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The Cape Town Convention on International Interests in Mobile Equipment (‘Treaty’) and the Protocol on Matters Specific to Aircraft Equipment (‘Protocol’) were drafted to give more predictability to the aircraft financing market: given that the assets in question often moved through different jurisdictions, there was a need for a body of law that would give owners, lessors, lessees, and creditors assurance that their rights and claims would apply uniformly throughout the globe. The United States has signed and ratified the Treaty and Protocol, and has also passed the Cape Town Treaty Implementation Act of 2004. By simply reading the words of these documents and treaties, one might think that US bankruptcy courts ought to be bound by Protocol Article XXX(4) as well. Protocol Article XXX(4) requires bankruptcy courts to go beyond the US Bankruptcy Code when dealing with debtors whose primary insolvency jurisdiction is another Contracting State of the Treaty. The courts are required to apply versions of an insolvency measure as had been adopted by the Contracting State that is the primary insolvency jurisdiction. As it is then shown that mere ratification does not make a treaty enforceable, I consider various arguments to assess the enforceability of Protocol Article XXX(4). Lastly, utilizing the conclusions made, I briefly comment on the unexpected outcome of In re: Oceanair and its potential errors.

Keywords: Cape Town Convention, Aircraft Protocol, Bankruptcy, Aircraft Finance, Chapter 15, insolvency, Alternative A, XXX(4), Cape Town Treaty Implementation Act, Treaty

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I. INTRODUCTION

There is a provision in the Aircraft Protocol\(^1\) to the Cape Town Convention (‘CTC’)\(^2\) – namely Article XXX(4), whose plain-text reading seems to suggest that US bankruptcy courts must apply insolvency proceedings external to Title 11 of the United States Code, more commonly known as the United States Bankruptcy Code\(^3\) (‘Bankruptcy Code’) for debtors of certain assets and certain nationalities, notwithstanding potential conflicts with existing provisions in the Bankruptcy Code. While the bankruptcy courts are no stranger to administering foreign law through Chapter 15 proceedings for foreign companies, the provision in question here would demand that the court reach beyond the Bankruptcy Code for other provisions as well, namely Chapter 7 or Chapter 13.

Whether bankruptcy courts are bound to apply the said provision of the Cape Town Convention is a question of first impression, and thus my analysis cannot be a simple review of existing jurisprudence, but rather must be forward-looking. Thus, this article will comprise of three main parts to argue for the enforceability of Article XXX(4) of the Aircraft Protocol (hereafter, ‘Article XXX(4)’).

The first part (section II) will introduce the background to the issue and will explain elements of aircraft financing, laws that typically govern such financing, section 1110 of the Bankruptcy Code, Cape Town Convention and the Aircraft Protocol, and the specific provision of Article XXX(4) that give rise to the topic at hand. The second part (section III) will discuss how the issue would be viewed in the purview of existing laws, with emphasis on the issue of whether the Cape Town Convention is an enforceable treaty under the Supremacy Clause of the US Constitution. The article will make an ‘even-if’ argument to show that different interpretations of relevant case laws would render the same result that the Cape Town Convention and Article XXX(4) are enforceable federal law. The third part (section IV) will argue that on grounds of both structural consideration of the balance of powers and public policy concerns, courts should find Article XXX(4) enforceable.

Once I have made the argument for the enforceability of Article XXX(4) (section V), I will review the Oceanair case and argue, in section VI, that the court was erroneous to not follow the Cape Town Convention as is required by section 1503 of the Bankruptcy Code.

II. BACKGROUND

To discuss the development of section 1110 and the Cape Town Convention, we ought to briefly review the basic principles and ideas governing secured transactions and the idiosyncrasies of aircraft financing.

Commercial finance – or the raising of debt finance outside of the public market – that concerns personal property security interests (and not real estate mortgage) is typically governed by Article 9 of the Uniform Commercial Code (‘UCC’) in the

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3. 11 USC §101 et seq.
A lender would often try to protect itself from the borrower’s default by taking a security interest in a collateral via a security agreement. From the borrower’s perspective, it can pre-commit to sure payment to the loan, which reduces interest rates.

For the security interest of the creditor to be enforceable in court against the borrower, the secured creditor puts a lien on the collateral asset and thus makes attachment. A signed security agreement with description of collateral will attach the security interest to the collateral, and this interest will be enforceable against the borrower in court. The creditor must then perfect the interest, often by public filing in a central state office, in order for the security interest to be enforceable against third parties in court. If the debtor defaults, the secured party ‘may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure’. If the borrower files for bankruptcy, however, section 362 of the Bankruptcy Code (Automatic Stay) prevents the secured creditor from immediately repossessing and foreclosing the collateral in most situations.

We shall now see why and how these general rules of commercial finance do not apply to aircraft finance.

1. What is aircraft finance, and why does it matter?

Aircraft finance, or aviation finance, simply refers to finance for the purchase, lease and operation of aircraft. While it shares many attributes with other fields of asset-backed finance such as project finance, aircraft finance gets its unique attributes and concerns from the nature of the aircraft themselves.

First, aircraft and key components of aircraft (e.g., engines) are a highly transferrable asset class. The global passenger aircraft market is currently in a duopoly of Boeing and Airbus, which have nearly 90 per cent of the aircraft market. Add to this the fact that the global demand for air-travel is projected to continuously grow at more than 3 per cent per year. This means that commercial aircraft are in constant demand by global airlines – which means that if a creditor has a secured interest in a commercial aircraft owned and operated by an airline, the said aircraft can be easily repossessed and find a willing buyer, given that ‘[a]irlines across the globe tend to employ the same few types of planes in their commercial fleets’. In the same line of logic, engines for these aircraft are highly transferrable. From the creditor’s perspective, this means that the risk of failing to recover the value of the collateral is low. This

5. ibid s 9–203(b).
6. ibid s 9–601(a).
7. 11 USC s 362 (2010).
requires one presumption, however: the lender must be able to repossess and either foreclose or sell the aircraft.

Given that aircraft in most international or interstate airlines often travel through different jurisdictions, if not for a unified system of law governing the financing and foreclosing of aircraft, the ease of creditors’ access to the collateral may fluctuate depending on where the aircraft is physically located at the moment of debtor’s filing for insolvency. Furthermore, given that aircraft are likely to travel throughout the world, without a central registry that applies globally, new creditors may have difficulty in checking whether there is a perfected, existing security interest in an asset. These are the peculiarities of the aircraft finance market that gave rise to Cape Town Convention and other similar rules.

It is also worth noting the structure of a typical aircraft finance transaction. Aircraft require great capital commitment—the Boeing 737, the most in-demand commercial aircraft in the world, costs on average US$103.4 million.11 Because of the heavy capital cost, airlines prefer to lease, rather than own, aircraft to respond more flexibly to economic fluctuations. According to Centre for Aviation, a market research company for the aviation and travel industry, more than half of the world’s commercial aircraft fleet is leased.12 Companies like Air Lease Corporation and Aircastle LTD are some of the world’s largest aircraft lessors that own more than a 100 commercial aircraft each and lease them to airlines around the world.13 As such, the borrower in aircraft finance is not always an airline, but can be a leasing company as well.

The global commercial helicopter market shares many of the attributes of commercial airplane market, but is also markedly different. First, unlike fixed-wing airplanes, rotary-wing aircraft (helicopter) market is not controlled by a monopoly or a duopoly. Not only are there many more key players, but there are demands for a wider variety of products as well, such as intermediate single engines, light twin engines, medium twin engines, etc.14 But like fixed-wing planes, the fact that helicopters can easily travel through different jurisdictions calls for a uniform commercial law to govern its financing. And like the commercial aircraft market, the aircraft in question can be owned by both airlines and lessors. Again, these facts explain why certain details were included in the Cape Town Convention, as explained in the following pages.

2. Bankruptcy Code section 1110

The previous section delineated the peculiarities of the aircraft finance market that make it difficult for creditors with secured interests in aircraft to just rely on the

particular laws and rules of a particular jurisdiction. Add to this the fact that commercial airlines are notoriously sensitive to fluctuations in overall economy (or have high income elasticities of demand) despite providing services that are crucial to a burgeoning economy.\textsuperscript{15} This was why as early as 1957, the Congress made special provisions in bankruptcy proceedings relating to aircraft finance.\textsuperscript{16} But whereas this earlier law was only applicable in the then-notoriously-complicated proceedings of Chapter X of the Bankruptcy Act of 1898,\textsuperscript{17} the Bankruptcy Reform Act of 1978 introduced a provision for secured interests in aircraft for the newly-introduced Chapter 11 proceedings of corporate reorganization; this was section 1110 of the Bankruptcy Code.\textsuperscript{18}

Section 1110 is comprised of four sub-clauses, of which the first three (1110(a) to 1110(c)) are highly pertinent to the present issue. Section 1110(a)(1) states:

\begin{quote}
Except as provided in paragraph (2) and subject to subsection (b), the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies, under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court.\textsuperscript{19}
\end{quote}

There are three logical compartments to this clause. First is the object of the clause, the equipment described in section 1110(a)(3). Second is the operation of the clause: for a secured party with a security interest in this equipment, or for a lessor or conditional vendor of such equipment, certain rights will not be limited or otherwise affected by any other provision of the Bankruptcy Code or of the court. These rights are the right to take possession of such equipment in compliance with an existing agreement, the right to enforce any other rights or remedies under such agreement, and the right to sell, lease, or otherwise retain or dispose of such equipment. The third compartment is the qualifying provisions: these rights can be limited per sections 1110(a)(2) and 1110(b). Analyzing each of these compartments better reveals the rules set forth by section 1110.

First, section 1110(a)(1) concerned equipment described in section 1110(a)(3). According to section 1110(a)(3)(A)(i), the equipment described in the paragraph includes ‘an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of Title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that, at the time such transaction is entered into, holds an air carrier operating certificate issued pursuant to chapter 447 of Title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo’.\textsuperscript{20} While the specific details of this provision will serve useful in a later discussion of this article, for now it suffices to understand that this provision applies to most aircraft employed by commercial airlines. Section 1110(a)(3)(B) also mentions

\begin{itemize}
  \item Ch 541, 30 Stat 544 (repealed 1978).
  \item Wilbur Foster and Risa Rosenberg, ‘Aircraft Lessors Entitled to Adequate Protection During the §1110 60-Day Period’ (2010) 29 American Bankruptcy Institute Journal 18.
  \item 11 USC s 1110(a)(1).
  \item 11 USC s 1110(a)(3)(A)(i).
\end{itemize}
that the ‘equipment’ hereon also includes ‘all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment’.  

Second, section 1110(a)(1) states that except for the qualifying conditions mentioned within sections 1110(a)(2) and 1110(b), no other provisions of the Bankruptcy Code or the powers of the courts will limit or affect the rights of secured creditors, lessors or conditional vendors against the collateral equipment as may have been conferred by security agreements, leases, or conditional sale contracts, respectively. Thus, with the description of equipment from section 1110(a)(3) in mind, for secured creditors (barring certain circumstances) the Bankruptcy Code may not limit or affect their right to take possession of collateralized aircraft, the right to enforce any remedies laid out in security agreements, or the right to sell or lease the aircraft to other parties.

Third, section 1110(a)(1) is limited by the conditions in sections 1110(a)(2) and 1110(b). Section 1110(a)(2), in short, gives ‘the debtor the protection of the automatic stay’ for a 60-day period after the date of the order for relief. If the trustee agrees to perform all obligations of the debtor under the security agreement during this 60-day period, to cure any default (other than a default that is a breach of a provision relating to insolvency or commencement of bankruptcy proceedings) in a timely manner, then the debtor can enjoy the automatic stay protection beyond the 60-day period. Section 1110(b) allows the trustee and the secured party (or lessor or conditional vendor) to agree to extend the 60-day period.

In short, to focus on the parts that pertain to a secured creditor, section 1110(a)(1) can be roughly summarized as stating the following: a secured creditor’s right to take possession of an aircraft in compliance with a security agreement, to enforce any of its other rights or remedies, under such security agreement, to sell, lease or otherwise retain or dispose of such aircraft, is not limited or otherwise affected by any provision of the Bankruptcy Code or by any power of the court, except if the trustee agrees to perform all obligations of the debtor under the security agreement and cures defaults (except certain defaults that relate to insolvency or commencing the bankruptcy proceeding) during a 60-day period – which may be extended by agreement between the trustee and the creditor – which then grants automatic stay protection on the debtor’s assets.

Section 1110(c)(1) states that if a secured party is entitled to take possession of aircraft pursuant to section 1110(a) – that is, if automatic stay has not been put in place either due to the trustee’s unwillingness to perform obligations of the debtor under the security agreement, or due to failure to cure a default – then the trustee ‘shall immediately surrender and return’ the aircraft to the secured party. Section 1110(c)(2) states that if the trustee is required under section 1110(c)(1) to immediately surrender and return aircraft, ‘any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, shall be deemed rejected’.  

22. See ibid s 1110(a)(1) (the actual phrase is ‘any other provision of this title’, but ‘title’ here refers to the Bankruptcy Code (Title XI)).
23. See generally Foster and Rosenberg (fn 18).
24. 11 USC s 1110(c)(2).
3. The limited scope of section 1110

Before moving on, one additional fact about section 1110 must be discussed. Section 1110 does not confer its 60-day protection to all owners of aircraft equipment. Here, details of section 1110(a)(3) matter.

Among aircraft, aircraft engine, propeller, appliance, or spare part, section 1110 only applies to those that are subject to a security interest granted by, leased to or conditionally sold to a debtor that holds an air carrier operating certificate.\(^\text{25}\) Section 44705 of Title 49 states that air carrier operating certificate is issued to a person desiring to operate as an ‘air carrier’, as defined in chapter 401 section 40102 of Title 49.\(^\text{26}\)

Section 40102 of Title 49 provides definitions for various terms pertinent to the current topic. The definition of an ‘air carrier’ is ‘a citizen of the United States undertaking, by any means, directly or indirectly, to provide air transportation’.\(^\text{27}\) ‘Citizen of the United States’ means

(A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.\(^\text{28}\)

‘Air transportation’ is defined as ‘foreign air transportation, interstate air transportation, or the transportation of mail by aircraft’.\(^\text{29}\)

Given these definitions, it becomes evident that section 1110 does not apply to every aircraft that is subject to a security interest or a lease or a conditional sale agreement. If the debtor is not a citizen of the United States per the aforementioned definitions, it cannot be an ‘air carrier’ and in turn cannot obtain an ‘air carrier operation certificate’, and the equipment of such a debtor would not be subject to section 1110. Also, helicopters are less likely to be subject to section 1110 than fixed-wing aircraft due to the fact that helicopters are much more likely to be used for intrastate transportation but not for foreign air transportation or interstate air transportation, which require transportation of passengers across national or state borders.\(^\text{30}\) Lastly, if the debtor is an aircraft lessor that does not engage in passenger transportation itself, it would not have an air carrier operating certificate and thus its aircraft assets would not be subject to section 1110 of the Bankruptcy Code.

In summary, section 1110 provides additional protection in bankruptcy proceeding to parties with a secured interest in aircraft equipment if the debtor filing for bankruptcy has an air carrier operating certificate issued for aircraft capable of carrying ten or more individuals or 6,000 pounds or more of cargo. For these secured creditors, section 1110 ensures that the trustee either cures defaults and performs obligations under a security agreement, or immediately surrenders the aircraft to the secured party. Given the highly transferrable nature of aircraft and the growing demand for

\(^{25}\) ibid s 1110(a)(3)(A)(i).
\(^{26}\) 49 USC s 44705.
\(^{27}\) ibid s 40102(a)(2) (emphasis added).
\(^{28}\) ibid s 40102(a)(15).
\(^{29}\) ibid s 40102(a)(5).
\(^{30}\) ibid s 40102(a)(23) and (25) (definitions for foreign air transportation and interstate air transportation, respectively).
aircraft, a secured creditor would be able to easily sell a surrendered aircraft to another party and recover any losses incurred by the debtor’s default. But if the debtor is not a US airline operating fixed-wing passenger aircraft, a secured creditor with a secured interest in an aircraft equipment collateral would not benefit from section 1110 protections. This limited scope is worth noting as we move on to discuss the broader protections conferred by Alternative A of the Aircraft Protocol.

4. Cape Town Convention and the Aircraft Protocol

The Cape Town Convention and the Aircraft Protocol were introduced in 2001 and reflected – through its perambulatory clauses – a shared understanding of the ‘need to acquire and use mobile equipment of high value’ and to ‘provide broad and mutual economic benefits for all interested parties’.

As explained before, one of the key risks of aircraft finance market is that aircraft by nature are likely to traverse through different jurisdictions with different rules regarding security interests. Thus, assuming that a debtor files for bankruptcy, parties with secured interest in the aircraft equipment may receive varying degrees of protection and rights, depending on where the aircraft is flying through at the moment of the filing. Furthermore, without a central registry, creditors would have to check multiple offices around the globe to see if there are any liens already attached to the aircraft.

The Cape Town Convention was drafted as a response to these issues of the finance that involve mobile equipment. A product of more than ten years’ effort of UNIDROIT (International Institute for the Unification of Private Law), the CTC lays the rules regarding mobile equipment in general (not only aircraft but rolling stock and space assets as well), whereas the Aircraft Protocol lays the rules specific to aircraft. The two documents are to be read as a single instrument, and for any inconsistency between the two, the Protocol would prevail.

The Cape Town Convention primarily focused on creating an international secured transaction regime for aircraft. It attained this goal by setting up in Ireland an international registry for aircraft engines, airframes and helicopters. Any person would be able to electronically search this registry for information on international interests attached to aircraft objects.

But simply setting up a global registry for aircraft objects would not reduce the risk that creditors receive different protections across different jurisdictions. Thus, the Cape Town Convention also introduced new remedies for defaults and insolvency that contracting states could selectively adopt through declarations. The range of choices on these declarations are listed in Article XXX of the Aircraft Protocol. And it is in this Article XXX that we find Article XXX(4) which gives rise to the topic of this article.

5. Alternative A and Article XXX(4) of the Aircraft Protocol

Article XXX(4) of the Aircraft Protocol states the following: ‘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’. A ‘Contracting State’

31. CTC, Preamble.
32. CTC, Article 6.
33. Aircraft Protocol, Article XXX(4).
simply refers to a country that is a state party to a treaty. Article XI lists two alternative remedies on insolvency – Alternative A and Alternative B – and Article XXX(3) allows a Contracting State to declare which of the two alternatives it will apply for which specific insolvency proceedings. A ‘primary insolvency jurisdiction’ is defined 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’. A ‘statutory seat’ means ‘the place designated by the founders or the members of a company or legal person as official address of the entity’.34

Thus, plain reading of Article XXX(4) can be understood in the following manner: if countries X and Y are both Contracting States, and X has declared per Article XXX(3) to apply Alternative A for insolvency proceedings, and if a debtor without a statutory seat is incorporated in X but files for insolvency proceedings in Y, then the courts of Y shall apply Alternative A in conformity with the declaration made by X that is the primary insolvency jurisdiction – even if country Y itself has not elected to apply Alternative A.

At this point, I should briefly compare the two alternatives as laid out by Article XI. Both Alternative A and Alternative B are similar with the overall structure of section 1110 in that they lay out a waiting period during which creditors can, with varying degrees of court assistance, repossess the aircraft object, assuming that the debtor or the administrator had not cured all defaults and has agreed to perform all future obligations under the agreement.36 But Alternative A confers a significantly broader protection to secured creditors of aircraft than Alternative B.

For example, under Alternative A, upon the occurrence of an insolvency related event, if the debtor or the administrator fails to cure all defaults other than a default constituted by the opening of insolvency proceedings and does not agree to perform all future obligations under the agreement by no later than the earlier of the end of the waiting period and the date on which the creditor would be entitled to possession of the aircraft object if Article XI did not apply, the debtor or the administrator directly gives the aircraft object to the creditor.37 Under Alternative B, however, upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, upon the request of the creditor, must give notice to the creditor whether it will cure all defaults and agree to perform all future obligations or give the creditor the opportunity to take possession of the aircraft.38

Thus, under Alternative B, a creditor seeking to repossess an aircraft owned by a debtor undergoing an insolvency-related event must first request the debtor or the administrator to give notice as to whether the debtor will cure the relevant defaults and agree to perform all future obligations or will give the creditor the opportunity to take possession of the aircraft. Then, with this opportunity, the creditor must be subject to the applicable law, which ‘may permit the court to require the taking of any additional step or the provision of any additional guarantee’.39 In contrast, under

34. ibid Article I(n).
36. Aircraft Protocol, Article XI. The similarities with section 1110 are no coincidence, as key US federal agencies were involved in the very drafting of the CTC, as explained in section III of this article.
37. ibid Article XI (Alternative A(2)).
38. ibid Article XI (Alternative B(2)).
39. ibid (Alternative B(3)).
Alternative A, the creditor need not do much to protect its interests: it is guaranteed that the debtor will either cure defaults and perform future duties or simply hand over the aircraft object. Because of the provision that leads to the debtor’s immediate surrender of an aircraft object under Alternative A, it has been deemed substantially similar to section 1110.\textsuperscript{40}

The plain-meaning based reading of XXX(4) suggests that even if country Y declares that it will apply Alternative B in insolvency proceedings, the courts of Y may be forced to apply the more creditor-friendly Alternative A if the debtor’s primary insolvency jurisdiction is a Contracting State that has declared, pursuant to XXX(3), to apply Alternative A in its insolvency proceedings.

The United States became a signatory to the Cape Town Convention in 2003, and the Senate ratified it in 2004.\textsuperscript{41} In 2004, Congress passed the Cape Town Treaty Implementation Act of 2004 to modify certain laws to implement key provisions of the Cape Town Convention, such as requiring interests in aircraft to be filed with the international registry. But in the process of becoming a Contracting State, the United States has refused to apply Alternative A or Alternative B per Article XXX(3) on the grounds that its existing bankruptcy law (section 1110) is ‘substantially equivalent to Alternative A of Protocol Article XI’.\textsuperscript{42}

But this decision overlooked the minor yet key difference between Alternative A and section 1110, and that is the length of the waiting period. Under Article XXX(3) of the Protocol, a Contracting State declaring to apply either Alternative A or Alternative B had to specify the waiting period required by Article XI. While some countries, such as Ireland, chose 60 days for this waiting period (and thus rendering it equivalent to section 1110), others such as Brazil have opted for shorter periods, such as 30 days. This minor difference leads to the main question of this article.

6. Can a foreign debtor use Alternative A and not section 1110?

Notwithstanding any other provision of section 109 of the Bankruptcy Code, ‘only a person that resides or has a domicile, a place of business, or property in the United States’ may be a debtor under the Bankruptcy Code.\textsuperscript{43} The interpretation of this statute has allowed foreign companies with a place of business or property in the United States to access the US bankruptcy processes, especially Chapter 11.\textsuperscript{44}

Based on the topics covered so far, then, we can surmise that a Brazilian airline with some of its assets in the United States may file for bankruptcy under Chapter 11 in a US bankruptcy court. Because the airline has property in the United States, it would have proper standing per section 109. If it is a Brazilian airline that has been incorporated in Brazil, its primary insolvency jurisdiction would be Brazil. Brazil has declared that ‘it will apply the entirety of Article XI, Alternative A, to all insolvency proceedings,

\textsuperscript{41} Senate Document No 108–10 (2003).
\textsuperscript{42} ibid.
\textsuperscript{43} 11 USC s 109.
and that the waiting period for the purposes of Article XI, paragraph 3, of this Alternative shall be thirty (30) calendar days.45

The plain reading of the law, especially Article XXX(4) of the Aircraft Protocol, seems to suggest that US bankruptcy courts, in administering a Chapter 11 proceeding, must go beyond the Bankruptcy Code and apply Alternative A of the Aircraft Protocol Article XI as the insolvency procedure. Creditors to this Brazilian airline with secured interests in their aircraft objects would be able to enjoy the shorter waiting period (30 days) of Alternative A as elected by Brazil, while creditors to a similarly situated American airline would have to wait 60 days per section 1110.

Unfortunately, there is no case law to support our plain reading yet, as the question of applying Article XXX(4) in domestic bankruptcy proceedings is one of first impression. For our predicted outcome to take place – despite the courts’ potential disdain to expand the scope of applicable bankruptcy law – it must first be established that Article XXX(4) is a binding US law to begin with.

III. IS ARTICLE XXX(4) OF THE AIRCRAFT PROTOCOL A BINDING US LAW?

In order to explore how a US bankruptcy court would interpret Article XXX(4) of the Aircraft Protocol, we must first explore whether the Aircraft Protocol and Article XXX(4) are valid US law. Existing case-law on the Supremacy Clause of the US Constitution seems to suggest that they are indeed valid, enforceable US federal law.

1. The Supremacy Clause and treaties: when is ratification not enough?

We begin our discussion by first exploring when treaties are accepted as valid US law. Article VI of the US Constitution states the following:

- This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.46

While a plain reading of this clause may suggest that any and all treaties ‘made under the Authority of the United States’ should be enforceable as the supreme Law of the land, the Supreme Court disagreed in Foster.47 Here, the court created a distinction that is still used to this day to determine whether a treaty is enforceable in the courts of the United States: the distinction between self-executing treaties and non-self-executing treaties. Simply put, the court in Foster explained that treaties become enforceable ‘supreme law of the land’ only if the text of the treaty clearly conveys intention to be executing without requiring additional steps by the legislature. The treaty in question in Foster, for example, required ratification and confirmation, and the court held

46. US Constitution Article VI, s 2.
that this language implied that the treaty is enforceable only once additional legislative action takes place.

Since Foster, however, the court has wavered in its rules regarding how to determine whether a treaty is self-executing. Foster was overruled four years later in Percheman on the grounds that the Spanish copy of the treaty in question revealed intent of the parties that the treaty was meant to be self-executing.48 Ever since, the courts have fluctuated between employing a text-based test like Foster and multi-factor, context-based test like Percheman, as summarized and shown by the majority and the dissent in Medellin, the most recent Supreme Court case concerning the issue.49

But while the criteria for determining what is self-executing or not have changed often, it has been held consistently that even a non-self-executing treaty can be enforceable if Congress implements it with a legislation.50 As mentioned before, Congress passed the Cape Town Treaty Implementation Act in 2004. Thus, we must first consider the prima facie argument that regardless of whether Cape Town Convention is self-executing or not, it has been implemented by Congress and is thus an enforceable federal law pursuant to the Supremacy Clause.

2. Prima facie argument: the Cape Town Treaty Implementation Act is sufficient

A cursory reading of the Cape Town Treaty Implementation Act of 2004 (‘Implementation Act’) may lead one to believe that this article should reach a quick, simple conclusion. In the ‘Findings and Purpose’ portion of the Implementation Act, Congress states the following: ‘Only technical changes to United States law and regulations are required since the asset-based financing and leasing concepts embodied in the Cape Town Treaty are already reflected in the United States in the Uniform Commercial Code’.51 It would be possible to conjecture based on these words that Congress viewed the Cape Town Convention as largely consistent with existing US laws, and that the Implementation Act – by making the required changes – implements the Cape Town Convention and makes it enforceable as federal law.

But the fact that the Implementation Act is silent on the issue of introducing new insolvency measures to be enforced in US bankruptcy proceedings leaves certain matters hanging. The Implementation Act only amends parts of Title 49 of the United States Code, which generally governs issues regarding transportation. It also requires the Administrator of the Federal Aviation Administration to make necessary regulations to carry out the Implementation Act. But the Implementation Act is silent on the issue of insolvency proceedings, and this may lead some courts to conclude that there is no ‘legislation to carry [Article XXX(4)] into effect’.52

Thus, we must now consider if the Implementation Act suffices as a legislation to make Article XXX(4) an enforceable law of the land despite its silence on the particular provisions. Despite the absence of direct textual reference, I would argue that the legislative intent was clear to enforce all of the Cape Town Convention as enforceable federal law.

52. Whitney (fn 50) 194.
Some scholars and courts believe that Congress’ silence on an issue is an indication of rejecting that issue.53 Following their logic, the absence of discussion of Article XXX(4) may suggest its rejection. That being said, ‘[a]n inference drawn from congressional silence cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent’.54 Article XXX(4), unlike other declarations under Article XXX, does not give an option that the Contracting States may elect; rather, by saying ‘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’, it gives a clear directive to Contracting States. Despite this, Congress found that only technical changes were required for the implementation of the Cape Town Convention.55

It must be admitted, however, that the lack of specific operative phrases in the Implementation Act for Article XXX(4) raises concerns as to whether the Implementation Act clearly resolves the issue of enforceability. As this prima facie argument did not yield satisfactory results, we now turn to the more traditional analysis of treaties and assess whether Article XXX(4) is self-executing.

3. Article XXX(4) is self-executing

In Medellin, the latest Supreme Court case on the issue of treaty self-execution, the court considers largely two factors to determine whether the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention56 (‘Optional Protocol’) and Article 94(2) of the United Nations Charter is self-executing.57 The first test is the text of the treaty itself, which must show an intent that the treaty be equivalent to an act of the legislature. The court here borrows its rationale from Foster, which held that the fact that the treaty had to be ‘ratified and confirmed’ conveyed intent that the treaty required a legislative act.58

Second, the Medellin court considers intent of the parties to the treaty by looking at “post-ratification understanding” of signatory nations.59 The court recognizes that neither the plaintiff nor his amici have identified a single nation that treats judgments of the International Court of Justice as binding in domestic courts, and uses this as grounds on which to conclude that the Optional Protocol was not expected to be directly enforceable as a matter of domestic law. This reflects a continuation of the ideas set forth in US v Percheman, which used the language in the Spanish copy of a treaty to conclude that the parties to the treaty had intended the document to be self-executing.60

57. Medellin (fn 49) 493.
59. Medellin (fn 49) 493.
60. Percheman (fn 48) 89.
If the courts are to stay consistent with these rules, then Article XXX(4) of the Aircraft Protocol should be deemed self-executing. First, unlike other declarations of Article XXX, Article XXX(4) does not depend on a Contracting State’s choice at ‘ratification, acceptance, approval of, or accession to this Protocol’; instead, it gives a clear imperative to the courts of Contracting States: ‘the courts of Contracting States shall apply Article XI’.61 Per the logic of Foster as applied by Medellin, textual interpretation here should then indicate a clear intent by the drafters of the Cape Town Convention that Article XXX(4) of the Aircraft Protocol be self-executing.

Furthermore, paragraph 5.123 of Sir Roy Goode’s Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Objects reads, ‘if there are secondary insolvency proceedings in another Contracting State relating to an aircraft object situated in that State the courts of that State must apply the version of Article XI selected by a declaration of the Contracting State of primary jurisdiction’.62

If the courts are to look at the intent of the drafters of the Cape Town Convention, these commentaries show that Article XXX(4) should be enforceable without the need for additional legislation – that is, be deemed self-executing.

Thus, even if the Implementation Act is deemed insufficient to be construed as ‘implementing’ Article XXX(4), Article XXX(4) should be deemed a self-executing part of the Cape Town Convention, and thus should be enforceable as ‘the supreme Law of the Land’ per the US Constitution.

IV. NON-JUDICIAL ARGUMENTS IN FAVOUR OF ARTICLE XXX(4)

The sections so far have introduced the key concepts of aircraft finance, section 1110 and the Cape Town Convention, and also explained why, under the current jurisprudence on the meaning of the Supremacy Clause regarding treaties, Article XXX(4) of the Aircraft Protocol is an enforceable federal law that binds courts to apply either Alternative A or Alternative B in proceedings where the debtor’s primary insolvency jurisdiction has adopted either of the Alternatives as a remedy for insolvency per Article XXX(3). We now present additional grounds for the enforceability of Article XXX(4).

1. Structural consideration of balance of powers

Respect for structure of the balance of powers ought to further persuade the courts to enforce Article XXX(4) in domestic bankruptcy proceedings. Both the legislative and executive branches have been strong proponents of the Cape Town Convention. Furthermore, the US government’s very own agencies have been the main drivers of the treaty. The treaty document for the Cape Town Convention starts with a message from the President of the United States that states: ‘Key federal agencies concerned with civil aviation and US exports, including the FAA, EXIM Bank, and the Departments of Transportation, Commerce and State were fully involved in negotiation of the Convention and in preparation for its implementation’.63 As such, barring clear conflicts with

61. Aircraft Protocol, Article XXX(4).
existing laws or public policies, the courts should enforce Article XXX(4) where it is applicable – even if some courts harbored reluctance to apply insolvency measures external to the Bankruptcy Code, they should not obstruct all other branches of the government for the sake of mere judicial convenience.

2. Public policy considerations

Lastly, we must consider if enforcing Article XXX(4) should be invalidated on public policy grounds. For this argument, we first consider if Article XXX(4) conflicts with any existing US laws – especially section 1110, given its similarity with Alternative A. Then we consider the positive outcomes that can be attained by enforcing Article XXX(4).

First, we consider if Article XXX(4) would create conflicts with section 1100, and the outcome is a quick ‘none’. In order for section 1110 to apply, the debtor must be a US citizen, which, for a corporation, means that it is organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.64

By all means, these requirements are likely to establish that the debtor’s ‘primary insolvency jurisdiction’ under the Cape Town Convention (which is 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’65) as the United States. The United States has elected neither Alternative A nor B per Article XXX(3) in its Implementation Act, citing section 1110 as an apt substitute. Thus, the Treaty is likely to be interpreted as allowing section 1110 to govern the insolvency proceedings where the debtor in question has its primary insolvency jurisdiction in the United States.

In its reverse, these facts mean that a Brazilian airline and its creditors can utilize the 30-day waiting period of Brazil’s declared alternative A and easily transfer ownership of aircraft objects, instead of having to wait for the 60-day window of section 1110 (it will not be eligible for section 1110 anyway) or through a regular automatic stay. From the creditor’s point of view, this could amount to a greater protection in its security interest, which could then lead to lower interest rates. Thus, public policy concerns for the aircraft finance market also weigh in favor of enforcing Article XXX(4) of the Aircraft Protocol.

V. CONCLUSION

The Cape Town Convention seeks to facilitate and foster the aircraft finance market by reducing risk for creditors, lessors and conditional vendors. While the CTC primarily focuses on the creation and management of an international registry for interests in aircraft objects, the courts should enforce Article XXX(4) where it is applicable – even if some courts harbored reluctance to apply insolvency measures external to the Bankruptcy Code, they should not obstruct all other branches of the government for the sake of mere judicial convenience.

64. 49 USC s 40102(a)(15).
65. Aircraft Protocol, Article I(n).
aircraft objects for this end, it also includes provisions that ensure creditors’ rights are uniformly protected regardless of the jurisdiction where the mobile equipment is physically present. In line of this logic, the Aircraft Protocol introduces insolvency remedies that are modeled after, but remain more flexible than, section 1110 of the Bankruptcy Code. Also, through Article XXX(4), the Aircraft Protocol requires the courts of Contracting States to respect and apply whichever insolvency remedy has been adopted by the primary insolvency jurisdiction of the debtor, in effect ensuring that the rights of secured parties, lessors, and conditional vendors are similarly enforced across the world.

A survey of existing case-law shows that Article XXX(4) of the Aircraft Protocol must be deemed an enforceable federal law pursuant to Article VI of the US Constitution. This is because the Implementation Act legislates Article XXX(4); even if the Implementation Act is insufficient to bring Article XXX(4) into operation, Article XXX(4) should be deemed self-executing treaty and thus law of the land.

Discussion of how courts would likely respond to the application of Article XXX(4) shows that there is ample reason for the courts to enforce Article XXX(4), and thus apply Alternative A or B where relevant. First, the courts should not ignore the efforts of the other branches of the government for what is little more than a pursuit of judicial expediency. Second, public policy considerations show that enforcing Article XXX(4) is unlikely to create conflicts with existing law and is rather likely to create benefits for certain debtors and creditors.

Thus, in view of existing case law, policy considerations for the aircraft finance market, and structural arguments, US courts should heed to Article XXX(4) of the Aircraft Protocol and apply the insolvency remedy that has been adopted by the primary insolvency jurisdiction of the debtor. By doing so, the courts would reduce risks for creditors of the aircraft finance market who otherwise would have been left out of the scope of section 1110, such as creditors with secured interests in helicopters or aircraft owned by lessors, and this is why enforcement of Article XXX(4) of the Aircraft Protocol would expand protection for creditors of aircraft financing.

VI. ADDENDUM: COMMENT ON IN RE: OCEANAIR

Having concluded that Article XXX(4) of the Aircraft Protocol is a binding federal law, I must necessarily conclude that In re: Oceanair was wrongfully decided. In this case, the debtor Oceanair Linhas Aéreas S/A (‘Oceanair’), a Brazilian airline, filed a petition for recognition of a foreign main proceeding under Chapter 15 on 27 December 2018 and was granted both recognition and automatic stay.

The issue that arose from this case was whether the US bankruptcy court should apply Article XXX(4) and in effect apply Alternative A (and grant a 30-day non-extendible waiting period) even when the foreign main proceeding in Brazil failed to comply with the Cape Town Convention. Honorable Sean H. Lane, the presiding US bankruptcy judge, made no reference to the Cape Town Convention in his order granting discretionary relief that paid no heed to the 30-day waiting period that Brazil had chosen in adopting Alternative A. The transcript of the hearing prior to the order shows his adamant belief that the US bankruptcy court was merely supervising an

ancillary proceeding and had no authority to second-guess the rulings of the Brazilian Bankruptcy Court (which had first violated provisions of the Cape Town Convention).

Honorable Sean H. Lane’s approach is likely in line with the legislative purpose of Chapter 15, which was likely not intended to allow US Bankruptcy courts to second guess the authority of the courts of the main proceeding. But the argument also collides head-first with section 1503 of Chapter 11 of the US Code, ‘International obligations of the United States’, which states: ‘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’.67

As it has been established in this article, Article XXX(4) of the Aircraft Protocol is a binding federal law arising out of a treaty that the United States is a party to. It is true that when the United States recognizes the Brazilian court as the foreign main proceeding and only supervises an ancillary proceeding per Chapter 15, it has no authority to second guess the Brazilian court’s ruling. Since the Brazilian Bankruptcy Court had made a ruling that is mutually exclusive with the US Bankruptcy Court’s enforcement of Article XXX(4), this is a case where the treaty-based obligation of the United States conflicts with the court’s recognition of foreign main proceeding, which arises from Chapter 15. Thus, if we were to rely on section 1503, the requirements of the treaty should prevail over any and all requirements of Chapter 15 – in other words, enforcing Article XXX(4) should take priority, and provisions of Chapter 15 should be applied only to the extent that they do not conflict with the court’s obligation under the Cape Town Convention to apply the insolvency measure declared by the Contracting State of the primary insolvency jurisdiction.

Thus, regardless of the Brazilian Bankruptcy Court’s ruling, the US Bankruptcy Court should have applied Article XXX(4) of the Aircraft Protocol as a matter of federal law and should have subordinated any and all Chapter 15 considerations per section 1503 of the Bankruptcy Code.

67. 11 USC s 1503.