

## The New International Regimen Proposed by UNIDROIT as a Means of Safeguarding Rights *in rem* of the Holder of an Aircraft under Netherlands Law

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### I. – INTRODUCTION

In November 2001, a *Convention on International Interests in Mobile Equipment* (CIME) and an *Aircraft Equipment Protocol* (AEP) are due to be concluded in South Africa.<sup>1</sup> The Convention and its Protocol will be known as the *Convention on International Interests in Mobile Equipment as Applied to Aircraft Objects* (CIME/AEP).<sup>2</sup> The CIME/AEP, and any Protocols subsequently introduced,<sup>3</sup> promise to be among the most important regulations in the area of international commercial law.<sup>4</sup> World-wide, both industrialised and developing countries are expected to accede to this instrument.

The CIME/AEP contains *inter alia* provisions relating to property law. It provides the creation of an autonomous *international interest*. This unique right *in rem*,<sup>5</sup> which is consensual in nature, encompasses the following categories of *national* legal relationships:

- (a) an *interest* under security agreement,
- (b) an *interest* under title reservation agreement, or

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<sup>1</sup> This article is based on the text of the Report of the ICAO Legal Committee, 31<sup>st</sup> Session, 8 September 2000.

<sup>2</sup> Art. II(2) AEP.

<sup>3</sup> The Railway Rolling Stock Protocol and the Space Property Protocol (Art. 49 CIME). More Protocols may be created in due course (Art. 50 CIME).

<sup>4</sup> B.P. HONNEBIER, "The need for clear rules to facilitate the international financing of the acquisition and use of aircraft", *Notarius International* (2000), No. 4, 146; M.J. STANFORD, "Preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment: Basic Features", Paper presented at a Briefing organised by the Aviation Working Group and the International Air Transport Association, Brussels, 14.V.1998; R.M. GOODE, "The UNIDROIT draft mobile equipment Convention: confluence of legal concepts and philosophies", *Mélanges en l'honneur de Denis Tallon* (1999), 69 at 81.

<sup>5</sup> In this article the terms "right *in rem*", "real right" and "interest" are used alternatively.

(c) an *interest* under leasing agreement.

These three legal devices are the methods of finance which are used most often in international practice and which require uniform rules of property law. The CIME/AEP regime also provides for special *remedies* which may be exercised by the holder of an international interest. An international interest can be constituted only in specific categories of *mobile equipment*. In general, the term *mobile equipment* encompasses objects which by their nature are used internationally. For the purpose of the AEP, it encompasses only airframes, aircraft engines and helicopters.<sup>6</sup>

In the Netherlands, the property law status of aircraft was laid down in Title 15 (Aircraft), Book 8 of the Netherlands Civil Code (hereinafter: NCC), with effect from 1996.<sup>7</sup> The present rules result from the incorporation of the substantive law section of the separate Statute of Registered Aircraft (SRA) into the NCC.<sup>8</sup> The statute was motivated by the text and objective of the *Convention on the Recognition of Rights in Aircraft* (1948 Geneva Convention).<sup>9</sup> Dutch air law provides *inter alia* for the possibility of granting an airline company a right *in rem* in the acquisition of an aircraft once it has paid a certain amount of money or has fulfilled another obligation (Article 8:1308 NCC). Furthermore, the holder may be granted a right *in rem* in the possession<sup>10</sup> of an aircraft provided the agreement is concluded for at least six months (Article 8:1309 NCC). These rights are consensual in nature. The persons entitled acquire a full right *in rem* by registering the notarial deed incorporating the agreement. The real rights of the holder of an aircraft occupy an exceptional position in the Dutch property law system, both in dogmatic and conceptual terms. The general rules of property law contained in Books 3, 5 and 6 of the NCC are not fully applicable. That part of Dutch air legislation that results from the Geneva Convention is a *lex specialis*. It has supremacy over the general provisions relating to property law contained in these Books.

The rights *in rem* of Netherlands airlines originate in the laws of certain states of the United States pre-dating World War II. Under specific American *conditional sale*<sup>11</sup> transactions and under certain versions of an *equipment trust*, the buyer or lessee was afforded protection as favourable as that afforded to the seller or lessor. These *proprietary interests* were incorporated into the Geneva Convention under American influence. These foreign legal devices were then transposed into the

<sup>6</sup> Art. 2(3)(a) CIME; Art. I(c) and Art. II AEP.

<sup>7</sup> Effective from 1996, the substantive part of the *Wet teboekgestelde Luchtvaartuigen* (Statute of Registered Aircraft) was incorporated into the *Burgerlijk Wetboek* (BW = Civil Code), Book 8, Title 15 (Aircraft).

<sup>8</sup> Act of 26 January 1995, *Nederlands Staatsblad*, 71.

<sup>9</sup> Geneva Convention, 19 June 1948, *Nederlands Tractatenblad* 1952, 86 (English and French texts) and *Tractatenblad* 1959 (Netherlands text). See also the Netherlands Statute of Registered Aircraft, 6 March 1957, *Staatsblad* 72.

<sup>10</sup> The term "possession" means that the airline company has control and/or use of an aircraft.

<sup>11</sup> K. RIJCK, *Het Verdrag van Genève*, Dissertation (1952), 108.

Netherlands' domestic legislation, by reason of the need to apply them in national practice with regard to the financing of aircraft.<sup>12</sup> It is interesting to note, however, that at this point in time no other Member State of the European Union has similar substantive rules of property law for the benefit of its airlines. In the United States, the legal devices of conditional sale and equipment trust, and certain forms of lease transactions, are currently governed by the regime of Article 9 of the Uniform Commercial Code (hereinafter: UCC). The UCC contains general rules on virtually all forms of *secured transactions*.<sup>13</sup> These American secured interests in turn fall within the sphere of application of the forthcoming CIME/AEP.<sup>14</sup>

The question arises of whether the sphere of application of the CIME/AEP also extends to the Netherlands' rights *in rem* of a holder in the acquisition or possession of an aircraft (Articles 8:1308 and 8:1309 NCC). These legal relationships satisfy the application criteria of the CIME/AEP regime where they can be characterised as an *international interest*. Some legal practitioners in the Netherlands argue that the CIME/AEP regime does not govern the above-mentioned real rights and that the interests of Dutch airlines would not therefore be protected. That, in their view, would be one of the most persuasive arguments against accession to the CIME/AEP.<sup>15</sup> It would substantiate their opinion that the forthcoming regime is *solely* financier-friendly. However, they fail to put forward any legal argument in support of this.

In any event, their assumption is incorrect. Drawing on the history and purpose of the U.S. and Netherlands air regulations and the intention of the Netherlands legislator, it is argued in this article that the sphere of application of the future CIME/AEP extends to these special rights. Consequently, in the near future it will be possible to protect the major interests of Dutch airlines also at international level, while at present they are afforded only national protection. This is yet another reason for the Kingdom of the Netherlands<sup>16</sup> to ratify the future CIME/AEP.

In the following sections, the author focuses on the history of the Netherlands rights *in rem* of a holder in the acquisition and possession of an aircraft and on the pragmatic secured transactions regime of the forthcoming CIME/AEP. In Section II, the American history of Netherlands air law is considered. The objective and purpose of the Geneva Convention are discussed in Section III, while Section IV relates to the present Netherlands rights *in rem* of the holder of an aircraft. Section V deals with the sphere of

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<sup>12</sup> *Memorie van Toelichting* (Explanatory Memorandum) (1955-1956), 4 4134, No. 6, 11 and *Memorie van Toelichting* (1993-1994), No. 3, 1.

<sup>13</sup> In many Canadian Provinces similar rules have been established under the Property Security Acts.

<sup>14</sup> R.M. GOODE, *supra* note 4 at 76.

<sup>15</sup> B.J.H. CRANS, "Analysis of the merits of the proposed UNIDROIT Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol on the basis of a fictional scenario", 2 *Air and Space Law* (2000), 51; G.M.H. VAN LOKVEN, *Jaarverslag van de Nederlandse Vereniging van Leasemaatschappijen* (2000), 10.

<sup>16</sup> The Kingdom of the Netherlands includes the Netherlands (European territory), the Netherlands Antilles and Aruba. At present no uniform law exists in these States with regard to the proprietary aspects of air law. Ratification of the CIME/AEP by the Kingdom of the Netherlands would be beneficial for all three States.

application of the CIME/AEP and the fact that the Netherlands rights *in rem* fall within the applicability thereof. Section VI winds up with some concluding remarks.

## II. – THE RIGHTS OF THE HOLDER OF AN AIRCRAFT UNDER NORTH-AMERICAN LAW

In most (European) countries, the *national authorities* traditionally occupy an important position as regards financing the acquisition and use of aircraft. The State is often the sole or major shareholder in the national airline and in such cases, new aircraft are frequently financed by Government funds. Hence many airlines have no need to resort to the modern financing transactions commonly used in North American jurisdictions, as discussed *infra*. However, the current trend towards privatisation of national airlines is changing this situation. Airline companies are increasingly having to turn to private financiers. In the United States, on the other hand, civil aviation has always been in the hands of *private undertakings* which have had to bear the responsibility for financing the necessary aircraft themselves. Yet no American airline can fund such high-value objects from its own resources, and they have to arrange loans with banks and other financial institutions. In such cases, a right *in rem* can be constituted in high-value aircraft, which presently have long commercial lives, in order to protect the financier's interests. In North American practice, use is made in particular of asset-based financing and leasing transactions.

A common feature of these categories of modern financing techniques is that the aircraft is used as the object of credit. When civil aviation first began, however, there was no uniform law on financing the acquisition and use of aircraft in the U.S. states. Depending on the circumstances of the case, the financier and airline could, for example, conclude a chattel mortgage, fleet mortgage, conditional sale, lease, equipment trust or hire purchase agreement. There were significant differences from state to state as regards the content and scope of these legal devices, resulting from an absence of uniform U.S. rules of property law and from unequivocal jurisprudence concerning this area of the law.

The *Civil Aeronautics Act* (hereinafter: CAA)<sup>17</sup> was introduced in the United States in 1938. It laid down provisions on the registration of agreements constituting rights *in rem* in aircraft and on the consequences thereof in *all* states.<sup>18</sup> The legal validity of the origin, contents and scope of these rights, on the other hand, was determined by the property law of those states themselves. As pointed out above, these state property law regimes tended to display considerable differences, in particular in respect of the above-mentioned *conditional sale* transactions, the content and purpose of which were subject to different rules from state to state. According to the courts of some states, under a conditional sale the buyer was to be regarded as the

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<sup>17</sup> The CAA was the predecessor of the Federal Aviation Act (FAA). See *Air Law and Treaties of the World*, Vol. II, 2885. The CAA contained definitions, for instance regarding various forms of financial transactions.

<sup>18</sup> See *In the matter of P. O'Connor for registration of aircraft*, 1 CAA 5 (1938); J.T. STEWART, "Aircraft leasing practices in the United States – a few observations", *Air Law*, Vol. VIII (1983), 72.

owner, whereas the courts of other states ruled that the seller was to be regarded as the owner. With so many different versions of conditional sale, the CAA was designed to put an end to the problem using the following two definitions, according to which *conditional sale* means:<sup>19</sup>

- (a) any contract for the sale of an aircraft or portion thereof under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any other contingency; or
- (b) any contract for the bailment or leasing of an aircraft or a portion thereof by which the bailee or lessee contracts to pay as a compensation a sum substantially equivalent to the value thereof, *or* has the option of becoming the owner thereof upon full compliance with the terms of the contract.

The conditional sale in turn formed the basis for the development of the aforementioned *equipment trust*. This legal device was used in the first instance in the financing of canal boats and railway rolling stock,<sup>20</sup> but after World War II, it was also frequently applied in the acquisition of aircraft. The equipment trust phenomenon encompassed aspects of conditional sale, lease and trust. Again, however, the equipment trust assumed different legal forms depending on the state in which it was created. The version of conditional sale defined in subparagraph (a) of the CAA became the basis for an equipment trust developed in the State of New York. Pursuant to the law of this state, the buyer under a conditional sale, which in turn formed part of an equipment trust, was entitled to extensive protection (New York Plan). The type of conditional sale defined in subparagraph (b) of the CAA, on the other hand, formed the basis for a special equipment trust which emerged in the State of Pennsylvania (Pennsylvania Plan) because in that state, a "New York" conditional sale had effect only as between parties.<sup>21</sup> Even if such a right were registered, the person entitled could not invoke it against third parties. The property law of the State of Pennsylvania, on the other hand, did provide for the invocation of registered lease agreements against third parties.

There was no uniform property law in the United States until rules were established on *secured transactions* in the Uniform Commercial Code (hereinafter: UCC) and the introduction thereof into the legal systems of all the federal states.<sup>22</sup> Under Article 9 UCC, secured transactions referred to "... security interests created by

<sup>19</sup> Section 1(17) CAA, 1938. J.T. STUART, *supra* note 18 at 72; K. RIJKS, *supra* note 11 at 37.

<sup>20</sup> M.D. RICE, "Current issues in aircraft finance", *The Journal of Air Law and Commerce*, Vol. 56 (1990), 1029.

<sup>21</sup> For a further form of equipment trust, see "Philadelphia Plan". See also R.O. WILBERFORCE, "The international recognition of rights in aircraft", 2 *International Law Quarterly* 412 (1948), 436; K. RIJKS, *Het Verdrag van Genève* (1952), 36.

<sup>22</sup> J.B. VEGTER, "The distinction between true leases and secured transactions under the Uniform Commercial Code", *Molengrafica* (1994).

contract including ... equipment trust, conditional sale ... and lease.”<sup>23</sup> Security interests in turn fall within the sphere of application of the future CIME/AEP, since they can form the basis for an international interest.<sup>24</sup> This is because they fall within the broad definition of “*an interest granted by the chargor under a security agreement*” (Article 2(2)(a) CIME). The sphere of application of the CIME/AEP is examined in Section V *infra*.

### III. – THE RIGHTS OF THE HOLDER OF AN AIRCRAFT UNDER THE GENEVA CONVENTION

An attempt was made by the International Technical Committee of Legal Aeronautical Experts (CITEJA)<sup>25</sup> in 1933 to lay down international rules on the establishment of mortgages in aircraft, to remedy the lack of rules at that time on the private law aspects of international aviation law. One problem it encountered was that no mortgages on aircraft could be established, for example, in the Netherlands and in many other countries, and effective uniform rules on the property law aspects of air law accordingly appeared to be impossible. The Convention proposed by CITEJA never entered into force. In the years that followed, both the United States and Europe were anxious to see the introduction of a Convention as soon as possible, but since an aviation Convention covering aspects of substantive property law was not feasible at the time,<sup>26</sup> the decision was finally taken to be content with a Convention on *recognition*. This resulted in the present (1948 Geneva) *Convention on the Recognition of Rights in Aircraft*. Since this Convention governs only the recognition of foreign rights *in rem* in aircraft, it is by its very nature less effective than a unifying Convention complementing the Contracting States’ national (closed) security regimes.<sup>27</sup> It has been regarded from the outset as no more than a provisional body of rules.<sup>28</sup>

The Geneva Convention provides that four distinct classes of rights may be constituted in aircraft in a Contracting State and that they must be *recognised* in the other Contracting States.<sup>29</sup> The Netherlands ratified the Convention in 1957.<sup>30</sup>

<sup>23</sup> See § 9-202 UCC: “Each provision of this Article with regards to rights, obligations and remedies applies whether title to collateral is in the secured party or the debtor”. See also § 9-201 UCC: “Security interest means an interest in personal property or fixtures which secures payment or performance of an obligation...”. The UCC is presently being revised. For the forthcoming text (effective July 2001), see *Uniform Laws Annotated* (2000).

<sup>24</sup> R.M. GOODE, *supra* note 4 at 76.

<sup>25</sup> CITEJA Doc. 162, 158; R.O. WILBERFORCE, *supra* note 21 at 422.

<sup>26</sup> After World War II, CITEJA had made another attempt to draft a uniform mortgage Convention.

<sup>27</sup> A. DJONEGORO, “The UNIDROIT proposal for a uniform air law: a new aircraft mortgage convention?”, *Annals of Air and Space Law*, Vol. XXII-II (1997), 57.

<sup>28</sup> ICAO Doc. 5722, 345; J.A. KRUPSKI, “Conflict of laws in aircraft securitization”, *Annals of Air and Space Law*, Vol. XXIV (2000), 129.

<sup>29</sup> See the Annotated text of the Convention on International Recognition of Rights in Aircraft, prepared by the Legal Subcommittee of the Air Coordinating Committee, 16 *Journal of Air Law and Commerce* (1949), 70.

<sup>30</sup> Act of Approval of the (1948) Geneva Convention, 6 March 1957, *Nederlands Staatsblad*, 71.

According to the Netherlands Explanatory Memorandum <sup>31</sup> relating to the approval of the Convention,

“the purpose thereof is primarily to provide international protection for the rights of those who have a *right in rem* (and in particular a mortgage right) in an aircraft. Consequently, its objective is to promote the extension of credit to owners of aircraft. Without international recognition of these *security rights*,<sup>32</sup> the extension of credit for aircraft is a precarious business ...”

and both the ratification of the Convention *and* the adaptation of Dutch laws to the Convention were, therefore, desirable.<sup>33</sup>

Article I(1) of the Geneva Convention incorporates the following categories of rights *in rem* in aircraft which must be recognised by the Contracting States:

1. “Rights of property in aircraft” (subparagraph (a)). For example, outright ownership,<sup>34</sup> fiduciary transfer of ownership for security purposes (*fiducia cum creditore*), the right of a seller under a title reservation agreement and the right of a (U.S. true) lessor.

2. “Mortgages, hypothèques and similar rights in aircraft which are contractually created as security for payment of an indebtedness” (subparagraph (d)). For example, chattel mortgage, title mortgage, fleet mortgage, lien mortgage, hypothèque, and any other type which is in the nature of a mortgage, pledge and equivalent rights *in rem* which involve payment of a debt.

3. “Rights to acquire aircraft by purchase coupled with possession <sup>35</sup> of the aircraft” <sup>36</sup> (subparagraph (b)). On account of its important position in international civil aviation, the United States very much left its mark on the contents of the Convention.<sup>37</sup> The United States delegation insisted, for example, that the right of the holder in the acquisition of an aircraft be incorporated into the Convention. As explained above, this right originated in New York. Under the law of that state, a buyer, on the basis of a *conditional sale*<sup>38</sup> or *equipment trust*, enjoyed as much protection as a seller. The primary aim of these transactions was to allow the airline to

<sup>31</sup> *Memorie van Toelichting* (1955-1956), 4134, 1.

<sup>32</sup> In the Netherlands Explanatory Memorandum to the ratification of the Geneva Convention, the terms “right *in rem*” (*zakelijk recht*) and “security right” (*zekerheidsrecht*) are used alternatively.

<sup>33</sup> *Memorie van Toelichting* (1955-1956), 4134, 2.

<sup>34</sup> Annotated text of the Convention, 70.

<sup>35</sup> Possession of the aircraft is not considered a vital necessity. See the Annotated text of the Convention on International Recognition of Rights In Aircraft prepared by the Legal Subcommittee of the Air Coordinating Committee, 15 *Journal of Air Law and Commerce* (1948), 348.

<sup>36</sup> The formal Netherlands translation is: “het recht van de houder van een luchtvaartuig tengevolge van een koopovereenkomst de eigendom daarvan te verkrijgen”. See Netherlands *Tractatenblad* 1959, No. 152, 1; *Bijlage bij de Memorie van Toelichting*, No. 4, 3.

<sup>37</sup> J.P. HONIG, *The legal status of aircraft* (1946), 81; K. RIJKS, *supra* note 11 at 110-111.

<sup>38</sup> “The legislative history of the convention indicates that the *civil code* lawyers intended this clause to cover this type of transaction”. See the Annotated text of the Geneva Convention, *supra* note 29 at 70.

become the owner once it had fulfilled its contractual obligations. In the first instance, there was criticism of the incorporation of this provision from the non-American side, since it did in fact run counter to the Convention's primary objective, *i.e.* that of protecting financiers.<sup>39</sup> The same criticism was expressed concerning the right of possession of an aircraft, which will be discussed *infra*. Nevertheless, the U.S. rights found their way into the Convention:

"These (four) classes of rights are so described as to break down into their various constituent elements every known interest regarded as a recordable interest in American law. When finally so broken down the bugaboo of the *equipment trust* which confronted the foreign lawyers soon vanished."<sup>40</sup>

4. "Rights to possession of aircraft under leases of six months or more"<sup>41</sup> (subparagraph (c)). The United States delegation also played an important role in the incorporation of this provision into the Convention. This article was based on the above-mentioned special forms of *conditional sale* and *equipment trust*, as developed in the State of Pennsylvania. In this state, a lease was used to grant to the holder of an aircraft rights which he could invoke against third parties.<sup>42</sup> Although this provision is aimed primarily at promoting the financing of aircraft, its wording is so broad as to cause "conventional" rental agreements also to fall within its scope.<sup>43</sup> The countries which have acceded to the Convention are therefore required also to recognise a registered rental contract of six months or more as a right *in rem* of the airline.<sup>44</sup> The six-month period is incorporated in order to ensure that the courts need not examine short-term lease transactions.

The Contracting States were entirely free as to how they gave effect to Article I of the Geneva Convention.<sup>45</sup> This freedom created legal uncertainty, since the Convention was implemented in completely different ways in the various Contracting States.

<sup>39</sup> See the comments by one of the drafters of the Convention: R.O. WILBERFORCE, *supra* note 21 at 437; *IDEM*, *Report of the Forty-Fourth Conference of the International Law Association* (1952), 237: "These clauses were drafted to cover the financial devices used in the U.S.A. known as the equipment trust and the conditional sale agreement. This is ... illogical ... and unnecessary."

<sup>40</sup> The author referred to the four categories of rights that must be recognised by the Member States of the Geneva Convention. See G.N. CALKINS, "Creation of international recognition of title and security rights in aircraft", 15 *Journal of Air Law and Commerce* (1948), 166; ICAO Doc. 4635, 37.

<sup>41</sup> The formal Netherlands translation is: "het recht een luchtvaartuig te gebruiken op grond van een huurovereenkomst, gesloten voor een termijn van ten minste zes maanden". See the Netherlands *Tractatenblad* 1959, No. 152, 2; Netherlands *Bijlage bij de Memorie van Toelichting*, No. 4, 3.

<sup>42</sup> B. HOFSTETTER, *L'hypothèque aérienne* (1950), 222, K. RUKS, *supra* note 11 at 115; J.P. HONIG, *supra* note 37 at 82.

<sup>43</sup> Annotated text of Geneva Convention, *supra* note 29 at 71.

<sup>44</sup> R.O. WILBERFORCE, *supra* note 21 at 237: "This clause gives protection to ... a purchaser and also to a *straight* lessee under a hiring agreement."

<sup>45</sup> I.H.Ph. DIJDERIKS-VERSCHOOR: "This [UNIDROIT Mobile Equipment Project] will create more security ..., whereas the Convention of Geneva leaves much to national rights", in *Comments (...), Revised draft articles of a future UNIDROIT Convention* (1997), UNIDROIT Study LXXII (1997), 4.

The Netherlands, for example, was the only country in Europe to incorporate into its national law the above-mentioned rights *in rem* of a holder in the acquisition and possession of an aircraft. This can give rise to legal uncertainty concerning, for example, the enforcement and transposition of these rights in the closed property law systems of other (European) countries.<sup>46</sup>

#### IV. – THE RIGHTS OF THE HOLDER OF AN AIRCRAFT UNDER NETHERLANDS LAW

The Netherlands implemented the Geneva Convention in the *Statute of Registered Aircraft* (SRA) in 1957.<sup>47</sup> The contents of the statute were, as far as possible, based on the wording and purpose of the Convention. The SRA was needed because of the inadequate Netherlands property law applying to aircraft at the time. For example, an aircraft could be encumbered with a pledge but not with a mortgage. The nature of the then existing pledge legislation, in particular the requirement that possession of the pledged object be transferred to the financier, gave rise to great problems in practice (Article 1196 of the previous NCC). The introduction of the SRA made it possible to establish mortgages in respect of certain Dutch aircraft.<sup>48</sup> Furthermore, the aforementioned rights of the holder of an aircraft which originated in the United States were accommodated in the SRA. From then on it was possible to grant a right *in rem* in the acquisition of an aircraft to a Dutch airline, provided that the agreement was laid down in a notarial deed which had been registered in the public registers (Article 8 SRA). This right was similar to the foreign right of an airline, which had to be recognised under the Geneva Convention, “to acquire aircraft by purchase coupled with possession of the aircraft”. According to the Explanatory Memorandum to the SRA,

“the incorporation of this article into Netherlands law opens up the possibility of creating legal devices such as *conditional sale* which exist in Anglo-Saxon law.”

The “features of this (conditional sale) agreement” were laid down in the SRA. The legislature intended to create a Netherlands *equivalent* of these transactions because they were unknown in the country. Consequently, the foreign right could “as it were, be *transposed* into Netherlands law”. This fact is of great importance as regards the question of the enforcement of foreign rights in the closed Dutch system of rights *in rem* and the mandatory priority status of conflicting rights.<sup>49</sup>

Furthermore, under the SRA the holder of an aircraft could be granted a right *in rem* by virtue of a lease agreement provided that it was entered into for a period of at least six months. The agreement had to be laid down in a notarial deed and entered into the public registers (Article 9 RCA). This Dutch right reproduced the “right to

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<sup>46</sup> R.C.C. CUMING, *International regulation of aspects of security interests in mobile equipment*, *Revue de droit uniforme / Uniform Law Review*, 1990-I, 62 at 111.

<sup>47</sup> *Wet teboekgestelde Luchtvaartuigen* (Statute of Registered Aircraft), 6 March 1957, *Nederlands Staatsblad*, 72 (entry into force: 1 August 1959).

<sup>48</sup> *Memorie van Antwoord* (Memorandum in Reply) (1955-1956), 4 4134, No. 6, 6.

<sup>49</sup> *Memorie van Antwoord* (1955-1956), 4 4134, No. 6, 9 and 11.

possession of aircraft under leases of six months or more" contained in the Geneva Convention. According to the Explanatory Memorandum,

"this article creates the possibility of making the lease of a registered aircraft a *full right in rem*." <sup>50</sup>

Besides, the Explanatory Memorandum referred specifically to what was noted in respect of the holder's above-mentioned proprietary right, laid down in Article 8 RCA, in the acquisition of an aircraft. Various facts also applied to the provision in question. As a result, the conditional sale and equipment trust under U.S. law could be assimilated into the right *in rem* in possession provided for in the Netherlands legal system.

As an argument in favour of incorporating the two aforementioned special rights *in rem* of the holder of an aircraft into the SRA, the Explanatory Memorandum contended that Dutch recognition of the rights, which were unknown here, would be undesirable without further adaptation of its national legislation:

"The Netherlands had ratified the Geneva Convention at the time to make it possible to obtain foreign credit for aircraft sold to the Netherlands. This could be achieved only by granting the same protection to those with rights *in rem* in foreign aircraft and those with rights *in rem* in Netherlands aircraft. This meant that the property law status of a Netherlands aircraft had to be made to conform, wherever possible, with the Convention. Otherwise, the Netherlands would experience the disadvantages of the Geneva Convention but not the advantages."

However, the drafters of the SRA were well aware that as a result of this law, the property law status of aircraft would differ greatly from that of other objects. The separate and distinct property law regime that would apply to the civil aviation sector following the introduction of the law, would differ considerably from the existing system of property law that applied to other branches of trade and industry.<sup>51</sup> According to the Explanatory Memorandum, straight rental and hire purchase agreements became *full* real rights as a consequence of the law.<sup>52</sup> As a result of the new regime, the holder of an aircraft gained more extensive protection than the holder of other items of property. As a consequence of these rules, the Dutch airlines were, so to speak, elevated to a superior class of rightful claimants. The Explanatory Memorandum contended that the disadvantage arising from the detriment caused to existing Netherlands (property) law did not cancel out the advantage gained. The advantage lay in the possibility of attracting foreign capital and of leasing out aircraft while at the same time granting the lessee a right *in rem*. Without the SRA, financing of the acquisition and use of high-value aircraft would be inhibited. These intentions

<sup>50</sup> See R. ZWITSER: for the difference between the Netherlands *full rights in rem* and intermediate forms, *Weekblad Privaatrecht, Notariaat en Registratie* (1994), No. 6161, 857.

<sup>51</sup> B.P. HONNEBIER, "De internationale financieringspraktijk heeft wederom behoefte aan een uitbreiding van het bestaande pakket van Nederlandse zakelijke rechten", *Weekblad Privaatrecht, Notariaat en Registratie* (2000), No. 6425, 914.

<sup>52</sup> In 1957, the operational and financial leasing agreements were not used in the Netherlands. The same is valid, however, for these modern financial techniques.

of the Netherlands legislator must be taken into account in classifying present Netherlands rights *in rem* over aircraft which will be discussed *infra*.

It was stated in the Explanatory Memorandum to the SRA that the substantive law section of this separate law would ultimately be incorporated into Book 8 of the NCC. In 1996, for reasons of convenience, this law was inserted into Title 15 of Book 8 of the NCC, entitled "Aircraft".<sup>53</sup> This legislation lays down rules on the special property law status of aircraft. The functional air law is regarded as a *lex specialis*. It follows from the Explanatory Memorandum that the provisions of Title 15 stemming from the Geneva Convention must be interpreted autonomously. The property law regime of Books 3, 5 and 6 of the NCC do not apply to these rules. The decisive factors in the interpretation of air law are the aims and objectives underlying the Geneva Convention. Regard must also be had to the above-mentioned intentions of the Netherlands legislator in implementing this Convention in national law. Existing air law provides *inter alia* for improved structuring of the aforementioned Articles 8 and 9 of the SRA. According to the Explanatory Memorandum, the new legislation dovetails *more effectively* with the regime of the Geneva Convention, in particular as regards the foreign rights *in rem* which must be recognised by the Netherlands.<sup>54</sup> It is also clear from existing air law that the rights to be constituted in an aircraft are enumerated exhaustively. The only rights *in rem* of which a registered aircraft may form the subject-matter are ownership, mortgage and the rights *in rem* of the holder in the acquisition and possession of an aircraft which will be discussed below (Article 8:1305 NCC).

The right of an airline in the acquisition of an aircraft is set out as follows in Book 8 of the NCC:

"A right *in rem* may be constituted in a registered aircraft, consisting in the right of the holder of the aircraft to acquire the ownership thereof under a purchase agreement, already concluded or to be concluded, following payment of a certain sum or upon fulfilment of another condition. The notarial deed<sup>55</sup> relating to the constitution of this right shall clearly identify the aircraft which is subject to this right" (Article 8:1308 NCC).<sup>56</sup>

The Explanatory Memorandum clearly refers back to the Explanatory Memorandum to the SRA, which in turn is based on the Geneva Convention. Present legislation also pursues the aim of that Convention. According to the Explanatory Memorandum, Article 8:1308 NCC maintains "the broad definition [...] so as not to inhibit the application of legal devices which are unknown here". In that respect

<sup>53</sup> Act of 26 January 1995, *Nederlands Staatsblad* 71; *Memorie van Toelichting* (1993-1994), 23 814, No. 1-2-3.

<sup>54</sup> Article I(1) Geneva Convention; *Memorie van Toelichting* (1993-1994), 23 814, No. 3, 7.

<sup>55</sup> This refers to the deed of a Netherlands civil law notary.

<sup>56</sup> "Op een teboekstaand luchtvaartuig kan een zakelijk recht worden gevestigd, bestaande in het recht van de houder van een luchtvaartuig om na betaling van een zeker bedrag of na vervulling van enige andere voorwaarde de eigendom daarvan krachtens een door hem reeds gesloten of nog te sluiten koopovereenkomst te verkrijgen. In de notariële akte bestemd voor de vestiging van dit recht, wordt duidelijk het aan dit recht onderworpen luchtvaartuig vermeld" (Art. 8:1308 NCC).

particular regard must be had to “the *conditional sale* <sup>57</sup> provided for in Anglo-Saxon law”. This kind of agreement was an important reason for the introduction of the SRA. As stated above, this particular version of conditional sale was the impetus for the development of the equipment trust in the State of New York. According to the Explanatory Memorandum,

“a characteristic of this type of agreement (conditional sale) is that the prospective buyer has possession over the aircraft, that he is entitled to acquire the ownership if he fulfils a particular condition (for the most part, but not always, payment), and that he has a right *in rem* in the aircraft. The wording articulates the *broad* meaning more effectively than Article 8 of the SRA.”

The new law is intended to cover two situations in conformity with the SRA:

“in one case the purchase agreement has already been concluded but transfer of title is made contingent on fulfilment of a condition, in the other case the purchase agreement will be concluded only when the condition has been fulfilled.”

A right may be constituted, for example, by virtue of title reservation agreements, including hire-purchase agreements.

“It follows from the wording of the article that it derogates from Article 3:92(2) NCC so that the restrictions contained in the latter with respect to the possibility of stipulating title reservation in a legally valid manner do *not* apply in this regard. A different outcome would be detrimental to the possible methods of financing which the Geneva Convention is intended to provide.”

According to the Explanatory Memorandum, an option to purchase in a lease agreement can also establish a right *in rem* in the acquisition, irrespective of the level of the purchase amount. On the other hand, an operational lease, most of which the Explanatory Memorandum states do not include an option to purchase, will, in many cases, give rise to a legally valid title in respect of the constitution of the right *in rem* in possession which is to be discussed below. It is clear that in this case, just as in the case of the introduction of the SRA, the intention of the Netherlands legislator was to create an equivalent of the conditional sale and similar rights under U.S. law. As stated in the Explanatory Memorandum, “there is no legal term for the right *in rem* in question.”

Book 8 of the NCC, which was inspired by the Geneva Convention,<sup>58</sup> lays down the following rules on the holder’s right *in rem* in the possession of an aircraft which matches the old United States law:

“A right *in rem* may be constituted in a registered aircraft and shall consist in the holder’s right to possess the aircraft on the basis of a lease agreement concluded for at least six

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<sup>57</sup> The *Memorie van Toelichting* to Title 15 (Aircraft) of Book 8 NCC refers to the *Memorie van Toelichting* to the Statute of Registered Aircraft (1955-1956), 4 134, No. 6, 11.

<sup>58</sup> Article 9 Geneva Convention; Article 9 Netherlands Statute of Registered Aircraft.

months. The notarial deed<sup>59</sup> relating to the constitution of this right shall clearly identify the aircraft which is subject to this right” (Article 8:1309 NCC).<sup>60</sup>

This right is similar to the special version of conditional sale and equipment trust developed in the State of Pennsylvania discussed in Section II *supra*. By constituting the full real right of the holder in the possession of an aircraft, the Netherlands legislator has created an equivalent of the equipment trust. In the Pennsylvania context, use was made of a lease in order to secure the airline’s possession of the aircraft in respect of third parties. Article 8:1309 NCC relates to this specific aspect of possession. According to the Explanatory Memorandum, an operational lease agreement may fall within the scope of the definition.<sup>61</sup> There is likewise no legal term for this right *in rem* of possession.

#### V. – THE PRAGMATIC SECURED TRANSACTIONS REGIME OF THE CIME/AEP

As international trade expands, there is an ever-increasing demand for various forms of high-value equipment, which by their nature are used internationally. According to the CIME, there is a need to facilitate the financing of the acquisition and use of these objects in an efficient manner. The modern *asset-based financing and leasing transactions* are advantageous for that purpose. However, the financing of mobile equipment is severely hampered by the varied treatment to which these transactions are subjected in different national property law regimes.<sup>62</sup> The resulting lack of legal certainty merely has the effect of increasing costs. The CIME/AEP seeks to establish clear rules to facilitate the aforementioned transactions and to ensure that *interests*<sup>63</sup> in mobile equipment are recognised and protected universally. In order to provide the requisite protection at international level, the Convention contains uniform substantive rules of property law. Since universal ratification of the Convention is desirable, its regime must be able to accommodate both civil law and common law jurisdictions. However, the creation of an internationally acceptable secured transactions regime requires great ingenuity, since the rules of property law differ fundamentally in many countries. Some countries, for example, have opted for a *functional* approach to secured transactions law. In these legal systems there has been a complete break with the traditional concept of security rights and the dogmatic obstacles have been abolished. They have created a regime that adopts a functional

<sup>59</sup> This refers to the deed of a Netherlands civil law notary.

<sup>60</sup> “Op een teboekstaand luchtvaartuig kan een zakelijk recht worden gevestigd, bestaande in het recht van de houder tot gebruik van het luchtvaartuig uit een huurovereenkomst die voor ten minste zes maanden is gesloten. In de notariële akte bestemd voor de vestiging van dit recht, wordt duidelijk het aan dit recht onderworpen luchtvaartuig vermeld” (Article 8:1309 NCC).

<sup>61</sup> *Memorie van Toelichting* (1993-1994), 4 23814, No. 3, 7-8.

<sup>62</sup> R.C.C. CUMING, *supra* note 46 at 75.

<sup>63</sup> The CIME/AEP does not provide a definition of the term “interest”.

approach to the concept of security interests.<sup>64</sup> In most other countries, on the other hand, there has been adherence to the past and secured transactions law is still based on the *traditional* model.<sup>65</sup> In order to be able to bridge these differences, the CIME/AEP has opted for a pragmatic secured transactions regime.<sup>66</sup>

The CIME/AEP provides for the constitution of an *international interest*,<sup>67</sup> of which *aircraft objects* may form the subject-matter.<sup>68</sup> The international interest is a unique right both conceptually and dogmatically. The right is consensual in nature.<sup>69</sup> Under the CIME/AEP regime, the holder of an international interest has or may be given important *remedies*<sup>70</sup> which he may exercise both in and outside the debtor's insolvency. These remedies are examined more extensively *infra*. However, neither the Convention nor the Protocol contain a detailed definition of the term "international interest". The real right is derived from the provisions of the Convention relating to the scope thereof.<sup>71</sup> The CIME provides the following general description:

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

This broad definition of international interest is aimed at the *functional* as well as the *traditional* approach to secured transactions law.<sup>72</sup> On the one hand, the modern United States and Canadian functional approach to rights *in rem* is fully reflected therein. The states of the United States and many Canadian provinces have rid secured transactions law of the dogmatic aspects of property law, which still characterise the parochial legal systems. In North-American jurisdictions, the same rules apply to security interests, *inter alia* in respect of constitution, publication requirements and priority. A security interest is any proprietary interest which secures payment or performance of an obligation. All interests that are intended to provide security as a means of protecting financiers *and* borrowers fall within the scope of this

<sup>64</sup> R.M. GOODE, "Transcending the boundaries of earth and space: the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment", *Uniform Law Review / Revue de droit uniforme* (1998), 52.

<sup>65</sup> R.C.C. CUMING, *supra* note 46 at 75.

<sup>66</sup> M.J. STANFORD, *supra* note 4 at 4.

<sup>67</sup> A Contracting State may, at the time of ratification, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State (Art. 48 CIME).

<sup>68</sup> Aircraft objects means airframes, aircraft engines and helicopters (Art. I(2)(c) and Art. II(1) AEP).

<sup>69</sup> For non-consensual rights, see Article 53 CIME.

<sup>70</sup> The CIME/AEP regime makes a distinction between the "Remedies of chargee" (Art. 7 CIME) and the "Remedies of conditional seller or lessor" (Art. 9 CIME) (see *infra*).

<sup>71</sup> R.M. GOODE, *supra* note 4 at 74.

<sup>72</sup> R.M. GOODE, *supra* note 4 at 76.

uniform regime. As stated in Section II *supra*, title reservation agreements, conditional sale agreements, equipment trusts and certain forms of lease agreements intended as security, for example, can be classified as secured transactions.<sup>73</sup> Under the CIME, all the United States and Canadian security interests belong to category (a): interests granted by the chargor under a security agreement.<sup>74</sup>

On the other hand, the CIME/AEP regime has not opted exclusively for the United States' and Canada's functional approach to secured transactions law. Article 2(2) CIME is worded in such a way as also to reflect the traditional approach to secured transactions law. The distinction between security agreement, title reservation agreement and leasing agreement is maintained in the definition of international interest. The three legal relationships are incorporated separately into the CIME regime in order to underline that they differ completely under the property laws of many countries. Therefore, those legal systems which do not take a functional approach to secured transactions law need not fear any unacceptable infringement of their property law regimes. The aim is not to impose the distinction between the terms security, title reservation and leasing agreements on the United States and the provinces of Canada, which draw no such distinction.<sup>75</sup>

It follows from Article 2(2) CIME that specific interests which are constituted by a security agreement, title reservation agreement and leasing agreement merge<sup>76</sup> to form an autonomous international interest.<sup>77</sup> As noted above, there are special remedies attached to this real right which afford the holder protection where a debtor fails to fulfil its obligations. The question arises as to what is implied by the terms: (a) an interest granted by the chargor under a security agreement, (b) an interest vested in the conditional seller under a title reservation agreement, and (c) an interest vested in the lessor under a leasing agreement. The characterisation of these legal devices (agreements) is of great importance since they alone can form the basis for an international interest. For example, the CIME/AEP regime applies to the Netherlands rights *in rem* of the holder in the acquisition and possession of an aircraft (Articles 8:1308 and 8:1309 NCC) only if these legal relationships are treated as one of these

<sup>73</sup> In the United States, under Article 9 UCC; in Canada, under the *Personal Property Acts of the Provinces*. R.C.C. CUMING, *supra* note 46 at 95.

<sup>74</sup> R.M. GOODE: "So a conditional sale relating to mobile equipment and governed by New York law under the conflict of law rules of the forum will be treated as a charge for the purposes of the Convention and not as a conditional sale agreement. For the purposes of the Convention the difference between categories has no significance except in relation to remedies", *supra* note 4 at 76.

<sup>75</sup> R.M. GOODE, "The protection of interests in movables in transnational commercial law", *Uniform Law Review / Revue de droit uniforme* (1998), 463-464.

<sup>76</sup> B. FOEX, in *Comments (...), Revised draft articles of a future UNIDROIT Convention on International Interests in Mobile Equipment* (1997), UNIDROIT Study LXXII, Doc. 36 Add. 4.

<sup>77</sup> The other factors that determine the sphere of application are: "the agreement providing for the interest: (a) is in writing, (b) relates to an object of which the chargor, conditional seller or lessor has the power to dispose, (c) enables the object to be identified in conformity with the protocol (serial number), and (d) in the case of a security agreement, enables the secured obligation to be determined, but without the need to state a sum or maximum sum secured (Art. 6 CIME). Further, see Arts. 3, 4 CIME and IV, V AEP.

three classes of *interests*. These Netherlands rights *in rem* do *not* belong to categories (b) and (c), since they are not interests vested in the conditional seller or in the lessor. However, they *do* fall within category (a) for the reasons set out below.

The CIME incorporates the following flexibly worded definition of a security agreement:

“Security agreement means an agreement by which a chargor<sup>78</sup> 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” (Article 1(ii) CIME).

This broad definition of a security agreement needs to be filled in at *national level*.<sup>79</sup> The term “security agreement” encompasses all types of agreement in a legal system that have the security function set out in the definition. The national legal relationships that fall under the definition are not classified in the CIME/AEP and are not even enumerated (exhaustively). A specific legal device must be characterised on the basis of the *applicable national*<sup>80</sup> law.<sup>81</sup> The private international law<sup>82</sup> of the forum, the *lex fori*,<sup>83</sup> determines which legal system is to be applied.

The security agreement set out above can be tailored to aircraft as follows:

“A security agreement is in principle *any* agreement, irrespective of the term assigned to it, through which, under the applicable *national* law of a Member State, a right in an aircraft is constituted whose purpose is to provide a chargee with security in respect of the payment of a sum of money *or* of the fulfilment of another obligation.”

The chargee might, for example, be a U.S. secured party, a Dutch mortgagee, a Belgian pledgee<sup>84</sup> or any other holder of a right *in rem*. The definition of security

<sup>78</sup> The terms “chargor” and “chargee” are not defined in the CIME/AEP and are not universally accepted.

<sup>79</sup> The broad definitions of title reservation agreement (Art. 1(II) CIME) and leasing agreement (Art. 1(q) CIME) must be supplemented at national level as well.

<sup>80</sup> “This Convention does not determine whether an interest to which paragraph 2 applies falls within sub-paragraph (a), (b), or (c) of that paragraph”(Art. 2(4) CIME). “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” (Art. 5(2) CIME).

<sup>81</sup> R.M. GOODE, *supra* note 75 at 464; IDEM, *supra* note 4 at 76; IDEM, *supra* note 64 at 62; T. PENTEADO RODRIQUES, “International regulation of interests in aircraft: the Brazilian reality and the UNIDROIT Proposal”, *Journal of Air Law and Commerce* (2000), Vol. 65, 287.

<sup>82</sup> B.P. HONNEBIER, “De *lex rei sitae* conflictregel is onhanteerbaar in relatie tot de financiering van de aanschaf en het gebruik van mobiel materieel”, *Weekblad Privaatrecht, Notariaat en Registratie* No. 6392 (2000), 62.

<sup>83</sup> “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” (Art. 5(3) CIME). H.-G. BOLLWEG – K.F. KREUZER, “Entwürfe einer UNIDROIT/CAO-Konvention über Internationale Sicherungsrechte an beweglicher Ausrüstung und eines Protokolls über Luftfahrt-ausrüstung”, *Zeitschrift für Wirtschaftsrecht* (2000), No. 32, 1365 and 1371.

<sup>84</sup> In Belgium, an aircraft can be the object of a pledge but not of a mortgage (Arts. 41-48 Hypotheekwet of Belgium).

agreement encompasses, for example, an agreement establishing a U.S. or Canadian secured interest, including a conditional sale, title reservation, equipment trust and certain lease agreements intended as security. In order to avoid characterisation problems, the Convention provides the following provision: a specific legal relationship which, under the law of a Contracting State, falls within category (a) interest under a security agreement, does *not* also fall within the above-mentioned categories (b) interest under a title reservation agreement or the (c) interest under a leasing agreement (final sentence of Article 2(2) CIME).

In addition, a security agreement is also an agreement<sup>85</sup> under which the owner (chargor)<sup>86</sup> grants the holder (chargee) of a Dutch aircraft the full right *in rem* to secure the obligation of the owner to transfer the ownership of the aircraft to the holder once a specific condition has been fulfilled. This definition is consistent with the contents and purpose of Article 8:1308 NCC. The definition of security agreement also covers an agreement<sup>87</sup> under which the owner (chargor) grants the holder (chargee) of a Dutch aircraft the full right *in rem* to secure the obligation of the owner to grant the holder possession<sup>88</sup> of the aircraft for a period of over six months.<sup>89</sup> This definition is consistent with Article 8:1309 NCC. The Netherlands rights *in rem* of the holder in the acquisition and possession of an aircraft thus belong to the category “*an interest granted by the chargor under a security agreement*” (Article 2(2)(a) CIME). This means that they fall within the sphere of application of the CIME/AEP and may constitute an international interest.

The CIME/AEP lays down detailed rules on the *remedies* available to the holder of an international interest in the event of the other party defaulting. These important remedies<sup>90</sup> relate only to the parties *inter se*. Furthermore, in relations with each other the parties may derogate from the majority of the provisions of the CIME/AEP

<sup>85</sup> “This may, for example, be a conditional sale agreement (*overeenkomst tot verkoop onder afbetaling*), hire-purchase agreement (*huurkoopovereenkomst*) or financial leasing agreement (*financiële leaseovereenkomst*)”. See the *Memorie van Toelichting* to Art. 8 SRA and Art. 8:1308 NCC.

<sup>86</sup> The terms “chargor” and “chargee” are not universally accepted terms. See also H.J. SOMMER, in *Comments (...), Revised draft articles of a future UNIDROIT Convention on International Interests in Mobile Equipment* (1997), UNIDROIT Study LXXIII, Doc. 36, 9. In this article, the chargor is the owner/seller/lessor of the aircraft, who has granted to the chargee a real right in the aircraft. The chargee is the holder/buyer/lessee, who has been granted, by the chargor, the real right in the acquisition or possession of an aircraft.

<sup>87</sup> For example, under a straight rental agreement or an operational leasing agreement. See the *Memorie van Toelichting* to Art. 9 SRA and the *Memorie van Toelichting* to Art. 8:1309 NCC.

<sup>88</sup> J.P. HONIG, *supra* note 37 at 80: “Netherlands law must be amended in such a way that a lease of an aircraft (rights of possession under leases of six months) will be regarded as a right *in rem*”. The SRA (1957) and Book 8 NCC follow this advice. For the various forms of charges on aircraft, see R.O. WILBERFORCE, *supra* note 21 at 435-437; G.N. CALKINS, *supra* note 40 at 160.

<sup>89</sup> R.M. GOODE, *supra* note 4 at 73: “In some systems a party holding equipment under a lease has *possession*, and thus enjoys a real right, while in others he is a mere *détenteur* whose rights are merely personal.”

<sup>90</sup> Art. IX(3) AEP and Art. 7(2) CIME.

concerning the remedies.<sup>91</sup> The Convention and the Protocol continue to build on the principle of the contractual freedom of professional parties that applies in international financial practice. The CIME/AEP states explicitly that its regime promotes the autonomy of parties in asset-based financing and leasing transactions. For that reason, some kind of “mandatory consumer related law” to protect (national) airlines is non-existent in current international air law,<sup>92</sup> and the same is true under the future CIME/AEP. The market in aircraft is characterised by the extremely high standard of the sophisticated market participants.<sup>93</sup> For example, many airlines are owned (to a large extent) by the State or have other affiliations with it. Furthermore, the parties concerned traditionally commission highly qualified legal and financial experts to act for them when concluding complicated transactions. The creation of inequality is not good for a market in which only equal parties come together.<sup>94</sup> This holds true both for the law and the economy. Consequently, it is legitimate for the CIME/AEP to expect that the parties will lay down their mutual rights and obligations in agreements tailor-made to suit them.

However, the CIME/AEP regime draws an important distinction<sup>95</sup> between the remedies which *may* be granted by the parties to the *chargee*, the person entitled under a security agreement, on the one hand, and the remedies which are available to a *conditional seller* or *lessor*, on the other hand.<sup>96</sup> The CIME/AEP incorporates this distinction, since special remedies can be made available to the holder of an international interest. In many countries, these remedies are available to a conditional seller or lessor *by law*, or may be granted to them. In other countries, the same remedies *cannot* be made available to a *chargee* and cannot be granted to it by the parties. For these reasons, under the CIME/AEP the above-mentioned special rights are available to the chargee only where the *chargor* has agreed to such remedies.<sup>97</sup> This provision means that, for example, the owner of an aircraft (*chargor*) *may* grant the special remedies to a Dutch airline (*chargee*) under a security agreement (Article 7 CIME and Article IX AEP; Articles 8:1308 NCC and 8:1309 NCC). In this respect, too,

<sup>91</sup> Art. 14 CIME and Art. IV(3) AEP.

<sup>92</sup> The (1948) Geneva Convention, too, acknowledges the principle that the parties are free to contract.

<sup>93</sup> B.P. HONNEBIER, “Air Holland is door dure internationale leasecontracten uitgeschakeld”, *Weekblad Privaatrecht, Notariaat en Registratie* No. 6383 (2000), 931. *IDEM*, “In de internationale financieringspraktijk bestaat nog altijd rechtsonzekerheid met betrekking tot de financiering van de aanschaf en het gebruik van mobiel materieel”, *Weekblad Privaatrecht, Notariaat en Registratie* No. 6393 (2000), 181. For a different opinion, see B.J.H. CRANS, “Waarom Air Holland niet door dure leasecontracten ten onder ging en waarom het wel meevalt met de problemen bij het leasen van luchtvaartuigen”, *Weekblad Privaatrecht, Notariaat en Registratie* No. 6393 (2000), 180.

<sup>94</sup> S.R. SOWTER, “Lease Finance for Airlines”, *Air Law*, vol. IV (1979), 13.

<sup>95</sup> This relevant distinction in the CIME/AEP regime is not understood by everyone. See, for example, B.J.H. CRANS, “The UNIDROIT Convention on International Interests and the Aircraft Equipment Protocol: some critical observations”, *Air and Space Law* (1998), Vol. XXIII, 256.

<sup>96</sup> Remedies of conditional seller or lessor: Art. 9 CIME and Art. IX AEP.

<sup>97</sup> Remedies of chargee: Art. 7 CIME and Art. IX AEP.

the CIME/AEP regime proceeds from the freedom of the parties to contract. The parties may agree between themselves on the remedies set out in the CIME/AEP which they regard as desirable in respect of their specific legal relationship. Which remedies the Dutch airlines will in fact be able to stipulate depends entirely on the economic and financial leverage of the parties.

For an international interest to be invoked against third parties it must have been published in the manner prescribed in the CIME/AEP.<sup>98</sup> The regime opts for a system of registration in an *International Registry*, which is to be established. The register will be completely computerised and will use the most up-to-date technology. The serial number of the aircraft in which the international interest is constituted effects the registration. An international interest may be registered by either party with the consent in writing of the other.<sup>99</sup> Therefore, also the holder of a Netherlands right *in rem* in the acquisition and possession of an aircraft must have registered its international interest if it wishes to be able to exercise its right in respect of third parties. A registered interest has priority over any other interest subsequently registered and over an unregistered interest. The holder of an international interest may assign it to another person, if the debtor consents to the assignment in writing.<sup>100</sup> In principle, the priority of competing interests may be varied by agreement between the holders of those interests.<sup>101</sup>

#### VI. – CONCLUDING REMARKS

This contribution has considered the question of whether the full Netherlands rights *in rem* of the holder in the acquisition of an aircraft (Article 8:1308 NCC) and in the possession of an aircraft for a period of over six months (Article 8:1309 NCC) fall within the sphere of application of the coming CIME/AEP. The answer to this question may be summarised as follows. The proprietary aspects of Netherlands air law are based on the (1948) Geneva Convention which in turn reproduces the United States security rights which existed at that time. Four categories of security rights emerged in the various states of the United States. These legal devices were applied in particular to financing the acquisition and possession of aircraft. They were incorporated into the Geneva Convention and must be recognised by the Member States. Examples are the special types of conditional sale and equipment trust. In the United States, these legal relationships are now governed by Article 9 UCC which has been implemented by all the states. In turn these rights fall within the sphere of application of the CIME AEP (Article 2(2)(a) CIME). The Netherlands legislator has adapted national legislation to the Geneva Convention and in particular to the United States property law situation of 1948. The foreign legal devices of conditional sale and equipment trust were

<sup>98</sup> Art. III(2) and Art. VII AEP and Arts. 3, 4 and 6 CIME. R.M. GOODE, *supra* note 64 at 68; M.J. STANFORD, *supra* note 66 at 5.

<sup>99</sup> Art. 19 CIME.

<sup>100</sup> Arts. 28(3), 30(1) and 32 CIME and Art. XV AEP.

<sup>101</sup> Art. 28(1) CIME and Art. 28(4) CIME.

incorporated first into the Netherlands Statute of Registered Aircraft and later into Title 15 (Aircraft) of Book 8 NCC. The Netherlands rights of the holder in the acquisition and possession of an aircraft are equivalents of these North-American legal devices. These rights were incorporated into Netherlands air law to create the possibility of financing the acquisition and possession of high-value Dutch aircraft. The provisions of Book 8 NCC, which are based on the Geneva Convention, must be interpreted autonomously. The CIME/AEP regime applies to the aforementioned Netherlands full rights *in rem* where they are characterised as an *international interest*. This is so where they are regarded as an interest (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*. However, these three legal relationships are not defined in detail in the CIME/AEP but are formulated in broad terms so as to accommodate the secured transactions regimes of both civil law and common law countries. The characterisation of these legal devices is left to the applicable national law. Therefore, it is for Netherlands law to determine the category within which the rights of the holder in the acquisition and possession of an aircraft fall. They are covered by category (a): interest granted by the chargor under a security agreement. The definition thereof can be tailored to aircraft as follows: a security agreement is in principle *any* agreement, irrespective of the term assigned to it, through which, under the applicable national law of a Member State, a right *in rem* in an aircraft is constituted whose purpose is to provide a chargee with security in respect of the payment of a sum of money *or* of the fulfilment of another obligation. This definition encompasses an agreement establishing Netherlands rights *in rem* (interests) of the holder in the acquisition and possession of an aircraft. The Netherlands rights can, therefore, constitute an international interest under the CIME/AEP regime. This means that the owner of an aircraft (chargor) may grant a Dutch airline (chargee) the special *remedies* contained in Article 7 CIME and Article IX AEP under a security agreement. Consequently, in the future it will be possible to protect the major interests of Dutch airlines also at international level, whereas at present they receive only national protection. This is yet another reason for the Kingdom of the Netherlands to accede to the CIME/AEP.



**LA PROTECTION DES DROITS RÉELS DU DETENTEUR D'UN AÉRONEF EN VERTU DU DROIT NÉERLANDAIS ET LE NOUVEAU RÉGIME INTERNATIONAL PROPOSÉ PAR UNIDROIT (Résumé)**

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*La question centrale envisagée par le présent article est de savoir si les droits réels sur l'aéronef dont dispose une compagnie aérienne en vertu du droit néerlandais relèvent du champ d'application de la future Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles telle qu'elle s'applique aux biens aéronautiques.*

*Le code civil néerlandais confère au détenteur d'un aéronef le droit d'en acquérir la propriété en vertu d'un contrat de vente conditionnelle – article 8:1308 – ou le droit à la possession de l'aéronef en vertu d'un contrat de bail conclu pour une durée supérieure à six mois – article 8:1309. Ce régime dérive de la Convention de Genève de 1948 relative à la reconnaissance internationale des droits sur aéronefs, qui s'inspirait elle-même des instruments juridiques des Etats-Unis d'Amérique destinés à faciliter le financement de l'acquisition et de l'utilisation des aéronefs tels que la vente conditionnelle et le equipment trust, qui sont maintenant couverts par l'Article 9 du Uniform Commercial Code.*

*En dépit des avis contraires qui ont pu être exprimés à cet égard, il ne fait pas de doute que, tout comme les droits relevant de l'Article 9 de l'UCC des Etats-Unis, les droits réels du détenteur d'un aéronef constitués en vertu du droit néerlandais devront être qualifiés de "garantie conférée par le constituant en vertu d'un contrat constitutif de sûreté" (article 2(2)(a) de la Convention) et pourront donc donner lieu à une "garantie internationale" en vertu de la Convention.*

