

# Aircraft Financing: US and International Laws, Regulations, and Registration Requirements

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This Note discusses the US and international laws and regulations that govern or apply to aircraft financing transactions. This Note also discusses the requirements for registering and perfecting security interests in aircraft under US and international law.

Aircraft are highly mobile and as a result may be subject to the laws of several different jurisdictions. This raises several issues for parties involved in these transactions and their counsel including:

- How to manage lenders' and investors' risk and liability in these different jurisdictions.
- How to protect these parties' interests and rights in the aircraft.

To assist counsel in understanding these issues, this Note discusses:

- The different US state and federal laws that apply to aircraft and their related components.
- The international treaties and conventions that apply to aircraft and their related components.
- The requirements for registering an aircraft in the US and internationally.
- The requirements to create, attach and perfect a security interest in aircraft under US and international laws and regulations.

All references to aircraft in this Note should be read to include helicopters, unless otherwise specified.

This Note focuses on the laws and regulations governing aircraft financing transactions. For a discussion of:

- Aircraft financing generally, including the parties typically involved in these transactions, see Practice Note, Aircraft Financing (US): Overview ([W-001-5042](#)).
- How aircraft finance transactions are typically structured, see Practice Note, Structuring Aircraft Financing Transactions ([W-001-6292](#)).

## US STATE AND FEDERAL LAWS

There are three main US statutes that apply to US aircraft financing transactions:

- The Uniform Commercial Code (UCC).
- The Transportation Code (49 U.S.C. § 40101 to § 50105).
- Section 1110 of the Bankruptcy Code (11 U.S.C § 1110).

## THE UNIFORM COMMERCIAL CODE

The primary state laws applicable to aircraft finance transactions are Articles 2, 2A, and 9 of the UCC. Articles 2 and 2A govern sales and leases, respectively, and Article 9 governs security interests in personal property. All 50 US states have adopted each of these Articles, except Louisiana, which has not adopted Articles 2 and 2A. Although each state's version of the UCC is substantially similar, there may be some variations in particular provisions. Counsel should, therefore, consider the UCC in effect in the state with laws applicable to the transaction.

For purposes of this Note, all references to specific provisions of the UCC are to the provisions of the UCC as in effect in the State of New York (the NY UCC). This is because New York law is often chosen as the governing law of many aircraft finance transactions.

## Article 9 of the UCC

Article 9 governs the effectiveness of security agreements and the attachment, perfection, and priority of security interests created in personal property and fixtures. The manner of perfection and issues of priority regarding security interests in aircraft and aircraft-related assets are determined, however, not only under Article 9 but also in many cases by the Transportation Code (see Transportation Code) and the Cape Town Treaty (see The Cape Town Treaty).

Article 9 of the NY UCC also contains provisions relating to the exercise of remedies by a secured creditor. In the event of a default by a debtor, the NY UCC generally allows a creditor to exercise self-help remedies if doing so does not result in a breach of the peace. If it can result in a breach of the peace, judicial intervention is required. An aircraft or other aircraft-related asset can be sold by a creditor in a public or private sale under the provisions of Article 9. The remedies

available under Article 9 may also be impacted by the Cape Town Treaty (see Availability and Exercise of Remedies Under the Cape Town Treaty).

For more information on the requirements of Article 9, including the rights of a secured party and when a security interest is enforceable against the debtor and third parties, see Practice Note, UCC Creation, Perfection and Priority of Security Interests ([6-381-0551](#)). For more information on Article 9 as it relates to aircraft, see Practice Note, Security Interests: Aircraft, Vessels and Rolling Stock ([2-519-3295](#)).

### THE TRANSPORTATION CODE

This Code, together with regulations published by the Federal Aviation Administration (FAA) are the principal rules and regulations that apply to aviation-related matters (14 C.F.R. § 1.1 to 14 C.F.R. § 198.17). The Transportation Code:

- Grants to the FAA the authority to issue air traffic regulations to ensure the safe and efficient use of US navigable airspace.
- Sets out the requirements for aircraft registration.
- Instructs the FAA to establish a recording system for certain conveyances, leases and instruments.

For more information on the FAA, see Practice Note, Logistics: Federal Agencies Overview: Federal Aviation Administration (FAA).

### Cape Town Implementation Act

The Transportation Code was amended following the US ratification of the 2001 Convention on International Interests in Mobile Equipment (Nov. 16, 2001, S. Treaty Doc. No. 108-10, 2001 WL 34360428) (the Cape Town Convention and the Protocol on Matters Specific to Aircraft Equipment (S. Treaty Doc. No. 108-10, 2001 WL 34360428) (the Aircraft Protocol, and together with the Cape Town Convention, the Cape Town Treaty), after the enactment of the Cape Town Treaty Implementation Act of 2004 (the Implementation Act) (P.L. 108-297, 118 Stat. 1095 (2004); see also, 14 C.F.R. § 49.61 and 14 C.F.R. § 49.630).

The Implementation Act:

- Designates the FAA as the US “entry point” to the international registry (the International Registry) established by the convention.
- Authorizes the FAA to set up a system for filing notices of international interests in the aircraft-related assets subject to the convention.

For more information on the Cape Town Convention, the significance of the FAA as a designated “entry point” and the International Registry, see International Registration Requirements.

### BANKRUPTCY CODE

Section 1110 of the Bankruptcy Code plays a significant role in aircraft finance transactions. This Section covers aircraft, engines, propellers, appliances, or spare parts that are subject to a security interest granted by, leased to, or conditionally sold to a debtor that, at the time the transaction is entered into holds an air carrier operating certificate issued under the Transportation Code for aircraft that carry ten or more individuals or 6,000 pounds or more of cargo (11 U.S.C. § 1110 (a)(3)).

Section 1110 of the Bankruptcy Code provides relief from the automatic stay on the exercise of remedies normally applicable in the event of an insolvency of a debtor, and permits a creditor to foreclose on an aircraft that meets specified criteria despite the insolvency, if the debtor or bankruptcy trustee does not cure all defaults and agree to perform under the relevant agreement with the creditor within 60 days.

Therefore, Section 1110 of the Bankruptcy Code provides a significant benefit to lenders and lessors by establishing a well-defined time period during which they must refrain from exercising remedies against a non-performing debtor but after the expiration of which they are free to enforce their claims despite that the relevant bankruptcy proceeding may still be ongoing.

For more information on this section, see Practice Note, Executory Contracts and Leases: Overview ([8-381-2672](#)). For more information on automatic stay, see Practice Note, Automatic Stay: Lenders’ Perspective ([9-380-7953](#)).

### AIRCRAFT REGISTRATION UNDER US LAW

In the US, aircraft (but not engines) are registered in the FAA Civil Aviation Registry, Aircraft Registration Branch (the FAA Registry), located in Oklahoma City, Oklahoma. The FAA Registry is an “owner” registry. This means that only the owner of an aircraft is authorized to register it with the FAA (although “owner” may include a buyer or a lessee under a conditional sale contract). To be entitled to registration, an aircraft cannot be registered in any other jurisdiction and must be:

- Owned by a citizen of the US.
- Owned by an individual citizen of a foreign country lawfully admitted for permanent residence in the US.
- Owned by a corporation not a citizen of the US if the corporation is organized and doing business under the laws of the US or a US State and the aircraft is based and primarily used in the US.
- An aircraft of:
  - the US government;
  - a State;
  - the District of Columbia;
  - a territory or possession of the US; or
  - a political subdivision of a State, territory, or possession.

(14 C.F.R. §47.3.)

### US CITIZENSHIP REQUIREMENTS

The term “US citizen” is defined as any of the following:

- An individual holding citizenship of the US or one of its possessions.
- A partnership with individual partners holding US citizenship.
- A corporation or association organized under the laws of the US or a US state, the District of Columbia, or a territory or possession of the US, of which the president and at least two-thirds of the board of directors and other managing officers hold US citizenship, which is under the actual control of citizens of the US and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the US.”

(14 C.F.R. §47.2)

Limited liability companies are judged against the standards set out for corporations and associations.

### REGISTRATION REQUIREMENTS FOR NON-CITIZENS

If the US citizenship requirement cannot be met directly, the FAA has permitted the use of several other types of arrangements. These include:

- **An owner trust.** One of the most common non-citizen structures involves the establishment of an owner trust (often referred to as a “non-citizen trust”) to which the legal title to the aircraft is transferred while the beneficial ownership of the aircraft is held by persons not otherwise meeting the US citizenship requirement. For more information on the owner trust structure, see Practice Note, Aircraft Financing (US): Overview: Owner Trusts and Owner Trustees ([W-001-5042](#)).
- **A US voting trustee.** A trustee may be appointed to hold the voting powers of the non-US persons under a separate voting powers trust agreement.

The use of these types of arrangements, while common, has been subject to increased scrutiny by the FAA recently and agreements creating owner trusts are subject to review and approval by the FAA before registration.

### US REGISTRATION REQUIREMENTS

The FAA Registry is not a registry of title. This means that the mere fact that a person or entity is registered as the owner of an aircraft in the registry does not guarantee good title. Title must be determined by looking at records of the aircraft and performing appropriate title searches.

To register an aircraft with the FAA Registry, an applicant must provide:

- An original Aircraft Registration Application on AC Form 8050-1.
- Evidence that the applicant is the owner of the aircraft.
- A certification of US citizenship or residency status (see US Citizenship Requirements).
- A filing fee of US \$5.

Ownership may be evidenced by a Bill of Sale on AC Form 8050-2 or equivalent document evidencing transfer of title. If the seller selling the aircraft is not the last registered owner of the aircraft, evidence of the chain of title from the last registered owner must also be produced.

If the aircraft was previously registered in foreign country, additional information must also be provided depending on whether the foreign country has ratified one of the aircraft conventions. If the foreign country has:

- Not ratified the Convention on the International Recognition of Rights in Aircraft (the Geneva Convention) or the Cape Town Convention, the registrant must provide evidence that the foreign registration has ended or is invalid.
- Ratified the Geneva Convention but not the Cape Town Convention, the registrant must provide evidence that:
  - the foreign registration has ended or is invalid; and
  - each recorded interest in the aircraft has been discharged or that each holder of that interest has consented to the transfer.

- Ratified the Cape Town Convention, the registrant must provide evidence that:
  - the foreign registration has ended or is invalid; and
  - all recorded interests ranking in priority have been discharged or the holders of those interests have consented to the deregistration and export of the aircraft.

(14 C.F.R. §47.37.)

Once the FAA has received a complete registration application that meets its requirements, the FAA issues a Certificate of Registration, namely AC Form 8050-03.

Any aircraft that is first registered on or after October 1, 2010 must be renewed every three years (14 C.F.R. §47.40).

### RECORDING OF CONVEYANCES, LEASES, AND OTHER INSTRUMENTS

Under the Transportation Code, the following interests (FAA Covered Interests) may be recorded with the FAA:

- Conveyances that affect an interest in civil aircraft of the US.
- Leases and instruments executed for security purposes, including conditional sales contracts, assignments, and amendments, that affect an interest in:
  - a specifically identified aircraft engine having at least 550 rated takeoff horsepower or its equivalent;
  - a specifically identified aircraft propeller capable of absorbing at least 750 rated takeoff shaft horsepower;
  - an aircraft engine, propeller, or appliance maintained for installation or use in an aircraft, aircraft engine, or propeller, by or for an air carrier holding a certificate issued under Section 44705 of the Transportation Code (49 U.S.C. §47705). This section also provides that the FAA may issue air carrier operating certificates to persons it finds after investigation are properly equipped and able to operate aircraft safely under prescribed regulations and standards; and
  - spare parts maintained by or for an air carrier holding a certificate issued under section 44705 of this title.
- Releases, cancellations, discharges, and satisfactions related to a conveyance, lease, or instrument described above (49 U.S.C. §44107(a)).

### Recordation Requirements

The Transportation Code provides that, to be valid as against anyone other than the debtor, any conveyance, lease, or instrument executed for security purposes that can be recorded with the FAA must be so recorded (49 U.S.C. §44108(a)). To be eligible for recording, any conveyance, lease or instrument must generally:

- Be in a form prescribed by or a form otherwise acceptable to the FAA.
- Describe the relevant aircraft by either make and model, manufacturer’s serial number and US Registration Number, or in a manner permitting the aircraft to be identified.
- Be an original, a duplicate original or (if neither is available) a true copy of the original.
- Be signed in ink by the relevant parties.

- Be submitted with payment of a fee of US \$5 (except in the case of certain releases, cancellations, discharges, or satisfactions) (14 C.F.R. §49.33).

## FAA DE-REGISTRATION AND EXPORT OF AIRCRAFT

The FAA Registry is an owner registry. Therefore, only the owner of an aircraft or a foreign purchaser (when supported by evidence of ownership) is legally entitled to register and de-register the aircraft, unless another party holds an Irrevocable De-registration and Export Request Authorization (IDERA) under the Cape Town Treaty (see Availability and Exercise of Remedies Under the Cape Town Treaty).

### DE-REGISTRATION REQUIREMENTS

The FAA requires that any request for de-registration include:

- A complete description of the aircraft.
- The reason for de-registration and the country to which the aircraft is being exported.
- The signature of the party requesting the de-registration.

In the case of aircraft that has outstanding security instruments and unexpired leases with a term of six months or more that were executed on or before February 28, 2006, the party seeking to de-register the aircraft must also submit a release or consent to export.

In the case of aircraft that have outstanding interests that were executed on or after March 1, 2006, the following information must also be submitted as part of the de-registration process:

- If the aircraft is subject to the Cape Town Treaty and there is an IDERA on file, then the IDERA authorized party must include with its request:
  - a copy of the International Registry Search Certificate. This certificate shows the details of any registration made against the relevant Aircraft Object or, if applicable, that no registrations have been made;
  - a written certification “that all registered interests ranking in priority to that of the requestor have been discharged or that the holders of such interests have consented to the cancellation for export purposes” (This specific wording from 14 C.F.R. Part 47 §47.47(a)(3) must be used in its entirety); and
  - evidence of the discharge of interest or consent to export from the holders of interests ranking in priority to the interest of the requestor.
- If the aircraft is subject to the Cape Town Treaty and there is no IDERA on file, then the aircraft owner must include with its request:
  - a written certification that all outstanding interests recorded with the FAA Aircraft Registration Branch have been discharged or that the holders of the interests have consented to the cancellation for export purposes; and
  - evidence that the holders of these outstanding interests have discharged their interest or consented to the export.
- If the aircraft is not subject to the Cape Town Treaty, the aircraft owner must include with its request a release or consent to export for all outstanding security instruments and unexpired leases with a term of six months or more.

Once the registration for an FAA-registered aircraft is cancelled, the FAA Registry notifies the country to which the aircraft is to be exported of the cancellation.

## INTERNATIONAL TREATIES AND CONVENTIONS

There are several international treaties that apply to aircraft and aircraft financing transactions. These include:

- The Convention on International Civil Aviation (61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (1947)) (the Chicago Convention).
- The 1948 Convention on the International Recognition of Rights in Aircraft (19 June 1948, 4 UST 1830, TIAS 2847, 310 UNTS 151) (the Geneva Convention).
- The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (League of Nations Treaty Series, Volume CXCII, page 281) (the Rome Convention).
- The Cape Town Treaty (The Cape Town Treaty).

### CHICAGO CONVENTION

This convention was signed on December 7, 1944 and came into effect on April 4, 1947. Currently, there are 192 contracting states, including the US which ratified the convention in August of 1946.

The purpose of the Chicago Convention, which applies **only** to civil aircraft, is to facilitate international civil air navigation by establishing rules to govern air space, safety, and travel. It:

- Recognizes each contracting state’s exclusive sovereignty over the air space above its territory.
- Provides that no scheduled operations are permitted in one contracting state by aircraft from another contracting state except with permission of and under the terms established by the first contracting state.

Non-scheduled flights are permitted to fly in or into the airspace of a contracting state without permission, with certain qualifications. Each contracting state has the right to prohibit civil aircraft registered in another contracting state from transporting passengers, mail, or cargo for hire within its territory.

Of particular significance for aircraft finance transactions, the Chicago Convention provides that:

- Civil aircraft can be registered in only one contracting state.
- Each contracting state has the right to determine what requirements to impose on these registrations.

The Chicago Convention also established the International Civil Aviation Organization (ICAO), which operates as a specialized agency of the United Nations. The primary goal of the ICAO is to develop international “standards and recognized practices” (SARPs) that contracting states can follow when developing their own national legal framework for the regulation of civil aviation. The ICAO to date has published over 10,000 SARPs.

### GENEVA CONVENTION

The Geneva Convention was signed in Geneva on June 19, 1948 and came into effect on September 17, 1953. There are currently 90 contracting states, including the US, which was one of the

original signatories and which ratified the convention on September 6, 1949. Like the Chicago Convention, the Geneva Convention covers **only** civil aircraft.

The purpose of the Geneva Convention was to facilitate the financing of aircraft used in international air travel. To do so, it established a system for the international recognition of rights in aircraft, requiring contracting states to recognize four different types of interests:

- Rights of property in aircraft.
- Rights to purchase coupled with possession of aircraft.
- Rights of possession of aircraft under leases with a term of six months or more.
- Security interests in aircraft if created to secure debt, in each case if:
  - these rights have been legitimately created under the laws of the contracting state in which the aircraft is registered at the time created; and
  - rights of that type are recorded on a regular basis in the public record in that state.

Under the Geneva Convention, these rights are given priority over any other rights in aircraft that a contracting state may recognize. The Geneva Convention is, therefore, primarily a choice of law document, requiring a contracting state in which an aircraft is detained or arrested to apply the law of the contracting state in which that aircraft is registered to determine:

- The validity of a creditor's rights regarding the aircraft.
- To enforce those rights if they were validly constituted and recorded in the contracting state of registration.

The Geneva Convention also addresses certain issues regarding the exercise of remedies by a creditor in a contracting state. It provides that when an aircraft registered as to nationality in one contracting state is sold in execution in another contracting state, the law of the contracting state where the aircraft is being sold governs the relevant proceedings, provided that certain formalities are satisfied, including:

- The creditor gives public notice in the jurisdiction of registration as well as notice to the owner of and any other persons with recorded interests in the aircraft.
- The date and time of the sale be fixed at least six weeks in advance.

The Geneva Convention has been superseded by the Cape Town Treaty to the extent of matters within the scope of the latter (see The Cape Town Treaty).

## ROME CONVENTION

This convention, which was signed on May 29, 1933, has limited application and there are currently only nine contracting states. Neither the US nor the UK are parties. Moreover, this convention has been expressly superseded by the Cape Town Treaty.

The Rome Convention precludes the arrest of aircraft in various circumstances where it would seriously disrupt commercial traffic or interfere with state services. It applies to the precautionary arrest of aircraft by judicial or administrative agencies at the behest of the owner of the aircraft, a creditor or a person with an in rem right. This would include a mortgagee or a lienholder. Arrest is prevented where sufficient security is provided.

This Convention should not be confused with the 1933 Rome Convention relating to Damage to Third Parties on the Surface which was also signed on May 29, 1933.

## THE CAPE TOWN TREATY

The Cape Town Treaty was signed by 53 countries on November 16, 2001 and entered into force on March 1, 2006. As of 2018, this treaty has been ratified by 79 contracting states and the European Union. The US ratified the Cape Town Treaty on October 28, 2004.

The Cape Town Treaty's primary goals are to facilitate aircraft transactions by:

- Creating a common set of rules that are recognized by each contracting state regarding the creation and priority of specified types of interests in Aircraft Objects (as defined below).
- Establishing the International Registry for recording those interests, which ensures a system of priority of interests and notice to third parties.
- Providing certain remedies to creditors in default and insolvency scenarios, which gives more certainty to creditors providing financing for Aircraft Objects as to their ability to recover in these scenarios.

Unlike the Geneva Convention, which required contracting states to recognize the validity of interests created under the laws of other contracting states, the Cape Town Treaty instead creates truly "international interests" constituted under the treaty itself rather than any domestic law. To the extent the Cape Town Treaty covers matters previously dealt with in the Geneva Convention, it supersedes the same.

## Aircraft Objects

The Cape Town Treaty covers the following aircraft objects (Aircraft Objects):

- Airframes that are certified to carry at least eight persons including crew or goods in excess of 2750 kg.
- Helicopters that are certified to carry at least five persons including crew or goods in excess of 450 kg.
- Jet engines that have at least 1750 pounds of thrust or turbine or piston powered aircraft engines that have at least 550 rated takeoff shaft horsepower.

Jet engines meeting the above criteria are considered separate Aircraft Objects, whether or not they are installed on an airframe. Therefore, interests in aircraft engines are considered independently from interests in the airframes on which they may be installed from time to time. By contrast, there is some ambiguity under the Cape Town Treaty regarding the treatment of helicopter engines. It is generally assumed that a helicopter engine is not an independent Aircraft Object while installed on a helicopter, but is an Aircraft Object both before its installation on, and after its removal from, a helicopter. It has, therefore, become common practice to register:

- A current International Interest (as defined below) for a helicopter engine not installed on a helicopter (see International Interests).
- A precautionary current International Interest for a helicopter engine installed on a helicopter in the event that it is in fact determined that helicopter engines do constitute independent Aircraft Objects even while so installed.

- A prospective International Interest that attaches to a helicopter engine on its removal from a helicopter.

Neither propellers nor spare parts are treated as distinct Aircraft Objects for purposes of the Cape Town Treaty.

### Connecting Factors

In addition to determining whether a particular aircraft or aircraft-related asset is subject to the Cape Town Treaty, certain “connecting factors” must also be present for the treaty to apply to a particular aircraft finance transaction. A sufficient connecting factor exists for an aircraft if the debtor is “situated” in a contracting state at the time of conclusion of the agreement under which the International Interest is provided for or created.

Article 4 of the Cape Town Convention states that a debtor is situated in a contracting state if either of the following applies:

- It is incorporated in or formed under the laws of that state.
- Has its registered office, statutory seat, center of administration, or place of business in that state.

If a debtor has more than one place of business, it is deemed to be situated in the state in which its principal place of business is located or, if it has no place of business, in the state of its habitual residence.

Alternatively, the Cape Town Treaty applies to a transaction involving Aircraft Objects consisting of airframes or helicopters if, at the time of conclusion of the agreement under which the International Interest is provided for or created, the airframe or helicopter is registered or it is agreed that it is to be registered in a contracting state. However, if the aircraft or helicopter is registered in a contracting state at the time the agreement is concluded but it is agreed that it must be re-registered in a non-contracting state, the treaty does not apply.

### International Interests

To qualify as an International Interest for purposes of the Cape Town Treaty, the interest must satisfy one of the requirements set out below. It was:

- Granted by a chargor under a security agreement.
- Vested in an entity that is the conditional seller under a title reservation agreement.
- Vested in an entity that is the lessor under a leasing agreement.

The relevant security, title reservation or lease agreement under which the interest is created or provided for must also be in writing. The chargor, conditional seller or lessor (as the case may be) must have the power to dispose of the relevant object. The object must also be identified by:

- Its manufacturer’s serial number.
- The name of the manufacturer.
- The model description (as required by the Aircraft Protocol).

For interests created by a security agreement, the obligations secured by the agreement must be capable of being determined (although it is not necessary to state a specific sum or maximum amount).

The Cape Town Convention covers not only current but also prospective International Interests. A prospective International

Interest is defined as 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.” When the stated event occurs and an actual International Interest is created, this interest is considered to have been registered from the time of registration of the prospective International Interest if the registration is still current immediately before the International Interest actually being constituted.

The Aircraft Protocol also extends the benefit of certain provisions of the Cape Town Convention to outright sales of aircraft, allowing those sales to be registered in the International Registry and therefore to be subject to and benefit from the same rules of priority as those that apply to International Interests. However, any agreements that fall within the main provisions of the Cape Town Convention, namely security, lease, and title retention agreements, are considered as falling under the Cape Town Convention and not as contracts of sale.

For example, a conditional sales agreement is treated as a title reservation agreement even though it provides for the ultimate sale of the aircraft, as the transfer of title under this agreement is not immediate. Prospective sales may also be registered, with the same effect as is afforded to prospective International Interests, namely, the effectiveness of the registration relating back to the time of filing of the prospective sale.

Certain amendments, assignments, and novations of existing agreements that impact an International Interest may either:

- Give rise to a new International Interest.
- Create an International Interest where one previously did not exist.

In either case, a new registration must be made to protect the priority of the creditor’s interest. Subordinations of International Interests may also be registered to protect the rights of the party benefitting from the subordination.

A contracting state may make a declaration under Article 39 of the Aircraft Protocol providing for priority, without registration, of specified non-consensual rights or interests created under the laws of the state over registered International Interests. Examples of these types of interests may include mechanics’ liens and liens for unpaid wages. A contracting state may also declare that the government of that state, an international organization, or any private entity that provides relevant public services maintains its right to arrest or detain an Aircraft Object for amounts due in connection with services provided to or regarding the Aircraft Object (such as air navigation charges). The US has made a declaration under Article 39 preserving the priority of any interest created under the laws of the US over a registered International Interest if (and to the extent that) that interest holds priority under those laws over an interest that is equivalent to that registered International Interest. The US has also made a declaration regarding arrest and detention as provided above.

A contracting state may also make a declaration under Article 40 of the Aircraft Protocol providing that specified non-consensual rights or interests can be registered as if they were International Interests,

thus preserving their priority against later registered International Interests and unregistered International Interests. The US has not made any declaration.

## AIRCRAFT REGISTRATION UNDER INTERNATIONAL LAW THE INTERNATIONAL REGISTRY

The International Registry established by the Cape Town Treaty is physically located in Ireland but operates purely as an online system that is accessible 24 hours a day, 7 days a week. It is a first in time registry. This means that a registered interest has priority over all later registered interests and all unregistered interests, even if the holder of the registered interest knew of the existence of an unregistered interest at the time of registration. Similarly, if an International Interest is not registered in the International Registry, that interest is junior to later registered interests even if the holder of any later registered interest has knowledge of the existence of the prior unregistered interest.

### INTERNATIONAL REGISTRATION REQUIREMENTS

Any entity or individual wishing to register (or consent to the registration of) International Interests in the International Registry must establish an account with the registry either as:

- A transaction user entity (TUE), if directly involved in the transaction giving rise to the International Interest at issue.
- A professional user entity (PUE), if providing professional services to a TUE (such as legal services, for example).

Each TUE and PUE must designate an administrator with the authority to make or consent to registrations on its behalf. The administrator can then bestow registration authority on another employee of the TUE or PUE (a Transacting User or TU or Professional User or PU, and together, Registry Users or RUs). RUs are not given general authority, but only authority to act regarding the specific Aircraft Objects designated by the relevant administrator.

The manner in which a registration is actually affected depends in part on whether or not the relevant contracting state has designated an “entry point”, as authorized by the treaty. An “entry point” is a local entity to which information that is to be transmitted to the International Registry is submitted. An entry point may be designated either as:

- **A “direct entry point”.** In this case, the relevant information is submitted by the RU to the designated local entity and the entity transmits the information directly to the International Registry.
- **An “authorizing entry point”.** In this case, the relevant information is submitted by the RU to the designated local entity, which then issues to the RU a unique registration code. The RU then uses the registration code when submitting the registration information to the International Registry.

To make a submission to the International Registry, the RU enters on the International Registry website the unique authorization code, together with the other required information, namely:

- The relevant Aircraft Object.
- The state in which it is registered.
- The parties involved.

- The type of registration being made.
- If desired, the date on which the registration should lapse.

The RU must also pay the registration fee (generally \$100).

For any registration for which the consent of both parties involved in a transaction is required, once the party that is actually making the registration finishes the process of doing so, the second party must be notified of that fact and the registration does not “go live” until the second party gives its consent.

Entry points can only be made compulsory regarding airframes or helicopters, not engines. The US has designated the FAA as an authorizing entry point, so required registration information regarding airframes and helicopters must first be submitted to the FAA. The unique registration code the FAA issues as part of the registration must then be used when the International Interest is registered in the International Registry. The FAA has published a form, AC Form 8050-135, for submitting information to it as an authorizing entry point. For more information, see US Registration Requirements.

### AVAILABILITY AND EXERCISE OF REMEDIES UNDER THE CAPE TOWN TREATY

The Cape Town Treaty contains provisions relating to the availability and exercise of remedies, some of which are mandatory and cannot be changed by agreement of the parties and some of which can be modified. If a debtor that has granted a security interest over an Aircraft Object agrees, the beneficiary of the security interest may generally take possession of the Aircraft Object, sell or lease it and collect any income arising from its management or use, subject to the right of a contracting state under Article 54 of the Cape Town Treaty to not permit the lease of this Aircraft Object while the same is in its territory or to require that these remedies not be exercised without leave of court, or both.

Remedies must be exercised in a commercially reasonable manner with proper prior notice, and sums collected as a result this exercise must:

- First, be applied to satisfy the debt.
- Second, unless otherwise ordered by a relevant court, be distributed to holders of later ranking interests
- Third, to the extent any amounts remain, be distributed to the debtor.

The Cape Town Treaty also permits the parties to agree that ownership of the relevant Aircraft Object vest in the name of the creditor in satisfaction or partial satisfaction of the debt secured, subject to a right of redemption by the debtor and certain other interested parties.

The Cape Town Treaty also allows a conditional seller or lessor to terminate its sale or lease agreement after a default occurs under the agreement and take possession of the Aircraft Object sold or leased, subject, as above, to the right of contracting states to make any contrary declaration under Article 54.

Creditors also have the right to apply for interim relief pending final determination, subject to a court’s right to impose terms on this relief to protect interested parties in the event that a creditor cannot

prove its case or fails to perform any obligation to the debtor under the treaty in the course of implementing any order granting that interim relief.

The Aircraft Protocol also specifically provides for the issuance by a debtor of an IDERA and sets out a form of IDERA to be used (see FAA De-Registration and Export of Aircraft). The protocol provides that the person designated in an IDERA is the only person entitled to exercise the remedies including to deregister and export the aircraft. This provision of the protocol applies only if a contracting state has so declared and the US has done so.

Any remedy exercised under the treaty must be exercised in conformity with the procedural laws of the jurisdiction in which the remedy is to be exercised, subject to the right of a contracting state under Article 54(2) to permit treaty remedies to be exercised on a self-help basis despite contrary local law. In ratifying the Cape Town Treaty, the US declared that to the extent that the treaty does not require a court order for the exercise of any remedies, then those remedies are exercisable on a “self-help” basis (in other words, without court order) in the US.

Finally, Article XI of the Aircraft Protocol allows contracting states to select one of two options regarding the effects of an insolvency of the debtor:

- Under “Alternative A”, the debtor or administrator in bankruptcy must either turn over possession of the aircraft to the creditor or cure all defaults and agree to perform under the relevant agreement with the creditor within the time period specified in the contracting state’s declaration (or any earlier date on which the creditor is otherwise entitled to possession under applicable law).
- Under “Alternative B”, on the request of the creditor, the debtor or administrator in bankruptcy must notify the creditor whether it intends to cure all defaults and agree to perform under the relevant agreement with the creditor or give the creditor the opportunity to take possession of the aircraft. In the latter case, the local courts then have discretion to decide whether or not to in fact give the creditor possession (making the remedy less certain than that provided under “Alternative A”). The US did not make a declaration under Article XI, as Section 1110 of the Bankruptcy Code already provides relief substantively equivalent to “Alternative A”.

## RELATIONSHIP BETWEEN INTERNATIONAL TREATIES AND US FEDERAL AND STATE LAW; FEDERAL PRE-EMPTION

The doctrine of federal pre-emption stems from the Supremacy Clause of the US Constitution, which provides that the US Constitution, any federal law made under the US Constitution, and any treaty entered into under the authority of the US are considered the “supreme law” of the land. Treaties that are either self-executing (meaning they are immediately enforceable within the US) or that have been the subject of implementing legislation, as well as any other validly enacted federal laws, pre-empt state law wholly or in part, depending on several factors. The specific provisions of each of the Cape Town Treaty (as well as the Geneva Convention and any other applicable treaty), the Transportation Code and the UCC must, therefore, be analyzed to determine which law applies to a given aspect of an aircraft finance transaction.

## VALIDITY OF INSTRUMENTS AND RIGHTS AND OBLIGATIONS

Regarding the validity of a conveyance, lease or security instrument that may be recorded with the FAA, the Transportation Code provides that the validity of this conveyance, lease, or instrument is subject to the laws of the state, the District of Columbia, or the territory or possession of the US at which the conveyance, lease, or instrument is delivered, regardless of the place at which the subject of the conveyance, lease, or instrument is located or delivered. If the conveyance, lease, or instrument specifies the place at which delivery is intended, it is presumed that the conveyance, lease, or instrument was delivered at the specified place (49 U.S.C §44108(e)).

Despite that the Cape Town Treaty may also apply to the transaction, it is silent as to the issue of the law governing the validity of these instruments. Therefore, if the instrument is one that may be filed with the FAA, the law of the state of delivery of that instrument applies to determine its validity.

Regarding the rights and duties of the parties under any this instrument, as opposed to the validity of the instrument itself, the Transportation Code is silent on this issue. Therefore, if the Cape Town Treaty is not applicable, general choice of law rules apply to determine what law governs those matters. For instruments to which the UCC applies, the UCC generally allows parties to choose the law they wish to govern those rights and duties, if the underlying transaction bears a reasonable relationship to the laws of the jurisdiction chosen. If the Cape Town Treaty is applicable, Article VIII of the Aircraft Protocol provides that, if a contracting state has elected to apply Article VIII, the parties “to an agreement, or a contract of sale, or a related guarantee or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part”. The US has declared that it is applying Article VIII and, therefore, in those circumstances the law chosen by the parties governs those matters.

## CREATION, PERFECTION, AND PRIORITY OF SECURITY INTERESTS UNDER INTERNATIONAL LAW

Neither the Transportation Code nor the Cape Town Convention purports to govern the creation of security interests in aircraft or aircraft-related assets. Therefore, applicable state law applies. Regarding the perfection of these interests, the Transportation Code explicitly provides for the establishment of the FAA Registry for the recording of FAA Covered Interests. The Cape Town Convention similarly expressly provides for the establishment of the International Registry for the recording of International Interests.

### Preemption of the UCC

The NY UCC’s provisions on perfection are, therefore, pre-empted to the extent that the Transportation Code or the Cape Town Treaty, or both, apply. Section 9-109(c) of the NY UCC confirms this position, providing that Article 9 does not apply to the extent pre-empted by a statute, regulation or treaty of the US (NY UCC § 9-109). Section 9-311(a)(1) of the NY UCC also states that the:

“filing of a financing statement is not necessary or effective to perfect a security interest in property subject to a statute, regulation, or treaty of the US whose requirements for a security interest’s obtaining priority over the rights of a lien

creditor regarding the property preempt Section 9-310(a).” (NY UCC § 9-311)

Therefore, perfection must be accomplished by filing with the FAA Registry and/or the International Registry, for interests in aircraft and aircraft-related assets subject to the Transportation Code and/or the Cape Town Treaty.

### Scope of International Registration

Section 44108 of the Transportation Code provides that until a filing with the FAA Registry is made, an instrument is effective only as against the person making it and those having actual notice of it (49 U.S.C. § 44108). Therefore, if no recording is made with the FAA Registry, a creditor stands to lose its priority to later recorded interests. The Cape Town Treaty provides a “first to file” rule, giving priority to registered interests over later registered interests and unregistered interests, even if the creditor had actual knowledge of the same.

Neither the Transportation Code nor the Cape Town Treaty, however, covers all aircraft or all aircraft-related assets. Rather, under:

- The Transportation Code, the FAA only provides for registry filings to be made regarding FAA Covered Interests (see FAA De-Registration and Export of Aircraft).
- The Cape Town Treaty provides for filings of International Interests only regarding Aircraft Objects (see Aircraft Objects).

Therefore, the UCC still has relevance even for matters of perfection and priority, as it governs aircraft-related assets that do not fall within the spheres covered by the Transportation Code and the Cape Town Treaty. As a result, secured parties should also generally take appropriate steps to perfect their security interests under the UCC. Although Section 44107(a) of the Transportation Code allows parties to file with the FAA any assignment of lease made for security purposes, there is no certainty on whether or not this filing perfects the secured party’s security interest in the relevant lease agreement. As a result, it is customary practice to file a financing statement regarding any lease agreement in addition to filing with the FAA.

### REMEDIES

Under the doctrine of pre-emption, the remedies provided under the Cape Town Treaty supersede those set out in the UCC to the extent that the aircraft or aircraft-related asset at issue is one to which the treaty applies and in circumstances where the relevant treaty provisions are mandatory in nature and cannot be varied by the parties.

For example, it is mandatory under the Cape Town Treaty that remedies be exercised in a “commercially reasonable manner”, that adequate prior notice be given and that proceeds from the exercise of these remedies be applied toward the debt secured.

Parties are free to modify other, non-mandatory treaty remedies and, to the extent that they do so, the UCC determines the validity of any remedies so agreed and the manner in which they should be exercised. The UCC provisions on remedies are also dispositive in situations in which the Cape Town Treaty is not applicable. However, the Transportation Code does not address remedies, so it is not of relevance to this issue.

### FOREIGN-REGISTERED AIRCRAFT AND ENGINES

In the case of aircraft and engines not registered with the FAA, to the extent the Cape Town Treaty applies and to the extent it addresses the matter at issue, its provisions govern in a proceeding brought in the US. If the Cape Town Treaty does not apply but the aircraft is registered in a jurisdiction that is party to the Geneva Convention, a court in the US may recognize a right of a creditor in an aircraft if the following conditions are met:

- It constitutes one of the four types of rights covered by the Geneva Convention (see Geneva Convention).
- The right both was legitimately created under the laws of that jurisdiction.
- The right is of a type regularly recorded in the public record of that jurisdiction.

The Geneva Convention’s provisions regarding minimum requirements that must be complied with in any proceeding for the sale in execution of an aircraft apply in any proceeding. Beyond these minimum requirements, the Geneva Convention mandates the application of the laws of the state where the proceeding takes place, meaning primarily the UCC as in effect in the relevant state.

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