# PART 3

## A REVIEW OF THE SPACE PROTOCOL

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Introduction

3.1. As its Preamble recites, the Space Protocol is designed to supplement and modify the Convention to meet the particular demand for and utility of space assets and the need to finance their acquisition and use. Space and the launching of satellites were originally the almost exclusive preserve of governments, who continue to play an important role. But this changed many decades ago with the coming of age of the private space industry, which finances the construction and launch of satellites for a variety of purposes, including navigation, telecommunications, observation and weather monitoring, as well as military use. Moreover, in recent years governments have sometimes found it more economical to have their payloads hosted by a commercial satellite and shared with the commercial payload. However, the use of space is not confined to satellites, which orbit round the Earth, but extends to vehicles that reach orbital altitude without going into orbit, such as the space shuttle, and sub-orbital spaceships which have been developed to carry passengers briefly to outer space before returning to Earth without going into orbit. Transfer of a payload to Earth orbit and back to Earth may also be envisaged. Spaceships are governed by the Aircraft Protocol, if applicable, not the Space Protocol (see paragraph 3.22).

3.2. The primary objective of the Convention and Protocol is to stimulate much-needed investment in such systems through additional private financing at lower cost. The two instruments seek to achieve this objective by means of an international legal regime that provides secured lenders, conditional sellers and lessors with an autonomous international interest in space assets protected by registration in an International Registry, coupled with speedy and effective default remedies, both within and outside the debtor’s insolvency. But the Protocol recognises the need to balance creditors’ remedies against the interest of States in maintaining an essential public service after the debtor’s default. This it seeks to do by a carefully crafted public service limitation restricting the exercise by a creditor of a default remedy that would make the space asset unavailable for the provision of a public service while at the same time providing necessary safeguards for creditors. In other ways too the Space Protocol, in building on the principle of party autonomy and commercial predictability, preserves the autonomy of Contracting States over the grant of licences and regulations concerning the export of controlled goods and national security and gives Contracting States the right to weigh other considerations against economic benefits and to
exclude or modify certain provisions of the Protocol felt to be incompatible with the State’s legal culture and tradition. Adoption of the Cape Town Convention and Space Protocol may also enable creditor banks to reduce the amount of capital required to be maintained under Basel III because of the enhanced value of collateral in the form of assignments by debtors to their creditors of receivables derived from space assets in which the creditors have taken and registered an international interest. A sound international legal regime which gives reassurance to financiers and lessors by reducing risk will enable operators to access capital markets previously denied to them or to obtain their funds at lower rates.

**Distinctive features of space financing**

3.3. One of the special aspects of dealings with space assets is not only their cross-border character while on Earth (they may be produced in one country and transferred to the launch pad in a different country) but the fact that once in space they do not fall within the physical borders of any jurisdiction, so that dealings in them are not susceptible to the normal conflicts rule applying the law of an object’s physical location. The Convention and Space Protocol will greatly reduce the size of the problem in Contracting States by providing uniform substantive law rules which, within their scope, remove the need to have recourse to the conflict of laws altogether. But as we have seen there remain sundry issues left to be determined by the applicable law. Reference has also been made (paragraph 2.9(2)) to the treaty law on outer space, which is unaffected by the Convention and Space Protocol and continues to govern the rights and responsibilities of States, whereas the Convention and Space Protocol are concerned with the rights of private parties to transactions involving space assets. However, as regards contractual issues Article VIII allows the parties to choose the applicable law and where they do not there are reasonably well settled principles for determining the applicable law, while as regards property rights there is a clear link between the space treaties and the concept of State control which underpins the *lex situs* rule and leads to the application of the *lex registri* as regards registered space assets (see paragraph 2.61).

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1 Basel III is a global regulatory framework for more resilient banks and banking systems, revised version June 2011, replacing the previous Basel Accords on capital adequacy.
3.4. Because of the impracticability of repossessing a space asset creditors attach much greater value to the revenue stream accruing to the debtor from third parties to whom the debtor grants lease capacity, licences, and the like, which it can assign to the creditor as additional collateral. In other words, space financing is regarded as more in the nature of project finance than asset-based finance. For this reason the Space Protocol contains elaborate provisions, not to be found in the earlier Protocols, by which the debtor can assign its claims against third parties (“debtor’s rights”) to the creditor and have such an assignment recorded against the registration of the creditor’s international interest so as to preserve the priority of the assignment. The creditor in turn can reassign debtor’s rights and the reassignee, if also taking a transfer of the international interest, can have the reassignment recorded against the international interest.

3.5. The Convention prescribes three forms of international interest: a security interest, a right vested in a person as conditional seller under a title reservation agreement; and a right vested in a person as lessor under a leasing agreement. Interests in and rights over space assets tend to be more complex than is the case for aircraft objects and railway rolling stock. While parts of a satellite, such as transponders, are susceptible to separate ownership they also involve the use of components shared with other transponder owners; indeed, a transponder is a system rather than a physically distinct object (see paragraph 3.21). The operator may grant a lease of a satellite or of a set of transponders, or a lessee may grant a sub-lease, thus becoming in each case the holder of a registrable international interest, but it is more common to grant lease capacity (or indefeasible right of use) giving the lessee a partial or non-exclusive right of access to a given channel or bandwidth capacity but not possession or control of the satellite or transponders. So although the grantor of the capacity lease agreement may be described in the agreement as the lessor and the party to whom capacity is granted as the lessee the agreement has purely contractual effects. It therefore does not fall within the definition of leasing agreement in Article 1(q) of the Convention and the “lessor” is not the holder of an international interest or any other right registrable under the Convention. The sharing of transponder capacity under so-called “condosat” agreements has become increasingly common. A commercial satellite may carry not only the operator’s payload but also a secondary, government payload. Such hosted payloads may give rise to separately registrable interests.
Sources of law

3.6. The Convention and Space Protocol (which by Article II(2) are together to be known as the Convention on International Interests in Mobile Equipment as applied to space assets) will be supplemented, as regards registration of international interests in space assets, by regulations and registry procedures made by the Supervisory Authority under Article 17(2)(d) of the Convention and Articles XXIX-XXXII of the Protocol. Such regulations may be amended by the Supervisory Authority from time to time. The regulations will not be confined to purely procedural matters relating to registration but will govern, among other things, access to the International Registry and suspension of Registry operations for maintenance or to deal with technical or security problems. The procedures will deal with administrative items required by the Regulations. As to the Supervisory Authority, see paragraphs 2.116, 3.94.

Entry into force

3.7. Apart from a few provisions of the Convention not relating to objects and therefore coming into force on 16 November 2001 (see paragraph 2.244) all the provisions of the Convention and Space Protocol will enter into force as between the States which have deposited instruments referred to in subparagraph (a) on the later of:

(a) the first day of the month following the expiration of three months after deposit of the tenth instrument of ratification, etc.; and

(b) the date of the deposit by the Supervisory Authority with the Depositary of a certificate confirming that the International Registry is fully operational (Article XXXVIII).

For States acceding to the Space Protocol after its entry into force the Protocol enters into force on the first day of the month following the later of:

(a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and

(b) the date of deposit of the certificate referred to above (Article XXXVIII(2)).
Paragraph (b) has no counterpart in the Aircraft Protocol but was taken from the Luxembourg Protocol and is designed avoid the possibility that the Convention and Space Protocol would come into force as regards space assets before the International Registry was up and running. This would, of course, be a disaster, and one that by good fortune was avoided in the case of aircraft objects because of a political impediment, since removed, to adoption of the Convention and Aircraft Protocol by the European Community.

Limb (b) of Article XXXVIII(2) is otiose, because the condition it embodies will necessarily have been satisfied already under Article XXXVIII(1)(b) in order for the Protocol to have come into force as regards the first ten States. A State may not become a Party to the Protocol unless it is or becomes a Party to the Convention (Article XXXVI(5)). But there is nothing to preclude a State from acceding to the Convention without acceding to the Protocol. See paragraph 2.14.

**Structure of the Protocol**

3.8. The Protocol prescribes a set of supplementary definitions specifically referable to space assets (Article I). Of particular significance are the definitions of “space”, “space asset”, which limits the sphere of application of the Protocol, “debtor’ rights” (claims of the debtor against third parties), “rights assignment” (the assignment of debtor’s rights to the creditor) and “rights reassignment” (the onward assignment of debtor’s rights by the creditor to the assignee, either contractually or automatically on transfer of the international interest). The Protocol modifies the Convention provisions in various respects and contains numerous substantive provisions supplementing the Convention in order to meet the specific needs of the space industry. These deal with such matters as the identification of space assets (Articles VII and XXX), choice of law (Article VIII), additional provisions relating to default remedies outside insolvency (Articles XVII-XX and XXVII), particular remedies on insolvency (Article XXI), the debtor’s right of quiet possession (Article XXV), the Supervisory Authority and the Registrar, the International Registry and supplementary rules governing registration (Articles XXVIII-XXXII), jurisdiction and waivers of sovereign immunity (Article XXXIII). There is also a detailed Article making it clear that the Protocol does not affect the power of Contracting States to control the grant or transfer of licences, the
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export of controlled goods and matters relating to national security (Article XXVI).

Definitions

3.9. The definitions given in the Convention apply equally to the Space Protocol except where the context otherwise requires (Article I(1)). However, as stated above the Protocol also contains its own list of definitions relevant to space assets and needs to be read in the light of these.

Influence of the earlier Protocols

3.10. At an early stage, as with the Luxembourg Protocol, the decision was taken to follow the text of the Aircraft Protocol as far as possible and to make deviations and additions only because of factors particular to the needs and practices of the space industry. For this reason the drafters resisted the temptation to make what might be thought as improvements on the text of the Aircraft Protocol, in order to maintain consistency and to avoid any implication that a change in wording was intended to alter the substance. In certain cases, however, it was thought desirable to make changes not attributable to the above factors. Some of these changes, taken from the Luxembourg Protocol, are designed merely to make explicit what was implicit in the Convention or Aircraft Protocol or to correct an inconsistency. Among these are a slight difference in the text of the Space Protocol relating to representative capacities (Article VI) and a correction of the priority rules relating to buyers of space assets (Article XXIII). These modifications, which follow those in the Luxembourg Protocol, are not intended to change the substance of the provision in question, merely to clarify its meaning or remedy error. Other modifications are intentional changes of substance in order to produce what was seen to be a more practical rule or to introduce an option not available under one of the earlier Protocols, remove an option given under it or insert an entirely new kind of provision. Among such changes are the following:

(1) A provision extending the Convention and Protocol to outright sales (Article IV), as in the Aircraft Protocol but not the Luxembourg Protocol.

(2) As in the Luxembourg Protocol, a differentiation in the identification requirements for the constitution of an international interest (Article VII) and
the registration of an international interest (XXX) by removing the specificity required for the former and allowing an agreement creating or providing for an international interest to identify space assets by item, by type, or by a statement that the agreement covers all present and future space assets or all such assets except for specified items or types. This flexibility as regards the constitution of an international interest avoids the need for a new security agreement each time the debtor acquires an additional space asset and enables security to be given over satellite constellations rather than individual satellites. The specificity required for registration in order to enable third parties to make an asset search is not needed as regards the relationship between the parties to an agreement. Article VII is even broad enough to cover floating security such as the English floating charge.

(3) Making Article VIII of the Space Protocol (freedom of the parties to choose the applicable law) apply in the absence of an opt-out declaration by a Contracting State, in contrast to the corresponding Article VIII of the Aircraft Protocol, which applies only if a Contracting State makes an opt-in declaration.

(4) Unlike the earlier Protocols, the inclusion in the Space Protocol of detailed provisions by which the creditor, to reinforce its security, can take an assignment of “debtor’s rights” — that is, rights to payment or other performance due or to become due to the debtor by any person with respect to a space asset — and can record these against the registration of its international interest, thereby securing priority over subsequently recorded assignments and unrecorded assignments. This is of particular importance, given that the scope for remedies against space assets themselves is somewhat limited by practical considerations. Reassignments by the creditor are also covered.

(5) The substitution of calendar days for working days in the provisions relating to notice of a proposed sale or lease by a chargee (Article XVII(2)) and relief pending final determination (hereafter referred to as “advance relief”) and remedies on insolvency (Articles XX(2)), as in the Luxembourg Protocol. This is because what constitutes a working day varies from country to country and even from one locality to another within a given country, making it difficult for a party not in the country or locality concerned to know when a designated time period will expire.

(6) The omission of the alternative connecting factor contained in the Aircraft Protocol, namely the nationality registration of the relevant aircraft at the date of the security agreement.
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(7) The omission of the remedies of de-registration and export, which are particular to aircraft and find no place in the Space Protocol.

(8) A provision attributing a notional location on Earth to a space asset when in space for the purposes of the rules on jurisdiction and insolvency assistance (see paragraph 3.151) and the definition of internal transaction (see paragraph 3.158).

(9) A provision limiting a creditor’s enforcement of an international interest in a space asset physically linked to another space asset in which a different party has an interest so as to impair or interfere with the operation of the other space asset.

(10) Rules limiting the exercise of remedies in relation to an asset providing public services, which have their counterpart in the Luxembourg Protocol but the provisions of which are significantly different.

(11) Separate provisions allowing a Contracting State which has made the requisite declaration to apply rules of its law restricting the exercise of remedies in relation to controlled goods, technology, data or services, which could, for example, be imposed in the interests of national security.

(12) The disapplication of Article 60 of the Convention so as to preclude the ability of a Contracting State to make a declaration extending the Convention and Protocol to pre-existing rights and interests (Article XL). However, as regards the ability of a creditor who has registered an international interest to enforce remedies against a physically linked asset in which another creditor has acquired an interest equivalent to an international interest or a buyer has acquired rights under a sale, which depends on the time of registration of their respective interests (see paragraph 3.77), registration made within three years of the effective date of the Convention is deemed to have been effected at the time of the constitution of the international interest (Article XVII(3)).

Assets to which the Convention and Space Protocol apply

3.11. The Convention and Space Protocol apply in relation to space assets, rights assignments (that is, the assignment of debtor’s rights by the debtor to the creditor) and rights reassignments (i.e. by the creditor or a subsequent assignee) as provided by the terms of the Protocol (Article II(1)). So in contrast
to the two previous Protocols the Space Protocol is not confined to physical assets and associated rights. However, as will be seen (paragraphs 3.46 et seq.), assignments and reassignments of debtor’s rights, like assignments of associated rights, are not international interests and cannot be protected by independent registration, only by recording against the registration of an international interest. This linkage between the protection of an assignment or reassignment in the International Registry for priority purposes and the registration of the international interest in a space asset from which the assigned rights are derived is of key importance and, as with the assignment of associated rights, is designed to ensure that even in the context of what is essentially project finance the International Registry does not move from its basic function as a registry of interests in physical assets. To allow independent registration of assignments and reassignments of debtor’s rights would necessitate a move from an asset-based registration system, which is necessarily confined to uniquely identifiable assets, to a debtor-based registration, thus undermining a central pillar of the Convention system. Assignments of receivables are not capable of unique identification, and the Convention is not a receivables financing Convention. Such a Convention already exists in the shape of the 2001 United Nations Convention on the Assignments of Receivables in International Trade.

3.12. Items which do not themselves constitute a space asset but are installed, incorporated or attached accessories, parts or equipment or data manuals and records relating thereto have no independent existence for the purpose of the Convention and Protocol but simply form part of the space asset to which they are attached. However, under Article 29(7) of the Convention the rights of a person in such an item under the applicable law prior to its installation on an object (in this context, a space asset) are not affected by the installation, and if the installed item is subsequently removed the Convention does not prevent the creation of rights in it under the applicable law. Where, for example, an electric motor intended for installation on a satellite is supplied under reservation of title, the seller’s interest in it is not registrable in the International Registry as it is not a space asset, nor does it become a separate space asset on installation. However, the seller’s ownership or whatever other rights the seller has under the applicable law are not affected by the installation. Similarly, new rights may be created in the motor under the applicable law after its removal from the satellite unless title to the motor had already vested in the owner of the satellite under an applicable law of accession.
Preservation of ownership or other rights

3.13. Under Article III of the Protocol ownership of or another right or interest in a space asset is not affected by:

(a) the docking of the space asset with another space asset;
(b) the installation of the space asset on or the removal of the space asset from another space asset; or
(c) the return of the space asset from space.

As to these, (a) is particular to space assets, (a) and (b) override any rule of national law of a Contracting State that would otherwise apply a doctrine of accessions to vest ownership in the owner of the principal space asset or would treat removal of a space asset from another space asset as giving rise to a new title in the removed asset, while (c) reflects the need of the creditor to have a continuing interest in a space asset even on return to the Earth, whether that return be voluntary or involuntary. So ownership of or an international interest in a set of transponders or some other payload is not affected by its installation on a spacecraft. However, ownership or other right or interest is safeguarded only from what might otherwise be the consequences of an event falling within (a), (b) or (c). It is no guarantee that priority will be preserved, that being governed by Article 29 of the Convention and Article XXIII of the Protocol.

Space

3.14. “Space” is defined by Article I(2)(j) as outer space, including the Moon and other celestial bodies. A space asset travels from Earth to space through airspace. There is no agreement on the distance above Earth when airspace ends and space begins and the Protocol does not offer one, though a commonly used point to denote the boundary between the Earth’s atmosphere and space is the Kármán line, which lies at an altitude of 100 kilometres (62.5 miles) above sea level. The distinction between space and airspace is important for the purposes of the Protocol in that objects falling within the definition of “aircraft objects” in the Aircraft Protocol are not covered by the Space Protocol merely because they enter space but only where they are primarily designed for use in space (Article II(3), (4)).
Space asset

3.15. The definition of “space asset”, which was agreed only after the most extensive debate over several years, is contained in Article I(2)(k), which reads as follows:

“space asset” means any man-made uniquely identifiable asset in space or designed to be launched into space, and comprising

(i) a spacecraft, such as a satellite, space station, space module, space capsule, space vehicle or reusable launch vehicle, whether or not including a space asset falling within (ii) or (iii) below;

(ii) a payload (whether telecommunications, navigation, observation, scientific or otherwise) in respect of which a separate registration may be effected in accordance with the regulations; or

(iii) a part of a spacecraft or payload such as a transponder, in respect of which a separate registration may be effected in accordance with the regulations,

[together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.”

This definition contains a number of elements which need to be individually analysed.

“man-made”

3.16. “Man-made” is incorporated into the definition in order to exclude celestial bodies or other objects naturally in space, for Article II of the Outer Space Treaty provides that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

“uniquely identifiable asset”

3.17. Since the International Registry is asset-based, each asset needs to be uniquely identifiable for the purposes of registration (see paragraph 3.100). However, specificity is not required for the constitution of the agreement creating or providing for the international interest, for which purpose it suffices that the asset is identifiable as falling within the scope of the agreement (see paragraph 3.10(2)).
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"in space or designed to be launched into space"

3.18. The Protocol is not confined to assets in space but applies equally to assets which, though designed primarily for use in space, are still on Earth or within the Earth’s atmosphere. It is important that this should be so, because most of the financing for a spacecraft is provided prior to launch. The Protocol thus begins to apply to an object at the point in manufacture when it can be identified as a space asset. Consideration was given to leaving interests in a space object while on Earth to be governed by the local law but this was rejected, partly because such interests were likely to be too transitory to justify the requirement to perfect under local law and partly because such perfection could anyway be defeated by the registration of the creditor’s interest in the International Registry as a prospective international interest which, on becoming an international interest, would displace the local law interest.

3.19. Limb (i) of the definition relates to the entire satellite or other spacecraft, which, so long as it is uniquely identifiable, does not have to meet any other test. By contrast a payload, or a part of a spacecraft or payload, falls within the Protocol only if it is separately registrable in accordance with the regulations. The registrability requirement fulfils two distinct functions. First, it provides a means of excluding components which, on incorporation into the spacecraft, lose their identity and cease to be available to the creditor, so that no useful purpose would be served by having the Protocol apply to them. So it is unlikely that the regulations would be drawn to permit the registration of international interests in nuts, bolts, screws and other components having no independent existence or value. Such components are treated as part of the spacecraft, payload or registrable part in which they are incorporated and prior to their incorporation or after their removal they are outside the scope of the Convention and Protocol, since they do not constitute "objects" as defined by Article 1(u) of the Convention and they are governed by the applicable law. See Article 29(7) of the Convention, discussed in paragraph 2.179. Secondly, the regulations can be used not only to filter out those objects for which registration would not be appropriate but also to accommodate new kinds of space asset, for example, a space hotel.
“spacecraft”; “satellite”; “space station”; “space module”; “space capsule”; “space vehicle”; “reusable launch vehicle”; “payload”

3.20. None of the above terms is defined in the Protocol and what follows should be regarded as a set of non-exhaustive descriptions rather than definitions used as terms of art. “Spacecraft” is a generic term denoting any machine, manned or unmanned, designed for use in space, of which the other items shown above are examples. A satellite is a man-made object which is designed to orbit around the Earth, as opposed, for example, to a spaceship, which is sub-orbital. A space station is an orbital spacecraft which has independent propulsion but no landing systems and is constructed to remain in space for a substantial period for the purpose of allowing the transport of passengers and cargo to and from the spacecraft, the rotation of crews on the spacecraft and the docking of other spacecraft in which cargo, passengers and crew are carried. A space module is a detachable, self-contained unit of a spacecraft or launch vehicle designed to perform specific tasks, for example, orbit, re-entry, the conduct of experiments in space or docking with a space laboratory or space station. A space capsule is a small wingless spacecraft, often used to ferry cargo and crew from and to a space station. A space vehicle is any vehicle capable of travelling in space. A launch vehicle is a rocket used to carry a payload into space. Launch vehicles are either expendable or reusable. An expendable launch vehicle is one which launches a payload into space and then falls back to Earth and is not capable of reuse. Such a vehicle is not a space asset and is outside the scope of the Protocol. A reusable launch vehicle, as its name implies, is a spacecraft which can be used for multiple space missions. The prime example is the space shuttle, an orbital vehicle which transports crew and cargo to the space station or into other low-Earth orbit and then returns to Earth. By contrast a spaceship, which carries passengers briefly into space before returning to Earth, is not a space asset but is treated as an aircraft, so that the airframe and engine fall within the Aircraft Protocol, though only if covered by the definitions in that Protocol (see paragraph 3.22). A payload is the total of everything carried on the bus (or platform) and necessary for performance of the satellite’s mission (whether telecommunications, navigation, observation, scientific or otherwise), including transponders (repeaters), antennae, filtering system, cameras and remote sensors. Increasingly common in recent years are hosted payloads, in which a commercial satellite not only carries its own payload but hosts a secondary, government payload under arrangements between the satellite operator and the government
department concerned. This has commercial advantages for the operator and is usually cheaper and quicker for the government than procuring its own launch of its payload.

“transponder”

3.21. A *transponder* (a short name for a transmitter-responder) is that part of the payload which receives signals from an uplinking ground station, amplifies them, converts them to a different frequency (to avoid interference between uplinks and downlinks) and transmits them to one or more other ground receiving stations. A transponder is not a single object but a system, a series of interconnected units and sub-systems which together produce the transmission of signals between the receiving and the transmitting antennas.

**Relationship with the Aircraft Protocol**

3.22. Those involved in work leading to the Aircraft Protocol were concerned to avoid overlap with the Space Protocol and to ensure that aircraft objects were not inadvertently caught by the Space Protocol. Accordingly Article II(3) of the Space Protocol provides that it does not apply to objects falling within the definition of “aircraft objects” under the Aircraft Protocol except where such objects are primarily designed for use in space, in which case the Space Protocol is to apply even while such objects are not in space. So as Article I(2)(k) of the Space Protocol itself provides, it covers objects such as satellites, space stations, space modules, space capsules, space vehicles and reusable launch vehicles, whether on Earth or in airspace en route to or returning from outer space. However, under Article II(4) the Space Protocol does not apply to an aircraft object merely because it is designed to be temporarily in space. An example is the sub-orbital spaceship launched from a carrier aircraft and designed to carry passengers briefly into outer space but otherwise to ascend and descend through airspace. It is therefore not within the Space Protocol, but this does not mean that it is necessarily within the Aircraft Protocol. That will only be the case if the frame and engines fall within the definition of “airframes” and “aircraft engines” in Article I(2) of the Aircraft Protocol.
Provisions of the Convention applicable to sales

3.23. Article IV of the Space Protocol extends to outright sales and prospective sales of space assets those provisions of the Convention that are relevant to such transactions. These include the definitions and the provisions relating to the connecting factor, the International Registry and registration, priorities, protection on insolvency, non-consensual rights and interests and jurisdiction. But Articles 2 and 7, relating to the constitution of an international interest, do not apply, since an outright sale does not constitute an international interest, and Chapter III of the Convention, relating to default provisions, is likewise disapplied since it has no relevance to outright sales. Again, the special priority rule for the protection of buyers in Article 29(3) is excluded since the buyer will be able to protect its rights by registration, a facility not open to an outright buyer under the Convention itself. Rights to payment under contracts of sale are not associated rights within the definition in Article 1(c) of the Convention, and none of the provisions of Chapter IX, relating to the assignment of associated rights, applies to sales. Finally, Article 60, dealing with pre-existing rights or interests, is not applicable to sales, being excluded by Article IV. This is of no significance as regards space assets because Article 60 itself is disapplied by Article XL of the Protocol. However, the basic rule of Article 60(1) that the Convention does not apply to a pre-existing right or interest is preserved (Article XL(2)), subject, however, to the second sentence of Article XVII(3), which, by making registration in respect of a physically linked asset retrospective to the date of acquisition, has the potential effect of applying the Convention and Protocol to a pre-existing right or interest in a space asset (see paragraph 3.77).

3.24. For the meaning of “sale” see paragraph 2.222. It is necessary to distinguish a sale of a space asset from an assignment of an international interest in a space asset. International interests arise under security, title reservation and leasing agreements. They are governed by the Convention as a whole and assignments of such interests are regulated by Chapter IX of the Convention. Sales by contrast are outside the Convention except so far as the Protocol otherwise provides. As noted above, certain provisions of the Convention, particularly those relating to registration, priorities and protection against insolvency, are applied to sales by Article IV of the Space Protocol.
Salvage

3.25. Nothing in the Convention or Protocol affects any legal or contractual right to salvage recognised by the applicable law (Article IV(3)). “Salvage” is defined as a legal or contractual right or interest in, relating to or derived from a space asset that vests in the insurer upon the payment of a loss relating to the space asset. Salvage insurers were concerned that their rights to salvage, particularly title salvage, on taking title to a space asset and revenue salvage on taking rights to revenue from a space asset, after payment on a constructive total loss (that is, a loss that is not total but where the insured requires a full indemnity as if there had been a total loss) could be adversely affected by the priority rule in Article 29(1). The effect of Article IV(3) is that legal or contractual rights of salvage given by the applicable law, including rights acquired by subrogation, are not affected by the Convention or Protocol, so that any priority dispute will be resolved by the applicable law as determined by the rules of private international law of the forum State.

Formalities and effect of contract of sale

3.26. Article V of the Space Protocol prescribes formalities for a contract of sale of space assets matching those in the Aircraft Protocol, which itself is based on the formalities for an international interest which is not a charge. Article V also states the effect of the contract, namely to transfer the interest of the seller in the space asset to the buyer according to the terms of the contract (Article V(2)). In other words, the Space Protocol creates a sui generis sale, which is not dependent on national law, although, as with an international interest, national law applies to questions such as whether an agreement was reached and whether the seller had a power to dispose. The definition of “contract of sale” in Article 1(g) of the Convention excludes (inter alia) a title reservation agreement, and Article V(2) does not apply to such an agreement. As in the case of constitution of an international interest a contract of sale, to be within the Protocol, must be one relating to a space asset of which the seller has power to dispose. The meaning of “power to dispose” has been discussed extensively on the context of an international interest (see paragraphs 2.66 et seq.). It is only necessary to emphasize that a power of disposal is wider than a right of disposal and covers situation where a person who is not entitled to dispose of the object may have power to do so under some exception to the nemo dat principle provided by the applicable law or inferred from the priority
rules of the Convention and Protocol themselves. The provision enabling a buyer to register a contract of sale presuppose that a seller still in possession is considered to retain a power of disposal, given that such a seller is the only person in place to make an improper second disposition.

**Registration of sales and prospective sales**

3.27. Despite the way in which Article IV refers to the application of Article 20(1), it is clear from the opening lines of Article IV that the true equivalent of an international interest is a sale, that is a transfer of ownership under a contract of sale, not a contract of sale as such. Accordingly where under a contract of sale ownership does not pass at the time of the contract it should be registered either as a title reservation agreement, if title is expressly reserved, or as a prospective sale, if it is not. When a prospective sale is registered and a sale is later concluded the sale is deemed to be registered as from the time of registration of the prospective sale provided that the registered information would have been sufficient for registration of a sale (Article 18(3) as applied by Article IV of the Protocol).

**Duration of registration of contract of sale**

3.28. Registration of a contract of sale (more accurately, a sale – see paragraph 3.27) remains effective indefinitely (Article V(3)), reflecting the fact that a sale is an outright transfer and thus not limited in time. For that reason discharge of a contract of sale is not normally permitted. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.

**Representative capacities**

3.29. A person may, in relation to a space asset, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention in an agency, trust or representative capacity (Article VI). So an international interest under a security agreement may be taken by an agent or trustee for bondholders or other creditors in the name of the agent or trustee as chargee and may be registered in that name. Whether in such a case default remedies are also exercisable by one or more of the creditors directly depends on the applicable law and the terms of the trust
or agency agreement. But if the agent or trustee takes enforcement measures Article VI precludes the party against whom they are taken from contending that the agent or trustee has no *locus standi* to do so. Article VI departs from the wording of Article VI of the Aircraft Protocol by encompassing all the registrable categories listed in Article 16(1), which is what Article VI intended and how it should be interpreted.\(^2\)

**Identification of space assets in agreements**

3.30. Reference has already been made to the differing identification requirements for the constitution of an international interest and its registration (see paragraph 3.10(2)). The requirements for identification of a space asset for registration purposes are left to be dealt with by the regulations but will certainly be such as to necessitate unique identification. See paragraphs 3.100 *et seq*.

**The applicable law; choice of law**

3.31. Like the Convention the Space Protocol contains various provisions referring matters to the applicable law. These are as follows:

1. Under Article VIII, except where this is excluded by a declaration by a Contracting State under Article XLI(2)(a), the parties are free to choose the law governing their relations *inter se* (see paragraph 3.32).

2. Under Article XXI, Alternative A, paragraph 6(b), unless and until the creditor is given the opportunity to take possession of a space asset after the occurrence of an insolvency-related event it is entitled to apply for any other forms of interim relief available under the applicable law (see paragraph 3.135).

3. Under Article XXI, Alternative A, paragraph 11, the provision in paragraph 10 that no obligations of the debtor under the agreement may be modified without the creditor’s consent does not affect any authority of the insolvency administrator under the applicable law to terminate the agreement (see paragraph 3.139).

\(^2\) See the Official Commentary on the Convention and Aircraft Protocol, paragraph 3.71.
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(4) Article XXI, Alternative B, provides in paragraph 2(b) that upon the occurrence of an insolvency-related event the insolvency administrator or the debtor, as applicable, is to give the creditor notice whether it will cure all defaults and agree to perform all future obligations under the agreement and related transaction documents or give the creditor the opportunity to take possession in accordance with the applicable law (see paragraph 3.141).

(5) Paragraph 3 of Alternative B provides that the applicable law may permit the court to require the taking of any additional step or the provision of any additional guarantee (see paragraph 3.142).

(6) Under Article XXV(2), nothing in the Convention or Protocol affects the liability of the creditor for any breach of the agreement under the applicable law in so far as that agreement relates to a space asset (see paragraph 3.126).

3.32. By Article VIII, which in contrast to its equivalent in the Aircraft Protocol is an opt-out, not an opt-in, provision and which therefore applies unless a Contracting State has made a declaration under Article XLI(2)(a), the parties to an agreement or a related guarantee contract or subordination agreement or contract of sale are free to choose the law to govern their contractual rights and obligations, wholly or in part, and unless otherwise agreed their choice is taken to be a reference to the domestic rules of law of the designated State (i.e. excluding its conflict of laws rules) or, where that State comprises several territorial units, the domestic law of the designated territorial unit. This choice must be respected by the courts of a Contracting State unless it is a Contracting State which has made a declaration under Article XLI(2)(a) disapplying Article VIII. In a Contracting State not making such a declaration the choice of law by the parties is not open to attack on grounds that might otherwise have been available, for example that the chosen law has no connection with the parties or the subject-matter of the transaction or that the transaction is a wholly domestic transaction involving no foreign element.

3.33. The choice of a foreign law is effective to displace rules of the lex fori which are mandatory in the sense of being incapable of exclusion by agreement of the parties if the lex fori applies but are not considered so important as to impose them on contracts governed by a foreign law. Examples of domestic mandatory rules which can be excluded by a choice of law clause are rules governing the validity of a contract or the enforceability of penalty clauses and
other restrictions on amounts payable. However, Article VIII will not displace the overriding mandatory rules of the *lex fori*, that is, rules which apply regardless of the otherwise applicable law. But such rules do not in any way limit the freedom of the parties to choose the applicable law, they merely preclude the selected law from being applied in a manner inconsistent with the overriding rules.

3.34. The reference to “law” requires that any choice by the parties be a national legal system, as opposed to the broader “rules of law”, which could encompass rules common to a number of States or accepted internationally or even the *lex mercatoria*. “Guarantee contract” is defined by Article I(2)(b) in terms which, read with Article I(2)(c), cover not only suretyship guarantees but demand guarantees, standby letters of credit and other forms of credit insurance. Article VIII does not extend to contractual provisions in an assignment of an international interest. Moreover, it is confined to provisions affecting the parties’ contractual relationship and does not extend to property rights. As to the applicable law where the parties do not make a choice, see paragraph 2.58.

3.35. Under established principles of the conflict of laws the law chosen by the parties governs not only the rights and obligations of the parties but the question whether the putative agreement has come into existence, its formal validity, its material validity (including issues such mistake or illegality), its interpretation, its performance and the effects of its breach.

**Debtor’s rights**

3.36. The Space Protocol contains detailed provisions for the assignment of debtor’s rights to the creditor, the recording of such an assignment in the International Registry against registration of the international interest, the priority of an assignment so recorded and the duties of the obligor (i.e. the account party, or debtor’s debtor) to the creditor-assignee. These provisions also apply to any reassignment of debtor’s rights, whether by contract or automatically as the result of a transfer of the international interest. The creditor may also record debtor’s rights acquired by subrogation (see paragraph 3.40).

3.37. Debtor’s rights are defined as “rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset” (Article I(2)(a)). The definition is very wide and although primarily concerned
with the debtor’s present and future contractual rights it is broad enough to extend to other sources of rights relating to a space asset, for example, tort or unjust enrichment, assignment, subrogation and even rights under government licences to the extent that these are capable of transfer. Moreover rights “with respect to a space asset” do not require that the asset be in existence or be directly affected by the rights; it suffices that there is a connection between the asset or intended asset and the rights in question. Debtor’s rights thus include rights of the debtor:

- as buyer under a contract for the manufacture and sale of a space asset, including rights to warranty payments and to refunds under a transponder purchase agreement and non-monetary rights such as the provision of services, manuals, and the like;
- as lessor under a lease capacity agreement or as grantor of an indefeasible right of use (IRU), including rentals and licence fees;
- as operator under a contract with a services provider;
- as customer under a contract for the provision of services relating to the space asset, including ground services;
- under a suretyship or demand guarantee issued to the debtor supporting the obligations of the manufacturer or other third party to the debtor;
- as an insured under contracts of insurance relating to the space asset and as the party entitled to the proceeds of insurance (however, proceeds will usually be vested in the creditor independently under Article 2(5) of the Convention – see paragraph 2.165);
- as the holder of intellectual property licences;
- as the holder of shares in any special-purpose vehicle established to hold the space asset; and
- as the holder of licences and operating permits granted to the debtor by third parties, including government licences, so far as constituting saleable assets as between the parties, and as the person entitled to the proceeds of such licences. Such licences, even where technically not transferable or transferable only with
regulatory approval, nevertheless have commercial value, particularly if they confer an exclusive entitlement, e.g. to occupy a given orbital slot, and they are bought and sold as commercial assets on the basis that the purchaser will be able to replace the seller as licensee. But as will be seen the Protocol makes it clear that, whatever the agreement between the parties, the State retains its regulatory control over transfers, though there is less difficulty in assigning the proceeds of licences as debtor’s rights.

3.38. Rights held by the debtor are not debtor’s rights unless they are rights “with respect to a space asset”. This includes all rights relevant to the construction, launch and operation of the space asset, including the ground system (earth stations, mission control centre, etc.) and any launch vehicle and services. But the assignment of sums due to the debtor from third parties otherwise than with respect to a space asset, for example in respect of loans advanced or goods or services supplied which are unrelated to the space asset, is outside the scope of the Convention and Protocol. This is because an essential feature of the regime governing the assignment of debtor’s rights is their linkage to a physical asset which is the subject of an international interest (see paragraphs 3.11, 3.45). The effect of the assignment as between the parties or as against the obligor is not dependent on registration of the international interest or the recording of the assignment against any registration, but such registration and recording are necessary if the priority of the assignment is to be preserved by an entry in the International Registry, since this can be effected only by recording the assignment against the registration of the international interest (Article XII(1)).

3.39. The seller under a contract of sale is not a debtor within the definition in Article 1(j) of the Convention, and the rights of the seller against third parties are not debtor’s rights within Article I(2)(a) of the Protocol, nor do assignments of such rights to the seller constitute rights assignments within Article I(2)(h). However, the provisions governing rights assignments also apply to a transfer to the buyer of rights to payment or other performance due or to become due to the seller by any person with respect to the space asset as if references to the debtor and the creditor were references to the seller and the buyer respectively (Article IV(2)). So if the seller were to assign to the buyer its rights under a contract of sale with its own seller or the benefit of any guarantee given by a third party in relation to the space asset or any policy of insurance covering the space asset, that would be treated as the equivalent of a
rights assignment and the buyer could record it against registration of the sale. Article IV(2) does not expressly refer to rights reassignments but there is no reason why the provisions on rights reassignments should not apply to a sub-sale of the space asset or an onward assignment of the rights assigned to the buyer.

Methods by which debtor’s rights may be transferred or retransferred

3.40. Debtor’s rights may be transferred to the creditor either by a rights assignment or by subrogation. An example of acquisition by subrogation is where the creditor has discharged the debt owed by the debtor to a senior creditor to whom it has assigned debtor’s rights. The creditor effecting the discharge then steps into the shoes of the senior creditor by subrogation, taking over the debtor’s rights the senior creditor had acquired. Debtor’s rights may be retransferred by the creditor or assignee by a rights reassig-nment, which, as indicated in the definition in Article I(2)(i), may take effect by contract or automatically under Article XII(4)(a) upon transfer of the international interest against which the debtor’s rights are recorded.

Rights assignment defined

3.41. The Protocol contains detailed provisions as regards a rights assignment, which is defined by Article I(2)(h) in the following terms:

“a contract by which the debtor confers on the creditor an interest (including an ownership interest) in or over the whole or part of existing or future debtor’s rights to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates.”

A rights assignment would include the debtor’s rights under contracts and any revenue payable to the debtor under those contracts. The definition does not cover all assignments, only those typically effected pursuant to a debtor-creditor relationship, namely assignments by way of security and outright assignments in reduction or discharge of the debtor’s existing or future obligations (in relation to an outright assignment the definition applies only where it is the assignment itself that is taken in reduction or discharge of the debt, regardless whether the creditor is able to obtain payment or other
performance from the obligor). The definition, therefore, does not cover the sale of debtor’s rights. Moreover, the assignment must be one tied to the debtor’s obligations under the security agreement creating or providing for the international interest. This restriction is necessary to maintain the linkage with the international interest. If the definition were extended to cover other obligations of the debtor to the creditor, one could have a situation in which the international interest was discharged by payment but the assignment would continue as a free-standing security interest for other obligations. That would destroy the linkage, and, indeed, would be incompatible with Article XII(1) and (5) and Article XIII(2). Similarly, if the definition were to cover assignments to secure the obligations of a third party, the link with the international interest would be lost. “Secured by” refers to a security agreement; “associated with”, to a title reservation agreement or a leasing agreement.

Formal requirements for rights assignment

3.42. Article IX sets out the formal requirements for a rights assignment, which track those set out in Article 7 of the Convention for the constitution of an international interest except that it omits reference to a power to dispose, this being unnecessary since Article X says that the transfer takes effect only “to the extent permitted by the applicable law”. The assignment must be in writing and must enable both the debtor’s rights and the space asset to which those rights relate to be identified. Unless the assignment covers all present and future debtor’s rights it will need to provide details enabling the obligors and the assigned rights to performance to be identified. In addition, the assignment must enable any obligations secured by the agreement to be identified, though without the need to state the sum or maximum sum secured. Just as the constitution of an international interest is not dependent on registration, so also the validity and effect of a rights assignment as between the parties and vis-à-vis the debtor is not dependent on the recording of the assignment, which is relevant only to a competition between successive assignees and to the effectiveness of the assignment in the event of the obligor’s insolvency.

Effects of rights assignment

3.43. A rights assignment made in conformity with Article IX transfers to the creditor the debtor’s rights the subject of the assignment to the extent
permitted by the applicable law (Article X). So the applicable law will determine whether a rights assignment is effective where the assigned rights arise under a contract between the debtor and the obligor which prohibits assignment or whether the assignment of a government licence is effective (see also Article XXVI(2)(a), which spells this out). The duties of the obligor to the creditor, and the defences and rights of set-off available to the obligor, are discussed later (paragraph 3.57).

**Assignment of future rights**

3.44. A provision in a rights assignment by which future debtor’s rights are assigned operates to confer on the creditor an interest in the assigned rights when they come into existence without the need for any new act of transfer. This is taken from Article 5(b) of the 1988 UNIDROIT Convention on International Factoring.

**Recording of rights assignment**

*No independent registration of a rights assignment*

3.45. The Protocol does not allow independent registration of a rights assignment any more than it does of associated rights. This would go against the whole thrust of the Convention, which is concerned with interests in tangible and uniquely identifiable assets. To make the assignment of debtor’s rights independently registrable as international interests would extend the Convention from physical assets to receivables, which are not themselves susceptible to asset-based registration and would not be revealed by a search against the physical asset. The purpose of the rights assignment provisions is to give additional protection to the creditor in whose name the related international interest or prospective international interest is registered by allowing a rights assignment to be recorded against that registration. Accordingly until such registration there can be no recording of the rights assignment (see Article XII(1)), and the recorded assignee must be the same person as the registered holder of the international interest.

*Recording of the rights assignment*

3.46. Article XII(1) allows the holder of an international interest or prospective international interest who has acquired an interest in or over
debtor’s rights under a rights assignment or by subrogation to record the rights assignment or acquisition by subrogation as part of the registration. This may be done either when the international interest or prospective international interest in the space asset is registered or subsequently by amendment to the registration, thus covering the case where the rights assignment is not made, or the debtor’s rights do not arise, until after registration of the international interest or prospective international interest. The request for such recording may identify the assigned rights either specifically or by a statement that the debtor has assigned all or some of the debtor’s rights, without further specification. However, the rights assignment has to enable the debtor’s rights the subject of the assignment to be identified (Article IX(a)) (see paragraph 5.41). The record of the assignment will then be inextricably linked to registration of the international interest and its discharge.

Recording of prospective rights assignment

3.47. In extending the provisions of Article 19 of the Convention to rights assignments Article XII(2) of the Space Protocol allows for the recording of a prospective rights assignment against a registered international interest or a registered prospective international interest, though in contrast to the provisions relating to international interests and sales there is no definition of a prospective rights assignment. But by analogy this can be defined as a rights assignment which is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain. Reference has already been made to the effect of an assignment of future rights (paragraph 3.44). The effect of the recording of a prospective rights assignment is that if and when the rights assignment is made its recording is treated as retrospective to the time of recording of the prospective rights assignment (Article 19(4)) and there is no need for a fresh recording. This can obviously have priority effects under Article XIII.

Extension of the registration provisions

3.48. Under Article XII(2), the registration provisions of the Convention are extended to cover mutatis mutandis the recording of rights assignments. However, a rights assignment recorded against a registered prospective international interest is treated as unrecorded unless and until the prospective international interest becomes an international interest, in which event the rights assignment has priority from the time it was recorded provided that the
registration was still current at the time the international interest was constituted as provided by Article 7 of the Convention (Article XIII(2)). This parallels the rule in Article 19(4) of the Convention relating to the priority of a prospective international interest upon its becoming an international interest.

Search certificate

3.49. A search certificate issued under Article 22 of the Convention is required to show particulars of any recorded rights assignment (Article XII(3)).

Discharge of the international interest

3.50. As a corollary of the fact that a rights assignment may be only protected by recording it against registration of an international interest, discharge of the registration of the international interest also discharges any record forming part of that registration (Article XII(5)).

Performance by the obligor

3.51. Performance by the obligor of an obligation covered by the rights assignment discharges the obligation, so that to the extent of the discharge the debtor's rights cease to exist. The Protocol does not itself contain any provision enabling the obligor to have the discharge noted against the record of the rights assignment, but the regulations could provide for this.

Priority of a recorded rights assignment

The general rule

3.52. It is worth repeating the point made in paragraph 2.157 that priority rules constitute an exception to the principle nemo dat quod non habet. The fact that the debtor has assigned debtor's rights to A absolutely in reduction of the debtor's obligations to A, though divesting the debtor of all interest in the debtor's rights, does not mean that the debtor lacks the power to make an assignment of the same debtor's rights to B. As between A and B the issue is one of priority, not of validity. Article XIII lays down priority rules for a recorded rights assignment which track those embodied in Article 29(1) of the Convention in relation to registered interests. So subject to Article 29(6) of the Convention (see paragraph 3.54) a recorded rights assignment has priority over
any other transfer of debtor’s rights (whether or not a rights assignment) except a rights assignment previously recorded (Article XIII(1)). In relation to the order of registration the wording departs from the normal wording of the priority rule exemplified in Article 29(1) of the Convention (“has priority over any other interest subsequently registered”), but the intended effect is the same, namely that as between two recorded rights assignments the first to be recorded does not merely rank pari passu with the other recorded rights assignment but has priority. It should be noted that the priority of competing rights assignments is governed by the order of their recording, not by the priority of the registered international interests against which they are recorded. So if A registers an international interest and takes an assignment of debtor’s rights and fails to record it and B subsequently registers an international interest and records an assignment of the same debtor’s rights B has priority even though A’s international interest was registered first. As stated above (paragraph 3.47), the recording of a prospective rights assignment which is followed by a concluded assignment has the effect that the assignment is deemed to have been recorded at the time of recording of the prospective rights assignment.

3.53. As mentioned earlier, a recorded rights assignment has priority over any other transfer of debtor’s rights, whether or not a rights assignment. So if creditor A takes from the debtor an assignment of the debtor’s revenue stream from a satellite but does not register an international interest and subsequently the debtor gives creditor B an international interest and assigns the same revenue stream to B, who registers the international interest and records the assignment, creditor B has priority even though creditor A, having no international interest, could not have recorded the assignment in its favour. This is deliberate policy. Creditor A should have taken and registered an international interest and recorded its assignment, otherwise creditor B has no way of knowing of the assignment. A prudent creditor would in any event not take an assignment of revenue from an asset without taking a security interest in the asset itself, since the debtor’s right to the revenue stream is dependent on the continuance of its interest in the asset from which the revenue is derived.

Proceeds

3.54. Under Article 2(5) of the Convention an international interest in an object extends to proceeds of that object. Under Article 29(6) any priority
given by Article 29 to an international interest in an object extends to proceeds, a term which has a restricted meaning but includes insurance proceeds (Article 1(w)). Accordingly while insurance proceeds under a policy taken out by the debtor in relation to a space asset constitute debtor’s rights so as to be captured by a rights assignment, the creditor’s interest in the proceeds is not dependent on the making or recording of a rights assignment but has priority as from the registration of the international interest in the space asset. It follows that in relation to insurance proceeds the creditor who is the first to register an international interest in the space asset has priority over a rights assignee under a rights assignment covering insurance proceeds who is the first to record the assignment, and this is so even if the first creditor to register did not take a rights assignment at all. There is no policy objection to this, because the rights assignee will be aware from the outset that the creditor’s priority as regards the international interest extends to proceeds as defined by Article 1(w) of the Convention, which include insurance proceeds.

Obligor’s duty to creditor

3.55. Article XIV(1) sets out the conditions in which the obligor (i.e. the grantor of the rights to the debtor) comes under a duty to give performance to the creditor. These conditions, requiring notice in writing to the grantor by or with the authority of the debtor identifying the debtor’s rights, parallel those set out in Article 33 of the Convention relating to the assignment of associated rights. They may be varied or excluded in their entirety by agreement between the creditor and the obligor (Article XVI) and it is quite common for agreements to be made governing payment by the obligor to the creditor. Where Article XIV applies a notice given by the creditor after the debtor’s default in performance is given with the authority of the debtor (Article XIV(2)), whose actual authority is thus dispensed with. Irrespective of any other ground on which payment or performance by the obligor discharged the obligor from liability, payment or performance is effective for this purpose if made in accordance with Article XIV(1). So if two creditors have recorded assignments of debtor’s rights and the creditor who was the later to record is the first to give notice to the obligor and collects payment from the obligor, the latter is discharged even though making payment to the lower-ranking creditor.
3.56. However, nothing in Article XIV affects the priority of competing rights assignments (Article XIV(4)), which depend on the order of recording against the international interest, not on the order of notice of assignment to the obligor, so that the higher-ranking priority retains the right to enforce the priority given by the Protocol by requiring the lower-ranking creditor to account for the sum it has received or by exercising such other remedy as is given by the applicable law. An obligor who receives notices of assignment from two assignees without having made payment should invoke local procedural rules governing its duty in such a case.

Obligor’s defences and rights of set-off

3.57. The applicable law determines the defences and rights of set-off available to the obligor against the creditor (Article X(2)). Many systems allow the obligor to set off against an assignee any defences the obligor would have had to a claim by the assignor and any rights of set-off accrued against the assignor up to the time of receipt of notice of the assignment. However, under Article X(3) the obligor may at any time by agreement in writing waive all or any of his defences and rights of set-off under the applicable law, other than defences arising from the creditor's fraudulent acts, and these will not then be available to the obligor in a Contracting State, even if such waiver would otherwise have been invalid under the law of that State.

Effect of obligor’s insolvency

3.58. Article 30 of the Convention applies to insolvency proceedings against an obligor (or the occurrence of another insolvency-related event in relation to an obligor) as it does to insolvency proceedings against the debtor (Article XII(2)). In consequence in such insolvency proceedings the assignment of debtor’s rights is effective if recorded against the assignee’s international interest prior to the commencement of the insolvency proceedings. However, this does not affect any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors or any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator (Article 30(3)). Even an unrecorded assignment is effective where it is effective under the applicable law (Article 30(2) as applied by Article IV of the Protocol), but such an assignment is vulnerable to any ground of
avoidance prescribed by the insolvency law, not merely a preference or a transaction in fraud of creditors. For a full analysis of these provisions as they relate to international interests see paragraphs 2.180 et seq.

Rights reassignment

3.59. As noted earlier, a rights reassignment means a transfer of debtor’s rights from the creditor to an assignee or from an assignee to a subsequent assignee. A rights reassignment may be effected in one of three ways. The first is by a contract by which the creditor transfers to the assignee, or an assignee transfers to a subsequent assignee, the whole or part of its rights and interests under the rights assignment without transferring the related international interest. The second is automatically upon a transfer of the related international interest under Article XII(4). The third is by a combination of the first two.

Contractual reassignment without transfer of the international interest

3.60. To the extent permitted by the applicable law the creditor can reassign debtor’s rights without transferring the related international interest. The priority given to the recorded original assignment by the debtor over subsequently recorded assignments by the debtor to a different assignee ensures for the benefit of the reassignee even though the reassignment has not been recorded. There is in fact no way in which a reassignment can be recorded except as part of the registration of the assignment of the international interest to the person to whom the rights reassignment was made (Article XV(2)). The reassignee is thus exposed to subordination to a later reassignee who takes a transfer of the registered international interest and records the reassignment against that registration. The position of the reassignee is thus analogous to that of the assignee of associated rights coupled with an international interest, who even without registering the assignment succeeds to the priority of the assignor against the holder of associated rights arising under a different subsequently registered or unregistered international interest but will be subordinated to a subsequent assignee of associated rights arising under the same international interest who registers that assignment first.

3.61. The ability to make a contractual reassignment of part only of debtor’s rights potentially exposes the obligor to a multiplicity of claims. The obligor may here be able to receive protection from the procedural rules of the forum,
e.g. a rule requiring that all parties come before the court in a single proceeding.

*Transfer of the international interest without a contractual assignment*

3.62. Article XII(4) of the Protocol provides as follows:

> “Where a rights assignment has been recorded as part of the registration of an international interest which is subsequently transferred in accordance with Articles 31 and 32 of the Convention, the transferee of the international interest acquires:

(a) all the rights of the creditor under the rights assignment; and

(b) the right to be shown in the record as assignee under the rights assignment.”

Article XII(4) would perhaps have been better placed in Article XV, since its effect is that a transfer of the international interest also constitutes a *reassignment* of debtor’s rights recorded against that international interest and entitles the transferee to be shown in the record as assignee of the creditor as regards debtor’s rights, i.e. as reassignee of those rights. In this case the reassignment of debtor’s rights is not dependent on contract but takes effect automatically on transfer of the registered international interest and, subject to Article XXVI, regardless whether it would otherwise be permitted by the applicable law. In this respect it differs from a contractual reassignment. However, the transfer operates as a reassignment of debtor’s rights only if the assignment to the creditor had itself been recorded. Article XII(4) does not apply to an unrecorded rights assignment. It follows that the creditor’s failure to record the rights assignment precludes a subsequent assignee from recording a rights reassignment.

3.63. It is not necessary for the transferee of the international interest in relation to which a rights assignment has been recorded to be separately recorded as assignee of the debtor’s rights in order to have priority over an assignee of debtor’s rights under a subsequently recorded rights assignment not accompanied by a transfer of the international interest, since such priority follows from Article XII(4), but failure to record the reassignment would expose the reassignee to subordination to a subsequent reassignee who takes and registers a transfer of the international interest and also records the subsequent reassignment against the registration of the transferred
international interest. This is because the fact that the competing assignments relate to different international interests rather than the same international interest is irrelevant. The priority of competing assignments and reassignments depends on the order of recording, not on the priority of the associated international interests. In the words of Article XIII(1) “… a recorded rights assignment has priority over any other transfer of debtor’s rights (whether or not a rights assignment) except a rights assignment previously recorded” [emphasis added].

**Contractual assignment of debtor’s rights followed by transfer of international interest**

3.64. If the creditor assigns recorded debtor’s rights without initially transferring the international interest then as previously noted this constitutes a reassignment of debtor’s rights. If subsequently the creditor transfers the international interest itself to the assignee Article XII(4)(a) does not apply as between the parties, debtor’s rights having already become vested in the reassignee. However, having acquired the international interest the reassignee should record the reassignment so as to preserve its priority against a subsequent reassignment to a different party. What is the position if the creditor transfers the international interest to a person other than the reassignee? Again, Article XII(4)(a), which refers to a transfer of “all the creditor’s rights under the rights assignment”, is inapplicable as between the parties, as the creditor no longer holds such rights. Nevertheless, as regards third parties the issue is one of priority, not of validity, so that the fact that the creditor no longer holds debtor’s rights does not preclude the creditor from reassigning them to another party, who would obtain priority if it is the first to record the reassignment against the international interest. Hence the need for the first reassignee to record the reassignment, though this is not necessary to preserve the reassignee’s priority against the assignee of debtor’s rights pursuant to an assignment to a different creditor under a subsequently registered international interest, because the reassignee succeeds to the priority of the creditor from whom the reassignment was taken.

**Transfer of international interest following by contractual assignment of debtor’s rights**

3.65. In the converse case where the creditor transfers the international interest to one party and later makes a contractual reassignment of debtor’s rights to another, the transferee of the international interest automatically becomes the reassignee of debtor’s rights under Article XII(4) and is entitled to
have the reassignment recorded. This will confer priority over subsequent reassignees. The later, contractual reassignee has no international interest against which it can record its own rights under the contractual reassignment. But if and so long as the transferee of the international interest has not exercised its right to be recorded as reassignee the issue of priority between the two assignees falls outside the scope of the Protocol and has to be resolved by reference to the applicable law.

**Power of derogation**

3.66. Under Article XVI the parties may, by agreement in writing, exclude the application of Article XXI of the Protocol (dealing with remedies on insolvency) and, in their relations with each other, derogate from or vary the effect of any of the provisions of the Protocol except Article XVII(2) (which relates to the minimum period of notice of an enforcing creditor’s intention to sell or lease the space asset). The power to vary the provisions of the Protocol does not apply to Article XXI, which can be excluded but not modified. The reason for this is that whichever of the two alternative versions of Article XXI is chosen by a Contracting State it can only be adopted in its entirety (Article XLI(4)). See further paragraphs 3.130, 5.80.

3.67. The power of derogation as regards provisions other than Article XXI is limited to relations between the parties themselves. They cannot derogate from provisions affecting a third party except by agreement with that third party, nor, of course, can they derogate from provisions concerning the rights of Contracting States.

**Default remedies generally**

3.68. The default remedies of the Convention are modified by the Space Protocol in certain respects to meet the particular needs of the space industry and to encompass the assignment and reassignment of debtor’s rights. Certain additional remedies are given; provisions relating to existing remedies are modified to give greater certainty; and on the other hand a number of restrictions are imposed. There are also special and important provisions relating to enforcement on the debtor’s insolvency.
PART 3

Additional remedies

Application of remedy provisions to rights assignments and rights reassignments

3.69. Article XVIII applies the default provisions of Chapter III of the Convention governing the enforcement of a security interest to defaults by the debtor or assignor under a rights assignment or rights reassignment, though in relation to debtor’s rights the provisions apply only so far as they are capable of application to intangible property. With one exception all remedies applicable in relation to the space asset, including the remedy of repossession, are available in relation to documentary intangibles, that is, those embodied in a document such that it represents the embodied rights, which can be transferred by delivery with any necessary endorsement, for example, negotiable instruments, negotiable securities and documents of title. The exception is the grant of a lease, a remedy which is clearly inapplicable even to documentary intangibles. Pure (i.e. non-documentary) intangibles are plainly not susceptible to possession or to the grant of a lease. All other remedies are available. Since Article XVIII is confined to rights assignments by way of security, the listed Articles of the Convention do not include Article 10, which relates to conditional sale and leasing agreements.

Placement of data and materials

3.70. Subject to Article XXVI, the parties to an agreement may specifically agree to the placement of command codes and related data and materials with another person in order to afford the creditor an opportunity to take possession of, establish control over or operate the space asset (Article XIX). A satellite command code is an encryption key giving control of the satellite. Arrangements can be made to deposit the command code in an escrow account with a third party such as an escrow agent or the manager of an international command code escrow account and to give the creditor the ability to change the command code and take control of the satellite in the event of the debtor’s default. However, Article XXVI(2)(c) provides that the Protocol does not affect the ability of a Contracting State in accordance with its laws and regulations to prohibit, restrict or attach conditions to the placement of command codes and related data and materials.
Modification of remedies provisions to give greater certainty

3.71. Like the Aircraft Protocol, the Space Protocol modifies the Convention in various respects to give greater certainty for the parties.

Exclusion of Article 8(3)

3.72. Article XVII(1) replaces Article 8(3) of the Convention with a more general duty of commercial reasonableness. This cannot be excluded by agreement (Article XVI). The duty imposed on a chargee to exercise remedies in a commercially reasonable manner is extended to cover all remedies in relation to a space asset and thus to embrace not only remedies of the creditor under the security agreement but those conferred on an assignee of associated rights qua transferee of the international interest under Article 34 but not remedies in relation to the associated rights themselves. But a remedy given in relation to space assets is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable (Article XVII(1)). In consequence Article 8(3), which is limited to security agreements, is disapplied.

Crystallisation of requirements of Article 8(4)

3.73. A chargee giving 14 or more calendar days’ prior written notice to interested parties of a proposed sale or lease is deemed to satisfy the requirement of “reasonable prior notice” specified in Article 8(4) (see Article XVII(2)). Here the Protocol follows Article VII(4) of the Luxembourg Protocol in preference to Article IX(4) of the Aircraft Protocol, which specified a minimum of 10 working days. This was considered unsatisfactory because what constitutes a working day varies from country to country and even from place to place within a given country. “Interested persons” are defined in Article 1(m) of the Convention as (i) the debtor, (ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance, or (iii) any other person having rights in or over the object (see paragraph 2.88). This is the one provision governing relations between the parties from which they are not free to derogate by agreement (Article XVI).
3.74. While Article XVII(1) extends the requirement of commercial reasonableness to the exercise of remedies under Articles 9, 10 and 12 of the Convention, some of these provisions will rarely be caught by the requirement. It can hardly apply to the remedies given by Article 9, which require either the consent of the debtor or a court order and incorporate various provisions for the protection of the debtor but otherwise do not specify a mode of proceeding to which the requirement of reasonableness could apply. Similarly the requirement will not usually apply to remedies under Article 10, because the creditor is in principle entitled to terminate the agreement for default and to repossess, sell or do what he likes with his own property. Article XVII(1) does not apply to the additional remedies referred to in Article 12 of the Convention as given by the applicable law or the agreement, since these are not remedies “given by the Convention”. Moreover, Article XVII(1) is limited to remedies given in relation to a space asset and therefore does not cover remedies in relation to the enforcement of debtor’s rights acquired by the creditor under a rights assignment. Had such remedies been intended to be covered Article XVII would have been among the Articles listed in Article XVIII, which applies to debtor’s rights the Convention remedy provisions relating to the object, i.e. the space asset.

Modification of provisions regarding relief pending final determination (advance relief)

3.75. Article XX modifies the provisions regarding advance relief, but the Article applies only where a Contracting State has made a declaration under Article XX(1) and to the extent of that declaration (Article XX(1)). Article XX(2) defines “speedy relief”, while Article XX(3) adds the remedy of sale and application of the proceeds of sale if the parties at any time specifically agree. Ownership or any other interest of the debtor passing on such a sale is free from any other interest over which the creditor’s international interest has priority under Article 29 of the Convention. Article XX(5) permits the parties to exclude the application of Article 13(2) of the Convention (which empowers the court to impose conditions for the granting of advance relief).

Restrictions on remedies

3.76. Apart from provisions for the preservation of a Contracting State’s regulatory powers under Article XXVI (see paragraph 3.152), which could affect the exercise of remedies, the most significant modifications of the creditor’s default remedies are the provisions on physically linked assets (see
paragraph 3.77) and the public service restriction in Article XXVII (see paragraphs 3.78 et seq.).

Physically linked assets

3.77. Unless otherwise agreed, a creditor may not enforce an international interest in a space asset that is physically linked with another space asset in which another person has an international interest as creditor or an interest as buyer so as to impair or interfere with the operation of the other space asset if the latter interest was registered before the interest of the enforcing creditor (Article XVII(3)). This is not strictly a priority question as the two interests relate to different space assets, but the underlying idea is similar. There are various ways in which enforcement action by a creditor over the space asset in which the creditor has an interest may adversely affect the operation of a physically linked asset. The most serious of these is moving the enforcing creditor’s asset, depriving the other creditor of the ability to use the physically linked asset for its intended purpose. Other methods are reducing or curtailing the linked asset’s access to power, preventing communications to the asset, and causing radio frequency interference with its communications. If the enforcing creditor is the first to register it is not affected by this provision, though that would not necessarily render the creditor immune from liability in tort under the applicable law. For this purpose a sale or an interest equivalent to an international interest made or arising before the effective date of the Convention (see paragraph 2.253) and registered within three years from that date is deemed to have been registered at the time of the constitution of the international interest or the sale, as the case may be. Since Article XVII(3) is a restriction on the enforcement of remedies it only affects a creditor, not a buyer. So on one side is the enforcing creditor, on the other a party who may be either a creditor or a buyer. If both parties register their respective interests within the three-year period, the effect is that Article XVII will apply unless the enforcing creditor’s interest was created first. The buyer of a space asset who uses it in such a way as to impair the operation of a physically linked space asset owned by a different party is not affected by Article XVII(3), though the buyer may incur liability under the applicable law. Article XVII(3) is confined to physically linked space assets. So the fact that action taken against one satellite interferes with the operation of another satellite in the same constellation but not physically linked does not attract the operation of Article XVII(3).
Article XVII(3) also takes effect subject to any agreement to the contrary between the parties concerned.

The public service restrictions

3.78. Article XXV of the Luxembourg Protocol addressed the problem of the potential impact of the exercise of a creditor’s remedies on the provision of public service railway rolling stock, that is, railway rolling stock habitually used for the purpose of providing a service of public importance. Article XXV recognised the importance to a Contracting State of securing the continuance of such services after default by the debtor and imposed certain restrictions on the exercise of default remedies by the creditor. Article XXVII of the Space Protocol also contains public service provisions. These are materially different from Article XXV of the Luxembourg Protocol but the underlying policy is the same. The State has a natural interest in ensuring that the exercise of creditor’s remedies against a space asset which provides a service of public importance, whether military, navigational, educational or otherwise, does not cause an abrupt termination of the public service provision, which could impair public health, national security and other services of public importance. Moreover States may have obligations under international agreements to provide and maintain services which involve the use of space assets, for example, radio services, meteorological services and other air navigation facilities under Article 28 of the Chicago Convention and global connectivity under the Agreement Relating to the International Telecommunications Satellite Organization. Many States have laws designed to ensure the continuity of a public service, either by restricting the exercise of creditors’ remedies or by the provision of a sovereign guarantee of the debtor’s solvency or a combination of the two. Equally the creditor is entitled to expect that if the provision of the services is to continue it will receive payment of sums accruing during the period for which exercise of its remedies is suspended. Article XXVII is the compromise solution which seeks to balance these interests, in line with principles of both public international law and human rights law requiring respect for private property and the avoidance of action tantamount to direct or indirect expropriation without compensation. Though the intent is clear Article XXVII is not without difficulties of interpretation. These are discussed below.
The public service notice

3.79. Article XXVII(1) provides as follows:

“Where the debtor or an entity controlled by the debtor and a public services provider enter into a contract that provides for the use of a space asset to provide services that are needed for the provision of a public service in a Contracting State, the parties and the Contracting State may agree that the public services provider or the Contracting State may register a public service notice.”

It will be seen that a distinction is drawn between the services needed for the provision of the public service and the public service itself. The former refer to the arrangements for the provision and maintenance of the space asset itself and connecting ground services and facilities, the latter to the public service for which the space asset is to be used, for example, education, navigation, surveillance. Article XXVII does not define “public service” (in the absence of guidance from national laws it was not found possible to reach agreement on this) but simply refers to “a public service recognised as such under the laws of the relevant Contracting State at the time of registration” (Article XXVII(2)(a)), that is, registration of the public service notice. “Public service notice” means a notice in the International Registry describing, in accordance with the regulations, the services which under the contract (referred to hereafter as “public services contract”) are intended to support the provision of a public service recognised as such under the laws of the relevant Contracting State at the time of registration (Article XXVII(2)(a)). The regulations referred to are regulations made by the Supervisory Authority of the International Registry. “Public services provider” means an entity of a Contracting State, another entity situated in that Contracting State and designated by the Contracting State as a provider of a public service or an entity recognised as a provider of a public service under the laws of a Contracting State (Article XXVII(2)(b)).

3.80. Registration of a public service notice requires the agreement of the parties and the Contracting State. This registration is the trigger for the suspension of the creditor’s remedies where the exercise of those remedies would make the space asset unavailable for the provision of the relevant public service. “Parties” means the parties to the public services contract. The creditor is not a party to that contract and its consent is not required. However, since the agreement creating the international interest will already be
in place prior to the registration of the public service notice (see paragraph 3.81) the creditor can impose contractual restraints on the debtor’s consent to registration of the public service notice, so in practice this is likely to be dealt with by negotiations involving all three parties.

3.81. The public service notice must relate to an existing and uniquely identifiable space asset which is the subject of an international interest created by an agreement between the debtor and a creditor. So the notice must identify both the space asset which is the subject of the notice and the creditor who is the holder of the international interest affected by the notice, since different international interests may have been granted to different creditors in respect of the same space asset. None of this is expressly stated in Article XXVII but it follows from the fact that the International Registry system is asset-based, so that registration of a public service notice must be made against a uniquely identified space asset, for otherwise the notice would not be searchable, while the reference to “the debtor” (defined in Article 1(j) of the Convention) and the requirement of the debtor’s consent presupposes that there is an existing agreement between a specific debtor and a specific creditor creating or providing for an international interest in the space asset and that the space asset, if not identified in the agreement, will have become identified by the time of the agreement for registration of the public service notice. The mode of registration is left to be prescribed by regulations of the International Registry but given the need for the public service notice to identify the holder of the international interest as well as the space asset itself the obvious solution is to note it against the registration of the international interest in the space asset to which it relates, in much the same way as the recording of an assignment of debtor’s rights (see paragraph 3.45).

Suspension of exercise of remedies

3.82. Subject to Article XXVII(8) and (9) (see paragraphs 3.92-3.93), a creditor holding an international interest in an asset that is the subject of a public service notice may not, in the event of default, exercise any of the remedies provided in Chapter III of the Convention or Chapter II of the Protocol that would make the space asset unavailable for the provision of the relevant public service prior to the expiration of the period specified in a declaration by a Contracting State as provided by Article XXVII(4) (see paragraph 3.83). Only the remedies specified in the two instruments are subject to this suspension. Other remedies given by the applicable law remain exercisable except so far as otherwise provided by that law. Again, the exercise
of remedies that do not make the space asset unavailable for the provision of the public services is not affected by this Article. So a creditor who has taken a rights assignment remains free to continue to collect direct from the obligor as the agreed machinery of payment by the debtor and, if the obligor defaults, to exercise remedies against the obligor, for example, by enforcing payment of rentals due from the public services provider for the grant of lease capacity or otherwise by ensuring that the revenue stream arising from the debtor’s grant of rights to the obligor can be collected by the creditor. This, indeed, is the mechanism by which the creditor is able to continue to collect any arrears due from the debtor and to receive payment for the use of the space asset despite the debtor’s default. In fact, most of the default remedies given by the Convention and Protocol have no impact on the availability of the space asset for the provision of the public service. Physical repossession is likely to be impracticable; in the ordinary way the only types of action capable of affecting the availability of the space asset or a physically linked space asset are electronic interference and constructive repossession in the shape of the assumption of control through such measures as the taking over of command codes. As will be seen, default by the public services provider removes the suspension of the creditor’s remedies.

Period of suspension

3.83. Under Article XXVII(4) a Contracting State must at the time of ratification of the Protocol specify by a declaration under XLI(1) a period of suspension (referred to below as “the suspension period”) not less than three nor more than six months from the date of registration by the creditor of a notice (hereafter referred to as the “default notice”) in the International Registry that the creditor may exercise any of the remedies in Chapter III of the Convention or Chapter II of the Protocol if the debtor does not cure its default within the suspension period. This declaration is mandatory and the Depositary cannot accept an instrument of ratification without it. Under Article XXVII(4) the period of suspension runs not from the date of the debtor’s default or from the accrual of the creditor’s right to assert a remedy but from the time of registration of the default notice in the International Registry. The default notice may not be registered earlier than registration of the public service notice. Since under Article XXVII(3) the creditor’s relevant enforcement rights are suspended until the expiry of the specified suspension period, it follows that the suspension operates not only during the suspension period but before it commences, and such commencement is dependent on the
creditor’s registration of its default notice (see paragraph 3.85). At the end of the suspension period the creditor resumes its full rights of enforcement if the debtor has not cured its default within the suspension period.

“Default”

3.84. Under Article 11 of the Convention the debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13. It is thus open to the parties either to expand the meaning of “default” in their agreement or to specify a non-default event as the trigger for the right to exercise remedies. For example, where it is desired that the remedies shall be exercisable on the attachment of any of the debtor’s assets this result could be achieved either by specifying such attachment as itself a default or (and perhaps more usually) by providing simply that on such an attachment the remedies are to become exercisable, without labelling the attachment as a default. In the absence of such an agreement “default” means a default which substantially deprives the creditor of what it is entitled to expect under the agreement (Article 11(2)).

Default notice

3.85. The default notice has to be registered in the International Registry in order to be effective (Article XXVII(4) (the reference in Article XXVII(6) to the creditor’s notice under paragraph 3 is a mistake and should be a reference to paragraph 4). Notice to the debtor does not suffice. This is because other parties, including the Contracting State, have an interest in knowing when the suspension of the creditor’s remedies comes to an end. The default notice that has to be registered in the International Registry is a notice that the creditor may exercise any of the remedies provided in Chapter III of the Convention or Chapter II of the Protocol if the debtor does not cure its default within the suspension period. Despite the word “may” there seems no reason why the creditor should not be free to register a notice that it will exercise any or all of the remedies at the expiration of the three months’ or six months’ period. Whether the notice uses the word “may” or “shall”, the creditor resumes its right to exercise any of the above remedies on expiry of the notice without further warning to the debtor or third parties.
Notification of the registration

3.86. The creditor must promptly notify the debtor and the public services provider of the date of registration of its notice and of the date of expiry of the suspension period (Article XXVII(6)). Article XXVII does not say what is to happen if the creditor fails to give the notification or is dilatory in giving it. One possible consequence is that the commencement of the suspension period would be postponed until the notice was given, a suggestion made by one delegate at the fifth meeting of the Committee of governmental experts, but it was not pursued at the diplomatic Conference, so that Article XVII(4) leaves the date of registration of the default notice as the starting point. Failure to give timely notification is nevertheless a breach of the creditor’s duty under the Protocol and on general principles the creditor should be precluded by its fault from contending that the suspension period began prior to giving the notification.

Duties of the parties during the suspension period

3.87. During the suspension period duties are imposed on various parties. First, the creditor, the debtor and the public services provider are required to co-operate in good faith with a view to finding a commercially reasonable solution permitting the continuation of the public service (Article XXVII(7)(a)). There seems no reason why a party’s failure to observe the obligation should not be actionable as a breach of that party’s duty under the Protocol. If the position were otherwise the supposed duty would be a brutum fulmen. The duty of co-operation is well-established in a number of civil law systems, if not as an independent duty then as an aspect of the requirement of good faith, though only to the extent that co-operation can reasonably be expected in the given circumstances.

3.88. The duty to co-operate has a positive and a negative aspect: a duty to act in seeking to find a commercially reasonable solution and a duty to refrain from conduct which would impede such a solution. Secondly, the regulatory authority of a Contracting State that issued a licence required by the debtor to operate the space asset that is the subject of a public service notice must, as appropriate, give the public services provider the opportunity to participate in any proceedings in which the debtor may participate in that Contracting State, with a view to the appointment of another operator under a new licence to be issued by the regulatory authority (Article XXVII(7)(b)). The purpose of this
provision is to address the situation where the debtor who contracted with the public services provider is located in a State other than a State receiving the services. The concern was that the receiving State would normally have no say in the regulatory negotiations in the licensing Contracting State. Article XXVII(7)(b) enables the State entity or State-designated entity which is the public services provider in the receiving State to seek the grant of a licence to a new operator, in place of the debtor or debtor-controlled entity, in any proceedings of the regulatory authority of the licensing Contracting State in which the debtor or entity controlled by the debtor could itself take part. Article XXVII(7)(b) is essentially procedural; it does not commit a Contracting State or its regulatory authority to grant a licence to a new operator and it is therefore not inconsistent with Article XXVI(1), which expressly preserves the authority of a Contracting State over the grant of licences.

Exceptions to the suspension of creditor's remedies

3.89. There are four exceptions to the suspension of the exercise of creditor’s remedies:

First exception: temporary step-in by creditor

3.90. The suspension does not affect the ability of a creditor, if so authorised by the relevant authorities, temporarily to operate or ensure the continued operation of a space asset during the suspension period where the debtor is not able to do so (Article XXVII(5)). Strictly speaking this is not a remedy “provided in Chapter 3” but the reference to paragraph 3 of Article XXVII can be justified by the fact that Article 12 permits additional remedies agreed by the parties. Article XXVII(5) does not itself confer on the creditor a right to remove the debtor, or a party appointed by the debtor, as operator without the debtor’s consent, though the agreement between the creditor and the debtor will normally contain a “step-in” clause empowering the creditor to appoint another operator in the event of the debtor’s default. Of course, this can only be done with the approval of the relevant authorities.

Second exception: proceedings to replace debtor with a new operator

3.91. During the suspension period the creditor is not precluded from initiating proceedings with a view to the replacement of the debtor by another person as operator of the space asset concerned in accordance with the rules of
the licensing authorities (Article XXVII(7)(c)). Again, the creditor can do this only if so empowered by the agreement or other consent of the debtor.

Third exception: default by the public service provider

3.92. The creditor is free to exercise any of the remedies provided in Chapter III of the Convention or Chapter II of the Protocol if at any time during the suspension period the public services provider fails to perform its duties under its contract with the debtor or entity controlled by the debtor (Article XXVII(8)). It is important to note that the default in question is not a further default by the debtor under the agreement with the creditor but default by the public services provider, e.g. in payment of sums due to the debtor under a lease capacity agreement or licence. The underlying assumption is that such debtor’s rights will have been acquired by the creditor under a rights assignment, so that any default in payment by the public services provider affects the income stream the creditor would otherwise have received. Such a default, or any other default in performance by the public services provider such as cessation of the service or failure to perform in the manner required by its contract, automatically ends the suspension period. The duties of performance and the circumstances in which performance is excused are governed by the law applicable to the contract under the rules of private international law of the forum State.

Fourth exception: registration of international interest without knowledge of prior public services contract

3.93. Unless otherwise agreed, the limitation on the remedies does not apply in respect of an international interest registered prior to registration of the public service notice where the international interest was created pursuant to an agreement made before the conclusion of the contract entered into by the debtor with the public services provider and at the time of that registration the creditor had no knowledge that such a public services contract had been entered into. However, this last exemption does not apply if the public service notice is registered no later than six months after the initial launch of the space asset (Article XXVII (9), (10)). This rather complex exception applies only if four tests, taken in the chronological order of events, are satisfied:

(1) The international interest was created pursuant to an agreement preceding the contract for the provision of the public service. It is not
necessary that the international interest shall actually have been created before the making of the public services contract; it suffices that there is an agreement for its creation conforming to the requirements of Article 7, even if the space asset is not identified in the agreement. Given that the registration of a public service notice is both asset-specific and transaction-specific (see paragraph 3.81), it is hard to see in what circumstances this condition will not be satisfied.

(2) The international interest was registered prior to registration of the public service notice. Assuming that condition (1) is satisfied the creditor will normally be able to ensure that this condition is also satisfied. Even before the creation of the international interest the creditor will have been able to register a prospective international interest with the consent of the debtor and when coming into existence the international interest will be deemed to have been registered from the time of registration of the prospective international interest (Convention, Article 19(4)).

(3) At the time of registration of the international interest the creditor had no knowledge of the making of the public services contract. The situation envisaged is that in which the public services contract was concluded after the creation of the international interest but before its registration and the creditor had not acquired knowledge of the public services contract in the interval between the two events. In the case of registration of a prospective international interest it is the creditor’s lack of knowledge at that time that is required.

(4) The public service notice was not registered within six months after the initial launch of the space asset. If it was so registered the exception does not apply even if all of the other three tests have been satisfied. The rationale for this is that it is unlikely that the services to be provided by the space asset will become available until the lapse of some months after launch. However, Article XXVII(10) does create the possibility that the creditor’s exemption under paragraph 9 from the limitation on remedies provided for by paragraph 3 is retrospectively removed by the registration of a public service notice under paragraph 10 before such remedies have been exercised.
The Supervisory Authority, the Commission of Experts and the Preparatory Commission

3.94. The Convention envisages a separate International Registry for each of the three categories of equipment covered by the Convention. The appointment of the Registrar and the establishment of the Registry are the responsibility of the Supervisory Authority. Article XXVIII(1) provides that the Supervisory Authority for the International Registry for space assets is to be designated at, or pursuant to a resolution of, the diplomatic Conference. By Resolution 2 the diplomatic Conference resolved to invite the governing bodies of the International Telecommunications Union (ITU) to consider the matter of becoming the Supervisory Authority upon entry into force of the Protocol. Resolution 1 provides a fall-back position by resolving that in the event of the governing bodies of ITU deciding that the ITU should not become the Supervisory Authority the General Assembly of UNIDROIT should appoint another international Organisation or entity to act as Supervisory Authority upon or after the entry into force of the Protocol. Resolution 1 also invited the Supervisory Authority to establish a Commission of Experts consisting of not more than 20 members from among persons nominated by the Signatory and Contracting States to the Protocol, having the necessary qualifications and experience, with the task of assisting it in the discharge of its functions. Such a body (CESAIR) was established to advise the Council of ICAO as Supervisory Authority of the International Registry for aircraft objects and has functioned well.

3.95. The appointment of a Registrar to run the International Registry and the establishment of the Registry take a considerable period of time to organise. A detailed specification has to be prepared on the basis of which competitive tenders are invited which then have to be evaluated; negotiations with the successful bidder may well be protracted; and the advanced technology involved in the setting up of the Registry will involve further delays as the system is devised and tested and defects remedied. Since the Registry must be in place and fully operational before the Protocol enters into force (see paragraph 3.7) it is obvious that the necessary work must be done long before the Supervisory Authority takes up its role. To that end the settled practice under the Cape Town Convention is to establish, by resolution of the diplomatic Conference, a Preparatory Commission as provisional Supervisory Authority to make the necessary arrangements for the setting up of the International Registry.
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3.96. Resolution 1 of the Berlin diplomatic Conference provides for the establishment of a Preparatory Commission under the guidance of the General Assembly of UNIDROIT, the Preparatory Commission to be composed of persons, having the necessary qualifications and experience, nominated by one-third of the negotiating States, with the ITU, the International Civil Aviation Organization (ICAO) and the Intergovernmental Organisation for Carriage by Rail (OTIF) being invited to participate as observers, together with representatives of the commercial space, financial and insurance communities and other interested parties. The Council of ICAO is the Supervisory Authority for the International Registry for aircraft objects, while OTIF will be the Secretariat of the Supervisory Authority yet to be established under the Luxembourg Protocol for the International Registry for railway rolling stock. Upon entry into force of the Protocol the Preparatory Commission’s task ends and the Supervisory Authority takes over.

3.97. Under Article 27(2) of the Convention the Supervisory Authority and its officers and employees enjoy such immunity from legal or administrative process as is specified in the Protocol. Article XXVIII(2) of the Protocol provides that the Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise. As a United Nations specialized agency the ITU already enjoys, on the plane of international law, the privileges and immunities set out in the standard clauses in the 1947 United Nations Convention on the Privileges and Immunities of the Specialized Agencies and Annex IX to that Convention with respect to countries that are parties to the convention. These include juridical personality and the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings. Sections 4-6 of Article III provide that the specialized agencies, together with their property, assets, premises and archives are inviolable and that they enjoy immunity from every form of legal process except so far as in any particular case they have waived their immunity. Further, under Article 31 of its Constitution the ITU enjoys in the territory of each of its Member States such legal capacity as may be necessary for the functions and the fulfilment of its purposes. So if it were to be appointed the Supervisory Authority it would enjoy all the privileges and immunities required, as well as any further privileges and immunities conferred by any agreement with the host State.
The International Registry system for space assets

3.98. Article 16 of the Convention lists the various matters capable of registration. Article XXXII of the Protocol inserts a new Article 16(1) bis which added further items that the Protocol provides shall feature in the registration system, namely the recording of rights assignments and rights reassignments, the recording of the acquisition of debtor’s rights by subrogation, the registration of public service notices under Article XXVII(1) of the Protocol and the registration of creditors’ notices under Article XXVII(4) of the Protocol. Regulations will determine how this is to be done but the simplest method would appear to be to note the public service notice against the registration of the international interest to which it relates, as in the case of an assignment of debtor’s rights. Article 16(1) bis affects only the International Registry established for space assets and Contracting States who ratify the Space Protocol.

3.99. The centralised functions of the International Registry are required to be operated and administered by the Registrar on a 24-hour basis (Article XXXII(5)), the intention being that the service should operate seven days a week throughout the year. The International Registry is, of course, entitled to suspend operations for reasonable periods for repair and maintenance. Either party to a registrable transaction can effect registration with the consent of the other. Registration may also be effected in the name of an agent, trustee or other representative (see paragraph 3.29), but it is not necessary to state the capacity of the registrant. For the purposes of Article 19(6) of the Convention the search criteria are those specified in Article XXX, which, however, does not itself specify any search criteria but leaves these to be prescribed by regulations. A person required by Article 25(2) to procure discharge of a registered prospective international interest or a registered prospective assignment must take such steps as are within its power to do so no later than ten calendar days after receipt of the demand in the manner that Article provides (Article XXXII(3)). The Supervisory Authority is entitled to set fees for use of the facilities of the International Registry on the basis of recovery of reasonable costs but not with a view to profit. The insurance or financial guarantee referred to in Article 28(4) of the Convention must cover the liability of the Registrar under the Convention to the extent provided by the regulations (Article XXXII(6)). Nothing in the Convention precludes the Registrar from procuring insurance or a financial guarantee covering events for
which the Registrar is not liable under Article 28 of the Convention (Article XXXII(7)).

Identification of space assets for registration purposes

3.100. As previously mentioned, the provisions of the Space Protocol concerning identification of space assets distinguish the identification criteria for the constitution of an international interest, which are governed by Article VII and are flexible (see paragraph 3.10(2)), from those required by Article XXX for registration, which are more stringent because they require that the asset against which a search is made be uniquely identifiable. In the case of aircraft objects the identification criteria are simple: manufacturer’s name, generic model designation and serial number. For space assets the working out of the identification criteria is more complex, partly because serial numbers are often not used and partly because of the problem of identifying assets already in space where any serial number may not be visible. Additional data suggested by a sub-committee of the Committee of governmental experts include the name of the asset, its orbital parameters such as inclination, nodal period, apogee and perigee, the country of administration in respect of the space asset, the ground station and the date of launch. Most of these were taken from the Registration Convention (see below, paragraphs 3.158-3.159). In the end it was decided to leave everything to be dealt with by the regulations. The advantage of a requirement of registrability in determining whether a payload or part of a spacecraft or payload falls within the Protocol has already been noted (paragraph 3.19). Leaving it to the regulations to determine the identification criteria allows a flexibility which would be lacking if basic criteria were to be set in stone in the Protocol.

Designated entry points

3.101. Article XXXI empowers a Contracting State, pursuant to Article 18(5) of the Convention, to designate an entity or entities in its territory as the entry point or entry points through which information required for registration shall or may be transmitted to the International Registry. Though any Contracting State is free to make a declaration under Article XXXI, the only space assets likely to be affected by the declaration are those registered or to be registered by the declaring State. That is the State which has control over the space asset, the transfer of licences, the authorisation of the use of orbital positions and
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frequencies and the ability to refuse to recognise or enforce an international interest where this would conflict with its laws or regulations governing exports or national security (Article XXVI). It is therefore the only State with the ability to control direct registration through arrangements with the International Registry. However, no such designation may be made in relation to notices of national interests, or registrable non-consensual rights or interests, arising under the laws of another State. The provisions and procedures relating to designated entry points apply only to registrations, not to searches, which are made direct to the International Registry.

Who can register

3.102. Either party to a registrable transaction can effect registration with the consent of the other. Registration may also be effected in the name of an agent, trustee or other representative. See paragraph 3.29.

Against what object may registration be effected?

3.103. In order for an international interest to be registered against an object two conditions must be satisfied. First, the object must be a space asset as defined by Article I(2)(k), that is, it must be (a) a spacecraft, or (b) a payload or part of a spacecraft or payload in respect of which a separate registration may be made under the regulations. Secondly, the description of the object must satisfy the identification criteria prescribed by the regulations.

Information required to effect registration

3.104. The information required to effect a registration will be governed by regulations yet to be made.

Searches and search certificates

3.105. Regulations will prescribe the search criteria, the types of search that will be able to be made in respect of space assets, the information to be supplied for the purpose of a search and the issue of search certificates. These will contain not only the information prescribed by the Convention but any additional information available under the Protocol, in particular the recording of rights assignments and rights reassignments against an international interest.
Registration errors

3.106. The Registrar is responsible for the International Registry’s own errors and omissions but not for errors in data supplied to it which it passes on unchanged (Article 28(2)). Errors in data such as the names of the debtor are much less likely to have significant adverse effects in an asset-based registration system than in a debtor-based registration system. Errors in the description of a space asset, on the other hand, could lead to more serious consequences. As to whether an error might invalidate a registration or expose a registrant to liability, see paragraph 2.132.

Priorities as regards sales

3.107. It has been seen earlier that under Article 29 of the Convention, in the absence of an agreement for subordination, a registered interest has priority over an unregistered interest and as between two registered interests priority is determined by the order of registration. However, successive sales do not raise a priority issue at all unless made by the same seller or by another seller retaining the power to dispose. For example, S sells a transponder to A and then wrongfully makes a second sale, to B. Priority goes to the first buyer to register its purchase. By contrast, in a chain of sales S→B1→B2→B3 where each sale has been registered there is no priority issue as the buyers are not in competition with each other, and this is so even if the registrations are made out of order. The position is simply that each buyer in the chain succeeds to the rights of its predecessor. Assuming that the sales are registered, each registration is independent of the others and because the International Registry is not a title registry (see paragraph 2.120) nothing turns on the order of registrations (see paragraphs 3.111 et seq.). At a practical level, however, an order of registration which follows the transaction sequence will reduce costs and simplify documentation, including legal opinions, which are aims of the Convention.

The priority position of a buyer

3.108. Article XXIII includes a provision designed to give the outright buyer of a space asset the same priority on registration as is enjoyed under Article 29 of the Convention by the holder of an international interest. Hence the special rule in Article 29(3) of the Convention for the protection of the buyer is not needed as regards space assets, since the buyer has the ability to register its
interest. Accordingly Article IV of the Protocol, in applying Article 29, excludes Article 29(3).

3.109. A conditional buyer or a lessee with an option to purchase can register a prospective sale, and if and when title is acquired the buyer's priority has effect from the time of registration of the prospective sale (Article 19(4) as applied by Article IV of the Protocol). Article XXIII also subordinates buyers that do not so register (Article XXIII(2)).

The importance of registration

3.110. The effect of Article 29 of the Convention, as applied by Article IV of the Space Protocol, is that the interest of the registered buyer has priority qua buyer over all subsequently registered sales by any seller retaining a power to dispose (see paragraph 3.112), all subsequently registered or unregistered international interests and all unregistrable interests – such as those of attachment or execution creditors – with the exception of non-consensual rights or interests protected by Article 39. Registration of a sale is thus almost as important for buyers as is registration of an international interest for chargees, conditional sellers and lessors. There are two significant differences. First, whereas under Article 29(1) international interests rank in order of registration, this is true of sales only where the same seller or another seller retaining a right to dispose makes two or more sales of the same asset to different buyers. By contrast registrations of successive sales do not fall within Article 29 at all (see paragraph 3.112). Secondly, in the case of the international interest the debtor against whose acts protection may be needed by registration enjoys possession, whereas in the case of a sale possession will usually pass to the buyer in the absence of a near-simultaneous chain of sales, so that the risk is somewhat reduced because a seller who has transferred both ownership and possession will not usually have a power to dispose. Nevertheless there are at least four reasons why it is important for buyers of space objects to avail themselves of the registration machinery provided under the Space Protocol:

(1) To preserve the buyer’s priority against a sale or grant of an international interests by a seller who remains in possession or otherwise has a power of disposal under the applicable law. In the absence of other sources of a power to dispose, such as agency, a seller who has parted with title and possession will no longer have a power to dispose.
(2) To secure priority over an earlier unregistered international interest other than a pre-existing right or interest and over a subsequent international interest.

(3) To secure priority over a non-consensual right or interest covered by a subsequent declaration by a Contracting State under Article 39 (see Article 39(3)) where no declaration has been made under Article 39(4).

(4) To secure priority over a registrable non-consensual right or interest not previously registered in the International Registry under Article 40.

Irrelevance of the status of intermediate buyers

3.111. It has already been noted (paragraph 2.120) that the International Registry is not a title registry. However, in practice this is of little significance; indeed, in some respects it is an advantage because a buyer can register without having to show a title reflected by a chain of registrations. Each registration stands on its own. Moreover, the fact that an intermediate sale may have been outside the Convention is irrelevant (see paragraph 3.113). Once the first registration has been made the registration and priority rules spring into play.

3.112. It will be apparent that registration of a sale works quite differently from registration of an international interest. In the case of the international interest priority goes to the first to register. By contrast buyers in a chain of sales are not in competition with each other. Each buyer takes the title of its predecessor, so if registrations are made in due order it is the last registration that will indicate the current holder of the asset. But as between buyers in a chain title vests in the last buyer pursuant to the contract of sale provided that the seller had a power to dispose. So whether a sale has been registered and the order of registrations are irrelevant to the transfer of title. For example, in a chain of sales A→B→C→D it may happen that B has not registered its purchase. This does not affect D’s title as between buyers in the chain. D’s title depends solely on whether C had a power to dispose under the applicable law or under the Convention (see paragraph 2.66), which could be the case even if C’s predecessor B did not have the power to dispose. However, failure of a buyer in the chain to register may lead to its subordination to other interests as discussed in paragraph 3.110. This subordination will affect subsequent buyers. Again, it could happen in practice that the sale by C to D is registered before the sales by A to B and B to C, but since the registry is not a title registry and
the sellers in the chain are not in competition with each other the chronology of registrations does not raise any priority issue. However, to cover the situation where the order of registrations does not follow the order of sales D, if satisfied that none of the prior sellers retained a power to dispose, may wish simply to register the last sale in the chain and not the prior sales.

3.113. It is equally immaterial that in a chain of sales one of the intermediate sales is not governed by the Convention because the seller is not situated in a Contracting State. The buyer under such a sale cannot, of course, avail itself of the protection given by registration under the Convention. But if the last sale is within the Convention the last buyer can register the sale and secure protection against subsequently registered interests and unregistered interests regardless of the fact that one of the buyer’s predecessors was not protected by the Convention.

Separate interests need separate registrations: no cross-over

3.114. The fact that a sale is registrable may lead to a situation in which the same person holds two distinct registrable interests in the same space asset. For example, B buys a satellite from S and supplies it to L under a leasing agreement, and is thus entitled to register both the sale and the international interest generated by the grant of the lease. What is the position if the buyer registers the sale but not the international interest or registers the international interest but not the sale? This raises the question whether registration of only one of the two interests suffices to protect the buyer against the consequences of failure to register the other. Can there, in other words, be a “cross-over” protection? For example, does B’s registration only of the sale suffice to protect it against a purchaser from L? Again, does B’s registration only of the international interest suffice to protect B against a purchaser from S? On a superficial interpretation this could give rise to conflicts between Article 29(1) of the Convention and Article IV and Article XXIII of the Protocol. In the first of these two cases B would apparently lose under Article 29(1) but win under Article XXIII(1). In the second case the position would be the reverse. However, the proper analysis is as set out below.

(1) Priorities when the sale by S to B is registered but the lease by B to L is not

3.115. In this situation B’s registration as buyer, though having priority over any subsequently registered interest or an unregistered interest, including an
international interest, protects only B’s interest under the sale and is designed to safeguard B against a wrongful second disposition by S. This is made clear by Article XXIII(1) of the Protocol, which states that a buyer of a space asset under a registered sale acquires its interest in that object (i.e. its interest qua buyer) free from a subsequently registered or unregistered interest. B’s interest as lessor is entirely distinct and is an interest of a different kind, namely an international interest, which requires registration as such in order to protect against a wrongful disposition by L. It follows that registration of the sale to B secures priority for the sale against a subsequently registered interest (whether this is a second sale by S or an international interest) and an unregistered interest but does not secure priority for B’s international interest as lessor against a wrongful disposition by L. A third party dealing with L who searches the register will be aware that B bought the space asset but in the absence of registration of B’s international interest may be led to believe that L, being in possession, bought the space asset under an unregistered sale.

(2) Priorities when the sale by S to B is not registered but the lease by B to L is registered

3.116. In the converse case where B registers its international interest but not the sale by S, B’s international interest is protected against a wrongful disposition by L but its separate interest as buyer is not protected against a second purchaser from the S or against S’s insolvency creditors.

3.117. In short, there is no cross-over protection; registration of one interest does not secure priority for the other. Similar considerations apply to the case where a lessee under a leasing agreement containing an option to purchase grants a sub-lease.

Prospective sales

3.118. An intending buyer may register a prospective sale of an identified space asset and if a sale later results it is deemed to have been registered as from the time of registration of the prospective sale if the registered information would have been sufficient for a sale (Article 19(4)), which may, of course, have priority effects.
Debtor’s right to quiet possession and use

3.119. Article XXV of the Space Protocol establishes a quiet possession regime which is in principle dependent on registration of the creditor’s international interest before registration of a chargee’s interest and follows the priority rule in Article 29(4) (see paragraphs 2.167 et seq.). Under Article XXV(1) the right to quiet possession and use (“quiet possession”) is conferred on a debtor who is a conditional buyer or lessee vis-à-vis its creditor, the conditional seller or lessor, and vis-à-vis the holder of an interest in the object subordinate to that of the creditor. In all cases the right of quiet possession depends on the terms of the agreement between debtor and creditor. To the extent that the right is qualified by the title reservation or leasing agreement it is qualified not only as against the creditor but also as against the chargee. Subject to the terms of the agreement the debtor is given the right to quiet possession as against:

(a) its creditor and the holder of any interest from which the debtor takes free under Article 29(4) of the Convention (see paragraph 2.167); and

(b) the holder of any interest to which the debtor’s right or interest would be subject under the above provisions, to the extent that such holder has so agreed.

For brevity of analysis the holder of the interest referred to above will be assumed to be, and will be described as, a chargee under a security agreement entered into by the conditional seller or lessor as chargor.

3.120. The effect of Article XXV is that (a) where the debtor who is a conditional buyer or lessee has priority over a chargee because the debtor’s creditor (conditional seller or lessor) registered its international interest before the creditor registered its charge that priority, unless and to the extent that the debtor has otherwise agreed, will carry with it a right of quiet possession as against the chargee (thus making explicit what is anyway implicit in the priority rule itself), and (b) the debtor will also have a right of quiet possession as against a chargee to whose interest the debtor’s right of quiet possession would otherwise be subject, to the extent that the chargee has so agreed. Such an agreement is in effect a subordination corresponding to the subordination provided for in Article 29(5) and qualifying the priority rule in Article 29(4). Article 29(5), which permits the variation of competing priorities, and the
registration thereof binding third parties, applies to the foregoing rules. So if a chargee who would otherwise have had priority over a conditional buyer or lessee agrees to hold its interest subject to the right of quiet possession of the conditional buyer or lessee, this constitutes a variation of priorities within Article 29(5) so as to subordinate the charge and entitles the conditional buyer or lessee to register the subordination, which should be done in order to bind an assignee of the subordinated chargee’s interest. The chargee’s consent to entry of the chargor into the conditional sale or leasing agreement itself does not by itself constitute an implied subordination to the right of quiet possession of the conditional buyer or lessee in the absence of any express or implied agreement for subordination between the chargee and the conditional buyer or lessee. By the same token, a debtor who would otherwise have priority against the chargee may agree to waive its right of quiet possession as against the chargee, and in that event the waiver should be registered as a subordination in order to bind an assignee of the title reservation or leasing agreement. The accrued right of quiet possession of the debtor or buyer cannot be terminated by a subsequent subordination agreement between the creditor or seller and the chargee, which operates only as between those parties. Article XXV extends the protection of the conditional buyer and lessee to the debtor “in the capacity of buyer”, that is, an outright buyer given priority under Article XXIII(1). Such a buyer is technically not a debtor at all but for ease of drafting is treated as a debtor for the purpose of Article XXV.

3.121. There could be a case in which two charges have been granted, one of which is registered before the registration of the international interest of the conditional seller or lessor, the other after such registration. In such a case the conditional buyer or lessee has a right of quiet possession against the second chargee but not against the first. The right of quiet possession against the second chargee is not affected by a subsequent subordination agreement between the two chargees, which cannot deprive the debtor of its accrued right of quiet possession against the beneficiary of the subordination. In determining whether the conditional buyer or lessee has a right of quiet enjoyment against a chargee the sole question, in the absence of a subordination agreement between them, is whether the international interest of the conditional seller or lessor was registered before that of the chargee. A change in priority of the two chargees is irrelevant.

3.122. The Protocol does not define quiet possession or state what kinds of act constitute an infringement of the right of quiet possession, but the concept
of quiet possession denotes freedom from interference with the debtor’s possession, use or enjoyment of the space asset. Accordingly any such act of interference constitutes a breach of the right to quiet possession, whether it takes the form of physical seizure (which is unlikely), disablement of the space asset, restriction of access to it or otherwise. However, the creditor is liable only for interference for which it is directly or indirectly responsible, as where the creditor takes control of the space asset or authorises a third party to do so or where a chargee not having priority over the lessee takes control because of default under the security agreement by the lessor or a third party obtains control by virtue of a judgment or order against the creditor for payment of sums due from the creditor. Similar considerations apply to the liability of a holder of an interest from which the debtor (i.e. a conditional buyer or lessee) takes free pursuant to Article 29(4) of the Convention or, in the capacity of buyer, Article XXIII(1) of the Protocol. See Article XXV(1).

3.123. Article XXV applies only where a debtor is not in default within the meaning of Article 11 of the Convention. That Article permits the parties to agree on what constitutes a default. Where no such agreement is contained in the contract, the default must be substantial. Assuming no such default, Article XXV entitles the debtor to quiet possession, in accordance with the agreement, as against (a) its creditor, and (b) the holder of any interest from which the debtor takes free under Article 29(4) of the Convention (see paragraph 3.120 above).

3.124. As stated above, the rules governing the priority of the right of quiet possession vis-à-vis a third party such as a chargee may be varied by agreement (see Article 29(5)). A prospective outright buyer cannot use the quiet possession provisions as an indirect method of securing priority, for this protection is given to it only in the capacity of conditional buyer, not of outright buyer or prospective buyer. Instead the prospective buyer should register a prospective sale (see paragraph 3.27). If it does not do so, then upon title passing to it under the title reservation agreement or through exercise of the option to purchase its right of quiet possession qua conditional buyer or lessee will come to an end and it will become subordinated to a registered chargee.

3.125. The right of quiet possession of a conditional buyer or lessee as against a chargee where the interest of the conditional seller or lessor was registered before registration of the charge is brought to an end by subsequent discharge
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of the former registration (see paragraph 2.167), though the conditional buyer or lessee may still have a remedy against the conditional seller or lessor in the event of interference with its quiet possession.

3.126. Under Article XXV(2) nothing in the Convention or the Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to the space asset. So if the agreement makes the creditor’s right to enforcement after default dependent on the fulfilment of certain conditions, for example, failure to comply with a default notice requiring a breach to be remedied within a specified time, and the creditor takes enforcement measures when those conditions have not been fulfilled, the fact that the creditor would otherwise have been entitled to possession under the Convention does not preclude a claim by the debtor for breach of its right to possession under the applicable law.

3.127. The debtor’s right of quiet possession under Article XXV(1) as against a person other than its creditor, e.g. a chargé, in effect constitutes a priority rule.

Remedies on insolvency

3.128. Article XXI introduces special rules in relation to space assets and debtor’s rights designed to strengthen the creditor’s position vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event, that is, (i) the commencement of insolvency proceedings against the debtor, or (ii) the debtor’s declared intention to suspend or actual suspension of payments where the creditor’s right to institute insolvency proceedings or to exercise remedies under the Convention is suspended by law or State action (Article I(2)(d)). “Insolvency proceedings” means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation (Convention, Article 1(l)). “Court” generally means a court of law or an administrative or arbitral tribunal established by a Contracting State (Article 1(h)) but in regard to arbitral tribunals this is a case where the context otherwise requires, since such tribunals do not normally control or supervise a debtor for the above purposes. It is open to a Contracting State to declare the relevant “court” or “courts” for the purpose of Article 1 (Article 53). “Insolvency administrator” is defined by Article 1(k) of the Convention as a
person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable law. The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices. The time of commencement of insolvency proceedings is determined by the applicable insolvency law. In some jurisdictions, where a winding-up order is made on a creditor’s petition the insolvency proceedings are deemed to commence at the time of presentation of the petition, and in those jurisdictions that will be the relevant time for the purpose of Article I(2)(d).

3.129. Article XXI applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XLI(4). “Primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests is situated, which is deemed to be the place of the debtor’s statutory seat or, if none, the place where the debtor is incorporated or formed, unless proved otherwise (Article I(2)(g)).

3.130. A Contracting State may elect to make a declaration applying Alternative A or Alternative B or it may make no declaration at all, in which case its existing insolvency law will continue to apply. Even where a Contracting State has made a declaration under Article XXI it is open to the parties to exclude the application of that Article by agreement in writing (Article XVI), but they cannot vary it, only exclude it in its entirety. This is because each of the alternative options for which a Contracting State may make a declaration, namely Alternative A or alternative B, has to be adopted in its entirety if it is to be adopted at all (see below). Under Article XLI(5) of the Protocol the courts of Contracting States (i.e. Contracting States other than the COMI Contracting State) are required to apply Article XXI in conformity with the declaration made by the Contracting State which is the primary jurisdiction. So if there are secondary insolvency proceedings in another Contracting State relating to a space asset situated in that State the courts of that State must apply the version of Article XXI selected by a declaration of the Contracting State of primary jurisdiction.

Alternative A

3.131. The “hard”, or rule-based, version, Alternative A, is specifically designed to meet the requirements of advanced structured financing, including international capital market financing structures. Paragraphs 2, 3 and 8 require
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the insolvency administrator or the debtor, as applicable, either (a) to give possession or control within the earlier of a waiting period specified in a Contracting State’s declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement, which includes obligations under other transaction documents (e.g. a loan agreement) incorporated by reference in such agreement. Paragraph 3 extends this to possession or control over the debtor’s rights covered by a rights assignment. If the insolvency administrator or the debtor fails to give up possession or control after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A the creditor can apply for and is entitled to obtain speedily a court order in accordance with the applicable procedural law requiring the insolvency administrator or the debtor to comply with those obligations. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9). The following points arise under paragraphs 2 and 3 of Alternative A:

“Insolveney administrator or the debtor, as applicable”

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

3.133. The waiting period begins on the occurrence of an insolvency-related event as defined by Article 1(2)(d) and is the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

“The date on which the creditor would be entitled to possession of or control over the space asset if this Article did not apply”

3.134. This must be interpreted as referring to a right to possession or control arising after the occurrence of an insolvency-related event as defined by Article 1(2)(d). The underlying premise is that such commencement causes a stay on the creditor’s right to possession or control. However, where there is no stay, whether because (a) the insolvency-related event is not the commencement of proceedings but the declaration of an intended suspension of payment, (b) the stay is lifted during the waiting period, or (c) the space asset or debtor’s rights do not form part of the debtor’s estate under the applicable insolvency law (which in the case of a space asset could, for example, be because it is held under a title reservation agreement or a leasing agreement), the creditor becomes entitled to possession or control even if the waiting period has not expired. In other words, paragraphs 2(b) and 3(b) are to be interpreted as if they read “would be entitled, or becomes entitled, to possession or control of the space asset notwithstanding the insolvency proceedings or other insolvency-related event”. The insolvency administrator or the debtor can only avoid loss of the right to possession or control if it has cured all defaults, other than a default cured by the opening of insolvency proceedings, by the earlier of the expiry of the waiting creditor and the accrual or resumption of the creditor’s right to possession or control and has within the same time agreed to perform all future obligations under the agreement, including obligations under other contracts incorporated by reference into the agreement.

3.135. Unless and until the creditor is given the opportunity to take possession or control the insolvency administrator must preserve the space asset and maintain its value in accordance with the agreement, but may use the space asset under arrangements designed to preserve the space asset and maintain it and its value in accordance with the agreement. This would seem to include earning income from continued operation of the space asset. Meanwhile the creditor for its part is entitled to apply for any other forms of interim relief available under the applicable law (Alternative A, paragraph 6(b)).
What constitutes interim relief varies with the applicable law. In a number of jurisdictions any form of relief which is considered appropriate before a final determination has been made on the merits qualifies as interim relief, so that in those jurisdictions sale of the object to which the proceedings relate can be ordered by way of interim relief, whereas other jurisdictions look to the finality of what is ordered and consider sale to be an irrevocable act and therefore inappropriate for interim relief. A court in a Contracting State before which interim relief is sought will thus apply its own law in deciding whether a particular remedy qualifies as interim relief. What constitutes the applicable law is to be determined by the rules of private international law of the forum State (Article 5(3)), and the availability of interim relief will usually be regarded as procedural in character and therefore governed by the lex fori. Where the insolvency-related event is the commencement of the insolvency proceedings the forum State will almost invariably be the State in which the proceedings are opened and the lex concursus will apply. A separate rule applies as regards advance relief under Article 13 of the Convention in that sale and the application of the proceeds of sale are made available as a form of relief under that Article if at any time the debtor and the creditor specifically agree (Protocol, Article XX(3)).

3.136. Paragraph 3 of Alternative A of Article XXI, applies in relation to debtor’s rights covered by a rights assignment the same provisions on possession or control as paragraph 2 of Alternative A applies in relation to space assets, though possession will be available only in the case of documentary intangibles (see paragraph 3.69). Of course, paragraph 3 assumes that the creditor has not already obtained payment or other performance from the obligor, which would pro tanto extinguish the debtor’s rights in relation to that obligor. As regards debtor’s rights in existence at the time of the rights assignment and still current at the time of the insolvency-related event it will usually be unnecessary for the creditor to resort to paragraph 3, because the rights assignment itself coupled with the ability to give notice of assignment to the obligor will already have given control to the creditor. However, debtor’s rights may have arisen after the rights assignment, and while these will have vested automatically in the creditor upon their coming into existence (Article XI) the debtor may not have given the creditor the information it needs to obtain payment or other performance from the obligors. In such cases paragraph 3 obliges the debtor to furnish the necessary information and provide such other assistance as the creditor reasonably requires to enforce performance.
3.137. Paragraph 8 is expressed to allow the insolvency administrator to retain possession or control of debtor’s rights where within the time specified in paragraph 1 it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. This works perfectly well in relation to debtor’s rights assigned by way of security, for the purpose of paragraph 8, where it applies, is to impose the same freeze on the enforcement of debtor’s rights as collateral as is imposed in relation to the space asset. However, the definition of “rights assignment” includes an outright assignment in reduction or discharge of the debtor’s present or future obligations to the creditor secured by or associated with the space asset. The debtor no longer has an interest of any kind in debtor’s rights so assigned and paragraph 8 cannot have been intended to apply to such an assignment.

3.138. The power to grant the creditor interim relief under paragraph 6(b) of Alternative A of Article XXI in a Contracting State that has made a declaration applying Alternative A does not affect the ordinary jurisdiction of an insolvency court, even in a Contracting State which has not made such a declaration, to grant such interim relief as its law allows. Where insolvency proceedings are opened in one Contracting State the jurisdiction of the courts of another Contracting State to grant interim relief may, of course, be circumscribed by rules of the latter State’s law requiring it to recognise the exclusive jurisdiction of the insolvency court of the former State, as where both Contracting States have adopted the UNCITRAL Model Law on cross-border insolvency.

3.139. Paragraphs 9 and 10 of Alternative A preclude the court from preventing or delaying the exercise of the creditor’s remedies beyond the above time-period and from modifying the debtor’s obligations without the creditor’s consent. In effect this removes, for space assets, the preservation of the court’s powers under Article 30(3)(b) of the Convention (see paragraph 2.184). Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors’ rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9. Similarly, any provisions of
domestic law modifying or empowering a court to modify the debtor’s obligations must be disapplied where these would conflict with paragraph 10. Though paragraph 10 only precludes modification of the debtor’s obligations under “the agreement”, that is, the security agreement, title reservation agreement or leasing agreement relating to the space asset, and says nothing about security assignments of debtor’s rights, it must be intended to cover these as well, particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditor’s remedies, applies to all remedies, not merely those relating to the space asset. But the insolvency administrator remains entitled to terminate the agreement where so allowed by the applicable law (Alternative A, paragraph 11), that is, the law governing the agreement.

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

Alternative B

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

3.142. Unlike the hard rule in Alternative A which requires performance of all the debtor’s obligations, including cure of all prior defaults other than the insolvency itself, under Alternative B the applicable law may condition the creditor’s rights. In particular, if the insolvency administrator does not give the required statement or give up possession or control of the space assets after stating it will do so, the applicable law may “permit the court to require the taking of any additional step or the provision of any additional guarantee” (Alternative B, paragraph 3). This wording is infelicitous in that it does not indicate what is meant by “additional step”, there being no mention in paragraph 2 of any prior step such as an order for possession, nor is it clear why paragraph 3 purports to provide what the applicable law may do, that being, one would have thought, a matter for the applicable law itself. The intended effect of paragraph 3 appears to be that the court may permit the creditor to take possession or control of space assets upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee permitted by the applicable law. This would allow the court, if so empowered by the applicable law, to require the creditor to furnish a guarantee against loss suffered by the debtor as the result of the order if on the substantive hearing the creditor’s claim were to prove unsuccessful. Since such relief is essentially procedural, so that the applicable law is the *lex fori*, it is not clear why any reference to the applicable law is necessary. Alternative B, in contrast to Alternative A, is confined to space assets and does not apply to debtor’s rights covered by a rights assignment.

3.143. Compared with Alternative A the creditor’s rights are qualified in three significant respects. First, the insolvency administrator does not have to take action to cure all defaults or give the creditor an opportunity to take possession; it merely has to give notice to the creditor whether it will do either of these things. Second, if the insolvency administrator does not give the required notice or if, having declared it will give the creditor the opportunity to take possession or control, it fails to do so, the creditor cannot exercise self-help but must apply to the court for leave to take possession or control and if leave is granted conditions may be imposed. So under the “soft” version of Article XXI the court’s discretion is substituted for the creditor’s entitlement to take possession or control. Pending the court’s decision regarding the claim and the international interest the space asset may not be sold (Alternative B,
paragraph 6). Third, Alternative B contains no equivalent to paragraph 12 of Alternative A that no rights or interests, other than non-consensual rights or interests covered by a declaration under Article 39, are to have priority over registered interests.

Non-consensual rights or interests

3.144. Neither Alternative A nor Alternative B affects the enforcement rights of the holder of a non-consensual right or interest, but these will be governed by the lex concursus.

The insolvency provisions and Member States of the European Union


Insolvency assistance

3.146. Article XXII, which applies only where a Contracting State has made a declaration pursuant to Article XLI(2)(b) provides that the courts of a variety of Contracting States shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XXI. The phrase “in accordance with the law of the Contracting State” means “so far as not incompatible with”. It is not necessary that the Contracting State’s law should provide for co-operation; it is sufficient that it does not preclude it from being given. Whether in any particular case the Contracting State’s law is a barrier to co-operation depends partly on any relevant legislation and partly on the judicial policy of its courts in cases of similar kind. Regard must also be had to the 1997 UNCITRAL Model Law on Cross-Border Insolvency in Contracting States that have adopted the Model Law.

3.147. In the Aircraft Protocol and the Luxembourg Protocol it was necessary to specify only the courts of the Contracting State in which the object was situated. Obviously the same approach could not be adopted for space assets, so instead Article XXII identifies six different points of control in relation a space asset by a Contracting State and imposes the duty of assistance on all or any Contracting States in which any such a control point exists. Thus judicial co-operation is required from the Courts of a Contracting State (i) in which the
space asset is situated; (ii) from which the space asset may be controlled; (iii) in which the debtor is located; (iv) in which the space asset is registered; (v) which has issued a licence in respect of the space asset; or (vi) otherwise having a close connection with the space asset. The phrase “in which the space asset is situated” must, when the space asset is not Earth, be treated as referring to (a) the Contracting State referred to in Article I(3) (see paragraph 3.158), (b) a Contracting State which has issued a licence to operate the space asset, or (c) a Contracting State on the territory of which a mission control centre for the space asset is located (Article I(4)). A mission control centre is a command centre controlling space flights.

**Assignment of associated rights**

3.148. Article XXIV introduces into Article 33(1) of the Convention a new sub-paragraph (c) making it necessary for the debtor to give its consent to an assignment of associated rights. In contrast to the usual rule regarding consents such a consent does not have to be communicated electronically to the International Registry, being outside the scope of Article 18(1)(a).

3.149. The debtor’s consent to an assignment is not usually required by national laws on assignment of claims but is designed to avoid disputes as to the efficacy of an assignment. That consent, however, may be given in advance and may be general in nature. The thinking is that, in exchange for a clear consent requirement, the debtor is bound to the assignment without qualification. Nevertheless some qualification is necessary. For example, if the debtor receives two notices of assignment from different assignees covering associated rights and the international interest it is inconceivable that a court would order the debtor to make payment twice. The debtor’s proper course is to invoke local procedural rules governing the debtor’s duty in such a case.

**Assignment of unregistered interest**

3.150. The assignee of an international interest is entitled to have it registered, whether or not the assigned international interest has itself been registered, in order to secure a measure of priority for its assignment. See paragraph 2.199.
3.151. Article I(4) also applies to determine the location of a space asset when not on Earth for the purposes of Article 43(1) of the Convention and insolvency assistance for the purposes of Article XXII of the Protocol. Under Article I(4) references to a Contracting State on the territory of which an object or space asset is situated are to be treated, as regards a space asset when not on Earth, as references to any of the following:

(a) the Contracting State referred to in Article I(3) (see paragraph 3.158);
(b) a Contracting State which has issued a licence to operate the space asset; or
(c) a Contracting State on the territory of which a mission control centre is located.

Preservation of powers of Contracting State

3.152. Most States jealously guard their right to regulate the transfer of licences, the grant of new licences, the authorisation of the use of orbital slots and frequencies, and the like. Article XXVI contains detailed provisions designed to make it clear that nothing in the Protocol affects the exercise by a Contracting State of its authority over such matters. Similarly, a Contracting State can continue to apply its laws and regulations prohibiting or restricting the placement of command codes. Further, nothing in the Protocol is to be construed as requiring a Contracting State to recognise or enforce an international interest in a space asset where such recognition or enforcement would conflict with that State’s laws or regulations concerning (a) the export of controlled goods, technology, data and services, or (b) national security. It is for each Contracting State to decide what concerns its national security. In some States this could include laws and regulations which prohibit certain assets from being made available. The definition of “controlled” featuring in the draft Protocol disappeared in the drafting of Article XXVI but that word simply denotes that the transfer of the goods, technology, data or services is subject to governmental restrictions. Many States have tight controls over the export or transfer of objects classified as arms, or munitions, including satellites.
3.153. It has to be said that provisions of this kind in a private commercial law instrument are rare. It has always been taken for granted that, except so far as it specifically provides, such an instrument does not touch regulatory law, criminal law or other legislation in the public law domain relating to national security (see paragraph 2.9(1)). No such provision is to be found in the Convention or either of the earlier Protocols, nor, indeed, does it feature in other commercial law conventions such as the 1980 Convention on Contracts for the International Sale of Goods, the 1988 UNIDROIT Conventions on International Factoring and International Financial Leasing or even, except to a minor degree, the 2009 UNIDROIT Convention on Substantive Rules for Intermediated Securities. It was inserted ex abundante cautela at the particular insistence of a few negotiating States whose concerns the other negotiating States agreed to accommodate. This does not, however, imply that the position would be any different under the earlier Protocols.

**Waiver of sovereign immunity**

3.154. Under Article XXXIII of the Space Protocol a waiver of sovereign immunity from the jurisdiction of the courts specified in Articles 42 and 43 which is given in writing and contains a description of the space assets as specified in Article VII of the Protocol is binding and, if the other conditions to such jurisdiction have been satisfied, is effective to confer jurisdiction. The provision that the waiver contain a description of the space asset refers to the instrument of waiver – usually the agreement in which the waiver clause is contained – and does not require that the description be contained in the waiver clause itself. Similarly, a waiver relating to enforcement is effective to permit enforcement if the above requirements are satisfied. The requirements as to description are the more general requirements set out in Article VII, not the more detailed ones in Article XXX. Accordingly any description which enables the space asset to be identified as falling within the scope of the agreement suffices.
Remedies for breach of Protocol provisions

Breach of Protocol by a party to an agreement

3.155. Examples of breach of a provision of the Space Protocol by a party to the agreement are the following:

(1) Breach by the creditor of its duty under Article XVII(1) to exercise a remedy in a commercially reasonable manner.

(2) Breach by the debtor of its duty under Alternative A of Article XXI to give possession of a space asset to a creditor.

(3) Breach by the debtor of its duty under Alternative A of Article XXI to preserve the space asset and maintain its value in accordance with the agreement.

(4) Breach by the creditor or a chargee of the debtor’s right of quiet possession under Article XXV.

(5) Exercise of remedies by the creditor during the suspension period in breach of Article XXVII.

The Protocol does not itself prescribe the remedy for a breach of its provisions. In a Contracting State this will simply constitute a breach of that State’s law and will attract whatever remedies that law provides, for example, payment of an amount due, damages, restitution, an injunction or specific performance.

Breach of Protocol by a Contracting State

3.156. It will have been seen that the Protocol imposes various duties on Contracting States and their competent authorities, for example in regard to insolvency assistance (Article XXII), or the provision of an opportunity to a public services provider in a receiving Contracting State to participate in regulatory proceedings in the licensing State (Article XXVII(7)(b)); but no direct remedy is given to a creditor who suffers loss as the result of any such duty being broken. See paragraph 2.236.

3 More accurately, breach of national law implementing the Protocol.
Relationship with other Conventions

3.157. The Convention as applied to space assets supersedes the 1988 UNIDROIT Convention on International Financial Leasing (Article XXXIV) in respect of the subject matter of the Protocol as between States parties to both Conventions but does not affect State Party rights and obligations under the existing United Nations outer space treaties or instruments of the International Telecommunications Union (Article XXXV).

Internal transactions

3.158. Under Article 50 of the Convention a Contracting State may, within rather narrow limits, by declaration exclude the Convention as regards internal transactions, which are there defined in terms which require that the centre of main interests of the parties and the location of the relevant object are in the same State and the interest created by the transaction has been registered in a national registry in the declaring State (Convention, Article 1(n)). In order to make this work for a space asset when not on Earth, Article I(3) of the Space Protocol provides that for the purposes of the definition of “internal transaction”, a space asset, when not on Earth, is deemed located in the Contracting State which registers the space asset, or on the registry of which the space asset is carried, as a space object under one of the following:

(a) the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 1967 (“the Outer Space Treaty”);

(b) the 1975 Convention on Registration of Objects Launched into Outer Space (“the Registration Convention”); and

(c) the UN General Assembly Resolution 1721 (XVI) B of 20 December 1961.

3.159. The Outer Space Treaty contains references indifferently to “the State of registry” and “the State on whose registry an object launched into outer space is carried” but does not itself contain a registration provision. That is the primary purpose of the Registration Convention, under which the Contracting State “which registers the space asset” is the launching State and will also be the State “on the registry of which the space asset is carried” (Registration Convention, Articles I(c), II(1)). Where more than one launching State is
involved it is for the launching States to agree which one is to effect registration of the space object. The term “space object” includes component parts as well as the launch vehicle and parts thereof but is not otherwise defined. It is possible for a registration to be transferred from one State to another. It is common practice to register separately the entire satellite and that part of the launch vehicle reaching orbit. The UN Resolution of 20 December 1961 called for the provision of information by launching States to the Committee on the Peaceful Uses of Outer Space (COPUOS) and for the maintenance of a public registry of such information by the UN Secretary General. The UN Office for Outer Space Affairs (OOSA) maintains this registry, as well as a registry of information about launchings supplied to it by States pursuant to the Registration Convention (see above, paragraph 3.100). States not party to the Registration Convention notify OOSA in accordance with the UN General Assembly Resolution 1721 (XVI) B. However, what Article 1(3) of the Space Protocol refers to is not the registers maintained by OOSA but those maintained by Contracting States. A space asset should only be carried on the registry of a single State at any one time and for the purposes of determining the deemed location of an asset in deciding whether a transaction is an internal transaction the relevant registry is that on which the space asset is carried at the time of entry of debtor and creditor into the security agreement, title reservation agreement or leasing agreement.

Transitional provisions

3.160. Article 60 of the Convention, while laying down a general rule that the Convention does not apply to pre-existing rights or interests, allows a Contracting State to extend the Convention to such interests by declaration specifying a date, not earlier than three years after the date on which the declaration becomes effective, when the Convention and Protocol become applicable to those interests for priority purposes. Article XL(1) of the Space Protocol disapplies Article 60 in relation to space assets, but Article XL(2) preserves the general rule that a pre-existing right or interest retains the priority it enjoyed under the applicable law before the effective date of the Convention. The reason why Article 60 was not simply left to apply is because it contains provisions for a declaration by a Contracting State to extend the Convention to pre-existing rights or interests and it was not wished to apply such provisions in relation to space assets. Article XL follows the Luxembourg Protocol in making explicit certain points which in Article 60 were merely implicit.
Pre-existing right or interest

3.161. Article XL(2) tracks the definition of “pre-existing right or interest” in Article 1(v) of the Convention and it is convenient to use the same label here.

3.162. The effect of Article XL(2) is that the holder of a pre-existing right or interest preserves its pre-Convention priority without the need to register under the Convention, even if the right or interest is of a registrable category and even if it would ordinarily be overridden by a registered interest under Article 29(1) of the Convention. Article XL(2) does not confine the concept of pre-existing interest to one arising under the law of a State that has become a Contracting State; even a pre-existing interest arising the law of a non-Contracting State falls within Article XL(2) if the debtor was situated in a Contracting State at the time of the agreement creating or providing for the international interest. However, the priority of a pre-existing right or interest over a registered international interest must, to make policy sense, be confined to a right or interest created or arising before the registration of the international interest. If the position were otherwise a registered international interest initially enjoying priority in the absence of any competing pre-existing right or interest would find that priority displaced by a subsequently created pre-existing right or interest. Conversely, the priority given to a registered international interest over an unregistered interest under Article 29(1) must, where the latter is a pre-existing right or interest, be read as confined to a pre-existing right or interest created or arising after registration of the international interest (see paragraph 2.250).

The rights or interests excluded by Article XL(2)

3.163. Article XL(2), replicating the definition of “pre-existing right or interest” in Article 1(v) of the Convention, covers a right or interest of any kind in or over an object created or arising before the effective date of the Convention as defined by Article 60(2)(a). So, subject to the second sentence of Article XVII(3) of the Protocol, Article XL(2) preserves not only the priority of a creditor under a security agreement, title reservation agreement or leasing agreement but also the priority of the holder of other rights in or over the object, including non-consensual rights or interests. It is, however, limited to a right which is in or over an object and thus does not, for example, cover a preferential claim for wages or taxes having priority over a security interest. A Contracting State wishing to protect such a claim should make a declaration
under Article 39, which could be extended to give priority even over an international interest registered prior to that State’s ratification (Article 39(4)).

**Existing priority under the applicable law**

3.164. What is preserved by Article XL(2) is the existing priority of a right or interest under the applicable law. By the applicable law is meant the domestic rules of the law applicable by virtue of the rules of private international law of the forum State (Article 5(3)). See paragraph 2.57. Since the applicable law in a non-Contracting State will have no concept of an international interest, the priority enjoyed by the pre-existing right or interest arising in a non-Contracting State is over the equivalent of an international right or interest. Of course, the conditions of priority prescribed by the applicable law, for example, registration in a national registry or other perfection requirements, must have been fulfilled. In other words, the mere fact that an interest is a pre-existing right or interest does not suffice to preserve its priority. It is necessary that any steps required by the applicable law to give that priority have been taken. Article XL(2) is not confined to a priority issue between a pre-existing right or interest and a registered international interest, it applies equally to a priority issue between two pre-existing rights or interests, which will likewise be governed by the applicable law, not by the Convention.

"Effective date of this Convention"

3.165. By “effective date of the Convention” is meant in relation to a debtor the time when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later (Article XL(3)(a), reproducing Article 60(2)(a) of the Convention). A State becomes a Contracting State to a convention by consenting to be bound by the convention whether or not it has entered into force (Vienna Convention on the Law of Treaties 1969, Article 2(1)(f)). So the State in which debtor is situated could become a Contracting State either before or after the Convention enters into force and it is the later of the two dates that is the effective date. It follows that a right or interest will be a pre-existing right or interest where (a) the debtor is not situated in a Contracting State at the time of the agreement, or (b) the debtor is situated in a Contracting State at the time of the agreement but the State became a Contracting State before the Convention entered into force as regards the space asset.
Situation of debtor

3.166. Under Article XL(3)(b), reproducing Article 60(2)(b) of the Convention, the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence. In contrast to Article 4 of the Convention, which this provision tracks, Article XL(3)(b) of the Space Protocol requires a single test of the debtor’s situation, adopting a cascade approach, so that the debtor’s situation is determined by the first test applicable, beginning with the debtor’s centre of administration if it has one. Article 4 has no relevance to the operation of Article XL(3)(b).

Physically linked assets

3.167. Article XL(2) makes one exception to the general rule, namely that provided by the second sentence of Article XVII(3). The first sentence of that Article provides that unless otherwise agreed a creditor may not enforce an international interest in a space asset physically linked with another space asset so as to impair or interfere with the operation of the other space asset if an international interest or sale has been registered with respect to the other space asset prior to the registration of the international interest that is being enforced. The second sentence of Article XVII(3) provides that for the purpose of determining which of the interests in physically linked assets was registered first, a sale or an interest equivalent to an international interest arising before the effective date of the Convention registration and registered within three years from the effective date of the Convention is deemed to be an international interest or sale registered the time of constitution of the international interest or the sale, as the case may be. But for this provision the holder of an international interest or sale constituted prior to the effective date of the Convention could find itself constrained by a creditor or buyer under a subsequent international interest or sale covering a physically linked space asset and constituted on or after the effective date of the Convention and duly registered.

Declarations

3.168. Like the Convention and the Aircraft and Luxembourg Protocols, the Space Protocol contains various provisions for declarations. These are
collected in Articles XLI-XLV. The position under the earlier Protocols that a declaration made by one State does not need to be accepted by other States applies equally to the Space Protocol. A Contracting State may make a subsequent declaration, but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration (Article XLIV) and the same applies to the withdrawal of declarations (Article XLV) and the denunciation of the Protocol (Article XLVI). Declarations made under the Convention, including those made under Articles 39, 40, 53, 54, 55, 57 and 58, are deemed to have also been made under the Protocol unless stated otherwise (Article XLII), thus avoiding the need to lodge fresh declarations under the Protocol in respect of matters covered by those already made under the Convention. For the position of EU Member States, see paragraph 2.267.

3.169. Declarations under the Protocol are of four kinds: opt-in declarations, opt-out declarations, declarations relating to the operation of the Protocol within a Contracting State and mandatory declarations. The pattern of declarations under the Space Protocol provisions is as follows:

Opt-in declarations

3.170. Provisions of the Space Protocol applicable in a Contracting State only if it makes a declaration to that effect are the following:

| Article XX | Modification of provisions regarding relief pending final determination, and time within which such relief to be granted |
| Article XXI | Remedies on insolvency and selection of Alternative A or Alternative B |
| Article XXII | Insolvency assistance. |

Opt-out declarations

3.171. Provisions of the Space Protocol applicable unless excluded by a declaration are:

| Article VIII | Choice of law. |
Declarations relating to the operation of the Protocol within a Contracting State

3.172. Provisions of the Protocol relating to the way in which it will operate within a Contracting State are the following:

- Article XXXI  Designated entry points
- Article XXXIX  Territorial units.

Mandatory declaration to be deposited at time of ratification, etc.

3.173. Declarations which are required to be made in every case at the time of ratification or adoption in order for the instrument of ratification or adoption to be accepted are the following:

- Article XXVII(4)  Period of suspension of creditor’s remedies under public service provisions (to be made by a Contracting State)
- Article XXXVII(2)  Transfer of competence to a Regional Economic Integration Organisation (to be made by the REIO)
- Article XLI(3)  Time-period required by Article XX(2) for speedy relief.

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

(a) it wishes to adopt an opt-in provision, i.e. Article XX, XXI and XXIII;
(b) it wishes to opt out of Article VIII;
(c) the declaration is mandatory under Articles XXVII(4) and XXXVII(2) and under Article XLI(3) where a declaration is made under Article XX(2).

3.175. In all other cases the Contracting State need take no action. All declarations other than a mandatory declaration made by a Regional Economic Integration Organisation under Article XXXVII(2) may be modified or replaced by subsequent declarations under Article XLIV or withdrawn under Article XLV. A mandatory declaration under Article XXXVII(2) may be made only at the time of ratification, etc., but changes to the competence of the Regional Economic Integration Organisation are to be promptly notified to the
Depositary. Even though Article XLI is expressed to permit declarations to be made at the time of ratification, they need not be made at that time but may be made subsequently under Article XLIV and thereafter replaced by a new declaration under that Article or withdrawn under Article XLV. The effect of Article XLI, therefore, is that such declarations may be made at any time.

3.176. There is no requirement for a declaration made by one State to be accepted by other States. A Contracting State may make a subsequent declaration, other than one authorised under Article 60, but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration (Article XLIV(3)) and the same applies to the withdrawal of declarations (Article XLV(2)) and the denunciation of the Protocol (Article XLVI(2)).

3.177. Certain opt-in declarations by a Contracting State are required to set out information relating to the declaration without which the declaration cannot be accepted by the Depositary. These are declarations under the following Articles:

- Article XX(2) Time-period required where (opt-in) declaration made under Article XX (Article XLI(3))
- Article XXI Types of insolvency proceeding covered by any declaration under Article XXI and time-period required by that Article (Article XLI(4)).

Regional Economic Integration Organisations

3.178. Article XXXVII follows the wording of Article 48 of the Convention as regards regional economic integration organizations.

Territorial units

3.179. Article XXXIX contains provisions relating to territorial units which for the most part, like the earlier Protocols, track those of Article 52 of the Convention (see paragraph 2.249). There are, however, two departures. First, instead of following Article 52(5) of the Convention, as did the other two Protocols, Article XXXIX(5) substitutes a new provision addressed to a different issue. This necessitates consideration both of the text of Article XXXIX(5) and of the effect of dropping the provisions which followed Article 52(5). Secondly, Article XXXIX adds a new paragraph 6.
3.180. Under Article XXXIX(5) references to the law in force in a Contracting State or to the law of a Contracting State are to be construed as references to the law in force in the relevant territorial unit. This could, for example, be relevant to Article XXVI (preservation of powers of Contracting State) or Article XXVII (public service limitations) where in a particular Contracting State the relevant laws or regulations do not apply uniformly throughout the Contracting State but differ from one territorial unit to another. This could be because any such laws or regulations fall within the competence of the territorial units rather than of the Contracting State and differ from one territorial unit to another or because those laws or regulations, though falling within the competence of the Contracting State (e.g. because in a federal jurisdiction they are federal laws rather than State or provincial laws) have been applied to one or more territorial units but not to all of them. In every such case it is the law of the territorial unit that is to be applied.

3.181. As stated above, in contrast to the equivalent provisions in the other two Protocols Article XXXIX omits provisions along the lines of Article 52(5) of the Convention which substitute the relevant territorial unit for the Contracting State in references to the deemed situation of the debtor, the deemed location of the space asset when not on Earth is already dealt with in Article I(3) and (4); and the Protocol does not mention administrative authorities, which in the Aircraft Protocol were linked to the remedy of de-registration and export, a remedy having no equivalent in the Space Protocol.

3.182. Article XXXIX(6) provides as follows:

“If a Contracting State has a federal system where the federal legislative power has competence over matters governed by this Protocol, that Contracting State shall have the same rights and obligations over those matters as those Contracting States which do not have a federal system.”

Article XXXIX(1) does not apply to the extent that the law is the same in all territorial units, whether because they have adopted uniform laws or because the law is federal law. The purpose Article XXXIX(6) is to make this clear as regards federal law.
PART 3

Depositary and its functions

3.183. The Depositary is UNIDROIT. Article XLVIII follows Article 62 of the Convention. See paragraph 2.284.