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The priority rules under the Cape Town Convention and Protocols

Roy Goode*

The 2001 Cape Town Convention and associated Protocols relating to aircraft objects, railway rolling stock and space assets are among the most ambitious international instruments ever to have been concluded in the field of commercial transactional law. The Convention and Aircraft Protocol, which together consist of no fewer than 99 Articles, have been widely adopted and more ratifications are in train. Central to the Convention is the International Registry in which international interests, and, in the case of aircraft objects and space assets, sales, can be registered and secure priority over subsequently registered interests and unregistered interests. By the end of 2011, in under six years since it came into operation, the International Registry for aircraft objects in Dublin had processed 313,000 registrations. The priority rules constitute key provisions of the Convention. In this article Roy Goode, who chaired the UNIDROIT Study Group and Drafting Committee and the Drafting Committee at the Diplomatic Conference on the Convention and Aircraft Protocol in Ottawa, and acted as Rapporteur at the Diplomatic Conferences in Luxembourg in 2007 to adopt the Rail Protocol and Berlin in 2012 to adopt the Space Protocol, provides a detailed analysis of the priority rules.

1. Introduction

The general rule in the conflict of laws is that proprietary rights and priority issues are governed by the law of the location of the object (*lex situs*) at the time of the relevant dealing, though in some jurisdictions interests in aircraft are subject to the law of the State of nationality registration (*lex registri*). The *lex situs* rule is singularly ill-adapted to mobile equipment such as aircraft objects, where the validity of the creation of a mortgage may be determined by the temporary presence of the aircraft in one jurisdiction while en route to another, as was held to be the position in the *Blue Sky* case,¹ and even where there is a uniform conflict rule

such as the *lex registri* the substantive content of the applicable law will vary from jurisdiction to jurisdiction, creating uncertainty and legal risk and reducing the availability of finance, increasing its cost and raising the level of premiums for credit insurance.

Only a uniform set of substantive rules governing creation, perfection and priority can resolve these problems. That is what is provided by the Cape Town instruments, which lay down a set of basic default remedies, with speedy relief pending final determination, an International Registry for the registration of international interests, a set of priority rules and a provision for recognition of a registered international interest in the event of the debtor going into insolvency proceedings. The present article focuses on the priority rules of the Cape Town Convention on International Interests in Mobile Equipment (hereafter the ‘Convention’) and the Protocol to the Convention on

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¹ *Blue Sky One Ltd & ors v Mahan Air & anor* [2010] EWHC 631 (Comm) (Beatson J).

International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the 'Aircraft Protocol'). The rules for the other two Protocols are similar except that the Luxembourg Protocol does not cover outright sales, while the Space Protocol has a quasi-priority rule concerning physically linked space assets.²

2. The priority rules: international interests

(a) Introduction

All priority rules provide exceptions to the principle *nemo dat quod non habet*. One might, for example, think that if the owner of an asset sells it to A and then purports to sell the same asset to B the second sale is void because A has nothing to give. But like national legal systems the Convention treats the question as one of priority, not of validity, so that it is perfectly possible for the sale to B to displace A's title, as where B is the first to register.

The priority rules in the Convention and Aircraft Protocol are of four kinds. First, there are rules in Article 29 governing the priority of registered interests, whether international interests or otherwise. These are remarkably simple for an area which in national legal systems tends to be complex. Nevertheless there are some underlying complexities. Secondly, under Article 31 the priority of assignments of associated rights³ related to different international interests is determined by the priority of those interests themselves under Article 29. So the two go together and the order of registration of the assignments is irrelevant. Thirdly, there are rules in Article 35 relating to the priority of competing assignments of associated rights related to the same international interest. These rules are more complex and are discussed separately in Section 3. Under Article 35 the

question of priority of international interests does not arise, there being only one. Instead, the priority rules of Article 29 are applied to the competing assignments themselves. However, Article 36 qualifies the extent of any priority under Article 29. The rules governing the priority of competing interests acquired by subrogation follow those relating to competing assignments. Fourthly, there are provisions relating to certain non-consensual rights or interests the subject of declarations by Contracting States. These are of two kinds: declarations the effect of which will be to give priority to specified non-consensual rights or interests without registration⁴ and declarations by which specified non-consensual rights or interests can be registered as if they were international interests,⁵ so that they will be governed by the ordinary priority rules. Finally, there are provisions governing the priority of competing sales. Such provisions apply priority rules similar to those governing international interests.⁶ Linked to the priority rules are rules in the Aircraft Protocol determining the persons against whom a debtor or buyer is entitled to quiet possession.⁷ For the most part the Aircraft Protocol leaves the Convention priority rules intact. However, Article 29(3) is disapplied⁸ and there is a modification of the rule as to the effect of installation in or removal from an aircraft object of an item which is not an aircraft object.⁹

Fractional interests in an aircraft object – for example, a 20% interest in an airframe or aircraft engine – are not uncommon in the aviation industry and constitute a special case in that among themselves they do not usually fall within the priority rules at all, for the simple reason that they are not in competition with each other.¹⁰

⁴ Article 39. See Section 4(d)(vii) below.

⁵ Article 40.

⁶ Aircraft Protocol, Articles III and XIV.

⁷ Article XVI.

⁸ See Section 2(e)(ii) below.

⁹ See Section 2(d)(v) below.

¹⁰ See Section 2(h) below.

² See Section 2(i) below.

³ That is, rights to payment or other performance under the agreement creating or providing for the international interest (Article 1(c)).

(b) The International Registry

A core feature of the Convention is the International Registry. There will be a separate registry for each of the three categories of equipment. So far only one registry is in existence, for aircraft objects, established and maintained by the registrar, Aviareto Ltd, in Dublin. The International Registry registers not only international interests and prospective international interests but a variety of other interests and transactions affecting interests, including certain non-consensual rights or interests, assignments and prospective assignments of associated rights together with the related international interest, acquisitions of international interests by legal or contractual subrogation and subordinations of interests. The registry system is asset-based, not debtor-based, so that it can only accept registrations of uniquely identified objects. It is wholly electronic, involving no human intervention at the registry end, and except when suspended for maintenance is operational 24 hours day, seven days a week. The Registrar operates under the guidance of a Supervisory Authority, which appoints the Registrar, sets fees and makes the regulations governing the registry. At present there is only one supervisory authority, the Council of the International Civil Aviation Organization (ICAO), which supervises the aircraft registry in Dublin, though under the Luxembourg Protocol a Preparatory Commission currently functions as the provisional Supervisory Authority until such time as the registry for railway rolling stock, which will be based in Luxembourg, becomes operative, and is currently negotiating a contract for the establishment of the International Registry. In most cases registration is the key to priority, hence its importance in the Cape Town scheme.

(c) The basic rule: Article 29(1)

The primary rule, laid down in Article 29(1), is that a registered interest has priority over an interest subsequently registered and over an

unregistered interest.¹¹ ‘Registered’ means registered in the International Registry pursuant to Chapter V of the Convention¹² and ‘registered interest’ means a registered international interest, a non-consensual right or interest registrable and registered under Article 40 or a registered national interest specified in a notice of a national interest.¹³ An unregistered interest is a consensual interest or a non-consensual right or interest falling outside Article 39¹⁴ which has not been registered, whether or not it is registrable.¹⁵

The rule in Article 29(1) is a strong rule. It usually applies to give priority over an unregistered interest even if it is not one capable of registration under the Convention. Examples of non-registrable consensual interests are the interest of an outright buyer (except under the Aircraft Protocol) or of a lessee from a party other than the debtor (a lessee from the debtor can shield behind the priority of his lessor, as discussed below). Non-consensual interests, such as liens given by law over stored or repaired objects to secure charges due to the warehouse or repairer, and attachments under court order, are non-registrable unless covered by a declaration under Article 40 and will be displaced by a registered interest except so far as within the scope of a declaration under Article 39. The interest first registered has priority even if acquired or registered with knowledge of the earlier unregistered interest and even as regards value given with such knowledge.¹⁶ The purpose of this rule is twofold: to avoid transaction costs that would be incurred by pursuing lines of enquiry and to avoid factual disputes as to whether a party did or did not have knowledge. The aim of the rule, as indeed of Article 29 as a whole, is simplicity and predictability of outcomes.

¹¹ The priority of competing assignments of associated rights is discussed below, Section 3(c) below.

¹² Article 1(bb).

¹³ Article 1(cc), (dd).

¹⁴ See Section 2(d)(vii) below.

¹⁵ Article 1(mm).

¹⁶ Article 29(2).

Article 29 applies to assignments of competing international interests but not to competing assignments of the same international interest.¹⁷

(d) Specified exceptions to the basic rule

Most exceptions to the general rule laid down in Article 29 are laid down in the Convention itself. These are set out below. There are also, however, some special cases in which exceptions from the general rule have to be inferred from general principles. These will be dealt with a little later.

(i) Proceeds

An international interest in an object extends to proceeds of that object¹⁸ and any priority given by Article 29 to an interest in an object extends to its proceeds¹⁹ even though an interest in proceeds is not independently registrable. However, proceeds are narrowly defined, being limited to money or non-money proceeds of an object arising from its total or partial loss or physical destruction or its total or partial confiscation, condemnation or requisition. Insurance proceeds are an example. So if successive international interests in an aircraft object which is insured against loss or damage are registered, first, in favour of A and then in favour of B, A has the first claim on the insurance proceeds and B's interest in the insurance proceeds is limited to any surplus remaining after A has been paid out. But in its application to proceeds Article 29(6) is limited to competing claims to proceeds both of which are derived from the object whose loss or compulsory acquisition gave rise to them. So Article 29(6) does not determine priority between the holder of an international interest claiming the proceeds of an insurance claim and a receivables financier who did not have an international interest in the object and claims the proceeds as original

collateral or as proceeds of debts purchased by or charged to the financier.

(ii) Outright buyer

The second exception concerns an outright buyer of an object, who acquires its interest in it free from an unregistered interest even if it has notice of it. The reason for this is not simply that outright sales are not registrable under the Convention (though they are under the Aircraft Protocol) but also that sales are such common transactions that it was considered necessary to give special protection to a buyer who takes before registration of the international interest.

(iii) Conditional buyer or lessee

A somewhat different protection is given to conditional buyers and lessees. They too do not have registrable interests but they can rely on any priority enjoyed by the conditional seller or lessor against a third party claimant. For example, if a lessor grants a lease of an airframe, registers its interest as an international interest and then charges the airframe to a creditor, who registers the charge as an international interest, the lessee takes free from the chargee's interest because the interest of the lessor was registered before that of the chargee. The Aircraft Protocol buttresses this protection by giving the conditional buyer or lessee a right of quiet enjoyment against the chargee.²⁰ The position would be otherwise if the chargee was the first to register.

(iv) Contractual variation

The priority of competing interests or rights under Article 29 may be varied by agreement between the parties.²¹ Inter-creditor priority agreements are common in the financial world and this is reflected in Article 29. Typically a subordination agreement will provide for the subordination of an interest which begins as the senior of the two competing interests but

¹⁷ See Section 3(c) below.

¹⁸ Article 2(5).

¹⁹ Article 29(6).

²⁰ Aircraft Protocol, Article XVI.

²¹ Convention, Article 29(5).

it is also possible to have a variation which subordinates an interest previously ranking *pari passu* with the competing interest. It is not necessary to obtain the debtor's consent to a variation, which concerns only the holders of the parties to it and does not affect the debtor. The subordination agreement does not affect an assignee of the subordinated creditor unless the subordination has been registered in the International Registry at the time of the assignment,²² for if this is not done the assignee is entitled to assume that it is dealing with the senior creditor. Article 29(5) does not deal with the effect of the assignee's knowledge of the subordination agreement but if this had been material Article 29(5) would surely have so provided, and in the light of the general policy of treating knowledge as irrelevant in order to avoid factual disputes as to the existence of knowledge²³ it may be assumed that the intention is that the assignee should not be bound by a subordination agreement even if taking the assignment with knowledge of the agreement. A subordination agreement may be registered even if the interest subordinated by it has not itself been registered, but there will usually be little point in seeking to procure subordination of an interest if that does not start as the senior or equal-ranking interest.

(v) Exclusion of doctrine of accession

Article 29(7)(a) provides that the Convention does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation. Under Article 29(7)(b) the Convention does not prevent the creation of rights in an item, other than an object, which has previously been installed on an object where under the applicable law those rights are created. This provision is designed to make it clear that the Convention does not implicitly embody a doctrine of accession by which, in many legal systems,

ownership of an object which becomes incorporated in a larger object passes to the owner of the principal object.²⁴ So Article 29(7)(a) leaves it to the applicable law to determine whether the installation of an item affects prior rights in it or whether those rights continue to exist. Article 29(7)(b) deals with the case where an item previously installed is then removed from the object. Again, the purpose of this provision is to make it clear that even though in principle accessories form part of the object on which they are installed the Convention is not to be taken to mean that the interest a person has in the installed item as part of the object continues after the removal of the item.

Article 29(7) does not apply to items which are themselves objects governed by the Convention. So in the case of aircraft objects it does not apply to the installation of an aircraft engine, which is treated as a distinct object, not as part of the airframe on which it is installed. Examples of items within Article 29(7) are computers, other equipment and components of various kinds.

Article 29(7) is not strictly a priority rule in itself but it can have priority effects in precluding the holder of a registered international interest from asserting the doctrine of accession to extinguish another creditor's rights in the installed item or to preclude that other creditor from granting new rights after the installed item has been removed. Article 29(7) is replicated in Article XIV(4) of the Aircraft Protocol. However, it does not apply to installed or removed aircraft engines, for these are not mere items but distinct Convention objects that do not form part of the airframe on which they are installed, interests in them being separately registrable. Article XIV(3), unlike Article XIV(4), does not leave ownership or other rights in installed engines to be dealt with by the applicable law; it lays down a positive rule that such rights are not affected

²² Article 29(5).

²³ See Article 29(2), (3).

²⁴ It may be noted that in Article I(2) of the Aircraft Protocol 'aircraft engines', 'airframes' and 'helicopters' are all defined as including all installed, incorporated or attached accessories, parts and equipment.

by the aircraft engine's installation or removal from the airframe.

(vi) International interest following registration of a prospective international interest

The priority of international interests which come into existence after the registration of a prospective international interest departs from the normal rule only in the sense that the international interest itself is never actually registered, it is merely treated as registered as from the time of registration of the prospective international interest.²⁵

(vii) Non-consensual right or interest covered by Article 39

Where a Contracting State makes a declaration under Article 39 declaring that non-consensual rights or interests which under its law have priority over an interest equivalent to an international interest are to have priority over registered international interests the priority ordinarily given to a registered international interest does not apply. In many national legal systems, lien creditors exercising repairers' liens or warehouse liens over objects in their possession have priority even over a perfected security interest. The policy reason is that they are adding value to or preserving the collateral and it would be unfair to allow the secured creditor to benefit from this without payment. So most declarations under Article 39 relate to such liens, while others also include liens in favour of employees for unpaid wages, either generally or for wages due to airline employees. Though Article 39 refers only to the priority of declared non-consensual rights or interests over *registered* international interests it must follow *a fortiori* that the non-consensual rights or interests also have priority over *unregistered* interests as well.

(viii) Registered non-consensual rights or interests

Non-consensual rights or interests registered

²⁵ Article 19(4).

pursuant to Article 40 are not international interests at all, but for priority purposes they are treated as if they were registered international interests.

(ix) Pre-existing rights or interests

In general the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of the Convention.²⁶ A pre-existing right or interest is a right or interest of any kind in or over an object created or arising before the effective date of the Convention,²⁷ which for this purpose means in relation to a debtor the date when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later.²⁸

(x) Special case: debtor cannot trump own creditor

A debtor cannot use Article 29(1) to trump his own creditor. So if A grants a lease to L who in turn sub-leases to SL, L cannot, by registering his interest as sub-lessor before A registers his own interest as head lessor, jump ahead of A. This exception is not to be found in the text of the Convention. It follows from the general legal principle that a person cannot act inconsistently with the obligations he has undertaken to another to the detriment of that other. To

²⁶ Article 60(1).

²⁷ Article 1(v).

²⁸ Article 60(2)(a). For the difficulties with this provision see Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (revised edn, UNIDROIT 2008), paras 4.343–4.354. When the Luxembourg Protocol was under discussion these difficulties were felt to be sufficiently significant to justify departure from the general policy of avoiding pure drafting improvements in subsequent Protocols, so that Article XXVI of the Luxembourg Protocol amends Article 60 of the Convention. However, the *Official Commentary on the Luxembourg Protocol* (revised edn, UNIDROIT 2008) paras 2.172, 5.80 makes it clear that these amendments are designed purely to make explicit what was previously implicit and not alter the substantive effect of Article 60 as set out in the Convention.

give L priority over his own creditor, A, would be inconsistent with L's obligations to A and a denial of A's title.

(e) *Extension of the priority rules to outright sales*

(i) *Adoption of the Convention priority rules*

Article III of the Aircraft Protocol and Article IV of the Space Protocol extend the registration and priority rules of the Convention to outright sales. Sales are outside the scope of the Convention and do not constitute international interests. Nevertheless Article 41 of the Convention provides for extension of the Convention to sales as provided for in the Protocol with any modifications therein, and the above Protocols implement that extension. The two sets of provisions follow the same pattern, so only those of the Aircraft Protocol will be discussed. The Luxembourg Protocol does not apply the Convention to sales. Instead it provides for registration of notices of sale, which however, is for information purposes only and has no effect under the Convention or Protocol,²⁹ its purpose being to serve as notice with a view to giving or preserving priority under national law.

Article XIV(1) of the Aircraft Protocol provides the same priority rule for competing sales *by the same seller* as does Article 29(1) of the Convention for competing international interests.³⁰

²⁹ Luxembourg Protocol, Article XVII.

³⁰ However, the astute reader will have observed that Article XIV(2), which is designed to be the converse of Article XIV(1), does not quite match it because instead of referring to the time of the second buyer's *registration* it refers to the time of its *acquisition*. In the ordinary way this would not matter, because a buyer cannot register a purchase until it has been made, but what the text does not allow for on a literal reading is the registration of a prospective sale with retrospective effect upon crystallising into a sale (Article 18(3)), an effect which on a strict construction Article XIV(2) overrides. But Article XIV(2) has to be construed to be consistent with Article XIV(1), which applies the order of registration, and should therefore be interpreted as if it read: 'A buyer of an aircraft object under a registered sale

The effect is that if S sells an aircraft engine to B1, who registers the sale in the International Registry, and S then sells the same engine to B2, B1 retains its interest free from that of B2. Suppose that B1 had failed to register its purchase and B2 registered its own purchase. B2 now has priority even if acquiring the engine with knowledge of the unregistered sale to B1. However, successive sales do not raise a priority issue at all unless made by the same seller. For example, S sells an aircraft object to A and then wrongfully makes a second sale, to B. Priority goes to the first buyer to register its purchase. By contrast, in a chain of sales S→B1→B2→B3 there is no priority issue as the buyers are not in competition with each other, so that Article 29 does not apply. The position is simply that each buyer in the chain succeeds to the rights of its predecessor. Assuming that the sales are registered, each registration is independent of the others and because the International Registry is not a title registry nothing turns on the order of registrations. However, if registrations follow the order of sales it will be apparent that it is the *last* registration that will indicate the current holder. If we exclude the case of sales by different sellers in succession, Article 29(1) applies to give a registered sale priority over (a) a second sale by the same seller, (b) a subsequently registered or unregistered international interest, (c) a registrable but subsequently registered or unregistered non-consensual right or interest; (d) a non-registrable non-consensual right or interest not protected by a declaration by a Contracting State under Article 39; (e) any other interest which is not registrable; and (f) a national interest notice of which is registered after the registration of the sale or is not registered.

acquires its interest in the object subject to an interest previously registered.' See Official Commentary, Goode (n 28) para 5.72.

(ii) *Disapplication of Article 29(3)*

Article III of the Aircraft Protocol disapplies Article 29(3) of the Convention³¹ for the simple reason that the outright buyer of an aircraft object can protect its interest by registration, so there is no need for the special rule provided by Article 29(3) and priorities are determined as stated above. Article XIV of the Protocol follows Article 29(2) of the Convention in making it clear that B2's knowledge of B1's prior interest does not affect B2's priority. There are two provisions under which a buyer acquires priority without the need to register. Where the creditor exercises a power of sale under Article 8(1)(b) or under Article 13(1)(d) as added by Article X(3) of the Aircraft Protocol ownership or any other interest of the debtor passes to the buyer free from any other interest over which the creditor's international interest has priority under Article 29 of the Convention.³²

(f) *Installed and removed engines*

While Article XIV(4) applies Article 29(7) of the Convention³³ to an item, other than an object, installed on an airframe, aircraft engine or helicopter, Article XIV(3) applies a different rule to aircraft engines. An aircraft engine is not a mere 'item' but an 'object' and as such is the subject of independent treatment and is separately registrable. Article XIV(3) does not leave the effect of installation or removal of an aircraft engine to be dealt with by the applicable law; instead it provides that ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft. This is consistent with the treatment of airframes and aircraft engines

as distinct objects in the Convention and the Aircraft Protocol. It is not possible to take an international interest in an aircraft as such unless it is a helicopter, only in an airframe or aircraft engine. Accordingly, though the definition of an airframe in Article I(2)(e) of the Protocol includes accessories it does not include aircraft engines, which even without Article XIV(3) would retain their distinct identity, so that an international interest in them would not be affected by their installation or removal.

Helicopters represent the exceptional case, because an installed engine is treated as part of the helicopter itself, with the result that an international interest cannot be taken over a helicopter engine while so installed, because it is not an aircraft object at all.³⁴ The solution for the financier is to register not only an international interest in the helicopter but a prospective international interest in the helicopter engine which will crystallise into an actual international interest the moment the engine is removed, registration of the international interest being retrospective under Article 18(3). On the other hand, prior to its installation a helicopter engine is an aircraft object, not a mere item such as a component, so that if an international interest is taken in an aircraft engine prior to its installation on a helicopter Article XIV(3) ensures that such installation does not affect the creditor's rights.

(g) *The need for dual registration: no cross-over protection*

A person may have a registrable interest in an aircraft object in two different capacities. For example B buys an aircraft engine from S and leases it to L. B can register both its interest under the sale and an international interest arising from the grant of the lease. Again, if a lessee under a leasing agreement containing an option to purchase grants a sub-lease it can

³¹ Article 29(3) provides that '[T]he buyer of an object acquires its interest in it: (a) subject to an interest registered at the time of its acquisition of that interest; and (b) free from an unregistered interest even if it has actual knowledge of such an interest.'

³² Convention, Article 10(5); Aircraft Protocol, Article X(4).

³³ See Section 2(d)(5) above.

³⁴ This view is not accepted by all representatives of the aviation industry but the arguments in favour of it are overwhelming. See the Official Commentary, Goode (n 28) paras 3.8, 3.10, 5.3–5.5.

register both a prospective sale and an international interest as sub-lessor. In such cases there need to be two registrations, one of the sale, the other of the international interest. In the first example, registration of the sale will protect B against a wrongful double sale by S but not against a wrongful sale by L to T. It is true that under Article XIV(2) a buyer's registered interest is overridden by a previously registered interest, which might suggest that T is bound by B's registered interest but that is not the case. Article XIV(2) is concerned with cases where the registered interest is a Protocol interest, ie a sale, not an international interest arising under the Convention the purpose of the registration being to protect B against a wrongful second sale by S. So B's registration of the sale in order to protect itself against a subsequent sale by S does not dispense with the need for B to protect its separate international interest arising from the lease by registering the international interest so as to bind T as a purchaser from L. Registration of the sale protects B only *as buyer*; registration of the leasing agreement as an international interest is needed to protect B *as lessor*. The two interests are quite distinct.

Conversely, the purpose of registration of an international interest is to protect the creditor from a wrongful disposition by the debtor. So B's registration of its international interest, though protecting B in its capacity of creditor, does not protect it against a subsequent wrongful sale by S to B2, which requires registration of the sale to B. In short, the two interests to be protected are distinct, the purposes of registration are different and each has to be registered in accordance with the rules applicable to it. Thus, there can be no 'cross-over' protection.

(h) Fractional interests

As stated earlier, it is not uncommon in the aviation industry for a buyer to take a fractional interest in an aircraft object, for example, a 20% interest, and for that interest to be given in security as an international interest. Fractional interests are not expressly dealt with by the Convention and initially the International

Registry was not geared up to accept them but as the technology developed they became registrable as separate international interests. So if an aircraft object is sold as to 40% to A, 20% to B and 30% to C three sales are registrable in the International Registry. Similarly each purchase of a fractional interest may be financed by a different creditor which takes security over that fractional interest, and each security constitutes a distinct international interest and is registrable as such. Fractional interests normally fall outside the priority rules in Article 29 because they are not in competition with each other. If, however, sellers sell or debtors charge by way of security fractional interests exceeding 100% of an aircraft object a priority issue arises and is determined by the order of registration.

(i) Physically linked assets

A provision unique to the Space Protocol is that dealing with physically linked assets. Article XVII(3) of the Protocol provides that, unless otherwise agreed, a creditor may not enforce an international interest in a space asset that is physically linked with another space asset so as to impair or interfere with the operation of the other space asset if an international interest has been registered with respect to the other space asset prior to the registration of the international interest being enforced. This is not strictly a priority rule since the two international interests relate to different assets. Nevertheless the underlying idea is similar. If the international interest in the physically linked space asset against which enforcement is sought was the first to be registered the enforcing creditor cannot proceed against the space asset in which he has an international interest if this would impair or interfere with the operation of the other space asset, for example by disabling a bank of transponders so as to interfere with the operation of other transponders. This restriction does not apply to an enforcing creditor who registers its international interest first, but that does not necessarily render the creditor immune from action under the applicable law.

3. The Priority Rules: associated rights

(a) *The nature of associated rights*

Chapter IX of the Convention is devoted to the assignment of associated rights, that is, all rights to payment or other performance by a debtor under an agreement³⁵ which are secured by or associated with the agreement. Associated rights are 'secured by' a security agreement or 'associated with' a title reservation or leasing agreement. The concept of associated rights is limited by three factors. First, associated rights are confined to rights to performance of obligations due from the debtor. Obligations due from third parties do not fall within the definition unless the debtor itself has undertaken in the agreement to procure their performance. Second, it is only performance due from the debtor 'under the agreement' that is relevant. Rights to performance by the debtor under other contracts do not qualify unless in the agreement itself the debtor undertakes to perform its obligations under the other contracts, whether these are individually specified or are referred to in generic terms. Where the debtor does agree to perform obligations under other contracts then subject to the third requirement the rights to performance under those contracts also become associated rights under the agreement. So if the debtor enters into a loan agreement and a separate security agreement which secures performance under the loan agreement, the rights to such performance constitute associated rights. Third, the performance must be secured on or associated with the agreement. So in the case of a security agreement the relevant obligations are those covered by the security. Other obligations which are unsecured do not count. In the case of a title reservation agreement all obligations the performance of which is necessary for the transfer of title to the debtor qualify. These will obviously include the price and typically other obligations, such as insurance, repair, indemnity

³⁵ That is, a security agreement, a title reservation agreement or a leasing agreement (Article 1(a)).

ties of different kinds and the observance of negative obligations, such as prohibition on sale or the grant of a security interest in the object.

Associated rights are of two kinds: those that are related to the financing or leasing of an object as described in Article 36(2) (hereafter referred to as 'object-related rights') and those that are not. As will be seen, the distinction is of importance in that any priority under Article 35 is limited to object-related rights.

(b) *Assignment of associated rights*

It is unfortunate that in the drafting of Chapter IX conceptual purity was allowed to obscure the true focus of the Convention, which is the registration and assignment of international interests in physical assets. The original draft provided that the transfer of an international interest would carry with it the associated rights. In the view of the writer, who as Chairman of the Drafting Committee was heavily involved in the drafting, this was the correct approach, because associated rights, being intangible, are not in themselves susceptible to registration, nor can an assignment of associated rights be registered. However, the diplomatic Conference succumbed to the argument that in legal theory a security interest is an accessory right and therefore follows the destination of the contract creating the secured obligations, not the other way round. As a matter of doctrine this cannot be faulted, but its application in the context of the Convention led to drafting complications, for the priority of competing assignments then had to be framed not along traditional lines (first to give notice of assignment to the debtor, or first to register, in a legal system providing for registration) but according to the priority of the assignment of the international interest to which the associated rights were related. In consequence, for the provisions to operate at all the assignment of associated rights can be effected only as part of the assignment of the related international interest. So Article 31 provides that except as otherwise agreed by the parties the assignment of associated rights transfers the related inter-

national interest and all the priorities of the assignor under the Convention; and where the assignment of associated rights is not effective to transfer the related international interest, eg because the parties have agreed that it should not be, the Convention does not apply to the assignment at all,³⁶ the reason being that associated rights are not in themselves capable of registration. As a corollary, an assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights also are assigned.³⁷ This is, of course, because the function of a security agreement is to secure payment or other performance, and if none of the associated rights secured are assigned the security agreement is not securing anything.

(c) Priority of competing assignments

It follows from what has been said before that what the Convention is really doing is laying down rules for the priority of competing assignments of international interests, from which flows the priority of competing assignments of associated rights. That is why it would have been better to ignore traditional doctrine and to provide that the assignment of the international interest carries with it the assignment of associated rights, rather than the other way round.

The rules on the priority of competing assignments of associated rights are rather more complex than those governing the assignment of the related international interest. In the first place it is necessary to distinguish the position of assignees of associated rights related to different international interests from that of competing assignees of the same international interest. Article 31 deals with the former and in essence applies the priority rules of Article 29 to the competing international interests, on the basis that the competing assignees stand in the shoes of their assignors as described below, while Articles 35 and 36 deal with the latter

and are concerned not with the priorities of the assigned international interests but with those of the assignments themselves, where the priority is based on the order of registration of the assignments, not of the assigned international interests. Secondly, the priority given by Article 35 is heavily qualified by Article 36.

(i) Assignments of different international interests and associated rights

The rules here are relatively simple. Where there are competing international interests the assignee of associated rights succeeds to the priority of its assignor.³⁸ What is relevant is the order of registration of the assigned international interests, not of the assignments themselves. Whether the assignments are registered, and if so the order of registration, is irrelevant because the assignments relate to different associated rights linked to different international interests and are therefore not in competition with each other at all. So if international interests granted successively to A and B are registered in that order, A and B assign their respective interests and associated rights to C and D and D's assignment is registered first, C nevertheless has priority because it succeeds to the priority of A, while D succeeds to B's junior international interest. The two assignments do not relate to the same international interest and therefore do not attract an independent priority rule governing competing assignments of associated rights; their status stems entirely from the priority of the international interests to which they are related.

(ii) Competing assignments of the same associated rights

The position discussed here is the very different one in which there is a single international interest and either that interest, with its associated rights, is assigned first to A and then to B or it is assigned to A alone while the assignment to B is only of the associated rights.

³⁶ Article 32(3).

³⁷ Article 32(2).

³⁸ Article 31(1)(b).

In this case the priority issue is not between competing international interests but between competing assignments of associated rights. This priority is governed not by Article 31 but by Article 35. The starting position under Article 35 is that the references in Article 29 to a registered interest are to be applied as if they were references to a registered assignment. So a registered assignment has priority over a subsequently registered assignment or an unregistered assignment.

In order for Article 35 to apply at least one of the assignments must include the international interest (for otherwise there would be nothing against which to effect a registration), the associated rights passing under that assignment must retain their linkage with the international interest³⁹ and at least one of the assignments of the international interest must be registered (because Article 29(1) does not regulate priorities between competing unregistered interests, this being left to the applicable law).

Article 36 contains two qualifications to the general priority rule. First, it is necessary for the contract under which the associated rights arise to state that they are secured by or associated with the object. This is to deal with the situation where the security agreement secures not only the obligations for which it provides but the obligations under a later agreement which does not refer to the security, so that an assignee of associated rights under the later agreement has no way of knowing that those obligations are secured. In such a case it would be unfair to expose the assignee to the Convention's priority rules. Second, the priority of the first assignment to be registered is given only to the extent that the associated rights are

object-related as provided by Article 36(2). This broadly covers obligations for the repayment of purchase-money loans,⁴⁰ and the payment of the price and rentals of objects, together with all ancillary obligations under the financing transaction documents, such as contract and default charges and interest, funding break-age costs, enforcement costs, and the like. In all other cases priority is determined by the applicable law.⁴¹

(iii) Pre-existing rights or interests

As mentioned above, pre-existing rights or interests fall outside the Convention except so far as covered by a declaration under Article 60(3). It follows that, with the same exception, the Convention does not apply to the assignment of pre-existing rights or interests.

4. Modes of transfer other than assignment

(a) Subrogation

The Convention contains various provisions relating to the acquisition of interests and rights by subrogation under the applicable law. Typical cases of subrogation under national law are where a surety discharges the debt and becomes subrogated to the creditor's rights or where an insurer meets a claim for loss or damage caused to its insured by a third party and becomes subrogated to the insured's rights against a third party. So Article 16(1)(c) provides for the registration of the acquisition of international interests by legal or contractual subrogation under the applicable law, while Article 38(1) provides that nothing in the Convention affects the acquisition of associ-

³⁹ See the Official Commentary, Goode (n 28) para 4.246. It is not necessary that the international interest should itself be registered in order to become the subject of a registered assignment, but the assignee will be displaced by the holder of a subsequent international interest who registers, and thus obtains priority over the unregistered interest, by the assignee of such a holder and by the debtor's bankruptcy creditors unless the applicable bankruptcy law treats the unregistered interest as effective (see Article 30(2)).

⁴⁰ Whether of the same object or of another object in which the assignor held another international interest if the assignor transferred that interest to the assignee and the assignment has been registered (Article 36(2)(b)). This is designed to cover cross-collateralisation. See Official Commentary, Goode (n 28) para 4.253.

⁴¹ Article 36(3).

ated rights and the related international interest by legal or contractual subrogation under the applicable law.

The priority rules here follow those relating to assignments. As with assignments, a competing interest can arise in one of two ways. The first is where there are two subrogees whose subrogatory rights relate to *different* international interests. So it is the international interests, not the subrogatory rights as such, that are in competition with each other. In this case each subrogee stands in the shoes of the original holder of the international interest to whom it has become subrogated and will succeed to any priority enjoyed by that international interest over the competing interest, irrespective whether the acquisition by subrogation is registered. So it is necessary to see whether under Article 29(1) the international interest has priority over the competing interest. For example, if international interests granted to A and B are registered in that order, S1 and S2 become subrogated to A and B respectively and S2 is the first to register its acquisition of the international interest by subrogation, S1 nevertheless has priority because it is subrogated to the interest of the senior creditor, A. Again, if an international interest is held by X, B buys the equipment before X has registered its international interest and S becomes subrogated to X, B takes free of the international interest, so that S acquires no interest in the equipment. A second possibility is that the subrogee is in competition with another subrogee in respect of *the same* international interest. In this case the competition is not between international interests but between rights of subrogation and priority goes to the first subrogee to have its acquisition registered. This is not expressly provided by the Convention but must follow from the general principle that the order of registration determines priorities. The parties can vary the priority of any such subrogatory interest and a competing interest by an agreement in writing but this will not bind an assignee of the junior interest unless at the time of the assign-

ment the subordination had been registered.⁴² The priority is in any event qualified by Article 36.

In short, the priority rules governing rights acquired by subrogation follow those applicable to assignments.

There is one right of subrogation given by the Convention itself. Article 9(4) provides that where, after default by the debtor and before sale of a charged object or its vesting in the creditor, an interested person other than the debtor⁴³ discharges the debt in full that person becomes subrogated to the creditor's rights. There seems no reason why, in a Contracting State, the right of subrogation given by Article 9(4) should not be considered to be given by the applicable law and be registrable accordingly.

(b) Assignment by operation of law

The Convention provisions on assignment are confined to contractual assignments and do not apply to transfers taking effect by operation of law, for example, transfers under statutory provisions or on a statutory merger of two corporations.

5. Effect of debtor's insolvency

The courts of a Contracting State are obliged to recognise the effectiveness of an international interest registered before the commencement of insolvency proceedings against the debtor,⁴⁴ though this does not impair the effectiveness of an unregistered interest where that interest is effective under the applicable law.⁴⁵ The near-universal conflicts rule is that the acquisition of

⁴² Article 38(2), which corresponds to Article 29(5) governing the variation of priorities of international interests.

⁴³ That is, a surety, an issuer of a demand guarantee or standby letter of credit or other form of credit insurance or any other person having rights in or over the object (Article 1(m)(ii), (iii)).

⁴⁴ Article 30(1).

⁴⁵ Article 30(2).

an interest in an object is governed by the *lex situs* of the object at the time of the relevant dealing. Where under that law the creditor's interest has been duly perfected the insolvency courts of a Contracting State are obliged to treat the interest as perfected for the purpose of the insolvency proceedings even though the interest has not been registered in the International Registry. There are two qualifications. First, nothing in Article 30 affects any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors.⁴⁶ But only those grounds of avoidance can be invoked in a Contracting State. For example, the fact that the international interest was not registered in the domestic registry prescribed by that State's law and would ordinarily be void on that ground is not a legitimate ground for refusing to recognise the effectiveness of the international interest. Similarly the priority rules applicable under the Convention cannot be displaced by a rule of the *lex concursus* subordinating the registered international interest to the claims of preferential creditors, eg for taxes or unpaid wages. Secondly, nothing in Article 30 affects any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.⁴⁷ So it remains open to the insolvency court to suspend or restrict the enforcement of a security interest or the institution of other proceedings against the debtor pursuant to an insolvency regime such as a UK administration or a US Chapter 11 in collective proceedings designed to facilitate a rescue of the debtor or a scheme of arrangement with creditors or to place the debtor in a better position than would result from an immediate liquidation. But in a Contracting State which ratifies the Aircraft Protocol and makes a declaration adopting Alternative A of Article XI⁴⁸ the provisions of Article 30(3)(b) are displaced.

⁴⁶ Article 30(3)(a).

⁴⁷ Article 30(3)(b).

⁴⁸ Which gives the creditor the right to recover the aircraft object without judicial interference if the insol-

6. Conclusions

The rules governing the priority of competing interests at least one of which is registrable in the International Registry are remarkably simple, being contained in a single Article of the Convention, Article 29. Equally simple are the rules governing a competition between assignments of associated rights arising under different international interests, because these follow the priority of the international interests to which they relate and thus apply Article 29. More complex are the provisions relating to competing assignments of associated rights arising under the same international interest, for these are hedged with rather intricate conditions and qualifications. Nevertheless they stand up surprisingly well to rigorous analysis. No doubt problems will arise which have not been foreseen but these are for the future. The key point is that the Convention and Protocols are concerned with security and quasi-security interests in, and sales of, physical, uniquely identifiable assets, and with rights to payment or other performance linked to registered international interests and sales, not with general receivables financing. For that there is a separate convention, the 2001 United Nations Convention on the financing of receivables in international trade, which was concluded soon after the Cape Town Convention, though so far it has secured only a single ratification.

If those who initiated the Cape Town Convention had realised the ambitious character of the project at the outset it is doubtful if they would have had the courage to embark upon it. As it is, the Convention and Aircraft Protocol, trenching on areas previously considered taboo and devising a range of innovative instruments and techniques, have proved a resounding success, to which the priority rules have made a major contribution. ■

_____ vency administrator fails within the declared waiting period to cure all default and to undertake to perform the debtor's future obligations.