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Canadian ratification of the Convention on International Interests in Mobile Equipment and of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment

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This bulletin includes an analysis of certain provisions of the Cape Town Convention and the Aircraft Protocol that will take effect in Canada on April 1, 2013.

AN OVERVIEW

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INTRODUCTION

This Bulletin is intended as a brief overview of the above-mentioned Convention and its Protocol and is not an in depth analysis of each of their provisions. We selected the provisions which we believe are required or useful to gain a working understanding of the CTC in the context of an overview. While drafted in layman's terms, this overview does raise a few transactional/financing legal points. Hopefully they will not overburden the reader's review.

Since they were concluded on November 16, 2001 at a Diplomatic Conference in Cape Town, South Africa, the Convention and Protocol have become known and referred to collectively as the "**CTC**" and this term will be used herein when referring to both. However, since certain terms are defined in the Convention and others in the Protocol, and given the need to read both the Convention and the Protocol in conjunction, when quoting or referring to definitions or Articles, a specific reference to the Convention or the Protocol, as the case may be, will be added. For ease of reference, the non-consolidated Convention and Protocol are readily available without cost at the web site of Unidroit[3]

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and all quotes and references herein are to the non-consolidated version of each of them. The International Interests in Mobile Equipment (Aircraft Equipment) Act[4], as amended, adopted by Canada provides that the non-consolidated texts have force of law.

We will briefly discuss the meaning of aircraft objects, the rules of form to create an international interest, the choice of forum and certain jurisdictional rules adopted under the CTC, the rules applicable to the location of the debtor (or "where the debtor is situated" to use the CTC terminology), the defaults, remedies, as well as preliminary reliefs and "self-help remedies" rules. The main priority and registration rules of the International Register (the "**IR**") will also be overviewed, as well as searches thereunder and will be followed by a few comments in respect of States and common law liens, "super priorities" and "prior claims" in the province of Québec, as well as "arrest" or "detain" rights, all of which will continue to be recognized. Priorities, assignments, accessory rights, subrogations and related defaults and priority rules will only be alluded to but not reviewed. We will finally discuss the coming into effect of the CTC in Canada, the grandfathered transactions and amendments thereto.

1. PURPOSES OF THE INTERNATIONAL REGISTRY OF MOBILE ASSETS

Other than commerce and trade benefits intended to be achieved by the adoption of the CTC, one of the main purposes of the IR, which is supervised by the International Civil Aviation Organization, is to centralize the recording of transactions related to aircraft objects (as hereinafter defined) occurring world-wide and is intended to eventually become the sole register for all transactions related to aircraft objects creating international interests, other than purely State internal transactions when a "national registry" exists in a Contracting State and has been declared to apply as "national interests" by such Contracting State and are registered at the IR[5]. Canada did not make such a declaration and does not currently have such a national registry to record "national interests" in aircraft objects. The Canadian Civil Aircraft Register merely records as "owner"[6] the person(s) or entities which have "custody and control" of aircraft registered thereunder; it does not allow for the recording of either national or international interests (as hereafter discussed). Thus, we will not elaborate further in respect of such national interests.

Some of the countries participating in the CTC negotiations had been asked by several industries to modernize and harmonize the various national registration systems applicable to security/title retention financing devices (if any even existed in certain States) related to aircraft objects. Their goal was to reduce the economic and insolvency risks created by the uncertainties related to the validity and effectiveness as against third parties of security agreements, title retention agreements (conditional sales), leases and title transfers related to aircraft objects and optimize the international uniformization and recognition by Contracting States of the remedies adopted under the CTC, the enforcement thereof by their courts, as well as the enforcement by the courts of Contracting States of foreign judgments in respect thereof rendered by the courts of other Contracting States.

2. AIRCRAFT OBJECTS

2.1 Types of aircraft object requiring registration.

The CTC is intended to apply in relation to "aircraft objects"[7], other than those used in military, customs or police services, which are defined in the Protocol to include the following:

(i) "airframes"[8] that are type certified to transport at least eight (8) persons including crew or goods in excess of 2,750 kilograms;
(ii) "aircraft engines"[9] having in the case of jet propulsion aircraft engines at least 1750 lb of thrust or its equivalent or in the case of turbine-powered or pistonpowered aircraft engines at least 550 rated

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take-off shaft horsepower or its equivalent; and
(iii) “helicopters”[10] that are type certified to transport at least five (5) persons including crew or goods in excess of 450 kilograms.

Each of the foregoing includes all installed, incorporated or attached accessories, parts and equipment (in the case of airframes, other than aircraft engines) and all data, manuals and records relating thereto.

Note that the Protocol specifically provides that ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an airframe[11].

There is no defined term “helicopter engines”, but in the Official Commentary of the CTC[12] (hereafter “**CTC Official Commentary**”), Professor Goode states:

“(i) a helicopter engine is an “aircraft engine” when it is not attached to a helicopter; and
(ii) when a helicopter engine is installed on a helicopter, the helicopter engine becomes a component or an accessory of the helicopter, and subsequently, loses the characterization as an “aircraft object.”

Instead of registering a new international interest every time a helicopter engine is removed from a helicopter or registering an international interest against a helicopter engine while it is installed on a helicopter, the CTC Official Commentary suggests to adapt the security agreement in order to contemplate the existence and registration at closing of both current and prospective interests against the engine (i.e. when the engine will be removed from the helicopter, the prospective registration against the engine will become effective)[13].

3. WHAT IS AN INTERNATIONAL INTEREST

3.1 Agreements covered by the CTC.

The CTC is intended to apply to a broad range of agreements, both current and prospective, creating or evidencing a security agreement, a title reservation agreement or a leasing agreement of an aircraft object, as these terms are hereafter defined.

None of the following agreements recognized by the CTC require a minimum term or duration to meet the definition requirements and to thus become subject to registration at the IR.

3.1.1 Security agreement;

Under the Convention:

“security agreement” means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;[14]

This definition is sufficiently broad to cover most forms of security interest and would include a security trust (fiducie-sûreté), a sale with a resolutory condition and a sale with a right of redemption securing a loan (as understood in the province of Québec under Article 1755 of the *Civil Code of Québec* (**“C.c.Q.”**), given that transfers of ownership interests as security are included. Of course, it also includes a Personal Property Security Act (“**PPSA**”) type security agreement and hypothec under the C.c.Q.

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Applicable law will determine if the agreement in question is a security agreement, a title reservation agreement or a leasing agreement (see Articles 2(4) and 5(2), (3) and (4) of the Convention).

3.1.2 Title reservation agreement;

Under the Convention:

“title reservation agreement” means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;[15]

Under Article 2(2) of the Convention, an agreement cannot be both a security agreement and a “title reservation agreement”. This last definition is arguably broad enough to include a consignment agreement where title will typically pass, subject to the other conditions of the agreement, upon consumption, use or resale of the property. While in the CTC Official Commentary[16] Professor Goode states that a consignment agreement “without a rental charge” cannot be a leasing agreement, he also states earlier on that a consignment “does not cross the threshold of falling within a Convention category…”[17]. In our view, a consignment may arguably qualify if all other requirements of the CTC are met. The conceptual differences as to when titles passes between a conditional sale and a consignment are full payment of the purchase price in a conditional sale, as opposed to the payment thereof upon use, consumption or sale in the case of a consignment. They are all “conditions” contemplated by the definition, which when fulfilled, trigger the transfer of title to the property involved.

3.1.3 Leasing agreement;

This Convention provides:

“leasing agreement” means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment;[18]

This definition is broad. Certain transactions which would not be subject to a registration at a personal property register or at the Québec register of personal and movable real rights, are leasing agreements under this definition and qualify for registration at the IR if the aircraft object is involved in a transaction where an international interest is created. This would include sale and leaseback transactions in PPSA jurisdictions (which include all Provinces in Canada, save Québec).

The definition undoubtedly includes the more common “financial leases” as well as “rental agreements”, as these terms are understood at common law and as codified in the C.c.Q. In the case of the C.c.Q. this is the case irrespective of the codified meaning given to “lease” (louage) and “leasing” (credit-bail) thereunder[19].

However, we again note that applicable law will determine if a lease or leasing is a “leasing agreement” under the CTC or a security agreement (see Article 2(4) of the Convention).

3.2 Formal requirements.

The Convention defines “international interest” as follows:

“international interest” means an interest held by a creditor to which Article 2 applies;

Article 2 of the Convention reads as follows:

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Article 2 — The international interest

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

(a) granted by the chargor under a security agreement;
(b) vested in a person who is the conditional seller under a title reservation agreement; or
(c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. The categories referred to in the preceding paragraphs are:

(a) airframes, aircraft engines and helicopters;
(b) railway rolling stock; and
(c) space assets.

4. The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph.

5. An international interest in an object extends to proceeds of that object.

A few observations are required. An outright sale, while not an international interest, nevertheless benefits from the registration provisions of the CTC pursuant to Articles III and XIV of the Protocol and can thus benefit from the priority or ranking rules provided by the CTC. The IR is not, *per se*, a title registry, but the registration of contracts of sale will, over time, provide a searchable list of title transfers with regards to a specific aircraft object (assuming that the CTC applies to each transfer).

“Non-consensual rights or interests” as defined in the Convention are not international interests although they are subject to registration at the IR if a Contracting State has made a declaration in respect thereof under Article 39 of the Convention. Canada has made such a declaration as we will see later on. We further note that a “prospective international interest” (discussed later) is an international interest for the purposes of the CTC.

Article 7 of the Convention requires the existence of four (4) formal conditions for an international interest to exist.

3.2.1 a writing;

The requirement of a writing may seem innocuous. However, readers from civil law jurisdictions should note that certain formal domestic law rules do not apply. For instance, this is the case for the rule prescribed by Article 2692 of the C.c.Q. for hypothecs in favour of a person holding the power of attorney (*fondé de pouvoir*) of the creditors, which rule requires that the document be signed “… on pain of absolute nullity be granted by notarial act *en minute*…”. An agreement failing to comply with this rule, when it applies, would nevertheless create an effective international interest even if invalid as a matter of domestic law.

Also note that a “writing” includes electronic records of information[20].

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3.2.2 having the power to dispose of the aircraft object;

This requirement is very broad and it was drafted as such so that entities which may not legally own, but have the “power” (as opposed to “right”) to create an interest in or dispose of an aircraft object could do so[21] (for instance a conditional buyer reselling or leasing, a lessee sub-leasing or a trustee acting under a trust agreement). This includes every type of transfer whether by sale, lease, conditional sale or a transfer by way of security.

3.2.3 identification of the aircraft object conforms to the Protocol requirements;

This requirement is important and is completed by Article V of the Protocol in respect of contracts of sale and by Article VII of the Protocol which states:

Article VII — Description of aircraft objects

A description of an aircraft object that contains its manufacturer’s serial number, the name of the manufacturer and its model designation is necessary and sufficient to identify the object for the purposes of Article 7(c) of the Convention and Article V(1)(c) of this Protocol.

(emphasis added)

This rule in effect prohibits the recognition of an international interest, current or prospective, in future aircraft objects and it follows that neither a general security agreement on all present and future personal property, nor a universal movable hypothec on all present and future movable property would charge future aircraft objects. See also the reference to “uniquely identifiable objects” in Article 2 of the Convention.

In Canadian PPSA provinces, except Ontario, the Personal Property Security Regulation[22] requires that reference be made to the Canadian registration marks of the aircraft (issued by Transport Canada), in any filing instead of the manufacturer serial number. This will no longer be required for IR purposes. However, it will still be possible to include such registration marks, as we will see later.

3.2.4 a security agreement must permit the determination of the obligations secured but not an amount or maximum amount secured;

Domestic law in several States or territories of States (in respect of a Federated State see Article 5 (4) of the Convention) such as the province of Québec in the case of hypothecs, requires that the maximum amount for which any property is being charged be specifically mentioned. Again, domestic law rules of form are ousted for international interests (such as the requirement to have a hypothec amount), provided that the secured obligations are determinable.

As the IR is not a document filing system, should someone wish to ensure compliance with the above formal rules for an international interest to be created, such person would need to obtain copy of the underlying agreement. No rule is provided obligating a creditor to provide copy of the agreement to someone requesting it, as is the case for instance in various PPSA jurisdictions[23]. Domestic law could apply to this question[24].

3.3 Choice of law/applicable law.

3.3.1 Choice of governing law recognition;

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Article VIII (2) of the Protocol provides:

The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.

This rule applies in Canada which has made a Declaration adopting it as is permitted under the first paragraph of this Article. The governing law of an agreement should be contrasted with the applicable law. The applicable law of where the debtor is situated will apply irrespective of the chosen governing law of an agreement. For instance, the rules governing registration and perfection of agreements under applicable law of a non-Contracting State would apply even if a debtor situated in a non-Contracting State agrees to a choice of law clause which selects the laws of a Contracting State as the governing law of the contract. Conversely, a debtor situated in a Contracting State who agrees to a choice of the laws of a non- Contracting State would not, by doing so, avoid the application of the CTC to its agreement.

3.3.2 Domestic law suppletive;

Article 5 (2) of the Convention provides:

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.

This rule is self-explanatory. It should be noted that both Article 5 (3) of the Convention and Article VIII, paragraph 3 of the Protocol provide that it is the domestic rules of law which are applicable, as opposed to conflict of laws rules of that State. This would exclude a possible transfer (renvoi) to the laws of another State.

3.4 Paramountcy of Protocol over the Convention.

Article 6 of the Convention is self-explanatory and reads as follows:

Article 6 — Relationship between the Convention and the Protocol

1. This Convention and the Protocol shall be read and interpreted together as a single instrument.

2. UN the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.

4. CONNECTING FACTORS

4.1 Location of debtor.

The term debtor is defined as follows in the Convention:

“debtor” means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest;[25]

Article 3 of the Convention provides:

Article 3 — Sphere of application

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1. This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.
2. The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

Article III (1) of the Protocol further provides:

1. Without prejudice to Article 3(1) of the Convention, the Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry, and where such registration is made pursuant to an agreement for registration of the aircraft it is deemed to have been effected at the time of the agreement.

These definitions make clear that the location of the debtor in a Contracting State is the main element required (connecting factor) for the CTC to apply in respect of aircraft objects, except aircraft engines. However, a debtor may be located in a non-Contracting State if the helicopter or airframe is registered as a civil aircraft in a national registry of a State which is a Contracting State.

In respect of a contract of sale, Article III of the Protocol adds “purchaser” as a “debtor” for the purposes of certain Articles.

Article 4 of the Convention provides the following rules to determine the location or “situs” of a debtor:

Article 4 — Where debtor is situated

1. For the purposes of Article 3(1), the debtor is situated in any Contracting State:
(a) under the law of which it is incorporated or formed;
(b) where it has its registered office or statutory seat;
(c) where it has its centre of administration; or
(d) where it has its place of business.

2. A reference in sub-paragraph (d) of the preceding paragraph to the debtor’s place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

As these rules are relatively clear and have been inspired by Uniform Commercial Code (“**UCC**”) UCC/PPSA-type statutes rules such as “centre of administration” or the better known “chief executive office”, they will be familiar to most. In the province of Québec, the private international law “domicile” rule is now replaced by these rules in respect of a “…corporeal movable ordinarily used in more than one country…”[26], when it qualifies as an aircraft object under the CTC.

4.2 The location of the debtor rule is not applicable to aircraft engines.

While mounted on an airframe, an aircraft engine will follow the same rule as other aircraft objects but are separately registered at the IR, as we shall see below. An engine which is not mounted on an airframe is subject to the rules of the place where it is physically situated. It is to be noted that the engines situated in a non-Contracting State may be registered at the IR. Whether the courts of a non-contracting State would recognize and enforce such an international interest is another matter.

5. MEANING OF DEFAULT

Article 11 of the Convention provides:

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Article 11 — Meaning of default

1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13

2. Where the debtor and the creditor have not so agreed, “default” for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

It follows from Article 11 that the parties may still determine which events may constitute defaults. However, secured creditors, conditional vendors and lessors will no doubt wish to continue providing what the events of default will be under their agreements to avoid any debate as to whether a default “substantially deprives the creditor of what it is entitled to expect under the agreement”, more particularly in connection with any attempted challenge from a debtor. This is particularly true in light of the “self-help” remedies hereafter discussed.

It is also possible to argue that the default by law provisions of the C.c.Q. could continue to apply. See for instance Articles 1597 (la demeure), 1598, 1599 and 1600 C.c.Q. We further refer to Article 2740, paragraph 2 of the C.c.Q. which requires that the claims of creditors be “liquid and exigible” for the hypothecary recourses of the C.c.Q. to be available and which seems overridden.

6. REMEDIES AGAINST AIRCRAFT OBJECTS

6.1 Under a security agreement.

Article 8 of the Convention sets out the three remedies available under a security agreement. The debtor must have agreed either in the agreement or thereafter to each of these remedies.

6.1.1 taking possession or control of aircraft objects;

This remedy is similar to one of the remedies available to secured creditors under existing Canadian law. It does not however refer to the concepts of “simple” or “full administration” as understood under the C.c.Q. Thus, these concepts will not apply to remedies against aircraft objects.

6.1.2 selling or leasing of aircraft objects;

These remedies are again not dissimilar to existing Canadian law. However, the concepts of sale by the creditor and of sale by judicial authority of the C.c.Q. will no longer apply.

6.1.3 collect or receiving income or profit from the management or use of the aircraft objects;

This remedy is interesting. While it is difficult to contemplate a “chargee” or secured creditor managing or using the aircraft object to earn “income or profit” when the aircraft or helicopter is still nationally registered in the name of the chargor or debtor who may have the sole right to the custody and control of the aircraft under the Canadian Aeronautics Act and the Canadian Aviation Regulations (“**CARs**”), it would be possible to de-register the aircraft and re-register it in the name of the secured creditor (or another third party) to collect such income or profit.

If a creditor’s international interest is prior registered at the IR and the debtor leases the object to a third party, the creditor could collect the rental payments from the lessee instead of terminating the lessee’s rights.

We further note that “income or profit” from an aircraft object is not itself an aircraft object and it is

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debatable whether security in such “income or profit” (which are normally considered as “accounts” or “claims” in the province of Québec) is subject to registration of a security interest or hypothec therein at the relevant register in the chargor’s or grantor’s State or territory of such State.

We also refer to the definition of “proceeds” in the Convention:

“proceeds” means money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition;[27]

This definition does not include receivables arising from the “use or management” of an aircraft object and we are left with the reference to “income or profit” in Article 8 of the Convention as the sole basis for this “secured” remedy under the CTC. What of “comingled” proceeds in a bank account of a secured lender? “Traceability” or whether an object’s proceeds (as normally understood) remains identifiable are matters for applicable law to determine.[28]

6.2 Under a title retention agreement or lease.

Article IX of the Protocol sets out the two remedies available under a title retention agreement or lease. Unlike under a security agreement, these remedies are available without any specific agreement by the debtor permitting them.

6.2.1 terminate the agreement and take possession or control of the aircraft object;

It is to be noted that Professor Goode states in the CTC Official Commentary that in jurisdictions where a title retention agreement or a particular type of lease is treated as a security agreement, the provisions of the Convention related to a title reservation agreement or a lease may not apply[29]. All Canadian PPSAs consider that title retention agreements create security interests, as well as leases of more than one year[30]. We also note that a title retention agreements, for the purposes of the Canadian insolvency statutes, a security agreement (as defined in such statutes) which statutes apply in all Canadian provinces and territories. One may thus question which remedies apply to them outside insolvency proceedings and we will need to await court decisions to clarify this.

In the province of Québec, in respect of leases and leasing agreements as defined in the C.c.Q., it is clear that the termination of the “leasing agreement” and possession of the aircraft object in accordance with this CTC remedy ends the matter and the lessor may thereafter freely dispose of the repossessed aircraft object without having to account to the debtor thereafter. This is a significant advantage as the remedies will vary depending on the governing law of the “leasing agreement”. Similarly, conditional sale remedies could be available in respect of an instalment sale agreement under Article 1745 of the C.c.Q. governed by Quebec law (outside insolvency proceedings), instead of the remedies available under a security agreement.

Since the Canadian Declarations include this Article, no application or leave from a court is required to exercise this remedy. This is part of the so-called “self-help remedies” hereafter discussed.

6.3 Realization to be commercially reasonable.

Article IX (3) of the Protocol reads as follows:

Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly

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unreasonable

Existing case law in Canada may provide guidance as to what may or may not be “manifestly unreasonable”. Creditors are likely to require acknowledgements from debtors in their agreements that the remedies set out in the agreement are commercially reasonable and not manifestly unreasonable.

6.4 Self-help “remedies”.

Article 54(2) of the Convention reads as follows:

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.

As part of its Declarations deposited with its instrument of ratification, the Government of Canada has specifically accepted this Article of the Convention. This Declaration reads as follows:

“The Government of Canada also declares, in accordance with Article 54 of the Convention, that any remedy available to a creditor under any provision of the Convention, the exercise of which does not thereby require application to the court, may be exercised without leave of the court.”

Professor Goode makes several comments in respect of this “remedy”. He states the following31:

“Conversely, where a State makes a declaration under Article 54(2) that remedies are to be available without leave of the court, then the creditor cannot be required to institute court proceedings to enforce a remedy”.

He also states:[32]

“Article 54(2) requires a Contracting State to declare whether or not any remedy which under the Convention does not require application to the court is to be exercisable only with leave of the court. Moreover, the Convention does not affect rules of criminal law or tort law in national legal system. ”

He also states the following in respect of certain remedies available to a conditional seller or lessor, (which we believe equally apply to self-help “remedies”):[33]

“The Convention does not, of course, entitle the creditor to use violence or other unlawful means or affect the criminal liability of a creditor who uses such means.”

Self-help will thus be subject to existing national legal system rules and its public order laws. In Canadian common-law jurisdictions, self-help is allowed[34].

In the province of Québec this is new law and it is to be anticipated that guidance from the common-law provinces case law, among others, will be sought by Québec courts in determining what a creditor may or may not do without leave of a court. We would anticipate that wherever an attempt to realize is being objected to, a creditor would not forcibly remove an aircraft object without leave from a court but we will need to await Québec court decisions for guidance as to the limits of this new “remedy”.

6.5 Registration and export request authorization.

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This additional remedy is provided at Article XIII of the Protocol and is available in Contracting States that have made a Declaration in that respect as part of their ratification of the CTC. Canada has made such a Declaration (Alternative A). A creditor which has obtained from a debtor such a form of irrevocable de-registration and export request authorisation substantially in the form attached to the Protocol would be entitled to request from the Contracting State's national registry authority, the deregistration of the aircraft further to a default. See Article X (6) of the Protocol and the Declarations made by Canada. The national registry authority and administrative authorities are obliged to expeditiously cooperate for such purposes. Article X (6) refers to "within 5 working days". This remedy is not dissimilar to certain powers of attorney provided in Canadian security agreements and hypothecs and while there are issues relating to their effectiveness and whether they can be irrevocable. The Protocol makes its effectiveness very clear and this will expedite realization and export of the aircraft object when required.

6.6 Additional Remedies.

Article 12 of the Convention provides:

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

Penalties, interest, liquidated damages and non-monetary awards would be examples of these additional remedies[35].

6.7 Prior notices.

Article 8(4) of the Convention reads as follows:

4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:

(a) interested persons specified in Article 1(m)(i) and (ii); and
(b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.

This article is completed by Article IX (4) of the Protocol which adds:

4. A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

This 10 day prior notice replaces any prior notice required by domestic law in respect of any security agreement. It does not apply where a leasing agreement or a title retention agreement is involved.

We note the definition of "debtor" quoted above and that of "interested persons" as follows:

"interested persons" means:
(i) the debtor;
(ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

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(iii) any other person having rights in or over the object;[36]

A chargee or secured creditor would therefore be required to provide such a prior notice to a guarantor, a provider of a standby letter of credit or of any other form of credit insurance.

6.8 Effects of realization.

The CTC contains provisions relating to the allocation of proceeds also called “collocation” among “interested parties”, the effects of realization, the vesting of ownership of an aircraft object in satisfaction of the underlying obligations and in respect of the effect of such ownership and satisfaction. We invite the reader to review Articles 9 and 10 of the Convention and the CTC Official Commentary[37].

As a final note, Article 15 of the Convention reads as follows:

In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.

The provisions which cannot be waived essentially relate to the reasonableness of the recourses, the collection and application of proceeds of realization (8(3) to 8(6)), consideration already paid by the debtor (9(3)), the possibility of curing defaults afforded to interested parties (9(4)), certain reliefs pending final determination (13(2)) and procedural matters.

Except for the above, the parties to any agreement may vary the remedies as may be agreed among them.

7. PRELIMINARY RELIEF (CONSERVATORY MEASURES)

Both Article 13 of the Convention and Article X of the Protocol address the interim measures or relief available through the courts (to ground, protect, preserve, immobilize, etc. the aircraft object) pending a final determination of certain issues.

Article 14 of the Convention reconfirms that: “…procedure will be as prescribed by the law of the place where the remedy is to be exercised”.

8. REMEDIES ON INSOLVENCY

One of the important changes brought about by the CTC in certain Contracting States that ratified the CTC is the changes to the bankruptcy and insolvency provisions of statutes of such Contracting States.

The CTC and the Protocol in particular recognize that speedy recovery is crucial to creditors given the intrinsic high value of aircraft objects and the need for their continued maintenance. We will only briefly discuss these changes to bankruptcy legislations of Contracting States given that Canada had enacted essentially the same provisions in its Canadian insolvency statutes some years ago. In a nutshell, at the end of the “waiting period” as defined in Article XI of the Protocol (and which Canada declared to be 60 days in its Declarations deposited with its Instrument of Ratification) the debtor or “insolvency administrator” must give possession of the aircraft object to the creditor, unless the insolvency administrator or the debtor, as the case may be, has cured all defaults other than bankruptcy and insolvency events and has agreed to perform all future obligations provided under the agreement between the debtor with the creditor. These remedies on insolvency provisions apply in respect of all security agreements, title reservation agreements and leasing agreements subject to

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the CTC.

In addition, these remedies on insolvency provisions recognize the continued priority of registered interests in such proceedings except of course for the priority afforded to nonconsensual rights or interests declared by a State to continue to apply pursuant to Article 39(1) of the Convention, as Canada did.

Article 30(2) provides:

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.

This provision means that the applicable law will continue to determine if an unregistered international interest is effective in insolvency proceedings.[38] Courts in common law PPSA jurisdictions in Canada have given priority to a trustee in bankruptcy over unregistered security interest, whereas Québec courts have given priority to the unregistered right in the same context.[39]

Article 30(3) of the Convention also maintains the insolvency rules of the applicable law relating to "…avoidance of a transaction as a preference or a transfer in fraud of creditors, as well as rules to enforce rights to property available to an insolvency administrator".

9. THE INTERNATIONAL REGISTRY

9.1 Types of registrations.

The CTC permits many types or registration at Section 16 of the Convention as follows:

Article 16 — The International Registry

1. An International Registry shall be established for registrations of

(a) international interests, prospective international interests and registrable non-consensual rights and interests;
(b) assignments and prospective assignments of international interests;
(c) acquisitions of international interests by legal or contractual subrogations under the applicable law;
(d) notices of national interests; and
(e) subordinations of interests referred to in any of the preceding subparagraphs.

2. Different international registries may be established for different categories of object and associated rights.

3. For the purposes of this Chapter and Chapter V, the term "registration" includes, where appropriate, an amendment, extension or discharge of a registration.

The IR is a web site operated by Aviareto Limited and located in Dublin, Ireland.

We will discuss only two types of registrations, in addition to the absence of "national interests" in Canada discussed earlier. They are "prospective international interests" and "international interests".

9.1.1 prospective international interest;

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The definition thereof in the Convention provides:

“prospective international interest” means an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor’s acquisition of an interest in the object), whether or not the occurrence of the event is certain;[40]

This definition is completed by the definition of “prospective sale” as follows:

“prospective sale” means a sale which is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;[41]

These definitions do not mean that the aircraft object may not be determined at the time of the registration of a prospective international interest. On the contrary, the definitions of “object” and “aircraft objects” make it clear that the description must comply with the requirements of the CTC in respect of the description of aircraft objects highlighted above. Parties contemplating the grant of an international interest in the future is not enough. There must be real negotiations relating to a uniquely identified object with an intent to create an international interest in such object upon the occurrence of such event[42].

While registrations in advance of the execution of an agreement are common under UCC/PPSA type registrations in commercial transactions, this is new law in the province of Québec. If the prospective international interests becomes an international interest, no second registration is required and the priority of registration rule of the IR will apply.

9.1.2 international interest;

We already discussed international interest earlier and would simply add here that again the following priority of registration rule will apply.

9.2 Priority of registration rule.

Section 29 of the Convention adopts the rule that the first to register a registered interest has priority. However, given certain exceptions, it is best to quote Article 29 at length:

Article 29 — Priority of competing interests

1. A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

2. The priority of the first-mentioned interest under the preceding paragraph applies:
(a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and
(b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

3. The buyer of an object acquires its interest in it:
(a) subject to an interest registered at the time of its acquisition of that interest; and
(b) free from an unregistered interest even if it has actual knowledge of such an interest.

4. The conditional buyer or lessee acquires its interest in or right over that object:
(a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and

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(b) free from an interest not so registered at that time even if it has actual knowledge of that interest.

5. The priority of competing interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

The CTC provides a number of rules relating to the priority of competing rights and the reader should review Article 29 and following of the Convention as completed by the Protocol in respect of sale agreements. The Official Commentary reviews the priority rules and has done a thorough analysis of these rules and absent court precedents at this time, we defer to its analysis[43]. We note however that these rules apply in respect of the various possible registrations described in Article 16 of the Convention quoted above.

9.3 Registration requirements.

We have already discussed how aircraft objects need to be described. The IR rules and regulations make clear that no other information in respect of the aircraft objects involved may or can be added. For instance, landing gears, propellers, avionics and auxiliary power units cannot be included in the description in the forms to be used for IR registration purposes.

9.4 User Entity, its Administrator and the named Professional User Entity.

The regulation, procedural requirements and guide to effect registrations at the IR require the user to become a “user entity”. The user entity names an “administrator” and the user entity may also name a “professional user entity”. It is also to be noted that the other party must also become a user and to consent to the registration. For a full analysis of the inner workings of the IR the reader should consult the International Registry User Manual (**“User Manual”**)[44] and the Regulations and Procedures for the International Registry (**“ICAO Regulation”**)[45].

Note that pursuant to Article 18(5) of the Convention a State may designate an entity or entities in its territory as the entry point

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