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DIPLOMATIC CONFERENCE TO ADOPT A MOBILE EQUIPMENT CONVENTION AND AN AIRCRAFT PROTOCOL

(Cape Town, 29 October to 16 November 2001)

DRAFT [UNIDROIT][UNIDROIT] CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND DRAFT PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

EXPLANATORY REPORT AND COMMENTARY

(Submitted by the Secretariats)

This document consists of an overview of the draft Convention and the draft Protocol, followed by an Article-by-Article commentary on the individual provisions of the two draft instruments. No comments have been added where the text of an Article appears self-explanatory.

The document is intended for information purposes only and is therefore presented as an information paper (DCME-IP). It is not an exhaustive analysis of the two draft instruments, but is intended for the information of Governments and delegates, in particular those who have not so far participated in the three Joint Sessions or in the 31st Session of the ICAO Legal Committee.

The two Secretariats are indebted to Sir Roy Goode (United Kingdom), Rapporteur to the Joint Sessions of the UNIDROIT Committee of Governmental Experts and the ICAO Legal Sub-Committee, who has drafted this document, which was finalised under the guidance of the two Secretariats.

I INTRODUCTION

1. The draft Convention on International Interests in Mobile Equipment is designed to establish an international legal regime for the creation, enforcement, perfection and priority of security interests and interests held by conditional sellers and lessors in three categories of high-value, uniquely identifiable mobile equipment, namely (a) airframes, aircraft engines and helicopters (which for brevity will be collectively referred to as aircraft equipment), (b) railway rolling stock, and (c) space property. The draft Convention is not itself equipment-specific and is to be applied by separate Protocols for each of the three categories. Three draft Protocols have been prepared but only that relating to aircraft equipment is ready for submission to the forthcoming Diplomatic Conference, which is to be hosted by South Africa and co-sponsored by the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (ICAO).

2. In relation to aircraft equipment the Convention and Protocol are the product of close collaboration between UNIDROIT and ICAO. The first text of the Convention was prepared by a Study Group established by the Governing Council of UNIDROIT in collaboration, as regards aircraft, with an Aviation Working Group (AWG) and the International Air Transport Association (IATA). A Protocol relating specifically to aircraft equipment was subsequently prepared by an Aircraft Protocol Group established by invitation of the President of UNIDROIT. The Aircraft Protocol Group included representatives of ICAO, IATA and the AWG. A Steering and Revisions Committee, consisting of representatives of the Governing Council of UNIDROIT and of the ICAO Secretariat, IATA and the AWG, was set up by the UNIDROIT Governing Council to finalise, from a technical perspective, the texts of the Convention and Protocol so as to make them suitable for transmission to Governments. The Study Group and Steering Revisions Committee were chaired by this Reporter.

3. The two texts were then examined at three successive Joint Sessions of the UNIDROIT Committee of Governmental Experts and the Sub-Committee of the ICAO Legal Committee (hereinafter referred to as “Joint Sessions”) held in Rome from 1st to 12th February 1999, in Montreal from 24th August to 3rd September 1999 and in Rome from 20th to 31st March 2000. The texts of the two instruments were then considered by the ICAO Legal Committee at its 31st Session held in Montreal from 28th August to 8th September 2000, when various changes were made. The amended texts were approved by the Governing Council of UNIDROIT and the Council of ICAO for submission to the Diplomatic Conference which is to be co-sponsored by the two intergovernmental organisations.

The Rapporteur is indebted to Mr. Jeffrey Wool, Chairman of the Aircraft Protocol Group, Mr. Gilles Lauzon, Chairman of the Legal Committee of ICAO and Rapporteur to its 31st Session, and Mr. Martin Stanford, Principal Research Officer of the UNIDROIT Secretariat, for their helpful comments on a draft of this Explanatory Report and Commentary.

4. In relation to aircraft equipment Mr. Gilles Lauzon (Canada), Rapporteur to the 31st Session of the Legal Committee, whose Report * provided the focus of its work, has prepared a consolidated text which combines the provisions of the Convention and the Aircraft Equipment Protocol and will be included in the documents distributed to the Diplomatic Conference (see DCME Doc No. 5).

5. This Explanatory Report is not an exhaustive analysis of the two instruments but is designed to provide a guide for Governments and members of delegations, including in particular those who have not so far participated in any of the Joint Sessions or in the work of the ICAO Legal Committee. The Report consists of an overview of the draft Convention and Protocol followed by an Article-by-Article commentary on the individual provisions of the two instruments. No comments have been added where the text of an Article appears self-explanatory.

II AN OVERVIEW OF THE CONVENTION

Objectives

6. A basic objective of the Convention is the efficient financing of transportation equipment. Such financing will assist in the development of cost-effective modes of transport utilising modern technologies. The financing of aircraft equipment, railway rolling stock and space property takes three principal forms: a loan secured by a charge (security interest) over the equipment; a sale in which the seller reserves ownership until payment; and a lease, which may be either a finance lease or an operating lease. These financing instruments need to be underpinned by a sound legal regime if they are to function efficiently so as to induce the assumption of risk and the release of funds by the private sector. The huge outlays involved in the financing of such equipment make it essential for the creditor (the financier, seller or lessor) to be able to have confidence that if the debtor defaults in payment or other performance the relevant legal regime will respect the creditor's contractual and proprietary rights and provide the creditor with efficient and effective means to enforce those rights.

7. Traditional conflict of laws rules apply the *lex rei sitae* as the law governing proprietary rights, but such a principle is unsuited to mobile equipment which are constantly moving from one country to another. Moreover, even if it were possible to devise a uniform conflicts rule, this would not overcome the disadvantage of dependence on national laws, which vary widely from one country to another and which in some jurisdictions are highly supportive of security interest while in others they may be more hostile. This may discourage potential financiers from extending credit or may lead to substantially increased credit costs. Hence the need for an international set of rules governing security and related interests in such equipment which will provide creditors with the necessary safeguards, while at the same time incorporating measures for the protection of debtors.

8. The Convention and its supporting Protocols are designed to fulfil five key objectives:

- To provide for the creation of an international interest which will be recognised in all Contracting States

* *Report on International Interests in Mobile Equipment (Aircraft Equipment)*, July 2000. Section 2C of this Report provides a helpful guide to the context of international aviation finance.

- To provide the creditor with a range of basic default remedies and, where there is evidence of default, a means of obtaining speedy interim relief pending final determination of its claim on the merits
- To establish an electronic international register for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and the debtor's insolvency administrator
- To ensure through the relevant Protocol that the particular needs of the industry sector concerned are met
- By these means to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

The two-instrument approach

9. As stated above, the Convention is not equipment-specific. Its provisions will in principle apply equally to any of the three categories of mobile equipment to which it relates. However, the Convention will not be brought into force as regards any category of equipment until a Protocol has been made relating to that equipment and will take effect subject to the terms of that Protocol. This two-instrument approach, endorsed by the third Joint Session and by the ICAO Legal Committee, results in a uniform set of rules for those provisions of the Convention that do not attract equipment-specific considerations coupled with a modification of those rules by the Protocol to meet the particular needs of the industry sector involved in the category of equipment to which the Protocol relates.

Underlying principles

10. The Convention and Aircraft Equipment Protocol are governed by five underlying principles:

- **Practicality** in reflecting the salient factors characteristic of asset-based financing and leasing transactions
- **Party autonomy** in contractual relationships, reflecting the fact that parties to a high-value cross border transaction in equipment of the kind covered by the Convention will be knowledgeable and experienced in such transactions and expertly represented, so that in general their agreements should be respected and enforced
- **Predictability** in the application of the Convention, a feature which is specifically mentioned in the interpretation provisions of Article 5(1) and is reflected in the concise and clear priority rules, which give pre-eminence to certainty and simplicity and a rule-based rather than standards-based approach
- **Transparency** through rules which provide for registration of an international interest in order to give notice of it to third parties and which subordinate unregistered international interests to registered international interests and to the rights of purchasers

- **Sensitivity** to national legal cultures in allowing a Contracting State to weigh economic benefits against principles of national law considered of fundamental importance, and to make declarations to exclude, wholly or in part, select provisions of the Convention it considers incompatible with these, for example, the exercise of extra-judicial remedies or the ready availability of judicial relief prior to a hearing on the merits.

Sphere of application

11. In order for the Convention to apply the following conditions must be satisfied:

- (a) The parties have entered into a security agreement, a conditional sale agreement or a lease (art. 2(1),(2))
- (b) The agreement relates to equipment which is:
 - (i) an airframe, an aircraft engine or a helicopter,
 - (ii) railway rolling stock, or
 - (iii) space property (e.g. a satellite);
- (c) The equipment falls within a category designated in the relevant Protocol and is uniquely identifiable (art. 2(2),(3))
- (d) The agreement is constituted in accordance with the formalities prescribed by the Convention (arts 2(2), 6)
- (e) The debtor is situated in a Contracting State at the time of conclusion of the agreement providing for the international interest (arts 3, 4).

12. Legal systems outside North America distinguish sharply between security agreements and title-retention and leasing agreements, treating a conditional seller or lessor as the full owner. By contrast in North American jurisdictions the law adopts a functional and economic approach, treating conditional sale agreements and certain types of leasing agreement as forms of security and the title of the conditional seller or lessor as limited to a security interest. Given these widely contrasting approaches it was recognised at an early stage that it would not be possible to reach agreement on a uniform Convention characterisation. Accordingly the solution adopted was to leave this to be dealt with under the applicable law as determined by the *lex fori* (which in many jurisdictions will be the *lex fori* itself), so that national courts will be able to apply their own national law to determine the characterisation issue.

13. Aircraft engines are treated separately from airframes since they are highly valuable, mobile independent units and are increasingly dealt in and financed separately and frequently interchanged. They are therefore unsuited to traditional legal rules by which ownership of an object annexed to a larger object passes to the owner of the latter by the principle of accession.

14. The ingredients of mobility and internationality are not expressly prescribed by the Convention but are considered inherent in the nature of the equipment. The Convention thus leaves open the possibility of taking and registering an international interest in equipment which never leaves its State of origin. However, the creditor needs to be able to protect itself against the possibility of such movement and is usually not well placed to know whether or not it has taken place. The Convention nevertheless allows Contracting States to exclude it as regards purely internal transactions (see paragraph 31(3)).

15. The provisions of the Convention describing the three categories of equipment to which it is applicable are qualified in important respects by the relevant Protocol,¹ for example, by giving definitions which are designed both to describe the type of object covered and to limit the coverage to equipment of high unit value,² and by specifying the method or methods by which the requirement of unique identifiability may be satisfied, e.g. in the case of aircraft objects the manufacturer's serial number, manufacturer's name and model designation of object.³ Registration is effected against an identified object. Accordingly the Convention does not apply to future property or to proceeds other than insurance and other loss-related proceeds.

Creation of international interest

16. All that is needed to create an international interest is an agreement which conforms to the requirements of Article 6. This is so whether or not the international interest has any counterpart in national law or fulfils the requirements for the creation of an interest under national law. But national law continues to play a role, for example, in determining whether an asserted agreement fulfils the essential requirements (such as consensus and legal capacity) required for a valid contract or whether the chargor, conditional seller or lessor has power to dispose of the object.

Relationship between Convention interests and national interests

17. In most cases a domestic security or title-retention interest will simultaneously constitute an international interest, so that the two will co-exist. However, the international interest will usually give the creditor stronger rights than a purely national interest. In particular a registered international interest has priority over a national interest which is not registered under the Convention, even if it is of a kind not registrable.

Default remedies

18. The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor. Chapter III of the Convention provides a chargee with a set of basic remedies in the event of the debtor's default. For this purpose it is not necessary for the international interest to have been registered; since registration is required only to protect the priority of the international interest against third parties. A distinction is drawn between the remedies of a chargee, which are specified in Articles 7 and 8, and the less detailed rules needed for the remedies of a conditional seller or lessor, which are the subject of Article 9.

19. Articles 7 and 8 empower the chargee, to the extent that the chargor has at any time so agreed, to:

- take possession or control of any object charged to it
- sell or grant a lease of any such object⁴

¹ In the rest of this Explanatory Report, except where otherwise indicated, references to "the Protocol" are to the Aircraft Equipment Protocol.

² For aircraft engines by reference to engine-power and for airframes by reference to their carrying capacity.

³ See Aircraft Equipment Protocol, art. VII.

⁴ But a Contracting State may, by a declaration under Article 52(1), exclude the power to lease agreement while on its territory.

- collect or receive any income or profits arising from the management of the object
- apply for a court order authorising or directing any of the above
- take ownership of the object in satisfaction of the debt.

However, the chargor and other interested persons, such as subsequent chargees and guarantors, are provided with a number of safeguards. Remedies are required to be exercised in a commercially reasonable manner. Notice of a proposed sale or lease must be given to interested persons. Vesting of ownership in satisfaction of the debt can occur only with the consent of all the interested persons or on an order of the court and, in the latter case, only if the court is satisfied that the amount of the secured obligations to be discharged is commensurate with the value of the object. The default must be substantial unless otherwise agreed. Additional remedies permitted by the applicable law, including any remedies agreed by the parties, may be exercised to the extent that they are in conformity with the mandatory provisions listed in Article 14.

20. In the case of a conditional sale agreement or leasing agreement, the only remedies designated (by Article 9) are termination of the agreement, possession or control of the object or a court order authorising or directing either of the above. The provisions are much simpler because in contrast to the chargee, who has merely a security interest, the conditional seller or lessor is the owner. However, in North American jurisdictions conditional sale agreement and certain types of leasing agreements are characterised as security agreements, so that a court in such a jurisdiction will apply the Convention rules governing security agreements.

21. Article 12 provides the creditor who adduces evidence of default with the right to speedy relief, pending final determination of its claim, in the form of an order for preservation of the object or its value, possession, control or custody of the object, immobilisation of the object or lease or management of the object and the income from it but not sale and application of the proceeds of sale. Certain safeguards are provided for the debtor. By Article 53 a Contracting State may make a declaration excluding Article 12, wholly or in part.

The registration system

22. The registration system lies at the heart of the Convention's system of priorities. Registration gives public notice of the existence of an international interest and enables the creditor to preserve its priority and the effectiveness of the international interest in insolvency proceedings against the debtor. Registration is against the individual object, not against the debtor; hence the requirement that the object must be uniquely identifiable and the restriction of proceeds claims to insurance and other loss-related proceeds. It is envisaged that there will be different registration systems for different types of equipment. The Registry will be administered by a Registrar - conceived as an independent operator rather than an employee - under the superintendence of a Supervisory Authority, which will be a body having international legal personality and immunity from process. By contrast the Registrar will be strictly liable for compensatory damages for loss suffered from errors, omissions or system malfunction, subject to any qualifications that may be decided at the Diplomatic Conference.

23. The registration provisions are predicated on the assumption that the system will be electronic and available on-line, so that registration and responses to searches will be effected automatically by computer and will not involve human intervention. Pursuant to Article 17(4) of the Convention, Article XVIII of the Protocol empowers a Contracting State to designate an entity as the

national access point through which applications for registration are to be transmitted. A Contracting State may wish to do this in order to marry the requirements for registration of a national interest with those for transmission of the application for registration of the international interest, so that an applicant could simultaneously register a national interest and effect registration in the international registry via the national link to it.

24. The registration system will accommodate registrations of international interests, prospective international interests, and registrable non-consensual rights and interests (explained in paragraphs 27 *et seq.*), as well as assignments, subordinations, and certain other rights. The system will also receive registrations of notices of national interests, that is, interests arising under a purely local transaction (i.e. where all the parties and the object are in the same Contracting State) and which the Contracting State in question has, pursuant to Article 48(1), declared will not be governed by the Convention. But under Article 48(2) this exclusion will not preclude registration of notice of the national interest in the International Registry, giving it the same priority as if it were a registered international interest. The detailed requirements for registration are prescribed by the Protocol and by regulations to be made under it. Article 19 states who is to be entitled to effect, modify or discharge a registration.

Priorities

25. The priority rules are set out in Article 28 and are simple and few in number. A registered interest has priority over a subsequently registered interest and over an unregistered interest. This priority applies even if the holder of the registered interest took with actual knowledge of the unregistered interest, a rule necessary to avoid factual disputes as to whether a holder did or did not have knowledge, and even as regards value given by the holder of a registered interest after knowledge of a subsequent interest, a rule designed for simplicity. There are two exceptions to the general priority rules. The interest of an outright buyer is not registrable;⁵ accordingly the buyer takes free from an international interest not registered prior to the buyer's acquisition of its interest (art. 28(3)). In addition, the priority rules may be varied by agreement between the holders of the competing interests (art. 28(4)). Any priority extends to proceeds as defined by Article 1(w). There is also a rule governing items that are installed on an object (Article 28(6)). Where a prospective international interest is registered and later becomes a completed international interest it is deemed to have been registered at the time of registration of the prospective international interest and ranks for priority accordingly (Article 18(3)). Until that time the prospective debtor has the right to have the registration discharged unless the prospective creditor has given value or committed itself to so doing (Article 24(2)). The priority of an international interest carries through to its proceeds. However, the term "proceeds" is confined by Article 1(w) to insurance and other loss-related proceeds. General proceeds, such as receivables arising from the sale of an object, are not covered.

Effect of insolvency

26. The general rule is that in insolvency proceedings against the debtor an international interest is effective if registered prior to the commencement of the proceedings (art. 29(1)). However this provision does not impair the effectiveness of an international interest which is effective under the applicable law (art. 29(2)). The general rule does not protect a registered international interest from rules of insolvency law relating to the avoidance of preferences and transfers in fraud of creditor or from rules

⁵ However, the Protocol extends the registration and priority provisions of the Convention to outright sales, so that the special rule in Article 28(3) of the Convention is not required as regards aircraft objects.

of insolvency procedure relating to the enforcement of rights to property under the control or supervision of an insolvency administrator, for example, rules which, with a view to facilitating a reorganisation of the debtor, restrict enforcement of a security interest.

Assignments

27. Chapter IX of the Convention deals with the formality, effect and priority of assignments of international interests. The formal requirements track those applicable to the creation of an international interest. An assignment transfers to the assignee all the interests and priorities of the assignor under the Convention, to the extent agreed between the parties, and all associated rights to payment or other performance secured by the object (in the case of a security agreement) or associated with it (in the case of a conditional sale agreement or a leasing agreement). However, the assignee's priority with regard to associated rights (as opposed to the priority to which the assignee succeeds as regards the international interest itself) is limited to purchase-money/rental rights and does not cover, for example, rights to payment under a separate agreement relating to other equipment. The default remedies available to an assignee under a security assignment, the priority of assignments and the effect of the assignor's insolvency follow, *mutatis mutandis*, the rules applicable to the international interest itself. Nothing in the Convention affects legal or contractual subrogation.

Non-consensual rights or interests

28. A Contracting State may make a declaration that specified categories of non-consensual right or interest shall be registrable as if they were international interests (Article 38). One might envisage, for example, the registration of a judgment debt or of a repairer's lien. Registration of such a non-consensual interest would give it the same status and priority as an international interest.

29. A Contracting State may also specify the types of non-consensual interest which, under that State's law, have priority over an interest equivalent to that of the holder of the international interest ("an equivalent interest") and are to have priority even over a registered international interest (Article 39). Typical examples are preferential claims for taxes and for wages due from an insolvent employer. It will not be necessary for a Contracting State to list all such types of non-consensual interest individually. It could simply make a declaration that all claims having priority over an equivalent interest under its existing law or acquiring such priority in the future are to enjoy priority over a registered international interest. But it is for the Contracting State to decide which of such claims should have priority over a registered international interest. The categories covered by its declaration could be fewer than the categories which under its national law have priority over equivalent interests.

Extension to outright sales

30. The Convention does not apply to outright sales, for these do not involve the assertion of any security or proprietary interest vis-a-vis the debtor. However, Article 40 provides for an extension of the Convention to outright sales as provided for in the Protocol.⁶

Jurisdiction

31. Articles 41 to 44 contain rules as to jurisdiction which may be summarised as follows:

⁶ See Aircraft Protocol, Article III.

(a) Except in relation to the grant of interim relief under Article 12 or the making of orders against the Registrar, exclusive jurisdiction is given to the courts of a Contracting State chosen by the parties.

(b) The courts of the territory on which the debtor is situated have concurrent jurisdiction to make orders for relief pending final determination, other than orders for the lease or management of the object and the income from it.

(c) The courts of the territory on which the object is situated have concurrent jurisdiction, pending final determination of the claim, to make orders for the lease or management of the object and income from it.

(d) The courts of the place in which the Registrar has its centre of administration have exclusive jurisdiction to award damages against the Registrar (e.g. for loss caused through error or failure of the registration system) and to make orders requiring a registration to be discharged in certain circumstances. Such courts also have a discretion to direct amendment or discharge of a registration where a person fails to comply with an order of a court of another State having jurisdiction under the Convention, for example, an order to procure the removal of a registration improperly made.

Final provisions

32. Chapter XIV of the Convention is not intended to set out a comprehensive set of final provisions (this traditionally being the prerogative of the Diplomatic Conference) but only those provisions needed to show the relationship between the Convention and the Protocol and to address the special issues arising in relation to interests in mobile equipment.

(a) Protocol controls Convention

The Convention takes effect as regards any category of equipment only when a Protocol has been made in relation to that category and subject to the terms of that Protocol. So in the case of aircraft equipment the general provisions of the Convention are modified in certain respects by the Aircraft Equipment Protocol to meet the particular needs of the aviation industry.

(b) Ratifications

Given that the Convention and the Protocol are to be read and interpreted as a single instrument (Article 47(2)), the Diplomatic Conference will no doubt consider whether it is either desirable or practicable to allow for independent ratification of the Convention. Also for consideration will be the number of ratifications required for entry into force.

(c) Internal transactions

Though in principle the Convention applies even where all the elements of a transactions are located in one jurisdiction, Article 48 permits a Contracting State, when adopting the Protocol, to make a declaration excluding the application of the Convention to a transaction which is internal in relation to that State, that is, where the centre of the main interests of all parties to the transaction is situated, and the relevant object located, in that State at the time of conclusion of the transaction (Article 1(n)). But under Article 48(2) such a declaration does not affect the application to internal transactions of Articles 7(3) and 8(1) and the provisions relating to registration and priority of international interests.

(d) *Procedure for additional Protocols*

Article 49, which is in square brackets, provides a procedure for the adoption of Protocols on railway rolling stock and space property. A draft Protocol on Railway Rolling Stock and a preliminary draft Protocol on Space Property are currently being reviewed by UNIDROIT. Article 50 empowers UNIDROIT to create working groups to assess the feasibility of extending the Convention to other categories of high-value mobile equipment through one or more Protocols. It will be for participating States to determine the procedure for the adoption of such a Protocol.

(e) *Transitional provisions*

Article 55 offers two alternative forms of transitional provision. The short form, Alternative A, provides that the Convention is not to apply to a pre-existing right or interest, which will retain the priority it enjoyed before the Convention entered into force. Under this provision pre-Convention interests neither enjoy nor are adversely affected by the Convention, and retain the priority they enjoy under the applicable law. Alternative B preserves the pre-Convention priority enjoyed under the applicable law by an interest of a kind to which the Convention applies but only if the interest is registered in the International Registry within 10 years after the Convention enters into force. An interest so registered will preserve its priority under the applicable law even against an international interest registered earlier. If the interest is not registered before expiry of the ten-year period its priority is determined by the Convention priority rules in Article 28, so that it will be subordinated to an international interest registered first. In no case will the Convention affect a right or interest in an object created or arising under the law of a non-Contracting State.

III AN OVERVIEW OF THE AIRCRAFT EQUIPMENT PROTOCOL

Introduction

33. As its Preamble recites, the Aircraft Equipment Protocol is designed to supplement and modify the Convention to meet the particular requirements of aircraft finance. Its provisions reflect the use of structured financing by sophisticated parties, including many state-owned airlines. It builds on the principle of party autonomy while at the same time giving Contracting States the right to weigh other considerations against economic benefits and to exclude or modify certain provisions of the Protocol felt to be incompatible with the State's legal culture and tradition. It seeks to adopt a practical approach to key issues in international asset-based civil aviation financing. Thus although outright sales are outside the scope of the Convention, which is directed at credit and leasing transactions, the provisions of the Protocol extending the registration and priority rules to sales of aircraft objects reflect civil aviation laws and practice in a number of States, address the problem created by the lack of any fixed *situs* of such objects and ensure a complete priority system.

Sphere of application

34. The Convention and Protocol treat airframes and aircraft engines separately for the reason previously given (paragraph 13). However, the term "aircraft" is used at points of reference to the 1944 Chicago Convention on International Civil Aviation, a public law convention dealing, among other things, with the establishment of an international system addressing the nationality of aircraft and their safe and secure operation. The Convention provisions as they relate to aircraft objects are

limited by the definitions of airframes and aircraft engines given in Article I(2) of the Protocol. These definitions both define airframes and aircraft engines and limit the Convention and Protocol to items of high unit value by embodying, in the case of aircraft engines, a minimum thrust or horse-power and, in the case of airframes, a minimum carrying capacity, the intention being to confine the Convention to dealings in high-value civil aviation aircraft by experienced parties. Following the Geneva Convention on the International Recognition of Rights in Aircraft, aircraft objects are excluded to the extent that they are used in military, customs or police services.

35. The Protocol extends the Convention to cover outright sales of aircraft objects to the extent that the Convention provisions are relevant to such sales. In contrast to agreements within the scope of the Convention, which are designed for the protection of the international interest, the extension to sales is to enable the outright buyer to obtain the benefit of the registration facility and the priority rules and to avoid the *lex situs* problem. Hence Chapter III, relating to default provisions, will not apply to outright sales. On the other hand, the Convention provisions as to registration and priorities will apply, except for the special priority rule as to buyers in Article 28(3), which is not needed in this context since the buyer will be able to protect its rights by registration, a facility not open under the Convention. The Protocol prescribes formalities for a contract of sale matching those for an international interest which is not a charge and also states the effect of the contract.

Description

36. Article VII of the Protocol sets out the identification elements for an aircraft object, namely manufacturer's serial number, manufacturer's name and its model designation. No other means of identification suffice or are necessary.

Choice of law

37. By Article VIII the parties are free to choose the law to govern their relationship.

Default provisions

38. The Protocol provides the creditor with two additional default remedies: to procure de-registration of the aircraft (that is, to remove the Chicago Convention nationality registration), thus permitting re-registration in another Contracting State in accordance with the applicable law, and to procure the export and physical transfer of the aircraft to the territory of another State.

39. The default rules of the Convention are modified by the Protocol in certain respects to meet the particular needs of the aviation industry. The duty imposed on a chargee to exercise remedies in a commercially reasonable manner is extended to cover all types of agreement, not merely security agreements, but an agreement between the debtor and the creditor as to what is a commercially reasonable manner is conclusive (Article IX). The provisions for speedy relief pending final determination of the creditor's claim are modified by Article X so as to provide for a decision within the time specified in a declaration of the Contracting State, to add the remedy of sale and application of the proceeds of sale and to permit the parties to exclude the application of some of the provisions of Article 12(2) of the Convention. However, Article X will apply only where a Contracting State has made a declaration to that effect and only to the extent of that declaration.

Remedies on insolvency

40. Article XI introduces special rules designed to strengthen the creditor's position vis-a-vis the insolvency administrator in the event of the debtor's insolvency. Two alternative versions are offered. It is open to a Contracting State to adopt one of these or to adopt neither and simply apply its ordinary domestic law. The "hard" version, Alternative A, requires the insolvency administrator either (a) to give possession within the earlier of a waiting period specified in a Contracting State's declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults and agree to perform all future obligations under the agreement. Alternative A also precludes the court from preventing or delaying the exercise of the creditor's remedies beyond the above time period and from modifying the debtor's obligations without the creditor's consent. Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors' rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. The "soft" version, Alternative B, requires the insolvency administrator, upon the creditor's request and within the period specified in the declaration of the Contracting State, to state whether it will cure all defaults and perform all future obligations or give the creditor the opportunity to take possession of the aircraft object. If the insolvency administrator does not give the required statement or give up possession after stating it will do so, the court may permit the creditor to take possession upon such terms as the court thinks fit. So under this version of Article XI the court's discretion is substituted for the creditor's entitlement to take possession.

Priorities

41. Article XIV includes a provision designed to give the outright buyer of an aircraft object the same priority on registration as is enjoyed by the holder of an international interest. There are also minor modifications to some of the priority rules in Article 28.

Assignment

42. Article XV introduces a requirement for the debtor to give its consent to an assignment. Such a requirement is not usually found in national laws on assignment of claims but is designed to avoid disputes as to the efficacy of an assignment.

Registration

43. The Protocol will identify the Supervisory Authority. The organisation which is to act as Supervisory Authority has yet to be determined. Following recommendations by the second and third Joint Sessions and by the ICAO Legal Committee, the Council of ICAO has indicated that if invited to do so by the Diplomatic Conference it would be prepared in principle to assume this role as regards aircraft equipment. The Protocol introduces various other provisions relating to registration as this affects aircraft equipment.

Jurisdiction

44. Article XX provides for concurrent jurisdiction to be exercisable by a Contracting State which is the State of registry of the aircraft. However, this will not apply where a court has exclusive jurisdiction by party agreement under Article 41, nor will it confer jurisdiction to entertain a claim against the Registrar.

**IV COMMENTARY ON THE DRAFT [UNIDROIT][UNIDROIT] CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT**

PREAMBLE

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**DRAFT [UNIDROIT][UNIDROIT] CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT**

THE STATES PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

HAVE AGREED upon the following provisions:

Comment

The Preamble identifies the primary object of the Convention as being to facilitate the asset-based financing and leasing of mobile equipment of high value or particular economic significance by providing an international regime for the enforcement, registration and protection of international interests in such equipment. The emphasis is therefore on an approach which responds to the practices and needs of the providers and users of asset-based financing and leasing in relation to aircraft objects, railway rolling stock and space property. The Preamble reflects the importance attached to predictability through clarity of rules (see also Article 5(1)) and party autonomy.

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1 *Definitions*

In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:

- (a) “agreement” means a security agreement, a title reservation agreement or a leasing agreement;
- (b) “assignment” means a contract which, whether by way of security or otherwise, confers on the assignee rights in the international interest;
- (c) “associated rights” means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object;
- (d) “commencement of the insolvency proceedings” means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;
- (e) “conditional buyer” means a buyer under a title reservation agreement;
- (f) “conditional seller” means a seller under a title reservation agreement;
- (g) “contract of sale” means a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in (a) above;
- (h) “court” means a court of law or an administrative or arbitral tribunal established by a Contracting State;
- (i) “creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;
- (j) “debtor” means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest;
- (k) “insolvency administrator” means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;
- (l) “insolvency proceedings” means 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 reorganisation or liquidation;
- (m) “interested persons” means:
 - (i) the debtor;
 - (ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;
 - (iii) any other person having rights in or over the object;

(n) “internal transaction” means a transaction of a type listed in Article 2(2)(a) to (c) where the centre of the main interests of all parties to such transaction is situated, and the relevant object is located (as specified in the Protocol), in the same Contracting State at the time of the conclusion of the transaction;

(o) “international interest” means an interest to which Article 2 applies;

(p) “International Registry” means the international registration facilities established for the purposes of this Convention or the Protocol;

(q) “leasing agreement” means an agreement by which a lessor grants a right to possession or control of an object (with or without an option to purchase) to a lessee in return for a rental or other payment;

(r) “national interest” means an interest in an object created by an internal transaction;

(s) “non-consensual right or interest” means a right or interest conferred by law to secure the performance of an obligation, including an obligation to a State or State entity;

(t) “notice of a national interest” means a notice that a national interest has been registered in a public registry in the Contracting State making a declaration to the Protocol pursuant to Article 48(1);

(u) “object” means an object of a category to which Article 2 applies;

(v) “pre-existing right or interest” means a right or interest of any kind in an object created or arising under the law of a Contracting State before the entry into force of this Convention in respect of that State, including a right or interest of a category covered by a declaration pursuant to Article 39 and to the extent of that declaration;

(w) “proceeds” means money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition;

(x) “prospective assignment” means an assignment that is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;

(y) “prospective international interest” means an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor’s acquisition of an interest in the object), whether or not the occurrence of the event is certain;

(z) “prospective sale” means a sale which is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;

(aa) “Protocol” means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;

(bb) “registered” means registered in the International Registry pursuant to Chapter V;

(cc) “registered interest” means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V;

(dd) “registrable non-consensual right or interest” means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 38;

(ee) “Registrar” means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 16(2)(b);

(ff) “regulations” means regulations made or approved by the Supervisory Authority pursuant to the Protocol;

(gg) “sale” means a transfer of ownership of an object pursuant to a contract of sale;

(hh) “secured obligation” means an obligation secured by a security interest;

(ii) “security agreement” means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;

(jj) “security interest” means an interest created by a security agreement;

(kk) “Supervisory Authority” means, in respect of the Protocol, the Supervisory Authority referred to in Article 16(1);

(ll) “title reservation agreement” means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;

(mm) “unregistered interest” means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention; and

(nn) “writing” means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person’s approval of the record.¹

Comment

1. This section contains a comprehensive list of defined terms. A number of these are self-explanatory; those meriting particular attention are explained in the following paragraphs.

2. “agreement” - a term covering all three types of agreement to which the Convention applies and used in those provisions where it is not necessary to distinguish one type from another, e.g. Articles 10 and 12.

3. “airframes, aircraft engines” - the Convention does not use the term “aircraft” since aircraft engines are highly valuable and mobile, are frequently interchanged and are increasingly dealt in and financed separately from airframes. They are currently subject to unsatisfactory and conflicting rules of national law governing the accession of objects to larger objects.

4. “associated rights” - these are rights to payment or other performance which under Article 31(1)(b) pass to an assignee of an international interest. Associated rights are “secured by” a security agreement or “associated with” a conditional sale or leasing agreement. They include rights to repayment of a loan or to payment of the price under a conditional sale agreement or rentals under a leasing agreement. They also include rights to other forms of performance, such as insurance and repair of the object, and the observance of negative obligations, such as a prohibition on the disposal of leased objects without the lessor’s consent. The Convention provisions are designed to ensure that the assignment of an international interest and the transfer of associated rights go together, thus minimising the risk of conflict with conventions relating to general receivables financing, such as the 1988 UNIDROIT Convention on International Factoring and the draft UNCITRAL Convention on Assignments in Receivables Financing.

¹ It was noted that this definition should be further reviewed.

5. “conditional buyer” - a buyer under a title reservation agreement; to be contrasted with “buyer”, which denotes an outright buyer under a contract of sale (see comment 5).
6. “court” includes an administrative or arbitral tribunal established by a Contracting State but does not include private administrative or arbitral tribunals.
7. “contract of sale” - this phrase denotes an outright sale, as opposed to a title reservation agreement.
8. “insolvency administrator” - the inclusion of a “debtor in possession” reflects the bankruptcy laws of some States by which the conduct of the business of an insolvent debtor undergoing reorganisation is left in the hands of its management.
9. “interested persons” - this phrase denotes the persons who (a) have to be notified under Article 7 of an intended sale or lease of the charged object by the chargee or (b) in the absence of a court order, have to give their consent under Article 8(1) to the vesting of the object in the chargee in satisfaction of the debt or (c) qualify for possible protection by a court which is proposing to make an order under Article 12 for relief pending final determination of the creditor’s claim.
10. “international interest” - a key phrase, meaning an interest to which Article 2 applies, and therefore an interest arising under an agreement which conforms to the formalities prescribed by Article 6. Registrable non-consensual rights or interests are not international interests but may be registered in the International Registry and then rank for priority as if they were international interests. The interest of an outright buyer is not an international interest but is brought within the registration and priority provisions of the Convention by Articles III and XIV of the Aircraft Equipment Protocol in relation to aircraft objects.
11. “internal transaction” - a transaction where all parties and the object are located in the same Contracting State when the agreement is concluded. This is significant only as regards a Contracting State which makes a declaration under Article 48(1) excluding the application of the Convention to internal transactions. But even where such a declaration is made the registration facilities established under the Convention will be available, and the priority rules embodied in Article 28 will apply, so that it will be open to the person holding the national interest to protect it internationally by registering a notice of the national interest in the International Registry under Article 15(1)(e), in which case the national interest will rank for priority in accordance with the rules set out in Article 28. However, the default provisions of Chapter III of the Convention will not apply.
12. “leasing agreement” - this covers leases and sub-leases, with or without an option to purchase.
13. “national interest” - an interest created by an internal transaction. See comment 11.
14. “proceeds” - narrowly defined so as to be limited to proceeds arising from total or partial loss or destruction of the object (e.g. insurance proceeds) or total or partial confiscation, condemnation or requisition. General proceeds, such as receivables arising from sale of an object subject to a security agreement, are not within the Convention, since this would broaden its scope beyond aircraft objects, railway rolling stock and space property, as well as cutting across the draft UNCITRAL Convention on Assignment in Receivables Financing.

15. “prospective international interest” - an interest intended to be created or provided for as an international interest in the future. Article 15(1)(a) enables a person intending to take security over an existing and identified object to register a prospective international interest and thereby preserve a priority position, in that if the international interest later comes into being under the relevant agreement it is treated for priority purposes as registered at the time of registration of the prospective international interest (Article 18(3)).

16. “registrable non-consensual right or interest” - a right or interest created by the law of a Contracting State, as opposed to agreement, which by virtue of a declaration made by that State under Article 38 can be registered in the International Registry as if it were an international interest. Possible examples are judgment creditors’ liens.

17. “security agreement” is widely defined so as to cover security by title transfer as well as a pledge or charge.

18. “unregistered interest” means any interest, whether consensual or non-consensual, which has not been registered in the International Registry, whether or not it is registrable, except for a non-consensual interest which a Contracting State declares under Article 39 is to have priority even over a registered international interest. The essential point is that under Article 28(1) a registered international interest has priority over an unregistered interest. The fact that the unregistered interest may not itself be capable of protection by registration is irrelevant; the superior ranking of the registered international interest lies at the heart of the protection which the Convention is designed to provide. There are two major exceptions: under Article 28(3) an outright buyer of an object takes free from an international interest not registered at the time of the purchase; and a non-consensual interest covered by a declaration under Article 39 has priority even though not registered in the International Registry.

19. “writing” is defined widely so as to embrace not only documents but also electronic and other forms of teletransmission. However, the teletransmission must be authenticated by an indication of a person’s approval of the record and must be capable of reproduction in tangible form on a subsequent occasion. So a message which appears on a computer screen but is not saved as a sent message will not constitute writing for the purposes of the Convention.

Article 2

The international interest

1. – This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

2. – For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 6, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

- (a) granted by the chargor under a security agreement;
- (b) vested in a person who is the conditional seller under a title reservation agreement;

or

- (c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. – The categories referred to in the preceding paragraphs are :

- (a) airframes, aircraft engines and helicopters;
- (b) railway rolling stock; and
- (c) space property.

4. – This Convention does not determine whether an interest to which paragraph 2 applies falls within sub-paragraph (a), (b) or (c) of that paragraph.

5. – An international interest in an object extends to proceeds of that object.

Comment

1. Article 2 defines an international interest. For an interest to qualify as an international interest four conditions must be satisfied:

(a) The interest must relate to an aircraft object, railway rolling stock or space property as designated in the relevant Protocol

(b) The interest must be granted by the chargor under a security agreement or be an interest which is vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement (Article 2(2) is framed in this way to reflect the fact that whilst a chargee's interest derives from the security agreement, the title of a conditional seller or lessor is not created by the title reservation or leasing agreement but arises from some prior and independent transaction)

(c) The interest must be duly constituted under Article 6, which sets out the formal requirements for the agreement creating or providing for the interest.

(d) The debtor must be situated in a Contracting State at the time of conclusion of the agreement (Article 3).

2. The Convention does not specify any requirements of mobility or internationality. These elements are considered to follow from the nature of the object. See further the Comment to Article 48.

3. The Convention does not determine whether an agreement is a security agreement, a title reservation agreement or a leasing agreement. North American jurisdictions characterise conditional sale agreements and certain types of leasing agreements as security interests. Other legal systems treat conditional sellers and lessors as full owners and draw a sharp distinction between security agreements and title retention and leasing agreements. Given the impracticability of securing agreement on a uniform approach to characterisation, this is left to the applicable law as determined by the rules of private international law of the forum, which may categorise the agreement either by reference to the *lex causae* or (more usually) by reference to its own law after ascertaining the scope and purpose of the relevant rule of the *lex causae*. Characterisation is primarily relevant to determine which of the provisions of Chapter III of the Convention (relating to default remedies) apply. Most of the other provisions of the Convention apply equally to all three forms of agreement.

Illustration 1

S in Paris agrees to sell an aircraft object to B in New York under an agreement to which the Convention applies. A New York court would apply New York law to characterise the agreement and would treat it as a security agreement. A Paris court would apply French law to the characterisation issue and would treat the agreement as a title reservation agreement. Accordingly if a question were to arise under Chapter III of the Convention relating to default remedies, then on the assumption that the United States and France had adopted the Convention a New York court would apply Articles 7 or 8, as appropriate, while a French court would apply Article 9.

4. Since in the preceding example the title reservation agreement is also an agreement for sale with a reservation of title it is necessary to provide in Article 2(2) that since it falls within the security agreement category it is not to be treated as a title reservation agreement for the purposes of the Convention. In other words, once category (a) of Article 2(2) is found to be applicable, neither (b) nor (c) can be applied.

5. An international interest in an object extends to its proceeds, though this term is narrowly defined by Article 1(w) (see comment 14 to Article 1). In consequence any priority enjoyed by the holder of the international interest under Article 28 covers the proceeds, a point expressly made by Article 28(5).

Article 3

Sphere of application

1. – This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.

2. – The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

Comment

Paragraph 1 of this Article is to be read with Article 4. The relevant time for determining whether the requirement of the present Article is satisfied is the time the agreement is made. If the debtor is then situated in a Contracting State the requirement is met, and the Convention does not cease to apply merely because the debtor moves to a non-Contracting State.

Article 4

Where debtor is situated

1. – For the purposes of this Convention, the debtor is situated in any Contracting State:

- (a) under the law of which it is incorporated or formed;
- (b) where it has its registered office or statutory seat;

- (c) where it has its centre of administration; or
- (d) where it has its place of business.

2. – A reference in this Convention to the debtor's place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

Comment

1. Article 3 provides the requisite connecting factor to a Contracting State, namely the fact that the debtor is situated in that State at the time the agreement is concluded. If this condition is not met, the Convention does not apply.

2. Article 4 enables the requirement to be satisfied in any one of four different ways, thereby facilitating the application of the Convention. The terms “statutory seat” and “registered office” are equivalents, the former featuring in some national laws and international instruments, the latter in others.

Article 5

Interpretation and applicable law

1. – In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

2. – Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3. – References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4. – Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

Comment

1. Paragraphs 1 and 2 expresses what have become standard principles of interpretation as exemplified by Article 7(1) of the Convention on Contracts for the International Sale of Goods except that predictability has been substituted for good faith, which in high value cross-border financing transactions is considered to create unacceptable uncertainty.

2. Where there are matters which are not settled by the express terms of the Convention or the principles on which it is based, these must be settled by the applicable law, by which is meant the *domestic* law of the State whose law is applicable by the rules of private international law of the forum, so that problems of *renvoi* are avoided. Recourse may also be made to the objects set out in the Preamble in identifying the principles underlying the Convention.

3. Paragraph 3 provides for the determination of the applicable law in the case of a State comprising several territorial units, or law districts.

CHAPTER II

CONSTITUTION OF AN INTERNATIONAL INTEREST

Article 6

Formal requirements

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:

- (a) is in writing;
- (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose;
- (c) enables the object to be identified in conformity with the Protocol; and
- (d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

Comment

1. Article 6 prescribes the formalities for an agreement creating or providing for the international interest. These are designed to be as simple as possible, but if they are not complied with then the interest is not validly constituted as an international interest under the Convention (see Article 2(2)).

2. The constitution of the international interest derives from the Convention, not from national law. It follows that an international interest comes into existence where the conditions of Article 6 are satisfied even if these would not be sufficient to create a security interest under the otherwise applicable law and even if the international interest is of a kind not known to that law. Conversely, if the conditions of Article 6 are not satisfied, no international interest is created even if the conditions for the creation of a comparable interest under the applicable law are fulfilled. However, the applicable law governs capacity to contract, the material validity of the agreement and the question whether the object is one of which the chargor, conditional seller or lessor (the creditor) has power to dispose. The creditor may have such a power either because it is itself the owner or other holder of a disposable interest in the object or because it has actual or ostensible authority from the holder to dispose of the object.

3. Given the relatively simple requirements of Article 6, it is likely that in many cases an interest validly created under national law will also constitute an international interest, so that the two interests will come into being at the same time. The creditor will continue to enjoy the rights given to it by national law in relation to the national interest, subject only to the qualification that if the interest is not also registered as an international interest the creditor risks loss of priority under Article 28(1).

4. A security agreement must enable the secured obligations to be determined but need not state a sum or maximum sum secured. It is common for security agreements to secure all sums from time to time advanced, since the amount to be advanced is not necessarily known at the outset. Any requirement to state a maximum sum would merely induce the creditor to play safe by stating a sum wildly in excess of the amount likely to be required. A third party wishing more information should ask the chargee.

CHAPTER III

DEFAULT REMEDIES

Article 7

Remedies of chargee

1. – In the event of default as provided in Article 10, the chargee may, to the extent that the chargor has at any time so agreed, exercise any one or more of the following remedies:

- (a) take possession or control of any object charged to it;
- (b) sell or grant a lease of any such object;
- (c) collect or receive any income or profits arising from the management or use of any such object,

or apply for a court order authorising or directing any of the above acts.

2. – Any remedy given by sub-paragraph (a), (b) or (c) of the preceding paragraph or by Article 12 shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.

3. – A chargee proposing to sell or grant a lease of an object under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed sale or lease to:

- (a) interested persons specified in Article 1(m)(i) and (ii); and
- (b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.

4. – Any sum collected or received by the chargee as a result of exercise of any of the remedies set out under paragraph 1 shall be applied towards discharge of the amount of the secured obligations.

5. – Where the sums collected or received by the chargee as a result of the exercise of any remedy given in paragraph 1 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall pay the excess to the holder of the registered interest ranking immediately after its own or, if there is none, to the chargor.

Comment

1. This Chapter prescribes the basic default remedies of a chargee (Articles 7 and 8), a conditional seller or lessor (Article 9) and any of them (Article 12). These are available only to the extent agreed by the parties but they can do this at any time. “Default” means a substantial default except where the parties otherwise agree (Article 10). Parties can exercise additional remedies given by the applicable law so far as not inconsistent with the mandatory provisions of Chapter III (Article 11).

2. In principle, all the remedies listed in Articles 7 and 9 may be exercised by extra-judicial means or by recourse to the court, as the creditor chooses. But to accommodate the concerns of those States where extra-judicial remedies are considered objectionable, Article 52(2) empowers a Contracting State to declare whether or not any remedy which under the Convention does not require application to the court is to be exercisable only with leave of the court. Moreover, the Convention does not affect rules of criminal law or tort law in national legal systems.

3. Articles 7 and 8 are more detailed than Article 9 because a chargee, unlike a conditional seller or lessor, is not the full owner of the object but has merely a security interest. It should, however, be borne in mind that in North American jurisdictions conditional sale agreements and certain types of lease are treated as security agreements, so that in proceedings in any such jurisdiction the court will apply Articles 7 and 8, not Article 9.

4. Of the four remedies available to a chargee under this Article one, the right to grant a lease of the object, is subject to Article 52(1), by which a Contracting State may declare that the chargee shall not grant a lease of the object while it is situated within or controlled from that State’s territory.

5. The remedies specified in Article 7 are not automatic; they are given only to the extent that the chargor has at any time so agreed. The chargor’s consent may be given in the security agreement itself or at any time thereafter.

6. Remedies must be exercised in a commercially reasonable manner, but if the mode of exercise conforms to a provision of the security agreement which is not manifestly unreasonable the exercise of the remedy is deemed to fulfil this requirement (Article 7(2)).

7. The sale or lease of the object by the creditor concerns not only the debtor but other “interested persons” as defined by Article 1(m), namely guarantors and other persons having rights in or over the object, such as other chargees. Accordingly before exercising the remedy of sale or lease the creditor must give reasonable prior notice to those of whose interests the creditor is aware. The creditor will always be aware of the interest of the debtor, any sureties and any charges registered prior to its own registration, and will have to give notice to them, but it will not necessarily be aware of

subsequent charges. Accordingly the creditor is not obliged to give notice to a subsequent chargee or holder of any other interest subsequent to its own unless the later chargee or other holder gives notice of its rights to the chargee within a reasonable time prior to the sale or lease.

8. To underline the security nature of the international interest and to prevent the chargee receiving a windfall from the exercise of the remedies given by Article 7, any surplus goes to the holder of the next ranking registered interest or, if there is none, to the chargor (Article 7(5)). Where there are two or more interests ranking after that of the chargee, the intention is that the chargee pays each subsequent secured creditor in order of priority. It is a question for consideration whether this should not be made more explicit.

Article 8

Vesting of object in satisfaction; redemption

1. – At any time after default as provided in Article 10, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2. – The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

3. – The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.

4. – At any time after default as provided in Article 10 and before sale of the charged object or the making of an order under paragraph 2, the chargor or any interested person may discharge the security interest by paying in full the amount secured, subject to any lease granted by the chargee under Article 7(1)(b). Where, after such default, the payment of the amount secured is made in full by an interested person other than the debtor, that person is subrogated to the rights of the chargee.

5. – Ownership or any other interest of the chargor passing on a sale under Article 7(1)(b) or passing under paragraph 1 or 2 of this Article is free from any other interest over which the chargee's security interest has priority under the provisions of Article 28.

Comment

1. This Article provides machinery by which the object given in security can be vested in the chargee in satisfaction of the secured obligations. For the protection of the debtor and interested persons, particularly in cases where the object exceeds the value of the secured debt, this remedy is exercisable only with the agreement of all the interested persons, including the chargee itself, or alternatively on an order of the court. Such an order can be made only if the court is satisfied that the amount of the secured debt is commensurate with the value of the object. If the amount of the secured debt exceeds the value of the object, a creditor acquiring the object under this Article has no claim to the deficiency, for the vesting of the object in the creditor extinguishes the debt. A creditor wishing to

preserve a right to the deficiency should exercise the remedy of sale given by Article 7(1), not the remedy of vesting under the present Article.

2. The chargor continues to have a right to redeem the object by paying the amount of the secured debt in full before the chargee has exercised its power of sale. On sale the right to redeem is lost. It is not, however, extinguished by the chargee's lease of the object. In such a case the chargor can still discharge the security interest, and redeem the object, subject to the rights of the lessee.

3. Upon sale of the object by the chargee or its vesting in the chargee, the buyer or the chargee (as the case may be) takes free from any interest subordinate to that of the chargee but subject to the interest of any prior chargee.

Illustration 2

The chargee has a charge over a railway wagon to secure a debt of one million euro. The wagon has a value of five million euro. The chargee wishes to take the wagon in satisfaction of the debt but the chargor objects. The court must refuse to make an order under Article 8, since the value of the wagon greatly exceeds the amount of the debt.

Illustration 3

D charges an airframe successively to A, B and C, whose interests are registered as international interests in that order. D defaults in its obligations to B, who sells the airframe to T in accordance with Article 7. T obtains ownership free from C's charge but subject to the charge given to A. The position would be otherwise if A had not registered its charge until after B's registration, for B would then have priority under Article 28(1).

Article 9

Remedies of conditional seller or lessor

In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 10, the conditional seller or the lessor, as the case may be, may:

- (a) terminate the agreement and take possession or control of any object to which the agreement relates; or
- (b) apply for a court order authorising or directing either of these acts.

Comment

1. As owner of the object the conditional seller or lessor needs only the remedies of termination of the agreement and possession. Other remedies, such as sale or lease, do not require consent, nor does the conditional buyer or lessee have any interest in any surplus resulting from sale except so far as the parties agree. This Article will not be applied in jurisdictions such as those of North America which treat a conditional sale agreement, or the particular leasing agreement, as a security agreement.

2. The Convention does not determine the effect of termination of a conditional sale agreement or leasing agreement on a derivative interest, such as a lease by the conditional buyer or a sub-lease by the lessee. That is left to the applicable law and the terms of the head agreement.

Article 10
Meaning of default

1. – The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 7 to 9 and 12.

2. – In the absence of such an agreement, “default” for the purposes of Articles 7 to 9 and 12 means a substantial default.

Comment

In the absence of agreement to the contrary “default” means a substantial default. The word “substantial” was chosen deliberately to avoid the differing terms currently used in national legal systems, such as “material” or “fundamental”. The parties can agree in writing as to what constitutes a default and may also agree that the remedies provided by this Chapter may be exercised on an event which is not technically a default at all, such as the onset of insolvency where the chargor has not undertaken to remain solvent or some other external event the risk of which is on the debtor.

Article 11
Additional remedies

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 14.

Comment

Where the applicable law confers additional remedies, or permits the additional remedies agreed by the parties, then those remedies may be exercised in addition to the Convention remedies, but only to the extent that they are not inconsistent with the provisions of Articles 7(2)-(5), 8(3) and (4), 12(2) and 13.

Article 12
Relief pending final determination

1. – A Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:

- (a) preservation of the object and its value;
- (b) possession, control or custody of the object;
- (c) immobilisation of the object; and/or
- (d) lease or management of the object and the income therefrom.

2. – In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:

(a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or

(b) fails to establish its claim, wholly or in part, on the final determination of that claim.

3. – Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.

4. – Nothing in this Article affects the application of Article 7(2) or limits the availability of forms of interim relief other than those set out in paragraph 1.

Comment

1. This Article builds on forms of interim relief commonly available in national legal systems. Where the creditor's right to exercise a default remedy under the Convention is disputed by the debtor, it may take some considerable time before the court is able to make a final determination on the merits of the claim. Meanwhile the creditor risks loss or deterioration of the object and is deprived of the opportunity to obtain income from it. This Article is intended to provide speedy judicial relief pending such final determination. The creditor has to show evidence of the debtor's default. If the court is satisfied that there is such evidence it must grant the creditor such one or more of the orders listed in Article 12(1) as the creditor requests. However, there are two qualifications designed for the protection of the debtor and other interested persons. First, the court may impose such terms as it considers necessary to protect them where the creditor:

(a) in implementing any order, fails to perform an obligation under the Convention, e.g. by selling the object at a gross undervalue or otherwise in a manner which is not commercially reasonable; or

(b) fails to establish its claim, wholly or in part, on the final determination of the claim, as where the court concludes that the debtor was not in default at all.

Secondly, the court may require notice of the creditor's request to be given to any of the interested persons before making the order.

2. The remedies listed in Article 12(1) do not include sale of the object and application of the proceeds of sale.

3. This Article does not dispense with the duty on a chargee to act in a commercially reasonable manner pursuant to Article 7(2), for example, in the way it makes a sale pursuant to the order of the court.

4. The creditor remains entitled to invoke any other form of interim relief that may be available under the *lex fori*, e.g. an order for interim payment by the debtor.

5. Under Article 53 a Contracting State may declare that it will not apply the present Article, wholly or in part.

6. As with other provisions of Chapter III, this Article may be excluded by agreement between the debtor and the creditor.

Article 13
Procedural requirements

Subject to Article 52(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

Comment

Any remedy provided by Chapter III is to be exercised in accordance with the procedural law of the place of exercise. This Article is concerned with procedure, not with substantive law, and therefore does not affect the exercise of extra-judicial remedies under Article 7. However, a remedy in respect of which a Contracting State has made a declaration under Article 52(2) may be exercised only with leave of the court even if (as provided by Article 7) it would otherwise be available under the Convention without such leave.

Article 14
Derogation

In their relations with each other, the parties may, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter, except as stated in Articles 7(2) to (5), 8(3) and (4), 12(2) and 13.

Comment

1. This Article embodies the general principle of party autonomy. The parties are free to exclude or vary any of the provisions of this Chapter except for those listed in the present Article as mandatory, namely those relating to:

- (a) exercise of chargee's remedies in a commercially reasonable manner (Art. 7(2));
- (b) required notice of intended sale by chargee (Art. 7(3));
- (c) application of proceeds of sale by chargee (Art. 7(4));
- (d) application of surplus (Art. 7(5));
- (e) restrictions on vesting of charged object in chargee (Art. 8(3));
- (f) imposition by court of terms for speedy judicial relief (Art. 12);
- (g) exercise of remedies in accordance with procedural law of place of exercise (Art. 13).

2. The power of derogation is limited to the relations between the parties, who cannot, of course, make an agreement which affects the rights of third parties. So the debtor's consent to vesting of ownership of the object in the chargee under Article 8(1) does not dispense with the need for the consent of other interested persons or alternatively an order of the court. Similarly, while the parties can vary the priority rules as between themselves (a point reinforced by Article 28(4)), they cannot by their agreement affect the priority of other parties.

CHAPTER IV

THE INTERNATIONAL REGISTRATION SYSTEM

Article 15

The International Registry

1. – An International Registry shall be established for registrations of:
 - (a) international interests, prospective international interests and registrable non-consensual rights and interests;
 - (b) assignments and prospective assignments of international interests;
 - (c) acquisitions of international interests by legal or contractual subrogation;
 - (d) subordinations of interests referred to in sub-paragraph (a) of this paragraph; and
 - (e) notices of national interests.
2. – Different international registries may be established for different categories of object and associated rights.
3. – For the purposes of this Chapter and Chapter V, the term “registration” includes, where appropriate, an amendment, extension or discharge of a registration.

Comment

1. Article 15 provides for the establishment of the International Registry, which occupies a central role in the Convention. It is envisaged that different registries will be established for different categories of object (as provided by paragraph 2) and that each will have its own Supervisory Authority and Registrar.
2. The registration system envisaged is an electronic system in which prescribed particulars will be entered on the register, but no contract documents or copies will be filed or presented for filing. A person searching the register will obtain any further information it requires by enquiry of the registrant. These factors facilitate a system which is both efficient and economic in cost terms. See also Comment 2 to Article 17.
3. Sub-paragraphs (a)-(d) of paragraph 1 list the types of agreement that may be entered in the International Registry. As to the registration of prospective international interests, see comment 4 to Article 18. Sub-paragraph (e) provides for the registration of notices of national interests, that is, interests arising under internal transactions which by a declaration of a Contracting State will in general have been excluded from certain provisions of the Convention, while remaining subject to the rules governing registration (in this case, registration of notice of their existence under paragraph (e) and Article 19(6)) and priorities. See Article 48 and comment thereon.
4. A registration may be amended, extended or discharged as provided by this Chapter, and references to “registration” are to be construed accordingly.

Article 16

The Supervisory Authority and the Registrar

1. – There shall be a Supervisory Authority as provided by the Protocol.
2. – The Supervisory Authority shall:
 - (a) establish or provide for the establishment of the International Registry;
 - (b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar;
 - (c) ensure that any rights required for the continued effective operation of the International Registry are such as may be assigned in the event of a change of Registrar;
 - (d) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;
 - (e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;
 - (f) supervise the Registrar and the operation of the International Registry;
 - (g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;
 - (h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;
 - (i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and
 - (j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.
3. – The Supervisory Authority may enter into any agreement requisite for the performance of its functions, including any agreement referred to in Article 26(3).
4. – The Supervisory Authority shall own all proprietary rights in the data and archives of the International Registry.
5. – The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to it by this Convention, the Protocol and the regulations.

Comment

1. The International Registry will be operated by a Registrar under the superintendence of a Supervisory Authority. Though the Registrar will be appointed by the Supervisory Authority it is envisaged that it will be an independent entity, as opposed to an individual serving as an employee.
2. The Supervisory Authority, which will be a body having international legal personality and immunity from process, will have power to supervise the Registrar and the operation of the International Registry but will not be entitled to give directions to the Registrar to change any data relating to a registration. This is a matter exclusively for the Registrar and, as regards relief sought

against the Registrar, for the courts of the country where the Registrar has its centre of administration (see Article 43). The principal functions of the Supervisory Authority are to appoint, supervise and (where necessary) dismiss the Registrar, to set and review fees of the International Registry, to secure the efficiency of the registration system, to make or approve regulations pursuant to the Protocol, and to make periodic reports to Contracting States.

3. The Supervisory Authority is also given power to enter into an agreement with the host State under Article 26(3) as to [exemption from taxes and] [other] privileges.

4. The Registrar is responsible for the efficient operation of the International Registry in conformity with the Protocol and of regulations made under it.

5. Paragraph 2(c) is designed to ensure that on a change of Registrar the new Registrar will be able to enjoy all the rights, including intellectual property rights, needed for the continued efficient operation of the International Registry. The Supervisory Authority is in a position to ensure this not only by contract but by reason of its ownership of proprietary rights in the data under paragraph 4 of this Article.

6. See also Comment 1 to Article XVI of the Aircraft Equipment Protocol.

CHAPTER V

MODALITIES OF REGISTRATION

Article 17

Registration requirements

1. – The Protocol and regulations shall specify the requirements, including the criteria for the identification of the object:

- (a) for effecting a registration;
- (b) for making searches and issuing search certificates, and, subject thereto;
- (c) for ensuring the confidentiality of information and documents of the International Registry.

2. – Such requirements shall not include any evidence that a consent to registration required by Article 19(1), (2) or (3) has been given.

3. – Registration shall be effected in chronological order of receipt at the International Registry data base, and the file shall record the date and time of receipt.

4. – The Protocol may provide that a Contracting State may designate an entity in its territory as the entity through which the information required for registration shall or may be transmitted to the International Registry.

Comment

1. While the ensuing Articles prescribe various matters relating to registrations and searches in the International Registry, the detail is left to be supplied by the Protocol and regulations made under it. It can be expected that, among other matters, these will deal with the registration of derivative interests in such a way as to show their derivative character, e.g. by notation of an assignment of a registered international interest against the registration or by notation of a registered sub-lease against the registration of the lease from which it derives .

2. The registration system envisaged is a low-cost system in which all registration applications, entries and searches will be effected by computer without the need for human intervention. Accordingly the system will be based on “notice filing”, that is, the filing of particulars which give notice to third parties of the existence of a registration, leaving them to make enquiries of the registrant for further information, as opposed to a system which requires presentation and/or filing of agreements or other contract documents or copies. A further consequence of the electronic nature of the system is that in principle the International Registry cannot be concerned with facts external to the transmitted data. In particular, paragraph 2 provides that the registration rules are not to include a requirement to furnish evidence that a consent to registration has been given. Articles 18(1) and 19(1) together protect the debtor from the consequences of a registration made without the debtor’s written consent.

3. Under paragraph 3 registration is to be effected in chronological order, the computer recording the exact time of registration. Registration takes effect when the registered data become searchable (art. 18(1)), and this will determine the priority of the international interest under Article 28, as well as the priority of other interests appearing on the register, i.e. registered national interests and registrable non-consensual interests registered under Article 38.

4. Under paragraph 4, the Protocol may empower a Contracting State to decide whether to allow registration to be effected directly into the International Registry or to designate an entity as the national entry point. For example, a Contracting State may wish to utilise an existing national registration system, modified to enable the holder of a national interest which also constitutes an international interest to make one input to the national entry point that will simultaneously procure registration of the national interest and transmission of details of the international interest to the International Registry. It will, of course, be necessary to ensure a suitable connection to the Contracting State in question. Thus Article XVIII of the Aircraft Equipment Protocol gives the power of designation as regards airframes and helicopters to a Contracting State which is the State of registry. Designated entities are not part of the International Registry and their operations are governed exclusively by national law, which will determine the conditions for use of the designated entry point.

5. The designation of national entry points is limited to registrations. Searches will be able to be made direct from any access point available to the searcher.

6. The registration system is open to all those who comply with the registration requirements, a point underlined by Article 25.

Article 18

When registration takes effect

1. – A registration shall be valid only if made in conformity with Article 19 and shall take effect upon entry of the required information into the International Registry data base so as to be searchable.

2. – A registration shall be searchable for the purposes of the preceding paragraph at the time when:

- (a) the International Registry has assigned to it a sequentially ordered file number; and
- (b) the registration information, including the file number, is stored in durable form and may be accessed at the International Registry.

3. – If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest.

4. – The preceding paragraph applies with necessary modifications to the registration of a prospective assignment of an international interest.

5. – A registration shall be searchable in the International Registry data base according to the criteria prescribed by the Protocol.

Comment

1. The effect of paragraph 1 is that a registration is valid only if made in conformity with Article 19. This important control has the effect that a registration made by a person not entitled to do so is invalid and consequently is incapable of affecting the rights of third parties. This will be the position where, for example, the creditor registers an international interest without the debtor's written consent.

2. There are other controls against improper registration. An interest cannot be validly registered as an international interest if no agreement has been made creating or providing for the interest or if the interest has not been constituted as an international interest in accordance with Article 6. In either case registration will have no effect.

3. A registration takes effect only when the required information has become searchable. Registration takes effect not from the time of transmission of the data or receipt of the data by the International Registry but from the time the registration is searchable. This rule is necessary in order to prevent third parties from being misled by a clear search. In the ordinary way the interval between transmission of data and entry in searchable form is likely to be short. If registration is delayed through a systems failure, the intending registrant, if suffering loss (e.g. through a loss of priority) may have a claim against the Registrar under Article 27.

4. Article 15(1) allows registration of a prospective international interest, that is, an interest which is intended to be created or provided for in an object as an international interest in the future upon the occurrence of a stated event, for example, the debtor's acquisition of an interest in the object (Article 1(y)). Given that registration is effected against identified assets, a prospective international interest can be

registered only in relation to an existing and identifiable object and with the written consent of the prospective debtor. The purpose of Article 18(3) is to allow an intending creditor to protect its priority pending the creation of the international interest, so that when that interest comes into being its priority will run from the time of registration of the prospective international interest.

Illustration 4

D is negotiating with C for a loan on the security of an aircraft object owned by D, the object being identified by the parties in accordance with Article VII of the Aircraft Equipment Protocol. On April 1 2001, with D's written consent, C registers its interest in the object as a prospective international interest. On May 1 C charges the object to X as security for an advance by X. On June 1 D concludes a security agreement with C by which C acquires an international interest in the object. C's interest is to be treated as if registered on April 1, with the result that C has priority over X. Having had notice of C's prospective international interest by reason of its registration X should have been aware that its initial priority was liable to be displaced and should have sought an agreement from C to subordinate its interest, wholly or in part.

Article 19

Who may register

1. – An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.

2. – The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.

3. – A registration may be discharged by or with the consent in writing of the party in whose favour it was made.

4. – The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee.

5. – A registrable non-consensual right or interest may be registered by the holder thereof.

6. – A notice of a national interest may be registered by the holder thereof.

Comment

1. This Article states the person or persons by whom a registration may be effected. This differs according to the nature of what is to be registered. International interests and prospective international interests, together with assignments and prospective assignments of such interests, may be registered by a party only with the written consent of the other party. This provides an important safeguard against improper registration. By contrast, registration of a subordination may be effected

either by the subordinated party or, with that party's written consent, by the beneficiary of the subordination. Discharge of a registration must be done by or with the written consent of the party in whose favour the registration was made, e.g. the creditor. The idea linking the treatment of all these situations is that the person whose interests would be adversely affected by the entry on the register must either effect the entry itself or give its written consent to this being done by the other party. In relation to the remaining three categories, only the holder of the right or interest may register it.

2. The Convention does not itself create rights of subrogation; what it does do, in Article 37, is to make it clear that nothing in the Convention prevents the acquisition of an international interest, whether by operation of law or by agreement, under the applicable law; and the present Article empowers the subrogee to register the international interest so acquired.

Illustration 5

G has guaranteed a loan by C to D secured by a charge on a fleet of railway wagons. D defaults and G pays off the debt pursuant to its guarantee. Under the applicable law G acquires the benefit of C's charge to the extent of the payment and is entitled to be registered in place of C as the holder of the international interest created by the chargee.

3. National interests are interests arising under internal transactions which the relevant Contracting State has elected to exclude from the Convention by making a declaration under Article 48(1). But such a declaration does not exclude the whole of the Convention; its main effect is to disapply (with two exceptions) the provisions of Chapter III dealing with default remedies. The registration and priority rules will continue to apply. So the holder of a national interest may secure the benefit of the registration provisions and priority rules by registering a notice of its national interest, in which event the national interest will prevail over a subsequently registered international interest under Article 28(1) as applied by Article 48(2).

Article 20

Duration of registration

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

Comment

The effect of this Article is to leave it to the parties to agree on the duration of registration and to incorporate this into the registered data.

Article 21

Searches

1. – Any person may, in the manner prescribed by the Protocol or regulations, make or request a search of the International Registry concerning interests registered therein.

2. – Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol or regulations, shall issue a registry search certificate with respect to any object:

(a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or

(b) stating that there is no information in the International Registry relating thereto.

Comment

1. The International Registry is to be a public registry to which all those complying with the rules of the Registry are entitled to have access, whether to make a registration or a search. However, while it is envisaged that registrations will be effected via a national entry point, searches will be able to be made directly from any point of computer access to the International Registry. See also Article 25.

2. As to the evidentiary value of certificates and purported certificates, see Article 23.

Article 22

List of declarations and declared non-consensual rights or interests

The Registrar shall maintain a list of declarations, withdrawals of declaration and of the categories of non-consensual right or interest communicated to the Registrar by the depositary State as having been declared by Contracting States in conformity with Article 39 and the date of each such declaration or withdrawal of declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol or regulations to any person requesting it.

Comment

The Convention contains several provisions entitling a Contracting State to exclude or qualify the Convention in relation to specified matters. The list referred to in this Article is a list of such declarations and withdrawals of them and of non-consensual rights or interests which a Contracting State, pursuant to Article 39, declares would have priority under its law over an interest equivalent to that of the holder of an international interest - in other words, an interest equivalent to that held by a chargee or by a person who is a conditional seller or lessor of equipment. Under Article 39 non-consensual rights or interests so declared have priority even over a registered international interest to the extent stated in the declaration (see Comment 2 to Article 39). The purpose of the present Article is to make the International Registry a central point which users can consult to ascertain the existence of such rights and interests instead of their having to make a separate search

through the declarations held by the depositary State. Hence the machinery envisaged is that the depositary State will supply the Registrar with details of all declarations deposited with it so that these can be accessed through the International Registry.

Article 23

Evidentiary value of certificates

A document in the form prescribed by the regulations which purports to be a certificate issued by the International Registry is *prima facie* proof:

- (a) that it has been so issued; and
- (b) of the facts recited in it, including the date and time of a registration.

Comment

1. A person holding a document which purports to be a certificate issued by the International Registry need not adduce evidence that it was in fact so issued and is factually correct, unless the authenticity of the document is challenged and the *prima facie* presumption displaced by evidence which shifts the burden of proof to the holder of the document.

2. A certificate issued by the International Registry is *prima facie* proof of the facts recited in it, including the date and time of registration, but evidence is admissible to show that the certificate does not correctly state the facts. A person reasonably misled by an erroneous certificate may be entitled to pursue a claim against the Registrar, as where the certificate wrongly states that there is no registered international interest against an object, thereby leading the person to whom the certificate is issued to advance funds in the belief that it will be the first registered holder of an international interest.

Article 24

Discharge of registration

1. – Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall procure the discharge of the registration upon written demand by the debtor delivered to or received at its address stated in the registration.

2. – Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall procure the discharge of the registration upon written demand by the intending debtor or assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.

3. – Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall procure the discharge of the registration upon written demand by the debtor delivered to or received at its address stated in the registration.

Comment

1. The effect of paragraph 1 is that where the obligations secured by a registered interest have been performed the debtor may require the holder of the interest to procure discharge of the registration. Discharge does not mean removal of an entry from the International Registry but a notation to the effect that the registered interest no longer exists.

2. Paragraph 2 deals with the case where a registration of a prospective international interest or a prospective assignment has been registered. If the intending creditor or assignee has neither given value nor incurred a commitment to give value, the prospective debtor or assignor is entitled to have the registration discharged. The position is otherwise where such value has been given or promised in a binding undertaking.

Illustration 6

D is negotiating a loan from C to be secured on a space satellite. With D's written consent C registers a prospective international interest. Subsequently D decides not to proceed with the transaction. D is entitled to require C to procure discharge of the registration.

Illustration 7

C agrees to lend FF10 million to D on the security of an identified airframe which D is in the course of acquiring and advances FF1 million of this sum immediately. With D's written consent C registers an international interest. Before D has completed its acquisition of the airframe it decides not to proceed with the loan transaction as regards the balance of FF9 million and requests C to arrange for discharge of the registration. C, having value to the extent of FF1 million, is entitled to refuse.

Article 25

Access to the international registration facilities

No person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter.

CHAPTER VI

PRIVILEGES AND IMMUNITIES OF THE SUPERVISORY AUTHORITY AND THE REGISTRAR

Article 26

Legal personality; immunity

1. – The Supervisory Authority shall have international legal personality where not already possessing such personality.

2. – The Supervisory Authority and its officers and employees shall enjoy [functional] immunity from legal or administrative process.

3. – (a) The Supervisory Authority shall enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State.

(b) For the purposes of this paragraph, “host State” means the State in which the Supervisory Authority is situated.

4. – Except for the purposes of Article 27(1) and in relation to any claim made under that paragraph and for the purposes of Article 43:

(a) the Registrar and its officers and employees shall enjoy functional immunity from legal or administrative process;

(b) the assets, documents, databases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.

5. – The Supervisory Authority may waive the immunity conferred by paragraph 4.

Comment

1. The Supervisory Authority will be designated in the relevant Protocol. It may or may not be a body already enjoying international legal personality. If it is not, it will be given international legal personality by virtue of its designation.

2. The Supervisory Authority and its officers and employees will enjoy immunity from process. The extent of such immunity will be decided by the Diplomatic Conference, which could also leave aspects of this to be dealt with in the host State agreement referred to in paragraph 3. Functional immunity denotes immunity of the Supervisory Authority from process in the exercise of its functions. Full immunity would extend this to the acts of employees of the Supervisory Authority outside the scope of their employment, for example, negligent driving while not engaged on business of the Supervisory Authority.

3. Functional immunity is to be given to the Registrar and its officers and employees except in relation to (a) claims under Article 27(1) for loss suffered through errors and omissions of the Registrar or staff of the International Registry or system malfunction or (b) orders against the Registrar under Article 43(2) and (3) affecting registrations.

4. Paragraph 5 enables the Supervisory Authority to waive any immunity that would otherwise be enjoyed by the Registrar.

CHAPTER VII

LIABILITY OF THE REGISTRAR

Article 27

Liability and insurance

1. – The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system [except ...]

2. – The Registrar shall provide insurance or a financial guarantee covering the liability referred to in the preceding paragraph to the extent provided by the Protocol.

Comment

1. In principle the liability of the Registrar is not dependent on fault, so that it is imposed not only for errors or omissions but for system malfunction. It is for the Diplomatic Conference to decide, in the light of the work of the Registry Task Force, what qualifications, if any, should be imposed on this liability in respects of events of *force majeure*.

2. The Registrar's liability is limited to compensatory damages for loss suffered. This excludes an award of punitive or exemplary damages.

CHAPTER VIII

EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

Article 28

Priority of competing interests

1. – A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

2. – The priority of the first-mentioned interest under the preceding paragraph applies:

(a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and

(b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

3. – The buyer of an object acquires its interest in it:
 - (a) subject to an interest registered at the time of its acquisition of that interest; and
 - (b) free from an unregistered interest even if it has actual knowledge of such an interest.

4. – The priority of competing interests under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

5. – Any priority given by this Article to an interest in an object extends to proceeds.

6. – This Convention does not determine priority as between the holder of an interest in an item held prior to its installation on an object and the holder of an international interest in that object.

Comment

1. This Article lays down a set of priority rules governing a registered interest. By virtue of the definition of “registered interest” in Article 1(cc) these rules apply not only to an international interest but also to a registrable non-consensual right or interest and a national interest notice of which has been registered in the International Registry. Given the size of transactions within the scope of the Convention, the aim is to provide a very small number of simple, objective and comprehensive rules, and to avoid some of the complexities found in national legal systems.

2. Paragraph 1 embodies two priority rules. First, as between registered interests priority goes to the first to be registered. Registration is therefore a priority point, not merely a perfection requirement. Where a registered prospective international interest becomes an actual international interest it is deemed to have been registered at the time of registration of the prospective international interest and to have priority from that time (see Article 18(3), text, Comment and Illustration 4). Secondly, subject to paragraph 3, a registered interest has priority over an unregistered interest. This is so whether or not the unregistered interest is registrable under the Convention (see the definition of “unregistered interest” in Article 1(mm)).

3. A registered interest has priority over an earlier unregistered interest even if this was known to the holder of the registered interest at the time of registration. The purpose of this rule, which finds its counterpart in a number of legal systems, is, first, to reflect the principle that all creditors are deemed to know of a registered interest and, secondly, to avoid factual disputes as to whether the second creditor did or did not know of the earlier interest. For the same reason, a registered interest securing further advances has priority over a subsequent interest (whether registered or not) even as regards advances made with knowledge of the later interest.

4. This Article does not deal specifically with derivative international interests, e.g. those arising under a sub-lease. It is, however, assumed that the holder of a derivative interest cannot, by being the first to register, obtain priority over the international interest from which it is derived. In other words, the priority rules deal with ranking of international interests of the same degree.

5. Paragraph 3 introduces an exception to the general rule that even an unregistrable interest is displaced by a subsequent registered interest. The case of purchase by an outright buyer (as opposed to a conditional buyer as defined in Article 1(e)) is considered so common and important as to justify a special rule providing for the buyer's interest to have priority over an interest not registered until after the time of the buyer's acquisition of the object.

6. Holders of competing interests may vary the priority between themselves by agreement but an assignee of a subordinated interest is not bound by the subordination unless it was registered prior to the assignment.

7. Any priority given by this Article extends to proceeds as defined by Article 1(w), which in effect confines the priority to insurance and other loss-related proceeds, as opposed to proceeds of a disposition of the object. See paragraph 24 of the overview.

8. This Article does not regulate priority between competing unregistered interests. That is left to the applicable law, though any priority given by the applicable law is liable to be displaced if the holder of one such interest subsequently registers it.

9. Paragraph 6 deals with the case where an item (which may or may not be an object within the scope of the Convention) becomes installed on an object. For example, a valuable item of space property supplied by C1 to D under a conditional sale agreement is incorporated into a satellite owned by C2 and leased to D. Paragraph 6 makes it clear that the Convention does not determine the priority between C1 and C2 but leaves this to the applicable law, which may, for example, have a rule that ownership of an item which becomes incorporated as an accessory to a larger object is extinguished.

Illustration 8

D gives a charge over a railway wagon to C1 on 1st February and to C2 on 2nd March. C2 registers its charge on 3rd March, while C1 registers its own charge on 6th March. C2 has priority and this is so even if it knew of the charge in favour of C1.

Illustration 9

D is the owner of an aircraft of which the nationality registration is Ruritania. Under Ruritanian law X has a non-possessory lien to secure a judgment debt. Subsequently D charges the airframe and engines to C to secure an advance and C registers the charge. C's registered international interest has priority over X's earlier lien even though this is not registrable under the Convention. The position would be otherwise if Ruritania had made a declaration providing for the registration of judgment debts and X had registered its judgment debt before C had registered its charge.

Illustration 10

D charges a space satellite to C1 to secure present and future advances. C1 advances DM 20 million and registers the charge. Subsequently D charges the satellite to C2, which advances DM 15 million and gives notice of its charge to C1. Later C1 makes a further advance to D of DM 5 million. C1 has priority over C2 both as to the DM 20 million advance and as to the DM 5 million advance. C2 could avoid this situation by negotiating a subordination of C1's charge to the extent of C2's advance.

Illustration 11

O, the owner of a railway engine, leases it to L. Before O has registered its interest L wrongfully sells the equipment to B. Subsequently O registers its interest. O has priority over B, since the interest which B acquired from L is a derivative interest which is therefore subordinate to the higher-degree interest held by O (see Comment 4).

Illustration 12

D gives a charge on an aircraft object to C1, who registers it, and a second charge to C2. Later C1 agrees to subordinate its charge to that of C2. However, C2 fails to register the subordination agreement. Subsequently C1 assigns its charge to A. A has priority over C2 and this is so whether or not A knew of the subordination agreement.

Illustration 13

D charges a railway wagon to C1 and C2 in succession, C1's charge being registered first. Subsequently the wagon, which was insured against loss, is destroyed in an accident. C1 has a prior claim to the insurance proceeds. If these exceed the amount of the debt owed to C1, the balance is payable to C2 to the extent of its claim, any surplus being payable to D.

Article 29

Effects of insolvency

1. – In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

2. – Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.

3. – Nothing in this Article affects any rules of insolvency law relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors or any rules of insolvency procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

Comment

1. An international interest is in principle effective in insolvency proceedings against the debtor if registered prior to the commencement of the insolvency proceedings, that is, the time at which those proceedings are deemed to commence under the applicable insolvency law (Article 1(d)). But by paragraph 2 even an international interest not so registered may be effective under the applicable law. In other words, paragraph 1 provides a rule of validation, not of invalidation. “Effective” means that the international interest will be recognised as proprietary in nature and therefore in principle ranking ahead of the claims of unsecured creditors.

2. Paragraph 3 preserves the effect of certain specific rules of insolvency law, namely those relating to the avoidance of preferences and transfers in fraud of creditors, and of rules of insolvency procedure designed to limit the enforcement of security or other property rights in the interests of the general body of creditors, for example, in order to facilitate a reorganisation.

Illustration 14

C, an unsecured creditor of D for a loan of 1 million euro, is concerned that D may be insolvent and takes a charge to secure the loan. A month later a court in Urbania makes a winding up order against D on the ground of insolvency and appoints an insolvency administrator. Under Urbanian insolvency law a security interest given for past value within a period of six months prior to the commencement of the insolvency proceedings will be set aside on the application of the insolvency administrator. If D’s insolvency administrator applies to set aside the charge given to D, paragraph 1 of the present Article will not provide a defence to the application.

Illustration 15

C, which has leased some railway engines to D, registers its interest in the engines in the International Registry as an international interest. Subsequently an insolvency administrator is appointed with a view to a reorganisation of D. Under the applicable law the effect of the appointment is to stay all enforcement measures against D. C cannot exercise its normal remedy of repossession under Article 9 so long as the stay continues in force.

CHAPTER IX²

ASSIGNMENTS OF INTERNATIONAL INTERESTS AND RIGHTS OF SUBROGATION

Article 30

Formal requirements of assignment

1. – The holder of an international interest (“the assignor”) may make an assignment of it to another person (“the assignee”) wholly or in part.
2. – An assignment of an international interest shall be valid only if it:
 - (a) is in writing;
 - (b) enables the international interest and the object to which it relates to be identified;
 - (c) in the case of an assignment by way of security, enables the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured.

Comment

1. This Chapter provides for the assignment of an international interest.
2. An assignment is registrable under Article 15(1)(b).
3. Paragraph 2 tracks the formal requirements laid down in Article 6 for the creation of an international interest. Failure to comply with paragraph 2 has the effect that the assignment is not valid under the Convention, though it may well take effect as an assignment of a national interest under the applicable law.

Article 31

Effects of assignment

1. – An assignment of an international interest in an object made in conformity with the preceding Article transfers to the assignee, to the extent agreed by the parties to the assignment:
 - (a) all the interests and priorities of the assignor under this Convention; and
 - (b) all associated rights.

² At the third Joint Session the Chairman invited three delegations to develop proposals designed to bring Chapter IX more into line with those national legal systems under which an assignment of associated rights would carry with it the interest securing those rights. A proposal containing two alternatives was discussed but there was insufficient time to give the alternatives full consideration. Substantial support for the approach taken in the proposal was expressed. However, it was agreed that the alternatives required further careful study by experts and a number of delegations expressed their wish to proceed with further informal consultations. This matter was not further discussed at the 31st Session of the ICAO Legal Committee.

2. – Subject to paragraph 3, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.

3. – The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph, but the debtor may not waive defences arising from fraudulent acts on the part of the assignee.

4. – In the case of an assignment by way of security, the assigned rights revert in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.

Comment

1. An assignment transfers to the assignee not only the international interest itself, with any priority it enjoys under the Convention, but also all associated rights, that is, rights to payment or other performance by a debtor which are secured by or associated with the object (Article 1(c)). The intention is to ensure that an assignment of an international interest and a transfer of the associated rights go together, so that the associated rights cannot be assigned under the Convention independently of the international interest. To allow such independent assignment would broaden the Convention well beyond its intended scope and create inconsistency with the draft UNCITRAL Convention on Assignment in Receivables Financing. The present text ensures that an assignment of the international interest carries with it a transfer of the associated rights but does not cover the converse position where the assignment is expressed to relate solely to the associated rights. This is one of the matters to be addressed by the informal Working Group on assignment.

2. The character of the transfer of the associated rights follows that of the assignment of the related international interest. So if the latter is an assignment by way of security, the transfer of the associated rights will also be by way of security.

3. The Convention does not itself contain any provisions as to defences or rights of set-off other than waiver (see paragraph 3 of this Article); these are left to the applicable law. However, this paragraph must be read in conjunction with Article 32(1), which sets out the formalities that are both necessary and sufficient to entitle the assignee to payment or other performance. If those formalities are complied with, the fact that the applicable law prescribes different or additional formalities for an assignment is irrelevant. Accordingly paragraph 2 of the present Article is confined to substantive defences (and rights of set-off).

4. Paragraph 3 of the present Article recognises the common practice of including a provision by which the debtor waives defences against the assignee, in order to make claims more readily transferable.

5. Where an assignment is by way of security and the secured obligations are discharged, any of the assigned rights still in existence revert in the assignor without the need for any instrument of reassignment.

Illustration 16

O, the owner/lessor of an aircraft object, registers its international interest and subsequently assigns the interest to A by way of an outright assignment. The effect of the assignment is that A acquires the ownership rights previously vested in O and becomes entitled to be registered as assignee of the international interest and to collect the rentals under the lease, subject to any defences or rights of set-off available to the lessee under the applicable law, e.g. for non-conformity of the equipment with the specifications in the leasing agreement.

Illustration 17

The facts are as in Illustration 16 except that the assignment is by way of security. After A has collected some of the rentals outstanding under the leasing agreement O discharges its debt to A, whereupon the aircraft object and the right to the remaining rentals become re-vested in O.

Article 32

Debtor's duty to assignee

1. – To the extent that an international interest has been assigned in accordance with the provisions of this Chapter, the debtor in relation to that interest is bound by the assignment, and, in the case of an assignment within Article 31(1)(b), has a duty to make payment or give other performance to the assignee, if but only if:

(a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor;

(b) the notice identifies the international interest [; and

(c) the debtor [consents in writing to the assignment, whether or not the consent is given in advance of the assignment or identifies the assignee] [has not been given prior notice in writing of an assignment in favour of another person]].

2. – Irrespective of any other ground on which payment or performance by the debtor discharges the latter from liability, payment or performance shall be effective for this purpose if made in accordance with the preceding paragraph.

3. – Nothing in the preceding paragraph shall affect the priority of competing assignments.

Comment

1. This Article sets out the conditions in which the debtor comes under a duty to make payment or give other performance to the assignee. It is to be read subject to the debtor's right to raise substantive defences and rights of set-off under Article 31(2) to the extent that this has not been displaced by a waiver of defences under Article 31(3). See comment 2 to Article 31.

2. The debtor must have been given notice of the assignment in writing identifying the international interest. For consideration at the Diplomatic Conference is the way in which the debtor's receipt of a prior notice of assignment shall be dealt with. Under the second of the bracketed alternatives this constitutes a defence to the assignee's claim to payment or other performance. The first alternative does not address this issue, leaving it to be dealt with under the applicable law pursuant to Article 31(2). However, defences under the applicable law may have been waived. The first alternative is designed to give a modicum of protection to the debtor in this situation by requiring that the debtor shall have given a written consent to the assignment. Under most national laws contractual rights are assignable without the debtor's consent.

3. A debtor who pays or performs when so required by paragraph 2 obtains a good discharge from liability. The debtor may also obtain a good discharge on payment or performance where the conditions of paragraph 2 have not been satisfied. The effect of paragraph 2 is simply that the debtor cannot be *required* to perform if the conditions of that paragraph have not been fulfilled. But this does not disable the debtor from performing in other cases, though if it is found that the person claiming to be the assignee does not have the best right to payment or performance the debtor may then have to perform again in favour of the person having the best right.

4. Even where the debtor does give a valid performance in favour of an assignee this does not affect the rights of another assignee who has priority. In such a case the latter would be able to pursue whatever remedy was available against the junior assignee under the applicable law.

Article 33

Default remedies in respect of assignment by way of security

In the event of default by the assignor under the assignment of an international interest made by way of security, Articles 7, 8 and 10 to 13 apply in the relations between the assignor and the assignee (and, in relation to associated rights, apply in so far as they are capable of application to intangible property) as if references:

(a) to the secured obligation and the security interest were references to the obligation secured by the assignment of the international interest and the security interest created by that assignment;

(b) to the chargee and chargor were references to the assignee and assignor of the international interest;

(c) to the holder of the international interest were references to the holder of the assignment; and

(d) to the object were references to the assigned rights relating to the object.³

Comment

1. This Article is confined to assignments by way of security and confers on the assignee default remedies corresponding to those given by Chapter III to the holder of an international interest

³ The Drafting Committee of the third Joint Session noted that this provision would require further technical consideration. However, this matter was not discussed by the third Joint Session Plenary, nor by the 31st Session of the ICAO Legal Committee.

on the debtor's default. So on the assignor's default the assignee may, for example, sell or lease the object and sub-assign the right to sums payable under the assigned agreement.

2. However, the default provisions apply only in the relations between assignor and assignee and do not affect the rights of the debtor unless the latter also has defaulted or has agreed to subordinate its rights to those of the assignee. Accordingly in the absence of such default or agreement any sale or lease by the assignee will take effect subject to the rights of the chargor, conditional buyer or lessee.

Illustration 18

O leases railway engines to L, registers an international interest in the engines and then assigns that interest to A by way of security for a loan from A repayable by instalments. O defaults in payment of an instalment and A thereby acquires the right to sell or lease the equipment. If A sells the engines, the purchaser acquires it subject to L's rights as lessee in possession and becomes entitled to collect the rentals while the lease is current and thereafter to take possession of the engines. The position is similar if A leases the engines. The lessee is then interposed between A and L and becomes L's lessor, with the consequent right to collect rentals from L.

Article 34

Priority of competing assignments

Where there are competing assignments of international interests and at least one of the assignments is registered, the provisions of Article 28 apply as if the references to an international interest were references to an assignment of an international interest.

Comment

1. The rules in Article 28 governing competition between a registered international interest and a subsequently registered interest or an unregistered interest apply *mutatis mutandis* to competing assignments. Accordingly a registered assignment has priority over a subsequently registered assignment and over an unregistered assignment.

2. As between a registered assignee and a person other than a competing assignee - for example, an outright buyer from the debtor - the assignee has the same ranking as its assignor (Article 31(1)(a)), so that the assignment does not affect existing priorities.

Article 35

Assignee's priority with respect to associated rights

Where the assignment of an international interest has been registered, the assignee shall, in relation to the associated rights transferred by virtue of or in connection with the assignment, have priority under Article 28 only to the extent that such associated rights relate to:

- (a) a sum advanced and utilised for the purchase of the object;

- (b) the price payable for the object; or
- (c) the rentals payable in respect of the object,

and the reasonable costs referred to in Article 7(5).

Comment

Under Article 31(1)(a) an assignment of an international interest transfers all the assignor's interests under the Convention and all priorities enjoyed by those interests. By Article 31(1)(b) an assignment of an international interest transfers all associated rights to payment or other performance. However, the priority of the assignee in relation to the associated rights is dealt with not under Article 31 but under the present Article, which limits such priority to rights to sums related to the acquisition or rental of the object and the reasonable costs referred to in Article 7(5). The purpose of this restriction is to avoid giving the assignee a Convention priority to rights to payment which, though secured on the object, are unrelated to its acquisition or rental, as, for example, an advance on the security of equipment already acquired by the chargor with its own or a third party's funds. The priority between two such assignees will be determined not by the Convention but by the applicable law, including any applicable provisions of what is currently the draft UNCITRAL Convention on Assignment in Receivables Financing.

Illustration 19

D charges a space satellite to C to secure repayment of (a) an advance by C for the purchase of the satellite and (b) money previously advanced by C to D. C registers the charge as an international interest in the International Registry. Subsequently D charges the same satellite to T to secure an existing indebtedness, and T registers its charge. C assigns its international interest to A; T assigns its international interest to U. Since C's international interest was the first to be registered, it has priority over T's international interest both as to C's purchase-money advance and as to its non-purchase-money advance. A succeeds to such priority and its interest thus ranks ahead of that held by U. However, in relation to the associated rights, to which both A and U are claimants, A's priority over U is limited to the sum outstanding in respect of C's purchase-money advance. Priority between A and U as to the two non-purchase-money advances is determined by the applicable law, not by the Convention.

Article 36

Effects of assignor's insolvency

The provisions of Article 29 apply to insolvency proceedings against the assignor as if references to the debtor were references to the assignor.

Comment

The effect of this Article is that if insolvency proceedings are instituted against the assignor then in principle the assignee's title to the assigned international interest is to be treated as

effective in the proceedings, subject, however, to the rules of insolvency law and procedure specified in Article 29. If, for example, the assignment were made in fraud of the assignor's creditors, nothing in the present Article would preclude the assignment from being set aside under a provision of the applicable insolvency law invalidating assignments in fraud of creditors.

Article 37
Subrogation

1. – Subject to paragraph 2, nothing in this Convention affects the acquisition of an international interest by legal or contractual subrogation under the applicable law.

2. – The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests.

Comment

The Convention deals only with transfers of an international interest by way of assignment. However, national laws commonly allow transfer by subrogation, typically as the result of a payment to the creditor by a third party such as a guarantor, who then stands in the shoes of the creditor to the extent of the payment. Subrogation may occur either by operation of law (as in the case of a discharge of the debtor's secured obligations by a guarantor) or by contract between the creditor and the third party. This Article makes it clear that the rights of the subrogee under the applicable law are unaffected. To the extent that those rights include succession to the international interest previously held by the creditor the subrogee becomes entitled to have such rights entered in the International Registry (see Article 15(1)(c)).

CHAPTER X

NON-CONSENSUAL RIGHTS OR INTERESTS

Article 38
Registrable non-consensual rights or interests

A Contracting State may at any time in a declaration deposited with the depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and be regulated accordingly. Such a declaration may be modified from time to time.

Comment

1. This Article enables a Contracting State to extend the application of the Convention so as to allow designated categories of non-consensual right or interest to be registered as if they were international interests. The type of non-consensual right or interest envisaged by this Article is one which

is susceptible to a first-to-file rule and which would otherwise be subordinate to a registered international interest, as opposed to a right or interest within Article 39. An example is the interest arising from the attachment of the debtor's equipment by way of execution of a judgment debt.

2. Where a non-consensual right or interest within a registrable category is registered in the International Registry it has effect thereafter in all respects as if it were an international interest, and therefore has priority over a subsequently registered international interest or an unregistered interest (Article 28(1)). If it is not registered it will be subordinate to a registered international interest. Its priority as against an unregistered interest is not governed by the Convention and is to be determined by the applicable law.

3. A Contracting State may at any time modify a declaration, as by adding, removing or altering categories.

Article 39

Priority of non-registrable non-consensual rights or interests

1. – A Contracting State may at any time in a declaration deposited with the depositary of the Protocol declare, generally or specifically, those categories of non-consensual right or interest (other than a right or interest to which Article 38 applies) which under that State's law would have priority over an interest in the object equivalent to that of the holder of the international interest and shall have priority over a registered international interest, whether in or outside the insolvency of the debtor. Such a declaration may be modified from time to time.

2. – A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3. – An international interest has priority over a non-consensual right or interest of a category not covered by a declaration deposited prior to the registration of the international interest.

Comment

1. This Article is confined to non-consensual rights or interests in respect of which the relevant Contracting State has not made a declaration under Article 38 and which are therefore not registrable in the International Registry. The non-consensual rights or interests capable of a declaration under the present Article are those which, under the law of the Contracting State, have priority over an interest equivalent to that of the holder of an international interest, that is, equivalent to the interest of a chargee, conditional seller or lessor. Such non-consensual rights or interests may be in respect of either secured or unsecured claims. An example of the former is a non-consensual lien on an aircraft for airport dues. Examples of the latter are claims for unpaid taxes and for wages due from an insolvent employer, which, though usually unsecured, are in some States given priority over the claims even of a secured creditor. In such a case, the Contracting State, if it has not included such claims in a declaration under Article 38, may by declaration under the present Article ensure that such claims, though not registered in the International Registry, have priority even over a registered international interest.

2. The purpose of requiring the declaration is to alert holders and prospective holders of international interests to categories of non-consensual right or interest which, contrary to the general rule in Article 28(1), will have priority even though unregistered and, indeed, even if unsecured. Two conditions are necessary to attract the application of this Article. First, the equivalent consensual interest must be one over which the non-consensual right or interest has priority under the applicable law. Secondly, the Contracting State must declare the non-consensual right or interest as one which is to have priority over a registered international interest. It is therefore open to a Contracting State to preserve or narrow its existing priorities for non-consensual rights or interests but not to expand them.

3. It is not necessary for a declaration to list such categories individually. It would, for example, be open to a Contracting State to declare that all non-consensual rights or interests which under the law of that State have priority over the rights of secured creditors are to have priority over registered international interests.

4. A declaration may be modified from time to time, for example, by adding, removing or modifying categories of non-consensual right or interest specified in the declaration prior to its modification.

5. The deposit of a declaration or modification of a declaration cannot affect the priority of international interests already registered. However, it is open to a Contracting State to make a declaration that is expressed to cover not only categories of non-consensual right or interest then having priority under its national law but any new categories that are created in the future. This avoids the need to deposit a new declaration, or a modification of an existing declaration, to add a new category each time there is a change in the law.

Illustration 20

Under the law of Domitia, a Contracting State, claims for unpaid wages and taxes have priority, within specified limits, over the claims of secured creditors. Before Domitia has deposited a declaration under this Article, D gives C1 a charge over identified items of railway rolling stock and C1 registers the charge as an international interest. Later Domitia makes a declaration under this Article that claims for unpaid wages and taxes, so far as having priority over secured claims under Domitia's national law, are to have priority over a registered international interest. Later D gives a second charge over the same equipment to C2, who registers the charge as an international interest. Some time afterwards D goes into insolvent liquidation. The preferential claims for unpaid wages and taxes are subordinate to the charge in favour of C1 but have priority over the charge to C2.

CHAPTER XI

APPLICATION OF THE CONVENTION TO SALES

Article 40

Sale and prospective sale

This Convention shall apply to the sale or prospective sale of an object as provided for in the Protocol with any modifications therein.

Comment

The purpose of this Article is to enable a Protocol to allow outright buyers of equipment to obtain the benefit of the registration system and the priority secured by registration. However, some parts of the Convention - in particular, the provisions of Chapter III dealing with default remedies - are not appropriate to outright sales. Thus the Aircraft Equipment Protocol, in extending the Convention to sales and prospective sales (Article III), does not include Chapter III in the list of applied provisions.

CHAPTER XII

JURISDICTION

Article 41

Choice of forum

Subject to Articles 42 and 43, the courts of a Contracting State chosen by the parties to a transaction have exclusive jurisdiction in respect of any claim brought under this Convention, unless otherwise agreed between the parties, whether or not the chosen forum has a connection with the parties or the transaction.

Comment

1. This Article embodies the general principle that exclusive jurisdiction is given to the courts of a Contracting State chosen by the parties. It is, however, open to the parties to agree that the jurisdiction selected is to be non-exclusive. Moreover, this Article does not exclude any jurisdiction conferred by Article 42, nor does it empower the parties to confer jurisdiction (exclusive or non-exclusive) to make orders against the Registrar where the court selected is not in a place where the Registrar has its centre of administration.

2. The parties are free to confer jurisdiction on the courts of any Contracting State, whether or not it has a connection with the parties or the transaction.

Article 42

Jurisdiction under Article 12(1)

1. – The courts of a Contracting State chosen by the parties and the courts on the territory of which the object is situated may exercise jurisdiction to grant relief under Article 12(1)(a), (b), (c) and Article 12(4) in respect of that object.

2. – The courts of a Contracting State chosen by the parties and the courts on the territory of which the debtor is situated may exercise jurisdiction to grant relief under Article 12(1)(d) and Article 12(4) if the enforcement of such relief is limited to the territory of the forum.

3. – A court may exercise jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 12(1) will or may take place in a court of another Contracting State or in an arbitral tribunal.

Comment

1. This Article is confined to jurisdiction to entertain claims by a creditor to speedy judicial relief under Article 12 pending final determination of the creditor's claim. The forms of relief set out in Articles 12(1)(a),(b) and (c) and 12(4) are seen as being of an *in rem* nature, and thus dependent on party agreement or on the object being within the territory of the Contracting State from whose courts relief is sought. By contrast, relief under Article 12(1)(d) is conceived as operating *in personam*, so that in the absence of party agreement what is required is that the debtor be situated in the territory of the forum State and the enforcement sought limited to that territory. In either case the jurisdiction is concurrent with that chosen by the parties under Article 41.

2. It is not necessary that the court from which relief is sought under Article 12 shall be the tribunal making the final determination of the claim. This may be a court or arbitral tribunal in another Contracting State.

Article 43

Jurisdiction to make orders against the Registrar

1. – The courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages against the Registrar under Article 27.

2. – Where a person fails to respond to a demand made under Article 24(1) or (2) and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration, the courts referred to in paragraph 1 shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order directed to the Registrar requiring the Registrar to discharge the registration.

3. – Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration, the courts referred to in paragraph 1 may direct the Registrar to take such steps as will give effect to that order.

4. – Except as otherwise provided by the preceding paragraphs, no court may make orders or give judgments or rulings against or purporting to bind the Registrar.

Comment

1. In general the Registrar enjoys functional immunity from legal process (Article 26(4)). However, there are three types of court order to which the Registrar may be subject:

(a) Orders under Article 27 for payment of compensatory damages for errors, omissions and system malfunction

(b) Orders under Article 43(2) directing the Registrar to discharge a registration where the discharge is one to which a debtor or prospective debtor is entitled under Article 24(1) or (2) and the creditor fails to take the necessary action or has ceased to exist or cannot be found

(c) Orders under Article 43(3) to amend or discharge a registration following the failure of the registrant to comply with an order of a foreign court to effect the amendment or discharge.

2. There are various reasons why it would be inappropriate to allow courts outside the country where the Registrar has its centre of administration to make orders against the Registrar. In the first place, the Registrar would *ex hypothesi* be outside the territorial jurisdiction and control of those courts. Secondly, to allow such orders would be incompatible with the international character of the Registrar's functions. Thirdly, there would be the risk of conflicting orders by courts in different jurisdictions. Accordingly this Article confers exclusive jurisdiction on the courts of the place where the Registrar has its centre of administration. However, where a court having jurisdiction under the Convention or, in the case of a national interest, a court of competent jurisdiction, has made an *in personam* order requiring a person to procure amendment or discharge of a registration (e.g. because under the applicable law the debtor had no power to dispose of the object to which the registration relates) the court where the Registrar has its centre of interest may (but is not obliged to) make the order of the foreign court effective by directing the Registrar to make the appropriate amendment or discharge entry.

Article 44

General jurisdiction

Except as provided by Articles 41, 42 and 43, the courts of a Contracting State having jurisdiction under the law of that State may exercise jurisdiction in respect of any claim brought under this Convention.

Comment

This Article is a residuary provision which, subject to Articles 41 to 43, confers general jurisdiction on any court having jurisdiction under the *lex fori*. Such a court may accordingly entertain a claim under the Convention, other than a claim under Article 12 or against the Registrar, where:

(a) the parties have not chosen a forum; or

(b) the forum selected under Article 41 is non-exclusive.

CHAPTER XIII

RELATIONSHIP WITH OTHER CONVENTIONS

Article 45

Relationship with the UNIDROIT Convention on International Financial Leasing

The Protocol may determine the relationship between this Convention and the *UNIDROIT Convention on International Financial Leasing*, opened for signature in Ottawa on 28 May 1988.

Article 46

Relationship with the [draft] UNCITRAL Convention on Assignment [in Receivables Financing] [of Receivables in International Trade]

[This Convention shall supersede the [draft] UNCITRAL Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] as it relates to the assignment of receivables which are associated rights related to international interests in objects of the categories referred to in Article 2(3).]⁴

CHAPTER XIV

FINAL PROVISIONS

Article 47

Entry into force

1. – This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [third/fifth] instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies:

- (a) as from the time of entry into force of that Protocol;
- (b) subject to the terms of that Protocol; and
- (c) as between Contracting States Parties to that Protocol.

2. – This Convention and the Protocol shall be read and interpreted together as a single instrument.

Comment

1. This Article reinforces the controlling power of the Protocol.

⁴ This provision may be modified or deleted depending on the final form of the future UNCITRAL Convention.

2. It will be for the Diplomatic Conference to decide on the number of ratifications required to bring the instrument into force.

3. It is for consideration whether it is either appropriate or practicable to allow ratification of the Convention independently of ratification of the controlling Protocol.

Article 48

Internal transactions

1. – A Contracting State may declare at the time of ratification, acceptance, approval of, or accession to the Protocol that this Convention shall not apply to a transaction which is an internal transaction in relation to that State.

2. – Notwithstanding the preceding paragraph, the provisions of Articles 7(3) and 8(1), Chapter V, Article 28, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.

Comment

The requirements of mobility and internationality are considered inherent in the nature of the equipment covered by the Convention and are not specifically stated. This allows the possibility of the Convention applying to a transaction which is purely internal in that all the parties and the object itself are situated in the same Contracting State at the time of conclusion of the contract (see Article 1(q)). Such a situation will not occur as regards objects in space, and is unlikely to occur in the case of aircraft objects but could arise as regards railway rolling stock. The practical problem is that a transaction which is internal when the agreement is made may become international the next day as the result of movement of the object from one country to another. Moreover, the creditor may have no means of knowing whether or not this has occurred. Further, a transaction which is international can derive from one which is internal, as where a leasing agreement is domestic but the lessee grants a sub-lease to a party in another Contracting State. Hence the Convention takes a practical approach in covering all transactions within Article 2 even if in some cases this catches internal transactions. Nevertheless it is open to a Contracting State to make a declaration under Article 48(1) excluding the application of the Convention to a transaction which is an internal transaction in relation to that State. This will not, however, affect the application of the registration provisions of Chapter IV or the priority rules in Article 28. Provision is made for registration of a notice of a national interest created by an internal transaction covered by a declaration made under this Article.

[Article 49

Protocols on Railway Rolling Stock and Space Property

1. – The International Institute for the Unification of Private Law (UNIDROIT) shall communicate the text of any preliminary draft Protocol relating to a category of objects falling within Article 2(3)(b) or (c) prepared by a working group convened by UNIDROIT to all Contracting States Parties to the Convention through their adherence to any existing Protocol, all Member States of UNIDROIT and all Member States of any intergovernmental Organisation represented in the working

group. Such States shall be invited to participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.

2. – UNIDROIT shall also communicate the text of any preliminary draft Protocol prepared by a working group to relevant non-governmental Organisations as UNIDROIT considers appropriate. Such non-governmental Organisations shall be invited to submit comments on the text of the preliminary draft Protocol to UNIDROIT or, as appropriate, to participate as observers in the preparation of a draft Protocol.

3. – Upon completion of a draft Protocol, as provided by the preceding paragraphs, the draft Protocol shall be submitted to the Governing Council of UNIDROIT for approval with a view to adoption by the General Assembly of UNIDROIT and such other intergovernmental Organisations as may be determined by UNIDROIT.

4. – The procedure for the adoption of Protocols covered by this Article shall be determined by the States participating in their preparation.]

Comment

The only Protocol ready for examination at the Diplomatic Conference is the Aircraft Equipment Protocol. This and the ensuing Article are designed to allow additional Protocols to be concluded pursuant to a procedure to be determined by the States participating in the preparation of the Protocols. The present Article remains in square brackets.

Article 50

Other future Protocols

1. – UNIDROIT may create working groups to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.

2. – The Protocols referred to in the preceding paragraph shall be prepared and adopted in accordance with the procedures provided for under Article 49.

Comment

This Article allows for additional categories of equipment of a kind not specified in Article 2(3). See also the Comment to Article 49.

Article 51
Determination of courts

A Contracting State may declare at the time of ratification, acceptance, approval of, or accession to the Protocol the relevant “court ” or “courts” for the purposes of Article 1 and Chapter XII of this Convention.

Comment

Article 1(h) defines a court as a court of law or an administrative or arbitral tribunal established by a Contracting State but not a private administrative or arbitral tribunal. The present Article empowers a Contracting State to declare the relevant court or courts which are to have jurisdiction under the Convention.

Article 52
Declarations regarding remedies

1. – A Contracting State may declare at the time of signature, ratification, acceptance, approval of, or accession to the Protocol that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.

2. – A Contracting State at the time of signature, ratification, acceptance, approval of, or accession to the Protocol shall declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

Comment

1. One of the default remedies conferred on the chargee by Article 7(1) and on any creditor by Article 12(1) is the granting of a lease of the object. Paragraph 1 of the present Article empowers a Contracting State to make a declaration excluding this remedy while the charged object is situated within or controlled from its territory. The phrase “controlled from” is primarily directed at satellites, which though in space are controlled from earth.

2. Paragraph 2 enables a Contracting State to make a declaration excluding extra-judicial remedies that would otherwise be available (for example, possession and sale) and to require the creditor to obtain leave of the court.

Article 53
Declarations regarding relief pending final determination

A Contracting State may declare at the time of signature, ratification, acceptance, approval of, or accession to the Protocol that it will not apply the provisions of Article 12, wholly or in part.

Article 54

Reservations, declarations and non-application of reciprocity principle

1. – No reservations are permitted except those expressly authorised in this Convention and the Protocol.
2. – No declarations are permitted except those expressly authorised in this Convention and the Protocol.
3. – The provisions of this Convention subject to any reservation or declaration shall be binding on the Contracting States that do not make such reservations or declarations in their relations vis-à-vis the reserving or declaring Contracting State.

Comment

No reservation or declaration may be made by a Contracting State except as expressly authorised in the Convention and Protocol. But reservations or declarations made by a Contracting State in conformity with the Convention or Protocol are binding on other Contracting States in their relations with the reserving or declaring State even if those other Contracting States have not themselves made a similar reservation or declaration. Accordingly no principle of reciprocity applies in regard to reservations and declarations.

Article 55

Transitional provisions

Alternative A

[This Convention does not apply to a pre-existing right or interest, which shall retain the priority it enjoyed before this Convention entered into force.]

*Alternative B*⁵

1. – Except as provided by paragraph 2, this Convention does not apply to a pre-existing right or interest.
2. – Any pre-existing right or interest of a kind referred to in Article 2(2) shall retain the priority it enjoyed before this Convention entered into force if it is registered in the International Registry before the expiry of a transitional period of [10 years] after the entering into force of this Convention in the Contracting State under the law of which it was created or arose. Where such a pre-existing right or interest is not so registered, its priority shall be determined in accordance with Article 28.

⁵ The ICAO Legal Committee, while maintaining both alternatives A and B, expressed the view that in case alternative B was selected, the fees charged with respect to these transactions should be nominal.

3. – The preceding paragraph does not apply to any right or interest in an object created or arising under the law of a State which has not become a Contracting State.]

Comment

1. This Article contains alternative sets of transitional provisions. The Diplomatic Conference will be asked to select one or the other. Alternative A offers a simple solution to the transitional problem by providing that the Convention does not apply to a pre-existing right or interest (defined in Article 1(v)) and that this is to retain its pre-Convention priority status. Two consequences follow from this. First, it is neither necessary nor possible for the holder of a pre-Convention right or interest to protect it by registration in the International Registry. Secondly, priority between a pre-Convention right or interest and a registered international interest will be determined by the applicable law, not by the rules set out in Article 28 of the Convention.

2. Paragraph 1 of Alternative B adopts the same principle as Alternative A except as provided by paragraph 2. The latter relates only to priorities. Accordingly the effect of paragraph 1 of Alternative B is that other provisions of the Convention, in particular the default provisions of Chapter III, do not apply in relation to a pre-Convention right or interest even if it falls within the definition of an international interest under Article 2.

3. Paragraph 2 of Alternative B preserves the priority of a pre-Convention right or interest under the applicable law provided that this is registered within the period of 10 years from the time the Convention enters into force in the Contracting State under the law of which the right or interest was created or arose. So if under the applicable law the holder of the pre-Convention right or interest has priority over an international interest, registration of the former within the 10-year period preserves that priority after the expiry of that period even if the international interest was registered first.

4. Paragraph 3 excludes the application of paragraph 2 to a right or interest created or arising under the law of a State which at the relevant time has not become a Contracting State. Hence the holder of an interest created or arising under the law of a non-Contracting State retains whatever priority it enjoys under the applicable law without the need to register. The effect of paragraph 3 is that, by virtue of paragraph 1, the holder of the right or interest in question is and remains wholly unaffected by the Convention and is neither bound by its priority rules nor entitled to register the right or interest so as to enjoy the benefit of those rules.

[Remaining Final Provisions to be prepared by the Diplomatic Conference]

**V COMMENTARY ON THE DRAFT PROTOCOL TO THE [UNIDROIT][~~UNIDROIT~~]
CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON
MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT**

PREAMBLE

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**DRAFT PROTOCOL TO THE [UNIDROIT][~~UNIDROIT~~] CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC
TO AIRCRAFT EQUIPMENT**

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING it necessary to implement the [UNIDROIT][~~UNIDROIT~~] Convention on International Interests in Mobile Equipment as it relates to aircraft equipment, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of aircraft finance and to extend the sphere of application of the Convention to include contracts of sale of aircraft equipment,

HAVE AGREED upon the following provisions relating to aircraft equipment:

Comment

The Preamble reflects the primary purpose of a Protocol, which is to adapt the Convention to the particular requirements of the industry sector affected while otherwise leaving it unchanged. The Protocol, like the Convention, is based on the policy of a high degree of party autonomy and the need to provide the creditor with adequate safeguards in the event of default. However, it also incorporates provisions enabling a Contracting State to balance its legal philosophy on key issues against the economic advantages of particular provisions and to make a declaration excluding such provisions, wholly or in part.

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article I

Defined terms

1. – In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2. – In this Protocol the following terms are employed with the meanings set out below:

(a) “aircraft” means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters;

(b) “aircraft engines” means aircraft engines (other than those used in military, customs or police services) powered by jet propulsion or turbine or piston technology and:

(i) in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent; and

(ii) in the case of turbine-powered or piston-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent, together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto;

(c) “aircraft objects” means airframes, aircraft engines and helicopters;

(d) “aircraft register” means a register maintained by a State or a common mark registering authority for the purposes of the Chicago Convention;

(e) “airframes” means airframes (other than those used in military, customs or police services) that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport:

(i) at least eight (8) persons including crew; or

(ii) goods in excess of 2750 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto;

(f) “authorised party” means the party referred to in Article XIII(2);

(g) “Chicago Convention” means the *Convention on International Civil Aviation*, opened for signature in Chicago on 7 December 1944, as amended, and its annexes;

(h) “common mark registering authority” means the authority maintaining a register in accordance with Article 77 of the Chicago Convention as implemented by the Resolution adopted on 14 December 1967 by the Council of the International Civil Aviation Organization on nationality and registration of aircraft operated by international operating agencies;

(i) “de-registration of the aircraft” means deletion or removal of the registration of the aircraft from its aircraft register in accordance with the Chicago Convention;

(j) “guarantee contract” means a contract entered into by a person as guarantor;

(k) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

(l) “helicopters” means heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes and which are type certified by the competent aviation authority to transport:

(i) at least five (5) persons including crew; or

(ii) goods in excess of 450 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto;

(m) “insolvency-related event” means:

(i) the commencement of the 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;

(n) "primary insolvency jurisdiction" means 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;

(o) "registry authority" means the national authority or the common mark registering authority, maintaining an aircraft register in a Contracting State and responsible for the registration and de-registration of an aircraft in accordance with the Chicago Convention; and

(p) "State of registry" means, in respect of an aircraft, the State on the national register of which an aircraft is entered or the State of location of the common mark registering authority maintaining the aircraft register.

Comment

Article I provides a series of definitions additional to those provided in Article 1 of the Convention. The following require to be noted:

1. "aircraft" - this is not a term used in the Convention, since aircraft engines are highly mobile and frequently interchanged and dealt in and financed separately. However, while the Protocol provisions for the most part reflect this through the definition of "aircraft objects", a definition of "aircraft" is also required for the purposes of the Protocol because of the following provisions:

(a) Article IV, which extends the scope of the Convention to cover aircraft registered in an aircraft register of a Contracting State;

(b) Articles IX and XIII, which respectively provide the additional remedies of de-registration of the aircraft and action to be taken by the relevant authorities;

(c) Article XX, which confers jurisdiction additionally on courts of a Contracting State which is the State of registry;

(d) Article XXII, dealing with the relationship between the Convention and the 1948 Geneva Convention on the International Recognition of Rights in Aircraft;

(e) Article XXIII, dealing with the relationship between the Convention and the 1933 Rome Convention on the Precautionary Attachment of Aircraft.

2. "aircraft engines" - the definition incorporates a minimum engine capacity as a way of reflecting that the Convention and Protocol are intended to be confined to objects of high unit value. The Protocol follows the Geneva Convention on the International Recognition of Rights in Aircraft in excluding engines used in military, customs or police services.

3. "aircraft objects" - a compendious phrase to describe all three of the categories mentioned in Article 2(3)(a) of the Convention.

4. "airframes" - airframes used for military, customs or police services are excluded.

5. “common mark registering authority” - the Chicago Convention provides not only for nationality registration of aircraft but also for the performance of a number of functions by a common mark registering authority established by two or more Contracting States. The phrase “registry authority” covers both national and common mark registering authorities (see Article I(o)).
6. “de-registration of the aircraft” - this denotes removal of the aircraft from its register (Article I(i)). Article IX of the Protocol provides the creditor with the additional default remedies of de-registration and export and physical transfer of the aircraft from one territory to another. These additional remedies pave the way for re-registration in another country pursuant to the terms of the agreement and in conformity with the rules of the applicable law.
7. “guarantee contract”, “guarantor” - these terms cover not only suretyship guarantees, which are accessory to the principal contract, are dependent upon its validity and are triggered by the default of the principal debtor, but also guarantees which are issued as independent payment undertakings and are payable on written demand and presentation of any other specified documents irrespective of performance or default in performance of the underlying transaction, for example, documentary credits, demand guarantees and standby credits.
8. “helicopters” - defined in such a way as to encompass a minimum carrying capacity, again capturing the high-unit-value element.
9. “insolvency-related event”, “primary insolvency jurisdiction” - relevant to Article XI.

Article II

Application of Convention as regards aircraft objects

1. – The Convention shall apply in relation to aircraft objects as provided by the terms of this Protocol.
2. – The Convention and this Protocol shall be known as the [UNIDROIT] [~~UNIDROIT~~] Convention on International Interests in Mobile Equipment as applied to aircraft objects.

Article III

Application of Convention to sales

The following provisions of the Convention apply in relation to a sale and shall do so as if references to an international interest, a prospective international interest, the debtor and the creditor were references to a contract of sale, a prospective sale, the seller and the buyer respectively:

- Articles 3 and 4;
- Article 15(1)(a);
- Article 17;
- Article 18(3);
- Article 19(1) (as regards registration of a contract of sale or a prospective sale);
- Article 24(2) (as regards a prospective sale); and
- Article 29.

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 28 (other than Article 28(3) which is replaced by Article XIV(1)), Chapter X, Chapter XII (other than Article 42), Chapter XIII and Chapter XIV (other than Article 55) shall apply to contracts of sale and prospective sales.

Comment

The Protocol extends the Convention to outright sales and prospective sales but only so far as the Convention provisions are appropriate to these. The effect of the present Article is to place the Convention provisions into three categories as regards sales and prospective sales: those that apply with modifications; those that are general in nature and thus apply; and those that do not apply - for example, Article 2, concerning the international interest, and Chapter III dealing with default remedies of creditors, since asset-based default remedies do not feature in sales transactions.

Article IV *Sphere of application*

1. – Without prejudice to Article 3(1) of the Convention, the Convention shall also apply if an aircraft is registered in an aircraft register of a Contracting State. And in such circumstances the application of the Convention shall be from the earlier of:

- (a) the date the aircraft is so registered; and
- (b) the date of an agreement providing that the aircraft shall be so registered.

2. – For the purposes of the definition of “internal transaction” in Article 1 of the Convention:

- (a) an airframe is located in the State of registry of the aircraft of which it is a part;
- (b) an aircraft engine is located in the State of registry of the aircraft on which it is installed or, if it is not installed on an aircraft, where it is physically located; and
- (c) a helicopter is located in its State of registry,

at the time of the conclusion of the agreement creating or providing for the interest.

3. – The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX (2)-(4).

Comment

1. The connecting factor prescribed by Article 3(1) of the Convention is that the debtor is situated in a Contracting State at the time of conclusion of the agreement. As regards aircraft the present Article provides an alternative connecting factor, namely registration of the aircraft in the aircraft register of a Contracting State from the earlier of the date of registration and the date of an agreement for registration.

2. An internal transaction (which a Contracting State may for certain purposes exclude from the Convention by declaration) is one where all the elements - situation of all parties and location of the equipment - are located in the same Contracting State (Convention, Article 1(n)). Paragraph 2 of the present Article gives precision to the concept of location of each of the three kinds of aircraft object.

3. Paragraph 3 enables the parties, by agreement in writing, to exclude Article XI (which strengthens the powers of the creditor on the debtor's insolvency) and to derogate from or vary the effect of any of the provisions of the Protocol except for the restrictions on default remedies specified in Article IX(2)-(4).

Article V

Formalities and effects of contract of sale

1. – For the purposes of this Protocol, a contract of sale is one which:

- (a) is in writing;
- (b) relates to an aircraft object of which the seller has power to dispose; and
- (c) enables the aircraft object to be identified in conformity with this Protocol.

2. – A contract of sale transfers the interest of the seller in the aircraft object to the buyer according to its terms.

3. – Registration of a contract of sale remains effective indefinitely. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.

Comment

1. This Article is confined to contracts of sale, that is, to contracts under which title passes to the buyer immediately, as opposed to conditional sale agreements (see Convention, Article 1(g)).

2. Paragraph 1 prescribes in relation to contracts of sale formalities which track the provisions of Article 6 of the Convention.

3. The reason for indefinite registration of a contract of sale is that since title passes to the buyer outright the seller has no residual interest of the kind that may, in the case of an agreement within the Convention, lead to the discharge of the registration.

Article VI

Representative capacities

A person may enter into an agreement or a sale, and register an international interest in, or a sale of, an aircraft object, in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention.

Comment

A person entering into an agreement as agent, trustee or other representative of the creditor or seller may register the international interest or contract of sale itself and assert rights and interests in its own name. This Article reflects the central role of representation arrangements in aircraft financing, where the sums involved often require syndicated lending and the conferment of representation powers on a trustee or agent. The Article also facilitates fractional ownership, an increasingly common feature in business jet acquisitions, use and financing.

Article VII

Description of aircraft objects

A description of an aircraft object that contains its manufacturer's serial number, the name of the manufacturer and its model designation is necessary and sufficient to identify the object for the purposes of Articles 6(c) and 30(2)(b) of the Convention and Article V(1)(c) of this Protocol.

Comment

This Article specifies three elements as necessary to satisfy the requirements of the Convention and Protocol as to identifiability of an aircraft object. If any of those elements is lacking no interest is validly constituted under the Convention, whether as an international interest or as a contract of sale. The manufacturer's serial number is chosen as the key identifier because of its permanence and its compatibility with the separate treatment of airframes and aircraft engines.

Article VIII

Choice of law

1. – The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations under the Convention, wholly or in part.

2. – Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

Comment

The Convention makes no express provision for choice of law by the parties. That is left to the rules of private international law of the forum State, which in some jurisdictions may impose certain restrictions, as by excluding selection of the law of a State which has no connection with the parties or the transaction. The present Article, which is intended to apply only where a Contracting State has made a declaration to that effect (Article XXVIII(1)), allows the parties to choose a law without restrictions of this kind. The law selected is deemed to be the domestic law of the designated State, not its conflict of laws rules. This is in line with the usual conflict of laws approach in relation to

commercial transactions and avoids problems of *renvoi*. But party choice is limited to *contractual* rights and obligations. Proprietary rights prospectively affect third parties and rights of creditors on the debtor's insolvency, and are outside the scope of this Article.

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article IX

Modification of default remedies provisions

1. – In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

- (a) procure the de-registration of the aircraft; and
- (b) procure the export and physical transfer of the aircraft object from the territory in which it is situated.

2. – The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. – (a) Article 7(2) of the Convention shall not apply to aircraft objects.
- (b) In relation to aircraft objects the following provisions shall apply:
- (i) any remedy given by the Convention shall be exercised in a commercially reasonable manner;
 - (ii) an agreement between the debtor and the creditor as to what is a commercially reasonable manner shall be conclusive.

4. – A chargee giving ten or more calendar days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 7(3) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

Comment

1. Paragraph 1 adds two remedies to those given in the Convention, namely de-registration and export and physical transfer of the object to a different territory. This enables the creditor to change the nationality of an aircraft, in accordance with the terms of the agreement and the applicable law.

2. However, this can only be done with the written consent of any holder of an interest ranking in priority to that of the creditor.

3. Article 7(2) of the Convention requires that the extra-judicial remedies given by Article 7(1) be exercised in a commercially reasonable manner. Paragraph 3 of the present Article disapplies Article 7(2) in relation to aircraft objects and instead extends the requirement of commercial reasonableness to embrace all remedies given by the Convention. However, it also makes an agreement between the parties as to what is commercially reasonable conclusive, whereas Article 7(2) adds the caveat that the contractual provision must not be “manifestly unreasonable.”
4. Paragraph 4 crystallises the meaning of “reasonable prior notice” in Article 7(3).

Article X

Modification of provisions regarding relief pending final determination

1. – This Article applies only where a Contracting State has made a declaration to that effect under Article XXVIII(2) and to the extent stated in such declaration.
2. – For the purposes of Article 12(1) of the Convention, “speedy” in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.
3. – Article 12(1) of the Convention applies with the following being added immediately after sub-paragraph (d):
 “(e) sale and application of proceeds therefrom”,
and Article 42(2) applies with the insertion after the words “Article 12(1)(d)” of the words “and (e)”.

4. – Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 28 of the Convention.

5. – The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 12(2) of the Convention.

6. – With regard to the remedies in Article IX(1):
 (a) they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State no later than [five] working days after the creditor notifies such authorities that the relief specified in Article IX(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with this Convention; and
 (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

Comment

1. This Article strengthens the position of the creditor in certain respects as regards relief sought by the creditor under Article 12 of the Convention. However, it applies in a Contracting State only if and to the extent that the Contracting State has made an affirmative declaration to that effect. A

Contracting State which makes such a declaration is required by Article XXVIII(2) to specify a time-period for the purpose of paragraph 2 of the present Article.

2. Paragraph 3 adds sale and application of the proceeds of sale to the speedy relief that can be sought under Article 12(1), and as a corollary paragraph 4 adds provisions matching those of Article 8(5) of the Convention.

3. The provisions of Article 12(2) can be excluded as regards aircraft objects by agreement of the relevant parties under paragraph 5.

4. Paragraph 6 requires the authorities responsible for de-registration and approval of exports to give co-operation and assistance to facilitate exercise of the creditor's remedies under Article IX(1).

Article XI *Remedies on insolvency*

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

[Alternative A]

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

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

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

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

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

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. – Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

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

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

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

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

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

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

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

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

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

[Alternative B]

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

(a) cure all defaults and agree to perform all future obligations, under the agreement and related transaction documents; or

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

3. – The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. – The creditor shall provide evidence of its claims and proof that its international interest has been registered.

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

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

Comment

1. This Article, which modifies Article 29(3) of the Convention, is designed to provide in relation to aircraft objects a special insolvency regime to govern the creditor's rights where the debtor becomes subject to insolvency proceedings. The underlying purpose is to facilitate capital market financing by ensuring as far as possible that the creditor either secures recovery of the object within a limited time or obtains from the insolvency administrator the curing of all past defaults and a commitment to perform the debtor's future obligations. There are two alternative texts of this Article, Alternative A, the "hard" version, and Alternative B, the "soft" version. It is open to a Contracting State to select one of these alternatives (but only in its entirety) or to select neither (see Article XXVIII(3)), leaving the insolvency issues to be dealt with by the applicable insolvency law.

2. Alternative A requires the insolvency administrator either (a) to give possession of the aircraft object within the waiting period specified in the declaration of the relevant Contracting State or (b) within the waiting period to cure all defaults and agree to perform all future obligations under the agreement. Meanwhile the insolvency administrator must preserve the aircraft object and its value and, subject to this, may allow its use. Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor's consent. Accordingly under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of a security interest over an aircraft object, or vary the terms of the security agreement, without the consent of the creditor. The underlying rationale of Alternative A is to give aircraft object financiers and lessors the assurance of a clear and unqualified rule.

3. Alternative B requires the insolvency administrator or the debtor, as the case may be, within the time specified in a declaration by the Contracting State, to notify the creditor whether it will (a) cure all defaults and perform all future obligations or (b) give the creditor the opportunity to take possession of the aircraft object, in the latter case subject to any additional step or the provision of any additional guarantee that the court may require as permitted by the applicable law. If the insolvency administrator or debtor does not either give the notice as to performance or give the creditor possession, the court may (but is not obliged to) permit the creditor to take possession on such terms as the court may order.

Article XII
Insolvency assistance

The courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.

Comment

This Article is intended to be applied only where a Contracting State has made a declaration to that effect. See Article XXVIII(1).

Article XIII
De-registration and export authorisation

1. – Where the debtor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the registry authority, that authorisation shall be so recorded.

2. – The person in whose favour the authorisation has been issued (the “authorised party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.

3. – The registry authority and other administrative authorities in Contracting States shall expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX.

Comment

This Article is intended to be applied only where a Contracting State has made a declaration to that effect (Article XXVIII(1)). The de-registration mechanism envisaged by this Article is that the debtor issues a de-registration and export request authorisation substantially in the form annexed to the Protocol, and submits the request to the registry authority (i.e. the authority maintaining the register in which the aircraft is registered), which then records the authorisation. Thereupon the person in whose favour the authorisation has been issued (typically the creditor) becomes entitled to procure de-registration of the aircraft and its export. This Article thus provides the means of implementing the remedies given in Article IX(1)(a) and (b).

Article XIV
Modification of priority provisions

1. – A buyer under a registered contract of sale takes its interest free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest, but subject to a previously registered interest.

2. – The provisions of Article 28(1) - (4) of the Convention shall determine the priority of the holders of interests in an aircraft engine and Article 28(6) shall not apply.

3. – Ownership of an aircraft engine shall not pass by virtue of its installation on, or removal from, an airframe or an aircraft.

Comment

1. Paragraph 1 applies the general priority rule in Article 28(1) to contracts of sale registered in accordance with the Protocol.

2. Paragraph 2 applies the priority rules of Article 28(1)-(4). Although on a literal construction this has the effect of retaining Article 28(3), it is clear that it is intended to be displaced by paragraph 1 of the present Article. Article 28(3) lays down a special rule governing the position of an outright buyer, whose interest is not capable of protection by registration. But the Protocol, in extending the scope of the Convention priority rules to include outright sales, enables even an outright buyer to register its interest in the International Registry, so that the special rule in Article 28(3) becomes unnecessary, and the buyer of a registered interest is given the same priority under paragraph 1 as the holder of an international interest enjoys under Article 28(1).

3. Article 28(6) of the Convention provides that it does not determine priority as between the holder of an interest in an item held prior to its installation on an object and the holder of an international interest in that object. That would be left to the applicable law. Paragraph 2 of the present Article disapplies Article 28(6) as regards aircraft objects and instead paragraph 3 provides that ownership of an aircraft engine does not pass by virtue of its installation on, or removal from, an airframe or aircraft. The effect is that the title of the owner of the aircraft engine is preserved even if it would have passed to the owner of the airframe or aircraft under the applicable law, for example, under a rule of accession by which title to an article which becomes an accession to a larger object passes to the owner of the larger object. In consequence of paragraph 2 of the present Article registration of an international interest in the airframe does not by itself affect the priority of an unregistered interest in an aircraft engine installed on the airframe, since the subject-matter of the two interests is different. This paragraph responds to the common practice by which aircraft engines are moved from one airframe to another, and adopts the principle of “title tracking” rather than “title transfer”.

Article XV
Modification of assignment provisions

1. – Article 30(2) of the Convention applies with the following being added immediately after sub-paragraph (c):

“(d) is consented to in writing by the debtor, whether or not the consent is given in advance of the assignment or identifies the assignee.”¹

[2. – Article 35 of the Convention applies as if the words following the phrase “under Article 28” were omitted].

Comment

1. Paragraph 1 of this Article adds a requirement, not usually found in national laws governing the assignment of rights, that the debtor shall have given its consent to the assignment. If the first of the two alternative bracketed provisions in Article 32(1)(c) is adopted, paragraph 1 of the present Article becomes redundant. If the second alternative is adopted, the debtor has to pay or otherwise perform only if it has not been given prior notice in writing of an assignment in favour of another person.

2. The effect of paragraph 2 is that any priority of the holder of a registered international interest under Article 28 to which an assignee succeeds under Article 31(1)(a) carries over to associated rights without being restricted to the sums specified in paragraphs (a), (b) and (c) of Article 35.

CHAPTER III

**REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS
IN AIRCRAFT OBJECTS**

Article XVI
The Supervisory Authority and the Registrar

1. – The Supervisory Authority shall be Y .

2. – The first Registrar shall operate the International Registry for a period of five years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or re-appointed at regular five-yearly intervals by the Supervisory Authority.

Comment

1. Following recommendations by the second and third Joint Sessions and by the ICAO Legal Committee that the Council of ICAO should consider taking on the responsibility of Supervisory Authority, the Council has indicated that it was prepared in principle to accept the function of Supervisory Authority if so requested by the Diplomatic Conference.

¹ The removal of square brackets in Article 32(1)(c) Convention may have implications for this provision.

2. The Diplomatic Conference will need to consider paragraph 2 in the context of the work of the Registry Task Force established to examine practical questions relating to the International Registry and its operation.

Article XVII
First regulations

The first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of this Protocol.

Article XVIII
Designated entry points

1. – At the time of ratification, acceptance, approval of, or accession to this Protocol, a Contracting State may, subject to paragraph 2, designate an entity in its territory as the entity through which the information required for registration shall or may be transmitted to the International Registry.

2. – A Contracting State may make a designation under the preceding paragraph only in relation to:

- (a) international interests in, or sales of, helicopters or airframes pertaining to aircraft for which it is the State of registry;
- (b) registrable non-consensual rights or interests created under its domestic law; and
- (c) notices of national interests.

Comment

It is for each Contracting State to decide whether to make a declaration designating a national entry point for the transmission of registration applications. Paragraph 2 identifies the Contracting State entitled to make such a designation in relation to aircraft objects. It is envisaged that a Contracting State which designates an entity pursuant to this Article will be free to add such additional requirements as it considers necessary for transmission of data to the International Registry, though in so doing it will need to have regard to Article 25 of the Convention. The registration will take effect as provided by Article 18 of the Convention. By contrast searches will be able to be made on-line from any point connected to the International Registry.

Article XIX
Additional modifications to Registry provisions

1. – For the purposes of Article 18(5) of the Convention, the search criterion for an aircraft object shall be its manufacturer's serial number, supplemented as necessary to ensure uniqueness. Such supplementary information shall be specified in the regulations.

2. – For the purposes of Article 24(2) of the Convention and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than five calendar days after the receipt of the demand described in such paragraph.

3. – The fees referred to in Article 16(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 16(2) of the Convention.

4. – The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis. The various entry points shall be operated during working hours in their respective territories.

5. – The insurance or financial guarantee referred to in Article 27(2) shall cover all liability of the Registrar under the Convention.

Comment

Paragraph 3 sets out the basis on which registration and search fees are to be determined. The twin approaches of an electronic system and, in consequence, notice filing (as opposed to presentation or filing of contract documents) are designed to ensure that costs are kept down.

CHAPTER IV

JURISDICTION

Article XX

Modification of jurisdiction provisions

For the purposes of Articles 42 and 44 of the Convention and subject to Article 41 of the Convention, a court of a Contracting State also has jurisdiction where that State is the State of registry.

Comment

This Article confers concurrent jurisdiction on courts of the State of registry of an aircraft to make orders under Article 42 (speedy judicial relief) and Article 44 (general jurisdiction) of the Convention. However, it cannot exercise jurisdiction where, under Article 41, the parties have chosen another Contracting State as the exclusive forum. Moreover, although the present Article does not specifically refer to Article 43 it is clear that it is subject to that Article also, so that the courts of a State of registry which is not the State where the Registrar has its centre of administration have no jurisdiction to make orders against the Registrar.

Article XXI

Waivers of sovereign immunity

1. – Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Articles 41, 42 or 44 of the Convention or relating to enforcement of rights and interests relating to an aircraft object under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

2. – A waiver under the preceding paragraph must be in a writing that contains a description of the aircraft object.

Comment

The reason for this Article is that many airlines are owned or controlled by States or State entities, and while under the law of many States it is considered an aspect of State sovereignty that a State can waive its immunity, this is not universally true. This Article makes it clear that a waiver of immunity is binding, though only where it is in a writing that describes the aircraft object. The waiver may relate to immunity from jurisdiction, enforcement or both. The instrument of waiver should make clear its extent. The general rule of international law is that waiver of immunity from suit does not by itself constitute waiver of immunity from enforcement.

CHAPTER V

RELATIONSHIP WITH OTHER CONVENTIONS

Article XXII

Relationship with the Convention on the International Recognition of Rights in Aircraft

The Convention shall, for a Contracting State that is a party to the *Convention on the International Recognition of Rights in Aircraft*, opened for signature in Geneva on 19 June 1948, supersede that Convention as it relates to aircraft, as defined in this Protocol, and to aircraft objects. However, with respect to rights or interests not covered or affected by the present Convention, the Geneva Convention shall not be superseded.

Comment

This Article establishes the primacy of the present Convention as regards matters within its scope relating to the creation, enforcement, perfection and priority of international interests in aircraft and aircraft objects, while retaining the provisions of the Geneva Convention relating to the recognition of rights and interests other than those “covered or affected by” the present Convention, a phrase intended to be read widely.

Article XXIII

*Relationship with the Convention for the Unification of Certain Rules
Relating to the Precautionary Attachment of Aircraft*

1. – The Convention shall, for a Contracting State that is a Party to the *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft*, opened for signature in Rome on 29 May 1933, supersede that Convention as it relates to aircraft, as defined in this Protocol.

2. – A Contracting State Party to the above Convention may declare, at the time of ratification, acceptance, approval of, or accession to this Protocol, that it will not apply this Article.

Article XXIV

Relationship with the UNIDROIT Convention on International Financial Leasing

The Convention shall supersede the *UNIDROIT Convention on International Financial Leasing* as it relates to aircraft objects.

CHAPTER VI

FINAL PROVISIONS

Article XXV

Adoption of Protocol

1. – This Protocol is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the Protocol to the [UNIDROIT] ~~[UNIDROIT]~~ Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment and will remain open for signature by all Contracting States at [...] until [...].

2. – This Protocol is subject to ratification, acceptance or approval of Contracting States which have signed it.

3. – This Protocol is open for accession by all States which are not signatory States as from the date it is open for signature.

4. – Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

Article XXVI
Entry into force

1. – This Protocol enters into force on the first day of the month following the expiration of three months after the date of deposit of the [third/fifth] instrument of ratification, acceptance, approval or accession.

2. – For each Contracting State that ratifies, accepts, approves or accedes to this Protocol after the deposit of the [third/fifth] instrument of ratification, acceptance, approval or accession, this Protocol enters into force in respect of that Contracting State on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Comment

The number of ratifications required reflects what has become the norm in private law conventions. See Comment to Article 47 of the Convention.

Article XXVII
Territorial units

1. – If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them and may substitute its declaration by another declaration at any time.

2. – These declarations are to be notified to the depositary and are to state expressly the territorial units to which this Protocol extends.

3. – If a Contracting State makes no declaration under paragraph 1, this Protocol is to extend to all territorial units of that Contracting State.

Article XXVIII
Declarations relating to certain provisions

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

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

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

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

Article XXIX

Subsequent declarations

1. – A Contracting State may make a subsequent declaration at any time after the date on which the Protocol enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. – Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of deposit of the instrument in which such declaration is made with the depositary. Where a longer period for that declaration to take effect is specified in the instrument in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. – Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of that subsequent declaration.

Article XXX

Withdrawal of declarations and reservations

Any Contracting State which makes a declaration under, or a reservation to this Protocol may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article XXXI

Denunciations

1. – This Protocol may be denounced by any Contracting State at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. – Any such denunciation shall take effect on the first day of the month following the expiration of [six/twelve] months after the date of deposit of the instrument of denunciation with the depositary. Where a longer period for that denunciation to take effect is specified in the instrument of denunciation, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. – Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of that denunciation.

Article XXXII

Establishment and responsibilities of Review Board

1. – A five-member Review Board shall promptly be appointed to prepare yearly reports for the Contracting States addressing the matters specified in sub-paragraphs (a)-(d) of paragraph 2.

2. – At the request of not less than twenty-five per cent of the Contracting States, conferences of the Contracting States shall be convened from time to time to consider:

(a) the practical operation of this Protocol and its effectiveness in facilitating the asset-based financing and leasing of aircraft objects;

(b) the judicial interpretation given to the terms of the Convention, this Protocol and the regulations;

(c) the functioning of the international registration system and the performance of the Registrar and its oversight by the Supervisory Authority; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

Comment

This Article provides the mechanism for periodic review of the Convention and Protocol in order to ensure that their provisions continue to be responsive to the needs of the aviation industry as regards aircraft objects.

Article XXXIII

Depositary arrangements

1. – This Protocol shall be deposited with the [...].

2. – The [depositary] shall:

(a) inform all Contracting States of this Protocol and [...] of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made in accordance with this Protocol;

(iii) the withdrawal of any declaration;

(iv) the date of entry into force of this Protocol; and

(v) the deposit of an instrument of denunciation of this Protocol together with the date of its deposit and the date on which it takes effect;

- (b) transmit certified true copies of this Protocol to all signatory States, to all States acceding to the Protocol and to [...];
- (c) provide the Registrar with the contents of each instrument of ratification, acceptance, approval, accession, declaration or withdrawal of a declaration, so that the information contained therein may be made publicly accessible; and
- (d) perform such other functions customary for depositaries.

Annex

**FORM OF IRREVOCABLE DE-REGISTRATION
AND EXPORT REQUEST AUTHORISATION**

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

The undersigned is the registered [operator] [owner]* of the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturers serial number [insert manufacturer's serial number] and registration [number] [mark] [insert registration number/mark] (together with all installed, incorporated or attached accessories, parts and equipment, the "aircraft").

This instrument is an irrevocable de-registration and export request authorisation issued by the undersigned in favour of [insert name of creditor] ("the authorised party") under the authority of Article XIII of the Protocol to the [UNIDROIT] [~~UNIDROFF~~] Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment. In accordance with that Article, the undersigned hereby requests:

(i) recognition that the authorised party or the person it certifies as its designee is the sole person entitled to:

(a) procure the de-registration of the aircraft from the [insert name of aircraft register] maintained by the [insert name of registry authority] for the purposes of Chapter III of the *Convention on International Civil Aviation*, signed at Chicago, on 7 December 1944, and

(b) procure the export and physical transfer of the aircraft from [insert name of country]; and

(ii) confirmation that the authorised party or the person it certifies as its designee may take the action specified in clause (i) above on written demand without the consent of the undersigned and that, upon such demand, the authorities in [insert name of country] shall co-operate with the authorised party with a view to the speedy completion of such action.

The rights in favour of the authorised party established by this instrument may not be revoked by the undersigned without the written consent of the authorised party.

Please acknowledge your agreement to this request and its terms by appropriate notation in the space provided below and lodging this instrument in [insert name of registry authority].

[insert name of operator/owner]

Agreed to and lodged this
[insert date]

By: [insert name of signatory]
Its: [insert title of signatory]

[insert relevant notational details]

* Select the term that reflects the relevant nationality registration criterion.