania to secure the loan and registers its international interest. In October, by which time D has declared a cessation of payments, C3 takes an international interest in an aircraft engine to secure a contemporaneous loan of 2 million euro but fails to register this as an international interest. All the aircraft objects were situated in Ruritania at the time the various interests in them were granted. C1 did not register its charge in the Ruritanian register of charges and under Ruritanian law this invalidates the charge in the event of the debtor's insolvent liquidation. The other two international interests were registered in the requisite Ruritanian register of charges and are considered duly perfected under Ruritanian law.

In November a court in Urbania, which has ratified the Convention and Aircraft Protocol but has not made a declaration under Article XI of the Protocol, makes a winding-up order against D on the ground of insolvency and appoints an insolvency administrator. Under Urbanian law a transfer made by a debtor after cessation of payment to its creditor is of no effect and a security interest given for past value within a period of six months will be set aside as a preference on the application of the insolvency administrator. The Urbanian insolvency administrator applies to the insolvency court for an order declaring (a) that the interest in favour of C1 is of no effect because it is invalid under Ruritanian law as the *lex situs*; (b) the international interest in favour of C2 should be set aside as a preference, and (c) the interest in favour of C3 is ineffective because it was not registered in the International Registry and also offends against a rule of Urbanian insolvency law which invalidates transfers made after cessation of payments by the debtor. Article 30(1) precludes the insolvency court from treating the registered international interest in favour of C1 as ineffective in the insolvency even if it is void under Ruritanian law. The interest in favour of C2 may be set aside as a preference by virtue of Article 30(3)(a). The international interest in favour of C3, not being registered in the International Registry, falls outside the protection given by Article 30(1) but is valid under Ruritanian law as the *lex situs* and must therefore be treated by the Urbanian insolvency court as duly perfected. However, it is subject to

the avoidance provisions of Urbanian insolvency law relating to transfers after cessation of payments even though this ground of avoidance is not one specified in Article 30(3)(a).

4.215. *Illustration 31*

C, which has leased some helicopters to D, registers its interest in the helicopter in the International Registry as an international interest. Subsequently, in insolvency proceedings opened in a Contracting State in which D's centre of main interests is situated, an insolvency administrator is appointed with a view to a reorganisation of D. Under the insolvency law the effect of the appointment is to stay all enforcement measures against D. C cannot exercise its normal remedy of repossession under Article 10 so long as the stay continues in force unless the Contracting State in question has made a declaration applying Alternative A of Article XI of the Aircraft Protocol, in which case no stay may be granted or continued in force after the date specified in paragraph 2 of Alternative A.

## CHAPTER IX

### ASSIGNMENTS OF ASSOCIATED RIGHTS AND INTERNATIONAL INTERESTS; RIGHTS OF SUBROGATION

#### Article 31 — Effects of assignment

1. Except as otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 also transfers to the assignee:

- (a) the related international interest; and
- (b) all the interests and priorities of the assignor under this Convention.

2. **Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph but not so as adversely to affect the debtor without its consent.**
3. **Subject to paragraph 4, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.**
4. **The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.**
5. **In the case of an assignment by way of security, the assigned associated rights revert in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.**

#### Comment

4.216. This Chapter deals with the effect, formal requirements and priority of assignments of associated rights and of the related international interests as well as with subrogation. Only a creditor (i.e. a chargee, a conditional seller or a lessor) can hold and assign associated rights. So an assignment by a lessee *qua* lessee is not within the Convention, though if the lease contains an option to purchase the lessee is a prospective buyer and can register and assign its rights as such, while a lessee who grants a sub-lease can, as sub-lessor, effect an assignment of its associated rights and a transfer of its international interest, and the assignment and transfer would be governed by the present Chapter. "Assignment" is widely defined so as to include the pledge or charge of associated rights and related international interests. However, it is limited to contractual assignments and does not include assignments by operation of law. Associated rights are defined in Article 1(c) as rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Associated rights therefore do not include (a) rights

remedy to permit effective re-marketability of aircraft objects and their generation of proceeds since, as provided in Article 18 of the Chicago Convention, dual registration is not permitted. If an aircraft is de-registered and then re-registered in another jurisdiction it will be necessary to issue a fresh IDERA addressed to the new Registry Authority.

5.12. “guarantee contract”, “guarantor” – these terms cover not only suretyship guarantees and credit insurance, which are accessory to the principal contract, are dependent upon its validity and are triggered by the default of the principal debtor, but also guarantees which are issued as independent payment undertakings and are payable on written demand and presentation of any other specified documents irrespective of performance or default in performance of the underlying transaction, for example, documentary credits, demand guarantees and standby credits. A guarantor is an “interested person” within the definition of Article 1(m)(ii) of the Convention and as such is entitled to be given notice of an intended sale or lease by the creditor (Article 8(4)) and to discharge a security interest after default by the debtor (Article 9(4)) and be considered for protection by the court in proceedings for advance relief (Article 13(2), (3)). The parties to a related guarantee contract may choose the law to govern their relations *inter se* (Article VIII(2)).

5.13. “helicopters” – defined in such a way as to encompass a minimum carrying capacity, again capturing the high-unit-value element, but excluding helicopters used in military, customs or police services. For comments on this exclusion, which are equally applicable to this definition, see paragraph 5.7. As with airframes and aircraft engines, attachments are also included, and the other points in paragraph 2 related to attached and installed property (in this case, including helicopter engines) and data, manuals and records apply to this definition as well.

5.14. “insolvency-related event” – an event which triggers the remedies of the creditor specified in alternative versions in Article XI, which itself is dependent on the making of a declaration by the Contracting State concerned and can be excluded by agreement of the parties (Article IV(3)). There are two alternative limbs to the definition. The first is the traditional commencement of insolvency proceedings. For the meaning of this see Article 1(d) of the Convention and paragraph 4.10. The second, a declared intention to suspend payments, or actual suspension of payments, where a creditor may not

commence proceedings or exercise Convention remedies by law or State action, also constitutes an insolvency-related event. This is required because, in certain systems, airlines are not eligible for insolvency proceedings (see Illustration 57, paragraph 5.18). More generally, the basic intent of the second limb of the provision is to trigger the starting of the time period in Article XI of the Protocol (either Alternative) 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. Where the law preventing or suspending the right to institute insolvency proceedings is not in force and State action has not been taken at the time of the declaration of intention, the declaration becomes an insolvency-related event when such law comes into force or the requisite State action has been taken.

5.15. “primary insolvency jurisdiction” – the Contracting State in which the centre of the debtor’s main interests is situated. There is a rebuttable presumption that this is the place of the debtor’s statutory seat or, if none, the place where it is incorporated or formed. This last is a slightly different formulation from that used in Article 4(1)(a) of the Convention, which refers to the Contracting State “under the law of which” the debtor is incorporated or formed. In practice, this will almost invariably be the law of the place of incorporation or formation. The presumption does not cover all possibilities. In particular it does not apply to a natural person, and in this case the “centre of main interests” is presumably the debtor’s place of business or, if more than one, its principal place of business.

5.16. “registry authority” – the national or common mark registering authority maintaining an aircraft register in a Contracting State (see paragraph 5.10).

5.17. “State of registry” – the State on the national register of which an aircraft is maintained or the State of location of the common mark authority maintaining the register (see paragraph 5.10).

**6. The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.**

**Comment**

5.56. Work in advance of the diplomatic Conference identified this provision as the single most significant provision economically. If the sound legal rights and protections embodied in the Convention and Aircraft Protocol are not available in the insolvency context, they are not available when they are most needed. In addition, and given the legal and policy importance of this provision, a special Insolvency Working Group, made up of international experts from differing legal systems, was formed to develop this provision. Article XI, as modified in the subsequent intergovernmental negotiations, is the result of that work.

5.57. This Article, which modifies Article 30(3) of the Convention, is designed to provide in relation to aircraft objects a special insolvency regime to govern the creditor's rights where the debtor becomes subject to insolvency proceedings (as defined by Article 1(l) of the Convention) or an insolvency-related event (as defined by Article I(2)(m) of the Protocol) has otherwise occurred. The underlying purpose is to reflect the realities of modern structured finance, in particular to facilitate capital market financing, by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains from the debtor or the insolvency administrator, as the case may be, the curing of all past defaults and a commitment to perform the debtor's future obligations. Article XI applies only where a Contracting State that is the primary insolvency jurisdiction (as defined by Article I(2)(n)) has made a declaration under Article XXX(3), and it may be excluded by the parties (Article IV(3)), though only in its entirety (see paragraph 5.27).

5.58. There are two alternative texts of this Article, Alternative A, the "hard", or rule-based, version, and Alternative B, the "soft", or discretion-based, version. A Contracting State considering making a declaration under Article XI has a number of options. It may decide to make no declaration at all, in which case Article XI will not apply and the Contracting State's national insolvency law, in its current form, will continue to be applicable in this

context. A Contracting State may opt to apply Article XI to all types of insolvency proceeding or only to some, and it may apply Alternative A to some types of insolvency proceeding and Alternative B to others, or apply one of these alternatives to all or only some types of insolvency proceeding and make no declaration as to others. But to whatever type of insolvency proceeding Alternative A or Alternative B is applied, it must be applied in its entirety. This is because each of the alternatives embodies a set of integrated provisions which make it impracticable to select one or more without the others.

5.59. Alternatives A and B both impose obligations on “the insolvency administrator or the debtor, as applicable”. The debtor itself will be the relevant party where (a) the insolvency-related event is a cessation of payments and insolvency proceedings cannot be opened or have not yet been opened or (b) insolvency proceedings have commenced but the insolvency administrator has not yet been appointed or (c) the estate is being administered by a debtor in possession. Alternative A states expressly in paragraph 4 that references in this Article to the “insolvency administrator” are to that person in its official, not its personal, capacity. So duties are imposed on the insolvency administrator only in its capacity as such. This provision merely states what must be obvious anyway. It is not replicated in any of the other Alternatives but the same rule implicitly applies. Article XI does not provide for the case where there are two or more holders of registered international interests relating to the same object. Where this occurs, the duties of the insolvency administrator are owed to the secured creditors successively in order of their priority, and only when the obligations owed to the first such creditor have been discharged does the next in line become entitled to invoke Article XI. The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices.

*Alternative A*

5.60. Alternative A requires the insolvency administrator or the debtor, as the case may be, by the end of the “waiting period” specified in the declaration of the relevant Contracting State or any earlier date on which the creditor would otherwise be entitled to possession under the applicable law, either (a) to give possession of the aircraft object to the creditor or (b) to cure all defaults (other than a default constituted by the opening of insolvency proceedings, which, of course, is not capable of being cured) and to agree to

perform all future obligations under the agreement, including obligations under other transaction documents (e.g. a loan agreement) which the debtor has, by virtue of their incorporation by reference, agreed to perform under such agreement (see paragraphs 3.106 *et seq.* and Illustration 61, paragraph 5.66). The duties must be performed before the end of the waiting period if the creditor has previously become entitled to possession. The underlying premise is that the commencement of the insolvency proceedings produces a stay on the creditor's right to possession. Where this is not the case or where any stay has been lifted the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 2(b) is to be interpreted as if it read "would be entitled, or becomes entitled, to possession of the aircraft object notwithstanding the insolvency proceedings or other insolvency-related event". Unless and until the creditor is given the opportunity to take possession the insolvency administrator or the debtor, as applicable, must preserve the aircraft object and its value in accordance with the agreement and, subject to this, may allow its use, while the creditor is entitled to apply for any other forms of interim relief available under the applicable law (see paragraph 3.110). The applicable law is determined by the *lex fori*. The forum is not necessarily the insolvency forum, since courts chosen by the parties have jurisdiction (Convention, Articles 42, 43(2)), as do courts of a Contracting State on the territory of which the debtor is situated where the interim relief is, by the terms of the order granting it, enforceable only in the territory of that Contracting State (Article 43(2)). Whereas paragraph 2(a) of Alternative B requires the insolvency administrator or the debtor, as applicable, to cure all defaults, and agree to perform all future obligations, under the agreement "and related transaction documents", the latter phrase does not feature in paragraph 7 of Alternative A, which is confined to future obligations under "the agreement", that is, the security agreement, title reservation agreement or leasing agreement. It is, however, open to the parties to incorporate into that agreement obligations under other related transaction contracts, in which case paragraph 7 will apply to those obligations. Paragraph 8 requires the registry authority and administrative authorities in a Contracting State, as applicable, to make available to the creditor the remedies of de-registration and export and physical delivery no later than five working days after the creditor has notified such authorities that it is entitled to pursue those remedies in accordance with the Convention, in addition to which they must expeditiously co-operate and assist the creditor, though only in conformity with the applicable safety laws

and regulations. It is implicit in this provision that the creditor is in fact entitled to exercise the remedies in question. So if the insolvency administrator's or the debtor's duty to give up possession under paragraph 2 has not yet arisen under that paragraph or the insolvency administrator or the debtor has acquired the right to retain possession under paragraph 7 the requisite authorities will not be obliged to provide any assistance to the creditor.

5.61. The duty of the insolvency administrator or the debtor under the Convention to preserve the aircraft object and its value comes to an end once the administrator or the debtor, as the case may be, has given the creditor the opportunity to take possession, whether or not the creditor avails itself of that opportunity. Thereafter, the duty to take care of the aircraft object is governed by the applicable law.

5.62. Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor's consent (paragraphs 9 and 10). Moreover, no second waiting period may be imposed in respect of a breach of a commitment to perform future obligations. Accordingly, under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of a security interest over an aircraft object, or vary the terms of the agreement, without the consent of the creditor, nor would provisions of national insolvency law providing for an automatic stay pending reorganisation be operative beyond the declared waiting period. The effect is to displace Article 30(3)(b) of the Convention. Similarly, any provisions of domestic law modifying or empowering a court to modify the debtor's obligations must be disapplied where these would conflict with paragraph 10. The underlying rationale of Alternative A is to give aircraft object financiers and lessors the assurance of a clear and unqualified rule.

5.63. Alternative A presupposes that the creditor holds an international interest which is effective in the insolvency proceedings, either because it was registered in the International Registry prior to the commencement of those proceedings or because it is otherwise effective under the applicable law (see Article 30(1) and (2) of the Convention and paragraphs 4.208 and 4.210).

*Alternative B*

5.64. Alternative B requires the insolvency administrator or the debtor, as the case may be, upon the request of the creditor, to notify the creditor within the time specified in a declaration by the Contracting State whether it will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take possession of the aircraft object, in the latter case subject to any additional step or the provision of any additional guarantee that the court may require as permitted by the applicable law (Alternative B, paragraph 3). “Related transaction documents”, which does not feature in Alternative A, is not defined but includes promissory notes given as payment under the agreement or as security for payment, and documents which embody collateral contracts and undertakings forming part of the overall transaction between the parties. It does not, however, include undertakings which are given orally and not embodied in the agreement or some other document. The right to take possession may be given either by the agreement, in which case it is the law governing the agreement that will be the applicable law, or by the procedural rules of the forum, in which case the applicable law will be the *lex fori*. If the insolvency administrator or debtor does not either give the notice as to performance or give the creditor possession, the court may (but is not obliged to) permit the creditor to take possession on such terms as the court may order. In contrast to the position under Alternative A of Article XI, the insolvency administrator or the debtor is not required to take any action unless and until required to do so by the creditor; accordingly any time-period specified in a declaration by a Contracting State as regards Alternative B should be expressed to commence not earlier than the time the insolvency administrator or the debtor receives the creditor’s request. Paragraph 5 of Alternative B does not deal with the case where the insolvency administrator or the debtor agrees to cure all defaults and to perform its future obligations but fails to do so. In that situation there seems no reason why the court should not be able to exercise its powers under paragraph 5.

5.65. Paragraph 4 of Alternative B requires the creditor to provide evidence of its claims and proof that its international interest has been registered. There is no similar provision in Alternative A. This is because Alternative B, unlike Alternative A, involves an application to the court, and the evidence and proof are to be provided to the court. Again in contrast to Alternative A, the requirement to furnish proof that the international interest has been registered

signifies that the creditor cannot invoke the provisions of Alternative B without first registering its international interest. This is despite the fact that such registration is only one of the methods of preserving the effectiveness of the international interest on the debtor's insolvency, the other being its effectiveness under the applicable law (Article 30(2)). The latter is not sufficient to enable the creditor to invoke the provisions of Alternative B. Paragraph 5 of Alternative B provides that if the insolvency administrator does not give the creditor the opportunity to take possession when the insolvency administrator has declared that it will do so the court may permit the creditor to take possession upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee. So in the absence of a court order or the consent of the debtor the creditor may not take possession. Paragraph 6 states that the aircraft object must not be sold pending the court's decision. It would seem that the creditor's ability to exercise other remedies is governed by the applicable insolvency law.

5.66. *Illustration 61*

Airline 1, the owner of an aircraft engine, leased it to Airline 2, a company situated in State X, where the engine was located at the time of the transaction. Airline 2 filed for bankruptcy on 1 April. The lessor's international interest was not registered in the International Registry, but under the laws of State X is nevertheless effective in the debtor's bankruptcy. Airline 1 also financed Airline 2's acquisition of a second aircraft engine. The international interest arising under the security agreement relating to this was registered on 1 March. State X has declared Alternative A for all insolvency proceedings (and for other insolvency-related events not subject to insolvency proceedings – see paragraph 5.119). It has declared a 60-day waiting period. The law of State X requires debtors to return assets owned by third parties immediately, but freezes all action by secured creditors against insolvent debtors for six months. Airline 2 must comply with the law of State X and immediately return the leased aircraft engine. The financed aircraft engine must be returned at the end of the 60-day period unless all defaults are cured and the debtor agrees to perform its future obligations. In the meantime, obligations under the security agreement may not be modified and the aircraft engine must be preserved, and Airline 2 will be required to maintain the aircraft engine and its value in accordance with the terms of the security agreement, even if that requires expenditure from general assets of the estate.

**Article XII — Insolvency assistance**

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).
2. The courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.

**Comment**

5.67. Article XII is an opt-in provision requiring a declaration under Article XXX(1). It seems clear that the only relevant declaration in any particular case is a declaration by a Contracting State falling within paragraph 2 the assistance of whose courts is invoked. Where such a declaration is made, foreign courts and foreign insolvency administrators applying Article XI are entitled to call for maximum co-operation on the part of the courts of the declaring State. This, of course, is in addition to any entitlement to co-operation they may have under other law, for example from States that have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

**Article XIII — De-registration and export request authorisation**

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).
2. Where the debtor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the registry authority, that authorisation shall be so recorded.
3. The person in whose favour the authorisation has been issued (the “authorised party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in

accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.

4. The registry authority and other administrative authorities in Contracting States shall expeditiously cooperate with and assist the authorised party in the exercise of the remedies specified in Article IX.

#### Comment

5.68. This Article applies only where a Contracting State has made a declaration to that effect (Article XXX(1)). If a Contracting State makes no declaration, the Article does not apply. For the effect of Article XIII see the annotations to Article IX, paragraphs 5.45 *et seq.* For an extensive discussion on de-registration and export, see paragraphs 3.30 *et seq.*

#### Article XIV — Modification of priority provisions

1. A buyer of an aircraft object under a registered sale acquires its interest in that object free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.
2. A buyer of an aircraft object acquires its interest in that object subject to an interest registered at the time of its acquisition.
3. Ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft.
4. Article 29(7) of the Convention applies to an item, other than an object, installed on an airframe, aircraft engine or helicopter.

## Cape Town Convention Academic Project

Facilitating the study of the Convention on International Interests in Mobile Equipment

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### ANNOTATION TO PROFESSOR SIR ROY GOODE'S

### OFFICIAL COMMENTARY, THIRD EDITION (UNIDROIT, 2013)

### CONVENTION ON INTERNATIONAL INTEREST IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

Release No.4

Date: 22 March 2016

This document sets out an annotation (“**Annotation**”) to Professor Sir Roy Goode’s Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Object, Third Edition (the “**Official Commentary**”). There is a [separate document that sets out all Annotations](#) on a cumulative basis, organised with reference to the order of the Official Commentary.

This document is issued by the Cape Town Convention Academic Project, a joint undertaking of the University of Oxford Faculty of Law and the University of Washington School of Law, pursuant to procedures established by these two institutions.

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The format followed in this document is to set out (i) the referenced paragraph(s) and/or illustration(s) in the Official Commentary, (ii) the background and/or issue(s), (iii) the Annotation related to such paragraph(s) and/or illustrations, and (iv) the rationale for such Annotation.

**Annotation 4. Official Commentary Reference(s): 2.183, 2.236, 3.102-3.114, 4.10, 4.17-4.18, 4.211-4.215, 5.14, 5.15, 5.18, 5.56-5.68, 5.118**

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General Background/ Issues: The availability of remedies on insolvency, where a Contracting State has made a declaration under Article XXX(3) of the Protocol in respect of Article XI of the Protocol (**remedies on insolvency**), is designed to strengthen the creditor's position vis-à-vis the insolvency administrator or the debtor on the occurrence of an "insolvency-related event". See paragraph 3.102 of the Official Commentary. The underlying purpose is to reflect the realities of modern structured finance by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains the curing of all past defaults and a commitment to perform future obligations. See paragraph 5.57 of the Official Commentary.

This annotation addresses select points relating to the treatment of remedies on insolvency in the Convention and Protocol. It will be divided into four parts, supplementing the Official Commentary on these points. First, what are the parameters for determining when an insolvency-related event has occurred under Article I(2)(m)(ii) of the Protocol. Secondly, which party must comply with remedies on insolvency. Thirdly, may the parties delay or condition the timing of the remedies on insolvency by agreement following an insolvency-related event. Fourth, whether the remedies on insolvency are applicable to a debtor outside of its primary insolvency jurisdiction.

### **Part I: Parameters of Insolvency-Related Event under Article I(2)(m)(ii) of the Protocol**

Specific Background/Issue: Remedies on insolvency are triggered if either (i) "insolvency proceedings" are commenced, or (ii) there is a "declared intention to suspend or actual suspension of payments by the debtor" where a right of a creditor to "institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action". This first limb, conventional insolvency proceedings, is given a wide and functional meaning under Article 1(l) of the Convention, and includes all collective proceedings, including interim proceedings, subject to control or supervision by a court (as defined in the Convention) for purposes of reorganisation or liquidation. The second limb, covering legislative, executive, or administrative action, is meant to make the definition of insolvency-related event more comprehensive and inclusive, triggering remedies on insolvency whenever (i) the debtor declares its intention to suspend payments or actually suspends payments, and (ii) the creditor's right to institute insolvency proceedings or exercise remedies under the Convention and Protocol is prevented or suspended by law or State action.

Annotation: A Contracting State that has declared the availability of remedies on insolvency may not, consistent with the Protocol, prevent or condition such or other Convention or Protocol remedies by law or state action outside the scope, or which seeks to avoid the effects, of an "insolvency-related event". Whether "insolvency proceedings" (Article I(2)(i)) have been commenced is a matter of national law. An insolvency-related event occurs under Article I(2)(m)(ii) of the Protocol on the date when two conditions have been met: (1) the debtor has suspended payments to a creditor or declared its intention to do so, and (2) a law has been enacted or state action occurs that prevents or suspends the rights of such creditor to initiate insolvency proceedings against the debtor or exercise remedies under the Convention and Protocol. . A declaration of intention to suspend payments is implicit in a statement by a debtor that it is unable to make payments to its creditors or that it intends to pay its creditors less than it is contractually obligated to pay.

Rationale: The annotation deals with actions contemplated by, and those inconsistent with, remedies on insolvency, and expands upon, and carries forward the logic of, paragraph 5.14 of ('the basic intent ...is to trigger the starting point of the time period in Article XI of the Protocol ... where there are financial problems and State action or law (whether made or taken before or after a declared intent to suspend payment) prevents application of the remedies under the Convention') and 5.18 (illustration 57, which addresses the core case) of the Official Commentary. It more clearly defines a law or state action which violates the basic principles of the provision on remedies on insolvency.

*Illustration A*

Airline 1, owned and controlled by the government of State Y, has encountered financial difficulty. State Y is a Contracting State that has made a declaration under Article XXX(3) to adopt Alternative A with a waiting period of 60 days. State Y passed a law preventing creditors of Airline 1 from commencing insolvency proceedings, or exercising remedies under the Convention and Protocol, against Airline 1. That legislation permits the debtor or a third party appointed by the debtor or the minister of transportation (manager) to take all action needed to restructure Airline 1, including modification of contracts and asset sales, without creditor consent. The legislation states that the action by the manager is not subject to judicial review, as authority therefor arises under the legislation. That legislation is non-compliant with the Protocol, unless its application is conditioned on the occurrence of an insolvency-related event as defined in the Protocol and, in such application, is subject to the terms of Protocol. If Airline 1 issues a communication to one or more of its creditors advising that it intends to modify the payment terms of its leases, or actually suspends its payments, an insolvency-related event shall have occurred on the date of the communication or suspension. In that case, at the end of the 60 day waiting period following that insolvency-related event, the creditors of Airline 1 are permitted to exercise all remedies permitted by the Convention and the Protocol, notwithstanding the conflicting provisions of the State Y's national legislation.

## **Part II: Party Obligated to Comply with Remedies on Insolvency**

Specific Background/Issue: Adoption of the Convention and Protocol obligates a Contracting State to give positive effect, within the timetable declared by the Contracting State that is the primary insolvency jurisdiction, to the remedies on insolvency. See paragraph 2.236 of the Official Commentary. The central requirements for meeting this obligation are that (i) a creditor is given possession of the object unless all transactional defaults (except one constituted by the opening of insolvency proceedings) are cured, and future obligations are committed to, by the end of the declared waiting period or earlier date on which a creditor is entitled to possession under applicable law, (ii) during the period described in (i), the object and its value is preserved and maintained in accordance with the agreement, and (iii) no obligations under the agreement may be modified without the consent of the creditor. See paragraphs 3.109 – 3.110 of the Official Commentary. This annotation focuses on which party is obligated to take or ensure these actions as part of Contracting State compliance with the Convention and Protocol.

### Annotation:

In all cases where an “insolvency-related event” has occurred, there must be one party (the **responsible party**) obliged and empowered to take the action required to effect the remedies on insolvency.

#### *Insolvency-related event under Article I(2)(m)(i) of the Protocol*

In the case that the insolvency-related event has arisen under Article I(2)(m)(i) of the Protocol (insolvency proceedings), the responsible party is (i) the “insolvency administrator”, as defined in Article 1(k) of the Convention, which may be the “debtor in possession”, applying the debtor in possession criteria below, where an insolvency administrator exists, and (ii) the debtor as such, where no such insolvency administrator exists. Thus, if an insolvency administrator exists, it is the responsible party, and if an insolvency administrator does not exist, the debtor is the responsible party.

The Official Commentary, at paragraph 3.107, states that a debtor is its own insolvency administrator “where the estate is being administered in insolvency proceedings by a debtor in possession if permitted under applicable insolvency law”. The foregoing standard is met, and thus the debtor in possession is its own administrator, where the debtor has the authority to administer the estate, meaning that it has the authority to enter into transactions and deal with assets, even if under the supervision of a court-appointed third party.

### *Illustration B*

A court in State X issued an order commencing insolvency proceedings against Airline 1, which is necessary and sufficient to commence such proceedings under domestic insolvency law. The court appoints an interim manager, whose responsibilities under domestic insolvency law are to collect financial information about Airline 1, supervise Airline 1's activities to preserve the value of the estate, and to interact with the supervising court in respect of matters that could adversely affect creditors generally. Airline 1, which has the power to remain operational, may enter into ordinary course transactions, but not make any substantial disposition of assets without the approval of the interim manager. Domestic insolvency law contemplates a later stage (following the end of the Alternative A waiting period) when a plan of reorganisation or restructuring, which may be proposed by any creditor, the debtor, or the interim manager, would be approved by the court. In this case, the debtor, and not interim manager, is the insolvency administrator with responsibilities to take action under Alternative A within the timetable declared by State X in its ratification of or accession to the Protocol.

#### *Insolvency-related event under Article I(2)(m)(ii) of the Protocol*

In the case that the insolvency-related event has arisen under Article I(2)(m)(ii) of the Protocol (law or state action described in the annotation above), the responsible party is the debtor as such, unless the law or state action expressly authorises a third party to administer the reorganization or liquidation, in which case it is such third party.

Rationale: The reference in Article XI (Alternative A and B) to action by "the insolvency administrator or the debtor, as applicable" is ambiguous in that it does not make clear how to determine which of those two parties is the responsible party. That lack of clarity leaves open the possibility that a debtor may claim that the actions required under Article XI are the responsibility of a purported insolvency administrator, while such purported insolvency administrator asserts that the responsibility remains with debtor. The annotation provides guidance by noting that in the absence of law or state action that expressly authorizes a third party to administer the reorganization or liquidation, the debtor remains the responsible party, and where an insolvency administrator exists, it is the responsible party.

### **Part III: Delay or Conditioning of Remedies on Insolvency following an Insolvency-Related Event**

Background/Issue: Article XI(2) and (7) (**Alternative A**) of the Protocol, with the related declaration under Article XXX(2) and (3) of the Protocol, sets out explicit timetables for the giving or retaining possession of an object. The relevant parties, namely the creditor with rights under Alternative A and the insolvency administrator (as defined in Convention and discussed in the annotation above), may wish to agree to delay, or otherwise condition, the availability of such rights.

Annotation: The holder of an international interest with rights under Alternative A and the insolvency administrator or the debtor, as applicable, may agree (i) to delay the giving of possession of the object to the creditor, and (ii) to the conditions applicable to such delay.

Rationale: While Official Commentary in paragraphs 3.109, 5.60-5.63, and 5.66 address the time-based rules which are critical to Alternative A, the overriding principle of party autonomy remains. In addition to excluding the application of Article XI of the Protocol, the parties may derogate from or vary its terms, provided that such is consistent with mandatory rules. See Article IV(3) of the Protocol, and, more generally, paragraphs 2.17 and 2.19 of the Official Commentary. A voluntary delay or conditioning of rights under Alternative A falls squarely with this party autonomy principle and does not violate mandatory rules in the instruments.

### **Part IV: Applicability of Remedies on Insolvency for a Proceeding Outside of the Primary Insolvency Jurisdiction.**

Background/Issue: Upon the occurrence of an insolvency-related event, Article XI(1) of the Protocol conditions the applicability of the Article XI remedies on insolvency upon a declaration pursuant to Article XXX(3) of the Protocol having been made by the primary insolvency jurisdiction. There is no other condition. Article I(2)(n) of the Protocol defines the “primary insolvency jurisdiction” as the Contracting State where the centre of debtor’s main interests is situated. However, some jurisdictions provide for insolvency proceedings in respect of a debtor connected to the jurisdiction by having a domicile, place of business or property there, and purport to bind the creditors and property of the debtor wherever located. Aviation and aviation finance are global industries and participants may have a domicile, place of business or property in many different jurisdictions. Accordingly, insolvency proceeding in respect to a debtor may occur in a Contracting State that differs from the primary insolvency jurisdiction for that debtor.

Annotation: Article XI of the Protocol applies to a debtor in a Contracting State if the primary insolvency jurisdiction for that debtor has made a declaration pursuant to Article XXX(3) of the Protocol. The application of Article XI of the Protocol does not depend upon the insolvency proceeding taking place within the debtor’s primary insolvency jurisdiction. Whether the courts of another State have jurisdiction over matters governed by Article XI depends entirely on that State’s own insolvency jurisdiction rules. If Article XI of the Protocol applies to a debtor, then, in accordance with Article XXX(4) of the Protocol, the courts of any Contracting State in which an insolvency proceeding with respect to such debtor takes place are obligated to apply Article XI of the Protocol in conformity with the declaration made by the primary insolvency jurisdiction. Article XI of the Protocol overrides Article 30(3)(b) of the Convention, and therefore any rules of law of the forum that conflict with Article XI are superseded by the rules of Article XI. The content of this annotation is to be distinguished from, but is compatible with, the terms of Article XII of the Protocol, which applies where a Contracting State has made a declaration under Article XXX(1) of the Protocol in respect thereof. Article XII of the Protocol addresses the cooperation with foreign courts and insolvency administrators, and thus presupposes the existence of foreign main proceedings, when an aircraft object is situated in the Contracting State making that declaration.

This annotation does not imply that insolvency proceedings outside of the primary insolvency jurisdiction should be treated as primary or main-type proceedings by-passing the latter as and where they occur, as contemplated inter alia by the UN Model Law on Cross-Border Insolvency or the EU Regulation (EU) 2015/848 on insolvency proceedings.

Rationale: The annotation confirms the plain meaning of Articles I(2)(n), XI(1), and XXX(4) of the Protocol, none of which state that insolvency proceedings must occur in the primary insolvency jurisdiction, and expands upon paragraph 5.118 of the Official Commentary. In its discussion of the availability of the remedies on insolvency provided by Article XI of the Protocol, the Official Commentary addresses secondary insolvency proceedings occurring outside of the primary insolvency jurisdiction, the main insolvency proceedings occurring within the primary insolvency jurisdiction, and the relationship between the two. It does not directly address the availability of the remedies on insolvency provided by Article XI of the Protocol where the insolvency proceeding takes place outside of the primary insolvency jurisdiction. Clarity on this item, the applicability of Article XI as declared by the primary insolvency jurisdiction (whether or not insolvency proceedings are taking place therein) in all Contracting States, is essential to avoid insolvency forum shopping and produce the intended economic benefits of the Convention and Protocol (see paragraph 5.56 of the Official Commentary), which are directly related in this context.