

# International Secured Transactions and Insolvency

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## I. Introduction

The following article surveys some of the significant developments in the field of cross-border insolvencies and secured financing during the twelve months prior to December 1, 2005. The most publicized and long-awaited bankruptcy development was the enactment of legislation in the United States to adopt the UNCITRAL framework for the recognition of foreign insolvency proceedings. Even with the adoption of the UNICTRAL framework, American courts continued to render significant decisions under the former law which may, over time, inform practice, under the UNICTRAL provisions. Brazil also enacted significant bankruptcy reforms during 2005. The international law of secured transactions experienced a tremendous breakthrough in 2005 when the first protocol under the UNIDROIT Convention on International Interests in Mobile Equipment, specifically the aircraft protocol, received approval by a sufficient number of states to come into force and to establish a benchmark effective date.

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## II. The United States Enacts Chapter 15

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,<sup>1</sup> known as BACPA, went into effect. The Act enacts chapter 15 and repeals section 304 of the U.S. Bankruptcy Code.<sup>2</sup> The enactment of chapter 15 represents the long-awaited adoption of the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) in the United States. The purpose of the new chapter is to “incorporate the [Model Law] so as to provide effective mechanisms for dealing with cases of cross-border insolvency.”<sup>3</sup> The objectives of the enactment are to foster cross-border cooperation in such cases as well as to “promote greater legal certainty for trade and investment[,] fair and efficient administration of cross-border insolvencies[,] . . . protection and maximization of the value of the debtor’s assets[,] and facilitation of the rescue of financially-troubled businesses . . .”<sup>4</sup>

### A. COMMENCEMENT OF THE CASE

The types of relief available under chapter 15 generally resemble much of the established practice under section 304. An ancillary case is “commenced by the filing of a petition for recognition of an [existing] foreign proceeding pursuant to section 1515.”<sup>5</sup> Once the court has granted the order of recognition,<sup>6</sup> the foreign representative may commence either an involuntary bankruptcy under section 303 or, if the foreign proceeding is a foreign main proceeding, a voluntary bankruptcy case under either section 301 or 302.<sup>7</sup>

### B. INTERIM RELIEF IN THE GAP PERIOD BETWEEN FILING THE PETITION AND THE ORDER FOR RECOGNITION

In the gap period between the filing of the petition and the entry of the order for recognition, the court is authorized to grant provisional protection upon the request of the foreign representative. Such relief may include staying execution against the debtor’s assets; placing the administration of the debtor’s assets in the United States in the hands of the foreign representative or a trustee to protect perishables or property susceptible to devaluation or otherwise in jeopardy; suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor; providing for broad discovery concerning the debtor’s affairs; and granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).<sup>8</sup> To

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 135 (codified as amended in scattered sections of 11 U.S.C.).

2. 11 U.S.C. § 304 (2004) (repealed 2005).

3. 11 U.S.C. § 1501(a) (2005).

4. *Id.*

5. 11 U.S.C. § 1504 (2005).

6. *See* 11 U.S.C. § 1517 (2005).

7. 11 U.S.C. § 1511 (2005). Under section 1502(4), “foreign main proceeding” means a foreign proceeding pending in the country where the debtor has the center of its main interests. By contrast, under section 1502(5), a “foreign nonmain proceeding” is a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.

8. 11 U.S.C. § 1519(a) (2005); 11 U.S.C. § 1521(a)(3)-(4), (7) (2005).

obtain such interim relief, the proponent carries the same burdens applicable to obtaining an injunction.<sup>9</sup>

Interim relief terminates upon the entry of the order of recognition,<sup>10</sup> and recognition may be denied where relief would “interfere with the administration of a foreign main proceeding.”<sup>11</sup> Moreover, in consonance with the regulatory exception to the automatic stay provided for in section 362, the court may not “enjoin a police or regulatory act of a foreign governmental unit, including a criminal action or proceeding . . .”<sup>12</sup>

### C. EFFECT OF RECOGNITION

Upon the entry of the order of recognition, pursuant to section 1520, the automatic stay applies, but is limited to the territorial jurisdiction of the United States.<sup>13</sup> This is much more limited than a case under other chapters, wherein the court assumes jurisdiction of the debtor’s property wherever located.<sup>14</sup> Additionally, the administrator or the trustee may: use, sell, or lease property as under section 363; avoid post-petition transfers, as under section 549; and acquire post-petition property free of liens and encumbrances unless previously bargained for under a valid pre-petition security agreement; as well as operate the debtor’s business and exercise the powers of a trustee.<sup>15</sup> These powers are also limited to the territorial jurisdiction of the United States.

### D. RELIEF UPON RECOGNITION

The foreign representative may seek specific relief from the court under section 1521. This may include: application of the automatic stay and injunctions against creditors beyond the scope of section 1520; permission to take discovery; turnover of assets; and the continuation of interim relief granted under section 1519.<sup>16</sup> Once again, when obtaining either additional injunctive or stay relief, or the continuation of an earlier grant of interim relief, the proponent must meet its burden by showing injunctive relief is appropriate.<sup>17</sup> The court is statutorily required to examine whether the interests of creditors in the United States are sufficiently protected.<sup>18</sup> However, this does not mean U.S. creditors will necessarily receive

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9. 11 U.S.C. § 1519(e). The traditional prerequisites for issuance of a preliminary injunction are:

(1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the party opposing the injunction; and (4) that the granting of the injunction will not disserve the public interest.

*In re Yukos Oil Co.*, 320 B.R. 130, 135 (Bankr. S.D. Tex. 2004).

10. 11 U.S.C. § 1519(b).

11. *Id.* § 1519(c).

12. *Id.* § 1519(d).

13. *Id.* § 1520(a)(1).

14. *See Liebmann v. French (In re French)*, 303 B.R. 774, 783 (Bankr. D. Md. 2003) (Even though the property at issue was located in the Bahamas, it was property of the estate within the subject matter jurisdiction of the U.S. Bankruptcy Court, pursuant to section 541(a), and the court enjoyed primary jurisdiction because there was no competing insolvency proceeding involving the debtor then pending in the Bahamas Islands).

15. 11 U.S.C. § 1520(a)(2)-(3).

16. *Id.* § 1521.

17. *Id.* § 1521(e).

18. *Id.* § 1521(b).

all of the same protections in terms of priorities and distributions in an ancillary case as they would in an original U.S. case.<sup>19</sup>

#### E. KNOWN PRINCIPLES GUIDE THE COURTS IN DETERMINING WHAT ADDITIONAL ASSISTANCE THE FOREIGN DEBTOR MAY OBTAIN

Section 1507 authorizes U.S. bankruptcy courts to grant additional assistance to the foreign representative. It adopts the factors previously set forth in section 304(c) for those instances where the court goes beyond the other provisions of chapter 15 in cooperating with the foreign court. Section 1507(b) provides:

In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure:

- (1) just treatment of all holders of claims against or interests in the debtor's property;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of the debtor;
- (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.<sup>20</sup>

Of interest is the elevation of comity, which was merely one of the factors in section 304; it is now the guiding principle above all the other factors. The moving spirit of achieving greater cooperation and uniformity is thus placed at the heart of the rationale for granting relief that goes beyond even the Model Law. The spirit of comity was also the guiding principle in resolving the first case under the new chapter 15, as discussed below.

Because section 304 has been repealed, previous case precedents under that section are not directly controlling in chapter 15 cases.<sup>21</sup> However, in the limited circumstances where additional assistance is sought, the issues will likely be understood and determined under principles similar to the precedents under pre-BACPA cases.

#### F. CASES DECIDED SINCE CHAPTER 15 WENT INTO EFFECT

The first significant decision since chapter 15 became effective was *United States v. J.A. Jones Construction Group, LLC*, which was decided on November 29, 2005.<sup>22</sup> The federal government brought suit against various parties for delays in performance of a construction contract.<sup>23</sup> Among the defendants was LBL Skysystems (U.S.A.), Inc. (LBL), a subsidiary

19. See Jay Lawrence Westbrook, *Chapter 15 At Last*, 79 Am. Bankr. L.J. 713, 723 (2005) (an excellent and extensive article on the impact of the new chapter 15).

20. 11 U.S.C. § 1507(b)(1)-(5).

21. See Westbrook, *supra* note 19, at 720. Westbrook notes that section 1507 reflects the intent of the BACPA drafters to ensure that the benefits of section 304 case law considered to be more advanced than the Model Law were not lost. Thus, while section 304 criteria will apply under section 1507 to requests for broader relief, prior law will not apply where relief is to be more limited than under chapter 15. See *id.*

22. *United States v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637 (E.D.N.Y. 2005).

23. *Id.*

of a Canadian company that had filed a bankruptcy proceeding in Quebec.<sup>24</sup> In accordance with Canadian bankruptcy law, the receiver sought a stay of the U.S. contract suit with respect to LBL through a filing in the existing civil action. However, the receiver failed to file a petition for recognition under chapter 15.<sup>25</sup>

The court held that relief under chapter 15 is only available after a foreign representative commences a separate ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court.<sup>26</sup> Moreover, the court for the Eastern District of New York stated that “[i]n the absence of recognition under chapter 15, this Court has no authority to consider [the foreign representative’s] request for a stay.”<sup>27</sup> The court, however, observed that although both LBL and its parent were insolvent, LBL had a substantial claim pending with the General Services Administration for compensation for delays related to the U.S. contract suit.<sup>28</sup> The surety also agreed not to transfer any funds received relating to LBL’s delay claims.<sup>29</sup> Based on those facts and on principles of comity, the court then proceeded to stay the action for sixty days to allow the receiver an opportunity to seek relief under chapter 15.<sup>30</sup> It appears, therefore, that the courts will give the greatest deference to comity and will use their inherent equitable powers to effect its principles, as articulated in chapter 15, even beyond the scope of those powers actually given.

### III. Reported Opinions Construing Ancillary Proceedings under Section 304(c)

Chapter 15 of the Bankruptcy Code applies only to cases commenced on or after October 17, 2005. Accordingly, ancillary proceedings commenced prior to that time will continue to rely upon the existing and still growing body of decisions affecting practice under section 304.

In *Argentinean Recovery Company, LLC v. Board of Directors of Multicanal, S.A.*, the reorganization of Argentinean cable television operator Multicanal, S.A. (Multicanal) resulted in another reported opinion during the coverage period.<sup>31</sup> The 2005 decision demonstrates the intersection of American securities laws with a foreign reorganization in which the debtor seeks collateral offset in the United States. Multicanal commenced a privately negotiated restructuring of its debt in Argentina in 2001, in a procedure known as an *Acuerdo Preventivo Extrajudicial* (APE) proceeding and sought recognition of the APE through an ancillary proceeding under section 304 in the Southern District of New York.<sup>32</sup> The APE proposed different treatment for institutional note holders versus individual, or retail note holders. A group of retail note holders objected to the recognition of the APE in the United States on the ground that the discriminatory treatment of similarly-situated claims was not consistent with the requirements of section 304(c).<sup>33</sup> Multicanal amended the APE to pro-

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24. *Id.* at 637-38.

25. *Id.* at 638.

26. *Id.* at 639.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Argentinian Rec. Co. v. Bd. of Dirs. of Multicanal*, 331 B.R. 537 (S.D.N.Y. 2005).

32. *Id.* at 540-41.

33. *Id.* at 542.

vide for equal treatment among the note holders and the bankruptcy court granted relief under section 304. The objecting retail note holders appealed.<sup>34</sup>

The APE as amended provided for a cash payment or the issuance of options for new securities of the reorganized debtor. In an earlier ruling, the district court refused to give full effect to the APE under section 304 until the offer of new securities under the APE complied in the United States with the registration requirement of the Securities Act of 1933 (the Securities Act).<sup>35</sup> Multicanal argued that it could avoid registration by applying for a waiver or by qualifying for a statutory exemption.<sup>36</sup> After the waiver was denied by the SEC, Multicanal continued to assert that it qualified for an exemption from registration.<sup>37</sup> The principal opponent to the plan objected on the grounds that securities issued under an exemption from registration were less valuable than securities offered following registration.<sup>38</sup> While the appeal to the district court was pending, Multicanal filed a registration; however, the objector contended that the registration was ineffective because it did not pertain to all of the options for new securities extended pursuant to the APE.<sup>39</sup>

The district court remanded the case to the bankruptcy court to consider the sufficiency of the proposed registration and Multicanal's ability to prove its eligibility for an exemption from registration.<sup>40</sup> The particular exemption Multicanal sought, under section 3(a)(10) of the Securities Act, required a hearing to determine the fairness of the terms and conditions of the proposed exchange.<sup>41</sup> The bankruptcy court on remand could determine whether Multicanal satisfied the requirements of the Securities Act by the proposed cure of the registration requirement (filed while the appeal was pending), or whether the court overseeing the APE proceeding in Argentina could conduct a fairness hearing to fulfill the exemption.<sup>42</sup> If Multicanal could demonstrate the satisfaction of either condition, then the APE reorganization could be granted comity under section 304(c). Failing that, Multicanal would need to comply with section 5 of the Securities Act or propose an alternative cure for the registration requirements.<sup>43</sup>

*In re Rose*<sup>44</sup> reflects one of the rare instances wherein a foreign proceeding was not recognized as a foreign insolvency proceeding to which comity should be extended under section 304(c). In *Rose*, a director, appointed pursuant to a proceeding referred to as a transfer scheme and originating under the United Kingdom Financial Services and Markets Act 2000 (FMSA), sought recognition of the transfer scheme under section 304(c) to avoid collateral attack against the transfer scheme in the United States.<sup>45</sup> The goal of the transfer scheme was to restructure the assets and liabilities of twelve insurance and reinsurance companies into a new entity. The twelve companies had ceased writing policies. The companies were solvent, but outstanding liabilities remained.<sup>46</sup>

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34. *Id.* at 544-45.

35. *Id.* at 543.

36. *Id.* at 543-44.

37. *Id.* at 544.

38. *Id.*

39. *Id.*

40. *Id.* at 544-45, 551.

41. *Id.* at 544-48.

42. *Id.* at 551.

43. *Id.*

44. *In re Rose*, 318 B.R. 771 (Bankr. S.D.N.Y. 2004).

45. *Id.* at 772-73.

46. *Id.* at 773.

The bankruptcy court concluded that the FMSA transfer scheme was not a reorganization within the meaning of section 304(a).<sup>47</sup> The transfer scheme did not share any of the characteristics of the types of insolvency proceedings mentioned alongside the term reorganization (for example, liquidation, debt adjustment, composition) in section 304(a).<sup>48</sup> The court rejected the director's contention that reorganization under section 304(a) referred to any type of foreign corporate reorganization.<sup>49</sup> The fact that the companies remained solvent was not dispositive because section 304 does not per se require proof of insolvency.<sup>50</sup>

In *Bondi v. Grant Thornton Int'l*, the foreign representative of the Parmalat conglomerate sued a group of defendants in Illinois state court for various claims concerning the defendants' alleged roles in Parmalat's financial collapse.<sup>51</sup> The defendants removed the action to federal court in Illinois,<sup>52</sup> and the action was then transferred to the Southern District of New York, the venue for all Parmalat-related litigation in the United States.<sup>53</sup> The foreign representative sought remand of the action back to Illinois on grounds that the federal courts could not exercise jurisdiction over the lawsuit within the section 304 ancillary proceeding because the latter was not a case under Title 11 within the meaning of section 1334(b) of Title 28 of the U.S. Code.<sup>54</sup> The district court disagreed and denied the request for remand.<sup>55</sup> An ancillary proceeding constitutes a case under the relevant provisions of the Bankruptcy Code, and therefore, the ancillary proceeding fell within the federal bankruptcy jurisdiction created by section 1334(b).<sup>56</sup> The fact that no Title 11 estate was created by recognizing a foreign proceeding under section 304 (only the estate of the foreign proceeding existed) did not defeat jurisdiction.<sup>57</sup>

#### IV. The New Brazilian Company Recovery Law

Brazil has a new bankruptcy law known as the Company Recovery Law.<sup>58</sup> The new law introduced innovative provisions concerning the judicial and extrajudicial recovery and bankruptcy of businesspersons and business companies in a Brazilian context.

Pursuant to Law 11,101/2005, if the debtor in a given transaction is a Brazilian company in financial difficulty, it may file for judicial or extrajudicial recovery. In this case, the Brazilian company will submit a recovery plan that must be approved by the creditors. Its creditors will be paid based on the schedule of payment set forth in article 83 of Law 11,101/2005, which is quite different from the schedule of payment established by the former Bankruptcy Law. The schedule set forth in article 83 of Law 11,101/2005 will apply: (1) labor credits up to 150 current minimum wages<sup>59</sup> per creditor, and those deriving from

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47. *Id.* at 774-75.

48. *Id.*

49. *Id.*

50. *Id.* at 775.

51. *Bondi v. Grant Thornton Int'l*, 332 B.R. 44, 44-46 (S.D.N.Y. 2005).

52. *Id.* at 47.

53. *Id.*

54. *Id.* at 47-48.

55. *Id.* at 49, 51.

56. *Id.* at 48.

57. *Id.*

58. Law No. 11,101, February 9, 2005 (Brazil).

59. The minimum wage is R\$260,00, which corresponds to approximately US \$99.61 as of 2/11/05.

occupational accidents; (2) credits secured by rights *in rem* up to the value of the encumbered property; (3) tax credits, independent of their nature, except for tax-related fines; (4) credits with special privileges;<sup>60</sup> (5) credits with general privileges;<sup>61</sup> (6) ordinary credits;<sup>62</sup> (7) credits regarding penalties for noncompliance of contracts; (8) tax penalties and pecuniary penalties for violation of criminal and administrative laws; and (9) subordinated credits (that is, credits regarded as such under any law or agreement and credits of partners and officers without employment relationship).

## V. The UNIDROIT Convention on International Interests in Mobile Equipment

After many years of study, drafting and diplomatic negotiations, the Cape Town Convention on International Interests in Mobile Equipment (the Cape Town Convention) entered into force with respect to aircraft on March 1, 2006.<sup>63</sup> The Cape Town Convention

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60. Credits with special privileges arise from the following: (1) items collected or settled for a creditor with a claim for court fees or expenses incurred in the collection and settlement; (2) items saved for a creditor with a claim for salvage expenses; (3) items improved for a creditor with a claim for necessary or useful improvement; (4) rustic or city buildings, plants, workshops, or any other construction for a creditor with a claim for materials, monies or services for the erection, reconstruction or betterment thereof; (5) agricultural produce for a creditor with a claim for seeds, instruments and services to the growing or harvesting thereof; (6) furniture, fixings and fittings and household utensils, at rustic or city buildings for a creditor with a claim for rents, as to the payments of current and preceding years; (7) copies of work existing in the editor's assets, the author thereof, or his/her lawful representatives, for credit claimed against the former under publishing agreement; (8) harvest produce, with the involvement of rural labor, (9) those regarded as such under other civil and commercial laws, except as provided otherwise in this Law; and (10) to whose holders law grants the right of retention with respect to the thing given as guarantee.

61. Credits with general privileges derive from the following: (1) expenses incurred in funerals, undertaken as specified by the deceased and the customs of the place; (2) court fees, or expenses incurred in the collection and liquidation of estate; (3) expenses incurred during mourning period of the deceased debtor's surviving spouse and children, provided that they are reasonable; (4) expenses incurred in connection with a disease from which the debtor suffered and died, arising during the six months preceding his/her death; (5) expenditures necessary to support deceased debtor and his/her family, in the quarter preceding the death; (6) taxes owing to the Public Treasury, in current and preceding years; (7) salaries of debtor's household help, in his/her last six months of life; (8) other credits with general privileges; (9) obligations assumed by debtor during the judicial recovery, including those respecting expenses with suppliers of goods or services and loan agreements; and (10) those regarded as such under other civil and commercial laws, except as otherwise provided in the Law.

62. Ordinary credits are: (1) credits not provided in the other items of this article; (2) balance of credits not benefiting from the sale of the assets linked to their payment; and (3) balance of credits deriving from labor laws and regulations exceeding the limitation set forth in item I.

63. The proposal that UNIDROIT undertake the creation of a convention on secured transactions was first made in 1988 by T.B. Smith QC. ROY GOODE, OFFICIAL COMMENTARY, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (2002). The convention only enters into force with respect to that category of assets for which a separate protocol has entered into force. Convention on International Interests in Mobile Equipment, art. 49(1), Nov. 16, 2001, S. Treaty Doc. No. 108-10, available at <http://www.unidroit.org/english/conventions/c-main.htm> [hereinafter Cape Town Convention]. The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Aircraft Protocol) enters into force three months following the deposit of the eighth instrument of ratification. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. XXVIII(1), Nov. 16, 2001, S. Treaty Doc. No. 108-10, available at <http://www.unidroit.org/english/conventions/c-main.htm> [hereinafter Aircraft Protocol]. The eighth instrument of ratification for the Aircraft Protocol was deposited by Malaysia on November 2, 2005. UNIDROIT, STATUS OF THE PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

is a breakthrough in a long campaign to liberalize and harmonize the law of secured transactions around the world. In addition to protecting the interests of secured parties, the Cape Town Convention also provides remedies for conditional sellers and lessors.

A liberal law of secured transactions, such as article 9 of the Uniform Commercial Code (article 9), allows for the creation of non-possessory security interests that are subject to clear priority rules and can be promptly enforced, even after the debtor has entered bankruptcy. The ability of creditors to easily enforce a security interest is a mainstay of modern finance and serves to keep interest rates low by reducing the creditor's risk of non-payment. However, the laws of many countries are hostile toward the creation of non-possessory security interests, the determination of priority based on the public registration of security interests, and the enforcement of security interests without a court order.<sup>64</sup> This uncertainty regarding the enforcement of security interests abroad increases the cost of loans secured on assets outside of the United States. The Cape Town Convention promises to solve this problem by creating a uniform legal regime for the creation and enforcement of non-possessory security interests in all contracting states. However, the Cape Town Convention only applies to a narrow spectrum of ultra-expensive mobile assets—namely, aircraft, rolling stock, and space assets. Given the cost and mobility of these assets, the impetus was greatest among these industries for creating an international legal regime to facilitate the financing of such assets.<sup>65</sup> While the Cape Town Convention has entered into force with respect to aircraft, the convention will not apply to rolling stock or space assets until the protocols concerning these categories of assets have been finalized and enter into force.<sup>66</sup>

#### A. CREATION, REGISTRATION AND PRIORITY OF AN INTERNATIONAL INTEREST

The Cape Town Convention provides for the creation and enforcement of an international interest, which can arise under a security agreement, a conditional sale agreement, or a lease agreement.<sup>67</sup> The convention facilitates the creation of an international interest by imposing only the few formal requirements that the debtor, seller, or lessor have the power to dispose of the asset, the agreement be in writing, and the agreement describe the asset with specificity.<sup>68</sup> This requirement of specificity distinguishes the Cape Town Con-

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ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT, available at <http://www.unidroit.org/english/implementation/2001-aircraftprotocol.pdf>. In addition to Malaysia, the Aircraft Protocol has been ratified by Ethiopia, Oman, Ireland, Panama, Pakistan, Nigeria, and the United States. *Id.*

64. For example, German law does not provide for the public registration of security interests for purposes of establishing priority. HANS-JOSEPH VOGEL & JAN BECHER, GER-16 INTERNATIONAL SECURED TRANSACTIONS (Oceana Publ'ns, Inc. 2003).

65. The Boeing Company and Airbus, as co-chairs of the Aviation Working Group, played a central role in ensuring the completion of the Aircraft Protocol. See Aviation Working Group, AWG Structure and Membership, available at <http://www.awg.aero/organisation.htm>. The Cape Town Convention should make it significantly easier for customers of Boeing and Airbus to finance the purchase of the new generation of airliners, such as Airbus's A380 and Boeing's 787 Dreamliner, that these manufacturers have recently brought to market. For information regarding the Boeing 787 see the Boeing Company website, <http://www.boeing.com/commercial/7e7/background.html>. For information regarding the Airbus 380 see the Airbus S.A.S. website, <http://www.airbus.com/en/aircraftfamilies/a380>.

66. The Aircraft Protocol extends the provisions of the Cape Town Convention to airframes, aircraft engines, and helicopters, subject to certain minimum weight, capacity, and power thresholds. Aircraft Protocol, *supra* note 63, arts. I(2)(b)-(c),(e),(l), II(1).

67. Cape Town Convention, *supra* note 63, art. 2(2).

68. *Id.* art. 7.

vention from article 9 and prevents the creation of a security interest in after-acquired collateral, also known as a floating lien. However, as explained below, this asset-centered approach makes it easier to search the registry to determine whether a particular aircraft is subject to existing interests. In addition to the foregoing requirements, a security agreement must provide a general description of the obligations secured by the asset.<sup>69</sup> The general nature of this description will allow for future advances that come within the scope of the described obligations to be secured on the asset without the need for further documentation. The security interest will continue as the proceeds of the collateral. However, the term “proceeds” does not have the broad meaning found in article 9, but is restricted to “proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation, or requisition.”<sup>70</sup> This narrow definition of proceeds includes insurance proceeds, but excludes, most notably, proceeds realized upon the sale or lease of the collateral.

One of the core features of the Cape Town Convention is the clear rule that a registered international interest in an asset will have priority over all other interests that are unregistered or were registered subsequently.<sup>71</sup> Using the parlance of article 9, an international interest is perfected upon registration of the interest with the registry created for that type of asset. As is true under article 9, a party will be permitted to register an international interest prior to the creation of such interest, also known as prospective filing.<sup>72</sup> Each protocol to the convention will create a single global registry for the type of asset governed by the protocol.<sup>73</sup> These registries will be searchable online at any time to assist in identifying any existing interests that have been registered with respect to a specific asset.<sup>74</sup>

## B. ENFORCEMENT REMEDIES AND INSOLVENCY

In addition to establishing clear priority rules, the Cape Town Convention provides a secured party with the ability to enforce a security interest swiftly without judicial intervention. The panoply of enforcement remedies provided to a secured party under the Convention include the right to repossess the asset, to sell or lease the asset, and to collect any income derived from the use of the asset.<sup>75</sup> In the absence of a court order, the debtor must give its consent before these remedies are exercised.<sup>76</sup> However, this consent can be given

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69. *Id.* art. 7(d).

70. *Id.* art. 1(w).

71. *Id.* art. 29(1). Contracting states may make a declaration granting priority to certain non-consensual interests priority over registered international interests. *Id.* art. 39(1). The Convention does not apply to pre-existing interests. *Id.* art. 60. The priority of such pre-existing interests will continue to be determined by domestic law. *Id.*

The Aircraft Protocol permits a sale of an aircraft to be registered and for the buyer to enjoy the priority rights associated with registration. Aircraft Protocol, *supra* note 63, art. III. The general rule under the Cape Town Convention is that buyers take free of an unregistered interest, but take subject to a registered interest. Cape Town Convention, *supra* note 63, art. 29(3).

72. GOODE, *supra* note 63, at 16.

73. *Id.* at 15.

74. The registry for aircraft will be administered by Dublin-based Aviareto, a joint-venture between SITA SC and the Irish Government. Aviareto Website, <http://www.aviareto.aero/public/about.php> (last visited Mar. 1, 2006).

75. Cape Town Convention, *supra* note 63, art. 8(1).

76. *Id.* art. 8(1)-(2).

in the security agreement prior to default.<sup>77</sup> As under article 9, the secured party must provide notice to the debtor and other interested parties prior to a sale or lease and must conduct the sale or lease in a commercially reasonable manner.<sup>78</sup> A secured party is also permitted to accept the collateral in total or partial satisfaction of the secured obligations, provided that the debtor and all interested parties consent to the acceptance (or a court order is issued).<sup>79</sup> A separate provision of the convention addresses the remedies for conditional sellers and lessors.<sup>80</sup> This provision permits a conditional seller or lessor to terminate the title reservation or lease agreement upon default and take possession of the asset.<sup>81</sup>

The greatest challenge to the drafters of the Cape Town Convention was the protection of the rights of a secured party, conditional seller, or lessor in the event of the debtor's insolvency.<sup>82</sup> Due to sensitive public policy considerations, the laws of many countries subordinate the rights of a secured parties when a debtor enters bankruptcy. As a result of the controversial nature of this issue, detailed insolvency provisions were ultimately omitted from the main convention and left to the industry-specific protocols.<sup>83</sup> The Aircraft Protocol offers contracting states the choice of three approaches to the status of a creditor's rights during insolvency.<sup>84</sup> Under the first approach, upon the debtor's insolvency, the insolvency administrator must, within a stated time frame, either cure all defaults and agree to satisfy all future obligations, or allow the secured party to take possession of the aircraft.<sup>85</sup> Under the second approach, upon insolvency, the secured party can demand that the insolvency administrator give notice within a stated time frame, either that it will cure all defaults and agree to satisfy all future obligations, or that it will allow the secured party to take possession of the aircraft.<sup>86</sup> Finally, under the third approach, a contracting state can choose not to adopt either of the foregoing rules and can simply apply its domestic insolvency law.<sup>87</sup>

### C. EXPECTED BENEFITS AND FUTURE PROTOCOLS

The Aircraft Protocol's entry into force will significantly reduce finance costs for purchasers and lessees of aircraft and aircraft engines.<sup>88</sup> In fact, the Export-Import Bank of the

77. *Id.* art 8(1).

78. *Id.* art. 8(3)-(4).

79. *Id.* art. 9.

80. *Id.* art. 10.

81. *Id.*

82. GOODE, *supra* note 63, at 199; *see also* Jeffrey Wool, *The Case for a Commercial Orientation to the Proposed Unidroit Convention as Applied to Aircraft Equipment*, 31 *LAW & POL'Y INT'L BUS.* 79, 92 (1999) (explaining that "[f]ew, if any, areas of commercial law are more policy laden than insolvency law.").

83. The Cape Town Convention only states that an international interest registered prior to the commencement of insolvency proceedings will be effective in the proceedings. Cape Town Convention, *supra* note 63, art. 30(1).

84. Aircraft Protocol, *supra* note 63, art. X. A contracting state must declare which of the three approaches it will take to insolvency upon its accession to the convention. *Id.* arts. XI, XXX(3).

85. *Id.* art. XI (Alternative A).

86. *Id.* art. XI (Alternative B).

87. *Id.* art. XI.

88. Regarding the economic impact of the Cape Town Convention with respect to the aviation industry, *see* Anthony Saunders & Ingo Walter, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment*, 23 *AIR & SPACE L.* 339 (1998).

United States has promised to reduce its exposure fee by one-third for the financing of American-made aircraft for foreign purchasers from countries that have ratified the Aircraft Protocol.<sup>89</sup> However, the ultimate success of the Cape Town Convention will hinge on whether the convention is broadly ratified among the many countries serviced by the major airlines. Provided that sufficient support is received from the rail and space industries, the coming year will also likely witness the successful completion and ratification of the additional protocols governing rolling stock and space assets.<sup>90</sup> Once these protocols are in place, the renovation of rail service in Eastern Europe will likely gain steam and the commercial satellite industry should rise to new heights.

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89. Press Release, Export-Import Bank of the United States, Eighth Country Ratifies Cape Town Treaty on Cross-Border Financing of Large Commercial Aircraft and Aircraft Engines, Enables Treaty to Enter into Effect Next Year, Nov. 3, 2005, available at <http://www.exim.gov/pressrelease.cfm/5B990FE6-B08A-3865-E12621AA8C505B72>.

90. For a detailed analysis of the provisions contained in the space protocol, see Paul B. Larsen, *Future Protocol on Security Interests in Space Assets*, 67 J. AIR L. & COM. 1071 (2002).