# PART 3

**A REVIEW OF THE AIRCRAFT PROTOCOL**

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Introduction

3.1. As its Preamble recites, the Aircraft Protocol is designed to supplement and modify the Convention to meet the particular requirements of aircraft finance and sales. Its provisions reflect the use of structured financing by sophisticated parties, including many State-owned airlines, represented by international legal advisers. The Aircraft Protocol builds on the principle of party autonomy and commercial predictability while at the same time giving 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. It seeks to adopt a practical approach to key issues in international asset-based civil aviation financing. Thus an important feature of the Protocol is the timely availability of remedies. Again, although outright sales are outside the scope of the Convention, which is directed at security interests and conditional sale and leasing transactions, the provisions of the Aircraft Protocol extending the registration and priority rules to sales of aircraft objects are designed to take advantage of the registration system to provide a means of giving public notice of outright sales and of ensuring the buyer’s priority. Adoption of the Cape Town Convention and Aircraft Protocol, by reducing risk and enhancing the value of aircraft objects and receivables provided as collateral, may also enable creditor banks to reduce the amount of capital required to be maintained under Basel IV¹ because of the enhanced value of aircraft receivables collateral. Moreover, if the Convention and Protocol are adopted with the requisite declarations (“qualifying declarations”) this may lead to a discount (the “Cape Town Convention discount”) in the rate of premiums charged to operators, borrowers, buyers and lessors of aircraft based in a Contracting State for officially supported export credits.² In addition, ratification of the Cape Town Convention and Aircraft Protocol with select declarations, including Article XI, Alternative A, of the Aircraft Protocol, will help airlines access the capital markets, for example, through the issue of enhanced equipment trust certificates, and thus tap a source of finance hitherto almost entirely confined to U.S. airlines.

¹ Basel IV (December 2017), a global regulatory framework for more resilient banks and banking systems, replaces the previous Basel Accords on capital adequacy.
because of the lack in other jurisdictions of any parallel of section 1110 of the U.S. Bankruptcy Code, which provided the model for Alternative A.

Sources of law

3.2. The Convention and Aircraft Protocol (which by Article II(2) are together known as the Convention on International Interests in Mobile Equipment as applied to aircraft objects) are supplemented, as regards registration of aircraft objects, by Regulations and Procedures made by the Supervisory Authority under Article 17(2)(d) of the Convention and Articles XVIII and XX(1) of the Protocol. Such Regulations and Procedures may be amended by the Supervisory Authority from time to time. The Regulations are not confined to purely procedural matters relating to registration but govern, among other things, access to the International Registry and suspension of Registry operations for maintenance or to deal with technical or security problems (see paragraphs 3.55 et seq.). The Procedures deal with administrative items required by the Regulations. Brief details are given in this Part. As to the Supervisory Authority, see paragraphs 3.48-3.49.

Entry into force

3.3. Apart from a few provisions of the Convention not related to objects and therefore coming into in force on 16 November 2001 (see paragraph 2.301) all the provisions of the Convention and Aircraft Protocol entered into force as regards aircraft objects on 1 March 2006 pursuant to Article 49(1) of the Convention and Article XXVIII of the Protocol. A State may not become a Party to the Protocol unless it is or becomes a Party to the Convention (Article XXVI(5)). But there is nothing to preclude a State from acceding to the Convention without acceding to the Protocol. See paragraph 2.302.

Structure of the Protocol

3.4. The Protocol prescribes a set of supplementary definitions specifically referable to aircraft objects (Article I) and identifies those provisions of the Convention which are to apply to outright sales (Article III). It modifies the Convention provisions in various respects and contains numerous substantive provisions supplementing the Convention in order to meet the specific needs of the aviation industry. These deal with such matters as formalities of contracts of sale (Article V, which broadly tracks Article 7 of the Convention), description of
aircraft objects (Article VII), choice of law (Article VIII), additional default remedies outside insolvency (Articles IX and X), particular remedies on insolvency (Article XI), priorities in relation to registered sales (Article XIV, which broadly tracks Article 29 of the Convention), the debtor’s right of quiet possession (Article XVI), the Supervisory Authority and Registrar (Article XVII), the International Registry and supplementary rules governing registration (Article XIX and XX), and jurisdiction and waivers of sovereign immunity (Articles XXI and XXII).

Definitions

3.5. The definitions given in the Convention apply equally to the Aircraft 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 aircraft objects and needs to be read in the light of these.

Objects to which the Convention and Aircraft Protocol apply

3.6. The Convention and Aircraft Protocol apply in relation to airframes, aircraft engines and helicopters, collectively termed “aircraft objects” (Convention, art 2(3); Protocol, art I(2)(c)). The Aircraft Protocol treats airframes and aircraft engines separately for the reason previously given (paragraph 2.38), and this is so even for an aircraft engine already installed on an airframe. Aircraft as a whole are not aircraft objects except in the case of helicopters, where the engine is part of the helicopter (see paragraphs 3.9, 3.11). However, there is nothing to prevent the parties from concluding an agreement relating to an aircraft so long as the airframe and the aircraft engine are separately identified and separate interests against them registered. Moreover, the term “aircraft” is used in six provisions, four of which refer to the Convention on International Civil Aviation (1944) (the “Chicago Convention”), a public law Convention dealing, among other things, with the establishment of an international system addressing the nationality of aircraft and their safe and secure operation. Under Article I(2)(a) of the Protocol “aircraft” means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters.

3.7 The Chicago Convention does not itself contain a definition of aircraft, though Annex 7 to the Convention states that an aircraft is “any machine that can derive support in the atmosphere from the reactions of the air other than
the reactions of the air against the earth’s surface”. The latter part of this definition, designed to exclude helicopters, does not apply in the context of the Cape Town Convention by virtue of the express language of Article I(2)(a) and (l) of the Aircraft Protocol. The definition of “aircraft” in Article I(2)(a) does not cover aircraft without installed engines, i.e. airframes. The Chicago Convention requires States Parties to it to provide a system of nationality registration for aircraft within the scope of the Convention and provides that there can be only such registration for the aircraft. It permits de-registration from one State’s registry and re-registration in that of another, thus providing the mechanism for the additional remedy of de-registration in Article IX(1) of the Aircraft Protocol. The method of de-registration and re-registration is left to the States concerned. What the Aircraft Protocol does is to provide the creditor with the means of securing de-registration. Re-registration remains within the exclusive province of the re-registering State. Re-registration in a non-Contracting State does not affect the continuing application of the Cape Town Convention and Aircraft Protocol under Article IV of the Protocol where at the time of the agreement the aircraft was registered in a Contracting State.

3.8. The Convention provisions as they relate to aircraft objects are limited by the definitions of airframes, aircraft engines and helicopters given in Article I(2) of the Aircraft Protocol. These definitions both define airframes, aircraft engines and helicopters and limit the Convention and Aircraft Protocol to items of high unit value relating to civil aviation aircraft by embodying, in the case of aircraft engines, a required minimum thrust of 1750 lb or equivalent of thrust for jet propulsion aircraft engines or required minimum horse-power of at least 550 rated take-off shaft horsepower or equivalent for turbine-powered or piston-powered aircraft engines and, in the case of airframes and helicopters, a minimum carrying capacity of at least eight persons including crew or goods in excess of 2750 kilograms. An airframe is in essence the body of the aircraft excluding its engine but including the fuselage, wings and undercarriage. Though the definition does not exclude unmanned aircraft (drones) their current carrying capacity is far below that required by the definitions. Following the Geneva Convention, aircraft objects are excluded to the extent that they are used in military, customs or police services. In essence this excludes State aircraft. The relevant time for determining such use is the time when the agreement creating or providing for the international interest is made.

3.9. As stated above, airframes and aircraft engines are treated as distinct objects under the Convention and Protocol. The definition of “aircraft engines”
in Article I(2)(b), if read in isolation, could be thought to include an engine installed on a helicopter. However that definition has to be read in the light of the threefold classification of aircraft objects in Article 2(3)(a) of the Convention and Article I(2)(c) of the Aircraft Protocol, namely airframes, aircraft engines and helicopters, from which it is clear that “aircraft engine” means an engine which is an “aircraft object”, and does not include an engine installed on a helicopter at the time an international interest is taken. This conclusion is reinforced by the fact that (a) if the intention had been to treat installed helicopter engines in the same way as engines installed on an airframe the reference would have been to a helicopter frame rather than a helicopter, (b) in the definition of “aircraft” in Article I(2)(a) there is a specific reference to aircraft engines installed on an airframe but no such reference to engines installed on a helicopter, and (c) in the definition of “airframes” in Article I(2)(c) there is a reference to installed accessories which expressly excludes aircraft engines, showing that but for this exclusion they would have been treated as installed accessories, but there is no such exclusion in the definition of “helicopters” in Article I(2)(f). However, prior to installation or after removal and before reinstallation a helicopter engine is an aircraft engine, for its status as such cannot be made to depend on whether it is to be installed on an airframe or on a helicopter. So in a Contracting State an international interest in an uninstalled helicopter engine can be created and registered and its efficacy preserved after installation. See further paragraph 3.11.

3.10. Each of the three categories of aircraft object is defined to include installed, incorporated or attached accessories, parts and equipment (collectively referred to below as “components”) and all data, manuals and records relating thereto. The items so included (which do not cover items merely resting on an airframe by their own weight) form part of the object and are not separately governed by the Convention or Protocol. So such items as installed propellers, winglets, seats, auxiliary power units, computers and engines installed on a helicopter are not distinct objects for the purpose of these two instruments, so that the registration and priority rules apply not to them but to the airframe of which they form part. However, their installation does not affect rights in them, or in other items not constituting an object, existing under the applicable law. See Article 29(7) of the Convention and Article XIV (3) and (4) of the Protocol, which exclude the doctrine of accessions in relation to engines and other items that become installed on an aircraft (see paragraph 2.231). Whether an agreement covers future components is a matter of construction of the agreement. “Parts” covers parts installed on or incorporated in an airframe or aircraft engine and
spare parts the subject of a security agreement, title reservation agreement or leasing agreement. Data, manuals and records relating to aircraft, airframes and aircraft engines are a vitally important part of what is included in the definitions in that without complete records the operator will be unable to obtain an airworthiness certificate.

3.11. An aircraft engine, even when installed on an airframe, is not an accessory of the airframe but constitutes an independent object (see Article I(2)(a)) and ownership of the engine or rights or interests in it under the applicable law are not affected either by its installation on an aircraft or its removal from it (Article XIV(3)). Accordingly an international interest can be taken in an aircraft engine as an independent object and is separately registrable. By contrast an engine already installed on a helicopter at the time an international interest is taken is not an aircraft engine but an accessory of the helicopter (see paragraph 3.9) and while so installed is not capable of being the subject of a separate international interest under the Convention. This has nothing to do with the doctrine of accessions, which comes into consideration only when an international interest is taken over an uninstalled engine which is later installed, whereas in the case under discussion the engine is already installed at the time the international interest is taken. The position is otherwise prior to the engine’s installation or subsequent to its removal, neither of which event affects the engine’s status as an independent object or the continuance of the international interest relating to it. This means, first, that when not installed it can become the subject of a registrable international interest and, secondly, that the creditor’s pre-installation rights and interests under the applicable law (including, in a Contracting State, its rights and interests under the Convention) are not affected by installation of the engine on a helicopter. In this situation the rights of the holder of the international interest are governed by Article XIV(3), referred to above, and are not subjected to the applicable law under Article XIV(4), since this is confined to items which are not objects and is therefore inapplicable to an interest acquired in an engine prior to its installation on a helicopter. So in a Contracting State an international interest in a helicopter engine taken and registered before installation continue to enjoy the full benefits of the Convention and Protocol, including preservation of its priority, after installation. Moreover, those rights and priority are preserved even after subsequent removal from the helicopter. What cannot be done, however, is to constitute and register an international interest in a helicopter engine while installed on a helicopter or to rely on such registration after its removal, when a new agreement will be needed and a new registration effected, otherwise the effect of Article XIV(3) is
to preserve the helicopter financier’s interest in the whole helicopter, including the engines. This is an awkward consequence of the fact that engines installed on a helicopter are not treated as separate objects but rather as components of the helicopter on which they are installed, a matter that could usefully be addressed at any Review Conference convened under Article XXXVI of the Protocol to consider the practical operation of the Convention as amended by the Protocol. However, there is a practical solution to the problem, namely to register a prospective international interest in the installed engine which will become an “object” immediately upon its removal (which is the time when it is required to constitute an object), while what was previously a prospective international interest will at the same time become an international interest and will be treated as registered as from the time of its registration as a prospective international interest (Article 19(4)) and have priority accordingly. So if the prospective international interest is registered before registration of an international interest in the helicopter (including the engine) by another creditor, the holder of the prospective international interest will acquire priority over the helicopter financier or a purchaser of the aircraft the moment the engine is removed from the helicopter. A search of the register by the financier or purchaser would reveal that even if it has initial priority this may be displaced by the ripening of the earlier prospective international interest into an international interest. Such an international interest will continue to preserve its priority even after subsequent re-installation in a different helicopter (Article XIV(3)). An engine installed on a helicopter may, of course, be the subject of a separate national law security or other interest if the applicable law so provides, though that interest will be subordinate to a registered international interest.

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

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3  See paragraphs 2.40(2) and 2.61.
includes accessories) and vest in the debtor subject to the lender’s security interest, which is the only interest then registrable under the Convention.

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

Relationship with the Space Protocol

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

3.15. The provisions of the Convention apply to aircraft objects as provided by the terms of the Protocol (Article II(1)). Article III of the Aircraft Protocol extends to outright sales and prospective sales of aircraft objects 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 III.

3.16. For the meaning of “sale”, “contract of sale” and "prospective sale" see paragraphs 2.276, 5.21. It is necessary to distinguish a sale of an aircraft object from an assignment of an international interest in an object. 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. Certain provisions of the Convention, particularly those relating to registration, priorities and protection against insolvency, are applied to sales by Article III of the Aircraft Protocol. Similarly, international interests in fractional holdings of an object are to be distinguished from acquisitions of fractional holdings in airframes under contracts of sale. Both types of fractional interest can be registered in the
International Registry but the former will be shown in the category “international interest” and the latter in the category “sale”.

Connecting factor

3.17. In the Convention the requisite connecting factor is the situation of the debtor in a Contracting State at the time of conclusion of the agreement (Article 3(1)). Article IV of the Aircraft Protocol specifies an alternative connecting factor, stating that the Convention is also to apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry. This alternative connecting factor does not apply to aircraft engines, for which there is no nationality registration; and the fact that the engine is located in a non-Contracting State does not affect the application of the Convention or Protocol where at the time of the agreement the debtor was situated in a Contracting State. “State of registry” means, in respect of an aircraft, the State of the national register on which an aircraft is entered or the State of location of the common mark registering authority maintaining the aircraft register (Article I(2)(p)), that is, the authority maintaining a register in accordance with Article 77 of the Chicago Convention (Article I(2)(h)). Article 77 permits two or more Contracting States to constitute joint air transport operating organizations or international operating agencies. Common marks are assigned by the International Telecommunications Union (ITU) but ICAO specifies which State is to act as the State of Registry. If an aircraft is owned or operated by a company registered in more than one State it may carry a common mark instead of a nationality mark. The alternative connecting factor, if relied on, has to be satisfied at the time of the agreement, since Article IV merely substitutes the State of registry for the debtor’s situation as the alternative to Article 3 and does not specify any different temporal point. So the helicopter, or the aircraft to which the airframe pertains, as the case may be, must be registered at the time the agreement providing for the international interest or (in the case of sale) the contract of sale is entered into. However, if registration is made pursuant to an agreement for registration (whether that agreement is contained in a security agreement, a title reservation agreement, a leasing agreement or an entirely separate agreement) the registration is deemed to have been effected at the time of that agreement (Article IV(1)). This provision covers, for example, agreements that when an airframe is completed or delivered by its manufacturer or imported by a debtor it is to be registered in the nationality register of the applicable Contracting State. No formalities are prescribed for the agreement for registration, which may be in writing or oral or
implied, though it must be an agreement which has contractual force. De-
registration of the aircraft and re-registration in another State after the making
of the agreement do not affect the application of the Convention, so that it is
irrelevant that the other State is not a Contracting State.

3.18. Article IV(2) also modifies the concept of internal transaction under
Article 50 of the Convention by providing that for the purpose of the definition
of “internal transaction” in Article 1 of the Convention:

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

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

(c) a helicopter is located in its State of registry,
at the time of the conclusion of the agreement creating or providing for the
interest.

Power of derogation

3.19. Under Article IV(3), in their relations with each other, the parties may,
by agreement in writing, exclude the application of Article XI (dealing with
insolvency) or derogate from or vary the effect of any of the provisions of the
Protocol except Article IX(2)-(4), which relate to the exercise of default
remedies. The power to vary the provisions of the Protocol does not apply to
Article XI, which can be excluded but not modified. The reason for this is that
whichever of the two alternative versions of Article XI is chosen by a
Contracting State it can only be adopted in its entirety (Article XXX(3)). See
further paragraph 5.27. The power of derogation as regards provisions other
than Article XI 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. The majority of Contracting States
have made declarations applying Article XI, all but one of these choosing
Alternative A.
Formalities and effect of contract of sale

3.20. Article V of the Aircraft Protocol prescribes formalities for a contract of sale matching those for an international interest which is not a charge (Article V(1)(c)) and also states the effect of the contract, namely to transfer the interest of the seller in the aircraft object to the buyer according to the terms of the contract (Article V(2)). In other words, the Aircraft 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 an aircraft object 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 2.82 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 presupposes 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

3.21. The registration system is extended to sales by the Aircraft Protocol. “Sale” is defined as a transfer of ownership of an object pursuant to a contract of sale (Convention, Article 1(gg)). 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 III of the Protocol). Article 22(3), which provides that a search certificate is not to indicate whether what is registered is an international interest or a prospective international interest (see paragraph 2.61) is also applied by Article III to sales and prospective
sales. For brevity the search certificate refers to “sale” but an explanatory note states that this is not intended to indicate whether what is registered is a sale or a prospective sale. Assignments of contracts of sale are outside the Convention, which does not cover agreements to sell, only outright sales.

**Duration of registration of contract of sale**

3.22. Registration of a contract of sale (more accurately, a sale – see paragraph 5.21) remains effective indefinitely (Article V(3)), reflecting the fact that a sale is an outright transfer and thus not limited in time. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.

**Description of aircraft objects**

3.23. Article VII of the Aircraft Protocol sets out the identification elements for an aircraft object, namely the manufacturer’s serial number, manufacturer’s name and its model designation, by which is meant the generic model designation, not a designation specific to a particular party. No other means of identification suffice or are necessary. As regards these items the use of electronic information provided by the International Registry in the form of lists from which selections must be made is mandatory except where the item in question is not among those listed (Regulations, Section 5.1). There is nothing to preclude the use of alphanumeric numbers. In the case of the Aircraft Protocol unique identification is necessary for three distinct purposes: constitution of the international interest, registration and search. The first of these is not required by any of the other Protocols.

**The applicable law; choice of law**

3.24. As previously noted (paragraph 2.80), while the validity of an agreement is in general governed by the applicable law this is true only to the extent to which that law is consistent with the Convention and Protocol. So where the Protocol sets out conditions that are both necessary and sufficient to satisfy the requirement of identifiability of the subject of an international interest or a sale, any additional requirements that would otherwise have to be met under the applicable law must be disregarded. As with Convention (see paragraph 2.71) it is impermissible to resort to the conflict of laws on matters governed by the Protocol except so far as this otherwise provides or as regards issues on which
it is silent and which cannot be determined by the general principles on which it
is based. Like the Convention the Aircraft Protocol contains various provisions
referring matters to the applicable law. These are as follows:

(1) Under Article VIII, subject to a declaration by a Contracting State, the
parties are free to choose the law governing their relations inter se (see
paragraph 3.25).

(2) Under Article XI, Alternative A, paragraph 5(b), unless and until the
creditor is given the opportunity to take possession of an aircraft object
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 paragraphs 3.130-3.131).

(3) Under Article XI, 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 3.132).

(3) Article XI, 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 the opportunity to
take possession in accordance with the applicable law (see paragraph
3.134).

(4) 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 3.135).

(5) Under Article XVI(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 an aircraft object (see
paragraph 3.115).

In most cases any Contracting State can make an opt-in or opt-out declaration
under a declaration provision of the Protocol. But in contrast to the Convention,
where any Contracting State may make any declaration, there are certain
provisions of the Protocol which prescribe the Contracting State which can
make the declaration, for example, Article XI, which can be triggered only by
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the Contracting State that is the primary insolvency jurisdiction (Article XI(1)) or alternatively leave the relevant Contracting State to be determined by the conflict of laws, for example, the lex fori will determine which other Contracting State’s declaration under Article 40 is the relevant declaring State.

3.25. By Article VIII, which applies only where a Contracting State has made a declaration under Article XXX(1), 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 but only if it is a Contracting State which has made a declaration under Article XXX(1). In such a Contracting State 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. However, Members States of the European Union are precluded from making a declaration under Article VIII (see paragraph 3.29), though such a preclusion does not have effect on the international plane. In proceedings in a Contracting State that has made no declaration applying Article VIII, the efficacy of the choice of law clause will be governed by that State’s ordinary conflict of laws rules on choice of law, including, within the EU, Rome I but excluding Article VIII. The fact that the conflict of laws rules of that State lead to the application of the law of a declaring State does not trigger the application of Article VIII, since the adoption of that Article by the declaring State forms part of its conflict of laws rules, not part of its domestic law, which is the applicable law for the purposes of the Convention (Article 5(3)). So it is only a declaration by the Contracting State of the forum that is relevant.

3.26. 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 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.

3.27. 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)(j) in terms which, read with Article I(2)(k), 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 paragraphs 2.76 et seq.

3.28. 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 as mistake or illegality), its interpretation, its performance and the effects of its breach.

3.29. As a Regional Economic Integration Organisation the European Community decided to make no declaration under Article XXX(1) relating to Article VIII, with the result that Member States of what is now the European Union may not make such declarations either. Member States are bound by the rules in Rome I, with the result that the parties cannot avail themselves of Article VIII to choose the applicable law; and while Rome I generally respects the autonomy of the parties as to choice of law there are qualifications, particularly as to the impact of a rather complex set of differing kinds of mandatory rule.

**Default remedies**

3.30. The default rules of the Convention are supplemented by Articles IX, X, XI (Alternative A, paragraph 8) and XIII of the Aircraft Protocol in certain respects to meet the particular needs of the aviation industry. One set of these provisions adds two new remedies, de-registration of the aircraft and export and physical delivery of the aircraft object; the other modifies some of the existing provisions on remedies.
De-registration and export and physical transfer

3.31. Article IX(1) provides that in addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

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

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

3.32. The purpose of these additional remedies is to remove the aircraft or aircraft objects still further from the debtor’s control and transfer control to the creditor. In the case of de-registration, the remedy also permits a subsequent re-registration in accordance with the Chicago Convention, which may be essential to the sale or re-deployment of the aircraft. The Chicago Convention does not itself provide for de-registration, merely for transfer of registration. How this is effected is left by Articles 18 and 19 to the States from and to which the registration is being transferred. So de-registration under the Cape Town Convention is a convenient method of removing an aircraft from the registration of one Cape Town Contracting State, while re-registration in the transforee State (which may or may not be a party to the Cape Town Convention) is governed by the transforee State and the Chicago Convention. The de-registration provisions are among the few that are concerned with an aircraft, as opposed to an aircraft object, because it is only aircraft that are registered. “Aircraft” means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters (Article 1(2)(a)) (but see paragraph 3.36). By contrast the separate remedy of export and physical delivery is given in respect of an aircraft object and thus extends to both installed aircraft engines and uninstalled engines located in the State of registry of the aircraft, which is the State responsible for certification of aircraft engines as well as aircraft. Of course in both cases the aircraft engine must be one in which the creditor has an international interest. Where an engine installed on the aircraft belongs to a third party, whose rights are in principle unaffected by the installation (Protocol, Article XIV(3)) the remedy of export and physical transfer must be exercised in such a way as respects the third party’s rights. The effect of the provisions is to enable the creditor to invoke the co-operation of the registry and other administrative authorities of the State of nationality registration of the aircraft in connection with de-registration and, if the aircraft is or becomes
situated in that State, export and physical transfer. De-registration changes the alternative connecting factor under Article IV(1) of the Aircraft Protocol. This does not affect any existing registration, but if a new international interest were to be created thereafter any alternative connecting factor applicable to the new interest would be made with reference to the new country of aircraft registration, if any. So unless the main connecting factor (the debtor being situated in a Contracting State) applies, the creditor will need to re-register in that or another Contracting State in order to secure the benefit of the alternative connecting factor provided by Article IV(1) in the event of the grant of a new interest.

3.33 De-registration falls within the province of the authority responsible for the nationality registration of aircraft. By contrast, export may involve more than one authority. There may be other departments of that State whose assistance and, in some cases, approval are required. For example, where there is an embargo on exports to the intended country of import it may be necessary to obtain the grant of an exemption from the embargo. Finally, any conditions imposed by the country of import will need to be met.

3.34 Though the provisions relating to de-registration and export and physical transfer and the form prescribed by the Annex envisage a composite authorisation as regards aircraft, there seems no reason why the procedure could not be used to procure export of the aircraft without de-registration, and vice versa. Moreover, not all the necessary steps have to be taken in the same Contracting State, though it is only the State of nationality registration that can de-register the aircraft. Where the aircraft is situated in the State of nationality registration, both de-registration and export and physical transfer can be procured in that State. But the aircraft may be situated in another Contracting State, in which case application may be made to the courts of that State for an order for possession by way of advance relief under Article 13(1)(a), with any necessary export assistance being provided by that State’s administrative authorities (Articles X(6)(b), XIII(4)). It is then necessary for the order to be recognized by a court of the State of nationality registration (Article X(6)(a)), for which purpose it would seem necessary to apply to that court for an order for recognition. Following this, the remedies of de-registration and export must be made available from the registry authority and other administrative authorities of the State of registry in conformity with Article X(6).

3.35 Another route to de-registration is through the issue by the debtor of an irrevocable de-registration and export request authorisation ("IDERA") and its
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submission to the registry authority for recordation (see paragraphs 3.40 et seq.). Re-registration in a new Contracting State would require a new IDERA addressed to the registry authority of the new jurisdiction. Registration of an IDERA in respect of a pre-existing interest, excluded from the Convention by Article 60(1), has no effect under the Convention though it may have an effect under national law.

3.36. As stated above, de-registration is available only for aircraft. Aircraft engines are not subject to nationality registration, so that the aircraft registry authorities have no relevance to them, and the only administrative authorities involved with regard to engines are those concerned with exports and imports.

3.37. If the creditor wishes to avail itself of the procedures laid down in the Protocol for procuring de-registration and export, then in addition to meeting the conditions specified in Article IX(1) and (2) (described in conditions (2) to (4) below) it must follow one of the two routes prescribed, the conditions varying somewhat according to which route is taken. Neither route is available unless the appropriate declaration has been made by the Contracting State in which the aircraft is registered (see below). However, Article IX(1) is not itself dependent on a declaration by a Contracting State and may therefore be invoked independently of the Protocol routes to de-registration and export; indeed, this will be necessary if the requisite declaration has not been made. In such a case it suffices that the creditor satisfies the requirements of Article IX(1) and (2) and follows the procedure prescribed by the lex registri (see the Convention, Article 14 and paragraph 5.47). But it is likely that in most cases the creditor will wish to follow one of the routes set out in the Protocol itself where the necessary declaration has been made by a Contracting State and the requisite conditions are satisfied, because the registry authority is then obliged to provide the remedies and cannot impose additional procedural requirements of its own. The first route, via Article X(6) is for the creditor to obtain an order for advance relief under Article 13 from a court in the jurisdiction where the aircraft is registered, or equivalent relief from a foreign court whose jurisdiction is recognised by the home court, and notify the relevant authorities of the grant of the order. This is referred to below as “the court route”. The creditor is then entitled to have the remedies made available within five working days. The second route, via Articles XIII and IX(5) and (6), is for the creditor to procure from the debtor the issue in favour of the creditor of an irrevocable de-registration and export request authorization (IDERA) and lodge this with the requisite authorities, who must then co-operate “expeditiously”. This route,
which does not involve a court order, is that envisaged by Article IX(5) and is referred to below as “the IDERA route”. For the position where the debtor falls within the insolvency provisions of Article XI, see paragraph 3.46. While the rules relating to the two routes differ there are certain common conditions that have to be satisfied.

**Common conditions**

3.38. Whether the creditor proceeds via the court route or the IDERA route, certain conditions common to the two routes must be observed. Additional conditions are then specified for each route as described below. The common conditions are as follows:

1. The Contracting State must have made a declaration under Article XXX(2) applying Article X (court route) or under Article XXX(1) applying Article XIII (IDERA route).

2. The debtor must have agreed to the additional remedies, though this may be at any time, not necessarily in the agreement creating or providing for the international interest (Article IX(1)). The remedies are exercisable only to the extent that the debtor has so agreed.\(^4\)

3. The circumstances specified in Chapter III of the Convention, relating to default remedies, must exist (Article IX(1)). This means that the debtor must be in default of its obligations under the agreement before the creditor may lawfully exercise an IDERA. 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 above remedies (Convention, Article 11(1)). In the absence of such agreement “default” means a default which substantially deprives the creditor of what it is entitled to expect under the agreement (Convention, Article 11(2), applicable to the remedies of de-registration and export by virtue of Articles IX(1) and I(1)). So unless and until the debtor is in default the creditor is not entitled to act on an IDERA and the debtor retains the freedom to de-register the aircraft itself, subject to any limitations imposed by the applicable law, e.g. pursuant to Article IX of the Geneva Convention. It is not, however, necessary that the creditor shall have terminated the

\(^4\) The debtor’s signature on the IDERA would be sufficient evidence of its agreement.
agreement, nor may the Registry authorities require evidence of the debtor’s default or the completion of any formalities other than those prescribed by the Protocol before proceeding with de-registration.

(4) Also necessary is the prior written consent of the holder of any registered interest ranking in priority to that of the creditor. This requirement, reflecting a similar provision in Article IX of the Geneva Convention as to recorded rights under that Convention, cannot be excluded by agreement, both because of Article IV(3) and because it does not concern the relations between the parties inter se, is provided expressly by Article IX(2). It is supplemented by Article IX(5), which requires the authorised party (the creditor – see paragraph 3.43) to certify that all registered interests ranking in priority have been discharged or the holders of such interests have consented to the de-registration and export. However, Article IX(2) and (5) say nothing about unregistered non-consensual rights or interests having priority by virtue of a Contracting State’s declaration under Article 39. There are two reasons for this. First, the creditor is unlikely to know of the existence of an unregistered non-consensual right or interest which is not yet being enforced. Secondly, the priority in question is given not by the Convention but by the law of the declaring State, so that if the creditor is enforcing its rights in a different Contracting State that State is not obliged to recognise the priority of the non-consensual right or interest except to the extent provided by its own conflict of laws rules. See paragraphs 2.265 et seq.

Each of the two Protocol routes will now be examined in more detail on the assumption that the common conditions have been met.

**The court route: Article X(6)**

3.39. Article X(6) provides the trigger for action by the authorities where the creditor follows the court route. A creditor invoking Article X(6) must have obtained an order for advance relief under Article 13(1) from a court in a Contracting State which is the State of registry or an equivalent order from a foreign court, which need not itself be a court of a Contracting State. In effect the order must be one which gives possession or control to the creditor or otherwise removes control from the debtor. In the case of an order by a foreign court the relief must be “recognised” by a court of the State of registry.
“Recognised” denotes recognition of the foreign court’s jurisdiction to make the order granting the relief, whether under the Convention or under other rules of recognition of the law of the State of registry. The basic idea is that any order should be either made or recognised by a court in a Contracting State which is the State of registry. The relevance of Article 13 is not apparent from Article X(6) because of a drafting slip. The second reference to Article IX(1) makes no sense because nowhere in the Convention or Protocol is there any reference to the grant by a court of relief under Article IX(1). The reference should be to an order granting relief under Article 13(1) of the Convention, as is clear from (a) an earlier draft presented by the Aviation Working Group in which the precursor of Article X(6) referred back to the relief specified in what became Article 13\(^5\) and (b) the fact that, as indicated by its heading, the whole of Article X is concerned with the modification of provisions regarding relief pending final determination. To trigger Article X(6) the creditor must notify the relevant authority (a) that relief has been granted under Article 13(1) and (b) that the creditor is entitled to procure the remedies of de-registration and export. The purpose of this requirement is to dispense with the need for the authority to investigate external facts and to require it to rely solely on the creditor’s notification. In short, the process is perceived as purely documentary. The creditor’s entitlement stems not from an IDERA (since Article X(6) applies only where the court route is followed) but from the debtor’s consent as required by Article IX(1) and the creditor’s compliance with Article IX(2) and (6). Once the creditor has notified the authorities of the grant of relief they come under two distinct obligations. The first obligation is to make the remedies available within five working days of the notification. This must mean five working days of the authorities’ receipt of the notification rather than its dispatch. The second obligation is expeditiously to co-operate with and assist the creditor in the exercise of the remedies of de-registration and export in accordance with the applicable aviation laws and safety regulations, which are unaffected by Article X(6) (see Article X(7)).

The IDERA route: Articles XIII and IX(5) and (6)

3.40. Article XIII, which applies only where the relevant Contracting State has made a declaration under Article XXX(1), provides for the recording in and

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recognition by the registry authority (defined in Article I(2)(o) of the Aircraft Protocol) of any IDERA issued by the debtor. This relates to the creditor’s additional remedy of de-registration and export conferred by Article IX(1). Exercise of this remedy is dependent on the debtor’s default but not on prior termination of the agreement by the creditor or the fulfilment of any other conditions beyond those specified in the Protocol (see paragraph 3.38(4)), nor is it necessary that the debtor shall have been divested of possession. The IDERA is an irrevocable authorisation by the debtor to the requisite registry authority:

(a) to recognise a named authorised party or the person that party certifies as its designee as being the sole person entitled to procure the de-registration of an aircraft from the register maintained by the registry authority and its export and physical transfer from the country where the register is maintained (this is to permit re-registration in another country selected by such authorised party or its designee);

(b) to confirm that the authorised party or its designee may take the above action on written demand without the debtor’s consent; and

(c) to record the IDERA in its registry.

The relevant authority for de-registration is that responsible for nationality registration of aircraft in the State of registry. But other administrative authorities may be involved in the export of aircraft objects, for example, in the grant of export licences.

3.41. Article XIII prescribes the first step towards securing de-registration and export through the IDERA route, providing for the recording of the IDERA by the requisite authorities. The recording, coupled with a certificate by the authorised party, if so required by the registry authorities, that prior-ranking registered interests have been discharged or that the holders have consented to the de-registration and export, triggers the duty of the registry authority under Article IX(5) to honour the IDERA. Only when an IDERA has been issued does Article IX(5) come into play, as is clear from its references to “the authorised party”, defined in Article I(2)(f) as the party referred to in Article XIII(3). The Protocol contains no provision to compel the debtor to issue an IDERA, and it is for that reason, among others, that the creditor will usually
require an IDERA from the debtor as part of the transaction documents. Failing this the creditor will have to take such steps to secure de-registration as are prescribed by the applicable law. Article XIII envisages that the procedure leading to the use of an IDERA will be initiated by the creditor following the debtor’s default (as defined by Article 11). If the creditor is a chargee it must give reasonable prior notice in writing of the proposed de-registration and export to (a) interested persons specified in Article 1(m)(i) and (ii) of the Convention, that is, the debtor and guarantors (including issuers of demand guarantees and standby credits and insurers) and (b) interested persons specified in Article 1(m)(iii) of the Convention, that is, others who have rights in or over the aircraft object, being persons who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export (Article IX(6)). This requirement is not imposed on a creditor pursuing the court route and thus does not have to be observed in cases within Article X(6), the reason being that a court asked to make an order under Article 13(1) to trigger Article X(6) can itself require notice to interested parties under Article 13(3). Moreover, even for a creditor pursuing the IDERA route Article IX(6) applies only to a chargee and matches the provision applicable under Article 8(4) to a proposed sale or lease by a chargee. A conditional seller or lessor is not affected by the requirement, for the same reason as it is not subject to a regime of the kind specified in Article 8(3), that is, because as owner (at least in the relationship with the conditional buyer or lessee) the creditor is simply asserting the right to control its own property. The IDERA, which cannot be revoked without the written consent of the authorised party, must identify the airframe or helicopter by manufacturer’s name, model number and serial number.

3.42. The remedies of de-registration and export and physical delivery are part of the remedial provisions of Chapter III of the Convention and therefore do not apply to internal transactions under Article 50. However, if a transaction is partly internal and partly international, as may be the case with respect to a three-party transaction that includes a lease between two parties in the same declaring state, and a lender to the lessor who is situated outside the declaring state, the remedial provisions of the Convention remain applicable to any international interest constituted between the party outside the declaring state and a debtor situated within the declaring state. Accordingly, in this example an IDERA could be granted by the lessee to the lender, though not to the lessor. Such grant would be given by the lessee (if the aircraft is registered in the name of the lessee in the aircraft registry) or the lessor (if the aircraft is registered in its name).
3.43. The effect of issue of the IDERA is that no one other than the authorised party or its designee is entitled to exercise the remedies of de-registration and export (Article XIII(3)). Accordingly the creditor’s assignee cannot do so unless designated by the creditor. It also follows that there can be only one IDERA relating to a given aircraft at any one time. Given that only the creditor is authorised to procure de-registration and export and that the IDERA form annexed to the Protocol specifies the creditor as the authorised party it is a little curious that Articles XIII(3) and IX(5) refer to “the authorised party” rather than simply to the creditor. It is evident that “authorised party” is not intended to include the creditor’s designee, since the IDERA form refers to the authorised party “or the person it certifies as its designee”.

3.44. Where Article XIII applies and the debtor’s authorisation is recorded, then several things follow. First, this fulfils one of the conditions necessary to trigger the obligation of the registry authority in a Contracting State to honour the request for de-registration and export (Article IX(5)(a)). Secondly, the registry authority and other administrative authorities in Contracting States must expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX (Article XIII(4)), including its application in proceedings under Article 13 for relief pending final determination. “Other administrative authorities” is not defined but can be taken to cover any administrative authority whose approval or assistance is required to effect de-registration or export and physical delivery. Thirdly, whether the recording of the debtor’s authorisation has taken place under Article XIII or otherwise, the registry authority must honour the IDERA if the conditions set out in Article IX(5) are satisfied. This it must do even if the general law of the Contracting State in which the registry authority is situated does not otherwise recognise the irrevocability of an authority or sets out circumstances in which it can be revoked. As a corollary, the registry authorities may not impose additional requirements, such as further consents by the debtor or the production of a power of attorney, nor may they use the existence of a power of detention or arrest covered by a declaration under Article 39(1)(b) of the Convention as a ground for refusing de-registration, though an arrest itself while the aircraft object is within the jurisdiction of the declaring Contracting State will, of course,

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6 And so held by the High Court of Delhi at New Delhi in *Corporation Aircraft Funding Co LLC v Union of India*, W.P. (C) 792/2012, 14 March 2013. In that case the aircraft had already left India and the argument that de-registration could be refused because of suspected evasion of customs duties was rejected.
preclude its delivery overseas. However, the duty to honour the IDERA is subject to any applicable safety laws and regulations (Article XIII(3)). These will be applicable only to export and physical delivery, not to de-registration, so that it would not be proper for the administration to require production of documents relating to safety standards purely for the purpose of de-registration. As with the court route, the IDERA route is intended to be purely documentary; the purpose is to dispense with the need for the authority to investigate external facts. Finally, if the Contracting State has adopted Alternative A of the insolvency provisions in Article XI then as stated above (paragraph 3.39) registry authority and the administrative authorities in the Contracting State concerned come under a duty to make the de-registration and export remedies available no later than five working days after the date of notification by the creditor that it is entitled to procure those remedies in accordance with the Convention, and to provide expeditious cooperation and assistance (Article XI, Alternative A, paragraph 8, and paragraph 3.46 below).

Duty to respect priorities

3.45. Reference has already been made to the general duty of an enforcing creditor to respect registered senior-ranking priorities (see paragraph 2.111) and to the position in relation to non-consensual rights or interests covered by a declaration under Article 39 (see paragraph 2.272). If the aircraft object is exported to another Contracting State the priority of higher-ranking registered international interests is not affected. However, if the aircraft is re-registered in and exported to a non-Contracting State the courts of that State would be free to hold that any sale or other dealing with the aircraft overrode the rights of higher-ranking creditors under that State’s law as the law applicable under its conflict of laws rules. Nevertheless, whether an aircraft is to be exported to a Contracting or a non-Contracting State, the enforcing creditor’s obligations under the Protocol remain the same, namely (i) to give notice to “interested persons” as required by Article IX(6)(a) and (b) and (ii) either to obtain the consent of the registered higher-ranking creditors to the de-registration and export or to discharge the debts owed to such creditors.

Insolvent debtor

3.46. Where the debtor is insolvent and a Contracting State has made a declaration applying Alternative A of Article XI, then if (a) the additional remedies have become exercisable via one of these two routes, (b) the creditor
has become entitled to possession under paragraph 2 of Alternative A, and (c) the creditor notifies the relevant authorities that it is entitled to procure the above remedies in accordance with the Convention, they must make such remedies available within five working days and must expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations (Article XI, Alternative A, paragraph 8). As discussed above, the process to be followed by the authorities is purely documentary, dispensing with the need for the authority to investigate external facts.

Modification of Convention provisions on remedies

3.47. The Aircraft Protocol modifies the Convention in various respects to give greater certainty for the parties.

(1) Exclusion of Article 8(3)

Article IX(3) replaces Article 8(3) of the Convention with a more general duty of commercial reasonableness. This cannot be excluded by agreement (Article IV(3)). The duty imposed on a chargee to exercise remedies in a commercially reasonable manner is extended to cover all remedies in relation to aircraft objects and thus to embrace not only remedies of the creditor under the security agreement but those conferred on the 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 an aircraft object 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 IX(3)). In consequence Article 8(3), which is limited to security agreements, is disapplied.

(2) Crystallisation of requirements of Article 8(4)

A chargee giving ten or more working 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) (Article IX(4)). While Article IX(3) extends the requirement of commercial reasonableness to the exercise of remedies under Articles 9, 10 and 12 of the Convention and, by extension, Article IX of the Protocol (see Article II(1)), some of these provisions will rarely be caught by the requirement. It can hardly apply to the remedies given by Article
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 IX(3) does not apply to the additional remedies referred to in Article 13 of the Convention as remedies given by the applicable law or the agreement since these are not remedies “given by the Convention”.

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

The provisions for speedy relief pending final determination of the creditor’s claim under Article 13 of the Convention are modified by Article X so as (a) to provide for a decision within the time specified in a declaration of the Contracting State, (b) to add the remedy of sale and application of the proceeds of sale if the parties specifically agree and (c) to permit 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). However, Article X applies only where a Contracting State has made a declaration to that effect under Article XXX(2) and only to the extent of that declaration. On signing the Convention and Aircraft Protocol as a Regional Economic Integration Organisation the European Community (now the European Union) decided to make no declaration under Article XXX(2). Had it done so, all Member States would have had to make the same declaration. The effect of the Council’s decision, while precluding Member States from making a declaration under Article XXX(2), is to leave them free to implement such parts of Article X as they wish in domestic legislation, so that each Member State is free to go its own way. The Council also made a decision on the mode of implementation of Articles 13 and 43 by Member States the effect of which has been discussed earlier (paragraph 2.288). Most declarations under Article X have specified 10 working days from the time of the application for an order for speedy relief within which the order must be granted, emphasizing the urgent nature of the proceedings. It is not open to a debtor to complain that the exercise of a remedy of repossession, for example, within the time period specified in a Contracting State’s declaration would do damage to the debtor’s business and is commercially unreasonable.
Supervisory Authority

3.48. The Supervisory Authority for the International Registry for aircraft objects is the Council of ICAO. See paragraphs 2.148, 3.49, 4.179.

3.49. The Supervisory Authority and its officers and employees enjoy such immunity from legal or administrative process as is applicable to them as an international entity or otherwise (Article XVII(3)). ICAO is a specialized agency of the United Nations and as such already enjoys, on the plane of international law, the privileges and immunities set out in the standard clauses in the 1947 UN Convention on the Privileges and Immunities of the Specialized Agencies (the “UN Immunities Convention”), and Annex III 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. Article II provides that the specialized agencies are to enjoy juridical personality. 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.

Registrar: liability and insurance

3.50. The liability of the Registrar for errors, omissions and system malfunction is strict but is limited to compensatory damages for loss directly suffered (Article 28(1)). The Aircraft Protocol does not cap the Registrar’s liability. It does, however, limit the amount of the insurance or financial guarantee required to be procured by the Registrar under Article 28(4) of the Convention to an amount, in respect of each event, not less than the maximum value of an aircraft as determined by the Supervisory Authority (Article XX(5)). This method of setting a limit is designed to give the Supervisory Authority a wide discretion, enabling it to choose an aircraft of a value not exceeding the amount for which insurance cover or a financial guarantee could be obtained in the market at reasonable cost. The Preparatory Commission for the International Registry, acting in its capacity of Provisional Supervisory Authority pursuant to Resolution No. 2 of the Cape Town diplomatic Conference, fixed the limit at USD 10 million based on an aircraft object of that value but requested the International Registry to seek a higher level of cover. Subsequently arrangements to increase the cover to USD 30 million were approved. The
current insurance cover is USD 200 million. In the twelve years since the International Registry came into operation no claim has been made against it for acts or omissions for which it is legally responsible under the Convention, though it is a necessary defendant in proceedings for an order to discharge an improperly made or maintained registration.

Extension of registration provisions; designated entry points

3.51. Article III of the Aircraft Protocol extends the registration provisions of the Convention to cover outright sales and prospective sales of aircraft objects. One effect of this is that although a lessee does not as such have a registrable interest, a lessee of an aircraft object under a lease containing an option to purchase can register its potential interest as buyer under a prospective sale. The provisions of Article XIX allowing a Contracting State to designate entry points for transmission of information to the International Registry are described in paragraphs 3.64 et seq. The designation may require the mandatory use or permit the use of a designated point for registrations for airframes or helicopters relating to aircraft for which the designating State is the Chicago Convention State of registry. For registrations relating to aircraft engines, only permissive use may be declared, since engines do not have Chicago Convention nationality. The International Registry provisions relating to designated entry points are contained in Section 12 of the Regulations. See further paragraphs 3.67 and 5.91 et seq.

The International Registry system for aircraft objects

3.52. The Convention envisages a separate International Registry for each of the three categories of equipment covered by the Convention. The International Registry for aircraft objects (formally the International Registry of Mobile Assets) is fully operational and is based in Dublin. It was set up by Aviareto, a joint venture company of SITA SC (an air transport telecommunications company owned by the world’s airlines) and the Irish Government, and is run by Aviareto as Registrar pursuant to a contract with ICAO, the Council of which is the Supervisory Authority7 and as such is responsible for general superintendence of the International Registry. The Supervisory Authority is

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7 Pending ICAO’s acceptance of this role the Preparatory Commission for the International Registry established pursuant to Resolution No. 2 of the Cape Town diplomatic Conference fulfilled the function of Provisional Supervisory Authority pursuant to that Resolution.
advised by a Commission of Experts of the Supervisory Authority of the International Registry (CESAIR), a body of governmental civil aviation officials established pursuant to Article XVII(4) of the Protocol, while Aviareto is assisted by the International Registry Advisory Board (IRAB), a group of industry specialist legal and technical experts set up by Aviareto as Registrar to provide advice to the Registrar on matters relating to the needs of the users in connection with the operations of the Registry. Proposals for change to the system or the regulations or procedures are put before CESAIR, which considers them and, with such modifications as it considers necessary, recommends them to the Council of ICAO as the Supervisory Authority. The International Registry operates a wholly electronic system in which registrations and searches are made and search certificates are issued entirely by electronic transmission.

3.53. The centralised functions of the Registry are required to be operated and administered by the Registrar on a 24-hour basis (Article XX(4)), 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 (see paragraph 3.93).

3.54. The operation and use of the International Registry are governed by Regulations made by the Supervisory Authority under the Protocol, supplemented by International Registry Procedures relating to the technical operation and administrative processes of the Registry and made as provided by Section 15 of the Regulations. The Regulations and Procedures are regularly updated as improvements in the service develop, and the following paragraphs on the registration system and the facilities offered should be read with this in mind. The current edition is the 8th edition, which is expected to come into effect by early 2020. Until then the 7th edition of the Regulations continues to apply. The main changes made by the new regulations relate to the following:

(1) Changes to most of the definitions (Section 2)

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8 The draft new regulations, approved by ICAO on 4 March 2019 subject only to minor editorial changes by the ICAO Secretariat, are reproduced in Appendix III by kind permission of ICAO. The effect of the regulations is that compliance with the procedures is a requirement of the regulations themselves and thus falls within Article 18(1) of the Convention. The current regulations are accessible on the ICAO and Aviareto websites.
(2) Power of the Registrar to collect and store transaction, technical and payment logs (Section 3.8)

(3) Power of a professional user entity to renounce the authorizations granted to all the users of the entity on their behalf (Section 4.2 affected by the subsequent availability of updated or new provided object identification information (Section 5.1)

(5) Changes to the provisions of registration of a unilateral registrable non-consensual right or interest (such a registration does not require the consent of another party) (Section 5.4), with the imposition of a duty on the Registrar to provide specified interested parties with a copy of the documentary evidence submitted in connection with the registration of an R-NCRI (Section 5.4.1)

(6) Changes to the rules on unilateral registration of a pre-existing right or interest (Section 5.10)

(7) Unilateral registration of notice of a national interest (Section 5.20)

(8) The provision by the Registrar, at its discretion, of supplementary priority search information (Section 7.8).

3.55. The Regulations and Procedures are designed to safeguard security through an elaborate system of verifications, approvals, authorisations and consents before access can be gained to the International Registry to effect a registration. Digital signatures are required (see paragraph 3.63). The International Registry publishes a detailed International Registry User Manual which is periodically revised.

3.56. The registration system is based on the concept of notice filing. That is, no transaction documents are filed, essential information concerning the parties, etc., is given so as to put third parties on notice but no further details of the transaction or the documents embodying it, and it is for the person making the search to obtain the information from the registrant or the other party shown.

3.57. Each entry in the International Registry indicates the registration type from the list in Article 16(1) of the Convention, e.g. international interest or prospective international interest, assignment or prospective assignment of an international interest, subordination of an international interest or acquisition of
an international interest by subrogation) or from the Protocol (sale). Regulations for the aircraft registry ensure that this is the case by applying the same information requirements to the registration of a prospective international interest as to an international interest, while for statistical purposes, but not as a requirement of the regulations, the registrant is asked to indicate whether the interest being registered is an international interest or only a prospective international interest, though this is captured only in the system and is not shown on the priority search certificate (see paragraph 2.195) and an erroneous indication does not vitiate the registration. The same applies to sales (see Article III of the Protocol, applying the general provisions of *(inter alia)* Chapter V of the Convention) and to the assignment and prospective assignment of an international interest (Article 18(5)). Each entry is allocated its own file number and, if the registration affects an existing entry, records the file number of the entry affected. So the first registration of an international interest will be recorded as “International interest” and will be allocated a file number. If an assignment, subordination or subrogation is registered, this will be shown as “Assignment of an international interest”, “Subordination of an international interest” or “Subrogation of an international interest” and will be allocated a file number, and record the file number of the international interest that has been assigned, subordinated or acquired by subrogation. Similarly, a discharge of an international interest will be shown as “Discharge” and the registration will record the date and time of discharge, the file number of the discharge entry and the file number of the international interest it discharges. Thus discharge of a registration of an international interest does not result in the registration being expunged. It remains permanently entered, so that the International Registry maintains a full history of registrations affecting a particular international interest. The one exception is where the Registrar exercises its authority under Section 5.16 of the Regulations to reverse a name change and remove the name change history. The names of the parties to the transaction the subject of the registration (e.g. for an international interest the debtor and the creditor, for an assignment the assignor and the assignee) are recorded, email contact details being available on the priority search certificate.

**Access to the International Registry**

3.58. Reference has been made elsewhere to the right of access to the registration and search facilities of the International Registry under Article 26 of the Convention, subject to compliance with the procedures prescribed by Chapter V of the Convention and payment of the prescribed fee. The
Regulations distinguish between registry user entities and registry users on the one hand (see below) and “searching persons” on the other. Under the Regulations there is open access for searches. Any member of the public is entitled to search the International Registry on applying for an account as a guest user (Section 2.1.17). By contrast access for the purpose of effecting, amending and discharging registrations is, for obvious reasons, tightly controlled, being restricted to:

(1) the administrator of an approved transacting user entity;

(2) an approved user of that transacting user entity duly authorised by the administrator;

(3) the administrator, or an approved user, of a professional user entity duly authorised by the administrator of the relevant transacting user entity; and

(4) an administrator or approved user of a direct entry point, designated by a Contracting State under Section 12.1(b) of the Regulations.

These terms are defined in Section 2 of the Regulations. An administrator is defined by Section 2.1.1 as “the person with authority to act on behalf of a registry user entity on administrative matters in dealings with the Registrar and the International Registry, and includes his/her acting administrator to whom he/she has delegated his/her powers in accordance with Section 4.1.”

A registry user is a transacting user (that is, an individual employee, member or partner of a transacting user entity or an affiliate of that entity), a professional user (that is, an individual employee, member or partner of a professional user entity) or a direct entry point. A registry user entity is (a) a transacting user entity, that is, a legal entity, natural person or more than one of the foregoing acting jointly intended to be a named party in one or more registrations; (b) a professional user entity, that is, a firm or other grouping of persons (such as an internal legal department of a transacting user entity) providing professional services to transacting user entities in connection with the transmission to the International Registry of information relating to registrations – for example, an
internal legal department of a transacting user entity\(^9\) or an outside law firm or other organisation providing professional services in connection with registration and searches; or (c) an entry point designated by a Contracting State under Section 12.1(b) (see paragraph 3.64).

3.59. The Registrar may approve or decline applications to become the administrator of a registry user entity. This involves (1) verifying the administrator’s contact and identification information\(^10\) (2) verifying the details of the entity itself, and (3) confirming that the administrator has the authority to act in the capacity of administrator for the relevant registry user entity. An administrator of a registry user entity has the sole power to approve applications to become a user of that registry user entity. An administrator of a transacting user entity may authorise an approved user of that transacting user entity, or an administrator or approved user of a professional user entity to make registrations on behalf of their transacting user entity. Authorisation to work on the transacting user entity’s behalf is granted on an object by object basis, so authorisation must be sought and granted separately in respect of each required aircraft object.

There are special rules governing the registration of a non-consensual right or interest registrable under Article 40 of the Convention, since there have been several instances of registrations purportedly within Article 40 but in respect of which no declaration has been made by the relevant Contracting State, and these have necessitated applications to the Irish High Court for an order requiring the Registrar to remove the registration. Section 4 of the Regulations accordingly provides that no administrator of a transacting user entity shall be entitled to register or amend the registration of a registrable non-consensual right or interest or issue an authorization for such registration unless the administrator has first obtained approval from the Registrar for that purpose. Section 4.1 provides that before giving such approval the Registrar must reasonably conclude, without undertaking specific legal analysis, that the administrator has the authority from his/her transacting user entity to make the certification and agreement required by Section 5.4(d) and (f) respectively.

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\(^9\) In this case the entity would need two accounts, one as a transacting user entity, allowing the entity to be a named party in registration, and the second account as a Professional User Entity through which the legal department would act.

\(^10\) The terms “Contact information” and “Identity information” are defined in Sections 2.1.6. and 2.1.11 of the Regulations respectively.
Section 5.4 requires, among other things, the name of the Contracting State under whose laws the registrable non-consensual right or interest has been conferred, the category of such right or interest as listed in the Contracting State’s declaration within which the right or interest being registered falls, the certification of the party named in the registration as the holder of the right or interest to which the registration relates that it has been validly conferred under the laws of that Contracting State, documentary evidence pertaining to the right or interest and the agreement of the party named in the registration as the holder of the registrable non-consensual right or interest to submit to the jurisdiction of the courts where the registrar has its centre of administration (i.e. the Irish High Court as regards aircraft objects) in relation to legal action under Article 44 of the Convention and accept liability for the registrar’s costs unless the registration is approved (see further paragraph 2.153). Approvals are given on an individual basis. The Registrar is required to provide a copy of the documentary evidence referred to above to designated categories of interested party on request (Section 5.4.1). However, the Registry is not equipped to investigate the veracity of filed documents, since this would be incompatible with a wholly automated electronic system. Moreover, Section 5.4(c) does not require documentary evidence establishing the existence of the non-consensual right or interest, because this could entail an investigation which the International Registry is not equipped to perform. Hence the only requirement is that the documentary evidence “pertains to” the non-consensual right or interest, which would seem to signify no more than that the document indicates on its face that the right or interest exists. The non-consensual right or interest must, of course, fall within one of the categories of such interests covered by the declaration.

Under Section 8.3 of the Regulations any person adversely affected by a unilateral registration who reasonably believes that the registration does not meet the requirements of the relevant Regulations may submit a complaint to the Registrar, and where such adverse effect is substantiated to its reasonable satisfaction the Registrar must proceed in accordance with Section 14.5 of the Procedures. Finally, Section 10.10 of the Procedures empowers the Registrar to suspend or revoke the approval, or disable or block the account, of a registered user entity’s administrator or user at any time where (among other things) there exists in the Registrar’s view a material risk of fraudulent registrations or other misuse.
3.60. In sum, the Registrar has to approve (1) organisations intended to be named as parties to transactions, (2) firms providing in-house or outside professional services to such organisations in connection with registrations, (3) administrators appointed by such organisations or firms and (4) an administrator for the registration of a registrable non-consensual right or interest under Article 40 of the Convention. An approved administrator then has power to authorise designated employees, etc., as transacting or professional users, depending on the nature of the entity. An administrator may also electronically approve, as a transacting user entity, a controlled entity which is an entity controlled, managed or administered by an approved transacting user entity, thus making it unnecessary for such an entity to seek approval from the International Registry itself.

3.61. A transacting user entity administrator may also electronically establish an account for a controlled entity such as a wholly owned subsidiary as a controlled entity. A controlled entity is a business entity, trust or association of any kind, however established, with capacity to be a named party in a registration, where a transacting user entity electronically asserts that it controls, manages or administers that business entity, trust or association (Regulations, Section 2.1.7). See further paragraphs 3.83 et seq as to registrations by trustees, agents and other representatives.

3.62. An administrator may from time to time, for periods not exceeding three months, electronically delegate his/her powers to an acting administrator, (who must be an approved user of that registry user entity), from time to time for periods not to exceed three months (Regulations, Section 4.1).

3.63. Access to the International Registry by an administrator or registry user requires possession of a valid digital certificate, compliance with the applicable part of the Registrar’s certificate practice statement and, where required, entry of the correct password (Procedures, Section 7.5(a)). The digital certificate referred to is a digital certificate for use in communications with the International Registry, issued to an administrator or other registry user in accordance with the Procedures and the Registrar’s certification practice statement (“CPS”) as displayed on the International Registry’s website (Procedures, Section 2(d), (c). The digital certificate contains identification information about the entity and the user and that user’s public key. A PKI (public key infrastructure) system is used to ensure data integrity and non-repudiation (i.e. preclusion of any challenge to that integrity). While the Registrar
has access to users’ public keys, private keys are held and controlled by individual users and are never made available to the Registrar or sent to the International Registry website.

**Designated entry points**

3.64. Article XIX 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 for aircraft objects through which information required for registration shall or may be transmitted to the International Registry.\(^{11}\) Though Article XIX does not specify which Contracting State may make the declaration, this will have an impact only in relation to aircraft objects for which the declaring State is the State of registry for the purposes of the Chicago Convention, for only that State has the requisite control. Accordingly Section 12.2(a) of the Regulations specifies that a Contracting State may designate a mandatory entry point only in respect of registrations relating to airframes and helicopters of which it is the State of registry and registrations of prospective international interests, prospective sales or prospective assignments of international interests in any airframe or helicopter for which it has taken regulatory steps to become the State of registry. Further, Section 8.1 of the Procedures requires the Registrar to establish arrangements applicable to the electronic transmission of registered information from, or authorized by, entry points designated under Article XIX of the Protocol and Section 12 of the Regulations, and under Section 8.2 of the Procedures registry users making registrations through a designated entry point are required to comply with such arrangements.

3.65. Where a declaration has been made under Article XIX designating an entry point Section 12.1 of the Regulations comes into play. This provides for two categories of designated entry point, namely an “authorizing entry point” (AEP), which shall or may authorize the transmission by the holder of the international interest or buyer to the International Registry of information required for registration under the Convention and the Protocol, and a “direct entry point” (DEP), through which information required for registration under the Convention shall or may be directly transmitted by the designated entry point.

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\(^{11}\) Of the 79 Contracting States parties to the Aircraft Protocol as at the current date (the European Union being excluded for this purpose) only eleven have so far designated an entry point, namely Albania, Argentina, Brazil, China, Côte d'Ivoire, Mexico, Spain, Ukraine, the United Arab Emirates, the United States and Viet Nam. All such entry points are authorizing entry points.
to the International Registry. In the case of a DEP the use of AEP codes does not arise. Where use of the DEP is mandatory the DEP enters the data in the International Registry on behalf of the parties, who cannot register direct, whereas if the DEP is not mandatory the parties can, if they wish, make the registration themselves without reference to the DEP or a DEP registration may be effected automatically without need for an authorization or entry of a code. To date no Contracting State has designated a DEP, and all Contracting States designating an AEP have made these mandatory for airframes and helicopters (they may not be made mandatory for aircraft engines). The effect of a mandatory AEP is that while the registering party still registers direct it must first obtain an authorisation code from the DEP, without which the system will not accept the registration. The code is provided to the registrant on compliance with the rules of the AEP and must be entered in the format agreed between the Contracting State and the International Registry order to effect registration.

Registrations of an international interest in aircraft engines may always be registered direct because use of an entry point may not be made compulsory.

3.66. A registration made in violation of the terms of a designation under Section 12.1 of the Regulations without an authorisation code issued by the authorised entry point is invalid (Regulations, Section 12.7) except in those cases where, in the case of an authorizing entry point, the authorisation code is not obtainable under its procedures or, in the case of a direct entry point, use of that entry point is not permitted under its procedures (Regulations, Section 12.8). But although “registration” generally includes discharge (Article 16(3) procurement of a discharge can be made without entering an AEP code on the International Registry. In the case of a non-mandatory AEP there is no requirement to enter an AEP code.

3.67 A Contracting State designating an entry point is required by Section 12.3 of the Regulations to notify the Depositary and the Supervisory Authority indicating whether such entry point is an authorizing entry point or a direct point and the Supervisory Authority is required to keep the Registrar informed of such designations and the Registrar to maintain a list of them that is electronically accessible to users. It is the practice of UNIDROIT as Depositary to treat designations as declarations and, in its Note Verbale to new Contracting States, to draw attention to Section 12.3 and record the category of designation if this information is supplied but to accept as a valid declaration a designation which does not indicate whether it is an authorizing or a direct entry designation. A
designation may be made at any time and, on the basis that it is a form of declaration, it may be withdrawn under Article XXXIV and replaced by a new form of designation under Article XXXIII.

3.68. No designation of an entry point may be made in relation to notices of national interests, or registrable non-consensual rights or interests, arising under the laws of another State. Moreover, a designation by a Contracting State may permit but may not compel use of a designated entry point or entry points for information for registrations in respect of aircraft engines. This is because, in contrast to the position as regards aircraft, there is no international system of nationality registration for aircraft engines. A creditor may apply for registration from a non-Contracting State as well as from a Contracting State, but where, in the latter case, the Contracting State which is the State of nationality of an aircraft has designated an entity as the compulsory entry point for registration of international interests in airframes or helicopters registration will not normally be accepted without the requisite authorization code format for the relevant State supplied by the designated entity which constitutes the designated entity’s authority to the transacting entity to effect registration and is a mandatory field. This does not apply in relation to aircraft engines, for which use of a designated entry point may not be made compulsory (Aircraft Protocol, Article XIX(2)). Article XX(4) requires that designated entry points be operated at least during working hours in their respective territories.

3.69. 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

3.70. 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 3.82.

Against what object may registration be effected?

3.71. It is important to bear in mind that most of the provisions of the Convention and Protocol do not, except in the case of helicopters, apply to aircraft as a whole but only to airframes and aircraft engines. So even if a charge is taken over an aircraft as a whole, it is necessary to register separate
international interests against the airframe and each aircraft engine. By contrast a helicopter is itself an aircraft object which includes any installed engines. The upgraded registry system includes facilities for multiple object registration, so that a single registration procedure may cover two or more objects simultaneously.

**Information required to effect registration**

*General requirements*

3.72. Section 5 of the Regulations specifies the information required to effect registration. This depends on which of the categories of registration into which the information to be supplied falls, namely:

1. an international interest, a prospective international interest or a notice of a national interest or a registrable non-consensual right or interest;
2. a registrable non-consensual right or interest;
3. a sale or prospective sale;
4. an assignment of an international interest, a prospective assignment of an international interest or an assignment of a registrable non-consensual right or interest;
5. a block assignment when the facility for such registration is provided by the International Registry (no such facility is currently provided);
6. the discharge of a registration other than a registration relating to a sale or a registration relating to a sale to which Article 25(4) of the Convention (improper or incorrect registration) applies;
7. various kinds of subordination;
8. a pre-existing right or interest;
9. an amendment of a registration (other than a registration of a non-consensual right or interest);
10. an amendment of a registration of a non-consensual right or interest
11. the acquisition of an international interest through subrogation.
Section 5.16 deals with an entity name change. Various provisions of the Regulations refer to “provided object identification information” and “registered information”, these terms being defined by Sections 2.1.14 and 2.1.15 of the Regulations.

The Regulations do not require a registrant to state whether what is being registered is an international interest or only a prospective international interest. This is in conformity with Articles 19(4) and 22(3) of the Convention, which are designed to avoid the need for a second registration where a prospective international interest becomes an international interest and to that end provide that a search certificate is to indicate that the registering creditor “has acquired or intends to acquire” an international interest in the object but is not to indicate whether what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information. Article 19(5) applies the same provision to prospective assignments. As to the form of search certificates see paragraphs 2.61, 2.238. But for statistical purposes a registrant is asked to indicate whether a registration is of an international interest or a prospective international interest. See paragraph 2.61.

Identification criteria

3.73. Article XX(1) of the Protocol provides that for the purposes of Article 19(6) of the Convention the search criteria for an aircraft object are the name of its manufacturer, its manufacturer’s serial number and its model designation, supplemented as necessary by the Regulations to ensure uniqueness. The International Registry requires the person making a registration to select information identifying the object (that is, manufacturer’s name, generic model designation and manufacturer’s serial number) from the lists provided by the manufacturers and made available online by the International Registry. To reduce the likelihood of an error in the registered particulars the use of electronic information where provided by the International Registry (“provided object identification information”) is mandatory (Section 5.1) and the use of free text to identify the object is permitted only within strict limits. The information from the Registry will show the manufacturer’s name and, from the data

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12 Free text data is data entered by a user of the website to uniquely identify an object where that object identification information is not provided in the manufacturers’ lists. Information must be inserted in accordance with instructions on the website.
provided electronically by the manufacturer, the generic model designation and serial number of the object. The generic model designation is that which is not specific to a particular customer. The system, being a computer system, requires precision in identifying the aircraft object. For example, model “737-800” is not the same as model “737 800”, and the serial number “444” is not the same as “444” followed by the input of a space, since computer systems store an entered space as a character. The registry provides a powerful informational search facility to assist users in detecting aircraft objects which may have been free texted by other users or may have been included on the manufacturers’ lists and which may have identities similar to that of the object in which they are interested.

3.74. Where the manufacturer does not supply the data to the International Registry the registrant must “free text” the manufacturer’s serial number, name and model designation using the format prescribed in the International Registry procedures. Assuming that the agreement accurately identifies the aircraft object, it is that identification which should feature in the registration.

However, there is no available process to ensure that what is registered corresponds to the description in the agreement. If there is a misdescription in the registered particulars the system will not pick it up. The agreement will be perfectly valid as between the parties but if the inaccuracy in the registered particulars is one that could seriously mislead a searcher (see paragraph 2.166) this might result in a court declaring that the registration is invalid, though ultimately only the Irish High Court has jurisdiction to order the Registrar to discharge it. Alternatively the agreement itself may describe the aircraft object inaccurately, as by misspelling the name of the manufacturer. Where there is a dispute and the misdescription is so serious that it does not enable the object to be identified then the interest is not validly constituted as an international interest (see Article 7(c)). In such a case a court might be asked to order rectification of the agreement and for that purpose to allow extrinsic evidence to show the true identity of the subject-matter of the agreement. This, of course, depends on the procedural law of the forum.

Multiple object registration

3.75. The registration system now allows for an identical registration to be placed on up to 100 objects covered by a single transaction, either through the standard registration procedure or through the Closing Room, but common
registration data such as the registration type and the named parties must be the same for registration on each object. Multiple object registration may be effected either under the standard registration procedure or through the Closing Room.

Consents and unilateral registrations

3.76. The registration data must normally include the electronic consent of a party whose consent is required, including a consent to an assignment required by Article XV of the Protocol. The transmission of an electronic consent is not, however, necessary for the registration of (1) the acquisition of an international interest by legal or contractual subrogation (Article 20(4) and Regulations, Section 5.19), (2) a registrable non-consensual right or interest under Article 40 (Regulations, Section 5.4), (3) a pre-existing right or interest pursuant to a Contracting State’s declaration under Article 60(3) (Regulations, Section 5.10) or (4) notice of a national interest under Article 50 (Regulations, Section 5.20). In all these cases the registration is unilateral. Moreover, while the assignor’s consent to an assignment of an international interest in an aircraft object must be communicated electronically to the International Registry, the consent of the debtor, required by Article XV of the Protocol, need not be so communicated since it falls outside Article 18(1)(a) of the Convention.

3.77. The International Registry accepts for registration all applications which appear on their face to conform to the Convention, Protocol, Regulations and Procedures. As is made clear by Section 3.2 of the Regulations the International Registry is not equipped to examine external facts, such as whether the debtor was situated in a Contracting State at the time of the agreement of which registration is sought, nor does the Registry provide legal advice. A registration improperly made is of no effect and may expose the registrant to legal liability (see paragraphs 2.164 et seq.). Moreover, registration is no guarantee that the agreement that has been registered is valid or even that it has been made. The Registrar is required to provide prompt electronic confirmation of a registration to the named parties. However, the Registrar does not guarantee that a confirmation properly transmitted will arrive unaltered in transmission or at all. The receipt or non-receipt of such confirmation does not imply that the registration has or has not been effected, that fact being determinable solely by means of a priority search (Regulations, Section 6.2).

3.78. Reference has already been made to the need to have regard to the technological limitations of the International Registry (see paragraph 2.162).
Thus in the initial stages of the registration system it was not possible to register fractional interests, and the rights of the parties had to rest on agreement between the parties concerned. The technology for recording fractional interests both in airframes and in aircraft engines installed on airframes that are the subject of fractional ownership later became available. Similarly the system did not originally accommodate amendments except to the period of registration and certain elective fields. But this problem too has now been resolved (see paragraphs 3.81 et seq.). This process of adapting the system to demand is likely to continue indefinitely. Thus a mechanism for accommodating multiple consents to discharge has so far proved impracticable. It is therefore necessary to balance the needs of users against the available technology. This balance is achieved by ensuring that the registration system focuses on what is necessary for the protection of the user rather than what is merely convenient and can be covered by contractual arrangements. System changes do not affect the validity of any existing registration or require any amendment to it (Regulations, Section 17.3).

**Date and time of registration**

3.79. All registrations are dated and timed in Greenwich Mean Time to the nearest second.

**Partial and fractional interests; multiple named parties**

3.80. The International Registry will register multiple interests in any aircraft object. This may arise either when two or more parties purchase an aircraft together without splitting their interests (“partial interests”) or when one or more parties purchase stated proportions or fractions of an interest (“fractional interests”) in an aircraft, whether in an isolated transaction or as the result of an offer for sale by companies that manage and/or operate a fleet of aircraft each of which is co-owned by multiple parties. Such registrations can be made under contracts of sale for a partial or fractional interest or under agreements creating or providing for an international interest in a partial or fractional interest in an aircraft object (see further as to fractional interests paragraphs 2.59 et seq., 3.97). Under Section 5.12 of the Regulations a registration in the International Registry for aircraft objects may specify that:

(a) it covers a fractional or partial interest in an aircraft object and the extent of such interest, and/or
(b) multiple named parties hold or have granted an interest evidenced thereby.

There is currently no facility for registering multiple debtors unless they are joint debtors operating under a single account.

Amendments

3.81. Detailed provisions dealing with amendments to a registration and of change of name are contained in Sections 5.10-5.11 and 5.14 of the Regulations. Of particular significance are the following provisions:

(1) **Definition of “amendment”**

“Amendment” is defined in Section 2.1.2 of the Regulations as “any change in registered information, including any change in the lapse date of a registration, but does not include assignment, subrogation or subordination”. The reason for these three exclusions is that each of them constitutes a separately registrable category and does not involve a change in the particulars originally registered (see also paragraphs 2.178-2.180). However, amendment of information contained in an assignment, subrogation or subordination is covered by Section 5.11. The registration of a further assignment by the assignee (reassignment) is effected by registering an assignment of the assignment, though Section 5.6(c) and (d) show correctly that it is the international interest that is being reassigned. The first assignment is given the file number and it is that file that is shown as assigned, the purpose being to distinguish the reassignment from the primary assignment.

(2) **Amendment of object identification information or registration category**

The effect of paragraph (a) of Section 5.13 is that a change of information in details identifying the aircraft object or a change of a category of registration is treated as a new registration in respect of the object or category to which the amending registration refers, with priority ranking from the time the amending registration is complete. Accordingly the system discharges the existing registration. Given the fact that identification data are pre-entered by the manufacturer and free-texting is in general not allowed, a change in identification information almost invariably indicates that the registration now relates to a different object. Hence the rule that the priority of the interest relating to this new object ranks from the time of registration of the amendment. Change in a
category, for example, from a conditional sale to an outright sale, results in the application of different priority rules, so that again it is necessary to say that priority dates from the time the amendment is registered. Registration of an amendment in which the information as to the name of each of the named parties has been changed requires the consent of the named parties that consented to that registration and of the named party to be specified in the amended registration (Section 5.13, paragraph (b)).

(3) Amendment of information as to the duration of the registration

By contrast with amendments to identification data or category, the amendment of information as to the lapse date of a registration, as by extending the period of registration, has no effect on the priority of the original registration for the amended duration of that registration (Section 5.13, paragraph (c)). This is because those searching the International Registry and finding a registration of specified duration are expected to be aware that under Article 20(1) of the Convention the registration may be extended prior to its expiry and thus to acquire their own interest subject to any such extension. An extension is treated as an amendment for the purpose of the regulations, but if there is no lapse date the question of an extension does not arise.

(4) Entity change of name

In contrast to what has been discussed earlier in this paragraph an entity change of name is not dealt with as an amendment. This is because a change of name is recorded not by way of amendment to a registration (which would require a separate amendment against every registration and could mislead a searcher into thinking that the original and new name related to the same entity) but in the list of transacting user entities. Under Section 5.16 of the Regulations the International Registry may provide a facility for notice of a change of name to a transacting user entity where set out in a “name change notification request” and such a facility is now available. For this purpose “change of name” means either that the transacting user entity has changed its name, that any rights and interests of the transacting user entity reflected on the International Registry have become vested in another transacting user entity as a result of a merger, a change in entity form or otherwise by operation of law, or that a correction is required due to an error in its name or to an administrative or technical error. The change is confirmed by the Registrar, upon which the new name features with the old name in the transaction user entity list, so that a search against either name will
show both names, and all existing registrations are then annotated to advise of the change of name, such annotations being included in all priority search certificates. New registrations are effected under the new name. The new or resulting entity is then deemed to be a transacting user entity for all purposes of the International Registry. It is also possible to change the name of the entity on an existing registration, though this will normally be done only where the wrong entity was originally selected. The name change has no effect on the priority of the original registration. Further, Regulation 5.16 makes it clear that it covers cases where rights and interests reflected on the International Registry have vested in a different transaction user entity. The Registrar may reverse the name change and remove the name change history in cases where the Registrar satisfies itself that no such name change took place (Section 5.16).

(5) Change of lapse date

By “lapse date” is meant the date of expiry of a registration if this is expressed to expire on a specified date or after expiry of a specified period. Where the registration is indefinite there is no lapse date. If such a registration is to be changed to one with an expiry date the consent of both parties is required even though such an extension is purely for the benefit of the debtor.

Representative capacities

3.82. A person may enter into an agreement or a sale, and register an international interest in, or a sale of, an aircraft object in an agency, trust or representative capacity and in such case is entitled to assert rights and interests under the Convention and Aircraft Protocol (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. Where registration is sought by a trust, the International Registry generally asks to see the document establishing the trust and verifies that the name is accurate. A trust may be registered either as a transacting user entity or as a controlled entity as the registrant wishes, though the former is more usual, often as “owner trustee”. It is not necessary to state the registrant’s capacity; indeed, the regulations for the International Registry make no provision for registration as trustee beyond requiring, in the case of registration of the trust as a controlled entity, an electronic assertion by the trustee that the trust is a controlled entity which the trustee manages or administers (Regulations, Section 2.1.7; and see Section 4.3 as to controlled
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entities). Whether in such a case default remedies are also exercisable by one or more of the creditors directly depends on the law of the State where enforcement is sought (Convention, Article 14) and the terms of the trust or agency agreement. This provision is to be interpreted broadly as permitting a person acting as trustee, agent or other representative to take any action under the Convention, including entering into or exercising default remedies, registering international interests or assignments or subordinations of international interests registration of an assignment or subordination, whether or not covered by the express language of this Article. Accordingly acts by the representative other than those specified in Article VI should be considered covered by analogy. This conclusion is reinforced by the extended definition of registration in Article 16(3) of the Convention and is consistent with the underlying objective, to facilitate creditor’s rights and remedies in the context of multi-party financing.

Article VI applies where the trust has been validly constituted and the trustee validly appointed or the agent or other representative has actual or ostensible authority to perform acts of a kind referred to in the above paragraph.

The status of a duly appointed trustee, agent or other representative must be recognized in all Contracting States, whether or not, in the case of a trustee, their laws recognize the concept of a trust and whether or not the law governing the trust is that of a Contracting State. Recognition of a valid trust involves acceptance of the title of a trustee duly appointed, the power of the trustee to exercise remedies, including possession and sale, on behalf of the creditors (see also paragraphs 3.83-3.85) and the status of trust assets as constituting a separate fund held for the beneficiaries and not available to the trustee’s creditors in the event of its insolvency.

3.83. Article VI presupposes that a person entering into an agreement, making a sale or effecting a registration as trustee possesses that capacity. This depends on whether (1) the concept of a trust is recognized by the law under which the trust was constituted, (2) the trust was validly constituted in accordance with that law and (3) the registrant was validly appointed a trustee under that law. In practice it is exceedingly unlikely that a person will seek to establish a trust under the law of a jurisdiction that does not possess the trust institution. Where the trust instrument specifies the law that is to govern the trust, as it almost invariably does, that will be the applicable law. The characteristics of a trust are well set out in Article 2 of the 1985 Hague Convention on the Law Applicable
to Trusts and on their Recognition, which has been ratified by both common law and civil law jurisdictions.

For the purposes of this Convention, the term “trust” refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

- **a)** the assets constitute a separate fund and are not a part of the trustee's own estate;
- **b)** title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- **c)** the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

The terms of the trust may be set out in the instrument transferring the aircraft object to the trustee or alternatively, as is common in aircraft financing, there is a mortgage of the aircraft object to the trustee followed by a declaration of trust, that is, a declaration by the trustee that it holds the object and rights associated with it on trust for the beneficiaries. In the latter case the efficacy as a contract of an agreement for transfer by way of security is governed by the law determined by the conflict rules of the forum (in the case of an EU Member State, by Rome I). This law will cover such issues as capacity to contract, *consensus ad idem* and the like. But where the agreement under that law is valid as a contract and the agreement falls within a category of agreement specified in Article 2(2) of the Convention and satisfies the formal requirements of Article 7 it must be recognised in a Contracting State and given the effects of the Convention and Protocol even if the domestic law of that State does not recognise that category of agreement or the agreement fails to satisfy the formal requirements of that State. The validity and effect of a declaration of trust will be determined by the law specified in the declaration of trust. In those jurisdictions which recognise the trust concept trust assets constitute a separate fund, as stated in Article 2 of the 1985 Hague Convention quoted above, do not constitute part of the trustee’s estate and are not available to meet the claims of the trustee’s personal creditors.
(though the position may be otherwise where the trustee enters into contracts on behalf of the trust), while the beneficiaries may or may not have proprietary rights as well as personal rights against the trustee. There are many civil law jurisdictions that have developed trust-like devices but these generally insist on the unity of ownership, which in some jurisdictions is vested exclusively in the trustee and in others exclusively in the beneficiary. In each case the law governing the trust will determine its characteristics and effect but dealings with an object by the trustee will under most conflict of laws rules be governed by the law of the location of the object at the time of the dealing. The beneficial interests created by the declaration of trust and the transfers of such beneficial interests, whether by way of security, sale or otherwise, do not themselves fall within the Convention or Protocol.

3.84 Where title to an international interest is vested in a trustee only the trustee can register the international interest, though powers of enforcement may be shared by trustee and beneficiaries (see paragraph 3.82). Further, only the trustee can make and register an assignment of the international interest registered in the trustee’s name. However, a useful feature of the provision for registration by a trustee is that beneficiaries may effect transfers of their beneficial interests off the register, thus obviating the need for a new registration every time an interest is transferred.

The appointment of a new trustee operates as a transfer of the existing international interest either by act of parties, in which case it is registrable as an assignment, or by operation of law, in which case the transfer is outside the scope of the Convention and is not itself registrable but is dealt with as a change of name by the original trustee under Section 5.16 of the Regulations. This does not, of course, mean that the new trustee is considered to be the original trustee under a new name. There is no amendment of the registration itself, only of the person recorded as the transacting user entity. See paragraph 3.81(4).

3.85. Where an international interest has been registered in the name of the trustee pursuant to a power contained in the trust instrument, a disposition by the trustee in breach of the terms of the trust instrument ought nevertheless to pass a good title to the transferee, for by authorising the trustee to register the interest the beneficiaries hold out the trustee as having the powers of a creditor, and it is important to the integrity of the registration system that third parties should be able to rely on a duly authorised entry in the register. In the absence of registration, however, the question whether an unauthorised disposition by the
trustee overreaches the interests of the beneficiaries, for example by virtue of the trustee's legal title or the application of the *possession vaut titre* principle, is determined by the *lex situs* at the time of the disposition.

**Agents and other representatives**

3.86. Similar considerations apply to registration by an agent or other representative duly appointed in accordance with the law of the State applicable to the agency or other representational relationship except that the question of assets forming part of the agent’s estate will not usually arise.

**Registration of prospective interests**

3.87. Reference has already been made to the ability to register a prospective international interest (see paragraphs 2.40(2), 2.159, 2.195) and a prospective assignment of an international interest (see paragraph 2.238). Such registrations will normally be made only a day or so before the closing of a transaction in order to avoid the inconvenience of having to remove the registration if the transaction is not completed. The Aircraft Protocol’s extension of the registration and priority provisions to cover outright sales enables prospective sales to be registered in the International Registry, unless for commercial reasons the sale agreement excludes the prospective buyer’s right to register a prospective sale, as is commonly the case. But termination of the prospective sale agreement for default in performance of the agreement, albeit a default outside the Convention default provisions, precludes subsequent registration of a prospective interest by the prospective buyer as the defaulting party and, as regards any existing registration, entitles the prospective seller to have it discharged. The right to a discharge in these circumstances is not expressly covered by either the Convention or the Protocol but the provisions in Article 25(4) of the Convention governing improper or incorrect registrations should be applied by analogy to cases where it is improper to maintain the registration. As to discharge of a registration generally, see paragraph 3.90 *et seq*. Article XX(2) gives greater precision to the phrase “without undue delay” in Article 25(2) by requiring the person responsible for procuring discharge of a registration to take such steps as are within its power to do so no later than five working days after receipt of demand.
Closing Room facility

3.88. The sixth edition of the Regulations introduced The Closing Room, a facility which went live in 2015 and is designed to emulate electronically the traditional physical closing of a transaction and to avoid the necessity for a series of registrations by different registry users which may not be effected in the order required. Only a brief account can be given here of this new facility. Detailed provisions concerning The Closing Room are contained in the Appendix to the Regulations. A closing room is in effect an electronic file that may be used to assemble, or “pre-position”, information required under the Regulations to effect one or more registrations. It is the responsibility of the registry user entity establishing The Closing Room to manage its operation. Each Closing Room is automatically assigned a unique identifier by the Registry and registry users may search against this ID. Registry users can transmit to the closing room “prepositioned information” necessary to effect a registration. However, though the closing room can be accessed electronically it is not searchable for the purposes of Articles 18(4) and 19, because registrations do not take effect until the information has been released to the International Registry so as to be searchable there (see Appendix to the Regulations, paragraph 1.2). Prepositioned information may be changed at any time prior to the locking of the Closing Room and up to that point the entire Closing Room may be extinguished by the coordinating entity (Appendix, paragraph 2.4). At a given point the closing room is locked and registry user entities thereafter enjoy “read-only” access, so that unless unlocked the information in it cannot be modified. Once the Closing Room is locked each registry user entity whose consent is required to the preposition registration may either give or refuse consent but any consent or refusal of consent may be revoked at any time prior to release of the prepositioned registration to the Registry. All necessary consents must be given before such release can be effected, through a release instruction to the Registrar to enter all prepositioned registrations to the Registry in the chronological order specified in the pre-registration report (paragraph 7.1). Thereupon all registrations will go live and would be duly entered in the International Registry. The coordinating entity may unlock the Closing Room, whereupon all prepositioned registrations become unavailable for signature and can be edited until the Closing Room is locked again (paragraph 5.2).
Searches and search certificate

3.89. The International Registry for aircraft objects provides four kinds of search facility. The first is that prescribed by the Convention in relation to registered information under Article 16 (see paragraph 2.195) and is referred to in the Registry Regulations as a priority search (Regulations, Section 7.2). This requires searches to be carried out against the manufacturer’s name, generic model designation and manufacturer’s serial number of the aircraft object. The International Registry’s certificate showing the information revealed by the search is known as a priority search certificate (Regulations, Section 7.4). As to prospective international interests, prospective sales and prospective assignments, see paragraphs 2.61, 2.238. The second kind of search is a “Contracting State search”, which is a search for all declarations, designations and withdrawals thereof made under the Convention and Protocol by the Contracting State specified in the search. A Contracting State search certificate must (a) indicate in chronological order the text of all declarations and designations, and withdrawals thereof, by the specified Contracting State and (b) list the effective dates of ratification, etc., of the Convention and Protocol and of each declaration or designation, and withdrawal thereof, by the specified Contracting State (Regulations, Section 7.5). Copies of instruments deposited with the Depositary, UNIDROIT, provided to the Registrar by UNIDROIT under Article 62(2)(c) of the Convention and maintained by the Registrar pursuant to Article 23 (see paragraph 4.168) are no longer furnished to a searcher. The search certificate, termed a Contracting State search certificate (Regulations, Section 7.5) is provided without fee and lists not only these but also the effective date of ratification, etc., of the Convention and Protocol. The third kind of search is an “informational search”, a facility also provided free. It is not covered by the Convention and designed simply as a service to the user without any priority or other Convention effects (Regulations, Section 7.3). It is an aircraft object search used for cases where the full information required to identify a specific object may not be known. The search is made using the criterion set out in Section 7.1. But the information is not considered searchable for the purposes of Articles 19(2) and (6) of the Convention and Article XX(1) of the Protocol and does not generate a search certificate (see Section 7.3 of the Regulations). Instead, the results of the search take the form of a list of all matching aircraft objects or objects where the serial number entered is contained within the object’s serial number. The International Registry carries no responsibility for the accuracy of information provided in an informational search listing (Procedures, paragraph 13.3). The fourth kind of search is the “registry user entity search”, a facility
which may be provided by the International Registry for International Registry guests and registry users. The results of such a search list the transacting user entity’s identity information and contact information (Regulations, Section 7.6).

The principle of open access applies to searches in the International Registry, so that, whilst access for the purpose of effecting entries in the International Registry is restricted, any member of the public can make a search on opening an account with the International Registry as a guest user. See paragraphs 2.192, 3.58.

**Discharge of a registration**

3.90. The provisions of the Convention on discharge of a registration have been discussed earlier (paragraphs 2.181 *et seq.*). Section 5.7 of the Regulations sets out the information required to discharge a registration. When a registration is created, other than a discharge, the beneficiary is deemed to be the sole holder of a right to discharge ("RTD"). However, the RTD can be transferred to any other party, a facility which on an assignment enables the RTD to be transferred to the assignee. Multiple creditors have to select one of their number to hold the RTD. Transfer of the RTD will be reflected in a priority search certificate showing the date and time of the transfer and details of the transferor and transferee. Registration of a discharge is not itself a dischargeable registration. Where an amendment is made to the object identifier or the registration type, the underlying interest is discharged automatically by the system when the amendment is made. Registration of a sale is not normally susceptible to discharge because the buyer’s rights are not limited. If the buyer resells, all that happens is that the new buyer is registered. Exceptionally a sale registration is discharged:

(a) if it is amended by the parties to the original registration, at which time the system automatically discharges it (Regulation 5.11(a), or

(b) by the buyer or the seller with the consent of the other (Regulation 5.16), typically where the registration was made in error, e.g. because the supposed sale never occurred or the wrong category was registered (such as a sale when it should have been an international interest), or
(c) by the Registrar in the case of system malfunction or if ordered to do so by the court (Regulations, Section 5.15).

In addition the registration of a prospective sale may be discharged by the buyer or the seller with the consent of the other, e.g. where the anticipated sale does not take place.

Registration errors

3.91. The Registrar is responsible for the International Registry’s own errors and omissions and for system malfunction 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 an aircraft object could lead to more serious consequences but the likelihood of these occurring is substantially reduced by the fact that free text for the entry of data concerning such objects, though allowed, is not encouraged, details being accessible electronically from the system from information given by the manufacturers. As to whether an error might invalidate a registration or expose the registrant to liability see paragraphs 2.164 et seq. Registration errors for which a party is responsible can be corrected only with the consent of the other party or on an order of the Irish High Court. By contrast the Registrar may itself correct an error in a registration or a discharge of a registration or the chronological order of registrations, or discharge a registration, if such error has been created by a malfunction in the International Registry, or alternatively may request the named parties to the original registration to amend or discharge the registration, leave the registration in place or seek a court order under Article 44(1) (Regulations, Section 5.15). In principle the Registrar is liable for any loss caused by the system malfunction (Convention, Article 28(1)).

Complaints

3.92. There are two kinds of complaint that may be made against the Registrar or Supervisory Authority. The first is a complaint about the operation of the International Registry, by which is meant a complaint concerning the Registry’s general procedures and policies, as opposed to a specific adjudication by the Registrar or Supervisory Authority (Regulations, Section 8.1; Procedures, Section 14.1). A person making a complaint is required to substantiate his/her assertions in writing. The Registrar is required to respond to such an operational
complaint and transmit the complaint and its response to the Supervisory Authority, and if the matter is not satisfactorily resolved the complaint may be submitted to the Supervisory Authority itself (Regulations, Section 8.1, Procedures, Section 14.3, 14.4). If the Supervisory Authority determines that changes to the procedures or policies of the International Registry are appropriate it will instruct the Registrar to carry out such changes (Regulations, Section 8.2; Procedures, Section 14.4). The other type of complaint arises where a person adversely affected by a unilateral registration reasonably believes that the requirements of the relevant provisions of the Regulations have not been met. Where in such a case such adverse effect is substantiated to its reasonable satisfaction the Registrar may take appropriate action as provided by Section 14.5 of the Procedures. No such complaint may be submitted to the Supervisory Authority.

Quite separate from the complaints procedure is that governing a claim against the Registrar under Article 28(1) of the Convention for errors, omissions or system malfunction. Suppose, for example, that because of faulty technology an application for registration is wrongly rejected by the system and the applicant considers that it should have been accepted. The applicant should then engage in consultations with the Registrar with a view to resolving the matter (Regulations, Section 14.2; Procedures, Sections 15.3, 15.4). If the Registrar is unable or unwilling to deal with the complaint, the parties are encouraged to engage in mediation, conciliation, arbitration or other dispute resolution process, but the applicant is free to apply to the designated Irish court, in accordance with Irish procedural law, for an order under Article 44(1) of the Convention directing that the registration be effected (see the Procedures, Section 15.4). The Supervisory Authority has no role to play in relation to claims against the Registrar. In particular, no appeal lies to the Supervisory Authority against a determination of the Registrar. Failing some other form of dispute resolution the only recourse is to the Irish courts. The claim must be made in writing within the time period applicable under Irish law (Regulations, Section 14.2(a)). The Registrar has no role to play in disputes between parties as to whether a registration should be amended or discharged. If the parties are unable to agree to file an electronic amendment or discharge the only remedy of the disaffected party is to apply to a court (see paragraph 2.188).
Suspension of operation of Registry for maintenance

3.93. Though the International Registry is required to be operational seven days a week, 24 hours a day, it is obvious that its operations may have to be suspended from time to time for maintenance or to deal with technical or security problems (Regulations, Section 3.4, Procedures, Section 7.4). Section 14.1 of the Regulations provides that for the purposes of Article 28(1) of the Convention dealing with claims for loss or damage through errors, omissions and malfunctions “loss or damage” does not include loss or damage resulting from lack of access to the International Registry as a result of the above measures.

Confidentiality of Registry information

3.94. Under Section 9 of the Regulations, largely repeated in Section 16 of the Procedures, all information in the International Registry is confidential except where it is:

(a) provided to the Registrar under the Regulations;
(b) provided by the Registrar in response to a search under Section 7;
(c) made electronically available to enable registry users to effect, amend or discharge registrations;
(d) provided to the Supervisory Authority at the latter’s request;
(e) submitted by the Registrar in court proceedings under Article 44 of the Convention; or
(f) used for the purposes of the statistics required by Section 10 of the Regulations.

International Registry fees

3.95. The International Registry is entitled to charge fees as set and periodically reviewed by the Supervisory Authority under Article 17(2)(h) of the Convention. These are required by Article XX(3) of the Aircraft Protocol to be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority
associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 17(2). In short, the fees must not be set with a view to providing a profit either to the International Registry or to the Supervisory Authority, though they are entitled to cover their reasonable costs, including the cost of services provided by outside suppliers, and the reasonable costs of the Supervisory Authority. They are provided for in Section 13 of the Regulations and Section 6 of the Appendix, Closing Room, and are set out in the Appendix, Fee Schedule.

Priorities as regards sales

3.96. It has been seen earlier in relation to international interests 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 another seller retaining a power to dispose. For example, S sells an aircraft object 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 2.152) nothing turns on the order of registrations (see paragraphs 3.99 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.

Priorities and fractional interests

3.97. 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. Accordingly when a transaction is concluded involving two or more chargees, they can either agree on the order of
registration\textsuperscript{13} or agree that one shall be subordinated to the other and the subordination agreement registered so as to bind an assignee of the subordinated interest where this is registered first. No such agreement is needed among buyers holding fractional interests in an aircraft object or creditors having international interests in fractional interests, since each fractional interest constitutes a distinct subject-matter, so that the holders of the fractional interests or international interests in them are not normally in competition with each other. However, there are exceptions, as where (a) the same party disposes of the same fractional interest outright to buyers under different contracts of sale or by way of security to different creditors, or (b) sellers together sell or debtors charge by way of security fractional interests exceeding 100% of an aircraft object. In these cases priority is determined by the order of registration.

\textit{The priority position of a buyer}

3.98. Article XIV includes a provision designed to give the outright buyer of an aircraft object 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 aircraft objects, since the buyer has the ability to register its interest. Accordingly Article III of the Protocol, in applying Article 29, excludes Article 29(3). There is an unfortunate inconsistency between paragraph 1 and paragraph 2 of Article XIV, requiring paragraph 2 to be read as referring to the buyer of an aircraft object under a registered sale. See paragraph 5.77. 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 6(1) of the Convention and Article III of the Protocol). Article XIV also subordinates buyers that do not so register (Article XIV(2)). The same Article provides that ownership of or another right or interest in an aircraft engine is not to be affected by its installation on or removal from an aircraft, and this is so even if under the applicable law the engine would otherwise have passed to the owner of the airframe by accession. The principle is thus one of title tracking, not title transfer under a doctrine of accession, and is intended to enhance the ability to determine property rights in aircraft engines. For the reasons given earlier (paragraphs 3.9, 3.11) “aircraft engine” does not include an engine installed on a helicopter. Article XIV(3) does not apply to installed items other

\textsuperscript{13} Typically the parties will entrust registration to a professional services provider.
than aircraft engines, for these other items are deemed to form part of the
airframe, aircraft engine or helicopter on which they are installed (see the
definitions in Article I(2)(b), (e) and (l)). Therefore the registration of the sale of
an installed helicopter engine in the International Registry would have no legal
effect under the Convention. However, there is nothing to preclude the
registration of a prospective sale, which will take effect as a sale as soon as the
engine is removed from the helicopter, with the result that registration as a sale
will be treated as effected at the time of registration of the prospective sale
(Article 19(4)), with priority accordingly. Moreover, Article XIV(3) does apply
to helicopter engines prior to installation, so that a pre-installation interest taken
in them continues to be effective after installation. The considerations applicable
to prospective international interests in a helicopter engine are equally relevant
to prospective sales. See generally paragraphs 3.9, 3.11.

The importance of registration

3.99. The effect of Article 29 of the Convention, as applied by Article III of
the Aircraft Protocol, is that the registered buyer has priority qua buyer over all
subsequently registered sales by any seller retaining a power to dispose (see
paragraph 3.96) and over 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 power to dispose
makes two or more sales of the same object to different buyers. By contrast
registrations of successive sales do not fall within Article 29 at all (see paragraph
3.101). 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 five reasons why it is
important for buyers of aircraft objects (including a buyer from a chargee who
exercises a power of sale under Article 8(1)(b)) to avail themselves of the
registration machinery provided under the Aircraft Protocol:
(1) To preserve the buyer’s priority against a sale or grant of an international interest 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 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.

(5) To confer on the buyer seniority over a creditor who plans to exercise the remedy of de-registration and export under Article IX(1) so as to ensure that the remedy cannot properly be exercised without the buyer’s written consent (Article IX(2)), though the registry authority need not concern itself with the fact of consent and can rely on the certificate given by the enforcing creditor under Article IX(5)(b) or its notification under Article X(6) that it is entitled to procure the remedies of de-registration and export.

Irrelevance of the status of intermediate buyers

3.100. It has already been noted (paragraph 2.152) 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 3.102). Once the first registration has been made the registration and priority rules spring into play.

3.101. 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 2.82), 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 (a) a buyer from any seller retaining a power to dispose where the buyer registers the sale first, (b) the holder of a previously registered international interest or (c) the holder of a registered non-consensual right or interest, and 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.

3.102. 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

3.103. 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 aircraft object. For example, B buys an airframe 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 or L’s creditors in L’s insolvency? Again, does B’s registration only of the international interest suffice to protect B against a purchaser from S or S’s creditors in S’s insolvency? On a superficial interpretation this could give rise to conflicts between Article 29(1) of the Convention and Article III and Article XIV of the Protocol. In the first of these two cases B would apparently lose under Article 29(1) but win under Article XIV(1). In the second case the position would be the reverse. However, the proper analysis is as set out below.

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

3.104. 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 and against S’s execution and insolvency creditors. This is made clear by Article XIV(1) of the Protocol, which states that a buyer of an aircraft object 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 and against L’s creditors in its insolvency. 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 and against S’s insolvency creditors but does not secure priority for B’s international interest as lessor against a wrongful disposition by L or against L’s insolvency creditors. A third party dealing with L who searches the register will be aware that B bought the aircraft but in the absence of registration of B’s international interest may be led to believe that L, being in possession, bought the aircraft under an unregistered sale.

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

3.105. 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 and against L’s insolvency creditors but its separate interest as buyer is not protected against a second purchaser from S or against S’s insolvency creditors.

3.106. In short, there is no cross-over protection; registration of one interest does not secure priority for the other. In policy terms, too, this is the right result; each interest should be perfected in the manner prescribed for that interest. Similar considerations apply to the case where a lessee under a leasing agreement containing an option to purchase grants a sub-lease. See paragraph 5.25.

Prospective sales

3.107. An intending buyer may register a prospective sale of an identified aircraft object and if a sale later results it is deemed to have been registered as from the time of registration of the prospective sale (Article 19(4) as applied by Article III of the Protocol), which may, of course, have priority effects.

Debtor’s right to quiet possession and use

3.108. Article XVI of the Aircraft 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 2.215 et seq.). Under Article XVI 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 another interest in the object. 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 2.215) and, in the capacity of buyer, Article XIV(1) of the Aircraft Protocol (see paragraph 3.98); 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.

3.109. The effect of Article XVI 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 if it is to bind an assignee of the subordinated chargee’s interest. However, the chargee may stipulate that the subordination is not to be registered, in order to ensure that if the conditional buyer or lessee defaults the chargee can take enforcement measures without having a cloud on its title. 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 XVI 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 XIV(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 XVI.

3.110. 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.

3.111. 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 aircraft object. Accordingly any such act of interference constitutes a breach of the right to quiet possession, whether it takes the form of physical seizure, disablement of the aircraft object, 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 possession itself or authorises another to do so or where a chargee not having priority over the lessee seizes the aircraft object because of default under the security agreement by the lessor or the aircraft is arrested or taken in execution by or on behalf of a third party by way of recovery of sums due from the creditor to that third party, including sums payable under a judgment or order of the court. 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 XIV(1) of the Protocol. See Article XVI(1).

3.112. Article XVI 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
XVI 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 paragraphs 3.108-3.109 above).

3.113. 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) of the Convention and Article XVI(1)(b) of the Aircraft Protocol). 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 3.107). 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.

3.114. 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 of the former registration (see paragraph 2.215), 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.

3.115. Under Article XVI(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 aircraft object. So if the agreement makes the creditor’s right to possession 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 repossesses the aircraft object 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.

3.116. The debtor’s right of quiet possession under Article XVI(1) as against a person other than its creditor, e.g. a chargee, in effect constitutes a priority rule. See further paragraph 3.109.
Remedies on insolvency

3.117. Article XI introduces special rules in relation to aircraft objects designed to strengthen the creditor’s position vis-à-vis the insolvency administrator or the debtor on the occurrence of an insololvency-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)(m)). Article XI applies only in a Contracting State which is the primary insolvency jurisdiction and has made a declaration under Article XXX(3). Most Contracting States have made such a declaration. Several points arise from this provision.

“Insolvency proceedings”

3.118. “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)). This definition, which closely follows Article 2(i) of the UNCITRAL Model Law except for the omission of the word “foreign”, has four elements.

(1) The proceedings must be collective proceedings, that is, proceedings for the benefit of creditors generally, therefore excluding proceedings designed primarily for the benefit of a particular secured creditor, such as receivership. Bankruptcy and liquidation (or winding-up) are expressly covered, while “other” proceedings would include interim proceedings, for example, a stay of enforcement of rights pending the hearing of the substantive insolvency proceedings.

(2) The proceedings may be judicial or administrative, covering both court proceedings and proceedings before an administrative tribunal, but although the definition of “court” in Article 1(h) also includes arbitral tribunals established by a Contracting State these are not mentioned in the definition of “insolvency proceedings” because such proceedings deal with disputes between parties and do not constitute collective proceedings.
PART 3

(3) The assets and affairs of the debtor must be subject to control or supervision by a court. Excluded, therefore, are informal workouts and contractual restructuring arrangements where the debtor is left in control of its assets and affairs. Subject only to the terms of the contract. However, the definition covers institutions such as court-approved refinancing and the “debtor in possession”, where possession and management remain with the debtor company but under the overall control of creditors or a supervisor and the court.

(4) The proceedings must have as their purpose reorganization or liquidation in insolvency. The winding up, reorganization or dissolution of a solvent company falls outside the scope of Article XI. However, the question whether the debtor is in fact insolvent is irrelevant.

It is open to a Contracting State to declare the relevant “court” or “courts” for the purpose of Article 1 (Article 53). It is not necessary that the court should be directly involved in control or supervision of the debtor. It suffices that the insolvency administrator, including a person fulfilling that function as debtor in possession, is subject to the court’s control or supervision. It is likely that in most cases the insolvent debtor will be a corporation but the definition of “insolvency proceedings” also covers the bankruptcy of an individual.

Commencement of the insolvency proceedings

3.119. The applicable insolvency law (that is, the lex fori concursus) determines the time when insolvency proceedings are deemed to commence. The word “deemed” indicates that what is relevant is not the actual time an order for winding up or reorganization is made but the time when, under the lex concursus, it is treated as having been made. In some jurisdictions a winding-up order following a winding-up petition is deemed to commence at the time of presentation of the petition. Some other jurisdictions apply a “zero hour” rule in which the order is treated as made retrospectively to the very first moment of the day of its making.

3.120. “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, such as a provisional liquidator appointed to preserve the assets pending the hearing of winding-up or reorganisation proceedings, and includes a debtor in possession if permitted by the applicable
The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices.

**Intended or actual suspension of payment**

3.121. The second type of insolvency-related event is the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action. In some countries insolvency proceedings against airlines are not permitted, while in others enforcement measures to recover aircraft may be barred or suspended by judicial or administrative orders falling outside the definition of insolvency proceedings in Article 1(l) of the Convention. One such case is where a stay of enforcement is imposed once the debtor has made an application to determine whether it is eligible for insolvency proceedings. “Suspension of payments” denotes suspension of payments to creditors generally, not merely to a specific creditor or class of creditor and is a phrase used to indicate that the debtor is unable to meet its debts as they fall due. A court order for the suspension of payments will usually fall within the definition of insolvency proceedings so as to be within limb (i) of the definition, but the debtor’s application for the order, if not itself marking the commencement of insolvency proceedings, will normally constitute a declared intention to suspend payments and the applicable insolvency law may also deem a debtor to be in suspension of payments where its liabilities exceed its assets.

3.122. Article XI, which in the event of an assignment of the international interest can be invoked by the assignee, applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3). “Primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests (COMI) 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)(n)). Interestingly, this reference to the COMI was taken not from Article 4(1) of the 1995 EU Convention on Insolvency Proceedings but from Article 17(2)(a) of the later UNCITRAL Model Law and the presumption that this is the registered office from Article 16(3) of the Model Law. The 2013 UNCITRAL Commission Guide to Enactment and Interpretation discusses in detail in paragraphs 144 et seq. the COMI concept and the factors that will militate against the general presumption. As pointed out in paragraph 141 of the Guide, although the
presumption contained in Article 16(1) corresponds to the presumption in what was then the Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “Insolvency Regulation”) and is now the EU Insolvency Regulation (recast) it serves a different purpose. Nevertheless the Guide concluded that “jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.” This is likely to be true also of the interpretation of the COMI in Article XI, though it does not follow that all aspects of the jurisprudence of the European Court of Justice will necessarily be adopted in the context of Article XI, which has its own autonomous meaning. If the approach of the European Court of Justice in relation to the Insolvency Regulation is followed then the test is not where head office functions are carried out from the viewpoint of internal management but the conduct of business activities visible to external creditors. Further, in the case of a debtor company forming part of a corporate group, the COMI is not the location of management of the group but the place of conduct of business activity, visible to creditors, of the debtor itself.

3.123. The time for determining whether Article XI(1) is satisfied is the time of occurrence of the insolvency-related event, not the time the agreement was concluded. It is the debtor’s centre of main interests at that time that is the relevant COMI. Where such a Contracting State has made a declaration applying Article XI the fact that the aircraft in question is registered in another Contracting State which has not made such a declaration does not affect the application of Article XI in the declaring State.

3.124. 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 XXX(3) it is open to the parties to exclude the application of Article XI by agreement in writing (Article IV(3)), but they cannot vary it, only exclude it in its entirety (see paragraph 5.27. This is because each of the alternative options for which a Contracting State may make a declaration has to be adopted in its entirety if it is to be adopted at all (see below). Under Article XXX(4) of the Protocol the courts of Contracting States (i.e. Contracting States other than the COMI Contracting State) are required to apply Article XI 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 an aircraft object situated in that State the courts of
that State must apply the version of Article XI selected by a declaration of the Contracting State of primary jurisdiction.

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

Alternative A

3.126. 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, and of the Contracting States making a declaration to apply Article XI only one has not chosen Alternative A. Paragraphs 2 and 7 require the insolvency administrator or the debtor, as applicable, either (a) to give possession within the earlier of a waiting period specified in a Contracting State’s declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement, which includes obligations under other transaction documents (e.g. a loan agreement) incorporated by reference in such agreement. If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A the creditor can apply for and is entitled to obtain speedily a court order requiring the insolvency administrator or the debtor to give possession of the aircraft object. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9). In the case of a Contracting State that has made a declaration under Article 54(2) requiring leave of the court for the exercise of remedies and has then gone on to opt for Alternative A of Article XI of the Aircraft Protocol, the Contracting State must be taken to have intended to exclude the creditor’s remedies under Alternative A from the scope of its declaration under Article 54(2). The following points arise under paragraph 2 of Alternative A:
3.127. The phrase “insolvency administrator or the debtor, as applicable” covers three situations. The first concerns cases within Article I(2)(m)(ii) of the Protocol, that is, where there are no insolvency proceedings and the insolvency-related event consists of the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or exercise remedies under the Convention is prevented or suspended by law or State action. In such a case there is no insolvency administrator and it is the debtor itself upon which the duties fall. The second involves cases within Article I(2)(m)(i) where there is a gap between the commencement of the insolvency and the appointment of the insolvency administrator. During that gap the debtor again is the party responsible. Of course, the debtor’s freedom of action may be circumscribed by the lex concursus. The third situation is where the estate is being administered in insolvency proceedings by a debtor in possession if permitted by the applicable insolvency law. The debtor is then its own insolvency administrator. “Debtor in possession” denotes an insolvent company which, in proceedings for reorganization, is left in the hands of the existing management with power to continue trading in the ordinary course of business under the supervision of creditors and the court.

3.128. The waiting period begins on the occurrence of an insolvency-related event as defined by Article I(2)(m) and is the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction (Article XI(3)). Most Contracting States making a declaration under Article XXX(3) have specified a period of 60 days as the waiting period.

3.129. This must be interpreted as referring to a right to possession arising after the occurrence of an insolvency-related event as defined by Article I(2)(m). The underlying premise is that such commencement causes a stay on the creditor’s right to possession. However, where there is no stay, whether because (a) the insolvency-related event is not the commencement of proceedings but the declaration of an intended suspension of payment, (b) the relevant insolvency law does not impose a stay, (c) any stay imposed is lifted during the waiting period, for example by the grant of interim relief under paragraph 5(b) (see
below) or (d) the aircraft object does not form part of the debtor’s estate under the applicable insolvency law (which could, for example, be because it is held under a title reservation agreement or a leasing agreement), the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 2(b) of Alternative A of Article XI(1) is to be interpreted as if it read “would be entitled, or becomes entitled, to possession of the aircraft object notwithstanding the insolvency proceedings or other insolvency-related event”.

The insolvency administrator or the debtor can only avoid loss of the right to possession if it has cured all defaults, other than a default cured by the opening of insolvency proceedings, by the earlier of the expiry of the waiting period and the accrual or resumption of the creditor’s right to possession and has within the same time agreed to perform all future obligations under the agreement, including obligations under other contracts incorporated by reference into the agreement.

3.130. Unless and until the creditor is given the opportunity to take possession the insolvency administrator or the debtor, as applicable, must preserve the aircraft object and maintain it and its value in accordance with the agreement, but may use the aircraft object under arrangements designed to preserve and maintain it and its value. This would seem to include earning income from continued operation of the aircraft object but would not, for example, allow the substitution of lower-value components. Meanwhile the creditor for its part is entitled to apply for any other forms of interim relief available under the applicable law (Alternative A, paragraph 5(b)). For example, where the aircraft is in imminent danger of being removed or damaged the court may by way of interim relief allow the creditor to repossess the aircraft object or have it taken into protective custody even if the waiting period has not yet expired. What constitutes interim relief varies with the applicable law. In a number of jurisdictions any form of relief which is considered appropriate before a final determination has been made on the merits qualifies as interim relief, so that in those jurisdictions sale of the object to which the proceedings relate can be ordered by way of interim relief, whereas other jurisdictions look to the finality of what is ordered and consider sale to be an irrevocable act and therefore inappropriate for interim relief. A court in a Contracting State before which interim relief is sought will thus apply its own law in deciding whether a particular remedy qualifies as interim relief. What constitutes the applicable law is to be determined by the rules of private international law of the forum State (Article 5(3)), and the availability of interim relief will usually be regarded as procedural in character and therefore governed by the lex fori. Where the insolvency-related
event is the commencement of the insolvency proceedings the forum State will almost invariably be the State in which the proceedings are opened and the lex concursus will apply. A separate rule applies as regards advance relief under Article 13 of the Convention in that sale and the application of the proceeds of sale are made available as a form of relief under that Article if at any time the debtor and the creditor specifically agree (Protocol, Article X(3)).

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

3.132. Paragraphs 9 and 10 of Alternative A preclude the court from preventing or delaying the exercise of the creditor’s remedies beyond the above time-period and from modifying the debtor’s obligations without the creditor’s consent. In effect this removes, for aircraft objects, the preservation of the court’s powers under Article 30(3)(b) of the Convention (see paragraph 2.236). Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors’ rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9. Similarly, any provisions of domestic law modifying or empowering a court to modify the debtor’s obligations must be disapplied where these would conflict with paragraph 10. Though paragraph 10 only precludes modification of the debtor’s obligations under “the agreement”, that is, the security agreement, title reservation agreement or leasing agreement relating to the aircraft object, and says nothing about security assignments of debtor’s rights, it must be intended to cover these as well,
particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditor’s remedies permitted by the Convention or Protocol, applies to all remedies, not merely those relating to the aircraft object. But the insolvency administrator remains entitled to terminate the agreement where so allowed by the applicable law (Alternative A, paragraph 11), that is, the law governing the agreement.

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

Alternative B

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

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

3.136. 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, it fails to do so, the creditor cannot exercise self-help but must apply to the court for leave to take possession and if leave is granted conditions may be imposed. So under the “soft” version of Article XI the court’s discretion is substituted for the creditor’s entitlement to take possession. Pending the court’s decision regarding the claim and the international interest the aircraft object 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. Only one Contracting State has so far opted for Alternative B.

Non-consensual rights or interests

3.137. Neither Alternative A nor Alternative B deals with the enforcement rights of the holder of a non-consensual right or interest covered by a declaration under Article 30.
The insolvency provisions and Member States of the European Union

3.138. A special situation exists for Member States of the European Union. This is because the duty of cooperation imposed on Member States by EU law precludes them from concluding international agreements deviating from the position adopted by the EU. In its decision of 6 April 2009 the Council of what was then the European Community decided to make no declaration under Article XXX(3) of the Aircraft Protocol as to the adoption of either Alternative A or Alternative B, while declaring that Member States kept their competence regarding rules of substantive law as regards insolvency. The only reason for the EC’s concern with the insolvency provisions of the Convention and Protocol was to ensure that nothing affected the Insolvency Regulation, which is primarily a conflict of laws convention. If the EC had made a declaration applying Alternative A or Alternative B all Member States of the EU choosing to ratify the Convention and Protocol would have had to make the same declaration, whereas it had been agreed with Member States that each should be free to go its own way. The result is that Member States are not permitted by EU law to make any declaration applying Article XI but they remain free either to retain their own substantive insolvency law without amendment or to reproduce the effects of Alternative A or Alternative B by domestic legislation.

3.139. The position taken by what is now the EU operates only at the level of domestic law within the EU. Accordingly while as a matter of EU law a declaration made by a Member State may be invalid, this is of no relevance on the international plane, so that the Depositary is required to accept declarations deposited in accordance with the Convention and Protocol even if they are void under EU law. The European Court of Justice has itself recognised on several occasions that the EC/EU is bound by international law, so that ratification of an international instrument in a form which breaches EU law can be dealt with only within the confines of EU law itself, for example, by steps to compel the offending Member State to exercise its power under the Convention or Protocol to withdraw or amend the offending declaration. See further paragraph 2.300.

Insolvency assistance

3.140. Article XII provides that the courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of that Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.
The form of co-operation most likely to be sought is delivery up of the aircraft object to the insolvency administrator in the main proceedings or such other person as the administrator may direct. 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 UNCITRAL Model Law in Contracting States that have adopted the Model Law. Where co-operation is not precluded it is the duty of the court to give the maximum assistance to foreign courts who seek it and have competent jurisdiction.

**Assignment of associated rights**

3.141. Article XV 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).

3.142. 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**

3.143. 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 2.239.
Jurisdiction

3.144. Article XXI confers on courts of the Contracting State which is the State of registry of an aircraft concurrent jurisdiction to grant advance relief under Article 13. However, this will not apply where a court has exclusive jurisdiction by party agreement under Article 42, nor will it confer jurisdiction to entertain a claim against the Registrar. Moreover, Article XXX(5) empowers a Contracting State to make a declaration excluding the alternative ground of jurisdiction provided by Article XXI. The European Community (now the European Union) has made a declaration that Article XXI will not apply within the Community and that instead Council Regulation (EC) No. 44/2001 (Brussels I) (now Regulation (EU) 1215/2012 (Brussels I (recast)) will apply to the matter for the Member States bound by that Regulation or by any other agreement designed to extend its effects. In consequence Member States of the European Union may not apply Article XXI. It should be borne in mind that the Convention contains no general jurisdiction provision beyond what is agreed by the parties; apart from such agreement only matters falling within Articles 13 and 43 are the subject of a Convention jurisdiction rule. Jurisdiction over all other claims is determined by the lex fori (see paragraph 2.277). In the case of Member States of the EU other than Denmark this means Brussels I (recast).

Waiver of sovereign immunity

3.145. Under Article XXII of the Aircraft 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 aircraft object 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 aircraft object 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. Earlier drafts more accurately required that the waiver “be in a writing that contains a description of the object”.

14 This was altered to the present wording but the intended effect is the same). Similarly, a waiver relating to enforcement is effective to permit enforcement if the above requirements are satisfied. Though there is no express reference to Article VII of the Protocol it would seem that the description must

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satisfy the requirements of that Article by setting out the manufacturer’s serial number, the name of the manufacturer and its model designation. A waiver of immunity from jurisdiction is not by itself a waiver of immunity from enforcement.

**Remedies for breach of Protocol provisions**

*Breached Protocol provision by a party to an agreement*

3.146. Examples of breach of a provision of the Aircraft Protocol by a party to the agreement are the following:

1. Breach by the creditor of its duty under Article IX(3) to exercise a remedy in a commercially reasonable manner.

2. Breach by the debtor of its duty under Alternative A of Article XI to give possession of an aircraft object to a creditor.

3. Breach by the debtor of its duty under Alternative A of Article XI to preserve the aircraft object 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 XVI.

*Breached Protocol by a Contracting State*

3.147. It will have been seen that the Protocol imposes various duties on Contracting States and their competent authorities, for example in regard to de-registration and export (Article IX(5) and, where covered by a declaration under Article XXX(1), Article XIII); insolvency assistance (Article XII); and the operation of designated entry points (if any) at least during working hours (Article XX(4)). But no direct remedy is given to a creditor who suffers loss as the result of any such duty being broken. See paragraph 2.292.

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

3.148. On matters covered by the Convention it supersedes the Geneva Convention (Article XXIII). This supersession of the Geneva Convention covers all rules relating to the creation, enforcement (including enforcement in insolvency), perfection and priorities of interests, as well as related assignments. Under Article XXIV the Convention also supersedes the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (the Rome “Convention”), in the absence of an opt-out permitted by Article XXIV(2), as well as the Leasing Convention in relation to aircraft objects (Article XXV).

Declarations

3.149. Like the Convention, the Aircraft Protocol contains various provisions for declarations. Declarations made by a Contracting State determine how the Protocol and Convention are to be applied in that State. The same three questions arise in respect of declarations under the Protocol as arise under the Convention (see paragraph 2.327). First, which Contracting State can make a declaration under a particular provision? Secondly, which Contracting State’s declaration is relevant (“the relevant declaration”) in any particular case and for that purpose what is the relevant time for answering this question? Thirdly, on which other States is the declaration of a Contracting State binding? In answer to the first question, most declarations may be made by any Contracting State. There are, however, three exceptions. A declaration applying Article XI on insolvency may be made only by the Contracting State that is the primary insolvency jurisdiction (Article XI(1)); a declaration under Article XXIV excluding supersession of the 1933 precautionary attachment of aircraft convention may be made only by a Contracting State that is Party to that convention; and a declaration under Article XXIX may be made only by a Contracting State which has territorial units in which different systems of law are applicable in relation to matters dealt with in the Protocol. The second question has to be answered by reference not to the time of the declaration itself but to the time at which and the forum in which the issue arises. In only one case is the applicable law of the declaring State relevant, namely in relation to a declaration under Article XXIV(2) (non-supersession of 1933 attachment of aircraft convention), which is a relevant declaration only where the applicable law is that of the declaring State. A declaration as to:
(1) Article VIII respecting the parties’ choice of law is the relevant declaration only in proceedings in a declaring State (but in an EU Member State no declaration can be made under Article VIII as a matter of EU law and any choice of law will be controlled by Rome I). In a non-declaring State it is that State’s ordinary conflict of laws rules (including, in an EU Member State, Rome I but excluding Article VIII), that will determine the law applicable to the effectiveness of the choice, but the reference is only to the domestic law of the referred State, not to its conflict of laws rules (Convention, Article 5(3)) and therefore does not include the referred State’s own declaration (see paragraph 3.25) - in other words, the declaration of a Contracting State other than that of the forum is irrelevant.

(2) Article X as to modification of the provisions for advance relief is the relevant declaration only in relation to applications for relief made in the declaring State;

(3) Article X(6) as to the duties of the relevant authorities in regard to the remedy of de-registration is a relevant declaration only in the State which is the State of Registry of the aircraft as defined by Article I(2)(p) of the Protocol (but in an EU Member State no such declaration may be made under EU law), whilst as to the remedies of export and physical transfer the relevant declaration is that of the State in which the aircraft object is located;

(4) Article XI relating to remedies on insolvency is a relevant declaration only where the declaration is that of the Contracting State that is the primary insolvency jurisdiction as defined by Article I(2)(n) of the Protocol (but in an EU Member State no such declaration can be made under EU law);

(5) Article XII relating to the provision of insolvency assistance is a relevant declaration only in proceedings in the declaring State where the aircraft object is situated (but under EU law no such declaration may be made by a Member State of the EU);

(6) Article XIII relating to the IDERA and Article XXI as to jurisdiction is a relevant declaration only in the State which is the State of Registry of the aircraft;
(7) Article XIX (designation of entry point) is relevant only in the State which is the State of Registry of the aircraft;

(8) Article XXX(5), excluding the additional ground of jurisdiction under Article XXI, is the relevant declaration only where the object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of Registry.

As regards the third question, a relevant declaration has to be respected by all other Contracting States and will also be respected by a non-Contracting State whose conflict of laws rules lead to the application of the law of a Contracting State, whether or not the declaring State. Further, the courts of Contracting States must apply Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction (Article XXX(4)), while a Contracting State that has made a declaration under Article XII has a duty, in relation to an aircraft object situated in that State, to co-operate with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI relating to insolvency remedies.

3.150. 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. As to the rationale of the distinction between opt-in and opt-out declarations, see paragraphs 2.331, 2.332. Most provisions that are subject to a declaration make this clear. An exception is Article XXI, which omits to mention that it is subject to an opt-out declaration under Article XXX(5). The pattern of declarations under the Aircraft Protocol provisions is as follows:

**Opt-in declarations**

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

<table>
<thead>
<tr>
<th>Article VIII</th>
<th>Choice of law</th>
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<tr>
<td>Article X</td>
<td>Modification of provisions regarding relief pending final determination, and time within which such relief to be granted</td>
</tr>
</tbody>
</table>
PART 3

Article XI Remedies on insolvency and selection of Alternative A or Alternative B

Article XII Insolvency assistance

Article XIII De-registration and export request authorisation

Opt-out declarations

3.152. Provisions of the Aircraft Protocol applicable unless excluded by a declaration are:

Article XXI Modification of jurisdiction provisions

Article XXIV(2) Superseding of Rome Convention

Declarations relating to the operation of the Protocol within a Contracting State

3.153. Provisions of the Aircraft Protocol as to the application of a Contracting State’s own laws are the following:

Article XIX Designated entry points

Article XXIX Territorial units

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

3.154. 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(2) Transfer of competence to a Regional Economic Integration Organisation

Article XXX(2) Time-period required by Article X(2) for speedy relief.

16 Designation of an entry point under Article XIX of the Protocol is treated by UNIDROIT as a declaration. See generally paragraph 3.67.
3.155. 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 VIII, X, XI, XII or XIII;

(b) it wishes to use one of the opt-out provisions to exclude a provision, i.e. Article XXI or XXIV(2);

(c) the declaration is mandatory, i.e. under Article XXVII(2) and under XXX(2) where a declaration is made under Article X(2).

3.156. In all other cases the Contracting State need take no action. All declarations under the Protocol other than a mandatory declaration made by a Regional Economic Integration Organisation under Article XXVII(2) may be modified or replaced by subsequent declarations under Article XXXIII or withdrawn under Article XXXIV. A mandatory declaration under Article XXVII(2) may be made only at the time of ratification, etc., changes to the competence of the Regional Economic Integration Organisation to be promptly notified to the Depositary. Even though Article XXX 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 XXXIII and thereafter replaced by a new declaration under that Article or withdrawn under Article XXXIV. The effect of Article XXXIII, therefore, is that such declarations may be made at any time.

3.157. A relevant declaration (see paragraphs 2.327 et seq) made by one Contracting State is binding on other Contracting 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 XXXIII) and the same applies to the withdrawal of declarations (Article XXXIV) and the denunciation of the Protocol (Article XXXV). Declarations made under the Convention are deemed to have also been made under the Protocol (Article XXXXI), thus avoiding the need to lodge fresh declarations under the Protocol in respect of matters covered by those already made under the Convention.
3.158. 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:

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>X(2)</td>
<td>Time-period required where (opt-in) declaration made under Article X(2)</td>
</tr>
<tr>
<td>XI</td>
<td>Types of insolvency proceeding covered by any declaration under Article XI</td>
</tr>
<tr>
<td>XXI</td>
<td>Under which conditions the relevant Article (that is, Article 13 or Article 43) will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied</td>
</tr>
</tbody>
</table>

**Regional Economic Integration Organisations**

3.159. Article XXVII follows the wording of Article 48 of the Convention as regards regional economic integration organisations. See paragraph 2.297. A Regional Economic Integration Organisation, like a Contracting State, may not become a Party to the Protocol unless it is or becomes also a Party to the Convention (Article XXVI(5) as applied by Article XXVII(3)). The only REIO so far to have availed itself of Article 48 is the European Community (now the European Union), which has made a declaration under Article XXX(5) that it will not apply Article XXI extending jurisdiction under Article 43. Instead Brussels I (recast) will apply. See paragraph 3.144.

**Territorial units**

3.160. Article XXIX contains provisions relating to territorial units which track those of Article 52 of the Convention (see paragraph 2.308).

**Depositary and its functions**

3.161. The Depositary is UNIDROIT. Article XXXVII follows Article 62 of the Convention.