

NOTE

JURISDICTIONAL JET LAG:

THE CASE FOR GREATER IMPLEMENTATION OF THE CAPE TOWN CONVENTION IN CROSS-BORDER AIRLINE INSOLVENCY

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I.INTRODUCTION.....	228
II.ORIGINS OF THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL: A NEW ERA IN AVIATION	232
III.THE FUNDAMENTALS OF AIRCRAFT FINANCING.....	236
IV.THE US BANKRUPTCY CODE'S APPLICATION TO DOMESTIC AND INTERNATIONAL INSOLVENCY PROCEEDINGS.....	239
A. History of US Airline Bankruptcies.....	239
B. Impact of the US Bankruptcy Code on Foreign Carriers Filing in the United States	240
C. Domestic Impact of §§ 1110 and 362	243
D. Distinctions and Benefits for Foreign Carriers.....	245
E. Chapter 15: A Means of Introducing Foreign Proceedings to the United States.....	246
V.THE CAPE TOWN CONVENTION'S SUPREMACY OVER THE BANKRUPTCY CODE.....	248
VI.ARTICLE XI AND ARTICLE XXX OF THE AIRCRAFT PROTOCOL ON INSOLVENCY.....	252

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A. Insolvency Alternatives Available to Contracting States Under the Convention.....	253
B. The Impact of a Declaration on Other States.....	256
C. The Problem for the United States: Inconsistent Treatment of Debtors	259
VII.ISSUES WITH THE APPLICABILITY OF THE CAPE TOWN CONVENTION IN US BANKRUPTCY COURTS	261
A. How the Cape Town Convention Has Been Recognized by US Courts	262
B. Problems of Applicability in <i>In re Oceanair</i>	264
C. The Road to Recovery: <i>In re SAS</i>	267
D. Additional Non-US Interpretations of the Convention: Nordic Aviation Capital DAC and AirAsia X Berhad.....	270
VIII.CONCLUSION	274

I. INTRODUCTION

The aviation industry is unique in many ways. With over 100,000 commercial flights each day, it is far more globally interconnected than many other industries.¹ For a typical commercial flight, each aircraft can cost upwards of one hundred million dollars, even without adding the costs of engines, fuel, and other flight necessities.² There is no doubt that a robust system of organization for such valuable and critical equipment is necessary.

Economic shifts over time have greatly impacted the aviation industry. Recently, many airlines have been driven to file for bankruptcy, whether impacted by competition or the COVID-19

1. OAG Aviation Worldwide Ltd., *Airline Frequency and Capacity Statistics* (Oct. 2025), <https://www.oag.com/airline-frequency-and-capacity-statistics> [https://perma.cc/MBW2-7MPH].

2. The Airbus A320 series and the Boeing 737 series are the most ordered aircraft for commercial airlines. John Grant, *The World's Most Heavily Used Aircraft Types – Answering the Big Ask*, OAG AVIATION WORLDWIDE LTD. (Mar. 27, 2023), <https://www.oag.com/blog/worlds-most-heavily-used-aircraft-types-ask> [https://perma.cc/NX78-3WAZ]; *Aircraft Pricing*, AXON AVIATION GRP., <http://www.axonaviation.com/commercial-aircraft/aircraft-data/aircraft-pricing> [https://perma.cc/EH4R-AQZS] (last visited June 9, 2026).

pandemic.³ To understand the uniqueness of the airline industry, it is crucial to consider the governing bankruptcy provisions, which have to be as globally impactful as the industry itself.

The United States has set itself up as a center for global commerce and has a developed court system which invites and welcomes foreign debtors to file for bankruptcy in the United States rather than their home courts. The US system offers favorable treatment to debtors, and the opportunity for the automatic stay, continued possession of assets, and a fast and efficient system built on the long history of Chapter 11 filings.⁴ The US Bankruptcy Code, § 1110, is dedicated to the unique considerations in US airline bankruptcies.⁵ Given the nature of the industry, a purely domestic approach would be insufficient; thus, international treaties are brought in to supplement.

The Cape Town Convention (“CTC” or “Convention”), an international treaty which the United States has ratified, additionally presents a detailed system which governs the financing and regulation of aircraft.⁶ Along with the CTC Aircraft Protocol, which adds additional specificity for transactions involving aircraft, the Convention sets up a necessary internationally applicable system which governs aircraft irrespective of where the equipment is or what a country’s local laws would dictate.⁷ The United States and eighty-nine other countries are contracting parties to the Convention, and most of

3. See generally Pol Fontanet-Pérez, Xosé H. Vázquez & Diego Carou, *The Impact of the COVID-19 Crisis on the US Airline Market: Are Current Business Models Equipped for Upcoming Changes in the Air Transport Sector?*, 10 CASE STUD. ON TRANSP. POL’Y 647 (2022). For additional information on the updates in 2025 and recent changes, see also Jaap Bouwer & Steve Saxon, *Can the Global Airline Industry Continue Its Climb?*, MCKINSEY & CO. (May 22, 2025), <https://www.mckinsey.com/industries/travel/our-insights/can-the-global-airline-industry-continue-its-climb> [https://perma.cc/D33G-9WGP].

4. Justin Cloyd, *Advantages of US Bankruptcy Law for Foreign Travel Companies*, BLOOMBERG L.: PRO. PERSP. (Aug. 2022) (Bloomberg Law, Doc. No. X77LMUU4000000). The benefits of the US Code have grown popular and have been adopted internationally—the EU issued a directive in 2019 to adopt a system of bankruptcy that mirrored the United States’. Other countries to adopt similar rules include Singapore, the Netherlands, and China. However, because of the United States’ long and developed history of the Bankruptcy Code, it is still considered the best “proven legal framework.”

5. See generally 11 U.S.C. § 1110(a).

6. See generally Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. TREATY DOC. NO. 108-10, 2307 U.N.T.S. 285 [hereinafter Cape Town Convention].

7. *Id.*

these states are also parties to the Aircraft Protocol.⁸ By ratifying the Convention and the Aircraft Protocol, countries have the option to make certain “declarations” notifying other countries which are parties to the Convention (“Contracting States” or “States”) about choices relating to proceedings involving airlines centered in their country, including declarations relating to insolvency proceedings.⁹

The insolvency provisions in the Convention and Aircraft Protocol are designed in part to create disincentives for insolvency-related forum shopping by airlines, which would have allowed the airline or debtor to choose where to file their insolvency proceeding if it is allowed in multiple jurisdictions.¹⁰ This is particularly applicable in scenarios with international assets such as aircraft, as the debtor may have multiple centers of commercial interests.¹¹ One way to understand how the Convention’s bankruptcy provisions affect forum shopping in practice is to view them from the perspective of debtors commencing insolvency proceedings in a jurisdiction other than the state in which their main interests are centered.¹² Ordinarily, airline debtors face jurisdictional limitations that limit insolvency relief to the state in which their main interests are centered.¹³ Unlike most countries, the jurisdictional provisions in the US Code have been interpreted to allow foreign debtors (whether airlines

8. *State Parties: Convention on International Interests in Mobile Equipment (Cape Town, 2001)*, UNIDROIT, <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/> [https://perma.cc/AF9R-HML2] (last visited June 7, 2026).

9. See generally Cape Town Convention, *supra* note 6, art. 23.

10. See Tamar Mskhvilidze, *The Legal Nature of Forum Shopping in International Civil Procedure Law*, 9 L. & WORLD 93, 94 (2023).

11. Donald G. Gray, Dean N. Gerber & Jeffrey Wool, *The Cape Town Convention Aircraft Protocol’s Substantive Insolvency Regime: A Case Study of Alternative A*, 5 CAPE TOWN CONV. J. 115, 143 (2016).

12. ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT: OFFICIAL COMMENTARY 304 (5th ed. 2022) [hereinafter OFFICIAL COMMENTARY]. Throughout the Official Commentary, Goode refers to a debtor’s “COMI,” or the center of main interests. This is of particular value when discussing the debtor’s state for an Aircraft Protocol Article XI analysis. Typically the COMI will be the “debtor’s statutory seat, or if not then the place where the debtor was incorporated or formed . . . in short, the COMI is determined not by the statutory seat but by the real seat.” *Id.* at 306; see also *id.* § 2.34 (explaining statutory seat determination).

13. EDWARD H. TILLINGHAST III & NICHOLAS DUGDALE, SHEPPARD MULLIN, CROSS-BORDER AIRLINE INSOLVENCIES: WILL THE CAPE TOWN CONVENTION’S ALTERNATIVE A LIMIT THE AUTOMATIC STAY IN A FOREIGN AIRLINE CHAPTER 11 1, 3 (Apr. 2021).

or not) to seek the protection of US bankruptcy courts by filing a Chapter 11 bankruptcy or reorganization petition.¹⁴ Normally, this move does not create questions regarding applicable law, as with most corporations, US law is applied.

However, when foreign airlines access Chapter 11 in this way, US courts have struggled to identify the governing law—namely, whether provisions of the US Bankruptcy Code supersede the insolvency provisions of the Convention and related Protocol, or vice versa—and, thus, the rights and obligations of these foreign debtors. As US bankruptcy courts begin to recognize the validity of the Cape Town Convention as federal law governing Chapter 11 bankruptcy cases pending before them, they must grapple with the applicability of the Convention and Protocol, especially when they are inconsistent with domestic law under the US Bankruptcy Code.

This Note will argue that by signing onto and ratifying the Convention and Protocol, the United States must adhere to the insolvency provisions of the Protocol and Convention that would govern a foreign airline debtor's filing in the jurisdiction of the center of main interests, including any declarations made under the Aircraft Protocol or the Convention by the state in which the debtor's main insolvency jurisdiction is located. This is so even though the United States has not made its own declaration under Article XXX (Declarations relating to certain provisions) of the Convention. US courts overseeing insolvency proceedings of foreign airlines must apply the declaration made by the insolvency state, or primary insolvency jurisdiction, rather than the local US Bankruptcy Code. Otherwise, they would be in breach of a federal treaty. Further, this Note advocates for greater implementation of the agreed-upon international treaty into domestic law through affirmative court judgment.

Part II provides the background and purpose of the Cape Town Convention, demonstrating its necessity and benefits to the global aviation industry. Part III describes the established system of aircraft financing and how it has changed over time. Part IV explains the specifics of 11 U.S.C. § 1110 as well as how the United States treats foreign carriers differently from local ones. Part V

14. See generally 11 U.S.C. §§ 1101–1174. Chapter 11 bankruptcy provides for reorganization of a corporation or partnership, allowing the debtor to keep the business alive and typically pay creditors over time.

argues that the Cape Town Convention should override the Bankruptcy Code when applied to foreign carriers on the basis of it being a self-executing treaty, one enforceable in domestic courts without implementing legislation. Part VI discusses the relevant provisions of the Protocol which govern bankruptcy and how they should be applied to proceedings within the United States. Part VII analyzes essential cases, both internationally and within US bankruptcy courts, highlighting the inconsistency yet importance of the Cape Town Convention's applicability.

Finally, this Note concludes by arguing that there remains an urgent need for a clearer precedent and definitive guidelines for accessing insolvency protection outside of a debtor's main insolvency jurisdiction, both in the United States and internationally. The Cape Town Convention has laid the necessary groundwork for an effective system, and what remains is the obligation on Contracting States to appropriately apply it to foreign debtors.

II. *ORIGINS OF THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL: A NEW ERA IN AVIATION*

Property laws internationally are often governed by the principle of *lex situs*, which purports that the laws of the jurisdiction in which the property is located apply. In itself, this principle is not controversial, and dates back to the feudalist era.¹⁵ For example, under *lex situs*, a building built in New York will be governed by New York law. While this principle continues to apply in some areas of the law, *lex situs* has become insufficient in others as our world grows to be more international and interconnected. What happens to property that is constantly changing its location? For example, if an owner of an asset or property has a security interest governing it under English law, *lex situs* becomes obsolete if the asset is then located in the United States, where the governing law no longer recognizes the same security interest. With respect to high-value mobile assets, such as aircraft, trains, and satellites, a

15. See David Colwyn Williams, *Land Contracts in the Conflict of Laws—Lex Situs: Rule or Exception*, 11 HASTINGS L.J. 159, 161–62 (1959).

clear answer about governing these security interests was not reached until 2001.¹⁶

Two international organizations, the International Institute for the Unification of Private Law (“UNIDROIT”)¹⁷ and the International Civil Aviation Organization (“ICAO”),¹⁸ collaborated to create the *Convention on International Interests in Mobile Equipment*, commonly known as the Cape Town Convention, named after the diplomatic conference hosted in South Africa where twenty-six states signed it on November 16, 2001.¹⁹ The collaboration represented an “unprecedented private-public sector cooperation” and was met with nearly unanimous support.²⁰ The primary goal of the Convention was to remedy the issue of “obtaining secure and readily enforceable rights” in high-value movable assets—specifically aircraft, rolling stock, and space assets—within a myriad of legal systems.²¹

Seeking to resolve the *lex situs* issue, the Convention made financing of high-value mobile equipment more accessible, cheaper, and included clearer guidelines.²² At the time of the Convention’s drafting and ratification, key sellers and purchasers of aircraft equipment anticipated sales of trillions of dollars of products, demonstrating major growth in the industry.²³ The Convention provided guidelines and reforms to support the secure financing of these products, which is especially crucial for states

16. See generally CHRISTIAN TWIGG-FLESNER, FOUNDATIONS OF INTERNATIONAL COMMERCIAL LAW 179 (2022); ANTON N. DIDENKO, THE CAPE TOWN CONVENTION: A DOCUMENTARY HISTORY 8–41 (2021).

17. See INT’L INST. FOR THE UNIFICATION OF PRIV. L., <https://www.unidroit.org/> [https://perma.cc/SJ6W-PKXU] (last visited June 7, 2026).

18. See INT’L CIV. AVIATION ORG., <https://www.icao.int/Pages/default.aspx> [https://perma.cc/YY7K-BS5T] (last visited June 7, 2026).

19. Sandeep Gopalan, *Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol*, 29 N.C. J. INT’L L. 59, 59 (2003); see also Roy Goode, *The Cape Town Convention on International Interests in Mobile Equipment: A Driving Force for International Asset-Based Financing*, 7 UNIF. L. REV. 3, 3 (2002) [hereinafter Goode, *Driving Force*].

20. Lorne S. Clark, *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines*, 69 J. AIR L. & COM. 3, 4 (2004).

21. Goode, *Driving Force*, *supra* note 19, at 4.

22. Gray, Gerber & Wool, *supra* note 11, at 115.

23. CHARLES W. MOONEY JR. & JOHN A. E. POTTOW, AVIATION WORKING GRP., INDEPENDENT EXPERT OPINION 4 (May 2024).

with inadequate domestic financing regimes.²⁴ Thus, the Convention had enormous potential for extensive economic impact, a driving factor for its widespread adoption.²⁵

The structure of the Convention is interesting for a number of additional reasons. The Convention lays out the general framework for secured transactions and leasing of high-value mobile equipment, but is not equipment-specific.²⁶ Since it alone would be insufficient to govern the various types of current and future assets to be considered, drafters implemented an innovative two-instrument structure.²⁷ The Convention is read in conjunction with a relevant “protocol” for each type of mobile equipment: aircraft, rail, space, and mining, agricultural, and construction equipment (“MAC”).²⁸ In the event of any inconsistency, the protocol would prevail because its provisions are more reflective of the specific industry practices.²⁹

The Aircraft Protocol (“Protocol”) was the first protocol to be ratified, signed alongside the Cape Town Convention on November 16, 2001.³⁰ The Convention and Protocol required twenty states to sign on, and eight states to fully ratify the Convention and Protocol, for both to go into effect. The Convention and Protocol were then ratified in 2006.³¹ The Protocol was considered a great success and laid the essential foundation for the later adoption of the Railway Rolling Stock Protocol, the Space Asset Protocol, and the MAC

24. *Id.* Many domestic regimes did not have sufficient law reform to carry out such complex transactions or doing so would incur high financial costs.

25. *Id.* at 4–5.

26. *See generally* Cape Town Convention, *supra* note 6, art. 2; *see also* MOONEY & POTTOW, *supra* note 23, at 4.

27. Goode, *Driving Force*, *supra* note 19, at 5.

28. TWIGG-FLESNER, *supra* note 16, at 182; *see Security Interests*, UNIDROIT, <https://www.unidroit.org/instruments/security-interests/> [https://perma.cc/8YU4-32UQ] (last visited June 8, 2026) (describing all protocols). MAC refers to the Protocol on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural, and Construction Equipment. *See* Cape Town Convention, *supra* note 6, art. 6(1) (“This Convention and the Protocol shall be read and interpreted together as a single instrument.”).

29. TWIGG-FLESNER, *supra* note 16, at 182; *see also* Cape Town Convention, *supra* note 6, art. 6(2) (“To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.”).

30. DIDENKO, *supra* note 16, at 3; *see also* ROY GOODE ET AL., *TRANSNATIONAL COMMERCIAL LAW: TEXTS, CASES AND MATERIALS* 396 (2d ed. 2015).

31. GOODE ET AL., *supra* note 30, at 396. Malaysia was the final state to sign on in November 2005, allowing the Convention and Protocol to come fully into force on March 1, 2006.

Protocol.³² Since then, leading scholars in the industry, including Roy Goode, reporter of the Convention and Chairman of the Conference Drafting Committee, regard the Convention and Aircraft Protocol as one of UNIDROIT's "great success stories."³³ After ratification, the Cape Town Convention became the second most ratified substantive commercial law treaty in the world.³⁴

The Convention revolutionized the aviation industry in multiple ways. One way was the creation of the International Registry, which sought to solve the issue of conflicting security interests under domestic law by creating "international interests" subject to perfection, the establishment of a security interest for the purpose of gaining priority, through registration in one place for all the Convention's Contracting States.³⁵ The International Registry is an asset-based system, which allows searching for a specified aircraft or object instead of searching for an owner's or debtor's name.³⁶ This system requires the asset to be uniquely identifiable, typically through a manufacturer and serial number, and follows a notice approach, where the order of registration determines claims on the asset.³⁷ In essence, it created a public record of existing or potentially existing security interests on aircraft objects—demonstrating priority or claims on security interests.³⁸ The International Registry is headquartered in Dublin, Ireland, but is accessible from anywhere online at any time.³⁹ Thus,

32. Clark, *supra* note 20, at 4. This Note will not discuss the details of the Rail, Space, or MAC protocols. However, the Luxembourg Protocol was established in 2007 governing Railway Rolling Stock, the Space Assets Protocol was established in 2012 in Berlin, and the MAC Protocol was adopted in 2019 in South Africa. *See supra* note 17.

33. Roy Goode, *The Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment*, in THE ELGAR COMPANION TO UNIDROIT 277, 277 (Thomas John, Rishi Gulati & Ben Köhler eds., 2024) [hereinafter GOODE, ELGAR COMPANION].

34. DIDENKO, *supra* note 16, at 3 (following the Convention on Contracts for the International Sale of Goods (1980)).

35. *See id.* at 23; *see also* Charles W. Mooney Jr., *United States of America: Reconsidering the Transaction Document Filing Requirement for National Registry*, in IMPLEMENTING THE CAPE TOWN CONVENTION AND THE DOMESTIC LAWS ON SECURED TRANSACTIONS 197, 201 (Souichirou Kozuka ed., 2017); Cape Town Convention, *supra* note 6, art. 17.

36. Mooney, *supra* note 35, at 201.

37. GOODE, ELGAR COMPANION, *supra* note 33, at 278–79.

38. Typically, aircraft objects would refer to the aircraft itself and its engines, which could be registered separately. Ronald C. C. Cuming, *The International Registry for Interests in Aircraft: An Overview of Its Structure*, 11 UNIF. L. REV. 18, 22, 30–32 (2006).

39. *Id.* at 30–32; *see also* Cape Town Convention, *supra* note 6, art. 22 ("Any person may, in the manner prescribed by the Protocol and regulations, make or request a search

the Convention, through the creation of the International Registry, is able to easily facilitate international transactions of aircraft and other mobile equipment.

The greatest success to come from the Convention is often considered to be in the realm of insolvency provisions.⁴⁰ Its insolvency provisions were essential to “lowering the cost and increasing the availability of financing equipment,” allowing the industry to progress with these internationally accepted protections.⁴¹ One of the remarkable features of these provisions is that they enable a creditor to override national laws if the relevant state has made an applicable declaration under the Convention or the Protocol.⁴²

III. THE FUNDAMENTALS OF AIRCRAFT FINANCING

Before examining the complex specificities of the Convention and Aircraft Protocol provisions, it is important to understand the way aircraft are financed, and why this system involves lessees and creditors. For the last fifty years, demand for global air traffic has been robust—doubling every fifteen years.⁴³ Increased demand for aircraft meant increased demand for efficient financing options, leading to the development of a great variety of investment instruments.⁴⁴

Generally, over time, airlines have found it more advantageous to lease aircraft rather than purchase them, as it has become increasingly difficult to afford new aircraft without securing financing, as each is valued upwards of one hundred million dollars, or to keep up with advancements by purchasing the

of the International Registry by electronic means concerning interests or prospective international interests registered therein.”).

40. Gray, Gerber & Wool, *supra* note 11, at 115–16.

41. *Id.* at 116.

42. GOODE, *ELGAR COMPANION*, *supra* note 33, at 281; *see also* Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. XI, Nov. 16, 2001, S. TREATY DOC. NO. 108-10, 2367 U.N.T.S. 517 [hereinafter Aircraft Protocol]; Cape Town Convention, *supra* note 6, art. 30. The specific provisions are discussed at length in Part VII.

43. ROB MURPHY, *AIRCRAFT FINANCING* 14 (5th ed. 2022).

44. *A Look at Aircraft Finance – Part I*, MBA AVIATION (Feb. 28, 2018), <https://www.mba.aero/redbook-insight-aircraft-finance-part-1/> [https://perma.cc/P9GZ-HA3V].

latest technology.⁴⁵ In recent years, airlines have found the optimal makeup of their fleet to be about sixty percent of leased aircraft with about forty percent being outright owned.⁴⁶ This shift is very significant, as only half of one percent of the world's fleet was leased in 1970.⁴⁷ This cheaper and more efficient system took off very quickly and has had many advantages.

Airlines typically have very low profit margins, due to a myriad of factors, including fuel prices and passenger demand—which are all a part of broader economic change.⁴⁸ Airlines can reduce costs by leasing their aircraft, because leased aircraft can be considered an *operating expense* rather than a *capital expense*, allowing for greater flexibility for growth.⁴⁹

Leasing is one of three common types of arrangements for aircraft and similar high-value assets, such as aircraft engines.⁵⁰ A typical leasing structure involves a manufacturer selling the aircraft to an owner who becomes a “Lessor,” and leases the aircraft to an airline, the “Lessee.”⁵¹ Leasing is advantageous because if the lessee fails to meet its obligations or becomes insolvent, the lessor still has ownership of the goods and can terminate the lease and reclaim possession of the assets.⁵² Lessors tend to be dedicated leasing companies, or large-scale investment managers such as private equity firms or banks.⁵³

45. *See id.* Another contributor is the rising costs in purchasing aircraft. A current price for a new Boeing or Airbus aircraft is well over \$100 million. *See Aircraft Pricing*, *supra* note 2.

46. *More Aircraft Are Leased than Owned by Airlines Globally*, INT'L AIR TRANSP. ASS'N, <https://www.iata.org/en/iata-repository/publications/economic-reports/more-aircraft-are-leased-than-owned-by-airlines-globally/> [<https://perma.cc/VR5X-SQB4>] (last visited June 8, 2026).

47. MURPHY, *supra* note 43, at 6.

48. Alexander Mitchell, *Increased Demand: Why Aircraft Leasing Rates Have Spiked by As Much As 30%*, SIMPLE FLYING (Apr. 27, 2024), <https://simpleflying.com/aircraft-leasing-companies-rates-increased-demand/> [<https://perma.cc/DUV6-5U84>].

49. *See id.* On a company's income statement, operating expenses are fully deductible in the period the expense is related to, allowing the company to reduce taxable income right away, improving profit margins, whereas capital expenses depreciate over the asset's life.

50. MURPHY, *supra* note 43, at 26.

51. Richard Furey, *Structuring Aircraft Financing Transactions*, PRAC. L. Art. W-001-6292 (Westlaw May 29, 2019).

52. TWIGG-FLESNER, *supra* note 16, at 178.

53. Mitchell, *supra* note 48. Some of the top lessors include AerCap (with \$52 billion in holdings), SMBC Aviation Capital (\$26.8 billion) and Air Lease Corporation (\$23.5 billion).

Purchasers of aircraft can reduce their costs by borrowing on a secure basis from the lender, with the aircraft as the collateral for a security interest.⁵⁴ Such purchases fall into one of the two other types of arrangements: a reservation of title clause or financing.⁵⁵ In a reservation of title clause, the seller retains ownership until the buyer's payment is met in full, whereas in a financing arrangement, the buyer grants the lender a security interest, providing the lender a proprietary interest in the event of the buyer's insolvency.⁵⁶ Several options for financing are available to buyers, including loans, loan facilities, bank arrangements, or loans through bank syndicates.⁵⁷ The mortgage created on the aircraft needs to be "perfected" by filing necessary documentation establishing the security interest.⁵⁸ One such filing is with the International Registry, established by the Convention.⁵⁹

The structures have grown to become far more complex with the growth of capital markets and asset-based securities ("ABS"), which allow debt to be issued by an entity with a diverse pool of aircraft leased to different airlines.⁶⁰ These diverse securities can be tranching or organized into different payment priority and risk levels, which spreads risk.⁶¹ Airlines and lessors have turned to not only bank loans, but capital markets as well, to create a balance of capital sourcing between cash, loans, ABS, and other financing instruments.⁶²

54. ELGAR CONCISE ENCYCLOPEDIA OF AVIATION LAW 76 (Anna Masutti & Pablo Mendes de Leon eds., 2023). Cost is reduced for the purchasers because in the event of default, they can repossess and sell the aircraft for high value.

55. TWIGG-FLESNER, *supra* note 16, at 178.

56. *Id.* at 179.

57. ELGAR CONCISE ENCYCLOPEDIA OF AVIATION LAW, *supra* note 54, at 76.

58. *A Lender's Overview to Perfecting Your Aircraft Interests with the FAA*, NAT'L AIRCRAFT FIN. ASS'N, <https://www.nafa.aero/articles/a-lenders-overview-to-perfecting-your-aircraft-interests-with-the-faa> [<https://perma.cc/H8AL-GWUK>] (last visited June 7, 2026). Perfecting an aircraft lien can have requirements under the Uniform Commercial Code (U.C.C.), Federal Aviation Administration in the United States (FAA), and the International Registry. *See id.*

59. *See supra* note 35 and accompanying text.

60. *See A Look at Aircraft Finance – Part I*, *supra* note 44.

61. *See id.*; MURPHY, *supra* note 43, at 28.

62. *See Furey, supra* note 51. While banks can offer substantial capital within a single source, the loans create "substantial risk to a financial institution's balance sheet" as they are exposed to depreciation risk. Capital markets in turn can reduce this risk by collateralizing the debt and spreading it across a wider pool of investors.

This organizational system of aircraft leasing is common to many legal systems internationally.⁶³ Within their own jurisdictions, the arrangements work effectively.⁶⁴ Challenges arise, however, when there are inconsistencies in international structures and courts cannot be persuaded to recognize a security interest from another jurisdiction.⁶⁵

IV. THE US BANKRUPTCY CODE'S APPLICATION TO DOMESTIC AND INTERNATIONAL INSOLVENCY PROCEEDINGS

A. History of US Airline Bankruptcies

Before the late 1970s, the airline industry in the United States was heavily regulated, with only a handful of major carriers dominating the routes that could be flown and the rates charged.⁶⁶ In 1978, the US Congress enacted the Airline Deregulation Act.⁶⁷ The Act is notable for its “dismantling of a substantial economic regulation apparatus” and dramatic transformation of the entire industry.⁶⁸ Following its implementation, Congress could no longer “enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . .”⁶⁹ Deregulation allowed price competition and lower fares for customers, and increased profits and future opportunities for carriers.⁷⁰ A flood of new airlines entered the market, driving older legacy carriers, including Pan Am, into bankruptcy.⁷¹ For consumers, there were some great benefits to the Airline Deregulation Act. The influx of new carriers continued to drive airfare prices down, increased the number of

63. See MURPHY, *supra* note 43, at 10.

64. See generally MURPHY, *supra* note 43, ch. 3.

65. TWIGG-FLESNER, *supra* note 16, at 179.

66. Henry Epp, *A Brief History of Airline Bankruptcies*, MARKETPLACE (Nov. 21, 2024), <https://www.marketplace.org/story/2024/11/21/a-brief-history-of-airline-bankruptcies> [https://perma.cc/EV6Z-GQ6D].

67. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 105(a)(1), 92 Stat. 1705, 1708.

68. Nancy L. Rose, *After Airline Deregulation and Alfred E. Kahn*, 102 AM. ECON. REV. 376, 376 (2012).

69. Airline Deregulation Act of 1978 § 105(a)(1).

70. See Rose, *supra* note 68, at 377.

71. See Epp, *supra* note 66.

flights and productivity, and developed new network structures for flight routes for airlines.⁷²

Some of the surviving legacy airlines merged together, leaving three major US players: Delta, American Airlines, and United Airlines.⁷³ They were then competing with a new wave of low-cost carriers, which created turbulence in the industry.⁷⁴ By 1984, forty-seven new carriers had entered the industry, and forty-eight had exited via liquidation or acquisition.⁷⁵ These twenty years leading up to the turn of the twenty-first century were considered an “explosion of growth in the air transportation industry.”⁷⁶ Increased carriers, dynamic shifts in consumer use, and the magnitude of transactions needed to keep up with such growth inevitably led to economic changes, which forced players into economic distress. Since then, airline bankruptcies, both in the United States and internationally, have continued to rise.⁷⁷ At the start of the COVID-19 pandemic in early 2020, airline revenue was quickly reduced by half, and then eventually reached near zero.⁷⁸ Though the US government aided in insulating domestic carriers through this period, many international carriers succumbed to bankruptcy.⁷⁹

B. Impact of the US Bankruptcy Code on Foreign Carriers Filing in the United States

In the United States, airline bankruptcy is governed by 11 U.S.C. § 1110, a subset of Chapter 11 bankruptcy.⁸⁰ Generally, Chapter 11 allows troubled companies to restructure their business by preserving profitable parts of their business and doing

72. Rose, *supra* note 68, at 376.

73. Epp, *supra* note 66.

74. See Rose, *supra* note 68, at 379.

75. See *id.*

76. Jason J. Kilborn, *Thou Canst Not Fly High with Borrowed Wings: Airline Finance and Bankruptcy Code Section 1110*, 8 GEO. MASON L. REV. 41, 41 (1999). In 1996, US air carriers logged nearly 435 billion passenger miles, demonstrating a 113% increase over that of 1980. For comparison, during the same timeframe, other modes of transportation such as passenger cars and motorcycles only grew about 55% and public transportation only 3.5%.

77. See Richard S. Brown, *COVID-19 and Global Passenger Airline Bankruptcies 2020 to 2022*, 24 J. MGMT. POL'Y & PRAC. 101, 101 (2023).

78. See *id.*

79. See generally *id.*

80. See generally 11 U.S.C. § 1110.

away with those that are not.⁸¹ Unlike Chapter 7 bankruptcy, which requires full liquidation, where inventory is sold off and operations close, Chapter 11 permits management to remain and for a bankruptcy court to oversee negotiations with creditors, which has allowed thousands of companies to emerge from restructuring and remain in business.⁸² While most companies that file for Chapter 11 primarily restructure their existing assets, the airline industry is not treated the same way because most equipment is financed through loans, stock issuance, or leases.⁸³ Accordingly, Congress addressed the industry's need for its own set of rules by revising the bankruptcy laws in the late 1970s to prohibit the absolute veto power of creditors to allow the debtor sixty days to elect to perform their obligations under a security agreement within § 1110—the section of the Bankruptcy Code dedicated to aircraft equipment and vessels.⁸⁴

Section 1110 is limited in the equipment it governs.⁸⁵ For example, for an airline's equipment to qualify for filing under § 1110, the equipment must be properly certified and be capable of carrying ten or more individuals or 6,000 pounds or more of cargo.⁸⁶ Section 1110 also applies only to debtors who are US carriers.⁸⁷ Section 1110(a)(3) defines the equipment to be

81. Abha Bhattarai, *What Is Chapter 11 Bankruptcy?*, WASH. POST (July 23, 2020).

82. *See id.*

83. Kilborn, *supra* note 76, at 42 n.6; *see also* AIR TRANSP. ASS'N OF AM., AIRLINE HANDBOOK: AIRLINE ECONOMICS 19 (June 7, 2008) (discussing capital-intensive business model in airline industry). "Most equipment is financed through loans or the issuance of stock. Increasingly, airlines are also leasing equipment, including assets they owned previously but sold to someone else and leased back."

84. *See* H.R. REP. NO. 95-595, at 239-40 (1977) ("Instead, they provide that the trustee may agree to perform the obligations of the debtor under a security agreement, conditional sale contract, or lease of equipment, within 60 days after the date of the order for relief. In addition, all prior defaults must be cured, and any defaults that occur after the agreement to perform is made must be cured within 30 days after they occur. If these conditions are met, the financier may not retake possession of the equipment. Otherwise, his right to retake is unaffected."); *see also* Kilborn, *supra* note 76, at 51-52. In other words, § 1110 imposes a stricter deadline, which is usually flexible in other Chapter 11 provisions, and limits the power of the automatic stay to only 60 days. The distinctions are generally designed to protect the financiers. For further legislative history and development of § 1110, *see* *In re W. Pac. Airlines, Inc.*, 219 B.R. 305 (D. Colo. 1998).

85. *See* 11 U.S.C. § 1110(a)(3)(A)(i).

86. *Id.*

87. *See* 11 U.S.C. § 1110(a); *see also* *In re Pan Am Corp.*, 124 B.R. 960, 964 (Bankr. S.D.N.Y. 1991); Gregory P. Ripple, *Special Protection in the Air[Line Industry]: The Historical Development of Section 1110 of the Bankruptcy Code*, 78 NOTRE DAME L. REV. 281, 291-93

governed under the provision, and defines air carrier as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”⁸⁸ On the whole, § 1110 provides special privileges to aircraft creditors by lessening the risks associated with financing aircraft—including repossession rights and the right to allow the debtor’s continued performance under the leasing agreement.⁸⁹

While eligible to file a Chapter 11 proceeding, foreign carriers cannot be bound by the provisions of § 1110.⁹⁰ However, foreign airlines can still file for Chapter 11 bankruptcy in the United States in the same manner that any international company can file for bankruptcy.⁹¹ Section 109(a) of the Bankruptcy Code defines who may be a debtor, limiting it to someone with “a domicile, a place of business, or property in the United States”⁹² Courts have long held that “there is virtually no formal barrier to a foreign entity commencing a case under title 11 in the United States.”⁹³ In *In re Global Ocean Carriers Ltd.*, the Delaware Bankruptcy Court held that less than \$100,000 in a US bank account was sufficient property for a foreign company to have standing to file in the United States.⁹⁴ Further, the Bankruptcy Code also defines property to include property of the estate “wherever located and by whomever held.”⁹⁵ Thus, in the case of airlines, there is no question that an airline doing business or flying routes to or from US airports has sufficient property and standing to file in the

(2002) (discussing some of the challenges Pan Am encountered to meet criteria of § 1110 before it was amended).

88. 11 U.S.C. § 1110(a)(3) (citing 49 U.S.C. § 40102).

89. *See generally* 11 U.S.C. § 1110.

90. *Id.*; *see also* 49 U.S.C. § 40102. For the purposes of § 1110, “air carrier” is defined as a “citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” “Foreign carriers” refers to all and any carriers that do not fall into the definition of air carrier per § 1110; in other words, any airline that is not a US airline. Thus, the air carriers to which § 1110 applies can only be domestic carriers, and not foreign ones.

91. *See* Timothy Graulich et al., *International Airlines and the Benefits of Chapter 11*, 15 *INSOLV. & RESTRUCTURING INT’L* 22, 22 (2021).

92. 11 U.S.C. § 109(a).

93. *In re Aerovias Nacionales de Colom. S.A. Avianca*, 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003) (citing 2 *COLLIER ON BANKRUPTCY* ¶ 109.02[3] (Lawrence P. King ed., 15th ed. rev. 2003)).

94. *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 38–39 (Bankr. D. Del. 2000).

95. 11 U.S.C. § 541(a).

United States.⁹⁶ They can file for Chapter 11 relief, but they just cannot be bound by the plain reading of § 1110.⁹⁷ This is in part due to Congress's intent in enacting § 1110, which was to protect the US airline industry and expand financing accessibility for US airlines.⁹⁸ Because § 1110 was designed to benefit US carriers specifically, extending its protections to foreign debtors would arguably not advance the United States' domestic goals or support public policy. It is therefore important to understand the differences in the way US courts treat domestic airline bankruptcies from foreign ones.

C. Domestic Impact of §§ 1110 and 362

Domestically, § 1110 allows a debtor in default to maintain possession of an aircraft only if the debtor cures its defaults and agrees to perform all future obligations within sixty days of the order for relief.⁹⁹ Notably, § 1110 overrides the automatic stay provisions of § 362, which is otherwise applicable to all Chapter 11 proceedings.¹⁰⁰ Section 362 prevents a secured party, or a lessor, from asserting their right to repossess collateral, which allows the debtor temporary relief from the creditor's right to collect their assets.¹⁰¹ The exercise of a creditor's interest is stayed upon the debtor's commencement of an insolvency proceeding, which persists throughout the proceeding, unless the court grants relief from the stay.¹⁰² Instead, § 1110 limits the stay to a short period of time: Creditors have the right to repossess their aircraft equipment unless the debtor cures defaults within sixty days, or enters into an

96. See *In re Avianca*, 303 B.R. at 9.

97. See Tillinghast & Dugdale, *supra* note 13, at 1. As this Note will discuss, this gap is later fixed with the application of the Cape Town Convention which is modeled after 11 U.S.C. § 1110.

98. Ripple, *supra* note 87, at 290.

99. See generally 11 U.S.C. § 1110(a); see also H.R. REP. NO. 95-595, at 239-40.

100. See 4 WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE 819 (3d ed. 2024); see also *In re W. Pac. Airlines, Inc.*, 223 B.R. 567 (Bankr. D. Colo. 1997). A critical airline bankruptcy case which led to the most recent amendment of § 1110 in 2000, which overruled the decision and implemented the provisions which state that following the 60-day period, the debtor had to cure the defaults in compliance with the agreement otherwise the automatic stay is lifted.

101. See 11 U.S.C. § 362. The stay is considered "automatic" because it goes into effect as soon as the bankruptcy is filed without the need for a court order.

102. Gray, Gerber & Wool, *supra* note 11, at 120.

agreement with the creditor to extend the sixty-day period.¹⁰³ The explicit language of § 1110 states that the right of the lessor to take possession of the equipment “is not limited or otherwise affected by any other provision of this title or by any power of the court,” which includes the automatic stay of § 362.¹⁰⁴

In *United Airlines v. US Bank*, the US Court of Appeals for the Seventh Circuit considered this language and concluded that there were only two exceptions to the inapplicability of § 362 to § 1110.¹⁰⁵ First, § 1110(a)(2) allows the automatic stay to apply during the initial sixty days while permitting the debtor to continue using the equipment.¹⁰⁶ Second, it permits the debtor to retain the aircraft if the debtor cures all defaults under the agreement and agrees to perform all future obligations according to the terms of its agreement within sixty days of the order for relief.¹⁰⁷ Otherwise, judges cannot use § 1110(a)(1), or “any source of law, including antitrust, as the basis of an injunction against repossession.”¹⁰⁸

This creates a challenging circumstance for an airline going into bankruptcy. Section 1110 forces a domestic airline filing for bankruptcy to make a “final, binding decision concerning billions of dollars’ worth of equipment” within just sixty days.¹⁰⁹ The airline must decide whether it can assume the obligations of the lease to maintain possession of the aircraft.¹¹⁰ If the airline chooses not to, the creditor can immediately repossess.¹¹¹ Congress struck a balance, as a debtor’s compliance with the conditions gives them the benefit of the pre-bankruptcy bargain, and should they choose to return the equipment, they would not incur additional administrative expense liability for future obligations under their agreements.¹¹²

103. 4 NORTON, *supra* note 100, at 817–18.

104. 11 U.S.C. § 1110(a)(1).

105. *See United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918, 922 (7th Cir. 2005).

106. 11 U.S.C. § 1110(a)(2).

107. *Id.* In this case, the lower court forbade a repossession of aircraft from a restraining order (treated as a preliminary injunction). The Seventh Circuit here vacated the preliminary injunction, claiming that following § 1110(a), judges were prevented from using any other source of law, here antitrust, and had to adhere to the provisions of § 1110.

108. *United Airlines*, 406 F.3d at 924.

109. Ripple, *supra* note 87, at 286.

110. *See id.*

111. *See id.* at 290.

112. 4 NORTON, *supra* note 100, at 820–21.

As a result of expanding 1994 and 2000 amendments to the Bankruptcy Code and the increase of airline bankruptcies in the United States, there is sufficient precedent on insolvency proceedings for US carriers in Chapter 11.¹¹³ Dozens of domestic airlines have filed for Chapter 11 bankruptcy over the years since these amendments, many successfully restructuring, following the established framework of § 1110.¹¹⁴

D. Distinctions and Benefits for Foreign Carriers

Section 1110's language unambiguously declares its limited applicability to US domestic carriers. However, with the developed Bankruptcy Code and strong court system in the United States, it is no surprise that foreign companies, including airlines that have routes in the United States, want to file Chapter 11 proceedings in the United States.¹¹⁵

There are a number of differences and advantages for foreign debtors wishing to file in the United States. Since § 1110 does not apply to foreign debtors, the power of the automatic stay is available to them, making this tool even more powerful, as it can prevent a creditor from trying to repossess while the debtor is in bankruptcy.¹¹⁶ Additionally, Chapter 11 filing allows for a "debtor in possession" ("DIP") regime, which retains the debtor's ability to control business affairs and propose its own plan for reorganization.¹¹⁷ DIP financing has been critical for many international airline reorganizations, including Aeroméxico, Avianca, and LATAM—each of which has borrowed or organized other financing arrangements that allowed them to successfully restructure.¹¹⁸ Furthermore, Chapter 11 bankruptcy in the United

113. Ripple, *supra* note 87, at 299.

114. See Brown, *supra* note 77, at 102–03.

115. See SANAM SAIDOVA, SECURITY INTERESTS UNDER THE CAPE TOWN CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT 174 (2018). The United States is not alone in having an automatic stay as a part of its Bankruptcy Code, though it is not found in all jurisdictions. The UK Insolvency Act 1986 similarly applies an automatic stay on the enforcement of security interests unless the court enforces otherwise.

116. See generally Graulich et al., *supra* note 91, at 23; see also Nakash v. Zur (In re Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (determining that "automatic stay applies extraterritorially").

117. See Graulich et al., *supra* note 91, at 24; see also 11 U.S.C. § 1107 (describing rights, powers, and duties of debtor in possession).

118. See Graulich et al., *supra* note 91, at 24.

States allows foreign airlines to assume or reject outstanding leases to rationalize their fleet by rejecting surplus.¹¹⁹ Overall, the numerous advantages of the US Bankruptcy Code and the experience of US courts invite foreign airlines to restructure in the United States, either under Chapter 11 or through Chapter 15 proceedings ancillary to a domestic restructuring.¹²⁰ Although § 1110 does not apply in the Chapter 11 proceedings involving foreign airlines, the Cape Town Convention may well govern.¹²¹

Though the US court system has historically been seen as a global leader for international insolvency proceedings because of the comprehensive Chapter 11 process and broad eligibility, a number of European courts have seen significant developments in the last five years, with the introduction of their own formal restructuring processes which bear similarity to Chapter 11.¹²² It is unlikely that European processes will displace US Chapter 11 proceedings given the longstanding precedent, though there are benefits to international debtors to use more than one process, and some European processes have been successful in recent years for high-profile restructurings.¹²³

E. Chapter 15: A Means of Introducing Foreign Proceedings to the United States

In addition to Chapter 11, Chapter 15 of the US Bankruptcy Code is a tool that non-US debtors may use.¹²⁴ Chapter 15 allows the commencement of an insolvency proceeding in the United States, which is ancillary to a proceeding in a different country.¹²⁵ Chapter 15 offers debtors many benefits, and stems from the Model Law on Cross-Border Insolvency created by the United

119. *Id.*

120. See Graulich et al., *supra* note 91, at 23.

121. Tillinghast & Dugdale, *supra* note 13, at 1.

122. Kelly DiBlasi, Matt Benson & Sunny Singh, *Choosing a Restructuring Venue: Weighing US Chapter 11 Against Europe's Evolving Regimes*, GLOB. RESTRUCTURING REV. (Nov. 14, 2025).

123. *Id.*

124. See Graulich et al., *supra* note 91, at 23.

125. See STEPHEN J. LUBBEN, *AMERICAN BUSINESS BANKRUPTCY: A PRIMER* 183 (2d ed. 2021). In other words it can be seen as “supporting” a foreign case rather than starting an entirely new Chapter 11 or Chapter 7 case in US courts.

Nations Commission on International Trade Law (“UNCITRAL”).¹²⁶ Typically, a case will be commenced by a foreign representative, a trustee or other official, who brings the case to US courts.¹²⁷ The primary goal is usually to extend the effects of a foreign bankruptcy proceeding to the United States.¹²⁸

Not only does Chapter 15 apply to traditional bankruptcy proceedings, but also to its equivalents, such as schemes of arrangement, which are common in England and Commonwealth jurisdictions.¹²⁹ Schemes of arrangement are “a compromise or arrangement between a company and its creditors, or any class of them, or its members, or any class of them.”¹³⁰ In other words, a company can use a “scheme” to restructure its debt or equity in a flexible manner upon receiving necessary approvals, which generally makes the process akin to a traditional restructuring.¹³¹

Schemes of arrangement can be functionally treated as substantially similar to insolvency proceedings, but there are some key differences. In some countries, such as the United Kingdom or Ireland, a provision of a scheme must be supported by a majority of creditors (seventy-five percent in value present and voting) in a meeting of each class of creditors.¹³² Then, this provision would be sanctioned by the High Court in a formal proceeding to take effect.¹³³ While similar to a US insolvency proceeding, the courts in

126. 11 U.S.C. § 1501. The purpose of this chapter is to assist with UNCITRAL objectives of (1) cooperation between US courts and foreign courts, (2) greater legal certainty in trade and investment, (3) fair and efficient administration of cross-border insolvency, (4) protection and maximization of value of debtor’s assets, and (5) facilitate rescue of financially troubled businesses.

127. LUBBEN, *supra* note 125, at 184.

128. *Id.* at 185. Typically this occurs when a foreign debtor has assets in the United States they would like to protect in the same manner that was decided in their own proceeding. For example, a Brazilian company can file for bankruptcy in Brazil, and then have the effects of the proceeding recognized in the United States using Chapter 15, protecting the company’s US assets from creditors.

129. *Id.*

130. JENNIFER PAYNE, SCHEMES OF ARRANGEMENT: THEORY, STRUCTURE AND OPERATION 1 (2d ed. 2021) (quoting Companies Act 2006, c. 46, § 895(1) (UK)). Part 26 of the Act sets out the statutory framework for schemes of arrangement.

131. *See id.* at 2.

132. David Berkery et al., *Irish Schemes of Arrangement – A Restructuring Option for Aircraft Lessors?*, A&L GOODBODY (July 2020), https://www.algoodbody.com/images/uploads/services/Aircraft/Irish_schemes_of_arrangement_deals_%E2%80%93_a_restructuring_option_for_aircraft_lessors_-_July_2020.pdf [https://perma.cc/8P2M-9NL5]; *see also* MURPHY, *supra* note 43, at 311.

133. MURPHY, *supra* note 43, at 311–12.

those nations do not become involved until the creditors reach a decision.¹³⁴ Until then, the court does not have jurisdiction, and in the case of airlines, cannot issue a stay.¹³⁵ However, the question remains if a scheme of arrangement is governed by the Cape Town Convention. The Convention defines insolvency proceeding as “bankruptcy, liquidation, or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganization or liquidation.”¹³⁶ Yet, neither the Convention nor the Official Commentary officially addresses whether a scheme of arrangement is an “insolvency proceeding.”¹³⁷

Chapter 15 opens the doors to a vast variety of international opportunities. For example, a company in one country can issue debt under English law, restructure this debt per a UK scheme of arrangement, and then subsequently have it recognized in the United States under Chapter 15.¹³⁸ Such an opportunity is considered to be a great improvement over past approaches, because it allows a greater ease of cooperation and recognition among countries.¹³⁹ Part VII returns to Chapter 15 and schemes of arrangement in examining how US and foreign courts have applied the Convention.

V. *THE CAPE TOWN CONVENTION'S SUPREMACY OVER THE BANKRUPTCY CODE*

As of the United States' ratification of the Cape Town Convention, international insolvency proceedings in the United States concerning foreign airlines cannot be viewed solely through the lens of the Bankruptcy Code. The Convention, an international treaty, should apply and supersede the Code. The Convention and corresponding Protocol lay out numerous sections governing insolvency proceedings for all Contracting States which sign it. Unlike the Convention, the Protocol has provisions which differ

134. *Id.*

135. *Id.* Note in schemes of arrangement, stays are often called “moratorium.”

136. Cape Town Convention, *supra* note 6, art. 1(l).

137. See MURPHY, *supra* note 43, at 315. This becomes a central issue in cases discussed in Part VII of this Note, including *AirAsia X Berhad* and *NAC*.

138. LUBBEN, *supra* note 125, at 186.

139. See generally *id.* at 187.

depending on the declaration of the relevant Contracting State.¹⁴⁰ Although conflicting declarations may seem to produce non-uniform rules governing insolvency law, the Protocol resolves this by directing parties to the insolvency laws of the primary insolvency jurisdiction, which would be the laws of the debtor's center of main interests.¹⁴¹ Doing so eliminates the issue of forum shopping for alternate jurisdictions and sets a precedent for effective proceedings specific to the aviation industry.

First, it is important to establish the applicability of the Convention and Protocol in US courts. The Supremacy Clause of the US Constitution states, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby."¹⁴² The Supreme Court has further drawn a distinction between self-executing and non-self-executing treaties.¹⁴³ In *Medellín v. Texas*, the Supreme Court purported that, through an analysis of the language of the treaty and its corresponding legislative intent, a self-executing treaty would not need further implementation into US law to be enforceable and take precedence domestically over federal law.¹⁴⁴

Following this precedent, the Convention and Protocol use sufficiently mandating language to deem them self-executing. For example, Article XXX(4) of the Protocol reads "the courts of

140. See generally Aircraft Protocol, *supra* note 42, art. XI.

141. See Aircraft Protocol, *supra* note 42, art. XXX(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."); see also OFFICIAL COMMENTARY, *supra* note 12, at 305–12. See *supra* note 12 for explanation of "center of main interests."

142. U.S. CONST. art. VI, cl. 2.

143. See *Medellín v. Texas*, 552 U.S. 491 (2008); see also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

144. See *Medellín*, 552 U.S. at 508. The treaty in question in *Medellín* used the language "undertakes to comply" which the court found to be insufficiently directive to be enforceable in domestic courts. The court further specified that language using words such as "shall" or "must" would be sufficient. Further, the *Medellín* court looked to the intent of the President and Senate who negotiated and ratified the treaty to determine whether the intent was for it to be self-executing. See *Medellín*, 552 U.S. at 508. The idea of self-executing or non-self-executing treaties comes from the notion that treaties are agreements between countries. The agreement reached in a treaty is between the states, but would need further implementation to be further conferred onto the citizens of the States. It is notable as well, that a treaty does not need to be self-executing as a whole. In the case of the Convention, this Note is focused on the self-executing nature of the bankruptcy provisions of Articles XI and XXX of the Protocol. To make this argument, it is not necessary to establish the entire Convention is self-executing.

Contracting States shall apply Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.”¹⁴⁵ The Convention also meets the requirement for legislative intent, as upon ratification, the Letter of Submittal provided by President George W. Bush at the time of ratification reads “[n]o implementing legislation is required, except for technical amendments to certain authorities of the FAA . . . and no changes to the Code are required.”¹⁴⁶ Congress has likewise written treaty supremacy into the Bankruptcy Code itself: § 1503 provides that, to the extent Chapter 15 conflicts with an obligation of the United States under a treaty, the treaty prevails.¹⁴⁷ Thus, the mandatory language and legislative intent components are met for the purposes of deeming the Convention self-executing.¹⁴⁸

On one hand, the Convention could be viewed as contrary to the congressional power afforded in Article I, § 8 of the Constitution.¹⁴⁹ This Article grants Congress the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.” Thus, the implementation of the Cape Town Convention and its supremacy over the Bankruptcy Code could be viewed as unconstitutional.¹⁵⁰ However, a better view is that congressional power is not being usurped by the Convention’s application. The two have different application spheres since the Bankruptcy Code still provides all the benefits to domestic debtors in Chapter 11 bankruptcies, through its limited definition of

145. Aircraft Protocol, *supra* note 42, art. XXX(4). The use of the phrase “courts of Contracting States *shall* apply” falls within the parameters specified as sufficient to be self-executing under *Medellín v. Texas*.

146. S. TREATY DOC. NO. 108-10, at xii (2003) (letter of submittal).

147. See 11 U.S.C. § 1503 (“To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail.”).

148. Many treaties are presumed and recognized as being self-executing, for example the Vienna Convention. “To the extent that the relevant provisions of the [Vienna] Convention are well recognized as self-executing, they are entitled to judicial enforcement without the need for any implementing legislation and should thus be fully enforced in state courts as a matter of federal law and through the application of principles of customary international law.” Kweku Vanderpuye & Robert W. Bigelow, *The Vienna Convention and the Defense of Noncitizens in New York: A Matter of Form and Substance*, 18 PACE INT’L L. REV. 99, 101 (2006).

149. U.S. CONST. art. I, § 8.

150. *Id.* art. I, § 8, cl. 4.

applicable debtors, which was Congress's intention behind enacting § 1110.¹⁵¹ Rather, the self-executing nature of the Convention and Protocol supersedes § 1110 in relation to foreign insolvency proceedings on the basis of the last-in-time rule.¹⁵²

According to the last-in-time rule, which the Supreme Court has long endorsed, the most recently enacted law governs. Once a self-executing treaty is ratified, it supersedes prior domestic law to the contrary, and is viewed as the equivalent to an act of Congress.¹⁵³ As discussed in Part IV, the relevant sections of the Bankruptcy Code were enacted in 1979, with the most recent substantive change in 2000.¹⁵⁴ The Convention and Protocol were ratified in 2004 and came into effect in 2006;¹⁵⁵ thus, they would control following the last-in-time rule.

Lawmakers and scholars on the topic uniformly agree that the Cape Town Convention is self-executing and thus is applicable in domestic courts.¹⁵⁶ However, the Court in *Medellín* stated certain treaties may "comprise international commitments" and yet still not be deemed to be domestic law unless Congress has implemented the statute domestically or has conveyed the self-

151. See 11 U.S.C. § 109(a); *supra* note 84. See generally Ripple, *supra* note 87.

152. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."). This case considered the validity of a treaty with the Dominican Republic which provided guidelines on the imposition of duties on foreign countries. Similarly, *Badar v. Swissport USA, Inc.*, 53 F.4th 739, 743–44 (2d Cir. 2022), upholds the Montreal Convention as being self-executing, recognizing its private right to action is applicable in US courts. Additionally, *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002), upholds the Convention on Contracts for the International Sale of Goods as a self-executing treaty with the preemptive force of federal law. The District Court concluded that the treaty governs unless parties have contracted to apply domestic law instead.

153. See *In re Comm'r's Subpoenas*, 325 F.3d 1287, 1305 (11th Cir. 2003); see also *Whitney*, 124 U.S. at 194 (holding treaty with Dominican Republic was to be placed "on the same footing" as US statute and created obligation equivalent to act of legislation).

154. See Kilborn, *supra* note 76, at 51–52; see also 4 NORTON, *supra* note 100, at 819.

155. See *supra* note 31.

156. See S. EXEC. REP. NO. 108-14, at 28 (2004) (agreeing that provisions of Convention do not require implementing legislation and "to that extent are self-executing"); see also OFFICIAL COMMENTARY, *supra* note 12, at 309–10. Sir Goode writes that states who have signed onto and ratified the Convention, under Article XXX(4) of the Protocol, "are required to apply Article XI whether or not their Contracting State has made a declaration" His use of the term "required" demonstrates a strong directive following the guidance of *Medellín*.

executing intention sufficiently.¹⁵⁷ Nevertheless, if Congress wanted to extend the provisions of § 1110 to govern foreign airlines, it could have amended the statute by expanding the definition of qualifying debtors. If Congress did not want the Cape Town Convention's insolvency proceedings to apply to the United States, it could have taken action other than wholly ratifying it, supporting it, and making further claims recognizing the importance of the insolvency provisions.¹⁵⁸

Furthermore, affirmative implementation of the Convention to US law can be seen through the application of the Uniform Commercial Code (the "U.C.C."), in conjunction with the Bankruptcy Code and § 1110. As discussed in Part III, acquisition and financing of aircraft can be extremely capital-intensive.¹⁵⁹ The high values of these transactions, whether through loans or leases, create the need for a guarantee by a secured interest.¹⁶⁰ Thus, they are governed by U.C.C. Article 9, which covers secured transactions in which property secures an obligation.¹⁶¹ Article 9 and the U.C.C. do not apply to a transaction if a treaty preempts it.¹⁶² Consequently, both the Bankruptcy Code and U.C.C. are superseded by the relevant provisions of the Cape Town Convention and Aircraft Protocol under US law.

VI. ARTICLE XI AND ARTICLE XXX OF THE AIRCRAFT PROTOCOL ON INSOLVENCY

Having established the validity and applicability of the Cape Town Convention and Aircraft Protocol to US domestic courts, this Note must then analyze how they should be applied and how the insolvency provisions differ from those of domestic laws. The

157. *Medellín*, 552 U.S. at 505; *see also* *Garcia v. Texas*, 564 U.S. 940 (2011).

158. *See* S. TREATY DOC. NO. 108-10, at xii, where the President in the letter of submittal notes that despite the United States not making a choice of declaration pursuant to Article XXX(1), "the United States notes the importance attached to declarations applying Alternative A of Protocol Article XI in attracting financing in aircraft transactions."

159. *A Look at Aircraft Finance – Part I*, *supra* note 44.

160. *See* B. Patrick Honnebier, *The Cape Town Convention Offers Registered International Interests Providing Maximal Security to American Lessees of Aircraft*, 88 J. AIR L. & COM. 817, 822 (2023).

161. *See* U.C.C. § 9-109(a)(1) (AM. L. INST. & UNIF. L. COMM'N 2022).

162. *See id.* § 9-109(c)(1) ("This article does not apply to the extent that: (1) a statute, regulation, or treaty of the United States preempts this article . . .").

central sections of the Protocol are Article XI – *Remedies on Insolvency*, Article XII – *Insolvency Assistance*, and Article XXX – *Declarations relating to certain provisions*.¹⁶³

These insolvency provisions set up a thorough system governing insolvency proceedings for States which have signed onto the Convention and Protocol. First, the Convention contains the broad rules protecting creditors against invalidations of interest.¹⁶⁴ Article XI of the Protocol then sets up the two alternative paths for governing insolvency, of which a Contracting State may make a declaration.¹⁶⁵

Article XXX(1) of the Protocol states “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.”¹⁶⁶ To accomplish this, a Contracting State may make its declaration with the Depositary of the Protocol, in essence providing a sufficient notification to UNIDROIT that it can be recognized by other Contracting States.¹⁶⁷

A. *Insolvency Alternatives Available to Contracting States Under the Convention*

To make a declaration, Contracting States have several options: declare Alternative A, Alternative B, or neither.¹⁶⁸

163. Aircraft Protocol, *supra* note 42, arts. XI, XII, XXX.

164. GOODE ET AL., *supra* note 30, at 418; *see also* Cape Town Convention, *supra* note 6, art. 30. This article states an insolvency proceeding over a security interest is effective if it was originally registered in conformity with the Convention (meaning done so through the International Registry), and it is effective under the applicable law. Even unregistered interests can have protections and be subject to insolvency proceedings under Article 30.

165. *See generally* Aircraft Protocol, *supra* note 42, art. XI.

166. Aircraft Protocol, *supra* note 42, art. XXX(1). The relevant referenced section here is Article XI(1), which reads “This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).”

167. Cape Town Convention, *supra* note 6, art. 39. While this requirement has not been disputed, the manner of declaration has been. *In re SAS* hinges on the fact that Sweden had not made a sufficient declaration. The discussion in *In re SAS* is further discussed in Section VII.C.

168. *See* Aircraft Protocol, *supra* note 42, art. XXX(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.”).

Alternative A is based on the US Bankruptcy Code § 1110; choosing this option would extend the policy choices made under US law to Contracting States opting in to this Alternative.¹⁶⁹ It is also commonly known as the “hard option,” in which the debtor must cure all defaults and agree to perform all future obligations within a specified waiting period or relinquish possession of the asset.¹⁷⁰ If relinquishing possession, the debtor must give up possession by the earlier of: (1) a waiting period specified in the Contracting State’s declaration, or (2) when the creditor would be entitled to possession if the Article did not apply, in essence using their own domestic insolvency laws.¹⁷¹

Similar to § 1110, Alternative A does not include an option for imposing an automatic stay.¹⁷² This choice is a result of a compromise over the differences in opinion during negotiations of the Convention.¹⁷³ Drafters considered whether automatic stay relief would be desirable, and agreed that Contracting States may decide.¹⁷⁴ As a result, Alternative A was drafted such that it preserved the intention and process of § 1110, while simplifying and amending “problematic provisions,” including the restrictions imposed on the US airline debtors filing domestically within the United States.¹⁷⁵ This was done with the specific intent of developing a more efficient and enhanced version of § 1110.¹⁷⁶

169. *Id.*

170. See Aircraft Protocol, *supra* note 42, art. XI(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.”).

171. See Aircraft Protocol, *supra* note 42, art. XI(2); see also MOONEY & POTTOW, *supra* note 23, at 6.

172. See GOODE ET AL., *supra* note 30, at 418; see also Aircraft Protocol, *supra* note 42, art. XI; *supra* Section IV.C.

173. MOONEY & POTTOW, *supra* note 23, at 6.

174. *Id.*

175. Gray, Gerber & Wool, *supra* note 11, at 124.

176. See *id.* at 117, 138 (noting that Alternative A’s underpinnings “were inspired principally from, are very similar to (and, in some ways, were drafted to be superior to)” § 1110); see also 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). That study was commissioned to determine the financial benefits resulting from the Cape Town Convention’s application. The study found that specifically Alternative A offers major benefits, internationalizing the types of financial alternatives available through the 11 U.S.C. § 1110 system. The study estimated benefits at several billion dollars annually, stemming primarily from reduced risks and increased availability of lending.

The choice to exclude an automatic stay in Alternative A is a critical provision for foreign airlines. Any airline centered in a non-US Contracting State that has adopted Alternative A should be bound by this limitation regardless of where it files for bankruptcy, including the United States.¹⁷⁷ What this should imply, therefore, is that foreign airlines either should be disallowed from filing outside their primary insolvency jurisdiction, or, if jurisdiction is granted for filing bankruptcy in the United States, should nonetheless be disallowed from achieving the automatic stay protections afforded by § 362. Limiting foreign airlines in this way would discourage forum shopping premised on both evading the contractual rights of lenders and lessors, and defeating the Convention's unified and predictable insolvency.¹⁷⁸ For proper application in an insolvency proceeding, it is essential that Contracting States understand that a valid declaration must be effective "even if the State whose law is selected has no connection with the parties or the transaction."¹⁷⁹ As a result, Alternative A gives the creditor stronger rights on the debtor's insolvency with the strict requirements within the waiting period.¹⁸⁰

On the other hand, Alternative B, often known as the "soft option," requires only that the relevant insolvency administrator give notice to the Contracting State as to whether it will cure all defaults and perform all future obligations, or if it will give the creditor the opportunity to repossess.¹⁸¹ This alternative affords greater discretion to courts to decide whether to grant relief in lieu of an automatic stay.¹⁸² This contrasts with Alternative A, in that a creditor under Alternative A need not petition the court for relief to protect its interests, because the debtor must either cure all defaults or relinquish possession within the waiting period.¹⁸³ As of 2024, eighty-three Contracting States have adopted the Protocol, fifty-nine declared Alternative A, and only one (Mexico) declared

177. See *infra* Section VI.B (discussing applicability of Contracting State's declaration irrespective of where they file).

178. MOONEY & POTTOW, *supra* note 23, at 13.

179. GOODE ET AL., *supra* note 30, at 401.

180. See *id.*

181. GOODE ET AL., *supra* note 30, at 418.

182. MOONEY & POTTOW, *supra* note 23, at 6.

183. Jun Hyon 'Henry' Nahm, *Cape Town Convention in US Bankruptcy Courts: How Foreign Creditors May Seek Greater Protection in US Bankruptcy Courts Through Enforcement of Article XXX(4) of the Aircraft Protocol*, 8 CAPE TOWN CONV. J. 47, 56 (2022).

Alternative B.¹⁸⁴ The remaining twenty-three Contracting States, including the United States, have made no declaration.¹⁸⁵

If a state does not make a declaration, its own insolvency laws will apply, both with respect to the waiting-period rules and the applicability of a stay.¹⁸⁶ Article XXX(4) states that Contracting States would apply Article XI “in conformity with the declaration made by the Contracting State.”¹⁸⁷ Read in conjunction with Article XXX(3), Article XI only applies to a Contracting State that has made a declaration which affirmatively applies it.¹⁸⁸ Therefore, without the declaration, local insolvency laws apply to US debtors.¹⁸⁹

Controversy exists regarding the application of these Alternatives. One in particular debates the significance of “give possession” in reference to what a debtor must do with respect to the aircraft if it fails to cure defaults (or make such decision within Alternative B).¹⁹⁰ The High Court of Australia in *Wells Fargo Trust Co. v. VB Leaseco Pty Ltd.* agreed the debtor must provide the creditor with an “opportunity to take control of the aircraft [engines]” and does not need to export and return the aircraft objects back to their premises.¹⁹¹ The court in that case upheld the effect of Alternative A, clarifying that to “give possession” required that debtors need not do more “than make the aircraft objects available for collection from wherever they are situated.”¹⁹²

B. The Impact of a Declaration on Other States

Once a Contracting State makes a declaration under the Aircraft Protocol, it is binding on all other Contracting States to adhere to if the Contracting State were to file for insolvency there.¹⁹³ In other words, courts of all Contracting States are

184. MOONEY & POTTOW, *supra* note 23, at 6.

185. *Id.*

186. GOODE ET AL., *supra* note 30, at 418; *see also* MOONEY & POTTOW, *supra* note 23, at 6.

187. Aircraft Protocol, *supra* note 42, art. XXX(4).

188. OFFICIAL COMMENTARY, *supra* note 12, at 323.

189. *Id.*

190. *Id.* at 314.

191. *Wells Fargo Tr. Co. v VB Leaseco Pty Ltd* [2022] HCA 8, [4] (Austl.).

192. GOODE, ELGAR COMPANION, *supra* note 33, at 281.

193. *Id.* at 281–82; *see also* Kristin van Zwieten, *The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives*, 1 CAPE TOWN CONV. J. 53, 64–65 (2012).

required to apply Article XI in conformity with the primary insolvency jurisdiction's declaration,¹⁹⁴ irrespective of whether their own State has made such a declaration.¹⁹⁵ This is stated in the Protocol itself,¹⁹⁶ and is also further clarified and expanded in the accompanying Official Commentary.¹⁹⁷ Roy Goode, reporter to the Cape Town Convention and author of its Official Commentary, provides that a declaration applying Alternative A "triggers the application of that Alternative of Article XI in the courts of all other Contracting States in which insolvency proceedings have been commenced."¹⁹⁸ Goode added that, in practice, "the courts of a non-COMI Contracting State must, under Article XXX(4) apply Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction."¹⁹⁹

This quotation implicates the United States, which has not made a declaration pursuant to Article XXX and thus elects neither Alternative A nor B.²⁰⁰ The United States ratified the Convention in 2004, and further enacted the Cape Town Treaty Implementation Act of 2004 to modify certain domestic laws,²⁰¹ and yet has chosen

194. Primary insolvency jurisdiction generally refers to the Contracting State which is the center of main interests, or COMI, of the debtor which is filing for bankruptcy. It is defined in the Aircraft Protocol as "the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise." Aircraft Protocol, *supra* note 42, art. I(2)(n); *see also* Cape Town Convention, *supra* note 6, art. 4 (listing criteria that establish when debtor is "situated" in Contracting State). For most countries, an insolvency proceeding can only be brought if the COMI is in that country. The United States in this situation is distinct as it allows filing with a mere property requirement. As a result of this, the issues discussed in *In re SAS* and *In re Oceanair*, discussed in Part VII of this Note, arise in US filings and are not commonly seen in other countries. *See also In re CHC Group* in which a Canadian company was determined to have its COMI in the United States rather than Canada and was not able to file in Canada.

195. GOODE, ELGAR COMPANION, *supra* note 33, at 281.

196. *See* Aircraft Protocol, *supra* note 42, art. XXX(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.").

197. OFFICIAL COMMENTARY, *supra* note 12, at 321–25.

198. *Id.* at 305.

199. *Id.* *See supra* note 194 for explanation of "COMI" and "primary insolvency jurisdiction."

200. As discussed in Section IV.B of this Note, this is particularly important for the United States because of the prominence of foreign insolvency proceedings within US courts under Chapter 11.

201. Nahm, *supra* note 183, at 56. For example, the United States added language to require aircraft interests to be filed with the International Registry.

not to make a declaration under Alternative A or B, “since existing United States law, specifically 11 U.S.C. Section 1110, will continue to apply, which is substantially equivalent to Alternative A of Protocol Article XI.”²⁰² Despite not making its own declaration, Congress nevertheless acknowledged the importance attached to making a declaration in “attracting financing in aircraft transactions” and adopted the remaining insolvency provisions by stating that “no changes to the Code are required.”²⁰³

Initially, it did not appear problematic that the United States made no declaration under the Aircraft Protocol, since the existing bankruptcy law, specifically § 1110, is in fact substantively the same.²⁰⁴ In signing onto the Protocol, Congress likely did not anticipate a future influx of foreign airline insolvency proceedings to take place in US courts.²⁰⁵ Even if it did, Chapter 11’s inclusive definition of a debtor would not preclude such an airline from filing in the United States.²⁰⁶ However, what was overlooked were the discrete distinctions between § 1110 and Alternative A and how the Convention would supersede the US Bankruptcy Code.

By and large, § 1110 and Alternative A assert the same requirements upon a debtor.²⁰⁷ Section 1110 offers slightly wider coverage in the type of equipment included in its coverage, as it relies on the definition of qualified equipment from the Federal Aviation Act.²⁰⁸ For example, it also extends protection to maintenance records, which it finds crucial to remarketing, whereas Alternative A includes “data, manuals, and records related hereto.”²⁰⁹ This may appear to be a minor distinction, but in fact,

202. S. TREATY DOC. NO. 108-10, at xii. Simply put, the United States did not find a need for adopting one of the Alternatives because Congress believed that existing law under § 1110 was sufficient.

203. *Id.*

204. See OFFICIAL COMMENTARY, *supra* note 12, at 222–23 (stating that 11 U.S.C. § 1110 “provided the model for Alternative A”). See generally 11 U.S.C. § 1110.

205. See Tillinghast & Dugdale, *supra* note 13, at 1. The limitations of the US system only became prominent after the COVID-19 pandemic which resulted in a great increase of airline bankruptcies, but this was fifteen years after the ratification.

206. See 11 U.S.C. § 1110(a)(3)(A).

207. Nahm, *supra* note 183, at 56.

208. Gray, Gerber & Wool, *supra* note 11, at 125. This can include airframes, engines, propellers, appliances, and spare parts.

209. Aircraft Protocol, *supra* note 42, art. I(2)(b)(ii).

the records may “materially enhance a creditor’s ability to recover the value of its collateral.”²¹⁰

Additionally, as mentioned, Alternative A is much more inclusive in its definition of debtors.²¹¹ It not only applies in the realm of every Contracting State but also has an additional extraterritorial effect, as the provisions apply across borders, whereas the Bankruptcy Code provisions only apply domestically within the United States to US carriers.²¹² Other distinctions between § 1110 and Alternative A include registration and recording requirements, as well as the rights and remedies during and after the waiting period.²¹³

In essence, though there are some distinctions between the insolvency provisions of the Protocol and § 1110, Articles XI and XXX nevertheless provide a strong framework for how insolvency proceedings would be structured in a Contracting State that ratified the Convention.²¹⁴ Contracting States make their declarations and are bound by them regardless of where the debtor chooses to file for bankruptcy.²¹⁵ This thorough system unifies the obligations of Contracting States under the Convention and eliminates opportunities for forum shopping for laws more favorable to the debtor.

C. The Problem for the United States: Inconsistent Treatment of Debtors

Inconsistency occurs when debtors are treated differently within the same court.²¹⁶ As it stands, a debtor would have different treatment in US courts depending on its primary insolvency jurisdiction.²¹⁷ For example, a Brazilian airline with

210. Gray, Gerber & Wool, *supra* note 11, at 126. A full set of records as opposed to limited records can make a difference in the future marketability of the aircraft.

211. *See generally supra* Section IV.C.

212. *See generally supra* Section IV.B.

213. *See* Gray, Gerber & Wool, *supra* note 11, at 127–28.

214. *See generally* Aircraft Protocol, *supra* note 42, arts. XI, XXX.

215. Aircraft Protocol, *supra* note 42, art. XXX(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.”).

216. *See generally* Nahm, *supra* note 183.

217. *See, e.g., id.* at 57 (“Creditors to this Brazilian airline with secured interests in their aircraft objects would be able to enjoy the shorter waiting period (30 days) of

property located in the United States, adequate for satisfying § 109 (requirements for who may be a debtor), could file for bankruptcy under Chapter 11, and generally would enjoy the benefits of the automatic stay under 11 U.S.C. § 362.²¹⁸ But, if this Brazilian airline were to be incorporated in Brazil, its primary insolvency jurisdiction would be Brazil for any issues related to the Convention. Brazil has declared Alternative A, allowing a thirty-day waiting period.²¹⁹ This Brazilian airline filing in the United States would then be bound by the provisions of Alternative A and the Protocol, not § 362 of the US Bankruptcy Code.²²⁰

Conversely, a US airline filing the same claims would be bound by § 1110 of the Code with a sixty-day waiting period, because § 1110 only applies to domestic debtors.²²¹ The same US bankruptcy court would thus be giving otherwise equivalent airlines different treatment, specifically an extra thirty days, simply based on the primary insolvency jurisdiction.²²²

Distinct treatment for domestic and foreign airline debtors depending on their place of origin creates confusion for creditors, even though it can be anticipated and foreseen by looking ahead at the primary insolvency jurisdiction. One way to avoid this issue would be if the United States were to make a declaration under Alternative A to the Aircraft Protocol. Then, both domestic and foreign debtors would be placed on the same footing. Either way, creditors stand to benefit from this applicability of Alternative A enforcement in US courts. Greater asset protection can lead to lower interest rates, improving the aircraft financing market.²²³ Moreover, domestically, US debtors would predominantly not be affected by the distinctions between Alternative A and § 1110 because the United States would primarily be adopting the sixty-day waiting period which already applies to domestic carriers.²²⁴

Alternative A as elected by Brazil, while creditors to a similarly situated American airline would have to wait 60 days per section 1110.”).

218. *See id.*

219. Kenneth D. Basch & Renata Iezzi, *Oceanair: First Brazilian Case Post-CTC Enaction*, 8 *CAPE TOWN CONV. J.* 64, 70 (2022).

220. *See id.* at 70–71.

221. *See* MOONEY & POTTOW, *supra* note 23, at 12–13.

222. *See* Nahm, *supra* note 183, at 57.

223. *See id.* at 62.

224. *See* 11 U.S.C. § 1110; S. TREATY DOC. NO. 108-10, at xii (“[E]xisting United States law, specifically 11 U.S.C. Section 1110, will continue to apply, which is substantially equivalent to Alternative A of Protocol Article XI.”).

VII. ISSUES WITH THE APPLICABILITY OF THE CAPE TOWN
CONVENTION IN US BANKRUPTCY COURTS

While Contracting States agree that the Convention governs, how to appropriately apply the provisions remains unclear.²²⁵ The United States specifically is a place of contention because of the expansive jurisdictional rules set out under the existing bankruptcy laws, which allow foreign debtors to file in the United States regardless of their status under the Convention.²²⁶ The task in the last twenty years has been to find a way to bridge the longstanding precedent of the US courts with this new, yet similar, system under the Convention. US courts remain uncertain as to how best to apply the provisions of the Convention, despite recognizing its validity.²²⁷

US courts have argued that because the United States did not make a declaration under Article XXX adopting Alternative A, then it would not apply if a foreign airline filed in the United States.²²⁸ However, as established in Part V of this Note, any Contracting State's declaration should be viewed as valid under US law even though the United States did not itself make the same declaration.²²⁹ Further, an assertion to the contrary returns to the issue of forum shopping, wherein a debtor who is situated in an Alternative A declared Contracting State could choose to forgo filing in their own Contracting State to benefit from a system applying Alternative B or their own domestic law.²³⁰ This defeats the central purposes of the Convention to have a unified and fair system governing Contracting States.

225. See Gray, Gerber & Wool, *supra* note 11, at 117 ("Alternative A raises educational and practical issues given that its concepts and approaches are significantly different from, and conflict with, prior insolvency law in most jurisdictions.").

226. See *supra* note 4.

227. See MOONEY & POTTOW, *supra* note 23, at 9.

228. See *generally* In re SAS AB, 644 B.R. 267 (Bankr. S.D.N.Y. 2022).

229. See OFFICIAL COMMENTARY, *supra* note 12, at 323.

230. See *id.* ("The provision is designed to prevent forum shopping with a view to selection of the opt-in Contracting State whose declaration is most indulgent to the debtor.").

A. *How the Cape Town Convention Has Been Recognized by US Courts*

As aircraft finance demand increases, so does creditors' interest in asserting their rights over aircraft and repossessing collateral in the event of a default.²³¹ However, in the twenty years since the Cape Town Convention was ratified, few domestic courts, bankruptcy or otherwise, have considered its application.²³² Some industry experts believe this can cause parties to "exploit the unfamiliarity," potentially creating dangerous precedents which may expand and encourage further forum shopping.²³³ Therefore, it is important to review the circumstances in which US courts analyzed the Convention.

A US bankruptcy court acknowledged the applicability of the Convention in a case following Russia's invasion of Ukraine, in which a Singaporean leasing company (BOC Aviation Ltd.) sought to recover three aircraft on lease to Russia amidst the imposition of sanctions.²³⁴ In *BOC Aviation Ltd. v. AirBridgeCargo Airlines, LLC* in 2023, the Southern District of New York denied the plaintiff's request for specific performance of an Order of Possession of BOCA engines pursuant in part to the Convention, recognizing the duties owed to a debtor under the Convention.²³⁵ The court instead awarded damages and denied specific performance of possession and control of the engines, "whether pursuant to the obligations of the Lease Agreements or pursuant to the CTC."²³⁶ While the opinion is not controversial, it is crucial for directly recognizing the Convention and Aircraft Protocol, and applying specific portions, which suggests that US courts do accept these documents as governing law.

231. MOONEY & POTTOW, *supra* note 23, at 9.

232. *See id.*

233. *Id.* at 10.

234. *See generally* *BOC Aviation Ltd. v. AirBridgeCargo Airlines, LLC*, 669 F. Supp. 3d 204 (S.D.N.Y. 2023).

235. *See BOC Aviation*, 669 F. Supp. 3d at 220.

236. *Id.* at 240; *id.* at 220 ("Plaintiff asserts a federal claim for an Order of Possession that arises under the Consolidated Text of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment Signed at Cape Town on 16 November 2001 (the 'CTC'), a treaty to which the United States is a signatory. The Court asserts supplemental jurisdiction over the breach of contract claims under New York law").

This is not the only instance of US courts recognizing the Convention. In *Wells Fargo Equipment Finance Inc. v. Sea Horse Marine, Inc.*, a Minnesota district court compelled a debtor to deliver possession of an aircraft pursuant to obligations owed under the Convention.²³⁷ Additionally, in 2022, in *In re JPA No. 111 Co.* and *JPA No. 49 Co.*, the Southern District of New York Bankruptcy Court similarly applied default remedies of Articles 8 (Remedies of the chargee) and 9 (Vesting of object in satisfaction; redemption) of the Convention.²³⁸

Directly speaking to the applicability of a declaration of Alternative A, a bankruptcy court for the Southern District of Texas issued an order in *In re Bristow Group*, stating the debtors in the case were “as of the date thereof, in compliance with their obligations under Article XI, Alternative A of the CTC . . . such that they are able to retain possession of aircraft covered by the CTC.”²³⁹ This order and the related insolvency proceedings are critical, as they demonstrate a court’s acknowledgment and recognition of not only the validity of the Convention,²⁴⁰ but further, a US court’s recognition of another Contracting State’s declaration of Alternative A.

With such precedent, it is important that the United States continue to recognize the validity of the Convention and Protocol and adhere to the elections made by other Contracting States. However, this has not always been consistent, and courts continue to dispute the Convention’s application in recent cases.

237. Order Granting Motion for Return of Property, *Wells Fargo Equip. Fin., Inc. v. Sea Horse Marine, Inc.*, No. 12-00305 (D. Minn. Feb. 29, 2012), Dkt. No. 14; see also MOONEY & POTTOW, *supra* note 23.

238. No. 21-12075 (Bankr. S.D.N.Y. Mar. 25, 2022); see also MOONEY & POTTOW, *supra* note 23.

239. CTC in this case is referring to the Cape Town Convention. *In re Bristow Grp. Inc.*, No. 19-32713 (Bankr. S.D. Tex. Sep. 23, 2019), ECF No. 698.

240. See Dania Slim et al., *Recent Ruling Addresses Applicability of Alternative A and Cape Town Convention in U.S. Bankruptcy Cases*, PILLSBURY (July 24, 2024), <https://www.pillsburylaw.com/en/news-and-insights/alternative-a-cape-town-convention-bankruptcy.html> [<https://perma.cc/RV9H-5BZN>] (“The U.S. Bankruptcy Court for the Southern District of Texas recognized the applicability of the Cape Town Convention and Alternative A in a case involving a non-U.S. operator of aircraft.”).

B. Problems of Applicability in In re Oceanair

Brazil enacted the Cape Town Convention in 2013,²⁴¹ and has made a declaration to the Depositary (UNIDROIT), stating “the Federative Republic of Brazil declares that it will apply the entirety of Article XI, Alternative A, to all insolvency proceedings, and that the waiting period for the purposes of Article XI, paragraph 3, of this Alternative shall be thirty (30) calendar days.”²⁴² Oceanair Linhas Aéreas S.A. was the first Brazilian airline to file for bankruptcy after Brazil ratified the Convention, filing originally in December 2018.²⁴³

Oceanair Linhas Aéreas S.A. encountered financial difficulties, and subsequently defaulted on its lease rentals on its aircraft during 2018.²⁴⁴ By the end of that year, Oceanair filed for a bankruptcy restructuring proceeding in Brazil, known as a judicial recuperation.²⁴⁵ By July 2020, this process failed, Oceanair’s air operating certificate was suspended, and the restructuring was converted into a “definitive liquidation.”²⁴⁶ The proceeding, *In re Oceanair*, was originally filed in Brazil, and then its foreign representative petitioned the Southern District of New York (“SDNY”) for recognition through a Chapter 15 proceeding.²⁴⁷ The courts’ actions highlight the opposing views courts have held, as well as their arguably improper action as pertaining to the application of the Convention.

241. Decreto No. 8.008, de 15 de Maio de 2013 (Braz.).

242. *Declarations Deposited Under the Aircraft Protocol Arranged by Article: Article XXX(3)*, UNIDROIT, <https://www.unidroit.org/instruments/security-interests/aircraft-protocol/depositary/declarations-deposited-under-the-protocol-to-the-cape-town-convention-on-international-interests-in-mobile-equipment-on-matters-specific-to-aircraft-equipment-arranged-by-article/article-xxx3/> [https://perma.cc/7ECP-UD5A] (last visited June 7, 2026).

243. Basch & Iezzi, *supra* note 219, at 64. Note, Oceanair was more commonly known as “Avianca Brasil” with no connection to the Colombian airline also named Avianca. Oceanair originally started as a “judicial recuperation” which is akin to a restructuring model of Chapter 11, but then afterwards had to convert into a liquidation (similar to filing for Chapter 7). Oceanair’s fleet was entirely leased, and throughout 2018, was having trouble paying the rental agreements. As a result, lessors began filing action in Brazilian civil courts. These early cases gave deference to the Convention and its applicability.

244. Basch & Iezzi, *supra* note 219, at 65.

245. *See id.*

246. *See id.*

247. *See infra* note 260 (discussion of Chapter 15 recognition).

As lessors began filing petitions to courts to repossess aircraft, Oceanair petitioned the São Paulo Bankruptcy Courts for a protective order and stay against the creditors.²⁴⁸ The court applied local Brazilian Bankruptcy Law, granting a 180-day stay of repossession.²⁴⁹ This holding was in direct conflict with the Convention and in violation of Brazil's requirements under its Alternative A declaration, which would have applied a thirty-day waiting period after which the lessee would need to return the aircraft.²⁵⁰

Moreover, the Brazilian bankruptcy court acted further in violation of the Convention by allowing an eighteen-day extension on the waiting periods to present a redelivery plan, thereby preventing a lessor from deregistering an aircraft it repossessed.²⁵¹ Additionally, in February 2019, the court extended the suspension of creditors' rights, all "based exclusively on the principle of preservation of the company and its social interests."²⁵² After increased pressure from the creditors to afford them their rights owed under the Convention and even local Brazilian law, the court allowed the creditors to repossess the leased aircraft; however, the court did not order Oceanair to deliver the aircraft—thereby forcing the creditors to seek repossession orders from a variety of civil courts. This is another inconsistency with the Convention and Protocol.²⁵³

The creditors believed that this case misread the Convention and thus was erroneously decided.²⁵⁴ After a creditors' meeting in 2019, the case was appealed to the 2nd Corporate Appeals Court Panel of São Paulo.²⁵⁵ These orders were subsequently reversed on

248. Basch & Iezzi, *supra* note 219, at 65.

249. *See id.*

250. *See id.*; *see also* Case No. 1125658-81.2018.8.26.0100 (1st Bankruptcy Court of the State of São Paulo) (Braz.).

251. Early in the proceedings, a few lessors were able to repossess some of the leased aircraft, and began filing de-registration agreements. The court prevented this and other measures to make sure Oceanair's operations would not cease or there would not be additional repossession.

252. Basch & Iezzi, *supra* note 219, at 67.

253. *Id.*; *see also* Aircraft Protocol, *supra* note 42, art. XI(2) (requiring debtor to give possession to creditor).

254. *See generally* Basch & Iezzi, *supra* note 219. This article depicts a number of violations to the Convention throughout the steps of this proceeding.

255. *See id.* at 70.

appeal, in April 2019, and creditors were permitted repossession of the leased aircraft, per the Convention and Aircraft Protocol.²⁵⁶

The Appeals Court expressly stated that the Cape Town Convention must apply and should continue to be respected by bankruptcy courts, ruling in favor of the creditors.²⁵⁷ The Appeals Court ultimately recognized that rights owed to creditors under the Cape Town Convention need to be honored.²⁵⁸ Not only did the Appeals Court clarify that bankruptcy judges could not block repossession of leased aircraft, but notably, the court rendered its opinion on the merits of the Convention, demonstrating the Convention is not only applicable, but should prevail over domestic bankruptcy law.²⁵⁹

During its waiting period, or the stay period before which creditors can reclaim their assets, Oceanair also filed a petition in the SDNY bankruptcy court for recognition of the Brazilian proceeding under Chapter 15 of the US Bankruptcy Code, to impose an automatic stay on property within the jurisdiction of the United States.²⁶⁰ SDNY is also obligated to follow the provisions of the Protocol, and it granted the recognition yet also the automatic stay, though the court should have only allowed the thirty-day non-extendable waiting period under Alternative A.²⁶¹ SDNY's order did not mention or recognize the applicability of the Convention or

256. See Case No. 2017633-29.2019.8.26.0000 (2nd Corporate Appeals Court Panel of São Paulo) 777–804 (Braz.); see also Basch & Iezzi, *supra* note 219, at 70.

257. MURPHY, *supra* note 43, at 210. This allowed the creditors the right to immediate repossession of their aircraft, and the court stated that the bankruptcy court had overstepped in its extension of protections for the airline.

258. See generally Case No. 1125658-81.2018.8.26.0100 (1st Bankruptcy Court of the State of São Paulo) (Braz.).

259. Additionally, despite the extensive delays in reaching the decision, it was nevertheless much faster of a resolution than in prior cases. In *Varig Airlines* in 2005–2006, the Brazilian courts spent more than double the time appropriately allocating the assets.

260. See *In re Oceanair Linhas Aéreas S.A.*, No. 18-14182 (SHL) (Bankr. S.D.N.Y. Jan. 15, 2019).

261. See Nahm, *supra* note 183, at 62. As a Contracting State to the Cape Town Convention, the United States must honor the applicable election made by another Contracting State, in this case Brazil. However, because Brazil's lower court improperly applied the Convention initially, the issue carried through with the proceeding to the US court.

Alternative A here.²⁶² The trouble in doing so exemplifies the conflict between Chapter 15 and the Protocol.

Section 1503 of the Bankruptcy Code states that, in the event of conflict with a treaty obligation, the treaty should prevail.²⁶³ Therefore, because the Convention is a binding treaty, SDNY should have applied the treaty's provisions. However, since the Brazilian court was the proceeding's main jurisdiction, the SDNY could not overrule its judgment, even if SDNY did properly recognize the inconsistency with the treaty.²⁶⁴ This left SDNY in a position where it would either be rejecting the Brazilian court's judgment, which would defeat Chapter 15's purpose, or violating its duties under the Convention, which would defeat the purpose of international cooperation.

Without the United States' intervention into the *Oceanair* proceedings, the courts were left without additional guidance on the applicability of Alternative A in such proceedings. Additional cases would need to be brought to reach a clear answer from US courts.

C. *The Road to Recovery: In re SAS*

In re SAS is a landmark proceeding in the aviation finance industry, as it begins to answer the looming questions about the Cape Town Convention's application to US bankruptcy law.²⁶⁵ Scandinavian Airlines System ("SAS") is a Swedish airline holding company with its primary insolvency jurisdiction in Sweden.²⁶⁶ Akin to most airlines, SAS was impacted heavily by the COVID-19 pandemic, which halted most airline traffic, and resulted in the

262. See *In re Oceanair*, No. 18-14182 (SHL). The US bankruptcy court believed it was in a supervising ancillary position and did not have the authority to second-guess the improper Brazilian rulings.

263. See 11 U.S.C. § 1503; see also *supra* Part V. International treaties, such as the Cape Town Convention, should supersede US law, including the Bankruptcy Code in this case.

264. See *supra* note 262.

265. See generally Dania Slim, Michael Burke & Antony Single, *Ch. 11 Ruling Clarifies Cross-Border 'Alternative A' Scope*, LAW360 (July 29, 2024), <https://www.law360.com/bankruptcy-authority/articles/1862773/ch-11-ruling-clarifies-cross-border-alternative-a-scope> [<https://perma.cc/7P3U-KEP4>].

266. See *In re SAS AB*, No. 22-10925 (MEW), 2024 WL 3506430, at *2 (Bankr. S.D.N.Y. July 22, 2024).

airline laying off ninety percent of its staff.²⁶⁷ On July 5, 2022, SAS filed for bankruptcy protection in the United States, hoping to complete a Chapter 11 restructuring within a year.²⁶⁸ At the time, it had leased two aircraft from Irish leasing companies CAVIC 31 and CAVIC 41 (the “Creditors”).²⁶⁹ Initial proceedings resulted in a unique DIP Financing Agreement with Apollo.²⁷⁰ The Creditors allowed continued use of the aircraft collateral, but reserved their rights regarding the extent to which the aircraft were subject to the Convention.²⁷¹

In 2024, Judge Michael E. Wiles of the SDNY directly questioned the applicability of Alternative A and the Cape Town Convention to SAS.²⁷² The Creditors relied on Alternative A to assert an administrative expense claim to recover lease payments and additional amounts due for debtor noncompliance with maintenance obligations.²⁷³ The debtors had rejected the pre-petition leases within the relevant waiting period, but the Creditors argued that SAS was required to both return the aircraft, and pay additional administrative expenses, per the provisions of the Alternative A declaration.²⁷⁴ SAS objected and the court ruled in its favor.²⁷⁵

SDNY held that Alternative A did not apply because Sweden, the primary insolvency jurisdiction, had not made the necessary declaration under the Aircraft Protocol.²⁷⁶ Dr. Riz Mokal, an expert

267. Stine Jacobsen & Johan Ahlander, *SAS to Halt Most Flights, Temporarily Lay Off 90% of Staff*, REUTERS (Mar. 15, 2020, at 2:14 PM EDT), <https://www.reuters.com/article/us-health-coronavirus-sas/sas-to-halt-most-flights-temporarily-lay-off-90-of-staff-idUSKBN2120YZ/> [https://perma.cc/H6HL-RUH9].

268. Anna Ringstrom, Stine Jacobsen & Jamie Freed, *Airline SAS Clashes with Striking Pilots Over U.S. Bankruptcy Filing*, REUTERS (July 5, 2022, at 12:47 PM EDT), <https://www.reuters.com/business/aerospace-defense/sas-applies-chapter-11-united-states-2022-07-05/> [https://perma.cc/6RUL-R4CD].

269. *In re SAS AB*, 2024 WL 3506430, at *2.

270. *In re SAS AB*, 644 B.R. 267, 269 (Bankr. S.D.N.Y. 2022).

271. *See generally id.*

272. *See In re SAS AB*, 2024 WL 3506430, at *1 (“The Stipulations stated that the parties reserved their respective rights as to whether the aircraft were subject to the provisions of the Cape Town Treaty, the Protocol and/or Alternative A thereunder, without admitting the applicability of the same.”).

273. Slim et al., *supra* note 240.

274. *In re SAS AB*, 2024 WL 3506430, at *2.

275. *See id.*

276. *See In re SAS AB*, 2024 WL 3506430, at *2 (“The expert witness report and testimony by Dr. Riz Mokal showed that Sweden has adopted Alternative A for purposes of its domestic law, but that Sweden has never made the declaration required by Article XI

witness in insolvency of financial institutions, stated “Sweden has adopted Alternative A for purposes of its *domestic* law” which was not the necessary declaration under Article XI.²⁷⁷ In this absence, Alternative A “has no international effect and is not applicable in this US bankruptcy case.”²⁷⁸ Mokal cited Roy Goode’s Official Commentary to emphasize that UNIDROIT would have accepted a notification from an EU member if it conformed to the requirements of the declaration otherwise, but this was also not present here.²⁷⁹

SDNY further held that CAVIC would not even have had a claim under Alternative A, because the debtor did not make the election which would have triggered their obligations.²⁸⁰ By analyzing the language of the Protocol provisions, the court determined the remedies available are object-related and the claims asserted did not constitute a modification of the lease (which would have required the Creditors’ consent).²⁸¹

Even though the Creditors were not successful in recovering the expenses they sought, the SAS decision is nonetheless usefully applied in assessing the impact of a declaration under Alternative A. The decision can be interpreted to suggest that, had Sweden made the appropriate declaration, the court would have applied the provisions of the Convention and adhered to the Alternative A election over the relevant provisions of the domestic Bankruptcy Code.²⁸² Thus, the Convention and Aircraft Protocol could be deemed as binding law under different circumstances if a debtor with a valid declaration of Alternative A had filed in the United States. However, Sweden’s insufficient declaration effectively alleviated the court’s need for ruling on whether Alternative A would displace the Bankruptcy Code in regard to stays and waiting periods.

of the Protocol. In the absence of such a declaration, Alternative A (as adopted domestically by Sweden) has no international effect and is not applicable in this US bankruptcy case.”).

277. *See id.*

278. *Id.*

279. *Id.* at *2–4.

280. *See id.*

281. *Id.*

282. *See* Slim, Burke & Single, *supra* note 265 (“The decision suggests that Alternative A may apply in US bankruptcy cases if a country makes the declaration required by Article XI of the Aircraft Protocol or gives adequate notice to intergovernmental organization UNIDROIT, the official repository for declarations under Article XI of the Aircraft Protocol.”).

In fact, the court did not dispute that “Alternative A of Article XI of the Protocol contains provisions that, if adopted by a Contracting State, may govern the use of aircraft by borrowers or lessees who are the subject of insolvency proceedings.”²⁸³ This proceeding is ongoing, with a memorandum opinion issued March 4, 2025.²⁸⁴ In this opinion, District Judge Kaplan found that, even if Alternative A applied, “it would not disturb the Bankruptcy Court’s decision sustaining the objections to CAVIC’s claims.”²⁸⁵

Until this case, US courts, though accepting the Convention’s authority, have avoided addressing the applicability of Alternative A. In *SAS*, the court’s extensive discussion surrounding the various sections of the Protocol, rather than dismissal of the claims, indeed suggests that the Convention and Protocol can be applicable, though a more definitive claim about the broader applicability will likely require another case that will rule on the specifics of provisions such as waiting periods and stays.²⁸⁶

D. Additional Non-US Interpretations of the Convention: Nordic Aviation Capital DAC and AirAsia X Berhad

The Cape Town Convention’s applicability has also been considered by other courts in Contracting States that employ bankruptcy solutions similar to Chapter 11, such as the scheme of arrangement.²⁸⁷ Both the High Court of Ireland and the High Court of Malaysia considered the applicability of the Convention to a scheme of arrangement for airlines.²⁸⁸ What results is another inconsistency of interpretation.

In 2020, the High Court of Ireland issued its judgment on a scheme of arrangement for the Nordic Aviation Capital Designated

283. *In re SAS AB*, 2024 WL 3506430, at *1.

284. *See* CAVIC 31 Designated Activity Co. v. Scandinavian Airlines Sys. Denmark-Norway-Sweden (*In re SAS AB*), No. 24-cv-6159 (LAK), slip op. at 14 (S.D.N.Y. Mar. 4, 2025).

285. *Id.* at 15.

286. *See supra* note 282.

287. *See generally* *In re Nordic Aviation Cap. Designated Activity Co.* [2020] IEHC 445 (H. Ct.) (Ir.); *AirAsia X Bhd v. BOC Aviation Ltd.* [2021] 10 MLJ 942 (HC) (Malay.).

288. *See generally* *In re Nordic Aviation Cap.* [2020] IEHC 445; *AirAsia X* [2021] 10 MLJ 942.

Activity Company (“NAC”).²⁸⁹ Notwithstanding that Ireland has ratified the Cape Town Convention and made the appropriate declaration under Alternative A, the proposed scheme for NAC did not comply with Alternative A.²⁹⁰ Instead, the company argued that the scheme was not within the definition of an insolvency proceeding, and thus, the Protocol did not need to apply.²⁹¹

Nevertheless, the court found it unnecessary to consider the Convention’s application or whether it was within the applicable definition of an insolvency proceeding, and thus the proposed scheme was unanimously approved.²⁹² The relevant provisions of the Protocol which would have protected non-consenting creditors were found to not have been an issue here.²⁹³ Similar to the United States, without another case testing the Convention’s applicability, Ireland as well as England and Wales “await clarification from their

289. *In re Nordic Aviation Cap.* [2020] IEHC 445, ¶¶ 59–61. NAC at the time was the world’s largest regional aircraft lessor, and it was uncommon for lessors, unlike airlines, to file for bankruptcy or restructuring.

290. *Id.* ¶ 59 (“The Scheme Company [NAC] forcefully argued that the Cape Town Convention and the Aircraft Protocol did not apply and that schemes of arrangement, including the Amended Scheme, fell outside the definition of ‘insolvency proceedings’ for the purposes of the Cape Town Convention and the definition of an ‘insolvency related event’ under the Aircraft Protocol.”).

291. See Karen McMaster, Ben Andrews & James Cameron, *Aviation: Cramming Cape Town Creditors*, GLOB. RESTRUCTURING REV. (Dec. 15, 2020), <https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2020/article/aviation-cramming-cape-town-creditors> [https://perma.cc/RCV2-F5UR]. Part of their argument was drawing a distinction between the proposed scheme and the elements of a Chapter 11 restructuring which has much more court involvement. Not discussed in this Note is the additional consideration of the courts and scholars as to what is considered an “insolvency proceeding.” Under the UK Companies Act 2006, it appears that Part 26A allows for a scheme, or restructuring plan, that can be viewed as independent of an insolvency proceeding. If such a scheme is not presented as an insolvency proceeding, it would not be bound by requirements of the Convention. See also *In re Nordic Aviation Cap.* [2020] IEHC 445, ¶ 59 (“Professor Payne’s [Linklaters Professor of Corporate Finance Law at the University of Oxford] conclusion was that the Amended Scheme did not fall within the definition of ‘insolvency proceedings’ for the purposes of the Cape Town Convention and did not fall within the definition of an ‘insolvency-related event’ for the purpose of the Aircraft Protocol.”).

292. *In re Nordic Aviation Cap.* [2020] IEHC 445. In the opinion, Justice David Barniville wrote: “I felt that it was not necessary and, indeed, might be inappropriate for me to embark upon a consideration of the issues arising under the Cape Town Convention and the Aircraft Protocol. I decided that it would be appropriate to leave over to a future determination of the potentially controversial issues which could arise in terms of the potential application of the Cape Town Convention and the Aircraft Protocol to schemes of arrangement under the 2014 Act.”

293. Berkery et al., *supra* note 132.

respective courts.”²⁹⁴ Prior to this court’s decision, NAC also sought recognition of the scheme under Chapter 15 in the SDNY Bankruptcy Court.²⁹⁵

However, the financial difficulties worsened, with additional losses mounting for NAC.²⁹⁶ By December 2021, NAC sought protection under Chapter 11 in the Bankruptcy Court for the Eastern District of Virginia, Richmond Division.²⁹⁷ The debtors were able to “confirm a consensual plan of reorganization” within just four months, with the plan creating an orderly exit of debt and raising new capital, marking a successful reorganization process.²⁹⁸

Ultimately, the NAC restructuring demonstrates that US courts are not the only courts that struggle to reconcile their law with the insolvency provisions of the Convention. In the original Irish proceeding, the remedies under the Protocol were not applicable to the Part 9 scheme of arrangement employed by NAC and accepted by the Irish High Court.²⁹⁹ Rather, the court distinguished the Part 9 scheme of arrangement from an insolvency proceeding, circumventing the potential inconsistency with the Protocol.³⁰⁰ While this may have worked for NAC, what still remains unclear is whether this could be applicable to a foreign company that may want to sanction such a scheme but still has to comply with their declaration and provision of the Protocol.

The court in *AirAsia X Berhad v. BOC Aviation Limited* provides a different view on schemes of arrangement.³⁰¹ The Malaysian High Court held that the proposed scheme of arrangement was in fact an

294. McMaster, Andrews & Cameron, *supra* note 291.

295. Berkery et al., *supra* note 132. Notably, this case was brought before Judge Wiles who also decided *In re SAS* discussed above.

296. Edward Russell, *Nordic Aviation Capital First Major Lessor to Restructure Due to Pandemic*, AIRLINE WKLY. (Dec. 20, 2021), <https://airlineweekly.skift.com/2021/12/nordic-aviation-capital-first-major-lessor-to-restructure-due-to-pandemic/> [https://perma.cc/8SFJ-XG6C] (“The lessor lost \$2.4 billion during the fiscal year ending in June, and \$639 million during the fiscal year ending June 30, 2020.”).

297. *See generally* *In re Nordic Aviation Cap. Designated Activity Co.*, No. 21-33693 (KRH) (Bankr. E.D. Va. Oct. 18, 2022).

298. *Id.*

299. *See supra* note 287. Part 9 is a form of restructuring which allows companies to propose a compromise or agreement with creditors to the High Court for approval.

300. *See supra* note 292.

301. *See generally* *AirAsia X* [2021] 10 MLJ 942.

insolvency-related event for the purposes of the Convention and thus the Convention and Protocol's provisions should govern.³⁰² The court turned to Goode's *Official Commentary*, which defined an insolvency proceeding as one where "debtor's assets and affairs are subject to court control or supervision for the purposes of reorganization."³⁰³ The court's interpretation took a much wider view of what court supervision entailed, by rejecting a more restrictive meaning, and found that the scheme's approval was sufficient to constitute "supervision."³⁰⁴ However, the court nonetheless recognized that there have been two UK cases which grappled with whether the scheme of arrangement is sufficient to be an insolvency-related event for the purposes of the Convention, stating that "in the end, the question was not necessary for the court's decision," citing to *NAC*.³⁰⁵ Ultimately, the Malaysian court concluded that "the present Scheme [of arrangement] is indeed an 'insolvency-related' event under Article XI of the Protocol," setting a new precedent for future schemes of arrangement.³⁰⁶ While this is a great stride for a uniform standard, other courts have not conclusively adopted this approach. Courts globally produce contradictory results, leaving both creditors and airlines equally uncertain about their rights and obligations.

302. Notably, Malaysia ratified the Convention in 2006 and "had declared the remedies under Alternative A of Article XI of the Protocol shall apply in its entirety to all types of insolvency related proceedings." *AirAsia X* [2021] 10 MLJ 942, [202].

303. OFFICIAL COMMENTARY, *supra* note 12, at 300. Notably, though referred to in court opinions, the Official Commentary is not legally binding on national courts, and does not have official standing.

304. *Cloudy Skies: The Cape Town Convention & Ireland's Insolvency Regime*, FLYNN O'DRISCOLL (June 29, 2021), <https://www.fod.ie/news/dispute-resolution> [<https://perma.cc/8YAP-W6UE>]. Notably the AWG also produced expert opinions to determine whether schemes of arrangement were to be considered insolvency proceedings—and found that they were considered under the Lugano Convention so should be treated similarly under the Cape Town Convention. However, courts are still waiting on a case to be brought to set the precedent. In this case, the Court rejected the *AirAsia X* lower court's expert opinion interpretation of an "insolvency proceeding" finding it was too restrictive in the use of the words "assets" and "subject to control or supervision by a court." Instead they ruled that all that is required is that the scheme be approved by the court or meet all the requirements of assets and affairs subject to control or supervision.

305. *AirAsia X* [2021] 10 MLJ 942, [249]. The court also cited the restructuring plan for Virgin Atlantic Airways Ltd., which similarly did find issue with the applicability of the Convention to the insolvency proceeding and did not proceed to resolve the question.

306. *Id.* [280].

VIII. CONCLUSION

Across the globe, courts continue to grapple with the application of the Cape Town Convention and Aircraft Protocol. In the United States, the decision in *In re SAS* comes close but falls short of creating clear and binding precedent for future debtors filing for bankruptcy in the United States.³⁰⁷ This continues to create confusion for creditors, as they are not clear on what rights they can assert during an insolvency proceeding. There is simply not enough reliable precedent or application of the Convention to have strong confidence in the application of their rights under Alternative A. This can suggest to parties hoping to rely on Alternative A that they can be met with scrutiny over their declaration.³⁰⁸

Nevertheless, *In re SAS* made great strides in bolstering the views scholars already had.³⁰⁹ The Independent Expert Opinion of the Aviation Working Group (“AWG”),³¹⁰ issued in May 2024, expressed this position ahead of the *SAS* opinion.³¹¹ The AWG argues that US courts are “obligated to apply Protocol Article XI Alternative A in conformity with the declaration of the debtor’s primary insolvency jurisdiction without further legislation or implementation by the United States.”³¹² Since the United States had the requisite intent and took the proper steps to become a party to the Convention and agreed to be bound by it, it must therefore apply the provisions to proceedings of foreign debtors in US bankruptcy courts.³¹³ Legal precedent carries great weight in the US judicial system, so great strides could even be achieved without changing the Bankruptcy Code or enacting new legislation. The legal framework has already established the supremacy of the

307. See generally *supra* Section VII.C.

308. David A. Rosenzweig, Emily Hong & Cathy Shu, *Alternative A Stowed Away (for Now): Decision Affirmed That Alternative A Not Applicable to Claim Treatment in SAS Case*, NORTON ROSE FULBRIGHT: RESTRUCTURING TOUCHPOINT (May 15, 2025), <https://www.nortonrosefulbright.com/en/restructuring-touchpoint/blog/2025/05/alternative-a-stowed-away-for-now> [https://perma.cc/45CE-54F7].

309. See generally *supra* Section VII.C.

310. Aviation Working Group, formed at the request of UNIDROIT to contribute to the development and oversight of the Cape Town Convention.

311. See MOONEY & POTTOW, *supra* note 23, at 1.

312. *Id.* at 2.

313. *Id.* at 14.

Convention over domestic law, so what is left now is setting an example through legal precedent.

There is no doubt that in the tumultuous aircraft financing market, more bankruptcies are bound to happen, both domestically and internationally. Therefore, there is an urgent need for a clear and binding authority to govern it. The Convention set out this framework, and now that it is ratified, it must be followed. If this clarity is not reached soon, creditors and debtors alike will remain uncertain about their claims, which will have extensive impacts. If creditors find that they will not be able to recover on their claims, they will have no incentive to remain in the market or will have to increase rates to cover these margins. This could have devastating impacts on the entire airline market globally, increasing the risks of legal ambiguity and forum shopping. Such uncertainties lead to higher risk premiums, which in turn raise costs and decrease investment, which can constrain the entire market. Clarity for this issue does not only benefit the creditor or the debtor, but is essential to the market as a whole.

The US Bankruptcy Code, specifically the globalization of Chapters 11 and 15, is designed to promote cooperation internationally. The ratification of the Convention and Aircraft Protocol advances these goals.³¹⁴ However, noncompliance with the Convention, even in the form of neutrality, frustrates these goals and undermines the credibility of the United States as a Convention-ratifying state. Therefore, either in the next proceeding brought before a US bankruptcy court, or through enacting legislation, the United States must complete the work begun in *In re SAS* and make it manifest that creditors can recover assets under the provisions of Alternative A if the debtor's primary insolvency jurisdiction has made such an election.

314. See generally OFFICIAL COMMENTARY, *supra* note 12, at 322.