

# Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment – Insolvency Remedies

Elizabeth H. Evans  
Weil, Gotshal & Manges LLP

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## Opt-In Provision

### Article XI – Remedies on Insolvency

- Article XI provides two alternative remedies provisions (“Alternatives”). Article XI only applies where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX (3).
- Article XXX(3) specifically allows a Contracting State, at the time of ratification, acceptance, approval of, or accession to the Protocol, to adopt Alternative A or Alternative B (both in their entirety). The Contracting State shall specify the types of insolvency proceedings to which it will apply such Alternatives.



## Opt-In Provision Article XI – Insolvency-related Event

- “Insolvency-related event” means (i) the commencement of insolvency proceedings or (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action.



Opt-In Provision

## Article XI – Primary Insolvency Jurisdiction

- “Primary insolvency jurisdiction” means the Contracting State in which the center of the debtor’s main interests is situated, which for this purpose is 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.



## Article XI – Alternative A

- Upon occurrence of an insolvency-related event, the insolvency administrator or the debtor, shall give possession of the aircraft object to the creditor no later than the earlier of (a) the end of the waiting period and (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply (such date, hereinafter, the “Outside Date”).



## Article XI – Alternative A

- “Waiting Period” is the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
- Article XXX(3) provides that a Contracting State making this declaration shall specify the time period required by the Article XI Alternatives.



## Article XI – Alternative A

- Provides further requirements regarding maintenance of the aircraft object.
- “Unless and until the creditor is given the opportunity to take possession under paragraph 2, the insolvency administrator or debtor, as the case may be, shall preserve the aircraft object and maintain it and its value in accordance with the agreement [between creditor and debtor].”  
This is not to preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.



## Article XI – Alternative A

- No obligations of the debtor under the agreement [between debtor and creditor] may be modified without the consent of the creditor.
- The “no modification” provision (above) is not to be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.





## Article XI – Alternative A

- Debtor, or insolvency administrator, may retain possession of the aircraft object where, by the Outside Date specified in Article XI(2), it has cured all defaults other than a default constituted by the opening of insolvency proceedings [ipso facto defaults] and has agreed to perform all future obligations under the agreement [between debtor and creditor].

## Comparison to section 1110 of U.S. Bankruptcy Code

- Section 1110 of the U.S. Bankruptcy Code provides that, despite other provisions of the Bankruptcy Code (for example, sections 362 [Automatic Stay], 363 [Use, Sale or Lease of Property] and 1129 [Confirmation of Plan/Cram-down Provisions]), financiers of certain aviation equipment may take possession of aviation equipment unless trustee or debtor-in-possession agrees to perform within 60 days of commencement of case.

## Comparison to section 1110 of U.S. Bankruptcy Code

- During the 60 day period, the automatic stay remains in effect. If default occurred post-petition, cure must be made within 60 days of petition or 30 days after the default, whichever is later.

## Comparison to section 1110 of U.S. Bankruptcy Code

- Aircraft equipment covered by section 1110 includes an aircraft, aircraft engine, propeller, appliance or spare part (as defined in the Transportation Code, section 40102 of Title 49) that is subject to a security interest granted by, or leased to, or conditionally sold to, a debtor that holds an air carrier operating certificate issued pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6000 pounds or more of cargo.

## Comparison to section 1110 of U.S. Bankruptcy Code

- “Aircraft objects” covered by the Protocol means airframes, aircraft engines and helicopters.
- Aircraft engines, airframes and helicopters excludes those used in military, customs or police services.
- Aircraft engines must be powered by jet propulsion (at least 1750 lb of thrust or its equivalent) or turbine or piston technology (at least 550 rated take-off shaft horsepower or its equivalent).
- Airframes must be type-certified by competent aviation authority to transport at least 8 persons (including crew) or goods in excess of 2750 kilograms.
- Helicopters must be type-certified by a competent aviation authority to transport at least 5 persons (including crew) or goods in excess of 450 kilograms. Must be supported in flight by the reactions of the air on one or more power-driven rotors on substantially vertical axes.

## Article XI – Alternative A Remedies

- Also provides that the creditor is entitled to apply for any other form of interim relief available under applicable law.
- Remedies are to be made available by the registry authority and the administrative authorities in a Contracting State no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure such remedies in accordance with the Convention.

## Article XI – Alternative A Remedies

- The applicable authorities shall expeditiously cooperate with and assist the creditor in the exercise of remedies in conformity with applicable aviation safety laws and regulations.
- The Convention as modified by Article XI of the Protocol shall apply to the exercise of any remedies under Article XI.
- No exercise of remedies permitted by the Convention or Protocol may be prevented or delayed beyond the Outside Date specified in paragraph 2 of Article XI.

## Article XI – Alternative B

- Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXX(3) whether it will:
  - (a) cure all defaults (other than ipso facto defaults) and agree to perform all future obligations under the agreement [between debtor and creditor) and related transaction documents; OR
  - (b) give the creditor the opportunity to take possession of the aircraft object, in accordance with applicable law.





## Article XI – Alternative B

### More Uncertainty for the Creditor:

(A) Applicable law referred to in the repossession section may permit the court to require the taking of any additional step or the provision of any additional guarantee.

(B) If no notice given, or aircraft object not returned in accordance with administrator or debtor's prior declaration, court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.



## Article XI – Alternative B

### Burden of Proof on the Creditor:

(A) Creditor must provide evidence of its claims and proof that its international interest has been registered.

(B) Aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.



## More Financial Certainty for Financing Aircraft in Countries Who Opt-in

Countries who opt-in for Alternative A should be entitled to financing benefits enjoyed by U.S. domestic carriers, assuming the waiting period is 60 days or less.

In particular, it is hoped that this will open capital market transactions (EETC issuances) up for airlines in foreign countries opting in.