In a recent matter handled by Gowling WLG (Canada) LLP (the "Transaction") representing a financial institution in the Canadian aviation market (the "Aircraft Financing Company"), a Canadian court order implemented, for the first time, "Alternative A" of the insolvency provisions set out in the Convention on International Interests on Mobile Equipment (the "Convention") and the Protocol on the Convention on International Interests on Mobile Equipment on Matters Specific to Aircraft Equipment (the "Aircraft Protocol", and collectively with the Convention, the "Cape Town Convention"). This article briefly discusses the origin of the Cape Town Convention, as well as the insolvency provisions in connection with the Transaction.

1. The Origin of the Cape Town Convention

The Cape Town Convention was signed on November 16, 2001, but Canada only ratified it in December 2012. The main objective of the Cape Town Convention is to facilitate the efficient financing and leasing of mobile equipment of high value. Airframes, aircraft’s engines and helicopters, defined as "aircraft objects" in the Cape Town Convention ("Aircraft Object"), have no fixed location and as a result, creditors had difficulty obtaining secure and enforceable rights.

2. Novelties of the Cape Town Convention

2.1 The international registry

One of the main novelties of the Cape Town Convention is the creation of an international
registry (the "Registry"). The Registry is an asset-based computerized registration system that registers not the debtor but individualized and uniquely identifiable asset by the serial number of the Aircraft Object. Parties to a security agreement, a title reservation agreement, a lease agreement, a transfer of rights under those agreements, or a sale without reservation of ownership can register interests in the Registry.

The Registry is a central element of the priority system of the Cape Town Convention. Registration is not necessary for the creation of the international interest or its proof of existence, but it ensures, in most instances, priority against subsequently registered and unregistered interests.

2.2 The insolvency proceedings

Each Contracting State has the option to make a declaration and to choose between two alternatives that will guide the insolvency process relating to Aircraft Objects. Under Articles XI and XXX of the Protocol, the declaration made by the Contracting States provide secured creditors with a special insolvency regime governing their rights. It is important to note that a Contracting State can choose not to make a declaration in which case the alternatives will not be implanted by the Contracting state law.

2.2.1 Alternative A

Alternative A provides many advantages to the secured creditor as it grants more in-depth protection than otherwise available to a secured creditor under bankruptcy and insolvency laws. The debtor has two options upon the occurrence of an "insolvency event" as defined in the Cape Town Convention:

(i) give possession of the aircraft covered by the contract to the secured creditor; or

(ii) cure all defaults and agree to perform all future obligations under the contract no later than the earlier of the end of the waiting period specified by the Contracting State or the date on which the secured creditor would be entitled to possession if the Cape Town Convention was not applicable.

Alternative A also requires the deregistration process and exportation of the aircraft to be completed in less than five working days. This is an undeniable advantage for a secured creditor.

Finally, Alternative A ensures the priority of secured creditors. It provides the Contracting
2.2.2 Alternative B

Alternative B gives much less protection to secured creditors than Alternative A. It is often characterized as the "soft" version of the insolvency recourses available to a secured creditor. For instance, Alternative B does not provide strict time periods that the debtor must respect.

3. The Transaction

In 2017, a helicopter company (the "Helicopter Company") sought an Initial Order under the CCAA. The Aircraft Financing Company was one of the Helicopter Company’s secured creditors and had first-ranking security over eight helicopters (the "Helicopters") owned and/or operated by the Helicopter Company, with subordinate security in all other assets that were registered at the Registry.

In these circumstances we determined that, the remedies of the Cape Town Convention had to be applied. The CCAA proceedings constituted an "insolvency-related event" as defined in the Aircraft Protocol and enabled the Aircraft Financing Company to benefit from the remedies provided in the Cape Town Convention, in particular, Alternative A. Canada chose to ratify the Cape Town Convention and to adopt Alternative A. As such, a Canadian court had to comply with the obligations under the Cape Town Convention and enforce a security/international interest duly registered in the Registry.

In light of the arguments of Gowling WLG professionals, the Aircraft Financing Company was permitted to sell the Helicopters, and for the first time a Canadian Court recognized the application of the Alternative A remedy.

The buyers of the Helicopters also had to deal with the deregistration process. The Aircraft Protocol allows an irrevocable deregistration and export request authorization for an Aircraft Object, from a civil registry of the Aircraft Object as a remedy for default by a debtor. In this Transaction, a court order confirmed the transfer of title free and clear of all rights and ordered all regulatory authorities to effect the change of ownership.

4. Conclusion
In practice, the application of the Cape Town Convention is not as simple as intended. Not all Contracting States, when faced with a situation where the Cape Town Convention is applicable, recognize and apply the Cape Town Convention as expected by ratification. Indeed, the recognition and scope of the Cape Town Convention are not the same for all Contracting States. However in Canada, the Transaction has set a precedent for the procedure to be followed by other Canadian courts in similar circumstances.

[5] Id., p.4-6.
[7] Article XI-Remedies on insolvency

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

Alternative A

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

(a) the end of the waiting period; and

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

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

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

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

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

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.
6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

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

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

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

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

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

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

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

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

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

Alternative B

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

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

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

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.
4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

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

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

Article XXX—Declarations relating to certain provisions

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply any one or more of Articles VIII, XII and XIII of this Protocol.

2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article X of this Protocol, wholly or in part. If it so declares with respect to Article X (2), it shall specify the time-period required thereby.

3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, or the entirety of Alternative B of Article XI and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article XI.

4. The courts of Contracting States shall apply Article XI in conformity with the declaration made by the Contracting State, which is the primary insolvency jurisdiction.

5. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will not apply the provisions of Article XXI, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.


[10] Id.

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