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**DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE  
DRAFT PROTOCOL TO THE CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE  
EQUIPMENT ON MATTERS SPECIFIC TO  
SPACE ASSETS**

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## **CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND DRAFT PROTOCOL THERETO ON MATTERS SPECIFIC TO SPACE ASSETS:**

### **EXPLANATORY NOTE**

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### **AN OVERVIEW OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT**

#### **Introduction**

1. The Convention on International Interests in Mobile Equipment (hereinafter referred to as the "Convention")<sup>1</sup> and the Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the "Aircraft Protocol") were concluded in Cape Town on 16 November 2001. The Convention covers three forms of mobile equipment: aircraft objects (airframes, aircraft engines and helicopters); railway rolling stock; and space assets. The Convention contains detailed provisions applicable to all three categories of mobile equipment. Equipment-specific Protocols supplement and modify the Convention to meet the particular needs of the industry sector concerned. Though it is possible to ratify the Convention alone, most of its provisions do not come into force as regards a category of mobile equipment until the Protocol covering that category has come into force. The Convention and Aircraft Protocol entered into force on 1 March 2006. The Protocol to the Convention on Matters specific to Railway Rolling Stock (hereinafter referred to as the "Luxembourg Protocol") was concluded in Luxembourg on 23 February 2007 but is not yet in force. The purpose of the diplomatic Conference to be hosted by the Federal Republic of Germany in Berlin from 27 February to 9 March 2012 is to examine the text of the draft Protocol to the Convention on Matters specific to Space Assets (hereinafter referred to as the "draft Space Protocol") established by a UNIDROIT Committee of governmental experts with a view to concluding that Protocol. This Explanatory note sets out key features of the Convention and the draft Space Protocol.

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<sup>1</sup> The text of the Convention is reproduced in the Appendix to this Explanatory note.

2. To date the Convention has secured 46 ratifications, including adoption by the European Union, and the Aircraft Protocol 40 ratifications, including adoption by the European Union. In the preparation of the Luxembourg Protocol the policy decision was taken to follow the Aircraft Protocol as closely as possible in the interests of consistency and only to deviate from it where required by considerations particular to the rail industry or, in a few cases, to make explicit what was only implicit in the Aircraft Protocol. A similar approach has been adopted in work on the draft Space Protocol.

3. The principal objective of the Convention and its Protocols is the efficient financing of mobile equipment. Such financing will assist in the development of cost-effective modes of transport and space assets utilising modern technologies. The Convention system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for mobile equipment that has previously been unavailable or available only at relatively high cost. A sound, internationally adopted legal regimen for security, title reservation and leasing interests will encourage the provision of finance and reduce its cost. This has already been amply demonstrated in the case of aircraft objects.

4. Traditional conflict of laws rules apply the *lex rei sitae* as the law governing proprietary rights, but such a principle is unsuited to items of mobile equipment which are constantly moving from one country to another or, in the case of space assets, are not on earth at all. Different legal systems adopt differing approaches to the determination of the applicable law in this situation. Moreover, even if it were possible to devise a uniform conflicts rule, this would not overcome the disadvantage of dependence on national laws, which vary widely from one country to another and which in some jurisdictions are highly supportive of security interests while in others they are more hostile or restrictive. This may discourage potential financiers from extending credit or may lead to substantially increased credit costs.

5. Space assets are distinctive in that there is no law of any kind, national or international, governing dealings with objects in outer space. Hence for these assets there is an even stronger need for an international set of rules governing security, title reservation and leasing interests in such equipment which will provide creditors with the necessary safeguards, while at the same time incorporating measures for the protection of debtors.

### **Forms of financing covered**

6. The financing of mobile equipment covered by the Convention takes three principal forms: a loan secured by a security interest in the object; a sale under an agreement (title reservation agreement) in which the seller reserves ownership until payment in full; and a lease, which may be either a finance lease or an operating lease and may or may not include an option to purchase. These financing instruments need to be underpinned by a sound legal regimen if they are to function efficiently so as to induce the assumption of risk and the release of funds by the private sector. The huge outlays involved in the financing of objects of the kinds covered by the Convention make it essential for the creditor (the financier, seller or lessor) to be able to have confidence that, if the debtor defaults in payment or other performance, the relevant legal regimen will respect the creditor's contractual and proprietary rights and provide the creditor with efficient and effective means to enforce those rights and to secure priority for its international interest.

7. The Convention and its supporting Protocols are designed to fulfil five key objectives:

- to facilitate the acquisition and financing of economically important items of mobile equipment by providing for the creation of an international interest which will be recognised in all Contracting States;

- to provide the creditor with a range of basic default and insolvency-related remedies and, where there is evidence of default, a means of obtaining speedy interim relief pending final determination of its claim on the merits;
- to establish an electronic international registry for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and the debtor's insolvency administrator;
- to ensure through the relevant Protocol that the particular needs of the industry sector concerned are met;
- by these means to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

8. Detailed though they are, the Convention and the Protocol have very specific objectives and do not seek to cover the whole field of asset-based secured financing, much of which will continue to be governed by national laws and the agreement of the parties. Moreover, the Convention itself allows considerable scope for party agreement on a range of issues, including default remedies and jurisdiction.

#### **Sources of regulation**

9. There are four sources of regulation: the Convention, the relevant Protocol, and the Regulations and Procedures to be made by the Supervisory Authority governing the International Registry

#### **The two-instrument approach and the relationship between the Convention and the Protocol**

10. As stated above, the Convention is not equipment-specific. Its provisions will in principle apply equally to any of the three categories of mobile equipment to which it relates. However, the Convention does not come into force as regards any category of equipment until a Protocol has been made relating to that equipment and takes effect subject to the terms of that Protocol, so that in the case of any inconsistency it is the Protocol that prevails. This two-instrument approach was seen to have a number of advantages. It results in a uniform set of rules for those provisions of the Convention that do not attract equipment-specific considerations, instead of having separate, stand-alone Conventions for each class of equipment. This avoids duplication and inconsistency between the non-equipment-specific provisions of one Convention and those of another, and allows a uniform interpretation of such provisions, regardless of the type of equipment involved. The two-instrument approach also avoids cluttering up the text of the Convention with detailed equipment-specific rules, and provides a convenient mechanism for modifying the Convention provisions by the Protocol to meet the particular needs of the industry sector involved. It has also enabled work on the different Protocols to proceed at different speeds.

#### **Underlying principles**

11. The Convention and Protocols are governed by five underlying principles:

- *Practicality* in reflecting the salient factors characteristic of asset-based financing and leasing transactions

- *Party autonomy* in contractual relationships, reflecting the fact that parties to a high-value cross-border transaction in equipment of the kind covered by the Convention will be knowledgeable and experienced in such transactions and expertly represented, so that in general their agreements should be respected and enforced
- *Predictability* in the application of the Convention, a feature which is specifically mentioned in the interpretation provisions of Article 5(1) and is reflected in the concise and clear priority rules, which give pre-eminence to certainty and simplicity and a rule-based rather than standards-based approach
- *Transparency* through rules which provide for registration of an international interest in order to give notice of it to third parties and which subordinate unregistered international interests to registered international interests and to the rights of purchasers
- *Sensitivity* to national legal cultures in allowing a Contracting State to weigh economic benefits against established rules of national law to which it attaches importance, and to make declarations (a) to exclude, wholly or in part, select provisions of the Convention it considers incompatible with such principles (for example, the exercise of certain interim remedies) or (b) to opt into select provisions which it considers will reinforce those principles (for example, the preservation of rights of arrest or detention of an object for payment for services in respect of that object).

## Definitions

12. Article 1 of the Convention contains a long list of definitions, and these are supplemented by definitions in the draft Space Protocol. It is important to keep these in mind at all times when reading the Convention and the draft Space Protocol, because ordinary words are sometimes given a special meaning, such as “agreement,” “creditor” and “debtor,” while a number of phrases have been specially coined for the two instruments, such as “associated rights”, “debtor’s rights”, “internal transaction”, “national interest”, and “non-consensual right or interest”, and therefore can be understood only by reference to their respective definitions.

## Sphere of application

13. The Convention provides for protection of five different categories of interest:

(a) *International interests*, that is interests granted by the chargor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement,<sup>2</sup> other than interests arising under an internal transaction in respect of which a State has made a declaration excluding the application of certain aspects of the Convention (see (c) below). The international interest is the primary category of interest with which the Convention and the relevant Protocol are concerned.

(b) *Prospective international interests*, that is interests intended to be taken over identifiable equipment as international interests in the future but which have not yet become international interests, for example, in the case of a security agreement, because the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an

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<sup>2</sup> For brevity the term “security agreement” is hereinafter used to include a title reservation agreement and a leasing agreement.

interest in the equipment to be charged. A prospective international interest may be registered as such in the International Registry but does not have effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration while it was still only a prospective international interest.

(c) *National interests*, that is interests registered under a national registration system which would be registrable as international interests but for the fact that they are created by internal transactions (as defined in the Convention) in respect of which a Contracting State has made a declaration under Article 50 excluding the application of the Convention. However, such an exclusion is of limited effect. In the first place, the national interest remains governed by the priority rules of the Convention, not those of national law, and by various other provisions of the Convention. Secondly, while it cannot be registered as an international interest, notice of it can be registered in the International Registry, thereby securing its priority in the same way as if it were a registered international interest. It is for consideration whether the concept of internal transactions should be retained in the draft Space Protocol.

(d) *Non-consensual rights or interests arising under national law and given priority without registration*. A Contracting State may make a declaration under Article 39 specifying those categories of non-consensual right or interest which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual rights or interests are not themselves registered.

(e) *Registrable non-consensual rights or interests arising under national law*. A Contracting State may make a declaration under Article 40 that non-consensual rights or interests arising under its law may be registered in the International Registry, and any such right or interest that is so registered is then treated for the purposes of the Convention as a registered international interest. Possible examples are a judgment or order affecting equipment of a category to which the Convention applies and a legal lien in favour of a repairer or warehouseman.

The Convention covers not only interests within one or other of the above categories but also “associated rights”, that is rights to payment or other performance by a debtor under a security agreement which are secured by or associated with the object. Purely personal contractual rights not secured on an object are outside the scope of the Convention, though Article 39(1)(b) preserves the efficacy of contractual as well as legal rights of arrest or detention under the law of a State for sums due to a provider of public services, to the extent declared by that State under the Convention.

### **Conditions of application**

14. In order for the Convention to apply the following conditions must be satisfied:

(a) The parties have entered into a security agreement, a title reservation agreement or a leasing agreement (Article 2(1), (2)).

(b) The agreement relates to equipment which, as defined by the relevant Protocol, is:

- (i) an airframe, an aircraft engine or a helicopter,
- (ii) railway rolling stock, or
- (iii) space assets (Article 2(3)).

(c) The equipment falls within a category designated in the relevant Protocol and is uniquely identifiable (Article 2(2),(3)).

(d) The agreement is constituted in accordance with the formalities prescribed by the Convention (Articles 2(2), 7).

(e) The debtor is situated in a Contracting State at the time of conclusion of the agreement creating or providing for the international interest (Articles 3, 4).

### **Characterisation**

15. Most legal systems distinguish sharply between security agreements and title reservation and leasing agreements, treating a conditional seller or lessor as the full owner. By contrast in the United States, Canada, New Zealand and, more recently, Australia, the law adopts a functional and economic approach, treating title reservation agreements and certain types of leasing agreement as forms of security and the title of the conditional seller or finance lessor as limited to a security interest. Given these widely contrasting approaches, it was recognised at an early stage that it would not be possible to reach agreement on a uniform Convention characterisation. Accordingly, the solution adopted was to leave this to be dealt with under the applicable domestic law as determined by the rules of private international law of the forum State (Articles 2(4), 5(2),(3)). Where the applicable law is the *lex fori* itself the national court will be able to apply its own law to determine the characterisation issue. However, it is first necessary that the agreement fall within the definition of security agreement, title reservation agreement or leasing agreement in the Convention. Only if this is the case does reference to national law and possible recharacterisation arise.

### **Mobility and internationality**

16. The ingredients of mobility and internationality are not expressly prescribed by the Convention but are considered inherent in the nature of the equipment. The Convention thus leaves open the possibility of taking and registering an international interest in equipment which never leaves its State of origin. However, the creditor needs to be able to protect itself against the possibility of such movement and is usually not well placed to know whether or not it has taken place. Article 50 of the Convention nevertheless allows Contracting States, in respect of purely internal transactions, to exclude certain provisions of the Convention relating to the rights of the parties between themselves but, as stated above, it is for consideration whether this Article and related provisions should be retained in the draft Space Protocol.

### **Constitution of international interest**

17. All that is needed to constitute an international interest is an agreement which conforms to the simple requirements of Article 7. This is so whether or not the international interest has any counterpart in national law or fulfils the requirements for the creation of an interest under national law. In this sense the international interest is autonomous, being derived from the Convention itself. But whether an agreement exists at all is to be determined by the applicable law, which will thus govern questions such as capacity to contract, the existence of a *consensus ad idem*, and the like. However, the formal requirements for the agreement are determined by the Convention itself. Under Article 7 an interest is constituted as an international interest where the agreement creating or providing for the interest satisfies four conditions:

(a) *Writing*

The agreement must be in writing. "Writing" is defined in broad terms in Article 1(nn) to cover not only documents but also an electronically held record of information which is capable of being reproduced in tangible form on a subsequent occasion. Whether the agreement is in paper or electronic form, it must indicate by reasonable means a person's approval of the record.

(b) *Power of disposal*

The agreement must relate to an object of which the chargor, conditional seller or lessor has power to dispose. The word "power" is not synonymous with "right". An unauthorised disposition may nevertheless be effective to pass ownership or some other interest because of a rule of law to that effect, for example, where an agent, though not having actual authority to dispose of its principal's property, sells it when having ostensible authority to do so. A power to dispose may arise either under the applicable law or under the Convention itself as a consequence of its registration and priority rules. So a lessee is to be considered as having a power of disposal, for otherwise there would be no point in requiring the lessor to protect its priority by registration.

(c) *Identifiability*

The agreement must enable the object to be identified in conformity with the relevant Protocol. Identifiability is a crucial requirement because the registration system is asset-based. It is thus not sufficient that (as in the common case of security over future property) the asset can be identified as falling within the scope of the security agreement. It is necessary that the object be specifically identified in the agreement itself. It is left to the relevant Protocol to determine the identification criteria, since these are likely to be equipment-specific.

(d) *Obligations secured*

In the case of a security agreement, this must enable the secured obligations to be determined; in other words, it must be possible to ascertain from the agreement what obligations it is securing. However, it is not necessary to state a sum or maximum sum secured, nor is it necessary to identify each particular obligation; a general description suffices. It was felt that to require the statement of a maximum sum or specificity in the statement of secured obligations was neither practicable nor desirable, for in many cases the agreement will secure future obligations whose nature and quantum will not be known in advance. If the secured party had to specify a maximum sum it would simply choose a figure higher than anything it would conceivably advance.

### **Relationship with national law**

18. The Convention does not exclude the creation of security interests under national law. In most cases a security, title reservation or leasing interest created under national law will simultaneously constitute an international interest, so that the two will co-exist. However, the international interest will usually give the creditor stronger rights than a purely domestic interest. In particular, a registered international interest has priority over (a) a domestic interest which is neither registered under the Convention (even if it is of a kind not capable of registration) nor covered by a declaration under Article 39 and (b) a national interest notice of which is not so registered.

## Default remedies

19. The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously. Chapter III of the Convention provides a chargee with a set of basic remedies in the event of the debtor's default. For this purpose it is not necessary for the international interest to have been registered, since registration is required only to give notice of the international interest to third parties and to protect the priority of the international interest. A distinction is drawn between the rules governing the remedies of a chargee, which are specified in Articles 8 and 9, and those applicable to the remedies of a conditional seller or lessor, which are the subject of Article 10 and are less detailed, reflecting the fact that vis-à-vis the conditional buyer or lessee the conditional seller or lessor is the owner of the equipment<sup>3</sup> and may deal with the equipment as it pleases once the agreement has come to an end. Article 12 ensures the availability of additional remedies under the applicable law, including any remedies agreed by the parties, so far as not inconsistent with the mandatory provisions of Chapter III.

20. Article 8 empowers the chargee, to the extent that the chargor has at any time so agreed, to:

- take possession or control of any object charged to it;
- sell or grant a lease of any such object;
- collect or receive any income or profits arising from the management of the object.

Alternatively, the chargee may, with or without the agreement of the chargor, apply for a court order authorising or directing any of the above.

21. Article 9 empowers the chargee to take ownership of the object in satisfaction of the debt. However, the chargor and other interested persons, such as subsequent chargees and guarantors, are provided with a number of safeguards. Extra-judicial remedies are required to be exercised in a commercially reasonable manner. Notice of a proposed sale or lease must be given to interested persons. Vesting of ownership in satisfaction of the debt can occur only with the consent of all the interested persons or on an order of the court and, in the latter case, only if the court is satisfied that the amount of the secured obligations to be discharged is commensurate with the value of the object. The parties may agree on the events that constitute default or otherwise give rise to the remedies set out in Chapter III. In the absence of such agreement the default must be substantial. Additional remedies permitted by the applicable law, including any remedies agreed by the parties, may be exercised to the extent that they are in conformity with the mandatory provisions listed in Article 15.

22. In the case of a title reservation agreement or leasing agreement, the only remedies designated (by Article 10) are termination of the agreement, possession or control of the object or a court order authorising or directing either of these. As mentioned in paragraph 19, the provisions are much simpler because, in contrast to the chargee, who has merely a security interest, the conditional seller or lessor is the owner. However, in the United States, Canada, New Zealand and Australia title reservation agreements and certain types of financial leasing agreement are characterised as security agreements, so that a court in such a jurisdiction will apply the Convention rules governing security agreements.

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<sup>3</sup> The conditional seller or lessor is not necessarily the owner; often it will be an intermediate party itself holding the equipment under a conditional sale agreement or lease. But in its relations with the conditional sub-buyer or sub-lessee its position is analogous to that of an owner.



23. Article 13 provides the creditor who adduces evidence of default with the right to speedy relief, pending final determination of its claim, in the form of an order for preservation of the object or its value, possession, control or custody of the object, immobilisation of the object or lease or management of the object and the income from it but not sale and application of the proceeds of sale (although the Aircraft Protocol and the draft Space Protocol add these remedies as regards aircraft objects and space assets). Certain safeguards are provided for the debtor. By Article 55 a Contracting State may make a declaration excluding Article 13, wholly or in part.

### **The registration system**

24. The registration system lies at the heart of the Convention's system of priorities. Registration gives public notice of an international interest or a prospective international interest and enables the creditor to preserve its priority and the effectiveness of the international interest in insolvency proceedings against the debtor. Registration is not, however, proof of the existence of an international interest and is of no effect if the purported international interest has not been validly created. Rather registration ensures that, if an international interest validly created is registered, priorities are determined on a simple, objective, first-to-register basis. Registration is against the individual object, not against the debtor; hence the requirement that the object must be uniquely identifiable and the restriction of proceeds claims to insurance and other loss-related proceeds. It is envisaged that there will be different registration systems for different types of equipment. The International Registry will be administered by a Registrar under the superintendence of a Supervisory Authority, which (insofar as it does not already have it) will be a body having international legal personality and immunity from process. By contrast the Registrar will be strictly liable for compensatory damages for loss suffered from errors, omissions or system malfunction, subject to certain very limited defences.

25. The registration provisions are predicated on the assumption that the system will be electronic and available on-line, so that the checking of registration applications, registration itself and responses to searches will be effected automatically by computer and will not involve human intervention. If the future International Registry for space assets adopts the same approach as the International Registry for aircraft objects, it will operate 24 hours a day, seven days a week, except when service is suspended to allow for repairs or maintenance. The provisions of the Convention and draft Space Protocol will be supplemented by regulations governing the operation of the future International Registry and procedures for effecting registrations and searches.

26. The registration system will accommodate registrations of international interests, prospective international interests, and registrable non-consensual rights or interests (explained in paragraphs 40-41), as well as assignments and prospective assignments, subordinations, and the acquisition of international interests by legal or contractual subrogation under the applicable law. There is nothing to preclude the holding and registration of international interests by two or more parties, whether jointly or in specified fractions or percentages. The system will also receive registrations of notices of national interests, that is interests registered in a national register and arising under a purely local transaction (that is where all the parties and the object are in the same Contracting State) and which the Contracting State in question has, pursuant to Article 50(1), declared will not be governed by the Convention. Where such a declaration has been made, a national interest may not be validly registered as an international interest but notice of the national interest may be registered under Article 16(1)(d) and, by virtue of Article 50(2), this will give the national interest the same priority as if it were a registered international interest, so that, as stated earlier, the effect of a declaration under Article 50(1) is limited. The detailed requirements for

registration are prescribed by the relevant Protocol and by regulations to be made under it. Article 20 states whose consent is required to effect, modify or discharge a registration.

### **Priorities**

27. The priority rules are set out in Article 29 and are few in number and for the most part simple. A registered interest has priority over a subsequently registered interest and over an unregistered interest. This priority applies even if the holder of the registered interest took with actual knowledge of the unregistered interest, a rule necessary to avoid factual disputes as to whether a holder did or did not have knowledge. There are three exceptions to the general priority rules. First, since the interest of an outright buyer is not registrable under the Convention,<sup>4</sup> Article 29(3) provides that the buyer takes free from an international interest not registered prior to the buyer's acquisition of its interest. Secondly, there is a special priority rule in Article 29(4) relating to certain conditional buyers and lessees. Thirdly, the priority rules may be varied by agreement between the holders of competing interests (Article 29(5)).

28. Article 29(4) deals with priority as between a conditional buyer or lessee and the holder of a registered interest (by which, of course, is meant a holder other than the conditional buyer's or lessee's own conditional seller or lessor). One of the cases envisaged is a conflict between the conditional buyer or lessee and a person to whom the conditional seller or lessor has charged the goods under a security agreement. The basic principle reflected in Article 29(4) is that parties shall not be affected by anything which is not on the register. It would be unfair to a chargee from the conditional seller or lessor to subordinate the charge to the interests of a conditional buyer or lessee which the chargee could not discover by a search in the International Registry. The interest of the conditional buyer or lessee is not itself registrable. However, registration of the interest held by the conditional seller or lessor will give notice of the existence of the title reservation agreement or lease and thus of the interest of the conditional buyer or lessee thereunder. Accordingly, the effect of the rule laid down in Article 29(4) is that the priority of the conditional buyer or lessee vis-à-vis the chargee is determined according to whether the international interest held by its conditional seller or lessor was registered before the chargee registered its interest. If it was, then the chargee takes its interest subject to the rights of the conditional buyer or lessee. If, on the other hand, the chargee registers its interest before the conditional seller or lessor has registered its own interest, the chargee has priority over the conditional buyer or lessee, whose existence the chargee will not have been able to discover from a search in the International Registry. Article 29(5), which permits the variation of competing priorities, and the registration thereof binding third parties, applies to the foregoing rules. Moreover, the draft Space Protocol follows the Aircraft Protocol in extending the concept of conditional buyer and lessee rights, linked to the time of registration, to confer a right of quiet possession on the conditional buyer or lessee against a chargee over whom the conditional buyer or lessee has priority under the rule described above.

29. By Article 29(6) any priority extends to proceeds. However, the term "proceeds" is confined by Article 1(w) to insurance and other loss-related proceeds. General proceeds, such as receivables arising from the sale of an object, are not covered. So long as proceeds as defined by Article 1(w) are identifiable in the hands of the debtor the creditor has the same priority in relation to them as it had in relation to the object itself prior to its loss. Whether proceeds which have left the debtor's hands or have become commingled with other assets of the debtor remain traceable is answered not by the Convention but by the applicable law. Article 29(7) is designed to ensure that rights in an item (other than an object) created under

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<sup>4</sup> It is, however, under the Aircraft Protocol and draft Space Protocol, both of which disapply Article 29(3).

the applicable law are not lost by installation of the item on an object and that new rights may be created in an installed item, where so permitted by the applicable law. By “item” is meant any article which is not an airframe, aircraft engine or helicopter, a railway wagon or railway engine or a space asset. In relation to space assets the term covers such articles as spare parts which do not fall within the definition of space assets, modules affixed to engines, computers, audio and visual systems and the like.

30. Finally, where a prospective international interest is registered and later becomes a completed international interest, it is deemed to have been registered at the time of registration of the prospective international interest and ranks for priority accordingly (Article 19(4)). Until the time of completion the prospective debtor has the right to have the registration discharged, unless the prospective creditor has given value or committed itself to doing so (Article 25(2)). What constitutes value is determined by the applicable law.

### **Effect of insolvency**

31. The general rule is that in insolvency proceedings against the debtor an international interest is effective if registered prior to the commencement of the proceedings (Article 30(1)). “Effective” means that the property interest will be recognised and the holder of the international interest will have a claim against the asset for obligations owed, and will not be limited to a *pari passu* sharing with unsecured creditors. However, this provision does not impair the effectiveness of an international interest which is effective under the applicable law (Article 30(2)). In other words, the rule in Article 30(1) is a rule of validity, not of invalidity. If under the applicable law the international interest is effective in the insolvency, even if it has not been registered prior to the commencement of the insolvency proceedings, or, indeed, at all, then its efficacy in those proceedings is not affected by the Convention. Under Article 30(3), the general rule does not protect a registered international interest from rules of insolvency law relating to the avoidance of preferences and transfers in fraud of creditors or from rules of insolvency procedure relating to the enforcement of rights to property under the control or supervision of an insolvency administrator, for example, rules which, with a view to facilitating a reorganisation of the debtor, suspend or restrict enforcement of a security interest.

### **Assignments**

32. Chapter IX of the Convention deals with the effect, formal requirements and priority of assignments of associated rights and related international interests, and with subrogation. “Assignment” is broadly defined so as to cover both transfers and charges or pledges. “Associated rights” are defined in Article 1(c) as all rights to payment or other performance by a debtor under a security agreement which are secured by or associated with the object. Associated rights, therefore, do not include (a) rights to performance by a third party or (b) rights to performance by the debtor under another contract or engagement (including the engagement embodied in a promissory note), unless in either case the debtor undertakes in the security agreement to perform the obligations of the third party or of itself under the other contract or engagement.

33. Associated rights may be one of two kinds: those that are related to the financing or leasing of an object in the sense of Article 36(2), for example, rights to payment of the price of the object, repayment of an advance for the purchase of the goods, or related obligations of the debtor under the transaction (such as indemnities and loan breakage costs resulting from an unwinding of funding arrangements because of premature termination of the security agreement for default), and those that are not so related, for example, rights to repayment of a non-purchase money loan in an unrelated transaction which may have as an element

security over the object but has nothing to do with its financing, rental or associated obligations.

34. An earlier draft of the Convention had focused on the assignment of international interests and had provided that this should also transfer the associated rights, that is all rights to payment or other performance by a debtor under a agreement which are secured by the object (in the case of a security agreement) or associated with the object (in the case of a title reservation or leasing agreement) (Article 1(c)). Though contrary to the normal rule that a security interest is accessory to the obligation secured, this had a certain logic in that the Convention is concerned with international interests, not with assignments of receivables as such. In the end, however, it was considered that the normal rule should be applied. Accordingly, Article 31(1) provides that, except as otherwise agreed by the parties, an assignment of associated rights made in conformity with the prescribed formalities also transfers to the assignee the related international interest and all the interests and priorities of the assignor under the Convention. The debtor may assert against the assignee all defences and rights of set-off available to it under the applicable law, unless it has waived them by an agreement in writing. Under the Convention such a waiver is binding, except where it purports to bar defences arising from fraudulent acts of the assignor (Article 31(3), (4)).

35. It is open to the parties to agree to assign the associated rights without transferring the related international interest, and this will be the effect anyway if the assignment does not conform to the requirements of Article 32, but in either case the Convention does not apply to the assignment (Article 32(3)) and the effect is left to be determined by the applicable law. What the parties cannot do is to assign an international interest without also assigning at least some of the related associated rights, for an international interest has no significance except in the context of the obligations which it secures or with which it is associated. A purported assignment of an international interest under a security agreement without inclusion of some or all of the associated rights is not valid (Article 32(2)).

36. Partial assignments of associated rights are permitted and it is then for the parties to agree as to their respective rights concerning the related international interest, but not so as adversely to affect the debtor without its consent (Article 31(2)). The parties could, for example, agree that the international interest is to be recorded as assigned into their joint names so as to secure their respective interests or that it is to remain in the sole name of the assignor (in which case the assignment will not be registered and the assignee will not benefit from the Convention's priority rules as against a subsequent assignee) with an undertaking by the assignor to enforce its rights on behalf of the assignee at the assignee's request or to subordinate its own rights as regards the part retained to the rights of the assignee as regards the part assigned. A partial assignment may adversely affect the debtor, as by requiring him to incur expense in paying two parties instead of one. In that case the parties to the partial assignment must obtain the debtor's consent if this has not already been given. Failure to do so does not, however, affect the validity of the assignment as between assignor and assignee.

37. Under Article 32, the formal requirements that have to be satisfied if an assignment of associated rights is to transfer the related international interest track those applicable to the creation of an international interest. The assignment must be in writing, must enable the associated rights to be identified under the contract from which they arise and, in the case of a security assignment, must enable the obligations secured by the assignment to be determined in accordance with the relevant Protocol but without the need to state a sum or maximum sum secured. Where this has been done the debtor has a duty to make payment or give other performance to the assignee, provided that the debtor has been given notice in writing of the assignment by or with the authority of the assignor and the notice identifies the associated rights (Article 33).

38. Under Article 34, the default remedies available to an assignee under a security assignment follow, *mutatis mutandis*, the rules applicable to the international interest itself.

39. The priority of competing assignments is a little complex. The starting position is that, where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply *mutatis mutandis*, so that a registered assignment has priority over an unregistered assignment and a later assignment. It is, of course, necessary that at least one of the assignments includes the related international interest, for otherwise neither assignee would have a right to register its assignment, since the function of registration is to record interests in equipment, not interests in associated claims in isolation, and as noted earlier an assignment of associated claims alone is outside the Convention (Article 32(3)). It is also necessary that the assigned associated rights retain a linkage with an international interest. Similarly, it is necessary that at least one of the assignments should be registered, for Article 29 does not regulate priorities between competing unregistered assignments, this being left to the applicable law. Article 36 qualifies in two respects the priority that would otherwise be conferred by Article 35. First, it is confined to cases where the contract under which the associated rights arise states that they are secured by or associated with the object. This is to deal with the situation where, for example, a security agreement secures not only the obligations for which it provides but obligations arising under a later agreement and the later agreement does not refer to the security, so that a subsequent assignee of the associated rights under the later agreement has no way of knowing that the obligations under the later agreement are secured on or in any way connected with the equipment and ought not, therefore, to be subject to the Convention priority rules. Secondly, the priority of the first assignment is given only to the extent that the associated rights are related to an object as specified in Article 36(2), which broadly covers obligations for the repayment of purchase money loans and the payment of the price and rentals of objects, together with all ancillary obligations under the financing transaction documents. Priority in cases falling outside these limits – for example, a priority involving an assignee of associated rights as security for a non-purchase money loan – is left to the applicable law. On the assignor's insolvency Article 30 applies as if the references to the assignor were references to the debtor (Article 37). Rights of legal or contractual subrogation are in general unaffected (Article 38). Article 38(2) permits parties to vary priorities between themselves along the lines of Article 29(5).

### **Non-consensual rights or interests**

40. A Contracting State may specify the types of non-consensual right or interest which, under that State's law, have priority over an interest equivalent to that of the holder of the international interest ("an equivalent interest") and are to have priority even over a registered international interest (Article 39). Basically, a State may retain or restrict its nationally preferred rights and interests arising by law but may not use the Convention to expand these preferred rights. Non-consensual rights or interests are those created by operation of law rather than by agreement. Typical examples are preferential claims for wages due from an insolvent employer and liens in favour of repairers or those holding goods in custody, though some Contracting States have added government taxes. Rights or interests covered by a declaration under Article 39 have priority over a registered international interest even though not themselves registrable. It will not be necessary for a Contracting State to list all such types of non-consensual interest individually. It could simply make a declaration that all claims having priority over an equivalent interest under its existing law or acquiring such priority in the future are to enjoy priority over a registered international interest. But it is for the Contracting State to decide which of such claims should have priority over a registered international interest. The categories covered by its declaration could be fewer than the categories which under its national law have priority over equivalent interests. Rights of arrest

or detention under national law, so far as not covered by a declaration under Article 39(1)(a) (for example because they are contractual and therefore outside Article 39(1)(a)), may be preserved by a declaration to the extent provided by Article 39(1)(b), which applies both to contractual rights of arrest or detention and to rights given by law.

41. A Contracting State may also make a declaration that specified categories of non-consensual right or interest shall be registrable as if they were international interests (Article 40). One might envisage, for example, the registration of a judgment debt or an attachment by an execution creditor. Registration of such a non-consensual interest would give it the same priority as an international interest.

### **Extension to outright sales**

42. The Convention does not apply to outright sales, for these do not involve a debtor or the assertion of any security or proprietary interest vis-à-vis the debtor. However, Article 41 provides for the possibility of an extension of the Convention to outright sales as provided for in the relevant Protocol, thereby enabling outright buyers to take advantage of the registration machinery to register their acquisitions. The Aircraft Protocol and the draft Space Protocol extend the Convention in this way.

### **Jurisdiction**

43. Articles 42 to 45 contain rules as to jurisdiction which may be summarised as follows:

(a) Except in relation to the grant of interim relief under Article 13 or the making of orders against the Registrar, exclusive jurisdiction for any claim brought under the Convention is given to the courts of a Contracting State chosen by the parties, except where they agree that the jurisdiction is to be non-exclusive. The chosen forum need not have a connection with the parties or the transaction. The agreement must be in writing or otherwise in accordance with the formal requirements (as opposed to substantive requirements) of the *lex fori* (Article 42).

(b) The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have concurrent jurisdiction to make orders requested by the creditor for relief pending final determination, other than orders for the lease or management of the object and the income from it (Article 43(1)). It is not competent to the parties to exclude the concurrent jurisdiction of courts of the *situs* of the object.

(c) The courts of the territory on which the debtor is situated have concurrent jurisdiction, pending final determination of the claim, (a) to make orders for the lease or management of the object and income from it under Article 13(1)(d) and (b) to grant any other interim relief available under the *lex fori* by virtue of Article 13(4), in either case as requested by the creditor, though the jurisdiction is limited to orders which by their terms are enforceable only in the territory concerned. Again, the parties cannot exclude the concurrent jurisdiction of the courts of the place where the debtor is situated.

(d) The courts of the place in which the Registrar has its centre of administration have exclusive jurisdiction to award damages against the Registrar (for example, for loss caused through error or failure of the registration system) and to make orders against the Registrar (Article 44(1)). As regards the latter, two specific cases are mentioned: orders requiring a registration to be discharged where the person under a duty to procure the discharge cannot be found or has ceased to exist (Article 44(2)) and orders directing

amendment or discharge of a registration where a person fails to comply with an order of a court of a State having jurisdiction under the Convention, for example, an order to procure the amendment or removal of a registration improperly made, or, in the case of a national interest, a court of competent jurisdiction (Article 44(3)). But Article 44(1) should be interpreted broadly as conferring (by analogy with Article 44(3)) a residual jurisdiction on the court where the Registrar has its centre of administration to make an order for amendment or discharge of a registration where a party has failed to comply with an order of a court having jurisdiction under the Convention, or with an order of any other court of competent jurisdiction, requiring that party to procure the amendment or discharge of the registration. Article 44(1) also confers exclusive jurisdiction on the Registrar's court to make orders to enforce the Registrar's duties and obligations under the Convention, for example, its duty (a) to issue a search certificate to a person making a search in due form and paying the requisite fee; and (b) to comply with directions properly given to it by the Supervisory Authority under Article 17 of the Convention. Jurisdiction in relation to claims against the Registrar outside the Convention, for example, claims arising from contracts entered into by the Registrar with the Supervisory Authority or with suppliers of goods and services, will be determined by the domestic law of the State in which the Registrar has its centre of administration.

(e) Chapter XII confers no jurisdiction in relation to insolvency proceedings, which are a matter for the relevant insolvency jurisdiction.

In applying rules (b) and (c) above, it is necessary to have regard to Article 52(5) where the relevant Contracting State has made a declaration which has the effect of excluding from the Convention one or more territorial units in which different systems of law are applicable with reference to a Contracting State. In such a case the debtor is not considered to be situated, or the object to be located, in a Contracting State, if situated or located in a territorial unit excluded by such a declaration.

### **Relationship with other Conventions**

44. Article 45 *bis*<sup>5</sup> provides that the Convention is to prevail over the United Nations Convention on the Assignment of Receivables in International Trade (hereinafter referred to as the "United Nations Convention").<sup>6</sup> This simply makes explicit what was implicit in Article 38(1) of the United Nations Convention. The main potential cause of conflict lies in Article 36 of the Convention, relating to the priority of assignments of associated rights. However, as noted above, Article 36 is limited in scope and in relation to associated rights the Convention and the United Nations Convention adopt broadly similar concepts. The relationship between the Convention and the UNIDROIT Convention on International Financial Leasing (hereinafter referred to as the "Leasing Convention")<sup>7</sup> is left to the Protocol.

### **Final provisions**

45. Chapter XIV of the Convention sets out final provisions. Some of these are standard; others reflect special elements and objectives of the Convention, including the two-instrument structure and the prospect of future Protocols.

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<sup>5</sup> Inserted subsequently to the Cape Town diplomatic Conference pursuant to an Annex approved by the Conference. This does not form part of the published documents, its effect being exhausted after the insertion was made.

<sup>6</sup> Opened to signature in New York on 12 December 2001.

<sup>7</sup> Opened to signature in Ottawa on 28 May 1988.

(a) *Regional Economic Integration Organisations*

The Convention is open for signature, acceptance, approval or accession, not only by sovereign States but also by a Regional Economic Integration Organisation (hereinafter referred to as an "REIO") which is constituted by sovereign States and has competence over certain matters governed by the Convention. A particular example is the European Union, which was involved in negotiations over the text at the Cape Town diplomatic Conference in relation to the provisions on which the Community claims exclusive external competence and has adopted the Convention and Aircraft Protocol.

(b) *Entry into force; controlling effect of Protocol*

The Convention itself required only three ratifications and entered into force three months after the deposit of the third instrument of ratification but, as regards a category of object to which a Protocol applies, only as from the time of entry into force of that Protocol, subject to the terms of that Protocol and as between States Parties to the Convention and that Protocol (Article 49). In consequence, the Convention entered into force at the same time as the Aircraft Protocol, namely 1 March 2006.

(c) *Internal transactions*

Though in principle the Convention applies even where all the elements of a transaction are located in one jurisdiction, Article 50 permits a Contracting State, when adopting the Protocol, to make a declaration excluding the application of the Convention to a transaction which is internal in relation to that State, that is where the centre of the main interests of all parties to the transaction is situated, and the relevant object located, in that State at the time of the conclusion of the transaction and the national interest created by the transaction has been registered in a national registry in the declaring State (Article 1(n), (r)). See sub-paragraph 13(c) above.

(d) *Transitional provisions*

Article 60 contains important transitional provisions. The general principle is that, unless otherwise declared by a Contracting State, a pre-existing right or interest, that is a right or interest created before the effective date of the Convention (Article 1(v)), is not affected by the Convention and retains its pre-Convention priority (Article 60(1)). By "effective date" is meant the time when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later (Article 60(2)(a)). A Contracting State may make a declaration specifying a date not less than three years after the declaration when the Convention and Protocol will become applicable to a pre-existing right or interest for the purpose of determining priority, including the protection of any existing priority, where the right or interest arises under an agreement made at a time when the debtor was situated in a Contracting State (Article 60(3)). So the holder of a pre-existing interest affected by a declaration will have at least three years in which to protect its pre-Convention priority by registration in the International Registry. While the holder's re-perfection of the interest by registration in the International Registry is necessary to preserve its priority against subsequent interests, the declaration should provide that as against prior interests the holder retains its pre-Convention priority. A declaration under Article 60 is limited to priority issues, so that in relation to a pre-existing interest a Contracting State may not apply the provisions of the Convention relating to relations between the debtor and the creditor or the provisions concerning insolvency. Of course, there is nothing to prevent a debtor and creditor from voluntarily replacing their security agreement with a new agreement



made after the effective date of the Convention, to which the Convention will then apply, though the creditor will then lose its pre-Convention priority as against earlier interests.

### **System of declarations**

46. Certain provisions of the Convention are dependent on policy decisions by States. For these provisions the Convention provides a system of declarations allowing Contracting States to make choices. Declarations are equipment-specific, in that they cannot be made independently of a Protocol. They are of four kinds: opt-in declarations, opt-out declarations, mandatory declarations and other declarations.

#### *(a) Opt-in declarations*

These are declarations which a Contracting State is required to make if a particular provision of the Convention, as applied by a Protocol, is to have effect within that State. There is only one such provision, namely:

Article 60 Application of the Convention priority rules to pre-existing rights or interests.

#### *(b) Opt-out declarations*

These are declarations which a Contracting State is required to make in order to exclude the application of a particular Convention provision, as applied by a Protocol, in that State. Opt-out declarations are required to exclude:

Article 8(1)(b)	Power to lease a charged object whilst in the declaring State's territory (Article 54(1))
Articles 8(1), 9(1), 10	Extra-judicial remedies (Article 54(2))
Article 13	Relief pending final determination (Article 55)
Article 43	Jurisdiction under Article 13 (Article 55)
Article 50	Application of the Convention to internal transactions

#### *(c) Declarations relating to a Contracting State's own laws*

Article 39	Non-consensual rights and interests having priority without registration
Article 40	Registrable non-consensual rights or interests
Article 53	Declaration of relevant court.

#### *(d) Mandatory declarations to be lodged at the time of ratification/signature, acceptance, approval or accession*

These are declarations which a REIO or a Contracting State is required to make in every case at the time of signature/ratification, acceptance, approval or accession in order for its instrument of signature/ratification, acceptance, approval or accession to be accepted. Such declarations are required under:

Article 48(2)	Transfer of competence to an REIO.
Article 54(2)	Whether remedies may be exercised only with leave of the court.

#### *(e) Other declarations*

There is one declaration not falling within any of the above categories, namely:

Article 52                      Application of the Convention to one or more territorial units.

Articles 39, 40 and 60(1), all of which are optional, provide that declarations may be made under them at any time. Articles 50, 52, 53, 54 and 55 provide for declarations under them to be made at the time of ratification, etc. However, it is open to a Contracting State that does not do this to make a declaration subsequently under Article 57, so that the effect is the same as in the phrase "at any time". By contrast, declarations under Articles 48(2) and 54(2) are mandatory and must be made at the time of ratification, etc., though they may be supplemented or replaced by a subsequent declaration under Article 57, the Depositary being notified of any changes in the distribution of competence as provided by Article 48(2).

## **AN OVERVIEW OF THE DRAFT SPACE PROTOCOL**

### **Introduction**

47. The draft Space Protocol supplements and modifies the Convention to meet the particular needs of space commerce and finance. Its provisions broadly follow those of the Aircraft Protocol and the Luxembourg Protocol. There are, however, some key deviations from one or other of the earlier Protocols.

(a) The Aircraft Protocol required unique identification of the aircraft object not only for registration purposes but also for the constitution of the international interest. The draft Space Protocol follows the Luxembourg Protocol in permitting, for the latter purpose, any method by which a space asset can be identified as falling within the scope of the security agreement, thus allowing the creation of an international interest in classes of space asset and in future space assets.

(b) The provisions on creditors' remedies on insolvency follow the Aircraft Protocol in providing only two options, Alternatives A and B, instead of the three provided by the Luxembourg Protocol.

(c) The Luxembourg Protocol did not extend the Convention to cover outright sales; the draft Space Protocol follows the Aircraft Protocol in making this extension.

(d) In contrast to the Aircraft Protocol, which provides as an alternative connecting factor the nationality registration of the relevant aircraft at the date of the security agreement, the draft Space Protocol applies only if the debtor is situated in a Contracting State at the time of the conclusion of the security agreement.

(e) The remedies of de-registration and export are particular to aircraft and find no place in the draft Space Protocol .

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

(g) The fact that, when in space, a space asset is not located within any national jurisdiction has necessitated a special provision defining the situation of a space asset, when not on Earth, for the purposes of the rules on jurisdiction. The draft Space Protocol, like the Luxembourg Protocol, contains rules limiting the exercise of remedies in relation to an asset providing public services but the provisions are significantly different. There are separate provisions allowing a Contracting State which has made the requisite declaration to apply rules of its law restricting the exercise of remedies in relation to controlled goods, technology, data or services, which could, for example, be imposed in the interests of national security.

(h) Finally, an issue to be resolved concerns the circumstances in which a creditor should be entitled to enforce a remedy against a space asset which is physically linked to another asset in which a different creditor has an interest.

### **Sphere of application**

48. The Convention applies in relation to space assets, rights assignments and rights reassignments as provided by the terms of the draft Space Protocol. However, given the possibility that a spacecraft or engine might also constitute an aircraft object, it is necessary to ensure that only one Protocol can apply to any particular transaction. So Article II(3), which is in parenthesis, looks to the predominant purpose of the design of the object. Where the object is designed predominantly for use in air space the Aircraft Protocol will apply; where the object is designed predominantly for use in outer space it will be a space asset, not an aircraft object, and the transaction will accordingly fall within the draft Space Protocol.

49. Security for pre-launch advances is of great importance. The Convention and draft Space Protocol therefore apply not only to security agreements relating to assets already in outer space but to those covering objects which are designed to be launched into space and have reached a sufficiently advanced point of manufacture that they can be identified as falling within the definition of "space asset" (see paragraph 51). So security agreements relating to space assets fall within the Convention and draft Space Protocol whether they are in outer space, in air space or on the ground. It follows, of course, that the return of a space asset from space (whether intended or unintended) does not affect an international interest in that asset, a point specifically provided for by Article III.

50. Article IV extends to outright sales most of the provisions of the Convention other than Chapter III relating to default remedies. This enables outright buyers to obtain the benefits of the registration system and priority rules as regards the space asset. However, since an outright sale does not create an international interest, Article 2 of the Convention does not apply, nor does Chapter III relating to default remedies, the default provisions being of no relevance to outright sales. Again, Article 29(3), under which an outright buyer takes free from any unregistered interest, is disappplied, because such a buyer can register the sale and therefore needs no special protection. The formalities governing contracts of sale are contained in Article V and track those governing the constitution of an international interest except, of course, that there is no reference to secured obligations.

### **"Space asset"**

51. Central to the scope of the draft Space Protocol is the definition of "space asset". By this is meant any man-made uniquely identifiable asset in space or designed to be launched into space and falling within one of the three categories specified in Article I(2)[(1)]. The first consists of spacecraft, such as a satellite, space station, space module, space capsule, space vehicle or other reusable launch vehicle. It is for consideration whether international interests in items in this category should automatically qualify for registration or should be registrable

only so far as provided by the regulations. This first category relates to the bus, or platform, with or without its payload. The second category consists of the payload, whether telecommunications, navigation, observation, scientific or otherwise. So in the case of a satellite an international interest could be taken in the entire satellite or alternatively in the bus or payload, and the latter could cover not only the operator's own payload but also a hosted payload belonging to another party, such as a government agency. The registration system would permit the holding and registration of an international interest by two or more parties in various ways (see paragraph 26). The third category consists of part of a spacecraft or payload, such as a transponder, in respect of which a separate registration may be effected in accordance with the regulations. The requirement that an international interest in a part only of a spacecraft or payload be capable of registration fulfils two functions. First, it acts as a filter to preclude, for example, the registration of accessories which, once incorporated into the spacecraft, lose their identity and cease to be available to the creditor, so that registration would serve no useful purpose. Secondly, it allows for the development of new kinds of component which could usefully be the subject of an international interest. An asset within any of these groups includes all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.

### **Identification of space assets for the purposes of constituting the international interest**

52. The Luxembourg Protocol departed from the Aircraft Protocol in distinguishing the identification criteria for the constitution of an international interest from those required for registration. Registration affects third parties and, since the register is asset-based, it is essential that the asset be uniquely identifiable so that a third party can make a search against it (see paragraph 83). No such considerations apply to the agreement between the parties, who can be allowed much greater flexibility. So Article VII follows the Luxembourg Protocol in providing that for the purposes of Article 7(c) of the Convention and Article V of the Protocol a description of a space asset suffices if it contains a description of the space asset by item, a description by type, a statement that the security agreement covers all present and future space assets or a statement that the security agreement covers all present and future space assets except for specified items or types. In essence, therefore, all that is required is that an asset be identifiable as falling within the scope of the security agreement. It is therefore unnecessary to have a separate security agreement for each space asset or to confine the security agreement to existing space assets.

### **Choice of law**

53. Subject to an opt-out by a Contracting State, Article VIII permits the parties to a security agreement, a contract of sale, a rights assignment or rights reassignment or a related guarantee contract or subordination agreement to agree on the law which is to govern their contractual rights and obligations, wholly or in part. One effect of this provision is to override any requirement imposed by the conflict of laws rules of a Contracting State that the law chosen by the parties must have some connection with them or with the transaction. However, a Contracting State may disapply this Article by declaration. It is not, of course, competent to the parties to a security agreement to choose a law to govern their relations with third parties.

### **Assignment of debtor's rights**

#### *(a) Definition of debtor's rights*

54. Article I(2)(a) defines debtor's rights as "all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset." The rights must relate to

a space asset, reflecting the principle that the Convention and draft Space Protocol are concerned exclusively with space assets and rights relating to them. Subject to this, any kind of right vested in the debtor is covered, whether or not payment or other performance has become due.

*(b) No independent registration of a rights assignment*

55. The draft Space Protocol does not allow independent registration of a rights assignment. This would go against the whole thrust of the Convention, which is concerned with interests in tangible and uniquely identifiable assets. To make the assignment of debtor's rights independently registrable as an international interest would extend the Convention from physical assets to receivables, which are not themselves susceptible to asset-based registration and would not be revealed by a search against the physical asset. Accordingly, the draft Space Protocol provides instead for the recording of an assignment of debtor's rights as part of the registration of an international interest or a prospective international interest, either at the time of that registration or subsequently. The recorded assignment will then be governed by registration and priority rules similar to those governing the international interest itself and will be inextricably linked to registration of the international interest, so that a rights assignment recorded in the registration of a prospective international interest will be treated as unrecorded unless and until the prospective international interest becomes an international interest and if a registration of an international interest is discharged the record will likewise be discharged.

*(c) Definition of rights assignment*

56. A rights assignment is defined in Article I(2)[(i)] as:

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

It will be noted that this definition does not cover all assignments, only those typically effected pursuant to a debtor-creditor relationship, namely assignments by way of security and outright assignments in reduction or discharge of the debtor's existing or future obligations. The definition, therefore, does not cover the sale of debtor's rights. Moreover, the assignment must be one tied to the debtor's obligations under the security agreement creating or providing for the international interest. This restriction is necessary to maintain the linkage with the international interest. If the definition were extended to cover other obligations of the debtor to the creditor, one could have a situation in which the international interest was discharged by payment but the assignment would continue as a free-standing security interest for other obligations. That would destroy the linkage, and, indeed, would be incompatible with Article XII(1) and (5) and Article XIII(2). Similarly, if the definition were to cover assignments to secure the obligations of a third party, the link with the international interest would be lost.

*(d) Formal requirements for rights assignment*

57. Article IX sets out the formal requirements for a rights assignment, which track those set out in Article 7 of the Convention for the constitution of an international interest. The assignment must be in writing and must enable both the debtor's rights and the space asset to which those rights relate to be identified. In addition, the assignment must enable any obligations secured by the agreement to be identified, though without the need to state the sum or maximum sum secured.

(e) *Effects of rights assignment*

58. A rights assignment made in conformity with Article IX transfers to the creditor the debtor's rights the subject of the assignment to the extent permitted by the applicable law, which also determines the defences and rights of set-off available to the obligor against the creditor (Article X).

(f) *Assignment of future rights*

59. Article XI, which provides for the assignment of future rights, is derived from Article 5(b) of the UNIDROIT Convention on International Factoring<sup>8</sup> and is designed to be self-executing.

(g) *Recording of rights assignment*

60. For the reasons given above (paragraph 55), a rights assignment may be recorded only as part of the registration of an international interest or a prospective international interest, not independently. The purpose of the rights assignment provisions is to give additional protection to the creditor in whose name the related international interest or prospective international interest is registered. Accordingly, until such registration there can be no recording of the rights assignment (see Article XII(1)) and the recorded assignee must be the same person as the registered holder of the international interest. As a corollary, discharge of the registration of the international interest also discharges any record forming part of that registration (Article XII(5)). Article XII(1) allows the holder of an international interest or prospective international interest who has acquired an interest in or over debtor's rights under a rights assignment or by subrogation to record the rights assignment or acquisition by subrogation as part of the registration. This may be done either when the international interest or prospective international interest in the space asset is registered or subsequently by amendment to the registration, thus covering the case where the rights assignment is not made, or the debtor's rights do not arise, until after registration of the international interest or prospective international interest. The request for such recording may identify the assigned rights either specifically or by a statement that the debtor has assigned all or some of the debtor's rights, without further specification.

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

(h) *Priority of recorded rights assignment*

62. Article XIII lays down priority rules for a recorded rights assignment, which track those embodied in Article 29(1) of the Convention in relation to registered interests. So a recorded rights assignment has priority over any other transfer of debtor's rights (whether or not a rights assignment), except a rights assignment previously recorded. This, however, is subject to the above-mentioned qualification in the case of recording against the registration of a prospective international interest.

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<sup>8</sup> Opened to signature in Ottawa on 28 May 1988.

(i) *Grantor's duty to creditor*

63. Article XIV sets out the conditions in which the third party (that is the grantor of the rights to the debtor) comes under a duty to give performance to the creditor. These conditions, requiring notice in writing to the grantor identifying the debtor's rights, parallel those set out in Article 33 of the Convention relating to the assignment of associated rights. But nothing in Article XIV affects the priority of competing assignments, which depend on the order of recording against the international interest, not on the order of notice of assignment to the obligor.

### **Reassignment of debtor's rights**

64. Article XV provides for the reassignment of debtor's rights by the creditor or a subsequent assignee and the recording of such reassignment. The provisions relating to a rights reassignment follow those relating to a rights assignment, substituting references to the assignee or subsequent assignee for references to the creditor or holder. However, in line with the principle that recording of an assignment must be in favour of the person shown in the International Registry as the current holder of the international interest, a rights reassignment may be recorded only as part of the registration of the assignment of the international interest to the person to whom the rights reassignment was made (Article XV(2)). So, if the original creditor with a registered international interest and a recorded assignment of debtor's rights in its favour were to reassign the debtor's rights while retaining the international interest, the assignee under the rights reassignment would not be able to record the reassignment in the International Registry.

### **Default remedies as regards rights assignments and reassignments**

65. Article XVIII, dealing with default remedies in relation to rights assignments and reassignments, is broadly aligned with Article 34 of the Convention, dealing with the comparable position as regards associated rights. Article XIX, like Article 34, is designed to avoid repeating all the provisions on default remedies available under Chapter III of the Convention to a chargee under a security agreement creating or providing for an international interest. The technique is simply to confer the same default remedies on a creditor to whom debtor's rights and related rights are assigned and on an assignee to whom such rights are reassigned so far as those remedies are applicable to intangibles. The remedies of physical repossession or the grant of a lease are plainly not applicable to intangibles. However, debtor's rights to payment are reducible to possession by payment or by being placed under the control of the creditor or assignee under a reassignment through a notice of assignment or reassignment, or alternatively may be sold; the income from such payments can be collected or received; the rights can be vested in the creditor or assignee in total or partial satisfaction of the secured obligations. Similarly, there is no difficulty in applying Articles 11 to 14 of the Convention to debtor's rights. Article XIX provides that the parties may specifically agree to the placement of command codes and related data and materials with another person in order to afford the creditor the opportunity to take possession of, establish control over or operate the asset.

### **Limitations on the exercise of default remedies**

(a) *Commercial reasonableness*

66. Article XVII follows the Luxembourg Protocol in disapplying Article 8(3) of the Convention and substituting a general duty to exercise remedies in a commercially reasonable manner, this being presumed where exercised in conformity with a provision of the security agreement, unless that provision is manifestly unreasonable. The requirement under Article 8(4) to give reasonable prior notice of a proposed sale or lease is deemed to be satisfied by ten or more working days' prior notice.

(b) *Physically linked assets*

67. The UNIDROIT Committee of governmental experts that prepared the draft Space Protocol devoted much attention to the situation where the exercise of a default remedy by creditor A in relation to a particular space asset causes physical damage to, or renders inoperable, another physically linked space asset in which creditor B has an interest. The Committee was unable to reach agreement on whether a remedy should be given to creditor B in this situation and, if so, the nature of such a remedy. Accordingly, in Article XVII three alternatives have been set out. Under Alternative A, no additional provision should be included in the draft Space Protocol, so that the matter would be left to inter-creditor agreement and to the applicable law. Alternative B expressly refers to the applicable law the question whether the creditor may proceed with the exercise of such a remedy. Alternative C provides for compensation to be paid to creditor B for the damage caused.

(c) *Controlled goods, technology, data or services*

68. Article XXVI provides for the application of the laws and regulations of a Contracting State restricting or attaching conditions to the exercise of default remedies where this would involve or require the transfer of controlled goods, technology, data or services or would involve the transfer or assignment of a licence or the grant of a new licence. "Controlled" means that the transfer of the goods, technology, data or services is subject to governmental restrictions. These may, for example, be imposed for reasons of national security or because for other reasons the national interest requires that the government be able to control the transfer of such goods, etc., or licences. Article XXVI(2) contains two alternative provisions to address this issue. Under the first the Contracting State's ability to apply its laws and regulations restricting transfer is dependent on the making of a declaration by the Contracting State pursuant to Article F(1) of the draft final provisions (DCME-SP – Doc. 5). The alternative text provides that nothing in the Convention and draft Space Protocol limits the ability of a Contracting State, in accordance with its laws, to restrict or attach conditions:

- (i) to the constitution of an international interest or a rights assignment, for reasons of national security, international peace and security, or in order to regulate controlled goods, and
- (ii) to the exercise of remedies given by the Convention and draft Space Protocol, including the placement of command codes and related data and materials where this would involve or require the transfer of controlled goods, etc.

It will be seen that the alternative text is wider in two respects. First, the Contracting State may apply its laws and regulations without the need to make a declaration. Secondly, its ability to do so is not confined to the exercise of default remedies but extends to the constitution of an international interest or a rights assignment for security reasons or to regulate controlled goods.

(d) *Public service limitations*

69. Article XXVII restricts the exercise of creditors' remedies as regards the use of space assets to provide services that are needed for the provision of a public service in a Contracting State. The phrase "public service" is not defined but broadly covers a service to the public which Contracting States have an interest in ensuring is not abruptly terminated or suspended through the exercise of creditors' remedies. Article XXVII seeks to balance the interests of the Contracting State in securing continuance of the public service and the interests of creditors in avoiding loss through inability to exercise their remedies for a given period.



70. Article XXVII applies where the debtor or an entity controlled by the debtor enters into a contract with a public services provider to provide services needed for the provision of a public service in a Contracting State. "Public service provider" means an entity of a Contracting State, another entity situated in that Contracting State and designated by the Contracting State as a provider of a public service or an entity recognised as a provider of a public service under the laws of a Contracting State. Where such a contract has been concluded, the parties to it and the Contracting State may agree that the public service provider may register a public service notice in the International Registry describing the services in question in accordance with the regulations. This registration is the trigger for the suspension of the creditor's remedies where the exercise of those remedies would make the space asset unavailable for the provision of the relevant public service. Such remedies are suspended until the expiry of six months from the creditor's registration of a notice by the creditor (hereinafter referred as "the default notice") that it may exercise any such remedies if the debtor does not cure the default within that period. The creditor must promptly notify the debtor and the public service provider of the date of registration of the default notice and of the date of expiry of the six-month period. During this period the creditor, the debtor and the public service provider must co-operate in good faith with a view to finding a commercially reasonable solution permitting the continuation of the public service, and the authority of a Contracting State licensing the debtor's operation of the space asset must give the public service provider the opportunity to participate in proceedings in which the debtor may participate in that State with a view to the appointment of another operator. The creditor is protected in that it may exercise any of its remedies if at any time during the six-month period the public service provider fails to perform its duties (for example, its duty of payment) under its agreement with the debtor. Moreover, the limitation of remedies does not apply at all in respect of an international interest registered prior to the public service notice, unless otherwise agreed by the parties.

### **Relief pending final determination**

71. Under Article XX, which applies only where a Contracting State makes a declaration under Article F(3) of the draft final provisions, Article 13(1) of the Convention is modified by adding the remedy of sale and application of proceeds thereof if at any time the debtor and the creditor specifically agree and by allowing the meaning of "speedy" to be determined by a declaration by a Contracting State. The parties may also agree to exclude Article 13(2), which empowers the court to impose terms in granting relief under Article 13(1).

### **Remedies on insolvency**

72. Article XXI adopts the same provisions as are contained in the Aircraft Protocol as to the creditor's remedies upon an insolvency-related event affecting the debtor, that is (i) the commencement of insolvency proceedings against the debtor or (ii) the debtor's declared intention to suspend or actual suspension of payments where the creditor's right to institute insolvency proceedings or to exercise remedies under the Convention is suspended by law or State action (Article I(2)(m)). "Insolvency administrator" is defined by Article 1(k) of the Convention as a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable law.

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

74. Even where a Contracting State has made a declaration under Article F(4) of the draft final provisions, it is open to the parties to exclude the application of Article XXI by agreement in writing (Article XVI) but they cannot vary it, only exclude it in its entirety. This is because each of the alternative options for which a Contracting State may make a declaration has to be adopted entire if it is to be adopted at all (see below).

75. Two alternative versions of Article XXI, Alternative A and Alternative B, are offered. It is open to a Contracting State to adopt one of these, though only in its entirety (Article F(4) of the draft final provisions), or to adopt neither and simply continue to apply its ordinary domestic law.

(a) *Alternative A*

76. The “hard,” or rule-based, version, Alternative A, is specifically designed to meet the requirements of advanced structured financing, including international capital market financing structures. It requires the insolvency administrator or the debtor, as applicable, to give possession of or control over the space asset, and over the debtor’s rights covered by a rights assignment to the creditor, no later than the earlier of (a) the end of the waiting period specified in a Contracting State’s declaration or (b) the date on which the creditor would otherwise be entitled to possession or control (Alternative A, paragraph 2). However, the insolvency administrator or the debtor, as applicable, may retain possession and control where within the above time it has cured all defaults (other than a default constituted by the opening of insolvency proceedings) and has agreed to perform all future obligations under the agreement (paragraph 8). If the creditor already has possession or control, it has no need to invoke the above remedy.

77. Unless and until the creditor is given the opportunity to take possession the insolvency administrator or the debtor, as applicable, must preserve the space asset and maintain its value in accordance with the security agreement but may use the space asset under arrangements designed to preserve and maintain it and its value. Meanwhile, the creditor for its part is entitled to apply for any other forms of interim relief available under the applicable law (paragraph 6).

78. Alternative A precludes the court from preventing or delaying the exercise of the creditor’s remedies beyond the above time-period and from modifying the debtor’s obligations without the creditor’s consent. In effect, this removes, for space assets, the preservation of the court’s powers under Article 30(3)(b) of the Convention. Thus, under Alternative A, the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditor’s rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Similarly, the court may not modify any obligations of the debtor under the security agreement without the creditor’s consent (paragraph 10). But the insolvency administrator remains entitled to terminate the security agreement where so allowed by the applicable law (paragraph 11).

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

(b) *Alternative B*

80. The “soft,” or discretion-based, version, Alternative B, requires the insolvency administrator or the debtor, as applicable, upon the creditor’s request and within the period specified in the

declaration of the Contracting State, to state whether it will cure all defaults and perform all future obligations under the security agreement and related transaction documents or give the creditor the opportunity to take possession of the space asset in accordance with the applicable law. If the insolvency administrator does not give the required statement or does not give up possession after stating it will do so, the court may permit the creditor to take possession upon such terms as the court may order and, again, may require the taking of any additional step or the provision of any additional guarantee. This would allow the court, if so empowered by the applicable law, to require the creditor to furnish a guarantee against loss suffered by the debtor as the result of the order if, on the substantive hearing, the creditor's claim were to prove unsuccessful. Compared with Alternative A, the creditor's rights are qualified in two respects. First, the insolvency administrator does not have to take action to cure all defaults or give the creditor an opportunity to take possession; it merely has to give notice to the creditor whether it will do either of these things. Secondly, if the insolvency administrator does not give the required notice or if, having declared it will give the creditor the opportunity to take possession, it fails to do so, the creditor cannot exercise self-help but must apply to the court for leave to take possession and, if leave is granted, conditions may be imposed. So, under the "soft" version of Article XI, the court's discretion is substituted for the creditor's entitlement to take possession. Pending the court's decision regarding the claim and the international interest the space asset may not be sold (Alternative B, paragraph 6).

81. Article XXII, which applies only where a Contracting State has made a declaration under Article F(1) of the draft final provisions, provides that the courts of a Contracting State which in one or more specified ways has a connection with the space asset<sup>9</sup> shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XXI. The phrase "in accordance with the law of the Contracting State" means "so far as not incompatible with". It is not necessary that the Contracting State's law should provide for co-operation; it is sufficient that it does not preclude it from being given.

### **Priority of outright sales**

82. The buyer of a space asset under a registered sale acquires its interest in that asset free from an interest subsequently registered or from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest but takes subject to an interest registered before the registration of the buyer's interest (Article XXIII).

### **Identification for registration purposes**

83. Whereas there is no need for unique identification of a space asset in order to constitute an international interest, the position is otherwise when it comes to registration. A description of a space asset is necessary and sufficient for the purposes of registration in the International Registry if it contains the name of its manufacturer, its manufacturer's serial number and its model designation, and satisfies such other requirements as may be established in the regulations. So regulations could prescribe additional information that would facilitate a search against the space asset, such as the date and place of launch and, in the case of a satellite, its assigned orbital location.

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<sup>9</sup> Article XXII(2) requires co-operation from the courts of a Contracting State (i) in which the space asset is situated; (ii) from which it may be controlled; (iii) in which the debtor is situated; (iv) in which the space asset is registered; (v) which has granted a licence in respect of the space asset; or (vi) otherwise having a close connection with the space asset.

**Waiver of sovereign immunity**

84. Article XXXII provides that a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to a space asset shall be binding if in writing and containing a description of the space asset in accordance with Article VII, which, it will be recalled, does not require unique identification.

**Relationship with other Conventions**

85. The Convention as applied to space assets supersedes the Leasing Convention (Article XXXIII).but does not affect State Party rights and obligations under the existing United Nations Outer Space Treaties or instruments of the International Telecommunication Union (Article XXXIV).

**Derogation**

86. Article XVI empowers the parties, by agreement in writing, to exclude the application of Article XXI (though only in its entirety) and, in their relations with each other, to vary the effect of any of the provisions of the draft Space Protocol except Article XVII(2) and (3), dealing respectively with reasonable notice and physically linked assets. It is not open to the parties to make an agreement which affects the rights of third parties or, indeed, to modify or exclude any provisions of the draft Space Protocol other than those applicable in their relations with each other.

**Final provisions**

87. Most of these are standard but three require specific mention. Under Article B of the draft final provisions, an REIO constituted by sovereign States and having competence over certain matters governed by the draft Space Protocol may adopt the future Protocol and be treated for most purposes as if it were a Contracting State. This follows a similar provision in the Convention. A prominent example of such an Organisation is the European Union, which has already adopted the Convention and Aircraft Protocol. Under Article C of the draft final provisions, the future Protocol's entry into force is conditional not only on the specified number of ratifications (provisionally five) but also on the deposit with the Depositary of a certificate confirming that the future International Registry is fully operational. This provision, which follows a similar provision in the Luxembourg Protocol, is designed to avoid the risk of the future Protocol coming into force before the future International Registry system has become operational, thus rendering the future Protocol largely inoperable, even though technically in force. Article E of the draft final provisions follows the Luxembourg Protocol in amending Article 60 of the Convention, so as to make explicit certain features which under Article 60 were only implicit.

**APPENDIX**

**CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT**

THE STATES PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,

HAVE AGREED upon the following provisions:

**Chapter I**

Sphere of application and general provisions

**Article 1 – Definitions**

In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:

- (a) "agreement" means a security agreement, a title reservation agreement or a leasing agreement;
- (b) "assignment" means a contract which, whether by way of security or otherwise, confers on the assignee associated rights with or without a transfer of the related international interest;

- (c) “associated rights” means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object;
- (d) “commencement of the insolvency proceedings” means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;
- (e) “conditional buyer” means a buyer under a title reservation agreement;
- (f) “conditional seller” means a seller under a title reservation agreement;
- (g) “contract of sale” means a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in (a) above;
- (h) “court” means a court of law or an administrative or arbitral tribunal established by a Contracting State;
- (i) “creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;
- (j) “debtor” means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest;
- (k) “insolvency administrator” means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;
- (l) “insolvency proceedings” means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation;
- (m) “interested persons” means:
  - (i) the debtor;
  - (ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;
  - (iii) any other person having rights in or over the object;
- (n) “internal transaction” means a transaction of a type listed in Article 2(2)(a) to (c) where the centre of the main interests of all parties to such transaction is situated, and the relevant object located (as specified in the Protocol), in the same Contracting State at the time of the conclusion of the contract and where the interest created by the transaction has been registered in a national registry in that Contracting State which has made a declaration under Article 50(1);
- (o) “international interest” means an interest held by a creditor to which Article 2 applies;

- (p) “International Registry” means the international registration facilities established for the purposes of this Convention or the Protocol;
- (q) “leasing agreement” means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment;
- (r) “national interest” means an interest held by a creditor in an object and created by an internal transaction covered by a declaration under Article 50(1);
- (s) “non-consensual right or interest” means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation;
- (t) “notice of a national interest” means notice registered or to be registered in the International Registry that a national interest has been created;
- (u) “object” means an object of a category to which Article 2 applies;
- (v) “pre-existing right or interest” means a right or interest of any kind in or over an object created or arising before the effective date of this Convention as defined by Article 60(2)(a);
- (w) “proceeds” means money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition;
- (x) “prospective assignment” means an assignment that is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;
- (y) “prospective international interest” means an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor’s acquisition of an interest in the object), whether or not the occurrence of the event is certain;
- (z) “prospective sale” means a sale which is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;
- (aa) “Protocol” means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;
- (bb) “registered” means registered in the International Registry pursuant to Chapter V;
- (cc) “registered interest” means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V;
- (dd) “registrable non-consensual right or interest” means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40;

- (ee) "Registrar" means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(2)(b);
- (ff) "regulations" means regulations made or approved by the Supervisory Authority pursuant to the Protocol;
- (gg) "sale" means a transfer of ownership of an object pursuant to a contract of sale;
- (hh) "secured obligation" means an obligation secured by a security interest;
- (ii) "security agreement" means 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;
- (jj) "security interest" means an interest created by a security agreement;
- (kk) "Supervisory Authority" means, in respect of the Protocol, the Supervisory Authority referred to in Article 17(1);
- (ll) "title reservation agreement" means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;
- (mm) "unregistered interest" means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention; and
- (nn) "writing" means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.

## **Article 2 – The international interest**

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

- (a) granted by the chargor under a security agreement;
  - (b) vested in a person who is the conditional seller under a title reservation agreement;
- or
- (c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. The categories referred to in the preceding paragraphs are:



- (a) airframes, aircraft engines and helicopters;
  - (b) railway rolling stock; and
  - (c) space assets.
4. The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph.
5. An international interest in an object extends to proceeds of that object.

### **Article 3 – Sphere of application**

1. This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.
2. The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

### **Article 4 – Where debtor is situated**

1. For the purposes of Article 3(1), the debtor is situated in any Contracting State:
- (a) under the law of which it is incorporated or formed;
  - (b) where it has its registered office or statutory seat;
  - (c) where it has its centre of administration; or
  - (d) where it has its place of business.
2. A reference in sub-paragraph (d) of the preceding paragraph to the debtor's place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

### **Article 5 – Interpretation and applicable law**

1. In the interpretation of this Convention, regard is to be had 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.
2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.
3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.
4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit,

the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

### **Article 6 – Relationship between the Convention and the Protocol**

1. This Convention and the Protocol shall be read and interpreted together as a single instrument.
2. To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.

## **Chapter II**

### Constitution of an international interest

### **Article 7 – Formal requirements**

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:

- (a) is in writing;
- (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose;
- (c) enables the object to be identified in conformity with the Protocol; and
- (d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

## **Chapter III**

### Default remedies

### **Article 8 – Remedies of chargee**

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:
  - (a) take possession or control of any object charged to it;
  - (b) sell or grant a lease of any such object;

- (c) collect or receive any income or profits arising from the management or use of any such object.
2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.
3. Any remedy set out in sub-paragraph (a), (b) or (c) of paragraph 1 or by Article 13 shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.
4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:
- (a) interested persons specified in Article 1(m)(i) and (ii); and
  - (b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.
5. Any sum collected or received by the chargee as a result of exercise of any of the remedies set out in paragraph 1 or 2 shall be applied towards discharge of the amount of the secured obligations.
6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.

### **Article 9 – Vesting of object in satisfaction; redemption**

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.
2. The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.
3. The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.
4. At any time after default as provided in Article 11 and before sale of the charged object or the making of an order under paragraph 2, the chargor or any interested person may discharge the security interest by paying in full the amount secured, subject to any lease granted by the chargee under Article 8(1)(b) or ordered under Article 8(2). Where, after such default, the payment of the amount secured is made in full by an interested person other than the debtor, that person is subrogated to the rights of the chargee.

5. Ownership or any other interest of the chargor passing on a sale under Article 8(1)(b) or passing under paragraph 1 or 2 of this Article is free from any other interest over which the chargee's security interest has priority under the provisions of Article 29.

#### **Article 10 – Remedies of conditional seller or lessor**

In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may:

- (a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or
- (b) apply for a court order authorising or directing either of these acts.

#### **Article 11 – Meaning of default**

1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.

2. Where the debtor and the creditor have not so agreed, "default" for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

#### **Article 12 – Additional remedies**

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

#### **Article 13 – Relief pending final determination**

1. Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:

- (a) preservation of the object and its value;
- (b) possession, control or custody of the object;
- (c) immobilisation of the object; and
- (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

2. In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:

- (a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or
- (b) fails to establish its claim, wholly or in part, on the final determination of that claim.

3. Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.

4. Nothing in this Article affects the application of Article 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1.

#### **Article 14 – Procedural requirements**

Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

#### **Article 15 – Derogation**

In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.

### **Chapter IV**

The international registration system

#### **Article 16 – The International Registry**

1. An International Registry shall be established for registrations of:
  - (a) international interests, prospective international interests and registrable non-consensual rights and interests;
  - (b) assignments and prospective assignments of international interests;
  - (c) acquisitions of international interests by legal or contractual subrogations under the applicable law;
  - (d) notices of national interests; and
  - (e) subordinations of interests referred to in any of the preceding sub-paragraphs.
2. Different international registries may be established for different categories of object and associated rights.

3. For the purposes of this Chapter and Chapter V, the term “registration” includes, where appropriate, an amendment, extension or discharge of a registration.

### **Article 17 – The Supervisory Authority and the Registrar**

1. There shall be a Supervisory Authority as provided by the Protocol.
2. The Supervisory Authority shall:
  - (a) establish or provide for the establishment of the International Registry;
  - (b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar;
  - (c) ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;
  - (d) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;
  - (e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;
  - (f) supervise the Registrar and the operation of the International Registry;
  - (g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;
  - (h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;
  - (i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and
  - (j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.
3. The Supervisory Authority may enter into any agreement requisite for the performance of its functions, including any agreement referred to in Article 27(3).
4. The Supervisory Authority shall own all proprietary rights in the data bases and archives of the International Registry.
5. The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to it by this Convention, the Protocol and the regulations.

## Chapter V

### Other matters relating to registration

#### Article 18 – Registration requirements

1. The Protocol and regulations shall specify the requirements, including the criteria for the identification of the object:
  - (a) for effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 20);
  - (b) for making searches and issuing search certificates, and, subject thereto;
  - (c) for ensuring the confidentiality of information and documents of the International Registry other than information and documents relating to a registration.
2. The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.
3. Where an interest registered as a prospective international interest becomes an international interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.
4. The Registrar shall arrange for registrations to be entered into the International Registry data base and made searchable in chronological order of receipt, and the file shall record the date and time of receipt.
5. The Protocol may provide that a Contracting State may designate an entity or entities in its territory as the entry point or entry points through which the information required for registration shall or may be transmitted to the International Registry. A Contracting State making such a designation may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry.

#### Article 19 – Validity and time of registration

1. A registration shall be valid only if made in conformity with Article 20.
2. A registration, if valid, shall be complete upon entry of the required information into the International Registry data base so as to be searchable.
3. A registration shall be searchable for the purposes of the preceding paragraph at the time when:
  - (a) the International Registry has assigned to it a sequentially ordered file number; and
  - (b) the registration information, including the file number, is stored in durable form and may be accessed at the International Registry.

4. If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest provided that the registration was still current immediately before the international interest was constituted as provided by Article 7.

5. The preceding paragraph applies with necessary modifications to the registration of a prospective assignment of an international interest.

6. A registration shall be searchable in the International Registry data base according to the criteria prescribed by the Protocol.

#### **Article 20 – Consent to registration**

1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.

2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.

3. A registration may be discharged by or with the consent in writing of the party in whose favour it was made.

4. The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee.

5. A registrable non-consensual right or interest may be registered by the holder thereof.

6. A notice of a national interest may be registered by the holder thereof.

#### **Article 21 – Duration of registration**

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

#### **Article 22 – Searches**

1. Any person may, in the manner prescribed by the Protocol and regulations, make or request a search of the International Registry by electronic means concerning interests or prospective international interests registered therein.

2. Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol and regulations, shall issue a registry search certificate by electronic means with respect to any object:

(a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or

(b) stating that there is no information in the International Registry relating thereto.



3. A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate whether what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information.

### **Article 23 – List of declarations and declared non-consensual rights or interests**

The Registrar shall maintain a list of declarations, withdrawals of declaration and of the categories of nonconsensual right or interest communicated to the Registrar by the Depositary as having been declared by Contracting States in conformity with Articles 39 and 40 and the date of each such declaration or withdrawal of declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol and regulations to any person requesting it.

### **Article 24 – Evidentiary value of certificates**

A document in the form prescribed by the regulations which purports to be a certificate issued by the International Registry is prima facie proof:

- (a) that it has been so issued; and
- (b) of the facts recited in it, including the date and time of a registration.

### **Article 25 – Discharge of registration**

1. Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

2. Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.

3. Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

4. Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor delivered to or received at its address stated in the registration.

### **Article 26 – Access to the international registration facilities**

No person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter.

## **Chapter VI**

Privileges and immunities of  
the Supervisory Authority and the Registrar

### **Article 27 – Legal personality; immunity**

1. The Supervisory Authority shall have international legal personality where not already possessing such personality.
2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative process as is specified in the Protocol.
3. (a) The Supervisory Authority shall enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State.  
(b) For the purposes of this paragraph, “host State” means the State in which the Supervisory Authority is situated.
4. The assets, documents, data bases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.
5. For the purposes of any claim against the Registrar under Article 28(1) or Article 44, the claimant shall be entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.
6. The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.

## **Chapter VII**

Liability of the Registrar

### **Article 28 – Liability and financial assurances**

1. The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system except where the malfunction is caused by an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those related to back-up and systems security and networking.

2. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information nor for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry.

3. Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.

4. The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority, in accordance with the Protocol.

## **Chapter VIII**

### Effects of an international interest as against third parties

#### **Article 29 – Priority of competing interests**

1. A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

2. The priority of the first-mentioned interest under the preceding paragraph applies:

(a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and

(b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

3. The 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.

4. The conditional buyer or lessee acquires its interest in or right over that object:

(a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and

(b) free from an interest not so registered at that time even if it has actual knowledge of that interest.

5. The priority of competing interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

6. Any priority given by this Article to an interest in an object extends to proceeds.

7. This Convention:
- (a) 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; and
  - (b) 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.

### **Article 30 – Effects of insolvency**

1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.
2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.
3. Nothing in this Article affects:
  - (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
  - (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

## **Chapter IX**

Assignments of associated rights and international interests;  
rights of subrogation

### **Article 31 – Effects of assignment**

1. Except as otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 also transfers to the assignee:
  - (a) the related international interest; and
  - (b) all the interests and priorities of the assignor under this Convention.
2. Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph but not so as adversely to affect the debtor without its consent.
3. Subject to paragraph 4, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.

4. The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.

5. In the case of an assignment by way of security, the assigned associated rights revert in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.

### **Article 32 – Formal requirements of assignment**

1. An assignment of associated rights transfers the related international interest only if it:
  - (a) is in writing;
  - (b) enables the associated rights to be identified under the contract from which they arise; and
  - (c) in the case of an assignment by way of security, enables the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured.
2. 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.
3. This Convention does not apply to an assignment of associated rights which is not effective to transfer the related international interest.

### **Article 33 – Debtor's duty to assignee**

1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor in relation to those rights and that interest is bound by the assignment and has a duty to make payment or give other performance to the assignee, if but only if:
  - (a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor; and
  - (b) the notice identifies the associated rights.
2. Irrespective of any other ground on which payment or performance by the debtor discharges the latter from liability, payment or performance shall be effective for this purpose if made in accordance with the preceding paragraph.
3. Nothing in this Article shall affect the priority of competing assignments.

**Article 34 – Default remedies in respect of assignment  
by way of security**

In the event of default by the assignor under the assignment of associated rights and the related international interest made by way of security, Articles 8, 9 and 11 to 14 apply in the relations between the assignor and the assignee (and, in relation to associated rights, apply in so far as those provisions are capable of application to intangible property) as if references:

- (a) to the secured obligation and the security interest were references to the obligation secured by the assignment of the associated rights and the related international interest and the security interest created by that assignment;
- (b) to the chargee or creditor and chargor or debtor were references to the assignee and assignor;
- (c) to the holder of the international interest were references to the assignee; and
- (d) to the object were references to the assigned associated rights and the related international interest.

**Article 35 – Priority of competing assignments**

1. Where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply as if the references to a registered interest were references to an assignment of the associated rights and the related registered interest and as if references to a registered or unregistered interest were references to a registered or unregistered assignment.

2. Article 30 applies to an assignment of associated rights as if the references to an international interest were references to an assignment of the associated rights and the related international interest.

**Article 36 – Assignee's priority with respect to associated rights**

1. The assignee of associated rights and the related international interest whose assignment has been registered only has priority under Article 35(1) over another assignee of the associated rights:

- (a) if the contract under which the associated rights arise states that they are secured by or associated with the object; and
- (b) to the extent that the associated rights are related to an object.

2. For the purposes of sub-paragraph (b) of the preceding paragraph, associated rights are related to an object only to the extent that they consist of rights to payment or performance that relate to:

- (a) a sum advanced and utilised for the purchase of the object;

- (b) a sum advanced and utilised for the purchase 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;
  - (c) the price payable for the object;
  - (d) the rentals payable in respect of the object; or
  - (e) other obligations arising from a transaction referred to in any of the preceding subparagraphs.
3. In all other cases, the priority of the competing assignments of the associated rights shall be determined by the applicable law.

### **Article 37 – Effects of assignor’s insolvency**

The provisions of Article 30 apply to insolvency proceedings against the assignor as if references to the debtor were references to the assignor.

### **Article 38 – Subrogation**

1. Subject to paragraph 2, nothing in this Convention affects the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law.
2. The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

## **Chapter X**

Rights or interests subject to declarations by Contracting States

### **Article 39 – Rights having priority without registration**

1. A Contracting State may at any time, in a declaration deposited with the Depository of the Protocol declare, generally or specifically:
- (a) those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State’s law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and
  - (b) that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest

or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

2. A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3. A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession.

#### **Article 40 – Registrable non-consensual rights or interests**

A Contracting State may at any time in a declaration deposited with the Depository of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.

### **Chapter XI**

Application of the Convention to sales

#### **Article 41 – Sale and prospective sale**

This Convention shall apply to the sale or prospective sale of an object as provided for in the Protocol with any modifications therein.

### **Chapter XII**

Jurisdiction

#### **Article 42 – Choice of forum**

1. Subject to Articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties.

2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.



**Article 43 – Jurisdiction under Article 13**

1. The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(4) in respect of that object.
2. Jurisdiction to grant relief under Article 13(1)(d) or other interim relief by virtue of Article 13(4) may be exercised either:
  - (a) by the courts chosen by the parties; or
  - (b) by the courts of a Contracting State on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.
3. A court has jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 13(1) will or may take place in a court of another Contracting State or by arbitration.

**Article 44 – Jurisdiction to make orders against the Registrar**

1. The courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.
2. Where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration, the courts referred to in the preceding paragraph shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order directed to the Registrar requiring the Registrar to discharge the registration.
3. Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration, the courts referred to in paragraph 1 may direct the Registrar to take such steps as will give effect to that order.
4. Except as otherwise provided by the preceding paragraphs, no court may make orders or give judgments or rulings against or purporting to bind the Registrar.

**Article 45 – Jurisdiction in respect of insolvency proceedings**

The provisions of this Chapter are not applicable to insolvency proceedings.

## Chapter XIII

### Relationship with other Conventions

#### **Article 45 bis – Relationship with the *United Nations Convention on the Assignment of Receivables in International Trade***

This Convention shall prevail over the *United Nations Convention on the Assignment of Receivables in International Trade*, opened for signature in New York on 12 December 2001, as it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.

#### **Article 46 – Relationship with the *UNIDROIT Convention on International Financial Leasing***

The Protocol may determine the relationship between this Convention and the *UNIDROIT Convention on International Financial Leasing*, signed at Ottawa on 28 May 1988.

## Chapter XIV

### Final provisions

#### **Article 47 – Signature, ratification, acceptance, approval or accession**

1. This Convention shall be open for signature in Cape Town on 16 November 2001 by States participating in the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held at Cape Town from 29 October to 16 November 2001. After 16 November 2001, the Convention shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article 49.
2. This Convention shall be subject to ratification, acceptance or approval by States which have signed it.
3. Any State which does not sign this Convention may accede to it at any time.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.

#### **Article 48 – Regional Economic Integration Organisations**

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting

States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

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

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

#### **Article 49 – Entry into force**

1. This Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies:

- (a) as from the time of entry into force of that Protocol;
- (b) subject to the terms of that Protocol; and
- (c) as between States Parties to this Convention and that Protocol.

2. For other States this Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of their instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies and subject, in relation to such Protocol, to the requirements of sub-paragraphs (a), (b) and (c) of the preceding paragraph.

#### **Article 50 – Internal transactions**

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of objects or some of them.

2. Notwithstanding the preceding paragraph, the provisions of Articles 8(4), 9(1), 16, Chapter V, Article 29, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.

3. Where notice of a national interest has been registered in the International Registry, the priority of the holder of that interest under Article 29 shall not be affected by the fact that such interest has become vested in another person by assignment or subrogation under the applicable law.

### **Article 51 – Future Protocols**

1. The Depositary may create working groups, in co-operation with such relevant non-governmental organisations as the Depositary considers appropriate, to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.
2. The Depositary shall communicate the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organisations, and shall invite such States and organisations to participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.
3. The Depositary shall also communicate the text of any preliminary draft Protocol prepared by such a working group to such relevant non-governmental organisations as the Depositary considers appropriate. Such non-governmental organisations shall be invited promptly to submit comments on the text of the preliminary draft Protocol to the Depositary and to participate as observers in the preparation of a draft Protocol.
4. When the competent bodies of the Depositary adjudge such a draft Protocol ripe for adoption, the Depositary shall convene a diplomatic conference for its adoption.
5. Once such a Protocol has been adopted, subject to paragraph 6, this Convention shall apply to the category of objects covered thereby.
6. Article 45 *bis* of this Convention applies to such a Protocol only if specifically provided for in that Protocol.

### **Article 52 – Territorial units**

1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them and may modify its declaration by submitting another declaration at any time.
2. Any such declaration shall state expressly the territorial units to which this Convention applies.
3. If a Contracting State has not made any declaration under paragraph 1, this Convention shall apply to all territorial units of that State.
4. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.
5. If by virtue of a declaration under paragraph 1, this Convention extends to one or more territorial units of a Contracting State:

- (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which this Convention applies or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which this Convention applies;
- (b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which this Convention applies; and
- (c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which this Convention applies.

### **Article 53 – Determination of courts**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant “court” or “courts” for the purposes of Article 1 and Chapter XII of this Convention.

### **Article 54 – Declarations regarding remedies**

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.
2. A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

### **Article 55 – Declarations regarding relief pending final determination**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.

### **Article 56 – Reservations and declarations**

1. No reservations may be made to this Convention but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.
2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.

### **Article 57 – Subsequent declarations**

1. A State Party may make a subsequent declaration, other than a declaration authorised under Article 60, at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.
2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.
3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

### **Article 58 – Withdrawal of declarations**

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

### **Article 59 – Denunciations**

1. Any State Party may denounce this Convention by notification in writing to the Depositary.
2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which notification is received by the Depositary.
3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

### **Article 60 – Transitional provisions**

1. Unless otherwise declared by a Contracting State at any time, 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 this Convention.
2. For the purposes of Article 1(v) and of determining priority under this Convention:
  - (a) “effective date of this Convention” means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later; and

- (b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.

### **Article 61 – Review Conferences, amendments and related matters**

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

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

- (a) the practical operation of this Convention and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;
- (b) the judicial interpretation given to, and the application made of the terms of this Convention and the regulations;
- (c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and
- (d) whether any modifications to this Convention or the arrangements relating to the International Registry are desirable.

3. Subject to paragraph 4, any amendment to this Convention shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of Article 49 relating to its entry into force.

4. Where the proposed amendment to this Convention is intended to apply to more than one category of equipment, such amendment shall also be approved by at least a two-thirds majority of States Parties to each Protocol that are participating in the Conference referred to in paragraph 2.

### **Article 62 – Depositary and its functions**

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

2. The Depositary shall:

- (a) inform all Contracting States of:
  - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
  - (ii) the date of entry into force of this Convention;
  - (iii) each declaration made in accordance with this Convention, together with the date thereof;
  - (iv) the withdrawal or amendment of any declaration, together with the date thereof; and
  - (v) the notification of any denunciation of this Convention together with the date thereof and the date on which it takes effect;
- (b) transmit certified true copies of this Convention to all Contracting States;
- (c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and
- (d) perform such other functions customary for depositaries.

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

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