COURT FILE NUMBER	1801-09188
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	THIRD EYE CAPITAL CORPORATION
RESPONDENTS	OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	STIKEMAN ELLIOTT LLP Barristers & Solicitors 4300 Bankers Hall West, 888-3rd Street S.W., Calgary, Canada T2P 5C5 **Attention: Joseph Reynaud / Nathalie Nouvet** nnouvet@stikeman.com Tel: (514) 397-3019 Fax: (403) 266-9034 Lawyers for Third Eye Capital Corporation File No.: 120536-1037

BRIEF OF LAW AND ARGUMENT IN RESPONSE TO THE APPLICATION BY ECN AVIATION INC. FOR ORDER FOR POSSESSION OF AIRCRAFT

To be Heard in Justice Chambers

On Wednesday, December 19, 2018

Before the Honourable Madam Justice B. E. C. Romaine

PART I - INTRODUCTION

1. This Supplemental Brief[1] is submitted by Third Eye Capital Corporation ("**TEC**"), the first ranking secured creditor of Ranch Energy Corporation ("**Ranch**"), OpsMobil Inc. ("**OpsMobil**"), 1734163 Alberta Inc., 1859821 Alberta Inc., Air Dallaire Ltd., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc., and K.L. Capital Corp. (collectively, the "**Debtors**") in support of its contestation of the *Application for Order for Possession of Aircraft* filed by ECN Aviation Inc. ("**ECN**") on November 19, 2018 (the "**ECN Application**"), and more particularly, in response to the Supplemental Brief of ECN Aviation Inc. dated December 13, 2018 (the "**ECN Supplemental Brief**").

2. On November 26, 2018, TEC submitted a *Brief of Law and Argument in Response to the Application by ECN Aviation Inc. for Order for Possession of Aircraft* (the "**Initial TEC Brief**") in contestation of the ECN Application, and continues to rely on the arguments submitted therein.

3. In this Supplemental Brief, TEC submits that its rights in the Power Train are explicitly excluded from the application of the *Convention on International Interests in Mobile Equipment* (the "**Convention**") and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the "**Protocol**", collectively with the Convention, the "**Cape Town Convention**"), as implemented in Alberta by the *International Interests in Mobile Equipment Act*, SA 2006, c I-6.5 (the "**Act**").

PART II - FACTS

4. The factual background and basis for the relief is set out in detail in the Seventh Horrox Affidavit, and summarized in the Initial TEC Brief at paragraph 5.

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[1] All capitalized terms in this Supplemental Brief that are not defined herein shall bear the meanings given to them in Seventh Affidavit of Mark Horrox sworn on November 27, 2018 (the "**Seventh Horrox Affidavit**").

PART III - ISSUES

5. The issue to be resolved in this Supplemental Brief is whether or not the Cape Town Convention applies to the Power Train.

PART IV – THE LAW

A. The Application of the Cape Town Convention to Helicopters

6. As set out in the Initial TEC Brief, the Cape Town Convention was implemented in Alberta pursuant to the Act on April 1, 2013, prior to the registration and perfection of the security interests of both (i) TEC[2] in C-GEMK and all of its installed, incorporated or attached accessories, parts and equipment (including the Power Train) and (ii) ECN in C-GEMU and all of its installed, incorporated or attached accessories, parts and equipment.[3]

7. Article 2(1) of the Cape Town Convention provides for the constitution and effects of an international interest in categories of mobile equipment and associated rights. Article 2(2) of the Cape Town Convention establishes that an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects established under Article 2(3), which includes helicopters. "*Object*" is defined by Article 1(u) of the Cape Town Convention as "*an object of a category to which Article 2 applies.*"

8. C-GEMU qualifies as a "*helicopter*", as defined at Article I(2)(l) of the protocol of the Cape Town Convention. The registered international interest of ECN made on April 1, 2014 is effective as against C-GEMU and the installed, incorporated or attached accessories, parts and equipment which together constituted C-GEMU <u>at the date of registration</u>. As such, the registered international interest of ECN does not apply to the

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[2] TEC's registered its security interest on C-GEMK (i) in the Alberta Personal Property Registry (the "**PPR**") on December 22, 2015 (Seventh Horrox Affidavit, para. 13), and (ii) at the International Registry established by the Cape Town Convention on March 23, 2016 (Affidavit of Lindsey Sleeman, sworn on December 17, 2018).

[3] ECN registered its security interest in C-GEMU (i) in the PPR on March 27, 2014, and (ii) at International Registry established by the Cape Town Convention on April 1, 2014.

Power Train, which was not attached to C-GEMU at the time of ECN's registration, but rather, to C-GEMK.[4]

B. The Application of Article 29(7) to Rights and Interests

9. The Power Train constitutes a "*component*" or an "*item*", which does not have separate status under Cape Town Convention, but rather, is subject to applicable provincial or national law, as provided for in Article 29(7) of the Convention and Article XIV (3) and (4) of the Protocol.

> "2.32. *Aircraft objects are defined in the Aircraft Protocol as including all components, but the components themselves have no separate status under the Convention or Protocol,* ***and rights in them when not installed on an airframe, aircraft engine or helicopter are governed by the applicable law***."[5] (our emphasis)

> "3.9. *Each of the three categories of aircraft object is defined to include installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto. The items so included (which do not cover items merely resting on an airframe by their own weight) form part of the object and are not separately governed by the Convention or Protocol. So such items as installed propellers, auxiliary power units and computers and engines installed on a helicopter are not distinct objects for the purpose of these two instruments,* ***which do not, however, affect rights in them, or in other items not constituting an object, existing under the applicable law. See Article 29(7) of the Convention and Article XIV (3) and (4) of the Protocol***."[6] (our emphasis)

10. More specifically, as an item, the Power Train is carved out from the priority regime established by the Cape Town Convention through the operation of both Article 29(7), which deals with the priority of competing interests, and the Protocol at Article XIV(4), which deals with the modification of priority provisions. Article 29(7)(a) and Article XIV(4) respectively read as follows:

> "*29(7)*

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[4] Vaitonis Affidavit sworn November 18, 2018, para. 10.

[5] Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects Official Commentary*, 3d ed (Rome: the International Institute for the Unification of Private Law (UNIDROIT), 2013) at para. 2.32 [*Official Commentary*] [Tab 3].

[6] Official Commentary, at para. 3.9 [Tab 3].

This Convention:

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

[...]

Article XIV

4. Article 29(7) of the Convention applies to an item, other than an object, installed on an airframe, aircraft engine or helicopter."

11. The *Official Commentary* on the Cape Town Convention, by Professor Sir Roy Goode, describes the focus of Article 29(7) as follows:

> *"2.176. Article 29(7) concerns dealings with an item other than object, that is, any article which is not an airframe, aircraft engine or helicopter, an item of railway rolling stock or a space asset. In relation to aircraft objects 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.* ***<u>Article 29(7) is designed to ensure that rights in an item (other than an object) are not lost by installation of the item on an object if under the applicable law those rights continue to exist after the installation</u>****, and that new rights may be created in a previously installed item which is removed where under applicable law those rights are created."*[7] (our emphasis)

12. TEC maintained a prior right to the Power Train through the registration and perfection of its security interest in C-GEMK under the PPSA on December 23, 2015, which priority persists despite the subsequent inappropriate removal and installation of the Power Train on C-GEMU, by OpsMobil. As such, Article 29(7)(a) of the Cape Town Convention prevents ECN from claiming an international interest in the Power Train, which is exempted from the application of the Cape Town Convention.[8]

13. ECN, in an effort to disregard the clear application of Article 29(7) of the Cape Town Convention, attempts to argue that Article 29(7)(a) of the Convention, by referring to "rights" instead of "interests", does not apply to a creditor's security interest created by

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[7] Official Commentary, at para. 2.176 [Tab 3].

[8] Seventh Horrox Affidavit, paras. 11 and 16.

agreement of a debtor to a lender (i.e. to TEC's registered security interest granted pursuant to the Omnibus Security Agreement).

14. ECN's literary wrangling runs contrary to the clear purpose of Article 29(7)(a), as provided for in the *Official Commentary*, which recognizes, in no uncertain terms, that the purpose of Article 29(7) is to protect those rights and/or interests (both words used interchangeably by Professor Goode in describing the effects of Article 29(7)(a) of other creditors that stem from agreements between a debtor and a lender and which are protected through the charging or registration of assets:

> "*2.176. [...] For example, computer units and other items may become damaged or defective and may need to be replaced by other units or spare parts which may themselves have a high economic value. The replacements units,* ***which may have been financed separately and given in security to the lender,*** *remain subject to that* ***security interest*** *and do not pass by accession to the owner of the airframe or aircraft engine. Again, if an item already installed on and forming part of the airframe or aircraft engine (i.e. not covered by Article 29(7)(a)) is then dealt with separately from the airframe or aircraft engine and the dealing is effective under the applicable law to create rights in the item separate from those in the airframe or aircraft engine, then under Article 29(7)(b) the Convention does not prevent the creation of those rights.* ***Article 29(7)*** *is not strictly a priority rule in itself but it can have priority effects in precluding the holder of a registered international interest from asserting the doctrine of accession to extinguish another creditor's* ***rights*** *in the installed item or to preclude that other creditor from granting new rights after the installed item has been removed. However, the effect of Article 29(7) is likely to be limited. Many legal systems possess the doctrine of accession by which an object that becomes affixed as an accession to a more substantial object so as to be incapable of removal without significant damage to either object loses its identity and passes into the ownership of the owner of the principal object. [...]*"[9] (our emphasis)

15. As such, in discussing Article 29(7), Professor Goode equivocates the underlying right to an accession created through a contract between parties with its registration as an interest excluded from the application of the Cape Town Convention in a national or provincial property regime. Further, Professor Goode indicates that Article 29(7) was adopted despite the difficulties created for registered owners of international interests in objects covered by the Cape Town Convention:

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[9] Official Commentary, at para. 2.176 [Tab 3].

"4.197. 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 or an aircraft engine, or spare parts incorporated into an airframe or aircraft engine (see Illustration 29, paragraph 4.207). 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.

[...]

Many states have adopted a doctrine of accession, and this can be justified not only doctrinally but also because without such a doctrine the principal object could be seriously impaired if a party claiming an ***interest*** *in a component, e.g. as a supplier selling under reservation of title, were to assert its interest.* ***However, there may be cases where the applicable law would allow such an interest to continue to subsite despite the annexure to the principal object.****"*[10] (our emphasis)

16. Further, TEC's right to the Power Train remains unaffected under Article 29(7) as Canada no longer maintains a doctrine of accession which would extinguish TEC's right to the Power Train. Rather, section 38(2) of the *PPSA* was enacted to oust the common law tests of accession, and was explicitly designed to preserve and protect the rights of a broader range of items as accessions. As Cuming, Walsh, and Wood state;

> *"The definition of accessions contained in the PPSA represents a significant break from the common law. Because the PPSA provides a right to remove the accession and contains a set of priority rules that take into account the different position* [sic] *of the competing claimants, it is possible to replace the common law tests for accession with a much simpler test. The PPSA defines accession simply as goods that are installed in or affixed to other goods. This definition encompasses many situations that would not have been regarded as involving an accession under the common law."*[11]

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[10] Official Commentary at para. 4.197 [Tab 3].

[11] Ronald Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, (Toronto: Irwin Law, 2005), p. 500 [Tab 2 to the Initial TEC Brief].

17. Professor Goode demonstrates the application of Article 29(7) where prior rights to an accession are protected through the following scenario:

> *"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."*[12] (our emphasis)

18. This example maintains a number of similarities with TEC's current position with respect to the Power Train, as the rights established under section 38(2) of the *Personal Property Security Act* (Alberta) continue to exist despite the accession of the Power Train. That this result would also be found for accessions in Canada is also supported by Cuming, Walsh, and Wood, where they state with respect to section 29(7):

> *"The effect of this provision* [29(7)] *is to leave to the applicable law resolution of issues associated with creation and priority of separately created interests in these items.*
>
> *[...]*
>
> *Under the PPSA, the owner of the accession can grant an effective security interests in the accession goods, either before or after they are attached to the other goods, that can be separately protected by registration from the effects of any disposition of or grant of an interest in the property to which they are attached.*
>
> *[...]*
>
> *As a result of Article 29(7), the holders of such interests are not required to register their interest under the Convention and its priority regime does not apply to them. Furthermore, a prior security interest in an accession taken under the PPSA can prevail over a later international interest taken in the airframe or engine and accession whether or not the security interest is perfected (registered) in a personal property registry."*[13]

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[12] Official Commentary at para. 4.207 [Tab 3].

[13] Ronald Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, (Toronto: Irwin Law, 2005), pp. 618-619 [Tab 2 to the Initial TEC Brief].

19. In light of the foregoing, it appears undeniable that Article 29(7)(a) of the Convention applies to protect TEC's rights and security interests in the Power Train, which are not lost by the simple fact that the Power Train was removed from C-GEMK and put onto C-GEMU without TEC's consent or knowledge.

C. Effects of Insolvency and Alternative A

20. In addition to the above limits on Article 29(7)(a) sought by ECN above, ECN further argues that the insolvency provisions in the Cape Town Convention have precedence over Article 29(7)(a) of the Convention, and that accordingly, the Court must refer to these provisions to the exclusion of Article 29(7)(a).

21. First, it is worth noting, that in the case at hand, TEC is not contesting ECN's right to seize C-GEMU pursuant to the Cape Town Convention, but rather, is seeking to exercise its own rights, as a secured creditor, on an "item" (the Power Train), on which ECN does <u>not</u> have a registered security interest.

22. ECN relies on Article XI, Alternative A, paragraph 12 of the Protocol, to argue that Third Eye's registered interest in the Power Train, cannot have precedence over ECN's registered interest in C-GEMU. Paragraph 12 reads as follows:

> "*No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.*"

23. Professor Goode, in the Official Commentary, describes how Article XI(12) functions to displace the rules of insolvency law so that certain specific priorities, established in an insolvency context, do not take precedence of a registered interest in an "object" (i.e. C-GEMU).

> "*3.113. The creditor's protection under Alternative A is further strengthened by a provision that no rights or interests, except for non-consensual rights or interests of a category covered by a declaration under Article 39(1), are to have priority over registered interests (Alternative A, paragraph 12). That makes explicit what is implicit in Articles 29 and 30(2) of the Convention,* <u>***namely that rules of insolvency law – for example, those giving priority to various categories of preferential debt such as claims for taxes or unpaid wages – cannot be***</u>

applied to displace the priority of a registered international interest."[14] (our emphasis)

24. It is first worth noting that TEC's security interest is not one created by insolvency rules, but rather, basic principles of security governed by the PPSA.

25. Moreover, in the case at hand, ECN's registered international interest is in C-GEMU, which, as mentioned above, did not include the Power Train at the time of registration. In this regard, ECN has no international interest or right in the Power Train. Accordingly, TEC is by no means seeking to exercise any sort of competing interest or right to C-GEMU, but rather, is seeking only to prevent its pre-existing and protected interests in an improperly installed part from being absorbed and consumed by the whole, despite their clear identifiability and continuous capacity for removal.

26. In addition, even if the rules of insolvency law are otherwise displaced for other competing forms of priorities for an object, the Cape Town Convention explicitly carves out an exception for the rights of "*items*" in both the main text of the Convention (Article 29(7)(a)) and the Protocol (Article XIV(4)). This carve out is consistent with the commercial principles set out in the preamble of the Cape Town Convention seeking the facilitation of financing of the acquisition and use of objects such as aircraft. If previously financed spare parts were to lose their prior claim whenever a debtor holding an aircraft went bankrupt, the purpose of financing such parts at all would be destroyed, inhibiting the efficient use and advantageous financing of high value aircraft. It would be an absurd result for the Convention to permit an outcome directly in contrast with its stated purposes, and is clearly not the result intended in light of the strength of the language of Article 29(7), which does not permit the protectionary regime otherwise created for aircraft to affect explicitly and exclusively the rights of accessions.

27. Article 5 of the Cape Town Convention establishes that where matters are not expressly settled by the general principles of the purposes set forth in the preamble, the international character of the Convention, and the need to promote uniformity and predictability, recourse will be made to the domestic rules of law applicable to the

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[14] Official Commentary at para. 3.113 [Tab 3].

dispute. As such, if it is not clear that Article XI(12) does not affect the protections afforded to accessions in light of the Cape Town Convention's purposes, the modern principle of interpretation further requires that absurdities be rejected, and that the act be read as a whole.

PART V - CONCLUSION

28. In light of the foregoing, TEC submits that there is nothing in the Cape Town Convention which permits the exclusion of Article 29(7)(a) to the Power Train, and accordingly, TEC's prior security interest in the Power Train taken under the PPSA prevails over ECN's international security interest in C-GEMK.

Respectfully submitted in Calgary this 17th day of December, 2018

STIKEMAN ELLIOTT LLP

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TABLE OF AUTHORITIES

1. *Convention on International Interests in Mobile Equipment*
2. *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*
3. Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects Official Commentary*, 3d ed (Rome: the International Institute for the Unification of Private Law (UNIDROIT), 2013)

TAB 1

CONVENTION

ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

Signed at Cape Town on 16 November 2001

COPY CERTIFIED AS BEING IN CONFORMITY WITH THE ORIGINAL

THE SECRETARY GENERAL

IGNACIO TIRADO

UNIDROIT

CAPE TOWN

16 NOVEMBER 2001

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:

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.

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 subparagraph (a), (b) or (c) of that paragraph.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Article 21 — Duration of registration

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

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.

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 nonconsensual 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.

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.

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.

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.

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.

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.

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.

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.

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 revest in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.

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.

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.

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.

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.

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 subparagraphs.

3. In all other cases, the priority of the competing assignments of the associated rights shall be 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.

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.

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 Depositary 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.

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.

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.

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.

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.

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.

Article 45 — Jurisdiction in respect of insolvency proceedings

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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;

(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.

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.

TAB 2

PROTOCOL

TO THE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

Signed at Cape Town on 16 November 2001

COPY CERTIFIED AS BEING
IN CONFORMITY WITH THE ORIGINAL

THE SECRETARY GENERAL

IGNACIO TIRADO

UNIDROIT

ICAO • OACI • ИКАО

CAPE TOWN

16 NOVEMBER 2001

PROTOCOL

TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING it necessary to implement the *Convention on International Interests in Mobile Equipment* (hereinafter referred to as "the Convention") as it relates to aircraft equipment, in the light of the purposes set out in the preamble to the Convention,

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

MINDFUL of the principles and objectives of the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944,

HAVE AGREED upon the following provisions relating to aircraft equipment:

Chapter I

Sphere of application and general provisions

Article I — Defined terms

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

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

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

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

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

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

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

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

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

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

(ii) goods in excess of 2750 kilograms,

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

(f) "authorised party" means the party referred to in Article XIII(3);

(g) "Chicago Convention" means the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944, as amended, and its Annexes;

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

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

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

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

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

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

(ii) goods in excess of 450 kilograms,

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

(m) "insolvency-related event" means:

(i) the commencement of the insolvency proceedings; or

(ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

(n) "primary insolvency jurisdiction" means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;

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

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

Article II — Application of Convention as regards aircraft objects

1. The Convention shall apply in relation to aircraft objects as provided by the terms of this Protocol.

2. The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to aircraft objects.

Article III — Application of Convention to sales

The following provisions of the Convention apply as if references to an agreement creating or providing for an international interest were references to a contract of sale and as if references to an international interest, a prospective international interest, the debtor and the creditor were references to a sale, a prospective sale, the seller and the buyer respectively:

Articles 3 and 4;
Article 16(1)(a);
Article 19(4);
Article 20(1) (as regards registration of a contract of sale or a prospective sale);
Article 25(2) (as regards a prospective sale); and
Article 30.

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 29 (other than Article 29(3) which is replaced by Article XIV(1) and (2)), Chapter X, Chapter XII (other than Article 43), Chapter XIII and Chapter XIV (other than Article 60) shall apply to contracts of sale and prospective sales.

Article IV — Sphere of application

1. Without prejudice to Article 3(1) of the Convention, the Convention shall also apply in relation 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, and where such registration is made pursuant to an agreement for registration of the aircraft it is deemed to have been effected at the time of the agreement.

2. For the purposes of the definition of "internal transaction" in Article 1 of the Convention:

(a) an airframe is located in the State of registry of the aircraft of which it is a part;

(b) an aircraft engine is located in the State of registry of the aircraft on which it is installed or, if it is not installed on an aircraft, where it is physically located; and

(c) a helicopter is located in its State of registry,

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

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

Article V — Formalities, effects and registration of contracts of sale

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

(a) is in writing;

(b) relates to an aircraft object of which the seller has power to dispose; and

(c) enables the aircraft object to be identified in conformity with this Protocol.

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

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

Article VI — Representative capacities

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

Article VII — Description of aircraft objects

A description of an aircraft object that contains its manufacturer's serial number, the name of the manufacturer and its model designation is necessary and sufficient to identify the object for the purposes of Article 7(c) of the Convention and Article V(1)(c) of this Protocol.

Article VIII — Choice of law

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

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

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

Chapter II

Default remedies, priorities and assignments

Article IX — Modification of default remedies provisions

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

(a) procure the de-registration of the aircraft; and

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

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

3. Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object 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 agreement except where such a provision is manifestly unreasonable.

4. A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

5. The registry authority in a Contracting State shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:

(a) the request is properly submitted by the authorised party under a recorded irrevocable deregistration and export request authorisation; and

(b) the authorised party certifies to the registry authority, if required by that authority, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.

6. A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed deregistration and export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and

(b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.

Article X — Modification of provisions regarding relief pending final determination

1. This Article applies only where a Contracting State has made a declaration under Article XXX(2) and to the extent stated in such declaration.

2. For the purposes of Article 13(1) of the Convention, "speedy" in the context of obtaining relief means within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

3. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

"(e) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom",

and Article 43(2) applies with the insertion after the words "Article 13(1)(d)" of the words "and (e)".

4. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor's international interest has priority under the provisions of Article 29 of the Convention.

5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

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

(a) they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State no later than five working days after the creditor notifies such authorities that the relief specified in Article IX(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and

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

7. Paragraphs 2 and 6 shall not affect any applicable aviation safety laws and regulations.

Article XI — Remedies on insolvency

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

Alternative A

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

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

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

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

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

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

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

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

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

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

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

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

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

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

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

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

Alternative B

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

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

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

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

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

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

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

Article XII — Insolvency assistance

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

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

Article XIII — De-registration and export request authorisation

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

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

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

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

Article XIV — Modification of priority provisions

1. A buyer of an aircraft object under a registered sale acquires its interest in that object free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.

2. A buyer of an aircraft object acquires its interest in that object subject to an interest registered at the time of its acquisition.

3. Ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft.

4. Article 29(7) of the Convention applies to an item, other than an object, installed on an airframe, aircraft engine or helicopter.

Article XV — Modification of assignment provisions

Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b):

> "and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee."

Article XVI — Debtor provisions

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the object in accordance with the agreement as against:

   (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4) of the Convention or, in the capacity of buyer, Article XIV(1) of this Protocol, unless and to the extent that the debtor has otherwise agreed; and

   (b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4) of the Convention or, in the capacity of buyer, Article XIV(2) of this Protocol, but only to the extent, if any, that such holder has agreed.

2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to an aircraft object.

Chapter III

Registry provisions relating to international interests in aircraft objects

Article XVII — The Supervisory Authority and the Registrar

1. The Supervisory Authority shall be the international entity designated by a Resolution adopted by the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol.

2. Where the international entity referred to in the preceding paragraph is not able and willing to act as Supervisory Authority, a Conference of Signatory and Contracting States shall be convened to designate another Supervisory Authority.

3. 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.

4. The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.

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

Article XVIII — First regulations

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

Article XIX — Designated entry points

1. Subject to paragraph 2, a Contracting State may at any time designate an entity or entities in its territory as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or a right or interest under Article 40 in either case arising under the laws of another State.

2. A designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of aircraft engines.

Article XX — Additional modifications to Registry provisions

1. For the purposes of Article 19(6) of the Convention, the search criteria for an aircraft object shall be the name of its manufacturer, its manufacturer's serial number and its model designation, supplemented as necessary to ensure uniqueness. Such supplementary information shall be specified in the regulations.

2. For the purposes of Article 25(2) of the Convention and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest or the person in whose favour a prospective sale has been registered shall take such steps as are within its power to procure the discharge of the registration no later than five working days after the receipt of the demand described in such paragraph.

3. The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 17(2) of the Convention.

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

5. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall, in respect of each event, not be less than the maximum value of an aircraft object as determined by the Supervisory Authority.

6. Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.

Chapter IV

Jurisdiction

Article XXI — Modification of jurisdiction provisions

For the purposes of Article 43 of the Convention and subject to Article 42 of the Convention, a court of a Contracting State also has jurisdiction where the object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of registry.

Article XXII — Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to an aircraft object under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

2. A waiver under the preceding paragraph must be in writing and contain a description of the aircraft object.

Chapter V

Relationship with other conventions

Article XXIII — Relationship with the *Convention on the International Recognition of Rights in Aircraft*

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

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

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

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

Article XXV — Relationship with the *UNIDROIT Convention on International Financial Leasing*

The Convention shall supersede the *UNIDROIT Convention on International Financial Leasing*, signed at Ottawa on 28 May 1988, as it relates to aircraft objects.

Chapter VI

Final provisions

Article XXVI — Signature, ratification, acceptance, approval or accession

1. This Protocol 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, this Protocol 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 XXVIII.

2. This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.

3. Any State which does not sign this Protocol 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.

5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

Article XXVII — 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 Protocol may similarly sign, accept, approve or accede to this Protocol. 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 Protocol. Where the number of Contracting States is relevant in this Protocol, 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 Protocol 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 Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

Article XXVIII — Entry into force

1. This Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of the eighth instrument of ratification, acceptance, approval or accession, between the States which have deposited such instruments.

2. For other States this Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article XXIX — 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 Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them and may modify its declaration by submitting another declaration at any time.

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

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

4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol 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 Protocol 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 the Convention and this Protocol apply 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 the Convention and this Protocol apply;

   (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 the Convention and this Protocol apply; 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 the Convention and this Protocol apply and any reference to the national register or to the registry authority in that Contracting State shall be construed as referring to the aircraft register in force or to the registry authority having jurisdiction in the territorial unit or units to which the Convention and this Protocol apply.

Article XXX — Declarations relating to certain provisions

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

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

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

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

5. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will not apply the provisions of Article XXI, 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.

Article XXXI — Declarations under the Convention

Declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57, 58 and 60 of the Convention, shall be deemed to have also been made under this Protocol unless stated otherwise.

Article XXXII — Reservations and declarations

1. No reservations may be made to this Protocol but declarations authorised by Articles XXIV, XXIX, XXX, XXXI, XXXIII and XXXIV may be made in accordance with these provisions.

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

Article XXXIII — Subsequent declarations

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXXI under Article 60 of the Convention, at any time after the date on which this Protocol 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 Protocol 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.

Article XXXIV — Withdrawal of declarations

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXXI under Article 60 of the Convention, 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 Protocol 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.

Article XXXV — Denunciations

1. Any State Party may denounce this Protocol 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 of receipt of the notification by the Depositary.

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

Article XXXVI — Review Conferences, amendments and related matters

1. The Depositary, in consultation with the Supervisory Authority, 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 regime established in the Convention as amended by this Protocol 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 the 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 the Convention as amended by this Protocol 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 Protocol 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 Protocol or the arrangements relating to the International Registry are desirable.

3. Any amendment to this Protocol 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 it has been ratified, accepted or approved by eight States in accordance with the provisions of Article XXVIII relating to its entry into force.

Article XXXVII — 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 Protocol;

(iii) each declaration made in accordance with this Protocol, 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 Protocol together with the date thereof and the date on which it takes effect;

(b) transmit certified true copies of this Protocol 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.

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

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.

Annex

FORM OF IRREVOCABLE DE-REGISTRATION AND EXPORT REQUEST AUTHORISATION

Annex referred to in Article XIII

[Insert Date]

To: [Insert Name of Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

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

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

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

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

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

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

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

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

---

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

[insert name of operator/owner]

Agreed to and lodged this
[insert date]

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

[insert relevant notational details]

TAB 3

CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT OBJECTS

OFFICIAL COMMENTARY

Third Edition

by

Professor Sir Roy Goode CBE, QC

Emeritus Professor of Law
University of Oxford

as approved for distribution by the UNIDROIT Governing Council
pursuant to Resolution No. 5 adopted by the
Cape Town Diplomatic Conference

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2.30. A court situated in a State which is not a Contracting State is not, of course, obliged to apply the Convention. However, it may do so if its own conflict of laws rules lead to the application of the law of a Contracting State, the debtor was situated in that State (or, in the case of an airframe, the aircraft was registered in that State) at the time of making of the agreement and the other conditions for the application of the Convention are satisfied. These rules may work perfectly well for contract remedies but are likely to be less satisfactory in relation to the international interest, for the primary purpose of the Convention is to lay down a regime for interests in assets which either move regularly from one State to another, as in the case of aircraft and railway rolling stock, so that the legal regime governing them is unstable, or are not situated on Earth at all, as in the case of space assets, so that it may be difficult to determine what law to apply.

Aircraft engines

2.31. Aircraft engines are treated separately from the airframes on which they may be installed 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, and under the Convention they are treated as separate objects. By contrast, aircraft engines installed on a helicopter are treated as components of the helicopter, not as distinct objects, and do not fall within the definition of "aircraft engines" in Article I(2)(b) of the Aircraft Protocol (see paragraphs 3.6, 3.8, 3.10). However, helicopter engines *are* aircraft engines prior to installation on a helicopter or after removal from a helicopter and before re-installation. Since helicopter engines, like engines installed on airframes, may move in and out of the aircraft it is common practice to register international interests in them without regard to whether at the time of the agreement they were or were not installed on the helicopter. See further paragraphs 3.8-3.10.

Components

2.32. Aircraft objects are defined in the Aircraft Protocol as including all components, but the components themselves have no separate status under the Convention or Protocol, and rights in them when not installed on an airframe, aircraft engine or helicopter are governed by the applicable law.[5]

Types of right or interest covered by the Convention

2.33. Articles 39, 40 and 60 of the Convention and various other provisions linked to those Articles refer to a "right or interest". The terms "right" and "interest" are not defined, but in general an interest denotes a right *in rem* in an asset whilst a right is a personal right to possession or control of, or otherwise associated with, an asset in which the holder has no interest (as in the case of a right of detention of an aircraft for airport dues) or a right to payment falling within the definition of "associated rights". The Convention provides for protection of seven different categories of original[6] right or interest, each of which is defined in Article 1:

(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 (Article 2(2)), 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. The nature of the international interest is discussed in more detail in paragraph 2.41. International interests may be sub-interests, that is, international interests in favour of a person that has itself granted a higher-tier international interest. Examples of such sub-interests are the international interest arising in favour of a conditional buyer who has granted a lease and of a lessee who has granted a sub-lease. In contrast to transferred interests, which simply constitute the original interest in new hands, sub-interests are distinct lower-tier interests the registration of which has in itself no impact on the position of the holder of the higher-tier interest from which they are derived. See paragraph 2.160.

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5 See Article 29(7) of the Convention, Article XIV(4) of the Aircraft Protocol and paragraphs 3.9, 3.11. For the status of helicopter engines, see paragraphs 3.8-3.10.

6 As opposed to being acquired by assignment or subrogation. See paragraph 2.34.

(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 if that registration has not been discharged. The definition of this requires that the interest be one which is intended to be created or provided for *as an international interest* in the future (Article 1(y)).

(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) **Non-consensual rights or interests arising under national law and given priority without registration.** A Contracting State may make a declaration under Article 39(1) 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 in the International Registry. The appellation "non-consensual right or interest", a phrase defined in Article 1(s), denotes a right or interest created by law, not by agreement. It is confined to a right or interest given priority under

Article 39 without registration and is thus to be distinguished from a "registrable non-consensual right or interest", described below. An interest does not become a non-consensual right or interest merely because the agreement between the debtor and creditor under which it is constituted requires and receives the approval of the court, as in the case of a court-approved secured loan made to a debtor in possession after the commencement of insolvency proceedings. It is clear that the security for such a loan is consensual, being created by agreement of the parties, not by law. A Contracting State may also declare that nothing in the Convention is to 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 amounts owed directly relating to those services in respect of that object or another object (as to other objects, see paragraph 2.217), and for this purpose it is irrelevant whether the right of arrest or detention is provided by law or by contract (see further paragraph 2.215). Again, such a declaration merely preserves rights of arrest or detention, it does not expand them. The phrase "other public provider" does not imply that an intergovernmental organisation is a private provider of public services. See paragraphs 2.215 and 4.276.

(5) **Registrable non-consensual rights or interests arising under national law.** A registrable non-consensual right or interest is defined by Article 1(dd) as "a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40". 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. The definition in Article 1(dd) uses the term "registrable", not "registered", and it is clear from the definition of "registered interest" in Article 1(cc) that the word "registrable" was chosen deliberately and encompasses registrable but unregistered non-consensual rights or interests. Nevertheless, registrable non-consensual rights or interests rank for priority under the Convention only when registered and this is the primary feature distinguishing them from non-consensual rights or interests falling under Article 39. A registrable but unregistered non-consensual right or interest thus has a very limited

impact under the Convention. Indeed, its only significance lies in the fact that the holder of such an interest falls within category (iii) of the list of "interested persons" defined in Article 1(m) and as such is entitled to benefit from those provisions of Chapter III of the Convention which confer rights on interested persons where the creditor is proposing to exercise default remedies. For example, the holder of a registrable but unregistered non-consensual right or interest has a right to be given notice of a chargee's intended sale or lease of the object on default by the debtor provided that the chargee has been given notice of the rights of the holder of the non-consensual right or interest within a reasonable time prior to the sale or lease (Article 8(4)(b)). See further paragraph 2.87(3).

(6) **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 (see paragraph 2.185). 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.

(7) **Pre-existing rights or interests** which are the subject of a declaration by a Contracting State under Article 60(3). See paragraphs 2.250 *et seq.*

Transferred rights and interests

2.34. In addition to the above original rights, the Convention provides means of protecting rights and interests acquired or prospectively acquired by the following means of transfer:

(1) **Assignments and prospective assignments** of international interests, which are registrable under Article 16(1)(b). An assignment of an international interest created or provided for by way of security is valid only if some or all of the related associated rights are also assigned (Article 32(2)).

Pre-existing rights or interests

2.174. Unless otherwise declared by a Contracting State under Article 60(3) the Convention does not apply to a pre-existing right or interest, as defined by Article 1(v), which retains the priority it enjoyed under the applicable law before the effective date of the Convention. This means that despite Article 29(1) a registered international interest is junior to an earlier pre-existing right or interest[23] which is given priority under the applicable law. On the other hand it would be inconsistent with the policy of the Convention to subordinate the registered international interest to a subsequently created pre-existing right or interest (see paragraph 2.250). Article 60(3) provides for extension of the Convention and Protocol to pre-existing rights or interests for priority purposes, but in this case registration within the period prescribed by the declaration is not a priority point, only a perfection requirement for the preservation of priority of the pre-existing right or interest under the applicable law (see further paragraphs 2.265 *et seq.*). For a detailed analysis of Article 60 see paragraphs 2.250 *et seq.* No Contracting State has so far made a declaration under Article 60(3).

Creditor in possession

2.175. As stated earlier, the only method of perfection of an international interest provided by the Convention is registration in the International Registry. The effect is that a registered security interest, for example, has priority over a prior unregistered security interest even where the first creditor has taken possession or control, e.g. under a pledge agreement or in exercise of a default remedy.

Exclusion of doctrine of accession: items other than objects

2.176. Article 29(7) concerns dealings with an item other than object, that is, any article which is not an airframe, aircraft engine or helicopter, an item of

23 "Pre-existing right or interest" refers, of course, to the definition in Article 1(v) which does not itself imply that the right or interest existed before the creation or registration of the international interest. Nevertheless Article 60(1) should be interpreted as confined to pre-existing rights or interests created prior to registration of the international interest. See below, paragraph 2.250.

railway rolling stock or a space asset. In relation to aircraft objects 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. Article 29(7) is designed to ensure that rights in an item (other than an object) are not lost by installation of the item on an object if under the applicable law those rights continue to exist after the installation, and that new rights may be created in a previously installed item which is removed where under the applicable law those rights are created. For example, computer units and other items may become damaged or defective and may need to be replaced by other units or spare parts which may themselves have a high economic value. The effect of Article 29(7)(a) is that where the applicable law so provides, the replacement units, which may have been financed separately and given in security to the lender, remain subject to that security interest and do not pass by accession to the owner of the airframe or aircraft engine. Again, if an item already installed on and forming part of the airframe or aircraft engine (i.e. not covered by Article 29(7)(a)) is then dealt with separately from the airframe or aircraft engine and the dealing is effective under the applicable law to create rights in the item separate from those in the airframe or aircraft engine, then under Article 29(7)(b) the Convention does not prevent the creation of those rights. Article 29(7) is not strictly a priority rule in itself but it can have priority effects in precluding the holder of a registered international interest from asserting the doctrine of accession to extinguish another creditor's rights in the installed item or to preclude that other creditor from granting new rights after the installed item has been removed. However, the effect of Article 29(7) is likely to be limited. Many legal systems possess the doctrine of accession by which an object that becomes affixed as an accession to a more substantial object so as to be incapable of removal without significant damage to either object loses its identity and passes into the ownership of the owner of the principal object. Such a doctrine is needed to avoid situations in which the assertion of title to the accession could seriously undermine the rights of the owner of the principal object.

2.177. Article 29(7) is replicated in Article XIV(4) of the Aircraft Protocol. However, it does not apply to installed or removed aircraft engines, for these are not mere items but distinct Convention objects that do not form part of the airframe on which they are installed, interests in them being separately registrable. Hence Article XIV(3), unlike Article XIV(4), does not leave ownership or other rights in installed engines to be dealt with by the applicable law; it lays down a positive rule that such rights are not affected by the aircraft engine's installation on or removal from the airframe.

2.178. Article XIV(3) of the Aircraft Protocol contains a special rule for aircraft engines. Ownership of or another right or interest in an aircraft engine is not affected by its installation on or removal from an aircraft, so that (in contrast to the position under Article 29(7)) this is the case even if under the applicable law the engine would otherwise have passed to the owner of the airframe by a rule of accession.

Effect of the debtor's insolvency

2.179. The general rule is that in insolvency proceedings against the debtor (see Article 1(l) and paragraph 4.18 for the definition of "insolvency proceedings") an international interest is effective if registered prior to the commencement of the proceedings (Article 30(1)). This, of course, presupposes that the insolvency proceedings have been opened in a Contracting State, which need not, however, be the same Contracting State as that under the law of which the international interest was created. Proceedings "against the debtor" would seem to include proceedings initiated by the debtor itself, e.g. for its own winding-up or administration, since these are in effect proceedings by the debtor against itself. The protection given by Article 30(1) extends to non-consensual rights or interests registered under Article 40 (see paragraph 2.219). "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. The applicable law under conflict of laws rules is generally taken to be the law of the situation of the object (*lex situs, lex rei sitae*) at the time of commencement of the insolvency proceedings. 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 Article 30. Given that an international interest is the creature of the Convention, not of national law, which will usually have nothing to say about international

definition of "helicopters" in Article I(2)(l). However, prior to installation or after removal and before re-installation a helicopter engine is an aircraft engine, for its status as such cannot be made to depend on whether it is to be installed on an airframe or on a helicopter. So in a Contracting State an international interest in an uninstalled helicopter engine can be created and registered and its efficacy preserved after installation. See further paragraph 3.10.

3.9. Each of the three categories of aircraft object is defined to include installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto. The items so included (which do not cover items merely resting on an airframe by their own weight) form part of the object and are not separately governed by the Convention or Protocol. So such items as installed propellers, auxiliary power units and computers and engines installed on a helicopter are not distinct objects for the purpose of these two instruments, which do not, however, affect rights in them, or in other items not constituting an object, existing under the applicable law. See Article 29(7) of the Convention and Article XIV (3) and (4) of the Protocol.

3.10. An aircraft engine, even when installed on an airframe, is not an accessory of the airframe but constitutes an independent object (see Article I(2)(a)) and ownership of the engine or rights or interests in it under the applicable law are not affected either by its installation on an aircraft or its removal from it (Article XIV(3)). Accordingly an international interest can be taken in an aircraft engine as an independent object and is separately registrable. By contrast an engine installed on a helicopter is not an aircraft engine but an accessory of the helicopter (see paragraph 3.8) and while so installed is not capable of being the subject of a separate international interest under the Convention. The position is otherwise prior to its installation or subsequent to its removal, when it constitutes an aircraft engine. This means, first, that when not installed it can become the subject of a registrable international interest and, secondly, that the creditor's pre-installation rights and interests under the applicable law (including, in a Contracting State, its rights and interests under the Convention) are not affected by installation of the engine on a helicopter. In this situation the rights of the holder of the international interest are governed by Article XIV(3), referred to above, and are not subjected to the applicable law under Article XIV(4), since this is confined to items which are not objects and is therefore inapplicable to an interest acquired in an engine prior to its installation on a helicopter. So in a

Contracting State an international interest in a helicopter engine taken and registered before installation continue to enjoy the full benefits of the Convention and Protocol, including preservation of its priority, after installation even though it thereupon ceases to be an "object". Moreover, those rights and priority are preserved even after subsequent removal from the helicopter. What cannot be done, however, is to constitute and register an international interest in a helicopter engine while installed on a helicopter or to rely on such registration after its removal, when a new agreement will be needed and a new registration effected, otherwise the effect of Article XIV(3) is to preserve the helicopter financier's interest in the whole helicopter, including the engines. This is an awkward consequence of the fact that engines installed on a helicopter are not treated as separate objects, a matter that could usefully be addressed at any Review Conference convened under Article XXXVI of the Protocol to consider the practical operation of the Convention as amended by the Protocol. However, there is a practical solution to the problem, namely to register a prospective international interest in the installed engine which, immediately upon its removal, will become an international interest and be treated as registered as from the time of its registration as a prospective international interest (Article 19(4)) and have priority accordingly. So if the prospective international interest is registered before registration of an international interest in the helicopter (including the engine) by another creditor, the holder of the prospective international interest will acquire priority over the helicopter financier the moment the engine is removed from the helicopter. Such an international interest will continue to preserve its priority even after subsequent re-installation in a helicopter (Article XIV(3)). An engine installed on a helicopter may, of course, be the subject of a separate national law security or other interest if the applicable law so provides, though that interest will be subordinate to a registered international interest.

3.11. The Convention and Protocol do not cover items (other than objects, which include data, manuals and records relating thereto) that are not installed on, incorporated in or attached to an airframe, aircraft engine or helicopter, though again under Article 29(7) of the Convention and Article XIV(4) of the Protocol rights created or preserved under the applicable law are not affected. Where, for example, propellers or other components of an airframe are supplied under reservation of title, the seller's interest in them cannot be protected by registration under the Convention. When the components are subsequently incorporated into an airframe which is financed by a purchase-money loan advanced on the security of the airframe then except as otherwise provided by the applicable law they become part of the airframe (which by Article I(2)(e) includes accessories) and vest in the debtor subject to the lender's security interest, which is the only interest then registrable under the Convention.

3.12. The definition of "airframes" in Article I(2)(e) means airframes that, when appropriate aircraft engines are installed on them, are type certified by the competent authority to transport at least eight persons or goods in excess of 2750 kilograms. This does not mean that the Convention and Protocol apply only when an engine is installed on an airframe, merely that the airframe must be one which *would be* covered by a type certification if and when the requisite engines were installed. The Convention does not deal with the effect of changes which would or could affect certification, for example, a reduction in the number of seats. The revocation of type certification is a matter for the competent authority and so long as the type certification continues the Convention and Protocol apply despite such changes. An airframe in the course of manufacture is an object falling within the Convention and Protocol where the manufacturing process has reached the point where what is being made can be identified as an airframe. This is generally taken to be the time a serial number is allotted to it. Accordingly lenders providing pre-delivery financing on the security of aircraft objects are able to benefit from the Convention and Protocol.

Relationship with the Space Protocol

3.13. Those involved in working leading to the Aircraft Protocol were concerned to avoid overlap with the future Space Protocol (which was eventually concluded in Berlin in March 2012) and to ensure that aircraft objects were not inadvertently caught by the Space Protocol. Accordingly Article II(3) of the Space Protocol provides that it does not apply to objects falling within the definition of "aircraft objects" under the Aircraft Protocol except where such objects are primarily designed for use in space, in which case the Space Protocol is to apply even while such objects are not in space. So as Article I(2)(k) of the Space Protocol itself provides, it covers objects such as satellites, space stations, space modules, space capsules, space vehicles and reusable launch vehicles, whether on Earth or in airspace en route to or returning from outer space. However, under Article II(4) the Space Protocol does not apply to an aircraft object merely because it is designed to be temporarily in space. A sub-orbital

relating to an aircraft object situated in that State the courts of that State must apply the version of Article XI selected by a declaration of the Contracting State of primary jurisdiction.

3.105. Two alternative versions of Article XI, Alternative A and Alternative B, are offered. It is open to a Contracting State to adopt one of these, though only in its entirety (Article XXX(3)), or to adopt neither and simply continue to apply its ordinary domestic law. To date, with one exception, every Contracting State making a declaration has opted for Alternative A.

Alternative A

3.106. The "hard", or rule-based, version, Alternative A, is specifically designed to meet the requirements of advanced structured financing, including international capital market financing structures. Paragraphs 2 and 7 require the insolvency administrator or the debtor, as applicable, either (a) to give possession within the earlier of a waiting period specified in a Contracting State's declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement, which includes obligations under other transaction documents (e.g. a loan agreement) incorporated by reference in such agreement. If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A the creditor can apply for and is entitled to obtain speedily a court order requiring the insolvency administrator or the debtor to give possession of the aircraft object. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9). The following points arise under paragraph 2 of Alternative A:

"Insolvency administrator or the debtor, as applicable"

3.107. The phrase "insolvency administrator or the debtor, as applicable" covers three situations. The first concerns cases within Article I(2)(m)(ii) of the Protocol, that is, where there are no insolvency proceedings and the insolvency-related event consists of the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or exercise remedies under the Convention is prevented or suspended by law or State action. In such a case there is no insolvency administrator and it is the debtor itself upon which the duties fall. The second involves cases within Article I(2)(m)(i) where there is a gap between the commencement of the insolvency and the appointment of the insolvency administrator. During that gap the debtor again is the party responsible. Of course, the debtor's freedom of action may be circumscribed by the *lex concursus*. The third situation is where the estate is being administered in insolvency proceedings by a debtor in possession if permitted by the applicable insolvency law. The debtor is then its own insolvency administrator.

"Waiting period"

3.108. The waiting period begins on the occurrence of an insolvency-related event as defined by Article I(2)(m) and is the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

"The date on which the creditor would be entitled to possession if this Article did not apply"

3.109. This must be interpreted as referring to a right to possession arising after the occurrence of an insolvency-related event as defined by Article I(2)(m). The underlying premise is that such commencement causes a stay on the creditor's right to possession. However, where there is no stay, whether because (a) the insolvency-related event is not the commencement of proceedings but the declaration of an intended suspension of payment, (b) the relevant insolvency law does not impose a stay, (c) any stay imposed is lifted during the waiting period, or (d) the aircraft object does not form part of the debtor's estate under the applicable insolvency law (which could, for example, be because it is held under a title reservation agreement or a leasing agreement), the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 2(b) of Alternative A of Article XI(1) is to be interpreted as if it read "would be entitled, or becomes entitled, to possession of the aircraft object notwithstanding the insolvency proceedings or other insolvency-related event". The insolvency administrator or the debtor can only avoid loss of the right to possession if it has cured all defaults, other than a default cured by the opening of insolvency proceedings, by the earlier of the expiry of the waiting period and the accrual or resumption of the creditor's right to possession and has within the same time agreed to perform all future obligations under the agreement, including obligations under other contracts incorporated by reference into the agreement.

3.110. Unless and until the creditor is given the opportunity to take possession the insolvency administrator or the debtor, as applicable, must preserve the aircraft object and maintain it and its value in accordance with the agreement, but may use the aircraft object under arrangements designed to preserve and maintain it and its value. This would seem to include earning income from continued operation of the aircraft object. Meanwhile the creditor for its part is entitled to apply for any other forms of interim relief available under the applicable law (Alternative A, paragraph 5(b)). What constitutes interim relief varies with the applicable law. In a number of jurisdictions any form of relief which is considered appropriate before a final determination has been made on the merits qualifies as interim relief, so that in those jurisdictions sale of the object to which the proceedings relate can be ordered by way of interim relief, whereas other jurisdictions look to the finality of what is ordered and consider sale to be an irrevocable act and therefore inappropriate for interim relief. A court in a Contracting State before which interim relief is sought will thus apply its own law in deciding whether a particular remedy qualifies as interim relief. What constitutes the applicable law is to be determined by the rules of private international law of the forum State (Article 5(3)), and the availability of interim relief will usually be regarded as procedural in character and therefore governed by the *lex fori*. Where the insolvency-related event is the commencement of the insolvency proceedings the forum State will almost invariably be the State in which the proceedings are opened and the *lex concursus* will apply. A separate rule applies as regards advance relief under Article 13 of the Convention in that sale and the application of the proceeds of sale are made available as a form of relief under that Article if at any time the debtor and the creditor specifically agree (Protocol, Article X(3)).

3.111. The power to grant the creditor interim relief under paragraph 5(b) of Alternative A of Article XI in a Contracting State that has made a declaration applying Alternative A does not affect the ordinary jurisdiction of an insolvency court, even in a Contracting State which has not made such a declaration, to grant such interim relief as its law allows. Where insolvency proceedings are opened in one Contracting State the jurisdiction of the courts of another Contracting State to grant interim relief may, of course, be circumscribed by rules of the latter State's law requiring it to recognise the exclusive jurisdiction of the insolvency court of the former State, as where both Contracting States have adopted the UNCITRAL Model Law on Cross-Border Insolvency or both are Member States of the European Union and as such are required to apply the EC Insolvency Regulation.

3.112. Paragraphs 9 and 10 of Alternative A preclude the court from preventing or delaying the exercise of the creditor's remedies beyond the above time-period and from modifying the debtor's obligations without the creditor's consent. In effect this removes, for aircraft objects, the preservation of the court's powers under Article 30(3)(b) of the Convention (see paragraph 2.183). Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors' rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9. Similarly, any provisions of domestic law modifying or empowering a court to modify the debtor's obligations must be disapplied where these would conflict with paragraph 10. Though paragraph 10 only precludes modification of the debtor's obligations under "the agreement", that is, the security agreement, title reservation agreement or leasing agreement relating to the aircraft object, and says nothing about security assignments of debtor's rights, it must be intended to cover these as well, particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditor's remedies permitted by the Convention or Protocol, applies to all remedies, not merely those relating to the aircraft object. But the insolvency administrator remains entitled to terminate the agreement where so allowed by the applicable law (Alternative A, paragraph 11), that is, the law governing the agreement.

3.113. The creditor's protection under Alternative A is further strengthened by a provision that no rights or interests, except for non-consensual rights or interests of a category covered by a declaration under Article 39(1), are to have priority over registered interests (Alternative A, paragraph 12). That makes explicit what is implicit in Articles 29 and 30(2) of the Convention, namely that rules of insolvency law – for example, those giving priority to various categories of preferential debt such as claims for taxes or unpaid wages – cannot be applied to displace the priority of a registered international interest.

Alternative B

3.114. The "soft", or discretion-based, version, Alternative B, requires the insolvency administrator or the debtor, as applicable, upon the creditor's request and within the period specified in the declaration of the Contracting State, to state whether it will cure all defaults and perform all future obligations under the agreement and related transaction documents or give the creditor the opportunity to take possession of the aircraft object in accordance with the applicable law (Alternative B, paragraph 2). "Related transaction documents" is not defined but would cover all documents, other than the agreement itself, which impose obligations in respect of the transaction, for example, obligations embodied in any separate loan agreement or in a promissory note given in respect of it. The right to take possession may be given either by the agreement, in which case it is the law governing the agreement that will be the applicable law, or by the procedural rules of the forum, in which case the applicable law will be the *lex fori*.

3.115. Unlike the hard rule in Alternative A which requires performance of all the debtor's obligations, including cure of all prior defaults other than the insolvency itself, under Alternative B the applicable law may condition the creditor's rights. In particular, if the insolvency administrator does not give the required statement or give up possession after stating it will do so, the applicable law may "permit the court to require the taking of any additional step or the provision of any additional guarantee" (Alternative B, paragraph 3). This wording is infelicitous in that it does not indicate what is meant by "additional step", there being no mention in paragraph 2 of any prior step such as an order for possession, nor is it clear why paragraph 3 purports to provide what the applicable law may do, that being, one would have thought, a matter for the applicable law itself. The intended effect of paragraph 3 appears to be that the court may permit the creditor to take possession upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee permitted by the applicable law. This would allow the court, if so empowered by the applicable law, to require the creditor to furnish a guarantee against loss suffered by the debtor as the result

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.

4.196. Article 29 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.

4.197. 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 (see Illustration 29, paragraph 4.207). 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.) The effect of Article 29(7)(b) is to ensure that where the applicable law so provides, rights in such items which have previously been installed may be created in them after removal from the object. But if under the applicable law a doctrine of accession applies to vest the items not constituting an object, such as engine modules, in the owner of the object, any pre-existing rights in them will be lost.

Many States have adopted a doctrine of accession, and this can be justified not only doctrinally but also because without such a doctrine the principal object could be seriously impaired if a party claiming an interest in a component, e.g. as a supplier selling under reservation of title, were to assert its interest. However, there may be cases where the applicable law would allow such an interest to continue to subsist despite the annexure to the principal object.

4.198. Article XIV(3) of the Aircraft Protocol creates a special rule for aircraft engines. Such engines, unlike engines installed in a helicopter, are separate objects for the purposes of the Convention and do not constitute part of the airframe. Accordingly Article 29(7) does not apply to them. Article XIV(3), however, gives still stronger protection to those holding pre-installation rights in an aircraft engine, 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. One effect of Article XIV(3) is that an international interest taken in an aircraft engine prior to its installation on a helicopter retains its effect under the Convention and Protocol after installation even though it has ceased to be an "object" as the result of the installation. However, an international interest cannot be taken in an aircraft engine while it is installed on a helicopter, because it is not then a separate object but simply a component of the helicopter. But nothing precludes the taking and registration of a prospective international interest in an installed engine which will take effect as an international interest as soon as the engine is removed from the helicopter, with priority as from the time of that registration. See generally paragraphs 3.8, 3.10.

4.199. *Illustration 21*

D gives a charge over an airframe 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.

4.200. *Illustration 22*

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.

4.201. *Illustration 23*

D charges an airframe to C1 to secure present and future advances. C1 advances 20 million euro and registers the charge. Subsequently D charges the airframe 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.

4.202. *Illustration 24*

O, the owner of an airframe, leases it to L. Before O has registered its interest L wrongfully sells the airframe to B. Under Article III of the Aircraft Protocol sales of aircraft objects are registrable. B's priority will depend on its registering its interest before O registers its own interest.

4.203. *Illustration 25*

The facts are as in Illustration 22 except that L, instead of selling the airframe, wrongfully sub-leases it to SL and then registers its international interest. Subsequently O registers its interest. O has priority over L (who cannot supplant its own lessor) but holds its interest subject to the lease to L, which may, however, be terminable because of L's wrongful behaviour. Nevertheless, O cannot exercise default remedies against SL, who is protected by Article 29(4).

4.204. *Illustration 26*

O leases an airframe to L, registers its international interest and then charges the airframe to C. C takes its charge subject to the lease to L, whose lessor, O, registered first and who is thus protected under Article 29(4)(b). 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.

4.205. *Illustration 27*

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.

4.206. *Illustration 28*

D charges an airframe to C1 and C2 in succession, C1's charge being registered first. Subsequently the aircraft embodying the airframe, 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.

4.207. *Illustration 29*

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

4.208. 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.

4.209. 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