

# SELF-INSTRUCTIONAL MATERIALS

PREPARED UNDER THE AEGIS OF THE LEGAL ADVISORY PANEL TO  
THE AVIATION WORKING GROUP



FOR USE BY THE CAPE TOWN CONVENTION ACADEMIC PROJECT

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## CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (2001)

PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT OBJECTS  
(2001)

LUXEMBOURG PROTOCOL ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK  
(2007)

PROTOCOL ON MATTERS SPECIFIC TO SPACE ASSETS  
(2012)

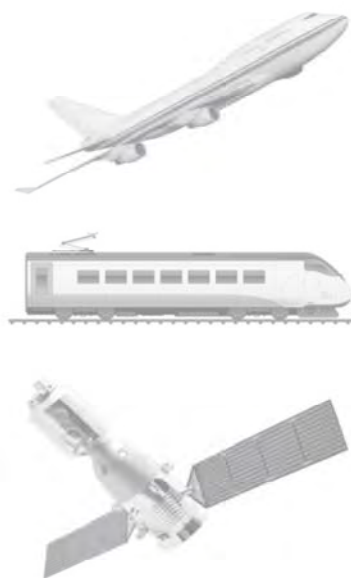
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## FOREWORD

The introduction below was prepared by Mark Lessard of Pillsbury Winthrop Shaw Pittman LLP, the coordinator of the Aviation Working Group's Legal Advisory Panel team on educational materials relating to the Cape Town Convention (the "*Convention*"). The Cape Town Convention Academic Project owes a great debt to Mr. Lessard for his creative, thoughtful, and precise work in assembling and editing, as well as contributing to, these self-instructional materials. Without his skill, and, equally, the substantial efforts of, and time contributed by, the supporting group at Pillsbury, these invaluable materials would be no more than idea.

We also wish to thank the following firms for their assistance with translation of these materials: Clyde & Co. (Arabic); King & Wood Mallesons (Chinese); {Blakes, Cassels, & Graydon/McCarthy Tetrault} (French); Basch & Rameh Consultores (Portuguese); White & Case (Russian); Abogados, Sierra y Vazquez (Spanish); Serap Zuvim Law Offices (Turkish). The forgoing disclaimer applies equally in favor of these law firms in respect of their translations.

Professor Jeffrey Wool  
Executive Director, Cape Town Convention Academic Project  
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## INTRODUCTION

The Cape Town Convention on International Interests in Mobile Equipment creates an innovative international framework that facilitates the efficient financing and leasing of mobile equipment. It is the product of a ground-breaking multi-jurisdictional legal and political effort, which was only possible with the backing of a wide-range of governmental and industry participants. Adopted in late 2001, the Convention is already one of the most successful commercial law treaties in history (as of January 2014, sixty (60) countries are parties to it). But it is equally important in substantive and conceptual terms: taken together, its provisions address property rights, insolvency, electronic commerce, and dispute resolution to a degree without precedent in the field of transnational commercial law.

These "Self-Instructional Materials" have been assembled in the context of the Cape Town Convention Academic Project (the "*Project*"), which seeks to assist scholars, students, practising lawyers, judges and other government officials, as well as the industry at large, by providing information on and education about the Cape Town Convention and its protocols. The Project is a joint undertaking between the University of Oxford Faculty of Law and the University of Washington School of Law. Parts of the Project are under the joint auspices of the Project and UNIDROIT, the international organisation that led the development and acts as the treaty depositary of the Convention. ICAO and OTIF are also cooperating with the Project. The Aviation Working Group ("*AWG*") is the founding sponsor of the Project.

This work is not intended to compete with existing literature, but to serve as an introduction to a complex subject matter that remains in constant evolution as the Convention is adopted, implemented and enforced in various jurisdictions around the world. These materials are therefore cursory in nature. They are largely inspired by, and based upon, the principles expounded in two key publications to which these modules owe their essence: Sir Roy Goode's *Official Commentary, Third Edition (2013)* (the "*Commentary*") and the *Practitioners Guide to the Cape Town Convention* prepared the Legal Advisory Panel to the AWG (the "*Guide*"). Users of these materials are encouraged to refer to the Commentary and the Guide for a more complete treatment of the subject matter.

For ease of instructional use, these materials have been divided into eight thematic modules, each with its own

individual set of test questions. [Module 1](#) describes the legal regime that preceded the Convention, largely based on a patchwork of national rules with inconsistent application and results across different jurisdictions. [Module 2](#) explains the movement for and philosophy behind the Convention, including how various actors overcame the legal and political hurdles to the adoption and implementation of the Convention around the world. [Module 3](#) lays out the structure of the Convention and its individual protocols, as well as the innovative declaration system that imbued this new framework with the flexibility required to apply across disparate legal and political systems. [Module 4](#) elucidates the key legal elements of the Convention, including its sphere of application ([Module 4.1](#)), its relationship to national law ([Module 4.2](#)), the legal interests protected by the Convention ([Module 4.3](#)), the legal priority afforded such interests ([Module 4.4](#)), the process for registration of interests with the international registry ([Module 4.5](#)) and the exercise of remedies under the Convention ([Module 4.6](#)). [Module 5](#) describes the International Registry in more detail, including the procedures and mechanisms that allow it to function as a public registry for the legal interests of creditors and debtors. [Modules 6, 7 and 8](#) discuss the application and specific requirements of the Aircraft, Luxembourg (or Rail) and Space Assets Protocols, respectively.

Several esteemed firms whose lawyers are members of the Legal Advisory Panel contributed the content for these modules, in particular: Norton Rose Fulbright LLP (James Tussing, Emma Giddings), Clifford Chance LLP (Geoffrey White, Marisa Chan), McCarthy Tetrault LLP (Michel Deschamps), DeBee Gilchrist (Jack Gilchrist, Jason Hartwig), Milbank Tweed Hadley & McCloy LLP (Helfried Schwarz, Peter Nesgos, Alessandra Tarcher), Sidley Austin LLP (Rory Kelleher), Kaye Scholer LLP (Michael Multiz), Rajinder Narain & Co (Ravi Nath), Simpson Thacher & Bartlett LLP (Alan Brenner, Terry Sanders), Motta Fernandes (Regina Lynch), Ganado & Assoc (Max Ganado) and Zuvin Law (Serap Zuvin). Without these dedicated and knowledgeable professionals these self-instructional materials would never have taken form.

Finally, I would like to thank Professor Jeffrey Wool for his general and specific comments, including, in particular, those reflecting the views of the students at University of Washington Law School who reviewed a working draft of the modules.

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## GLOSSARY OF TERMS

<b>AIRCRAFT PROTOCOL:</b>	<i>Protocol on Matters Specific to Aircraft Objects (2001)</i>
<b>AWG:</b>	Aviation Working Group
<b>CONVENTION:</b>	<i>Convention on International Interests in Mobile Equipment (2001)</i>
<b>COMMENTARY:</b>	Sir Roy Goode's <i>Official Commentary on Matters Specific to the Aircraft Protocol, Third Edition (2013)</i> (Note: For <a href="#">Module 7</a> , this refers Sir Roy Goode's <i>Official Commentary on Matters Specific to the Luxembourg Protocol</i> and for <a href="#">Module 8</a> to Sir Roy Goode's <i>Official Commentary on Matters Specific to the Space Assets Protocol</i> )
<b>GUIDE:</b>	<i>Practitioners Guide to the Cape Town Convention prepared the Legal Advisory Panel to the AWG, Revised Edition (2013)</i>
<b>PROTOCOL(S):</b>	The Aircraft Protocol, the Rail Protocol and/or the Space Protocol, as the context indicates.
<b>RAIL PROTOCOL:</b>	<i>Luxembourg Protocol on Matters Specific to Railway Rolling Stock (2007)</i>
<b>SPACE PROTOCOL:</b>	<i>Protocol on Matters Specific to Space Assets (2012)</i>





# MODULE 1: THE PROBLEM

## AN INADEQUATE PATCHWORK OF LAWS

### ISSUES UNDER PRE-EXISTING NATIONAL LAWS AND CONFLICT RULES

#### COMMERCIAL AND LEGAL SETTING

The Convention is designed to increase the availability and reduce the cost of asset-based financing, something that requires a sound international legal regime for the protection of security, ownership and other legal interests in mobile equipment as it moves around the globe. The greater security offered to creditors by such a regime lowers risk of loss, enhances the credit rating of loan and leasing receivables secured on equipment, and enables national export credit guarantee institutions providing coverage against loss to reduce the exposure fees they charge. See [Commentary, 2.1](#).

The need to create legal predictability and to lower borrowing costs is particularly relevant as the aviation industry has evolved from

a traditionally government-owned or heavily regulated industry to a privatized and deregulated industry, increasingly governed by an open-skies policy. This privatization movement has led to increased default history among airlines, which has, in turn, focused creditors on the security in financings and other transactions.

As will be described in detail below, the Convention fills a number of voids that existed within an inadequate patchwork of international

laws. Crucially, the Convention creates an international registry system as an effective means of perfecting and publishing property and security interests in high-value mobile equipment. It also offers creditor various basic default remedies and possibilities for expedited relief in the event of default. These and the other elements of the Convention described in this guide serve to increase predictability for all parties involved in asset financing.



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#### KEY TERMS FOR THIS MODULE:

- “conflict of laws”
- “secured transactions laws”
- “substantive law”
- “geneva convention (1948)”
- “governing law clause”

#### INSIDE THIS MODULE:

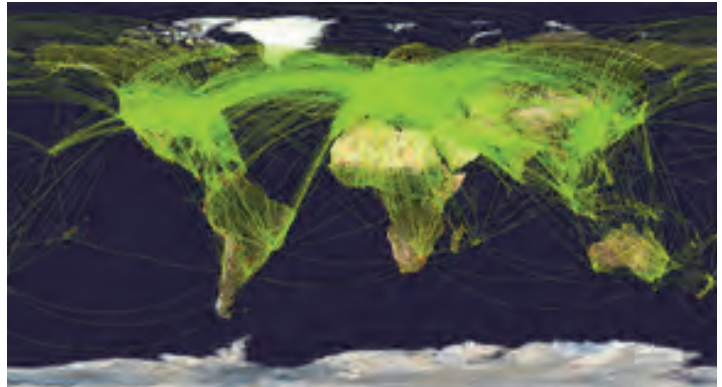
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*The Convention fills a number of voids that existed within an inadequate patchwork of international laws.*

## THE NEED FOR PREDICTABILITY

Predictability is crucial in the area of secured transactions and leasing. A financier who extends secured credit needs to ensure that its security will be recognized in the State of the main location of the debtor and in other States where its security may have to be enforced. To achieve this goal, the financier must first examine the conflict of laws rules of all States concerned. Conflict of laws rules are the rules which determine the jurisdiction whose substantive law will apply to a particular legal issue. Thus, the conflict rules of the forum State (e.g. the State in which litigation takes place) will indicate the substantive law that a court of that State will apply to the creation, effectiveness against third parties (perfection), priority and enforcement of a security interest. Recognition of cross-border security in any given State requires compliance with the substantive law designated by its conflict rules. The applicable substantive law may be the law of that State or of another State.

CONFLICT OF LAWS RULES ARE THE RULES WHICH DETERMINE THE JURISDICTION WHOSE SUBSTANTIVE LAW WILL APPLY TO A PARTICULAR LEGAL ISSUE.



*In aircraft financing, identifying the applicable national laws is a challenging task.*

Ascertaining the applicable substantive law of the (or each) relevant State is an easy task if the charged asset (the collateral) consists of a manufacturer's inventory stored in the State of the location of the head office of the manufacturer. In this scenario, the financier most often will need to fulfill only the secured transactions requirements of that State; cross-border issues will rarely arise because the conflict rules will generally point to the law of such State on matters such as the creation, perfection, priority and enforcement of the financier's security interest.

In aircraft financing, identifying the applicable national law (or laws) is a much more challenging task. As an aircraft may land in numerous States, in the absence of a uniform international regime, a prudent financier must inquire about the conflict rules of all such States (or at least of each State where the aircraft will frequently land). The costs associated with the inquiry may be significant. Moreover, States do not always have clear conflict rules and, in such cases, predictability cannot be achieved. The financier then faces additional legal risks.



## DIVERSITY OF NATIONAL CONFLICT RULES

The difficulties associated with determining the applicable laws are compounded by reason of the diversity of the conflict rules in effect in various States. Conflict rules are not harmo-

nized internationally. Each State has its own conflict rules and they may differ from one State to another. For example, the conflict rule of some States provides that the substantive law applicable to a

security interest in any kind of asset is the traditional *lex situs* rule (the law where the asset may be situated at any given time); to be fully protected, an aircraft financier will need to obtain

## DIVERSITY OF NATIONAL CONFLICT RULES (CONT'D...)

a valid and perfected security in all such States where the aircraft may land (which is not easy to predict). Other States have a conflict rule for mobile assets (such as aircraft) pointing to the law of the location of the debtor or the state where the aircraft is registered for nationality purposes. The debtor-location rule offers more predictability. However, that rule is not as simple to apply as it would appear at first glance: the notion of the location of the debtor is not defined in the same manner in the States. There exists a variety of national definitions of debtor's location (debtor's centre of main interests, debtor's registered office, debtor's place of incorporation or formation, etc...).

The complexity of investigating the relevant substantive law is exacerbated where a State does not provide for one single conflict rule for all issues or for all types of transactions. Certain national conflict of laws regimes have different criteria to designate the law applicable to the creation, perfection, priority or enforcement of a security interest; these regimes may point to the law of one State for perfection issues and the law of another State for priority issues. Other national conflict rules designate one substantive law for security interests in the strict sense and another substantive law for the ownership interest of a conditional seller or a lessor. Finally, there are States in which the doctrine of renvoi is still in effect.

Under that doctrine, the reference by the conflict rules of a State to the law of another State is a reference not only to the domestic law of the other State but also to the conflict rules of that other State. In such case, if the conflict rules of State A refer to the law of State B for perfection issues and if the conflict rules of State B refer to the law of State C for perfection issues, then a security interest will have to be perfected under the law of State C in order to be recognized in State A. Indeed, renvoi adds another layer of complexity to the conflict of laws analysis.



*Conflict rules are not harmonized internationally.*

## INADEQUACY OF THE GENEVA CONVENTION 1948

The *Geneva Convention on the International Recognition of Rights in Aircraft (1948)* (the "[Geneva Convention](#)") was an attempt to harmonize conflict rules on property interests in or leases of aircraft. It provides that the applicable substantive law is the law of the State of nationality of the aircraft. The Geneva Convention is however outdated in many respects.

For example (i) the scope of the Geneva Convention is unclear or limited with

respect to leases, (ii) in certain cases, the absence of knowledge by a secured creditor of the existence of a previous unregistered interest is a condition to the secured creditor obtaining priority by registration (a requirement that has been eliminated in many modern secured transactions regimes), and



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(iii) the provisions of the Geneva Convention on remedies do not take extrajudicial enforcement sufficiently into account.

Among Contracting States parties to both instruments, very little remains of the Geneva Convention in its application to aircraft objects within the scope of the Cape Town Convention. See [Commentary, 5.102](#).

It would have been possible to update and refine the Geneva Convention in order

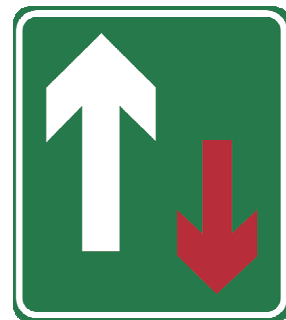
THE GENEVA CONVENTION IS ESSENTIALLY BASED ON A CONFLICT RULE APPROACH: IT DEFERS A NUMBER OF ISSUES TO THE LAW OF THE NATIONALITY OF THE AIRCRAFT.



## INADEQUACY OF THE 1948 GENEVA CONVENTION (CONT'D...)

to clarify and expand its scope and deal with issues such as those noted above. However, this would have remained an unsatisfactory solution as the Geneva Convention is essentially based on a conflict rule approach (referring most issues to the law of the nationality of the aircraft). A financier would still have been left with the burden of researching in detail the substantive law in effect in the State of nationality of

the aircraft. Moreover, depending on the contents of the applicable substantive law, the financier might not have obtained the desired protection. Therefore, relying on a conflict rule approach would not achieve uniformity as the outcome might be different depending on the national regime designated by the conflict rule. This is illustrated by the following segments of this module.



*Relying on a conflict rule approach would not achieve uniformity and may result in the application of an inadequate rule.*

## INADEQUACY OF NATIONAL SECURED TRANSACTIONS LAWS

NOT ALL NATIONAL LAWS ARE RESPONSIVE TO THE COMMERCIAL EXPECTATIONS OF THE PARTIES.



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Significant differences exist among States as to the legal regime governing security interests, leasing or other devices used for financing purposes. Not all national laws are fully responsive to the commercial expectations of the parties. Moreover, in many States, financing leases and conditional sales are governed by a legal framework which is

distinct from that applicable to traditional security interests. As a result, even if, as contemplated by the Geneva Convention, the law of one single State were to apply, a lender (or conditional seller or a lessor) would be subject to a different treatment depending on the State whose substantive law would be applicable.

## NATIONAL LAWS: CREATION OF A SECURITY INTEREST

For example, in some States, a security interest may secure all present and future obligations of the debtor to the secured creditor, whereas in other States the obligations secured must be specifically identified in the security agreement. Another example is that certain national laws permit the grant of a security interest to an agent or trustee for the benefit of a pool of lenders; this is common practice in syndicated loan transactions. However, in other national regimes, the practice is not recognized or is subject to complicated legal constraints.



DIFFERENT STATES OFFER VARYING REGIMES FOR THE VALID CREATION OF A SECURITY INTEREST.

## NATIONAL LAWS: PRIORITY

Priority rules also vary in many respects from one State to another. A large number of States provide that a security interest registered in a security interest registry will rank ahead of an unregistered security interest. There are however a myriad of exceptions or qualifications to that rule in most States. For example, there is a diversity of approaches with respect to the treatment of conditional sales and financing leases. In some States, they are assimilated to security interests and are subject to the same priority rules; yet, in many other States, they are governed by a different legal framework and an unregistered title reservation agreement may be effective

against third parties. Another example is the “[purchase money security interest](#)” concept found in certain national laws. Under such laws, a purchase money security interest is a security interest in goods the acquisition of which has been financed by the creditor; in such case, the lender will rank ahead of another secured creditor who has previously registered its security interest. However, in other States, a lender would not enjoy the same super priority.

Non-consensual interests such as liens (e.g. for tax claims or repairs) or rights of detention constitute another area where States have different rules.

There are a large number of liens susceptible of ranking ahead of a registered security; it goes without saying that there is no uniformity among States as to the types of liens to which a security interest is subordinate.

*A large number of States provide that a security interest registered in a security interest registry will rank ahead of an unregistered security interest.*



## NATIONAL LAWS: ENFORCEMENT REMEDIES

*“The scope of and the exceptions to a stay of creditor’s remedies upon insolvency vary significantly from one State to another.”*

Enforcement is also an issue where national legal systems take different approaches. Extra-judicial enforcement (self-help) is permitted in some States, whereas in many other States the exercise of remedies requires court intervention. Yet, in States where judicial proceedings are required, this requirement is often confined to a security interest in the strict sense (a charge) and self-help is allowed in the case of a conditional sale or a lease. These various approaches result in a creditor enjoying speedy remedies under national laws that generally recognize self-help; in States where there is no such recognition, the creditor will often be faced with delays and additional risks and costs. Indeed, the availability of speedy remedies is critical in the assessment of the practical value of a security interest or other interest. A creditor

who is empowered to take possession of the collateral upon default by the debtor is in a better position than a creditor who needs court authorization to do so.

A similar lack of uniformity must be noted in the event of a debtor’s insolvency. Upon the commencement of insolvency proceedings against or by a debtor, many national insolvency laws provide for a stay of creditors’ remedies. However, the scope of and

the exceptions to the stay vary from one State to another. In some States, the stay applies to any type of insolvency proceeding; in other States, the stay does not operate or operates differently where the proceeding is not of a reorganization or restructuring nature. Again, these distinctions prevent a financier from benefiting from a level playing field in the various States where the insolvency of its debtor may be administered.



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## NATIONAL LAWS: CHOICE OF LAW AND FORUM

WHEN RELYING ON DISPARATE NATIONAL LAWS, CHOICE OF LAW AND CHOICE OF FORUM CANNOT BE GUARANTEED.

The diversity of national rules on the effectiveness of a choice of law or a choice of forum is also an impediment in international transactions and, in particular, in aircraft financing transactions. This is another area where relying only on national laws is a source of uncertainty.



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## NATIONAL LAWS: CHOICE OF LAW AND FORUM (CONT'D...)

The parties to a commercial agreement generally specify in their agreement the law that will govern their contractual rights and obligations (a governing law clause). The law so selected may have been chosen because that law is perceived as being well adapted to the relevant transaction and giving better effect to their bargain. Parties located in two different States may also want to choose the law of a third State. For example, if party A believes that the law of the State of location of party B is unreliable (or party A is unwilling

to investigate the contents of the law of that location), the parties will choose the law of a third State which they both know and find reliable.

In the event of a dispute, the question arises as to whether the law so chosen will be recognized and applied by the court hearing the dispute. This is a matter falling under the private international law rules of the forum State (e.g., the State in which the dispute will be heard). As for the other issues discussed in this module, there is no uniformity at the international level on whether and in what circum-

stances a court of any given State will give full effect to the choice of a foreign law. For example, will the forum court require a connection between the agreement and the law selected by the parties in the governing law clause? In some States a connection is required and in other States there is no such requirement. Yet, in States which generally recognize the choice of a foreign law, there are often qualifications or exceptions to such recognition.

Even in States where self-help is permitted, an enforcement dispute will have to be re-

IN SOME STATES  
A CONNECTION  
IS REQUIRED FOR  
A VALID CHOICE  
OF LAW; IN  
OTHER STATES  
THERE IS  
NO SUCH  
REQUIREMENT.



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## NATIONAL LAWS: CHOICE OF LAW AND FORUM (CONT'D...)

solved by the courts. Many other disputes may also bring the parties before the courts. It is then necessary to determine the court (or courts) which will have jurisdiction. Typically, the parties will specify in their agreement that the courts of a particular State will be competent to hear a potential dispute ([“choice of forum”](#)). Most States have rules on the juris-

diction of their courts and on the recognition and enforcement of judgments rendered in other States. However, as for the other issues discussed in this module, national laws provide for different criteria with respect to access to their courts or the recognition of a choice of forum clause.

*“Most States have rules on the jurisdiction of their courts and on the recognition and enforcement of judgments rendered in other States.”*



## KEY TERMS FOR THIS MODULE

This Module employs certain established phrases taken from the international secured transactions lexicon and also references certain international treaties and conventions.

### “Conflict of Laws”

Conflict of laws rules are the rules which, in a State, designate the substantive law that is applicable to a particular legal issue. The substantive law so designated may be the law of that State or of another State.

### “Secured Transactions Laws”

Secured transactions laws are the laws which govern security interests and other similar devices. In some States,

leases not made for security purposes are in some respects subject to secured transactions laws.

### “Substantive Law”

The term substantive law refers to the domestic law governing legal issues in a State. The term excludes the conflict of laws rules of the State. In the area of secured transactions, the substantive law of a State determines the requirements applicable in that State for the creation, perfection, priority and enforcement of a security interest.

### “Geneva Convention (1948)”

The Geneva Convention (1948) is principally a conflict of laws treaty. This treaty provides that the law of the State of nationality of an aircraft is the substantive law applicable to security interests and ownership interests in aircraft.

### “Governing Law Clause”

A governing law clause is a clause whereby the parties to an agreement choose the law that will govern their contractual rights and obligations.

THIS MODULE EMPLOYS CERTAIN ESTABLISHED PHRASES FROM THE INTERNATIONAL SECURED TRANSACTIONS LEXICON.







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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

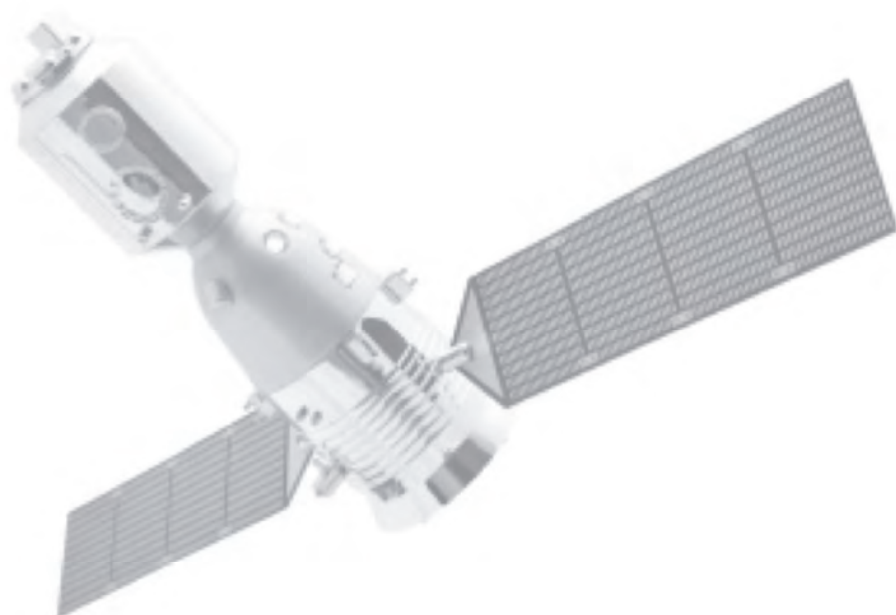
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### QUESTIONS

- What was the main impetus for the Cape Town Convention?
- Which political and economic developments led creditors to focus more on their ability to recover assets?
- What is the analysis to be conducted to ensure that cross-border security will be recognized in all States where the collateral may from time to time be situated?
- What is the national law conflict rule which offers more predictability?
- What is the conflict rule provided for by the 1948 Geneva Convention?
- Why was the 1948 Geneva Convention found inadequate to facilitate aircraft financing?
- Do all States confer priority to a security interest which is first in time registered?
- What are the two principal approaches under various legal systems as to the power of a secured creditor to obtain possession of the collateral upon default of its debtor?
- Is a “governing law” clause in an agreement always effective?



[Link to Answer Key Here](#)



# MODULE 2: THE SOLUTION

## AN INNOVATIVE INTERNATIONAL CONVENTION

### HOW THE CAPE TOWN CONVENTION CAME TOGETHER

#### THE MOVEMENT FOR A NEW CONVENTION

The movement for a new treaty began under the direction of the International Institute for the Unification of Private Law (UNIDROIT), an intergovernmental organisation whose purpose is to study needs for modernising, harmonising and coordinating private and in particular commercial law and then to formulate uniform law, instruments and rules to achieve those objectives.

In June 1988, the Canadian member of the UNIDROIT Governing Council proposed the development of a new uniform international law regarding security interests in mobile equipment. The new law would cover not only security in the traditional sense but also the interests of sellers and conditional lessors. Research commissioned by UNIDROIT revealed that the main problems in taking security over mobile equipment concerned (a) the international protection of security and related interests in mobile equipment and (b) the differences in availability and application of default remedies. A study group was then

created by UNIDROIT to take the project forward.

It was clear from the outset that the project needed the particular support of the aviation industry. At the request of UNIDROIT, Airbus Industrie and The Boeing Group established the Aviation Working Group to contribute to the Convention in so far as it applied to aircraft. Members of the Aviation Working Group (AWG) comprise leading aviation manufacturers, lessors and financiers. This support meant that progress in relation to aircraft was made at a faster pace than for other asset classes. It was therefore decided to adopt a two instrument approach; a framework convention which would apply to all asset categories and then a separate protocol for each asset category which would adapt the Convention to the needs of the relevant industry.

In 1998, a preliminary draft of the Aircraft Protocol was presented to the President of UNIDROIT by the Aircraft Protocol Group; the core members of which



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*The movement for  
a new treaty began under  
the direction of UNIDROIT.*

comprised the International Civil Aviation Organisation (ICAO), the International Air Transport Association (IATA) and the Aviation Working Group, which served as chair.

In 1999, at the 79th session of the Governing Council of UNIDROIT, the drafts of the Convention and Aircraft Protocol were deemed ready for submission to a diplomatic conference. The Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol was convened under the joint auspices of UNIDROIT and ICAO in Cape Town from 29 October to 16 November 2001.

#### INTERNATIONAL ORGANISATIONS REFERENCED IN THIS MODULE:

- “UNIDROIT”
- “ICAO”
- “IATA”
- “OECD”
- “AWG”

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THE  
CONVENTION  
AND ITS  
SUPPORTING  
PROTOCOLS ARE  
DESIGNED TO  
FULFILL FIVE KEY  
OBJECTIVES.

## OBJECTIVES AND BENEFITS

The Convention and its supporting Protocols are designed to fulfill five key objectives:

(1) 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;

(2) To provide the creditor with a range of basic default and insolvency-related remedies, and where there is evi-

dence of default, a means of obtaining speedy relief pending final determination of its claim on the merits.

(3) 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 creditors in the debtor's insolvency.

(4) To ensure through the relevant Protocol that the particular needs of the industry sector concerned are met.

(5) 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 and credit insurance premiums to the advantage of all interested parties.

See [Commentary, 2.6](#).

## CONCEPTUAL UNDERPINNINGS

The Convention and the Protocols were developed having regard to the following five key principles:

(1) Practicality in reflecting the salient characteristics of asset-based financing and leasing transactions

(2) 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.

(3) Predictability in the application of the Convention; a feature which is specifically mentioned in the

interpretation provisions of [Article 5\(1\)](#), replacing the normal reference to good faith and is reflected in the exercise of clear priority rules which give pre-eminence to certainty and simplicity and a rule-based rather than a standards-based approach.

(4) 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.

(5) 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 so 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 remedies pending final determination of a claim) 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).

See [Commentary, 2.17](#).



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*The principles  
of Practicality,  
Party Autonomy,  
Predictability,  
Transparency and  
Inter-culturalism  
underpin the  
Convention.*

## CAPE TOWN CONFERENCE



PHOTO COURTESY OF MATTHIAS KNIESE

ON 16 NOVEMBER 2001, THE CONVENTION AND AIRCRAFT PROTOCOL WERE CONCLUDED AT THE DIPLOMATIC CONFERENCE IN CAPE TOWN.

On 16 November 2001, the Convention and Protocol were concluded at the diplomatic conference in Cape Town co-sponsored by UNIDROIT and ICAO and hosted by the Government of South Africa. The Convention was signed in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic.

In addition the conference passed a resolution requesting

that Professor Sir Roy Goode CBE QC as chairman of the drafting committee should prepare an official commentary to the Convention in collaboration with the ICAO and UNIDROIT secretariats, the chairmen of conference committees and participating governments and observer organisations. The Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters

Specific To Aircraft Equipment is an invaluable resource to understanding the Convention and Protocols.

UNIDROIT became the depository for instruments of ratification and details of the status of the Convention and Protocols, the Contracting States and the declarations they have made can be found at [www.unidroit.org/english/implement/i-main.htm](http://www.unidroit.org/english/implement/i-main.htm).

## RATIFICATIONS AND DECLARATIONS

The Convention and the Protocol have been successful. At the time of writing the Convention has been signed and ratified by 60 States plus the European Union (EU) and the Aircraft Protocol has been signed and ratified by 54 States plus the EU. The EU has signed and ratified both

the Convention and the Aircraft Protocol as a Regional Economic Integration Organisation however in order for the Convention and Protocol to be apply within individual EU members states, those member states need to individually sign and ratify the Convention and Protocols.

In keeping with the principle of sensitivity to national legal cultures outlined in [Module 4.2](#), Contracting States are able to opt in or opt out of certain select provisions of the Convention. Of the various possible declarations, the so called “economic” declarations are of key importance. These







CONTRACTING STATES ARE ABLE TO OPT IN OR OPT OUT OF CERTAIN SELECT PROVISIONS OF THE CONVENTION. OF THE VARIOUS POSSIBLE DECLARATIONS, THE SO CALLED "ECONOMIC" DECLARATIONS ARE OF KEY IMPORTANCE.

## RATIFICATIONS AND DECLARATIONS (CONT'D...)

facilitate timely access to collateral on default and are the declarations which are required to be made in order for airlines within the relevant Contracting State to qualify for the "[Cape Town discount](#)" under the OECD Sector Understanding for Export Credits for Civil Aircraft (the OECD Sector Understanding).

The "economic" declarations are; (1) the declaration under [Article XI](#) of the Aircraft Protocol on Remedies on Insolvency – Alternative A specifying a maximum period of 60 days (2) the declaration under [Article XIII](#) of such Protocol regarding the de-registration and export request authorisation and permitting the use of the form annexed to the Protocol, (3) the declaration under [Article VIII](#) of such Protocol regarding choice of law and

(4) either the declaration under [Article 54\(2\)](#) of the Convention providing that the leave of the court is not required on an exercise of certain remedies or under [Article X](#) of the Aircraft Pro-

TOCOL (modification of provisions regarding relief pending final determination of claim) specifying up to 10 days for conserving remedies and up to 30 days for disposition remedies.



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*Many Contracting States must pass implementing domestic legislation to give prevailing effect to the Convention.*

## IMPLEMENTATION UNDER NATIONAL LAW

In many jurisdictions, ratifying an international treaty is not sufficient in order for the treaty to become binding domestic law in that jurisdiction and to override any inconsistent provision of domestic law.

As such, in many Contracting States further work (and notably the passing of implementing domestic legislation) is required to ensure that the provisions of the Convention

and the Protocols will be effective as a matter of national law in that Contracting State.

The Aviation Working Group has undertaken a project to summarise the implementation of the Convention and the Protocol in Contracting States and further details can be found [here](#). [www.awg.aero/assets/docs/CTC-IP%20Summary%20Chart.pdf](http://www.awg.aero/assets/docs/CTC-IP%20Summary%20Chart.pdf).

It is worth noting that the

"[Cape Town discount](#)" is only available to airlines in Contracting States which have made the "economic declarations" referred to in [Module 3](#) and in which the provisions of the Convention and relevant Protocol would prevail over any conflicting provisions of national law. A list of those Contracting States who currently qualify for the "[Cape Town discount](#)" can be found [here](#). [www.oecd.org/tad/xcred/ctc.htm](http://www.oecd.org/tad/xcred/ctc.htm).

## CONTINUING TO BUILD INTERNATIONAL CONSENSUS

The Convention and the Aircraft Protocol have been an undisputed success however the project is far from complete. Much work remains to be done in encouraging further states to ratify the Convention and the Protocols and also for those states to then ensure that the Convention and Protocols are implemented correctly as a matter of their domestic law. The Aviation Working Group (AWG), together with UNIDROIT and ICAO, is at the forefront of this process. It has established relations with a wide range of governments, intergovernmental bodies and industry groups to educate governments and key industry stakeholders as to the purpose, framework and terms of the Convention and Aircraft Protocol and to promote the benefits that may be derived from its implementation.

For example due to the unique legal framework created by the treaties which establish the EU and the consequent division of competencies between the EU itself and the individual member states, it would be problematic for individual member states to make certain declarations under the Convention and Protocol; notably under [Articles VIII, X and XI](#) of the Protocol. UNIDROIT, working closely with the Aviation Working Group, convened a seminar on 29 November 2009 to discuss this issue (amongst other matters). It [established a basis](#) upon which individual EU member states could sign,

ratify and implement the Convention and Protocol.

In addition ICAO with UNIDROIT's cooperation has sent out a formal administrative ratification assistance package under an ICAO state letter which contains (amongst other things) guidance as to making declarations and a model form of ratification or approval instrument. The AWG has prepared implementation resource materials which can be found [here](#). [www.awg.aero/assets/docs/Implementation-Resource-Materials-Sept2013.pdf](http://www.awg.aero/assets/docs/Implementation-Resource-Materials-Sept2013.pdf).



PHOTO BY BECKS/CC

MUCH WORK REMAINS TO BE DONE IN ENCOURAGING FURTHER STATES TO SIGN AND RATIFY THE CONVENTION. THE AVIATION WORKING GROUP HAS PREPARED IMPLEMENTATION RESOURCE MATERIALS.

### INTERNATIONAL ORGANISATIONS REFERENCED IN THIS MODULE

The [International Civil Aviation Organisation](#) (ICAO) is a United Nations Specialized Agency created in 1944 to promote the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection.



The [International Institute for the Unification of Private Law](#) (UNIDROIT) is an independent intergovernmental organisation whose purpose is to study needs and methods for modernising, harmonising and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.



The [International Air Transport Association](#) (IATA) is the trade association for the world's airlines, representing some 240 airlines or 84% of total air traffic. It supports many areas of aviation activity and help formulate industry policy on critical aviation issues.



The [Organisation for Economic Co-operation and Development](#) (OECD) provides a forum in which governments can work together to share experiences and seek solutions to common problems. We work with governments to understand what drives economic, social and environmental change.



The [Aviation Working Group](#) is a not-for-profit legal entity comprised of major aviation manufacturers, leasing companies and financial institutions that contribute to the developments of policies, laws and regulations that facilitate advanced international aviation financing and leasing.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS



- Which key representatives from the aviation industry were involved in developing the convention in so far as it related to aircraft?
- What benefits are conferred by the creation of an electronic international registry for the registration of international interests in mobile equipment such as aircraft?
- What one of the five key principles set out in Module 4.3 is mentioned in the interpretation provisions of Article 5(1) of the Convention and how is this principle otherwise reflected in the Convention?
- In what languages were the Convention and Protocol signed? Does any single language version take precedence over the others?
- What are the “economic declarations” and why are they important?
- Why is it important that the provisions of the Convention and the Protocol are implemented under domestic law in the relevant Contracting State?
- What type of activities are ongoing to encourage further states to sign and ratify the Convention and the Protocol?

[Link to Answer Key Here](#)



# MODULE 3: STRUCTURE OF THE CONVENTION

## THE TWO-INSTRUMENT APPROACH

### HOW DO THE CONVENTION AND INDIVIDUAL PROTOCOLS WORK TOGETHER?

#### THE CONVENTION AND ITS PROTOCOLS

As described in earlier modules, the Convention was created to provide a stable international legal regime for the protection of secured creditors, conditional sellers and lessors of aircraft objects, railway rolling stock and space assets. The various Protocols are designed to supplement and modify the Convention to meet the particular requirements of the specific types of mobile equipment (objects) covered by such Protocols. To date, three Protocols have been concluded:

- (i) The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the “[Aircraft Protocol](#)”);
- (ii) The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (the “[Luxembourg Protocol](#)”); and
- (iii) The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to

*To date, three Protocols have been concluded. There are proposals to initiate a project for a fourth protocol.*



Space Assets (the “[Space Protocol](#)”). See [Commentary, 2.15](#).

There are also proposals to initiate a project for a fourth protocol, covering mobile agricultural, construction and mining equipment.

Under [Article 49\(1\)](#), the Convention does not come into force as regarding a category of equipment until a Protocol has been made relating to that equipment

and takes effect subject to the terms of such Protocol, so that in the case of any inconsistency the Protocol prevails, which is made explicit by [Article 6\(2\)](#). See [Commentary, 2.12](#).

The Cape Town Convention Academic Project website contains a very useful comparison of the key provisions of the three Protocols, which can be found [here](#).

#### KEY TERMS FOR THIS MODULE:

- “Contracting States”
- “object”
- “opt-in declaration”
- “opt-out declaration”
- “REIO”

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*Identifiability is a crucial requirement because the registration system under the Convention is asset-based.*

## THE CONVENTION HAS ASSET SPECIFIC REQUIREMENTS

The Convention is not equipment specific and its provisions will apply equally to any “object” as defined by [Article 1\(u\)](#), provided that such object is the subject of a protocol. An “object” is a generic term for any article of equipment within the scope of [Article 2](#) of the Convention. [Article 2.3](#) of the Convention currently covers three categories of objects (equipment):

- (1) airframes, aircraft engines and helicopters (collectively termed “[aircraft objects](#)” in [Article I\(2\)\(c\)](#) of the Aircraft Protocol;
- (2) railway rolling stock; and
- (3) space assets.

Each of the above categories of object is defined in the Protocol relating to it. See [Commentary, 2.2](#) and [2.3](#). It is left to the relevant Protocol

to determine the identification criteria, since these are likely to be equipment specific. Identifiability is a crucial requirement because the registration system under the Convention is asset-based. See [Article VII](#) of the Aircraft Protocol, [Article VII](#) of the Space Protocol and [Article V](#) of the Luxembourg Protocol.

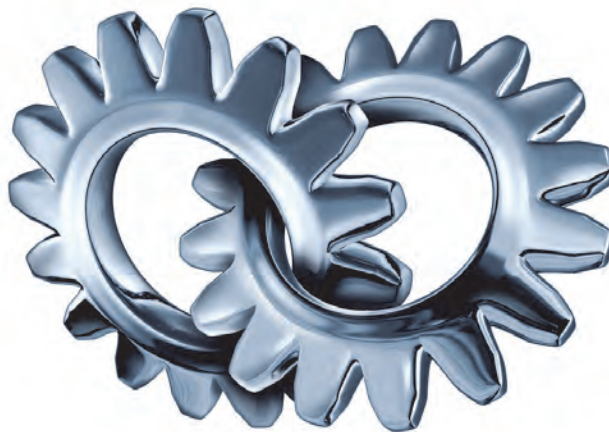
## THE TWO-INSTRUMENT APPROACH

As stated above, the Convention is not equipment specific. Its provisions will apply in principal equally to any “object” as defined by [Article 1\(u\)](#) to any categories of mobile equipment to which it relates, namely airframes, aircraft engines and helicopters, railway rolling stock and space assets, and is covered by a protocol. This is what distinguishes the protocols from those usually known to international law, which supplements the conventions to which they relate but do not control them and normally operate only within the limits set by the Convention themselves. See [Commentary, 2.12](#).

This two-instrument approach has a number of advantages. It results in a uniform set of rules for those provisions of the Convention that do not deal with equip-

ment-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. This permits different industry sectors to develop its own protocols to be included at its own pace and has allowed the Aircraft Protocol to be concluded and adopted independently. See [Commentary, 2.13](#).



THE TWO-INSTRUMENTS APPROACH AVOIDS DUPLICATION AND INCONSISTENCY BETWEEN THE NON-EQUIPMENT SPECIFIC PROVISIONS OF ONE CONVENTION AND THOSE OF ANOTHER.

## THE TWO-INSTRUMENT APPROACH (CONT'D...)

The provisions of the Convention cannot operate independently of a Protocol to the extent that they relate to objects. All three Protocols provide that a State may not become a party to the Protocol unless it also is or becomes a party to the Convention. See [Commentary, 2.14](#).

[Article 6](#) of the Convention provides that (1) the Convention and the Protocol shall be

read and interpreted together as a single instrument and (2) to the extent of any inconsistency between the Convention and the Protocol, the Protocol shall prevail.

The effect of this [Article 6](#) is that the Convention must be interpreted as if the provisions of the relevant Protocol were read into it. While [Article 49](#) specifies the overriding character of

the relevant Protocol as regards the entry into force of the Convention, paragraph 2 of [Article 6](#) affirms the priority of the Protocol in all questions that may arise concerning the interpretation of the two instruments. Any inconsistency is to be resolved in favor of the Protocol. See [Commentary, 4.66](#).

“ARTICLE 6  
AFFIRMS THE  
PRIORITY OF THE  
PROTOCOL IN ALL  
QUESTIONS THAT  
MAY ARISE  
CONCERNING THE  
INTERPRETATION  
OF THE TWO  
INSTRUMENTS.”

## THE CONTINUING ROLE OF NATIONAL LAW

[Article 5](#) of the Convention applies to the rules for interpretation and applicable law. The Convention applies to the exclusion of otherwise applicable law where the two conflict. However, it is not a comprehensive code and therefore coexists with other sources of law where no such conflict is present. See [Commentary, 2.9](#). The Convention deals with rights and obligations in private law and obligations of Contracting States relevant to the enforcement of those rights. It does not address, and is not intended to affect rules of criminal law, tort law, or regulatory public law in national legal systems.

The purpose of the Convention is to provide uniform rules which make it unnecessary to resort to the conflict of law on matters within the scope of the rules, including the creation, registration,

enforcement and priority of international interests and the assignment of associated rights. See [Commentary, 2.58](#). However, these and various matters on which resort to applicable law is necessary. Questions concerning matters governed by the Convention which are not expressly settled on 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 ([Article 5\(2\)](#)), being the domestic rules of the law applicable of the former State ([Article 5\(3\)](#)). There are many examples of where the Convention expressly leaves it to applicable (national) law for determination. [Articles 5\(2\)](#) and [5\(3\)](#) of the Convention adopt the universally applied rules that the applicable law is determined by the *lex fori*. The Convention will



not displace the overriding mandatory rules of the *lex fori*, which apply regardless of the otherwise applicable law.

See [Module 5.1](#) regarding choice of law and forum rules and principles under the Convention and applicability of national law.

*The Convention  
will not displace the  
overriding mandatory  
rules of the lex fori,  
which apply regardless  
of the otherwise  
applicable law.*

## BASIC STRUCTURE OF THE PROTOCOLS

*The Protocol on Matters specific to certain types of Equipment extends the provisions of the Convention and limits its scope of application. According to Goode, the Convention defines the general provisions - applicable to the different Protocols - and each Protocol shall define the more specific determinations, which demand detailed approach and regulation according to distinctive features of each kind of equipment.*

### AIRCRAFT PROTOCOL



*The Aircraft Protocol creates a special regime for the exercise of remedies.*

The Aircraft Equipment Protocol is designed to supplement the Convention in order to meet the particular requirements of aircraft finance.

The Protocol brings its own definitions of aircraft objects and, thus, the Convention shall be applied according to such provisions. It also defines the sphere of application of the Convention and the Protocol ([Articles I and IV](#)) indicating what objects shall be registered to be protected and defining the necessary formalities and effects of registration. Other important aspect of the system relates to the determination regarding

the applicable law ([Article VIII](#)) which can be chosen by involved parties. Such article, however, will only be applicable if the contracting State has made a declaration to this effect.

Basically, the aim of the Protocol is to reflect the principle of party autonomy and commercial predictability, giving Contracting States the opportunity to exclude or modify some provisions. In this regard, most articles of the Protocol refer to the options given to contracting States by means of the possible declarations to be made by each of them. The main

possibilities are related to the application or modification of clauses regarding default provisions ([Article IX](#)), relief pending final decision ([Article X](#)), priority rules ([Article XIV](#)), competent jurisdiction ([Article XXI](#)) and, critically, remedies on insolvency ([Article XI](#)) - detailing the alternatives of proceedings to be exercised in a situation of insolvency.

Finally, one of the most important dispositions of the Protocol refers to the De-registration and export request Authorisation - IDERA ([Article XIII](#)), by [Article XI](#).



## LUXEMBOURG (RAIL) PROTOCOL

The Luxembourg Protocol on Matters Specific to Railway Rolling Stock, signed in 2007, applies to vehicles that move on fixed railway or track. The Rail Protocol applies to all such vehicles, whether used in public transport, cargo, maintenance or other fields.

The first chapter of the Protocol on Matters specific to Railway Rolling Stock is related to the sphere of application and defined terms ([Articles I and II](#)), as well as choice of law ([Article VI](#)). Default remedies - some of them adapting to the Convention principles - and provisions related to relief pending final decision ([Articles VII and](#)

[VIII](#)) comes in chapter two, along with insolvency remedies and proceedings ([Articles IX and X](#)) and debtor's rights ([Article XI](#)). A Contracting State may make a declaration at any time that existing local law will apply in respect of creditor repossession of equipment that is used for public service. [Articles XII to XVII](#) discuss the Supervisory Authority and the Registrar, indicating additional modifications to Registry provisions ([Article XV](#)) and the operation of the International Registry for specific purpose of registration of railway rolling stock. [Module IV](#) is about jurisdiction and waivers of sovereign immunity

([Article XVIII](#)) and [Module V](#) approaches the relationship of the Convention and the Protocol with other conventions.

Other dispositions of the Protocol worth highlighting refer to the entry of the Protocol into force (according to [Article 47](#) of the Convention, its provisions relating to an object shall be governed by the Protocol which covers that specific class of objects - and, in this sense, such provisions will only come into force when the relevant Protocol does) and the possibility of declarations and reservations by the States relating to certain provisions ([Articles III and XXVII to XXXI](#)).



*The Luxembourg Protocol adapts the Convention in order to meet specific needs of railway market and industry.*

## SPACE ASSETS PROTOCOL

The Protocol on Matters Specific to Space Assets, signed in Berlin, in 2012, has numerous supplementary definitions. Since the separate regulation of certain category of assets reflects the special features that set such equipment apart from the other categories, its initial dispositions indicate the sphere of application of the Protocol, defining the meaning of “space”, “space assets”, and rights and remedies available for the debtor against third parties.

The most important items brought by the Space Protocol are related to the identification of space assets and their components ([Articles VII and XXX](#)), the possibility

of choice of law ([Article VIII](#)) - which must be declared by each ratifying State, remedies on insolvency ([Article XXI](#)), default remedies and additional determinations related to that ([Articles XVII to XX, and XXVII](#)) and debtor's rights ([Article XXV](#)). The Space Protocol contains specific provisions ([Article XXVII](#)) restricting the remedies available to a creditor with respect to space assets that are physically-linked to other space assets (so as not to impair such other space assets) and space assets that provide a public service. Besides, there are definitions regarding the International Registry and registration rules ([Articles XXVIII to XXXII](#)),

jurisdiction and related immunity ([Article XXXIII](#)) and powers to Contracting States ([Article XXVI](#)) - which are given the opportunity to choose clauses it will apply or not.

With such provisions reflecting the needs of the different affected parties involved and

as stated in its Preamble, the Space Protocol is designed to bolster private investment in an area historically dominated by governments, as well as to provide the legal certainty required by private investors. Therefore, the dispositions of the Protocol must be read according to such aims.



*The Space Protocol is designed to bolster private investment in an area historically dominated by governments.*

## BASIC CONCEPTUAL APPROACH

The principle of sensitivity to national legal cultures, one of the five principles underlying the Convention ([Commentary, 2.17](#)) underpins the Convention declarations system: a Contracting State is able to balance the economic benefits of the treaty against the potential impact of the treaty on established national law rules and practices. The declarations system allows a Contracting State to exclude, accept or modify certain treaty provisions, in order to bring the Convention into that state's legal system in a form most appropriate to its national framework of laws and jurisprudence. At the same time, to safeguard the Convention's objective of providing a set of uniform rules for international interests ([Commentary, 4.1](#)), the declarations system is deliberately limited to certain fundamental matters in respect of which a Contracting State may wish to weigh up opposing factors and make a policy decision ([Commentary, 2.266](#)).

As the Convention only comes into force in respect

of an equipment class if and when the relevant equipment-specific protocol comes into force, declarations (other than in the case of a declaration by an REIO ([Article 48](#))) can only be made on or after ratification of that protocol ([Commentary, 2.266](#)). Declarations made under the Convention are deemed to have been made under the Protocol so that a state is not required to lodge a fresh declaration under the Protocol for matters already addressed by a Convention declaration ([Article XXXI, Commentary, 2.278](#)).

A Contracting State must notify the Depositary in writing of declarations, including subsequent declarations, withdrawals of declarations and Convention denunciations ([Articles 56\(2\)](#) and [59\(1\)](#)). A Contracting State may not make any reservations ([Article 56\(1\)](#)).

At any time after the Convention enters into force for it, a Contracting State may make a subsequent declaration ([Article 57\(1\)](#)) or withdraw a declaration ([Article 58\(1\)](#)) (in either case other than in

relation to any mandatory declaration by an REIO under [Article 48\(2\)](#) or regarding the transitional provisions in [Article 60](#) over pre-existing interests), with effect from the first day of the month falling six months after the date of the Depositary's receipt of notice. A Contracting State may denounce the Convention ([Article 59\(1\)](#)), with effect from the first day of the month falling twelve months after the date of the Depositary's receipt of notice. Any subsequent declaration, withdrawal or denunciation will not affect prior rights and interests ([Articles 57\(3\)](#), [58\(2\)](#) and [59\(3\)](#)).

Refer to [Commentary, 2.266](#) to [2.281](#); and [4.336](#) to [4.347](#), generally, for commentary on the Convention declarations system. Refer to [Module 6.1](#) for an overview of the Protocol declarations system and to [Commentary, 3.129](#) to [3.138](#), generally, for corresponding commentary. [Appendix XI](#) to Goode includes a helpful matrix summarising the Convention and Protocol declarations systems and [Appendix XIIE](#) provides a glossary of declarations.



PHOTO BY VOICE OF MY SOUL / CC

The declarations system allows a Contracting State to exclude, accept or modify certain treaty provisions.

“A CONTRACTING STATE IS ABLE TO BALANCE THE ECONOMIC BENEFITS OF THE TREATY AGAINST THE POTENTIAL IMPACT OF THE TREATY ON ESTABLISHED NATIONAL LAW RULES AND PRACTICES.”

## CONVENTION OPT-IN DECLARATIONS

A particular Convention provision will **only** apply in respect of a Contracting State if it makes an “opt-in declaration” to that effect. Table 3.1 sets out the relevant Convention article requiring an opt-in

declaration (the “[Directing Article](#)”) against the respective Convention article to which it relates (the “[End Article](#)”), being [Article 60\(1\)](#).

A Contracting State may make this sole Convention opt-in declaration at any

time, specifying the types of pre-existing interests to which the priority rules under the Convention and relevant protocol shall apply and the date on which this shall occur, provided that such date may not be earlier than three years after the effective date of the

TABLE 3.1

End Article(s)	Subject	Directing Article(s)	Comment
Article 60(1)	Pre-existing interests and application of treaty priority rules	Article 60(1), as supported by Article 60(3)	Refer to <a href="#">Module 4.1</a> for an explanation of pre-existing interests and their priority position

## CONVENTION OPT-IN DECLARATIONS (CONT'D...)

declaration, in order to give holders a reasonable period of time to re-perfect their relevant interests and preserve their priority position ([Article 60\(3\)](#) and [Commentary, 4.353](#)).

Any Article 60 declaration may not be modified or withdrawn subsequently, as this could affect vested rights in an object ([Articles 57\(1\)](#) and [58\(1\)](#) and [Commentary, 4.348](#)). The declaration is subject to the Contracting State's ability to denounce the Convention in its entirety ([Article 59](#)).

## CONVENTION OPT-OUT DECLARATIONS

Certain Convention provisions will apply in respect of a Contracting State unless it makes an “[opt-out declaration](#)” to that effect. Table 3.2 sets out the relevant Convention article(s) requiring an opt-out declaration (the “[Directing Article](#)”)

against the respective Convention article(s) to which it relates (the “[End Article](#)”).

The opt-out declarations below may be made at ratification, acceptance, approval of, or accession to the Protocol ([Commentary, 4.338](#)) or

later, under the provisions for subsequent declarations ([Article 57](#)) and are subject to the Contracting State's ability to withdraw a declaration ([Article 58](#)) or to denounce the Protocol in its entirety ([Article 59](#)).



TABLE 3.2

End Article(s)	Subject	Directing Article(s)	Comment
Article 8(1)(b)	Power to lease charged object	Article 54(1), as supported by Article 56(1)	Refer to <a href="#">Module 4.6</a> for an overview of basic Convention remedies
Article 13	Interim relief	Article 55, as supported by Article 56(1); declaration must specify any conditions for application of Article 13 or other interim relief available; declaration must be compatible with a declaration regarding Article 43	Refer to <a href="#">Module 4.6</a> for an overview of advance/interim relief
Article 43	Jurisdiction under Article 13	Article 55, as supported by Article 56(1); declaration must specify any conditions for application of Article 43 or other interim relief available; declaration must be compatible with a declaration regarding Article 13	Refer to <a href="#">Module 1</a> and <a href="#">Module 4.1</a> for an overview of Convention jurisdictional provisions
Article 50	Internal transactions	Article 50, as supported by Article 56(1)	Refer to <a href="#">Module 4.1</a> for an overview of internal transactions

## DECLARATIONS RELATING TO NATIONAL LAW AND TERRITORIAL UNITS

A Contracting State may make certain declarations regarding the application of its own laws to specific Convention matters and in respect of the application of the Convention to territorial units with different legal systems.

Table 3.3 sets out the relevant Convention article(s) allowing such national law declaration (the “[Directing Article](#)”) against the respective Convention article(s) to which it relates (the “[End Article](#)”).

TABLE 3.3

End Article(s)	Subject	Directing Article(s)	Comment
Article 39	Non-consensual rights and interests having priority without registration	Article 39, as supported by Article 56(1)	Refer to <a href="#">Module 4.4</a> for an overview of priority of interests
Article 40	Registrable non-consensual rights or interests	Article 40, as supported by Article 56(1)	Refer to <a href="#">Module 4.4</a> for an overview of priority of interests
Article 53	Relevant court with jurisdiction under the Convention	Article 53, as supported by Article 56(1)	Refer to <a href="#">Module 1</a> and <a href="#">Module 4.1</a> for an overview of Convention jurisdictional provisions
Article 52(1)	Territorial units	Article 52(1), as supported by Article 56(1); declaration must specify territorial units covered	See below and refer to <a href="#">Commentary, 4.323</a> to <a href="#">4.327</a> for an overview of the Convention territorial unit provisions

## DECLARATIONS RELATING TO NATIONAL LAW AND TERRITORIAL UNITS (CONT'D...)

An [Article 39](#) or an [Article 40](#) declaration may be made at any time. An [Article 52](#) or an [Article 53](#) declaration may be made at ratification, acceptance, approval of, or accession to the Protocol or later, under the provisions for subsequent declarations



([Article 57](#)). Any of the national law declarations below are subject to the Contracting State’s ability to withdraw a declaration ([Article 58](#)) or to denounce the Protocol in its entirety ([Article 59](#)).

### TERRITORIAL UNIT DECLARATION

Under [Article 52\(1\)](#), a Contracting State may make a declaration providing that the Convention is to extend to all or any of its territorial units, as specified in the declaration, in which different systems of law apply. If it makes such declaration, then independent Convention declarations may be made in respect of each territorial unit.

Such declaration may be made at ratification, acceptance,

approval of, or accession to the Protocol ([Article 52\(1\)](#)), may be modified at any time under [Article 52\(1\)](#) or under the provisions for subsequent declarations ([Article 57](#)) and is subject to the Contracting State’s ability to withdraw a declaration ([Article 58](#)) or to denounce the Convention in its entirety ([Article 59](#)).

If no declaration is made, then the Convention shall apply to all territorial units ([Article 52\(3\)](#)). If the law regarding Convention matters is the same in all territorial units of a Contracting State, then [Article 52](#) is not applicable.

Refer to [Article XXIX](#) for the equivalent Protocol declaration regarding territorial units.



There are two key declarations which a Contracting State is required to make.

## MANDATORY DECLARATIONS

There are two key declarations which a Contracting State is required to make ([Commentary, 2.273](#)). Table 3.4 sets out the relevant Convention article(s) requiring such mandatory declaration (the “[Directing Article](#)”) against the respective Convention article(s) to which it relates (the “[End Article](#)”).

An [Article 54\(2\)](#) declaration

must be made at the time of ratification, acceptance, approval of, or accession to the relevant Protocol ([Commentary, 4.330](#)) and may only be withdrawn if a subsequent declaration is made at the same time ([Commentary, 2.277](#)).

### REIO DECLARATION

An REIO must make a declaration under [Article 48\(2\)](#)

specifying the matters in respect of which exclusive competence has been transferred to it by its Member States. Such declaration must be made at the time the REIO adheres to the Convention ([Commentary, 4.312](#)) (or, for aircraft-object specific matters, at the time of adherence to the relevant Protocol) and may not be modified, replaced or withdrawn

TABLE 3.4

End Article(s)	Subject	Directing Article(s)	Comment
Article 48(1)	Regional Economic Integration Organisation (“REIO”) competence	Article 48(2)	See below and refer to <a href="#">Commentary, 2.239</a> to <a href="#">2.242</a> and <a href="#">4.311</a> to <a href="#">4.313</a> for an explanation of the treaty approach to REIOs
Articles 8(1), 9 (1) and 10	Extra-judicial or “self-help” remedies	Article 54(2)	Refer to <a href="#">Module 4.6</a> for an overview of Convention remedies



## MANDATORY DECLARATIONS (CONT'D...)

([Commentary, 2.277](#)), save that the REIO must notify the Depositary of any changes to the distribution of competence and a declaration under [Article 48\(2\)](#) is subject to a Contracting State's ability to denounce the Convention in its entirety.

For a summary of the equivalent Protocol declaration regarding REIO competence, refer to [Article XXVII\(2\)](#); [Commentary, 3.136, 3.319](#) and [5.111](#); and [Module 6.1](#).



A REIO may accede to the Convention.

PHOTO BY EUROPEAN PARLIAMENT/CC

For a discussion on the EC/EU position regarding REIO

competence, refer to [Commentary, 2.267](#) to [2.269](#).

## KEY DEFINITIONS FOR THIS MODULE

**A** [Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“Contracting States”** means those countries that have ratified or acceded to the Convention.

**“Object”** is a generic term for any article of equipment within the scope of [Article 2](#) of the Convention. [Article 2.3](#) of the Convention currently covers three categories of objects: aircraft objects, railway rolling stock and space assets.

**“Opt-In Declaration”** means a declaration which a Contracting State is required to make if a particular provision of the Convention is to have effect within that State.

**“Opt-Out Declaration”** means a declaration which a Contracting State is required to make in order to exclude the application of a particular Convention provision in that State or the availability of extra-judicial relief.

**“REIO”** means a regional economic integration organisation (REIO) may accede to the Convention and shall have the rights and obligations of a contracting state, to the extent of its competence over matters governed by the Convention.

**“Territorial Unit”** means one or more territorial units within a Contracting State having different systems of law applicable in relation to matters dealt with in the Convention.



IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.



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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS

- How are the Conventions and individual Protocols to be read and interpreted? In this case of conflict, which text prevails?
- What types of objects are covered by the Convention and how are these defined and covered by the Protocols? What types of equipment are not covered by the Aircraft Protocol?
- In what instances do the provisions of the Convention and specific Protocol take priority governing rights in a specific object and the related transactions over national law?
- When does national law apply to aspects of a transaction subject to the Convention and the Aircraft Protocol?
- Must a Contracting State make a declaration under the Convention in relation to the application of the Convention's self-help remedies?
- Assume Lessor X grants a mortgage over an aircraft in favour of Bank Y. Lessor X is located in State A at the time the mortgage takes effect. Subsequently, State A adopts the Convention and Aircraft Protocol but without making a declaration under Article 60. Lessor X grants a second mortgage over the aircraft in favour of Bank Z. Bank Z registers its interest under the mortgage on the International Registry. Bank Z does not register its mortgage on the International Registry. What is Bank Y's position as regards priority over Bank Z?
- Lessor J is considering leasing an aircraft to Airline K, situated in Contracting State L. Lessor J is concerned over the customs authorities' extensive powers to detain leased assets for non-payment of any customs duties payable by Airline K, under national law. Which Convention declaration should Lessor J check has been made by Contracting State L?



[Link to Answer Key Here](#)

# MODULE 4.1: KEY LEGAL ELEMENTS OF THE CONVENTION

## APPLICATION OF THE CONVENTION

### WHERE AND WHEN DOES THE CONVENTION APPLY?

#### SPHERE OF APPLICATION

The initial step in any [Cape Town Convention](#) analysis is to determine whether the specific rights created in a particular situation fall within its scope.

In order for the Convention to apply (and an interest to be created) the following conditions must be satisfied:

(1) “[Agreement](#)”: The parties have entered into an agreement creating an international interest, i.e. a security agreement, a title reservation agreement or a leasing agreement. ([Article 2 \(1\), \(2\)](#)).

(2) “[Object](#)”: The agreement relates to uniquely identifiable equipment which, as defined by the relevant Protocol, is:

(a) an airframe, an aircraft engine or a helicopter,

(b) railway rolling stock, or

(c) space assets.

([Article 2\(2\), \(3\)](#)).

(3) [Formalities](#): The agreement is constituted in accordance with the formalities prescribed by the Convention ([Articles 2\(2\), 7](#)); and

(4) [Connecting Factors](#): The debtor is situated in a Contracting State at the time of conclusion of the agreement creating or providing for the international interest ([Article 3](#)).

As discussed in [Module 6.1](#), the [Aircraft Protocol](#) extends application of certain parts of the Convention to “contracts of sale” (i.e. an agreement for the sale of an aircraft object that is not one of the three “agreements” described



*The Convention is intended to have broad application to cross-border aircraft, rail and space equipment transactions.*

above) and, as regards airframes and helicopters, adds nationality registration as an additional connecting factor. The Space Protocol also extends to contracts of sale, but the Rail Protocol does not.

#### KEY TERMS FOR THIS MODULE:

- “[agreement](#)”
- “[creditor](#)”
- “[object](#)”
- “[debtor](#)”
- “[international interest](#)”
- “[leasing agreement](#)”
- “[security agreement](#)”
- “[title reservation agreement](#)”

#### INSIDE THIS MODULE:

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#### THE CONVENTION APPLIES TO “AGREEMENTS”

An “[international interest](#)” is a right *in rem* (i.e. in a qualifying object) arising under or resulting from an agreement. Therefore, the existence of an agreement is a precondition to application of the Convention.

An “[agreement](#)” means a security agreement, a title reservation agreement or a leasing agreement, including any amendments or supplements to the agreement. See [Key Definitions](#).

Whether an interest falls within one of these three

intentionally broad categories (which are meant to capture most forms of leasehold and security interests) is determined by applying the Convention’s own definitions and autonomous rules of interpretation, and not by reference to national law.



*“The Convention applies only to certain legal agreements that create international interests.”*

## “AGREEMENTS” (CONT’D...)

Once it is established that an interest falls within one of the three categories specified above, its characterization for the purposes of subsequent provisions of the Convention is determined by “applicable law”, meaning the national law determined to be applicable under the relevant rules of private international law of the forum.

This is important because the Convention was designed to

override national law as to its applicability, but not necessarily as to all of its effects (in particular with respect to the exercise of remedies). For example, a title reservation agreement may in some common law jurisdictions be treated as a security interest (i.e. as a loan that is secured by retention of title). Although such an agreement would be characterized as a title reservation agreement for purposes of determining

whether the Convention applies, it would be a “security agreement” for purposes of determining the rights and remedies of the parties under the Convention. See [Module 4.2](#).

A leasing agreement must be distinguished from a “wet lease”, which does not confer possession and control on the lessee and is therefore not a leasing agreement.

## THE CONVENTION APPLIES TO “OBJECTS”

An “object” is a generic term for any article of equipment within the scope of [Article 2](#) of the Convention. It therefore covers an airframe, aircraft engine, helicopter, railway rolling stock and space assets, whether completed or in course of manufacture to the point where it is sufficiently identifiable as an object.

Identifiability is a crucial requirement because the registration system under the Convention is asset-based. It is thus not sufficient to create an interest under the Convention 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

to be equipment-specific. For example, in the case of aircraft objects, [Article VII](#) of the Aircraft Protocol provides that the manufacturer’s serial number, manufacturer’s name and model designation of the object are necessary and sufficient to identify the object.

An aircraft as such (as opposed to an airframe) is not an object for the purposes of the Convention unless it is a helicopter. An engine installed on an airframe is a separate object and does not form part of the airframe. By contrast an engine installed on a helicopter forms part of the helicopter, though any pre-installation rights and interests are preserved after installation.

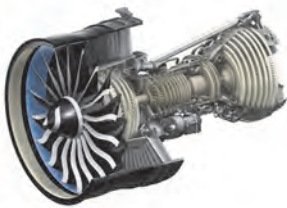
The International Registry pursuant to the Aircraft Protocol requires the user making a registration to select information pertaining to a

specific aircraft object (specifically, the manufacturer, model designation and serial number) from the drop-down list of options provided on the registry.

Given the unreliability of the numbering systems adopted by different rolling stock manufacturers and operators in different regions of the world, the Rail Protocol tasks the registrar with establishing a system enabling unique identification of objects. See [Module 8.2](#).

The Space Protocol does not outline what makes a space asset “uniquely identifiable”, but rather has left it to be determined under the applicable regulations. It is important to note that such regulations are still under development, as the Space Protocol is not yet in force. See [Module 9.2](#).

“OBJECT”  
COVERS AN  
AIRFRAME,  
AIRCRAFT  
ENGINE,  
HELICOPTER,  
RAILWAY  
ROLLING STOCK  
AND SPACE  
ASSETS.



## CREATION OF INTERESTS

As discussed in more detail in [Module 4.4](#) (Creation of Interests), an agreement must be in writing to create an interest under the Convention. “Writing” is defined in broad terms 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. This will usually be by manual or electronic signature. [Article 1\(nn\)](#).

In addition, the agreement must relate to an object of which the chargor, conditional seller, lessor or seller, as applicable, has power to dispose. This does not mean that the debtor must be the owner of the object, such as the granting of a sublease. Nor does it necessarily re-

quire that the debtor has been granted a specific legal right to transact with respect to the relevant object. 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. See [Commentary, 2.65](#).



*An “international interest” may only be created by a “writing”.*

## CONNECTING FACTORS

Connecting Factors are the elements that justify application of a treaty. Under the Convention, the main connecting factor is that a debtor is situated in a contracting state at the time of conclusion of the relevant agreement. In the absence of a connecting factor, the Convention will not apply (although precautionary notice registrations may still be made in the international registry).

In order to give maximum scope to the application of the Convention, [Article 4](#) provides several alternative means to establishing the situation of the debtor in a contracting state. A debtor will be situated in a contracting state where:

(a) it is formed or incorporated under the law of that state (which includes unincorporated associations organised

under the law of that state, such as trusts or partnerships);

(b) it has its registered office or statutory seat in that state;

(c) it has its center of administration in that state; or

(d) it has either its place of business, or if more than one, its principal place of business, or if none, its habitual residence in that state.

The “[time of conclusion](#)” of an agreement is not necessarily the date of the agreement, but rather the time of its effectiveness with respect to the relevant object (e.g. lease commencement).

If the debtor is not situated in a Contracting State at the time of the agreement, the fact that it later relocates to a Contracting State does not bring the agreement within the Convention, so registration of the agreement would

have no Convention effects; it would be necessary to conclude a new agreement. Conversely, where the debtor is situated in a Contracting State at the time the agreement is concluded the debtor’s change of location to a non-Contracting State does not affect the application of the Convention to the agreement in a Contracting State or preclude registration of the interest as an international interest. See [Commentary, 2.29](#).

Under the Aircraft Protocol, a connecting factor alternative to the debtor’s situation in a Contracting State is that the agreement relates to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of Registry. See [Article IV\(1\)](#), Aircraft Protocol.

“CONNECTING FACTORS” ARE THE ELEMENTS THAT JUSTIFY APPLICATION OF A TREATY.







## CHOICE OF LAW AND FORUM

The Convention makes no express provision for choice of law by the parties. That is left to the rules of private international law of the forum state. The laws of some jurisdictions impose certain restrictions on party choice, as by excluding selection of the law of a state which has no connection with the parties or the transaction.

Under the Protocol, a Contracting State may make a declaration allowing the parties to an agreement to choose a law governing their contractual relations without restrictions of this kind. [Article XXX\(1\)](#). In effect, application of this rule over-

rides otherwise applicable law, and the law selected is deemed to be the domestic law of the designated State, excluding its conflict of laws rules. [Article 8](#). However, the Convention will not displace the overriding mandatory rules of the *lex fori*, that is, rules which apply regardless of the otherwise applicable law.

Party choice is limited to *contractual* rights and obligations. Proprietary rights prospectively affect third parties and rights of creditors on the debtor's insolvency, and are outside the scope of this party choice.

Under the Convention, the parties are free to confer jurisdiction on the courts of any Contracting State, whether or not it has a connection with the parties or the transaction. It suffices that the forum selection clause covers matters arising in connection with the agreement, which would include claims under the Convention as well as those outside it. The selected jurisdiction is exclusive unless otherwise agreed between the parties. This provision overrides contrary national law. [Article 42](#). See [Commentary, 2.59, 4.285, 5.36](#).



*National interests arising under internal transactions are not international interests but, if protected by a notice in the International Registry, will enjoy the same priority status as a registered international interest.*

## INTERNAL TRANSACTIONS

The Convention is intended to apply even to "[internal transactions](#)," i.e. transactions where the centre of the main interests of all the parties is situated and the object itself is located within a Contracting State that has a national registry capable of protecting the parties under domestic law. In the case of Aircraft, for example, an internal transaction could be a loan secured by an aircraft that is registered in the Contracting State where the debtor and creditor are located.

A Contracting State may declare, at the time it becomes a party to the Convention, that the Convention will not apply to such "internal transaction."

[Article 50\(1\)](#). The relevant interest created under an internal transaction is referred to as a "[national interest](#)". The main effect of such a declaration is that most of the default provisions of [Module III](#) of the Convention will not apply and that national interests may not be registered as "international interests" under The Convention. However, the Convention remains applicable on the critical items of registration and priority of interests. Thus, the parties may register a notice of the national interest, to which the priority rules under the Convention will apply in the same way as to international interests.

[Article 50\(2\)](#). Accordingly, such a declaration is of limited application.

A Contracting State that has territorial units in which different systems of law apply may make a declaration which has the effect of excluding the application of the Convention to one or more of those territorial units. [Article 52](#). In such event, a transaction will not be an internal transaction unless (x) the centre of the main interests of all the parties is situated and the object is located in the same territorial unit and (y) the territorial unit is one to which the Convention applies. See [Commentary, 2.246, 4.318](#).

## PRE-EXISTING INTERESTS

The Convention contains transitional provisions centered on the concept of non-retroactivity. A “[pre-existing right or interest](#)” is a right or interest of any kind in or over an object created or arising before the effective date of the Convention.

[Article 1\(v\)](#). Unless otherwise declared by a Contracting State, a pre-existing right or interest retains the priority it enjoyed under the applicable law before the effective date of The Convention. [Article 60](#). Only upon a

declaration can the Convention apply retroactively. See [Module 3](#).

The “effective date” of the Cape Town Convention means (in relation to a debtor) 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 later.

This means that a registered international interest is junior to an earlier pre-existing right or interest which is given

priority under the applicable law. The holder of a pre-existing right or interest preserves this pre-Convention priority without the need to register under the Convention (assuming fulfillment of all perfection requirements under applicable law). Even a pre-existing interest arising under the law of a non-Contracting State benefits from this priority over validly created international interests. See [Commentary, 2.250, 4.348](#).



## KEY DEFINITIONS FOR THIS MODULE

[Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

“**agreement**” means a security agreement, a title reservation agreement or a leasing agreement.

“**creditor**” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;

“**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 bur-

dened by a registrable non-consensual right or interest.

“**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.

“**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\(1\)](#);

“**object**” means an object of a category to which [Article 2](#) applies.

“**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\(2\)\(a\)](#).

“**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.

“**title reservation agreement**” means an agreement for the sale of an object on terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement.

“**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.

IN THE  
CONVENTION  
AND RELATED  
PROTOCOLS,  
ORDINARY WORDS  
ARE SOMETIMES  
GIVEN A SPECIAL  
MEANING.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS

- Which three types of agreement create an international interest under the Convention? Which legal principles (those of the Convention or national law) determine whether an agreement falls into one of these categories?
- Is an engine installed on an airframe a separate aircraft object? What about a helicopter engine? How are rail and space assets identified under the relevant protocols?
- What alternative connecting factor (other than the location of the debtor) is available under the Aircraft Protocol?
- In what instance, and with what limits, does the Convention allow parties to select the substantive law governing their contractual relations without regard to conflicts rules under national law?
- Is there any benefit to registering a national interest with the International Registry? What about a pre-existing interest?



[Link to Answer Key Here](#)



# MODULE 4.2: KEY LEGAL ELEMENTS OF THE CONVENTION

## RELATIONSHIP TO NATIONAL LAW

### HOW THE CONVENTION WORKS WITH EXISTING LEGAL SYSTEMS

#### RELATIONSHIP TO NATIONAL LAW

While the Convention coexists with other sources of law, it is intended to prevail on matters within its scope. In most cases, a security, title-retention or leasing interest created under national law will simultaneously constitute an international interest.

However, a registered international interest has priority over a domestic interest which is neither registered under the Convention nor covered by a declaration under [Article 39](#).

The Convention is not a comprehensive code and does not address matters of criminal law, tort law, or regulatory or procedural public law in national legal systems. Such matters are largely left to the respective Contracting States.

[Commentary, 2.9\(1\)](#).

While given a wide reading based on its interpretation



*The purpose of the Convention is to provide uniform rules which make it unnecessary to resort to the conflict of laws on matters within the scope of the rules, including the creation, registration, enforcement and priority of international interests and the assignment of associated rights.*

and gap-filling provisions, the Convention does not cover the whole field of asset-based secured financing, much of which continues to be governed by national laws and the agreement of the parties. For example, national law determines the validity of an agreement providing for an international interest, the time at which the agreement is to be considered

concluded, and other matters. The Convention also does not address issues such as assignments by operation of law, or risk of loss or damage to objects disposed of under a contract of sale. There is also considerable scope for party agreement on a range of issues, including default remedies and jurisdiction. [Commentary, 2.9\(3\)](#) and [\(4\)](#).

#### KEY TERMS FOR THIS MODULE:

- “agreement”
- “contracting states”
- “national interests”
- “leasing agreement”
- “security agreement”
- “title reservation agreement”

#### INSIDE THIS MODULE:

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#### PRIORITY OVER CONFLICTING LAW

Although the Convention coexists with other sources of law, in those cases in which a matter is governed by both the Convention and

national law and there is a conflict between the Convention and national law, the Convention controls. [Commentary, 2.9](#).

If properly implemented by a Contracting State, such conflicts between the Convention and national law should be rare. This is because once the Convention

*Contracting States are prohibited from imposing conditions incompatible with the Convention.*



## PRIORITY OVER CONFLICTING LAW (CONT'D...)

has entered into force in a Contracting State, that State is required to ensure that its domestic law gives effect to all the applicable provisions of the Convention. Moreover, the Convention prohibits a Contracting State from imposing conditions in its private law incompatible with provisions in the Convention. [Commentary, 2.9\(5\)](#).

The constitution of an international interest derives from

the Convention, not from national law. It follows that an international interest comes into existence where the conditions of the Convention are satisfied even if these would not be sufficient to create a security interest under the otherwise applicable law and even if the international interest is of a kind not known to that law. [Commentary, 4.69](#).

Neither a debtor nor a credi-

tor may assert national law rights which conflict with the Convention. However, the Convention leaves it to the national law to determine a number of matters, including the validity of underlying contracts and the characterization of interests for the purposes of remedies, discussed below.

“THE CONVENTION DOES NOT APPLY TO DETERMINE THE VALIDITY OF UNDERLYING CONTRACTS BY PRIVATE PARTIES.”

## VALIDITY OF UNDERLYING CONTRACTS

In accordance with the central tenet that the Convention seeks to coexist with other sources of law, the Convention does not apply to determine the validity of underlying contracts by private parties. Consequently, the applicable law will usually govern all aspects of the contractual relationship, includ-

ing substantive validity, interpretation, performance, and remedies. This includes such questions as the existence of the agreement and the effect of factors such as mistake or illegality. [Commentary, 2.59, 4.69](#).

The Convention adopts the universally applied rule that the applicable law is deter-

mined by the *lex fori* (i.e. by application of the conflict of law rules of the jurisdiction in which a case is brought). [Article VIII](#) of the Aircraft Protocol allows the parties to choose the law to govern their relationship where the Contracting State has made the requisite declaration.

## CHARACTERIZATION OF INTERESTS



In order to fall within the Convention, an interest must fall within one of the three categories specified in [Article 2\(2\)](#): a security agreement, a title reservation agreement or a leasing agreement. This determination is made by applying the Convention's own definitions and its autonomous rules of interpretation of these. Hence the

initial characterization is prescribed by the Convention itself. Once it has been established that the interest is a Convention interest, its characterization for the purposes of subsequent provisions of the Convention is then determined by the applicable law.

Characterization is primarily relevant to determine which of the default remedies of

[Module III](#) of the Convention apply. Default remedies differ according to whether the agreement is a security agreement on the one hand to which [Articles 8](#) and [9](#) apply or a title reservation or leasing agreement on the other hand to which [Article 10](#) applies. Most of the other provisions of the Convention apply equally to all three cate-

## CHARACTERIZATION OF INTERESTS (CONT'D...)

gories. If, for example, a leasing agreement containing an option to purchase is characterized by the applicable law as a security agreement, then [Articles 8](#) and [9](#) of the Convention, not [Article 10](#), apply.

Though the applicable law

determines the characterization of an agreement falling within [Article 2\(2\)](#), it cannot expand the sphere of application of the Convention. For example, while certain jurisdictions treat a consignment agreement as capable of creating a security interest, de-

pending on its terms, this will not bring the agreement within the Convention, because it is outside the controlling definitions of security agreement, title reservation agreement and leasing agreement. [Commentary, 4.50](#).



*Once it has been established that the interest is a Convention interest, its characterization for the purposes of subsequent provisions of the Convention is then determined by the applicable law.*

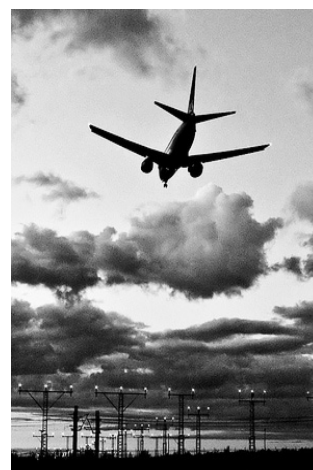
## NATIONAL REGISTRATIONS

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 may be excluded from application of the Convention if a Contracting State has made a declaration under [Article 50](#). These excluded interests are considered

“[national interests](#)”. See also, [Module 5.1](#). However, such exclusion is of limited effect: first, 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. Second, 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.” [Commentary, 2.33\(3\)](#).

*Certain “National Interests” can be excluded from application of the Convention, but these will still be governed by the priority rules of the Convention.*



## OVERRIDING MANDATORY AND PROCEDURAL LAWS

Most legal systems allow the parties to commercial transactions a wide measure of freedom in selecting the law to govern their relations *inter se*, and [Article VIII](#) of the Protocol grants parties the ability to choose the law to govern their transactional relationships where the Contracting State has made the requisite declaration. However, [Article VIII](#) will not displace the overriding

mandatory rules of the forum jurisdiction, that is, rules which apply regardless of the otherwise applicable law. Such rules do not limit the freedom of the parties to choose the applicable law, they merely preclude the selected law from being applied in a manner inconsistent with the overriding rules. [Commentary, 3.25](#).

[Article 14](#) stipulates that any

remedy provided by [Module III](#) is to be exercised in accordance with the procedural law of the place of exercise. This provision does not affect the exercise of extra-judicial remedies under [Article 8](#) except in a Contracting State which has made a declaration under [Article 54\(2\)](#) requiring leave of the court in which case the remedy may be exercised only with such leave. [Commentary, 4.117](#).



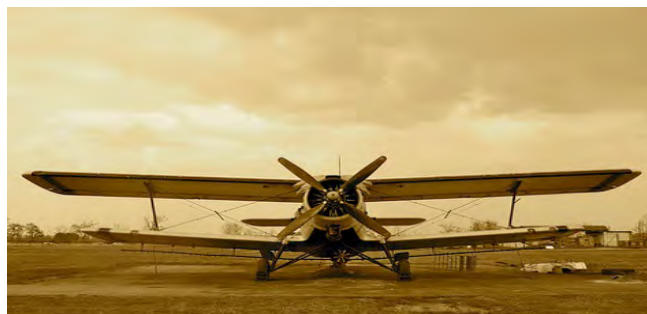
*Article VIII of the Convention will not displace the overriding mandatory rules of the forum jurisdiction which apply regardless of the otherwise applicable law.*

*The Convention neither addresses nor aims to alter the public laws of Contracting States.*

## PUBLIC LAWS

The Convention neither addresses nor aims to alter public laws of Contracting States. It deals with rights and obligations in private law and obligations of Contracting States relevant to the enforcement of those rights. The Convention does not address, and is generally not intended to affect rules of criminal law, tort law, or regulatory public law in national systems.”

[Commentary, 2.9\(1\)](#). Thus Contracting States remain free to apply and enforce their rules of criminal law and tort law, as well as regulatory measures designed to impose economic sanctions or to prevent money laundering, drug dealing, and the like, and regulations in the field of financial services law and competition law.



However, there may be specific instances in which a provision of the Convention specifically covers a point that would ordinarily be dealt with as a matter of public law. In such an instance, the 1969 Vienna Convention on the Law of Treaties expressly provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” [Commentary, 2.252](#).

Like all other modern commercial law treaties, the Convention contains interpreta-

tion and ‘gap-filling’ provisions. The former ensures an international, rather than national, means of interpreting the text, driven by the objectives of providing uniformity and predictability in its application, and advancing the aims of the Convention as set out in the preamble. [Article 5\(1\)](#). The latter provides missing terms – gaps – in accordance with Convention’s general principles prior to referring to national law. [Article 5.2](#).



IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.

## KEY DEFINITIONS FOR THIS MODULE

[Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

“**agreement**” means a security agreement, a title reservation agreement or a leasing agreement.

“**Contracting States**” means those countries that have rati-

fied or acceded to the Convention.

“**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\(1\)](#).

“**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.

“**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.

“**title reservation agreement**” means an agreement for the sale of an object on terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement.



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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS

- When do the rules of the Convention apply to a contract?  
Is the Convention intended to operate as a comprehensive code?
- In the case of a conflict between the Convention and other applicable law, which controls?
- To what extent does the Convention not recognize validly existing contracts?
- Can a nationally registered interest secure priority as if it were a registered international interest?
- Can the parties to a contract select the procedural rules applicable to their dispute?
- To what extent does the Convention address public laws?

[Link to Answer Key Here](#)





# MODULE 4.3: KEY LEGAL ELEMENTS OF THE CONVENTION INTERESTS PROTECTED

## PROPERTY AND OTHER INTERESTS IN MOBILE EQUIPMENT

### INTERESTS PROTECTED

By establishing primacy in respect of matters within its scope over private laws, the Convention minimises the element of jurisdictional risk and provides parties involved in the leasing, financing and sale of mobile equipment greater degree of security than was hitherto available.

The Convention protects seven categories of rights and interests as defined in [Article 1](#) as follows:

1. international interests. [Article 1 \(o\)](#);
2. prospective international interests. [Article 1 \(y\)](#);

3. national interests. [Article 1 \(r\)](#);
4. non-consensual rights or interests arising under national law which need not be registered, if not to the extent declared by a Contracting State. [Article 1 \(s\)](#);
5. registrable non-consensual rights or interests arising under national law, if not to the extent declared by a Contracting State. [Article 1 \(dd\)](#);
6. associated rights. [Article 1 \(c\)](#); and
7. pre-existing rights or interests. [Article 1 \(v\)](#). See [Commentary, 2.33](#).

Additionally, the Convention accommodates the protection of rights and interests acquired or prospectively acquired in the following manner:

1. assignments and prospective assignments. [Articles 1 \(b\)](#) and [1 \(x\)](#);
2. assignments of associated rights which are not independently registrable but are protected by the registration of the assignment of their corresponding international interest; and
3. acquisitions of international interests by legal or contractual subrogation. See [Commentary, 2.34, 2.124](#).

Further, an agreement of subordination of a prior interest may also be registered under [Article 16\(1\)\(e\)](#) by the party in favour of whom the subordination has been made. This secures protection for such a party from an assignee of the subordinated interest. See [Commentary, 2.35](#).

*The Convention protects seven categories of rights and interests, including such rights and interests as are acquired in accordance with the requirements of the Convention.*

### KEY TERMS FOR THIS MODULE:

- “associated rights”
- “fractional interests”
- “international interests”
- “prospective international interests”
- “right to discharge”

### INSIDE THIS MODULE:

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PROSPECTIVE ASSIGNMENTS	43
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THE  
CONVENTION  
CREATES A  
“*SUI GENERIS*  
INTERNATIONAL  
INTEREST WHICH  
IS NEITHER  
DERIVED FROM  
NOR DEPENDENT  
ON NATIONAL  
LAW.”

## INTERNATIONAL INTERESTS

The concept of international interests is central to the purpose of the Convention. An international interest is a right in rem arising under or resulting from a certain agreement. The Convention creates a “*sui generis* interest which is neither derived from nor dependent on national law.” See [Commentary, 2.41, 2.42](#). An international interest may be held by a single creditor or multiple creditors who may hold different fractional interests. See [Commentary, 4.21](#). An International Interest must be constituted according to the formal requirements of [Article 7](#) of the Convention, in a uniquely identifiable airframe, aircraft engine or helicopter, under a:

- i. security agreement;
- ii. title reservation agreement; or
- iii. leasing agreement. [Article 2](#).

An international interest is effective in insolvency proceedings against a debtor if (1) it is registered at the International Registry prior to the commencement of such



PHOTO BY VICTORIA PICKERING/CC

proceedings, or (2) under local law it is so effective without registration. [Article 30\(1\)](#) and [\(2\)](#). Failure to register an international interest renders such unregistered interest subject to competing registered interests even if the unregistered interest was created earlier or was known to the holder of the registered interest at the time of registration. [Article 29\(2\)](#).

However, the default remedies offered by the Convention continue to be available in respect of unregistered interests. Registration is required only to give notice of the international interest to third parties and to protect the priority of the international interest. See [Commentary, 2.78](#).

The formal requirements of an agreement creating an International Interest under [Article 7](#) are:

- (i) it must be in writing;
- (ii) it must relate to an aircraft object of which the chargor, conditional seller, lessor or seller, as applicable, has power to dispose;
- (iii) it must describe the applicable aircraft object by manufacturer’s serial number, name of manufacturer and generic model designation; and
- (iv) in the case of a security agreement, it must enable the secured obligations to be determined (although the agreement need not state a sum or maximum sum secured).

## ASSIGNMENTS OF INTERNATIONAL INTERESTS

Assignments relating to international interests are registrable under the Convention. [Article 16\(1\)\(b\)](#). However, this is confined to contractual assignments and does not extend to assignments by operation of law.

The Convention is conceptually

centered on the assignment of associated rights rather than on the assignment of international interests. Thus, an assignment of associated rights also transfers to the assignee the related international interest and all the interests and priorities of the assignor (unless otherwise

agreed). [Article 31\(1\)](#). Further, an assignment of an international interest is only valid if some or all of the related associated rights are also assigned. [Article 32\(2\)](#).

An assignee stands in the same position as its assignor. Therefore, if the assigned interest was not registered



PHOTO BY DENISE KREBS/CC

Assignments are registrable under the Convention.

## ASSIGNMENTS OF INTERNATIONAL INTERESTS (CONT'D...)

under the Convention, the registration of the assignment does not convert the unregistered interest into a Convention interest. See [Commentary, 2.191](#). A debtor is bound by the assignment and owes to the assignee the same duties it owed to the assignor provided the formal requirements of [Article 33\(1\)](#) were complied with. See [Commentary, 2.192](#). In the case of assignments covered by

the Aircraft Protocol, such formed requirements include a debtor's consent. [Article XV](#).

The position in most legal systems is that the essence of assignment is the transfer of the creditor's rights without reference to its obligations. In contrast, an agreement containing a release of the assignor from its obligations is treated as a novation. However, hybrid transactions

in which a creditor transfers its rights as well as, with the consent of the debtor, transfers its obligations either wholly or in part are also treated as assignments by the Convention. See [Commentary, 2.43, 2.44](#).

An agreement to assign is not treated as an assignment under [Article 1\(b\)](#) and such an agreement to assign can only be registered as a prospective assignment.

*"A debtor is bound by the assignment and owes to the assignee the same duties it owed to the assignor provided the formal requirements...are complied with."*

## ASSOCIATED RIGHTS

Associated rights are defined under [Article 1\(c\)](#) as "all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object." Such rights are secured by a security agreement or associated with a title reservation or leasing agreement. Associated rights can only be created under the agreement and may include undertakings to perform other contracts, but obligations of third parties or of the debtor itself under other contracts do not fall within the definition of associated rights. See [Commentary, 4.9](#).

Examples of associated rights include the right to repayment of a loan or rentals under a lease agreement and other rights to performance, such as insurance and repair of an aircraft object.

Associated rights may be of two kinds:

i. object related rights:

rights related to the financing and leasing of an object; and

ii. rights in an unrelated transaction which may have as an element security over the object but have nothing to do with its financing, rental or associated obligations.

There are five categories of object related associated rights described under [Article 36 \(2\)](#):

(i) a sum advanced and utilized for the purchase of the object;

(ii) a sum advanced and utilized 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;

(iii) the price payable for the object;

(iv) the rental payable in respect of the object; or

(v) other obligations arising from a transaction referred to in any of the preceding sub-paragraphs. See [Commentary, 4.258](#).

ASSOCIATED RIGHTS ARE DEFINED AS  
"ALL RIGHTS TO PAYMENT OR OTHER  
PERFORMANCE BY A DEBTOR UNDER AN  
AGREEMENT WHICH ARE SECURED BY OR  
ASSOCIATED WITH THE OBJECT."

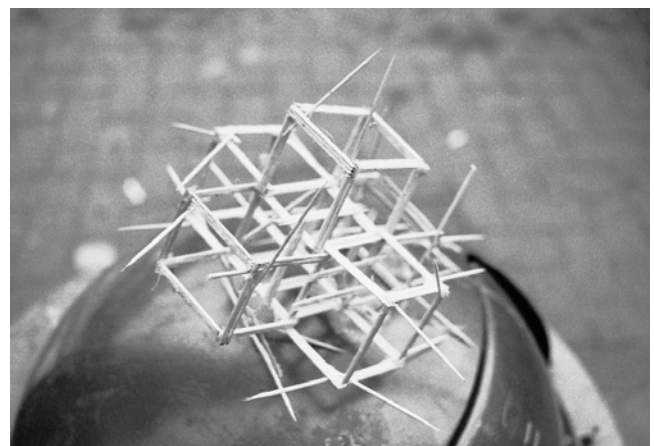


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## ASSIGNMENT OF ASSOCIATED RIGHTS

AN ASSIGNMENT OF AN INTERNATIONAL INTEREST CREATED OR PROVIDED BY A SECURITY AGREEMENT IS NOT VALID WITHOUT THE INCLUSION OF SOME OR ALL RELATED ASSOCIATED RIGHTS.



PHOTO BY ASENAT29/CC

An assignment of associated rights made in conformity with the formal requirements of [Article 32](#) of the Convention also transfers to the assignee the related international interest and all of the interests and priorities of the assignor under the Convention, unless the parties otherwise agree. This is in consonance with the position adopted by most major legal systems that views a security interest as an accessory to the obligation secured.

While parties may agree to assign associated rights without transferring the underlying international interest, an assignment of an international interest created or provided by a security agreement is not valid without the inclusion of some or all related associated rights. [Article 32\(2\)](#).

The definition of “[associated rights](#)” provided in [Article 1\(c\)](#) is worded in a manner from which it is evident that only a creditor can assign associated rights. Thus, an assignment by a lessee of its rights under a lease cannot be treated as an assignment of associated rights under the Convention. The treatment changes in cases where the lessee sub-leases the aircraft since in such a situation the lessee becomes a sub-lessor and as such, is a creditor in the eyes of the Convention. See [Commentary, 2.185](#).

An assignee stands in the same position as its assignor. Thus, if the assigned interest was itself unregistered, the registration of the assignment will not convert the interest into an international interest under the Convention. See [Commentary, 2.191](#).

The formal requirements for the constitution of an assignment of associated rights that also transfers the related international interest are similar to the requirements for the creation of an international interest, namely, the assignment must:

1. be in writing,
2. enable the associated rights to be identified in accordance with the Protocol under the contract from which they arise, and
3. in the case of an assignment by way of security, enable the obligations secured by the assignment to be determined (but without the need to state a sum or maximum sum secured). [Article 32\(1\)](#).



## PROSPECTIVE INTERNATIONAL INTEREST

*“In cases where a prospective international interest is registered and subsequently ripens into an actual international interest, it is treated as being registered from the time of registration of the prospective international interest.”*

A prospective international interest is an interest in an aircraft object that is intended to be created as an international interest upon the occurrence of a specified future event irrespective of whether or not the occurrence of the event is certain. [Article 1\(y\)](#). However, the mere intention to create an international interest in the future is not enough to constitute a prospective international interest. The aircraft object must either be in existence or have reached a stage of manufacture at which it can be seen to be equipment falling within the purview of the Convention and be uniquely identifiable. See [Commentary, 2.49](#).

A prospective international interest need not be provided for in writing; the only requirement provided by the Convention is that the interest be identifiable as an air-

craft object. In cases where a prospective international interest is registered and subsequently ripens into an actual international interest, it is treated as being registered from the time of registration of the prospective international interest. [Article 19\(4\)](#). See [Commentary, 2.49](#), [2.173](#).

A person searching the International Registry will not be

able to distinguish an international interest from a prospective international interest. The International Registry will merely state that the creditor named has acquired or intends to acquire an international interest in the aircraft object. Thus, the onus lies squarely on the party searching to make further inquiries. [Article 22\(3\)](#). See [Commentary, 4.157](#).



PHOTO BY ALEX LOMIX/CC

## PROSPECTIVE ASSIGNMENTS

A prospective assignment is defined to be 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. [Article 1\(x\)](#). These assignments are registrable under [Article 16\(1\)\(b\)](#).

Since [Article 35](#) states that the priority rules governing international interests apply *mutatis mutandis* to assignments, it follows that a prospective assignment, upon conversion into an international interest, will be treated as though it was registered from the time of registration of the prospective assign-

ment. Thus, an intending assignee of associated rights may register a prospective assignment, so that when the assignment is made it dates back to the time of registration of the prospective assignment and accordingly gets priority. See [Commentary, 2.203](#).

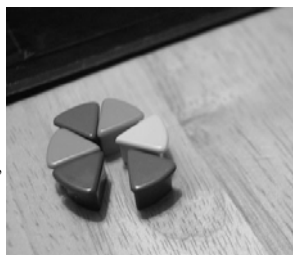
PHOTO BY SEAN MACENTEE/CC



*Prospective assignments are also registrable under the Convention.*

## FRACTIONAL INTERESTS

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THE CONVENTION  
WILL TREAT EACH  
SALE OF A  
FRACTIONAL  
INTEREST IN AN  
AIRCRAFT AS  
A SEPARATELY  
REGISTRABLE  
DISTINCT SALE  
OF A UNIQUE  
INTEREST.

The concept of fractional interests is meant to deal with situations where two or more parties acquire an aircraft object as co-owners. In these cases, each owner will own a specified 'fractional interest' in the aircraft. Although fractional interests are not explicitly dealt with by the Convention, its principles are broad enough to incorporate the concept. The Official Commentary states nothing precludes such interests from being treated as the subject of a separate international interest. Moreover, the International Registry allows parties to specify a fractional interest

in registrations in respect of aircraft objects. See [Commentary, 2.47](#). Fractional interests up to six decimal places may be specified. Fractional interests are shared interests and as such, should not be confused with multiple interests. The rights of a head-lessee and sub-lessee over an aircraft object differ from the rights of holders of fractional interests.

The convention will treat each sale of a fractional interest in an aircraft as a separately registrable distinct sale of a unique interest. Thus, each creditor whose debtor has defaulted is entitled to exercise the remedy of sale under

the Convention without the consent of other creditors holding other fractional interests. See [Commentary, 2.111, 2.140](#). Each party holds its interest *pari passu* with the other interest holders. Priority conflicts only arise when (a) the same party disposes the same interest to multiple buyers, or (b) parties who hold interests in the same aircraft object, sell or charge by way of security fractional interests that exceed a 100% of an aircraft object. In these cases priority is determined according to the order of registration. See [Commentary, 3.82](#).

## RIGHT TO DISCHARGE

*Discharge of an interest may only be achieved with the written consent of the party in whose favour the registration was made.*



PHOTO BY KLEFF/CC

International interests are to be discharged when they are no longer effective, i.e., when a person no longer owes any obligations under an agreement or, in the case of registration of a prospective international interest or a prospective assignment of an

international interest, the intending creditor or assignee has not given value or contracted to give value. [Article 25](#). See [Commentary, 2.139](#). An existing registered interest on the International Registry usually proves to be an impediment to future financing

or sale of the aircraft object. Thus, the discharge of an interest following the conclusion of a transaction is an important step.

Discharge of an interest may only be achieved with the written consent of the party in whose favour the registration

## RIGHT TO DISCHARGE (CONT'D...)

was made. [Article 20\(3\)](#). With respect to a security agreement, a title reservation agreement or a lease agreement, the consent must come from the chargee, conditional seller or lessor, respectively. See [Commentary, 2.140](#). Upon fulfillment of obligations, the holder of the registered interest must procure the discharge of the registration after a written demand by the debtor is delivered to or received by the holder at the address stated in such a registration. [Article 25\(1\)](#). In the event that a party owing a duty to discharge fails to do so, the debtor can seek a court order per [Article 44](#).

The right to consent to the discharge, itself, may be further transferred to a third party. In such cases, the transferee shall have to sole right to consent to such a discharge. (Section 5.8.2 of the Regulations and Procedures for the International Registry, Fourth Edition (2010) published by ICAO). Multiple creditors have to select one of their number to hold the right to discharge. See [Commentary, 3.75](#). Transfer of the right to discharge will be reflected in a priority search certificate. The Convention does not

expressly refer to the registration of partial discharge but the Convention is deemed to cover such registrations too and they are accepted in the International Registry. Such partial discharges occur when a party owning a percentage of an aircraft object gives security over that interest and then, upon payment, seeks to reduce the percentage offered as security. See [Commentary, 2.141](#).

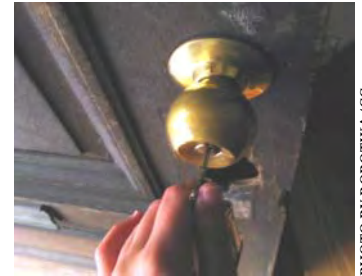


PHOTO BY ROBOTIKA/CC

*The right to consent to the discharge, itself, may be further transferred to a third party.*

## KEY DEFINITIONS FOR THIS MODULE

**A** [Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“associated rights”** All rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. [Article 1 \(c\)](#).

**“fractional interests”** A specifically identified percentage interest in an aircraft object. Fractional Interests are held by two or more parties jointly as co-owners, where each party holds its interest *pari passu* with

the other interest holders.

### **“international interests”**

An international interest in mobile equipment is an interest, constituted under [Article 7](#) of the Convention, in uniquely identifiable airframes, aircraft engines and helicopters: (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 international interest in an object extends to proceeds of that object. [Articles 2\(2\), 2\(3\), 2\(5\)](#).

**“prospective international interests”** 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. [Article 1 \(y\)](#).

**“right to discharge”** Once a registration is made, the right to discharge is deemed to vest with the Beneficiary. Upon fulfillment or discharge of obligations by Debtor, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor has been delivered to or received at its address stated in the registration. [Article 25\(1\)](#). This Right to discharge may be transferred to a third party. See [Commentary 3.75](#).

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS

- What are the seven different categories of 'original' rights/ interests protected by the Convention?
- What are the formal requirements of an agreement creating an international interest and what is the effect of not having a registered international interest?
- What is the effect of registering the assignment of a non-convention interest?
- What types of rights fall under the definition of associated rights?
- How does the Convention treat assignment of associated rights vis-à-vis assignment of international interests?
- What is a prospective international interest? What is the treatment of a prospective international which subsequently converts into an actual international interest, under the Convention?
- What is the scope and benefit of prospective assignment?
- What happens if the interest in an aircraft is divided between two or more owners? Are such rights secured by the Convention, if yes, under what provision?
- What are the remedies available to an erstwhile debtor when a party does not fulfil their duty to discharge?



[Link to Answer Key Here](#)

# MODULE 4.4: KEY LEGAL ELEMENTS OF THE CONVENTION

## PRIORITY OF INTERESTS

FIRST IN TIME, FIRST IN LINE

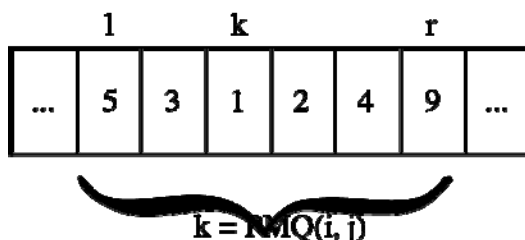
### GENERAL PRIORITY RULES

The basic priority rule under the Convention is that the first to register an international interest has priority. A registered interest has priority over a subsequently registered interest. In addition a registered interest has priority over an unregistered interest. An unregistered interest is a consensual interest or a registrable non-consensual right or interest that has not been registered. An interest is also unregistered if its registration has expired or otherwise been discharged. The priority of the first to register applies even if the

holder of the registered interest took with actual knowledge of the unregistered interest. Registration also perfects the interest under the Convention and assures its effectiveness in insolvency proceedings, effectively establishing priority of the interest over the debtor's unsecured creditors. There are a limited

number of exceptions to these general priority rules which are described in the remainder of this module. [Commentary, 2.155](#).

*Under the Convention, the first to register an international interest has priority.*



### KEY TERMS FOR THIS MODULE:

- “creditor”
- “non-consensual right or interest”
- “pre-existing right or interest”
- “prospective international interest”
- “registered interest”
- “registrable non-consensual right or interest”
- “unregistered interest”

### NON-CONSENSUAL RIGHTS OR INTERESTS

A non-consensual right or interest means a right or interest arising under the law of a Contracting State to secure the performance of an obligation. Under [Article 39](#) of the Convention, a Contracting State may specify the types of non-consensual rights or interests which have priority over a registered international interest with-

*A Contracting State may specify the types of non-consensual rights or interests which have priority over a registered international interest without themselves being registered.*



PHOTO BY #PACOM/CC

### INSIDE THIS MODULE:

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OTHER EXCEPTIONS	48
COMPETING ASSIGNMENTS	49
SUBROGATION	49
VARIATION OF PRIORITIES	50



## NON-CONSENSUAL RIGHTS OR INTERESTS (CONT'D...)

THERE ARE  
SEVEN  
EXCEPTIONS TO  
THE GENERAL  
PRIORITY RULES.

out themselves being registered. Examples are possessory liens of repair or storage facilities securing unpaid amounts, liens for unpaid wages owed to employees, liens on aircraft for unpaid air navigation charges and liens for unpaid taxes. Under [Article 39](#), a Contracting State may also make a declaration that rights of a State or other provider of public services to arrest an object for unpaid amounts owed for such services are not affected

by the Convention. Under [Article 39](#), a Contracting State may retain or restrict applicable national law rights; it may not, however, expand them. [Commentary, 2.211](#) and [2.216](#). A Contracting State may also make a declaration under [Article 40](#) that specified categories of non-consensual rights or interests shall be registrable as if they were international interests. Examples would be judgments permitting attachment of equipment.



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## OTHER EXCEPTIONS TO GENERAL PRIORITY RULES

Beyond non-consensual rights or interest, there are six additional exceptions to the general priority rules.

(1) The buyer of an object has priority over an interest not registered until after the buyer's acquisition of the object even though the buyer's interest is not registrable. This exception does not apply to the buyer of an aircraft object since its interest is registrable and so must be registered in order to have priority over an unregistered interest, Protocol, [Article XIV](#) and [Commentary, 5.70](#).

(2) A conditional buyer or lessee, which as "[debtor](#)" does not have a registrable interest, acquires its interest free from a subsequently registered interest if the conditional sale or lease is first registered by its "[creditor](#)", the conditional seller or lessor.

(3) The general priority rules may be varied by agreement between the parties, such that

the holder of a registered interest may agree to be subordinated to the holder of a subsequently registered interest or of a prior or subsequent unregistered interest.

(4) A debtor who itself holds an international interest cannot use its registration of that interest to assert priority over its own creditor in a manner inconsistent with the rights it has granted to the creditor.

(5) An international interest completed after a prospective

international interest registration departs from the normal rule in that it is never filed, but rather deemed to relate back to the time of the prospective registration when completed.

(6) Finally a pre-existing right or interest will continue to have the priority it had under applicable law prior to the Convention becoming applicable in a State unless the Contracting State otherwise declares. [Commentary, 2.162](#).

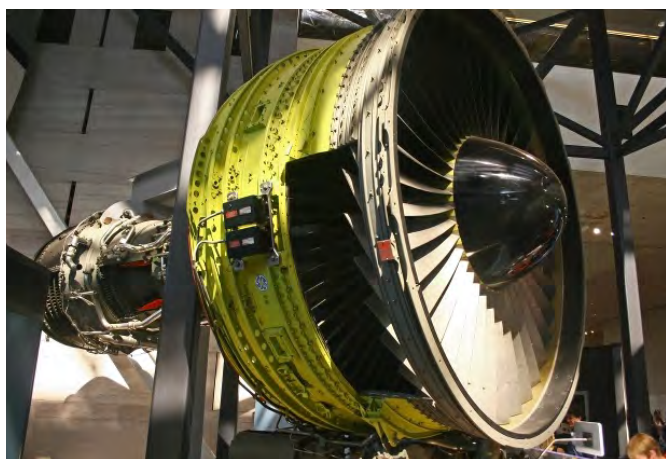


PHOTO COURTESY OF MITCHELL JOHNSON



*A pre-existing right or interest will continue to have the priority it had under applicable law prior to the Convention becoming applicable.*

## PRIORITY OF COMPETING ASSIGNMENTS

An assigned interest retains its original priority, so the priority of the assignee is the same as the assignor. For example, a charge given by Debtor and registered in favor of A has priority over a second charge given by Debtor and registered in favor of B. But further if A assigns its charge to C, C has priority over B even

if the assignment from A to C is not registered. Similarly if B assigns its interest to D and registers the assignment, C's unregistered assignment also has priority over D. However C should still register its assignment because if A assigns the same international interest that it originally received from Debtor and

assigned to C to another party, F, and the assignment to F is registered, F's registered assignment takes priority over C's unregistered assignment of the same interest.

AN ASSIGNED  
INTEREST  
RETAINS ITS  
ORIGINAL  
PRIORITY.

PHOTO COURTESY OF SIMON NATAL NORTON

*Priority Pass™*

## SUBROGATION

Rights acquired by subrogation have the priority of the acquired interest. Rights may be acquired by subrogation under [Article 9\(4\)](#) of the Convention, providing that after default a person who pays a chargee the full amount of the debt secured is

subrogated to the rights of the chargee. So, for example, if a chargee registers a security interest in an object and the charger subsequently defaults, a purchaser from the chargee who repays the full debt will acquire the same priority in the object as the

chargee. Under [Article 38](#) of the Convention, rights may also be acquired by legal or contractual subrogation under applicable national law. A common example would be if a guarantor fully repays the amounts owed to a creditor, the guarantor would acquire the priority of the interest registered by the creditor. Rights acquired by subrogation are registrable under [Article 16](#) of the Convention. Such a registration would protect one subrogee of an interest against another, if, for example, under applicable law partial payment of a debt could result in more than one subrogee.



PHOTO BY DIALMFORMETCALFE/CC

*“...rights may also be  
acquired by legal or  
contractual subrogation  
under applicable  
national law”.*

## VARIATION OF PRIORITIES BY AGREEMENT (SUBORDINATION)



The parties may vary the priority rules of the Convention by agreement.

As previously discussed, parties may vary the priority rules of the Convention by agreement. Thus, for example, the holder of a registered interest may agree to be subordinated to the holder of a subsequently registered interest or a prior or subsequent unregistered interest. Parties will often agree in negotiations in a transaction

on the order in which their respective interests will be registered, thus effectively achieving an agreed subordination through use of the general priority rules. A subordination agreement may be registered under [Article 16](#) of the Convention and unless it is registered an assignee of a subordinated interest is not bound by the subordination.

Thus, for example, if A holds a registered interest in an object that was registered prior to a subsequently registered interest given to B but agrees to subordinate its interest to that of B, if A assigns its interest to C, C will have priority to B unless the subordination was registered at the time of the assignment to C.

## KEY DEFINITIONS FOR THIS MODULE

[Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“creditor”** means a charge under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement.

**“international interest”** means an interest held by a creditor to which [Article 2](#) applies.

**“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.

**“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\(2\)\(a\)](#).

**“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.

**“registered”** means registered in the International Registry pursuant to [Module V](#).

**“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 [Module V](#).

**“registrable non-consensual right or interest”** means a non-consensual right or interest registrable pursuant to a declaration deposited under [Article 40](#).

**“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.

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.





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### QUESTIONS



- Does the holder of a registered interest take priority over an unregistered interest even if the holder has actual knowledge of the unregistered interest? Does perfection of a registered interest occur under the legal principals of the Convention or applicable national law?
- Does the possessory lien of a repair shop take priority over a registered interest in the same object? Can the Convention be used to improve the position of that lien holder compared with its rights under national law?
- Does a conditional buyer or lessee have a registrable interest? Does a conditional buyer or lessee benefit from having the conditional sale or lease registered with the International Registry?
- Does an assignment have the same priority as the original interest? What priority does the assignment have if it is not registered?
- Do rights acquired by subrogation have the same priority as the acquired interest? What priority does the subrogation have if it is not registered?
- Does a subordination agreement need to be registered to be effective? What is the benefit of registering a subordination agreement?

[Link to Answer Key Here](#)







# MODULE 4.5: KEY LEGAL ELEMENTS OF THE CONVENTION

## REGISTERING INTERESTS IN THE INTERNATIONAL REGISTRY

### THE PROCESS OF REGISTERING SECURITY AND OTHER INTERESTS

#### THE INTERNATIONAL REGISTRY

The International Registry is established as the facility for effecting and searching registrations under the Convention and the Protocol. It has been established and is operated under the authority of the Convention. See Convention, [Article 16](#).

The International Registry is a computer-based electronic system, accessed through its website, [www.internationalregistry.aero](http://www.internationalregistry.aero). It is through this computer database that registrations of interests are made, purely electronically, from any place in the world, any time of day and any day of the week.

Registrations made at the International Registry



*The International Registry is a computer-based system where interests in aircraft equipment may be electronically registered.*

include international interests, amendments, extensions, discharges, contracts of sale, subrogations, subordinations, prospective interests and registrable non-consensual rights and interests. See Convention, [Article 17](#).

There is a Registrar of the

International Registry who is appointed by the Supervisory Authority, established under the Convention and the Protocol. The Registrar is responsible for ensuring the efficient and reliable operation of the International Registry. See Protocol, [Article XVII](#).

#### KEY TERMS FOR THIS MODULE:

- “pre-existing right or interest”
- “amendment”
- “national interests”
- “internal transaction”
- “entry point”

#### INSIDE THIS MODULE:

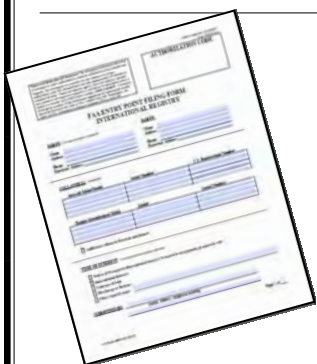
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#### DESIGNATED ENTRY POINTS

For airframes that are part of aircrafts for which it is the state of registry under the Chicago Convention of 1944, Contracting States under the Convention may designate one or more entities as an entry

point through which information required for registration with the International Registry may be or is required to be transmitted to the Registry. For all registrations relating to such airframes and helicopters,

a Contracting State may require that such a designated entry point be the exclusive conduit through which registrations are made. However, when it comes to aircraft engines, while a Contracting State may



*A Contracting State may designate one or more entities as an “entry point” for registrations on the International Registry.*

## DESIGNATED ENTRY POINTS (CONT'D...)

provide a procedure for making International Registry registrations through its designated entry point it cannot require that the entry point be used.

This restriction reflects the policy of permitting control over airframes and helicopters

operated or to be operated on its civil registry, whereas aircraft engines have no equivalent civil operating registration mechanism.

The effect of not requiring use of a designated entry point, or merely permitting its use, is that registrations

can be made directly with the International Registry by a qualified user of the International Registry, from any computer where the user’s digital certificate is stored. See [Commentary, 5.87](#) and [5.91](#).

## TRANSITIONAL PROVISIONS FOR EXISTING INTERESTS



THE CONVENTION RECOGNIZES THE PRIORITY OF PRE-EXISTING RIGHTS AND INTERESTS, UNLESS A CONTRACTING STATE HAS DECLARED THAT THESE MUST GET REGISTERED TO MAINTAIN THEIR PRIORITY.

There may be existing liens or encumbrances on aircraft objects in a contracting state prior to its ratification. According to [Article 1\(v\)](#) of the Convention, a “[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 the Convention as defined by [Article 60 \(2\)\(a\)](#).

To allow for the orderly transition of any Contracting State into the notice-based system of the Convention, the Convention sets forth what happens to pre-existing rights and interests after the Convention becomes law in the State. The Convention recognizes the priority of these pre-existing rights and interests in that, unless a Contracting State declares

a time at which pre-existing interests must be registered with the International Registry to retain an existing priority valid, pre-existing rights or interests are not affected by the Convention and retain whatever priority they held prior to the date of the Convention. See [Official Commentary, 2.250](#).

## AMENDING EXISTING INTERESTS

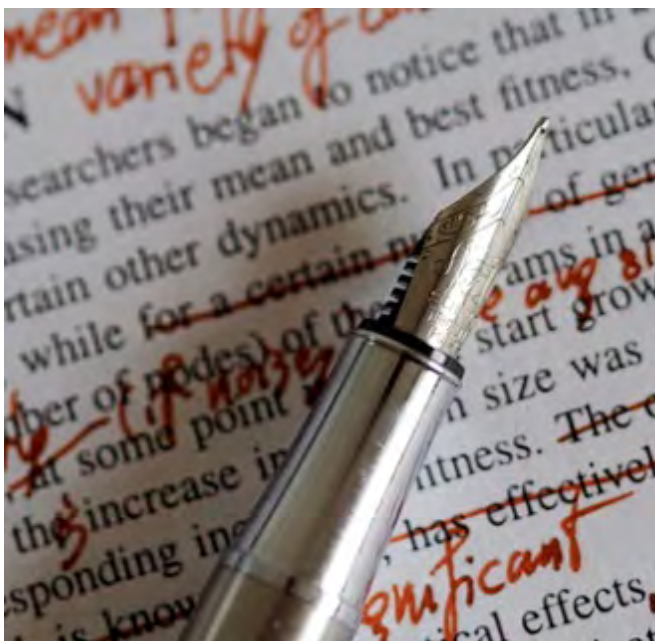
Once an interest or assignment has been registered on the International Registry it is possible to amend the registration with the consent of all affected parties. For purposes of the International Registry and amending registrations made there, “[amendment](#)” means any change in registration information, including any change in the duration of a registration. [Regulation 2.1.2](#). See also [Commentary, 2.136](#).

Depending on the information being amended, making an amendment to a registered interest may result in the automatic discharge of the original registration and a new registration reflecting the amended features. This effect is necessary in that once a registration is made it serves as notice to all interested parties. As such, if for instance the information being amended changes the aircraft object which is the subject of the

registration, to have notice of that amended registration one would have to perform a search which covers the new object description, so it is necessary to say that priority dates from the time the amendment is registered.

The definition of amendment contained in the Regulations, however, specifically excludes the assignment, subrogation and subordination of interests. [Regulation 2.1.2](#). This is true because these are separate registration actions to be taken on the International Registry and require an underlying written agreement and do not involve a change in the information originally registered. See [Regulation 5.6](#) and [5.9](#), and [Commentary, 3.70](#).

An extension falls within the definition of amendment for the purposes of the Regulations. Renewal of a lease should not be dealt with by registering an extension of the existing registration, for this



*An amendment involves continuance of an existing registration in modified form.*

would give retrospective effect to the renewal, whereas as a new interest it should take its place after interests registered prior to registration of the renewal. [Commentary, 2.137](#).

## NATIONAL REGISTRATIONS

**N**[ational interests](#) under the Convention are interests which are held by a creditor in an aircraft object and created by what is referred to as an “[internal transaction](#).” Convention [Article 1\(r\)](#). “[Internal Transactions](#)” are discussed in more detail in [Module 4.1](#).

The objective of the Convention in providing this excluded category of interests is to, at least in a nominal way, recognize the interest of the Contracting States in providing for their own, internal interest recording/registering system. However, even in respect of National Interests,

registration with the International Registry is the only way to ensure the priority of those interests.

The Official Commentary cautions that “an interest arising under the law of a Contracting State not registered in a national registry of that State, for whatever reason,

“THE OBJECTIVE OF THE CONVENTION IN PROVIDING THIS EXCLUDED CATEGORY OF INTERESTS IS TO, AT LEAST IN A NOMINAL WAY, RECOGNIZE THE SOVEREIGNTY OF THE CONTRACTING STATES.”

## NATIONAL REGISTRATIONS (CONT'D...)

is not a national interest... because the transaction under which it arises is not an internal transaction as defined by [Article 1\(n\)](#).” [Commentary, 4.24](#).

In the case of National Interests, these interests are, still, separately to be registered with the International Registry. They are not registered as international interests but

as national interests, and enjoy the same priority system with other interests registered with the International Registry. [Commentary, 2.33\(3\)](#).

## KEY DEFINITIONS FOR THIS MODULE

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.

**A** [rticle 1](#) of the Convention contains a list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“amendment”** means any change in registered information, including any change in the lapse date of a registration, but does not include assignment, subrogation or subordination. [Regulation 2.1.2](#).

**“entry point”** means an entity designated by a Contracting State: (i) which shall or may authorize the transmission of information required for registration under the Convention and the Protocol to the International Registry, referred to as an “authorizing entry point;” or (ii) through which information required for registration under the Convention and the Protocol shall or may

be directly transmitted to the International Registry, referred to as a “direct entry point.” [Regulation 12.1](#).

**“internal transaction”** means a transaction involving a security agreement, a title reservation agreement or a leasing agreement where the centre of the main interests of all parties to such transaction is situated, and the relevant object located, 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\(1\)](#). [Article 1\(n\)](#).

**“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\(2\)\(a\)](#).

**“prospective international interest”** means an interest that is intended to be cre-

ated 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.

**“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](#).







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### QUESTIONS

- Can a registry user gain access to and make registrations on the International Registry from any computer terminal?
- What registration details may be amended on the International Registry?
- Under what circumstances does an amendment to a registration result in an automatic termination of the understanding registration?
- When can a pre-existing right or interest be registered on the International Registry, even though the applicable Contracting State has not declared that such a pre-existing right or interest must be registered to retain its pre-Convention priority?
- For an internal transaction to qualify as a National Interest, must the aircraft object at issue be physically located within the particular Contracting State?



[Link to Answer Key Here](#)





# MODULE 4.6: KEY LEGAL ELEMENTS OF THE CONVENTION

## ENFORCEMENT OF INTERESTS

### EXERCISE OF REMEDIES TO ENFORCE INTERNATIONAL INTERESTS

#### ENFORCEMENT OF INTERESTS IN GENERAL

A core purpose of the Cape Town Convention is to create greater certainty that upon default, creditors can swiftly exercise their remedies to repossess and sell or otherwise realize upon secured or leased assets.

Exercise of remedies depends upon the existence of a “default” ([Article 11](#)). When a default exists, a creditor may exercise remedies as provided in the Convention and as agreed with the debtor (if not inconsistent with certain “mandatory” provisions of the Convention (see below)). In certain cases, the availability of particular remedies depends on whether the creditor’s interest is pursuant to a lease, a title reservation agreement or a security agreement. That



PHOTO BY SALFAIRO/CC

*The Convention is designed to facilitate enforcement of interests.*

characterization question is determined by the “applicable law,” that is, the law applied by the forum, ([Article 24](#)).

The Convention also provides ([Article 13](#)) for forms of “speedy” advance relief prior to a determination of the merits of a creditor’s claim, unless limited by a

declaration of a Contracting State ([Article 55](#)).

A key element of the Convention ([Article 30\(1\)](#)) is that in the event of insolvency proceedings against a debtor an international interest is effective if it was registered prior to the commencement of the proceedings.

#### DEFAULT

All remedies under the Convention (other than insolvency remedies) are predicated on the existence of a default, which under [Article 11](#) will be those events constituting a

default as agreed in writing by the debtor and creditor or, if not so agreed, will be a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

[Article 11\(1\)](#) does not prescribe any materiality standard for a default agreed by the parties and therefore overrides any such standard under prior law. Also, the events constituting a default

#### KEY TERMS FOR THIS MODULE:

- “agreement”
- “creditor”
- “debtor”
- “leasing agreement”
- “security agreement”
- “title reservation agreement”
- “default”

#### INSIDE THIS MODULE:

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## DEFAULT (CONT'D...)

(where not defined by the parties) may include circumstances that are not breaches of obligations by the debtor but “events reflecting the allocation of risk, whether internal (such as debtor’s insolvency) or external (such as adverse changes in taxation law).” [Commentary at para 4.106.](#)

[tary at para 4.106.](#)

Virtually all financing and lease transactions define defaults so there should be no need to change customary agreements to meet the requirements of the Convention.

A “default” is needed to permit exercise of remedies.

## BASIC REMEDIES

Upon default under a title reservation agreement or a lease agreement (which in either case is not a security agreement), the conditional seller or lessor has the right under [Article 10](#) to:

- terminate the agreement;
- take possession or control of the object; or
- apply for a court order authorizing those actions.

Upon default under a security agreement, the chargee has the right to:

- take possession or control of the object ([Article 8\(1\)\(a\)](#));
- sell or grant a lease of the object ([Article 8\(1\)\(b\)](#)) on reasonable prior notice to “interested persons” (defined below) ([Article 8\(4\)](#)), but leasing as a remedy may be limited by a Contracting State by declaration under [Article 54\(1\)](#);

- collect or receive any income or profits arising from the management or use of the object ([Article 8\(1\)\(c\)](#));
- apply for a court order authorizing those actions ([Article 8\(2\)](#));
- if agreed by the debtor, the creditor and all other “interested persons” after default, vesting ownership of the object in the creditor in or towards the satisfaction of the secured obligation ([Article 9\(1\)](#)).

In addition, pursuant to [Article 12](#), any other remedies provided by applicable law, including those agreed by the parties, may be exercised to the extent not inconsistent with mandatory provisions in [Article 15](#) (see below).

Any sum realized by a chargee on exercise of remedies is to be applied toward discharge of the secured obligations

([Article 8\(5\)](#)), with any surplus remaining after paying such obligations and reasonable costs of exercising remedies to be payable to junior interests and then to the chargor ([Article 8\(6\)](#)).

Under the Convention, “interested persons” (defined in [Article 1\(m\)](#)) entitled to notice of exercise of remedies by a chargee are the debtor, any person who has provided a guaranty or other credit support to the chargee with respect to the debtor’s obligations and any other person having rights in the object who has given notice to the chargee of such rights within a reasonable time prior to exercise of remedies.

In general, the parties have broad rights to vary the default remedy provisions of the Convention, but may not do so as to mandatory provisions regarding (1) exercise of a chargee’s remedies in a reasonable manner, (2) required

A CONTRACTING STATE MUST DECLARE WHETHER OR NOT REMEDIES MAY BE EXERCISED WITHOUT LEAVE OF THE COURT.



## BASIC REMEDIES (CONT'D...)

prior notice of sale and application of proceeds of sale by a chargee, (3) restrictions on vesting title to an object in a chargee, (4) a debtor's right to redeem any object prior

to sale, (5) imposition by a court of terms for speedy judicial relief and (6) exercise of remedies in accordance with the procedural laws of the place of exercise.



PHOTO BY ARANJUEZ1404/CC

*Remedies include the right to receive income and profits from the object.*

## ADVANCE/INTERIM RELIEF

**A**rticle 13 of the Convention sets forth forms of “*speedy relief*” to be provided by courts upon default and in advance of a final determination of the creditor’s claim, when the debtor has at any time so agreed, and except as limited by a Declaration of a Contracting State under [Article 55](#). Advance relief, when available, is in addition to any rights to “*interim relief*” that may be available under non-Convention law ([Article 13\(4\)](#)) and also in addition to any non-judicial or self-help remedies that are available as referred to under “*Method of*

*Enforcement*”. It is a *sui generis* right created and governed by the Convention and is not derived from or dependent on National Law.

When available, the prescribed forms of advance relief are court orders (to be issued within the number of working days as is specified in a Contracting State’s declarations) for one or more of the following as requested by the creditor:

- preservation of the object ([Article 13\(1\)\(a\)](#));
- possession, control or custody of the object

([Article 13\(1\)\(b\)](#) of the Convention);

- immobilization of the object ([Article 13\(1\)\(c\)](#) of the Convention); and
- lease or management of the object and income therefrom ([Article 13\(1\)\(d\)](#) of the Convention).

The creditor must provide evidence of default ([Article 13\(1\)](#)). The court may require notice to “*interested persons*” of the request for relief and may impose terms, such as the creditor providing an undertaking or bond to protect the debtor and other “*interested persons*” ([Article 13\(2\)](#) of the Convention and [Commentary, para. 4.111](#)).

As discussed in [Module 6](#), [Module 7](#) and [Module 8](#), respectively, the Protocols include additional provisions relating the exercise of interim remedies.

“SPEEDY”  
ADVANCE RELIEF  
CAN BE  
AVAILABLE  
UNDER THE  
CONVENTION.



## METHOD OF ENFORCEMENT



PHOTO BY JAREDASATO/CC

*Non-judicial self help may be possible, if endorsed by a Contracting State.*

A chargee must exercise remedies of possession and control, sale or lease, collecting income or profits and all remedies pursuant to advance relief in a commercially reasonable manner (which includes actions taken in conformity with the relevant agreement, unless the provision of the agreement is manifestly unreasonable) ([Article 8\(3\)](#)).

Regardless of the type of agreement, the remedies described under “*Basic Remedies*” may be taken as non-judicial

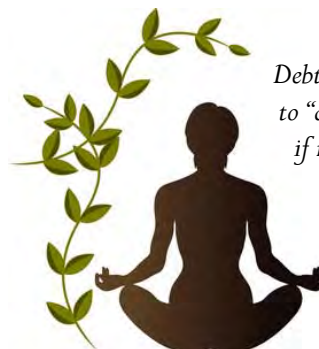
or self-help remedies without court authorization if and to the extent provided in a declaration by the Contracting State under [Article 54\(2\)](#) ([Commentary at para. 4.79](#) and [4.104](#)).

Whether a repossessing creditor may proceed against an object without leave of a court will depend on (i) the declarations made by the Contracting State under [Article 54\(2\)](#), and (ii) the local law where the aircraft object is located. In other words, if the local law would

permit the use of self-help in seizing an object, and the Contracting State did not change that law in its declarations when adopting the Convention, the Convention would permit the repossession and sale of an object without going to court for assistance. Of course, seizing a commercial aircraft in most airports or other type of significant mobile object without a court order will require compliance with local administrative regulations.

## QUIET POSSESSION AND USE

While the Convention does not have express provisions governing debtors’ rights to quiet possession and use of objects as against creditors or third parties ([Commentary para. 2.114](#), the Aircraft Protocol does at [Article XVI](#)). That provision establishes quiet possession rights on the basis of the terms of registration with the international registry, with such rights being subject to contractual modification by the parties.



*Debtors want a right to “quiet possession” if not in default.*

## TREATMENT OF INTERESTS ON INSOLVENCY

The general rule under the Convention is that in the event of insolvency proceedings against a debtor, an international interest is effective if it was registered against the debtor prior to the commencement of the proceedings ([Article 30\(1\)](#)). This principle extends to (a) the effectiveness against an assignor of an international interest if the assignor is subject to insolvency proceedings but

the assignment to an assignee was registered prior to the commencement of the proceedings ([Article 37](#)) and (b) the effectiveness, against a debtor subject to insolvency proceedings, of a registered non-consensual right or interest ([Article 40](#)). An unregistered international interest may nevertheless be effective under applicable non-Cape Town Convention law ([Commentary at para.](#)

[2.179](#)).

The terms “*insolvency proceedings*” and “*insolvency administrator*” are defined in the Convention along familiar lines to be used for purposes of reorganization or liquidation ([Article 1\(l\)](#) and [\(k\)](#) of the Convention). Therefore, as used in the Convention, these terms are not limited to a reorganization. The term “*insolvency administrator*” in-



## TREATMENT OF INTERESTS ON INSOLVENCY (CONT'D...)

cludes a debtor in possession if permitted under applicable law ([Article 1\(k\)](#)).

The meaning of effectiveness is that the property interest represented by the international interest will be recognized and the creditor will have a claim against the object, with appropriate ranking against other holders of international interests and other creditors ([Commentary at para. 2.179](#)).

The general rule under the Cape Town Convention outlined above does not override applicable rules of law relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors, or rules of procedure relating to the enforcement of rights to property under the control or supervision of the insolvency administrator ([Article 30\(3\)](#)). The latter item, however, is overridden by [Article XI](#) of the Aircraft Protocol, if applicable.



PHOTO BY FIBER/CC

*International interests are effective on insolvency if previously registered.*

## KEY DEFINITIONS FOR THIS MODULE

**A** [rticle 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“agreement”** means a security agreement, a title reservation agreement or a leasing agreement.

**“creditor”** means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;

**“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.

**“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.

**“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.

**“title reservation agreement”** means an agreement for the sale of an object on terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement.

IN THE  
CONVENTION  
AND RELATED  
PROTOCOLS,  
ORDINARY WORDS  
ARE SOMETIMES  
GIVEN A SPECIAL  
MEANING.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS

- Is there any materiality standard as to what the parties may agree as constituting a default?
- In what ways are the remedies available to chargees different from those for lessors and conditional sellers?
- What portions of the Convention regarding remedies are mandatory and not subject to variation by the parties?
- Under what circumstances is an international interest effective in the case of insolvency proceedings?
- What forms of advance relief are provided by the Convention when Contracting States make the relevant declaration, and what are the conditions thereto?



[Link to Answer Key Here](#)

# MODULE 5: THE INTERNATIONAL REGISTRY

## A GROUNDBREAKING FEATURE PROVIDING CLARITY ON PRIORITY

### THE WORKINGS OF THE INTERNATIONAL REGISTRY SYSTEM

#### NOTICE-BASED SYSTEM

All interests under the Convention are registered electronically on the International Registry with the consent from the parties. The International Registry is a notice-based registration system in that its electronically searchable registrations give notice of interests in specific objects.

No actual documents are filed with the International Registry. A search of the International Registry merely provides notice of claimed interests by gener-



ally only revealing the type of registered interest and the identity of the parties. Interested parties must perform their own due diligence in seeking the details of any agreement directly from the parties to the agreement.

Thus, the International Registry is unlike a physical document registration system. A document registration system allows parties to obtain and examine transaction documents. The distinction permits the International Registry to maintain lower administrative costs and to protect the confidentiality of the terms of each transaction. See [Commentary, 2.122](#).

#### ORGANIZATION AND SUPERVISORY AUTHORITY

Pursuant to [Article 17](#) of the Convention, the Supervisory Authority maintains a broad range of powers and responsibilities. The Supervisory Authority is the primary governing body charged with overseeing the establishment and operation of the International Registry. The Supervisory Authority is responsible for the appointment and dismissal of the International

Registry Registrar and the publication of International Registry regulations and procedures. The Supervisory Authority is further obligated to set the fees charged by the International Registry and establish the necessary procedures for handling complaints concerning International Registry operations. Despite its broad range of control, the Supervisory Authority is not em-

powered to adjudicate matters relating to a specific registration, which are determinations made by the courts. [Commentary, 2.115](#).

The Supervisory Authority under the Aircraft Protocol is the Council of International Civil Aviation Organization (ICAO), which is advised by a Commission of Experts of the Supervisory Authority of the Interna-

#### KEY TERMS FOR THIS MODULE:

- “*Transacting User Entity*”
- “*Professional User Entity*”
- “*Priority Search*”
- “*Contracting State Search*”
- “*Informational Search*”
- “*Registry User Entity Search*”

#### INSIDE THIS MODULE:

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## ORGANIZATION AND SUPERVISORY AUTHORITY (CONT'D...)

tional Registry (CESAIR).  
[Commentary, 2.115, 3.40](#);  
 see [Aircraft Protocol Article XVII\(4\)](#).

The Supervisory Authority for the Rail Protocol is the Intergovernmental Organisation for International Carriage by Rail.

For the Space Protocol it is the International Telecommunications Union.



## APPROVAL PROCESS

No party may access the International Registry without the prior approval of the Registrar. [Regulation 4.1](#). To register interests on the International Registry, a party must establish an account with the International Registry as a “[transacting user entity](#).”

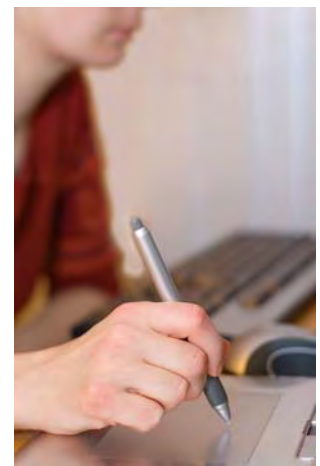
An account is established by completing the initial entity application on the International Registry website. [Procedure 10.1](#). The application will require the applicant to submit basic identity and contact information of the applicant and an appointed administrator, as well as the name and contact information of the applicant’s back-up contact. At the time of submission of the application, the applicant must pay a fee of \$200.00 to create and maintain the transacting user entity account for

a one (1) year licensing period. [Procedure 10.2](#).

Upon receipt of the initial application, the International Registry will send an email to the applicant’s administrator requesting that the applicant provide: (i) evidence of its existence such as a certificate of formation or good standing; and (ii) a Certificate of Entitlement Act (“CEA”) in a form prescribed by the International Registry and signed by the person with authority to act on behalf of the applicant. [Procedure 10.1](#). The CEA is the official appointment of both the applicant’s administrator and back-up contact.

An International Registry official will verify the information provided by the applicant and make a final determination regarding whether the applicant qualifies as a transacting user entity

in accordance with the Regulations and Procedures for the International Registry. See [Regulation 4.1](#), [Procedure 10](#). The Registrar’s approval will generally be issued within 24 to 48 hours of receipt of the application. [Procedure 10.6](#).



*The Registrar’s approval will generally be issued within 24 to 48 hours of receipt of the application.*



“NO PARTY MAY HAVE ACCESS TO THE INTERNATIONAL REGISTRY WITHOUT THE PRIOR APPROVAL OF THE REGISTRAR.”

## REGISTRATION PROCESS

Once an entity is an approved transacting user entity (“TUE”) on the International Registry, the TUE is given access to make registrations on the International Registry. The initial step in the registering of interests on the International Registry is the authorization process. The TUE administrator is authorized to register interests on behalf of the TUE. The TUE administrator will either make a registration directly or authorize a professional user entity (“PUE”) to do so on behalf of the TUE.

The appointment of a PUE to register interests on behalf of a TUE is limited to the specific objects for which the PUE has requested authorization.

When all of the relevant authorizations have been obtained, the registering party will select the object, the type of registration to be made and identify the parties to the registration. The registering party must also provide the State of Registry for the airframe, and if applicable, the unique authorization code provided by the State of Registry. The party initiating the

registration will submit payment and consent to the registration. The registration will enter pending status and the other party that is required to consent under [Article 20](#) for the registration to be effective will receive an electronic request for consent. [Procedure 12.2](#). The second party will have thirty-six (36) hours in which to consent before the registration is automatically cancelled. [Procedure 12.2\(b\)](#).



*A party will have thirty-six (36) hours in which to consent before the registration is automatically cancelled.*

## VALIDITY AND DURATION OF REGISTRATIONS

A registration is only valid if made after obtaining the necessary consents from the relevant parties in accordance with [Article 20](#). [Article 19\(1\)](#).

The registration of an interest on the International Registry is no guarantee that the underlying factual circumstances giving rise to the registration or the manner in which the registration was made are valid. For instance, the agreement giving rise to an interest may have pre-existed the Convention, and thus, the interest would not be within the purview of the Convention. As a result, the International Registry records do not verify external facts and circumstances, and the act of registering an interest does

not confirm the validity of that interest. All interested parties must inquire further with the relevant parties to an interest to determine its validity. See [Commentary, 2.130](#).

The registration of an international interest remains effective until discharged or until the expiration of the period specified in the registration. [Article 21](#). A registration may be discharged by or with the written consent of the party in whose favor it was made. [Article 20\(3\)](#).

*The registration of an international interest remains effective until discharged or until the expiration of the period specified in the registration.*





## AMENDMENT AND DISCHARGE OF REGISTRATIONS



*An international interest must be discharged when a party no longer owes an obligation under an agreement.*

An international interest may be amended by either party with the written consent of the other, except that no written consent is necessary where the amendment is a change of the name of the creditor. [Article 20\(1\)](#); [Commentary, 2.136](#).

An amendment is a continuance of an existing registration in a modified form. [Commentary, 2.137](#). An amendment is any change in registered information, including any change in the lapse date of a registration, but does not include an assignment, subrogation or subordination. [Regulation 2.1.2](#); [Commentary, 3.70\(1\)](#).

Where the parties seek to amend the identifying object information (*i.e.*, manufacturer name, model or serial number) or the category

of registration, the amendment is treated as a new registration in respect of the object or category to which the amending registration refers, with priority ranking from the time the amending registration is complete. [Commentary, 3.70\(2\)](#).

An international interest must be discharged when a party no longer owes an obligation under an agreement or the intending creditor or assignee has not given value in the case of a prospective international interest. See [Article 25](#).

A registration may only be discharged by or with the written consent of the party in whose favor it was made. [Article 20\(3\)](#). The right to consent to the discharge of a registration may be transferred to another party, such that the transferee

obtains the sole right to consent to the discharge.

The registration of a discharge is not itself a dischargeable registration. The registration of a contract of sale is generally not a dischargeable registration. A contract of sale may only be discharged: (i) if the registration is amended by the parties and the system automatically discharges the original registration; (ii) with the consent of both the buyer and the seller pursuant to [Regulation 5.16](#), which typically occurs where the registration was made in error (*e.g.*, the sale never occurred or the parties selected the wrong type of registration); or (iii) by the Registrar in the case of a system malfunction or if ordered by the court. [Regulation 5.15-5.16](#); [Commentary, 3.75](#).

THE  
INTERNATIONAL  
REGISTRY  
PROVIDES FOR  
FOUR DIFFERENT  
TYPES OF  
SEARCHES.

## SEARCHES AND SEARCH CERTIFICATES

The International Registry provides for four different types of searches. A search for registration information using a manufacturer's name, the generic model designation and serial number of an object is a "[priority search](#)." See [Regulation 7.1-7.2](#).

The International Registry produces a certificate showing the results of such a search known as a "[priority search certificate](#)." See [Article 22](#); [Regula-](#)

[tion 7.4](#). A priority search certificate issued by the International Registry is prima facie proof of the facts set forth within the certificate, including the date and time of

a registration. Thus, a creditor seeking to establish its priority position need only produce a priority search certificate. [Article 24](#); [Commentary, 2.150](#).

The second search is for declarations and designations, and withdrawals thereof, by a Contracting State which is referred to as a "[Contracting State search](#)." The search certificate termed a "[Contracting State search certificate](#)" lists these items and also the effective date of



## SEARCHES AND SEARCH CERTIFICATES (CONT'D...)

ratification of the Convention and Protocol for a Contracting State. See [Article 23](#); [Regulation 7.5](#).

The third search is an “[informational search](#),” which uses the manufacturer’s serial number to produce a list of all matching objects or objects where the serial number

entered is contained within the object’s serial number. The International Registry does not produce a certificate and carries no responsibility for the accuracy of the information provided in an informational search listing. See [Regulation 7.3](#); [Commentary, 2.150](#).

The last type of search is a “[registry user entity search](#),” which is a search of the International Registry’s list of registry user entities and their contact information.

## LIMITS OF THE SYSTEM AND LIABILITY FOR ERRORS

The registration of an international interest does not identify the category of international interest to which the registration relates. In other words, the registration of an international interest relating to a lease agreement will appear on the priority search certificate in the same manner as an international interest relating to a

security agreement. As a result, interested parties are left to inquiry further with the parties to the registration to determine the specific type of agreement involved. [Commentary, 2.129](#).

The International Registry assumes liability for errors under specific circumstances. The Registrar is liable for compensatory damages for

loss suffered by a person directly resulting from an error or omission of the Registrar and its officers or employees, or from a malfunction of the system. The Registrar is not liable for the recordation or transmission of erroneous data in the form it was received. [Regulation 14.1](#); [Commentary, 2.131](#). Furthermore, the Registrar is not responsible for loss or damage resulting from a lack of access to the International Registry, where the International Registry is not accessible due to maintenance, or technical or security problems. [Regulation 14.1](#); see [Regulation 3.4](#).



*The Registrar is not liable for the recordation or transmission of erroneous data in the form received.*

## NEXT GENERATION AND RE-DESIGN

The principal modification to the International Registry provided for in the upcoming sixth edition of the Regulations is the introduction of the “[Closing Room](#).” The Closing Room will allow users to pre-position all necessary registration information and obtain the required consents from the parties prior to closing a transaction.

A Closing Room Coordinator will initiate the process by entering all of the necessary registration information into the Closing Room. Although

the Closing Room will be electronically accessible, this registration information will not be searchable by other registry users until the registrations go live.

Once all registration information is input and the Closing Room is “locked,” each party to the registrations will be notified electronically with a request for consent to the registrations. When all consents are obtained, the Closing Room Coordinator will issue a release instruction to the Registrar to enter all pre-positioned registrations on

the International Registry. As a result, all of the registrations will go live and become searchable on the International Registry by other registry users. [Commentary, 3.73.](#)

The Closing Room will substantially enhance the efficiency of the International Registry. The Closing Room will also allow the parties review all registrations prior to being made on the International Registry. This will further reduce the risk of errors and surprises in the registration process.



*The Closing Room will allow users to pre-position all necessary registration information and obtain the required consents from the parties prior to closing a transaction.*

## KEY DEFINITIONS FOR THIS MODULE

[Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“Contracting State search”** is a search for all declarations and designations, and withdrawals thereof, made under the Convention and the Protocol by the Contracting State specified in the search. [Regulation 7.5.](#) A Contracting State search will produce a Contracting State search certificate which shall: (i) indicate, in chronological order, all declarations and

designations, and withdrawals thereof, by the specified Contracting State; (ii) list the effective date of ratification, acceptance, approval or accession of the Convention and the Protocol, and of each declaration or designation, and withdrawal thereof, by the specified Contracting State; and (iii) attached, in the electronic form set out in the Procedures, a copy of all instruments deposited by the specified Contracting State relating to items within the scope of such ratifications, acceptances, approvals or accessions of the Convention and the Protocol, and declarations or designations, and withdrawals thereof, by the specified Contracting State. [Regulation 7.5.](#)

**“Informational search”** is an object search other than a priority search, using a manufacturer’s serial number of an object. The results of an informational search, an “informational search listing,” shall be a list of all matching objects by manufacturer’s serial number. [Regulation 7.3.](#)

**“Priority search”** is a search for registered information using three criteria: (i) a manufacturer’s name; (ii) a manufacturer’s generic model designation; and (iii) a manufacturer’s serial number of an object. A priority search produces a priority search certificate that will generally include the following information: the type of registered interest; the name and

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.

## KEY DEFINITIONS FOR THIS MODULE (CONT'D...)

electronic address of each of the named parties to a registration; the manufacturer's name, generic model designation and serial number of the object; and the name of the party who is to hold the sole right to consent to the discharge of the registration. [Regulations 7.1-7.2, 7.4.](#)

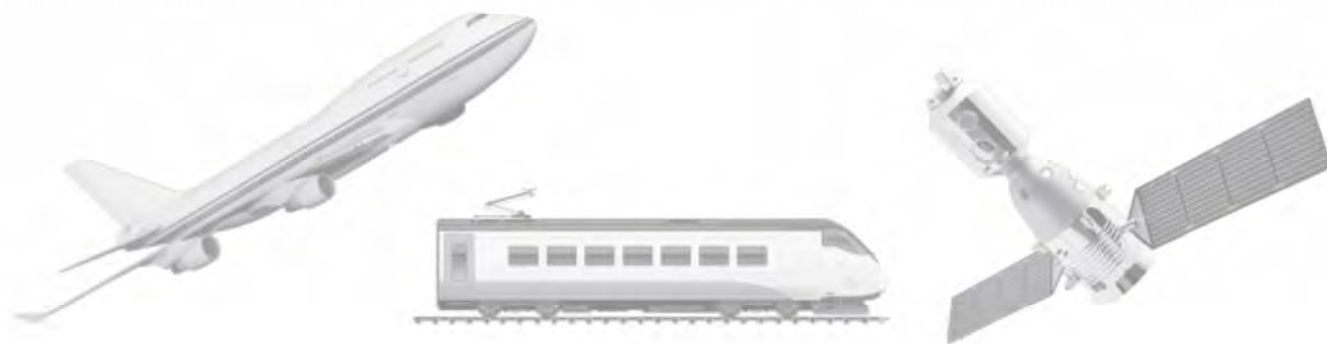
**“Professional user entity”** means a firm or other grouping of persons (such as an internal legal department of a transacting user entity) providing professional services to transacting user entities in connection with the transmission, to the International Registry, of information

relating to registrations, and a “professional user” means an individual employee, member or partner of a professional user entity. [Regulation 2.1.12.](#)

**“Registry user entity search”** means a search of the registry user entities on the International Registry, which include transacting user entities, professional user entities and direct entry points. The results of a registry user entity search shall be a list of the entity's identity information and contact information (subject to exclusions as the registry user entity has selected). When con-

ducted by a registry user, such a search shall also indicate whether or not such registry user entity's account is active. [Regulation 7.6;](#) see [Regulation 2.1.15.](#)

**“Transacting user entity”** means a legal entity, natural person or more than one of the foregoing acting jointly intending to be a named party in one or more registrations, and a “transacting user” means an individual employee, member or partner of a transacting user entity or an affiliate of that entity. [Regulation 2.1.17.](#)





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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## QUESTIONS

- What are the primary differences between transacting user entity and a professional user entity?
- Why should a transacting user entity appoint a professional user entity on behalf of the transacting user entity?
- Does a transacting user entity have to go through the same approval process with the Registrar each year to maintain an active account on the International Registry?
- Must a transacting user entity maintain an active account on the International Registry for registrations in which the transacting user entity is a named party to remain effective?
- Under what circumstances is the right to consent to the discharge of an interest typically transferred from one party to another party?



[Link to Answer Key Here](#)



# MODULE 6.1: LEGAL OVERVIEW OF THE AIRCRAFT PROTOCOL

## SPHERE OF APPLICATION

### WHEN AND HOW IS THE AIRCRAFT PROTOCOL APPLIED?

#### AIRCRAFT OBJECTS

**A** [rticle II\(1\)](#) of the Protocol provides that “The Convention shall apply in relation to aircraft objects as provided by the terms of the Protocol.” [Article I\(2\)\(c\)](#) of the Protocol defines *aircraft objects* to include airframes, aircraft engines and helicopters. Identifiability of the particular object is a crucial requirement because the registration system under the Convention is asset-based. [Article VII](#) of the Aircraft Protocol provides that the manufacturer’s serial number, manufacturer’s name and model designation of the object are necessary and sufficient to identify the object.



*The Aircraft Protocol applies to airframes, aircraft engines and helicopters.*

An aircraft as such (as opposed to an airframe) is not an object for the purposes of the Convention unless it is a helicopter. An engine installed on an airframe is a separate object and does not form part of the airframe. By contrast an engine installed on a helicopter forms part of the helicopter.

Under the Aircraft Protocol, a connecting factor alternative to the debtor’s situation in a Contracting State is that the agreement relates to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of Registry. See [Article IV\(1\)](#), Aircraft Protocol.

#### KEY TERMS FOR THIS MODULE:

- “aircraft object”
- “airframes”
- “engines”
- “helicopters”
- “contract of sale”

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#### AIRFRAMES

**A** [rticle I\(2\)\(e\)](#) of Aircraft the Protocol defines Airframe as “airframes [...]that, when appropriate aircraft engines are installed thereon, are type certified by the component aviation authority to transport (i) at least eight (8) persons including crew; or (ii) goods in excess of 2750 kilograms.” The definition extends to

all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines) and all data manuals and records relating thereto.

The Aircraft Protocol follows the Geneva Convention in explicitly excluding airframes that are used in military, customs and police services. But the Protocol

applies to airframes used in other state services, such as firefighting and medical flight services, and the transportation of government officials.

All attachments (other than aircraft engines) are included in the definition of airframe, together with all related data, manuals and records.

## ENGINES

As with airframes, the Aircraft Protocol incorporates a minimum operating capacity as a way of reflecting that the Convention is intended to be confined to objects of high unit value. [Article I \(2\)\(b\)](#) of the Aircraft Protocol defines aircraft engines as “Aircraft engines that are powered by jet propulsion or turbine or piston technology and (i) in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent; and (ii) in the case of turbine-powered or piston aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent, together with all data, manuals and records relating thereto.”

THE PROTOCOL ONLY APPLIES TO THOSE AIRCRAFT ENGINES THAT GENERATE MINIMUM LEVELS OF THRUST OR HORSEPOWER.



The definition does not include auxiliary power units (APUs), which do not provide propulsion but supply power to the main engine. APUs are considered part of the airframe. As discussed above with respect to airframes, the Protocol also excludes engines which are used in military, customs and police services, but not other state services.

All physical property on the aircraft engine, including all modules and other installed and attached accessories, parts and equipment form part of the aircraft engine. In principle, therefore, an international interest in an aircraft engine includes all such attachments. However, if another person had rights in an attached item prior to its installation on an aircraft



PHOTO COURTESY OF FRANK CARTER

*The Aircraft Protocol covers only aircraft engines used in civil aviation.*

engine and under the applicable law those rights continue to exist after the installation and the Convention does not affect them ([Article XIV\(4\)](#) of the Aircraft Protocol and [Article 29\(7\)\(a\)](#) of the Convention), nor does the Convention affect the ability to grant rights in the attached item after its removal from the engine where such rights may be created under the applicable law ([Article XIV\(4\)](#) and [Article 29\(7\)\(b\)](#) of the Convention).

In contrast, [Article XIV\(3\)](#) of the Protocol overrides a national law of a Contracting State which would otherwise apply a doctrine of accessions and ensures that neither the installation of an aircraft engine on an aircraft or its removal from the aircraft

affect the ownership of or other interest in the aircraft engine. So if, for example, an aircraft engine is leased by its owner to an airline and installed on its aircraft, ownership of the engine does not pass to the airline but remains with the lessor. [Article XIV\(3\)](#) states only that the rights of the owner of, or the holder of another right or interest in, the aircraft object are not affected by installation or removal; whether they are affected by a sale depends not on [Article XIV\(3\)](#) but on [Article 29](#) of the Convention if this applies, and, if not, then on the applicable law. Where the buyer is the first to register, it will displace the owner/lessor by virtue of [Article 29\(1\)](#) of the Convention.

## HELICOPTERS

Helicopters are defined in such a way as to encompass a minimum carrying capacity, again capturing the high-unit-value element, but excluding helicopters used in military, customs or police services. Protocol [Article 1\(2\)\(d\)](#). They are “*heavier-than-air machines supported in flight chiefly by the reactions of the air on one or more power driven rotors on substantially vertical axes and which are type certified by the competent*

*aviation authority to transport; (i) at least five (5) persons including crew; or (ii) goods in excess of 450 kilograms together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto.*”

Helicopter engines are not treated as separate aircraft objects under the Convention or the Protocol. International interests in them cannot be separately taken while they

are so installed, though, as stated above, if such interests are taken prior to installation they continue to be effective after installation. [Commentary, 5.7](#).

As with airframes and aircraft engines, attachments are also included, and the other points above related to attached and installed property (in this case, including helicopter engines) and data, manuals and records apply to this definition as well.



*Helicopter engines are not treated as separate aircraft objects.*

## APUS, PROPELLERS, SPARE PARTS, EQUIPMENT, RECORDS ETC.



Each of the three categories of aircraft object is defined to include installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto. The items so included (which do not cover items merely resting on an airframe by their own weight) form part of the object and are not separately governed by the Convention or Protocol. Therefore a creditor's interest in them cannot separately be protected by registration under the Convention.

This does not, however, affect rights in such items, or in other items not constituting an aircraft object, existing under the applicable law. See [Article 29\(7\)](#) of the Convention and [Article XIV \(3\)](#) and [\(4\)](#) of the Protocol. [Article 29\(7\)](#) of the Convention provides that the Convention does not (i) affect the rights of a person in an item other than an aircraft object held prior to its installation on an object if under the applicable law those rights continue to exist after the installation;

and (ii) prevent the creation of rights in an item other than an aircraft object which has previously been installed on an object, where under the applicable law those rights are created.

The position is otherwise where under the applicable law the right to the installed or incorporated items passes under the doctrine of accession to the owner of the airframe or aircraft engine as the principal asset. In such a case the person who previously had an interest in such items loses its title to them and they become vested in the owner of the airframe or aircraft engine or, if this has been charged, become subject to the charge if this covers accessions. See [Commentary, 4.197](#)

“APUS,  
PROPELLERS,  
SPARES,  
EQUIPMENT,  
RECORDS, ETC.  
CAN ONLY BE  
PROTECTED  
UNDER THE  
SCOPE OF THE  
CONVENTION/  
PROTOCOL.”

## EXTENSION TO CONTRACTS OF SALE

THE AIRCRAFT  
PROTOCOL CREATES  
A SUI GENERIS  
“CONTRACT OF SALE,”  
WHICH OWES ITS  
EXISTENCE TO THE  
CONVENTION IS NOT  
DEPENDENT ON  
NATIONAL LAW.

**A**rticle III of the Aircraft Protocol extends the provisions of the Convention relating to registration and priority to contracts of sale and prospective sales of aircraft objects. It provides the formalities for a contract of sale relating to a space asset, stating that “a contract of sale is one which: (a) is in writing; (b) relates to an aircraft object of which the seller has power to dispose; and (c) enables the aircraft object to be identified in conformity with this Protocol.” In other words, the Aircraft Protocol creates a *sui generis* sale, which is not dependent on national law, although, as with an international interest, national law applies to questions such as whether an agreement was reached and whether the seller had power to dispose ([Commentary, 5.30](#)). Therefore, establishment of a contract of sale



*A contract of sale transfers the interest of the seller in the aircraft object to the buyer.*

under the Convention and the Aircraft Protocol is straightforward; no local or national law requirements will be sought provided that the formalities listed under Article V of the Protocol are satisfied.

[Article V](#) also states the effect of the contract, namely to transfer the interest of the seller in the aircraft object to the buyer in accordance with

the terms of the contract. In this case, the seller's interest must pass to the buyer immediately and, thus, buyers may benefit from the registration system. Title reservation agreements are not considered among the scope of contracts of sale but would be considered as constituting an international interest under [Article 2\(2\)\(b\)](#) of the Convention.

## CONTRACTUAL FORMALITIES

**A**rticle V of the Protocol lists out the formalities which must be fulfilled for entering into a contract of sale in terms of the Convention. Accordingly, a contract of sale must (i) be in writing, (ii) relate to an aircraft object which can be disposed of by the seller due to its power to such effect; and (iii) enable the aircraft object to be identified in accordance with the Protocol.

The formalities as prescribed above for contracts of sale in

terms of the Convention and the Protocol contemplates a *sui generis* sale as underlined under the Official Commentary and eliminates any formality which may arise from the national law of the seller/buyer, etc.

Therefore, an international interest may occur in case the requirements as prescribed in the preceding paragraphs are met, even supposing that meeting with such requirements would not be sufficient for entering into a sale

contract under local law.

For example, under certain local laws, contract of sales may be subject to different or sometimes heavier legal formalities such as notarization, witness statement, etc.

Establishment of a contract of sale under Convention is straight forward, no local/national law requirements will be sought provided that the formalities as listed under [Article V](#) of the Protocol are satisfied.



*Formality of a contract  
of sale under Convention  
must be in writing.*



## REGISTRATION OF CONTRACTS OF SALE

The Aircraft Protocol extends the Convention to prospective sales. This enables prospective sales to be registered in the International Registry, unless for commercial reasons the sale agreement excludes the prospective buyer's right to register a prospective sale, as is commonly the case.

A "prospective sale" is defined as 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. [Article 1\(z\)](#) of the Convention.

A mere agreement to sell under which ownership has not yet passed to the buyer cannot be registered as a sale, but it can be registered as a prospective sale or, if contains an express reservation of title, as a title reservation agreement. So also can a lease containing an option to purchase. Although the lease

is not itself a contract of sale (see [Article 1\(g\)](#) of the Convention), exercise of the option to purchase results in a sale, so that the lessee is a prospective buyer. [Commentary, 5.23.](#)

If a sale later results, it is deemed to have been registered as from the time of registration of the prospective sale ([Article 19\(4\)](#) as applied by [Article III](#) of the Protocol). This may, of course, have priority effects. [Commentary, 3.92.](#)

CONTRACT OF SALE



*Contracts of sale remain effective for an indefinite period of time unless the contract is terminated or expired.*

## EFFECT OF REGISTRATION

A registered interest will have priority over all other registered interest with a latter date as well as any unregistered interests. Registrations are made through the international registry as further described in [Module 5](#). Registration of a contract of sale remains effective indefinitely. Protocol, [Article V](#). The rationale is that since title passes to the buyer outright, the seller has no residual interest of the kind that may, in the case of an agreement within the Convention, lead to discharge of the registration. [Commentary, 5.32.](#)

## AIRCRAFT PROTOCOL DECLARATION SYSTEM

The Protocol, as the Convention, involves certain declarations which must or may be made by a Contracting State ([Commentary, 3.129 to 3.138](#)). The declarations system embedded in the Protocol reflects the treaty principle of sensitivity to national legal cultures ([Commentary, 2.17 and 5.1](#)); consequently, the application of the treaty as regards Aircraft Objects will necessarily differ between the Contracting States, depending on the

specific declarations each state has made, but always within the parameters of the declarations system.

A Contracting State must notify the Depositary in writing of declarations, including subsequent declarations, withdrawals of declarations and Protocol denunciations. A Contracting State may not make any reservations.

At any time after the Protocol enters into force for it, a Contracting State may make



*The application of the treaty as regards Aircraft Objects will necessarily differ between the Contracting States.*



## AIRCRAFT PROTOCOL DECLARATION SYSTEM (CONT'D...)



PHOTO BY HORIA VARLAN / CC

Declarations made under the Convention are deemed to have been made under the Protocol.

a subsequent declaration or withdraw a declaration (other than in relation to any mandatory declaration by an REIO under [Article XXVII\(2\)](#) or regarding the transitional provisions in [Article 60](#) over pre-existing interests), with effect from the first day of the month falling six months after the date of the Depository's receipt of notice. A Contracting State may denounce a specific Protocol, with effect from the first day of the

month falling twelve months after the date of the Depository's receipt of notice. Any subsequent declaration, withdrawal or denunciation will not affect prior rights and interests ([Articles XXXIII, XXXIV](#) and [XXXV](#)).

Declarations made under the Convention are deemed to have been made under the Protocol, unless otherwise expressed ([Article XXXI](#)). Convention declarations (other than those made by

an REIO) are equipment-specific and are made at the time the Protocol is adopted. [Article XXXI](#) avoids the need to lodge fresh Protocol declarations, where unnecessary.

Refer to [Module 4.2](#) for an overview of the Convention declarations system, including key economic declarations which also encompass certain of the Protocol declarations, and to [Commentary, 2.266 to 2.281](#); and [4.336 to 4.347](#) generally).

## OPT-IN DECLARATIONS

Certain Protocol provisions will **only** apply in respect of a Contracting State if it makes an "[opt-in declaration](#)" to that effect. Table 6.1.3.1 sets out the relevant Protocol article(s) requiring an opt-in declaration (the "[Directing Article](#)") against

the respective Protocol article(s) to which it relates (the "[End Article](#)").

An opt-in declaration may be made at ratification, acceptance, approval of, or accession to the Protocol ([Article XXX](#)) or later,

under the provisions for subsequent declarations ([Article XXXIII](#)) and is subject to the Contracting State's ability to withdraw a declaration ([Article XXXIV](#)) or to denounce the Protocol in its entirety ([Article XXXV](#)).

TABLE 6.1.3.1

End Article(s)	Subject	Directing Article(s)	Comment
Article VIII	Choice of Law	Article XXX(1), as supported by Article VIII(1)	Refer to Module 1 and Module 4.1
Article X	Modification of Convention interim relief provisions	Article XXX(2), as supported by Article X(1)  Declaration must specify time period required under Article X(2), for purposes of definition of "speedy" relief under Article 13(1)	Refer to Module 6.2 for an overview of Articles X, IX and XIII  Refer to Module 4.6 for an overview of Article 13
Article XI	Insolvency remedies	Article XXX(3), as supported by Articles XI(1)  Declaration must specify relevant time period required under Article XI(2)	Refer to Module 6.2 for an overview of Articles IX, XI, XII and XIII
Article XII	Insolvency assistance	Article XXX(1), as supported by Article XII(1)	Refer to Module 6.2 for an overview of Articles XI and XII
Article XIII	De-registration and export request authorisation	Article XXX(1), as supported by Article XIII(1)	Refer to Module 6.2 for an overview of Articles IX and XIII

OPT-OUT DECLARATIONS

Certain Protocol provisions will apply in respect of a Contracting State unless it makes an “opt-out declaration to that effect. Table 6.1.3.2 sets out the relevant Protocol article(s) requiring an opt-out declaration (the “[Directing Article](#)”)

against the respective Protocol article(s) to which it relates (the “[End Article](#)”). An opt-out declaration may be made at ratification, acceptance, approval of, or accession to the Protocol ([Articles XXX and XXIV](#)) or later, under the provisions

for subsequent declarations ([Article XXXIII](#)) and is subject to the Contracting State’s ability to withdraw a declaration ([Article XXXIV](#)) or to denounce the Protocol in its entirety ([Article XXXV](#)).



TABLE 6.1.3.2

End Article(s)	Subject	Directing Article(s)	Comment
Article XXI	Modification of Convention jurisdiction provisions	Article XXX(5)  Declaration must specify any conditions under which Article 13 or Article 43 will apply, if partially applied, or which other interim relief forms will be applied.	Refer to Module 4.1
Article XXIV(1)	Superseding of Rome Convention	Article XXIV(2)	Refer to Module 1

DECLARATIONS RELATING TO NATIONAL LAW

A Contracting State may make certain declarations regarding the application of its own laws to specific Protocol matters.

DEP DECLARATION

Under [Article XIX\(1\)](#), a Contracting State may make a declaration regarding a DEP at any time. Such declaration may be replaced or withdrawn under the respective provisions for subsequent declarations ([Article XXXIII](#)) and withdrawals (Article [XXXIV](#)). An [Article XIX](#) declaration will only affect an airframe or a helicopter for which the declaring State is the State of registry ([Commentary, 5.85](#))

Refer to [Module 4.5.2](#) for an overview of DEPs and to [Commentary, 3.56](#) to [3.59](#); and [5.84](#) to [5.91](#) generally.

TERRITORIAL UNIT  
DECLARATION

Under [Article XXIX\(1\)](#), a Contracting State may make a declaration providing that the Protocol is to extend to all or any of its territorial units, as specified in the declaration, in which different systems of law apply. If it makes such declaration, then independent Protocol declarations may be made in respect of each territorial unit.

Such declaration may be made at ratification, acceptance, approval of, or accession to the Protocol ([Article XXIX \(1\)](#)), may be modified at any time under [Article XXIX](#) or under the provisions for subsequent declarations ([Article XXXIII](#)) and is subject to the Contracting State’s ability to withdraw a declaration ([Article XXXIV](#)) or to

denounce the Protocol in its entirety ([Article XXXV](#)).

If no declaration is made, then the Protocol shall apply to all territorial units ([Article XXIX\(3\)](#)). If the law regarding Protocol matters is the same in all territorial units of a Contracting State, then [Article XXIX](#) is not applicable.

[Article XXIX](#) follows [Article 52](#).

Refer to [Module 3](#) and to [Commentary, 5.113](#).

*A Contracting State may make certain declarations regarding the application of its own laws to specific Protocol matters.*



## MANDATORY DECLARATIONS

### REIO DECLARATION

An REIO must make a declaration under [Article XXVII\(2\)](#) specifying the matters in respect of which exclusive competence has been transferred to it by its Member States. Such declaration must be made at the time the REIO signs, accepts, approves or accedes to the Protocol and may not be modified, replaced or withdrawn ([Commentary, 3.136](#)), save that the REIO must notify the Depositary of any changes to the distribution of competence.

[Article XXVII](#) follows Article 48.

Refer to [Module 3](#) and to [Commentary, 3.139](#); [4.311](#) to [4.313](#); and [5.111](#).



*In some cases, a mandatory declaration is required.*

## KEY DEFINITIONS FOR THIS MODULE

[Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“aircraft object”** means airframes, aircraft engines and helicopters.

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

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

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

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

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

(ii) in the case of turbine-powered or piston aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent, together

with all data, manuals and records relating thereto.

**“helicopter”** means heavier-than-air machines supported in flight chiefly by the reactions of the air on one or more power driven rotors on substantially vertical axes and which are type certified by the competent aviation authority to transport; (i) at least five (5) persons including crew; or

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

**“contract of sale”** means a contract for the sale of an object by a seller.

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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## QUESTIONS



- What are the formalities which must be fulfilled for entering into a contract of sale under the Convention/Protocol?
- Assume an airline, Airline X, is incorporated in Contracting State A, which, on ratification, has made a declaration under Article 55 to opt-in wholly to the interim relief provisions under Article 13 and the jurisdiction provisions under 43 as regards Aircraft Objects but which has made an opt-out declaration under Article XXX(5) in relation to the extension of jurisdiction to the State of Registration of an Airframe or Helicopter under Article XXI. Airline X leases an Aircraft from Lessor Y. The Aircraft is registered in Contracting State B. The parties agree under the Lease that the courts of Contracting State A should have jurisdiction. Airline X defaults under the Lease when the Aircraft is located in State C, which is not a Contracting State. State C does not recognise judgments from the courts of Contracting State A but it does recognise judgments from courts of Contracting State B. Would Lessor Y be able to bring a claim for speedy relief under Article 13(1) in the courts of Contracting State B? If at a later date, Contracting State A makes a subsequent declaration under Article XXX(5) to adopt Article XXI, would this alter Lessor Y's ability to claim speedy relief under Article 13(1) in the courts of Contracting State?
- Must a Contracting State make a declaration under the Protocol in relation to choice of law?



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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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## QUESTIONS (CONT'D...)

- Assume Contracting State A makes a declaration under Article XXX(3), adopting Alternative A under Article XI with a specified waiting period of 60 days, but Contracting State B does not make any declaration in respect of the Protocol's insolvency remedies. What is the position as regards a mortgagee's ability to recover an Airframe and installed Aircraft Engines charged by an insolvent debtor incorporated in Contracting State A, if the Aircraft Objects are located and registered in Contracting State B at the time of insolvency? Would it make a difference if Contracting State B had made a declaration under Article XXX(1) adopting Article XII?



[Link to Answer Key Here](#)



# MODULE 6.2: LEGAL OVERVIEW OF THE AIRCRAFT PROTOCOL

## AIRCRAFT-SPECIFIC PROVISIONS

### A SPECIAL REGIME FOR THE EXERCISE OF REMEDIES

#### MODIFICATION OF BASIC REMEDIES

The Convention provides lessors, conditional sellers and secured creditors (and their assignees) with certain remedies upon an aircraft debtor's default. For aircraft objects, [Article IX](#) of the Protocol supplements and modifies certain remedies provided by the Convention. Not all of these remedies apply automatically, however, and certain remedies must be agreed by the debtor to be effective.

[Article 8\(1\)](#) of the Convention allows a creditor to exercise any of the following remedies if the parties have at any time agreed: (a) take possession and control of any object; (b) sell or lease such object; or (c) collect or receive any income or profits arising from the management or use of such object. A Contracting State will specify whether a creditor must obtain court approval prior to the exercise of these remedies. In addition to these remedies, [Article IX](#) of the Protocol allows the creditor, to the extent the



THE PROTOCOL REQUIRES THAT ALL REMEDIES BE EXERCISED WITH "COMMERCIAL REASONABLENESS."

debtor has agreed, to procure the de-registration, export and physical transfer of the aircraft from the territory where it is situated. [Protocol, IX\(1\)](#). Subject to applicable safety laws and regulations, the registry authority in the Contracting State must honor a request for de-registration and export if certain conditions are met. [Protocol, IX\(5\)](#).

The Protocol modifies the Convention remedies by requiring that all remedies exercised with respect to aircraft objects be exercised

with "[commercial reasonableness](#)." [Protocol, IX\(3\)](#). This requirement is mandatory and cannot be excluded by the parties' agreement. Under [Article IX](#) of the Protocol, a remedy is deemed exercised with commercial reasonableness where it is exercised in conformity with the applicable agreement except where such a provision is "[manifestly unreasonable](#)." This standard embodies a strong presumption in favor of reasonableness. [Commentary, 5.51](#).

#### KEY TERMS FOR THIS MODULE:

- "aircraft"
- "aircraft engines"
- "aircraft objects"
- "airframes"
- "creditor"
- "helicopters"
- "insolvency-related event"
- "international interest"
- "primary insolvency jurisdiction"
- "registry authority"

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## TREATMENT OF INSOLVENCY



*Article XI of the Aircraft Protocol has been described as the single most significant economic provision of the Convention.*

Because a creditor's legal rights are considered most in need of protection when a debtor becomes insolvent or is subject to an insolvency proceeding, [Article XI](#) of the Protocol has been described as the single most significant economic provision of the Convention. [Commentary, 5.56](#). Critically, [Article XI](#) applies only if the Contracting State that is the primary insolvency jurisdiction (i.e., the location of the center of a debtor's main interest) has elected its application. Absent this election, [Article XI](#) will not apply and the Contracting State's national insolvency laws will control. There are two alternative formulations of [Article XI](#) – Alternative A and Alternative B.

A Contracting State may elect the types of insolvency proceedings to which [Article XI](#) will apply, electing that Alternative A apply to one or more types of insolvency proceedings and that Alternative B apply to others. However, for each type of insolvency proceeding to which Alternative A or Alternative B is applied, such alternative must be applied in its entirety.

The practical objective of [Article XI](#) is to ensure that within a specified time limit either (a) the creditor recovers the object or (b) the debtor or the insolvency administrator, as applicable, cures past defaults and commits to perform the debtor's future obligations. Both Alternative A and Alternative B impose obligations on the debtor or the insolvency administrator. Whether such obligations are performed by the debtor or the insolvency administrator

depend on, among other things, whether an insolvency proceeding has been commenced, whether an insolvency administrator has been appointed and whether the debtor under applicable insolvency laws may act (or is acting) as a “debtor in possession.” [Commentary, 5.59](#). For ease of reference, when used in this [Module 8.5](#), “debtor” refers to the debtor and the insolvency administrator, as applicable.

[Article XI](#) does not address the situation where there are two or more holders of registered international interests relating to the same object. In this situation, the duties of the debtor are owed to the secured creditors successively in order of their priority, and only when the obligations owed to the first such creditor have been discharged does the next in line become entitled to invoke [Article XI](#). [Commentary, 5.59](#).

## ALTERNATIVE A

Alternative A is often referred to as the “hard” rule, as its underlying rationale is to give aircraft financiers and lessors the assurance of a clear and unqualified rule. [Commentary, 5.58, 5.62](#). If a Contracting State has elected Alternative

A, it must specify a “[waiting period](#)” by which, prior to its expiration, the debtor must either (a) give possession of the object to the creditor or (b) cure all defaults (other than defaults caused by the commencement of insolvency proceedings) and agree to

perform all future obligations under the applicable agreement. If the debtor fails to take either action by the expiration of the waiting period, the creditor may exercise all remedies available to it under applicable law and the parties' agreement. Critically, Alter-

## ALTERNATIVE A (CONT'D...)

native A does not allow local insolvency law to prevent or delay the creditor from exercising remedies at the end of the waiting period or modify the debtor's obligations without the creditor's consent.

[Commentary, 5.62](#). On the other hand, Alternative A does not affect the authority, if any, of the debtor under applicable law to terminate the parties' agreement.

During the waiting period, the debtor must preserve the

object and maintain it and its value in accordance with the parties' agreement. [Protocol, XI \(Alternative A\)\(5\)\(a\)](#). The creditor may also apply for interim relief available under applicable law during the waiting period. [Protocol, XI \(Alternative A\)\(5\)\(b\)](#).

Alternative A also requires the registry authority and administrative authorities in a Contracting State to make available to the creditor the remedies of de-registration

and export and physical delivery no later than five working days after the creditor has notified such authorities that it is entitled to pursue those remedies in accordance with the Convention. [Protocol, XI \(Alternative A\)\(8\)](#).

*Alternative A is often referred to as the "hard" rule.*



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## ALTERNATIVE B

Alternative B is often referred to as the "soft" rule, as it is the discretion-based version. [Commentary, 5.58, 5.64](#). Under Alternative B, the creditor must request that the debtor notify the creditor in a specified time period whether the debtor will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take possession of the object. If the debtor fails to provide the notice of cure or performance or, after notifying the creditor of the opportunity to take possession of the object, fails to allow the creditor to take possession, the creditor must seek court authorization

to repossess the object. In this instance, and unlike Alternative A, the Court may condition the creditor's ability to repossess the object to the extent permitted by applicable law (*e.g.*, the taking of an additional step or the provision of an additional guarantee).

Alternative B requires the creditor to provide evidence of its claims and proof that its international interest has been registered. This is because Alternative B, unlike Alternative A, involves an application to the court, along with evidence and proof. [Commentary, 5.65](#). Pending the court's decision, the creditor may not sell the aircraft object.

ALTERNATIVE B REQUIRES THE CREDITOR TO PROVIDE EVIDENCE OF ITS CLAIMS AND PROOF THAT ITS INTERNATIONAL INTEREST HAS BEEN REGISTERED.



## INTERIM REMEDIES

A CREDITOR MAY SEEK INTERIM REMEDIES FOLLOWING A DEFAULT, BUT PRIOR TO A FINAL DETERMINATION ON THE MERITS OF THE CREDITOR'S CLAIM.

**A**rticle 13 of the Convention allows a creditor to seek certain interim remedies following a default, but prior to a final determination on the merits of the creditor's claim against the debtor. Article X of the Protocol modifies some of those remedies with respect to aircraft objects; however, it only applies where a Contracting State has elected its application under Article XXX of the Convention and then only

to the extent of such election. [Protocol, X\(1\)](#).

As modified by [Article X](#), the Convention permits a creditor to obtain certain “speedy” relief on an interim basis, including (a) preservation of the object and its value, (b) possession, control and custody of the object, (c) immobilization of the object, (d) the ability to lease or manage the object and retain the income and (e) if the parties at any time specifically agree, sale and the application of proceeds therefrom. [Convention, 13\(1\); Protocol, X\(2\)](#). If the creditor sells an aircraft object as an interim remedy, such sale will be free and clear of any interest over which the creditor's international interest has priority under the Convention. [Protocol, X\(4\)](#). Under the Protocol, the Contracting State that elects the application of [Article X](#) will specify the number of days that constitute “speedy” relief. [Protocol, X\(2\)](#). In no case, howev-

er, may the timeframe specified by such Contracting State affect any applicable aviation safety laws or regulations.

Article 13 of the Convention allows the court, as a condition to the grant of interim remedies, to provide the debtor with protection if the creditor (i) fails to perform any of its obligations under the Convention or Protocol in exercising the interim remedies or (ii) fails to establish its claim, wholly or in part, on a final basis. [Convention, 13\(2\)](#). The Protocol allows the parties to agree to remove the ability of the court to provide the debtor with these protections. [Protocol, X\(5\)](#). Such agreement does not, however, preclude the debtor from pursuing a claim against the creditor under applicable law for failure to perform any of its obligations to the debtor under the Convention, including damages and other relief available in the local jurisdiction. [Commentary, 5.55](#).



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## IDERA

**I**n connection with an aircraft finance transaction, the parties may at any time agree that upon a default by the debtor of its obligations under the agreement, the creditor may (a) procure the deregistration of the aircraft and (b) procure the export and physical transfer of the aircraft object from the terri-

tory in which it is situated. [Protocol, IX\(1\)](#). The purpose of these additional remedies is to remove the aircraft still further from the debtor's control and transfer control to the creditor. [Commentary, 3.30](#). If the Contracting State has so elected, [Protocol, XIII\(1\)](#), a creditor may procure de-registration and ex-

port by having a debtor issue an irrevocable de-registration and export request authorization (IDERA). Cf. [Protocol, X \(Court route\)](#). A debtor is not obligated to issue an IDERA, but creditors often require this as a condition to extending credit.

If the debtor has issued an IDERA, it must be recorded

## IDERA (CONT'D...)



with the registry authority. Only one IDERA can be outstanding for a given aircraft at any time. Accordingly, an IDERA is beneficial to a creditor because only that creditor (or its designee) can exercise the remedies of de-registration and export. [Commentary, 3.35](#). An IDERA is also powerful tool because the registry authority

may not impose additional requirements to its exercise by the creditor, such as additional consents from the debtor. [Commentary, 3.36](#). Furthermore, the registry authority and other administrative authorities are required to expeditiously cooperate with and assist the creditor in exercising its de-registration, export and transfer remedies.

*The duty to honor an IDERA is subject to any applicable safety laws and regulations.*

[Protocol, XIII\(4\)](#). However, the duty to honor an IDERA is subject to any applicable safety laws and regulations. [Protocol, X\(7\)](#), [Commentary, 3.36](#). It is important to note however, that this remedy is not an authority to transfer the aircraft object to any specified territory (e.g., in contravention of applicable export control rules) but rather is only authority to transfer from its existing territory. [Commentary, 5.44](#).

IF THE DEBTOR  
HAS ISSUED AN  
IDERA, IT MUST  
BE RECORDED  
WITH THE  
REGISTRY  
AUTHORITY.

## ENGINE ACCESSION ISSUES

The Protocol protects those who own or otherwise have registered interests in aircraft engines ([Article XIV\(1\)](#)), even if such engines are installed on or removed from an aircraft. Specifically, [Article XIV\(3\)](#) overrides any law of a Contracting State that would otherwise apply a doctrine of accession (whereby property affixed to other property may be deemed a nonseverable part of the latter) and ensures that neither installation of nor removal from an aircraft affect previously registered

interests in the aircraft engines. [Commentary, 5.71](#). This override, however, applies only to *aircraft* engines and not to other items that may be installed on an aircraft, helicopter or the aircraft engine itself (including helicopter engines) which items are deemed to form part of the airframe.

Although [Article XIV\(3\)](#) preserves the interests of owners and creditors upon installation and removal of aircraft engines, it affords no independent protection to the owner or creditor if the

engine is sold. [Commentary, 5.71](#). For protection in connection with a sale, the owner or creditor must rely on the priority provisions of the Convention ([Article 29](#)), if applicable, the Protocol ([Article XIV\(1\)](#) and [\(2\)](#)) or applicable law. To ensure maximum protection, the owner or creditor should register its international interest in the aircraft engine before installation on the aircraft or prior to the time the buyer registers its own international interest. [Commentary, 5.71](#).



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*The Protocol preserves the interests of owners and creditors upon installation and removal of aircraft engines.*



## SOVEREIGN IMMUNITY

ARTICLE XXII IS USEFUL BECAUSE MANY AIRLINES ARE OWNED OR CONTROLLED BY STATES.

**A**rticle XXII of the Protocol provides that a waiver of sovereign immunity from jurisdiction, or a waiver relating to the enforcement of rights and interests relating to an aircraft object, is binding and allows for the enforcement of rights against the waiving party to the extent the other conditions to enforcement have been satisfied. Any such waiver of sovereign immunity must be in writing and contain a description of the aircraft object.

Only the agreement containing the waiver clause, however, must contain a description of the aircraft object, not the waiver clause itself. [Commentary, 5.100.](#)



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[Article XXII](#) is useful because many airlines are owned or controlled by states. [Commentary, 5.100.](#) Because the waiver may relate to immunity from jurisdiction, enforcement or both, the instrument of waiver should be clear as

to its extent. [Article XXII](#) does not affect the general rule of international law that a waiver of immunity from suit does not by itself constitute a waiver of immunity from enforcement. [Commentary, 5.100.](#)

## QUIET POSSESSION AND USE

*The quiet possession and use regime of Article XVI can be modified by agreement of the relevant parties.*

**A**rticle XVI provides debtors with quiet possession and use of aircraft objects. First, [Article XVI](#) confirms that the debtor enjoys quiet possession and use of an object absent a default under the applicable agreement. A debtor enjoys such quiet possession and use against (a) its creditor, (b) the holders of unregistered interests in the object (even if the debtor has knowledge of such interests), (c) any interest to which it would otherwise be subordinated where the holder of that interest agrees to the debtor's quiet possession, [Commentary, 5.75](#), and (d) in its capacity as a buyer in a registered sale, the hold-

ers of unregistered interests (even if the debtor has knowledge of the interest) and subsequently registered interests. [Protocol, XVI\(1\); Convention, 29\(4\).](#)

Consistent with the general architecture of the Protocol, the quiet possession and use regime of [Article XVI](#) can be

modified by agreement of the relevant parties. [Commentary, 5.76.](#)

[Article XVI](#) does not specify the acts that constitute a breach of the debtor's right to quiet possession and use of the object, which is to be determined by the agreement between the parties. [Commentary, 5.77.](#) Failing agreement, the default must be substantial. [Commentary, 5.75.](#) Similarly, [Article XVI](#) makes clear that nothing in the Convention or Protocol affects the debtor's rights or remedies against the creditor for interference with the debtor's possession that constitutes a breach of the agreement under applicable law. [Commentary, 5.78.](#)



## KEY DEFINITIONS FOR THIS MODULE

**A**rticle 1 of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

**“aircraft”** means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters.

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

- (i) in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent; and
- (ii) in the case of turbine-powered or piston-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent, together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto;

**“aircraft objects”** means airframes, aircraft engines and helicopters.

**“airframes”** means airframes (other than those used in mili-

tary, customs or police services) that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport:

- (i) at least eight (8) persons including crew; or
- (ii) goods in excess of 2750 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto.

**“creditor”** means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement.

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

- (i) at least five (5) persons including crew; or
- (ii) goods in excess of 450 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto.

**“insolvency-related event”** means:

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

**“international interest”** means an interest held by a creditor to which Article 2 applies.

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

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

IN THE  
CONVENTION  
AND RELATED  
PROTOCOLS,  
ORDINARY WORDS  
ARE SOMETIMES  
GIVEN A SPECIAL  
MEANING.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS



- If an engine is leased by a manufacturer to an airline, installed on an aircraft and used for revenue service for two years, does the manufacturer or the airline own the engine?
- Must a debtor agree to the remedies provided by the Convention, or do they apply automatically to aircraft objects?
- Must a Contracting State apply either Alternative A or Alternative B to all types of insolvency proceedings?
- If a Contracting State has elected Insolvency Alternative A, may the debtor petition a court for additional time to cure defaults at the end of the waiting period?
- If a Contracting State has elected Insolvency Alternative B, is court authorization required for the creditor to repossess the aircraft if the debtor has not voluntarily surrendered possession?
- If a creditor sells an aircraft as an interim remedy, is such sale free and clear of all interests in the aircraft?
- How many IDERAs can be outstanding for a particular aircraft at any given time?
- Does the Protocol require a Contracting State to waive sovereign immunity?
- If a lessor has agreed to give its lessee quiet possession and use of an aircraft, is the lessee automatically entitled to quiet possession and use from the lessor's creditors who may acquire an interest in the lease as collateral?

[Link to Answer Key Here](#)

# MODULE 7.1: LEGAL OVERVIEW OF THE LUXEMBOURG RAIL PROTOCOL

## SPHERE OF APPLICATION

### WHEN AND HOW IS THE RAIL PROTOCOL APPLIED?

#### RAILWAY ROLLING STOCK

**A** [rticle II\(1\)](#) of the Rail Protocol provides that the Convention shall apply in relation to railway rolling stock. The Protocol defines railway rolling stock as vehicles that move with the help of a track or a guideway, whether directly on, above or below, and all their components. [Article I \(2\)\(e\)](#)

Given the unreliability of the numbering systems adopted by different rolling stock manufacturers and operators in different regions of the world, the Rail Protocol tasks the registrar with establishing a system enabling unique identifica-

tion of objects. See below.

The relevant rolling stock must be described in the relevant agreement as provided for by [Article V](#) of the Protocol. This Article provides the option to cover in the agreement all present and future rolling stock or to exclude certain types of rolling stock or specified items from the relevant contract.

In addition to the description of the rolling stock in the relevant agreement, there are more stringent requirements that apply for registration under [Article XIV](#) of the Protocol.

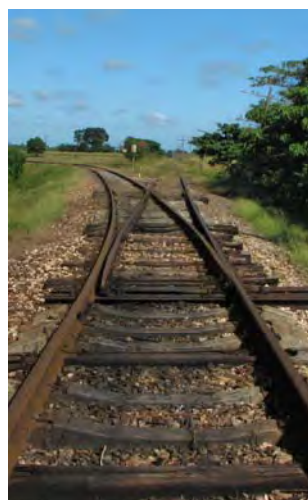


PHOTO BY LEZUMBALABERENJENA/CC

*Article II(1) of the Rail Protocol provides that the Convention shall apply in relation to railway rolling stock.*

#### KEY TERMS FOR THIS MODULE:

- “agreement”
- “international interest”
- “registered interest”
- “regulations”
- “railway rolling stock”

#### INSIDE THIS MODULE:

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#### MOVEABLE VEHICLES

**T**he detailed definition for railway rolling stock is contained in [Article I\(2\)\(e\)](#) of the Protocol which states that: “*railway rolling stock means vehicles moveable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed or incorporated in the vehicles,*

*and together with all data, manuals and records relating thereto.*”

The Protocol applies to all rolling stock, whether they are used in town (for examples trams), on a high-speed rail route or on a mountain railway. Moreover the wide definition covers other equipment such as airport monorails and other guided shuttles as well as specialist equipment such as track

repair and tunnel boring machines and cranes where, in each case they can operate on, above or below a fixed track or guideway.

The Protocol is concerned with international interests created over individual carriages, wagons and locomotives, not with trains as such unless such train is one articulated, non-separable, unit.

## COMPONENTS

*An international interest cannot be separately created over an engine powering a locomotive.*

Unlike the Aircraft Protocol, an international interest cannot be separately created over an engine powering a locomotive or other traction equipment mounted in the locomotive. In addition, a pantograph or other equipment or components

that are installed or incorporated in the vehicle are *prima facie* considered to be part of the item of railway rolling stock over which the international interest may be created and on the other hand are only protected under the Protocol if they are installed or incorporated in an item of railway rolling stock.

[Article 29\(7\)](#) of the Convention provides that the Convention does not (i) affect the rights of a person in an item other than an item of railway rolling stock held prior to its installation on such item if under the applicable law those rights continue to exist after the installation; and (ii) prevent the creation of rights in an object other than an item of railway rolling

stock which has previously been installed on such rolling stock, where under the applicable law those rights are created. In the light of the foregoing information and considering the explicit language of [Article 29\(7\)](#) of the Convention on this particular matter, it can be concluded that installation or incorporation of engines, air conditioning units, spares, ancillary equipment, records or similar components in or accessories on an item of railway rolling stock will not affect any pre-existing rights in such components and accessories, provided that such pre-existing rights are established and protected under the applicable law.



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## NON EXTENSION TO CONTRACTS OF SALE

Under [Article 1\(a\)](#) of the Convention three types of agreements are considered as international interests in a transaction: i) a security agreement, ii) a title reservation agreement and iii) a leasing agreement. A contract of sale is, in accordance with [Article 1\(g\)](#) of the Convention, a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in [Article 1\(a\)](#) of the Convention.

By application of the provisions of [Article 41](#) of the Convention, each Protocol

may elect that the Convention applies to sales or prospective sales of an object. Indeed, the Aircraft Protocol extends its application to the sale or prospective sale of an aircraft. On the other hand, [Article XVII](#) of the Rail Protocol does not extend its application to contracts of sale, but it provides that notices of sale may be registered in the International Registry for information purposes only. Such notices will have no effect under the Convention, but will allow a buyer to give notice of the sale to third parties. It is up to applicable



PHOTO BY PHIL HILFKE/CC

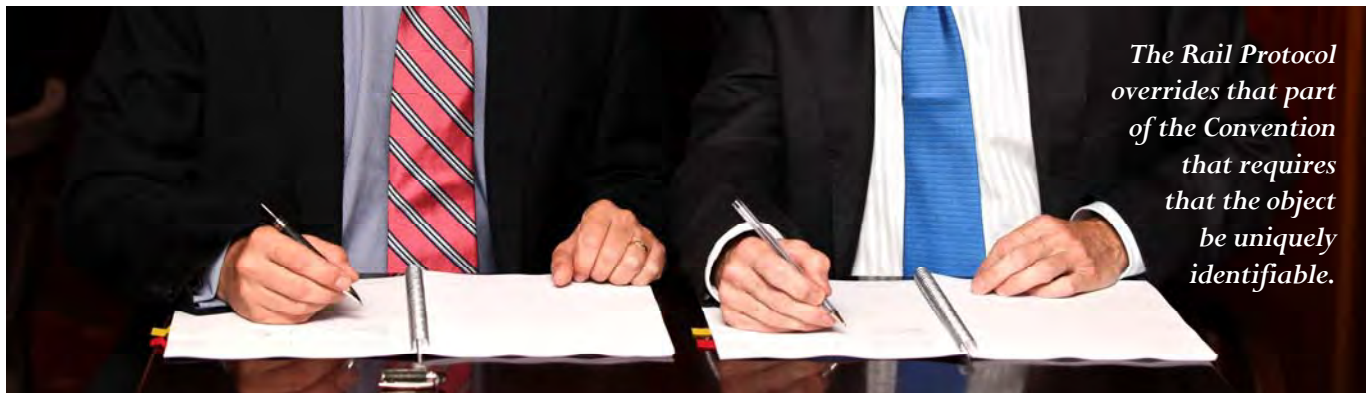
national law to determine the effect of such a registration as against third parties.

The Protocol does not provide for registration of prospective sales.

THE RAIL PROTOCOL DOES NOT EXTEND ITS APPLICATION TO CONTRACTS OF SALE, BUT IT PROVIDES THAT NOTICES OF SALE MAY BE REGISTERED IN THE INTERNATIONAL REGISTRY FOR INFORMATION PURPOSES ONLY.



## CONTRACTUAL FORMALITIES



*The Rail Protocol overrides that part of the Convention that requires that the object be uniquely identifiable.*

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**A**rticle 7 of the Convention indicates what are the formal requirements for an interest to be constituted as an international interest under the Convention and the Protocol and provides that the agreement creating or providing for the interest must (a) be in writing, (b) relate to an object of which the charger, conditional seller or lessor has power to dispose; (c) enable the object to be identified in conformity with the Protocol and (d) in the case of a security agreement, enable the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

Article V of the Protocol further specifies that a description of the rolling stock is considered sufficient to identify the relevant railway rolling stock if it contains either (a) a description of the rail-

way rolling stock by item; (b) a description of the rolling stock by type; (c) a statement that the agreement covers all present and future railway rolling stock; or (d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.

Article V of the Rail Protocol overrides that part of Article 2(2) of the Convention that requires that the object be uniquely identifiable.

It was indeed considered at the Luxembourg Diplomatic Conference that a unique identification was only necessary for the registration of the asset and not also for the constitution of an international interest, which is based on the agreement of the parties and which does not depend on registration (Commentary, 5.11).

Indeed, not all manufacturers of rolling stock allot serial numbers and, in certain cases, identification (running) numbers that have been assigned by operators may be removed or changed through the life of the asset.

The Rail Protocol therefore contains two sets of rules, one covered by Article V for the formal requirements for an international interest to be created and another, covered under Article XIV, dealing with more stringent registration formalities where a unique identifier for the rolling stock is required.

ARTICLE V OF THE RAIL PROTOCOL OVERRIDES THAT PART OF ARTICLE 2(2) OF THE CONVENTION THAT REQUIRES THAT THE OBJECT BE UNIQUELY IDENTIFIABLE.



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## REGISTRATION FORMALITIES



PHOTO BY ROB REEDMAN/CC

*The Rail Protocol provides that the Registrar shall be responsible for allocating registration numbers on the basis of a system of identification numbers established by the regulations.*

**A**rticle 18(1)(a) of the Convention provides that the Protocol and the regulations shall specify the requirements and criteria of identification of the object to effect a registration.

Given the non-existence or unreliability of the numbering systems adopted by different manufacturers and operators in different regions of the

world, [Article XIV](#) of the Rail Protocol provides that the Registrar shall be responsible for allocating registration numbers on the basis of a system of identification numbers established by the regulations which “enable the unique identification of items of railway rolling stock”.

[Article XIV](#) of the Protocol gives directions as to how the identification numbers are to be discoverable. They shall be either (a) affixed directly to the item of railway rolling stock, or (b) associated in the International Registry with the manufacturer’s name and the manufacturer’s identification number which is so affixed; or (c) associated in the International Registry with a national or regional identification number so affixed.

In order for the third method of identification to be used, it is necessary that the relevant Contracting State makes a declaration whereby it describes the identification method that has been chosen and such system shall be subject to an agreement between the Supervisory Authority and the relevant Contracting State so as to ensure that the system guarantees the unique identification of each item of rolling stock to which the system applies. Moreover for a registration of an item of railway rolling stock to be valid under this method, it must “specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol under [Article XXIII\(1\)](#) and the time during which each number has applied to the item”.

## RAIL PROTOCOL DECLARATION SYSTEM



PHOTO BY AMAURY HENDRICK/CC

*The Rail Protocol contains several opt-in declarations.*

**T**he Convention and the Rail Protocol introduce a system of declarations that Contracting States may make or must make at the time of or subsequent to ratification, acceptance, approval of, or accession to the Protocol. This system has been described in detail in [Module 6.1](#) above and applies to all protocols to the Convention.

The Rail Protocol contains several opt-in declarations, i.e. declarations that a Contracting State must make if it wishes that certain provisions apply on its territory. A Contracting State willing to make a declaration must notify the Depositary in writing. [Arti-](#)

[cle 57](#) of the Convention provides that new declarations may be made by Contracting States, but they cannot affect rights and interests that arose before the effective date of the relevant declaration. The same applies to the withdrawal of declarations ([Article 58](#) of the Convention) and to the denunciation of the Protocol ([Article 59](#)).

In one case provided for by the Protocol, declarations cannot be withdrawn. This is the case of declarations regarding the transitional regime applicable to pre-existing interests as provided for under [Article 60](#) of the Convention.

Under [Article XXII\(2\)](#) of the Protocol a Regional Economic Integration Organisation (REIO), at the time of signature, acceptance, approval or accession to the Convention and the Protocol shall make a declaration specifying the matters governed by the Protocol in respect of which competence has been transferred to the REIO by its Member States. If any changes to the distribution of competence occur, the REIO shall promptly make a new declaration.

The Protocol contains no opt-out provisions but only provision for declarations concerning the application of national law.

# OPT-IN DECLARATIONS

Certain provisions of the Protocol will **only** apply in respect of a Contracting State if such State has made an opt-in declaration to that effect. Table 7.1.1 sets out the relevant opt-in articles of the Protocol requiring an opt-in declaration (the

“[Directing Article](#)”) against the respective Protocol article (s) to which it relates (the “[End Article](#)”) in order to apply.

An opt-in declaration may be made at ratification, acceptance, approval of, or accession to the Protocol

([Article XXVII](#)) or later, under the provisions for subsequent declarations ([Article XXX](#)) and is subject to the Contracting State’s ability to withdraw a declaration ([Article XXXI](#)) or to denounce the Protocol in its entirety ([Article XXXII](#)).

“ Table 6.2.1 sets out the relevant opt-in articles of the Protocol. ”

TABLE 7.1.1

End Article(s)	Subject	Directing Article(s)	Comment
Article VI	Choice of Law	Article XXVII(1), as supported by Article VI(1)	Refer to Module 1 and Module 4.1
Article VIII	Modification of provisions regarding relief pending final determination of a claim	Article XXVII (2) as supported by Article VIII(1).  Declaration must specify time period required under Article VIII(2), for purposes of definition of “speedy” relief under Article 13(1)	Refer to Module 6.2 for an overview of Articles VIII  Refer to Module 4.6 for an overview of Article 13
Article IX	Remedies on Insolvency	Article XXVII (3), as supported by Article IX(1)  Declaration must specify relevant time period required under Article IX Alternative A(4) or Alternative C (15) as appropriate	Refer to Module 7.2 for overview of Article IX
Article X	Insolvency Assistance	Art. XXVII(1) as supported by Article X(1)	

# DECLARATIONS RELATING TO NATIONAL LAW

A Contracting State may make certain declarations regarding the application of its own laws to specific Protocol matters. A declaration may be replaced or withdrawn under the respective provisions for subsequent declarations ([Article XXX](#)) and withdrawals ([Article XXXI](#)).

## DEP (Designated Entry Points) DECLARATION

Under [Article XIII\(1\)](#), a Contracting State may make a declaration regarding a DEP at any time. An [Article XIII](#) declaration will only affect an item of railway rolling stock located in the territory of the declaring

State ([Commentary, 5.53](#)).

Refer to [Module 5.5.2](#) for an overview of DEPs and to [Commentary, 3.48](#); and [5.53](#) to [5.60](#) generally.

## TERRITORIAL UNIT DECLARATION

Under [Article XXIV\(1\)](#), a Contracting State may make a declaration providing that the Protocol is to extend to all or any of its territorial units, as specified in the declaration, in which different systems of law apply. If it makes such declaration, then independent Protocol declarations may be made in respect of each territorial unit. Such declaration may be made at ratification,

A CONTRACTING STATE MAY MAKE CERTAIN DECLARATIONS REGARDING THE APPLICATION OF ITS OWN LAWS TO SPECIFIC PROTOCOL MATTERS.



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## DECLARATIONS RELATING TO NATIONAL LAW (CONT'D...)



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*If no declaration is made, then the Protocol shall apply to all territorial units.*

acceptance, approval of, or accession to the Protocol ([Article XXIV\(1\)](#)), may be modified at any time under [Article XXIX](#) or under the provisions for subsequent declarations ([Article XXX](#)). If no declaration is made, then the Protocol shall apply to all territorial units ([Article XXIV\(3\)](#)). If the law regarding Protocol matters is the same in all territorial units of a Contracting State, then [Article XXIV](#) is not applicable.

[Article XXIV](#) follows [Article 52](#).

Refer to [Commentary, 5.77](#).

### TRANSITIONAL PROVISIONS

Under [Article 60](#) of the Convention as modified by [Article XXVI\(3\)](#), a Contracting State may by declaration specify a date, not earlier than three years and not later than ten years after the date on which the declaration becomes effective, when the Convention's priority rules become applicable to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State.

Refer to [Module 7.2](#) and to [Commentary, 5.82](#) to [5.86](#).

## KEY DEFINITIONS FOR THIS MODULE

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.

**A** [rticle 1](#) of the Convention contains a list of definitions that are used throughout the Convention and the Rail Protocol. Definitions are indispensable for a good understanding of the matters governed by the Convention and the Protocol.

The most important definitions are listed here below.



**“agreement”** means a security agreement, a title reservation agreement or a leasing agreement.

**“international interest”** means an interest held by a creditor to which [Article 2](#) applies.

**“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](#).

**“regulations”** means regulations made or approved by the Supervisory Authority pursuant to the Protocol.

In the Protocol, the following definitions are particularly important:

**“railway rolling stock”** means vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.



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## QUESTIONS

- What constitutes an item of railway rolling stock for the purposes of the Convention and the Protocol?
- How are engines/traction systems or other components of railway rolling stock treated for the purposes of the Protocol and the definition of railway rolling stock?
- How are contracts of sale dealt with for the purposes of the Protocol?
- What opt-outs are there in relation to the Protocol?
- What are the transitional rules which apply to railway rolling stock covered by the Protocol?



[Link to Answer Key Here](#)





# MODULE 7.2: LEGAL OVERVIEW OF THE LUXEMBOURG RAIL PROTOCOL

## RAILWAY ROLLING STOCK SPECIFIC PROVISIONS

### A SPECIAL REGIME FOR THE EXERCISE OF REMEDIES

#### IDENTIFICATION OF ROLLING STOCK

Unlike the aviation sector, there is no uniformly accepted system for identifying railway rolling stock. Some numbers used on rolling stock can be recycled or replicated. Accordingly [Article XIV](#) creates a new mechanism for uniquely identifying the rolling stock for the purposes of registrations and searches at the international registry. This Article delegated responsibility to the supervisory authority to set out in regulations “*a system for the allocation of identification numbers by the Registrar which enable the unique identification of items of railway rolling stock.*” [Protocol Article XIV\(1\)](#). The identifier then must either be affixed to the rolling stock or linked in the registry to another number



PHOTO COURTESY OF MORIO

(a manufacturer or national or regional identifier) which is affixed to the rolling stock. A Contracting State may in certain circumstances designate the regional or national identification numbering system but this is subject to

agreement with the supervisory authority that the numbering system will “*ensure the unique identification of each item of railway rolling stock to which the system applies*”. [Protocol Article XIV\(2\)](#). See also [Commentary, 5.61 – 5.62](#).

#### TREATMENT OF INSOLVENCY

[Article IX](#) of the Luxembourg Protocol has been described as “*perhaps the most significant provision economically*” [Commentary, 5.30](#). It follows the system of [Article XI](#) in the Aircraft Protocol but with one major difference.

[Article IX](#) applies only if the Contracting State that is the primary insolvency jurisdiction has elected its application. Absent this election, [Article IX](#) will not apply and the Contracting State’s national insolvency laws will apply. The primary insol-

veny jurisdiction is the location of the centre of a debtor’s main interests, in turn deemed to be “*the place of the debtor’s statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise*”. [Protocol Article I\(2\)\(d\)](#).

#### KEY TERMS FOR THIS MODULE:

- “regulations”
- “public service railway rolling stock”
- “railway rolling stock”

#### INSIDE THIS MODULE:

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TREATMENT OF INSOLVENCY	99
EXPORT AND PHYSICAL TRANSFER	102
INTERIM REMEDIES	102
REGISTRAR LIABILITY	103
QUIET POSSESSION	103

## TREATMENT OF INSOLVENCY (CONT'D...)

There are three alternative formulations of [Article IX – Alternatives A -C](#). A Contracting State may elect the types of insolvency proceedings to which [Article IX](#) will apply, electing that one alternative applies to one or more types of insolvency proceedings and another applies to others ([Article XXVII\(3\)](#)). However, for each type of insolvency proceeding to which an alternative is stated to apply, it must be applied in its entirety.

The practical objective of [Article IX](#) is to ensure that within a specified time limit either (a) the creditor recovers the railway rolling stock or (b) the debtor or the insolvency administrator, as applicable, cures past defaults and commits to perform the debtor's future obligations. All alternatives impose obligations on the debtor or the insolvency administrator. Whether such obligations are performed by the debtor or the insolvency administrator depend on, among other things, whether an insolvency proceeding has been commenced, whether an insolvency administrator has been

appointed and whether the debtor under applicable insolvency laws may act (or is acting) as a “debtor in possession.” [Commentary, 5.32](#).

For ease of reference, when used in this [Module 8.2](#), “debtor” refers to the debtor and the insolvency administrator, as applicable.

Alternative A is often referred to as the “hard” rule, as its underlying rationale is to give rolling stock financiers and lessors the assurance of a clear rule. If a Contracting State has declared Alternative A, it must specify a “waiting period” during which, prior to its expiration, the debtor must either (1) give possession of the railway rolling stock to the creditor or (2) cure all defaults (other than a default caused by the commencement of insolvency proceedings) ([Commentary, 5.33](#)). If the debtor fails to take either action by the expiration of the waiting period, the creditor may exercise all remedies available to it under the applicable law and the parties' agreement.

Critically, Alternative A does not allow local insolvency law to prevent or delay the creditor from exercising remedies at the end of the waiting period or modify the debtor's obligations without the creditor's consent. [Commentary, 5.35](#). On the other hand, Alternative A does not affect the authority, if any, of the debtor under applicable law to terminate the parties' agreement. [Protocol Article IX, Alternative A\(11\)](#).

During the waiting period, the debtor must preserve the railway rolling stock and

maintain it and its value in accordance with the parties' agreement - [Protocol, IX \(Alternative A\)\(5\)\(a\)](#). The creditor may also apply for interim relief available under applicable law during the waiting period. [Protocol, IX \(Alternative A\)\(5\)\(b\)](#). Alternative A also requires the registry authority and administrative authorities in a Contracting State to make available to the creditor the remedies of de-registration and export and physical delivery no later than five working days after the creditor has notified such authorities that it is entitled to pursue those remedies in accordance with the Convention. [Protocol, IX \(Alternative A\)\(8\)](#).

Alternative B is often referred to as the “soft” rule, as it is a discretion based version. [Commentary, 5.32, 5.37](#). Under Alternative B, the creditor must request that the debtor notify the creditor in a specified time period whether the debtor will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take possession of the railway rolling stock. If the debtor fails to provide the notice of cure or performance or, after notifying the creditor of the opportunity to take possession of the railway rolling stock, fails to allow the creditor to take possession, the creditor must seek court authorization to repossess the railway rolling stock. In this instance, and unlike Alternative A, the Court may condition the creditor's ability to repossess the railway rolling stock to the extent permitted

“All alternatives impose obligations on the debtor or the insolvency administrator.”







PHOTO BY PHOTOMATT28/CC

by applicable law (*e.g.*, the taking of an additional step or the provision of an additional guarantee). Alternative B requires the creditor to provide evidence of its claims and proof that its international interest has been registered. This is because Alternative B, unlike Alternative A, involves an application to the court, along with evidence and proof. [Commentary, 5.38](#). Pending the court's decision, the creditor may not sell the railway rolling stock.

Alternative C in [Article IX](#) is an option which does not appear in the Aircraft or Space Assets Protocols. Its starting point is that upon the occurrence of an insolvency-related event, the debtor shall within the cure period either cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or give the creditor the opportunity to take possession of the railway rolling stock. [Protocol Article IX Alterna-](#)

[tive C\(3\)](#). The cure period is specifically stated as being the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction - [Protocol Article IX Alternative C\(15\)](#).

It then attempts to retain the basic creditor protection components in Alternative A but still reserves a right for an insolvency administrator (debtor) to apply to the court for suspension of the creditor rights of repossession during the cure period (but can be made after the end of the cure period - [Commentary, 5.41](#)) as long as the debtor continues to make the payments to the creditor as per the original finance agreement (*i.e.* preserves the creditor's bargain from the date when repossession would otherwise have taken place) and the payment takes priority over claims of other creditors in the insolvency. [Commentary, 5.41](#).

It is up to the court to determine the suspension period. [Protocol Article IX Alterna-](#)

[tive C\(4\)](#). In other words, it creates a limited and restricted judicial restraint on the self-help provisions in Alternative A. If an application is made to the court by the insolvency administrator the creditor shall not take possession of the railway rolling stock pending an order of the court but if the application is not granted within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree. [Protocol Article IX Alternative C \(5\)](#). This creates a mechanism to protect the credit from protracted court processes.

Many of the other asset preservation paragraphs in Alternative A (but not Alternative B) are replicated in Alternative C.

ALTERNATIVE C  
IN ARTICLE IX IS  
AN OPTION  
WHICH DOES  
NOT APPEAR IN  
THE AIRCRAFT  
OR SPACE ASSETS  
PROTOCOLS.

## EXPORT AND PHYSICAL TRANSFER

A creditor may, to the extent that the debtor has at any time so agreed procure the export and physical transfer of railway rolling stock from the territory in



PHOTO BY STEPHEN REES/CC

which it is situated but there is no authority from such remedy to require transfer of the rolling stock to a particular jurisdiction. [Protocol VII\(1\)](#). [Commentary, 5.21](#). But the remedy is subject to the debtor being in default, the written consent of any holder of any registered interest ranking in priority to that of the creditor ([Protocol, VII\(2\)](#)) and reasonable prior notice must be given to interested persons as specified in [Protocol, VII\(6\)](#) unless it is acting under a court order. [Commentary, 5.23](#).

A Contracting State is required to ensure that the relevant administrative authorities expeditiously cooperate with and assist the creditor to the extent necessary for the exercise of the remedy but subject to any applicable safety laws and regulations. [Protocol, VII\(5\)](#).

No declaration is required for [Article VII](#) to apply but the enforcement remedies under the Protocol come under [Article VIII](#) which does require a declaration. [Commentary, 5.22](#).

## INTERIM REMEDIES



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[Article 13](#) of the Convention allows a creditor to seek certain interim remedies following a default, but prior to a final determination on the merits of the creditor's claim against the debtor.

[Article VIII](#) of the Protocol modifies some of those remedies with respect to railway rolling stock; however, it only applies where a Contracting State has elected under [Article XXVII](#) of the Protocol to apply the [Article VIII](#) and then only to the extent of such election.

[Protocol, VIII\(1\)](#). As modified by [Article VIII](#), the Convention permits a creditor to obtain certain "speedy" relief on an interim basis, including (a) preservation of the object and its value, (b) possession, control and custody of the rolling stock, (c) immobilization of the object, (d) the ability to lease or manage the rolling stock and retain the income and (e) if the parties at any time specifically agree,

sale and the application of proceeds therefrom. [Convention, 13\(1\)](#); [Protocol, VIII\(3\)](#). The Contracting State electing the application of [Article VIII](#) will specify the number of days that constitute "speedy" relief. [Protocol, VIII\(2\)](#).

If the creditor sells an item of rolling stock as an interim remedy, such sale will be free and clear of any interest over which the creditor's international interest has priority under the Convention. [Protocol, VIII\(4\)](#) but this cannot affect any applicable safety laws or regulations. [Protocol, VIII\(7\)](#).

[Article 13](#) of the Convention allows the court, as a condition to the grant of interim remedies, to provide the debtor with protection if the creditor (i) fails to perform any of its obligations under the Convention or Protocol in exercising the interim remedies or (ii) fails to establish

its claim, wholly or in part, on a final basis. [Convention, 13\(2\)](#). The Protocol allows the parties to agree to remove the ability of the court to provide the debtor with these protections. [Protocol, VIII\(5\)](#). Such agreement does not, however, preclude the debtor from pursuing a claim against the creditor under applicable law for failure to perform any of its obligations to the debtor under the Convention, including damages and other relief available in the local jurisdiction. [Commentary, 5.29](#).

This assistance must be furnished within 7 days and shall also include expeditious guidance on exercising the remedy consistent with applicable safety laws and regulations. [Protocol, VIII\(6\)](#). The reference to Article VII is an error – it should refer to [Article 13](#) of the Convention. [Commentary, 5.23](#).

*Article 13 of the Convention allows a creditor to seek certain interim remedies following a default, but prior to a final determination on the merits of the creditor's claim against the debtor.*



## REGISTRAR LIABILITY

The Convention provides that the registrar has liability for errors and omissions except where the malfunction is “caused by an event of an inevitable and irresistible nature”. [Convention Article 28\(1\)](#). In addition, the registrar is not liable for factual inaccuracy of registration information received or transmitted by the registrar in the form in which it was received. [Convention Article 28\(2\)](#). Subject to these caveats, the liability is

unlimited. The Protocol limits the registrar’s liability in two separate ways. The liability cannot exceed the value of the railway rolling stock to which the loss relates and the annual aggregate annual liability cannot exceed 5 million Special Drawing Rights or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations. [Protocol Article XV\(5\)](#). [Commentary, 5.66](#).

“The registrar has liability for errors and omissions except where the malfunction is ‘caused by an event of an inevitable and irresistible nature’.”



## QUIET POSSESSION

[Article XI](#) provides debtors with quiet possession and use of railway rolling stock. First, [Article XI](#) confirms that the debtor enjoys quiet possession and use of railway rolling stock absent a default under the applicable agreement (as defined in [Article 11](#) of the Convention). A debtor enjoys such quiet possession and use against (a) its creditor, (b) the holders of unregistered interests in the railway rolling stock (even if the debtor has knowledge of such interests), (c) any interest to which it would otherwise be subordinated where the holder of that interest agrees to the debtor’s quiet possession, [Commentary, 5.45](#). [Protocol, XI\(1\)](#); [Convention, 29 \(4\)](#). Con-

sistent with the general architecture of the Protocol respecting party autonomy where possible, the quiet possession and use regime of [Article XI](#) may be modified by agreement of the relevant parties. [Commentary, 5.46](#).

[Article XI](#) does not specify the acts that constitute a breach of the debtor’s right to quiet possession and use of the railway rolling stock, which is to be determined by the agreement between the parties, or absent agreement, by applicable law. [Commentary, 5.47](#). Failing agreement, the default must be substantial. [Commentary, 5.45](#). Similarly, [Article XI](#) makes clear that nothing in the Convention or Protocol affects the debtor’s rights or

remedies against the creditor for interference with the debtor’s possession that constitutes a breach of the agreement under applicable law. [Commentary, 5.48](#).

### PUBLIC SERVICE RAILWAY ROLLING STOCK

[Article XXV](#) represents a compromise between the rights of accreditor to enforce its remedies against the railway rolling stock and the perceived desire of some states to restrict those rights on public policy grounds.

Under [Article XXV\(1\)](#), a Contracting State may make a declaration at any time that it will continue to apply, to the extent specified in the declaration, local law in relation to exercise of creditor repossession rights in relation



PHOTO BY WALLY GOBETZ/CC

*A debtor enjoys such quiet possession and use.*

## QUIET POSSESSION (CONT'D...)



PHOTO BY ZOMBYLUVR/CC

to public service railway rolling stock defined as “*railway rolling stock habitually used for the purpose of providing a service of public importance*”, as specified in that declaration.

Under [Article XXV\(4\)](#), a Contracting State may make a further declaration state disapplying the provisions of [Article XXV\(2\)](#) and [\(3\)](#) relating to, respectively, the preservation and maintenance of the railway rolling stock, and compensation to the creditor during the period when it is precluded from repossessing the railway rolling stock where the Contract-

ing State’s rules of law do not permit such remedy. But this does not preclude a party (e.g. a local authority) agreeing to perform these duties in favour of the creditor or such agreement being enforceable.

Any initial or subsequent declaration made under [Article XXV](#) by a Contracting State does not adversely affect rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depositary.

Refer to [Commentary, 5.78](#) to [5.81](#).

## KEY DEFINITIONS FOR THIS MODULE

**A** [rticle 1](#) of the Convention contains a list of definitions that are used throughout the Convention and the Rail Protocol. Definitions are indispensable for a good understanding of the matters governed by the Convention and the Protocol.

The most important definitions are listed here below.

**“regulations”** means regulations made or approved by the Supervisory Authority pursuant to the Protocol.

In the Protocol, the following definitions are particularly important:

**“public service railway rolling stock”** means railway rolling stock habitually used for the purpose of providing a service of public importance

**“railway rolling stock”** means vehicles movable on a fixed railway track or directly on, above or below a guideway, together

with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.





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LINK TO CAPE TOWN CONVENTION ACADEMIC PROJECT WEBSITE

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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

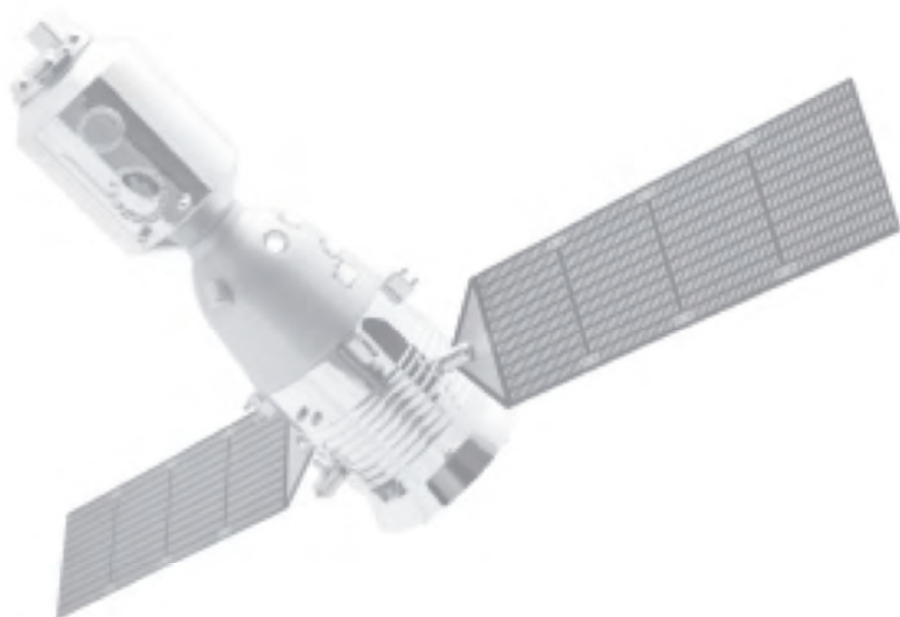
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## QUESTIONS

- What rights does a creditor have to enforce delivery of railway rolling stock to a jurisdiction outside that of where the rolling stock is located when a default occurs?
- Which alternative under Article IX represents a compromise between creditor and debtor rights?
- What are the debtor obligations if a court grants it relief from repossession under Article IX?
- How is public service railway rolling stock defined and what scope is there for a contracting state to make declarations concerning such rolling stock?
- Is the registrar's liability for errors or omissions limited and if so, to what amount?
- Does a debtor have the right to quiet possession?



[Link to Answer Key Here](#)



# MODULE 8.1: LEGAL OVERVIEW OF THE SPACE ASSETS PROTOCOL

## SPHERE OF APPLICATION

### WHEN AND HOW IS THE SPACE ASSETS PROTOCOL APPLIED



**A**rticle II(1) of the Space Protocol states that *“The Convention shall apply in relation to space assets, rights assignments and rights reassignments as provided by the terms of this Protocol”*.

Important to the analysis of the scope of the Space Assets Protocol are the definitions of these three terms and the set of supplementary definitions prescribed in [Article I](#) of the Protocol.

Of particular significance

are the supplementary definitions for Space and Debtor’s Rights ([Commentary, 3.8](#)).

Space “means outer space, including the Moon and other celestial bodies” and Debtor’s Rights “means rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset”.

The definitions of Space Assets, Rights Assignments

and Rights Reassignments need to be read in light of these supplementary definitions. Each of the three terms will be discussed in more detail in this Module.

As a preliminary matter, it is important to note that the Space Assets Protocol is not yet in force pending ratification and deposited instruments from ten States and the operational status of the International Registry.

## SPACE ASSETS

**A**rticle I(2)(k) of the Space Assets Protocol defines space asset as “any man-made uniquely identifiable asset in space or designed to be launched into space”, which includes (i) a spacecraft,

such as a satellite, space station, space module, space capsule, space vehicle or reusable launch vehicle, (ii) a payload (whether telecommunications, navigation, observation, scientific

or otherwise), and (iii) a part of a spacecraft or payload such as a transponder, together with, for each of the foregoing assets, all installed, incorporated or attached accessories, parts

### KEY TERMS FOR THIS MODULE:

- “agreement”
- “creditor”
- “debtor”
- “leasing agreement”
- “national interest”
- “object”
- “pre-existing right or interest”
- “security agreement”
- “title reservation agreement”
- “writing”

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## SPACE ASSETS (CONT'D...)

THE DEFINITION OF SPACE ASSETS IS NOT CONFINED TO ASSETS IN SPACE, BUT ALSO INCORPORATES ASSETS WHICH, THOUGH DESIGNED PRIMARILY FOR USE IN SPACE, ARE STILL ON EARTH OR WITHIN THE EARTH'S ATMOSPHERE.



and equipment and all data, manuals and records relating thereto.

It is important to note that the definition of space assets in [Article I\(2\)\(k\)](#) is not con-

fined to assets in space, but also incorporates assets which, though designed primarily for use in space, are still on Earth or within the Earth's atmosphere ([Commentary, 3.18](#)). In addition,

the definition only allows a payload, or a part of a spacecraft or payload to fall within the Space Assets Protocol if it can be separately registered in accordance with the regulations ([Commentary, 3.19](#)). The registrability requirement fulfills two distinct functions, (1) it provides a means of excluding components which, on incorporation into the spacecraft, lose their identity and cease to be available to the creditor, thus no useful purpose would be served by having the Protocol apply to them and (2) it provides a means to accommodate new kinds of space assets, for example, a space hotel ([Commentary, 3.19](#)).

## RIGHTS ASSIGNMENTS



*Rights Assignments are a crucial aspect of the Space Protocol.*

**A** [Article I\(2\)\(h\)](#) of the Space Assets Protocol defines rights assignment 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”.

The 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 (in relation to an outright assignment the definition applies only where it is the assignment itself that is taken in reduction or discharge of the debt, regardless of whether the creditor is able to obtain payment or other performance from the obligor) ([Commentary, 3.41](#)). Therefore, the definition does not cover the sale of debtor’s rights. Moreover, the assignment must be tied to the debtor’s obligations under the security agreement creating or providing for the international interest ([Commentary, 3.41](#)).

[Article IX](#) sets out the formal requirements for a rights assignment. The assignment must: (1) be in writing, (2) enable both the debtor’s rights and the space asset to which those rights relate to be identified and (3) enable any obligations secured by the agreement to be determined, though without the need to state the sum or maximum sum secured ([Commentary, 3.42](#)). In addition, [Article X](#) states that a rights assignment made in conformity with [Article IX](#) transfers to the creditor the debtor’s rights subject to the rights assignment to the extent permitted by the applicable law.

## RIGHTS REASSIGNMENTS

**A**rticle I(2)(i) of the Space Assets Protocol defines rights reassignment as “(i) a contract by which the creditor transfers to the assignee, or an assignee transfers to a subsequent assignee, the whole or part of its rights and interest under a rights assignment; or (ii) a transfer of debtor’s rights under [Article XII \(4\)\(a\)](#) of this Protocol”.

In accordance with this definition, a rights reassignment may be effected in one of three ways: (1) by a contract by which the creditor transfers to the assignee, or an assignee transfers to a subsequent assignee, the whole or part of its rights and interests under the rights assignment without transferring the related international interest,

(2) automatically upon transfer of the related international interest without a contractual assignment under [Article XII \(4\)](#) ([Article XII\(4\)](#) states that a transfer of a registered international interest of a rights assignment constitutes a reassignment of debtor’s rights recorded against that international interest and entitles the transferee to be shown in the record as assignee of the creditor with regard to the debtor’s rights, i.e. as reassignee of those rights) and (3) a combination of the first two (a contractual assignment of debtor’s rights followed by transfer of an international interest or a transfer of international interest followed by a contractual assignment of debtor’s rights).



The different ways a rights reassignment may be effected impacts how it is registered and accorded priority, as highlighted in the Official Commentary to the Space Assets Protocol ([Commentary, 3.59](#) to [3.65](#)). The formal requirements for a rights reassignment are the same as those for a rights assignment.

*The formal requirements for a rights reassignment are the same as those for a rights assignment.*

## EXTENSION TO CONTRACTS OF SALE

**A**rticle V of the Space Assets Protocol extends the provisions of the Convention relating to registration and priority to contracts of sales of space assets. It provides the formalities for a contract of sale relating to a space asset, stating that “a contract of sale is one which: (a) is in writing; (b) relates to a space asset of which the seller has power to dispose; and (c) enables the space asset to be identified in conformity with this Protocol.” In other words, the Space Assets Protocol creates a *sui generis* sale, which is not dependent on national law, although, as with an international interest, national law

applies to questions such as whether an agreement was reached and whether the seller had power to dispose ([Commentary, 3.26](#)). Therefore, establishment of a contract of sale under the Convention and the Space Assets Protocol is straightforward; no local/national law requirements will be sought provided that the formalities listed under Article V of the Protocol are satisfied.

[Article V](#) also states the effect of the contract, namely to transfer the interest of the seller in the space asset to the buyer in accordance with the terms of the contract. In this

context, in case of a contract of sale, the seller’s interest must pass to the buyer immediately and, thus, buyers may benefit from the registration system. Title reservation agreements are not considered among the scope of contracts of sale under the Convention and the Protocol but would be considered as constituting an international interest under [Article 2\(2\)\(b\)](#) of the Convention.



PHOTO BY VISITBERLIN/CC

ARTICLE V OF THE SPACE ASSETS PROTOCOL  
EXTENDS THE PROVISIONS OF THE  
CONVENTION RELATING TO REGISTRATION  
AND PRIORITY TO CONTRACTS OF SALES  
OF SPACE ASSETS.

## THE REGISTRATION SYSTEM

In terms of the Convention, a validly registered international interest will have priority over subsequently registered interests and unregistered interests, regardless of whether the first to register had knowledge of an earlier unregistered interest. The operation of the International Registry for Space Assets will be governed by the Convention, the Space Assets Protocol, and partly by future regulations made under the Protocol and rules of procedures for effecting registrations and searches ([Commentary, 2.117](#)). It is important to note that the International Registry and regulations related to it are still in the process of creation for the Space Assets Protocol by the UNIDROIT Preparatory Commission for the Establishment of the International Registry for Space Assets.



*A validly registered international interest will have priority over subsequently registered interests and unregistered interests.*

In order for an international interest to be registered against a space asset two conditions must be met, (1) the space asset must meet the definition in [Article I\(2\)\(k\)](#) and (2) the description of the space asset must satisfy the identification criteria prescribed in the regulations ([Commentary, 3.103](#)). While the Space Assets Protocol does not allow the independent registration of a rights assignment or rights reassignment, under [Article XII\(2\)](#) the Space Assets Protocol extends the registration provisions of the Convention to cover *mutatis mutandis* the recording of rights assignments and rights reassignments. [Article XII\(1\)](#) allows the holder of an international interest who has acquired an interest in or over the debtor's rights under a rights assignment, a rights reassignment or

by subrogation to record the assignment as part of the registration of the international interest.

As highlighted above, the Space Assets Protocol also allows the registration of contracts of sale. In the case of a contract of sale, there must be a transfer of ownership of the space asset under the contract in order for it to be registered. Accordingly, where under a contract of sale, ownership does not pass at the time of the contract it should be registered either as a title reservation agreement, if title is expressly reserved, or as a prospective sale, if it is not ([Commentary, 3.27](#)). Registration of a contract of sale remains effective indefinitely, reflecting the fact that a sale is an outright transfer and thus not limited in time ([Commentary, 3.28](#)).

## SPACE ASSETS PROTOCOL DECLARATION SYSTEM

The Space Assets Protocol, like the Convention, contains various provisions for declarations ([Articles XLI–XLV](#)). A Contracting State must notify the Depositary in writing of declarations, including subsequent declarations, withdrawals of declarations and Protocol denunciations. A Contracting State may not make any reservations. There is no requirement that a declaration made by one State need be accepted by other States

under the Protocol ([Commentary, 3.168](#)).

A Contracting State may make a subsequent declaration, but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration ([Article XLIV](#)) and the same applies to the withdrawal of declarations ([Article XLV](#)) and the denunciation of the Protocol ([Article XLVI](#)). Declarations made under the Convention, including those

made under [Articles 39, 40, 53, 54, 55, 57](#) and [58](#), are deemed to have also been made under the Protocol unless otherwise expressed ([Article XLII](#)), thus avoiding the need to lodge fresh declarations under the Protocol where they are unnecessary ([Commentary, 3.168](#)).

Declarations under the Protocol are of four kinds: opt-in declarations, opt-out declarations, declarations relating to the operation of the Protocol



*A Contracting State may not make any reservations.*



## SPACE ASSETS PROTOCOL DECLARATION SYSTEM (CONT'D...)

within a Contracting State and mandatory declarations ([Commentary, 3.169](#)). The effect of the Declaration Sys-

tem is that a Contracting State must make a declaration if: (1) it wishes to adopt an opt-in provision, (2) it wishes to

opt-out of [Article VIII](#) (Choice of Law), and (3) the declaration is mandatory ([Commentary, 3.174](#)).

## OPT-IN & OPT-OUT DECLARATIONS

Certain provisions in the Space Assets Protocol will only apply to a Contracting State if it makes an “[opt-in declaration](#)” to that effect.

These provisions include:

(1) modification of provisions regarding relief pending final determination, and time within which such relief is to be granted ([Article XX](#)), (2) remedies on insolvency and selection of Alternative

A or B ([Article XXI](#)) and (3) insolvency assistance ([Article XXII](#)).

The opt-in declarations required under [Article XX\(2\)](#) and [Article XXI](#) of the Protocol are required to set out further information relating to the declaration or the declaration will not be accepted by the Depositary.

The Protocol provision relat-

ed to the Choice of Law ([Article VIII](#)) will apply to a Contracting State unless it makes an “opt-out declaration” to that effect. Thus, the parties to an agreement are free to choose the law to govern their contractual rights and obligations, wholly or in part, unless the Contracting State has opted-out of [Article VIII](#).



## DECLARATIONS RELATED TO NATIONAL LAW

A Contracting State may make certain declarations regarding the application of its own laws to specific matters in the Space Assets Protocol. Under [Article XXXI](#), a Contracting State may make a declaration designating an entity or entities in its territory as the entry point or entry points through which information required for registration shall or may be transmitted to the International Registry. Such declaration may be replaced or withdrawn under the respective provisions for subsequent declarations ([Article XLIV](#)) and withdrawals ([Article XLV](#)).

Though any Contracting State is free to make a declaration under [Article XXXI](#), the only

space assets likely to be affected by the declaration are those registered or to be registered by the declaring State. That is the State which has control over the space asset, the transfer of licenses, the authorization of the use of orbital positions and frequencies and the ability to refuse to recognize or enforce an international interest where this would conflict with its laws or regulations governing exports or national security ([Article XXVI](#)) ([Commentary, 3.101](#)).

Further, under [Article XXXIX](#), a Contracting State may make a declaration providing that the Protocol is to extend to all or any of its territorial units, as specified in the declaration, in which



different systems of law apply. A Contracting State may make this declaration at the time of signature, ratification, acceptance, approval or accession to the Protocol and the declaration may be modified at any time. If no declaration is made, then the Protocol will apply to all territorial units of the Contracting State.

A CONTRACTING  
STATE MAY MAKE  
CERTAIN  
DECLARATIONS  
REGARDING THE  
APPLICATION OF  
ITS OWN LAWS.

## MANDATORY DECLARATIONS

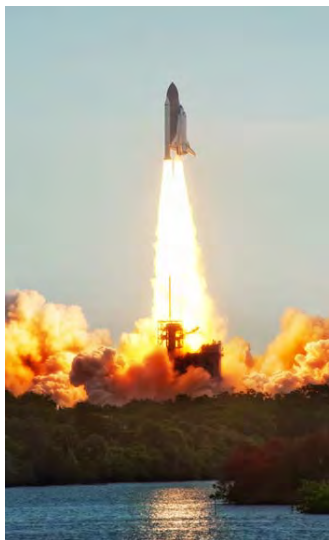


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Certain provisions in the Space Assets Protocol require a mandatory declaration to be made at the time of ratification or adoption in order for the instrument of ratification or adoption to be accepted, including: (1) period of suspension of creditor's remedies under public service provisions (to be made by a Contracting State) ([Article XXVII\(4\)](#)), (2) transfer of competence to a Regional Economic Integration Organization (to be made by the REIO) ([Article XXXVII\(2\)](#)) and (3) the time-period

required by [Article XX\(2\)](#) for speedy relief pending final determination of a creditor's claim ([Article XLI\(3\)](#)).

For the purposes of a mandatory declaration under [Article XXVII\(4\)](#), a Contracting State must specify a period of time, not less than three months nor more than six months, for the suspension of a creditor's remedies with respect to an international interest in a space asset that is the subject of a public service notice.

A mandatory declaration made by an REIO under

[Article XXXVII\(2\)](#) cannot be modified or replaced by subsequent declarations under [Article XLIV](#) or withdrawn under [Article XLV](#). It must be made only at the time of ratification, etc., but changes to the competence of the REIO are to be promptly notified to the Depositary ([Commentary, 3.175](#)).

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*Certain declarations are mandatory under the Space Protocol.*

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## KEY DEFINITIONS FOR THIS MODULE

IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.

[Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

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dened by a registrable non-consensual right or interest.

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**“object”** means an object of a category to which [Article 2](#) applies.

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**“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.







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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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## QUESTIONS

- What are the assets covered under the Space Assets Protocol?
- How does the Space Assets Protocol define the term “space asset”?
- How does the Space Assets Protocol define the term “rights assignment”?
- How does the Space Assets Protocol define the term “rights reassignment”?
- What are the formalities for rights assignments and rights reassignments?
- What is a “contract of sale” in terms of the Convention/Space Assets Protocol?
- What are the formalities under the Convention/Space Assets Protocol which must be fulfilled for entering into a contract of sale?



[Link to Answer Key Here](#)



# MODULE 8.2: LEGAL OVERVIEW OF THE SPACE ASSETS PROTOCOL

## SPACE-SPECIFIC PROVISIONS

### A SPECIAL REGIME FOR THE SPACE INDUSTRY

#### IDENTIFICATION OF SPACE ASSETS



*Serial numbers are not often used for space assets.*

The provisions of the Space Assets Protocol concerning the identification of space assets distinguish the identification criteria for the constitution of an international interest, which are governed by [Article VII](#) and are flexible, from those required by [Article XXX](#) for registration, which are more stringent because they require that the asset against which

a search is made be uniquely identifiable ([Commentary, 3.100](#)). The characteristics that make a space asset “uniquely identifiable” for registration have not been outlined in the Protocol, a departure from previous Protocols in which identification criteria have been explicitly outlined.

Considering industry knowledge regarding space

assets (i.e. serial numbers are not often used for space assets and where they are it is logistically difficult to identify assets already in Space because the serial number may not be accessible), figuring out the identification criteria for space assets requires a complex analysis. In light of this complexity, the Space Assets Protocol left it to the regulations to determine the identification criteria for space assets. Leaving it to the regulations to determine the identification criteria allows a flexibility which would be lacking if basic criteria were to be set in stone in the Protocol ([Commentary, 3.100](#)).

It is important to note that the International Registry and regulations related to it are still in the process of creation for the Space Assets Protocol by the UNIDROIT Preparatory Commission for the Establishment of the International Registry for Space Assets. The Space Assets Protocol is not yet in force.

#### KEY TERMS FOR THIS MODULE:

- “agreement”
- “creditor”
- “debtor”
- “leasing agreement”
- “national interest”
- “object”
- “pre-existing right or interest”
- “security agreement”
- “title reservation agreement”
- “writing”

#### INSIDE THIS MODULE:

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*A payload can constitute a Space Asset*

## COMPONENTS AND PARTS

The definition of space assets includes “accessories, parts and equipment” that are installed, incorporated or attached to identifiable assets. However, these components have no separate status under the Convention (see [Article 29\(7\)](#)) or the Protocol and any rights in them when not installed on a space asset are governed by the applicable law ([Commentary, 2.31](#)).

The Space Assets Protocol does recognize that a payload or a part of a spacecraft or payload, such as a transponder or a secondary or hosted payload, can constitute a space asset provided it is uniquely identifiable and a separate registration may be effected in accordance with the regulations. The regulations are currently in preparation.

## PHYSICALLY LINKED ASSETS

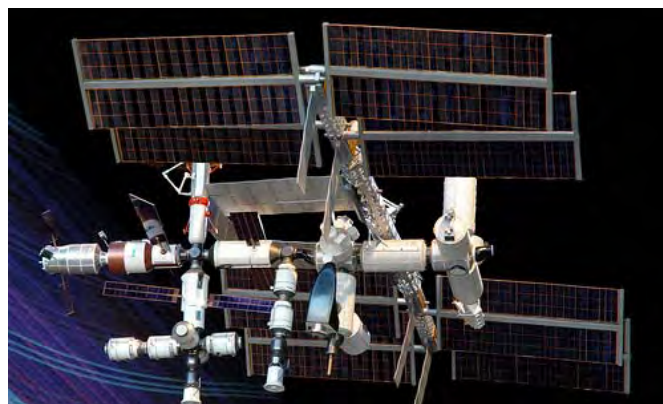
[Article XVII\(3\)](#) prescribes a significant restriction on the exercise of remedies related to physically linked assets. Unless otherwise agreed, a creditor may not enforce an international interest in a space asset that is physically linked with another space asset so as to impair or interfere with the operation of the other space asset, if a creditor or a buyer has an interest in that space asset that was registered before the interest of the enforcing creditor ([Article XVII\(3\)](#)). It is important to note, however, that [Article XVII\(3\)](#) takes effect subject to any agreement to the contrary between the parties concerned ([Commentary, 3.77](#)).

This is not strictly a priority question as the two interests relate to different space assets, but the underlying idea is similar. There are various ways in which enforcement action by a creditor over the space

asset in which the creditor has an interest may adversely affect the operation of a physically linked asset. The most serious of these is moving the enforcing creditor’s asset, depriving the other creditor of the ability to use the physically linked asset for its intended purpose. Other methods are reducing or curtailing the linked asset’s access to power, preventing communications to and from the asset, and causing radio-frequency interference with its communications ([Commentary, 3.77](#)).

A buyer of a space asset who uses it in such a way as to impair the operation of a physically linked space asset owned by a different party is not affected by [Article XVII\(3\)](#), though the buyer may incur liability under the applicable law. [Article XVII\(3\)](#) is confined to physically linked space assets. So the fact that action taken against one satellite interferes with the operation of another satellite in the same constellation but not physically linked does not attract the operation of [Article XVII\(3\)](#) ([Commentary, 3.77](#)).

A CREDITOR MAY NOT ENFORCE AN INTERNATIONAL INTEREST IN A SPACE ASSET THAT IS PHYSICALLY LINKED WITH ANOTHER SPACE ASSET SO AS TO IMPAIR OR INTERFERE WITH THE OPERATION OF THE OTHER SPACE ASSET.





## PUBLIC SERVICE RESTRICTION

**A**rticle XXVII of the Space Assets Protocol contains provisions restricting the remedies available to a creditor with respect to a space asset that provides a public service. The rationale for the public service provision is that the State has a natural interest in ensuring that the exercise of creditor's remedies against a space asset which provides a service of public importance, whether military, navigational, educational or otherwise, does not cause an abrupt termination of the public service, which could impair public health, national security and other services of public importance. Moreover States may have obligations under international agreements to provide and maintain services which involve the use of space assets (e.g., radio services, meteorological services, other air navigation facilities, and global connectivity) ([Commentary, 3.78](#)). The Protocol does not provide a definition of public services.

[Article XXVII](#) applies where the debtor and a public services provider enter into a contract intended to support the provision of a public service recognized as such under the laws of the relevant Contracting State. Where such a contract exists, the parties to it and the Contracting State may agree that the public services provider may register a public service notice in the International Registry describing the services in ac-



PHOTO BY @JB TAYLOR/CC

*The Space Protocol restricts the remedies available to a creditor with respect to a space asset that provides a public service.*

cordance with the regulations ([Commentary, 3.79](#)). This registration triggers a suspension of the creditor's remedies under the Convention and the Space Assets Protocol where the exercise of those remedies would make the space asset unavailable for the provision of the relevant public service ([Commentary, 3.79 – 3.80](#)).

A Contracting State must at the time of ratification of the Protocol specify by a declaration under [Article XLI\(1\)](#) a suspension period not less than three nor more than six months from the date of registration by the creditor of a notice in the International Registry that the creditor may exercise any such remedies if the debtor does not cure its default within that period. The period of suspension

runs not from the date of the debtor's default or from the accrual of the creditor's right to assert a remedy but from the time of registration of the default notice in the International Registry. The notice may not be registered earlier than registration of the public service notice. The creditor must promptly notify the debtor and the public services provider of the date of registration of its notice and the date the suspension period expires ([Article XXVII\(6\)](#)) ([Commentary, 3.83](#)).

During the suspension period, the creditor, the debtor and the public services provider are required to cooperate in good faith to find a commercially reasonable solution permitting the continuation of the public service ([Article XXVII\(7\)\(a\)](#)).

A PUBLIC SERVICES PROVIDER MAY IN SOME CASES REGISTER A PUBLIC SERVICE NOTICE IN THE INTERNATIONAL REGISTRY.

*“Command codes are required to take possession of, establish control over or operate a space asset.”*



## ESCROW OF COMMAND CODES & RELATED DATA

In keeping with the particular needs of the space industry with respect to the exercise of remedies, the drafters of the Space Assets Protocol created provisions allowing the parties to an agreement to specifically agree to the placement of command codes and related data and materials with another person in order to afford the creditor an opportunity to take possession of, establish

control over or operate the space asset ([Article XIX](#)).

A satellite command code is an encryption key giving control of the satellite. Arrangements can be made to deposit the command code in an escrow account with a third party such as an escrow agent or the manager of an international command code escrow account and to give the creditor the ability to change the

command code and take control of the satellite in the event of the debtor's default ([Commentary, 3.70](#)). However, [Article XXVI\(2\)\(c\)](#) provides that the Protocol does not affect the ability of a Contracting State in accordance with its laws and regulations to prohibit, restrict or attach conditions to the placement of command codes and related data and materials.

## MODIFICATION OF DEFAULT REMEDIES

The Convention provides lessors, conditional sellers and secured creditors (and their assignees) with certain remedies upon a debtor's default. The default remedies of the Convention are modified by the Space Assets Protocol in certain respects to meet the particular needs of the space industry. For space assets, the Space Assets Protocol modifies the Convention in various respects to give greater certainty for the parties.

[Article XVII\(1\)](#) replaces [Article 8\(3\)](#) of the Convention with a more general duty of commercial reasonableness. This cannot be excluded by agreement ([Article XVI](#)). The duty imposed on a chargee to exercise remedies in a commercially reasonable manner is extended to cover all remedies in relation to a space asset ([Commentary,](#)

[3.72](#)). However, a remedy given in relation to a space asset is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision in a security agreement, except if the provision is manifestly unreasonable ([Article XVII\(1\)](#)). It is important to note that [Article XVII\(1\)](#) is limited to remedies with respect to space assets, and does not cover remedies in relation to the enforcement of debtor's rights acquired by the creditor under a Rights Assignment or Rights Reassignment.

For the purposes of [Article 8\(4\)](#) of the Convention, which requires a chargee to give “reasonable prior notice” to interested parties of a proposed sale or lease, a chargee giving 14 or more calendar days' prior written notice is deemed to have satisfied

the requirement ([Article XVII\(2\)](#)). This is the one provision governing relations between the parties that they are not free to derogate from by agreement ([Article XVI](#)).

[Article XX](#) modifies [Article 13](#) of the Convention, which relates to advance relief; but the Article only applies where a Contracting State has made a declaration under [Article XX\(1\)](#) and to the extent stated in that declaration ([Article XX\(1\)](#)). [Article XX\(2\)](#) defines “speedy relief”, while [Article XX\(3\)](#) adds the remedy of sale and application of proceeds of sale if the parties at any time specifically agree ([Commentary, 3.75](#)). [Article XX\(5\)](#) permits the parties to exclude the application of [Article 13\(2\)](#) of the Convention, which empowers the court to impose conditions for the granting of advance relief ([Commentary, 3.75](#)).

FOR SPACE ASSETS, THE SPACE ASSETS PROTOCOL MODIFIES THE CONVENTION IN VARIOUS RESPECTS TO GIVE GREATER CERTAINTY FOR THE PARTIES.

## APPLICATION OF REMEDY PROVISIONS TO RIGHTS ASSIGNMENTS & RIGHTS REASSIGNMENTS



As highlighted above, the default remedies of the Convention are modified by the Space Assets Protocol in certain respects to meet the particular needs of the space industry. These modifications include provisions created to encompass the assignment and reassignment of debtor's rights ([Commentary, 3.68](#)).

[Article XVIII](#) applies the default provisions of Chapter III of the Convention, which governs the enforcement of a security interest, to defaults by the debtor or assignor

under a rights assignment or rights reassignment, though in relation to a debtor's rights the provisions apply only to the extent they are capable of application to intangible property ([Commentary, 3.69](#)).

All remedies applicable in relation to the space asset, including the remedy of repossession, are available in relation to documentary intangibles, for example, negotiable instruments, negotiable securities and documents of title. The exception is the

grant of a lease, a remedy which is clearly inapplicable even to documentary intangibles. Pure (i.e. non-documentary) intangibles are plainly not susceptible to possession or to the grant of a lease. All other remedies are available. It is important to note that [Article XVIII](#) is limited to rights assignment with respect to security, thus [Article 10](#) of the Convention, which relates to conditional sale and leasing agreements, is not applicable ([Commentary, 3.69](#)).

*“All remedies applicable in relation to the space asset, including the remedy of repossession, are available in relation to documentary intangibles.”*

## TREATMENT OF INSOLVENCY

[Article XXI](#) introduces special rules in relation to space assets and debtor's rights designed to strengthen the creditor's position vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event, that is, (i) the

commencement of insolvency proceedings against the debtor, or (ii) the debtor's declared intention to suspend or actual suspension of payments where the creditor's right to institute insolvency proceedings or to exercise remedies under the Convention is sus-

pending by law or State action ([Article I\(2\)\(d\)](#)).

“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

## TREATMENT OF INSOLVENCY (CONT'D...)

*“Both Alternative A and Alternative B have to be adopted in their entirety if they are to be adopted at all.”*

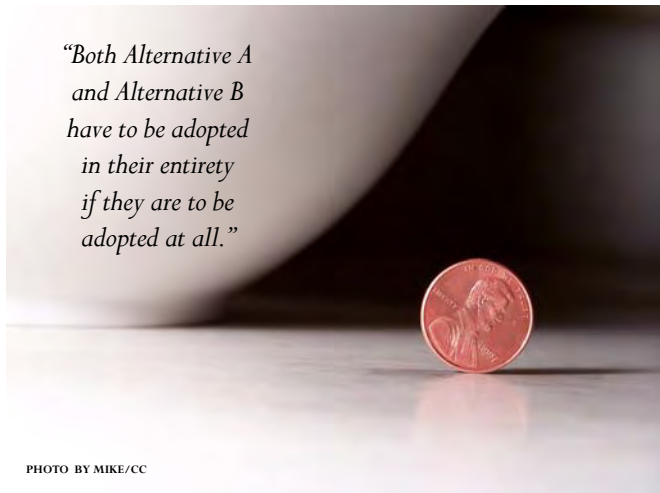


PHOTO BY MIKE/CC

a debtor in possession if permitted by the applicable law. The time of commencement of insolvency proceedings is determined by the applicable insolvency law. In some ju-

risdictions, where a winding-up order is made on a creditor’s petition the insolvency proceedings are deemed to commence at the time of presentation of the petition, and in those jurisdictions that will be the relevant time for the purpose of [Article I\(2\)\(d\)](#).

[Article XXI](#) applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to [Article XLI\(4\)](#). Absent this declaration, the Contracting State’s national insolvency laws will control. There are two options which a Contracting State may declare under [Article XXI](#) – Alternative A and Alternative B. However,

even where a Contracting State has made a declaration under [Article XXI](#), it is open to the parties to exclude the application of the Article by agreement in writing ([Article XVI](#)), but they cannot vary it, only exclude it in its entirety ([Commentary, 3.130](#)).

This is because both Alternative A and Alternative B have to be adopted in their entirety if they are to be adopted at all ([Commentary, 3.130](#)). Both Alternative A and Alternative B impose obligations on the debtor or the insolvency administrator. Whether such obligations are performed by the debtor or the insolvency administrator depends on various factors.

## ALTERNATIVE A

Alternative A is often referred to as the “hard” rule, as its underlying rationale is to give space asset financiers and lessors the assurance of a clear rule. If a Contracting State has declared Alternative A, it must specify a “waiting period” during which, prior to its expiration, the debtor must either (1) give possession of the object to the creditor or (2) cure all defaults (other than a default caused by the commencement of insolvency proceedings) ([Commentary, 3.131](#)). If the debtor fails to take either action by the expiration of the waiting period, the creditor may exercise all remedies available to it under the applicable law and the parties’ agreement.



ALTERNATIVE A  
IS OFTEN  
REFERRED TO  
AS THE  
“HARD” RULE.

PHOTO BY RBANKS/CC

If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under Alternative A or in any other way fails to fulfill its obligations under Alternative A, the creditor can apply to the insolvency court for an order in accordance with the applicable procedural law requiring the insolvency administrator or the debtor to comply with those obligations ([Commentary, 3.131](#)).

Critically, Alternative A does not allow local insolvency law to prevent or delay the creditor from exercising remedies at the end of the waiting period or modify the debtor’s obligations without the creditor’s consent ([Commentary,](#)

[3.134](#)). On the other hand, Alternative A does not affect the authority, if any, of the insolvency administrator under the applicable law to terminate the parties’ agreement ([Article XXI, Alt. A\(11\)](#)).

During the waiting period, the insolvency administrator must preserve the space asset and maintain its value in accordance with the parties’ agreement, but may use the space asset under arrangements designed to preserve the space asset and maintain its value ([Commentary, 3.135](#)). The creditor may also apply for interim relief available under the applicable law during the waiting period.



## ALTERNATIVE B

In contrast to Alternative A, Alternative B is often referred to as the “soft” or discretion-based version. Under Alternative B, upon the creditor’s request, the insolvency administrator or the debtor, as applicable, shall notify the creditor within a specified time period whether the debtor will (1) cure all defaults and perform all future obligations under the agreement and related transaction documents or (2) give the creditor the opportunity to take possession or control of the space asset in accordance with the applicable law.

If the debtor fails to provide the notice of cure or performance or, after notifying the

creditor of the opportunity to take possession of or control and operation over the space asset, fails to allow the creditor to do so, the creditor must seek court authorization to repossess the space asset. In this instance, and unlike Alternative A, the Court may condition the creditor’s ability to repossess the object to the extent permitted by the applicable law (e.g., the taking of an additional step or the provision of an additional guarantee) ([Commentary, 3.142](#)). Thus, under the “soft” version of [Article XXI](#), the court’s discretion is substituted for the creditor’s entitlement to take possession or control ([Commentary, 3.143](#)).



Alternative B requires the creditor to provide evidence of its claims and proof that its international interest has been registered. This is because Alternative B, unlike Alternative A, involves an application to the court, along with evidence and proof. Pending the court’s decision, the creditor cannot sell the space asset.

*Alternative B is often referred to as the “soft” or discretion-based version.*

## SALVAGE

As insurance is an important consideration in the financing of space assets, the Space Assets Protocol seeks to ensure that this aspect of the industry is not significantly affected by the application of the provisions in the Convention and the Protocol. [Article IV\(3\)](#) states that nothing in the Convention or Protocol can affect any legal or contractual rights of an insurer to salvage in accordance with the applicable law. In this context, “salvage” means a legal or contractual right or interest in, relating to or derived from a space asset that vests in the insurer upon the payment of a loss relating to the space asset ([Article IV\(3\)](#)).

The effect of [Article IV\(3\)](#) is that legal or contractual rights of salvage given by the applicable law, including rights acquired by subrogation, are not affected by the Convention or Protocol, so that any priority dispute will be resolved by the applicable law

as determined by the rules of private international law of the forum State ([Commentary, 3.25](#)). Presumably the applicable law will recognize the priority of a creditor’s right to recovery of its claim in full.

INSURANCE IS AN IMPORTANT CONSIDERATION IN THE FINANCING OF SPACE ASSETS.

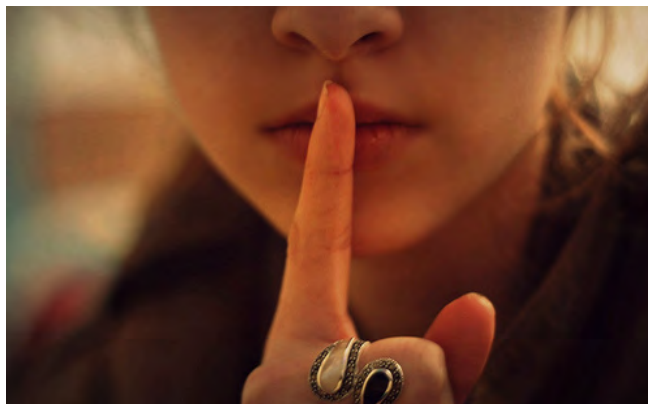




## QUIET POSSESSION & USE (CONT'D...)

Consistent with the general architecture of the Protocol, the quiet possession and use regime of [Article XVI](#) can be modified by agreement of the relevant parties ([Commentary, 3.120](#)). [Article XXV](#) does not specify the acts that constitute a breach of the debtor's right to quiet possession and use of the object, which is to be determined by the agreement between the parties ([Commentary, 3.122](#)).

Failing agreement, the default must be substantial ([Commentary, 3.123](#)). Similarly, [Article XXV](#) makes clear that nothing in the Convention or Protocol affects the debtor's rights or remedies against the creditor for interference with the debtor's possession that constitutes a breach of the agreement under the applicable law in so far as that agreement relates to space assets ([Article XXV\(2\)](#)).



*The quiet possession and use regime can be modified by agreement of the relevant parties.*

## KEY DEFINITIONS FOR THIS MODULE

**A** [Article 1](#) of the Convention contains a long list of definitions, supplemented by definitions in the relevant Protocol. It is important to keep these in mind at all times when reading the Convention and Protocols, because ordinary words are sometimes given a special meaning.

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IN THE CONVENTION AND RELATED PROTOCOLS, ORDINARY WORDS ARE SOMETIMES GIVEN A SPECIAL MEANING.





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FACILITATING THE STUDY OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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### QUESTIONS

- What makes the identification procedures for space assets unique from regimes in other Protocols?
- How have the default remedies in the Space Assets Protocol been modified to ensure more certainty for the parties to an agreement for a space asset?
- Are the remedies available for a space asset also available for rights assignments and rights reassignments?
- If one space asset is physically linked to another, may a creditor enforce an interest in that space asset even if it impairs the use of the space asset that is physically linked?
- How does the Protocol treat a space asset that is used to provide a public service in a Contracting State?
- Must a Contracting State apply either Alternative A or Alternative B to all types of insolvency proceedings?
- If a Contracting State has elected Insolvency Alternative A, may the debtor petition a court for additional time to cure defaults at the end of the waiting period?
- If a Contracting State has elected Insolvency Alternative B, is court authorization required for the creditor to repossess a space asset if the debtor has not voluntarily surrendered possession?
- Does the Protocol require a Contracting State to waive sovereign immunity?



[Link to Answer Key Here](#)