Cape Town Convention Journal, 2018
Vol. 7

Floating Securities under the Cape Town Convention: Swimming, Sinking or Treading Water?

Bruce Whittaker[*]

Abstract

Floating security structures are a common and important feature of many developed commercial legal systems. They allow a business to grant security over a fluctuating pool of assets, such as inventory, without ongoing documentation as assets are added to or removed from the pool. This article looks at the extent to which floating security structures are possible under the Cape Town Convention and the three existing Protocols, and at how they have been accommodated in the proposed fourth Protocol relating to mining, agricultural and construction equipment that is to be put forward for adoption at a Diplomatic Conference in late 2019.

I. The topic of this article

This article looks at the operation of floating security structures under the 2001 Convention on International Interests in Mobile Equipment (the 'Convention') and its associated protocols.[1] It is born out of a concern, the subject of a good deal of debate in recent years, that the very specific rules in the Convention and Protocols for the creation and registration of international interests in an object do not comfortably accommodate the commercial expectations of parties that wish to enter into a floating security transaction.

This article focusses on securities that are granted by a debtor over its inventory, as that is the context in which floating securities are most commonly used. However, the issues that it discusses are broadly applicable to floating securities over non-inventory as well.

Section II considers the particular features of floating securities that will be the focus of this article, and gives some examples from non-Convention law. Section III looks at the implications for

[*] Honorary Senior Fellow, Law School, University of Melbourne.
The author would like to thank Dr Marek Dubovec of the Kozolchyk National Law Centre for his helpful comments on an earlier draft of the article. Any remaining errors, of course, are the responsibility of the author.

[1] The three existing protocols are the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, signed at Cape Town on 16 November 2001 (the 'Aircraft Protocol'); the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, signed at Luxembourg on 23 February 2007 (the 'Rail Protocol'); and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, signed at Berlin on 9 March 2012 (the 'Space Protocol'). The proposed fourth protocol, the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, is reproduced in UNIDROIT, *Study 72k - CGE1 - DC - Doc. 3* (2018) <*www.unidroit.org/english/documents/2018/study72k/dc/s-72k-dc-03-e.pdf*> accessed 18 April 2019 (the 'MAC Protocol'). In this article, the Aircraft Protocol, the Rail Protocol, the Space Protocol and the draft MAC Protocol are referred to collectively as the 'Protocols' (and individually, a 'Protocol').

a floating security structure of the three aspects of the Convention that are most likely to affect it: the rules for the creation of an international interest in an object; the rules for registration of an international interest in an object; and the rules that establish priority as between competing interests in an object, including the interest of a buyer or lessee of the object. Sections IV to VII then look at these same questions in the context of the object-specific rules in each of the Protocols. Section VIII concludes.

Much has already been written about the Convention and the Protocols. In particular, the body of available learning about the Convention and the Protocols includes the very comprehensive official commentaries on the three existing Protocols,[2] and the reports of the various intergovernmental proceedings convened by UNIDROIT that led to their adoption.[3] This article refers to these supporting materials at appropriate points, but does not lean on them too heavily. The objective of this article is to interpret the Convention and the Protocols in the way in which a court in a Contracting State is likely to do so, and while the Official Commentaries in particular contain a wealth of insights and useful information, they are not binding interpretations, as they themselves acknowledge.[4]

II. Framing the discussion – what do we mean by a 'floating security structure'?

A. What is the issue?

The first Preamble to the Convention states that the Convention is inspired by 'the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the equipment and use of such equipment in an efficient manner'.

As we will see, the Convention's rules apply most clearly and comfortably to transactions in which a financier is taking security over an individual item of high-value equipment that is in existence and identifiable at the time the financing transaction is entered into. By doing so, the Convention was able to respond to a gap in international legal rules that the proponents were looking to fill.[5]

Many tangible mobile assets are indeed financed on an asset-by-asset basis, particularly where the asset involved is intended to form part of the debtor's long-term capital base. Often, however, a debtor will want to grant security over assets that form part of its inventory. A manufacturer, for example, may want to grant security over its stockpile of raw materials, or over the products that it has manufactured with them. Alternatively, a wholesaler or retailer may want to grant security over

---

2 Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, UNIDROIT 2013) (the 'Official Commentary (Air)'); Roy Goode, C*onvention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock: Official Commentary* (2nd edn, UNIDROIT 2014) (the 'Official Commentary (Rail)'); Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Space Assets: Official Commentary* (UNIDROIT 2013) (the 'Official Commentary (Space)'). In this article, the three official commentaries are referred to collectively as the 'Official Commentaries'.

3 See UNIDROIT, 'Study LXXII – International Interests in Mobile Equipment – Preparatory Work' <www.unidroit.org/prepwork-2001capetown> accessed 02 May 2019; UNIDROIT, 'Study LXXII D – International Interests in Aircraft Equipment – Preparatory Work' <*www.unidroit.org/prepwork-2001capetown-aircraft-preparatory*> accessed 02 May 2019; UNIDROIT, 'Preparatory Work – Study LXXII H – Luxembourg Protocol to the Convention On International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock – Preparatory Work' <*www.unidroit.org/prepwork-2007lux*> accessed 02 May 2019; UNIDROIT, 'Conference Documents – Diplomatic Conference for the Adoption of a Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 27 February – 9 March 2012) – Preparatory Work' <*www.unidroit.org/prepwork-2012-space-assets*> accessed 02 May 2019.

4 See, for example, Official Commentary (Air), Introduction, para 7.

5 See, for example, Roy Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols' (2012) 17 Unif L Rev 599, 600–601.

the pool of assets that it has purchased for resale. It may not be practicable or cost-effective in these circumstances for a debtor to grant a separate security interest over each individual item of collateral, particularly as the identity of the individual items of inventory owned by the debtor will change constantly, as the debtor turns its inventory over in the course of its trading activities.

Issues relating to the giving and taking of security over inventory were not front of mind when the Convention and the Aircraft Protocol were finalised in 2001. This is perhaps not surprising, given the value of aircraft objects and the manner in which they are customarily bought, owned and sold.

As will be seen later in this article, some additional flexibility was built into the rules for the creation of international interests in the Rail Protocol and the Space Protocol. That new flexibility may not have been included specifically with inventory in mind, but it does facilitate the taking of security over inventory, at least to some extent. Concerns about the extent to which the Convention could accommodate floating security structures loomed very large in the negotiation of the MAC Protocol, however, in particular in relation to inventory. These concerns flowed from the fact that mining, agricultural and construction equipment (and particularly agricultural equipment) is commonly held and financed as inventory through distribution chains, rather than being directly sold by the manufacturer to the end-user. This is discussed further in Section VII.

B. A working definition

The characteristics of a well-functioning floating security structure may vary from market to market, and from jurisdiction to jurisdiction. For the purposes of this article, though, a floating security structure displays these three core features:

- The security agreement identifies the collateral by means of a generic description of the collateral's common characteristics, rather than by individual item. The description can be of specific types of collateral (eg 'all the debtor's raw materials', or 'all the debtor's inventory'), or it can be very general (eg 'all the debtor's property').[6]
- The security can grip future collateral, as well as existing collateral. Moreover, it attaches to future collateral automatically, in that an asset that fits the description of the pool will automatically be gripped by the security when the debtor acquires it or otherwise becomes able to grant security over it, without the debtor needing to sign a fresh security document, or to take any other act to cause the new asset to become subject to the security.
- The debtor is able to deal with the collateral, free of the security, in the ordinary course of its business – for example, by using the collateral in a manufacturing process, or by selling or leasing it to a third party.

C. Some examples

(i) The paradigmatic 'floating security' – the English floating charge

The floating charge is one of the great creations of English judicial law. Born in a time of commercial expansion when companies were crying out for capital, it sprang almost fully-formed from those fer-

[6] Admittedly, it would be uncommon for a security interest over all of a company's property to be entirely floating. Usually, it will be a fixed security over the debtor's key assets, and floating security over those assets that the debtor is expected to deal with on a regular basis, in the ordinary course of business. However, this does not affect the issues being considered in this article.

tile loins of English law, the English courts of Chancery, over a remarkably brief period in the middle of the second half of the nineteenth century.[7] The floating charge enabled companies to raise finance against the value of their inventory in a way that had not previously been possible under English law, and very quickly became a key part of the toolkit of English finance lawyers and of their bank and corporate clients.

Many attempts have been made to define the term 'floating charge',[8] and while the core features of the floating charge are well understood, some aspects remain the source of vigorous debate.[9] Despite these uncertainties, the floating charge has been an enormously successful creation, and is now an indispensable feature of corporate finance practice in England and countries that have adopted English law.

Floating charges are an example *par excellence* of a floating security:

- they identify their collateral not individually, but in a generic way (which can be as simple as 'all present and future property of the chargor');
- they attach automatically to future property as the chargor acquires it, without the need for any further action by either chargor or chargee; and
- they allow the chargor to deal with the floating charge property, free of the floating charge, in the ordinary course of the chargor's business.

(ii) USA, and the PPSA jurisdictions

As is well known, US jurisprudence declined to follow the English lead, and did not develop an equivalent of the English law floating charge.[10] This was ultimately remedied, however, by the introduction in the USA of Article 9 of the US Uniform Commercial Code ('UCC'). Article 9 allows a debtor to grant a security interest that displays all the core features of a floating security:

- the security agreement does not need to identify items of collateral individually, but can describe them in a generic way;[11]
- the security interest can attach automatically to future property, without the need for any further action by either the creditor or the debtor;[12] and
- the debtor is able to dispose of collateral, free of the security interest, in the ordinary course of its business.[13]

As is also well known, all the Canadian provinces other than Quebec have enacted Personal Property Security Acts (each a 'PPSA') that are based on the same underlying principles as Article 9 of the

---

7 For background on the development of the floating charge, see Robert R Pennington, 'The Genesis of the Floating Charge' (1960) 23 MLR 630; *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, 717.

8 See, for example, the discussion in Louise Gullifer and Roy Goode, *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet and Maxwell 2017) para 4.03; *Agnew* (n 7) 719.

9 See Gullifer and Goode (n 8) paras 4.04-4.05.

10 The most celebrated case on this topic is *Benedict v Ratner 268 US 353 (1925).*

11 UCC § 9-108. Article 9-108(c) does not allow super-generic descriptions such as 'all present and future property', but that does not appear to present a practical impediment to the taking of a broad floating security under US law.

12 UCC § 9-204(a).

13 UCC § 9-320(a).

UCC.[14] Similar legislation has been enacted in a growing number of other jurisdictions, including (to name just two) Australia[15] and New Zealand.[16] Secured transactions legislation based on either Article 9, the PPSA model or an amalgam of the two has also been enacted in a number of Asia-Pacific countries.[17] All these legislative models allow a debtor to grant a floating security over some or all of its property.

(iii) Other examples

The English floating charge is part of the law of other countries that inherited or have adopted English law. The laws of many other countries have also been amended to allow a debtor (at least in some circumstances) to grant a security interest that displays the core features of a floating security.[18] The Model Law on Secured Transactions, adopted in 2016 by the United Nations Commission on International Trade Law (UNCITRAL),[19] has also been structured to accommodate floating security arrangements.

D. There is a clear need for floating security structures

Floating securities are a feature of the laws of many jurisdictions, and many legal traditions. This reflects the fact that a security structure of this type has an important economic role to play, by facilitating the financing of inventory and so stimulating the production and trade of goods. For this reason, it is important to understand the extent to which it is possible to implement floating security structures under the Convention and its Protocols.[20]

III. The Convention itself

A. Introduction

The Convention has little substantive operation as a stand-alone instrument. While a small number of countries have acceded to the Convention without acceding to any of the Protocols,[21] the Con-

[14] For an excellent explanation of the Canadian PPSA legislation, see Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (2nd edn, Irwin Law 2012).

[15] Personal Property Securities Act 2009.

[16] Personal Property Securities Act 1999.

[17] Such as the Solomon Islands (Secured Transactions Act 2008), Vanuatu (Personal Property Securities Act 2008), Papua New Guinea (Personal Property Security Act 2011) and the Philippines (Personal Property Security Act 2017).

[18] For example, countries in South America that have adopted the Model Inter-American Law on Secured Transactions promulgated by the Organisation of American States in 2002. See Organization of American States, 'Model Inter-American Law on Secured Transactions' <*www.oas.org/dil/Model_Law_on_Secured_Transactions.pdf*> accessed 18 April 2019.

[19] See United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Secured Transactions' <*https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_st_e_ebook.pdf*> accessed 18 April 2019.

[20] This article focusses on floating security structures under which the debtor grants a security interest over its inventory in favour of a creditor. Some other commercial arrangements could also produce a commercial result that has similarities to a floating security structure. For example, a manufacturer could agree to provide a customer with an ongoing supply of assets on a retention-of-title basis. That type of arrangement is unlikely to operate as automatically as a floating security structure, however, as the manufacturer/creditor will know when an asset is added to the pool, and will need to take some action for this to happen (ie deliver the asset to the debtor). This means that the creditor in these circumstances is not faced with all of the same practical challenges as the creditor under a floating security.

[21] Only three states are party to the Convention but none of the Protocols: Seychelles, Syria and Zimbabwe.

vention will only have substantive legal effect in a country if the country also ratifies or accedes to a Protocol.[22] The Convention is also subsidiary to the Protocols, in that a Protocol can override the Convention in relation to objects that are subject to that Protocol.[23] All of the Protocols do this, in a number of ways.

Despite this, it is helpful to start with a consideration of the relevant provisions of the Convention on a stand-alone basis, before we turn to look at how they are applied or varied by the Protocols. That is because a consideration of the rules in the Convention will set a benchmark against which the Protocols themselves can be measured. The Convention also contains the default rules that will apply to the extent that a Protocol does not say otherwise.

B. Application of the Convention to floating security structures

(i) Can a floating security structure create an international interest under the Convention?

The types of agreement that can be subject to the Convention

Article 2(1) of the Convention sets out the Convention's core purpose. It says that the Convention 'provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights'. Article 2(2) says that an interest in an object[24] may be an international interest if the interest is granted by the chargor under a 'security agreement'.

The term 'security agreement' is defined in Article 1(ii) to be an agreement:

> by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person.

While the definition uses the English law terminology of 'charge', it is clear that the term 'security agreement' is not intended to be limited to charge agreements in the sense in which the term is understood under English law. This can be seen in the fact that the definition says that the chargee's interest under the charge can be an ownership interest (which would not be possible for a charge in the strict sense), but also follows from the fact that the Convention is an international instrument rather than just an English law document, and needs to be interpreted accordingly. This point is probably self-evident, but it is confirmed by Article 5(1), which says that regard is to be had, in the interpretation of the Convention, 'to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application'.

As the Official Commentaries point out,[25] the scope of the term 'security agreement' needs to be determined through an interpretation of the Convention itself, without reference to any Contracting State's non-Convention law.[26] The Official Commentaries also emphasise that the term 'security agreement' should be given a broad meaning.[27]

---

22 The Protocol will also need to be in force.

23 Article 49(1)(b) of the Convention.

24 Article 2(2) also says that the object needs to be uniquely identifiable, and of a specified type as designated in a Protocol.

25 See for example the Official Commentary (Air) para 2.51.

26 Once the Convention is engaged, however, a Contracting State's non-Convention law may be used to determine whether an agreement should be re-characterised for the purposes of determining how to apply the substantive rules of the Convention and Protocols to it. See Article 2(4) of the Convention, and (for example) the Official Commentary (Air) para 2.51.

27 See for example the Official Commentary (Air) para 4.41.

A floating security structure, as it has been posited for the purposes of this article, is an arrangement under which a secured creditor looks to take an interest in or over a shifting pool of assets to secure the performance of existing or future obligations. If the collateral under a floating security structure includes an object as defined in Article 1(u) of the Convention, then it would seem that the agreement establishing the arrangement would be within the definition of 'security agreement' that is set out in Article 1(ii) of the Convention. It is also instructive to note that the definition of 'security agreement' includes an agreement by which a chargor 'agrees to grant' an interest in or over an object to secure the performance of obligations. While this phrase does not expressly refer to an agreement to grant an interest in future property, it can apply perfectly well to future property, and there is no obvious reason why it should be read down so that it does not.[28]

So, on the language of the Convention alone, there does not appear to be any compelling reason why an agreement that looks to establish a floating security structure cannot be a security agreement within the meaning of the Convention.

The need for identification of the object

Article 2(2) also states that an interest will only be an international interest if it is constituted under Article 7. Article 7 says, in turn, that an interest is only constituted as an international interest if, among other things, the agreement that creates or provides for the interest 'enables the object to be identified in conformity with the Protocol'.[29]

The Convention itself sheds no light on what might be needed to satisfy this requirement, and leaves it entirely to the Protocols to establish what is required. This will be discussed further in sections IV to VII.

(ii) Can an interest created under a floating security structure be registered under the Convention?

Article 16 of the Convention provides for the establishment of the International Registry, and for the registration in the International Registry of a number of types of interests, including international interests.

An international interest can be created under the Convention, and the substantive rules of the Convention (including the enforcement remedies in Chapter III) will then apply to the international interest, whether or not the international interest is registered. If an international interest is registered, however, it will be able to benefit from the protection of Article 30(1) of the Convention, which provides that a registered international interest will be effective in insolvency proceedings against the debtor.

If an international interest is not registered, it also risks being defeated by another registrable interest if that other interest is registered (regardless of the order in which they were created, and whether or not the holder of the other interest knew of the unregistered interest).[30] This can be as important to the holder of a floating security as it is to the holder of any other type of security over a debtor's assets.An unregistered international interest is also exposed to the risk that a buyer or lessee of the object could take the object free of the international interest, under Article 29(3)(b) or

[28] The Official Commentary (Air) suggests otherwise – see for example paras 2.53 and 2.56. Those comments are made, however, in the context of the Convention as modified by the Aircraft Protocol, where it is indeed correct that an agreement for a floating security structure cannot satisfy the requirements for the creation of an international interest (see section IV(B) below). The corresponding discussion in the Official Commentaries for the Rail Protocol and Space Protocol recognises, in contrast, that it is possible for a floating security structure to give rise to an international interest under those Protocols. See for example the Official Commentary (Rail) para 2.49.

[29] Article 7(c) of the Convention.

[30] Articles 29(1) and (2) of the Convention.

29(4)(b) of the Convention. This will generally be of less concern to the holder of a floating security over inventory, as they will be expecting the debtor to use or dispose of the inventory in the ordinary course of the debtor's business.[31]

Article 18 deals with the requirements for a registration of an international interest. Rather than set out registration requirements that could apply to all international interests under the Convention, however, Article 18 says that the requirements for effecting a registration, including the criteria for the identification of the object, are to be specified in the relevant Protocol and regulations. In other words, the Convention itself does not say whether (and if so, how) an interest granted under a floating security structure can be registered, and leaves the details to be determined on a Protocol-by-Protocol basis.

(iii) What is the position of a buyer or lessee in the ordinary course of the debtor's business?

So far, the rules in the Convention itself for the creation and registration of international interests appear to accommodate (or at least are not expressly inconsistent with) the creation and registration of a security interest that:

- is over a pool of assets that are identified generically, rather than individually; and
- is over future as well as existing property.

As discussed in section II(B) above, though, a third customary feature of a floating security over inventory is that it allows the debtor to deal with the inventory, free of the security, in the ordinary course of the debtor's business. This reflects the commercial expectation of a buyer or lessee of inventory that they should be able to take their interest in the inventory free of the interest of the seller or lessor, and free of any interest that the seller or lessor may have created in it.[32]

Article 29 of the Convention sets out some rules for resolving a competition between an international interest and the interest of a buyer or lessee.

Outright sales

If a floating security structure creates an international interest and the international interest has been registered, then the relevant provision is Article 29(3)(a) of the Convention. It says that the buyer of an object acquires its interest in it: 'subject to an interest registered at the time of its acquisition of that interest'.

This rule does not sit comfortably with the commercial expectation of a buyer of inventory in the ordinary course of the seller's business, as the rule would require the buyer to take the inventory subject to the interest, rather than free of it. Article 29(5) states that this outcome can be varied by agreement between the parties, but a typical buyer of inventory is unlikely to even be aware of the secured creditor's interest in the inventory, let alone be in a position (or wanting) to negotiate an appropriate agreement with the secured creditor so that it can get clear title.

As a practical matter, the commercially expected outcome might be produced by the floating security agreement itself. Such an agreement will typically state that the debtor is able to sell the inven-

[31] It could still concern the holder of a floating security in some circumstances, however – for example, if the debtor disposed of the inventory outside the ordinary course of its business, or if the holder of the floating security had withdrawn its consent to the disposal of the collateral (eg on default by the debtor). It will also be of interest to a buyer or lessee of the object. This is discussed in the next section.

[32] Some secured transactions regimes go even further and cut off all pre-existing security interests, even if granted by a predecessor in title to the dealer. See for example Article 34(4) of the UNCITRAL Model Law on Secured Transactions (n 19).

tory free of the floating security, and that is likely to operate as an automatic release of the security at the time of sale. This would enable the buyer to take the object free of the international interest, rather than subject to it, despite Article 29(3)(a). It would however mean that the buyer's position was dependent on the terms of the security agreement (which the buyer has neither insight into nor any control over), and so is less satisfactory than a protection that is enshrined in the applicable law, as is commonly the case outside the Convention.

If a floating security structure does not create an international interest or has not been registered, then Article 29(3)(b) applies to a sale of the object by the debtor. Article 29(3)(b) states that the buyer of an object acquires its interest in it 'free of an unregistered interest even if it has actual knowledge of the interest'.

Under Article 1(mm), an 'unregistered interest' includes a consensual interest that is not registered, whether or not it is even registrable in the first place. This means, if a floating security structure does not create an international interest over an object or the interest has not been registered, and the object is sold in the ordinary course of the debtor's business, that the buyer will take the object free of the security.[33]

The most complete solution for a prospective buyer of an object to which the Convention applies, of course, would be to search the International Registry before the purchase, even if the object is inventory of the seller. Whether this is likely or practicable, however, will depend very much on the buyer, and the nature of the object being purchased. The buyer of a very expensive and bespoke object (such as an aircraft) is likely to be sufficiently well-informed to know of the existence of the International Registry and of the desirability of searching it, and the high value of the object would justify the effort. This will not necessarily be the case, however, for objects under other Protocols.

Conditional sales, and leases

A debtor may also want to sell an object that is part of its inventory under a title reservation agreement, or may want to lease it out. The rules for these situations are set out in Article 29(4). They produce outcomes that are broadly equivalent to the outcomes described above for outright sales.

- If the floating security structure creates an international interest and the international interest is registered at the time when the conditional seller or lessor registers its interest under the title reservation agreement or lease, then the conditional buyer or lessee takes subject to the international interest. However, the terms of the security agreement itself may release the security for the sale or lease, in which case the conditional buyer or lessee will take free of the international interest anyway.
- If the floating security structure did not give rise to an international interest or the international interest was not registered at that time, then the conditional buyer or lessee will take free of the international interest, even if it had actual knowledge of it.[34]

[33] Indeed, the rule in Article 29(3)(b) over-delivers in this context, as the buyer will take free of the floating security whether or not the sale was in the ordinary course of the debtor's business.

There is also a threshold question here of whether the Convention is even engaged. Article 3 of the Convention says that the Convention is engaged when the debtor under an agreement that creates or provides for an international interest is situated in a Contracting State. If the agreement for a floating security structure does not create an international interest and there is nothing else (such as an international interest in favour of another creditor) that could engage the Convention under Article 3, then the taking free rule in Article 29(3)(b) may not even come into play because there is no debtor to which the rule in Article 3 could apply. Thankfully, it will be seen from the discussion in relation to the Protocols below that the Protocols largely overcome this potential problem.

[34] Again, this assumes that the Convention is engaged. See n 33.

(iv) The conclusion so far

It can be seen from the above discussion that the Convention itself sheds some light on the way in which it could apply to a floating security structure over inventory. If a debtor grants a floating security over inventory that is or includes property that is an object for the purposes of the Convention, then the agreement appears (again, based only on the text of the Convention itself) to be capable of being a security agreement for the purposes of the Convention, and the interest that it creates or provides for in the object appears to be capable of being an international interest. The rules in Article 29 also go some way towards providing that a buyer or lessee of the object may be able to take its interest free of an interest created under a floating security structure, largely depending on whether or not the interest was effectively registered.

However, we have already noted that the Convention does not provide a complete set of rules, and that it defers to the Protocols on a number of important matters. Relevantly for this article, the Convention leaves it to the Protocols to determine:

- the manner in which a security agreement needs to identify the object (Article 7(c)); and
- the requirements for effecting a registration on the International Registry, including (again) the criteria for identification of the object (Article 18(a)).

The Protocols also override aspects of the taking free rules for buyers and lessees in Article 29 of the Convention. So it is to the Protocols that this article now turns.

IV. The Aircraft Protocol

A. Introduction

The Aircraft Protocol was signed at the same time as the Convention, in November 2001. It implements the Convention with respect to 'aircraft objects', which are defined in article I(2)(c) of the Aircraft Protocol to be 'airframes', 'aircraft engines' and 'helicopters'. Those three terms are also defined in the Aircraft Protocol.

It is not necessary for the purposes of this article to delve into these definitions.[35] It suffices to note that an aircraft object will unambiguously be an item of 'high value'.

B. Description of an aircraft object in the agreement

As noted above, Article 7(c) of the Convention leaves it to the Protocols to specify the way in which a security agreement needs to identify the object. The rule for aircraft objects is set out in Article VII of the Aircraft Protocol. It says:

> 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…[36]

It can be seen that Article VII contemplates a detailed, asset-specific description of the object. Article

[35] They are discussed in the Official Commentary (Air) paras 5.4, 5.7, 5.13.

[36] Article VII of the Aircraft Protocol (emphasis added).

VII also says that this very specific description is not only 'sufficient' for the purposes of Article 7(c) of the Convention, but that it is also 'necessary'. In other words, an international interest in an aircraft object can only arise under Article 7 of the Convention if the agreement that creates or provides for it expressly sets out the manufacturer's serial number, the name of the manufacturer and its model description.

This is clearly incompatible with a floating security structure, as one of the key features of a floating security structure is that the security agreement only needs to describe the collateral in general terms, and does not need to describe items individually. It also makes it impossible to capture future property in the manner contemplated by a floating security structure, as it would only be able to capture future property that was in existence (and for which the necessary identifying information was available) at the time it was entered into.

This means that a floating security structure, as we have posited it for the purposes of this article, is incapable of creating an international interest over an aircraft object for the purposes of the Convention.

C. Criteria for identification of an aircraft object in a registration

The information that is required to effect a registration of an international interest in an aircraft object is not set out in the Aircraft Protocol itself, but rather is set out in section 5.4 of the supporting Regulations and Procedures for the International Registry (the 'Aircraft Regulations').[37]

Section 5.4 of the Aircraft Regulations says that the required information is the type of aircraft object, the manufacturer's name, the manufacturer's generic model description, and the manufacturer's serial number. In other words, the details that need to be included in the registration of an international interest over an aircraft object are essentially the same as those that need to be included in the agreement that gives rise to the international interest – with the qualification that the information for the registration needs to identify the type of aircraft object (ie airframe, aircraft engine or helicopter) as well.

It was contemplated in the early stages of the development of the Convention that the Convention might allow for a registration system that recorded international interests against the name of the debtor, either instead of or in addition to a system that recorded interests against the details of the asset.[38] At a relatively early stage, however, the decision was taken to move to solely an asset-based registration system,[39] and the drafting of the Convention and the Aircraft Protocol subsequently proceeded on that understanding. Article VII of the Aircraft Protocol and section 5.4 of the Aircraft Regulations are reflective of this.

This means, for a secured creditor that wishes to take a floating security over aircraft objects, that the registration requirements simply compound their woes. Even if an agreement for a floating security structure were able to give rise to an international interest over aircraft objects, the holder of the international interest would not be able to perfect the security by means of a single registration against the grantor of the security (as would be the usual expectation for a floating security structure). Instead, they would need to effect individual registrations against each aircraft object, including on an ongoing basis as future aircraft objects came into the collateral pool. This would not be consistent with the usual functioning of a floating security structure.

---

[37] The Aircraft Regulations have been issued by the International Civil Aviation Organization, the Supervisory Authority under the Aircraft Protocol. See Aviareto, 'Regulatory Information' <*www.aviareto.aero/information-centre/regulatory-information/*> accessed 18 April 2019.

[38] See Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols' (n 5) 602.

[39] ibid.

It is not unheard of that the holder of a general security over a debtor's property might need to make additional asset-specific registrations for some of its collateral, such as land or intellectual property. Indeed, asset-specific registrations can be necessary or desirable in relation to aircraft as well, under the non-Convention law in some countries.[40] Aircraft objects are valuable items of collateral, so in most cases the secured creditor under a floating security structure is likely to be prepared to register against each aircraft object as it becomes part of the pool, and live with the additional administrative burden that this involves.

However, registering against each aircraft object in the pool will not solve the greater problem, discussed in the previous section, that the usual form of floating security structure is incapable of giving rise to an international interest in aircraft objects in the first place. The secured creditor might make a registration against an aircraft object in the International Registry, but the registration will not be of an international interest. This means that any interest that the secured creditor might have in the aircraft object[41] will be an unregistered interest for the purposes of the priority and taking free rules in Article 29 of the Convention, despite the registration.[42]

D. Disposals in the ordinary course of business

The Convention defines a 'contract of sale' in Article 1(g) to mean 'a contract for the sale of an object by a seller to a buyer'.[43] A 'sale' is defined in turn in Article 1(gg) to be 'a transfer of ownership of an object pursuant to a contract of sale'.

Article 41 of the Convention allows the substantive rules of the Convention regarding international interests to be extended to sales of objects as well, by stating that the Convention is to apply to the sale or prospective sale of an object 'as provided for in the [relevant] Protocol'.

The Aircraft Protocol takes up the opportunity afforded by Article 41 of the Convention, and extends the application of the Convention to sales and contracts of sale of aircraft objects in several ways. It provides rules for the constitution of a contract of sale of an aircraft object that reflect the corresponding rules for the constitution of an agreement for an international interest, and then applies most of the substantive rules of the Convention to sales of aircraft objects in much the same way as it applies them to international interests in aircraft objects.[44] Importantly, Article III of the Aircraft Protocol extends the application of the registration provisions of the Convention to contracts of sale and sales of aircraft objects, so that a contract of sale can be registered in largely the same fashion as an international interest.[45]

Outright sales

Article XIV of the Aircraft Protocol also modifies the rules in Article 29 of the Convention that

[40] This had been the case in Australia, for example, before the coming into force in 2012 of its Personal Property Securities Act 2009.

[41] The interest, if any, would need to arise under non-Convention law.

[42] The only solution would be to take specific security over each aircraft object as well. See section IV(E).

[43] Unless it is a security agreement, title reservation agreement or leasing agreement – that is, unless it is an agreement that can separately give rise to an international interest under Article 7 of the Convention.

[44] See in particular Articles III, V and XIV. The main exceptions are the rules for the enforcement of international interests, which do not apply to sales or contracts of sale. The rules for enforcement of sales and contracts of sale are left to the applicable law.

[45] Article III of the Aircraft Protocol also says that a seller of an aircraft object is a 'debtor' for the purposes of Article 3 of the Convention, thus ensuring that the Convention is engaged in relation to an aircraft object if a contract of sale is entered into in relation to it, and the seller is situated in a Contracting State. This overcomes the potential nexus issue referred to in n 33 above and ensures that the Convention is engaged.

regulate a competition between an international interest in an aircraft object and the interest of a buyer. Because contracts of sale of aircraft objects are registrable (a situation not contemplated by the default rules in the Convention itself), Article XIV of the Aircraft Protocol replaces Article 29(3) of the Convention,[46] and provides in its stead that a buyer of an aircraft object under a registered sale is subject in effect to the same priority rules as the holder of a registered international interest.[47] This means that the buyer will take subject to an international interest that is registered first, and will take free of an interest that is registered subsequently, or not registered at all.

As was discussed in section IV(B) above, a floating security structure that describes its collateral in a generic way is incapable of giving rise to an international interest in an aircraft object, as it does not comply with the formal requirements for the identification of the object that are set out in Article VII of the Aircraft Protocol. This means, if a person buys an aircraft object under an agreement that complies with the formal requirements of a contract of sale (under Article V of the Aircraft Protocol) and they register the sale, that they will take free of any interest created by the floating security structure, whether or not the secured creditor had also registered.

Aircraft objects are high-value assets, and a potential buyer is likely to be aware of the existence of the Convention and of the need both to document the purchase correctly and to register the sale.[48] If they do this, then they will be buying the aircraft object under a registered sale, and the effect of Article XIV of the Aircraft Protocol is that they will take free of any interest created by the floating security structure, whether or not the sale was in the ordinary course of the seller's business.

On the other hand, the Convention as modified by the Aircraft Protocol is silent on what the outcome would be if the buyer's agreement does not comply with Article V or if the buyer does not register, as that would then be a competition between two unregistered interests. A competition of this type will need to be resolved in accordance with the applicable law, outside the Convention.[49]

Conditional sales, and leases

While the Aircraft Protocol replaces the priority rule in Article 29(3) of the Convention for buyers under a contract of sale, it does not change the rule in Article 29(4) of the Convention for conditional buyers or lessees. This means that the considerations discussed in section III(B)(iii) above will apply where a debtor under a floating security structure deals with an aircraft object by agreeing to sell it under a title reservation agreement, or by leasing it. As a floating security structure cannot give rise to an international interest in an aircraft object (because it does not identify the object in accordance with Article VII of the Aircraft Protocol), the conditional buyer or lessee will take free of any interest that the floating security structure might create in the object.[50]

---

[46] Technically, Article 29(3) is dis-applied for aircraft objects by Article III of the Aircraft Protocol, and Article XIV is enacted as a new rule. In a practical sense, however, Article XIV of the Aircraft Protocol replaces Article 29(3) of the Convention.

[47] As the Official Commentary (Air) itself concedes, the drafting of Article XIV is less than ideal, and does not achieve this result as obviously as might be desired. As the Official Commentary (Air) notes, however, this is the way in which Article XIV is likely to be read. See the Official Commentary (Air) para 5.70.

[48] A secured creditor under a floating security structure is also likely to be aware of the Convention, but unless they take specific security in accordance with the Convention and Aircraft Protocol in support of their floating security structure (in which case they would be a specific security holder, not just the holder of a floating security), then they are incapable of overcoming the fact that they will not have an international interest.

[49] See the Official Commentary (Air) para 4.196.

[50] This assumes that the Convention is applicable. See n 33.

E. The outcome, in summary

The secured creditor under a floating security structure that is intended to encompass aircraft objects is in an unhappy position under the Aircraft Protocol. Its security agreement will not comply with the requirements for the identification of the object set out in Article VII of the Aircraft Protocol, and so will be incapable of giving rise to an international interest. This means that the secured creditor will have at best an unregistered interest in the aircraft object for the purposes of the Convention, even if they go to the effort of registering against the aircraft object in the International Registry, and will rank behind any other secured creditor who might take and register an international interest in the correct way.

A buyer of an aircraft object who enters into a contract of sale and registers their interest as buyer in the correct way will also rank ahead of any interest in the aircraft that is created by a floating security structure, whether or not the secured creditor purported to register. A conditional buyer or lessee will take free of any interest that is created by the floating security structure as well.

The only solution for the secured creditor under a floating security structure that wants to ensure that its security is effective under the Convention and Aircraft Protocol is to take a specific security over the aircraft objects as well, in the form required by Article 7 of the Convention and Article VII of the Aircraft Protocol. This may be a commercially viable option given the value of aircraft objects, but would run counter to the commercial rationale for wanting to take a floating security in the first place.

V. The Rail Protocol

A. Introduction

The Rail Protocol was signed in Luxembourg in February 2007. It is not yet in force. When it does come into force, it will implement the Convention with respect to 'railway rolling stock'. That term is defined in article I(2)(e) of the Rail Protocol to mean 'vehicles movable on a fixed railway track or directly on, above or below a guideway'.[51]

While large items of railway rolling stock will no doubt be of high value, at least some vehicles that fit the description in this definition are less likely to be so.[52] This may have some practical consequences, as discussed below.

B. Description of railway rolling stock in the agreement

As we noted in section III(B)(iv) above, Article 7(c) of the Convention leaves it to the Protocols to specify the way in which a security agreement needs to identify the object to which it applies. The rule for railway rolling stock is set out in Article V(1) of the Rail Protocol. It says that a description of railway rolling stock is sufficient to identify the railway rolling stock for the purposes of Article 7(c) of the Convention (in other words, for the purposes of the agreement that creates or provides for an international interest in the railway rolling stock) if it contains:

(a) a description of the railway rolling stock by item;

---

[51] The definition goes on to include a range of ancillary items, but only to the extent that they are installed on or incorporated in the vehicle.

[52] For examples of the types of assets that could be covered, see the Official Commentary (Rail) para 3.8.

(b) a description of the railway rolling stock by type;

(c) a statement that the agreement covers all present and future railway rolling stock; or

(d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.

This is clearly very different to the approach that is taken in the Aircraft Protocol. Rather than require a specific description of each object, the Rail Protocol allows a security agreement to describe the railway rolling stock in a more generic way. It accepts that the description of the objects in the agreement only needs to make it possible to identify them – it does not need to identify the objects precisely.[53]

The four options set out in article V(1) of the Rail Protocol (as set out above) all refer to 'railway rolling stock'. Even the broadest of the options (in paragraph (c)) refers to a 'statement that the agreement covers all present and future railway rolling stock'. It is not uncommon in many jurisdictions, however, for a security agreement to use even more generic language than this to describe the collateral subject to it, such as 'all present and future inventory', or even 'all present and future property'.[54] While language such as this does not expressly 'state' that it covers railway rolling stock, that is clearly its effect, and there is no obvious reason why language along those lines should be insufficient. On that basis, very generic language such as 'all present and future inventory' or 'all present and future property' should satisfy the requirements of Article V(1) of the Rail Protocol as well.[55]

The rule in Article V of the Rail Protocol is clearly more accommodating of the usual form of a floating security structure than the corresponding rule in the Aircraft Protocol – both because it allows the use of a generic description for the collateral, and because it clearly allows an agreement to apply to future property. This means that a floating security structure is capable (in principle) of creating an international interest in railway rolling stock for the purposes of the Convention.

Article V(2) then makes it clear that an interest in future railway rolling stock that is identified in accordance with Article V(1) is constituted automatically as an international interest as soon as the chargor, conditional seller or lessor (as relevant) acquires the power to dispose of the railway rolling stock. There is no need for a new act of transfer.[56]

C. Criteria for identification of railway rolling stock in a registration

Similar to the Aircraft Protocol, the Rail Protocol does not spell out exactly how railway rolling stock is to be identified in a registration on the International Registry. The Rail Protocol leaves this to be resolved by the regulations (the 'Rail Registry Regulations') that are to be made by the Supervisory

[53] This point was apparently made quite late in the development of the Rail Protocol, at the Diplomatic Conference at which the Rail Protocol was signed. See Roy Goode, 'Asset Identification under the Cape Town Convention and Protocols' (2018) 81 Law and Contemporary Problems 135, 142.

[54] But not in the USA – see n 11 above.

[55] See also the Official Commentary (Rail) paras 3.7(1) and 5.11.

[56] Some legal systems only allow an agreement to grant security over future property if the grantor appropriates the property to the agreement, or performs some other new act of transfer, when it has acquired the property (ie when it is no longer 'future'). See for example Cuming, Walsh and Wood (n 14) 260-261. The last sentence of Article V(2) makes it clear that no such rule applies here.

Authority which is to be established under Article XII of the Rail Protocol.[57]

Unlike the Aircraft Protocol, however, the Rail Protocol does provide guidance on the level of specificity that is required for the identification of railway rolling stock in a registration. Article XIV(1) of the Rail Protocol says that the Rail Registry Regulations are to prescribe a system for the allocation of identification numbers by the Registrar 'which enable the unique identification of items of railway rolling stock'. In other words, consistent with section 5.4 of the Aircraft Regulations, the registration of an international interest in railway rolling stock will need to uniquely identify the item of railway rolling stock to which the international interest relates.[58]

The details of the identification system that the Registrar will employ for registrations against railway rolling stock are still under development.[59] It is clear, however, that registrations will need to be on an asset-by-asset basis. This means again that the secured creditor under a floating security structure will not be able to register its security over railway rolling stock in a generic fashion, but will need (if it wishes) to register against each item of railway rolling stock as the relevant identifying information becomes available.

As discussed above in relation to aircraft objects, this could be administratively burdensome, but is possible. Whether it is commercially practicable will depend very much on the circumstances. As mentioned in section V(A) above, railway rolling stock may range in value from very expensive to less so, and while some items of railway rolling stock may be of a value that would justify the additional administrative effort, this may not always be the case.

The consequences of not registering, of course, can be severe. As explained in section III(B)(ii), an unregistered interest will rank behind a registered interest, even if the registered interest was created later and even if the holder of the registered interest knew of the unregistered interest at the time. The holder of a floating security over railway rolling stock will need to take this risk into account in deciding on the extent to which it should go to the effort of making registrations against the individual items of railway rolling stock over which it takes security. In contrast to the position under the Aircraft Protocol,[60] however, the secured creditor under a floating security structure will at least know that its security agreement can give rise to an international interest in railway rolling stock in the first place, so that a registration, if it makes one, can have legal effect.

D. Disposals in the ordinary course of business

Unlike the Aircraft Protocol,[61] the Rail Protocol does not include additional provisions for contracts of sale, and so does not modify the rules in Article 29 of the Convention to deal with them. This means that the position of a buyer or lessee of an item of railway rolling stock from a debtor under a floating security structure, where the debtor sells or leases the item in the ordinary course of its

---

[57] See the definition of 'regulations' in Article 1(ff) of the Convention. The Supervisory Authority is yet to be established. A draft of the Rail Registry Regulations has been published by UNIDROIT – see UNIDROIT and OTIF, 'Draft Regulations for the International Registry' <*www.unidroit.org/english/conventions/mobile-equipment/registry-rail/draft-regulations-20160222.pdf*> accessed 18 April 2019.

[58] Article XIV(2) of the Rail Protocol also allows a Contracting State to substitute its own system of identification numbers for registrations against railway rolling stock that is subject to an international interest granted by a debtor that is situated in that Contracting State. Article XIV goes on to say, however, that the substitute identification system must also ensure the unique identification of each item of railway rolling stock.

[59] See Rory McPhillips and others, 'Comparative Analysis of Aircraft, Rail and Space International Registries and Their Regulatory Provisions' (2016) 5 Cape Town Convention Journal 29, 45-48; Goode, 'Asset Identification under the Cape Town Convention and Protocols' (n 53) 144-146.

[60] See section IV(B) above.

[61] See section IV(D) above.

business, will be as described in section III(B)(iii) above.

E. The outcome, in summary

The position of a secured creditor that wants to take a floating security over railway rolling stock is potentially much stronger than the position of a secured creditor that wants to take a floating security over aircraft objects. Unlike the situation under the Aircraft Protocol, a security agreement that establishes a floating security structure over railway rolling stock is capable of giving rise to an international interest under the Convention. This means in turn, if the secured creditor goes to the effort of registering against items of railway rolling stock in its security pool, that it will have a registered interest for the purposes of Article 29 of the Convention, and so will rank ahead of both later-registered interests and unregistered interests.

The position of a person who buys or leases an item of railway rolling stock from the debtor in the ordinary course of the debtor's business, however, is not quite as favourable. If the secured creditor has not registered its interest in the item in the International Registry, then the buyer or lessee will take free of the secured creditor's interest. If the secured creditor has registered its interest, the buyer or lessee may still take free if the terms of the floating security structure permit this. If the holder has registered and the terms of the floating security structure do not permit the sale or lease, however, then the buyer or lessee will take subject to the security.

VI. The Space Protocol

A. Introduction

The Space Protocol was signed in Berlin in March 2012. Like the Rail Protocol, it is not yet in force. If it does come into force, it will implement the Convention in relation to 'space assets'. This term is defined in Article 1(k) to mean, broadly, a man-made asset in space or designed to be launched into space that is:

- a spacecraft;
- a payload; or
- part of a spacecraft or payload.

The definition also requires that the asset be 'uniquely identifiable'.

Traditional types of spacecraft, such as space vehicles for human transport and large satellites, will clearly be of high value. With recent developments in the miniaturisation of satellites, however, this is not necessarily going to be the case for all spacecraft. Some payloads, or parts of spacecraft or a payload, might also be less obviously of high value. Similar to the Rail Protocol, this can have some practical consequences, as discussed below.

The text of the Space Protocol is based very closely on the Aircraft Protocol, with some clarifications and some enhancements that have been taken from the Rail Protocol. As a result, the way in which the Space Protocol applies to floating security structures is something of an amalgam of the positions under the first two Protocols.

B. Description of a space asset in the agreement

The Space Protocol follows the approach taken in the Rail Protocol to the manner in which a space asset needs to be identified in the agreement that creates or provides for the international interest over it. Article VII(1) of the Space Protocol says that a description of a space asset in the agreement is sufficient if it contains:

(a) a description of the space asset by item;

(b) a description of the space asset by type;

(c) a statement that the agreement covers all present and future space assets; or

(d) a statement that the agreement covers all present and future space assets except for specified items or types.

Similarly, Article VII(2) of the Space Protocol states that an interest in a future space asset that is identified in accordance with Article VII(1) is constituted as an international interest as soon as the chargor, conditional seller or lessor has the power to dispose of it, without the need for any new act of transfer.

This means, like the position under the Rail Protocol but in contrast to the Aircraft Protocol, that a floating security structure can give rise to an international interest in space assets for the purposes of the Convention, including in space assets that are future property.

C. Criteria for identification of a space asset in a registration

Similar to the Aircraft Protocol, the Space Protocol leaves it entirely to the regulations (the 'Space Registry Regulations'), to be made by the relevant Supervisory Authority, to specify how a space asset is to be identified for the purposes of effecting a registration in the International Registry.[62]

The nature of space assets and their physical inaccessibility has made it more difficult to develop a workable identification system than was the case for the previous Protocols, and the resultant rules are correspondingly more complex. Thankfully for the reader, it is not necessary to traverse the details of the rules here.[63] All that is required here is to note, consistent with the other Protocols and the unspoken expectation behind the Convention as a whole, that registrations will need to be made against each space asset individually.[64]

This means that the position under the Space Protocol of a secured creditor with a floating security structure over space assets will be the same as for the secured creditor with a floating security structure over railway rolling stock under the Rail Protocol, as regards registration of its international interest and its priority position as against other holders of an interest in the same assets. Whether it wants to go to the effort of registering against each space asset, including future space assets as they come into the security pool, will depend on the commercial circumstances of the transaction and the relative value that the individual space assets bear in relation to the security pool as a whole.

---

[62] Space Protocol, Article XXX. The Supervisory Authority has yet to be identified. A draft of the Space Registry Regulations has been published by UNIDROIT – see UNIDROIT, 'Summary Report of the Fourth Session' (2015) Report of the Preparatory Commission for the Establishment of the International Registry for Space Assets pursuant to the Space Protocol <*www.unidroit.org/english/documents/2015/depositary/ctc-sp/pcs-04-07rev-e.pdf*> accessed 18 April 2019.

[63] For a summary of the complexities, see Rory McPhillips and others (n 59) 55-57; Goode, 'Asset Identification under the Cape Town Convention and Protocols' (n 53) 146-148.

[64] Space Registry Regulations, s 5.3(c).

D. Disposals in the ordinary course of business

The Space Protocol follows the Aircraft Protocol in its approach to contracts of sale. It provides rules for the constitution of a contract of sale of a space asset that reflect the corresponding rules for the constitution of an agreement for an international interest, and then applies many of the substantive rules in the Convention to sales of space assets in much the same way as it applies them to international interests in space assets.[65] Importantly, Article IV of the Space Protocol extends the application of the registration provisions of the Convention to contracts of sale and sales of space assets, so that a contract of sale can be registered in largely the same fashion as an international interest.

The position of a buyer, conditional buyer or lessee under the Space Protocol of a space asset that is subject to a floating security will not necessarily be the same, however, as the position of a buyer, conditional buyer or lessee under the Aircraft Protocol. That is because a floating security structure under the Space Protocol, in contrast to the position under the Aircraft Protocol, is able to give rise to an international interest in a space asset.

Outright sales

Like Article XIV of the Aircraft Protocol, Article XXIII of the Space Protocol modifies the rules in Article 29 of the Convention that regulate a competition between an international interest in a space asset and the interest of a buyer. In particular, because contracts of sale of space assets are registrable, Article XXIII of the Space Protocol replaces Article 29(3) of the Convention[66] and provides in its stead that a buyer of a space asset under a registered sale is subject in effect to the same priority rules as the holder of a registered international interest: the buyer will take subject to an international interest that is registered first, and will take free of an interest that is registered later, or not registered at all.[67]

A buyer of an aircraft object that documents the sale correctly and registers it will take free of any interest in the aircraft object that may have been created by a prior floating security structure, even if the secured creditor under the arrangement had made a registration in relation to it. That is because a floating security structure is incapable of giving rise to an international interest over an aircraft object, and so can at best give rise to an unregistered interest for the purposes of the Convention even if the secured creditor makes a registration on the International Registry. A buyer of a space asset is in a less favourable position, however, even if the sale is correctly documented and registered, because a floating security structure is capable of creating an international interest in a space asset, so that the secured creditor will have a registered interest if it has in fact registered. The buyer will rank behind the secured creditor if the secured creditor has registered and the sale is either registered later, or if the sale is not registered at all.

As discussed in section III(B)(iii), the buyer may still be able to take free of the secured creditor's interest if the terms of the floating security structure permit the sale. That will however be entirely dependent on the terms of the floating security structure, which the buyer will not know and will have no control over.

If neither party has registered, then the competition between them will fall to be resolved by the applicable non-Convention law.

---

[65] See in particular Articles IV, V and XXIII. As for the Aircraft Protocol, the main exceptions are the rules for the enforcement of international interests, which do not apply to sales or contracts of sale. The rules for enforcement of sales and contracts of sale are left to the applicable law.

[66] Technically, Article 29(3) is dis-applied for space assets by Article IV of the Space Protocol, and Article XXIII is enacted as a new rule. In a practical sense, however, Article IV of the Space Protocol replaces Article 29(3) of the Convention.

[67] The drafting of Article XXIII has been tidied up to remove the uncertainty in the drafting of Article XIV of the Aircraft Protocol referred to in n 47.

Conditional sales and leases
Like the Aircraft Protocol, the Space Protocol replaces the priority rule in Article 29(3) of the Convention for buyers under a contract of sale, but does not change the rule in Article 29(4) of the Convention for conditional buyers or lessees. This means that the considerations discussed in section III(B)(iii) above will apply where a debtor under a floating security structure over a space asset deals with it by agreeing to sell it under a title reservation agreement, or by leasing it. Unlike a floating security structure under the Aircraft Protocol, however, a floating security structure is capable of giving rise to an international interest under the Space Protocol, and a conditional buyer or lessee of a space asset that is subject to an international interest that is created under a floating security structure:

- will take subject to the floating security (again, assuming that the terms of the floating security structure do not release it) if the secured creditor under the floating security structure registers its international interest before the debtor registers the international interest that it holds under the title reservation agreement or lease; or
- will take free of the floating security over the asset if it was not so registered at that time.[68]

E. The outcome, in summary

The secured creditor under a floating security structure over space assets is in a similar position to the secured creditor under a floating security structure over railway rolling stock. Unlike the position under the Aircraft Protocol, a floating security structure over space assets can give rise to an international interest under the Space Protocol, and that international interest, if registered, will be a registered interest for the purposes of Article 29 of the Convention.

The position of a buyer or lessee of a space asset in the ordinary course of the debtor's business will depend very much on whether the secured creditor under the floating security structure has registered its international interest. If it has registered, then the buyer or lessee will take subject to the international interest, unless the terms of the floating security structure release it.

If the secured creditor under a floating security structure has not registered but an outright buyer does, then the outright buyer will prevail.[69] If an outright buyer does not register either, then the competition between them will fall to be resolved by non-Convention law.

If the secured creditor under the floating security structure has not registered its international interest, then a conditional buyer or lessee will take free.

VII. The draft MAC Protocol

A. Introduction

The UNIDROIT General Assembly resolved in 2005 that UNIDROIT's Work Program should include a project to prepare a protocol for mining, agricultural and construction equipment.[70] After an extended period of preparatory work, UNIDROIT's Governing Council decided in 2016 that the draft MAC Protocol was sufficiently developed that a Committee of Governmental Experts (the 'CGE') should be convened to consider the text. The CGE met twice over the course of 2017 to dis-

[68] Article 29(4) of the Convention.

[69] If it has also documented its sale correctly.

[70] See UNIDROIT, *Report A.G. (59) 12 (2005)* para 61 <*www.unidroit.org/english/documents/2005/ag59-12-e.pdf*> accessed 18 April 2019.

cuss and further refine the draft MAC Protocol,[71] and the revised draft of the MAC Protocol was then resubmitted to the Governing Council at its meeting in May 2018. At that meeting, the Governing Council approved the convening of a diplomatic conference (the 'MAC Diplomatic Conference') to adopt it.[72]

The MAC Diplomatic Conference will be held in November 2019, in South Africa.

The expression 'high value', as it appears in the first Preamble to the Convention, is not a term of precise content. It is a relative notion, and what is 'high value' to one person in one context may not be 'high value' to another person or in a different context. Aircraft objects, of course, are no doubt 'high value' to almost any person in almost any context. The same may be able to be said for most railway rolling stock, and most space assets. It cannot be said with the same confidence, however, for mining, agricultural or construction equipment, as equipment used in the mining, agricultural and construction sectors can range from items that are clearly of very high-value (such as specialised tunnelling equipment in the mining sector) to items that equally clearly are not (such as a chainsaw). Also, unlike objects under the first three Protocols, which are readily identifiable as belonging to specific industries (ie the air, rail and space industries) and are capable of being defined with reasonable precision, much of the equipment used in the mining, agricultural and construction sectors is not specific to those industries, and does not lend itself to a neat yet comprehensive definition. This presented the drafters of the MAC Protocol with a considerable challenge.[73]

After much deliberation, the drafters came up with the solution of defining the three categories of asset not by means of a description of their characteristics or their operational attributes, but rather by calling in aid the Harmonised Commodity Description and Coding System (the 'Harmonised System') that is used by the World Customs Organisation to classify goods for customs purposes.[74] The draft MAC Protocol does this by listing a series of Harmonised System codes in three Annexures (one for each category of asset), and providing that an asset will be 'mining equipment', 'agricultural equipment' or 'construction equipment' if it falls within one of the Harmonised System codes that are listed in the relevant Annexure.

The selection of the appropriate Harmonised System codes was not a straightforward process.[75] As a general statement, however, the selections focussed on codes that cover equipment that is most likely to be 'high value', that is used principally in the mining, agricultural or construction industries, and that is most likely to be uniquely identifiable.[76] Because of the way in which the Harmonised System codes are compiled, however, one code can encompass both equipment that is unquestionably of high value, and equipment that is not.

This was the subject of a great deal of discussion at the Committee of Governmental Experts meetings in 2017.

---

[71] See UNIDROIT, *Study 72K – CGE1 – Report (2017) <www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-report-e.pdf>* accessed 18 April 2019; UNIDROIT, *Study 72K – CGE2 – Report (2017) <www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf>* accessed 18 April 2019.

[72] See UNIDROIT, *Governing Council Report C.D. (97) 19 (2018) <www.unidroit.org/english/governments/councildocuments/2018session/cd-97-19-e.pdf>* accessed 18 April 2019.

[73] The first Preamble of the Convention also refers, as an alternative to mobile equipment that is 'high value', to mobile equipment 'of particular economic significance'. It does not seem, however, that much reliance has been placed on that expression as an alternative source of purpose for the Convention.

[74] See World Customs Organization, 'Nomenclature and Classification of Goods: Overview' <www.wcoomd.org/en/topics/nomenclature/overview.aspx> accessed 18 April 2019.

[75] The lists have also not necessarily stopped moving. States have been provided with an opportunity to suggest additional codes for inclusion in one or more of the Annexures, ahead of the MAC Diplomatic Conference.

[76] For further explanation of the processes involved in choosing the Harmonised System codes, see Goode, 'Asset identification under the Cape Town Convention and Protocols' (n 53) 150-151.

Inventory

Unlike objects that are typically the subject of the first three Protocols, it is very common for mining, agricultural or construction equipment to be sold not directly to the end-user by the manufacturer, but for the manufacturer to sell the equipment to a retailer (or to an intermediary distributor, who then on-sells to a retailer), and for the retailer to then on-sell the equipment to the end-user in due course.[77] It is also common for distributors and retailers (and indeed manufacturers as well) to borrow funds to finance the inventory that they hold for on-sale. Many jurisdictions have well-established laws and practices for the financing of inventory in the hands of such dealers, and there was a concern among those involved in the drafting of the MAC Protocol that those practices could be upset by the rigid application of the Convention's rules, particularly as they relate to the registration of interests on the International Registry, because of the administrative burden involved in the need to register interests on an asset-by-asset basis.

Also, while participants in the airline, rail and space industries are likely to be relatively sophisticated and able to understand and work with the Convention, the same cannot necessarily be said of participants in the mining, agricultural and construction sectors (particularly the agricultural sector). While those sectors do include large and sophisticated businesses, many participants in those sectors are smaller and much less sophisticated. The businesses are often owned and operated by families or individuals, who are unlikely to be aware of the Convention or to be well-equipped to deal with its rules.

These concerns led to the inclusion in the draft MAC Protocol of a number of provisions that are not found in the other Protocols. They are discussed below.

B. Description of the equipment in the agreement

The draft MAC Protocol takes the same approach as the Rail Protocol and the Space Protocol to the manner in which equipment needs to be identified in the agreement that creates or provides for the international interest. Article V(1) of the draft MAC Protocol says that a description of equipment in the agreement is sufficient if it contains:

(a) a description of the equipment by item;

(b) a description of the equipment by type;

(c) a statement that the agreement covers all present and future equipment; or

(d) a statement that the agreement covers all present and future equipment except for specified items or types.

Similarly, Article V(2) of the draft MAC Protocol says that an interest in future equipment that is identified in accordance with Article V(1) is constituted as an international interest as soon as the chargor, conditional seller or lessor has the power to dispose of it, without the need for any new act of transfer.

This means, like the position under the Rail Protocol and the Space Protocol but in contrast to the Aircraft Protocol, that a floating security structure can give rise to an international interest in mining equipment, agricultural equipment or construction equipment for the purposes of the Convention, including in future property.[78]

---

[77] Businesses can also hold inventories of equipment for rent, rather than on-sale.

[78] The rules in Article V will not apply (and domestic law will apply instead), however, if a Contracting State has opted to apply Article XII(4)-(7), and the debtor is a dealer located in that Contracting State. See section VII(C) below.

C. Criteria for identification of the equipment in a registration

There was a great deal of discussion through the course of 2017, both at the meetings of the Committee of Governmental Experts and in the inter-sessional work that was undertaken in between those meetings, about how to ensure that individual items of equipment would be uniquely identifiable for the purposes of registering interests in them. Unlike the situation that prevails for the other Protocols and in particularly stark contrast to the situation under the Aircraft Protocol, there is an enormous number world-wide of manufacturers of mining, agricultural and construction equipment, and no universally-applicable system of serial numbering that could be relied upon by itself to distinguish between the individual items that they manufacture.[79]

The proposed approach is set out in Article XVII of the draft MAC Protocol. It relies on a combination of identifying factors – one set out in the MAC Protocol itself, and the others to be developed in the regulations that are to be made under the MAC Protocol. Under Article XVII, to be sufficient for the purposes of effecting a registration, the description of the equipment needs to contain:

- its manufacturer's serial number; and
- such additional information as is required to ensure uniqueness, as specified in the regulations.

Whatever additional requirements are ultimately set out in the regulations, it is clear (as is the case for the other Protocols) that registrations will need to be made on an asset-by-asset basis.

While the value of the assets involved under the other Protocols (and particularly the Aircraft Protocol) may be able to justify the administrative burden involved in doing asset-by-asset registrations, this is less likely to be the case for much of the equipment under the draft MAC Protocol. In particular, the bottom end of the range of likely values for the equipment in some of the Harmonised System codes is relatively low.[80] Secured creditors of equipment under the MAC Protocol will need to weigh the cost and administrative effort involved in registering for lower-value equipment against the risk that they expose themselves to if they do not.

Registration of an interest on the International Registry potentially protects the holder of the interest against two classes of competing claimant: buyers and lessees on the one hand, and other holders of a registrable interest on the other. The position vis-à-vis buyers and lessees is discussed in section VII(D) below. As regards other financiers, in assessing the level of risk that a financier of a dealer's inventory exposes itself to if it does not register on the International Registry, the financier will need to consider how likely it is that the dealer will grant security to another financier, and that the other financier will go to the effort of registering. A financier might be prepared to take the view on balance that registration is not worthwhile in the case of equipment of relatively low value, on the basis that if it does not think that it is worthwhile registering, then other financiers are unlikely to bother either. A financier that applied such a risk-based approach might only register for more expensive items of equipment. That, however, is unlikely to be an entirely satisfactory position for the financier.

Registration of an interest on the International Registry also can protect the holder of the interest

[79] This is also something of an issue under the Rail Protocol. See Rory McPhillips and others (n 59) 46, where reference is made to the very large number of manufacturers of railway rolling stock worldwide.

[80] See entries under the heading `Approximate Range of List Prices for New Equipment ($USD)´ in the table contained in UNIDROIT, *Study 72K – CGE2 – Doc. 5* (Spreadsheet Detailing Harmonised System Codes Proposed for Inclusion in the Annexes to the Preliminary Draft MAC Protocol, 2017) <*www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-05-e.pdf*> accessed 18 April 2019.

against the risk that its interest might become ineffective on an insolvency of the debtor.[81] A financier that does not want to register against an item of equipment over which it has security will therefore be exposed to the risk that its security over that item may not be effective if the debtor becomes insolvent, unless the security is protected from the risk by non-Convention law under Article 30(2) of the Convention.

An alternative solution – disapplication of the Convention for dealer-granted securities
The draft MAC Protocol offers another pathway for a Contracting State to address this issue, in Article XII. It says this:

> **Article XII — Provisions relating to inventory**
>
> 1. Notwithstanding Article 29(3)(a) of the Convention, the buyer of inventory from a dealer acquires its interest in it free from any registered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.
> 2. Notwithstanding Article 29(4)(a) of the Convention, the conditional buyer or lessee of inventory of a dealer acquires its interest in or rights over that inventory free from any registered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.
> 3. Paragraphs 4 to 7 apply only where a Contracting State has made a declaration pursuant to Article XXVII(4).
> 4. An interest in inventory created or provided for by an agreement under which the dealer is the debtor is not an international interest if the dealer is situated in a Contracting State referred to in paragraph 3 at the time the interest is created or arises.
> 5. For the purposes of this Article a dealer is situated in a State where it has its place of business or, if it has more than one place of business in different States, its principal place of business.
> 6. Notwithstanding Article 29(3)(b) of the Convention, if a State has made a declaration under paragraph 3, a buyer of inventory from a dealer acquires its interest in it free from any unregistered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.
> 7. Notwithstanding Article 29(4)(b) of the Convention, if a State has made a declaration under paragraph 3, a conditional buyer or lessee of inventory of a dealer acquires its interest in or rights over that inventory free from any unregistered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.

The term 'dealer' is defined in Article I(2)(c) to mean 'a person (including a manufacturer) that sells or leases equipment in the ordinary course of its business'. The term 'inventory' is defined in Article I(2)(j) to mean 'equipment held by a dealer for sale or lease in the ordinary course of its business'.

The first two paragraphs of Article XII deal with the position of a person who buys or leases equipment from a dealer (rather than the relationship between competing secured inventory financiers), and will be discussed in section VII(D) below. The focus in this section is on Articles XII(3) to (7).

[81] Article 30(1) of the Convention.

Article XII(3) provides[82] that a Contracting State may elect, when it ratifies, accepts, approves of or accedes to the MAC Protocol, to apply Articles XII(4) to (7). If a Contracting State makes this election, then Article XII(4) will have the effect that an interest in inventory that is created by a dealer situated in that State will not be an international interest, even if it otherwise complies with Article 7 of the Convention. This will leave matters such as the creation and enforcement of the interest, and the circumstances in which the interest could be defeated by a competing claimant such as a buyer or lessee, to be regulated by the otherwise-applicable law.

This does not mean, however, that the dealer-created interest will be entirely outside the Convention. The dealer-created interest will be an unregistered interest for the purposes of the Convention, and so exposed (for example) to being defeated by an international interest that is granted in the equipment by a later non-dealer owner (for example, if a buyer of the equipment from the dealer takes out secured finance to fund the purchase, and the provider of that finance does register its international interest).[83] It will also be exposed to being defeated by any registrable non-consensual rights or interests, or notices of national interest, that are registered against the equipment, even while the dealer is the owner. This means, on the current drafting of Article XII, that a declaration by a Contracting State under Article XII(3) will not entirely remove dealer-granted security interests from the influence of the Convention.

D. Disposals in the ordinary course of business

Another challenging topic that was discussed at some length at the second of the two meetings of the Committee of Governmental Experts in 2017 relates to the position of a buyer, conditional buyer or lessee of an item of equipment from a dealer – in other words, where the equipment is part of the seller or lessor's inventory.

There is a strong commercial expectation that a person who buys an item from a dealer should be able to acquire clear title to the item, free of any security interests (including registered interests) that the dealer might have granted over it. This commercial expectation is reflected in the manner of operation of the English floating charge, and of the other floating securities described in section II. It is not reflected, however, in Article 29 of the Convention, or in the modifications to Article 29 that are made by any of the first three Protocols.[84]

There was consensus at the second meeting of the Committee of Governmental Experts that the MAC Protocol needed to include provisions that addressed this issue as well. The result is Articles XII(1) and (2) and, if a Contracting State makes a declaration under Article XII(3), Articles XII(6) and (7). However, while the consensus on the need to address this issue was clear, the resulting text itself is less so. This is rather embarrassing for the author of this article, as he was a member of the drafting committee that produced the text, on the evening of the second-last day of the meeting.

The intent behind the drafting was to recognise that some Contracting States may already have well-developed inventory financing practices and legal structures that support those practices, and that the MAC Protocol should make it possible for those practices to continue.[85] This is intended to be achieved by the fact that Articles XII(1), (2), (6) and (7) allow a buyer, conditional buyer or lessee

---

[82] In conjunction with Article XXVII(4).

[83] As the equipment will have been the dealer's inventory, however, the financier to the dealer should accept that the dealer can sell the equipment free of the financier's interest, so this should not be a significant concern.

[84] Again, because the types of objects that are covered by those Protocols are not typically held by dealers as inventory for on-sale.

[85] This is also the reason why Article XII(3) allows a Contracting State to provide via Article XII(4) that a dealer-created interest is not an international interest, so that the Contracting State's non-Convention laws will apply to the interest instead.

to take free of a registered or an unregistered interest 'unless the applicable law provides otherwise'. Where a court is applying the Convention and the MAC Protocol, however, that will be because they are part of the 'applicable law' for the purposes of that court. If that is correct, then it is difficult to see how the applicable law could provide otherwise, as the Convention and the MAC Protocol will prevail over anything that the rest of the applicable law might otherwise have said.

The answer may be that the references to 'applicable law' should be read as references to the applicable 'non-Convention' law. If that is correct, though, then it might help if that were made clearer.

It must be asked, however, whether it will always be desirable to allow a Contracting State's non-Convention law to override the operation of Articles XII(1) and (2) (which are not dependent on the Contracting State making a declaration under Article XII(3). It might be appropriate to allow this where the Contracting State does have a modern and commercially-balanced set of taking-free rules for inventory. That will not always be the case, however. Despite this, the provisions appear to allow their operation to be overridden by a Contracting State's non-Convention taking-free rules, no matter how outmoded those rules may be.

It should also be asked whether Articles XII(6) and (7) are necessary. If the expectation is that a Contracting State will make a declaration under Article XII(3) because it already has well-developed inventory financing rules and wishes to preserve them, then it is perhaps unclear why Article XII needs to provide a partial taking-free rule for buyers, conditional buyers and lessees, particularly as it does so 'unless the applicable law otherwise provides'. If the concern is to avoid the risk that Articles XII(6) and (7) might otherwise cut across the operation of the Contracting State's inventory financing rules, then it might have been better to express it in the positive and say that a buyer, conditional buyer or lessee of inventory from a dealer takes free from any unregistered interest, notwithstanding the Convention, to the extent that the applicable law so provides.[86]

The MAC Protocol is still in draft form, so it is perhaps not necessary to express a concluded view on these questions. Rather (unless there are good explanations for these points that have eluded the author), there may still be an opportunity to clarify the operation of Article XII by amending it at the MAC Diplomatic Conference. This article would recommend, however, that some considered language be prepared in advance of the MAC Diplomatic Conference, to avoid the risk that rushed drafting at the MAC Diplomatic Conference itself might resolve the current uncertainties in the text but at the expense of replacing them with new ones.

E. The outcome, in summary

The text of the draft MAC Protocol pays much greater heed to the needs of inventory financing and the operation of floating security structures than any of the other Protocols. Like the Rail Protocol and the Space Protocol (but in contrast to the Aircraft Protocol), a floating security structure over mining, agricultural and construction equipment is capable of being a security agreement under the Convention, and so can create an international interest in the equipment. Unlike the other Protocols and in recognition of the nature of mining, agricultural and construction equipment and the way in which it is commonly held and sold through distribution chains, the draft MAC Protocol also contains rules that facilitate inventory financing practices, by allowing a Contracting State to opt out of the Convention and instead apply its non-Convention law to security agreements over mining, agricultural and construction equipment that is held by a dealer. In Contracting States that have not opted out so that the Convention and MAC Protocol still apply, however, the holder of a floating security over inventory is still unable to escape the fact that it will need to register its international interest, if it wishes to do so, on an asset-by-asset basis.

[86] This, of course, will still struggle with the point made above about just what is meant by the 'applicable law'.

The MAC Protocol also goes beyond the first three Protocols in the way that it makes it easier for a buyer, conditional buyer or lessee of inventory from a dealer to take the asset free of registered interests granted by the buyer.

The drafting that produces these outcomes is not as clear as it perhaps could be. As the MAC Protocol is still a draft, however, there will be an opportunity to clarify the text before it is adopted at the MAC Diplomatic Conference.

VIII. Conclusions

The order in which the various Protocols under the Convention have been settled over time shows a steady evolution in the extent to which the Convention can accommodate floating security structures.

The Aircraft Protocol simply does not accommodate floating security structures. Its very restrictive rules for the creation of an international interest in an aircraft object have the effect that a floating security structure is not even capable of creating an international interest in an aircraft object for the purposes of the Convention. Its priority rules also make no allowance for the usual expectations of a buyer, conditional buyer or lessee of inventory from a dealer, as they will need to take the asset subject to any registered interests. Given the value of aircraft objects, and the nature of the airline industry and the manner in which aircraft objects are typically bought, sold and financed, however, this does not appear to have been a concern.

The Rail Protocol and Space Protocol are somewhat more accommodating of floating security structures than the Aircraft Protocol. Their more flexible rules for the creation of international interests at least make it possible for a floating security structure to create an international interest in railway rolling stock and space assets. Like the Aircraft Protocol, however, they do not make any concessions to buyers, conditional buyers or lessees of inventory from a dealer. Again, however, the nature of railway rolling stock and space assets, and of the industries that deal in them, may mean that this will not be a significant concern.

It is in the draft MAC Protocol that issues relating to floating security structures and inventory financing practices come to the fore. Some mining, agricultural and construction equipment is likely to be of lower value than objects under the other three Protocols (particularly aircraft objects under the Aircraft Protocol), and mining, agricultural and construction equipment is commonly sold and on-sold through distribution chains before it reaches the end-user. If the MAC Protocol did not recognise these realities and find a way to accommodate them, then it would be less able to deliver on the Convention's objective, as stated in the first Preamble, of 'facilitat[ing] the financing of the acquisition and use of such equipment in an efficient manner'. Indeed, it might even limit the enthusiasm of Contracting States to adopt the MAC Protocol in the first place. For these reasons, in addition to following the Rail Protocol and Space Protocol in the way that makes it possible for a floating security structure to create an international interest in mining, agricultural and construction equipment, the draft MAC Protocol also allows a Contracting State to preserve its existing inventory financing practices by being able to elect that interests created by dealers in the Contracting State over inventory will not be international interests at all, leaving the Contracting State's other laws to apply instead. The draft MAC Protocol also endeavours to preserve the commercial expectation of a buyer, conditional buyer or lessee of inventory from a dealer that it should be able to acquire the asset free of any interests created by the dealer.

In the case of all four Protocols, however, the unavoidable impediment to efficient inventory financing practices and the usual expectations associated with floating security structures is the fact that international interests can only be registered on an asset-by-asset basis. This is not a practical concern under the Aircraft Protocol, particularly as security agreements under the Aircraft Protocol

need to specifically identify the aircraft object as well. Whether this will be an issue under the Rail Protocol and Space Protocol remains to be seen. In the case of the draft MAC Protocol, where issues relating to inventory financing are most relevant, there is no getting around the fact that the holder of a floating security over inventory will need to register its international interest against each individual asset in the pool,[87] if it wants to enjoy the full protection of the Convention.

One possible consequence of this may be to distort the competitive landscape for inventory financiers of mining, agricultural and construction equipment. It is likely to be easier for a vendor to a dealer (or a financing affiliate of the vendor) to make registrations against the serial number and other required identification information for the assets that it sells to the dealer, as it will have that information stored in its data systems and should be able to use those systems to make the registrations without manual intervention. This would enable it to make registrations more efficiently and with greater reliability than will be possible for external financiers, as external financiers would not have the same level of access to this information, and may need to apply less efficient and less risk-free methods of obtaining and then uploading the required information on to the International Registry.

It may be that systems could be put into place to deal with this, and perhaps not too much should be made of it. It should also not distract from the fact that the drafters of the MAC Protocol have gone a long way towards accommodating the needs and expectations of those who provide dealers with inventory finance for mining, agricultural and construction equipment, and those who buy or lease the inventory from those dealers. This is to be commended.

[87] Unless the dealer is in a Contracting State that has made a declaration under Article XII(3) of the MAC Protocol (as currently drafted).