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*EXTRACT*

*from the Official Commentary  
on the Convention on International Interests in Mobile Equipment  
and Protocol thereto on Matters specific to Aircraft Equipment  
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## NOTE

(by the UNIDROIT Secretariat)

This document reproduces part of the *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment* prepared by Professor Sir Roy Goode, C.B.E., Q.C., Emeritus Professor of Law, University of Oxford, pursuant to Resolution No. 5 adopted by the Cape Town diplomatic Conference, namely those parts carrying an overview of, and a Commentary on the Convention. This extract is published with the kind permission of Professor Sir Roy Goode. No part of this extract may, whether by trade or otherwise, be reproduced, lent, re-sold, hired out or otherwise circulated or distributed, except within the Governments receiving it, without UNIDROIT's prior consent. Complimentary copies of the Official Commentary were sent out by UNIDROIT to all negotiating States and participating observers at the Cape Town diplomatic Conference between December 2002 and January 2003. Additional copies of the Official Commentary may be obtained from UNIDROIT, the publisher and distributor, either in English or in French, at the price of €100 per copy, postage and packing included. Orders should be addressed to Ms Carla Milani, UNIDROIT Secretariat, at [unidroit.rome@unidroit.org](mailto:unidroit.rome@unidroit.org). As decided by the UNIDROIT Governing Council at its 81<sup>st</sup> session, held in Rome on 24 and 25 September 2002, all profits from the sale of the Official Commentary will go to the Uniform Law Foundation.

## INTRODUCTION

1. The Convention on International Interests in Mobile Equipment (“the Convention” or, where requiring to be distinguished from other instruments, “the Cape Town Convention”) and the Protocol thereto on Matters specific to Aircraft Equipment (“the Aircraft Equipment Protocol” or “the Protocol”) were opened for signature on 16 November 2001 at the conclusion of a Diplomatic Conference (“the Diplomatic Conference”) held under the joint auspices of the International Civil Aviation Organization (ICAO) and the International Institute for the Unification of Private Law (UNIDROIT) at Cape Town from 29 October to 16 November 2001. The Diplomatic Conference was attended by government representatives from 68 States and 14 international organisations. The Convention and Aircraft Equipment Protocol were signed at the concluding meeting of the Diplomatic Conference by 20 participating States. This Official Commentary has been prepared by the Chairman of the Drafting Committee pursuant to Resolution No. 5 adopted at the Diplomatic Conference and annexed to the Final Act. In preparing the Official Commentary the Chairman of the Drafting Committee has worked in close collaboration with the two Secretariats and in co-ordination with the Chairman of the Commission of the Whole, the Chairman of the Final Clauses Committee and interested members of the Drafting Committee and observers that participated in its work, and has taken due account of the many helpful comments received from negotiating States and participating observers on drafts circulated to them.

*(Omissis)*

3. The Convention is designed to establish an international legal regime for the creation, enforcement, registration and priority of security interests and interests held by chargees, 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 objects), (b) railway rolling stock, and (c) space assets. The Convention is not itself equipment-specific and for each of the three categories of object it applies only through separate Protocols. The draft Aircraft Equipment Protocol was the only draft Protocol ready for consideration by the Diplomatic Conference. Draft Protocols for railway rolling stock and space assets are already at an advanced stage of preparation with a view to their adoption at future Diplomatic Conferences. They are not dealt with in the present Commentary. However, illustrations are given relating to railway rolling stock and space assets on the assumption that the relevant Protocol will in due course be in place.

*(Omissis)*

## AN OVERVIEW OF THE CONVENTION

### Objectives

8. The principal objective of the Convention is the efficient financing of mobile equipment. Such financing will assist in the development of cost-effective modes of transport and space assets utilising modern technologies. The Convention system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for mobile equipment that has previously been unavailable or available only at relatively high cost. A sound, internationally adopted legal regime for security, title-retention and leasing interests will encourage the provision of finance and reduce its cost.

9. The financing of aircraft objects, as with railway rolling stock and space assets (which are not further discussed), takes three principal forms: a loan secured by a security interest in the object; a sale under an agreement (title reservation agreement) in which the seller reserves ownership until payment in full; and a lease, which may be either a finance lease or an operating lease and may or may not include an option to purchase. 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 objects of the kinds covered by the Convention 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.

10. Traditional conflict of laws rules apply the *lex rei sitae* as the law governing proprietary rights, but such a principle is unsuited to items of mobile equipment which are constantly moving from one country to another or, in the case of space assets, are not on earth at all. Different legal systems adopt differing approaches to the determination of the applicable law in this situation. 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 interests while in others they are more hostile or restrictive. 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, title-retention and leasing interests in such equipment which will provide creditors with the necessary safeguards, while at the same time incorporating measures for the protection of debtors.

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

- ? To facilitate the acquisition and financing of economically important items of mobile equipment by providing for the creation of an international interest which will be recognised in all Contracting States;
- ? to provide the creditor with a range of basic default and insolvency-related 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 registry 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.

Detailed though they are, the Convention and the Protocol have very specific objectives and do not seek to cover the whole field of asset-based secured financing, much of which will continue to be governed by national laws and the agreement of the parties. Moreover, the Convention itself allows considerable scope for party agreement on a range of issues, including default remedies and jurisdiction.

### **The two-instrument approach and the relationship between the Convention and the Protocol**

12. 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 does not come into force as regards any category of equipment until a Protocol has been made relating to that equipment and takes effect subject to the terms of that Protocol, so that in the case of any inconsistency it is the Protocol that prevails. This two-instrument approach was seen to have a number of advantages. It results in a uniform set of rules for those provisions of the Convention that do not attract equipment-specific considerations, instead of having separate, stand-alone conventions for each class of equipment. This avoids duplication and inconsistency between the non-equipment-specific provisions

of one convention and those of another, and allows a uniform interpretation of such provisions, regardless of the type of equipment involved. The two-instrument approach also avoids cluttering up the text of the Convention with detailed equipment-specific rules, and provides a convenient mechanism for modifying the Convention provisions by the Protocol to meet the particular needs of the industry sector involved. However, to meet the needs of those concerned with aircraft finance and their advisers the Joint Secretariat of the Conference (namely the Secretariats of ICAO and UNIDROIT) has produced a user-friendly Consolidated Text which reproduces the combined effect of the Convention and the Aircraft Equipment Protocol. As stated earlier, this is not a legally operative document but a convenient text for use by those involved in aircraft equipment finance and leasing.

### **Underlying principles**

13. 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 established rules of national law to which it attaches importance, and to make declarations (a) to exclude, wholly or in part, select provisions of the Convention it considers incompatible with such principles (for example, the exercise of certain interim remedies) or (b) to opt into select provisions which it considers will reinforce those principles (for example, the preservation of rights

of arrest or detention of an object for payment for services in respect of that object).

## **Definitions**

14. Article 1 of the Convention contains a long list of definitions, and these are supplemented by definitions in the Aircraft Equipment Protocol. It is important to keep these in mind at all times when reading the Convention and Aircraft Equipment Protocol, because ordinary words are sometimes given a special meaning, such as “agreement,” “creditor” and “debtor,” while a number of phrases have been specially coined for the two instruments, such as “associated rights”, “internal transaction”, “national interest”, and “non-consensual right or interest”, and therefore can be understood only by reference to their respective definitions.

## **Sphere of application**

15. The Convention provides for protection of five different categories of interest:

(1) **International interests**, that is, interests granted by the chargor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement, other than interests arising under an internal transaction in respect of which a State has made a declaration excluding the application of certain aspects of the Convention (see (3) below). The international interest is the primary category of interest with which the Convention and the relevant Protocol are concerned.

(2) **Prospective international interests**, that is, interests intended to be taken over identifiable equipment as international interests in the future but which have not yet become international interests, for example, in the case of a security agreement because the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an interest in the equipment to be charged. A prospective international interest may be registered as such in the International Registry but does not have effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration as a prospective international interest.

(3) **National interests**, that is, interests registered under a national registration system which would be registrable as international interests but for the fact that they are created by internal transactions (as defined in the Convention) in respect of which a Contracting State has made a declaration under Article 50 excluding the application of the Convention. However, such an exclusion is of limited effect. In the first place, the national interest remains governed by the priority rules of the Convention, not those of national law, and by various other provisions of the

Convention. Secondly, while it cannot be registered as an international interest, notice of it can be registered in the International Registry, thereby securing its priority in the same way as if it were a registered international interest.

(4) **Registrable non-consensual rights or interests arising under national law.** A Contracting State may make a declaration under Article 40 that non-consensual rights or interests arising under its law may be registered in the International Registry, and any such right or interest that is so registered is then treated for the purposes of the Convention as a registered international interest. Possible examples are a judgment or order affecting equipment of a category to which the Convention applies and a legal lien in favour of a repairer or warehouseman.

(5) **Non-consensual rights or interests arising under national law and given priority without registration.** A Contracting State may make a declaration under Article 39 specifying those categories of non-consensual right or interest which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual rights or interests are not themselves registered.

The Convention covers not only interests within one or other of the above categories but also “associated rights”, that is, rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Purely personal contractual rights not secured on an object are outside the scope of the Convention, though Article 39(1)(b) preserves the efficacy of contractual as well as legal rights of arrest or detention under the law of a State for sums due to a provider of public services, to the extent declared by that State under the Convention.

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

(1) The parties have entered into a security agreement, a conditional sale agreement or a leasing agreement (Article 2(1), (2)).

(2) The agreement relates to equipment which, as defined by the relevant Protocol, is:

- (a) an airframe, an aircraft engine or a helicopter,
- (b) railway rolling stock, or
- (c) space assets (Article 2(3)).

(3) The equipment falls within a category designated in the relevant Protocol and is uniquely identifiable (Article 2(2),(3)).

(4) The agreement is constituted in accordance with the formalities prescribed by the Convention (Articles 2(2), 7).

(5) The debtor is situated in a Contracting State at the time of conclusion of the agreement creating or providing for the international interest (Articles 3, 4). Under the Aircraft Equipment Protocol, an alternative to the debtor's situation in a Contracting State is that the agreement relates to a helicopter, or to an airframe pertaining to an aircraft, registered in a nationality register of a Contracting State (Article IV(1)).

17. Most 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, and more recently in New Zealand, the law adopts a functional and economic approach, treating title reservation agreements and certain types of leasing agreement as forms of security and the title of the conditional seller or finance 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 domestic law as determined by the rules of private international law of the forum State (Articles 2(4), 5(2),(3)). Where the applicable law is the *lex fori* itself the national court will be able to apply its own law to determine the characterisation issue.

18. 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 or removed from a larger object passes to or from the owner of the latter by the principle of accession or severance.

19. 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. Article 50 of the Convention nevertheless allows Contracting States, in respect of purely internal transactions, to exclude certain provisions of the Convention relating to the rights of the parties between themselves.

20. 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, 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, 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 the object. Registration is effected against an object so identified. Accordingly the Convention does not apply to future property or to proceeds other than insurance and other loss-related proceeds.

### **Constitution of international interest**

21. All that is needed to constitute an international interest is an agreement which conforms to the simple requirements of Article 7. 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. In this sense the international interest is autonomous, being derived from the Convention itself. But whether an agreement exists at all is to be determined by the applicable law, which will thus govern questions such as capacity to contract, the existence of a *consensus ad idem*, and the like. However, the formal requirements for the agreement are determined by the Convention itself. Under Article 7 an interest is constituted as an international interest where the agreement creating or providing for<sup>1</sup> the interest satisfies four conditions:

(1) *Writing*

The agreement must be in writing. "Writing" is defined in broad terms in Article 1(nn) to cover not only documents but also an electronically held record of information which is capable of being reproduced in tangible form on a subsequent occasion. Whether the agreement is in paper or electronic form, it must indicate by reasonable means a person's approval of the record.

(2) *Power of disposal*

The agreement must relate to an object of which the chargor, conditional seller or lessor has power to dispose. The word "power" is not synonymous with "right". An unauthorised disposition may nevertheless be effective to pass ownership or some other interest because of a rule of law to that effect, for example, where an agent, though not having actual authority to dispose of its principal's property, sells it when having ostensible authority to do so. A power to dispose may arise either under the applicable law or under the Convention itself as a consequence of its registration and priority rules. See Comment 5 to Article 7.

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<sup>1</sup> A security agreement creates an international interest, whereas a conditional sale or lease agreement merely "provides for" an international interest, since the title retained by the seller or lessor does not derive from the conditional sale or leasing agreement but is acquired independently of (and usually before entry into) that agreement.

(3) *Identifiability*

The agreement must enable the object to be identified in conformity with the relevant Protocol. Identifiability is a crucial requirement because the registration system is asset-based. It is thus not sufficient that (as in the common case of security over future property) the asset can be identified as falling within the scope of the security agreement. It is necessary that the object be specifically identified in the agreement itself. It is left to the relevant Protocol to determine the identification criteria, since these are likely to be equipment-specific. Thus Article VII of the Aircraft Equipment Protocol requires a statement of the manufacturer's serial number, the name of the manufacturer and its model designation, whilst for railway rolling stock and space assets it may be necessary to have alternative criteria.

(4) *Obligations secured*

In the case of a security agreement, this must enable the secured obligations to be determined; in other words, it must be possible to ascertain from the agreement what obligations it is securing. However, it is not necessary to state a sum or maximum sum secured, nor is it necessary to identify each particular obligation; a general description suffices. It was felt that to require the statement of a maximum sum or specificity in the statement of secured obligations was neither practicable nor desirable, for in many cases the agreement will secure future obligations whose nature and quantum will not be known in advance. If the secured party had to specify a maximum sum it would simply choose a figure higher than anything it would conceivably advance.

### **Relationship with national law**

22. The Convention does not exclude the creation of security interests under national law. In most cases a security, title-retention or leasing interest created under national law 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 domestic interest. In particular a registered international interest has priority over (a) a domestic interest which is neither registered under the Convention (even if it is of a kind not capable of registration) nor covered by a declaration under Article 39 and (b) a national interest notice of which is not so registered.

### **Default remedies**

23. The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously. 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 give notice of the international interest to third parties and to protect the priority of the international interest. A distinction is drawn between the rules governing the remedies of a chargee, which are specified in Articles 8 and 9, and those applicable to the remedies of a conditional seller or lessor, which are the subject of Article 10 and are less detailed, reflecting the fact that vis-à-vis the conditional buyer or lessee the conditional seller or lessor is the owner of the equipment <sup>2</sup> and may deal with the equipment as it pleases once the agreement has come to an end. Article 12 ensures the availability of additional remedies under the applicable law, including any remedies agreed by the parties, so far as not inconsistent with the mandatory provisions of Chapter III.

24. Article 8 empowers 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 object;<sup>3</sup>
- ? collect or receive any income or profits arising from the management of the object.

Alternatively, the chargee may, with or without the agreement of the chargor, apply for a court order authorising or directing any of the above.

25. Article 9 empowers the chargee to 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. Extra-judicial 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 parties may agree on the events that constitute default or otherwise give rise to the remedies set out in Chapter III. In the absence of such agreement the default must be substantial. 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 15.

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<sup>2</sup> The conditional seller or lessor is not necessarily the owner; often it will be an intermediate party itself holding the equipment under a conditional sale agreement or lease. But in its relations with the conditional sub-buyer or sub-lessee its position is analogous to that of an owner.

<sup>3</sup> But a Contracting State may, by a declaration under Article 54, exclude the power to lease equipment while on its territory.

26. In the case of a conditional sale agreement or leasing agreement, the only remedies designated (by Article 10) are termination of the agreement, possession or control of the object or a court order authorising or directing either of the above. As mentioned in paragraph 23 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 the United States, most of the Canadian jurisdictions and New Zealand conditional sale agreements and certain types of financial leasing agreement are characterised as security agreements, so that a court in such a jurisdiction will apply the Convention rules governing security agreements.

27. Article 13 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 (although the Aircraft Equipment Protocol adds these remedies as regards aircraft objects). Certain safeguards are provided for the debtor. By Article 55 a Contracting State may make a declaration excluding Article 13, wholly or in part.

### **The registration system**

28. The registration system lies at the heart of the Convention's system of priorities. Registration gives public notice of an international interest or a prospective 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 not, however, proof of the existence of an international interest and is of no effect if the purported international interest has not been validly created. Rather registration ensures that if an international interest validly created is registered priorities are determined on a simple, objective, first-to-register basis. 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 International Registry will be administered by a Registrar under the superintendence of a Supervisory Authority, which (insofar as it does not already have it) 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 certain very limited defences. By Resolution No. 2 adopted by the Diplomatic Conference ICAO was invited to accept the functions of Supervisory Authority for aircraft objects.

29. The registration provisions are predicated on the assumption that the system will be electronic and available on-line, so that the checking of registration applications, registration itself and responses to searches will be effected

automatically by computer and will not involve human intervention. The provisions of the Convention and Protocol will be supplemented by regulations governing the operation of the International Registry and procedures for effecting registrations and searches. Pursuant to Article 18(5) of the Convention, Article XIX of the Aircraft Equipment Protocol empowers a Contracting State to designate an entity or entities as the national entry point or entry points through which, for aircraft objects for which it is the State of registry for the purposes of the 1944 Chicago Convention on International Civil Aviation (“the Chicago Convention”), applications for registration shall or may be transmitted to the International Registry. Alternatively, for purposes of efficiency, a Contracting State may elect not to make a declaration under Article XIX, thus permitting direct access to the International Registry by end users. However, no such designation may be made in relation to notices of national interests, or registrable non-consensual rights or interests, arising under the laws of another State. Moreover, a designation by a Contracting State may permit but may not compel use of a designated entry point or entry points for information for registrations in respect of aircraft engines. This is because, in contrast to the position as regards aircraft, there is no international system of nationality registration for aircraft engines.

30. The registration system will accommodate registrations of international interests, prospective international interests, and registrable non-consensual rights and interests (explained in paragraph 45), as well as assignments and prospective assignments, subordinations, and the acquisition of international interests by legal or contractual subrogation under the applicable law. The system will also receive registrations of notices of national interests, that is, interests registered in a national register and 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 50(1), declared will not be governed by the Convention. Where such a declaration has been made a national interest may not be validly registered as an international interest, but notice of the national interest may be registered under Article 16(1)(d) and by virtue of Article 50(2) this will give the national interest the same priority as if it were a registered international interest, so that, as stated earlier, the effect of a declaration under Article 50(1) is limited. The detailed requirements for registration are prescribed by the relevant Protocol and by regulations to be made under it. Article 20 states whose consent is required to effect, modify or discharge a registration.

### **Priorities**

31. The priority rules are set out in Article 29 and are few in number and for the most part simple. 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. There are three exceptions to the general priority rules. First, since the interest of an outright buyer is not registrable,<sup>4</sup> Article 29(3) provides that the buyer takes free from an international interest not registered prior to the buyer's acquisition of its interest. Secondly, there is a special priority rule in Article 29(4) relating to certain conditional buyers and lessees. This is explained in paragraph 32 below. Thirdly, the priority rules may be varied by agreement between the holders of competing interests (Article 29(5)).

32. Article 29(4) deals with priority as between a conditional buyer or lessee and the holder of a registered interest (by which, of course, is meant a holder other than the conditional buyer's or lessee's own conditional seller or lessor). One of the cases envisaged is a conflict between the conditional buyer or lessee and a person to whom the conditional seller or lessor has charged the goods under a security agreement. The basic principle reflected in Article 29(4) is that parties shall not be affected by anything which is not on the register. It would be unfair to a chargee from the conditional seller or lessor to subordinate the charge to the interests of a conditional buyer or lessee which the chargee could not discover by a search in the International Registry. The interest of the conditional buyer or lessee is not itself registrable. However, registration of the interest held by the conditional seller or lessor will give notice of the existence of the conditional sale agreement or lease and thus of the interest of the conditional buyer or lessee thereunder. Accordingly the effect of the rule laid down in Article 29(4) is that the priority of the conditional buyer or lessee vis-à-vis the chargee is determined according to whether the international interest held by its conditional seller or lessor was registered before the chargee registered its interest. If it was, then the chargee takes its interest subject to the rights of the conditional buyer or lessee. If, on the other hand, the chargee registers its interest before the conditional seller or lessor has registered its own interest the chargee has priority over the conditional buyer or lessee, whose existence the chargee will not have been able to discover from a registry search. Article 29(5), which permits the variation of competing priorities, and the registration thereof binding third parties, applies to the foregoing rules. Moreover, Article XVI of the Aircraft Equipment Protocol extends the concept of conditional buyer and lessee rights, linked to time of registration, to confer a right of quiet possession on the conditional buyer or lessee against a chargee over whom the conditional buyer or lessee has priority under the rule described above. This Article too permits of contractual variation.

33. By Article 29(6) any priority extends to 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

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<sup>4</sup> However, the Aircraft Equipment Protocol extends the registration and priority provisions of the Convention to outright sales of aircraft objects, so that the special rule in Article 29(3) of the Convention is not required as regards aircraft objects.

covered. So long as proceeds as defined by Article 1(w) are identifiable in the hands of the debtor the creditor has the same priority in relation to them as it had in relation to the object itself prior to its loss. Whether proceeds which have left the debtor's hands or have become commingled with other assets of the debtor remain traceable is answered not by the Convention but by the applicable law. Article 29(7) is designed to ensure that rights in an item (other than an object) created under the applicable law are not lost by installation of the item on an object and that new rights may be created in an installed item, where so permitted by the applicable law. Article XIV(3) of the Aircraft Equipment Protocol contains a special rule for aircraft engines. By "item" is meant any article which is not an airframe, aircraft engine or helicopter, a railway wagon or railway engine or a space asset. The term covers such articles as spare parts which are not themselves aircraft engines, modules affixed to engines, computers, audio and visual systems, and the like.

34. Finally, 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 19(4)). Until the time of completion 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 25(2)). What constitutes value is determined by the applicable law.

### **Effect of insolvency**

35. 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 (Article 30(1)). "Effective" means that the property interest will be recognised and the holder of the international interest will have a claim against the asset for obligations owed, and will not be limited to a *pari passu* sharing with unsecured creditors. However this provision does not impair the effectiveness of an international interest which is effective under the applicable law (Article 30(2)). In other words, the rule in Article 30(1) is a rule of validity, not of invalidity. If under the applicable law the international interest is effective in the insolvency even if it has not been registered prior to the commencement of the insolvency proceedings, or, indeed, at all, then its efficacy in those proceedings is not affected by the Convention. Under Article 30(3) 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 creditors or from rules 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, suspend or restrict enforcement of a security interest.

## Assignments

36. Chapter IX of the Convention deals with the effect, formal requirements and priority of assignments of associated rights and related international interests, and with subrogation. “Assignment” is broadly defined so as to cover both transfers and charges or pledges. “Associated rights” are defined in Article 1(c) as all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Associated rights therefore do not include (a) rights to performance by a third party or (b) rights to performance by the debtor under another contract or engagement (including the engagement embodied in a promissory note), unless in either case the debtor undertakes in the agreement to perform the obligations of the third party or of itself under the other contract or engagement.

37. Associated rights may be one of two kinds: those that are related to the financing or leasing of an object in the sense of Article 36(2), for example, rights to payment of the price of the object, repayment of an advance for the purchase of the goods, or related obligations of the debtor under the transaction (such as indemnities and loan breakage costs resulting from an unwinding of funding arrangements because of premature termination of the agreement for default), and those that are not so related, for example, rights to repayment of a non-purchase money loan in an unrelated transaction which may have as an element security over the object but has nothing to do with its financing, rental or associated obligations. The distinction between the former category and the latter is relevant to the priority of competing assignments of associated rights under Article 36, discussed in paragraph 43 below.

38. An earlier draft of the Convention had focused on the assignment of international interests and had provided that this should also transfer the associated rights, that is, all rights to payment or other performance by a debtor under an agreement which are secured by the object (in the case of a security agreement) or associated with the object (in the case of a conditional sale or leasing agreement) (Article 1(c)). Though contrary to the normal rule that a security interest is accessory to the obligation secured, this had a certain logic in that the Convention is concerned with international interests, not with assignments of receivables as such. In the end, however, it was considered that the normal rule should be applied. Accordingly Article 31(1) provides that, except as otherwise agreed by the parties, an assignment of associated rights made in conformity with the prescribed formalities also transfers to the assignee the related international interest and all the interests and priorities of the assignor under the Convention. For the position where the assigned international interest has not been registered see Comment 4 to Article 35. The debtor may assert against the assignee all defences and rights of set-off available to him under the applicable law unless he has waived them by an agreement in writing. Under the Convention such a waiver is binding except where it purports to bar defences arising from fraudulent acts of the assignor (Article 31(3), (4)).

39. It is open to the parties to agree to assign the associated rights without transferring the related international interest, and this will be the effect anyway if the assignment does not conform to the requirements of Article 32, but in either case the Convention does not apply to the assignment (Article 32(3)) and the effect is left to be determined by the applicable law. What the parties cannot do is assign an international interest without also assigning at least some of the related associated rights, for an international interest has no significance except in the context of the obligations which it secures or with which it is associated. A purported assignment of an international interest under a security agreement without inclusion of some or all of the associated rights is not valid (Article 32(2)).

40. Partial assignments of associated rights are permitted and it is then for the parties to agree as to their respective rights concerning the related international interest, but not so as adversely to affect the debtor without its consent (Article 31(2)). The parties could, for example, agree that the international interest is to be recorded as assigned into their joint names so as to secure their respective interests or that it is to remain in the sole name of the assignor (in which case the assignment will not be registered and the assignee will not benefit from the Convention's priority rules as against a subsequent assignee) with an undertaking by the assignor to enforce its rights on behalf of the assignee at the assignee's request or to subordinate its own rights as regards the part retained to the rights of the assignee as regards the part assigned. A partial assignment may adversely affect the debtor, as by requiring him to incur expense in paying two parties instead of one. In that case the parties to the partial assignment must obtain the debtor's consent if this has not already been given. Failure to do so does not, however, affect the validity of the assignment as between assignor and assignee.

41. Under Article 32 the formal requirements that have to be satisfied if an assignment of associated rights is to transfer the related international interest track those applicable to the creation of an international interest. The assignment must be in writing, must enable the associated rights to be identified under the contract from which they arise, and in the case of a security assignment must enable the obligations secured by the assignment to be determined in accordance with the relevant Protocol but without the need to state a sum or maximum sum secured. Where this has been done the debtor has a duty to make payment or give other performance to the assignee provided that the debtor has been given notice in writing of the assignment by or with the authority of the assignor and the notice identifies the associated rights (Article 33). The Aircraft Equipment Protocol adds a requirement that the debtor has consented to the assignment, although that consent may be general and may be given in advance.

42. Under Article 34, the default remedies available to an assignee under a security assignment follow, *mutatis mutandis*, the rules applicable to the international interest itself.

43. The priority of competing assignments is a little complex. The starting position is that where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply *mutatis mutandis*, so that a registered assignment has priority over an unregistered assignment and a later assignment. It is, of course, necessary that at least one of the assignments includes the related international interest, for otherwise neither assignee would have a right to register its assignment, since the function of registration is to record interests in equipment, not interests in associated claims in isolation, and as noted earlier an assignment of associated claims alone is outside the Convention (Article 32(3)). It is also necessary that the assigned associated rights retain a linkage with an international interest (see Comment 2 to Article 35). Similarly it is necessary that at least one of the assignments should be registered, for Article 29 does not regulate priorities between competing unregistered assignments, this being left to the applicable law. Article 36 qualifies in two respects the priority that would otherwise be conferred by Article 35. First, it is confined to cases where the contract under which the associated rights arise states that they are secured by or associated with the object. This is to deal with the situation where, for example, an agreement secures not only the obligations for which it provides but obligations arising under a later agreement and the later agreement does not refer to the security, so that a subsequent assignee of the associated rights under the later agreement has no way of knowing that the obligations under the later agreement are secured on or in any way connected with the equipment and ought not, therefore, to be subject to the Convention priority rules. Secondly, the priority of the first assignment is given only to the extent that the associated rights are related to an object as specified in Article 36(2), which broadly covers obligations for the repayment of purchase-money loans and the payment of the price and rentals of objects, together with all ancillary obligations under the financing transaction documents. Priority in cases falling outside these limits – for example, a priority involving an assignee of associated rights as security for a non-purchase money loan – is left to the applicable law, including (where applicable) the United Nations Convention on the Assignment of Receivables in International Trade (“the UN Convention”) opened for signature on 12 December 2001.

44. On the assignor’s insolvency Article 30 applies as if the references to the assignor were references to the debtor (Article 37). Rights of legal or contractual subrogation are in general unaffected (Article 38). Article 38(2) permits parties to vary priorities between themselves along the lines of Article 29(5).

### **Non-consensual rights or interests**

45. A Contracting State may specify the types of non-consensual right or 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). Basically, a State may retain or restrict its nationally preferred rights and interests arising by law, but may not use the Convention to expand these preferred rights. Typical examples are preferential claims for taxes and for wages due from an insolvent employer and statutory or other liens ranking in priority. Rights or interests covered by a declaration under Article 39 have priority over a registered international interest even though not themselves registrable. 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. Rights of arrest or detention under national law, so far as not covered by a declaration under Article 39(1)(a) (e.g. because they are contractual and therefore outside Article 39(1)(a)), may be preserved by a declaration to the extent provided by Article 39(1)(b), which applies both to contractual rights of arrest or detention and to rights given by law, e.g. in exercise of a lien for unpaid navigation charges.

46. A Contracting State may also make a declaration that specified categories of non-consensual right or interest shall be registrable as if they were international interests (Article 40). One might envisage, for example, the registration of a judgment debt or an attachment by an execution creditor or a repairer's lien. Registration of such a non-consensual interest would give it the same priority as an international interest.

### **Extension to outright sales**

47. The Convention does not apply to outright sales, for these do not involve a debtor or the assertion of any security or proprietary interest vis-à-vis the debtor. However, Article 41 provides for the possibility of an extension of the Convention to outright sales as provided for in the relevant Protocol, thereby enabling outright buyers to take advantage of the registration machinery to register their acquisitions.<sup>5</sup>

### **Jurisdiction**

48. Articles 42 to 45 contain rules as to jurisdiction which may be summarised as follows:

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<sup>5</sup> See Aircraft Equipment Protocol, Article III.

(1) Except in relation to the grant of interim relief under Article 13 or the making of orders against the Registrar, exclusive jurisdiction for any claim brought under the Convention is given to the courts of a Contracting State chosen by the parties except where they agree that the jurisdiction is to be non-exclusive. The chosen forum need not have a connection with the parties or the transaction. The agreement must be in writing or otherwise in accordance with the formal requirements (as opposed to substantive requirements) of the *lex fori* (Article 42).

(2) The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have concurrent jurisdiction to make orders requested by the creditor for relief pending final determination, other than orders for the lease or management of the object and the income from it (Article 43(1)). It is not competent to the parties to exclude the concurrent jurisdiction of courts of the *situs* of the object.

(3) The courts of the territory on which the debtor is situated have concurrent jurisdiction, pending final determination of the claim, (a) to make orders for the lease or management of the object and income from it under Article 13(1)(d) and (b) to grant any other interim relief available under the *lex fori* by virtue of Article 13(4), in either case as requested by the creditor, though the jurisdiction is limited to orders which by their terms are enforceable only in the territory concerned. Again, the parties cannot exclude the concurrent jurisdiction courts of the place where the debtor is situated.

(4) 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 against the Registrar (Article 44(1)). As regards the latter, two specific cases are mentioned: orders requiring a registration to be discharged where the person under a duty to procure the discharge cannot be found or has ceased to exist (Article 44(2)) and orders directing amendment or discharge of a registration where a person fails to comply with an order of a court of a State having jurisdiction under the Convention, for example, an order to procure the amendment or removal of a registration improperly made, or, in the case of a national interest, a court of competent jurisdiction (Article 44(3)). But Article 44(1) should be interpreted broadly as conferring (by analogy with Article 44(3)) a residual jurisdiction on the court where the Registrar has its centre of administration to make an order for amendment or discharge of a registration where a party has failed to comply with an order of a court having jurisdiction under the Convention, or with an order of any other court of competent jurisdiction, requiring that party to procure the amendment or discharge of the registration. Article 44(1) also confers exclusive jurisdiction on the Registrar's court to make orders to enforce the Registrar's duties and obligations under the Convention, for example, its duty (a) to issue a search certificate to a person making a search in due form and paying the requisite fee; and (b) to comply with directions

properly given to it by the Supervisory Authority under Article 17 of the Convention. Jurisdiction in relation to claims against the Registrar outside the Convention, for example, claims arising from contracts entered into by the Registrar with the Supervisory Authority or with suppliers of goods and services, will be determined by the domestic law of the State in which the Registrar has its centre of administration.

(5) Chapter XII confers no jurisdiction in relation to insolvency proceedings, which are a matter for the relevant insolvency jurisdiction.

In applying rules (2) and (3) above it is necessary to have regard to Article 52(5) where the relevant Contracting State has made a declaration which has the effect of excluding from the Convention one or more territorial units in which different systems of law are applicable with reference to a Contracting State. In such a case the debtor is not considered to be situated, or the object to be located, in a Contracting State, if situated or located in a territorial unit excluded by such a declaration.

### **Relationship with other Conventions**

49. Article 45 *bis*<sup>6</sup> provides that the Convention is to prevail over the UN Convention. This simply makes explicit what was implicit in Article 38(1) of the UN Convention. The main potential cause of conflict lies in Article 36 of the present Convention, relating to the priority of assignments of associated rights. However, as noted above, Article 36 is limited in scope and in relation to associated rights the two Conventions adopt broadly similar concepts. The relationship between the Convention and the 1988 UNIDROIT Convention on International Financial Leasing (“the Leasing Convention”) is left to the Protocol.<sup>7</sup>

### **Final provisions**

50. Chapter XIV of the Convention sets out final provisions. Some of these are standard, others reflect special elements and objectives of the Convention, including the two-instrument structure and the prospect of future Protocols.

(a) *Regional Economic Integration Organisations*

The Convention is open for signature, acceptance, approval or accession, not only by sovereign States but also by a Regional Economic Integration Organisation (“REIO”) which is constituted by sovereign States and has competence over certain

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<sup>6</sup> Inserted subsequent to the Diplomatic Conference pursuant to an Annex approved by the Conference. This does not form part of the published documents, its effect being exhausted after the insertion was made.

<sup>7</sup> See Article XXV of the Aircraft Equipment Protocol superseding the Leasing Convention as regards aircraft objects.

matters governed by the Convention. A particular example is the European Community, which was involved in negotiations over the text at the Diplomatic Conference in relation to the provisions on which the Community claims exclusive external competence. Under Article 48 of the Convention any Regional International Economic Organisation will have to make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation.

*(b) Entry into force; controlling effect of Protocol*

The Convention itself requires only three ratifications and enters into force three months after deposit of the third instrument of ratification but, as regards a category of object to which a Protocol applies, only as from the time of entry into force of that Protocol, subject to the terms of that Protocol and as between States Parties to the Convention and that Protocol (Article 49). It follows that the Convention does not apply to a category of objects until the Protocol is in effect, and the Protocol controls where it modifies the Convention in respect of that category. So in the case of aircraft objects the Convention first applies when the Protocol is in force, and the general provisions of the Convention are modified in various respects by the Aircraft Equipment Protocol to meet the particular needs of the aviation industry. The Aircraft Equipment Protocol requires eight ratifications (Article XXVIII), so that in relation to aircraft objects the Convention itself does not enter into force until the lapse of three months from the deposit of the eighth instrument of ratification. There are, however, provisions that are not object-related. They include Article 47 (signature, ratification, etc.), Article 48 (Regional Economic Integration Organisations), Article 51 (arrangements for extension to future Protocols), Article 52 (territorial units), Article 59 (denunciations), and Article 62 (Depositary and its functions). These final clauses came into force on 16 November 2001 pursuant to Article 24(4) of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"). Accordingly Article 49 merely states the need for ratification of the Convention itself, a point emphasised by Article XXVI(5) of the Aircraft Equipment Protocol, which provides that a State may not become a party to the Protocol without becoming a party to the Convention.

*(c) Internal transactions*

Though in principle the Convention applies even where all the elements of a transaction are located in one jurisdiction, Article 50 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 and the national interest created by the transaction has been registered in a national registry in the declaring State (Article 1(n), (r)). However, the effect of this exclusion

is limited. In general terms, Article 50 disapples most of the default provisions in Chapter III, but not the basic system for perfecting and prioritising interests. The default provisions in Articles 8(4) and 9(1) restricting sale of an object or vesting of ownership of it in the creditor apply to a national interest. The national interest may be protected by notice in the International Registry, and is then given the same priority as a registered international interest. The priority of an assignment of a national interest notice of which has been entered in the International Registry is controlled by the provisions governing the priority of an assignment of a registered international interest. Finally, in the case of a Contracting State which has territorial units in which different systems of law are applicable and that State has made a declaration under Article 52 which has the effect of excluding the application of the Convention to one or more of those territorial units, a transaction will not be an internal transaction unless the centre of the main interests of all the parties is situated and the object is located in the same territorial unit and the territorial unit is one to which the Convention applies.

*(d) Procedure for additional Protocols*

Protocols on railway rolling stock and space assets are specifically provided for in the Convention (Article 2(2),(3)). Article 51 provides a procedure for the preparation of other Protocols and their adoption at Diplomatic Conferences.

*(e) Transitional provisions*

Article 60 contains important transitional provisions. The general principle is that unless otherwise declared by a Contracting State a pre-existing right or interest, that is, a right or interest created before the effective date of the Convention (Article 1(v)), is not affected by the Convention and retains its pre-Convention priority (Article 60(1)). By “effective date” is meant the time when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later (Article 60(2)(a)). A Contracting State may make a declaration specifying a date not less than three years after the declaration when the Convention and Protocol will become applicable to a pre-existing right or interest for the purpose of determining priority, including the protection of any existing priority, where the right or interest arises under an agreement made at a time when the debtor was situated in a Contracting State (Article 60(3)). So the holder of a pre-existing interest affected by a declaration will have at least three years in which to protect its pre-Convention priority by registration in the International Registry. While the holder’s re-perfection of the interest by registration in the International Registry is necessary to preserve its priority against subsequent interests, the declaration should provide that as against prior interests the holder retains its pre-Convention priority.

A declaration under Article 60 is limited to priority issues, so that in relation to a pre-existing interest a Contracting State may not apply the provisions of the Convention

relating to relations between the debtor and the creditor or the provisions concerning insolvency. Of course, there is nothing to prevent a debtor and creditor from voluntarily replacing their agreement with a new agreement made after the effective date of the Convention, to which the Convention will then apply, though the creditor will then lose its pre-Convention priority as against earlier interests.

### **System of declarations**<sup>8</sup>

51. Certain provisions of the Convention are dependent on policy decisions by States. For these provisions the Convention provides a system of declarations allowing Contracting States to make choices. Declarations are equipment-specific in that they cannot be made independently of a Protocol. They are of four kinds: opt-in declarations, opt-out declarations, mandatory declarations and other declarations.

#### *(1) Opt-in declarations*

These are declarations which a Contracting State is required to make if a particular provision of the Convention, as applied by a Protocol, is to have effect within that State. Provisions triggered only if a declaration is made are:

Article 39	Non-consensual rights and interests having priority without registration
Article 40	Registrable non-consensual rights or interests
Article 60	Application of Convention priority rules to pre-existing rights or interests.

A declaration under Article 39 may be general or specific and may be expressed to cover future categories as well as existing categories.

#### *(2) Opt-out declarations*

These are declarations which a Contracting State is required to make in order to exclude the application of a particular Convention provision, as applied by a Protocol, in that State. Opt-out declarations are required to exclude:

Article 8(1)(b)	Power to lease a charged object while in the declaring State's territory (Article 54(1))
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<sup>8</sup> A declarations matrix is contained in Annex X showing all declarations required or permitted under the Convention and Aircraft Equipment Protocol and identifying which declarations are opt-in and which opt-out. The Depositary, UNIDROIT, will be publishing a guide to the declarations system, *The system of declarations under the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment: an explanatory memorandum for the assistance of States and Regional Economic Integration Organisations in the completing of declarations* (UNIDROIT 2002 DC9/DEP Doc. 1).

Articles 8(1),  
9(1), 10            Extra-judicial remedies (Article 54(2))  
Article 13            Interim relief (Article 55)  
Article 43            Jurisdiction under Article 13 (Article 55)  
Application of the Convention to internal transactions (Article 50(1)).

(3) *Mandatory declarations*

These are declarations which a Regional Economic Integration Organisation or a Contracting State is required to make in every case. Such declarations are required under:

Article 48(2)        Specification by a Regional Economic Integration Organisation of matters governed by the Convention in respect of which competence has been transferred to the Organisation by its Members  
Article 54(2)        Whether remedies may be exercised only with leave of the court.

(4) *Other declarations*

There are two declarations within this category, namely :

Application of the Convention to one or more territorial units (Article 52(1))  
Article 53            The relevant “court” for the purposes of Article 1 and Chapter XII.

The effect of the declaration system is that a Contracting State *must* make a declaration if:

- (a) it wishes to *adopt* an opt-in provision, i.e. under Article 39, 40 or 60;
- (b) it wishes to *exclude* an opt-in or modifying provision, i.e. under Article 8(1), 9(1), 10, 13 or 43;
- (c) the declaration is mandatory, i.e. under Articles 48(2) and 54(2); or
- (d) it wishes to define the relevant court under Article 53.

In all other cases the Contracting State need take no action. All declarations other than those made under Article 60 may be modified or replaced by subsequent declarations under Article 57 or withdrawn under Article 58.

The Aircraft Equipment Protocol provides for additional declarations as regards aircraft objects. To ensure predictability, and, to a degree, to limit political risk, the Convention and Aircraft Equipment Protocol protect interests arising prior to the

effective date of any denunciation of the Convention or the making or withdrawing of any declaration which could adversely affect an existing interest.

These declarations are to be distinguished from reservations, which the Convention does not permit. A reservation is a unilateral declaration by a State purporting to exclude or modify the legal effect of certain provisions of a Treaty in their application to the reserving State (Article 2(1)(d) of the Vienna Convention). Unless otherwise stated in the Treaty, a reservation does not bind another State unless accepted by that State. By contrast the contents of a declaration are expressly provided for in the Treaty and a declaration does not require acceptance to bring it into force. The technique of declarations has been regularly employed in international conventions for many years.

Articles 39, 40 and 60(1), all of which are optional, provide that declarations may be made under them at any time. Articles 50, 52, 53, 54 and 55 provide for declarations under them to be made at the time of ratification, etc. However, it is open to a Contracting State that does not do this to make a declaration subsequently under Article 57, so that the effect is the same as in the phrase “at any time”. By contrast, declarations under Articles 48(2) and 54(2) are mandatory and must be made at the time of ratification, etc., though they may be supplemented or replaced by a subsequent declaration under Article 57, the Depositary being notified of any changes in the distribution of competence as provided by Article 48(2).

*(Omissis)*

# **COMMENTARY ON THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT**

## **PREAMBLE**

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**CHAPTER XIII RELATIONSHIP WITH OTHER CONVENTIONS**

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**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 and mutual 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,**

**TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,**

**HAVE AGREED upon the following provisions:**

**Comment**

1. 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 mobile equipment, and in particular aircraft objects, railway rolling stock and space assets.

2. The second paragraph of the Preamble reflects the importance attached to predictability through clarity of rules (see also Article 5(1) and Comment 1 to Article 5), which is itself assisted by the separate principle of party autonomy (see Comment 4). The Convention seeks to provide specific answers to the legal issues faced, rather than setting out general standards which are susceptible to widely differing judicial interpretation. Justified reliance by transaction parties on these clear rules, as drafted, is the basic intent. But some general standards have been found necessary, for example, the requirement of commercial reasonableness in the exercise of remedies (though here again a provision in the agreement between the parties on what is commercially reasonable is determinative unless the provision itself is considered by the court to be manifestly unreasonable).

3. The third paragraph, which focuses on the need to recognise and protect interests in high-value mobile equipment, goes to the very *raison d'être* of the Convention, namely to provide a set of uniform rules for the creation, perfection and priority of international interests in such equipment, in order to overcome the serious problems arising from differences among legal regimes on these issues and the inadequacy of the traditional *lex rei sitae* principle when applied to equipment constantly moving from one State to another.

4. The fifth paragraph of the Preamble reflects two further policies of the Convention, namely its reflection of the principles of asset-based financing and leasing and its recognition of the need for a high degree of party autonomy. The essence of such financing is the reliance placed by the creditor, when making its credit decision, on its ability to have recourse to an asset and its value to safeguard itself against the risk of default by the debtor. A secure and efficient legal regime for recovery by the creditor of assets held under security, title retention and leasing agreements helps to reduce risk, increase access to finance and lower borrowing costs. Similarly party autonomy is central to the philosophy of the Convention. The Convention is predicated upon a respect for mercantile practice as reflected in contracts and an interpretation of contracts in line with their accepted commercial meanings. At the same time safeguards have been provided to protect the debtor against manifestly unreasonable contractual provisions or behaviour and to allow a Contracting State to disapply certain provisions where it feels that these run counter to its fundamental policies.

## 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 associated rights with or without a transfer of the related 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 bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of 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 located (as specified in the Protocol), in the same Contracting State at the time of the conclusion of the contract and where the interest created by the transaction has been registered in a national registry in that Contracting State which has made a declaration under Article 50(1);**

**(o) “international interest” means an interest held by a creditor 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 one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment;**

**(r) “national interest” means an interest held by a creditor in an object and created by an internal transaction covered by a declaration under Article 50(1);**

**(s) “non-consensual right or interest” means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation;**

**(t) “notice of a national interest” means notice registered or to be registered in the International Registry that a national interest has been created;**

**(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 or over an object created or arising before the effective date of this Convention as defined by Article 60(2)(a);**

**(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 40;**

**(ee) “Registrar” means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(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 17(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.**

## Comment

1. This Article contains a comprehensive list of defined terms and the Convention and Aircraft Equipment Protocol must be read in the light of these. Certain terms are not defined, either because it was considered that their meaning is clear from defined terms to which they are related (e.g. “buyer”, “chargee”, “chargor,” “seller”) or from the context or the nature of the categories of object to which the Convention applies (e.g. “international”, “mobile equipment” – and see paragraph 19 of the Overview above) or because they are defined in the Aircraft Equipment Protocol (e.g. “aircraft engine”, “airframe,” “helicopter”).

2. “agreement” – a term covering all three types of agreement creating or providing for an international interest, and used in those provisions where it is not necessary to distinguish one type from another, notably Articles 3(1), 7, and 60(3). “Agreement” is to be contrasted with “contract”, a term not defined but used in Articles 32(1)(b) and 36(1)(a) to cover, for example, a loan agreement in respect of which the repayment obligation is secured not by the loan agreement itself but by a prior security agreement under which the debtor agrees to perform all its obligations under other contracts, present or future. “Agreement” is also to be contrasted with “contract of sale”, which is separately defined and denotes a contract of outright sale (see Comment 8). Like other definitions, the definition of agreement does not apply where the context otherwise requires, for example, in Articles 29(5), 31(4) and 38(2).

3. “assignment” – this definition relates to the assignment of associated rights (see the next definition) which is the subject of Chapter IX of the Convention. “Assignment” is here used in a broad sense to cover any form of contract by which associated rights are conferred on another, whether by outright transfer of ownership, security transfer of ownership or a pledge or charge of the associated rights creating a right *in rem* without a transfer of ownership. The definition covers both an assignment which also transfers the related international interest, as will be the effect under Article 31(1) if the parties do not otherwise agree, and an assignment of the associated rights alone where the parties so agree. The latter is not, however, governed by the Convention.

4. “associated rights” – these are rights to payment or other performance secured by or associated with the object. Associated rights are “secured by” a security agreement or “associated with” a title reservation or leasing agreement. They include rights to repayment of a loan or to payment of the price under a title reservation agreement or rentals under a leasing agreement, as well as rights to other forms of performance, such as insurance and repair of the object, breakage costs, indemnities, and the observance of negative obligations, such as a prohibition on the disposal of leased objects without the lessor’s consent. But associated rights are confined to the obligations of the debtor itself under the agreement, including undertakings in the agreement to perform other contracts; obligations of third parties – and, indeed, of

the debtor itself under other contracts with the creditor or with third parties – are not associated rights, even though secured by the agreement, unless the debtor also undertakes performance of those obligations in the agreement.

5. “commencement of the insolvency proceedings” – the time at which they are deemed to commence under the applicable insolvency law. The definition is relevant to Article 30(1) under which an international interest is effective in insolvency proceedings if registered in the International Registry prior to the commencement of the insolvency proceedings. The applicable insolvency law is determined by the conflict of laws rules of the forum.

6. “conditional buyer” – the buyer under a title reservation agreement; to be contrasted with the term “buyer” used in Article 29(3), which denotes an outright buyer under a contract of sale (see Comment 8).

7. “conditional seller” – the seller under a title reservation agreement as defined in Article 1(II).

8. “contract of sale” – this phrase denotes a contract for an outright sale in which ownership passes in accordance with ordinary rules of law, as opposed to a title reservation agreement under which the seller reserves ownership until payment and/or the fulfilment of other specified conditions.

9. “court” includes an administrative or arbitral tribunal established by a Contracting State but does not include a private administrative or arbitral tribunal. Under Article 53 a Contracting State may declare the relevant “court” or “courts” for the purposes of the present Article and Chapter XII. It is, however, implicit in the Convention that the designated body is one which fulfils judicial or quasi-judicial functions.

10. “creditor” – the term is used to denote the person to whom obligations are owed under an agreement where the relevant provision of the Convention does not distinguish between one form of agreement (e.g. a security agreement) and another (e.g. a title reservation agreement or leasing agreement). See, for example, Articles 11 and 13.

11. “debtor” – the person who owes obligations under an agreement. See Comment 10.

12. “insolvency administrator” – a person authorised to administer the reorganisation or liquidation, i.e. in an insolvency proceeding as defined by the next paragraph. 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 authorised to be left in the hands of its management. A person not authorised in a collective insolvency proceeding, for example, one appointed by a

secured creditor under the terms of a security agreement or by a group of creditors under an informal workout arrangement, is not an insolvency administrator for the purposes of the Convention.

13. “insolvency proceedings” – this phrase covers all forms of collective proceeding in which the debtor’s assets are subject to control or supervision by a court for the purposes of reorganisation in insolvency or liquidation.

14. “interested persons” – this phrase denotes the persons who (a) have to be notified under Article 8(4) 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 9(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 13 for relief pending final determination of the creditor’s claim. Interested persons include the debtor itself, a surety, the issuer of a demand guarantee, standby credit or credit insurance, and another creditor holding security over the object, whether senior or junior to the creditor seeking to exercise a remedy.

15. “internal transaction” – a definition relevant only to Article 50, under which a Contracting State may by declaration exclude, albeit within narrow limits, the application of the Convention to internal transactions. In summary, an internal transaction is a security agreement, title reservation agreement or leasing agreement in respect of which (a) the centre of main interests of all parties is situated and the equipment is located in the same Contracting State at the time of conclusion of the contract and (b) the interest created by the transaction has been registered in a national registry in the declaring State. Such an interest is referred to as a national interest (see paragraph (r) of the present Article and Comment 19 below). The requirement that it be registered in a national registry is designed to ensure that there is a mechanism through which notice of the national interest can be transmitted to the International Registry so as to secure the comprehensive application of the Convention’s first-in-time priority provisions. Most of the default provisions are inapplicable to internal transactions, and the national interest arising under an internal transaction cannot be registered as an international interest, but it can be protected by registration of notice of a national interest, to which the priority rules apply in the same way as to international interests. An agreement in respect of which the interest has not been registered in a national register is not an internal transaction and cannot, therefore, be excluded from the Convention by a declaration under Article 50. See further Comment 19.

16. “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 7 (as to prospective international interests, see Comment 26 below). 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, though the default provisions of Chapter III do not apply to them. The same is true of national interests protected by a notice in the International Registry. The interest of an outright buyer is not an international interest but is protected against prior unregistered interests by Article 29(3) and 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.

17. “International Registry” – the registry established under the Convention by the Supervisory Authority to record international interests and other registrations provided by Article 16.

18. “leasing agreement” – this covers leases and sub-leases, with or without an option to purchase, and, indeed, any agreement by which one person grants to another a right to possession or control of an object in return for a rental or other payment, whether or not the transaction would be characterised by national law as a leasing agreement, though under Article 2(4) it is left to the applicable law to determine whether the agreement is to be characterised as a leasing agreement or a security agreement. “Possession” is to be construed in a broad Convention sense, not in terms of national law, and is therefore wide enough to cover what would in some jurisdictions be regarded as mere detention. However, an agreement is not a leasing agreement, even if so called in commercial usage, if possession is retained by the lessor and the lessor is merely providing services. Thus a “wet lease” of an aircraft, by which the aircraft and crew of the lessor are made available to the lessee for a specified time but remain under the control of the lessor, is not a leasing agreement within the Convention.

19. “national interest” – an interest created by an internal transaction covered by a declaration under Article 50(1). An interest arising under the law of a Contracting State but not registered in a national registry of that State is not a national interest for the purposes of the Convention because the transaction under which it arises is not an internal transaction as defined by Article 1(n). Accordingly the transaction is fully covered by the Convention and cannot be excluded by a declaration under Article 50(1), and this is so whether the non-registration is because the interest is not registrable under the national law or the chargee has failed to register it or because the Contracting State concerned has no national registration system in place at all. Even a registered interest is not a national interest if the Contracting State has made no declaration with respect to it. However, as noted earlier, national interests are governed by the Convention’s perfection and priority rules. See further Comment 15.

20. “non-consensual right or interest” – this definition is confined to non-consensual rights or interests falling within Article 39 and therefore having priority without registration if covered by a Contracting State’s declaration under that Article. The phrase is also used in Article 40, where it has a somewhat broader meaning and

could, for example, cover a judgment or order. “Interest” denotes a right *in rem*, whereas “right” is a broader term capable of embracing a purely *ad rem* personal right enforceable by recourse to the object, e.g. a right of seizure, detention or sale given by law or a right of recourse by way of execution of a judgment or order of a court. Excluded from the definition are purely personal contractual rights not constituting interests in an object and these are outside the Convention altogether, though Article 39(1)(b) enables a Contracting State to make a declaration that nothing is to affect rights of arrest or detention of an object, whether contractual or given by law, for payment of amounts owed to a provider of public services directly relating to those services in respect of that object or another object.

21. “notice of a national interest” – the means by which a national interest arising under an internal transaction can be protected by entry of the notice in the International Registry. The first-in-time rule applies to the registration of a notice of a national interest as it does to registration of an international interest.

22. “object” – a generic term for any article of equipment within the scope of Article 2 of the Convention and therefore covering an airframe, aircraft engine, helicopter, railway rolling stock or space assets.

23. “pre-existing right or interest” – a right or interest created or arising before the effective date of the Convention (as defined by Article 60(2)(a)) and therefore unaffected by the Convention except in a Contracting State that has made a declaration under Article 60 and then only for the purposes of determining priority under the Convention.

24. “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 assets, as well as cutting across the UN Convention.

25. “prospective assignment” – an assignment intended to be made in the future upon the occurrence of a stated event and registrable under Article 16(1)(b). Under Article 35 the priority rules governing international interests apply *mutatis mutandis* to assignments, with the result that when the assignment is in due course made it is treated as registered as from the time of registration of the prospective assignment and ranks for priority accordingly.

26. “prospective international interest” – an interest intended to be created or provided for as an international interest in the future on the occurrence of a stated event. Article 16(1)(a) enables a person intending to take security over an 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 19(4)). So long as the registered particulars are sufficient for a completed international interest no second registration is required when the international interest comes into being (for example, when the only element lacking was the debtor's power of disposal and the debtor acquires a power to dispose of the object). This is reinforced by Article 22(3), the effect of which is that a person searching the International Registry will not be able to differentiate between an international interest and a prospective international interest because the search certificate will state merely that the creditor named in it has acquired or intends to acquire an international interest in the object identified. In either case, a searching party knows that it risks not having the highest priority – and must make further inquiries of the parties. Among other things, this concept will facilitate the closing of transactions by permitted pre-filings, which, however, require the consent of both parties to a transaction.

27. “prospective sale” – a sale intended to be made in the future upon the occurrence of a stated event. The Convention does not itself contain provisions governing sales or prospective sales but Article 41 provides that it may be applied to them by virtue of a Protocol (as has been done under the Aircraft Equipment Protocol) with the effect that where a prospective sale is registered and the sale is duly completed it is treated as registered from the time of registration of the prospective sale.

28. “Protocol” – the Protocol applicable to a particular category of object.

29. “registered” – registered in the International Registry pursuant to Chapter V. An interest is to be treated as registered only if it is validly registered, that is, registered in conformity with Article 20 (see Article 19(1)). A registration is not valid if the consent prescribed by Article 20 is lacking or if the interest to which it relates was never validly created in the first place, which in the case of an international interest requires, amongst other things, conformity with Article 7.

30. “registered interest” – this denotes any interest registered pursuant to Chapter V, whether as an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest. This definition is relevant primarily to the priority rule in Article 29(1) and its application to assignments under Article 35(1) and internal transactions under Article 50(2).

31. “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 40 can be registered in the International Registry as if it were an international interest. A possible example is the lien of a judgment creditor.

32. “Registrar” – an entity or other person, natural or legal, appointed by the Supervisory Authority (or if otherwise provided by the relevant Protocol, designated by that Protocol) to run the International Registry.

33. “regulations” – regulations made or approved by the Supervisory Authority pursuant to the Protocol. The function of the regulations is to prescribe the detailed requirements for the operation of the International Registry, including requirements for registrations, searches, the functions of the Registrar and fees payable. Regulations are thus the bottom tier of the rule-making structure. They are relevant only to matters within the purview of the International Registry and will usually be made pursuant to a Protocol, not directly under the Convention, though as regards aircraft objects provision for electronic consents and electronic searches will be made directly by regulations since the Protocol omits to deal with these as envisaged by Articles 18(1)(a) and 22(1).

34. “sale” – a transfer of ownership pursuant to a contract of sale as opposed to a title reservation agreement.

35. “secured obligation” – an obligation secured by a security interest as defined by paragraph (jj) of this Article. The definition is relevant to Articles 8(5), 9 and 34(a).

36. “security agreement” is widely defined so as to cover (a) security by title transfer as well as a pledge (though the latter would be unusual as it involves delivery of actual or constructive possession to the creditor) or a charge or other form of consensual security, (b) security for future as well as existing obligations, and (c) security for performance of the obligations of a third party as well as of the chargor.

37. “security interest” – an interest created by a security agreement. See Articles 8(6), 9 and 25(1).

38. “Supervisory Authority” – the body responsible for setting up the International Registry, appointing and dismissing the Registrar, promulgating the regulations and fulfilling the other functions specified in Article 17. See further paragraph 28 of the Overview above.

39. “title reservation agreement” – an agreement for sale by which the transfer of ownership is retained by the seller until the fulfilment of payment and/or other conditions specified in the agreement. This is to be contrasted with “contract of sale”, under which ownership is to pass under normal rules of law governing the transfer of ownership where the seller does not reserve title.

40. “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, without registration, even over a registered international interest. The essential point is that under Article 29(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 three major exceptions: under Article 29(3) an outright buyer of an object takes free from an international interest not registered at the time of the purchase (this rule is disapplied in the Aircraft Equipment Protocol, since the buyer of an aircraft object can register its interest in the object); under Article 29(4) a conditional buyer or lessee can shelter under the registration of its conditional seller or lessor; and a non-consensual right or interest covered by a declaration under Article 39 has priority even though not registered in the International Registry.

41. “writing” is defined widely so as to embrace not only documents but also electronic and other forms of teletransmission. However, the teletransmission must indicate by reasonable means a person’s approval of the record and must be capable of reproduction in tangible form on a subsequent occasion.

Some terms are not defined, their meaning generally being considered self-evident. But one of these worthy of mention is “person,” which embraces both natural and legal persons and thus covers individuals, partnerships and other unincorporated associations if having legal personality, corporations and other legal entities.

## **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 7, 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 assets.**
- 4. The applicable law determines 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 the conditions set out in paragraph 16 of the Overview must be satisfied. The “effects” referred to in Article 2(1) include default remedies, perfection and priority requirements, and effectiveness in the debtor’s insolvency.

2. The Convention does not specify any requirements of mobility or internationality. These elements are considered to follow from the nature of the object. If the connecting factor in Article 3 is satisfied, the Convention applies without further conditions. See also the Comment to Article 50. Article 51 contains provisions for extension of the Convention, through future Protocols, to additional items of equipment.

3. The Convention does not determine whether an agreement is a security agreement, a title reservation agreement or a leasing agreement. Law in certain jurisdictions, notably the United States, most of the Canadian jurisdictions and New Zealand, characterises 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, that is, the domestic rules of the law applicable by virtue of the rules of private international law of the forum State (Article 5(3)), i.e. excluding the rules of private international law of the applicable law and thus excluding *renvoi*. 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 a title reservation agreement to which the Convention applies. If a New York court were to apply New York law to characterise the agreement it would treat it as a security agreement. If a Paris court were to apply French law to the characterisation issue it 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 and each court was applying its own law a New York court would apply Articles 8 or 9, as appropriate, while a French court would apply Article 10.

4. In the preceding example the title reservation agreement is also a security agreement under New York law. If New York law applies, the effect of Article 2(2) is that the agreement is to be treated only as a security agreement and not also 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 24 to Article 1). In consequence any priority enjoyed by the holder of the international interest under Article 29 covers the proceeds, a point expressly made by Article 29(6).

## **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**

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. If it is met, the Convention does apply. No further conditions are relevant.

2. 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 IV of the Aircraft Equipment Protocol provides as an alternative ground of application the fact that the agreement relates to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry (as defined by Article I(p) of the Aircraft Equipment Protocol).

#### **Article 4 — Where debtor is situated**

**1. For the purposes of Article 3(1), 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 sub-paragraph (d) of the preceding paragraph 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 4 sets out six alternative ways in which the test of situation of the debtor in a Contracting State may be satisfied. The purpose of this wide range of factors is to give maximum scope to the application of the Convention. However, where paragraphs (a) – (c) are inapplicable and the debtor has more than one place of business, the Convention applies only if the principal place of business is situated in a Contracting State. Article 4(1) does not apply for any purposes other than those of Article 3(1).

2. The words “or formed” in sub-paragraph (a) include unincorporated associations organised under the law of the Contracting State in question. The terms “statutory seat” and “registered office” in sub-paragraph (b) are equivalents, the former featuring in some national laws and international instruments, the latter in others.

3. Where a Contracting State has territorial units with different systems of law applicable in relation to matters dealt with in the Convention and exercises its power under Article 52 to apply the Convention only to one or some of those territorial

units, the debtor is considered to be situated in a Contracting State only if situated in one such territorial unit as set out in Article 52(5)(a).

4. Article 4 applies only for the purposes of Article 3(1). It is therefore inapplicable to Article 1(n) (which refers to the centre of main interests of the parties), Article 43(2)(b) (which contains no test for determining the debtor's situation), Article 52(5)(a) (see Comment 3 above) or Article 60(2)(b) which applies a cascade approach. See Comment 5 to Article 60.

### **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 express what have become standard principles of interpretation as exemplified by Article 7(1) of the 1980 United Nations Convention on Contracts for the International Sale of Goods (“the Sales Convention”) except that predictability has been substituted for good faith, which in high value cross-border financing transactions is considered to create unacceptable uncertainty. The general principles on which the Convention is based include, as stated in the Preamble, predictability, party autonomy, and the protection and ready enforceability of security, title retention and lessor interests in equipment, all of which are designed

to promote the overriding objective of the Convention, namely to promote the asset-based financing of mobile equipment.

2. Paragraph 1 is an instruction to national courts to avoid national concepts in interpreting the texts.

3. Under paragraph 2, the “general principles” described in the comments on the Preamble are the first and primary source for gap-filling. These principles are those that underlie asset-based financing and leasing, namely, prompt enforcement and clear priorities, together with predictability and party autonomy.

4. 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. The law thus determined need not be the law of a Contracting State. Recourse may also be made to the objects set out in the Preamble in identifying the principles underlying the Convention.

5. Paragraph 4 provides for the determination of the applicable law in the case of a State comprising several territorial units each having its own rules of law in respect of the matter to be decided. This paragraph is not confined to federal States; it applies to all States having two or more law districts. Where there is no indication of the relevant territorial unit then what has to be applied is the law of the territorial unit selected by the law of the State or, if none, of the territorial unit with which the case is most closely connected. Thus in the first instance the conflict rules of the *lex fori* are applied and will usually lead to the law of the appropriate territorial unit, either because it has been specifically chosen by the parties or because objective factors lead to the application of that law. Where the conflict rules of the *lex fori* provide no solution, the internal conflict rules of the multi-territorial State must be applied. If there are no such rules, the court must apply the substantive law of the territorial unit with which the case has the closest connection. These three categories are not exhaustive. It is possible to have a case in which none of them apply, as where the parties select the law of a multi-unit State which has no connection with the case and do not specify or indicate the means of determining a particular territorial unit, and the State itself has no internal conflict rules. The Convention offers no solution to exceptional cases of this kind. The parties' designation of the applicable law being ineffective for want of certainty, the only solution is to leave the matter to be resolved by the *lex fori* in the light of all factors considered relevant by the court.

## **Article 6 – Relationship between the Convention and the Protocol**

- 1. This Convention and the Protocol shall be read and interpreted together as a single instrument.**
- 2. To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.**

### **Comment**

The effect of this Article is that the Convention must be interpreted as if the provisions of the relevant Protocol were read into it. Whilst Article 49 spells out the overriding character of the relevant Protocol as regards the conditions for entry into force of the Convention, paragraph 2 of the present Article affirms the primacy of the Protocol in all questions that may arise concerning the interpretation of the two instruments. Any inconsistency is to be resolved in favour of the Protocol.

## **CHAPTER II**

### **CONSTITUTION OF AN INTERNATIONAL INTEREST**

#### **Article 7 — 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**

- Article 7 prescribes the formalities that are both necessary and sufficient for an agreement creating or providing for the international interest – “creates” in the case of a security agreement, “provides for” in the case of a title reservation

agreement or leasing agreement, where the creditor's interest does not derive from the agreement but precedes it. These formalities, which may not be added to by national law, 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)) and a purported registration of it in the International Registry has no effect except as a prospective international interest relating to an identified object.

2. Given the relatively simple requirements of Article 7, it is likely that in most 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. In that case 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 29(1). However, neither the debtor nor creditor may assert national law rights which conflict with the Convention (see Illustrations 2 and 3).

3. 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 7 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 7 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 (including such questions as the existence of the agreement and the effect of factors such as mistake or illegality) and the question whether the object is one of which the chargor, conditional seller or lessor (the creditor) has power to dispose so far as this question is not determined by the Convention itself (see Comment 5 below).

4. "Writing" covers any record of information which is either in tangible form or capable of being reproduced in tangible form on a subsequent occasion and indicates by reasonable means a person's approval of the record (Article 1(nn)). It is thus not confined to agreements in document form but includes teletransmissions held in a permanent record.

5. "Power to dispose" includes, of course, a right of disposal, as where the debtor, seller or lessor is either the owner of the object or authorised by the owner to dispose of it. But "power" is wider than "right" and covers all cases where, under the applicable law or under the Convention, the creditor has the ability to make a disposition which is binding on the owner even if the owner has not authorised it, as where the disposition is by an agent acting in excess of its actual authority but within the scope of its apparent authority or where, by reason of some other exception to

the *nemo dat quod non habet* principle (e.g. in many jurisdictions, delivery to a *bona fide* purchaser by a creditor who held possession with the consent of the owner), the disposition overrides the owner's title (in the case of an outright disposition) or subordinates it (in the case of a disposition by way of security).

While the power to dispose usually arises under the applicable law, it may also arise under the Convention. It is, for example, implicit in the Convention rules governing the registration and priority of the interest held by a lessor that the lessee is to be considered as having a power to dispose, and thus to grant a security interest which, if registered before the interest of the lessor, will take priority over a security interest granted by the lessor, for if the position were otherwise there would be little point in making the lessor's interest a registrable international interest. The whole point of the registration system is to give transparency as to the existence of international interests and other registrable interests and to avoid secret interests.

The word "dispose" covers every form of disposition encompassed within the power and relevant to the transaction between the debtor and the creditor, whether taking the form of a grant of a security interest, a sale under a reservation of title or a lease. Thus it is not necessary for a lessor to be the owner of the object; it may itself be a lessee with a right or power to grant a sub-lease. Again, the fact that the chargor has granted a prior charge does not deprive it of the power to grant one or more subsequent charges, which under the Convention will rank in order of registration (Article 29(1)).

6. 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. Moreover, the statement of the maximum sum secured would be of limited informative value, as it would not show the amount outstanding at any one time. The reference to "sum or maximum sum" in paragraph (d) of Article 7 does not imply that only monetary obligations can be secured by the agreement, for the definition of "security agreement" in Article 1(ii) refers to a charge to secure "the performance of any existing or future obligations of the chargor or a third person"; the reference is inserted solely to remove doubt in those jurisdictions whose national law requires that the sum or maximum sum secured be stated (see Illustration 4). Ultimately, however, the breach of a non-monetary obligation, if not cured by performance by the debtor, gives rise to a money claim, such as the cost of performance by the creditor or diminution in the value of the object because of non-performance.

*Illustration 2*

D and C enter into a leasing agreement which is both an international interest and a national leasing interest in State X. After default by D, C terminates the agreement under Article 10(a) of the Convention. Assuming that under the law of X termination of a leasing agreement requires one prior month's notice and the approval of the aviation authority, D cannot validly assert these national law provisions against C's exercise of its rights under Article 12.

*Illustration 3*

C advances money to D and takes a security interest in D's aircraft engine under a security agreement which is both an international interest and a mortgage under Ruritanian law. D defaults in payment. Ruritanian law would allow C to forfeit the engine in satisfaction of the debt. C cannot exercise this remedy without the consent of the debtor and other interested persons or an order of the court; the requirements of Article 9 of the Convention override the provisions of Ruritanian law.

*Illustration 4*

A security agreement states that it secures "all obligations owed by D to C under all contracts, now or in the future." This satisfies Article 7(1)(d) since the definition of "security agreement" expressly contemplates that it may secure future obligations and the obligations can be determined in that all obligations are covered by the security.

## CHAPTER III

### DEFAULT REMEDIES

#### Article 8 — Remedies of chargee

**1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, 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.**

**2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.**

**3. Any remedy set out in sub-paragraph (a), (b) or (c) of paragraph 1 or by Article 13 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.**

**4. A chargee proposing to sell or grant a lease of an object under paragraph 1 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.**

**5. Any sum collected or received by the chargee as a result of exercise of any of the remedies set out in paragraph 1 or 2 shall be applied towards discharge of the amount of the secured obligations.**

**6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 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 distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.**

## **Comment**

1. This Chapter prescribes the basic default remedies of a chargee (Articles 8 and 9), a conditional seller or lessor (Article 10) and any of them (Articles 12 and 13). Extra-judicial remedies are available only to the extent agreed by the parties but they can agree them at any time. The parties are free to agree on the events constituting default or otherwise giving rise to default remedies. It would, for example, be open to them to say that the lessor under a leasing agreement can terminate it for any delay in payment by the lessee or upon the occurrence of an event which is not in itself a breach of the agreement at all, such as the transfer of control of the lessee company

to a third party. This is a further example of the principle of party autonomy underlying the Convention. However, in the absence of agreement “default” means a default which substantially deprives the creditor of what it is entitled to expect under the agreement (Article 11). Parties can exercise additional remedies given by the applicable law so far as not inconsistent with the mandatory provisions of Chapter III (Article 12).

2. In principle, all the remedies listed in Articles 8 and 9 which do not refer to the court 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 54(2) requires 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 8 and 9 are more detailed than Article 10 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 the United States, most of Canada and, more recently, New Zealand conditional sale agreements and certain types of lease are treated as security agreements, so that in proceedings involving the law of any such jurisdiction the court will apply Articles 8 and 9, not Article 10.

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 54(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 extra-judicial remedies specified in Article 8 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. However, no agreement is required for recourse to the court.

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 8(3)). Article 8(3) is confined to the remedies of a chargee under Article 8(1); there is no comparable provision governing the remedies of termination and possession by a conditional seller or lessor under Article 10, since in these cases the creditor is simply exercising a right to recover its own property. The Convention does not, of course, entitle the creditor to use violence or other unlawful means.

7. Established commercial practice is relevant to whether a provision in a security agreement is “manifestly unreasonable”. A provision that is in line with

accepted international practice will normally be regarded as not manifestly unreasonable.

8. 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, issuers of letters of credit and credit insurance, and other persons having rights in or over the object, such as other chargees, whether under charges prior or subsequent to that of the chargee exercising the remedy. 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 and to the holder of any subsequent registered interest, but it will not necessarily be aware of prior or subsequent unregistered charges. So the creditor is not obliged to give notice to the holder of such a charge, or of any other unregistered interest subsequent to its own, unless that holder gives notice of its rights to the chargee within a reasonable time prior to the sale or lease. The selling chargee will also need to search the register before making distributions.

9. To underline the accessory nature of those international interests which are security interests, and to prevent the chargee receiving a windfall from the exercise of the remedies given by Article 8, any sum collected or received by the chargee in exercise of its remedies goes towards discharge of the amount of the secured obligations and any surplus goes to the holder of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, with any remaining balance being paid to the chargor (Article 8(5) and (6)). The order of priority will follow that laid down in Article 29, that is, the chargee exercising the right of sale will pay any surplus to the holder of subsequent registered chargees in the order in which their charges appear on the register and only after the registered charges have been satisfied will an unregistered chargee of whose interest the selling chargee has notice become entitled to a payment from any balance remaining.

10. Where there are successive security interests, the remedies can be exercised not only by the senior chargee but by any one of the chargees. A sale by the senior chargee overrides junior security interests, which then attach to the proceeds. By contrast a sale by a junior chargee takes effect subject to senior registered security interests, unless these are released.

*Illustration 5*

Debtor charges an airframe successively to C1, C2, C3 and C4. The charges to C1, C2 and C4 are registered in the order in which they were created, while C3 did not register its charge but gave notice of it to C1. Debtor having defaulted, C1 gives notice to C2, C3 and C4 of its intention to sell the airframe and then sells it and collects the proceeds. These must, so far as sufficient, be distributed

in the following order: C1, C2, C4, C3, Debtor. If the sale had been effected by C2 the purchaser would obtain a title overriding the interests of C3 and C4 but subject to the interest of C1.

### **Article 9 — Vesting of object in satisfaction; redemption**

- 1. At any time after default as provided in Article 11, 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 11 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 8(1)(b) or ordered under Article 8(2). 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 8(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 29.**

### **Comment**

1. This Article provides machinery by which the object given in security can be vested in the chargee in or towards satisfaction of the secured obligations. For the protection of the debtor and interested persons, particularly in cases where the object substantially 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. Moreover (and this is in contrast to all other remedies under the Convention), such agreement cannot be made in advance, but only after the default has occurred. Though paragraph 2 is not expressly limited to cases where the debtor is in default, it provides for a court order as an alternative to the agreement of all parties under paragraph 1 after default has occurred, and paragraph 2 must likewise be taken to be conditioned on the debtor's default.

2. An order under paragraph 2 can be made only if, first, the chargee has applied for the remedy and, secondly, the court is satisfied that the amount of the secured debt 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, e.g. a higher-ranking chargee (see Illustration 7). The purpose of this provision is to avoid a situation in which, without the consent of all interested persons, the chargee obtains a windfall as the result of the chargor's default. Where the value of the object is greatly in excess of the debt owed to the chargee the court must refuse to make a vesting order (see Illustration 6). If the amount of the secured debt exceeds the value of the object, the court may permit vesting "towards satisfaction" of that debt. In that case, the creditor retains its deficiency claim.

3. The chargor continues to have a right to discharge the security interest by paying the amount of the secured debt in full before the chargee has exercised its power of sale. While paragraph 3 of the Article refers only to payment of the amount secured rather than discharge of the secured obligations and therefore does not in terms cover non-monetary obligations, the position ultimately as regards breaches of these is that the debtor must either cure them or pay compensation, so that in almost every case the secured obligations are discharged by payment. On sale the right to discharge the security interest 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, subject to the rights of the lessee.

4. An interested person other than the debtor who discharges the debtor's obligation in full is subrogated to the rights of the chargee. This reflects a rule common in national legal systems and one which is preserved by Article 38 (see Illustration 8).

5. 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 any interest having priority over that of the chargee (see Illustration 9).

*Illustration 6*

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 9, since the value of the wagon greatly exceeds the amount of the debt.

*Illustration 7*

The facts are as in Illustration 3 except that, to secure full ownership of the railway wagon, the chargee has to pay a little under four million euro to discharge a security interest having priority over its own security interest. The value of the railway wagon is only a little over the aggregate of the amount due to the chargee and the sum paid to discharge the prior security, and there is no objection to the court making a vesting order.

*Illustration 8*

C advances US\$ 10 million to D on the security of a satellite and a guarantee of the debt by S. The debt is repayable by five instalments of US\$ 2 million each and on default in payment of any one instalment the full outstanding balance becomes immediately payable. D defaults in payment of the second instalment and C calls upon S as surety to pay US\$ 8 million together with outstanding interest and charges. Upon making this payment S becomes subrogated to C's rights and becomes entitled to the benefit of the charge to secure the amount it has paid under its guarantee. Alternatively, under Article 38, S could invoke any right of subrogation given to it by the applicable law.

*Illustration 9*

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 8. 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 29(1) and would sell free from A's charge.

**Article 10 — 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 11, the conditional seller or the lessor, as the case may be, may:**

- (a) subject to any declaration that may be made by a Contracting State under Article 54, 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 to title reservation agreements in jurisdictions which treat a title reservation agreement, or the particular leasing agreement, as a security agreement. The same is true of forms of lease treated as security agreements in those jurisdictions.

2. The Convention does not determine the effect of termination of a title reservation 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. However, Article XVI of the Protocol addresses aspects of this situation in the context of the debtor's right to quiet possession of aircraft objects.

3. The remedies given by this Article may be exercised without a court order except so far as stated otherwise in a declaration made by a Contracting State under Article 54(2).

### **Article 11 — 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 8 to 10 and 13.**

**2. Where the debtor and the creditor have not so agreed, “default” for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.**

### **Comment**

1. In most cases the agreement itself will specify “events of default” that are to attract the remedies in Chapter III. Typically these are not confined to the debtor's failure to perform its obligations but extend to non-default events reflecting the allocation of risk, whether internal (such as the debtor's insolvency) or external (such

as adverse changes in taxation law). Paragraph 1 establishes the binding nature of such an agreement.

2. In the unusual case where the agreement does not specify the default or other events giving rise to remedies, the default must be serious in the sense of substantially depriving the creditor of its legitimate contractual expectation. What the creditor is entitled to expect under the agreement is to be determined as at the time the agreement is concluded, not in the light of subsequent events. The typical default in the case of a debtor is the failure to make payment within the time set by the agreement. Where paragraph 2 applies, delay in payment will not normally be considered a substantial default unless it is clear from the terms of the agreement that the creditor attaches importance to punctual payment or the delay in payment is substantial, persistent or intentional. Terms the breach of which may be considered a substantial default, depending on the circumstances, include insurance of the object and its maintenance in good repair. An unauthorised disposal of the object in defiance of the creditor's interest in it is likely to be considered a substantial default within the meaning of paragraph 2.

#### **Article 12 — 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 15.**

#### **Comment**

All the Convention remedies available to the creditor are remedies exercisable over or in relation to the object. 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 to the extent that they are not inconsistent with the provisions of Articles 8(3)-(6), 9(3) and (4), 13(2) and 14, which are mandatory (Article 15). Such remedies would typically include the right to payment of accrued sums, damages for breach of the agreement (including liquidated damages, so far as these are recoverable under the applicable law) and specific performance of non-monetary obligations.

#### **Article 13 — Relief pending final determination**

**1. Subject to any declaration that it may make under Article 55, 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**
- (d) lease or, except where covered by sub-paragraphs (a) to (c), 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 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1.**

## **Comment**

1. Article 13, together with its related Aircraft Equipment Protocol provision, Article X, as regards aircraft objects, is considered a particularly important one from an economic perspective. Yet it may raise policy issues, and thus may be excluded by a Contracting State by a declaration under Article 55. See also Article 43 and Comment 2 to Article 55.

2. This Article builds on forms of relief pending final determination (which for brevity will be referred to as interim relief) commonly available in national legal systems but it is to be interpreted in accordance with the Convention, not by reference to national law. Where the creditor's right to exercise a default remedy under the Convention is disputed by the debtor, it may take some considerable time – perhaps years – 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. Such delays obviously reduce the value of the security, and the prospect of their occurring would influence a

prospective creditor's evaluation of the risk. This Article is intended to address these problems by providing 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 13(1) as the creditor requests. However, the chargee cannot obtain an order for management of the object as well as an order under sub-paragraph (a), (b) or (c).

3. 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 (see also Comment 5 below); 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.

Such protection could take various forms, including an undertaking to pay damages to the debtor for loss resulting from the order if the creditor fails to establish default on the substantive hearing or the provision by the creditor of a bond or demand guarantee covering its potential liability for breach of a Convention obligation and/or damages pursuant to the above undertaking. Secondly, the court may, before making the order, require notice of the creditor's request to be given to any of the interested persons as defined in Article 1(m).

4. The remedies listed in Article 13(1) do not include sale of the object and application of the proceeds of sale. Such remedies are, however, available in relation to aircraft objects if at any time the debtor and the creditor specifically agree (Aircraft Equipment Protocol, Article X(3)).

5. This Article does not dispense with the duty on a chargee to act in a commercially reasonable manner pursuant to Article 8(3), for example, in the way it makes a sale pursuant to the order of the court, but by the terms of Article 8(3) itself the exercise of a remedy in conformity with a provision of the security agreement is deemed to be exercised in a commercially reasonable manner except where such a provision is manifestly unreasonable.

6. 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.

7. In relation to aircraft objects, the relevant parties may agree in writing to exclude Article 13(2) (Aircraft Equipment Protocol, Article X(5)).

## Article 14 — Procedural requirements

**Subject to Article 54(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

1. 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 8 except in a Contracting State which has made a declaration under Article 54(2) requiring leave of the court, in which case the remedy may be exercised only with such leave (see Illustration 11). Conversely, where a State makes a declaration under Article 54(2) that remedies are to be available without leave of the court, then the creditor cannot be required to institute court proceedings to enforce a remedy. However, other procedural law may be applicable, for example, a legal requirement that an administrative approval must be obtained (see Illustration 10).

2. In relation to aircraft objects, where a Contracting State has made a declaration adopting Alternative A of Article XI of the Aircraft Equipment Protocol, Article 14 is effectively excluded by paragraph 9 of Alternative A.

#### *Illustration 10*

Under the pre-Convention law of State X, a creditor may not take possession of an aircraft or any part thereof without first obtaining a court order and then, if possession is ordered, obtaining administrative approval of the airport authority. Under Article 54(2), State X declares that leave of the court is not required. Thus, the creditor merely needs the administrative approval of the airport authority, which may not deny the same on grounds of there being no court order.

#### *Illustration 11*

Under the pre-Convention law of State Y, no court order is required in exercising remedies. State Y, however, makes a declaration under Article 54(2) that a court order is needed. The declaration supersedes that State's pre-Convention law.

## Article 15 — Derogation

**In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.**

## **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 (Article 8(3));
- (b) required notice of intended sale by chargee (Article 8(4));
- (c) application of proceeds of sale by chargee (Article 8(5));
- (d) application of surplus (Article 8(6));
- (e) restrictions on vesting of charged object in chargee (Article 9(3));
- (f) imposition by court of terms for speedy judicial relief (Article 13(2));
- (g) exercise of remedies in accordance with procedural law of place of exercise (Article 14).

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 9(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 29(5)), they cannot by their agreement affect the priority of other parties.

## **CHAPTER IV**

### **THE INTERNATIONAL REGISTRATION SYSTEM**

#### **Article 16 — 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 subrogations under the applicable law;**
- (d) notices of national interests; and**

**(e) subordinations of interests referred to in any of the preceding sub-paragraphs.**

**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 16 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 for by paragraph 2 of this Article) and that each will have its own Supervisory Authority and Registrar.

2. Registration in the International Registry will be against an identified asset, not against the debtor. It is for this reason that the Convention is confined to uniquely identifiable objects and does not extend to unidentified future property of the debtor or to proceeds other than those resulting from loss, confiscation, and the like. But an asset-based system has the advantage of enabling a person making a search to discover the existence of all registered interests affecting the object, not merely those granted by the debtor.

3. The registration system, on which a great deal of preparatory work has already been done by the International Registry Task Force in relation to the International Registry for aircraft objects, will be an electronic system in which registrations and searches will be effected, and consents to registrations transmitted, by computer-to-computer transmission without the need for human intervention at the Registry end. Prescribed particulars will be entered on the register, but no contract documents or copies will be filed or presented for filing. The system will thus be a “notice filing” system, not one requiring the filing of documents or the registration of specific transactions, and will give brief particulars of an existing interest or a prospective international interest, leaving it to the person effecting the search to obtain further information by enquiry of the creditor. Prospective international interests as well as existing international and other interests are registrable. No further registration will be needed when a prospective international interest becomes an international interest if the filed particulars are sufficient for the latter (see Article 18(3)). Thus a search certificate will state merely that the registrant has acquired or intends to acquire an international interest without stating which of these is applicable. But even if the registration information states that it relates only to a prospective international interest, a search certificate must not indicate this (see Article 22(3) and Comment 4 thereto). A person searching the register will obtain any further information it requires by enquiry of the registrant. These factors facilitate a notice filing system which is both efficient

and economic in cost terms as well as helping to preserve the confidentiality of contract documents. See also Comment 2 to Article 18.

4. Sub-paragraphs (a)-(e) of paragraph 1 list the types of agreement that may be entered in the International Registry. In relation to title reservation and leasing agreements it should be noted that the registration is not a title registration as such but rather the interest held by a person who is a conditional seller or lessor. Accordingly while the interest of the conditional seller or lessor in the object does not derive from the agreement but is acquired before and independently of the agreement, that interest does not become registrable until the conditional sale or leasing agreement conforming to the Convention has been concluded. As to the registration of prospective international interests, see Comment 4 to Article 19. Sub-paragraph (d) provides for the registration of notices of national interests, that is, interests arising under internal transactions registered in a national registry of a Contracting State which by a declaration of that 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 (d) and Article 20(6)) and priorities. See Article 50 and Comment thereon. There is nothing to prevent an assignment of an international interest even if that interest has not itself been registered as an existing or prospective international interest, and this will protect the assignee against subsequently registered and unregistered assignees but not against displacement by the holder of a subsequent international interest who registers first. Sub-paragraph (e) of paragraph 1 provides for registration of subordinations of interests. Although this refers only to subordination of interests referred to in sub-paragraphs (a) to (d), it must be read in conjunction with Article 29(5), which requires registration of a subordination of interests referred to in that Article if such subordination is to bind an assignee of the subordinated party, and Article 29(5) extends to priorities between a registered interest and the interest of an outright buyer, a conditional buyer or a lessee. Accordingly the clear intention is that subordination agreements relating to such priorities are registrable in addition to subordinations within Article 16. Similar considerations apply to subordinations under Article XVI of the Aircraft Equipment Protocol.

5. A registration may be amended, extended or discharged as provided by this Chapter, and references to “registration” are to be construed accordingly. “Discharge” does not mean removal from the register but a strike-through of, or notation against, the existing registration, so that the register will contain a full history of entries.

6. Registration is not an element in the constitution of an international interest: it is merely a perfection requirement designed to give public notice of the interest and to preserve the holder’s priority. Conversely, registration of a purported international interest which does not in fact exist has no legal effect. Since registration can only be effected with the debtor’s consent, the registration of a non-

existent interest will normally arise only if the consent was never effectively given or the agreement was not validly created under the applicable law. An improper registration may give rise to a claim for damages by the person against whom the registration was wrongfully made or any other person adversely affected by the registration.

#### **Article 17 — 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 in the event of a change of Registrar will vest in or be assignable to the new 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 27(3).**

**4. The Supervisory Authority shall own all proprietary rights in the data bases 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.

2. The Supervisory Authority has power not only to appoint but also to dismiss the Registrar. The right of dismissal and the Registrar's entitlements on the premature termination of its role are among the matters one would expect to be controlled by the terms of the Registrar's appointment. In that context the Supervisory Authority and the Registrar would no doubt wish to consider either the waiver of the Supervisory Authority's immunity from suit or some contractually agreed dispute resolution mechanism.

3. The Supervisory Authority will be a body having international legal personality and, so far as specified in the Protocol, immunity from process. In relation to aircraft objects it is envisaged that the Supervisory Authority will be ICAO (see Resolution No. 2). The Supervisory Authority has power to supervise the Registrar and the operation of the International Registry but is not entitled to adjudicate on a particular registration or to give directions to the Registrar to change any data relating to a particular registration. This is a matter exclusively for the Registrar and, as regards relief sought against the Registrar, for the courts of the place where the Registrar has its centre of administration (see Article 44). The principal functions of the Supervisory Authority are to appoint, supervise and (where necessary) dismiss the Registrar, to set and review the fees of the International Registry, to secure the existence of an efficient, notice-based electronic registration system, to make or approve regulations pursuant to the Protocol, and to make periodic reports to Contracting States.

4. The Supervisory Authority is also given power to enter into an agreement with the host State under Article 27(3) as to exemption from taxes and other privileges.

5. The Registrar is responsible for the efficient operation of the International Registry in conformity with the Protocol and of regulations made under it. This includes the measures necessary to ensure that the Registry system is kept up-to-date and in good working order.

6. Article 17(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 bases and archives of the International Registry under paragraph 4 of this Article.

7. See also Comment 1 to Article XVII of the Aircraft Equipment Protocol.

## CHAPTER V

### OTHER MATTERS RELATING TO REGISTRATION

#### Article 18 — 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 (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 20);**

**(b) for making searches and issuing search certificates, and, subject thereto;**

**(c) for ensuring the confidentiality of information and documents of the International Registry other than information and documents relating to a registration.**

**2. The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.**

**3. Where an interest registered as a prospective international interest becomes an international interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.**

**4. The Registrar shall arrange for registrations to be entered into the International Registry data base and made**

**searchable in chronological order of receipt, and the file shall record the date and time of receipt.**

**5. The Protocol may provide that a Contracting State may designate an entity or entities in its territory as the entry point or entry points through which the information required for registration shall or may be transmitted to the International Registry. A Contracting State making such a designation may specify the requirements, if any, to be satisfied before such information is 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 relevant Protocol (see, in relation to aircraft objects, Chapter III of the Aircraft Equipment Protocol) and regulations made under it. It can be expected that, among other matters, the regulations 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 an asset-based, low-cost electronic system in which all registration applications, checking of applications entries, searches and the issue of search certificates will be effected by computer without the need for human intervention. Accordingly, as stated earlier, 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, while an electronic transmission of consent to the registration is required under paragraph 1(a) of this Article, which in the case of aircraft objects will be supplemented by regulations, paragraph 2 provides that the Registrar is not to be under a duty to enquire whether a consent to registration has been given or is valid. Articles 19(1) and 20(1) together protect the debtor or purported debtor from the consequences of a registration made without its written consent. However, in the absence of consent a registration will be of no effect (Article 19(1)). The Registry system will be designed to prevent registrations without the required prior electronic consents.

3. Paragraph 3 provides that where an interest registered as a prospective international interest becomes an international interest, no further registration is required if the registration information is sufficient for registration of an international

interest. It will not be sufficient if, for example, it fails to state, in the case of a security agreement, the obligations secured. On the other hand, the fact that the registration refers only to a prospective international interest and does not, for example, take the form of a statement that the registrant “has acquired or intends to acquire” an international interest does not necessitate a fresh registration. It is to give effect to this principle that Article 22(3) provides that a search certificate is not to state whether what is registered is an international interest or a prospective international interest even if this is ascertainable from the registration particulars. Since the search certificate should reflect what is actually on the register, the entry on the register should likewise be neutral as to whether what is registered is an actual interest or a prospective interest, for example, by recording that the person in whose favour the registration has been effected “has acquired or intends to acquire” an international interest. The onus is on the searcher to ascertain the facts from the person in whose favour the registration was made.

4. Under paragraph 4 registration is to be effected in chronological order of receipt, the computer recording the exact time of registration. Registration, if valid, is complete when the registered data become searchable within the meaning of Article 19(3) and this will determine the priority of the international interest under Article 29, as well as the priority of other interests appearing on the register, i.e. registered notices of national interests and registrable non-consensual interests registered under Article 40. Article 18(4) is a rule for the protection of the searching party, not the registering party. But the latter can protect itself by not releasing funds until it searches for its own registration, and is content with its recorded priority.

5. Under paragraph 5, the Protocol may empower a Contracting State to designate an entity or entities as the compulsory or optional national entry point or points for transmission of registration information to the International Registry instead of allowing or requiring registrations to be transmitted to the International Registry direct. For example, a Contracting State may wish to utilise an existing national registration system, modified to enable or require 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. In relation to aircraft objects Article XIX of the Aircraft Equipment Protocol provides for the designation of national entry points. However, Article XIX does not allow a Contracting State to designate an entry point for notices of national interests, or of registrable non-consensual rights or interests, arising under the law of another State. Moreover, in the case of aircraft engines use of a national entry point may not be made compulsory.

6. While it is open to any Contracting State to impose its own requirements and restrictions for access to its designated entry points, nothing in the Convention prevents a Contracting State from making its designated entry points available to any

intending registrant, whether or not that registrant or the interest it wishes to register has any connection with the Contracting State in question. It is therefore open to a Contracting State to make its designated entry points available to foreigners in respect of international interests and other registrable interests created or arising under foreign law, though in relation to aircraft objects, as previously mentioned, an entry point may not be designated for notices of national interests and registrable non-consensual interests arising under foreign law, while in relation to helicopters, and to airframes pertaining to an aircraft, the declaration should be made only by the State which is the State of registry (see Comment 2 to Article XIX of the Aircraft Equipment Protocol). 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 points, though these should not be such as to impair the efficiency of the registration system. Similarly, the liability of a designated entity and any requirements for insurance are matters for national law.

7. 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.

8. The registration system is open to all those who comply with the registration requirements, a point underlined by Article 26. Accordingly access to the International Registry system is open to those situated in a non-Contracting State as it is to those in a Contracting State.

### **Article 19 — Validity and time of registration**

**1. A registration shall be valid only if made in conformity with Article 20.**

**2. A registration, if valid, shall be complete upon entry of the required information into the International Registry data base so as to be searchable.**

**3. 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.**

**4. 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 provided**

**that the registration was still current immediately before the international interest was constituted as provided by Article 7.**

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

**6. 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 20, that is, by or with the written consent of the person specified in paragraph 1, 2 or 3 of that Article or by the person specified in paragraph 4, 5 or 6. 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. The risk of this, however, is limited since the debtor's prior electronic consent is a condition of registration.

2. There are other controls against improper registration. A registration cannot be validly made of 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 7. Similarly a registration of a registrable non-consensual right or interest or of a notice of a national interest has no effect unless the right or interest is effective under the relevant national law. But these are not matters of concern to the Registry, which in a wholly electronic registration system cannot be responsible for investigating facts.

3. 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 as the result of its registration being expunged), may have a claim against the Registrar under Article 28.

4. Article 16(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 identifiable object and with the written consent of the prospective debtor. The purpose of Article 19(4) 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. So long as the registration particulars suffice to cover the completed international interest (see Comment 3 to Article 18) and the registration of the prospective international interest was still current immediately before the international interest was constituted (i.e. any period specified in the registration as its duration has not expired), no further registration is required to reflect the transformation of the prospective international interest into an actual international interest.

*Illustration 12*

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 1 April 2005, with D's written consent, C registers a prospective international interest. On 2 May C charges the object to X as security for an advance by X. On 1 June D concludes a security agreement with C by which C acquires an international interest in the object. Assuming that the registered particulars adequately and accurately cover what would be required for registration of C's international interest, no further registration information need be filed and C's international interest is to be treated as if registered on 1 April, 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.

*Illustration 13*

The facts are as in Illustration 12 except that after the charge in favour of X and before C has given value or committed itself to give value to D, D breaks off negotiations for the loan and at D's request C procures discharge of the registration. Subsequently negotiations between C and D are resumed and C advances funds on the security of the aircraft object. X has priority over C, whose registration had ceased to be current before its international interest was created.

## **Article 20 — Consent to registration**

- 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 or with whose consent 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 international interests, may be registered, and the registration extended, by either party but only with the written consent of the other party. This provides an important safeguard against improper registration, particularly given the reference in Article 18(1)(a) to prior electronic transmission of consents required by Article 20. 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. A registration may be extended only during the currency of the existing registration. See further Comment 2 to Article 21. 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 procure the registration 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. 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 50(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 29(1) as applied by Article 50(2).

3. The Convention permits registration of a right of subrogation, whether arising under the Convention itself or under national law. Only one provision of the Convention creates a right of subrogation, namely Article 9(4), under which an interested person other than the debtor who pays in full the amount secured by a security interest is subrogated to the rights of the chargee. But Article 38 makes it clear that nothing in the Convention prevents the acquisition of an international interest by subrogation, 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 14*

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 Article 8(4) of the Convention G acquires the benefit of C's charge and is entitled to be registered in place of C as the holder of the international interest in the railway wagons created by the charge.

**Article 21 — Duration of registration**

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

**Comment**

1. This Article does not prescribe any period for the duration of a registration. Instead, the parties may agree on the period and incorporate this into the registered data. Whether or not they do so, registration ceases to be effective after it has been discharged.

2. Under Article 20(1) any period of registration agreed by the parties may be extended prior to its expiry by either party with the written consent of the other. It is necessary for the agreed extension to be transmitted to the International Registry in the prescribed form during the currency of the existing registration, that is, before the expiry of the period (if any) specified as the duration of the existing registration. If this is done the registered interest retains its priority as from the time of the original registration. But once the agreed period has expired it is too late to extend it, and it will be necessary to effect a new registration which will rank for priority from the time it takes effect.

3. Destruction of the object does not of itself result in discharge of a registration. Indeed, continuance of the registration may be important in order to maintain the priority of the creditor's claim in respect of loss-related proceeds under Article 29(6).

### **Article 22 — Searches**

**1. Any person may, in the manner prescribed by the Protocol and regulations, make or request a search of the International Registry by electronic means concerning interests or prospective international interests registered therein.**

**2. Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol and regulations, shall issue a registry search certificate by electronic means 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.**

**3. A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate whether what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information.**

### **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 (see Article 26). While it is open to Contracting States to designate an entity or entities as the entry point or entry points through which a registration shall or may be effected (see Comments 5 to 7 to Article 18), searches will be able to be made directly from any point of computer access to the International Registry. All information recorded in the International Registry in conformity with the registration requirements may be searched.

2. Search certificates are to be issued by electronic means in the manner prescribed by the relevant Protocol and regulations. The Aircraft Equipment

Protocol makes no provision about such manner and leaves this to be dealt with in regulations.

3. A search certificate must be issued in response to a request even if there is no information in the International Registry relating to the subject-matter of the search. In that event the certificate must contain a statement to that effect.

4. The search certificate must be neutral as to whether it relates to a completed international interest or merely a prospective international interest. This is a necessary corollary of the provisions of Article 18(3) dispensing with the need for a further registration when a prospective international interest becomes an international interest, for in the absence of such further registration the International Registry will have no way of knowing whether a registered prospective international interest has become an international interest.

5. As to the evidentiary value of certificates and purported certificates, see Article 24.

### **Article 23 — 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 as having been declared by Contracting States in conformity with Articles 39 and 40 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 and regulations to any person requesting it.**

#### **Comment**

The Convention contains several provisions entitling a Contracting State to make declarations applying or disapplying certain provisions of the Convention or specifying other matters. See paragraph 51 of the Overview of the Convention. This Article relates to such declarations and withdrawals of them as well as two forms of non-consensual right or interest. The first of these are those non-consensual rights or interests having priority without registration by virtue of a declaration under Article 39 and the second those non-consensual rights or interests registrable by virtue of a declaration under Article 40. 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 declarations and withdrawals of declarations and non-consensual

rights and interests instead of their having to make a separate search through the declarations held by the Depositary. Hence the requirement in Article 62(2)(c) that the Depositary will supply the Supervisory Authority and the Registrar with details of, among other things, all declarations deposited with it, and all withdrawals or amendments of such declarations, so that these can be accessed through the International Registry.

#### **Article 24 — 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, unless the authenticity of the document is challenged and the *prima facie* presumption displaced by evidence which shifts the burden of proof to the person relying on 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 under Article 28(1), 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 25 — 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, without undue delay, procure the discharge of the registration**

**after 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, without undue delay, procure the discharge of the registration after 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, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.**

**4. Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after 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 covered 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. That mechanism will ensure an accurate historical file. Paragraph 3 applies the same rule to a national interest that has been discharged. The phrase “its address” in paragraph 1 of this Article refers, of course, to the address of the holder of the interest.

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 (see Illustration 15). The position is otherwise where such value has been given or promised in a binding undertaking (see Illustration 16). Whether value has been given or committed is a question for the law applicable to the legal relations between the parties.

3. Paragraph 4 deals with registrations incorrectly made and provides that the debtor is entitled to require these to be removed or amended. Although paragraph 4 is expressed to confer this right only on the debtor, it is clearly assumed by Article 44(3) that a court of competent jurisdiction under the Convention, if applicable, or under national law if the Convention does not apply, can make an order against any person in whose favour a registration has been made to procure its amendment or discharge, whether the registration relates to an international interest, a prospective international interest, an assignment, a prospective assignment, or anything else on the register. The only case in which a court has jurisdiction to make such an order under the Convention is where the parties have so agreed in conformity with Article 42(2). In such a case the party affected by the improper registration should apply to the court on which jurisdiction has been so conferred for an order directing the defendant to take the necessary steps. If that order is not complied with then in addition to the sanctions available for non-compliance a court in the place where the Registrar has its centre of administration may (but is not obliged to) order the Registrar to take such steps as will give effect to the order made in the defendant's jurisdiction (Article 44(3)). Where the parties have not made an agreement as to jurisdiction, the remedy of the party affected by the improper registration is to apply to a court having jurisdiction under its national law for an *in personam* order directing the defendant to procure amendment or discharge of the registration and, if this is not complied with, to apply to a court in the Registrar's jurisdiction, directly or through the court making the order, for an order directing the Registrar to amend or discharge the registration. See further the Comments to Article 44.

*Illustration 15*

D is negotiating a loan from C to be secured on a 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 16*

C agrees to lend 10 million euro to D on the security of an identified airframe which D is in the course of acquiring and advances 1 million euro 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 9 million euro and requests C to arrange for discharge of the registration. C, having given value to the extent of 1 million euro, is entitled to refuse.

**Article 26 — 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.**

**Comment**

1. This Article makes it clear that the International Registry is a public registry and searches may be made by anyone (whether or not situated in a Contracting State) who complies with the requisite procedures, including payment of any prescribed fee.
2. Under Article XX(4) of the Aircraft Equipment Protocol the centralised functions of the International Registry are to be operated and administered by the Registrar on a 24-hour basis, while any entry points are to be operated at least during working hours in their respective territories.

**CHAPTER VI**

**PRIVILEGES AND IMMUNITIES OF THE SUPERVISORY AUTHORITY  
AND THE REGISTRAR**

**Article 27 — 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 such immunity from legal or administrative process as is specified in the Protocol.**
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. **The assets, documents, data bases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.**

**5. For the purposes of any claim against the Registrar under Article 28(1) or Article 44, the claimant shall be entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.**

**6. The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.**

### **Comment**

1. The Supervisory Authority will be designated in the relevant Protocol. In relation to aircraft objects the Aircraft Equipment Protocol provides that it is to be the international entity designated by a Resolution adopted by the Diplomatic Conference, namely ICAO, subject to the willingness of ICAO to perform this function. Under Article 47 of the Chicago Convention and, as a specialised agency of the United Nations, under Article II of the 1947 United Nations Convention on the Privileges and Immunities of the Specialized Agencies (“the UN Immunities Convention”) ICAO already possesses, on the plane of international law, juridical personality and the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings. It is therefore not dependent on paragraph 1 of the present Article. A Supervisory Authority not already enjoying international legal personality will acquire it under this Article by virtue of its designation.

2. Being the creation of a multilateral treaty concluded by States, the Supervisory Authority is a public international organisation. The Convention does not require that it be an intergovernmental organisation, though ICAO is an intergovernmental organisation having most of the States of the world as members.

3. The attribution of international legal personality to the Supervisory Authority has two principal effects. First, the Supervisory Authority is a subject of international law in its own right, with a legal personality distinct from that of its members, and its “personal” law is international law.<sup>9</sup> This entitles it to assert claims at the international level directly rather than through the intermediation of its members and it is similarly exposed to direct liability for non-performance of any obligations so far as not covered by any immunity conferred by the Protocol under Article 27(2) of the Convention. Secondly, it has power to enter into agreements with States or other parties, and do other things, so far as is requisite for the performance of its functions under the Convention and the relevant Protocol. In the case of entry into agreements

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<sup>9</sup> Though when it enters into transactions, such as the acquisition of property, goods or services, the applicable law will generally be the national law determined by the conflict of laws rules of the forum.

this power is expressly conferred by Article 17(3) both in general terms and with specific reference to an agreement with the host State pursuant to Article 27(3).

4. Article 27(2) leaves the question of immunity of the Supervisory Authority to be determined by the Protocol. Article XVII(3) of the Aircraft Equipment Protocol provides that the Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise. The privileges and immunities of ICAO and its officers and employees are those set out in the standard clauses in the UN Immunities Convention and in Annex III to that Convention.

5. Exemption from taxes and other privileges in the State where the Supervisory Authority is situated are left to be determined by the headquarters agreement.

6. While the Registrar does not itself enjoy immunity from process, the assets, documents, data bases and archives of the International Registry are inviolable and immune from legal or administrative process (under Article 17(4) all proprietary rights in the data bases and archives are owned by the Supervisory Authority). However, the inviolability of the data bases and archives is subject to the qualification that a person making a claim against the Registrar under Article 28(1) or Article 44 is entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.

7. Paragraph 6 enables the Supervisory Authority to waive any inviolability and immunity that would otherwise be enjoyed in relation to the data bases and archives. Quite apart from this provision the Supervisory Authority may be asked to include in its contracts – e.g. with the Registrar and with other suppliers of goods and services – a provision waiving the inviolability and immunity, so far as this is necessary under the applicable law.

## CHAPTER VII

### LIABILITY OF THE REGISTRAR

#### Article 28 — Liability and financial assurances

**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 where the malfunction is caused by an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry**

**design and operation, including those related to back-up and systems security and networking.**

**2. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information nor for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry.**

**3. Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.**

**4. The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority, in accordance with the Protocol.**

#### **Comment**

1. In principle the liability of the Registrar is not dependent on fault but is a strict liability imposed not only for errors or omissions of the Registrar and its staff but for system malfunction. This standard is necessary since the system is electronic, and, in such a system, ensuring its proper design and operation is an essential function of the Registrar. However, the Registrar's liability is not absolute. In the first place, the Registrar is not liable for a malfunction caused by an event of an "inevitable and irresistible nature" which could not be prevented by best practice in design, operation or security. Though unforeseeability of the adverse event is not a stated precondition of the Registrar's exemption from liability, the exemption is narrowly defined. It is not sufficient that the malfunction results from the failure of the Supervisory Authority to ensure the existence of an efficient electronic registration system as required by Article 17(2)(i) or that the Supervisory Authority and the Registrar took all reasonable steps to appoint competent experts to design and construct the system. The malfunction must be caused by an event which is unavoidable and insurmountable even with best practices in current use in the field of electronic design and operation. This *force majeure* concept is capable of including such events as war, insurrection, terrorist attack, and natural disaster. But with an electronic system employing off-site back-up facilities and distributed networking as required by best practice it is likely that only in very exceptional cases will events of the kind described be considered of an "inevitable and irresistible" nature.

2. Among best practices that the system needs to reflect are the following:

- ? Hardware and software appropriate to a web-based, high-speed, reliable system, able to receive data from and transmit data to all time zones and, in the case of aircraft objects, accessible 24 hours a day (Aircraft Equipment Protocol, Article XX(4));
- ? Accurate receipt and transmission of data in the form in which data are received (see Comment 3);
- ? Regular maintenance arranged to cause minimum dislocation to the working of the International Registry;
- ? State-of-the-art protection against viruses and system corruption;
- ? Rapid identification and rectification of a system malfunction;
- ? Back-up of data on the main site;
- ? Back-up systems on other sites, so that if the system goes down on the main site alternative sites can be used;
- ? Security systems to prevent unauthorised interference with stored data and data messages.

3. The Registrar is not liable for the factual inaccuracy of information it receives or transmits in the form in which the Registrar received it. Even in a manually operated registration system in which transaction documents are inspected it is not possible for the registry to investigate facts, its role being essentially administrative. In an automated registration system with no human intervention in the registration and search processes there is even less scope to check the accuracy of information received. The Registrar is entitled to assume the correctness of data received and to transmit such data in search certificates without liability. This does not, however, exempt the Registrar from ensuring that the system embodies up-to-date security features designed to verify that registration information comes from an authorised person. The Registrar is also not responsible for acts or circumstances arising prior to receipt of registration information, since these are outside the Registry system. So the Registrar incurs no liability for errors or system malfunction in a national entry point.

4. The Registrar's liability is limited to compensatory damages for loss suffered. This excludes an award of punitive or exemplary damages. Damages may be reduced by the claimant's contributory negligence.

5. The Registrar is required to cover its prospective liability by insurance or a financial guarantee to the extent determined by the Supervisory Authority, in accordance with the relevant Protocol. Under Article XX(5) of the Aircraft Equipment Protocol the amount of the insurance or financial guarantee is to be not less than the maximum value of an aircraft as determined by the Supervisory Authority.

## CHAPTER VIII

### EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

#### Article 29 — 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 conditional buyer or lessee acquires its interest in or right over that object:
  - (a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and
  - (b) free from an interest not so registered at that time even if it has actual knowledge of that interest.
5. The priority of competing interests or rights 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.
6. Any priority given by this Article to an interest in an object extends to proceeds.
7. This Convention:

**(a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation; and**

**(b) does not prevent the creation of rights in an item, other than an object, which has previously been installed on an object where under the applicable law those rights are created.**

### **Comment**

1. This Article lays down a set of priority rules governing a registered interest in relation to other registered interests and to every kind of unregistered interest, whether or not registrable. 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 registered in the International Registry and a national interest notice of which has been so registered. 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 (Illustration 17). 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 19(4), text, Comment 4 and Illustrations 12 and 13). Secondly, subject to paragraphs 3 and 4, 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) and Illustration 18).

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 and the previous rule, which find their 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 (Illustration 19). By the same token, registration of an interest in a national registry is irrelevant to the ordering of priorities under Article 29.

4. The purpose of registration is, of course, to give the creditor protection against the competing claims of third parties. Registration is not necessary to protect the creditor against its own debtor, who will, of course, be aware of the agreement into which it has entered. So a lessee cannot invoke Article 29 to gain priority over its own lessor by virtue of the latter's failure to register, for a lessee is not a third party. To allow the lessee priority would enable it to disregard its obligations under the lease and would run counter not only to the purpose of registration but to the principle that a person cannot take advantage of its own wrong. Similarly a lessee who grants a sub-lease cannot gain priority over its lessor by registering its interest as sub-lessor prior to registration by the head lessor. By contrast, if the sub-lessor charges the object itself (as opposed to its rights as lessee under the head lease) the chargee will have priority over the unregistered interest of the head lessor, as will a buyer from the sub-lessor (see Illustration 20 and Comment 5 to Article 7); and the sub-lessee whose sub-lessor registers before the head lessor is protected by Article 29(4)(b). See Comment 6.

5. Paragraph 3 introduces the first of two exceptions to the general rule that even an unregistrable interest is displaced by a subsequent registered interest. The case of purchase by an outright buyer is considered so common and important as to justify a special rule giving the buyer's interest priority over an interest not registered until after the time of the buyer's acquisition of the object. But this rule does not apply in relation to aircraft objects, since under the Aircraft Equipment Protocol the interest of an outright buyer is registrable.

6. Paragraph 4 provides a rather different kind of exception to the general rule referred to above. It is designed to deal with two situations: the grant of a charge by the conditional seller or lessor and the grant of a lease followed by a sale and lease-back from the buyer subject to the terms of the existing lease.

(1) *Charge by conditional seller or lessor*

In this first situation a conditional seller or lessor charges its interest to its creditor under a security agreement and, following default, the chargee seeks to recover the object from the conditional buyer or lessee in possession. The rule here is that the conditional buyer or lessee is protected if the interest of its conditional seller or lessor was registered before the registration of the charge but is not protected if the charge was registered first. This rule is designed to protect the integrity of the registration system. Registration by the conditional seller or lessor puts a subsequent chargee on notice of the existence of the title reservation or leasing agreement. So while a conditional buyer or lessee does not itself possess a registrable interest, it can rely on the registration of its conditional seller or lessor (Illustrations 20 and 21). In keeping with the principle that a party should not be affected by an unregistered interest even if knowing of it (see Comment 3 above) paragraph 4 of the present Article follows paragraph 2(a) in making it clear that the protection of the conditional buyer or lessee is not affected by its prior knowledge of the unregistered charge. In

what is likely to be the more common case where the chargee takes its interest and registers it before the chargor enters into the conditional sale or leasing agreement the conditional buyer or lessee is not protected from enforcement of the charge, the existence of which the conditional buyer or lessee could have ascertained by searching in the International Registry. The basic rules, however, may be varied by contract, with the variation registered as a subordination (as contemplated by Article 29(5)), thereby binding third parties.

(2) *Sale and lease-back*

Where there is a lease and a sub-lease, the head lessor will normally register its interest before the sub-lessor has registered. There may, however, be cases in which the sub-lessor's interest is registered first. This is most likely to occur where, after granting a lease, the lessor sells the object and leases it back from the buyer. Such a lease will take effect subject to the existing lease, which then takes effect as a sub-lease, the buyer being the head lessor and the seller the sub-lessor. The effect of Article 29(4)(b) is that the sub-lessee is entitled to quiet possession both as against the sub-lessor and as against the buyer as head lessor, subject to the terms of any subordination agreement.

7. 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, for otherwise the assignee would assume that it was acquiring the status of the senior creditor (see Illustration 23). Though Article 29(5) does not expressly state that the assignee's actual knowledge of an unregistered subordination is irrelevant, the policy consideration underlying paragraphs 2(a) and 4(b) is equally applicable, so that the assignee will not be affected by an unregistered subordination even if knowing of it at the time of the assignment.

8. By Article 29(6) 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 33 of the Overview and Illustration 24. In its application to proceeds the priority rule is limited to competing claims to proceeds both of which are derived from the object whose loss, etc., gave rise to the proceeds. So Article 29(6) does not, for example, determine priority as between the holder of an international interest claiming insurance proceeds in the form of a claim on the bank into which these have been paid and a receivables financier who has never had an interest in the object, will usually be unaware that the proceeds are insurance proceeds, and simply asserts a right to such proceeds as buyer or chargee of debts due to the holder's debtor. Such a priority dispute is to be determined in accordance with the applicable law. Any priority given by Article 29(6) may be lost if the proceeds cease to be identifiable, as where they are paid into a bank account and thereafter paid out as

part of the debtor's general expenditure. Whether proceeds remain identifiable is again a matter for the applicable law.

9. 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 in the International Registry.

10. Paragraph 7(a) deals with the case where an item which is not itself an object (i.e. is not an aircraft object or a unit of railway rolling stock or a space asset as defined in the relevant Protocol) becomes installed on an object. Examples are a computer, an audio system or video system installed on an airframe or an engine module on an aircraft engine, or spare parts incorporated into an airframe or aircraft engine (Illustration 25). In all these cases the installation or incorporation does not affect pre-existing rights if these are preserved by the applicable law. The position is otherwise where under the applicable law the right to the installed or incorporated items passes under the doctrine of accession to the owner of the airframe or aircraft engine as the principal asset. In such a case the person who previously had an interest in such items loses its title to them and they become vested in the owner of the airframe or aircraft engine or, if this has been charged, become subject to the charge if this covers accessions. Paragraph 7(b) concerns the case where a person deals with an item, not itself an object, which has previously been installed on an object, and is directed to the situation where the item is dealt with separately from the object on which it is installed. (If it is dealt with as part of the object itself there is, of course, no problem to be resolved.) Where under the applicable law the dealing is effective to create rights in the item (i.e. rights independent of those in the object itself) the Convention does not affect those rights.

11. Article XIV(3) of the Aircraft Equipment Protocol creates a special rule for aircraft engines (which are, of course, objects), stating that ownership of or another right or interest in an aircraft engine is not to be affected by its installation on or removal from an aircraft. The effect of this is to displace any doctrine of accession that might otherwise operate under the applicable law and to preserve the Convention interest in the engine. Engines are regularly interchanged as between one aircraft and another. Article XIV(3) thus adopts the principle of title-tracking, not title transfer, so that if engines are swapped the holder of an interest in the engine removed from the aircraft retains that interest and does not acquire an interest in the substitute engine installed on the aircraft, which continues to be subject to whatever interest was granted to another party prior to its installation.

*Illustration 17*

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

*Illustration 18*

D is the owner of an aircraft of which the nationality registration is Ruritanian. 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 general declaration under Article 39 covering the priority of unregistered judgment debts or had made a declaration under Article 40 of the Convention providing for the registration of judgment debts in the International Registry and X had registered its judgment debt before C had registered its charge.

*Illustration 19*

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

*Illustration 20*

O, the owner of a railway engine, leases it to L. Before O has registered its interest L wrongfully sells the engine to B. B displaces O as owner. The position would be otherwise if the object were an airframe or an aircraft engine, for B's priority would then depend on its registering its interest before O registered its own interest.

*Illustration 21*

The facts are as in Illustration 20 except that L, instead of selling the engine, wrongfully sub-leases it to SL and then registers its international interest. Subsequently O registers its interest. O has priority over L but holds its interest subject both to the lease to L (which may, however, be terminable because of L's wrongful behaviour) and the sub-lease to SL, who is protected by Article 29(4)(b).

*Illustration 22*

O leases a satellite to L, registers its international interest and then charges the satellite to C. C takes its charge subject to the lease to L, whose lessor, O, registered first. The position would be otherwise if C had registered first, whether because O had not then granted the lease to L and therefore had no registrable interest or because it failed to register before C.

*Illustration 23*

D gives a charge on an aircraft object to C1, who registers it, and a second charge to C2, who also registers. 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 24*

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.

*Illustration 25*

An audio system leased by A to L is installed on an aircraft which is owned by D and has been charged to C. Later, S supplies spare parts under a conditional sale agreement and these are incorporated into the aircraft engine but subsequently removed and held in store. Paragraph 7(a) of this Article makes it clear that the Convention does not affect A's rights over the audio system where under the applicable law those rights continue to exist despite the installation in the aircraft and that if the applicable law so provides S's interest in the spare parts continues notwithstanding their incorporation into the aircraft engine and their subsequent removal.

### **Article 30 — 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:**

**(a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or**

**(b) any rules of 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 in the International Registry 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)). This is so even if the international interest would otherwise be void for want of compliance with local perfection requirements.

2. The effect of Articles 40 and 50(2) is that the protection given by paragraph 1 of the present Article extends to registered non-consensual rights or interests and to national interests protected by notice on the International Registry, in either case where the registration was effected prior to the commencement of the insolvency proceedings.

3. 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. In this context “that interest” means the interest as recognised by the applicable law, not the international interest as such, which is the creation of the Convention, not of the applicable law.

4. “Effective” means that the international interest will be recognised as proprietary in nature and therefore in principle rank ahead of the claims of unsecured creditors. An effective international interest may thus not be set aside or subordinated for the benefit of the debtor, the insolvency administrator or the estate, or other claimants. “Applicable law” means the domestic law determined by the rules of private international law of the forum State (Article 5(3)), which may or may not be the State in which the insolvency proceedings were opened.

5. Paragraph 3 preserves the effect of certain specific rules of insolvency law, namely those relating to the avoidance of preferences (see Illustration 26) 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, by imposing an automatic stay on the enforcement of security and other *in rem* rights in order to facilitate a reorganisation (see Illustration

27). However, in relation to aircraft objects paragraph 3 gives way to Article XI, Alternative A, paragraphs 9 and 10, in a Contracting State which has made a declaration applying Alternative A, with the effect that in such a case no stay or other impediment to the exercise of the creditor's remedies may be imposed.

6. Article 30(3) is confined to the avoidance of preferences and transfers in fraud of creditors. It follows that other grounds of avoidance that would ordinarily be applicable cannot be invoked to impeach an international interest effective under Article 30(1) or (2). Similarly the international interest cannot be subordinated to another right or interest under the insolvency law unless that other right or interest is a non-consensual right or interest covered by a declaration under Article 39(3) deposited prior to the registration of the international interest or is a right of arrest or detention preserved under Article 39(1)(b).

7. Article 30(3)(b) states that nothing in the Article affects "rules of procedure relating to the enforcement of rights to property" in the insolvency context. However, as regards aircraft objects Article XI of the Aircraft Equipment Protocol overrides such rules and thus displaces Article 30(3)(b).

*Illustration 26*

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 as a preference 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 27*

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 10 so long as the stay continues in force. The position would be otherwise if the object were an airframe or aircraft engine and the insolvency jurisdiction were that of a State applying Alternative A of Article XI of the Aircraft Equipment Protocol.

## CHAPTER IX

### ASSIGNMENTS OF ASSOCIATED RIGHTS AND INTERNATIONAL INTERESTS; RIGHTS OF SUBROGATION

#### Article 31 — Effects of assignment

1. Except as otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 also transfers to the assignee:

- (a) the related international interest; and
- (b) all the interests and priorities of the assignor under this Convention.

2. Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph but not so as adversely to affect the debtor without its consent.

3. Subject to paragraph 4, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.

4. 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 other than defences arising from fraudulent acts on the part of the assignee.

5. In the case of an assignment by way of security, the assigned associated 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. This Chapter deals with the effect, formal requirements and priority of assignments of associated rights and of the related international interests as well as with subrogation. Only a creditor (i.e. a chargee, a conditional seller or a lessor) can hold and assign associated rights. So an assignment by a lessee *qua* lessee is not within the Convention, though if the lease contains an option to purchase the lessee is a prospective buyer and can register and assign its rights as such, while a lessee

who grants a sub-lease can, as sub-lessor, effect an assignment of its associated rights and a transfer of its international interest, and the assignment and transfer would be governed by the present Chapter. “Assignment” is widely defined so as to include the pledge or charge of associated rights and related international interests as well as transfers (see Comment 3 to Article 1). Associated rights are defined in Article 1(c) as rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Associated rights therefore do not include (a) rights to performance by a third party, or (b) rights to performance by the debtor itself under a separate contract or engagement (such as an engagement embodied in a promissory note), unless in either case the debtor undertakes in the agreement itself to perform the obligations of the third party or of itself under the other contract or engagement.

2. Rights are secured by the object when the agreement is a security agreement by which the chargor grants security over the object to the chargee. Typically what is secured is repayment of a loan with interest and charges, but all rights against the debtor which arise under the agreement and are secured on the object are associated rights, whether they are rights to money or to a non-monetary performance. They may include – in addition to repayment of the loan and contract interest – default interest, maintenance, repair and insurance of the object, indemnities against breaches of covenant, and obligations of the debtor (but not of third parties) under other contracts secured on the object under a cross-default clause and incorporated into the agreement as obligations under that agreement (see Comment 4 below).

3. Rights are associated with the object, as opposed to being secured on it, where they are rights to payment or other performance (for example, maintenance, repair and insurance) by a conditional buyer under a title reservation agreement or a lessee under a leasing agreement. Rights to performance unrelated to the transfer of ownership or the debtor’s right to retain possession (because under the terms of the agreement non-performance does not affect the transfer of ownership or confer on the creditor the right to repossess the object) are not associated rights.

4. Also included in associated rights are rights to performance by the debtor or a third party under another contract provided that (a) the debtor undertakes in the agreement to perform or procure performance under that other contract, and (b) the rights to such performance are secured on or associated with the object to which the agreement relates, as where a security agreement secures indebtedness under other contracts or a title reservation agreement provides for ownership to pass to the conditional buyer when it has performed its obligations to the conditional seller under that or any other title reservation agreement. But rights to performance under other contracts are not associated rights in relation to the agreement merely because they are secured by or associated with the object to which the agreement relates; it is also necessary that the debtor shall have undertaken in the agreement to perform them or procure their performance. See Comment 4 to Article 1.

5. Associated rights may be one of two kinds: those that are related to the financing or leasing of an object in the sense of Article 36(2) and those that are not. The distinction is significant in that an assignee of rights that are not object-related cannot invoke the priority rules of the Convention. See Comment 4 to Article 36.

6. Except as otherwise agreed by the parties, the assignment of associated rights transfers to the assignee the related international interest (i.e. that of the chargee, conditional seller or lessor) and all the interests and priorities of the assignor under the Convention (Illustration 28). This follows the rule, common in legal systems, that security does not exist in the abstract but is accessory to the rights secured and therefore travels with those rights. See also paragraph 38 of the Overview.

7. It is, however, open to the parties to agree on an assignment of the associated rights without a transfer of the security or other international interest. For example, a conditional seller under a title reservation agreement providing for payment of the price by instalments could agree to assign its rights to future instalments without transferring ownership of the object to which the agreement relates. The effect of an assignment of associated rights divorced from the related international interest is that the Convention does not apply to the assignment at all (Article 32(3)). This is a logical consequence of the fact that the Convention is devoted to international interests and registrations affecting international interests. It is not concerned with assignments of receivables as such. These fall within the purview of national law, including the UN Convention. However, Article 32(3) must be read subject to Article 35, which gives a registered assignee of associated rights coupled with an international interest priority over an assignee of associated rights assigned in isolation from the international interest. See Comment 1 to Article 35.

8. The Convention does not permit the transfer of an international interest created by a security agreement without an assignment of at least some of the associated rights. See Article 32(2).

9. There is nothing to preclude the transfer of an unregistered international interest but the assignee would have to register the international interest before it could register the assignment. See Comment 2 to Article 35.

10. Where, as will be the case in the absence of agreement to the contrary, the assignment of the associated rights carries with it the related international interest, the assignee obtains the same priority status as its assignor. So if an airframe is given in security to A, B and C under successive security agreements and registrations are effected in the same order, then an assignment by A of the associated rights under its security agreement with the debtor transfers to the assignee A's international interest and the priority of that interest over the interests of the later registrants, B and C. Despite this, A's assignee should register the assignment in order to safeguard itself against the possibility of its interest being lost or subordinated in favour of a

subsequent assignee who registers first. Moreover, the priority is qualified in important respects by Article 36.

11. The parties can agree on a partial assignment of the assignor's associated rights, e.g. the right to some but not all future instalments or rentals. However, the rights assigned must be identifiable under the contract from which they arise (Article 32(1)(b)) and must be identified before the debtor can be called upon to pay the assignee (see Article 33(1)(b)). On a partial assignment it is for the parties to agree on their respective rights concerning the related international interest, though so far as their agreement would adversely affect the debtor it requires the debtor's consent. That consent may be a general consent and may be given in advance. So the parties could agree that the security under a security agreement or ownership reserved under a title reservation agreement is to be shared and that the existing registration should be amended to show the assignor and assignee as co-chargees or co-owners. In the absence of agreement, determination of the respective rights of assignor and assignee as regards the related international interest is to be determined by the applicable law. Where Article VIII of the Protocol applies, and the agreement takes the form of a subordination, the law applicable is that contractually selected.

12. The concept of a partial assignment presupposes assignment of part of a single set of associated rights, as opposed to an assignment of the associated rights under one of two separate contracts between the same parties. However, where in the agreement the debtor undertakes to perform its obligations under other contracts as well, the associated rights under the agreement incorporate the rights to payment or other performance under those other contracts, so that an assignment by the creditor of its rights under another such contract constitutes a partial assignment of its rights under the first agreement. It is then for the creditor and the assignee to agree as to their respective rights concerning the related international interest (Article 31(2)), to which both have claims (Illustration 30). Failing agreement, the question has to be determined by the applicable law; it is not a question determined by the Convention. See Comment 11 above.

13. The Convention does not itself contain any provisions as to defences or rights of set-off other than waiver of these (see paragraph 4 of this Article and Comment 14 below). Apart from waiver clauses, which, under the principle of party autonomy, are binding under Article 31(4) of the Convention, the availability of defences and rights of set-off is left to the applicable law. This would also determine the effect of contractual provisions prohibiting assignment, which in some legal systems are ineffective against the assignee.

14. Paragraph 4 of the present Article recognises the common practice of including a provision by which the debtor waives defences and rights of set-off against the assignee, in order to make claims more readily transferable. Such waiver is permitted and binding except for defences arising from fraudulent acts on the part of the

assignor. So where the Convention applies then subject to the above exception the debtor's waiver of defences or rights of set-off will be effective even if this would not be recognised under the otherwise applicable law.

15. Where an assignment is by way of security and the secured obligations are discharged, the assigned associated rights still in existence revert in the assignor automatically without the need for any instrument of reassignment. See Illustration 29.

*Illustration 28*

O, the owner/lessor of an aircraft object, registers its international interest and subsequently assigns its rights under the leasing agreement (associated rights) to A by way of an outright assignment. The effect of the assignment is to transfer to A not only the associated rights but also, in the absence of agreement to the contrary, the ownership rights previously vested in O. Absent such agreement A becomes entitled to be registered as assignee of the international interest, enjoying the same priority as that previously enjoyed by O, 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, so far as these have not been waived by the lessee by the terms of the lease or in some other writing.

*Illustration 29*

The facts are as in Illustration 28 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 revested in O.

*Illustration 30*

C advances money to D for the purchase of a railway engine. In the loan agreement D undertakes to perform all its obligations to C under that agreement and any other contract entered into between the parties, and a cross-default clause provides that any default by D under any such other contract shall be a default under the loan agreement. D's obligations under the agreement are secured by a charge on the engine, and C registers its international interest. Subsequently C makes a non-purchase-money loan to D under a separate loan contract and later assigns its rights under that contract to A. Even if the loan contract makes no reference to security, D's obligations under this loan contract are secured by the charge given in the earlier loan agreement, so that both C and A have rights in the international interest. The assignment of the loan contract is also a partial assignment of the associated rights under the earlier agreement (see Comment 12 above), so that Article 31(2) applies and it is for C and A to agree as to their respective rights concerning the international interest, in default of which this is determined by the applicable law.

## **Article 32 — Formal requirements of assignment**

**1. An assignment of associated rights transfers the related international interest only if it:**

**(a) is in writing;**

**(b) enables the associated rights to be identified under the contract from which they arise; and**

**(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.**

**2. An assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights also are assigned.**

**3. This Convention does not apply to an assignment of associated rights which is not effective to transfer the related international interest.**

### **Comment**

1. Paragraph 1 contains rules for the constitution of an assignment under the Convention, prescribing the conditions in which the assignment of associated rights transfers the related international interest and tracks the formal requirements laid down in Article 7 for the creation of an international interest except that what has to be identified is not the object (which is already identified) but the associated rights. This requires identification of the contract from which the associated rights arise. The term “contract” is used here instead of “agreement” because the rights may arise from a separate contract with the debtor which the debtor additionally agrees to perform as a term of the security or other agreement (in the absence of such a term the rights are not associated rights under the agreement).

2. Failure to comply with paragraph 1 has the effect that the related international interest does not pass to the assignee and the assignment then falls outside the scope of the Convention altogether (see paragraph 3 of the present Article and Comment 7 to Article 31) and its efficacy will depend on the applicable law.

3. An assignment of an international interest created by a security agreement is not valid unless some or all of the associated rights are also assigned. The reason for this rule is that the function of a security agreement is to secure payment or other performance, and if the international interest is held by a chargee to whom none of the secured rights have been assigned it is not securing anything. The position is

otherwise in the case of an international interest held by a conditional seller or lessor, who could, in theory at any rate, sell the object subject to the rights of the conditional buyer or lessee under the conditional sale or leasing agreement without assigning to the purchaser its rights of payment under the conditional sale or leasing agreement.

### **Article 33 — Debtor's duty to assignee**

**1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor in relation to those rights and that interest is bound by the assignment and 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; and**

**(b) the notice identifies the associated rights.**

**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 this Article 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 the applicable law to the extent that this right has not been waived by an agreement in writing. Such a waiver is binding under Article 31(4), which overrides any contrary provisions of national law. See Comment 14 to Article 31. Article 33 does not apply to an assignment which is ineffective to transfer the related international interest. Such an assignment is governed by the applicable law, including the UN Convention where this has become part of the applicable law.

2. The debtor must have been given notice of the assignment in writing by or with the authority of the assignor and the notice must identify the associated rights to which it relates.

3. A debtor who pays or performs when so required by paragraph 1 obtains a good discharge from liability. The debtor may also obtain a good discharge on payment or performance where the conditions of paragraph 1 have not been satisfied. The effect of paragraph 1 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 favour of the assignee 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 34 — Default remedies in respect of assignment by way of security**

**In the event of default by the assignor under the assignment of associated rights and the related international interest made by way of security, Articles 8, 9 and 11 to 14 apply in the relations between the assignor and the assignee (and, in relation to associated rights, apply in so far as those provisions 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 associated rights and the related international interest and the security interest created by that assignment;**

**(b) to the chargee or creditor and chargor or debtor were references to the assignee and assignor;**

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

**(d) to the object were references to the assigned associated rights and the related international interest.**

#### **Comment**

1. This Article is confined to assignments by way of security which transfer both the associated rights and the related international interest. It has no application to an assignment of associated rights in isolation, this being outside the Convention (Article 32(3)).

2. This Article confers on the assignee default remedies in relation to the object corresponding to those given by Chapter III to the holder of an international interest on the debtor's default. So on the assignor's default the assignee may, for example, sell or lease the object (subject to the rights of the debtor in possession as buyer under a conditional sale agreement or lessee under a leasing agreement – see Comment 3) and sub-assign the right to sums payable under the assigned agreement. The assignor may also apply under Article 13 for relief pending final determination of its claim. The default remedy provisions do not apply to the associated rights themselves, as regards which the remedies of an assignee by way of security are left to the terms of the assignment and the applicable law.

3. 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 to the extent that it is entitled to quiet possession as against the assignee. In relation to aircraft objects this right is made explicit in Article XVI of the Protocol.

*Illustration 31*

O leases railway engines to L, registers an international interest in the engines and then assigns that interest and the associated rights 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 the equipment or lease it and receive the rentals. If A sells the engines, the purchaser acquires them 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 to T, who takes its lease subject to the existing lease in favour of L. L's lease then becomes a sub-lease, so that T becomes L's lessor, with the consequent right to collect rentals from L and to recover the engines in the event of a default by L within the meaning of Article 11, while T has to pay rentals to A under the head lease.

### **Article 35 — Priority of competing assignments**

**1. Where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply as if the references to a registered interest were references to an assignment of the associated rights and the related registered interest and as if references to a registered or unregistered interest were references to a registered or unregistered assignment.**

**2. Article 30 applies to an assignment of associated rights as if the references to an international interest were references to an assignment of the associated rights and the related international interest.**

**Comment**

1. This Article applies where at least one of the competing assignments of associated rights also transfers the related international interest (see Article 35(1)). Priority conflicts involving only associated rights assigned in isolation from the international interest are outside the scope of the Convention since such rights are not susceptible to registration (Article 32(3)). However, the scope of Article 32(3) is qualified by the fact that if one assignment is related to an international interest and is registered that is all that is necessary to attract the application of the present Article, so that the registered assignee will have priority over an assignee of associated rights assigned in isolation so long as, and to the extent to which, the registered assignee's associated rights remain linked to the assigned international interest (see Comment 2 below). Accordingly it is only if both of the competing assignments relate solely to the associated rights (as can be done by agreement – see Article 31(1)) that the present Article and, indeed, the Convention as a whole have no application.

2. Since the registration system is concerned only with the registration of *interests* in an object, not with associated rights as such, the priority given to an assignee of associated rights is dependent on their continuing linkage to an international interest. An assignee of associated rights assigned in isolation from an international interest has nothing to register and cannot protect itself against loss of priority to an assignee of associated rights coupled with an international interest who registers the assignment. Similarly, if associated rights initially assigned with an international interest become detached from that interest, as where the assignee of a conditional sale agreement and associated rights itself assigns the international interest while retaining part of the associated rights, these fall outside the Convention, and cease to be protected by the Convention against loss of priority, because they are no longer linked to a registered interest.

3. Paragraph 1 of Article 35 may appear somewhat complex in that it requires references to a registered interest in Article 29 to be treated in two different ways: (1) as if they were references to an assignment of the associated rights and the related registered interest and (2) as if they were references to a registered assignment. The reason for this double reference is that paragraph 1 is dealing with two distinct priority situations. The first is a competition between the assignee of a registered interest and the assignee of a subsequently registered interest or an unregistered interest. Here the rule is that the assignee takes the same priority as its assignor, so that the assignee of a registered interest has priority over the assignee of an interest

registered subsequently or an interest not registered at all. The second situation concerns a priority between competing assignees of the same registered interest. In this case, as indicated by the second statement of references, the rule is that a registered assignment has priority over a subsequently registered assignment and over an unregistered assignment. However, this rule is qualified by Article 36 governing the priority of competing assignments of the same associated rights. Where a registered assignment of associated rights does not fall within Article 36, its priority as against another assignee of those rights is not governed by the Convention and the same is necessarily true of the competing claims to the related international interest itself. See Illustration 36 to Article 36.

4. There is nothing to preclude the assignment of an unregistered international interest, but the assignee will need to perfect its rights by registering, first, the international interest itself (which by virtue of the assignment only the assignee can do) and, secondly, the assignment. It would not seem possible to register an assignment of an international interest which itself remains unregistered, because there will be no entry in the Registry against which the assignment can be noted. The effect of the dual registration is to preserve the assignee's priority as against subsequent assignees and prior unregistered assignees and also as against the holders of subsequently registered international interests.

5. 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)(b)), so that the assignment does not affect existing priorities.

#### **Article 36 — Assignee's priority with respect to associated rights**

**1. The assignee of associated rights and the related international interest whose assignment has been registered only has priority under Article 35(1) over another assignee of the associated rights:**

**(a) if the contract under which the associated rights arise states that they are secured by or associated with the object; and**

**(b) to the extent that the associated rights are related to an object.**

**2. For the purposes of sub-paragraph (b) of the preceding paragraph, associated rights are related to an object only to the extent that they consist of rights to payment or performance that relate to:**

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

**(b) a sum advanced and utilised for the purchase of another object in which the assignor held another international interest if the assignor transferred that interest to the assignee and the assignment has been registered;**

**(c) the price payable for the object;**

**(d) the rentals payable in respect of the object; or**

**(e) other obligations arising from a transaction referred to in any of the preceding sub-paragraphs.**

**3. In all other cases, the priority of the competing assignments of the associated rights shall be determined by the applicable law.**

#### **Comment**

1. Under Article 31(1)(b) an assignment of associated rights transfers to the assignee the related international interest and all the interests and priorities of the assignor under the Convention. In principle, the holder of a registered international interest has priority over a subsequently registered interest and over an unregistered interest (Article 29(1)), so that but for the present Article the effect of Article 31(1)(b) would be that the priority given by Article 29(1) to a registered international interest would extend to all rights secured by or associated with that interest. In other words, the security would be enforceable for the entirety of the secured obligations before junior assignees could resort to the object for payment of sums due to them. Article 36 qualifies that priority in two ways: first, by requiring that the contract under which the associated rights arise states that they are secured by or associated with the object and, secondly, by restricting the priority to associated rights relating to the financing transaction. For examples, see Illustrations 32 and 33.

*(1) Disclosure of international interest*

2. By definition associated rights are rights to payment or other performance by the debtor under an agreement – that is, a security agreement, a title reservation agreement or a leasing agreement – which are secured by or associated with the object (Article 1(c)). However, in Article 36(1)(a) the broader word “contract” is used. This is intended to cover the case where the debtor undertakes in the original agreement to perform not only the obligations under that agreement but also those incurred to the creditor under any subsequent contract or engagement (Illustrations 32 and 34). The right to performance of such obligations, if secured by or associated with the object, thereby becomes part of the associated rights under the original agreement (see Comment 4 to Article 1 and Comments 1-4 to Article 31).

Accordingly in the ordinary way it would not be necessary for the subsequent loan contract to state that the rights under it were secured, this result having already been achieved by the original agreement. An assignee of the later contract which provided simply for a non-purchase-money loan and contained no reference to security would therefore have no reason to know that the loan was secured on or in any way related to an object and would thus be entirely ignorant of the existence of the international interest. It would be unfair to apply the Convention's priority rules so as to subordinate that assignee to the rights of an earlier assignee of the associated rights and related international interest. In such a case those priority rules are disapplied and priority is left to be determined by the applicable law (Illustration 32). This result can be avoided only by an express statement in the later contract that the associated rights assigned under that contract are secured by or associated with the object. The mere fact that the assignee has been made aware of this from other sources is irrelevant. As with Article 29, the purpose is to avoid factual disputes as to whether the assignee did or did not have knowledge of the linkage with the object.

3. Article 36(1)(a) addresses only a priority dispute between competing assignees and thus presupposes the existence of an earlier assignment which carries the international interest. Article 36(1)(a) does not deal with priority as between the original holder of the international interest who enters into a separate loan agreement not referring to security and an assignee of that agreement where there has been no earlier assignment of the associated rights and international interest to a prior assignee. In this case, though the fact will be unknown to the assignee unless informed of it, the assignment constitutes a partial assignment of the associated rights under the original agreement, so that the respective rights of the assignor and the assignee in the object fall to be determined, in the absence of agreement, by the applicable law (see Comment 12 and Illustration 30 to Article 31). The assignee will usually be further protected by provisions of national law requiring an assignor to disclose to its assignee facts relevant to the assigned rights, including in this case the fact that the assigned rights are associated rights under an earlier agreement in favour of the assignor and are secured by the assignor's registered international interest.

(2) *Restriction of priority to object-related rights*

4. The second qualification of the general priority rule is that a registered assignee of an international interest and associated rights has priority over another assignee (whether a subsequent assignee or a prior assignee under an unregistered assignment) only to the extent that the associated rights are object-related within the meaning of Article 36(2). In broad terms associated rights are object-related where they represent (a) payment of the price of the object (or in certain conditions another object), the advance of a loan for the purchase of that object or of another object, or the rental of an object (rental and price may be combined, as in the case of a lease with an option to purchase), or (b) other obligations arising from a title reservation agreement, purchase-money loan agreement or leasing agreement, including

maintenance, repair and insurance, and obligations of the debtor or a third party under other contracts which are incorporated as an obligation of the debtor under the agreement (Illustration 35). The purpose of this restriction is to avoid giving the assignee a Convention priority to rights to payment which, though secured on an object, are unrelated to its acquisition or rental or the purchase of another object, 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 Convention is concerned essentially with international interests; it is no part of its purpose to regulate priorities between general receivables financiers. The priority between two assignees of non-object-related associated rights will be determined not by the Convention but by the applicable law, including any applicable provisions of the UN Convention (Illustration 36).

5. Article 36(2) lists five categories of object-related associated rights:

(a) *A sum advanced and utilised for the purchase of the object*

It is not sufficient that the advance is made for the purchase of the object; it is necessary that the debtor shall actually have applied it to that purpose if the Convention priority rule is to apply. Often a relatively small part of the funds advanced will be utilised to acquire equipment to be installed on an object or spare parts. While they are not technically part of the object until installed, for the purposes of this provision, such funds will generally be considered utilised for purchase.

(b) *A sum advanced and utilised for the purchase of another object in which the assignor held another international interest if the assignor transferred that interest to the assignee and the assignment has been registered*

This category is designed to cover cross-collateralisation, that is, a provision in a security agreement by which the international interest secures not only the debtor's obligations under that agreement but also obligations to repay obligations of a purchase-money type (broadly defined – see Article 36(2)(e)) under another contract (earlier or later) giving rise to another international interest which is transferred to the assignee under an assignment that is then registered. Provided that the agreement also incorporates an undertaking by the debtor to perform its obligations to the creditor under the other contract, so that the right to performance of those obligations forms part of the creditor's associated rights under the agreement, the assignee under the registered assignment has priority over a subsequent assignee both in relation to any advance under the assigned agreement which is utilised for the purchase of the object to which that agreement relates and in relation to any advance of a purchase-money type under another agreement for the purchase or use of another object. See Illustration 33.

- (c) *The price payable for the object*
- (d) *The rentals payable in respect of the object*

Sub-paragraphs (c) and (d) are self-explanatory.

- (e) *Other obligations arising from a transaction referred to in any of the preceding sub-paragraphs*

In fact the preceding sub-paragraphs refer to obligations (which may conveniently be referred to as primary obligations) rather than transactions. However, the intent is clear, namely to pick up all other obligations of the debtor under a transaction involving a security agreement, title reservation agreement or leasing agreement under which the primary obligations arise, including (a) contract and default interest and charges, funding breakage costs, enforcement costs, sums payable under indemnities, and the like, and (b) obligations arising from related transaction documents and incorporated as obligations under the agreement. See Illustration 32.

#### *Illustration 32*

C advances money to D for the purchase of a railway engine and takes a security interest in the engine to secure repayment of the advance and all other obligations of D to C under the agreement (including default interest and breakage costs) or any other contract entered into between them, D undertaking in the agreement to perform also its obligations under all such other contracts. C registers its interest as an international interest and subsequently assigns its rights under the agreement, together with the international interest, by way of security first to A1 and secondly to A2. Subsequently C makes a further advance to D for the purchase of a second engine. The loan agreement does not provide for security on the engine, nor does it refer to the fact that the further advance is secured under the earlier loan agreement. C assigns its rights under the second loan agreement to A1, who registers its assignment, and then to A3. The priority of the competing assignments to A1 and A2 relating to the purchase-money advance for the first engine and other obligations of D under the first loan agreement (including default interest and breakage costs) is determined by the order of registration, both conditions of Article 36(1) being satisfied. The Convention does not determine priority as between A1 and A3 as regards the assignments of the loan agreement relating to the purchase-money advance for the second engine because, while the requirements of sub-paragraph (b) of Article 32(1) are fulfilled, those of sub-paragraph (a) are not. In the absence of any statement in the second loan agreement assigned to A3 that it is secured on the object A3 has no way of knowing that the loan is connected to an international interest in favour of C1 and no reason to search the International Registry. Priority as between A1 and A3 as to the associated rights, and therefore as to the related international interest, is determined by the applicable law, not by the Convention and the ordinary priority rule in Article 35 is displaced.

*Illustration 33*

The facts are as in Illustration 32 except that the second loan by C to D is for D's general purposes and the loan agreement states that the loan is secured on the railway engine. A1 registers the assignment and later the assignment to A3 is registered. In this case the Convention determines priority not only as between A1 and A2 but also as between A1 and A3 because sub-paragraph (a) of Article 36(1) is satisfied and the assignment to A1 is of associated rights related to an object as required by sub-paragraph (b). The fact that the assignment to A3 is not object-related is irrelevant.

*Illustration 34*

C advances money to D for the purchase of a railway engine, and D gives C a security interest in the engine to secure D's obligations under the loan agreement and under any other contract between them, D undertaking in the loan agreement to perform also its obligations under any such other contract. Subsequently C makes a further loan to D under a new loan agreement, the loan being made for the purchase of another engine. C's associated rights under the first agreement include its rights to repayment under the second agreement, so that if C assigns its rights under the first agreement to A1, who registers the assignment, and later to A2, A1 has priority both as to the first advance and as to the second advance. The position would be otherwise if the first loan agreement, though securing future as well as existing indebtedness, did not incorporate an undertaking by D to fulfil its obligations under subsequent contracts, for the rights to performance of those agreements, though associated rights under such contracts, would not be associated rights under the first agreement.

*Illustration 35*

Lessor leases a satellite to Lessee under a leasing agreement and registers its interest in the satellite as an international interest. The agreement provides for payment of rentals, interest on arrears and the expenses of any repossession following default. Lessor assigns its associated rights and international interest to A1 and A2 in succession. Priority as between A1 and A2 is determined by the order of registration both as to the rentals and as to any default interest and repossession expenses, these being object-related under sub-paragraphs (d) and (e) of Article 36(2).

*Illustration 36*

C advances money to D for D's general purposes under a loan agreement which provides for the grant of a security interest in an aircraft engine owned by D to secure D's repayment obligation under the loan agreement. C registers its international interest and later assigns its rights under the loan agreement by way of security, first, to A1 and, secondly, to A2. Both assignments are registered, A1

registering its assignment first. Ordinarily A1 would have priority under Article 35 as the first to register, but as the associated rights assigned to A1 are not related to an object as required by Article 36(1)(b) the Convention priority rules do not apply and the priority as between A1 and A2 is determined by the applicable law.

### **Article 37 — Effects of assignor’s insolvency**

**The provisions of Article 30 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 the assignee’s title to the assigned international interest and to the associated rights (see Article 35(2)) is to be treated as effective in the proceedings if registered in the International Registry prior to the commencement of the insolvency proceedings or if otherwise effective under the applicable law. “Effective” means that the proprietary effect of the assignment is recognised and will be respected in the insolvency of the assignor as overriding the claims of the assignor’s general creditors and as protected against attack by the insolvency administrator or other claimants. This, however, is subject to the rules of insolvency law and procedure specified in Article 30. 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. But rules of insolvency law other than those relating to the avoidance of preferences and transfers in fraud of creditors may not be invoked to defeat or qualify the assignee’s title to the international interest and associated rights.

### **Article 38 — Subrogation**

**1. Subject to paragraph 2, nothing in this Convention affects the acquisition of associated rights and the related 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 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.**

**Comment**

1. The Convention deals only with transfers of associated rights and the related international interest by way of assignment, and this is contractual (see the definition of assignment in Article 1(b)). However, national laws commonly confer a right of 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. 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 16(1)(c)). In principle a subrogee stands in the position of the original holder of the interest and acquires the same priority as that holder in relation to other holders (see Illustration 37). But as between competing subrogees (a position normally likely to arise only where the applicable law recognises a right of subrogation for partial performance by the party claiming the right) priority will be determined by the applicable law, though if the priority is varied by a subordination agreement this will not bind an assignee from the subordinated party unless the subordination was registered.

2. Paragraph 2 permits subordination between a subrogee and the holder of a competing interest (see Illustration 38). These subordinations are binding upon the parties and bind third parties, when registered in advance of subsequent interests. This extends the rule set out in Article 29(5) to this context, reflecting the Convention's approach of bringing complex inter-creditor priorities within its terms on the basis of (a) party autonomy, where third parties are unaffected, and (b) first-in-time registration, where third parties are affected.

*Illustration 37*

C1 advances money to D on the security of an airframe and registers its international interest. Subsequently C2 makes a loan to D on the security of the same airframe and a guarantee by G. C2 registers its international interest. D defaults in payment of sums due under the second loan agreement and C2 demands payment from G under its guarantee. G pays in full and under the applicable law becomes subrogated to the rights of C2, which are subordinate to those of C1.

*Illustration 38*

D enters into two security agreements, with C1 and C2, to secure the repayment of advances for the acquisition of an airframe. C1 and C2 register their respective international interests. Both debts are guaranteed by State bank Y, which subordinates in favour of C2 its prospective right of subrogation to C1. D defaults on loan to C1. Y pays on its guarantee, thereby acquiring C1's international interest by way of subrogation under the applicable law. Y's interest in the airframe is junior to that of C2.

## CHAPTER X

### RIGHTS OR INTERESTS SUBJECT TO DECLARATIONS BY CONTRACTING STATES

#### Article 39 — Rights having priority without registration

**1. A Contracting State may at any time, in a declaration deposited with the Depository of the Protocol declare, generally or specifically:**

**(a) those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and**

**(b) that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.**

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

**3. A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.**

**4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession.**

### **Comment**

1. Paragraph 1(a) of this Article is confined to non-consensual rights or interests (as defined by Article 1(s)) in respect of which the relevant Contracting State has not made a declaration under Article 40 and which are therefore not registrable in the International Registry.

2. The non-consensual rights or interests capable of a declaration under the present Article are limited to those which, under the law of the Contracting State, have priority without registration 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. The Convention may not be used as a vehicle to expand such preferred rights. They may be retained or restricted, in either case, by a declaration, which may be general (including contemplation of future preferences) or specific. The effect of not making a declaration, or not covering a class, is that a registered international interest will have priority. The basic principle is that of retention of priority by publicising preferred non-consensual rights and interests, thus permitting financing parties to assess and price these risks.

3. A possible example of a right under Article 39(1)(a) is a non-consensual lien arising under national law on an aircraft for unpaid air navigation charges. Another possible example is a claim for unpaid taxes or for wages due from an insolvent employer, which, though usually unsecured, is 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 40, 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.

4. Rights of arrest or detention given by the law of a State for payment of amounts due to a provider of public services, e.g. to arrest or detain an aircraft for unpaid air navigation charges, can be covered by a declaration under paragraph 1(a) if given priority under the relevant national law over interests equivalent to that of the holder of a registered international interest. Alternatively a Contracting State can make a declaration under Article 39(1)(b) (see paragraph 8 below). This is the only way of protecting rights of arrest or detention given by contract, since these fall

outside Article 39(1)(a). The words “such entity” in the third line of Article 39(1)(b) omit reference to the State itself, but this is clearly a slip and the phrase should be construed as if it read “such State or State entity.”

5. While the definition of non-consensual right or interest includes one securing an obligation to an intergovernmental or private organisation, for example, the European Organisation for the Safety of Air Navigation (“Eurocontrol”), yet to qualify for a declaration under Article 39(1)(a) or (b), the priority (in the case of (1)(a)) or right of detention or arrest (in the case of (1)(b)) must arise under the national law of the declaring State. No declaration may be made by an intergovernmental or private organisation, nor may it be made by a State relating to obligations to such an organisation which do not enjoy priority, or attract a right of arrest or detention, under national law.

6. 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 29(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 without registration 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 make a declaration covering a narrower range of non-consensual rights or interests than that provided under its law for an equivalent interest but not a broader range.

7. 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, without registration, over registered international interests.

8. Article 39(1)(b) empowers a Contracting State to make a declaration preserving the right of the provider of public services (whether itself a State, State entity, intergovernmental organisation or private organisation) to arrest or detain an object for payment of amounts directly related to those services in respect of that object or another object, for example, the right of an aviation authority to detain an aircraft for unpaid airport charges due in respect of services to that aircraft or another aircraft in the same ownership. This sub-paragraph is of particular importance in those cases where the right of arrest or detention is given by contract and cannot, therefore, be protected by a declaration under Article 39(1)(a). Article 39(1)(b) is drafted in terms wide enough to cover charges collected by an intergovernmental organisation, such as Eurocontrol, in its own name, but the declaration can only be made by a Member State and the right of arrest or detention

must be given by the law of that State. There are some small drafting infelicities in Article 39(1)(b), such as the word “other” before “private provider” when the preceding parties are public providers; and the reference to parties to whom payment of amounts is due should include the State itself, not merely a State entity. Article 39(1)(b) should be construed accordingly.

9. 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.

10. The deposit of a declaration or modification of a declaration cannot affect the priority of international interests already registered (see Illustration 39). This follows the fundamental principle that the holder of a registered international interest should be entitled to rely on what is on the International Registry at the time of its registration. However, by exception to this rule it is open to a Contracting State to make a declaration at the time of its ratification, etc., securing the priority of a non-consensual right or interest over an international interest registered prior to the ratification.

11. A Contracting State may also 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 39*

Under the law of Domitia, a Contracting State, claims for taxes have priority over the claims of secured creditors. Before Domitia has deposited a declaration under this Article covering such claims, D gives C1 a charge over identified items of railway rolling stock to secure an advance and C1 registers the charge as an international interest. Later Domitia makes a declaration under this Article that claims for unpaid taxes, capped at six per cent of the proceeds of rolling stock, are to have priority over a registered international interest. Thereafter D gives a second charge over the same equipment to C2, from whom it has also borrowed money, and C2 registers the charge as an international interest. Some time afterwards D, having made default in respect of both loans, goes into insolvent liquidation, and C1 sells the equipment. The preferential claims for unpaid taxes are subordinate to the charge in favour of C1 but have priority over the charge to C2 up to the six per cent cap.

## **Article 40 — 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 shall 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. Possible examples are the interest arising from the attachment of the debtor's equipment by way of execution of a judgment debt and the rights of a creditor under a lien for repair given by law. In contrast to Article 39, which permits a general description of categories in a declaration made under that Article, the present Article requires the categories of registrable non-consensual right or interest to be listed.

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 29(1)). If it is not registered it will be subordinate to a registered international interest and its priority as against an unregistered interest is not governed by the Convention but 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.

## CHAPTER XI

### APPLICATION OF THE CONVENTION TO SALES

#### Article 41 — 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. It also permits use of the Protocol to allow of a sale which has only to conform to the formal requirements of the Protocol. 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 42 — Choice of forum

- 1. Subject to Articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties.**
- 2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.**

## Comment

1. This Article is a general jurisdiction provision covering “any claim” under the Convention. It embodies the general principle of party autonomy. The selected jurisdiction is exclusive. It is, however, open to the parties to agree that the jurisdiction selected is to be non-exclusive. Where exclusive, the provision precludes courts of other Contracting States from accepting or asserting jurisdiction.

2. There are, however, two qualifications. First, this Article does not exclude any jurisdiction conferred by Article 43 in relation to relief under Article 13 (relief pending final determination). Secondly, it does not 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.

3. 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. This provision overrides contrary national law. But under Article 42(2) they must do so in writing or otherwise in accordance with the formal requirements of the *lex fori*. Article 42(2) was inserted in order to ensure conformity with Article 23 of the European Community Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters (“the Brussels Regulation”) which replaces the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and binds all Member States of the European Community. It is only requirements as to form which are governed by the *lex fori*. Issues of substantive validity of the forum selection agreement are governed by the applicable law.

4. The Convention does not, of course, deal with the conferment of jurisdiction on the courts of a non-Contracting State. In such a case the effectiveness of the jurisdiction clause is determined by the *lex fori* and it is for the forum court to decide whether it will take jurisdiction.

5. Jurisdiction under Articles 42 and 43 is confined to the courts of a Contracting State. This does not, of course, preclude the courts of a non-Contracting State from exercising jurisdiction pursuant to its own jurisdiction rules. Article 44 is not confined to the courts of a Contracting State, thereby covering the possibility that the Registrar will have its centre of administration in a non-Contracting State. See Comment 7 to Article 44.

6. The Convention makes no provision for cases where the parties have not made a choice of forum and the claim is not for interim relief under Article 13 or for an order against the Registrar under Article 44 but is, for example, for breach of a duty imposed on the creditor under Article 8 or Article 9 or is a claim by a person

other than the debtor for the correction or discharge of a registration, as where a junior chargee wishes to have a satisfied prior charge recorded as discharged. Jurisdiction in such cases is determined by the *lex fori*, including any external rules having effect under the *lex fori* by reason of ratification of an international convention or by a regulation made by the European Community as regards a Member State. A provision in the draft Convention expressly providing for jurisdiction under the *lex fori* of a Contracting State was removed at the Diplomatic Conference. This leaves it free to a court of a non-Contracting State to make orders under the Convention in cases outside the Convention jurisdiction rules, for example, where the applicable law is the law of a Contracting State.

### **Article 43 — Jurisdiction under Article 13**

- 1. The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(4) in respect of that object.**
- 2. Jurisdiction to grant relief under Article 13(1)(d) or other interim relief by virtue of Article 13(4) may be exercised either:**
  - (a) by the courts chosen by the parties; or**
  - (b) by the courts of a Contracting State on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.**
- 3. A court has jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 13(1) will or may take place in a court of another Contracting State or by arbitration.**

### **Comment**

1. This Article is confined to jurisdiction to entertain claims by a creditor to speedy judicial relief under Article 13 pending final determination of the creditor's claim. The forms of relief set out in Article 13(1)(a),(b) and (c) 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 (this will not necessarily be true of other forms of interim relief given to the creditor by the *lex fori* and available by virtue of Article 13(4), but the jurisdiction rule for these is the same as for relief under Article 13(1)(a), (b) and (c)). By contrast, relief under Article 13(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 by the terms of the order granting relief. In either case the jurisdiction is concurrent with that chosen by the parties under Article 42(1).

2. The jurisdiction of the court of the Contracting State to grant relief under Article 13 where the object is situated (Article 43(1)) or where the debtor is situated (Article 43(2)(b)) cannot be excluded by a choice of forum clause under Article 42(1), though it is for the creditor to decide whether to invoke that jurisdiction.

3. Article 43 does not provide any test for determining the situation of the debtor, nor is Article 4(1) directly applicable, for the alternative tests of situation laid down in that Article are solely for the purposes of Article 3(1). However, there is no reason why a court should not have regard to these in determining whether the debtor is situated within the territory of that court's State for the purpose of the exercise of *in personam* jurisdiction.

4. It is not necessary that the court from which relief is sought under Article 13 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(3) is silent as to the position where the final determination is to be made by the court of a non-Contracting State which determines that the applicable law is that of a Contracting State. It would seem that in such a case the courts of a Contracting State should be able to grant relief under Article 13.

5. Under Article 55 a Contracting State may declare that it will not apply the provisions of Article 13 or Article 43 or both, wholly or in part. A Contracting State should take care to ensure that any decision as to a declaration under one of these Articles is consistent with the decision under the other. For example, a Contracting State making a declaration excluding Article 13 will also want to exclude Article 43.

#### **Article 44 — 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 or make orders against the Registrar.**

**2. Where a person fails to respond to a demand made under Article 25 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 the preceding paragraph 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. Article 44(1) confers on the courts of the place in which the Registrar has its centre of administration exclusive jurisdiction to award damages or make orders against the Registrar. There are various reasons for excluding the jurisdiction of other courts. 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, the Registrar would be exposed to multiple proceedings in different States, with consequent burdens and expense as well as the risk of conflicting orders by courts in different jurisdictions. Finally, a challenge to a registration will normally be based on issues between the parties, not with the Registrar. It is for these reasons that 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 administration 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.

2. Article 44(2) and (3) make specific provision for the following awards and orders against the Registrar:

(a) awards under Article 28 for payment of compensatory damages for errors, omissions and system malfunction;

(b) orders under Article 44(2) directing the Registrar to discharge a registration where the discharge is one to which a debtor is entitled under Article 25(1) or an intending debtor or intending assignor is entitled under Article 25(2) and

the creditor fails to take the necessary action or has ceased to exist or cannot be found;

(c) orders under Article 44(3) to amend or discharge a registration following the failure of the registrant to comply with an order of a foreign court having jurisdiction under the Convention or, in the case of a national interest, a court of competent jurisdiction, directing the registrant to effect the amendment or discharge of the registration.

3. There are, however, various situations not covered by Article 44(2) and (3). For example:

(a) Article 44(2) requires an application by the debtor or intending debtor to procure discharge of a registration and does not extend to an application by other interested parties, for example, an intending assignor who has invoked Article 25(2) of the Convention or a junior chargee who wishes to have a satisfied senior charge recorded as discharged;

(b) Article 44(3) refers to non-compliance with “an order of a court having jurisdiction under this Convention” but in the absence of party choice under Article 42 no court has jurisdiction under the Convention (though it may have under its own jurisdiction rules) to make an order to enforce obligations under Article 25, or, indeed, under any Article other than Article 13 (as stated above, the proposed Article on general jurisdiction was dropped at the Diplomatic Conference);

(c) Articles 25 and 44(2) and (3) give no right to a creditor wrongly recorded as subordinated to another creditor to have the registration corrected;

(d) apart from the award of damages under Article 28, there is no express provision in Article 44 for orders requiring the Registrar to comply with its obligations under the Convention.

4. As regards cases (a), (b) and (c) above, since no court other than that of the place of the Registrar’s centre of administration has jurisdiction to make orders against the Registrar, an aggrieved party, though able to obtain an *in personam* order from a court of competent jurisdiction requiring the defendant to procure the amendment or discharge of the incorrect registration, would, in the absence of a broad reading of Article 44(1), have no means of procuring correction of the registration if the order so obtained were not complied with. The courts of the Registrar’s jurisdiction should therefore be treated as having (under paragraph 1 and by analogy with paragraph 3 of the Article) a residual power, on the application of any person who has obtained an *in personam* order as described above or at the request of the court making the order, to direct the Registrar to amend or discharge an improper or incorrect registration. It is likely that resort to this residual jurisdiction will only rarely be necessary; and the condition that the applicant must first have obtained an order in its favour from a court of competent jurisdiction ensures that the courts of the Registrar’s jurisdiction are not themselves involved in

the determination of registration issues arising between the parties, this falling within the province of courts having jurisdiction under the Convention or under the *lex fori*.

5. Cases within paragraph 3(d) above should also be regarded as falling within the residual jurisdiction of the courts where the Registrar has its centre of administration. Thus Article 44(1) should be interpreted as conferring exclusive jurisdiction on the Registrar's court to make orders to enforce the Registrar's duties under the Convention, for example, its duty (a) to issue a search certificate to a person making a search in due form and paying the requisite fee; and (b) to comply with directions properly given to it by the Supervisory Authority under Article 17 of the Convention.

6. There remain obligations of the Registrar arising independently of the Convention, for example, under contracts with the Supervisory Authority or with the suppliers of goods or services. Jurisdiction over claims for breach of such obligations is a matter to be dealt with under the domestic law of the State where the Registrar has its centre of administration.

7. There is no requirement that the Registrar should have its centre of administration in a Contracting State, though problems could arise if it did not. This is a factor which the Supervisory Authority can take into account in deciding who to appoint as Registrar. If the Registrar were in the jurisdiction of a non-Contracting State jurisdiction would have to be conferred by the law of that State independently of the Convention.

#### **Article 45 — Jurisdiction in respect of insolvency proceedings**

**The provisions of this Chapter are not applicable to insolvency proceedings.**

#### **Comment**

The jurisdictional aspects of insolvency proceedings are placed outside the scope of this Chapter and jurisdiction is left to be determined by the *lex concursus*.

## CHAPTER XIII

### RELATIONSHIP WITH OTHER CONVENTIONS

#### **Article 45 bis — Relationship with the *United Nations Convention on the Assignment of Receivables in International Trade***

**This Convention shall prevail over the *United Nations Convention on the Assignment of Receivables in International Trade*, opened for signature in New York on 12 December 2001, as it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.**

#### **Comment**

1. This Article was inserted subsequent to the Diplomatic Conference pursuant to an Annex approved by the Conference which provided for its insertion after deposit of the UN Convention with the Secretary-General of the United Nations. Its purpose is to make explicit what is implicit in Article 38(1) of the UN Convention, namely, that to the extent of any inconsistency between the two Conventions, this Convention supersedes the UN Convention. While such an inconsistency could occur in the context of associated rights related to an international interest in an aircraft object, railway rolling stock or space assets and assigned with the international interest, the provisions of the two Conventions will usually lead to the same result.

2. The impact of this Article on the UN Convention is very limited, reflecting the fact that the Cape Town Convention is concerned with international interests, not with assignments of receivables as such. So the Convention does not cover assignments detached from the related international interest, and under Article 36(3) it defers to the UN Convention or other applicable law as regards associated rights which do not satisfy the conditions stated in Article 36(1).

#### **Article 46 — 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*, signed at Ottawa on 28 May 1988.**

## **Comment**

Article XXV of the Aircraft Equipment Protocol provides that the Convention supersedes the Leasing Convention as it relates to aircraft.

## **CHAPTER XIV**

### **FINAL PROVISIONS**

#### **Article 47 — Signature, ratification, acceptance, approval or accession**

- 1. This Convention shall be open for signature in Cape Town on 16 November 2001 by States participating in the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held at Cape Town from 29 October to 16 November 2001. After 16 November 2001, the Convention shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article 49.**
- 2. This Convention shall be subject to ratification, acceptance or approval by States which have signed it.**
- 3. Any State which does not sign this Convention may accede to it at any time.**
- 4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.**

## **Comment**

1. This Article applies from the time of adoption of the text of the Convention (Article 24(4) of the Vienna Convention), that is, from 16 November 2001. The effect of Article 47(3) is that a non-signatory State may accede before as well as after the Convention comes into force.
2. At the closing ceremony of the Diplomatic Conference 20 States signed the Convention and Aircraft Equipment Protocol. There have since been additional signatories.

## **Article 48 — Regional Economic Integration Organisations**

**1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.**

**2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.**

**3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.**

### **Comment**

1. This Article enables a Regional Economic Integration Organisation (“REIO”) constituted by sovereign States (for example, the European Community) to sign, accept, approve or accede to the Convention, but only to the extent it has exclusive competence (see Comment 2 below) over matters covered by the Convention. The European Community, for example, has issued two regulations, the Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “Insolvency Regulation”) and the Brussels Regulation, which touch on matters covered by the Convention. Only the Community and not its Member States has competence to conclude international agreements which affect those regulations. For this reason it was necessary to include an appropriate provision permitting the European Community (and any other REIO in a similar situation) to become a Party to the Convention and the Aircraft Equipment Protocol.

2. In view of the importance of this matter, REIOs are to declare their sphere of competence at the time of adherence to the Convention or, as regards matters covered by the Protocol in relation to aircraft objects, at the time of adherence to the Protocol (Article XXVII). They must specify the matters governed by the Convention in respect of which “competence has been *transferred* to that Organisation by its Member States”. Thus, the declaration should be made only where, as the result of the transfer of competence, the REIO has exclusive competence in relation to the specified matters and Member States no longer have independent authority to legislate concerning them.

#### **Article 49 — Entry into force**

**1. This Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third 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 States Parties to this Convention and that Protocol.**

**2. For other States this Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of their instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies and subject, in relation to such Protocol, to the requirements of sub-paragraphs (a), (b) and (c) of the preceding paragraph.**

#### **Comment**

1. Paragraph 1 provides for entry into force for those States whose ratifications are effective to bring the Convention into force; paragraph 2 concerns States adhering to the Convention after it has entered into force.

2. This Article states the controlling power of the relevant Protocol. Paragraph 2 states that the Convention takes effect subject to the terms of the Protocol. This provision is complementary to Article 6, which provides that the instruments are to be read together as a single instrument and that, in the case of a conflict, the Protocol controls.

3. The provisions of the Convention relating to objects cannot operate independently of the relevant Protocol, so that as regards these it does not come into force until the Protocol has come into force, which in the case of the Aircraft Equipment Protocol requires eight ratifications. There are a few Final Provisions which operate independently of a Protocol, including Article 47 (signature, ratification, etc.), Article 48 (Regional Economic Integration Organisations), Article 51 (arrangements for extension to future Protocols), Article 52 (territorial units), Article 59 (denunciations) and Article 62 (Depositary and its functions). Under Article 24 of the Vienna Convention most, if not all, these provisions came into force on the adoption of the text of the Convention on 16 November 2001. Accordingly the requirement of three ratifications for the Convention serves simply to emphasise that the Convention is a separate instrument which itself requires ratification by three States and is not brought into force simply by ratification of a Protocol. See also Article XXVI(5) of the Aircraft Equipment Protocol.

#### **Article 50 — Internal transactions**

**1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of objects or some of them.**

**2. Notwithstanding the preceding paragraph, the provisions of Articles 8(4), 9(1), 16, Chapter V, Article 29, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.**

**3. Where notice of a national interest has been registered in the International Registry, the priority of the holder of that interest under Article 29 shall not be affected by the fact that such interest has become vested in another person by assignment or subrogation under the applicable law.**

#### **Comment**

1. 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(n)). 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 50(1) that the Convention is not to apply to a transaction which is an internal transaction in relation to that State with regard to all types of object or some of them. Such a declaration may be made at the time of ratification, etc., but if not made then it may be made subsequently under Article 57. The effect is the same as the more concise formulation in Articles 39 and 40 that the declaration may be made at any time. Any declaration once made can be supplemented or replaced by a subsequent declaration under Article 57 or withdrawn under Article 58.

2. Article 50 has a limited effect. It does not affect the Convention's basic registration and priority structure, discussed below. It applies only where the declaring State has a national registry for the recording of interests of the kind created by the transaction and that interest (termed a national interest in the Convention – see Article 1(r)) has been registered in the national registry. Although a national interest cannot be an international interest, it is governed by Articles 8(4) (as to which see Comment 3), 9(1) and 16 as if it were an international interest, notice of the national interest can be registered in the International Registry, and, most importantly, the priority rules of Article 29 apply to the national interest, so that registration of a notice of the national interest protects it against subsequently registered interests and unregistered interests, while failure to register such a notice results in loss of priority under Article 29(1). Other provisions of the Convention applicable to internal transactions are those relating to registered interests, e.g. Articles 30, 35(1) and 40.

3. Since Article 50 refers only to paragraph 4 of Article 8, thereby impliedly excluding the other paragraphs, paragraph 4 in its application to internal transactions must be construed as if the words “under paragraph 1” were omitted.

### **Article 51 — Future Protocols**

**1. The Depositary may create working groups, in co-operation with such relevant non-governmental organisations as the Depositary considers appropriate, 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 Depositary shall communicate the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organisations, and shall invite such States and organisations to participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.**

**3. The Depositary shall also communicate the text of any preliminary draft Protocol prepared by such a working group to such relevant non-governmental organisations as the Depositary considers appropriate. Such non-governmental organisations shall be invited promptly to submit comments on the text of the preliminary draft Protocol to the Depositary and to participate as observers in the preparation of a draft Protocol.**

**4. When the competent bodies of the Depositary adjudge such a draft Protocol ripe for adoption, the Depositary shall convene a diplomatic conference for its adoption.**

**5. Once such a Protocol has been adopted, subject to paragraph 6, this Convention shall apply to the category of objects covered thereby.**

**6. Article 45 *bis* of this Convention applies to such a Protocol only if specifically provided for in that Protocol.**

### **Comment**

The Convention is at present confined to aircraft objects (for which the Protocol has been concluded) and railway rolling stock and space assets (for which draft Protocols are in preparation and which will in due course be submitted to Diplomatic Conferences). The present Article allows for extension of the Convention to additional categories of equipment of a kind not specified in Article 2(3) each member of which is uniquely identifiable. The process laid down is that the Depositary (UNIDROIT) will create working groups to assess the feasibility of preparing future Protocols and to prepare drafts for UNIDROIT to communicate to all States Parties to the Convention and other States and intergovernmental and non-governmental organisations referred to in Article 51(2) and (3). These will be invited to participate in intergovernmental negotiations for the preparation of a draft Protocol on the basis of the preliminary draft, and when the Governing Council of

UNIDROIT considers that the draft is ripe for adoption UNIDROIT will convene a Diplomatic Conference for its adoption.

### **Article 52 — Territorial units**

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

**2. Any such declaration shall state expressly the territorial units to which this Convention applies.**

**3. If a Contracting State has not made any declaration under paragraph 1, this Convention shall apply to all territorial units of that State.**

**4. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.**

**5. If by virtue of a declaration under paragraph 1, this Convention extends to one or more territorial units of a Contracting State:**

**(a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which this Convention applies or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which this Convention applies;**

**(b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which this Convention applies; and**

**(c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which this Convention applies.**

## Comment

1. Article 52 embodies what are sometimes loosely referred to as federal clauses. However, it is not confined to federal States, in which legislative power is distributed between the federal legislature and the State or provincial legislatures, but applies to any State in which different systems of law are applicable in relation to the matters dealt with in the Convention. It is open to a Contracting State to make a declaration extending the Convention to all its territorial units or only to one or more of them. If it does not make a declaration the Convention applies to all the territorial units. A declaration under this Article can be made only at the time of ratification, etc., though if so made it can be supplemented or replaced by a subsequent declaration under Article 57 or withdrawn under Article 58.

2. Declarations under the Convention (see Overview, paragraph 51) may be made in respect of each territorial unit and may differ as between one territorial unit and another.

3. Where a declaration under Article 52(1) covers only one or some of a State's territorial units but not all, the effect of Article 52(5) is that the debtor is to be considered as situated, and the object as located, in a Contracting State only if situated or located in a territorial unit to which the Convention applies. Paragraph 5(a) corresponds to Article 4 except for the omission of the reference to the principal place of business where the debtor has more than one place of business. Since this sub-paragraph envisages only one place of business, it is thought that for a debtor with more than one such place the reference is to the principal place of business, as in Article 4. Paragraph 5(c), which deals with references to the administrative authorities in a Contracting State, was copied from the Aircraft Equipment Protocol and its retention is an error since the Convention itself nowhere refers to administrative authorities. Accordingly the sub-paragraph should be disregarded and reference made instead to Article XXIX(5) of the Aircraft Equipment Protocol as regards aircraft objects.

### *Illustration 40*

Ruritania is a Contracting State with three territorial units, each having its own system of law, namely Rus, Urbs and Terra. Ruritania has made a declaration applying the Convention to Terra but not to Rus or Urbs. Creditor enters into an agreement with Debtor, who is situated exclusively in Urbs at the time the agreement is concluded, to lease to Debtor a railway wagon located in Terra. The Convention does not apply, since for the purposes of Article 3(1) the debtor is not situated in a Contracting State.

### **Article 53 — Determination of courts**

**A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare 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. It is not intended to allow such a declaration to cover private tribunals or even public administrative tribunals so far as these are not fulfilling judicial or quasi-judicial functions. If a declaration under this Article is not made at the time of ratification, etc., it may be made subsequently under Article 57 (see Comment 1 to Article 50), and any declaration made may be supplemented, modified or replaced by a subsequent declaration under that Article or withdrawn under Article 58.

### **Article 54 — Declarations regarding remedies**

- 1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare 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 shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, 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 8(1) and on any creditor by Article 13(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 of this Article requires a Contracting State to make a declaration whether remedies which under the Convention would be available without leave of the court (for example, possession and sale) are to be exercisable only with leave of the court or whether on the other hand such remedies may be exercised without such leave. This Article reflects the fact that while some States have no objection to the extra-judicial exercise of remedies, others require court control, and leave it to each Contracting State to decide which alternative to choose. A declaration under Article 54(2) is mandatory, and this is so whether or not a Contracting State chooses to make a declaration under Article 54(1).

3. A declaration under Article 54(1) may be made, and a declaration under Article 54(2) must be made, at the time of ratification, etc., but if a declaration under Article 54(1) is not made then it may be made subsequently. See Comment 1 to Article 50.

#### **Article 55 — Declarations regarding relief pending final determination**

**A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.**

#### **Comment**

1. Article 55 represents the outcome of discussions with European Community representatives at the Diplomatic Conference. Their concern was to ensure that if there were deviations from the Brussels Regulation the Member States of the Community should adopt a common position. Other Contracting States may have different reasons for making a declaration under this Article.

2. Contracting States need to ensure that any declaration under one of the two Articles referred to is compatible with the other Article and/or declarations under it. For example, a Contracting State which has made no declaration excluding any part of Article 13 could not sensibly make a declaration excluding Article 43, for the effect would be to render the Convention silent on questions of jurisdiction to grant relief under Article 13. Similarly, to retain Article 43 as regards forms of relief under Article 13 excluded by a declaration under the present Article would deprive Article 43 of any meaning in relation to such relief.

3. Articles 13 and 43 may be excluded wholly or in part. Again, partial exclusions under one of these Articles need to be consistent with the scope of application of the other Article.

4. In order to ensure transparency the declaration is required to specify (a) the conditions under which the non-excluded part of the relevant Article will be applied, or (b) forms of interim relief available in the declaring State other than those provided by Article 13(1). The word “applied” at the end of the Article should be construed as “available”, since it is for the court in each case to decide whether such other form or forms of relief should be given and in what conditions.

5. A declaration under this Article may be made at the time of ratification, etc. If not, it may be made subsequently under Article 57. A declaration, once made, may be supplemented, modified or replaced by a subsequent declaration under Article 57 or withdrawn under Article 58.

#### **Article 56 — Reservations and declarations**

**1. No reservations may be made to this Convention but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.**

**2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.**

#### **Comment**

1. A reservation differs from a declaration in that it is a unilateral act by a Contracting State purporting to exclude or modify a Treaty provision (Article 2(1)(d) of the Vienna Convention), and, unless authorised by the Treaty, is not binding on other States unless they accept it (Article 20 of the Vienna Convention), whereas a declaration applying or excluding a provision of the Convention is authorised by the Convention itself and requires no acceptance.

2. No reservation is permitted by the Cape Town Convention, but declarations may be made as authorised by the Articles listed in Article 56(1) and may be replaced by a subsequent declaration under Article 57 or withdrawn under Article 58. In addition Article 40 permits the modification of declarations made under that Article.

3. All declarations made under the Convention are on an equipment-specific basis. The Convention therefore provides for all declarations to be made at the time of adherence to the Protocol, not the Convention. For example, Contracting States may,

and undoubtedly will, make different declarations under Article 39 of the Convention in respect of different categories of equipment.

4. This Article does not state when a declaration takes effect. International treaty practice, as exemplified by Article 97(3) of the Sales Convention, Article 43(3) of the UN Convention and three instruments of the Depositary, UNIDROIT – namely Article 21(3) of the Leasing Convention, Article 19(3) of the 1988 UNIDROIT Convention on International Factoring and Article 15(3) of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – shows that a declaration notified to the Depositary prior to or upon entry into force of the Convention for the declaring State takes effect simultaneously with such entry into force, while a declaration notified to the Depositary subsequently (as is permitted for declarations under Articles 39 and 40) takes effect on the first day of the month following the expiration of six months after receipt of the notification by the Depositary. This period corresponds to the period specified in Article 57 for the coming into effect of a subsequent declaration and in Article 58 for the coming into effect of the withdrawal of a declaration.

5. For the different rule governing the effective date of a denunciation, see Article 59(2).

6. Those wishing to ascertain the content of declarations made by Contracting States will be able to do so either by communicating with the Depositary, UNIDROIT, or any Contracting State (see Article 62(1), (2)(a)), or by searching in the International Registry (see Articles 23 and 62(2)(c)). The Depositary is issuing a guide to forms of declaration (see Overview, footnote 12) which Contracting States will find very helpful.

#### **Article 57 — Subsequent declarations**

**1. A State Party may make a subsequent declaration, other than a declaration authorised under Article 60, at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.**

**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 receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.**

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

#### **Comment**

1. A State which has made a declaration may make a subsequent declaration supplementing, replacing or modifying the earlier declaration but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration. This qualification is necessary to ensure the stability of acquired legal rights. See also Article 40, which contains specific provision for modification of a declaration made under that Article. By virtue of Article 48(3), this Article applies also to a Regional Economic Integration Organisation in respect of its declaration under Article 48(2).

2. By way of exception, once a declaration has been made under Article 60 no subsequent declaration may be made under that Article.

3. As to the effective date of a subsequent declaration, see Comment 4 to Article 56.

#### **Article 58 — Withdrawal of declarations**

**1. Any State Party having made a declaration under this Convention, other than a declaration authorised under Article 60, may withdraw it at any time by notifying 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 receipt of the notification by the Depositary.**

**2. Notwithstanding the previous paragraph, this Convention shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.**

#### **Comment**

1. Similarly a declaration may be withdrawn but not so as to affect rights or interests arising prior to the effective date of the withdrawal. See Comment 1 to Article 57.

2. As to the effective date of withdrawal of a declaration, see Comment 4 to Article 56.

## **Article 59 — Denunciations**

- 1. Any State Party may denounce this Convention by notification in writing to the Depositary.**
- 2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which notification is received by the Depositary.**
- 3. Notwithstanding the previous paragraphs, this Convention 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 any such denunciation.**

### **Comment**

By denouncing the Convention a State Party to the Convention communicates its withdrawal from the Convention. This takes effect 12 months after receipt of the denunciation by the Depositary but does not affect rights and interests arising prior to that time, nor does it affect other States Parties to the Convention except in their relations with the denouncing State. See Comment 1 to Article 57.

## **Article 60 — Transitional provisions**

- 1. Unless otherwise declared by a Contracting State at any time, the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.**
- 2. For the purposes of Article 1(v) and of determining priority under this Convention:**
  - (a) “effective date of this Convention” means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later; and**
  - (b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.**
- 3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the**

**purpose of determining priority, including the protection of any existing priority, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.**

## **Comment**

1. Paragraph 1 of this Article sets out the general principle that unless otherwise declared by a Contracting State the Convention does not apply to a pre-existing right or interest. Any such declaration is controlled by the provisions of Article 60(3). Once made, a declaration under Article 60 may not be modified by a subsequent declaration or withdrawn (see Articles 57(1) and 58(1)), since this could affect vested rights. Under Article 1(v) “pre-existing right or interest” means a right or interest created or arising before the effective date of the Convention (as defined by Article 60(2)(a)) and therefore unaffected by the Convention except in a Contracting State that has made a declaration under Article 60(3). The effective date of the Convention for the purposes of determining priority is the later of the time the Convention enters into force as provided by Article 49 and the time when the State in which the debtor is situated becomes a Contracting State.

2. The Convention enters into force on the first day of the month following the expiration of three months after the date of deposit of the third instrument of ratification, etc. or the date of coming into force of the relevant Protocol, whichever is the later (see Article 49 and Comment 3 thereto). In relation to aircraft objects the Aircraft Equipment Protocol comes into force on the first day of the month following the expiration of three months from deposit of the eighth instrument of ratification, etc. (Article XXVIII(1)).

3. Though Article 60(2)(b) does not identify the relevant time of the debtor’s situation it is obvious from Article 1(v) that the right or interest will be a pre-existing right or interest if the debtor is not situated in a Contracting State at the time when the right or interest is created or provided for, even if the debtor later moves to a Contracting State and thereby establishes the effective date of the Convention for that debtor.

4. Subject to the effect of a declaration under Article 60, a pre-existing right or interest is outside the scope of the Convention for all purposes. Accordingly in the absence of a relevant declaration under Article 60 issues arising in relation to a pre-existing right or interest are governed by the applicable law, and the holder of the right or interest is neither affected by nor entitled to invoke any of the provisions of the Convention, whether relating to remedies for default, access to the registration system, priorities, or otherwise.

5. In applying Article 60(1) it is necessary to designate a single test of the debtor's situation. Article 60(2)(b) applies a cascade approach, so that the debtor's situation is determined by the first test applicable, beginning with the centre of administration if the debtor has one. Article 4 has no relevance to the operation of Article 60.

6. It is open to a Contracting State to make a declaration at any time under Article 60 applying the priority rules (but not other provisions) of the Convention and the relevant Protocol to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in Article 60(2)(b), a condition explained below. But the date specified as that on which the Convention priority provisions are to apply in relation to pre-existing rights or interests must not be earlier than three years after the date when the declaration becomes effective. The purpose of these provisions is to avoid a situation in which post-Convention rights or interests are indefinitely subordinated to pre-Convention rights or interests the existence of which may not be readily ascertainable, while at the same time allowing creditors holding pre-Convention rights or interests a reasonable time within which to perfect or re-perfect their rights or interests by registering them in the International Registry, thereby preserving the priority of such rights or interests (see Comment 7 below). When the specified period (which may be longer than three years) has elapsed, the Convention priority provisions in Article 29, will come into force in the declaring State even for rights and interests existing before the effective date of the Convention as defined by Article 60(2)(a), but only to the extent of the declaration. It will therefore be open to the declaring State to exclude specified pre-existing rights or interests from the scope of its declaration.

7. Any declaration made under Article 60 must preserve the pre-existing priority of a pre-Convention interest for a creditor who re-perfects by registration in the International Registry within the specified (minimum three-year) period. Such re-perfection ensures not only the Convention priority of the creditor's pre-Convention right or interest against subsequently registered rights or interests and unregistered rights or interests but also the continuance of any pre-Convention priority enjoyed by the creditor over another right or interest even if that right or interest was registered in the International Registry prior to the creditor's registration. Conversely, failure to register within the specified period means that the pre-Convention priority of the creditor's right or interest over the other right or interest will be lost if the holder of the other right or interest registers first.

8. Paragraph 3 of this Article raises four questions:

(1) What nexus, if any, has to exist between the Contracting State making the declaration and the debtor, the creditor, the transaction or the applicable law? See Comment 9.

(2) With reference to the phrase “protection of a pre-existing right or interest”, is this confined to the priority given by the law of the declaring State? See Comment 10.

(3) What interpretation is to be given to the phrase “made at a time when the debtor is situated in a State referred to in sub-paragraph (b) of the preceding paragraph”? See Comment 11.

(4) What is the date on which a declaration under Article 60(3) becomes effective? See Comment 12.

9. As to the first of these four questions, the emphasis on the situation of the debtor in Article 60(2)(a),(b) and (3) shows that the only relevant connecting factor is the debtor’s situation at the time of the agreement, so that a Contracting State’s declarations can be made solely in relation to a pre-existing right or interest arising under an agreement concluded while the debtor was situated in the declaring State. It is necessary to read this limitation into Article 60(3) in order to make policy sense of it and to ensure consistency with declarations by other States. Other factors, such as the situation of the creditor or the State whose law is applicable to the agreement, are irrelevant to a Contracting State’s right to make a declaration under Article 60(3). As to the situation of the debtor, see Comment 11.

10. The second question concerns the phrase “protection of any existing priority.” This can only mean an existing priority given by the law of the declaring State if this is the applicable law. Whether that State’s law governs the priority issue depends on the applicable law under the rules of private international law of the forum State.

11. The third question is the significance of the phrase “made at a time when the debtor was situated in a State referred to in sub-paragraph (b)”. Construed literally it would be hard to make sense of this phrase, since there will never be a time when the debtor is not so situated. Here again, however, the phrase must be interpreted in such a way as to make policy sense and must be read in conjunction with the reference to the definition of “effective date of this Convention” in Article 60(2)(a). Properly interpreted this phrase means that the Convention and the relevant Protocol will apply to a pre-existing right or interest created by a debtor only if the debtor is situated in the declaring State (within the meaning in Article 60(2)(b)) at the time the interest was created. The debtor’s situation at the time the declaration becomes effective is irrelevant.

12. The last question, namely the time at which a declaration under Article 60 becomes effective, is not expressly answered by the Convention but is resolved by reference to international treaty practice and by analogy to Articles 57 and 58, as described in Comment 4 to Article 56.

*Illustration 41*

The Convention has come into effect. Prior to that D had granted a security interest in favour of C1 to secure a loan for the purchase of an aircraft engine. The security agreement was governed by the law of Ruritania, a State which has not made a declaration under Article 60(3). After the entry into force of the Convention D grants a security interest in the same aircraft engine to C2, who registers it in the International Registry. Article 29(1) of the Convention does not apply and the priority of the two security interests is determined by the applicable law.

*Illustration 42*

The Convention has come into effect. D grants a security interest in a railway engine to C1 and later grants a security interest in the same engine to C2. Both security interests were given when the railway engine was located in Ruritania. Ruritanian law required perfection of a security interest by registration in a national registry and gave priority to the first to register. C2 registered its security interest first and thereby obtained priority. Ruritania makes a declaration under Article 60 providing for re-perfection of existing interests by registration in the International Registry within four years of the date of the declaration, subject to which the existing priority of those interests under Ruritanian law will be preserved. C1 registers its interest in the International Registry three years after the date of the declaration and C2 registers its interest six months after the registration of C1's interest. C2, though the last to register, has priority, since its registration within the four-year period has the effect of preserving its pre-Convention priority under Ruritanian law.

*Illustration 43*

The facts are as in Illustration 42 except that C2 registers its interest five years after the date of the declaration. C1 has priority under Article 29(1) of the Convention.

**Article 61 — Review Conferences, amendments  
and related matters**

**1. The Depositary shall prepare reports yearly or at such other time as the circumstances may require for the States Parties as to the manner in which the international regimen established in this Convention has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.**

**2. At the request of not less than twenty-five per cent of the States Parties, Review Conferences of States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:**

**(a) the practical operation of this Convention and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;**

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

**(c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and**

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

**3. Subject to paragraph 4, any amendment to this Convention shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of Article 49 relating to its entry into force.**

**4. Where the proposed amendment to this Convention is intended to apply to more than one category of equipment, such amendment shall also be approved by at least a two-thirds majority of States Parties to each Protocol that are participating in the Conference referred to in paragraph 2.**

## **Comment**

1. Article 61 sets out the machinery for keeping the Convention under review and providing an efficient mechanism to revise the Convention in the light of evolving practices or problems identified in its interpretation. The basic objective of these processes is to ensure that the Convention remains effective in facilitating asset-based financing and leasing.

2. The primary responsibility in the first instance lies with the Depositary, which must take into account reports of the Supervisory Authority and must act in consultation with the Supervisory Authority when convening a Review Conference. This can be done only if requested by at least 25 per cent of the States Parties, that is, States which have become bound by the Convention as the result of their adherence to it and the Convention coming into force via the entry into force of the relevant Protocol. Amendments must be approved by at least a two-thirds majority of States participating in the Review Conference and enter into force on ratification, etc., by three States.

### **Article 62 — Depositary and its functions**

**1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (UNIDROIT), which is hereby designated the Depositary.**

**2. The Depositary shall:**

**(a) inform all Contracting States of:**

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

**(ii) the date of entry into force of this Convention; the**

**(iii) each declaration made in accordance with this Convention, together with the date thereof;**

**(iv) the withdrawal or amendment of any declaration, together with the date thereof; and**

**(v) the notification of any denunciation of this Convention together with the date thereof and the date on which it takes effect;**

**(b) transmit certified true copies of this Convention to all Contracting States;**

**(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or**

**amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and**

**(d) perform such other functions customary for depositaries.**

### **Comment**

1. Paragraph 1 of this Article designates UNIDROIT as the Depositary.
2. Paragraph 2(a)-(c) lists the specific responsibilities of the Depositary, which are quite onerous in view of the number and diversity of declarations for which the Convention provides. The responsibilities include the transmission to Contracting States of certified true copies of the Convention in each of the six authentic language texts (English, Arabic, Chinese, French, Russian and Spanish) and the furnishing of information to Contracting States about deposits of instruments of ratification, etc., date of entry of the Convention into force, deposits of declarations and withdrawals and amendments of declarations.
3. Also imposed on the Depositary is the duty to provide the Supervisory Authority and the Registrar with a copy of each instrument and declaration so as to enable them to know which States have become Contracting States and to enable the Registrar to maintain a list of declarations as required by Article 23.
4. Similar duties are imposed on the Depositary in relation to the Protocol under Article XXXVII of the Protocol.
5. Finally, the Depositary is required to perform “such other functions [as are] customary for depositaries”. These include keeping custody of the original texts of the Convention and Protocols and of instruments of ratification, etc., and declarations; receiving signatures of the Convention and Protocol; examining each signature and each instrument to ensure that it is in proper form and in accordance with the Convention and relevant Protocol; and registering the Convention with the Secretariat of the United Nations upon its coming into force (Article 77(1) of the Vienna Convention). The Depositary is also in a position to give guidance on such matters as the standards it employs to determine the acceptability of instruments and the format of declarations to be deposited with it. UNIDROIT is in the course of preparing a guide to declarations under the Convention and Aircraft Equipment Protocol. See Overview, footnote 12.

**IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.**

**DONE at Cape Town, this sixteenth day of November, two thousand and one, in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another.**

### **Comment**

The six texts were duly authenticated by the President of the Conference as being linguistically aligned, and all are equally authentic.