PART 5

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

PREAMBLE

CHAPTER I SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article I Defined terms
Article II Application of Convention as regards aircraft objects
Article III Application of Convention to sales
Article IV Sphere of application
Article V Formalities, effects and registration of contracts of sale
Article VI Representative capacities
Article VII Description of aircraft objects
Article VIII Choice of law

CHAPTER II DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article IX Modification of default remedies provisions
Article X Modification of provisions regarding relief pending final determination
Article XI Remedies on insolvency
Article XII Insolvency assistance
Article XIII De-registration and export request authorisation
Article XIV Modification of priority provisions
Article XV Modification of assignment provisions
Article XVI Debtor provisions

CHAPTER III REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AIRCRAFT OBJECTS

Article XVII The Supervisory Authority and the Registrar
Article XVIII First regulations
Article XIX Designated entry points
Article XX Additional modifications to Registry provisions
CHAPTER IV  JURISDICTION

Article XXI  Modification of jurisdiction provisions
Article XXII  Waivers of sovereign immunity

CHAPTER V  RELATIONSHIP WITH OTHER CONVENTIONS

Article XXIII  Relationship with the Convention on the International Recognition of Rights in Aircraft
Article XXIV  Relationship with the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft
Article XXV  Relationship with the UNIDROIT Convention on International Financial Leasing

CHAPTER VI  FINAL PROVISIONS

Article XXVI  Signature, ratification, acceptance, approval or accession
Article XXVII  Regional Economic Integration Organisations Article XXVIII Entry into force
Article XXIX  Territorial units
Article XXX  Declarations relating to certain provisions
Article XXXI  Declarations under the Convention
Article XXXII  Reservations and declarations
Article XXXIII  Subsequent declarations
Article XXXIV  Withdrawal of declarations
Article XXXV  Denunciations
Article XXXVI  Review Conferences, amendments and related matters
Article XXXVII  Depositary and its functions

ANNEX  FORM OF IRREVOCABLE DE-REGISTRATION AND EXPORT REQUEST AUTHORISATION
PROTOCOL

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

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING it necessary to implement the Convention on International Interests in Mobile Equipment

(hereinafter referred to as “the Convention”) as it relates to aircraft equipment, in the light of the purposes set out in the preamble to the Convention,

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

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

HAVE AGREED upon the following provisions relating to aircraft equipment:

Comment

5.1. The Preamble reflects the primary purpose of a Protocol to the Cape Town Convention, which is to adapt the Convention to the particular requirements of the industry sector affected while otherwise leaving it unchanged. The Aircraft Protocol, like the Convention, is based on the policy of a high degree of party autonomy and the need to provide the creditor with adequate safeguards in the event of default, safeguards reinforced as regards aircraft objects by the insertion of additional remedies and the modification of provisions of the Convention restricting the exercise of remedies. However, it also incorporates provisions enabling a Contracting State to balance its legal philosophy on key issues against the economic advantages of particular provisions and to make a declaration excluding such provisions, wholly or in part, where an opt-out is required, or to make no declaration, where an opt-in is
required. The Chicago Convention records in its Preamble the agreement of
governments on certain principles and arrangements “in order that international
civil aviation may be developed in a safe and orderly manner and that the
international air transport services may be established on the basis of equality of
opportunity and operated soundly and economically”. The Cape Town
Convention and the Aircraft Protocol reflect similar principles at the private law
level in relation to international interests in aircraft objects. However, the third
Preamble to the Convention is carefully worded to avoid any implication that
the Convention has to be construed by reference to the provisions of the
Chicago Convention.

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article I — Defined terms

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

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

   (a) “aircraft” means aircraft as defined for the
       purposes of the Chicago Convention which are either air-
       frames with aircraft engines installed thereon or
       helicopters;

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

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

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

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

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

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

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

(ii) goods in excess of 2750 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto;

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

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

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

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

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

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

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

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

(ii) goods in excess of 450 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto;

(m) “insolvency-related event” means:

(ii) the commencement of the insolvency proceedings; or

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

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

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

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

Comment

Definitions

5.2. The first point to note is that, except where the context otherwise requires, terms used in the Protocol have the same meanings as those used in the Convention (Article I(1)). So the 40 Convention definitions have always to be borne in mind when reading the Protocol.

5.3. “aircraft” – this is not a term used in the Convention, whether in defining its scope or otherwise, since airframes and aircraft engines are treated as distinct items of property. Aircraft engines are highly mobile and frequently interchanged and dealt in and financed separately from airframes. However, while the Aircraft Protocol provisions for the most part reflect this through the definition of “aircraft objects”, a definition of “aircraft” (i.e. an airframe with aircraft engines installed thereon or a helicopter) is also required in the Aircraft Protocol for limited purposes, in particular:

(a) the definitions in the present Article of “common mark registering authority” (sub-paragraph (h)), “de-registration of the aircraft” (sub-paragraph (i)), “registry authority” (sub-paragraph (o)), and “State of registry” (sub-paragraph (p)), all of which are referred to in the paragraphs below;

(b) Article IV, which extends the scope of the Convention to cover aircraft, airframes forming part of an aircraft and engines
installed on an aircraft, registered in an aircraft register of a Contracting State;

(c) Articles IX and XIII, which respectively provide the additional remedies of de-registration of the aircraft and action to be taken by the relevant authorities (but see below);

(d) Article XIV(3), which provides that ownership of or another right or interest in an aircraft engine shall not be affected by its installation or removal from an aircraft;

(e) Article XXI, which confers jurisdiction additionally on courts of a Contracting State where the object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of registry;

(f) Article XXIII, dealing with the relationship between the Convention and the Geneva Convention;

(g) Article XXIV, dealing with the relationship between the Convention and the Rome Convention.

5.4. “aircraft engines” – the definition incorporates a minimum engine capacity as a way of reflecting that the Convention and Aircraft Protocol are intended to be confined to objects of high unit value. 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 definition does not include auxiliary power units (APUs), which do not provide propulsion but supply power to the main engine. Though related to the main engine these are part of the airframe. The Aircraft Protocol follows the Geneva Convention in excluding engines used in military, customs or police services. For comments on this exclusion, which are equally applicable to this definition, see paragraph 5.7. “Aircraft engine” includes all modules and other installed and attached accessories, parts and equipment: in short, all physical property on the aircraft engine. In principle, therefore, an international interest in an aircraft engine includes all such attachments. However, if another person had rights in
an attached item prior to its installation on an aircraft engine and under the applicable law those rights continue to exist after the installation and the Convention does not affect them (Article XIV(4) of the Aircraft Protocol and Article 29(7)(a) of the Convention), nor does the Convention affect the ability to grant rights in the attached item after its removal from the engine where such rights may be created under the applicable law (Article XIV(4) and Article 29(7)(b) of the Convention). In addition, all data, records and manuals are included.

5.5. An aircraft engine does not form part of the airframe on which it is installed but is an independent object for the purposes of the Convention and Protocol and international interests in it are separately registrable. However, helicopter engines already installed at the time an international interest is taken are not separate objects (see paragraphs 3.9, 3.11, 5.6-5.7), nor, indeed, are they aircraft objects at all within the definition in Article I(2)(c) while installed on a helicopter. But pre-installation rights or interests taken in them, including international interests, are preserved after installation. Moreover, there is nothing to preclude the registration of a prospective international interest in, or a prospective sale of, an installed helicopter engine which will take effect as an international interest as from the time of that registration as soon as the engine is removed from the helicopter, and such international interest will preserve its priority even after re-installation on a helicopter. See generally paragraphs 3.9 and 3.11.

5.6. “aircraft objects” – a compendious phrase to describe all three of the categories mentioned in Article 2(3)(a) of the Convention, namely airframes, aircraft engines and helicopters. Taken in isolation the definition of “aircraft objects” might be thought to include installed helicopter engines. However, it is clear from other provisions of the Convention and Protocol that this is not the case. See paragraphs 3.9-3.11.

5.7. “airframes” – the body of the aircraft excluding its engine but including the wings, fuselage and undercarriage. The definition uses the test of type certified carrying capacity (persons or cargo) to exclude small airframes and ensure high unit value. Airframes used in military, customs or police services are also excluded. But the Aircraft Protocol applies to aircraft objects used in other State services, for example, those used in firefighter and medical services or to transport government officials. The Aircraft Protocol is intended as a vehicle for facilitating the financing of these aircraft objects. Nor does it preclude the
potential application of the Convention to “mixed use” aircraft objects, that is, objects used for commercial and other purposes. Again, all attachments (other than aircraft engines) are included in the definition of “airframe”, and the other points in paragraph 5.2 relating to attached and installed items and their removal, and to data, manuals and records, apply to this definition as well. However, aircraft engines, even when installed, do not constitute part of the airframe and are independent objects for the purposes of the Convention and Aircraft Protocol. By contrast installed helicopter engines are not separate objects but components of the helicopter and international interests in them cannot be separately taken while they are so installed, though, as stated above, if such interests are taken prior to installation they continue to be effective after installation. See Article XIV(3) and paragraph 3.11.

5.8. “authorised party” – the creditor in whose favour the debtor has issued an irrevocable de-registration and export request authorisation (IDERA) in order to give effect to these additional remedies, which are conferred on the creditor by Article IX(1). See paragraph 3.43. The creditor may designate someone else to exercise the authorisation. No person other than the debtor may issue the authorisation and only the creditor or its designee may exercise it. So if an international interest is later assigned the assignee, if not itself the designee, will need to obtain a new IDERA.

5.9. “Chicago Convention” – as noted in the comments to the Preamble, the Aircraft Protocol and the Chicago Convention have a similar set of principles and objects, namely, the economic development of the international air transport sector. Yet the Convention and the Chicago Convention address quite different subjects. The latter is a public law treaty, which establishes an international system promoting safe and secure flight operations. It is centred on concepts of nationality. The former is largely a private law treaty designed to facilitate the financing and leasing of aircraft objects. Principles of interpretation employed in dealing with one text are unlikely to apply in dealing with the other.

5.10. “common mark registering authority” – Article 77 of the Chicago Convention, as implemented by an ICAO Council Resolution adopted on 14 December 1967, permits such an authority to maintain a civil aviation register in accordance with the terms thereof (see paragraph 3.17). Where this occurs, certain concepts under the Aircraft Protocol must be applied with reference to that authority, including de-registration under Article IX(1) of the Protocol. Thus, the phrase “registry authority” covers both national and common mark
registering authorities (see Article I(2)(o)) and “State of registry” includes the State of location of the common mark registering authority maintaining the aircraft register (Article I(2)(p)).

5.11. “de-registration of the aircraft” – this denotes removal of the aircraft from its register in accordance with the Chicago Convention (Article I(2)(i)) and means, in effect, the “removal or transfer” of registration as contemplated by Article 19 of the Chicago Convention. Article IX of the Aircraft Protocol provides the creditor with the additional default remedies of de-registration and export and physical transfer of the aircraft from one territory to another. These additional remedies pave the way for re-registration in another country pursuant to the terms of the agreement and in conformity with the rules of the applicable law. That is a necessary remedy to permit effective re-marketability of aircraft objects and their generation of proceeds since, as provided in Article 18 of the Chicago Convention, dual registration is not permitted. If an aircraft is de-registered and then re-registered in another jurisdiction it will be necessary to issue a fresh IDERA addressed to the new Registry Authority. The Chicago Convention provides for transfer of registration from one State to another, leaving the method of transfer to the States concerned. So de-registration under the Cape Town deals with the transferring end, while re-registration in the transferee State is governed by the law of that State, which need not be a State party to the Cape Town Convention.

5.12. “guarantee contract”, “guarantor” – these terms cover not only suretyship guarantees and credit insurance, which are accessory to the principal contract, are dependent upon its validity and are triggered by the default of the principal debtor, but also guarantees which are issued as independent payment undertakings and are payable on written demand and presentation of any other specified documents irrespective of performance or default in performance of the underlying transaction, for example, documentary credits, demand guarantees and standby credits. A guarantor is an “interested person” within the definition of Article 1(m)(ii) of the Convention and as such is entitled to be given notice of an intended sale or lease by the creditor (Article 8(4)) and to discharge a security interest after default by the debtor (Article 9(4)) and be considered for protection by the court in proceedings for advance relief (Article 13(2), (3)). The parties to a related guarantee contract may choose the law to govern their relations inter se (Article VIII(2)).
5.13. “helicopters” – defined in such a way as to encompass a minimum carrying capacity, again capturing the high-unit-value element, but excluding helicopters used in military, customs or police services. For comments on this exclusion, which are equally applicable to this definition, see paragraph 5.7. As with airframes and aircraft engines, attachments are also included, and the other points in paragraph 2 related to attached and installed property (in this case, including helicopter engines) and data, manuals and records apply to this definition as well.

5.14. “insolvency-related event” – an event which triggers the remedies of the creditor specified in alternative versions in Article XI, which itself is dependent on the making of a declaration by the Contracting State concerned and can be excluded by agreement of the parties (Article IV(3)). There are two alternative limbs to the definition. The first is the traditional commencement of insolvency proceedings. For the meaning of this see Article 1(d) of the Convention and paragraph 4.13. The second, a declared intention to suspend payments, or actual suspension of payments, where a creditor may not commence proceedings or exercise Convention remedies by law or State action, also constitutes an insolvency-related event. This is required because, in certain systems, airlines are not eligible for insolvency proceedings (see Illustration 64, paragraph 5.18). More generally, the basic intent of the second limb of the provision is to trigger the starting of the time period in Article XI of the Protocol (either Alternative) where there are financial problems and State action or law (whether made or taken before or after a declared intention to suspend payment) prevents application of the remedies under the Convention (see paragraph 3.121). Where the law preventing or suspending the right to institute insolvency proceedings is not in force and State action has not been taken at the time of the declaration of intention, the declaration becomes an insolvency-related event when such law comes into force or the requisite State action has been taken, whichever is the earlier.

5.15. “primary insolvency jurisdiction” – the Contracting State in which the centre of the debtor’s main interests is situated. There is a rebuttable presumption that this is the place of the debtor’s statutory seat or, if none, the place where it is incorporated or formed. This last is a slightly different formulation from that used in Article 4(1)(a) of the Convention, which refers to the Contracting State “under the law of which” the debtor is incorporated or formed. In practice, this will almost invariably be the law of the place of incorporation or formation. The presumption does not cover all possibilities.
In particular it does not apply to a natural person, and in this case the “centre of main interests” is presumably the debtor’s place of business or, if more than one, its principal place of business. See paragraph 3.122.

5.16. “registry authority” – the national or common mark registering authority maintaining an aircraft register in a Contracting State (see paragraph 5.10).

5.17. “State of registry” – the State on the national register of which an aircraft is maintained or the State of location of the common mark authority maintaining the register (see paragraph 5.10).

5.18. Illustration 64

Under the laws of State X, government-controlled airlines may not be subject to insolvency proceedings. Airline 1 is a government-controlled airline. Airline 2 is an affiliate of Airline 1, which holds a 25% interest in Airline 2. The remaining 75% interest is held by private investors. On 2 January, Airline 1 declares its intent to suspend payments to all creditors. On 15 January, Airline 2 declares its intent to suspend payments to all creditors, and on 17 January State X, by presidential decree, establishes a moratorium on legal actions against Airline 2. For the purposes of Article XI of the Protocol, an insolvency-related event has occurred on 2 January with respect to Airline 1, and on 17 January with respect to Airline 2.

Article II — Application of Convention as regards aircraft objects

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

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

Comment

5.19. Paragraph 1 emphasises in relation to aircraft objects the controlling power of the Protocol as provided by Articles 6 and 49 of the Convention.
Article III — Application of Convention to sales

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

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

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

Comment

5.20. The Aircraft Protocol extends the Convention to outright sales and prospective sales but only so far as the Convention provisions are appropriate to these. The first part of this Article lists Articles which apply with the deemed substitution of a contract of sale, a sale, a prospective seller, the seller and the buyer. The second part of this Article designates the Articles or Chapters which apply in full in relation to sales and prospective sales of aircraft objects except as otherwise specified. The overall effect of the present Article is to place the Convention provisions into three categories as regards sales and prospective sales, namely those that are general in nature and thus apply as they stand in the Convention; those that apply with modifications; and those that do not apply.
The provisions of the Convention that do not apply at all in relation to contracts of sale, sales and prospective sales, and the reasons for their exclusion, are:

- Articles 2 and 7: The interest of an outright buyer is not an international interest.
- Chapter III: Asset-based default remedies do not feature in outright sales.
- Article 29(3): An outright buyer of an aircraft object can register its interest.
- Chapter IX: No rights to payment are secured on an outright sale.
- Chapter XI: Its effect is provided by Article III.
- Article 43: Article 13 does not apply to outright sales.
- Article 60: On an outright sale no pre-existing interest is retained.

These exclusions apply only in relation to sales and prospective sales. The Articles referred to above apply fully as regards international interests in aircraft objects except to the extent stated elsewhere in the Aircraft Protocol. Similarly, certain provisions in the Protocol, whether by the terms of the Protocol or by nature, apply exclusively in respect of international interests and do not apply to sales or prospective sales. These are Articles IX-XIII, XV, and XVI (except in relation to the debtor’s capacity as buyer).

5.21. It is necessary to be precise as to the equivalents prescribed by Article III and in particular to distinguish a contract of sale, which is merely an agreement to sell, from a sale, which is a transfer of ownership. The following is a table of equivalents:

<table>
<thead>
<tr>
<th>Agreement (as defined in Article 1(a) of the Convention)</th>
<th>Contract of sale</th>
</tr>
</thead>
<tbody>
<tr>
<td>International interest</td>
<td>Sale</td>
</tr>
<tr>
<td>Prospective international interest</td>
<td>Prospective sale</td>
</tr>
<tr>
<td>Debtor</td>
<td>Seller</td>
</tr>
<tr>
<td>Creditor</td>
<td>Buyer</td>
</tr>
</tbody>
</table>
The references to “contracts of sale” as regards Article 20(1) and the provisions set out in the last paragraph of Article III are therefore inaccurate, since all those Articles, so far as they relate to international interests, deal with the international interest itself, not with the agreement under which it arises (indeed, contracts of sale which are not sales are outside the scope of the Convention altogether), and the equivalent under Article III is not a contract of sale but a sale, as is clear from the opening lines of that Article. A similar comment applies to Article V(3). See paragraph 5.30.

5.22. It may seem odd to treat the buyer under a sale as the creditor rather than the debtor but this is correct because it is the buyer who, like the creditor under an agreement, is entitled to be registered. Moreover, the seller is in the same position as the debtor for other purposes. For example, the connecting factor which must be satisfied for the Convention to apply is that the debtor is situated in a Contracting State (Article 3) and in the case of a sale under the Aircraft Protocol is, by virtue of the present Article, that the seller is situated in a Contracting State. This is appropriate since in both cases the connecting factor relates to the party who is granting or reserving an interest.

5.23. A sale means a transfer of ownership pursuant to a contract of sale (see the definition of “sale” in Article 1(gg) of the Convention). This denotes an outright transfer for a price, though not necessarily a money price and thus excludes a transfer by way of gift or mortgage. A mere agreement to sell under which ownership has not yet passed to the buyer cannot be registered as a sale, but it can be registered as a prospective sale or, if contains an express reservation of title, as a title reservation agreement. So also can a lease containing an option to purchase. Although the lease is not itself a contract of sale (see Article 1(g) of the Convention), exercise of the option to purchase results in a sale, so that the lessee is a prospective buyer. Accordingly the lessor registers its interest as lessor while the lessee can register a separate interest as prospective buyer. Exercise of the option to purchase extinguishes the lessor’s interest and entitles the lessee exercising the option to have this discharged and to be registered as buyer but this is not necessary if the lessee has already registered its interest as a prospective buyer in order to avoid being displaced by another buyer or prospective buyer to whom the lessor sells or agrees to sell the object and who might otherwise register first. If the option to purchase is not exercised or is extinguished by the lessor’s termination of the leasing agreement for default the lessor is entitled to have the lessee’s registration as prospective buyer discharged.
5.24. The provisions of the Convention that apply to sales and prospective sales are set out in the last part of this Article. They include Chapters V and XII (except Article 43, which is not relevant to sales). Thus Article 19(5) of the Convention, which enables registration of a prospective international interest to constitute registration of an international interest without need of a separate registration applies to prospective sales, as does Article 22(3) requiring a search certificate to be neutral as to whether the register is of an actual or a prospective international interest (see paragraphs 2.159, 2.195). Article 42 of the Convention, in that Chapter, is the provision conferring jurisdiction on courts of a Contracting State selected by the parties and covering litigation relating to “any claim” brought under the Convention. Claims relating to sales or prospective sales are included. However, Article 60, relating to pre-existing interests, does not apply to sales. See paragraph 3.15. The constitution of a sale is separately provided for by Article V.

5.25. A person may have a registrable interest in an aircraft object in two different capacities. For example, if a lessee under a leasing agreement containing an option to purchase grants a sub-lease, it can register both a prospective sale as a prospective buyer and an international interest as sub-lessee under the sub-lease. Again, where an aircraft object is sold by a manufacturer or supplier for the purpose of being let under a leasing agreement, the buyer registers its rights as buyer and upon granting the lease registers its separate international interest as lessor. The two registrations have separate functions and protect different interests; the first is designed to protect the lessee against the risk of a second disposal by the head lessor, the second to protect itself against an unauthorised disposal by the sub-lessee. Registration of only one such interest does not protect the registrant against the consequences of failure to register the other. See paragraphs 3.103-3.106.

**Article IV — Sphere of application**

1. **Without prejudice to Article 3(1) of the Convention, the Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry, and where such registration is made pursuant to an agreement for registration of the aircraft it is deemed to have been effected at the time of the agreement.**
2. For the purposes of the definition of “internal transaction” in Article 1 of the Convention:

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

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

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

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

Comment

5.26. The connecting factor prescribed by Article 3(1) of the Convention is that the debtor is situated in a Contracting State at the time of conclusion of the agreement. As regards a helicopter, or an airframe pertaining to an aircraft, the present Article provides an alternative connecting factor, namely registration of the aircraft in the aircraft register of a Contracting State which is the State of registry (as defined by Article I(2)(p)). But if the debtor is situated in a Contracting State or the alternative connecting factor is satisfied, the fact that the State of registry is a non-Contracting State does not prevent the application of the Convention. Under paragraph 1 of the present Article the registration of the aircraft, when made pursuant to an “agreement for registration”, is deemed to relate back to the time of the agreement (see Illustration 65, paragraph 5.28). The term “agreement” is not used in its ordinary Convention sense (see Article 1(a) of the Convention) but means a contract, and “registration” means Chicago Convention nationality registration. Article IV(1) does not apply to aircraft engines, for which no system of nationality registration is operative. An internal transaction (which a Contracting State may for limited purposes exclude from the application of the Convention by declaration) is one where at the time of conclusion of the contract all the elements – the situation of the main centre of interests of all the parties and the location of the equipment – are in the same Contracting State, and this has a national registry in which the interest arising
under the transaction has been registered (Article 1(n) of the Convention). Paragraph 2 of the present Article gives precision to the concept of location of each of the three kinds of aircraft object. For an example, see Illustration 66, paragraph 5.29.

5.27. Paragraph 3 enables the parties, by agreement in writing, to exclude the application of Article XI altogether or, in their relations with each other, to derogate from or vary the effect of any of the provisions of the Protocol except Article IX(2)-(4). “Writing” includes authenticated teletransmissions (Convention, Article 1(nn)). The exclusion of Article XI by agreement of the parties is not, of course, necessary unless the Contracting State that is the primary jurisdiction has elected to make a declaration under Article XXX(3). Where this is the case then despite the absence of the word “other” before “provisions” it seems clear from the use of the word “exclude” in relation to Article XI, in contrast to “derogate from or vary”, that the power of derogation or variation is not exercisable in relation to Article XI and that the parties must either exclude the application of Article XI in its entirety or adhere in full to the Alternative selected by the State that is the primary insolvency jurisdiction. This is logical because the question which, if any, of the two alternatives is to be selected is a matter for the Contracting State that is the primary insolvency jurisdiction, not the parties, and the Contracting State cannot select part of Alternative A or Alternative B but must select either one of the alternatives in its entirety or make no declaration at all. Any exclusion agreement can be invoked by the insolvency administrator as well as the debtor. The parties cannot derogate from the provisions of Article IX(2)-(4), laying down certain conditions for the exercise of remedies and can derogate from or vary other provisions of the Protocol only in the relations between themselves and not so far as affecting third parties.

5.28. Illustration 65

On 1 March S and B enter into a contract for the sale and purchase of a helicopter. As a term of the contract the parties agree that the helicopter will be registered in State X. State X is a Contracting State, but State Y, where S is situated, is not. The sale is completed on 2 April. The helicopter is registered in the national registry of State X on 10 April. The sale is governed by the Convention and Protocol, since the helicopter is treated as registered on 1 March, so that at the time of the sale on 2 April the alternative connecting factor under Article IV is present.
5.29. **Illustration 66**

State X has made a declaration under Article 50 that, in respect of aircraft objects, the application of the Convention to internal transactions is excluded to the extent permitted by that Article. D and C have their main centres of interest in State X but at the time of the agreement the aircraft engine is being repaired in a maintenance centre located in State Y. Under Article IV(2)(b), that engine is located in State Y, so that the transaction is not an internal transaction as defined by Article 1(n) of the Convention and is fully governed by the Convention without the Article 50 limitation.

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

1. For the purposes of this Protocol, a contract of sale is one which:
   
   (a) is in writing;
   
   (b) relates to an aircraft object of which the seller has power to dispose; and
   
   (c) enables the aircraft object to be identified in conformity with this Protocol.

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

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

**Comment**

5.30. This Article is confined to contracts of sale which do not contain an express reservation of title, as opposed to title reservation agreements (see Article 1(g) of the Convention). While use of the phrase “contract of sale” is consistent with the reference in Article III to Article 20(1) of the Convention,
the reference in Article V(3) to registration of a contract of sale is technically incorrect. The term “contract of sale” appears in the Convention only for the purpose of defining “sale” which is a transfer of ownership pursuant to a contract of sale. Article 41 of the Convention extends its scope to the sale of an object as provided by the Protocol; it says nothing about contracts of sale. Moreover, the chapeau to Article III makes it clear that a contract of sale is equated with an agreement creating or providing for an international interest and that the equivalent of an international interest is a sale. Accordingly while Article V(1) correctly prescribes the formalities for a contract of sale in much the same way as Article 7 of the Convention does for an agreement, what is registrable in the International Registry is the sale, not the contract under which it is made. See also paragraph 5.21.

5.31. Paragraph 1 prescribes in relation to contracts of sale formalities which track the provisions of Article 7 of the Convention. Like an international interest and an assignment under the Convention, this paragraph provides for a sui generis sale which for the most part is not dependent upon or derived from national law and thus avoids the need for any reference to the lex situs. See the Comment to that Article, at paragraph 4.73 et seq.

5.32. The reason for the indefinite duration of the registration of a contract of sale is that, since title passes to the buyer outright, the seller has no residual interest of the kind that may, in the case of an agreement within the Convention, lead to the discharge of the registration.

Article VI — Representative capacities

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

Comment

5.33. In relation to trusts Article VI presupposes the establishment of a trust valid under its applicable law (usually the law specified in the trust instrument) and the appointment of the trustee in conformity with that instrument and the applicable law, while in relation agents or other representatives it is necessary
that the agent acts within the scope of its actual or apparent authority in effecting a registration and asserting the creditors rights and interests under the Convention. For the nature of a trust as described in the 1985 Hague Convention see paragraph 3.83. All Contracting States must recognize a validly created foreign trust, whether it is a concept recognized by their national law or not. Where the trust instrument specifies its governing law, that will be the applicable law for determining the validity of the trust. See paragraphs 3.82 and 3.83.

Article VI must be interpreted broadly. The intent is to permit a person to take any action under the Convention – entering into agreements, enforcing them or registering them with the International Registry – in a representative capacity, whether as agent, trustee or in some other representative capacity. A narrow reading of this Article would lead to illogical results, for example, the ability to enter into an agreement and register an international interest as agent, but not to enter into or register an assignment in the same capacity. The same problems would arise where the interest was to be subordinated, again in that capacity. Accordingly, acts by the representative other than those specified in Article VI should be considered covered by it by analogy. This conclusion is reinforced by the extended definition of registration in Article 16(3) of the Convention. It is also consistent with the principle objective of this provision, namely, to simplify matters in the context of multi-party financing, which, given the amounts involved in aircraft transactions, is commonplace. This Article, which applies both to disclosed and to undisclosed representation (a party need not disclose or identify its representative capacity in the International Registry), reflects the central role of representation arrangements in aircraft financing, where the sums involved often require syndicated lending and the conferment of representation powers on a trustee or agent. Where a trustee or agent effects a registration on behalf of beneficiaries or principals it is not open to the beneficiaries or principals to make a separate registration of the same interest. The capacity and authority of the representative are in principle determined by the instrument under which the representative was appointed and the law governing that instrument. Where, in the case of a trust, the trust instrument specifies its governing law, that will be the applicable law for determining the validity of the trust. All Contracting States must recognize a validly created foreign trust, even if their national law does not recognise the institution of trust and even if the law governing the trust is not the law of a Contracting State. See paragraphs 3.82-3.83. Similar considerations apply to instruments by which agents or other representatives are appointed. Further, a disposition by the representative should
be recognised as transferring a good title even if the disposition was made in breach of the authority conferred on the representative (see paragraph 3.85) This Article also facilitates the co-ordination of fractional ownership, an increasingly common feature in business jet acquisitions, use and financing.

5.34. The appointment of a new trustee does not generate a new international interest; it constitutes a transfer either by act of parties, in which case it is registrable as an assignment, or by operation of law, in which event it falls outside the Convention. See further paragraph 3.83.

5.35.  Illustration 67

A syndicate of banks advances funds for the purchase of a fleet of aircraft registered in Urbania, taking security interests under the Convention in the various aircraft objects and appointing the lead bank as agent for the other banks, with power to take enforcement measures against the debtor, in the event of the debtor’s default, unless otherwise directed by the other banks. The lead bank procures registration in its own name of international interests in the various aircraft objects. The debtor defaults and the lead bank institutes proceedings for recovery of the aircraft objects in Ruritania, where the debtor has its centre of administration. Ruritania is a Contracting State but under its law only the secured creditor, not an agent, is entitled to bring proceedings for the recovery of aircraft objects. Nevertheless the courts of Ruritania must respect the status of the lead bank under Article VI of the Protocol as competent to bring proceedings in its own name. If the lead bank had held the collateral as security trustee in conformity with Urbanian law, its status as such would have had to be recognized by the Ruritanian courts even if Ruritanian law did not recognize the trust concept.

**Article VII — Description of aircraft objects**

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

5.36. This Article specifies three elements as necessary to satisfy the requirements of the Convention and Aircraft Protocol as to identifiability of an aircraft object. If any of those elements is lacking no interest is validly constituted under the Convention, whether as an international interest or as a contract of sale. The manufacturer’s serial number is chosen as the key identifier because of its permanence and its compatibility with the separate treatment of airframes and aircraft engines.

5.37. The reference to “model designation” is to the manufacturer’s generic model designation, not to a model designation specific to a particular party, as is made clear by Section 5.3(c)(ii) of the Regulations made by the Supervisory Authority. The restriction of the description requirements to these three elements is consistent with the basic intent of universality and simplicity.

Article VIII — Choice of law

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

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

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

Comment

5.38. The Convention makes no express provision for choice of law by the parties. That is left to the rules of private international law of the forum State. The Protocol refers a number of matters to the applicable law (see paragraph 3.24). The laws of some jurisdictions impose certain restrictions on party choice, as by excluding selection of the law of a State which has no connection with the parties or the transaction or where all the elements of the transaction are situated in a single State, so that the transaction is a domestic transaction. Seeking
commercial predictability, the present Article, which applies only where a Contracting State has made a declaration to that effect under Article XXX(1), allows the parties to an agreement or a related guarantee contract or subordination agreement or a contract of sale to choose a law governing their relations inter se without restrictions of this kind. States that are not prepared to permit an unqualified selection by the parties will not opt into this provision. The only Contracting State whose declaration is relevant in any given case is the State of the forum. However, EU law precludes Member States from making a declaration under Article VIII, as their courts have to apply Rome I. The choice of law under Article VIII is effective to displace rules of the lex fori which are mandatory only in the sense that that they cannot be excluded by agreement where the lex fori applies - for example, rules requiring a connection between the parties or the transaction and the chosen law - but can be excluded by choice of a foreign law. However, such choice does not affect overriding mandatory rules of the lex fori, that is, rules which are considered of such importance by the lex fori that they apply regardless of the applicable law. Such rules do not displace the applicable law except so far as inconsistent with it, they merely sit on top of the applicable law. Member States of the European Union are precluded from making a declaration under Article VIII, being bound by Rome I. See paragraph 3.29. If proceedings are brought in a Contracting State that has made no declaration under this Article the validity of the choice of law will be determined by its own conflict of laws rules, including, in an EU Member State, Rome I but excluding Article VIII. See paragraphs 3.25, 3.149(1)).

5.39. The law selected is deemed to be the domestic law of the designated State, excluding its conflict of laws rules (Article 5(3)). This is in line with the usual conflict of laws approach in international conventions in relation to commercial transactions and avoids problems of renvoi. 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.

5.40. Article VIII(3) deals with cases where the parties select the law of a territorial unit of a multi-unit State. Although, in contrast to Article 52(1) of the Convention, Article VIII(3) is not expressed to be limited to territorial units which have their own system of law, this is inherent in the Article, for otherwise there would be no distinct legal system to consider and the party choice would have to be interpreted as a reference to the law of the State itself. Article VIII(3)
is not confined to federal States but applies wherever a State has territorial units with different systems of law.

5.41. In the relations between themselves the parties may apply the selected law to only part of their contract and, in consequence, may apply different laws to different parts or issues (dépeçage).

5.42. Party choice is limited to contractual rights and obligations. Proprietary rights prospectively affect third parties and rights of creditors on the debtor’s insolvency, and are outside the scope of this Article. There is no requirement that the agreement on a choice of law be in writing, though in practice it almost invariably will be.

5.43. The ability to select the governing law on contractual matters applies not only to agreements constituting international interests but also to contracts of sale, guarantees and subordinations, as well as to other contracts incorporated by reference into any of the foregoing so as to become terms of them.

5.44. Illustration 68

Creditor brings proceedings before a court of competent jurisdiction in Ruritania for payment due to Creditor from Guarantor under a guarantee of Debtor’s obligations under a loan agreement secured by a security agreement, the guarantee being expressed to be governed by Urbanian law. Debtor is a company having its sole place of business in Ruritania, while Creditor was incorporated and carries on business in Urbania. Both Urbania and Ruritania are Contracting States. Under Ruritanian law (but not Urbanian law) such a guarantee is ineffective even as between the parties unless witnessed by a notary, and this is a requirement that cannot be waived by agreement of the parties to the guarantee. Urbania is the subject of economic sanctions by Ruritania and Ruritanian law also contains a provision that any transactions by a Ruritanian national which are entered into with a national of Urbania without prior government approval are illegal and void.

The requirement of Ruritanian law requiring the guarantee to be witnessed by a notary in order for it to be valid is a rule of domestic mandatory law which applies only to a contract governed by Ruritanian law and therefore has no application to a guarantee governed by Urbanian law. However, the rule of Ruritanian law rendering void a guarantee given to a national of Urbania without
government approval is an overriding mandatory rule of the *lex fori* which applies regardless of the otherwise applicable law and in the absence of such approval the guarantee is void.

**CHAPTER II**

**DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS**

Article IX — Modification of default remedies provisions

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

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

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

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

3. Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4. A chargee giving ten or more working days’ prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing “reasonable prior notice” specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.
5. The registry authority in a Contracting State shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:

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

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

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

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

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

Comment

5.45. Articles IX to XI and XIII need to be read together. They contain three distinct sets of provisions. The first set relates to the additional remedies of de-registration and export. This comprises Articles IX(1), (2), (5) and (6), X(6) and XIII. For a comprehensive analysis, see paragraphs 3.31 et seq. The second set embodies modifications of the provisions governing the Convention remedies and comprises Article IX(3) and (4) and Article X (other than paragraph (6)). These provisions are discussed in the annotations to Article X. The third set deals with the creditor’s remedies on the debtor’s insolvency (see paragraphs 3.128 et seq.).

5.46. Paragraph 1 adds two remedies to those given in the Convention, namely de-registration of an aircraft and export and physical transfer of an
aircraft object from its existing territory. Such remedies may be exercised independently from one another — that is, a creditor may seek to deregister an aircraft without concurrently seeking to export and physically transfer it, and vice versa. See Illustrations 69 and 70. The provisions relating to de-registration are among the few applying to aircraft as opposed to aircraft objects. It is important to note that this remedy is not an authority to transfer to any specified territory (e.g. in contravention of applicable export or import control rules) but rather is only authority to transfer from its existing territory. These additional remedies are available to all creditors, that is, chargees, conditional sellers, and lessors, and are included in the remedies available pending final determination under Article 13 of the Convention. This enables the creditor to change the nationality of an aircraft, in accordance with the terms of the agreement and the applicable law (including, where applicable, Article XIII), and to have the aircraft moved to the State of the new nationality or, indeed, any other State. Re-registration is governed by the law of the transferee State. These additional remedies, which are designed to reinforce the control exercisable by the creditor on the debtor’s default, are only available (a) to the extent agreed by the debtor (the agreement can be given at any time), (b) when the debtor is in default (as defined by Article 11) and (c) with the consent in writing of the holder of any registered interest ranking in priority to that of the creditor. This last condition is mandatory and cannot be excluded by agreement (Article IV(3)).

5.47. The Protocol itself provides machinery for procuring the remedies of de-registration and export via one of two routes, both of which are, however, dependent on a declaration by the Contracting State which is the State of registry of the aircraft. However, Article IX(1), which prescribes the remedies, is not itself dependent on a declaration, so that whether or not a Contracting State has made the requisite declaration it is open to the creditor to fulfil the conditions of Article IX(1) and (2) which are prerequisites to the substantive remedies (see paragraph 5.48) and then procure these in conformity with the procedural requirements of the lex registri (see Article 14 and paragraph 4.124). But if the necessary declaration has been made it is likely that the creditor will prefer to use the Protocol machinery, which obliges the registry and export authorities to provide the remedies if the conditions prescribed by the Protocol are met and precludes them from imposing separate procedural requirements or conditions of its own. There are two alternative routes to securing de-registration and export under the Protocol provisions. The first, 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 (the second reference to Article
IX(1) in Article X(6) is a mistake and should be a reference to Article 13 of the Convention), or equivalent relief from a foreign court whose jurisdiction is recognised by the home court, and notify the registry and other authorities of the grant of the order. The remedies must then be made available within five working days. The second, via Articles XIII and IX(5) and (6), is for the creditor to procure from the debtor an irrevocable de-registration and export request authorisation (IDERA) substantially in the form of the Annex to the Protocol and lodge this with the relevant authorities, who must then act “expeditiously”. Though the form envisages de-registration and export and physical transfer in combination, de-registration relates to the aircraft as a whole while export and physical transfer relate to aircraft objects, so that there seems no reason why the creditor cannot invoke the IDERA procedure to procure assistance for export of installed or uninstalled aircraft engines so long as these are situated in the State of registry of the aircraft and are engines the primary right to which is vested in the creditor, not a third party.

5.48. Whether the creditor follows the court route or the IDERA route it is first necessary that the Contracting State shall have made a declaration applying the relevant Article – under Article XXX(2) applying Article X or under Article XXX(1) applying Article XIII. The debtor must have agreed to the additional remedies and must be in default (Article IX(1)) within the meaning of Article 11. This is not expressly stated but follows from the fact that the whole Article is dealing with default remedies. The creditor must also obtain the prior written consent of the holder of any registered interest ranking in priority to that of the creditor (Article IX(2)). It is not necessary to obtain the prior consent of the holder of an unregistered non-consensual right or interest covered by Article 39. Whether and the extent to which a creditor may owe a duty to such holder is discussed in paragraphs 2.265 and 2.35.

5.49. Article X(6) contains a drafting slip in that the reference to Article IX(1) of the Protocol should be a reference to Article 13 of the Convention. A creditor following the court route under Article X(6) must obtain an order for advance relief under Article 13(1) from a court of the State in which the aircraft is registered, or equivalent relief from a court whose jurisdiction is recognised by the home court, and notify the registry and other administrative authorities, as applicable, that the relief has been granted and that the creditor is entitled to pursue the remedies of de-registration and export in accordance with the Convention. The purpose of this notification is to trigger an automatic duty on the authorities to give effect to the remedies within five working days without
the burden of investigating the facts. In short, the process is perceived as purely documentary. However, it does not affect any applicable safety laws and regulations (Article X(7)).

5.50. A creditor who chooses to follow the IDERA route otherwise than pursuant to a court order must first, if a chargee, give interested parties reasonable prior notice under Article IX(5) (this follows Article 8(4) of the Convention) and then obtain the IDERA from the debtor in the form annexed to the Protocol and transmit it to the registry authorisation for recordation (Article XIII(2)). Subject to any applicable safety laws and regulations the registry authority must honour the IDERA if the creditor or other authorised party certifies to the registry authority, where so required by the authority, that all registered interests ranking in priority to that of the creditor have been discharged or that the holders of such interests have consented to the de-registration and export (Article IX(5)). In other words, the IDERA machinery is purely documentary, dispensing with the need for the regulatory authority to investigate external facts. Moreover, except as provided by safety laws and regulations, which apply only to export, not to de-registration, the registry authorities may not impose any additional requirements, for example, further consents by the debtor.

5.51. Where the debtor, having agreed to the remedies of de-registration and export, fails or refuses to issue the authorisation, the creditor’s remedy is to invoke (a) the procedural law of the State of registry (Article 14 of the Convention as applied by paragraph 1 of the present Article), subject to Article 54(2) thereof, which may permit action without leave of the court or require that leave, or (b) Article 13 of the Convention (as applied by Article X(3) of the Protocol), if applicable.

5.52. Article 8(3) of the Convention requires that the extra-judicial remedies given by Article 8(1) be exercised in a commercially reasonable manner. This provision is mandatory and the parties cannot derogate from it by agreement (Article IV(3)). Article IX(3) disapplies Article 8(3) in relation to aircraft objects and instead extends the requirement of commercial reasonableness to embrace all remedies given by the Convention. This provision is also mandatory and cannot be excluded by agreement (Article IV(3)).

5.53. Under both Articles 8(3) of the Convention and IX(3) of the Protocol a remedy is deemed to be exercised in a commercially reasonable manner where
exercised in conformity with a provision of the agreement except where such a provision is “manifestly unreasonable”. This wording embodies a strong presumption in favour of the reasonableness of a contractual provision as to the mode of exercise of a remedy and is designed to encourage reliance on contract wording, particularly where the wording is customary in international aircraft financing and leasing contracts.

5.54. Article IX(4) crystallises the meaning of “reasonable prior notice” in Article 8(4) of the Convention. There is a safe-haven of ten working days. Parties may select and rely on that time-period. Alternatively, it is open to the parties to agree a longer period but not a shorter one, since Article IX(4) is mandatory (Article IV(3)). “Working days” means working days in the Contracting State, or locality within the Contracting State, where the remedy is to be exercised.

5.55. Illustration 69

An aircraft supplied on lease by LR is registered and situated in Urbania, a Contracting State. Following the debtor’s default LR wishes to repossess the aircraft and send it to Ruritania without changing its nationality registration. If the debtor has given an IDERA which has been registered with the administrative authorities of Urbania, LR may require those authorities to assist in the export of the aircraft even though de-registration is not sought.

5.56. Illustration 70

The facts are as in Illustration 69 except that the aircraft is situated in Domitia. LR may institute proceedings in Domitia for recovery of possession of the aircraft by way of advance relief under Article 13(1)(a), with any necessary export assistance being provided by that State’s administrative authorities (arts X(6)(b), XIII(4)). The scope of an IDERA as to the administrative authorities who deal with matters of export and physical transfer is limited by Article XIII(4) to the Contracting State where the aircraft is registered, and thus the authority of the creditor under this IDERA does not extend beyond Urbania.

Article X — Modification of provisions regarding relief pending final determination

1. This Article applies only where a Contracting State has made a declaration under Article XXX(2) and to the extent stated in such declaration.
2. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

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

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

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

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

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

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

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

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.
7. Paragraphs 2 and 6 shall not affect any applicable aviation safety laws and regulations.

Comment

5.57. Article X(6) has already been discussed in paragraph 5.49. The remaining provisions of Article X need to be read in conjunction with Articles IX(3) and (4).

5.58. Article X applies in proceedings in a Contracting State only if and to the extent that such State has made an affirmative declaration to that effect and as regards Article X(6) is applicable only in relation to a declaration made by Contracting State which is the State of Registry of the aircraft as defined by Article I(2)(p) of the Protocol. For the purposes of the Convention “speedy” in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made. A Contracting State which makes a declaration under Article X is required by Article XXX(2) to specify a binding time-period for the purpose of paragraph 2 of the present Article within which the speedy relief sought is to be given. Most Contracting States have specified a period of 10 working days, thereby emphasizing the urgency of the proceedings in the light of the fact that without rapid action aircraft may suffer physical or commercial deterioration, cannibalization or removal. So if the creditor adduces evidence of non-payment, the most common form of default, an order under Article 13 is almost invariably likely to be granted, since examination of defences such as late delivery or defects cannot be conducted within the very limited time available and will have to await the substantive hearing. On the principle that a party cannot complain of matters caused by its own acts or omissions, a creditor will not have grounds for complaint if a court fails to give relief within the specified time because, for example, the creditor has not filed the correct documents or followed the proper procedures. Paragraph 3 adds sale and application of the proceeds of sale to the speedy relief that can be sought under Article 13(1) of the Convention, subject, however, to the requirement that the debtor and the creditor “specifically agree”, that is, agree expressly (though not necessarily in writing) to the court’s ordering a sale and application of the proceeds of sale on the creditor’s application. This agreement may be made at any time. As a corollary, paragraph 4 of the Article adds provisions matching those of Article 9(5) of the Convention.
5.59. Article 13(2) of the Convention provides protection for the debtor but imposes transaction costs. In relation to aircraft objects Article X(5) enables that concern to be addressed by permitting the relevant parties to exclude Article 13(2) by an agreement in writing. This would not otherwise be allowed, since under Article 15 of the Convention Article 13(2) is a mandatory provision. Such agreement does not, however, exclude the debtor’s rights under the applicable law to pursue a claim against the creditor for failure to perform any of its obligations to the debtor under the Convention, nor does it preclude the debtor from exercising any right to damages or other relief given by the lex fori applicable (a) to the relief under Article 13 or (b) on final determination of the creditor’s claim, if the claim is dismissed and the debtor has suffered loss through the prior granting of relief under Article 13. Where Article 13(2) is excluded the debtor is left to rely on any protections given by the procedural law of the place where the remedy is to be exercised (Article 14). For the meaning of “writing” see Article 1(nn) of the Convention.

Article XI — Remedies on insolvency

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

Alternative A

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

(a) the end of the waiting period; and
(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
4. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

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

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

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

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

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

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

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

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.
9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

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

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

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

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

*Alternative B*

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

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

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

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.
4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

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

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

Comment

5.60. Work in advance of the diplomatic Conference identified this provision as the single most significant provision economically. If the sound legal rights and protections embodied in the Convention and Aircraft Protocol are not available in the insolvency context, they are not available when they are most needed. In addition, and given the legal and policy importance of this provision, a special Insolvency Working Group, made up of international experts from differing legal systems, was formed to develop this provision. Article XI, as modified in the subsequent intergovernmental negotiations, is the result of that work.

5.61. This Article, which modifies Article 30(3) of the Convention, is designed to provide in relation to aircraft objects a special insolvency regime to govern the creditor’s rights where the debtor becomes subject to insolvency proceedings (as defined by Article 1(l) of the Convention) or an insolvency-related event (as defined by Article I(2)(m) of the Protocol) has otherwise occurred. The underlying purpose is to reflect the realities of modern structured finance, in particular to facilitate capital market financing, by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains from the debtor or the insolvency administrator, as
the case may be, the curing of all past defaults and a commitment to perform the debtor’s future obligations. Article XI applies only where a Contracting State that is the primary insolvency jurisdiction (as defined by Article I(2)(n)) has made a declaration under Article XXX(3), and it may be excluded by the parties (Article IV(3)), though only in its entirety (see paragraph 5.27). Under EU law Member States may not make a declaration under Article XI but are free to introduce equivalent provisions through domestic legislation. What is now the EU deliberately made no declaration under Article XI in order to leave each Member State the freedom to choose through its domestic laws Alternative A or Alternative B or neither.

5.62. There are two alternative texts of this Article, Alternative A, the “hard”, or rule-based, version, and Alternative B, the “soft”, or discretion-based, version. A Contracting State considering making a declaration under Article XI has a number of options. It may decide to make no declaration at all, in which case Article XI will not apply and the Contracting State’s national insolvency law, in its current form, will continue to be applicable in this context. A Contracting State may opt to apply Article XI to all types of insolvency proceeding or only to some, and it may apply Alternative A to some types of insolvency proceeding and Alternative B to others, or apply one of these alternatives to all or only some types of insolvency proceeding and make no declaration as to others. But to whatever type of insolvency proceeding Alternative A or Alternative B is applied, it must be applied in its entirety. This is because each of the alternatives embodies a set of integrated provisions which make it impracticable to select one or more without the others.

5.63. Alternatives A and B both impose obligations on “the insolvency administrator or the debtor, as applicable”. The debtor itself will be the relevant party where (a) the insolvency-related event is a cessation of payments and insolvency proceedings cannot be opened or have not yet been opened or (b) insolvency proceedings have commenced but the insolvency administrator has not yet been appointed. Alternative A states expressly in paragraph 4 that references in this Article to the “insolvency administrator” are to that person in its official, not its personal, capacity. So duties are imposed on the insolvency administrator only in its capacity as such. This provision merely states what must be obvious anyway. It is not replicated in any of the other Alternatives but the same rule implicitly applies. Article XI does not provide for the case where there are two or more holders of registered international interests relating to the same object. Where this occurs, the duties of the insolvency administrator are owed
to the secured creditors successively in order of their priority, and only when the obligations owed to the first such creditor have been discharged does the next in line become entitled to invoke Article XI. The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices.

**Alternative A**

5.64. Alternative A requires the insolvency administrator or the debtor, as the case may be, by the end of the “waiting period” specified in the declaration of the relevant Contracting State or any earlier date on which the creditor would otherwise be entitled to possession under the applicable law, either (a) to give possession of the aircraft object to the creditor or (b) to cure all defaults (other than a default constituted by the opening of insolvency proceedings, which, of course, is not capable of being cured) and to agree to perform all future obligations under the agreement, including obligations under other transaction documents (e.g. a loan agreement) which the debtor has, by virtue of their incorporation by reference, agreed to perform under such agreement (see paragraphs 3.126 et seq. and Illustration 71, paragraph 5.70). The duties must be performed before the end of the waiting period if the creditor has previously become entitled to possession. The underlying premise is that the commencement of the insolvency proceedings produces a stay on the creditor’s right to possession. Where this is not the case or where any stay has been lifted the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 2(b) 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”. 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 its value in accordance with the agreement and, subject to this, may allow its use, while the creditor is entitled to apply for any other forms of interim relief available under the applicable law (see paragraph 3.130). The applicable law is determined by the *lex fori*. The forum is not necessarily the insolvency forum, since courts chosen by the parties have jurisdiction (Convention, Articles 42, 43(2)), as do courts of a Contracting State on the territory of which the debtor is situated where the interim relief is, by the terms of the order granting it, enforceable only in the territory of that Contracting State (Article 43(2)). Whereas paragraph 2(a) of Alternative B requires the insolvency administrator or the debtor, as applicable, to cure all defaults, and agree to perform all future
obligations, under the agreement “and related transaction documents”, the latter phrase does not feature in paragraph 7 of Alternative A, which is confined to future obligations under “the agreement”, that is, the security agreement, title reservation agreement or leasing agreement. It is, however, open to the parties to incorporate into that agreement obligations under other related transaction contracts, in which case paragraph 7 will apply to those obligations. Paragraph 8 requires the registry authority and administrative authorities in a Contracting State, as applicable, to make available to the creditor the remedies of de-registration and export and physical delivery no later than five working days after the creditor has notified such authorities that it is entitled to pursue those remedies in accordance with the Convention, in addition to which they must expeditiously co-operate and assist the creditor, though only in conformity with the applicable safety laws and regulations. It is implicit in this provision that the creditor is in fact entitled to exercise the remedies in question. So if the insolvency administrator’s or the debtor’s duty to give up possession under paragraph 2 has not yet arisen under that paragraph or the insolvency administrator or the debtor has acquired the right to retain possession under paragraph 7 the requisite authorities will not be obliged to provide any assistance to the creditor.

5.65. The duty of the insolvency administrator or the debtor under the Convention to preserve the aircraft object and its value comes to an end once the administrator or the debtor, as the case may be, has given the creditor the opportunity to take possession, whether or not the creditor avails itself of that opportunity. Thereafter, the duty to take care of the aircraft object is governed by the applicable law.

5.66. Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor’s consent (paragraphs 9 and 10). Moreover, no second waiting period may be imposed in respect of a breach of a commitment to perform future obligations. Accordingly, under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of a security interest over an aircraft object, or vary the terms of the agreement, without the consent of the creditor, nor would provisions of national insolvency law providing for an automatic stay pending reorganisation be operative beyond the declared waiting period. The effect is to displace Article 30(3)(b) of the Convention. 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. The underlying rationale of Alternative A is to give aircraft object financiers and lessors the assurance of a clear and unqualified rule. However, it is always open to the parties to agree on an extension of time or otherwise to vary the rights of the creditor.

5.67. Alternative A presupposes that the creditor holds an international interest which is effective in the insolvency proceedings, either because it was registered in the International Registry prior to the commencement of those proceedings or because it is otherwise effective under the applicable law (see Article 30(1) and (2) of the Convention and paragraphs 4.217 and 4.219).

Alternative B

5.68. Alternative B requires the insolvency administrator or the debtor, as the case may be, upon the request of the creditor, to notify the creditor within the time specified in a declaration by the Contracting State whether it will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take possession of the aircraft object, in the latter case subject to any additional step or the provision of any additional guarantee that the court may require as permitted by the applicable law (Alternative B, paragraph 3). “Related transaction documents”, which does not feature in Alternative A, is not defined but includes promissory notes given as payment under the agreement or as security for payment, and documents which embody collateral contracts and undertakings forming part of the overall transaction between the parties. It does not, however, include undertakings which are given orally and not embodied in the agreement or some other document. 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. If the insolvency administrator or debtor does not either give the notice as to performance or give the creditor possession, the court may (but is not obliged to) permit the creditor to take possession on such terms as the court may order. In contrast to the position under Alternative A of Article XI, the insolvency administrator or the debtor is not required to take any action unless and until required to do so by the creditor; accordingly any time-period specified in a declaration by a Contracting State as regards Alternative B should be expressed to commence not earlier than the time the insolvency administrator or the debtor receives the creditor’s request. Paragraph 5 of
Alternative B does not deal with the case where the insolvency administrator or the debtor agrees to cure all defaults and to perform its future obligations but fails to do so. In that situation there seems no reason why the court should not be able to exercise its powers under paragraph 5.

5.69. Paragraph 4 of Alternative B requires the creditor to provide evidence of its claims and proof that its international interest has been registered. There is no similar provision in Alternative A. This is because Alternative B, unlike Alternative A, involves an application to the court, and the evidence and proof are to be provided to the court. Again in contrast to Alternative A, the requirement to furnish proof that the international interest has been registered signifies that the creditor cannot invoke the provisions of Alternative B without first registering its international interest. This is despite the fact that such registration is only one of the methods of preserving the effectiveness of the international interest on the debtor’s insolvency, the other being its effectiveness under the applicable law (Article 30(2)). The latter is not sufficient to enable the creditor to invoke the provisions of Alternative B. Paragraph 5 of Alternative B provides that if the insolvency administrator does not give the creditor the opportunity to take possession when the insolvency administrator has declared that it will do so 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. So in the absence of a court order or the consent of the debtor the creditor may not take possession. Paragraph 6 states that the aircraft object must not be sold pending the court’s decision. It would seem that the creditor’s ability to exercise other remedies is governed by the applicable insolvency law.

5.70. Illustration 71

Airline 1, the owner of an aircraft engine, leased it to Airline 2, a company situated in State X, where the engine was located at the time of the transaction. Airline 2 filed for bankruptcy on 1 April. The lessor’s international interest was not registered in the International Registry, but under the laws of State X is nevertheless effective in the debtor’s bankruptcy. Airline 1 also financed Airline 2’s acquisition of a second aircraft engine. The international interest arising under the security agreement relating to this was registered on 1 March. State X has declared Alternative A for all insolvency proceedings (and for other insolvency-related events not subject to insolvency proceedings – see paragraph 5.124). It has declared a 60-day waiting period. The law of State X requires
debtor to return assets owned by third parties immediately, but freezes all action by secured creditors against insolvent debtors for six months. Airline 2 must comply with the law of State X and immediately return the leased aircraft engine. The financed aircraft engine must be returned at the end of the 60-day period unless all defaults are cured and the debtor agrees to perform its future obligations. In the meantime, obligations under the security agreement may not be modified and the aircraft engine must be preserved, and Airline 2 will be required to maintain the aircraft engine and its value in accordance with the terms of the security agreement, even if that requires expenditure from general assets of the estate.

Article XII — Insolvency assistance

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

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

Comment

5.71. Article XII is an opt-in provision requiring a declaration under Article XXX(1). It seems clear that the only relevant declaration in any particular case is a declaration by a Contracting State falling within paragraph 2, that is, the Contracting State where the aircraft object is situated and the assistance of whose courts is invoked. Where such a declaration is made, foreign courts and foreign insolvency administrators applying Article XI are entitled to call for maximum co-operation on the part of the courts of the declaring State. This, of course, is in addition to any entitlement to co-operation they may have under other law, for example from States that have adopted the UNCITRAL Model Law.

5.72 Illustration 72

D is situated in Urbania, a Contracting State which as the centre of D’s main interests is the primary insolvency jurisdiction and which has made a declaration
under Article XXX(3) selecting Alternative A of Article XI and specifying a period of 60 days. D leases an aircraft from L. Subsequently D defaults and enters into insolvency proceedings. The insolvency administrator fails to cure the default within the 60-day period. The aircraft is situated in Ruritania, a Contracting State which has made a declaration under Article XXX(1) applying Article XII but has not made a declaration under Article XXX(3) applying Article XI. D’s liquidator institutes proceedings in Ruritania for recovery of the aircraft. Article XII(2) obliges the Ruritanian courts to make an order for delivery of the aircraft to L and the Ruritanian administrative authorities to facilitate the expeditious return of the aircraft to L despite the fact that Ruritania has not adopted Article XI.

**Article XIII — De-registration and export request authorisation**

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

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

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

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

5.73. This Article applies only where a Contracting State has made a declaration to that effect (Article XXX(1)). If the relevant Contracting State, that is, the State which is the State of Registry of the aircraft as defined by Article I(2)(p), makes no declaration, the Article does not apply. For the effect of Article XIII see the annotations to Article IX, paragraphs 5.47 et seq. For an extensive discussion on de-registration and export, see paragraphs 3.31 et seq. Aviation safety laws and regulations are those that relate to fitness of the aircraft to fly out of the jurisdiction and do not affect the remedy of de-registration.

Article XIV — Modification of priority provisions

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

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

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

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

Comment

5.74. The registration provisions of the Convention have been extended to cover outright sales of aircraft objects, so that (in contrast to the position under the Convention itself) the buyer can register the sale in the International Registry. Accordingly, the special protection given to a buyer by Article 29(3) of the Convention is not appropriate to a buyer of aircraft objects, which is why Article III of the Aircraft Protocol excludes Article 29(3) of the Convention.
5.75. Paragraphs 1 and 2 of the present Article extend the general priority rule in Article 29(1) to a sale registered in accordance with the Aircraft Protocol, so that the buyer under a registered sale of an aircraft object takes free from an interest registered after the time of the buyer’s registration and from an unregistered interest but takes subject to a previously registered interest. A revision of the wording of the draft presented to the diplomatic Conference has resulted in an unfortunate inconsistency between paragraphs 1 and 2 in that paragraph 1, which looks at the matter from the perspective of the first to register, follows the general rule in Article 29(1) that priorities are determined by the order of registration, whereas paragraph 2, which was intended to apply the same rule but looked at from the perspective of the later registrant, is in fact expressed as subordinating the buyer’s interest to an interest registered at the time of the buyer’s acquisition of the object. In many cases this would not matter, since the buyer would only be able to register its purchase after it had made the purchase. What paragraph 2 does not allow for on a literal reading is the registration of a prospective sale by the intending buyer. While the resulting sale is considered registered as from the time of registration of the prospective sale, no similar retroactive rule applies to the buyer’s acquisition of the object. The result would be that an intending buyer who registered a prospective sale would be postponed to another buyer or a creditor who registered subsequently but before the prospective sale had crystallised into an actual sale. Paragraph 2 cannot, therefore, be given its literal meaning, which is against the intent and is wholly inconsistent with paragraph 1 and Article 29(1) of the Convention. It is therefore necessary to interpret paragraph 2 as if it read: “A buyer of an aircraft object under a registered sale acquires its interest in the object subject to an interest previously registered.”

5.76. Paragraph 3 of the Article is devoted to the effect of ownership or other rights in an aircraft engine if it is installed on or removed from an aircraft. In such a case the question may arise whether the pre-existing rights of another party in the engine are affected by its installation and/or subsequent removal. In contrast to the position as regards items other than objects (see paragraph 5.77 below), Article XIV(3) overrides a national law of a Contracting State which would otherwise apply a doctrine of accession (see paragraph 2.231) and ensures that neither the installation of an aircraft engine on an aircraft or its removal from the aircraft affect the ownership of or other interest in the aircraft engine. So if, for example, an aircraft engine is leased by its owner to an airline and installed on its aircraft, ownership of the engine does not pass to the airline but remains with the lessor. Thus Article XIV(3) adopts the principle of title tracking
rather than title transfer. Article XIV(3) does not apply to installed items other 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) and paragraphs 3.9, 3.11). But it does have the effect of preserving pre-installation international and other interests in a helicopter engine even though upon installation the engine ceases to be an “object” and becomes an “item”. It should not, however, be assumed that the lessor will in every case have priority over a buyer of the engine following its removal and sale. Article XIV(3) states only that the rights of the owner of, or the holder of another right or interest in, the aircraft object are not affected by installation or removal; whether they are affected by a sale depends not on Article XIV(3) but on Article 29 of the Convention if this applies, and, if not, then on the applicable law. Where the owner/lessor has registered its interest in the aircraft engine as an international interest before installation of the engine on the aircraft or at any time prior to the buyer registering its own international interest, the interest of the owner/lessor will prevail. Where the buyer is the first to register, it will displace the owner/lessor by virtue of Article 29(1).

5.77. Paragraph 4 applies Article 29(7) to an item which is not an airframe, aircraft engine or helicopter. The paragraph is in fact redundant, since Article 29(7) of the Convention already applies by its own terms. See paragraph 4.206 and Illustration 33 to Article 29 (paragraph 4.216).

**Article XV — Modification of assignment provisions**

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

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

**Comment**

5.78. The effect of this Article is to make the debtor’s consent to an assignment a precondition of the debtor’s duty to make payment or give other performance to the assignee. This is a requirement not usually found in national laws governing the assignment of rights. The purpose is to avoid as far as possible a situation in which the debtor is faced with notices of assignment from competing assignees. However, the debtor’s obligation is not unqualified. If, for
example, the debtor has inadvertently consented to two assignments (and the consent may be given in advance and need not identify the assignee) it is inconceivable that it would be ordered by a court to make a double payment. In such a case, if the debtor is unable to secure agreement between the competing assignees as to which of them should be paid, the debtor’s remedy is to invoke the local procedural law for dealing with such cases.

5.79. The debtor’s consent is required only for the purpose of its duty of performance to the assignee; it is not a prerequisite of the effectiveness of the assignment as between assignor and assignee. An assignment registered before the commencement of insolvency proceedings against the assignor is effective against the insolvency administrator and general creditors whether or not the debtor consented to it. The same is true if the assignment, though not registered, is effective under the applicable law despite the absence of the debtor’s consent.

**Article XVI — Debtor provisions**

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

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

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

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

5.80. Article XVI establishes a quiet possession regime which is based on transparency through use of the International Registry and is directly linked to the priority rule in Article 29(4); indeed, it can properly be regarded as itself a supplementary priority rule that can be varied by a subordination agreement between debtor and chargee registrable under Article 16(1)(e). It 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. Failing such agreement, the default must be substantial. Assuming no such default, a debtor is entitled to quiet possession, on the terms of the agreement, as against (a) its creditor, (b) the holder of any interest from which the debtor takes free under Article 29(4) of the Convention (see paragraph 2.215), (c) any interest to which it would otherwise be subordinated where the holder of that interest agrees to the debtor’s quiet possession (see Illustration 73, paragraph 5.84) and (d) any interest from which, in its capacity of buyer, it takes free under Article XIV(1) of the Aircraft Protocol (see paragraphs 3.108 et seq.). Article XVI thus 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.

5.81. Conversely, a debtor is not entitled to quiet possession as against the holder of any interest to which the debtor takes subject. Yet reflecting the principle of party autonomy, the foregoing rules may be varied by the agreement of the relevant parties. Where registrations are made reflecting these subordinations, third parties are bound thereby. See also paragraph 4.135 as to such registrability.

5.82. Article XVI does not state which acts constitute a breach of the debtor’s right to quiet possession once it is in possession. In the relations between the debtor and the creditor this is left to the agreement between them. Questions not dealt with by the agreement or arising in the relationship between the debtor and third parties are left to the applicable law. Seizure or attempted seizure of the aircraft object by the creditor (in the absence of default) or by a lessor’s chargee under a charge registered after registration of the lessor’s interest would clearly be an infringement of the right to quiet possession. So too would seizure,
absent a default, by a third party at the request or by the authority of the creditor or chargee, or arrest of the object by the third party for sums due to it from the creditor, or a taking of the object in execution of a judgment obtained by the third party against the creditor or chargee.

5.83. Quite independently of Article XVI, the debtor may have remedies against the creditor for any interference with the debtor’s possession which is a breach of the agreement under the applicable law.

5.84. Illustration 73

Head lessor, HL, leases an airframe to lessee, L. HL’s international interest is registered on 1 January. The lease expressly requires that any sub-lease be “subject and subordinate” to the head lease. L enters into discussions with sub-lessee, SL, to sub-lease the airframe. Negotiations are finalised on 1 March. SL refuses to sign the sub-lease until HL agrees to SL’s quiet possession. HL so agrees, so that its international interest is subordinated to SL’s right of quiet possession under the Convention, but the subordination is not registered with the International Registry to reflect the variation to the normal outcome under Article XVI(1)(b). L registers its international interest as sub-lessor on 1 April. HL assigns its rights as lessor under the head lease, together with its international interest, by way of security on 1 August to C, who registers the assignment the same day. HL defaults under its loan agreement with C, giving C the right to exercise remedies under its security agreement. SL is entitled to quiet possession vis-à-vis HL under their agreement, but not vis-à-vis C, who is not bound by the unregistered subordination. The fact that C’s assignment was registered later than the registration of L’s international interest is irrelevant, because in the absence of registration of the subordination agreement C is entitled to rely on the fact that HL’s international interest was registered before that of L and that accordingly SL cannot invoke Article XVI(1)(a) against HL or against C as HL’s assignee.

5.85. Illustration 74

The facts are the same as in Illustration 73 except that HL did not consent to the sub-lease, there was no assignment to C, and L defaulted in its obligations under the head lease. HL is entitled to recover possession of the airframe from SL, who under Article XVI(1)(b) is not entitled to quiet possession vis-à-vis HL.
CHAPTER III

REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AIRCRAFT OBJECTS

Article XVII — The Supervisory Authority and the Registrar

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

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

3. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise.

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

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

5.86. Resolution No. 2 of the Cape Town diplomatic Conference invited ICAO to accept the functions of Supervisory Authority for aircraft objects. The same resolution:

(1) invited ICAO to establish a Commission of Experts consisting of not more than 15 members appointed by the ICAO Council from among persons nominated by the Signatory and Contracting States to the Convention and the Aircraft Protocol, having the necessary qualifications and experience, to assist the Supervisory Authority upon entry into force of the Convention and the Aircraft Protocol;

(2) resolved to set up, pending entry into force of the Convention and Aircraft Protocol, a Preparatory Commission, consisting of persons of the requisite authority and experience nominated by 20 designated States, to act with full authority as the Provisional Supervisory Authority for the establishment of the International Registry, under the guidance and supervision of the ICAO Council.

5.87. The Registrar was duly appointed by the Preparatory Commission. The Convention and Protocol entered into force on 1 March 2006, on which date the work of the Preparatory Commission came to an end and the Council of ICAO assumed the office of Supervisory Authority and established the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR). For a brief description of the International Registry and the registration system, see paragraphs 2.149 et seq., 3.52 et seq. For the Supervisory Authority’s immunities from suit, see paragraph 3.49.

Article XVIII — First regulations

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

---

1 For the full text of the Resolution, see Appendix VI.
Comment

5.88. The regulations referred to are those which first laid down the detailed requirements for the operation of the International Registry. They have since been revised. The 8th edition, approved in draft subject only to minor editorial changes, which is due to come into force by early 2020, is reproduced in Appendix III by kind permission of ICAO and is the edition on which the following comments are based. For the current regulations see ICAO’s website at https://www.icao.int.

Article XIX — Designated entry points

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

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

Comment

5.89. Article XIX implements for aircraft objects Article 18(5) of the Convention (see paragraphs 4.147-4.149). It is for each Contracting State to decide whether to make a declaration designating an entity as the entry point for the transmission of registration information to the International Registry, but in any given case the only relevant declaration is that of the State of Registry of the helicopter, or airframe pertaining to the aircraft, to which the intended registration relates. Where a Contracting State has designated an entity as the entry point the International Registry system will, to the extent agreed between the International Registry and the Contracting State in question, provide an electronic warning against any application for registration which is not through a direct entry point where the use of this is mandatory or in accordance with procedures required by an authorizing entry point (Regulations, Section 12.5). A
registration made otherwise than through the entry point designated by the Contracting State which is the State of registry is invalid (Regulations, Section 12.7) except in those cases where the authorisation code was for some reason unobtainable (Regulations, Section 12.8). Section 12.1 of the Regulations prescribes two categories of designated entry point, namely an “authorizing entry point”, which shall or may authorize the transmission of information required for registration under the Convention and a “direct entry point”, through which information required for registration under the Convention shall or may be directly transmitted to the International Registry. The former involves obtaining an authorization code issued by the relevant Contracting State with regard to the registration whereas the latter transmits the information automatically through the entry point without need for an authorisation. 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 entry 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. There are currently no direct entry points and Contracting States who have made a declaration under this Article have made use of authorized entry points mandatory except for aircraft engines (see paragraph 5.94). The effect is that a registration will not normally be accepted by the International Registry unless the registrant provides the authorization code.

5.90. Though a declaration under Article XIX(1) may be made by any Contracting State, it will affect only a helicopter, or an airframe pertaining to an aircraft, for which the declaring State is the State of registry (as defined by Article I(2)(p)). That limitation was, indeed, expressly stated in the draft text presented to the diplomatic Conference but was inadvertently dropped in the process of revision. It is, however, a necessary limitation, for only the State of registry has the requisite control.

5.91. A further limitation is that an entry point may not be designated for registration of a notice of a national interest, or of a non-consensual right or interest, arising under the laws of another State. Subject to this an entry point may be designated for any kind of registration, whether of an international or prospective international interest, a notice of a national interest, or a registrable non-consensual right or interest, arising under the law of the State designating the entry point, an assignment or prospective assignment, a subordination, or an amendment or discharge of a registration.
5.92. The effect of not requiring use of a designated entry point, or merely permitting its use, is that registrations can be made with the International Registry without need of an authorisation code from the entry point. It is open to a State to require use of a designated entry point for some classes of transaction only while leaving the registration of other classes within the Convention to be effected directly. It is not, of course, open to a State to prohibit direct registration of categories of transaction without allowing access to the designated entry point for such categories.

5.93. A Contracting State which designates an entity pursuant to this Article will be free to add such additional requirements (including the payment of fees) as it considers necessary for transmission of data to the International Registry, though in doing so it will need to have regard to Article 26 of the Convention.

5.94. Use of the entry point may be made optional or compulsory except in the case of aircraft engines, for which there is no system of nationality registration, so that use of the entry point cannot be made compulsory.

5.95. The registration will take effect as provided by Article 19 of the Convention; receipt of information at the national entry point is not sufficient. Similarly, the fact that a registration made via an entry point does not qualify for national registration under national law is irrelevant under the Convention.

An interest is a valid interest if it complies with the Convention’s substantive requirements. Its priority is established when it is registered with the International Registry.

5.96. Searches will be able to be made on-line from any point connected to the International Registry and are not made through a national entry point.

**Article XX — Additional modifications to Registry provisions**

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

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

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

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

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

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

Comment

5.97. Paragraph 1 of this Article states, for the purposes of Article 19(6), the basic search criteria for an aircraft object. Article 19(6) determines when an interest is “searchable”, which, under Article 19(2) and (3), determines when it is valid. That, in turn, establishes priority for the purposes of Article 29 of the Convention.
5.98. The search criteria are the name of its manufacturer, the manufacturer’s serial number and the model (as noted under Article VII, the manufacturer’s generic model designation). These are the items of information which will generally suffice to ensure uniqueness, the essential requirement. However, to cover the possibility that this information will not be sufficient, as where the manufacturer assigns different kinds of serial number, additional criteria may be prescribed by the regulations.

5.99. Paragraph 2 gives greater precision to the phrase “without undue delay” in Article 25(2), specifying a period no later than five working days after the receipt of the demand for the discharge. But the obligation to procure the discharge within this time is not a strict one; all that is required is that the holder of the prospective international interest or the person in whose favour a prospective assignment is registered takes such steps as are within its power.

5.100. The Supervisory Authority is required to set and may from time to time amend fees. The basis of the fees is cost recovery. The International Registry is not a for-profit operation. In setting the fees the Supervisory Authority is entitled to charge for reasonable setting-up costs – which will thus be recouped over a period rather than falling on the States Parties to the Convention and Aircraft Protocol – and the reasonable costs of establishing, operating and regulating the International Registry and of supervising the Registrar and performing the other functions of the Supervisory Authority. Such costs may obviously include provision for servicing of equipment, repair and replacement and maintenance of the system as a state-of-the-art registration system. But the Supervisory Authority is not entitled to fix fees on the basis of a profit to either the Registrar or itself. The cost of establishing and operating national entry points is not a matter for the Supervisory Authority and must be borne by the Contracting State in which the entry point is established. Similarly, the arrangements made for an entry point to transmit the information required for registration must be cost neutral to the International Registry. In other words, a Contracting State may not require arrangements that oblige the International Registry to incur costs unique to the relationship with the designated entry point and therefore in excess of the costs otherwise required to operate the International Registry.

5.101. The International Registry is required to provide its registration and search facilities on a 24-hour basis (Article XX(4)), and the intention of the provision is that the facility should be available seven days a week throughout
the year, though it may be necessary from time to time to close the Registry for limited periods for maintenance, repair, upgrading of systems, technical security and the like, as provided by Section 3.4 of the Regulations, though obviously the Registry will seek to keep disruption to the service to a minimum. Contracting States providing national entry points are responsible for ensuring that these operate at least during working hours in their respective territories.

5.102. Paragraphs 5 and 6 of this Article deal with insurance of the Registrar against liability. Paragraph 5 provides that the amount of the insurance or financial guarantee to be procured by the Registrar is to be, in respect of each event, not less than the maximum value of an aircraft object as determined by the Supervisory Authority. 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 limit originally fixed was USD 10 million. The cover is now for USD 200 million. See paragraph 3.50.

CHAPTER IV
JURISDICTION

Article XXI — Modification of jurisdiction provisions

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

Comment

5.103. This Article confers concurrent jurisdiction on courts of the State of registry of a helicopter, or of an aircraft to which an airframe pertains, to make orders under Article 13 of the Convention (speedy judicial relief), on the application of the creditor, in relation to the helicopter or airframe. Article XXI does not, of course, apply to the extent that the relevant Contracting State has made a declaration under Article 55 that it will not apply Article 13. Even where the Contracting State has made no such declaration, it may exclude Article XXI
by a declaration under Article XXX(5), in which case the court’s jurisdiction will
depend on Article 43 without the ground provided by Article XXI.

5.104. Although the present Article does not specifically refer to Article 44 it is
clear that it is subject to that Article also, so that the courts of a State of registry
which is not the State where the Registrar has its centre of administration have
no jurisdiction to make orders against the Registrar.

Article XXII — Waivers of sovereign immunity

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

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

Comment

5.105. The reason for this Article is that many airlines are owned or controlled
by States or State entities, and while under the law of many States it is considered
an aspect of State sovereignty that a State can waive its immunity, this is not
universally true. This Article makes it clear that a waiver of immunity is binding,
though only where it is in a writing that describes the aircraft object. The waiver
may relate to immunity from jurisdiction, enforcement or both. The instrument
of waiver should make clear its extent. The general rule of international law,
which is not affected by this Article, is that waiver of immunity from suit does
not by itself constitute waiver of immunity from enforcement. Though Article
XXII(2) says that the waiver must contain a description of the aircraft object,
what is meant is not necessarily the waiver clause itself but the instrument of
waiver, which will usually be the agreement containing the waiver clause. See
paragraph 3.145.
Chapter V

Relationship with Other Conventions

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

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

Comment

5.106. This Article establishes the primacy of the present Convention as regards matters within its scope relating to the creation, enforcement, perfection and priority of international interests in aircraft and aircraft objects, while retaining the provisions of the Geneva Convention relating to the recognition of rights and interests which are not “covered or affected by” the present Convention, a phrase intended to be read widely.

5.107. Among Contracting States Parties to both instruments very little remains of the Geneva Convention in its application to aircraft objects within the scope of the Cape Town Convention. As a threshold matter, the basic characterisation of aircraft under the Geneva Convention is directly affected, as they are treated as airframes and aircraft engines under the Convention. The Convention also conceptually differs from the Geneva Convention on (a) the nature of rights and interests therein (compare international interests with those referred to in Article I(1)(a)-(d) of the Geneva Convention and the inconsistency between Article I(1)(c) of the Geneva Convention and Article XVI of the Aircraft Protocol), (b) the use of nationality as a principle for establishing property rights under the Geneva Convention (Article I) and (c) the methods and places of registration and perfection (Articles I and II of the Geneva Convention).
5.108. In addition, the following Geneva Convention provisions, among others, are directly inconsistent with the Convention: (a) priorities established by Article VI of the Geneva Convention (contrast the irrelevance of knowledge of a prior interest under Article 29 of the Convention with the significance of knowledge in Article VI), (b) the limits on local procedural law under Article VII of the Geneva Convention (contrast Article 14 of the Convention), (c) the substantive rule of Article IX of the Geneva Convention (contrast Articles IX and XIII of the Aircraft Protocol), and (d) the treatment of spare parts under Article X of the Geneva Convention as it relates to aircraft engines.

5.109. It is however possible to argue that the basic concept in the Geneva Convention – the recognition of rights arising under the laws of the State of registry – can be preserved by a complementary construction of the two instruments. Where the Convention and Protocol are in force, they constitute the “law” for the purposes of Art. I(1)(i) of the Geneva Convention in that State. That construction, without preserving the detailed rules of the Geneva Convention, would signal to Geneva Convention Contracting States (not yet Parties to the Cape Town Convention) that they should recognise the Convention and Protocol rules of other Geneva Convention Contracting States.

5.110. The provisions of the Geneva Convention remaining in force for a Contracting State Party to the Cape Town Convention are provisions relating to:

(1) the recognition of rights of first ownership of an aircraft or of ownership not resulting from a sale where those rights are recorded in a public aircraft nationality register of the Contracting State concerned, since such rights are not covered by the Cape Town Convention;

(2) priorities between two unregistered international interests (since these fall outside the Cape Town Convention);

(3) the duty under Article X of the Geneva Convention to recognise the extension of security rights in an aircraft to “stored” (i.e. unattached) spare parts under the law of the Contracting State where the aircraft is registered (Article X), since in a Geneva Convention Contracting State the law in question will be the applicable law for the purposes of Article 29(7)(a) of the Cape Town Convention – but in relation to aircraft engines Article X, as previously stated, is overridden by the Convention and the Aircraft Protocol. The Geneva Convention also continues to
govern rights in aircraft objects which fall below the capacity threshold set out in Article I(2)(b), (e) and (l) of the Aircraft Protocol.

5.111. The effect of the present Article is limited to the relations between Contracting States to the Cape Town Convention; it has no effect on the rights and obligations of a Contracting State to the Cape Town Convention in its relations with a non-Contracting State, so that the Geneva Convention will continue to apply where both such States are Parties to that Convention. See Article 30(4)(b) of the Vienna Convention. In such a case the Geneva Convention will complement the Cape Town Convention where the applicable law is that of a State Party to the Cape Town Convention, since for the purposes of the Geneva Convention the law of a Contracting State Party to that Convention will then include the law incorporating the Cape Town Convention.

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

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

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

Comment

5.112. The Rome Convention limits the right to arrest an aircraft in pursuit of a private claim for the benefit of a creditor or the owner, and provides for release from arrest if certain conditions are satisfied. The effect of the present Article is that for a Contracting State to the Cape Town Convention the Rome Convention is completely superseded unless the Contracting State has made a declaration that it will not apply this Article. One consequence of this is that if a Contracting State makes a declaration under Article 39(1)(b) of the Cape Town
Convention, the rights of arrest thereby preserved will not be controlled by the Rome Convention.

5.113. Article XXIV has effect only in the relations between Contracting States to the Cape Town Convention; it does not affect the rights and obligations of a Contracting State to the Cape Town Convention in its relations with a non-Contracting State, so that the Rome Convention will continue to apply where both States are Parties to that Convention. See Article 30(4)(b) of the Vienna Convention. The effect of Article XXIV is that as between two Contracting States which are Parties both to the Rome Convention and the Cape Town Convention the latter supersedes the former in its entirety, not merely in cases of inconsistency.

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

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

Comment

5.114. The 1988 UNIDROIT Leasing Convention provides for the rights of parties involved in an international financial leasing transaction, including the lessor, the lessee and the supplier. The lessee is given various direct rights against the supplier, in place of remedies against the lessor, in whose favour basic default remedies are specified. The lessor’s real rights are also protected in the event of the lessee’s bankruptcy. The effect of Article XXV is that as between two Contracting States which are Parties both to the Leasing Convention and the Cape Town Convention the latter supersedes the former in its entirety, not merely in cases of inconsistency.
CHAPTER VI

FINAL PROVISIONS

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

1. This Protocol shall be open for signature in Cape Town on 16 November 2001 by States participating in the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held at Cape Town from 29 October to 16 November 2001. After 16 November 2001, this Protocol shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article XXVIII.

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

3. Any State which does not sign this Protocol may accede to it at any time.

4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.

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

Comment

5.115. A State may not become a Party to the Aircraft Protocol without also becoming a Party to the Convention, which requires not only that the State is a Contracting State but that the Convention has entered into force for that State (Vienna Convention, Article 2(1)(g)). See further paragraph 2.302.
Article XXVII — Regional Economic Integration Organisations

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

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

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

Comment

5.116. This Article enables a Regional Economic Integration Organisation established by sovereign States and having competence over matters within the scope of the Protocol to adhere to the Protocol as if it were a Contracting State. For the corresponding provision in the Convention see Article 48 and paragraphs 4.322-4.324.
Article XXVIII — Entry into force

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

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

Comment

5.117. Paragraph 1 deals with entry into force as regards the eight States whose ratification brings the Aircraft Protocol into force. Paragraph 2 deals with States adhering to the Protocol thereafter.

Article XXIX — Territorial units

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

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

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

4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.
5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

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

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

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

Comment

5.118. This Article applies to the Aircraft Protocol the same provisions as apply to the Convention under Article 52, and reference should be made to paragraphs 4.336-4.338. The reference to “administrative authorities”, which was carried over in error to the Convention by Article 52(5)(c), denotes the authorities concerned with the enforcement of the remedies of de-registration and export referred to in Articles X(6), XI, Alternative A, paragraph 8, and XIII(4). Article XXIX(1) does not apply to the extent that the law in relation to the matters dealt with in the Protocol is the same in all territorial units, whether because they have adopted uniform laws or because the law is federal law.
Article XXX — Declarations relating to certain provisions

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

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

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

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

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

Comment

5.119. For the nature of reservations see paragraph 4.349. For a description of the system of declarations, the Contracting States entitled to make a declaration,
the Contracting State whose declaration is the relevant declaration and the time as at which the relevant declaration is to be determined, see paragraphs 2.327 et seq. as regards declarations under the Convention and paragraph 3.149 as regards declarations under the Protocol. No reservation is permitted by the Protocol, but declarations may be made as authorised by the Articles listed in Article XXXII and may be replaced by a subsequent declaration under Article XXXIII or withdrawn under Article XXXIV. As to the time when a declaration may be made, see paragraph 2.341. The declaration system is designed to allow Contracting States freedom to opt out of certain provisions which would be contrary to their basic legal philosophy and to decide whether to opt in to certain other provisions which they might not want to apply automatically. With three exceptions (see paragraph 3.149) declarations under the Protocol may be made by any Contracting State.

5.120. Declarations relating to Article VIII, X, XI, XII and XIII are opt-in declarations; declarations relating to Articles XXI and XXIV(2) are opt-out declarations.

5.121. For the various options open to a Contracting State when considering a declaration under Article XI, see paragraph 5.62. A Contracting State making a declaration under paragraph 4 must apply the entirety of the selected Alternative; it cannot combine elements of one Alternative with elements of another (see paragraph 5.62). It may, however, select different Alternatives for different insolvency procedures.

5.122. Paragraph 3 requires a Contracting State to specify “the types of insolvency proceeding” to which it will apply Alternative A or Alternative B. However, the intention is to cover both forms of insolvency-related event referred to in Article I(2)(m) and the second of these deals with the case where the creditor cannot pursue insolvency proceedings. Accordingly, paragraph 3 should be interpreted as enabling a Contracting State to specify the types of insolvency proceeding or other insolvency-related event to which Alternative A or Alternative B is to apply. Paragraph 3 also requires that the declaration state the time-period required by Article XI within which the debtor or the insolvency administrator has to give possession or cure all defaults and agree to perform all future obligations (Alternative A) or to give notice whether it will do so (Alternative B). Whereas under Alternative A of Article XI the duty arises automatically upon the occurrence of an insolvency-related event, under Alternative B it arises only on request by the creditor. Accordingly any time-
period specified by a declaration in relation to Alternative B should be expressed to commence not earlier than the date of receipt of the creditor’s request by the insolvency administrator or the debtor.

5.123. Paragraph 4 requires Contracting States to apply Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction, defined in Article I(2)(n). 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. Paragraph 5, providing for the total or partial exclusion of extended jurisdiction under Article XXI, applies only where the object is a helicopter, or an airframe pertaining to a helicopter, for which the declaring State is the State of Registry.

**Article XXXI — Declarations under the Convention**

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

**Comment**

5.124. This Article is arguably unnecessary but has the merit of making it clear that declarations under the Convention relating to specified provisions apply to any modification of those provisions by the Aircraft Protocol. See further the annotations in Part 4 to the Articles listed.

**Article XXXII — Reservations and declarations**

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

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

5.125. See paragraph 3.149.

**Article XXXIII — Subsequent declarations**

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

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

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

Comment

5.126. See paragraphs 4.355-4.357.

**Article XXXIV — Withdrawal of declarations**

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXXI under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.
2. Notwithstanding the previous paragraph, this Protocol shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

Comment


Article XXXV — Denunciations

1. Any State Party may denounce this Protocol by notification in writing to the Depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.

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

Comment

5.128. See paragraph 4.360.

5.129. It is open to a Contracting State which is Party to the Aircraft Protocol and others to denounce that Protocol while continuing to adhere to the others. A Contracting State which is Party only to the present Protocol and denounces it without denouncing the Convention remains bound only by those final provisions of the Convention which are operative independently of the Aircraft Protocol. See paragraph 4.328.
Article XXXVI — Review Conferences, amendments and related matters

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

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

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

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

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

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

3. Any amendment to this Protocol shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved

550
such amendment when it has been ratified, accepted or approved by eight States in accordance with the provisions of Article XXVIII relating to its entry into force.

Comment


**Article XXXVII — Depositary and its functions**

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

2. The Depositary shall:

   (a) inform all Contracting States of:

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

      (ii) the date of entry into force of this Protocol;

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

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

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

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

   (c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification.
thereof, so that the information contained therein is easily and fully available; and

(d) perform such other functions customary for depositaries.

Comment

5.131. See paragraphs 4.379, 4.383.

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

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

Comment

5.132. See paragraph 4.384.