

THE CAPE TOWN TREATY AND INTERNATIONAL REGISTRY OUTLINE AND SUGGESTED BEST PRACTICES CHECKLIST

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THE CAPE TOWN TREATY AND INTERNATIONAL REGISTRY OUTLINE AND SUGGESTED BEST PRACTICES CHECKLIST

(This outline is general nature and designed to assist the reader with identifying legal and practical issues associated with the Cape Town Convention and International Registry, and to provide a reference to additional resources and/or potential solutions for consideration by the reader. This outline is not a comprehensive analysis of the Cape Town Treaty, and you should engage legal counsel to address the issues noted herein.)

I. RESOURCES

A. Websites

1. Aviation Working Group (www.AWG.aero)
2. Unidroit (www.UNIDROIT.org)
3. International Civil Aviation Organization (www2.icao.int)
4. International Registry (www.internationalregistry.aero)
5. Federal Aviation Administration Aircraft Registry
(www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry)

B. Selected Legal Text

1. Convention on International Interests in Mobile Equipment (Cape Town, 2001) (“**Convention**”) (www.UNIDROIT.org)
2. Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town, 2001) (“**Protocol**”) (www.UNIDROIT.org)
3. Consolidated Text (www.UNIDROIT.org)
4. Declarations submitted by Contracting States (www.UNIDROIT.org)
5. Declarations Memorandum (www.UNIDROIT.org)
6. List of Contracting States (www.UNIDROIT.org and www.internationalregistry.aero)
7. Registry Regulations and Procedures (www.internationalregistry.aero)
8. Registry User Manual (www.internationalregistry.aero)
9. Registry Quick Guide to User Application and Approval
(www.internationalregistry.aero)
10. Registry Quick Guide to Asset Registration and Consent
(www.internationalregistry.aero)
11. Registry Quick Guide to Searching (www.internationalregistry.aero)

C. Papers and Commentary

1. Cape Town Convention and Aircraft Protocol Official Commentary – Revised Edition (2008) by Professor Sir Roy Goode C.B.E., Q.C. (the “OC”)(www.UNIDROIT.org)
2. Contract Practices under the Cape Town Convention (www.AWG.aero)
3. Advanced Contract and Opinion Practices under the Cape Town Convention (www.AWG.aero)
4. Practitioners Handbook (www.AWG.aero)

II. SELECTED TERMS USED IN THIS OUTLINE

- A. Authorizing Entry Point is referred to as “**AEP**”.
- B. Direct Entry Point is referred to as “**DEP**”.
- C. Registry Users: means a transacting user or a professional user.
- D. Transacting User Entity (“**TUE**”) or a Transacting User: means a legal entity, natural person or more than one of the foregoing intended to be a named party in one or more registrations.
- E. Transacting User (“**TU**”): means an individual employee, member or partner of a TUE or an affiliate of that entity.
- F. Administrator: means the individual with authority to act on behalf of a registry user on administrative matters in dealings with the **IR**.
 1. The Administrator manages the **IR** account for the Registry User and has the power to register interests on the **IR** for the Registry User or delegate the authority to register interests to a Professional User.
 2. This Administrator does not have to be an employee of the Registry User.
- G. Professional User Entity (“**PUE**”): means a firm or other grouping of persons providing professional services to TUEs in connection with the registration of interests.
 1. Professional User (“**PU**”) is an individual who is an individual employee, member or partner of a PUE. The PUE and/or PU are designated by the Administrator and authorized to make registrations on specifically identified equipment on behalf of the TUE.
- H. The International Registry is referred to herein as the “**IR**”.
- I. The Convention and Protocol are referred to collectively as the “**Treaty**”.

III. RATIFICATIONS

- A. Contracting States. As of September 7, 2011 the following 49 countries and regional economic organizations have ratified the Protocol: Afghanistan, Albania, Angola, Bangladesh, Belarus (effective 01 October 2011)¹, Cameroon (effective 01 August 2011), Cape Verde, China, Colombia, Costa Rica (effective 01 December 2011), Cuba, Ethiopia, European Community, Fiji (effective 01 January 2012), Gabon, India, Indonesia, Ireland, Jordan, Kazakhstan, Kenya, Latvia, Luxembourg, Malaysia, Malta, Mexico, Mongolia, New Zealand, Nigeria, Norway, Oman, Pakistan, Panama, Russian Federation (effective 01 September 2011), Rwanda, Saudi Arabia, Senegal, Seychelles, Singapore, South Africa, Syrian Arab Republic, The Kingdom of the Netherlands (Netherlands Antilles and Aruba)², Tajikistan (effective 01 September 2011), Togo, Turkey (effective 01 December 2011), United Republic of Tanzania, United States of America, United Arab Emirates, and Zimbabwe.
- B. Cayman Islands. Although the Cayman Islands is not currently a Contracting State, it has adopted internal laws that impose on the Cayman Islands the various obligations that it would have if it were a party to the Treaty.
- C. Entry Points. A Contracting State may designate entry points for purposes of the Treaty.
1. An Authorizing Entry Point (“**AEP**”) is one which authorizes the transmission of information to the International Registry required to make a registration.
 - a. the relevant TUE initiates and consents to the registrations using a unique authorization code.
 - b. The United States, Mexico, Albania and China are AEPs.
 2. A Direct Entry Point (“**DEP**”) is one through which information required to make a registration on the IR must be submitted, and the DEP transmits the information directly to the International Registry.
 - a. The relevant TUE would consent to the registrations.
 - b. To date only the United Arab Emirates is a DEP.

¹ The Depository, the International Institute for the Unification of Private Law, has advised the International Registry that it has accepted the deposit of the Instrument of Accession of the Republic of Belarus only to the extent that the instrument relates to the Cape Town Convention, and that it has not accepted the deposit of the Instrument of Accession of the Republic of Belarus to the extent that the instrument relates to the Aircraft Protocol. Article 54(2) of the Cape Town Convention requires that a Contracting State, at the time of its accession to a Protocol, must make the declaration specified in that Article. The Republic of Belarus did not make a declaration under Article 54(2) at the time of the deposit of its Instrument of Accession. Unidroit was therefore not able to accept the deposit of the Instrument of Accession to the extent that the instrument relates to the Aircraft Protocol.”

² Pursuant to Article 52, paragraph 1, of the Convention and Article XXIX of the Protocol, the Kingdom of the Netherlands declares that the Convention and the Protocol are to apply to the following territorial units: the Netherlands Antilles and Aruba. Please consult UNIDROIT website (www.unidroit.org) and your legal advisors or both if you query relates to any of the following territories: the Kingdom of the Netherlands, the Netherlands Antilles, Aruba, Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba), European part of the Netherlands, Curaçao and Sint Maarten.

3. The requirements are listed in the Regulations and Procedures for the International Registry for each entry point type, and each entry point has its own regulations on how the process works.
4. The DEP and AEP requirements are only applicable to airframes and helicopters (not aircraft engines) for which the DEP or AEP is the State of Registry or in certain instances where they have taken regulatory steps to become the State of Registry.
5. Pursuant to Section 12.7 of the Regulations registrations that don't comply with the relevant AEP and DEP requirements are invalid.

D. DEP requirements for the United Arab Emirates.

1. Ince Al Jallaf & Co (IAJ) is designated by the United Arab Emirates as its DEP. IAJ's contact details are as follows:

Ince Al Jallaf & Co
Gulf Towers, B-2, Suite no 503
P.O. Box 15952
Dubai. UAE
Telephone: +971 4 3366260
Fax: +971 4 3366274
Administrator's Name: Amna Al Jallaff, Partner
Email: amna.aljallaf@incelaw.com
User's Name: Francois Touchette, Solicitor
Email: francois.touchette@incelaw.com
General Email: international.registry@incelaw.com

2. Registrations against aircraft engines may be, but are not required to be, submitted through IAJ.
3. Each entity must establish an account as a TUE through the normal process.
4. The TUE then enters into a Services Agreement with IAJ. The Services Agreement will set out, in part, the information and documentation that the approved TUE is required to submit to IAJ.
5. IAJ then transmits the registration information to the International Registry.
6. Upon receipt of the registration information transmitted by IAJ, the International Registry makes the registration available for consent by the relevant TUEs.
7. Each TUE must consent to the relevant registration before they take effect and become searchable on the International Registry.
8. The DEP requirements do not apply to notices of national interests, or registerable non-consensual rights or interests, arising under the laws of another Contracting State.
9. The DEP requirements do not apply to or restrict searches on the International Registry.

E. AEP Requirements for the United States (49 USC §44107).

1. The US Federal Aviation Administration Aircraft Registry (“**FAA Registry**”) is designated as the US AEP.
2. Recording documents with the FAA as the Authorizing Entry Point is required for:
 - a. U.S. registered airframes and helicopters: and
 - b. airframes and helicopters for which a United States Registration number has been assigned but not currently a civil aircraft of the United States.
3. The underlying documents must be filed for recordation with FAA to establish validity of the registration on the International Registry under US Law.
4. The underlying documents must be filed with the FAA within sixty-days for prospective interest registrations to remain valid under US law.
5. The AC Form 8050-135 is a form filed with the documents and used to obtain the Unique Authorization Code necessary to comply with the US Authorizing Entry Point Requirements. 14 CFR §§ 49.61 & 49.63.
6. The Unique Authorization Code is entered as part of the registration information on the International Registry.
7. Failure to comply with US entry point requirements and regulations invalidates the non-complying registrations. 49 USC §44107(e)(3); Section 12.6 of the Regulations and Procedures of the International Registry.
8. AC Form 8050-135 FAA ENTRY POINT FILING FORM INTERNATIONAL REGISTRY.
 - a. The AC Form 8050-135 may be downloaded at <http://www.faa.gov/library/forms/> and:
 - i. must relate to an airframe on FAA approved list;
 - ii. contain the complete name, address and telephone number of at least one of the parties to the document being filed;
 - iii. include a complete description of any airframe or helicopter (make, model, serial number, and N#, if applicable);
 - iv. designate at least one type of interest; and
 - v. show name, address, and telephone number of the submitter.

F. Declarations. Contracting States may adopt the Treaty with a series of Declarations that affect how the Treaty will be implemented and whether certain rights and remedies under the Treaty will be recognized in that Contracting State. Parties should review and understand any Contracting State Declarations when drafting documents and enforcing rights and remedies.

1. The Treaty provides for Opt-in declarations, Opt-out declarations, Declarations relating to a Contracting State’s own laws, and Mandatory declarations.

2. The Declarations Memorandum (www.UNIDROIT.org) provided by Unidroit provides a detailed description of the possible Declarations under the Treaty and also contains a list of Declarations from each Contracting States.

3. United States Declarations:

- a. FAA Entry Point. (Protocol Article XIX);
- b. Non-Consensual rights or interests having priority without registration. (Convention Article 39);
- c. Detention Rights. (Convention Article 39);
- d. Insolvency Assistance Declaration. (Protocol Article XII);
- e. Choice of Law. (Protocol Article VIII);
- f. De-registration and Export Request Authorization. (Protocol Article XIII); and
- g. Remedies without leave of the Court. (Convention Article 54).

IV. TREATY OVERVIEW

A. What is the Cape Town Treaty?

1. International treaty governing the creation of defined interests in covered aircraft, helicopters and engines, as well as the perfection, priorities and remedies of the interest.
2. US LAW STARTING March 1, 2006 and certain other contracting states.
3. The Treaty establishes the International Registry as the place to register/perfect/establish these interests.

B. Treaty Basics

1. Supervisory Authority
 - a. Supervisory Authority - International Civil Aviation Authority (“ICAO”).
2. Registrar
 - a. Aviareto – Ireland
3. International Registry
 - a. Electronic registry-Ireland.
 - b. Open 24 hours a day, 7 days a week.
4. Contracting States may require registration through a Designated Entry Point for covered Airframes and Helicopters registered on their nationality register
 - a. FAA Aircraft Registry for US.
5. Contracting States may vary application of the Treaty by Declarations.

C. Why should you care about the Treaty?

1. The Treaty preempts or modify laws of Contracting States regarding:

- a. how to create and perfect/establish interests in covered airframes, engines and helicopters; and
 - b. certain priorities and remedies associated with the interests.
2. The Treaty establishes priority based on first to file regardless of actual notice.
 - a. this is a change from current US law.

D. Why should you care about the Treaty?

1. Priorities apply to sales and security/leasehold interests.
2. The Treaty provides for the perfection of sales for covered engines.
3. If the Treaty applies to your transaction and you register first on the International Registry – You are probably protected.
4. If the Treaty applies to your transaction and you don't register with the International Registry – you probably lose in a dispute.

E. When does the Treaty apply?

1. Test 1-Sphere of Application:
 - a. Where the “debtor” is situated in a contracting state at the time of the conclusion of the agreement creating the international interest; or
 - b. Where the airframe or helicopter is registered in a contracting state OR subject to an agreement to register in a Contracting State.
 - c. “Debtor” is defined as the:
 - i. Seller under a contract of sale;
 - ii. Chargor under a security agreement;
 - iii. Conditional Buyer under a Title Reservation Agreement; or
 - iv. Lessee under a Leasing Agreement.
2. Test 2-Aircraft Objects (not used in military, customs or police service) type certificated for:
 - a. Airframes – 8 (persons) including crew or to carry goods in excess of 2,750 kilograms;
 - b. Helicopters – 5 (persons) including crew or to carry goods in excess of 450 kilograms; or
 - c. Engines – at least 1,750 lbs thrust or at least 550 rated takeoff shaft horsepower.
3. Where is the Debtor Situated?
 - a. Article 4 provides a Debtor is Situated in the Contacting State:
 - i. under the law of which it is incorporated or formed;
 - ii. where it has its registered office or statutory seat;
 - iii. where it has its centre of administration; **or**

- iv. where it has its place of business.
 - b. Article 4.2 further provides a reference 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.
 - c. OC Section 4.57 indicates the intent of Article 4 is to “give maximum scope to the application of the Convention”.
- F. Common documents creating interests covered by Treaty:
- 1. Security Agreement;
 - 2. Title Reservation Agreement;
 - 3. Lease;
 - 4. Contract of Sale; and
 - 5. Other – Subordination, Subrogation, Assignment, Amendments, Discharges.
- G. Basic Requirements for creating an International Interest or Sale (Convention Article 7 and Protocol Article V)
- 1. The “agreement” or “contract of sale” must be:
 - a. in writing; and
 - b. relate to an aircraft object of which the Chargor/Conditional Seller/lessor/Seller has the “power to dispose”;
 - c. enable the aircraft object to be identified in conformity with the Protocol; and
 - d. in the case of a Security Agreement, enables the secured obligations to be determined without a need to state a sum or maximum.
 - 2. The Treaty provides for *sui generis* creation of International Interests, Assignments and Sales, which for the most part are not dependent on or derived from local law. There in fact can be an International Interest, Sale or Assignment even though a security interest, Sale or Assignment is not created or valid under local law. OC Sections 5.31 & 4.69.
- H. Power to Dispose
- 1. What is “power to dispose”?
 - i. It is a formal requirement under Convention Article 7 and Protocol Article V for purposes of creating an International Interest or a Sale.
 - 2. Unfortunately, power to dispose is not defined in the Treaty.
 - 3. How does the Official Commentary define power to dispose?
 - a. Power to dispose is not synonymous with the right to dispose. OC Section 2.42.
 - b. Power to dispose may arise under the applicable law or under the Treaty itself. OC Section 2.42 and 4.72.

- c. Power to dispose is broader than the “right to dispose” and may include all situations where the Creditor has the apparent authority to dispose of the object. OC Section 4.71.
 - d. It can include instances the disposition overrides the owner’s title or subordinates the owner's title. OC Section 4.71.
 - e. The Conditional Buyer or Lessee has a power to dispose. OC Section 4.72.
 - f. The Conditional Seller or Lessor does not have to be the owner of the object, they can themselves be a Lessee. OC Section 4.72.
 - g. A disposition can be a sale, a security interest, a lease, etc. OC Section 4.72.
 - h. A power to dispose can be created by the Treaty’s registration or priority rules. OC Section 2.42.
- I. Basic Remedies – Chargee (Convention Article 8)
- 1. In the event of default and to the extent that the Chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State:
 - a. take possession or control of any object charged to it;
 - b. sell or grant a lease of any such object;
 - c. collect or receive any income or profits arising from the management or use of any such object; or
 - d. apply for a court order authorizing these remedies.
 - 2. Any other remedies under applicable law.
- J. Basic Remedies – Conditional Seller or Lessor (Convention Article 10)
- 1. In the event of default under a title reservation agreement or under a leasing agreement as provided in the Conditional Seller or the Lessor may:
 - a. subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or
 - b. apply for a court order authorizing or directing either of these acts.
 - 2. Any other remedies under applicable law.
- K. Relief pending final determination (Convention Article 13)
- 1. Subject to a declaration made by a Contracting State, a Creditor who adduces evidence of default by the Debtor may, pending final determination of its claim and to the extent that the Debtor has at any time so agreed, obtain from a court speedy relief in the form of:
 - a. preservation of the object and its value;
 - b. possession, control or custody of the object;
 - c. immobilization of the object;

- d. lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom; and
- e. if at any time the Debtor and the Creditor specifically agree, sale and application of proceeds therefrom.

L. Basic remedies of an Assignee (Convention Article 34)

- 1. In the event of a default by the assignor under a collateral assignment of associated rights and the related international interest, the Convention remedies apply to associated rights as if they were aircraft objects.
 - a. Insofar as the provisions are capable of application to intangible property.

M. Additional Remedies (Protocol Article IX)

- 1. To the extent that the Debtor has at any time agreed:
 - a. procure the de-registration of the aircraft; and
 - b. procure the export and physical transfer of the aircraft object from the territory in which it is situated.
- 2. This remedy may be enforced by the holder of a De-registration and export request authorization.

N. Disputes with the Registrar/IR

- 1. Courts of the place where the Registrar has its center of administration (Ireland) have exclusive authority to award damages or make orders against Registrar.
- 2. Disputes would be first addressed by local courts having jurisdiction over the matter.
 - a. Exception-person has ceased to exist or cannot be found for the purpose of obtaining an order.
- 3. If the person fails to comply with the order of the local courts, the local court may direct the courts where the Registrar is located (Ireland) to take such steps as will give effect to the order.
 - a. If in agreement, the local courts of the Registrar (Ireland) would then direct the Registrar.

O. U.S. Requirements for Irrevocable Deregistration and Export Request Authorizations (“IDERA”)

- 1. Must be substantially in the form attached to Protocol.
- 2. Must be “linked” to a security document recorded or filed for recordation with the FAA.
- 3. FAA will accept multiple IDERAs, but will only act on first in time filed with the FAA unless prior IDERAs have been released.
 - a. make sure prior IDERA’s have been released.
- 4. Creditor’s should require IDERA’s to protect their interests.
- 5. Export – holder of an IDERA (filed first of record with the FAA) must:

- a. include a certification under 14 C.F.R. §47.47(a)(3); and
 - b. include an International Registry Search Certificate – and evidence of discharges or consents where necessary.
6. If an IDERA is of record, FAA will not cancel based on request of registered owner.
 7. If no IDERA is of record with the FAA, FAA will require releases or consents from all lien holders of record with the FAA (in compliance with the Convention on the International Recognition of Rights in Aircraft).
 8. IDERA and certification must be originally executed in ink and otherwise meet the FAA signature requirements.

V. GENERAL DOCUMENTATION CHANGES/ADDITIONS

A. Include defined terms in documents

1. Define the Convention, Protocol, etc, in the documents.
2. When applicable, include and use terms defined in the Treaty such as International Interest, Contract of Sale, Sale, Prospective International Interest, Prospective Sale, Associated Rights, etc.

B. General closing procedure changes to be agreed to and addressed in the documents

1. Transacting User Entities (“**TUE**”)
 - a. Determine which parties in a transaction should be established as a TUE and require the same in the documents.
 - b. Require the TUE be established in the exact legal name of the entity.
 - c. Determine if the entity could be considered a Special Purpose Entity (the “**SPE**”) of an existing TUE or if it was already established as a TUE, and if so require appropriate representations. The parties may want to consider the consequence if the SPE fails to meet the test in the future.
 - d. Require TUE’s be established prior to the day of closing (the sooner the better).
 - e. Determine if the TUE will be established by the party itself, or by a third party administrator. If a third party Administrator is used.
 - i. Confirm there is a sufficient agreement in place for the Administrator to act on behalf of the TUE; and
 - ii. Require the Administrator be an entity acceptable to the other parties in the transaction.
 - f. Require the TUE establish the entity for a sufficient duration, and to maintain the entity as active with the International Registry.
2. Prospective Interests
 - a. Determine if the parties will utilize prospective registrations. As a practical matter, prospective registrations may avoid delays for the closings, or possible delays in registering interests post closing (which are common).

- b. Prohibit future registrations (prospective or otherwise) involving third parties.
 - c. Evidence prospective registrations by a written agreement?
 - d. Unwind Agreements. If prospective registrations are allowed the parties should consider entering into an agreement with a PUE to discharge the registrations if the transaction does not close within a set time frame. All parties would need to designate the same PUE to make the registrations at closing.
 - e. Consider including indemnification requirements from the parties if unauthorized registrations are made or allowed to be made by a party.
 - f. United States related issues with prospective registrations.
 - i. For airframes and helicopters, the United States continues to require filing of documents with the FAA Aircraft Registry within 60 days of the prospective registration; and
 - ii. Submit AC Form 8050-135 in order to obtain Unique Authorization Codes to comply with the United States designated entry point requirements.
3. Documents should address who will pay for the additional International Registry fees and costs incurred by:
- a. Establishing TUEs; and
 - b. Searches and Registrations (could be substantial).
- C. Describing Aircraft Objects. Parties should determine how they will describe the aircraft objects in the documents.
- 1. IR Manufacturer's List descriptions should be referenced if available – may not be complete or consistent with the true make or model designations. If the equipment is not listed in the IR Manufacturer's List, consider:
 - a. Type Certificate Data sheet descriptions;
 - b. Manufacturer's serial plate descriptions; and
 - c. Descriptions used by the Nationality Registry.
 - 2. Require confirmations in the documents the descriptions are accurate.
- D. Basic requirements under the Treaty for creating an International Interest or Sale
- 1. Types of contracts that create interests or otherwise affect interests covered by the Treaty.
 - a. Agreement as defined in the Treaty to include:
 - i. Security Agreement;
 - ii. Title Reservation Agreement; and
 - iii. Leasing Agreement;
 - b. Contract of Sale / Sale;
 - c. Assignments;

- d. Subordinations; and
 - e. Subrogation.
2. The Treaty requirements for these types of agreements may or may not meet local law requirements. Convention Article 7 and Comment 3 of the Official Commentary to Article 7.
 3. The Treaty requires that Agreements and Contracts of Sale must be;
 - a. In writing (i.e. “record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a persons approval of the record” Protocol, Article 1(nn));
 - b. Relate to an Aircraft Object of which the Chargor, Conditional Seller, Seller, or Lessor has the “power to dispose”;
 - c. Enable the Aircraft Object to be identified in conformity with the Protocol (parties should consider including both the International Registry drop down menu descriptions and the technically accurate descriptions); and
 - d. In the case of a security agreement, enable the secured obligations to be determined, but without the need to state a sum or maximum secured.
 4. Assignments must be:
 - a. In writing;
 - b. Enable the Associated Rights assigned to be identified under the contract from which they arise (The assignment should identify the contract and associated rights being assigned);
 - c. In the case of an assignment by way of security, enable the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum secured;
 - d. Assign part or all of the underlying International Interest and Associated Rights; and
 - e. To bind the Debtor, the Debtor must:
 - i. Be given notice of the assignment in writing by or with the authority of the assignor and the notice must identify the associated rights assigned; and
 - ii. Debtor must consent in writing.

E. Miscellaneous Provisions.

1. Choice of Law Provisions. If a contracting state has made the relevant Declaration, Article VIII of the Protocol confirms a choice of law clause is binding and parties should consider including this in their documentation.
2. Choice of Forum. For purposes of the Treaty and as further noted therein, Convention Article 42 confirms a choice of forum is binding regardless of connection with the parties or the transaction. Parties should confirm if the choice is exclusive and it should be in writing.

3. Sphere of Application.
 - a. Require Debtors specifically acknowledge where they are situated for purposes of Article 4 of the Convention and to confirm if they do (or do not) meet the centre of administration or place of business tests.
 - b. Consider requiring Parties acknowledge where the airframe or helicopter is registered for nationality purposes and whether or not there is an agreement in place that contemplates registering the airframe or helicopter in a Contracting State in the future.
 - c. If there is an agreement to register an airframe or helicopter in a contracting state in the future the agreement should be in writing and acknowledge that it is intended to comply with Article IV of the Protocol.
4. Order of registrations and Subordinations. The parties should consider setting out the specific order of registrations in the documents to avoid confusion in the future.
5. Include a most favored nation's clause in connection with rights and remedies under the Treaty.
6. For transactions (or parts of transactions) that don't currently fall under the Treaty, consider adding further assurances clauses that will require registrations under the Treaty if the subsequent ratification of the Treaty by a Contracting State would bring the transaction (or parts of the transaction) under the Treaty.
7. Documents that create interests that can be registered should contain provisions specifically confirming the parties consent to the registrations on the International Registry in compliance with the Treaty.

VI. SPECIFIC ISSUES/CHANGES BY DOCUMENT TYPE

A. Security Agreement

1. Remedies.
 - a. Consider adding language that the Secured Party may employ all remedies available to a secured Creditor under the local law and those rights and remedies available to a Creditor under the Treaty.
 - b. The Treaty provides for the following remedies which the parties should consider adding or confirming are addressed in the documents:
 - i. if Debtor is in possession, custody or control of the Aircraft Object, to enter Debtor's or any other person's premises and take possession of such Aircraft Object;
 - ii. to require Debtor to assemble and make available such Aircraft Object at a location selected by chargee;
 - iii. to sell, lease or otherwise dispose or cause the Debtor to sell, lease or otherwise dispose of the Aircraft Object;
 - iv. collect or receive any income, rents or profits arising from the management or use of the Aircraft Object;

- v. procure the deregistration of the registration of the Aircraft and export of the Aircraft to a jurisdiction of chargee's choice pursuant to the IDERA and as authorized by the Treaty; and
 - vi. apply for a court order authorizing these remedies.
 - c. Upon Default Chargee may also, pending final determination of its claim in any court proceeding, obtain speedy relief in the form of an order providing for:
 - i. preservation of the object and its value;
 - ii. possession, control or custody of the object;
 - iii. immobilization of the object;
 - iv. lease or, except where covered by sub-paragraphs (i) to (iii), management of the object and the income therefrom; and
 - v. sale and application of proceeds therefrom (if the Contracting State has made the relevant Declaration under Article X of the Protocol).
- 2. Specify remedies and default provisions in detail, as well as what may be considered reasonable written notice as set out in Article 8 of the Convention and Article IX of the Protocol.
- 3. Consider adding language that the parties are granting and creating an International Interest in the collateral and assigning Associated Rights and the related International Interest under the relevant documents.
- 4. Provide for Irrevocable De-Registration and Export Request Authorization ("IDERA"), in the form required by the Protocol and that may be required by other Contracting States.
 - a. Parties often obtain an IDERA but their documents don't confirm they have the remedy under the Treaty to use it.
- 5. It may be possible to bring in certain rights to performance by the Debtor or a third party under third party contacts (such as maintenance contracts, etc.) within the meaning of Associated Rights under the Convention by including a statement/undertaking, that the Debtor undertakes to perform or procure the performance under these contracts (See Official Commentary Comment 4 to Article 31 of the Convention).
- 6. Include an agreement by the Debtor that the Creditor may assign associated rights and the related international interest, in whole or in part, at any time in the future without further consent by the Debtor.
- 7. If Treaty is applicable, require the Debtor's ownership interest be registered (after that of the International Interest in favor of Creditor if possible).
- 8. Upon default, specifically acknowledge that Creditor can require Debtor register a sale to a third party, or that Debtor's Administrator will be authorized and required to register a sale if instructed by the Creditor.

- a. It may be possible to enter into an agreement with a third party Administrator that they will register interests at the instruction of the Creditor in the event of a default.

B. Lease Agreement or Title Reservation Agreements

1. Confirm the type of agreement.
2. Specifically address the Lessee's presumed right of quiet possession as provided in Article XVI of the Protocol.
3. Include a statement the parties are creating an International Interests in the Aircraft and Engines in favor of the Lessor/Sublessor.

C. Assignment

1. Confirm the parties are assigning any international interests and associated rights created by the documents being assigned.
2. Address whether the assignment is a collateral assignment, and if the interest will re-vest in assignor. Specifically require the Assignor to maintain its status as a TUE and to register a discharge of the interests when the underlying obligation has been satisfied, or transfer the right to discharge the international interest originally in favor of the Assignor to the Assignee.
3. The US FAA does not currently recognize an assignment of an IDERA. Documents should require the Debtor execute a new IDERA if the Creditor assigns the interest and confirm the prior IDERA is terminated.

D. Purchase Agreements and Bills of Sale

1. Require bill of sale that includes airframe and engines by make, model and serial number.
2. If the Treaty is applicable, either require registration of the sale on the International Registry or obtain waivers and acknowledgements from buyer that Seller is not liable for failure to register.

VII. SPECIFIC ISSUES AND CONSIDERATIONS

A. Why register non-convention interests?

1. Registration of a non-convention interest is not prohibited by the Treaty or the International Registry. OC Section 2.99.
2. Registration may provide actual notice of the rights or interests.
3. Actual notice is meaningful in many jurisdictions.
 - a. Title 49 USC § 44108(a) confirms that under US law a person is subject to a conveyance, lease, or instrument executed for security purposes of which it has actual notice.
 - b. Even if actual notice is not a legal concept in a jurisdiction, as a practical matter almost everyone now searches the international registry and would require registered interests be accounted for before closing a transaction.

4. It is common for non-convention interests to be registered if any part of the transaction is subject to the Treaty.
 5. Reflect a complete chain of title of record for the airframe and engines.
 - a. If only part of the chain of title is registered, there may be buyers of record that have never actually registered a Sale to a future buyer.
- B. Do you need to review the documents underlying the registrations?
1. The registration of a discharge is no guarantee that the interest has in fact been discharged (although it would lose its convention priority). OC Section 2.8.
 2. A Sale registration may not be supported by an underlying Sale.
 3. Some registrations may have been prospective.
- C. US Imports
1. If a US Registration number has been assigned to the aircraft prior to its US registration, the US entry point requirements would apply to the registrations associated with the import.
 2. If the US Registration number has not been assigned prior to the import, the US Entry point requirements may not apply.
 - a. Although it may be preferable to comply with the US Entry point requirements to avoid any questions.
- D. US Exports
1. US Entry Point requirements would arguably apply so long as the Aircraft is assigned a US registration number.
 - a. When is the US Registration number no longer assigned?
 2. Consider filing the chain of title to the foreign purchaser with the FAA in order to obtain the UAC and to comply with Entry Point requirements;
 3. In regard to the foreign security or lease agreements:
 - a. They could be filed for recording with the FAA and registered on the International Registry, then the parties would simply consent to the cancellation rather than releasing the interests; or
 - b. Wait until the aircraft is cancelled from the US registry in order to register the interests on the International Registry in regard to the airframe; or
 - c. Register twice – once before the aircraft is cancelled from the US registry and once after cancellation.
 4. Consider leaving Security Agreements in place and the related international interests registered on export, and consent to cancellation of US registration from the lender.
 - a. The International Interest is not contingent on continued FAA registration.
 5. Check with local counsel to confirm when their exclusive entry point requirements apply.

- a. The requirements may apply only once the aircraft is registered on the foreign registry.

E. Issues with Leases

1. Article 1(q) “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.
 - a. What constitutes rental or other payment?
2. OC Section 4.23 confirms a lease under the Treaty may not be a lease under local law, and possession may be “wide enough to cover what would in some jurisdictions be regarded as mere detention.”
3. Wet leases are not covered by the Treaty. OC Section 4.23.
4. A Lessee has the power to dispose of an aircraft object, and the OC provides the only way a Lessor protects against the power to dispose is to register the lease.
 - a. B buys an aircraft object and registers the Sale on the International Registry, and subsequently leases the object to L but does not register the lease. L has the power to dispose of the aircraft from B, and B’s Sale registration in its favor does not protect B from L selling the aircraft to a third party. OC Section 3.57 and Section 3.58.

F. Helicopter Engines

1. Article 1 definitions:
 - a. “aircraft” means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters;
 - b. “aircraft engines” means aircraft engines ... powered by jet propulsion or turbine or piston technology and ...”;
 - c. “airframes” means airframes ... together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines) ...”; and
 - d. “helicopters” means ...together with all installed, incorporated or attached accessories, parts and equipment (including rotors) ...”.
2. Official Commentary sections relating to Helicopter Engines:
 - a. OC Section 2.21. A helicopter engine is an aircraft engine and covered by the Treaty only when not attached to the helicopter; and
 - b. OC Section 3.10. The registration of an International Interest or Sale while the helicopter engine is installed on the helicopter would have no legal effect because it is not an aircraft engine at that time. But the registration of a prospective Sale or International Interest would be effective once the helicopter engine is removed from the helicopter. But it would be subject to a prior registered interest against the helicopter? See OC 3.310.
3. The better interpretation is that a helicopter engine is simply an aircraft engine:

- a. “aircraft” includes both airframes and helicopters, so “aircraft engines” would obviously include engines for both airframes and helicopters;
 - b. the definition of helicopters would have specifically included engines, like it did rotors, if it were intended to include helicopter engines as part of the helicopter; and
 - c. Considering helicopter engines as aircraft engines only while not installed on the helicopter is against the underlying principle of Article 5(1) promoting uniformity and predictability.
4. Possible solutions:
- a. Register against the helicopter;
 - b. Register a current (just in case the OC is wrong) and a prospective International Interest or Sale against the engine at the time of the closing;
 - i. Include in your agreement that the prospective interest ripens into an International Interest when the engine is removed from the helicopter; and
 - ii. This could create future sales and use tax issues, as well as document enforceability issues;
 - c. Confirm on what helicopters the engine has been installed and search those helicopters for prior registrations; and
 - d. Amend the Treaty.

G. Subordinations

1. Often used to subordinate the priority created by previously registered interests.
2. Used to subordinate the priority given to a Conditional Buyer or Lessee under Article 29(4) over an Unregistered Interest.
3. May be used to subordinate an International Interest to a Non-Convention Interest.
 - a. For instance, a lease may fall under the Treaty based on the location of the Lessee, but the Security Agreement does not. The rights of the Lessor and Lessee would need to be subordinated to the Non-Convention Interests of the Lender. OC Section 2.111.
4. Advisable to have a writing evidencing the subordination.

H. When do Amendments require a new registration?

1. Examples given in OC Section 2.32 to amendments that create a new interest are:
 - a. Amendments that change an leasing agreement into a Security Agreement;
 - b. Amendments that add an aircraft object, increase a fractional interest in an aircraft object, add a new grantee or a grantor, or to extend a security interest to an obligation not previously secured; and
 - c. Amendments that extend or renew a lease.

2. Following are examples in OC Section 2.32 of amendments that do not create a new interest:
 - a. amendment to reflect a name change;
 - b. amendment to reflect a change of mode or time of payment; and
 - c. amendment as to repair or insurance provisions.
3. Official Commentary Section 4.74 Illustration 3: “A security agreement states that it secures ‘all obligations owned by D to C under all contracts, now or in the future.’ This satisfies Article 7(1)(d) since the definition of ‘security agreement’ expressly contemplates that it may secure future obligations and the obligations can be determined in that all obligations are covered by the security.”
4. The definition of Security Agreement in Article 1(ii) acknowledges it may secure future obligations .

I. How to address Assignments or Novations.

1. Novations in theory create a new International Interest.
 - a. Require the registration of a new International Interest between new parties.
 - b. Discharge of the original International Interest?
 - c. What if you are wrong and it’s actually an assignment and assumption?
 - d. Consider a precautionary registration of an Assignment of the old interest?
2. An Assignment and Assumption does not create a new International Interest.
 - a. Register an Assignment from assignor to assignee;
 - b. The Treaty only deals with Assignments of rights held by a Creditor;
 - c. Register a new International Interest between the assignor and assignee as a precautionary matter.
3. An Assignment of a Debtor’s interest can be mechanically registered, but does not fall under the Treaty.
 - a. Is an Assignment of a Debtor’s interest a novation?

J. Can pre-existing interests or un-registered interests be assigned?

1. An Assignment of a Pre-Existing Interest does not bring it under the Treaty. OC Section 2.126.
2. You can assign an unregistered International Interest, but it:
 - a. Only protects the assignee against subsequently registered and unregistered assignees who do not procure registration of the International Interest.
 - b. Does not protect against displacement by:
 - i. the holder of a subsequent International Interest who registers its International Interest first;
 - ii. the assignee of such holder; or

- iii. against Creditors in the Debtor's insolvency. OC Section 4.223 and OC Section 2.132.

K. What are Associated Rights?

1. Article 1 (c) "associated rights" means all:
 - a. rights to payment or other performance (Element 1);
 - b. by a Debtor (Element 2); and
 - c. under an agreement (Element 3).
2. Agreement is defined in Article 1(a) as a Security Agreement, title reservation agreement or leasing agreement:
 - a. which are secured by or associated with the object (Element 4); and
 - b. Associated Rights are secured by a Security Agreement or associated with a title reservation or leasing agreement. OC Section 4.9.
3. OC Examples of Associated Rights Element 1:
 - a. Rights to repayment of a loan or price under a title reservation agreement;
 - b. Rentals under a lease agreement;
 - c. Rights to other performance:
 - i. Insurance and repair of the object;
 - ii. Breakage cost;
 - iii. Indemnities; and
 - iv. Negative obligation.
4. What are Associated Rights by a Debtor (Element 2)?
 - a. OC Section 4.9 is confined to obligations of the Debtor itself under the Agreement including:
 - i. Undertakings in the agreement of the Debtor to perform other contracts with Creditor.
 - (A) Contracts are not defined and therefore not limited by definition in the same way agreements are limited.
 - ii. But OC Section 4.218 indicates rights to performance by a third party other than the Debtor under another contract may be obligations of the Debtor under the agreement if:
 - (A) The Debtor undertakes in the agreement to perform or procure the performance under that other contract; and
 - (B) The rights to such performance are secured by or associated with the object to which the agreement relates.
 - b. What other types of contracts would fall under this section?

L. What is an Assignment of Associated Rights?

1. Article 1 (b) “assignment” means a contract which, whether by way of security or otherwise, confers on the assignee Associated Rights with or without a transfer of the related International Interest.
2. The Treaty specifically addresses the Assignment of Associated Rights, not the Assignment of the underlying International Interest.
3. Only Assignments by contract are covered. OC Section 2.123.
4. Only a Creditor can hold and assign Associated Rights. OC Section 2.123.

M. Formal requirements of Assignment

1. An Assignment of Associated Rights transfers the related International Interest only if it:
 - a. is in writing;
 - b. enables the Associated Rights to be identified under the contract from which they arise; and
 - c. in the case of an Assignment by way of security, enables the obligations secured by the Assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured. Article 32(1).
2. An Assignment of an International Interest created or provided for by a Security Agreement is not valid unless some or all related Associated Rights also are assigned. Article 31(2).
3. An International Interest held by a Creditor under a lease or title reservation agreement can be assigned. OC Section 2.128.
4. This Convention does not apply to an Assignment of Associated Rights which is not effective to transfer the related International Interest. Article 32(3).
5. You can have a partial Assignment of Associated Rights. Article 31(2).

N. Effects of Assignment.

1. Except as otherwise agreed by the parties, an Assignment of Associated Rights also transfers to the assignee:
 - a. the related International Interest; and
 - b. all the interests and priorities of the assignor under this Convention. Article 31(1).
2. The Debtor may at any time by agreement in writing waive all or any of the defenses and rights of set-off as to the Assignee. Article 31(4).
3. 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. Article 31(5). The parties should register discharges from assignor in order to clear the record.

- O. Debtor's duty to assignee. The Debtor is bound by the Assignment and has a duty to make payment or give other performance to the assignee, if but only if:
1. the Debtor has been given notice of the Assignment in writing by or with the authority of the assignor; and
 2. the notice identifies the Associated Rights. Article 33(1).
- P. Default remedies in respect of Assignment by way of security.
1. Article 34 provides that in the event of default by the assignor under the Assignment of Associated Rights and the related International Interest made by way of security, Articles 8, 9 and 11 to 14 apply in the relations between the assignor and the assignee (and, in relation to Associated Rights, apply insofar as those provisions are capable of application to intangible property) as if references:
 - a. to the secured obligation and the security interest were references to the obligation secured by the Assignment of the Associated Rights and the related International Interest and the security interest created by that Assignment;
 - b. to the charge or Creditor and or Debtor were references to the assignee and assignor;
 - c. to the holder of the International Interest were references to the assignee; and
 - d. to the object were references to the assigned Associated Rights and the related International Interest.
 2. Examples of Article 34 Associated Rights Remedies applied to Article 8.
 - a. In the event of default as provided in Article 11, the assignee may, to the extent that the assignor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:
 - i. take possession or control of any assigned Associated Rights and the related International Interest charged to it;
 - ii. sell or grant a lease of any such assigned Associated Rights and the related International Interest ;
 - iii. collect or receive any income or profits arising from the management or use of any such assigned Associated Rights and the related International Interest.
 - b. The assignee may alternatively apply for a court order authorizing or directing any of the acts referred to in the preceding paragraph.
 3. Examples of Article 34 Associated Rights Remedies applied to Article 13.
 - a. Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a assignee who adduces evidence of default by the assignor may, pending final determination of its claim and to the extent that the assignor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the assignee requests:

- b. preservation of the assigned Associated Rights and the related International Interest and its value;
- c. possession, control or custody of the assigned Associated Rights and the related International Interest ;
- d. immobilization of the assigned Associated Rights and the related International Interest ; and
- e. lease or, except where covered by sub-paragraphs (a) to (c), management of the assigned Associated Rights and the related International Interest and the income therefrom.

Q. Priority of competing Assignments

1. Article 35(1). Where there are competing Assignments of Associated Rights and at least one of the Assignments includes the related International Interest and is registered, the provisions of Article 29 as to priority are applicable.
2. Article 35(2). Article 30 regarding the bankruptcy of the assignor applies to an Assignment of Associated Rights and would read in part as follows:
 - a. In insolvency proceedings against the Debtor an Assignment of Associated Rights and the related International Interest is effective if prior to the commencement of the insolvency proceedings that assigned Associated Rights and the related International Interest was registered in conformity with this Convention.
3. Assignee's priority with respect to Associated Rights. Article 36(1). The assignee of Associated Rights and the related International Interest whose Assignment has been registered only has priority under Article 35(1) over another assignee of the Associated Rights:
 - a. if the contract under which the Associated Rights arise states that they are secured by or associated with the object; and
 - b. to the extent that the Associated Rights are related to an object. Under Article 36(2), Associated Rights are related to an object only to the extent that they consist of rights to payment or performance that relate to:
 - i. a sum advanced and utilized for the purchase of the object;
 - ii. a sum advanced and utilized for the purchase of another object in which the assignor held another International Interest if the assignor transferred that interest to the assignee and the Assignment has been registered;
 - iii. the price payable for the object;
 - iv. the rentals payable in respect of the object; or
 - v. other obligations arising from a transaction referred to in any of the preceding subparagraphs.
 - c. In all other cases, the priority of the competing Assignments of the Associated Rights shall be determined by applicable law.

R. Associated Rights – Practical Considerations

1. Associated Rights is a term of art in the Treaty, use it in your documents.
2. Clearly designate Associated Rights and the International Interest are assigned:
 - a. Describe the contracts under which the Associated Rights arise;
 - b. Associated Rights under other “contracts” may be included if the Debtor in the Agreement agrees to perform or procure the performance under those contracts;
 - c. Appropriate notice to the Debtor under the Agreement assigned;
 - d. Incorporate Treaty remedies as to the Associated Rights;
 - e. Designate in the contracts assigned that they are secured by or associated with the object; and
 - f. Confirm Associated Rights consist of rights to payment or performance that relate to sums advanced and utilized for the purchase of the object, rentals payable in respect of the object or other categories of payment or performance under Art 36(2).

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(This outline is general nature and designed to assist the reader with identifying legal and practical issues associated with the Cape Town Convention and International Registry, and to provide a reference to additional resources and/or potential solutions for consideration by the reader. This outline is not a comprehensive analysis of the Cape Town Treaty, and you should engage legal counsel to address the issues noted herein.)