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A Comparison of the Position of Buyers under the Cape Town Convention, the Three Existing Protocols and the Draft MAC Protocol

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The position of buyers of equipment under the Cape Town Convention itself is modified in each of the existing three Protocols. Buyers are considered differently in, on one hand, the Aircraft and Space Protocols to the Cape Town Convention, and on the other hand, the Rail Protocol. The former treat a buyer as having an International Interest which can be registered in the International Registry, while under the latter only registration of a 'notice of sale' is possible. The draft MAC Protocol currently follows the Rail Protocol. This paper considers the unmodified position of buyers under the Convention, particularly in relation to the priority rules and the requirement of a 'power to dispose', and then considers how this is changed by the modifications in each Protocol. The line between a Title Reservation Agreement and a contract of sale is examined, although ultimately this is of limited significance, at least in relation to the Aircraft and Space Protocols. Treating a sale as an international interest causes some challenges to the drafting of the Aircraft and Space Protocols, and some of the resulting difficulties are discussed. The reasons for the different approach in the Rail Protocol, and the ramifications of that approach, are considered. Finally, in relation to the draft MAC Protocol, the various options available in relation to the treatment of sales are discussed, both as to registration and the priority position of buyers.

I. Introduction[1]

This paper considers in some detail the provisions relating to buyers of equipment in the Cape Town Convention[2], its three Protocols and the draft Mining, Agricultural and Construction Equipment (MAC) Protocol which has recently been discussed at the second meeting of Governmental Experts.[3] The purpose of the Convention and its Protocols is to increase the availability, and decrease the cost, of credit used for the acquisition of high value uniquely identifiable equipment by providing for an

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1 The references to the Official Commentary are, as the context requires, to Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (3rd edn, UNIDROIT 2013) ('OCA'); Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets* (UNIDROIT 2013) ('OCS') and Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock* (2nd edn, UNIDROIT 2014) ('OCR').

2 Convention on International Interests in Mobile Equipment 2001 (the 'Convention' or the 'CTC').

3 See reports at UNIDROIT, 'Study LXXII K – Development of a Fourth Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment' <*https://www.unidroit.org/work-in-progress/mac-protocol#a2*> accessed 02 March 2018.

international system of rules enabling a creditor to take an interest in that equipment, to enforce effectively on default and to protect its interest by registration in an International Registry and by the ability to search for the existence of prior interests in the equipment.[4] Its primary purpose is not, therefore, to protect buyers of equipment, or to provide rules governing sales. However, it cannot be ignored that equipment is routinely bought and sold, and the Convention and its Protocols have, therefore, to deal with the position of buyers to a greater or lesser extent. The ways in which this is done vary according to the particular market and type of equipment involved.

This paper seeks to compare the position (a) under the Convention itself without reference to any Protocol, (b) under the Aircraft and Space Protocols and (c) under the Rail Protocol. Position (a), of course, does not actually apply in relation to any type of equipment at the moment. It is, however, worth examining both for purposes of exposition, and also because it is the default position which will apply under the MAC or any other later Protocol if that Protocol does not include any specific provisions in relation to sales.[5] As this is already a detailed paper, some familiarity with general operation of the Convention and the Protocols is assumed, and the analysis concentrates on the provisions dealing with buyers.

II. The policy arguments in relation to buyers

Before examining the provisions of the Cape Town Convention and the Protocols in detail, this section contains some reflections on the policy arguments which affect the development of the law in this area.

As with all questions of priority between different interests in relation to property, the starting point is *nemo dat quod non habet* (no one can give what they do not have). In a legal system with no exceptions to the nemo dat principle in its legal system, the priority position where the owner of an asset (A) had created a security interest in that asset in favour of one person and had also sold the asset to another person would depend solely on the order in which these events took place. If the asset were sold before the security interest was created, the position is simple. A has no further rights in the asset and cannot therefore create a security interest in that asset, and the buyer wins. If the security interest was created before the sale, then the buyer would take subject to the security interest.[6] The same rules apply where an asset is sold twice by A, to two different people.

The *nemo dat* principle preserves the sanctity of ownership and of property rights. After all, except for authorised dispositions, the second disposition or the creation of the second interest by A is wrongful. Why, then, should the first in time not win? Despite this reasoning, very few, if any, systems adhere entirely to the *nemo dat* principle with no exceptions. There are several reasons for this. The first is that it can be extremely unfair. If a person appears to have complete and unencumbered ownership of an asset, but in fact another person has a 'secret' interest in that asset, it seems unfair for a buyer of that asset to take subject to that 'secret' interest. This argument is strengthened if the person with the interest has the means of giving publicity to that interest but chooses not to do it. Thus, in many national sale of goods laws, a buyer who leaves the seller in possession of goods, rather than taking delivery, loses his interest to a later buyer who does take delivery.[7] A second reason for the existence of exceptions to the *nemo dat* principle is to facilitate the ease of commerce. It is burdensome for a buyer to have to take steps to check that the person from whom he buys something is actually

4 For a more detailed discussion, see OCA para 2.6.

5 See section VI below.

6 It should be noted that even in such a legal system, it is likely that the secured creditor could authorise the security giver to sell the asset free of the security interest, for example, on terms that a security interest was granted over the proceeds.

7 Sale of Goods Act 1979, s 24; Uniform Commercial Code, §2-403.

the unencumbered owner. When goods are sold in the ordinary course of business, there is a strong policy argument for the *nemo dat* principle to apply only in limited circumstances.

The extent of exceptions to the *nemo dat* principle in any legal system involves the balancing of interests between the first and the second in time and is a matter of policy on which states can genuinely disagree. Relevant factors other than those mentioned above include the state of the market for the types of assets involved,[8] and ease with which a person who is first in time can publicise his interest, and with which the second in time can discover that interest. For example, a first in time buyer can usually publicise his ownership by taking delivery, while a first in time security taker will not want to, or even be able to, do so. The classic way for a security taker to publicise his interest is by registration in a centrally searchable register. Even this, however, raises a question of the balance of interest between the first in time secured creditor and the second in time. If the latter is also taking security, he can be expected to search a register, since he himself will (probably) be registering his interest there. If the second in time is a buyer, the 'ease of commerce' argument above could lead to the conclusion that he should not be expected to search the register. Again, where the balance should lie in this situation will be influenced both by the ease of searching and by the relevant market. If the goods, for example, are extremely high value and a buyer does not buy them particularly frequently, the argument for expecting him to search is a great deal stronger than where the goods are low value and are bought (and sold) frequently. These policy arguments can be seen reflected in the choices made about the position of buyers under the various Protocols.

III. The position of buyers under the Cape Town Convention itself without any of the Protocols

The three Protocols all contain additions to the basic position under the Cape Town Convention. This section will consider the position under the Convention without taking into account any of the Protocols, ('the basic Convention position'), and then the following sections will consider the Protocols. Despite the fact that the basic Convention position is not actually applicable in relation to aircraft, rail or space objects, it is worth considering, both for the purposes of comparison and also because it would be the governing position in relation to the MAC Protocol (or any future Protocols) if they did not include specific provisions about the priority of buyers. Much of what is said in this section is qualified by the various Protocols, but these qualifications are discussed in sections IV, V and VI below rather than in this section. This should be borne in mind when reading this section.

A. The definition of 'buyer'

The Convention defines the term 'sale' as 'a transfer of ownership of an object pursuant to a contract of sale',[9] while a contract of sale is defined as 'a contract for the sale of an object by a seller to a buyer which is not [a security agreement, a title reservation agreement or a leasing agreement]'.[10] Thus, a buyer is a person to whom ownership is transferred, but only if that transfer is pursuant to a 'contract of sale'. What amounts to a transfer of ownership does not appear to be covered by the Convention,[11] and is therefore left up to the applicable law,[12] although certain necessary criteria for the transfer of ownership (such as identification of the equipment) are prescribed in the Convention and its Proto-

8 Thus, under English law until fairly recently, there was an exception to the *nemo dat rule for all goods sold in market overt.*

9 CTC, Article 1(gg).

10 CTC, Article 1(g) incorporating words in square brackets from Article 1(a).

11 The Aircraft and Space Protocols, however, do cover this issue, see section IV(B) below.

12 Gap-filling is primarily to be done in conformity with the general principles on which the Convention is based (CTC, Article 5(2)) but where, as here, there are no specific principles, gaps are to be filled in accordance with the applicable law.

cols and would therefore displace any contrary requirements under the applicable law. It is very clear from the definition set out above that a 'contract of sale' does not include a 'title reservation agreement' ('TRA'): this is important as otherwise it would do so. A TRA is defined in the Convention as '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'.[13]

Despite the clarity of the definition of 'contract of sale', the line between it and a TRA requires some examination.[14] Where a contract is made in relation to the sale of an object ownership either passes at the time the contract is made or at a later time: which of these is the case will depend on the terms of the contract and on the applicable general law of sale. Generally, though perhaps not always under every applicable law, there are three situations where ownership will not be immediately transferred:

> (1) where the contract stipulates a condition that has to be fulfilled before ownership passes (here, as explained below, the agreement is a TRA);
> (2) where a requirement of the applicable law, for example, that the goods must be identified, has to be fulfilled before ownership passes, and no mention of this or any other condition for the passing of ownership is included in the contract (this, as explained below, is a contract of sale);
> (3) where an agreement expressly includes a general law requirement, such as that the goods must be identified before ownership passes, but includes no other conditions as to the passing of ownership (this is very unlikely to occur in practice).
>
> Each situation will now be discussed.
>
> (1) In the first situation there is a TRA according to the wording of the definition in the Convention as mentioned above. This is easy to appreciate where the condition stipulated to be fulfilled is the payment of the price, since that is the archetypical reservation of title agreement, and is mentioned as such in the Official Commentary.[15] However, a contract of sale could stipulate other conditions that have to be fulfilled before ownership passes. For example, it could provide that ownership only passes when the goods are delivered, or when the seller performs some repairs or other work on the goods. It might be thought that this type of agreement is not what is usually known as a 'title reservation agreement', but it clearly falls within the definition of TRA in the Convention.[16] An agreement where the only conditions for the passing of property do not relate to the payment of the price is very unlikely to occur in practice, since a term stipulating that ownership of the item passes on payment of the price is a standard term, and is likely to be in the contract even if the actual facts are that (unusually) the entire price is paid before or at the moment the contract is entered into. There may (and are likely to be) other conditions in the contract to

[13] CTC, Article 1(ll).

[14] This is particularly important in the light of the comments made by Howard Rosen in his comment on this paper. See Howard Rosen, 'Commentary on "A Comparison of the Position of Buyers under the Cape Town Convention, the Three Existing Protocols and the Draft MAC Protocol"' (2017) 6 Cape Town Convention Journal [this issue] 122.

[15] OCA, OCS and OCR paras 4.13 and 4.44.

[16] See OCA, OCS and OCR para 4.13 ('a contract of sale … does not include contracts in which title is expressly reserved to the seller until completion of payment *or fulfilment of other conditions') (my emphasis) and para 4.44 ("'title reservation agreement" – an agreement for sale… by which the transfer of ownership is retained by the seller until the fulfilment of payment and/or other conditions specified in the agreement') (my emphasis).*

be fulfilled as well, of course. In any of these situations, the agreement for sale is a TRA until the moment at which the conditions are fulfilled. Then, a 'contract of sale' comes into existence, and, simultaneously, ownership is transferred and so the transaction is a sale.[17] A TRA is contrasted in the Official Commentary with a 'contract of sale' which is described as an agreement 'under which ownership is to pass under normal rules of law governing the transfer of ownership where the seller does not reserve title'.[18] It is therefore very clear that a 'contract of sale' is an agreement which does not contain provisions about the passing of title, and where the passing of ownership depends on the rules of the applicable law.[19]

(2) In the second situation described above, the agreement cannot be a TRA given the wording of the definition, since there is no condition as to the passing of ownership stated in the agreement;[20] it must be a contract of sale until the requirement is fulfilled, then at that point there is a sale.

(3) The third situation is more difficult to analyse. Is the agreement a 'TRA' solely because this particular condition is stipulated in the agreement, rather than the matter being left to the (identical) general law? It is suggested that this is not the case, since even without the stipulation, the condition of identifiability would be imposed by the general law, and so the agreement is a 'contract of sale'.[21]

However, whether an agreement is a 'TRA' or a 'contract of sale' is not ultimately practically important in relation to aircraft objects and space assets, although it could be significant for railway rolling stock and MAC equipment.[22] Once the conditions stipulated in a TRA are fulfilled, ownership passes to the buyer, and this is effected under a simultaneous 'contract of sale' and 'sale' within the terms of the Convention.[23] The provisions of the Convention (and Protocols) relating to 'buyers' apply to the transferee of ownership at that stage. The only significant difference between a contract of sale and a title reservation agreement under the Convention itself (as opposed to the Aircraft Protocol and Space Protocol) is that a TRA can be registered by the seller in the International Registry and is protected against subsequently registered interests,[24] whereas a contract of sale cannot be registered by anyone, even under the Protocols which provide for the registration of a sale. In relation to aircraft objects and space assets, as discussed below, a sale and a prospective sale can be registered by a buyer, provided, in relation to aircraft objects, the criteria in Article IV of the Aircraft Protocol as to sphere of application are fulfilled. However, even in relation to those assets, a contract of sale

17 OCA, OCS and OCR para 4.39.

18 OCA, OCS and OCR para 4.44.

19 See section IV(A) below in relation to the difficulties this analysis causes with Article V(2) of the Aircraft Protocol and Space Protocol.

20 This is the case irrespective of whether the identification of the equipment is required for a valid title reservation agreement (as in the Aircraft Protocol) or not (as in the Rail Protocol).

21 cf Rosen (n 14) 126-129. Howard Rosen takes a contrary view because, among other arguments, of the uncertainty that this would cause as to whether or not a clause merely reflected the applicable law, and where the same wording would be potentially treated differently in different jurisdictions. Both of these points are well made, and this difficult point remains an open one, although unlikely to be a significant issue in practice for the reasons given in the text.

22 See Rosen (n 14) 128-129.

23 OCA, OCS and OCR para 4.39.

24 On the possible advantages of this for conditional buyers see Rosen (n 14) 129-130..

cannot be registered by a buyer.[25] What can be registered by a buyer under the Aircraft Protocol or Space Protocol is a prospective sale,[26] and this can be registered whether the agreement for sale is a contract of sale or a TRA.[27]

A 'contract of sale' also does not include a leasing agreement, even if the agreement includes an option to purchase.[28] If the option is exercised, however, there is a simultaneous contract for sale and a sale, and the person to whom ownership is transferred is a 'buyer'.[29] Nor does a 'sale' include an assignment of an international interest as a result of an assignment of associated rights.[30] While an assignment may constitute an outright transfer of associated rights, the transfer of the international interest is not a transfer of ownership of the object.[31]

B. The priority position under the Convention

The basic priority position is set out in Article 29(3) of the Convention. This provides that a 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 that interest'. It can be seen that this is a qualified exception to the *nemo dat* principle. A holder of an international interest who is first in time (who would win under an unbridled application of the *nemo dat* principle) only wins if he has registered his interest before the sale, that is, the transfer of ownership to the buyer. If the person who is first in time has not registered by the time of the sale, he loses his interest entirely and the buyer obtains an unencumbered title: this operates as an exception to the *nemo dat* principle. Since what the buyer is obtaining is absolute ownership, a previous but unregistered international interest is completely extinguished, whatever its nature, that is, whether it is a security interest granted to the secured creditor or the (qualified) ownership interest of a conditional seller or lessor.[32]

The justification for this exception is the existence and operation of the register, which is paramount. Registration is the sole means of publicising the earlier interest, and the second in time is bound by a registered interest whether or not he knows about it. Moreover, even if he does know of an unregistered interest he is not bound by the first in time interest: it is the register and not any other actual or constructive knowledge which governs. The primary reasons for this are to avoid any question of the buyer having to make investigations apart from searching the register, and to avoid difficult factual disputes about knowledge.[33] It also has the beneficial effect of incentivising buyers to search the register, that is, for the register to be seen as the central point of information.

(i) *Priority between buyer and registered interest*

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25 See sections IV(A) and IV(B) below where it is pointed out that the references to registration of a contract of sale in Articles III and V(3) of the Aircraft Protocol are mistakes.

26 See section IV(B) below.

27 See sections IV(A) and IV(B) below.

28 OCA, OCS and OCR para 4.13.

29 OCA, OCS and OCR para 4.39.

30 See CTC, Article 1(b) for a definition of such assignment. An international interest will be assigned together with associated rights unless the parties otherwise agree (Article 31(1)).

31 OCA para 3.15; OCS para 3.23.

32 See OCA para 4.187; OCS para 4.185; OCR para 4.186. Note that the actual characterisation of the interest created by the agreement is a matter for the applicable law, see OCA, OCS and OCR paras 4.41 and 4.44 and Michel Deschamps, 'The Perfection and Priority Rules of the Cape Town Convention and the Aircraft Protocol A Comparative Law Analysis '(2013) 2 Cape Town Convention Journal 51.

33 OCA para 4.185, OCS para 4.183 and OCR para 4.184.

Article 29(3) deals with the priority of a buyer vis a vis many different kinds of interest. The first part (a) covers the priority between a buyer and a registered interest (this is obviously the case even though the order of the words are reversed to 'interest registered [at the time of acquisition]' in the text). 'Registered interest' is a defined term, meaning 'an international interest, a registrable non-consensual right or interest[34] or a national interest specified in a notice of a national interest[35] registered pursuant to Chapter V'[36] (in other words, an interest validly registered in the relevant International Registry).[37] Where the registered interest is that of a conditional seller under a TRA, a person could be a buyer in two different situations. The first is where a conditional buyer of an object (wrongfully) sells the object to the buyer. In that situation, the buyer takes subject to the interest of the conditional seller if it is registered. However, a 'buyer' could also be a conditional buyer who has fulfilled the conditions of the TRA, and to whom ownership passes under a simultaneous contract of sale and sale. Here, of course, the interest of the conditional seller disappears under the terms of the TRA, so there is no longer any registered interest for the buyer to take subject to. The same applies to the interest of a lessor under a hire purchase agreement if the option to purchase is fulfilled.

(ii) *Priority between buyer and 'unregistered interest'*

The second part of Article 29(3)(b) appears to apply to any 'unregistered interest', which term is defined in the Convention as 'a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies)[38] which has not been registered, whether or not it is registrable under this Convention'.[39] Thus, a buyer takes free from unregistered international interests, unregistered but registrable non-consensual interests and unregistered national interests that could have been protected by a notice. It also appears to take free of any unregistrable interest which is, ex hypothesi, not registered. This raises the question: what interests are included in this wide category?

First, it includes a national interest of which a notice is not registrable. When a security agreement creates an international interest, it usually also simultaneously creates a national law interest, which can be registered and protected locally.[40] A buyer would take free from such an interest (even if protected under local law) under Article 29. If the position were otherwise, depending on the national law priority rules, the buyer might have to search the relevant local registry as well as the International Registry, which would defeat the purpose of the Convention.

Second, the category includes non-consensual interests which have not been made registrable by a declaration of the relevant contracting state.[41] Non-consensual interests subject to a declaration of the relevant contracting state under Article 39 are not included in the category, since they are expressly excluded from the category of 'unregistered interest' in the definition of that term in Article 1(mm). If a non-consensual interest is the subject of an Article 39 declaration, this only has the ef-

[34] That is, an interest arising by operation of law which is the subject of a declaration by the relevant contracting state under Article 40, which enables states to declare that such an interest is registrable as regards any category of object as if it were an international interest.

[35] If a contracting state makes a declaration under Article 50 that the Convention does not apply to internal transactions, a notice of a national interest created by an internal transaction can nonetheless be registered in the International Registry, in which case the priority rules in Article 29 apply to it.

[36] CTC, Article 1 (cc).

[37] Chapter V of the Convention sets out the requirements for registration.

[38] Article 39 enables contracting states to nominate non-consensual rights or interests which have priority over registered international interests without registration.

[39] CTC, Article 1(mm).

[40] See OCA paras 2.72 to 2.74; OCS paras 2.73 to 2.75; OCR paras 2.67 to 2.68.

[41] Under CTC, Article 40.

fect that it has priority over a registered international interest, although it is likely that, by necessary implication, it also has priority over an unregistered international interest as well.[42] The declaration does not seem to have any effect on the priority of the non-consensual interest over the interest of a buyer. Since Article 29(3)(b) does not apply to such an interest, the question of priority between it and a buyer would appear to be a matter for applicable law.

Third, we should consider the interest of a person who has bought the object prior to the sale to the buyer with whom we are concerned. This person has an ownership interest in the object, and it would seem extremely odd if a buyer took free from that interest under Article 29(3)(b), especially since that provision operates irrespective of knowledge. However, on its face, there is nothing to limit 'interest' in the term 'unregistered interest' to an interest less than ownership. This would mean that the rule in Article 29(3)(b) applied to a priority battle between two buyers.[43] It is therefore important to consider, as well, the meaning of 'power to dispose' which is discussed in the next section.

(iii) *Power to dispose*

It is argued in the Official Commentary that Article 29(3) only operates where the seller has the power to dispose of the object, since this is implicit in the text of the article,[44] and this argument is very persuasive. A power to dispose is wider than a right to dispose, since a person may be able to dispose of an object, even though they do not have a right to do so, because of the operation of an exception to the *nemo dat principle*.[45] A seller will have a right to dispose if it owns the object or if it is authorised to dispose of the object (by the operation of actual or apparent authority). It has the power to dispose if it falls within an applicable law exception to the *nemo dat* principle whereby a second buyer would take free of the first buyer's interest. If a seller has neither the right nor the power to dispose, Article 29(3) does not apply. In this situation the second buyer would not take free of the first buyer's interest and the first buyer's ownership interest would remain intact.

Thus, where the object has been sold to Y and the seller (X) then purports to sell to Z, the analysis is as follows. If the sale to Y is valid and ownership has passed, then, unless Y has authorised the sale to Z, X will not have had a right to dispose of the object to Z. However, it is possible an exception to the *nemo dat* principle applies under the applicable law, in which case Article 29(3)(b) would appear prima facie to apply, since there would be power to dispose. The question whether the term 'unregistered interest' in Article 29(3)(b) includes the absolute interest of a previous buyer would then have to be answered. In most cases, of course, the answer would make little practical difference, since under Article 29(3)(b) Z would take free of the interest of Y, and the same result would apply under the applicable law, under the relevant exception to the *nemo dat* principle (which is likely, anyway, only to apply if the buyer did not have actual knowledge of the first buyer's interest). Thus, whether the buyer takes free under Article 29(3)(b) or the applicable law would normally be theoretical. Despite this, it is argued that the better analysis is that the term 'unregistered interest' in Article 29(3)(b) does not include an outright sale, and therefore that Z takes free of Y's interest as a result of the application of the applicable law.

It is argued in the Official Commentary, that a power to dispose can arise under the Convention even if such a power does not exist under the applicable law. This argument is based on the operation of Article 29(1) and (2). An object could be the subject of a TRA or lease under which X is the con-

[42] See OCA para 2.214; OCS para 2.215; OCR para 2.206.

[43] Note that the position is different under the Aircraft Protocol and the Space Protocol, see section IV(B) below.

[44] See OCA para 4.187; OCS para 4.185; OCR para 4.186. cf Article V of the Aircraft Protocol where it is a requirement for a 'contract of sale' that the seller has the power to dispose of the object.

[45] OCA para 2.65 (OCS para 2.66; OCR para 2.60), discussing a 'power to dispose' in the context of an agreement creating an international interest where a 'power to dispose' is required under Article 7 of the Convention.

ditional buyer or the lessee, and Y the conditional seller or lessor. X is not the owner, and therefore has no right to dispose of the object. However, if Y does not register its interest, X can create a charge over the object in favour of Z which, if registered before that of Y, has priority over Y's interest. This is an exception to the *nemo dat* principle. X, therefore, must have had power to dispose of the object in order to create the interest in favour of Z, which has priority over that of Y, irrespective of whether such a power existed under the applicable law.

This argument also applies where Article 29(3)(b) operates as a *nemo dat* exception, that is, where, in the situation set out in the previous paragraph, X sells the object to Z rather than creating a charge in Z's favour. Since Y's interest is not registered, Z obtains title free from Y's interest. Again, X must have had power to dispose, irrespective of the position under the applicable law.

However, this argument does not apply where the first in time interest is that of a buyer, that is, if X sells to Y and then to Z. Here, Y cannot register its interest and therefore the 'Convention' power to dispose, which arises where a holder of an international interest does not register it, as described above, does not arise. Therefore, X will only have power to dispose if such a power arises under an exception to the *nemo dat* principle under the applicable law. It should be remembered, though, that the discussion in this section relates only to the Convention itself, and not to the position under the Aircraft and Space Protocols. It does, however, apply to the position under the Rail Protocol and the draft MAC Protocol.

The situation where X sells to Y and then grants an international interest to Z is now discussed. First, consider the position where X purports to grant a charge to Z. When a chargor grants a charge, it is a requirement under Article 7 of the Convention that he has 'power to dispose'. Unless Y authorises X to grant the charge or an exception to the *nemo dat* principle applies under the applicable law, X granted the charge to Z at a time when X had no power to dispose, and therefore Article 29 does not apply at all. This has the consequence that Y will not be affected by Z's purported interest, even if Z has attempted to register it.[46] As with successive sales, if an exception to the *nemo dat* principle does apply under the applicable law, X will have a power to dispose. Z will therefore win, either on the basis that Article 29(1) applies (although this does entail reading the term 'unregistered interest' to include the sale to Y) or on the basis that Article 29 does not apply, and so the applicable law fills the gap. The latter analysis is preferable, since it is more consistent with the conclusion reached above that the term 'unregistered interest' does not include a sale.[47]

The next situation to be discussed is where X sells to Y and then purports to enter into a registered conditional sale (a TRA) or a registered lease to Z. Article 7 requires that a conditional seller or lessor has power to dispose of the object for a TRA or leasing agreement to constitute a valid international interest. Thus, unless either Y authorised the TRA or lease to Z, or an exception to the *nemo dat* principle applies under the applicable law, Y's position will not be affected by X's (or Z's) rights under the TRA or lease. An exception to the *nemo dat* principle under the applicable law is likely to protect Z by preserving Z's right to possession of the object (if it has possession) and its right to obtain ownership of the object by performing the condition required under the contract. Again, it is argued here that this is the preferable analysis, rather than an analysis based on Article 29(4)(b), since this would entail reading the phrase 'an interest not so registered' to include the interest of a buyer. Furthermore, X cannot argue, in reliance on Article 29, that its registered interest prevails over that of Y, since this would be inconsistent with the rights it has already granted to Y.[48]

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[46] A purported registration of an international interest which is not validly constituted has no effect even as a prospective international interest, see OCA, OCS and OCR para 4.67.

[47] The position is, of course, different under the Aircraft Protocol or Space Protocol, see section IV.

[48] The reasoning underlying this is the same as that applied in OCA para 2.171 (OCS para 2.173; OCR para 2.163) in relation to the position where a debtor attempts to rely on the registration of its international interest to assert priority over its own creditor in a manner inconsistent with the rights it has granted its own creditor.

So far we have considered a person who buys from the debtor, that is, the person who has granted the competing international or other interest, or the conditional buyer under a title reservation agreement, or the lessee under a lease. However, one possible means of enforcement available to a chargee (that is, the holder of an international interest which is characterised by the applicable law as a security interest)[49] under Article 8 is to sell the object.[50] If the chargee selling the object by way of enforcement is the senior (or only) chargee, the buyer appears to take free of all international and other interests[51] (whether registered or not): while this is not expressly provided for in the Convention, it is implicit in the enforcement scheme whereby the interests subsequent to that of the enforcing creditor transfer to the proceeds, and the enforcing creditor must distribute those proceeds to the holders of those interests in accordance with the Convention priority rules.[52] Further, the selling creditor is obliged to give reasonable prior notice to all interested parties who have given notice to the chargee of their rights (usually this will be by registration in the International Registry).[53]

If a junior chargee wishes to enforce by sale of the object, it will have to give notice, inter alia, to any senior chargee, and must permit the senior chargee to enforce itself if it wishes.[54] If the senior chargee does not wish to enforce itself, there will usually be an agreement between it and the junior chargee as to whether the sale is subject to the rights of the senior chargee or whether (as is more likely) the sale will be free of the interest of the senior chargee and the junior chargee is to account to the senior chargee out of the proceeds of sale or otherwise pay off the senior chargee. However, if the junior chargee, in breach of Article 8(4),[55] does not notify the senior chargee, and goes ahead and sells, it appears (although there is no express provision in the Convention) that this sale will be subject to the interest of the senior chargee.[56] This is presumably a straight application of Article 29(3): without the consent of the senior chargee, the junior chargee cannot unilaterally release its interest. In either case, this affects the rights of the buyer, who will not obtain unencumbered title. It is therefore advisable for a buyer from a chargee to check the register before buying, to ensure that there are no chargees senior to the selling chargee whose rights may bind the buyer.

The same point arises in relation to a registrable non-consensual right or interest which ranks in priority to the enforcing chargee,[57] and to any non-registrable non-consensual rights or interests covered by a declaration under Article 39 by the relevant contracting state. In relation to the latter it will be more difficult for the buyer to discover these, although, since ex hypothesi such rights or interests will have priority under the general applicable law as well as under the Convention,[58] a buyer in the relevant contracting state is likely to be aware of them. A chargee who is junior to a title reservation seller or lessor will have no power to dispose of the object and therefore cannot sell it: for this reason (and the fact that there will be no surplus available on enforcement by the title reservation seller or

[49] The term 'chargee' is not defined per se in the Convention, but appears in the definition of a 'security agreement' in Article 1(ii) as the person to whom is given an interest to secure the performance of an obligation. A chargee is to be distinguished from a conditional seller or a lessor, whose rights of enforcement under the Convention are different, see Article 10.

[50] CTC, Article 8(b).

[51] Subject to the points made later in this sub-section.

[52] See CTC, Article 8(5) and (6); OCA and OCR paras 4.89 and 4.90; OCS paras 4.88 and 4.89.

[53] See OCA para 2.87(3); OCS para 2.88(3); OCR para 2.80(3).

[54] See OCA para 2.89; OCS para 2.90; OCR para 2.81.

[55] For discussion of possible remedies for this and other breaches, see OCA and OCS para 2.234 et seq; OCR para 2.226 et seq.

[56] See OCA and OCR para 4.90; OCS para 4.89.

[57] See OCA, OCS para 2.83; OCR para 2.76.

[58] This is a criterion for an interest in respect of which a state can make a declaration under Article 39, see Article 39(1)(a).

lessor)[59] no creditor would take a security interest over an object subject to a registered TRA or leasing agreement.

IV. The position under the Aircraft Protocol and the Space Protocol

The approach taken by the Aircraft Protocol (the full name of which is 'The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment') and the Space Protocol (the full name of which is 'The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets') is very different from that contained in the Convention itself. The Convention merely includes priority rules in relation to buyers: sale contracts and the transfer of ownership are governed not by the Convention but by the applicable law. The Convention does, however, include a provision enabling a Protocol to provide that the Convention shall apply to a sale or prospective sale of an object.[60] This was done in the Aircraft Protocol, so that outright sales (and prospective sales) are registrable in the International Registry, and the priority rules applicable to international interests apply to sales as well. The reasons for this approach appear to be that there is a well-developed market in used airframes and engines, which would benefit from the certainty provided from the registration of sales, and also because the registration of outright transfers of ownership of aircraft was a widespread practice in many jurisdictions.[61]

The Space Protocol follows the Aircraft Protocol in this and many other respects. The wording of the provisions dealing with buyers is identical to that of the Aircraft Protocol (even reproducing the 'mistakes')[62] except that the subject matter of the sale is a 'space asset' instead of an 'aircraft object'. As a result, the discussion below focuses on the provisions of the Aircraft Protocol, and the equivalent provisions of the Space Protocol and the equivalent comments in the Official Commentary on the Space Protocol are referenced in the footnotes.

Technically, the inclusion of sales of aircraft objects within the Convention is quite complex. First, what is meant by a contract of sale and a sale becomes a matter of Convention law, rather than the applicable law. Secondly, not all Convention provisions are suitable to apply to sales, and so it is necessary to make clear which apply and which do not. Thirdly, the priority position is changed. Each of these issues will be examined in turn.

A. The definition of 'sale' and 'contract of sale'.

The definitions of 'contract of sale' and 'sale' in Article 1 of the Convention do, of course, apply to aircraft objects, and, thus, most of the discussion in the previous paragraphs applies here. However, since a sale is treated like an international interest under the Aircraft Protocol, it, and a contract of sale, are *sui generis* Convention concepts governed by the Convention to the extent that it is applicable. Some confusion is caused by the way in which the Aircraft Protocol uses the term 'contract of sale'. Article III sets out which terms replace those in the Convention provisions.[63] The equivalents are helpfully set out in paragraph 5.21 of the Official Commentary[64] and are very important to bear in mind, but their use is not even consistent within the Aircraft Protocol itself. A contract of sale is equated to an agreement creating or providing for an international interest, and a sale is equated to an international interest (and a prospective sale is equated to a prospective international interest).

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59 See OCA and OCR para 4.102; OCS para 4.101.
60 CTC, Article 41.
61 See, eg, UNIDROIT, *Study LXXII - Doc. 16* (1995) 8-9.
62 With one exception, see section IV(C) below.
63 Space Protocol, Article IV.
64 OCS para 5.22.

Following this logic, Article V(1) of the Aircraft Protocol[65] sets out the requirements for a 'contract of sale', which are parallel to the requirements for an agreement creating or providing for an international interest in Article 7 of the Convention. It is pointed out in the Official Commentary that '[t]his Article is confined to contracts of sale which do not contain an express reservation of title, as opposed to title reservation agreements'.[66] This is not a problem, however, given that the requirements of Article V(1) mirror those of Article 7(a) to (c) of the Convention. The two articles dovetail, in that where an agreement for sale contains provisions making the passing of ownership subject to conditions, the requirements of Article 7 apply, and where the agreement contains no such provisions, the requirements of Article V(1) apply.

The requirements of Article V(1) are clearly set out and reasonably easily understood. As with Article 7 of the Convention, contracting states must not add to these requirements in relation to the creation of an international interest (or Convention 'sale'),[67] although, of course, there can be additional requirements for the creation of a national law interest or a national law sale. In the same way that an agreement for an international interest is likely also to create a national law interest,[68] a contract of sale, presumably, can also have a parallel effect under national law, but this will depend on the applicable law relating to sales. Article V(1) requires that a contract of sale be in writing, relate to an aircraft of which the seller has power to dispose and enable the aircraft object to be identified in conformity with the Aircraft Protocol.[69] The second requirement, that the seller has power to dispose, has already been discussed.[70] The only difference here would seem to be in relation to the situations where a seller would have such a power because of the operation of an exception to the *nemo dat* principle. Under the Convention, such an exception would have had to be under the applicable law. Under the Aircraft Protocol, the priority rules themselves provide an exception in that a seller who has sold to a buyer who does not register its interest has the power to dispose of the aircraft object to a second buyer who will obtain priority over the first buyer if it registers first.[71] As a matter of practice, this will usually, if not inevitably, be where the seller retains possession of the aircraft object after the first sale, although it is not a requirement of the Convention or the Aircraft Protocol that the seller be in possession.

Article V(2) is much more difficult. It provides that a contract of sale transfers the interest of the seller in the aircraft object to the buyer 'in accordance with its terms'. Since 'contract of sale' does not include a TRA, the only agreements to which Article V(2) apply are where ownership transfers at the time of the contract of sale, or at a later date as a result of a requirement of applicable law, rather than by the fulfilment of a condition or conditions set out in the agreement. The drafting of Article V(2) is therefore, at best, odd, and potentially very confusing. If there are express terms governing the transfer of ownership, then the agreement is not a contract of sale, but a TRA. It is only when the conditions as to transfer are fulfilled that a contract of sale comes into existence, simultaneously to the sale actually taking place.[72] Article V(2) must, therefore, be read as saying 'if there are no express terms as to the transfer of ownership, ownership is transferred at the time of the contract or later if so required by the applicable law; if there are express conditions in the

65 Art V of the Space Protocol.

66 OCA para 5.30; OCS para 5.27.

67 OCA and OCS para 4.67.

68 OCA para 2.72; OCS para 2.73; OCA and OCS para 4.68.

69 Aircraft Protocol, Article VII and Space Protocol, Article VII prescribe the elements required to satisfy the requirements of identifiability.

70 See section III(B) above.

71 See section IV(C) below.

72 OCA, OCS and OCR para 4.39. To fulfil the writing requirement of Article V(1), this contract of sale must be taken to arise from the original agreement for sale (formally a TRA) which will, ex hypothesi, be in writing.

agreement for sale which have to be fulfilled before ownership is transferred, ownership is transferred according to the contract of sale which arises once those conditions are met'. As mentioned above, little will turn on this in practice, since the time of transfer of ownership will always be clear (providing that the wording of the agreement or the applicable law is clear): it is just the wording of Article V(2) which is odd.

Yet more confusion is caused by Article V(3) which refers to registration of a contract of sale, which is not possible.[73] Fortunately, the Official Commentary points out this drafting error: the reference should be to registration of a sale and not a contract of sale.[74] As discussed below, a prospective buyer can protect its priority position by registering a prospective sale. This is the case whether the agreement for sale is (using Convention terminology) a 'contract of sale' or a TRA. In either case, the transaction becomes a sale at the point when ownership passes, and priority will date from the time of registration of the prospective sale.

Fortunately, the term 'contract of sale' is not used extensively in the Aircraft Protocol. In fact, the only substantive provision in which it appears is Article V (Article VIII(2) provides that the parties may choose the law of a contract of sale, which is uncontentious). Article III provides for certain provisions in the Convention to apply to 'contracts of sale'. While there are some problems with the drafting of Article III, there is no substantive problem, since if an agreement for sale is a TRA the Convention already applies, and if it is a 'contract of sale', the Aircraft Protocol applies by dint of the equivalence provisions. Thus it is to Article III that we now turn.

B. Application of the Convention provisions to sales

Article III of the Aircraft Protocol[75] sets out in detail which Convention provisions apply to a sale and to a contract of sale. Certain provisions are clearly not applicable to sales and are not included in Article III: in broad terms,[76] these are those provisions dealing with the definition of, and requirements for, an international interest and an agreement for an international interest,[77] the chapter setting out remedies available to the holder of an international interest[78] (enforcement of a contract of sale or of the interest of a buyer is not covered by the Convention and would be a matter for applicable law) and the chapter dealing with the assignment of associated rights[79] (as rights to payment are not secured by a sale). Importantly for this paper, Article 29(3) is also disapplied, and is replaced by the priority rules in Article XIV of the Aircraft Protocol.[80]

The equation of 'sale' and 'contracts of sale' to terms in the Convention has already been discussed.[81] Other equations are also confusing. A seller is equated to a debtor and a buyer to a creditor. This is, of course, because the person who wants to protect its interest is the buyer in the context of a sale, and so it is the buyer who will want to register. The person who could (wrongfully) effect a disposition which could adversely affect the priority position of a (potential) registrant is the debtor in the case of an international interest (he can create another interest which could, potentially, achieve

73 See section IV(B) below.
74 OCA para 5.30 and OCS para 5.27.
75 And Article III of the Space Protocol, in identical terms.
76 For a detailed discussion, see OCA para 5.20 and OCS para 5.21.
77 CTC, Articles 2 and 7: Article 7 is mirrored in Article V of the Aircraft Protocol and Article IV of the Space Protocol, see section IV(A) above.
78 CTC, Chapter III, and also Article 43 which relates to advance relief under Article 13.
79 CTC, Chapter IX.
80 See section IV(C) below.
81 See section IV(A) above.

priority over the first in time) and is the seller in the case of a sale (he could sell to a second buyer).[82] One particular effect of this equivalence is that the Convention applies if the seller is situated in a contracting state; the location of the buyer is immaterial.[83]

The most important provisions which apply specifically to sales are those relating to registration.[84] Thus Article 16(1)(a) of the Convention is read to provide that the International Registry shall be established for registration of sales and prospective sales, and Article 20(1) is read to provide that a sale or a prospective sale may be registered by either party with the consent in writing of the other. This is despite the fact that Article III of the Aircraft Protocol[85] states that Article 20(1) applies 'as regards registration of a *contract of* sale or a prospective sale'. The words in italics must be a mistake, since Article 20(1) itself refers to registration of an international interest (not an agreement for an international interest), for which the equivalent is a sale and not a contract of sale.[86]

Furthermore, it is the sale and not the contract of sale which is registrable. A potential buyer who wishes to protect himself by registration before the transfer of ownership in the aircraft object takes place can do so by registering a prospective sale. The provisions of the Convention relating to the registration of prospective international interests are also applied to prospective sales, so that Article 19(4) must be read to provide that, if a sale first registered as a prospective sale becomes a sale (by the transfer of ownership), the sale shall be treated as registered from the time of registration of the prospective sale.

The last part of Article 19(4) contains a proviso that, for the effect stated to operate, the registration had still to be current immediately before the international interest was constituted as provided by Article 7. It thus envisages that a registration could be time-limited and have expired before the constitution of the international interest.[87] A registration of a prospective sale can also be time-limited: it is effective unless discharged[88] or until the expiry of any period specified in the registration[89] (unlike that of a sale, which is effective indefinitely,[90] since the buyer obtains absolute title and there is no right of redemption or other residual interest in the seller which could be the reason for a time-limited registration[91]).

Thus, to 'translate' Article 19(4) for sales, for the registration of a prospective sale to take effect automatically as a registration of the sale from the time of initial registration, the registration of the prospective interest must be current at the time (presumably) when ownership is transferred and the sale takes place. Although this is not entirely spelt out, it is the analogous moment to the 'constitution' of the international interest, which takes place when the conditions of Article 7 are fulfilled. The only other possible 'moment' is the making of the contract of sale (which is also in some ways analogous to the making of the agreement according to the requirements in Article 7) but this would make no sense, since it is the sale which is registrable and not the contract of sale: it is the moment at which the registrable sale takes place that the registration of the prospective sale must be current.

82 See OCA para 5.22 and OCS para 5.23.

83 CTC, Article 3(1) and (2)

84 CTC, Article 16(1)(a).

85 And Article III of the Space Protocol.

86 See OCA para 5.20 and OCS para 5.21. The same mistake is made in Article V(3), see section IV(A) above.

87 See OCA para 4.145 and OCS para 4.143.

88 CTC, Article 25(2) (as applied to sales) provides that the buyer must procure the discharge of a registration of a prospective sale on receipt (at the address stated in the registration) of a written demand by the intended seller as long as this is before the intending buyer has given value or incurred a commitment to give value.

89 Aircraft Protocol and Space Protocol, Article V(3).

90 ibid.

91 See OCA para 5.32 and OCS para 5.29.

C. The priority position with regard to sales

Given that sales and prospective sales are registrable, the priority position is clearly very different from that under the Convention set out above.[92] Article III of the Aircraft Protocol expressly provides that Article 29(3) of the Convention does not apply, and that it is replaced by Article XIV(1) and (2) of the Aircraft Protocol.[93] Article XIV(1) is just a redrafted version of the basic rule in Article 29(1) of the Convention, namely that a registered interest (here, an outright interest under a sale) has priority over any subsequently registered interest and from any unregistered interest. Although it is not entirely spelt out, 'subsequently registered' must mean 'registered subsequently to the registration of the buyer's interest', as opposed to 'registered subsequently to the date on which the buyer acquired its interest'. This makes it the equivalent of Article 29(1) of the Convention, which clearly has this meaning, and also exemplifies the 'first to register wins' principle which is a clear principle of the Convention.[94]

(i) *Priority between buyer and registered interest*

The term 'registered interest' appears in the phrase 'subsequently registered interest' and is as discussed above,[95] except that here it also includes a sale, since Article III of the Aircraft Protocol provides that (inter alia) the general provisions of Article 1 of the Convention shall apply to 'contracts of sale and prospective sales' (the wording does not include the term 'sales' but this surely is also a mistake).[96] Thus, the first part of Article XIV(1) means that a buyer can search the register, and, if finding there are no entries in relation to the relevant aircraft object, can register the sale under which it bought the aircraft (or a prospective sale), knowing that its interest under the sale is unencumbered by any later registered sale, international interest, registrable non-consensual interest or any national interest specified in a notice of national interest. To the extent that any of these interests were actually created before the aircraft object was sold to the buyer, the first part of Article XIV (1) acts as an exception to the *nemo dat* principle. The buyer is entitled to rely on the register and need make no further enquiries. The situation where the buyer takes free from an earlier sale which was not registered until after the buyer had registered its sale (or prospective sale) is likely, in reality, only to arise where the seller remains in possession after the first sale[97] as the buyer would be unlikely to buy the aircraft object from a seller not in possession.

So long as a buyer registers the sale when it takes place, the first part of Article XIV(1) provides an easier route to the answer to the priority battle between a buyer and a holder of a subsequent international interest than reliance on an analysis of the requirement of 'power to dispose', as discussed in the previous section. Of course, it is still a requirement under Article 7 of the Convention that the chargor has power to dispose of the object, but if the sale is registered before the international interest it is easier to determine the order of priority than to consider the more complex question of whether the chargor had power to dispose. Unfortunately, where X sells to Y under a registered sale and then enters into a TRA or leasing agreement with Z, the question of power to dispose still has to be decided in order to determine Z's position, since Article XIV does not cover this case.

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92 See section III(B).

93 The same is true of Article III of the Space Protocol, which refers to Article XXIII(1) (in identical terms to the Aircraft Protocol) and Article XXIII (2) (which has been amended to deal with the problem mentioned below).

94 See OCA para 2.156 and OCS para 2.158; OCA para 4.184 and OCS para 4.182.

95 See section III(B).

96 The paraphrase of the relevant part of the article in the OCA refers to 'sales and prospective sales', see para 5.20 and see also para 5.21 where the mistake is pointed out (the equivalent in OCS is paras 5.21 and 5.22).

97 See above, section IV(A).

(ii) *Priority between buyer and 'unregistered interest'*

The term 'unregistered interest' is key to the meaning of the second part of Article XIV(1) (that a buyer under a registered sale takes free from any unregistered interest). The meaning of the term is discussed above,[98] though some of that discussion is not relevant here, since in the Aircraft Protocol and the Space Protocol it is clear that the unregistered interest of a buyer is included in the term 'unregistered interest'.[99] Article XIV(1) provides that the buyer takes free from an unregistered interest even if it has actual knowledge of it.[100] Although there is no equivalent mention of the irrelevance of actual knowledge of a pre-existing but subsequently registered 'registered interest' it seems clear that such knowledge cannot be relevant. The words 'unregistered interest' at the end of Article XIV(1) could, in any event, also cover a subsequently registered interest in that, ex hypothesi, such an interest would be an unregistered interest at the time that the buyer registered its interest.

(iii) *Article XIV(2) of the Aircraft Protocol and Article XXIII(2) of the Space Protocol*

Article XIV(2) of the Aircraft Protocol, unfortunately, does not fit particularly well with Article XIV(1), as pointed out in the Official Commentary.[101] It provides that a buyer of an aircraft object acquires its interest subject to an interest registered at the time of its acquisition. As mentioned earlier, under Article XIV(1) the moment in time determining priority is the time of registration, whereas under Article XIV(2) the relevant time seems to be the time of acquisition. To be consistent with the 'first to register wins' principle, however, the relevant time should be that of registration.

Let us take an example. A owns an aircraft object. It grants an international interest to B at point 1. It sells the object to C at point 2. B registers at point 3. C registers the sale at point 4. Article XIV(1) does not apply, since when C registered its interest, B's interest was not a 'subsequently registered interest' or an 'unregistered interest', so C does not take free from B's interest. On a literal reading of Article XIV(2), that article does not apply either, since B's interest was not registered at the time C acquired its object. Thus, under the wording of the Aircraft Protocol, C neither takes free from B's interest nor takes subject to it. There is therefore a gap, which would need to be filled in conformity with the general principles on which the Convention is based:[102] the general principle is that 'first to register wins' and so in this situation B wins as first to register.

Another gap in Article XIV(2) concerns the registration of a prospective interest. Let us take another example. A owns an aircraft object. It is in negotiations to sell the object to C, and C registers a prospective sale at point 1. A grants an international interest to B at point 2. B registers its interest at point 3. The sale whereby C acquires the object is completed at point 4. On a literal interpretation of Article XIV(2), C takes subject to B's registered interest, but this is entirely contrary to the 'first to register wins' principle, since, under Article 19(4) of the Convention, once the sale takes place, it is to be treated as registered from the time of registration of the prospective sale.[103] The Official Commentary is surely right in suggesting that Article XIV(2) should be interpreted as if it read 'A

98 See section III(B).

99 This is because Article III of the Aircraft Protocol and Space Protocol apply the general provisions of Article 1 of the CTC (including the definition of 'unregistered interest') to sales, see above section IV(B).

100 See above for discussion of the primacy of the register and the policy reasons why the Cape Town Convention rules apply irrespective of actual knowledge. See section III(B).

101 OCA, para 5.70. Article XXIII(2) of the Space Protocol is in a different form to deal with the problem discussed here, see OCS para 5.95.

102 CTC, Article 5(2).

103 See section IV(B) above.

buyer of an aircraft object under a registered sale acquires its interest subject to an interest previously registered',[104] and, indeed, this form of wording has been adopted in the Space Protocol.[105]

(iv) *The need for a priority contest*

The 'first to register wins' regime only, of course, applies where there is actually a priority contest. Where A sells an aircraft object to B, who then sells the object to C, who then sells it to D, there is no priority contest, since each sale is a separate transaction. Each buyer acquires its interests from its seller with that seller's consent, and so there are no conflicting claims. Thus, the order of registration of these sales (if at all) in the International Registry is irrelevant to the rights of the parties.[106] As pointed out in the Official Commentary, the register is not a title register.[107] While this might seem obvious, it is still a qualification to Article XIV(2) which, on its wording, might be thought to apply to the 'chain of sales' situation.

(v) *Article XVI of the Aircraft Protocol and Article XXV of the Space Protocol*

It should also be noted that Article XVI of the Aircraft Protocol[108] applies to buyers.[109] This is clear from the words in Article XVI(1)(a) ('in the capacity of buyer, Article XIV(1) of this Protocol') and in Article XVI(1)(b) ('in the capacity of buyer, Article XIV(2) of this Protocol'). As mentioned above, Article XIV only applies to the priority position of buyers.

Article XVI's primary focus, however, is on conditional buyers and lessees (to which the term 'debtor' in Article XVI relates) and relates to two situations. The first is a right to quiet possession as against the conditional seller or lessor, in the absence of default by the conditional buyer or lessee. Since the quiet possession is in accordance with the terms of the agreement and is subject to contrary agreement, this right does not seem to add much to the debtor's contractual position.

The second situation relates to the operation of Article 29(4). This article provides for a priority rule between the interest of a conditional buyer or lessee (in this paragraph, 'the debtor') and the holder of another interest created by the conditional seller (such as a charge over the object) or lessee (such as the interest of a (head) lessor following a sale and lease-back by the lessee).[110] The priority rule is first to register, but the relevant registrations are (a) the registration of the interest of the conditional seller or lessor and (b) the registration of the competing interest. Article XVI addresses the situation where the holder of the competing interest attempts to enforce against the object. Effectively the holder of the competing interest cannot disturb the quiet possession of the debtor if (a) there is no default by the debtor[111] and either (b) the interest of the conditional seller or lessor is registered before that of the holder of the competing interest (unless the debtor otherwise agrees) or (c) the interest of the holder of the competing interest is registered before that of the conditional seller or lessor AND the holder has agreed to the quiet possession of the debtor.

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104 OCA para 5.70 and OCS para 5.95.

105 Space Protocol, Article XXIII(2) and OCS para 5.95.

106 See OCA para 4.183 and OCS para 4.181.

107 OCA paras 3.81, 3.84 to 3.87 and OCS paras 3.107, 3.111 to 3.113.

108 Article XXV of the Space Protocol.

109 See OCA para 5.75; OCS para 5.98.

110 For detailed discussion see OCA paras 4.188 to 4.193, OCS paras 4.186 to 4.190.

111 Article XVI(1) refers to 'a default within the meaning of Article 11' of the Convention, which relates to a default by the debtor. The reference must be limited to a default by the debtor, since it is hard to see why the chargee or head lessor would wish to enforce unless there was a default by the conditional seller/chargor or lessor/sub-lessor (the original lessor becomes a sub-lessor following a sale and leaseback, see OCA paras 4.188 and 4.193 (OCS paras 4.186 to 4.190).

This translates into two situations relating to a buyer (instead of a debtor) as follows. First, the buyer has an entitlement to quiet possession and use of the object in accordance with the terms of the sale[112] as against the seller. This is hardly remarkable: after the sale the buyer has become the owner of the object and the seller would not be able to interfere with the buyer's quiet possession under the general law. However, since the concept of 'sale' is a *sui generis* concept under the Convention,[113] this might conceivably be worth stating. It is rather unclear what is meant, in relation to buyers, by the qualification in Art XVI(1) that it applies 'in the absence of default within the meaning of Article 11 of the Convention'. That article does not apply to sales,[114] and remedies for default in a contract of sale do not appear to be covered by the Convention as modified by the Aircraft and Space Protocols, and would therefore be governed by the applicable law. Typically, sales laws do not give a right to repossess for non-payment (or any other default of a buyer) once ownership has passed and the goods have been delivered. So it seems unlikely that the qualification of lack of default has much meaning in relation to a buyer.

Second, the buyer has a right of quiet possession against the holder of any interest from which the buyer takes free under Article XIV(1)[115] (except to the extent of contrary agreement by the buyer), and also against the holder of any interest to which the buyer takes subject to under Article XIV(2),[116] but only to the extent that that holder has agreed. Such a holder would have an international interest to 'secure'[117] an obligation owed by the seller of the object (who in that context would be a debtor). The holder of such an interest might wish to enforce it against the object in the hands of the buyer if the debtor defaulted in the obligation owed to the holder: in the absence of such a default, the holder would have no possible right to disturb the possession of the buyer in any event. Therefore, it would seem that the qualification to the buyer's right to quiet possession of 'in the absence of default' cannot have any meaning in this situation either. It cannot refer to the buyer's default (for the reasons given in the previous paragraph) nor can it refer to the default of the debtor, or the provision would have no practical effect or meaning.

The application of Article XVI to buyers in the Aircraft and Space Protocols, while clear on the face of the text, therefore seems odd, and potentially confusing. It is, however, unlikely to cause major problems so long as it is realised that it adds little, if anything, to the rights a buyer would have anyway under its contract and its proprietary status.

D. The position of a buyer under a sale by way of enforcement.

The reasoning in section III applies here as well, with one qualification. Article 13 of the Convention provides for court-granted advance relief pending final determination to be available to a creditor who can adduce evidence of default to the extent that the debtor has agreed. Article 13 itself lists a number of possible orders that can be made, but they do not include an order for sale. However, under the Aircraft and Space Protocols, the list is extended to include the possibility of an order for

[112] The Article uses the word 'agreement' which is suitable for a security agreement, a title reservation agreement or leasing agreement, but the equivalent here appears to be the sale (and not the contract of sale) although the sale will be on the terms set out in the contract of sale.

[113] As modified by the Aircraft Protocol and Space Protocol.

[114] It is in Chapter III of the Convention which is not included in the list of Convention provisions applicable to sales in Article III of the Aircraft Protocol and Article IV of the Space Protocol.

[115] That is, an interest registered after the interest of the buyer or an unregistered interest, see above.

[116] That is, an interest registered before that of the buyer, see above.

[117] This is used in a general sense to include the operation of a title reservation agreement or a leasing agreement.

sale, but only if the creditor and the debtor specifically agree.[118] Further, these Protocols provide expressly that the ownership (or other interest) passing on the sale is free from any other interest over which the creditor obtaining the advance relief has priority under Article 29 of the Convention. This, of course, means that the buyer takes subject to any interests which have priority over that of the creditor obtaining advance relief, and the cautionary comments set out in section III(C) apply here as well.

V. The position under the Rail Protocol

The position under the Rail Protocol (the full name of which is 'Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock') is different from both the Convention and the Aircraft and Space Protocols. In broad outline, the position is as follows. The rules regarding sales are those pertaining under the Convention and are as discussed above in section III, but provision is made for voluntary registration of sales in the International Registry. This is for information purposes only, and the effect on priority rules, if any, is a matter for the applicable law.

All the discussion in section III above therefore applies to the Rail Protocol, and this section will concentrate on the provisions in that Protocol that deviate from the Convention.

A. Registration of notice of sale

As explained above, the inclusion of sales as registrable interests in the Aircraft and Space Protocols brought sales within the scope of the Convention, so that a 'contract of sale' and a 'sale' were *sui generis* Convention concepts. In contrast, the Rail Protocol does not do this, and, while the definitions of 'contract of sale' and 'sale' discussed in section III above[119] do, of course, apply, the transaction itself is entirely governed by national law. Given the immense utility of the International Registry as a public source of information, however, it was considered worthwhile to enable a buyer, if it wished, to post a notice of a sale on the register. Not only could this be said to provide useful information for the market in resale of railway rolling stock,[120] but it would also generate extra fees for the International Registry by providing a service for which people were willing to pay (and if they were not, they would not use it).[121] The inclusion of notices of sale could, then, be seen as a 'win-win' situation.

The technical legal means by which notices of sale are made capable of being registered is by Article XVII of the Rail Protocol, which provides:

> The regulations shall authorise the registration in the International Registry of notices of sale of railway rolling stock. The provisions of this Chapter[122] and Chapter V of the Convention,[123] shall, in so far as relevant, apply to these registrations. However, any such

[118] Aircraft Protocol, Article X(3); Space Protocol, Article XX(3). These articles only apply where a contracting state has made a declaration under Article XXX(2) (Aircraft Protocol) and Article XLI(3) (Space Protocol) and only to the extent stated in that declaration (see Aircraft Protocol, Article X(1) and Space Protocol, Article XX(1)).

[119] See section III(A).

[120] This term is the Rail Protocol equivalent of 'aircraft objects' and 'space assets' in the Aircraft and Space Protocols, respectively.

[121] Although this was not a major motivation for the registration of notices of sale, see Rosen (n 14) 125-126..

[122] Chapter III of the Rail Protocol which contains the International Registry provisions.

[123] The Chapter headed 'Other matters relating to registration'.

> registration and any search made or certificate issued in respect of a notice of sale shall be for the purposes of information only and shall not affect the rights of any person, or have any other effect, under the Convention or this Protocol.

Thus, while the registration rules as to how to make a registration apply to the registration of a notice of sale, the notice is of no legal effect under the Convention or the Protocol. The clear effect of Article XVII is that any legal effect of a registered notice of sale must arise under the applicable law.

It should be noted that only notices of sale can be entered on the register and not notices of a prospective sale. The main purpose of registering a prospective international interest is to fix priority of that interest at the moment of that registration. The registration of a notice of prospective sale would not have this effect under the Convention or the Rail Protocol.[124] It also is very unlikely to have a legal effect under non-Convention law as it could not constitute notice of the buyer's interest (the sale might never have proceeded). It could, perhaps, be of some informational value to another potential buyer or secured creditor, in that they would know that they might need to get into contact with the prospective buyer to clarify the position, and also it might indicate that the seller had not been entirely truthful with the potential buyer or secured creditor by not disclosing the prospective sale, but both these 'benefits' are very speculative, and it is unlikely that they would justify the inclusion of notices of prospective sales. Furthermore, there would need to be a system for 'upgrading' the notice of prospective sale to a notice of sale for it to be of much real use, and such a system does not exist under the registration provisions of the Convention.[125]

B. The priority position with regard to sales

Article 29(3) of the Convention is not disapplied, and therefore a buyer of an item of railway rolling stock acquires it subject to an interest registered in the International Registry at the time of the acquisition and free from an unregistered interest even if it has actual knowledge of that interest. The analysis in section III above[126] concluded that an 'unregistered interest' included (a) any registrable interest,[127] (b) a national interest which is not registrable by notice and (c) non-consensual interests which have not been made registrable by a declaration of the relevant contracting state. Whether it includes the interest of a previous buyer is not entirely clear. The implied requirement that the seller has 'power to dispose' will render Article 29(3) inapplicable where there is a previous buyer unless the sale was authorised[128] by the previous buyer or where an exception to the *nemo dat* principle applies under the applicable law. In that case, it was argued that the seller does have power to dispose and so Article 29(3) applies (that is, the buyer will take free of any unregistered interest including that of the previous buyer).

The registration of a notice of sale of an item of railway rolling stock, while not being of relevance under Convention law, could be relevant to whether an exception to the *nemo dat* principle applied under applicable law. If notice of sale no. 1 is registered, then a buyer under sale no. 2 could have either actual notice (if it had searched the International Registry) or constructive notice (if it had not searched) of sale no. 1. Whether it has constructive notice would depend on the applicable law,

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[124] Contrast its effect under the Aircraft Protocol and the Space Protocol discussed in section IV(B) above.

[125] Note, though, the argument made by Howard Rosen, which suggests that a similar function to a notice of prospective sale could be served by registration of a TRA, which would be overtaken by the registration of a notice of sale once property had passed. See Rosen (n 14) 132.

[126] See section III(B).

[127] Ie an international interest or a 'registrable non-consensual right or interest' as defined in CTC, Article 1(dd) or a national interest of which a notice could be registered.

[128] This includes actual or apparent authority.

which would, in its turn, usually depend on whether the second buyer would be expected to search the International Registry. Many laws make the application of an exception to the *nemo dat* principle depend on whether the second buyer has notice or not of the first sale (although there may be other criteria as well, such as whether the seller was in possession of the item at the time of the sale no 2).[129] A second buyer with notice usually will not take free of the interest of the first buyer.

Therefore, the registration of a notice of sale no. 1 could determine whether the seller has 'power to dispose' of the item under sale no. 2. If the debtor does have 'power to dispose' then, on the analysis above, Article 29(3) applies and the buyer will take free of the interest of buyer no. 1 'irrespective of any actual knowledge of that interest' (although in the present situation the words in inverted commas would be irrelevant).

Although the registration of a notice of sale could, therefore, have priority consequences, its importance is more practical than legal.[130] Given the high value of items of railway rolling stock, anyone buying such an item is likely to make enquiries before purchase. Such enquiries could include making enquiries of the seller (so that if the seller gives false information, the sale would be voidable for misrepresentation), taking warranties from the seller that it has good title (to give contractual remedies if breached) and attempting to discover whether the seller is in possession of the item: if it is not, this is an indication that the seller does not own the item. However, all of these enquiries take time and money, and the last mentioned may be hard to do, given that railway rolling stock is very unlikely to be in the actual physical possession of the seller at the moment of the enquiry,[131] but may be being used anywhere in the world. Therefore, being able to search the International Registry to see whether there is a notice of sale registered is a quick and easy way to obtain at least some information. If there is a notice of sale, the potential buyer knows that he need waste no more resources on making enquiries. Of course, if there is no notice registered, the potential buyer cannot rely on this as evidence that the seller has good title, and will need to make further investigations.

Further, the ability to indicate to the world that he has bought the item is of considerable utility to a buyer.[132] It will be particularly useful in a situation where the item, for whatever reason, is left in the possession of the seller, but even when this is not the case, as long as registration of a notice is not too expensive, it can be a cost-effective way of knowing that there are unlikely to be competing claims made by other buyers.

So far we have considered the situation where there is a potential priority battle between two buyers. The effect of a registered notice of sale on a person taking an international interest in the item is substantially the same, in that, unless the seller was authorised to grant the international interest by the buyer, or an applicable law exception to the *nemo* dat principle applied, the seller would not have had 'power to dispose' of the item, and so Article 29 would not apply: if an applicable law nemo dat exception did apply, the seller would have 'power to dispose' with the result that Article 29 applied, and a registered international interest would have priority over the interest of the buyer (an unregistered interest) under Article 29(1). The existence of the registered notice, as before, could be relevant to whether such an exception applied. The applicable law rules as to when the granting of a security interest is an exception to the *nemo dat* principle might be different from those applying to successive sales. One particular difference could be that a person taking an international interest

[129] For an analysis of a number of laws on this point, for the purposes of the discussions relating to the MAC Protocol, see Annex VII to the Issues Paper prepared for the Fourth MAC Protocol Study Group in 2016 by the National Law Center in UNIDROIT, *Study 72K – SG4 – Doc. 2* (Issues Paper, 2016). Notice of a preceding interest was only irrelevant to priority in one of the seven jurisdictions examined (Colombia).

[130] See also the discussion in section VI(A) below.

[131] Although note the comment by Howard Rosen that sale and leasebacks are common in rail finance. See Rosen (n 14) 125..

[132] Note also the argument made by Howard Rosen that a buyer could also keep the registration of a previous TRA in place to give itself additional protection. See Rosen (n 14) 132-133.

is likely to be expected to search the International Registry, so as to give rise to constructive notice of the notice of sale under the applicable law, and thus render the existence of a *nemo dat* exception unlikely. As a matter of practice, a creditor would not take an international interest if it searched the register and saw the registered notice of sale, since it would know that the grantor of that interest did not have the right to dispose. Again, the existence of the notice is likely to have saved the creditor taking the international interest the costs of investigation, even though it might well have discovered the previous sale by other means eventually.

C. The position of a buyer under a sale by way of enforcement

The position under the Rail Protocol[133] is exactly the same as under the Convention[134] as modified by the Aircraft and Space Protocols in relation to Article 13 of the Convention.[135]

VI. The position under the draft MAC Protocol

A. Registration of notice of sale

When it was decided to draft a Protocol covering MAC equipment, in theory there were four options available to the UNIDROIT study group ('Study Group') in relation to the treatment of buyers: (a) follow the approach in the Aircraft and Space Protocols, (b) follow the approach in the Rail Protocol, (c) follow the approach in the Convention, unqualified by either (a) or (b), and (d) qualify the Convention approach in some other way. At the first meeting of the Study Group in December 2014, a distinction was not made between (c) and (d): the discussion appeared to proceed on the basis that not to follow (a) or (b) was a new, third, approach.[136] The Chair took the view that such an approach should be followed with caution. Option (a) appears to have been dismissed quite quickly, on the grounds that the special circumstances which applied in the aircraft and space industries (the very high value of the equipment and the practice of registering sales on a title register) did not apply in the MAC industries.[137] The main discussion in that meeting and subsequent meetings of the Study Group on this issue centred on whether the Rail Protocol approach should be adopted, or (presumably) the unqualified approach in the Convention.[138] A similar approach has been followed so far by both the meeting of Governmental Experts in March 2017[139] and the meeting in October 2017. Thus, an article in near identical terms to that of Article XVII of the Rail Protocol is included in the revised draft of the MAC Protocol.[140]

Three, rather separate, lines of argument have featured in the discussions on the inclusion of a system of notices of registration of sale in the MAC Protocol. The first hinges on the effect such notices would have on the priority of interests under national law. As a result, considerable research as to the national law position of a number of jurisdictions was carried out.[141] Two possible arguments seem

[133] Article VIII(3) and (4).
[134] Discussed at section III(C) above.
[135] Discussed at section IV(D) above.
[136] UNIDROIT, *Study 72K – SG1 – Doc. 5* (2015) para 52.
[137] ibid para 48.
[138] ibid paras 49 – 51 (first meeting); UNIDROIT, *Study 72K – SG2 – Doc. 6* (2015) paras 73 - 81 (second meeting); UNIDROIT, *Study 72K – SG3 – Doc. 5* (2015) paras 146 – 162 (third meeting); UNIDROIT, *Study 72K – SG4 – Doc. 5* (2016) paras 86 – 92 (fourth meeting).
[139] UNIDROIT, *Study 72K – CGE1 – Report* (2017) paras 89 – 92.
[140] Draft MAC Protocol in UNIDROIT, *Study 72K – CGE2 – Report* (2017), Appendix II.
[141] Annex VII to the Issues Paper prepared for the Fourth MAC Protocol Study Group in 2016 by the National Law Center – see UNIDROIT, *Study 72K – SG4 – Doc. 2* (2016).

to flow from the national law effect of registration of notices. The first is that, if registration of notices in the International Registry has no, or very little, effect on priorities under national laws (it ex hypothesi has no effect under Convention law)[142] then there is no point in permitting such registration, while if it does have an effect, then it is useful to include such registration.[143] The second is that, if the registration of notices does have an effect under national laws, it is not the purpose or function of the Convention and the MAC Protocol to assist domestic priority rules.[144] This line of discussion assumes that the purpose of registration is to determine priority conflicts (or, ex ante, for a registrant to preserve its priority against others).

The second line of argument is more pragmatic.[145] A buyer would wish to register a notice, not to preserve its priority per se, but to decrease the chance of an expensive and messy priority conflict with a second buyer (or, maybe, the holder of an international interest) since if the second buyer or secured creditor saw the notice, they would no longer wish to do business with the seller/debtor. This is because the second buyer/secured creditor would, to proceed with the transaction, have to make costly investigations and, probably, a priority agreement with the first buyer, which it would be unlikely to want to do. Further, the second buyer/secured creditor is likely to have asked the seller/debtor whether it had the right to sell or to grant the security interest. If the seller/debtor had replied in the affirmative and the second buyer/secured creditor then saw a registered notice of sale, it would be likely not to want to do business with the seller/debtor. Thus registration of a notice could benefit a buyer. It would also benefit a searcher (the second buyer/secured creditor) since if a search proved positive he would be able to pull out of the transaction at an early stage before incurring any significant costs.[146] It is not that the second buyer/secured creditor might not have been able to find out about the first buyer by other means, but those means are likely to have cost more than merely searching the International Registry. This line of argument, therefore, is one based on cost effectiveness of the system of registration of notices. It is further bolstered by the argument that whether the system is actually cost effective will be determined by the market which will only use it if it considers that it is beneficial and cost effective to do so. If the market chooses not to use it, no harm has been done.[147] There is one possible counterargument to this last point, which is that if the system exists then those taking an interest, particularly buyers, will feel constrained to search the register at the beginning of negotiations. This is not really a problem, since the effect of Article 29(3) is that potential buyers are likely to search anyway as they would take subject to registered international interests.[148]

The third line of argument is even more pragmatic. It is that permitting registration of notices of sale would increase the number of registrations and therefore the income of the International

[142] Although it could be relevant to whether the debtor has 'power to dispose', see section V(B) above.

[143] This appears to follow from the Study Group's desire to find out the effect of registration of notices on priority rules under national laws. Note, though, that it could then be said that registration should be made compulsory rather than voluntary, see UNIDROIT, *Study 72K – SG3 – Doc. 5* (2015) para 159.

[144] UNIDROIT, *Study 72K – SG1 – Doc. 5* (2015) para 51; UNIDROIT, *Study 72K – SG2 – Doc. 6* (2015) para 75.

[145] A version of this argument can be seen at UNIDROIT, *Study 72K – SG1 – Doc. 5* (2015) para 49; UNIDROIT, *Study 72K – SG2 – Doc. 6* (2015) para 76; UNIDROIT, *Study 72K – SG3 – Doc. 5* (2015) para 151.

[146] It could be said that the benefits could be even more if a buyer could register a notice in advance of the completion of the sale, UNIDROIT, *Study 72K – SG3 – Doc. 5* (2015) para 151. However, this would involve a deviation from the Rail Protocol which does not permit registration of a notice of a prospective sale, see section V(A) above, though note the discussion by Howard Rosen of the possible use of registration of a TRA for a similar purpose. See Rosen (n 14) 128. This discussion could, potentially, also apply to the MAC Protocol.

[147] Whether the market actually uses the system for registration of notices of sale in the International Rail Registry will be able to be determined soon once that Registry begins to operate, see UNIDROIT, *Study 72K – SG3 – Doc. 5* (2015) para 148.

[148] Though see below in relation to buyers of inventory from dealers.

Registry.[149] While pragmatic, this could have a beneficial effect on the operation of the International Registry and therefore further the purpose of the Convention and the MAC Protocol.

What has not been considered in great detail is the analysis of the position if an approach not used in any of the existing Protocols is followed in the MAC Protocol, so that the 'basic position' under the Convention applies. It is suggested that the analysis in section III of this paper would then apply, and the points made therein should be taken into consideration when deciding whether to follow the approach in the Rail Protocol or not.

B. The priority position with regard to sales

In general, the priority position with regard to sales under the draft MAC Protocol is the same as under the Rail Protocol, as discussed above. However, at the second meeting of Governmental Experts, a new provision was included with regard to inventory, that is, equipment held by a dealer for sale in the ordinary course of its business.[150] This provision had two aspects.

First, it was considered that buyers of inventory from a dealer should not be expected to search the register to discover whether the inventory was subject to any registered international interests in relation to which the dealer was the debtor. Such interests included a charge created by that dealer, and a TRA or leasing agreement under which the dealer was conditional buyer or lessee. Therefore, the operation of Articles 29(3)(a) and 29(4)(a) of the Convention is modified so that the buyer takes free from any such interests unless national law provides otherwise.[151] For example, national law could provide that a buyer took free of such an interest unless it knew that the sale to it was in breach of the terms of the charge, TRA or leasing agreement. Generally, of course, the charge, TRA or leasing agreement is likely to provide that the dealer is free to sell the inventory as most inventory financiers are eager for the financed dealer to make valid sales, since it is through the proceeds of those sales that the financier is going to be repaid, and so permission to sell in the ordinary course of business is inherent in inventory financing agreements. In this situation there would be no breach and so national law is likely to give the same answer as the proposed modification. The provision only relates to international interests in relation to which the dealer is the debtor. The buyer would still take subject to any registered international interests created by another person, for example, the person from whom the dealer obtained the equipment.

Second, states were given the option to make a declaration that any interest in relation to which a dealer was the debtor was not an international interest.[152] This was to meet the concern of inventory financiers[153] that, first, registering an international interest in every item of inventory and then releasing it when that item was sold was too onerous and the burden of this would outweigh the benefits of the MAC Protocol, and, second, that if an inventory financier chose not to take on this burden, a second financier might take an interest in the inventory, or certain items of that inventory, and register it in the International Registry, thus gaining priority over the first financier. Concern as to this possibility would lead inventory financiers to make registrations, despite the fact that this was uneconomic. If, however, no international interest could subsist in inventory, the problem would not arise. The provision was limited to where the dealer was the debtor, so that a registered international interest created by another person, such as a previous or subsequent owner, would retain its priority over any inventory financier under Article 29(1) of the Convention.

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149 UNIDROIT, *Study 72K – SG1 – Doc. 5* (2015) para 49; UNIDROIT, *Study 72K – SG2 – Doc. 6* (2015) para 73; UNIDROIT, *Study 72K – SG4 – Doc. 5* (2016) para 84.

150 UNIDROIT, *Study 72K – CGE2 – Report* (2017), Appendix II, Article XI bis.

151 ibid paras 1-2.

152 ibid paras 3-5.

153 This concern was made known to the Committee of Governmental Experts by the MAC Working Group.

Where such a declaration was made, however, there was a danger that a buyer from a dealer could be put into a better position than it would have been before the Protocol applied, since under Article 29(3)(b) it would take free from any unregistered interest (including that of the dealer's creditor) regardless of knowledge, whereas under the national law of many states, a buyer in the ordinary course of business would only take free from such an interest if it was without notice that the sale was in breach of the security agreement. To meet this concern, an additional provision was added modifying the operation of Articles 29(3)(b) and 29(4)(b) of the Convention and having the effect that, as between the buyer and an interest as to which the dealer was the debtor, priority is governed by the applicable law.[154] Of course, as discussed above, in many situations, the dealer's creditor will have given the dealer permission to sell the item of inventory, and so the buyer will take free whether it has knowledge of that creditor's interest or not. Thus, the provision just mentioned will only have any practical effect where (a) the dealer's ability to sell the item is limited, (b) the sale is outside the limited permission, (c) the buyer knows of (a) and (b) and (d) the applicable law, in this situation, provides that the buyer takes subject to the interest of the creditor.

Under the draft MAC Protocol, the position in relation to a buyer under a sale by way of enforcement is the same as in the other Protocols.[155]

VII. Conclusion

This paper has examined the position of buyers under the Convention and its Protocols. The differences between the approaches in the Aircraft and Space Protocols, and the Rail Protocol are reasonably easily explained by the differences in the markets, and also in the treatment of sales of those types of equipment under national law. Thus, this paper has sought to do two things. First, it has analysed the provisions in considerable detail, pointing out where there appear to be gaps, or uncertainties and suggesting solutions (many of which have already been suggested in the magisterial Official Commentaries to which extensive reference is made). Secondly, it has attempted to set out the alternatives which could be followed in the MAC Protocol, and to indicate some of the policy arguments which will apply to that choice, as well as considering the current position of buyers under that Protocol.

[154] UNIDROIT, *Study 72K – CGE2 – Report* (2017), Appendix II, Article XI bis paras 6-7.

[155] The modification of Article 13 of the Convention to include sales is in UNIDROIT, *Study 72K – CGE2 – Report* (2017), Appendix II, Article IX(3) and (4).