THE NEXT GENERATION OF INTERNATIONAL AVIATION FINANCE LAW: AN OVERVIEW OF THE PROPOSED UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AS APPLIED TO AIRCRAFT EQUIPMENT*

JEFFREY WOOL**

1. INTRODUCTION

The International Institute for the Unification of Private Law ("UNIDROIT")1 and the International Civil Aviation Organization ("ICAO")2 are cosponsoring inter-governmental negotiations relating to the proposed UNIDROIT Convention on Interna-

---

* This article was originally published in 17 ANNUALS AIR & SPACE L. 243 (1998). It is reprinted in this journal with the permission of Air & Space Law. The article has been updated to reflect changes to the official texts of the Convention on International Interests in Mobile Equipment and the Aircraft Protocol that have been made since the previous publication.

** Jeffrey Wool is a Partner of Perkins Coie LLP. While Mr. Wool, in his capacity as counsel to the Aviation Working Group, chaired the group responsible for initial preparation of the Preliminary Draft Aircraft Protocol, this article does not necessarily reflect the positions, official or otherwise, of UNIDROIT, the International Civil Aviation Organization, or any other group. The Author wishes to thank Adam Schless, Perkins Coie LLP, for his assistance in preparing this article.

1 UNIDROIT was established in 1926 within the framework of the League of Nations. Reconstituted after World War II, its principal purpose is to "examine ways of harmonizing and coordinating the private laws of States and of groups of States, and to prepare gradually for the adoption by various States of uniform rules of private law." Statute of UNIDROIT, art. 1 (official translation approved by its General Assembly on November 26, 1991).

2 ICAO was formed by virtue of the Convention on International Civil Aviation, Dec. 7, 1944, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. See Statute of UNIDROIT, supra note 1, art. 43. ICAO came into existence in 1947. ICAO's principal objective is to ensure the "safe and orderly growth of international civil aviation throughout the world." Id. art. 44(a).
tional Interests in Mobile Equipment as applied to aircraft equipment by virtue of a specific protocol.

The primary purpose of the Convention as applied by the Aircraft Protocol is to facilitate the extension and reduce the cost of aviation credit. It will do so by establishing substantive, commercially oriented international rules regulating key elements of secured transactions and leasing of aircraft equipment. Because the obtaining of credit is typically a condition to the acquisition of aircraft, these instruments may also enhance the safety of international air transport by assisting the world's airlines in their efforts to acquire newer, safer fleets.

This article will provide an overview of these proposed treaty instruments, focusing exclusively on their application to aircraft equipment. The aim is not to be comprehensive, but rather to help readers understand the evolution, organisation and basic terms of the instruments, as well as the general thinking employed in their development. Part II will sketch the historical development of the instruments. Part III will describe the general structure of the instruments. Part IV will set out their salient fea-

---


4 For the precise definition of aircraft equipment, see infra notes 115-18 and accompanying text (defining "aircraft objects," "airframes," "aircraft engines," and "helicopters").


6 See Anthony Saunders et al., The Economic Implications of International Secured Transactions Law Reform: A Case Study, 20 U. PA. J. INT'L ECON. L. 309, 312 (1999) [hereinafter Economic Implications] (noting that "specifically because of its technology and capital-intensive nature, cyclical nature and competitive structure, the commercial airline industry is heavily dependent on external finance").

7 Comprehensive treatments are not yet available. Other than short update articles, precious little has been written about the Convention/Aircraft Protocol. The first two articles to systematically address the proposed instruments have been prepared by those who participated in the drafting process. See Roy M. Goode, Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment, 3 UNIFORM L. REV. 52 (1998); R.C.C. Cuming, The Draft UNIDROIT Convention on International Interests in Mobile Equipment, 30 UCC L.J. 365 (1998) [hereinafter Cuming, Draft UNIDROIT Convention].
tures and summarise their central provisions. Finally, Part V will highlight several issues worthy of careful consideration during the upcoming governmental process.

2. HISTORICAL DEVELOPMENT OF THE TREATY INSTRUMENTS: FROM THE LEX SITUS PROBLEM TO FACILITATING ASSET-BASED FINANCING AND LEASING

2.1. The Threshold Problem

Responding to a proposal by its Canadian member and following preliminary feasibility work, the Governing Council of UNIDROIT in 1992 authorised the creation of a study group ("study group") to draft uniform rules on certain international aspects of security interests in mobile equipment.\(^8\)

Taking its lead from the findings of a comparative law study undertaken by Professor R.C.C. Cuming,\(^9\) the study group, chaired by Professor R.M. Goode, initially focused on and sought to address the lex situs problem.

The lex situs rule applies the law, often including conflict of laws rules, of the jurisdiction in which mobile assets are situated to determine a range of basic questions, including the validity of security-type rights and interests.\(^10\) Because mobile assets regularly change locations, the law applicable to security rights over them also changes. This conflict of laws rule reduces the level of predictability in a transaction, thereby increasing its risk. Mindful that greater risk translates to greater cost, the Cuming report

---

\(^8\) For a summary of the background to, and initial steps of, the initiative, see Cuming, Draft UNIDROIT Convention, supra note 7, at 365-66.


\(^10\) See generally PIERRE A. LALIVE, THE TRANSFER OF CHATTELS IN THE CONFLICT OF LAWS, 88-99 (1955) (describing the lex situs theory in private international law); P.M. NORTH & J.J. FAWCETT, PRIVATE INTERNATIONAL LAW 784 (1992) (discussing the law of the situs regarding movable and immovable property); 4 RABEL, THE CONFLICTS OF LAWS: A COMPARATIVE STUDY 30 (1958) (discussing the lex situs principle as it relates to property and contract laws). See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 244 (1971) (stating the choice of law in determining the validity and effect of conveyance of interest in chattel).
rightly noted the perceived adverse effect of the *lex situs* problem on international trade in high-value mobile equipment.\(^{11}\)

Yet, if this was the principal legal problem to be addressed in the context of international secured financing and leasing, the appropriate means to do so would have been an international conflict of laws instrument. Why, then, did the study group embark on the expediently more ambitious task of drafting a substantive Convention? There are three reasons, the first two of which were highlighted in the Cuming report.

First, the risks associated with the *lex situs* problem are magnified by the resistance to nonpossessory security interests over personalty in select countries,\(^{12}\) principally civil law jurisdictions that have historically limited security to that physically pledged to a financier.\(^{13}\) In simplest terms, nonpossessory security-type rights and interests validly created in one country might not be recognized in the courts of another country to which the underlying asset may have moved in the ordinary course of business or unpredictably.\(^{14}\)

Second, the Cuming report drew attention to the prevalence of certain national legal rules that inequitably favour domestic over foreign parties, particularly in the context of priority disputes.\(^{15}\) These two issues, the nonrecognition of nonpossessory security-type rights and interests and the prevalence of inequitable national rules, suggested fundamental substantive problems.

\(^{11}\) See Cuming Report, *supra* note 9, at 26-27, 39.

\(^{12}\) See PHILIP R. WOOD, COMPARATIVE LAW OF SECURITY AND GUARANTEES 4-5 (1995) (describing the objections to “false wealth” and ostensible creditworthiness by virtue of retaining physical possession of mortgaged assets); Goode, *supra* note 7, at 64-65 (noting that on one end of the spectrum relating to security rights generally are States “whose laws are hostile to non-possessory security interests of any kind and, indeed, [that] may be unwilling to recognise security rights at all in anything other than land.”).

\(^{13}\) Cf. WOOD, *supra* note 12, at 5-6 (classifying jurisdictions based on their sympathy or hostility to security interests and concluding that Belgium, Luxembourg, Greece, Spain, most Latin-American countries are “quite hostile” and that Austria, France, and Italy are “very hostile”).

\(^{14}\) See generally Shilling, Some European Decisions on Non-Possessory Security Rights in Private International Law, 34 INT'L & COMP. L.Q., 77, 77-93 (1995) (suggesting that in select continental European legal systems the continued validity of security-type rights created under the original *situs* is dependent upon its correspondence to a form of security recognised under the law of the second *situs*).

2.2. The Broader Aviation Sector Agenda

The third reason pointing in favour of a substantive treatment of secured transactions and leasing problems was the advice of the aviation sector, provided at the request of the study group. This advice was provided over time through the coordinated comments of an informal international grouping of major aerospace manufacturers and leasing and financial institutions as well as the International Air Transport Association ("IATA").

As an initial matter, it was noted that several of the problems mentioned above, while relevant to mobile equipment on the whole, are of marginal significance in the context of aviation law and finance. The basic issue underlying the lex situs problem is addressed in the Convention on International Recognition of Rights in Aircraft. The problem of nonpossessory security is typically solved through specific national aviation legislation in

---


17 This group is known as the Aviation Working Group ("AWG"). It was organised by Airbus Industrie and The Boeing Company. In addition to these two institutions, the other members of that group, listed alphabetically, are Bombardier, Boullioun Aviation Services, Chase Manhattan Bank, CIBC Wood Gundy, Crédit Agricole Indosuez, Deutsche VerkehrsBank, General Electric Aircraft Engines, GE Capital Aviation Services, International Lease Finance Corp., Kreditanstalt für Wiederaufbau, Pratt & Whitney, Rolls-Royce Capital Limited, Singapore Aircraft Leasing Enterprise, and Snecma.

18 The International Air Transport Association represents 260 airline members from over 150 countries carrying 98% of worldwide scheduled international air transport.

19 See Convention on International Recognition of Rights in Aircraft, June 19, 1948, art. II(1), 4 U.S.T. 1830, 1833, 310 U.N.T.S. 151 [hereinafter Geneva Convention] (requiring recognition of, inter alia, security-type rights in aircraft that have been constituted in accordance with the law of the contracting State in which the aircraft was registered as to nationality and where such rights are regularly recorded in a public record of that State). A number of countries that are not parties to the Geneva Convention would nevertheless reach similar conclusions through conflict of laws rules by applying the lex registri in relation to transfers of property interests in aircraft. The position under Austrian law is a case in point. See Austrian Federal Statute on Private International Law, §33 BGB1 304/1978.
civil law countries. These laws often conceptualise aircraft as immobile assets against which nonpossessory mortgages may be taken.

The AWG and IATA explained that their respective interests in the UNIDROIT initiative related to broader aviation sector objectives, namely the project's potential to facilitate asset-based financing and leasing. These transaction types are essential to help the world's airlines meet the unprecedented demand for aircraft equipment over the next twenty years, the estimated value of which exceeds U.S.$1.2 trillion.

2.2.1. The Commercial Objective of Facilitating Asset-Based Financing and Leasing

Asset-based financing and leasing are efficient forms of credit extension in which prompt recourse to the value of underlying assets (e.g., aircraft equipment) is a central feature in the analysis of overall risk in transactions. National legal rules that are inconsistent with the general principles underlying these transaction types impose costs: financing is comparatively more costly or, where excessive risk is present, unavailable.

The AWG and IATA indicated that they would support the initiative to the extent that its overarching objective was the facilitation of asset-based financing and leasing of aircraft equipment through increasing availability and/or reducing cost. That objective should guide the development of the proposed legal instruments. Individual provisions, and the instruments as a whole,

---

20 This is the case with the aviation legislation in Argentina. See Law No. 17.285, May 23, 1967, CÓD. AERO. art. 52.
21 See Law No. 3108, CÓD. CIV., Título 14, 756 (expanding the provisions of the Argentine Civil Code, based on the French Civil Code of 1804, that limits the granting of mortgages to immovable property); Law 340, 1869, CÓD. CIV. art. 3108 (defining a mortgage as a real right constituted as security on "immovable property which continues to be held by the debtor").
23 See Economic Implications, supra note 6, at 316. See also K.W. Heinemann, Assessing an Airline's Credit: The Lender's Perspective, in AIRCRAFT FINANCING, 246, 253 (A. Littlejohns & S. McGairl eds., 1998) (differentiating between the obligor credit risk, i.e., the risk of default, and the obligor transaction risk, i.e., the risk of loss).
24 See Economic Implications, supra note 6, at 317-18.
25 See AWG Memorandum, supra note 16, at 5.
should be continuously measured against the ability to achieve that objective.

Turning to content, it was further suggested that this central objective would be achieved if and only if the legal instruments were drafted to reflect the fundamental principles underlying asset-based financing and leasing. These principles have been articulated as follows:

A financier or lessor should be able to determine and assure itself that its proprietary interest in a financed or leased asset is superior to all potential competing claims against that asset [transparent priority principle]. [Secondly, a financier or lessor must have the ability] upon default . . . to promptly realize the value of the asset and/or redeploy that asset for purposes of generating proceeds/revenues to be applied against amounts owed [prompt enforcement principle]. [Thirdly, the rights of a financier or a lessor relating to the transparent priority principle and the prompt enforcement principle] must not be qualified or modified in the context of bankruptcy or insolvency [bankruptcy law enforcement principle].

In view of the centrality of the above-stated economic and commercial objectives, a formal study by applied economists under the auspices of the Institut Européen d’Administration des Affaires (INSEAD) and New York University’s Solomon Center was commissioned to analyse the economic implications of the Convention as modified by the Aircraft Protocol. That study predicts that the proposed law reform, if widely and effectively implemented, would produce several billion dollars in annual savings. It also concludes that these gains would be “widely shared among airlines and manufacturers, their employees, suppliers, shareholders and customers, and the national economies in which they are located.” Certain categories of benefits, such as financing cost savings, are slanted in favour of developing countries.

---

26 Economic Implications, supra note 6, at 316.
27 See Economic Implications, supra note 6.
28 See id. at 352.
29 Id.
Other types of benefits, such as fleet planning and export and employment benefits, are slanted in favour of developed countries.\textsuperscript{30}

2.2.2. \textit{Reservations as Vehicles for Balancing Commercial and Diplomatic Objectives}

It has been recognised that select provisions contained in the instruments which embody the above mentioned asset-based financing and leasing principles raise fundamental policy questions for certain countries. Yet, these are precisely the provisions that facilitate aviation credit and reduce its cost.\textsuperscript{31} Most notable in this regard are the insolvency rules,\textsuperscript{32} the timetables applicable to legal proceedings,\textsuperscript{33} the ability to take possession without the need for judicial proceedings,\textsuperscript{34} and the use of an internationally sanctioned form to facilitate nationality deregistration.\textsuperscript{35}

The instruments contain provisions that specifically contemplate and permit reservations in respect of these crucial matters.\textsuperscript{36} While use of reservations to address policy issues is customary,\textsuperscript{37}

\begin{flushright}
\textsuperscript{30} See id. at 329 (stating that access to secured leases and loans on a commercial basis will be improved for developing and emerging-market countries).
\end{flushright}

\begin{flushright}
\textsuperscript{31} See id. (noting the centrality of these provisions in predicting financing-related benefits).
\end{flushright}

\begin{flushright}
\textsuperscript{32} See infra notes 196-212 and accompanying text (discussing insolvency-related provisions).
\end{flushright}

\begin{flushright}
\textsuperscript{33} See infra notes 182-95 and accompanying text (discussing expedited remedies).
\end{flushright}

\begin{flushright}
\textsuperscript{34} See infra notes 174-81 and accompanying text (discussing non-judicial remedies).
\end{flushright}

\begin{flushright}
\textsuperscript{35} See infra notes 178-81 and accompanying text.
\end{flushright}

\begin{flushright}
\textsuperscript{36} See Convention, supra note 3, arts. Y(2), Z (regarding nonjudicial remedies and expedited judicial relief, respectively); Aircraft Protocol, supra note 5, art. XXX (regarding, \textit{inter alia}, timetables for judicial proceedings and for nationality deregistration).
\end{flushright}

\begin{flushright}
\textsuperscript{37} See, e.g., \textit{U.N. Conference on Contracts for the International Sale of Goods}, 19 I.L.M. 668, art. 92, U.N. Doc. A/C.97/18 (1980) (permitting exclusion of provision addressing the formation of a contract and of provision addressing contractual performance and remedies for breach of contract); Convention, supra note 3, art. 95 [hereinafter CISG] (permitting nonapplication of art. 1(1)(b), which provides for the application of the Convention where, although the transaction parties are not from different contracting States, the private international law rules of the forum would apply the law of a contracting state); UNIDROIT Convention on International Financial Leasing, May 28, 1988, 27 I.L.M. 931, art. 20 [hereinafter International Financial Leasing Convention] (permitting a declaration that national law, rather than a provision which limits the ability of transaction parties from derogating from their quiet possession

https://scholarship.law.upenn.edu/jil/vol20/iss3/6
their central use as a basic feature of these treaty instruments is innovative when viewed against the backdrop of recent international commercial law instruments. Accordingly, governments will be given the opportunity to weigh their economic versus non-economic interests and policies and decide, when ratifying the instrument, whether to opt in or out of these critically important provisions. They are elective, but they have financial implications for the electors. The elective nature of these provisions also has important drafting implications. It permits the Convention and Aircraft Protocol to contain clear, commercially valuable rules. Generalised and vague “compromise” standards that undercut predictability will be avoided.

2.2.3. Deference to Party Autonomy

A general trend toward deference on contractual matters to the autonomy of sophisticated transaction parties with comparable bargaining power is readily apparent. This is the case in the context of international legal rules. It is also evident in civil law and common law systems.

This trend is understandable in light of the general rationale for limiting party autonomy: concerns about substantive or procedural unfairness. One would be hard pressed to identify a transaction type in which this trend is more justified than struc-

---

obligation where the cause of the breach of the obligation is attributable to an act or omission of lessor, will apply when national law does not permit a lessor to exclude its liability for its default or negligence).


39 See Economic Implications, supra note 6.


41 Countries as varied as Japan, Russia, Switzerland, and Venezuela have rules that uphold contractual clauses stipulating the law to govern contractual aspects of commercial transactions. See, e.g., G. McBAIN & RICHARD HAMES, AIRCRAFT FINANCE: REGULATION, SECURITY AND ENFORCEMENT (1998).

42 See, e.g., N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989) (permitting parties to contracts exceeding U.S.$250,000 to select New York law to govern their rights and duties regardless of whether such contract bears a reasonable relation to New York).
tured financing, and the secured financing and leasing of aircraft equipment in particular. Aircraft financing transactions are generally carried out among highly sophisticated parties represented by specialised international legal advisors. \(^{43}\) The financial value of the transactions \(^{44}\) is such that great care is paid to ensure that their particular features reflect the commercial expectations of the parties, most notably in terms of risks and benefits allocations. \(^{45}\) Finally, governmental involvement in aircraft financing transactions is significant on both the debtor \(^{46}\) and creditor \(^{47}\) sides. A restriction on the ability of parties to enforce their contractual agreement is often a restriction on the ability of governments to effectuate financing programs.

3. **Structure of Instruments: Framework Convention and Controlling Sectoral Protocols**

3.1. **Relationship Between Convention and Protocols**

While the Convention applies to various categories of specifically identifiable high-value mobile equipment, it takes effect regarding any particular category only from the time of entry into

---

\(^{43}\) A specialised international bar has developed. There are active sections in each of the International Bar Association, Inter-Pacific Bar Association, and American Bar Association specialising in aeronautical and/or aircraft financing law. More than ten regularly scheduled specialised legal conferences or meetings are held each year addressing aviation finance topics.

\(^{44}\) Financing amounts may exceed U.S.$100,000,000 in transactions for the acquisition of a new wide-bodied aircraft manufactured by Airbus or Boeing.

\(^{45}\) For example, financing transaction documents typically contain mandatory termination events linked to issues outside the reasonable control of either party, such as the imposition of increased costs as a result of regulatory changes or the transaction documents becoming illegal on account of a change of law. *See generally* Heinemann, *supra* note 23, at 281-302.

\(^{46}\) While the last decade has witnessed increased airline privatisations, the majority of the world’s airlines remain government-owned or controlled.

\(^{47}\) A significant percentage of aircraft financing transactions are supported by “export credit financing,” which may be defined as credit, guarantees, or other financing support provided by governments (or governmentally owned or mandated corporations or entities) for the specific purpose of facilitating the sale and export from their countries of aircraft equipment. *See Economic Implications, supra* note 6, at 330-31. Such export credit financing is regulated under the auspices of the Organisation for Economic Cooperation and Development. For a brief summary, see R. Murphy, *Export Credit Agency Support, in Aircraft Financing* 47-57 (A. Littlejohns & S. McGairl eds., 1998).
force of a protocol covering that particular category. The Convention will take effect, for any category of equipment covered by a protocol, only between contracting States to that protocol and, crucially, subject to the terms of that protocol. The cumulative effect of these provisions is clear; the Convention provides a general conceptual framework, but specific protocols control.

3.2. Rationale for Framework Convention with Controlling Protocols

The framework Convention with controlling protocols approach, while a technically permissible means of treaty making, is unorthodox and produces complex instruments. One can only understand its rationale in the context of the ambitious nature and wider law reform objectives of the UNIDROIT initiative and the practical alternatives to this approach.

Although a useful grouping, "mobile equipment" is not a unitary concept. While most national legal systems contain general rules for secured and leasing transactions involving a wide-range of personal property, they will often apply specialised, supersed ing rules in the context of transportation-related equipment financing. These specialised rules are typically set out in specific legislation, both in civil law and common law systems. Different parts of government may well have supervisory responsibility

48 See Convention, supra note 3, art. U(1)(a).
49 See id. art. U(1)(c).
50 See id. art. U(1)(b).
51 The law of international agreements has been codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. That instrument, which addresses international law-making by purposeful agreement among States, defines a "treaty" to include, where appropriate, "two or more related instruments." See id. art. 2(1)(a). This provision captures the notion that the intent to be bound, rather than the terminology employed, is dispositive. Cf. RESTATEMENT OF FOREIGN RELATIONS LAW § 301 cmt. (a) (1987).
52 More commonly, protocols, as subsequent amending instruments, control regarding their narrow subject matter. The subsequent protocols to the Convention for the Unification of Certain Rules Relating to International Transportation by Air are a case in point. See 17 ANNALS AIR & SPACE L., pt. III, at 321-515 (1993) (reproducing the full texts of the seven subsequent instruments amending the base Convention, including six protocols).
53 Even aspects of the well-developed secured transactions system under Article 9 of the Uniform Commercial Code are superseded by specific perfection requirements set out in federal law. See U.C.C. § 9-104(a) (1995); see also 49 U.S.C. § 44107 (1998).
for different types of mobile equipment. Moreover, different types of mobile equipment are regulated internationally by specialist bodies. They are also subject to specialized international treaties. Finally, and importantly, different types of equipment are subject to specialised financing customs, norms, and practices.

In view of the foregoing, it became apparent that any effort to pursue strict international harmonisation across equipment types would face difficulties. At best, it would materially delay project completion. At worst, it would result in the failure of the entire exercise. The only viable alternative to the adopted approach would be a set of equipment-specific stand-alone conventions. This alternative, which may be revisited during the intergovernmental process, was rejected by the study group and Governing Council of UNIDROIT as inconsistent with the wider law reform objective of efficiently upgrading commercial law generally.

3.3. Application of Convention Through Aircraft Protocol

3.3.1. Process Employed in the Development of Aircraft Protocol

At the invitation of the President of UNIDROIT, a working group ("Aircraft Protocol Group") was organised in early 1997 to prepare a draft of the Aircraft Protocol. Representatives of ICAO, IATA and AWG constituted the core membership of the

---


56 See Letter from Professor L.F. Bravo to Mr. J. Wool (Feb. 10, 1997) (on file with author).
Aircraft Protocol Group. Numerous others were involved in its work.

After circulating an outline and working draft of the Proposed Aircraft Protocol, the Aircraft Protocol Group held its first working session at ICAO headquarters in Montreal from 25-27 August 1997. The Aircraft Protocol Group held its second session at the offices of IATA in Geneva from 19-21 November 1997, using the draft produced after the first session as its working document. Following that meeting, a final version of the Draft Aircraft Protocol, prepared under the auspices of the Aircraft Protocol Group, was circulated and agreed upon by its core members.

In early 1998, the final version of the Draft, together with the text of the Draft Convention prepared by the study group, was

---

57 Dr. L. Weber, Director, Legal Bureau, represented the ICAO Secretariat. Mr. L. Clark, General Counsel and Corporate Secretary, represented IATA. Mr. J. Wool, Counsel to the AWG, represented that group.

58 Observers from Canada, China, Colombia, France, Germany, India, Indonesia, Ireland, Nigeria, the Russian Federation, the United Kingdom, the United States of America, and the Commission of the European Union were involved in one form or another in the work of the Aircraft Protocol Group.


62 See id.

63 See Preliminary Draft Protocol on Matters Specific to Aircraft Equipment as Established by a Working Group Organised by Mr. J. Wool, Expert Consultant to the Study Group on International Aviation Finance Matters, at the Invitation of the President, at the Conclusion of its Second Session, UNIDROIT 1998 Study LXXIID-Doc. 1 (Nov. 21, 1997) [hereinafter Preliminary Draft Aircraft Protocol (Aircraft Protocol Group)] (stating that the draft was then revised in light of comments of the Aircraft Protocol Group and observers thereto).

64 See id.

65 See Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment as Established by the Study Group at the Conclusion of its Fourth Session, UNIDROIT 1997 Study LXXII-Doc. 37 (Nov. 7, 1997).
submitted to the Governing Council of UNIDROIT. With a view toward facilitating governmental review of the two instruments, the Governing Council decided that the instruments required further refinement, coordination and alignment, in both style and terminology, by a steering and revisions committee. The product of that committee's work was then transmitted to governments by UNIDROIT for their formal consideration.


68 See id. at 39 (noting that the steering and revisions committee should be open to representatives of UNIDROIT, ICAO, and, as core members of the Aircraft Protocol Group, IATA and AWG) "Its terms of reference should be to co-ordinate the preliminary draft Convention and [aircraft] protocol throughout intergovernmental negotiations, in particular so as to reflect decisions taken and comments received, and to deal with other matters relating to the preparation of these texts for adoption at a diplomatic Conference. It should be able to co-opt such experts as might be required to deal with special aspects of the texts." See id.

69 See Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment, UNIDROIT 1998 Study LXXII-Doc. 42; Preliminary Draft Protocol to the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, UNIDROIT 1998 Study LXXXII-Doc. 3. The deliberations of the steering and revisions committee have been summarised in a report prepared by the UNIDROIT Secretariat. See SRC M.1 Report, supra note 55. In addition to summarising the agreed upon changes from the drafts produced by the study group and Aircraft Protocol Group, respectively, and submitted to the UNIDROIT Governing Council, the SRC M.1 Report summarises a set of policy questions to be addressed by governments in the upcoming intergovernmental preparations. See id. at 30-39.

70 The Convention, supra note 3, and the Aircraft Protocol, supra note 5, were first transmitted to UNIDROIT Member States in July/August 1998 through their respective embassies in Italy. The covering correspondence provided a terse summary of the sequence of events leading up to that transmission. While Goode, supra note 7, was contained in the distributed materials, no official commentary or report was sent. The SRC M.1 Report, supra note 55, serves that function, in part. The need remains, however, for extensive explanatory materials that, subject to the concurrence of governments, may develop into formal commentary. See infra notes 372-79 and accompanying text.

71 UNIDROIT's processes contain two distinct stages. The first is a preparation of preliminary draft instruments by a small group of experts sitting in a non-governmental capacity. The second is a consideration of that instrument by a much larger group of experts representing UNIDROIT Member States. It is during the second stage that the preliminary draft text is converted into a draft instrument capable of being submitted to a diplomatic conference. See Towards Adoption of the Proposed Convention and Protocol, Remarks at the Spe-
Those documents were also transmitted by ICAO to its Member States.

The first session of intergovernmental negotiations relating to the instruments took the form of a joint session of UNIDROIT governmental experts and a subcommittee of the Legal Committee of ICAO.\(^2\)

3.3.2. Basic Approach of Aircraft Protocol Group in Preparation of Aircraft Protocol

Because a number of central concepts previously advocated by the aviation sector had been gradually integrated into the fabric of the framework Convention,\(^3\) the Aircraft Protocol Group was able to concentrate its efforts on matters required to meet the needs of aircraft financing and to coordinate with existing international aviation law.

As a starting point, the Aircraft Protocol Group confirmed its intent to pursue the broader objectives previously articulated by representatives of the aviation sector.\(^4\) That intent, duly reflected in the preamble to the Aircraft Protocol,\(^5\) was recorded in the introductory remarks to the chairman’s report of the first meeting of the Aircraft Protocol Group as follows:

There was agreement on the basic objective of the Aircraft Protocol Group. That objective is to prepare a draft legal instrument that has the potential to both (i) significantly facilitate the asset-based financing of the aircraft objects, in terms of reducing the cost and increasing the availability of such financing and (ii) gain wide acceptance from States.

\(^2\) As noted in Convention, supra note 3, that session was held 1-12 February 1999 in Rome. Convention, supra note 3, and Aircraft Protocol, supra note 5, reflect the changes to the texts resulting from the decisions made at that session.

\(^3\) For example, (i) the proposed expedited judicial relief provision, discussed infra notes 182-95 and accompanying text, (ii) the proposed treatment of non-consensual rights and interests, discussed infra notes 219-27 and accompanying text, and (iii) numerous features of the proposed framework applicable to the international registry system were developed by the study group from aviation sector recommendations. See also supra note 16.

\(^4\) See supra notes 23-47 and accompanying text.

\(^5\) See Aircraft Protocol, supra note 5, preamble.
As regards the former, it was agreed that the principles underlying asset-based financing and the notion of transaction party autonomy (re matters \textit{inter se}) would guide the Aircraft Protocol Group in its work. As regards the latter, the importance of a high quality government consultation process was acknowledged. . . . The aircraft protocol group agreed, as a general principle, that the use of provisions on which reservations are expressly permitted . . . offer[s] a means of avoiding tension between the two strands of the basic objective [in the preceding paragraph], and would thus enable the Aircraft Protocol Group to pursue them in tandem. [Such] provisions would address matters that directly relate to the asset-based financing principles yet have the potential to raise policy questions under many national legal systems.\footnote{APG M.1 Report, \textit{supra} note 61, (iii).}

The Aircraft Protocol opens with precise definitions of the types of aircraft equipment covered.\footnote{See infra notes 115-18 and accompanying text.} Several provisions in the Aircraft Protocol are drafted with reference to the asset-based financing principles articulated above. These provisions expand upon the provisions in the Convention.\footnote{See, e.g., \textit{Aircraft Protocol, supra} note 5, arts. IX(1) (adding aircraft specific remedies), IX(3) (defining commercial reasonableness in relation to the exercise of remedies), X(1) (defining “speedy” in the context of obtaining expedited judicial relief), XI (adding a special insolvency provision), XII (adding an international insolvency cooperation provision), XIII (adding an international form of de-registration request).} Other provisions in the Aircraft Protocol broaden the scope of the Convention—beyond secured type and leasing transactions—to apply to select issues involving the outright sale of aircraft equipment.\footnote{See id. arts. IV (listing the provisions in the Convention applicable to outright sales), V (delineating the formalities and effects of a contract of sale). The extension of these concepts to the generality of mobile equipment will be considered by governments. See also SRC M.1 Report, \textit{supra} note 55, at 38.} An example is the application of the Convention’s priority rules.\footnote{See \textit{Aircraft Protocol, supra} note 5, arts. IV (noting the applicability of Chapter VII, the Convention’s priority rules, to sales), XIV (modifying those priority rules in light of the registrability of sales transactions).} Other important matters addressed in the Aircraft Protocol include the
specific characteristics of the future aircraft registry, the relationship with the Geneva Convention and the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft, and the broadening of the proposed jurisdictional rules.

3.3.3. Institutionalising and Updating the Treaty Instrument

The view of the Aircraft Protocol Group on the notion of institutionalising and updating the treaty instrument is noteworthy. The Aircraft Protocol contains a provision which states in effect that, at the request of a specified percentage of contracting States to the Aircraft Protocol, review conferences shall be convened from time to time to consider, inter alia, the practical operation of, and the desirability of amendments to, the Aircraft Protocol. A standing review board will be created to issue yearly reports in order to help prepare contracting States for these conferences.

The basic purpose of specifically contemplating review conferences is to ensure that the Convention, as implemented by the Aircraft Protocol, remains responsive to the future needs and requirements of the international aviation community. In addition to dealing with textual or interpretive problems and the operation of the international registry, the review conferences will provide contracting States with an opportunity to incorporate changes in customs and practices associated with the asset-based financing of

---

81 See id. ch. III; see also infra notes 241-96 and accompanying text.
82 See Aircraft Protocol, supra note 5, art. XXII; see also infra notes 341-60 and accompanying text.
84 See Aircraft Protocol, supra note 5, arts. XX (confering jurisdiction on courts located in the state of nationality registration), XXI (adding a "waiver of sovereign immunity" provision); see also infra notes 317-26 and accompanying text.
85 The proposed percentage would be twenty-five percent. See Aircraft Protocol, supra note 5, art. XXXIV (2).
86 See id.
87 See id. art. XXXIV(1) (noting that the contemplated five-member review board will be organised by UNIDROIT and ICAO in consultation with other aviation interests).
aircraft equipment. Given the great cost and time\textsuperscript{88} required to prepare and agree on these international instruments, efforts have been made to institutionalise the treaty framework, as well as to anticipate and facilitate its evolution.\textsuperscript{89}

4. **SALIENT FEATURES AND PROVISIONS OF TREATY INSTRUMENTS**

This part of the article will describe the salient features and provisions of the legal instruments. Since the Convention is subject to the terms of the Aircraft Protocol,\textsuperscript{90} and the two texts are to be read and interpreted as a single instrument,\textsuperscript{91} this description will make no distinction between the terms of the Convention and those of the Aircraft Protocol. The single instrument will henceforth be referred to as the Convention/Aircraft Protocol. Precise citations will then direct the reader to the relevant source, be it the Convention and/or the Aircraft Protocol.

4.1. **Sphere of Application and General Provisions**

4.1.1. **Autonomous International Interests in Aircraft Equipment**

The notion that lies at the conceptual centre of the Convention/Aircraft Protocol is that of an international interest,\textsuperscript{92} that is, a proprietary interest in mobile equipment created by complying with the simple requirements contained in the Convention/Aircraft Protocol.\textsuperscript{93} The interest, to be recognised internationally, is "autonomous" in the sense that it neither derives from nor depends upon any particular national law.\textsuperscript{94}

\textsuperscript{88} Ten years have passed since the proposal of the initiative, and six years have passed since the authorisation of the UNIDROIT study group. See supra notes 8, 9 and accompanying text.

\textsuperscript{89} One example may be changes, in due course, to reflect the policies underlying Article 83\textsuperscript{bis}. See infra notes 339, 348 and accompanying text.

\textsuperscript{90} See Convention, supra note 3, art. U(1)(b).

\textsuperscript{91} See id. art. U(2).

\textsuperscript{92} See id. arts. 1 (definition of "international interest"), 2(1).

\textsuperscript{93} See infra notes 140-47 and accompanying text.

\textsuperscript{94} While the word "autonomous" was not used in the Convention/Aircraft Protocol, it did appear in earlier drafts. See, e.g., First Set of Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment, UNIDROIT 1996 Study LXXII-Doc. 24, art. 1(1) (noting the "autono-
An international interest may, in fact, also constitute a proprietary interest under national law. However, this is not a condition to the creation of the Convention/Aircraft Protocol interest. Simply put, if the treaty's creation requirements are satisfied, the interest will be enforceable between transaction parties in any contracting State, whether or not it also constitutes a national security-type or leasing interest in that State.\(^95\) Courts are also instructed not to subvert the creation of international norms through nationalistic interpretation of these treaty creation criteria.\(^96\) The inverse of this proposition is that a validly created national interest will not be enforceable between transaction parties under the Convention/Aircraft Protocol unless that interest also complies with the treaty's creation requirements.\(^97\)

Parallel reasoning is employed with respect to the effect of an international interest on the rights of third parties, that is, the priority rules. The Convention/Aircraft Protocol sets out rules of decision to determine the priority of an international interest as against competing interests in the same property. Subject to the debate surrounding the question of non-consensual rights and interests,\(^98\) the Convention/Aircraft Protocol priority rules will trump national priority rules.\(^99\) National law does, however, remain highly relevant under the legal regime established by the Convention/Aircraft Protocol. Beyond direct references in the Convention/Aircraft Protocol to national law (in Convention parlance, "applicable law") that address select issues,\(^100\) there is the now customary gap-filling provision, traceable to the CISG,\(^101\) which states that questions not expressly settled by the treaty in-

---

\(^95\) See Goode, supra note 7, at 66.

\(^96\) See Goode, supra note 7, at 74.

\(^97\) See Goode, supra note 7, at 74.

\(^98\) See infra notes 219-27 and accompanying text.

\(^99\) See infra notes 213-18 and accompanying text.

\(^100\) See, e.g., Convention, supra note 3, arts. 12 (referring to local procedural law in relation to an exercise of remedies), 13 (permitting additional remedies), 36 (retaining legal subrogation).

\(^101\) See CISG, supra note 37, art. 7(2). For a comprehensive treatment of this norm as developed from its initial articulation in the CISG, see Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U. PA. L. REV. 687 (1998).
instrument or the general principles on which it is based are to be settled in conformity with the applicable law. 102

4.1.2. Covered Transaction Types and Related Concepts and Definitions

The Convention/Aircraft Protocol sets out three transaction types that create international interests: an interest granted under a security agreement, 103 one vested in a conditional seller under a title reservation agreement, 104 and one vested in a lessor under a leasing agreement. 105 While certain legal systems which follow a functional approach to the question of whether security-type rights exist might disregard distinctions between these three categories of interests, 106 the categories have been employed to respect the vast majority of legal systems that draw distinctions between security- and title-type interests, 107 as well as sub-distinctions between different types of title-based interests. 108 The Convention/Aircraft Protocol defers to the applicable law to determine the categorisation of an interest. 109 If applicable law respects the integrity of a title-based interest, it will retain that characterisation for purposes of the Convention/Aircraft Protocol. Conversely, if a title-based interest is recharacterised under applicable law as a security interest, it will be categorised as the latter for

102 See, e.g., Convention, supra note 3, art. 6(2) (discussing conformity with applicable law).
103 See Convention, supra note 3, arts. 1 (defining “security agreement” to include security for the performance of future obligations of the chargor or a third party and also defining “security interest”), 2(2)(a).
104 See Convention, supra note 3, arts. 1 (defining “title reservation agreement”), 2(2)(b).
105 See Convention, supra note 3, arts. 1 (defining “leasing agreement” without reference to any minimum duration and including subleases, but excluding non-possessory wet leases), 2(2)(c).
107 This is the case not only in most civil law systems but also in the common law world outside of North America. Cf. Goode, supra note 7, at 70.
108 See id. (noting the sensitivity among leasing interests that leases not be characterised as title-retention agreements); see also Comments, European Federation of Equipment Leasing Company Associations, UNIDROIT 1995 Study LXXII-Doc. 17 add. 2 (seeking to distinguish the concept of right of ownership from the concept of the security interest).
109 See Convention, supra note 3, art. 2(3); see also id., art. 6(2) (concerning applicable law).
purposes of the Convention/Aircraft Protocol. The point is more important conceptually than practically. There are few substantive distinctions in the instrument among the different categories of international interests. The most notable sub-
distinction is contained in separate default remedies. 110

While they do not constitute an international interest for all purposes, contracts of sale also fall within the sphere of application of the Convention/Aircraft Protocol. 111 In particular, the treaty sets out validity criteria 112 and priority rules 113 to cover this transaction type. The comments made above regarding the relationship between the Convention/Aircraft Protocol and national law 114 apply equally to contracts of sale regarding issues covered by the treaty.

To fall within the sphere of application of the Convention/Aircraft Protocol, the international interest or contract of sale must relate to a specifically identifiable “aircraft object,” 115 which consists of “airframes,” 116 “aircraft engines,” 117 or “helicopters” 118 as these terms are defined. The Convention/Aircraft Protocol addresses only those types of aircraft objects likely to be used internationally and financed by sophisticated parties. Airframes, aircraft engines, or helicopters that fall outside of these definitions will be unaffected by the Convention/Aircraft Protocol.

A carefully considered decision was made to treat airframes and aircraft engines separately. Except in the case of the remedy of deregistering an aircraft from the applicable nationality register under the Chicago Convention, 119 airframes and aircraft engines are separate aircraft objects for all purposes of the Conven-

110 Compare Convention, supra note 3, art. 8 (chargee's default remedies), with art. 10 (conditional seller's and lessor's default remedies).
111 See Convention, supra note 3, art. 1 (defining a “contract of sale”); Aircraft Protocol, supra note 5, art. IV.
112 See Aircraft Protocol, supra note 5, art. V(1).
113 See Convention, supra note 3, art. 27; Aircraft Protocol, supra note 5, art. XIV.
114 See supra notes 94-97 and accompanying text.
115 See Aircraft Protocol, supra note 5, art. I(2) (defining “aircraft objects”).
116 See id. art. I(2) (defining “airframes”).
117 See id. (defining “aircraft engines”).
118 See id. (defining “helicopters”).
119 See id. art. IX(1) (referring to the “aircraft” for purposes of the deregistration and export remedies).
tion/Aircraft Protocol. Accordingly, a separate aircraft engine registry or sub-registry will be created.\textsuperscript{120} This decision was made in recognition of the need to facilitate the separate financing of aircraft engines,\textsuperscript{121} and the far from satisfactory, and internationally inconsistent, legal rules applicable to property interests in aircraft engines.\textsuperscript{122}

The Convention/Aircraft Protocol also sanctions the use of complex trust and agency structures common in aircraft financing and leasing transactions.\textsuperscript{123} Similarly, the treaty permits filings of prospective interests, i.e., interests intended to be granted in the future,\textsuperscript{124} in a manner responsive to the practicalities of aircraft financing closings.\textsuperscript{125}

\section*{4.1.3. Per Se Internationality}

International commercial law treaties generally contain an "internationality requirement" designed to ensure that sufficient factual grounds exist for the application of international, rather than national, rules to a particular transaction. While there has been movement toward lessening this requirement in recognition of the long reach of international trade and finance generally,\textsuperscript{126} it remains a basic feature of the treaty architecture.

\begin{footnotes}
\item[120] Cf Convention, supra note 3, art. 16(3). There is no provision that expressly states that a separate registry or subregistry for aircraft engines will be created. Inserting such a provision was deemed unnecessary given the designation of aircraft engines as a separate category of objects to which the Convention applies.
\item[122] See id.; see also C. Thaine, Can One be Serious About Secured Financing of Spare Engines?, Mar. 5-6, 1998 (London, Wilde Sapte, Pointers) (copy on file with author) (using a hypothetical to consider the problem of secured financing of aircraft); see generally WOOD, supra note 12, at 219-21 (discussing ship and aircraft mortgages).
\item[123] See Aircraft Protocol, supra note 5, art. VI.
\item[124] See infra notes 309-14 and accompanying text.
\item[125] See id.
\end{footnotes}
Deviating from customary practice, the Convention/Aircraft Protocol will apply in contracting States to all transactions involving international interests in, or contracts for sale of, aircraft objects, regardless of whether the transaction parties are domestic or foreign, or whether the aircraft object has been used, or is being used, domestically or internationally. The decision was taken to deem conclusively that the internationality requirement was satisfied by virtue of the mobile nature of aircraft objects. The potential concern about imposing international rules on wholly domestic transactions was thought to be outweighed by the need to provide commercial predictability. Since it is reasonably likely that aircraft objects will at some point be used internationally, yet impossible to know ex ante whether this will be the case, any system other than one centered on per se internationality would result in double filings, unnecessary legal risk, and other inefficiencies.

4.1.4. Connecting Factor to a Contracting State

Whereas an internationality requirement seeks to shield domestic transactions from international rules, the traditional “connecting factor” requirement serves a different purpose. It seeks to ensure that there is a nexus between a contracting State and the relevant international transaction to justify application of a treaty norm.

The Convention/Aircraft Protocol contains provisions limiting its application to transactions in which (a) the debtor in a secured transaction—a buyer under a title reservation agreement or

---

127 This could fairly be described as an internationality requirement broadly comparable to that in the CISG. See CISG, supra note 37, art. 1(1) (limiting the Convention to transactions between parties whose places of business are in different States: (a) when the States are contracting States, or (b) when the rules of private international law lead to the application of a law of a Contracting State). Compare International Financial Leasing Convention, supra note 37, art. 3(1), with United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, December 11, 1995, 35 I.L.M. 735, art. 1(1).

128 See Aircraft Protocol, supra note 5, art. III(2) (disapplying Convention Article V, a provision that permits a contracting State to declare that the Convention will not apply in relation to a purely domestic transaction).

129 For background of this decision, see AWG Memorandum, supra note 16, at footnote 14 and accompanying text.

130 See id.
a lessee in a leasing agreement— is situated in a contracting State or (b) the subject aircraft or helicopter is registered in a contracting State for purposes of the Chicago Convention.

4.1.5. Ability to Derogate and Vary Provisions

The party autonomy principle discussed above is reflected throughout the Convention/Aircraft Protocol. It first appears in the general provisions. In their relations with each other, the transaction parties may agree, with narrow fairness-based limitations, to derogate or vary the effect of any of the default remedy provisions. Of course doing so would not, and could not, affect the rights or interests of any third parties with an interest in the underlying aircraft object.

4.1.6. Choice of Law on Contractual Matters

The party autonomy principle may also be seen in the contractual choice of law provision. The parties to a transaction covered by the Convention/Aircraft Protocol may agree on the substantive law to govern their contractual rights and obligations, wholly or in part. There is no requirement that the selected law bear a relationship, reasonable or otherwise, to the underlying transaction or parties. This standard is consistent with recent treaties and the rules under many national legal systems. Nonetheless, contracting States may enter a reservation regarding

---

131 See Convention, supra note 3, art. 1 (defining “obligor” as a chargor, conditional buyer, lessee, or as a person whose interest in an object is burdened by a registrable non-consensual right or interest). Hereinafter, the term “obligor” will be used in reference to voluntary obligors.

132 See id. art. 4 (a party is situated in a contracting State if it is incorporated or has its registered office, centre of control, or place of business in that State).

133 See id. art. 3(1)(a).

134 See id. art. 3(1)(b); Aircraft Protocol, supra note 5, art. III(1).

135 See Convention, supra note 3, arts. 8(2)-(6), 9(3)-(4), 12(1), 13.

136 See id. art. 5.

137 See Aircraft Protocol, supra note 5, art. VIII(1).

138 Cf. id. There was an express statement as to the absence of that requirement in the draft of the Aircraft Protocol established by the Aircraft Protocol Group. See Preliminary Draft Aircraft Protocol (Aircraft Protocol Group), supra note 63, art. XX(1). It was deleted on the grounds that it was self-evident and thus unnecessary.

139 See supra notes 40-42 and accompanying text.
the provision if it should be unacceptable from a policy perspective.

4.2. Constitution of International Interests and Contracts of Sale

An international interest is constituted under the Convention/Aircraft Protocol when the relevant agreement satisfies four conditions. First, the agreement must be in writing. Second, it must relate to an aircraft object of which the obligor has the power to dispose. Third, the agreement must describe the aircraft object with reference to its manufacturer's serial number, the name of the manufacturers, and its model designation. Fourth, in the event the agreement is a security agreement, it must enable the secured obligations to be determined.

The satisfaction of these four conditions is both necessary and sufficient to constitute an international interest. In each case, in accordance with the Convention/Aircraft Protocol, no additional requirements under national law need be satisfied as a condition to the exercise of default remedies or, in the event a filing is made with the international registry, to the establishment of priority.

It should be noted that the second condition mentioned above, namely, that the obligor has the power to dispose of the aircraft object, does implicate numerous factual and legal issues.

---

140 See Convention, supra note 3, arts. 1 (defining "writing" generally to mean a record of information that is in tangible form or is capable of being reproduced in tangible form and noting that the agreement must be in writing), 7(a) (noting that the agreement must be in writing).

141 See id. art. 7(b).

142 See id. art. 7(c); Aircraft Protocol, supra note 5, art.VII.

143 See Convention, supra note 3, art. 7(d). This subclause also contains wording that confirms that there is no requirement to state a sum or maximum sum secured in the description of the secured obligations.

144 While the exhaustive character of these conditions is not so stated, this is the intent. Otherwise, the basic notion of establishing a uniform standard for the creation of security-type interests in mobile equipment would be seriously prejudiced. See SRC M.1 Report, supra note 55, at 8, 13-14. Consideration should be given to affirmatively stating this proposition. See id. at 13 (noting that one possible means of addressing the matter would be to add a provision along the following lines: "[r]ules of law otherwise applicable to an agreement shall not apply in respect of the creation, perfection or priority of an international interest").
These issues will be addressed by applicable law through the gap-filling procedure described above. Throught it does not employ the same terminology used with respect to the constitution of international interests, the Convention/Aircraft Protocol also sets out quite similar validity criteria for contracts of sale. If: (1) an agreement for the sale of an aircraft object is in writing, (2) the seller has the power to dispose of that aircraft object, and (3) the agreement identifies the aircraft object by the manufacturer's name, serial number, and model designation, then the contract transfers the interest of the transferor in the aircraft object to the transferee in accordance with its terms under the Convention/Aircraft Protocol.

4.3. Remedies Available Upon Default

A main feature of the Convention/Aircraft Protocol is the inclusion of basic remedies available to a chargee in a secured transaction, a seller under a title reservation agreement, and a lessor under a leasing agreement in the event of a default by an obligor. Subject to the satisfaction of the connecting factor condition, these basic remedies will be available in any contracting State in which the aircraft object is then situated. In view of the limited function of the international registry—which is solely a notice-giving and priority-determining instrumentality—default remedies may be exercised against an obligor whether or not a filing that reflects the international interests has been made in the international registry.

145 See supra note 102 and accompanying text.
146 See Aircraft Protocol, supra note 5, arts. V(1), VII.
147 See id. art. V(2).
148 See Convention, supra note 3, art. 1 (defining "obligee" as a chargee, conditional seller, or lessor). Hereinafter, the term "obligee" will be used in reference to such parties.
149 For a description of the corollary jurisdictional provision, see infra note 318 and accompanying text, and SRC M.1 Report, supra note 55, at 34.
150 See infra notes 241-52 and accompanying text.
151 Compare Convention, supra note 3, ch. III, with Aircraft Protocol, supra note 5, art. IX. Neither of these sources conditions the exercise of remedies on registration. See also Goode, supra note 7, at 66 (discussing the role of registration with regard to the parties involved in the transaction).
4.3.1. Definition of Default

Reflecting once again the party autonomy principle, the transaction parties are at liberty to provide in their agreement for the kind of default, or event other than default, that will give rise to the remedy provisions in the Convention/Aircraft Protocol. The reference to events other than default is intended to capture, *inter alia*, mandatory termination events, a common vehicle for the allocation of major risks in aircraft financing and leasing transactions.

In the event the transaction parties do not set out the definition of default in their agreement—a highly unlikely circumstance in the context of aircraft financing—a "substantial default" is required in order to give rise to the remedies under the Convention/Aircraft Protocol. While the Aircraft Protocol Group sought to codify into rule-form all vague, open-textured standards appearing in the Convention, the concept of a substantial default was not altered since the parties are free to contractually override that standard.

4.3.2. Substantive Remedies

A chargee under a security agreement may exercise one or more of the following remedies in the event of default: first, it may take possession or control of any aircraft object charged to it; second, it may sell or grant a lease of such object; and third, it may collect or receive any income or profits arising from the use of the aircraft object. Where the sums collected or received exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of its remedies, unless otherwise ordered by the court, the chargee shall pay that excess to the holder of any international interest registered immediately af-

---

152 See Convention, supra note 3, art. 11(1).
153 See id. art. 11(2).
154 See, e.g., Aircraft Protocol, supra note 5, arts. IX(3)(b)(1) (defining "commercially reasonable" for purposes of Ch. III of the Convention), IX(4) (defining "reasonable prior notice" for purposes of Convention art. 9(3)), X (defining "speedy judicial relief" for purposes of Convention art. 14(1)). For the two remaining open-textured standards, public order and public policy, see infra notes 166-70 and accompanying text.
155 But cf. Convention, supra note 3, art. Y(1) (permitting a declaration that prevents a chargee from granting a lease).
156 See generally id. art. 8(1) (describing the remedies available to a chargee).
ter its own, if any, or if none, to the chargor.\textsuperscript{157} A chargee may apply for a court order to effectuate each of the foregoing remedies. Additionally, a chargee may deregister an aircraft from the relevant Chicago Convention nationality register.\textsuperscript{158} It may also export and physically transfer the aircraft object from the territory in which it is situated.\textsuperscript{159}

A conditional seller under a title reservation agreement or a lessor under a leasing agreement may, in the event of default by the conditional buyer or lessee, respectively, “terminate the agreement and take possession or control of any [aircraft] object to which the agreement relates.”\textsuperscript{160} The conditional seller or lessor may also apply for a court order to effectuate each of the foregoing remedies.\textsuperscript{161} The nationality deregistration and export remedies described above are also available.

The basic remedies set out in the Convention/Aircraft Protocol are not exhaustive.\textsuperscript{162} They do not displace additional remedies permitted by applicable law except to the extent such additional remedies are inconsistent with mandatory provisions\textsuperscript{163} in the Convention/Aircraft Protocol.

4.3.3. Role of Commercial Reasonableness

All remedies given by the Convention/Aircraft Protocol shall be exercised in a commercially reasonable manner.\textsuperscript{164} Recognising the litigation implications of this general standard, and the sophisticated nature of parties to aircraft financing and leasing transactions, the Aircraft Protocol provides that an agreement between an obligor and an obligee as to what is commercially reasonable is conclusive.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{157} See id. art. 8(5).
\item \textsuperscript{158} See Aircraft Protocol, supra note 5, art. IX(1)(a).
\item \textsuperscript{159} See id. art. IX(1)(b).
\item \textsuperscript{160} Convention, supra note 3, art. 10(a).
\item \textsuperscript{161} See id. art. 10(b).
\item \textsuperscript{162} See id. art. 13 (noting that additional remedies may be exercised).
\item \textsuperscript{163} See id.; see also supra note 135 and accompanying text (summarising the noted mandatory rules).
\item \textsuperscript{164} See Convention, supra note 3, art. 8(2).
\item \textsuperscript{165} See Aircraft Protocol, supra note 5, arts. IX(3)(a) (disapplying the Convention provision setting out a commercial reasonableness standard applicable only to the exercise of remedies under a security agreement), IX(3)(b) (inserting a new party autonomy-based provision applicable to the exercise of remedies by any obligee).
\end{itemize}
Party autonomy on this matter, however, is limited by three provisions. First, an obligee may not take possession or control of an aircraft object otherwise than by "lawful means."\textsuperscript{166} Although that standard is indeterminate, its creators felt that any attempt to define "lawful means" with precision would meet with resistance from certain contracting States.\textsuperscript{167} That this phrase should be interpreted narrowly\textsuperscript{168} is signaled by a clause designating that the removal of the aircraft object from service shall not in itself be deemed unlawful.\textsuperscript{169} Second, in order to safeguard the interests of junior creditors and the obligor in the aircraft object, a chargee may not exercise the sale or re-lease remedies without giving interested persons\textsuperscript{170} prior written notice of at least ten working days.\textsuperscript{171} Third, no deregistration or export remedy may be exercised without the prior written consent of the holder of any higher ranking registered interest.\textsuperscript{172} This provision is designed to ensure consistency with the relevant provision of the Geneva Convention.\textsuperscript{173}

\textsuperscript{166} See supra note 164 and accompanying text; see also Aircraft Protocol, supra note 5, art. IX(3)(b)(3) ("An obligee may not take possession or control of an aircraft object in a manner which contravenes public order.").

\textsuperscript{167} Compare Convention on Contractual Obligations, supra note 40, art. 16 (stating that a country may refuse to apply a rule of law if it is deemed "manifestly incompatible with public policy"), with Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(2)(b), 21 U.S.T. 2517, 330 U.N.T.S. 3 (permitting nonrecognition or non-enforcement of arbitral awards contrary to public policy).

\textsuperscript{168} In this context, the essence of the "lawful means" rule is harm to persons or property or the violation of property rights (other than an obligor's rights in an aircraft object but for the default and an obligee's resulting rights under the Convention/Aircraft Protocol), rather than ancillary or generalised policies embedded in a particular legal system. The commentary to the texts must explain this concept in appropriate detail.

\textsuperscript{169} See Aircraft Protocol, supra note 5, art. IX(3)(b)(3).

\textsuperscript{170} See Convention, supra note 3, art. 8(6) (defining "interested persons").

\textsuperscript{171} See Aircraft Protocol, supra note 5, art. IX(4).

\textsuperscript{172} See id. art. IX(2).

\textsuperscript{173} Cf. Geneva Convention, supra note 19, art. IX (stating that all holders of recorded rights in an aircraft must have been satisfied or given their consent for the aircraft to be transferred, if there has not already been a sale of the aircraft in accordance with the same procedures set out in Article VII of the same convention).
4.3.4. Applicable Procedural Law

The Convention/Aircraft Protocol, however ambitious, would be considerably more so if the texts sought to prescribe uniform procedures pursuant to which the sets of basic remedies would be exercised in all contracting States. Given the great sensitivity to national procedural rules, no effort has been made in this regard. With one large caveat, any remedies provided by the Convention/Aircraft Protocol must be exercised in conformity with the procedural law in the place the remedy is exercised.174

That caveat relates to the question of non-judicial remedies or, in aviation parlance, self-help. The Convention/Aircraft Protocol makes clear that any remedy available to an obligee that does not require application to the court may be exercised without leave of the court.175 This provision in general, and its phraseology in particular, are meant to signal the usefulness of non-judicial remedies in sophisticated secured transactions and leasing involving high-value mobile equipment such as aircraft. Nonetheless, it was recognised that certain contracting States have a strong public policy against non-judicial remedies.176 Provision has therefore been made to specifically permit a reservation on this matter by any such contracting States.177

The Convention/Aircraft Protocol establishes an innovative procedure relating to deregistration and export remedies. Viewed as the functional equivalent of a non-judicial remedy, an obligor may issue an “irrevocable de-registration and export request” to its national civil aviation authority in favour of the obligee or its certified designee.178 This is done in a form annexed to the Aircraft Protocol which will be recorded by the civil aviation authority.179 The effect of these arrangements will be that the beneficiary of the request shall be the sole person entitled to deregister and ex-

174 See Convention, supra note 3, art. 12(1).
175 See id. art. 12(2).
176 Most civil law systems prevent or severely curtail the exercise of non-judicial remedies. See WOOD, supra note 12, at 138-44. A small subset of such systems constructs legal fictions (e.g., a “fiduciary transfer”) and/or permits latitude to holders of title-based rights. For example, Germany, Japan, and Sweden do so as a means of permitting the exercise of select non-judicial remedies. See id. at 141.
177 See Convention, supra note 3, art. Y(2).
178 See Aircraft Protocol, supra note 5, art. XIII(1).
179 See id.
port the aircraft. The request may not be revoked without the beneficiary's prior written consent.\textsuperscript{180} As with non-judicial remedies, these valuable provisions may raise public policy concerns for certain contracting States, and thus a reservation is expressly permitted.\textsuperscript{181}

### 4.3.5. Sui Generis Expedited Remedies

One major impediment to true asset-based financing is the risk, following default, of prolonged litigation or protracted court proceedings. The effect of these are to prevent a financier or lessor from exercising contractual remedies, including repossession, redeployment, and realisation of proceeds. Beyond the bare text of legal rules, financiers are keenly concerned with the practical aspects of implementing these remedies, including the time frame in which rights can and will be enforced.\textsuperscript{182} This is such an important consideration, particularly in a number of developing legal systems, that the economic impact assessment identified prompt enforcement as a key criterion against which the Convention/Aircraft Protocol must be benchmarked.\textsuperscript{183}

Balanced against the economic significance of prompt enforcement is the concern about imposing procedural rules on national courts. Judiciaries are independent organs of government with their own procedural rules, including those relating to timing.

This balancing results in provisions intended to reflect the prompt enforcement principle, while at the same time permitting an opt-out by countries in which the associated policy concerns outweigh the demonstrable economic benefits. In particular, the Convention/Aircraft Protocol contains a provision entitling an obligee who adduces prima facie evidence of default by an obligor

\textsuperscript{180} See id. art. XIII(2).

\textsuperscript{181} See id. art. XXX.

\textsuperscript{182} See AWG Memorandum, supra note 16, at 16-18 (containing recommendations and rationales regarding this time frame).

\textsuperscript{183} See Economic Implications, supra note 6, at 325-26; see also Anthony Saunders & Ingo Walters, INSEAD & New York University Salomon Center, Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol (Sept. 1998) [hereinafter International Interests] at app. 3 (calculating the effects of litigation delay on bondholder returns and concluding that, based on the selected assumptions, such litigation delay could reduce the present value of bonds by as much as 12%).
to "speedy judicial relief" in the form of a variety of court orders relating to remedies against the aircraft object. That relief is available "pending final determination" of the obligee's claim. Contracting States may enter a reservation, wholly or in part. Another provision defines "speedy," in regards to judicial relief to mean "a period not exceeding [thirty] calendar days from the date on which the instrument initiating the proceedings is lodged with the court or its administrative office." Contracting States that accept the general concept of speedy judicial relief and yet are concerned with the precise timetable, may enter a reservation solely with respect to the latter.

These provisions will not apply, or will only partially apply, in contracting States that have entered the appropriate reservations. Moreover, these provisions are subject to the party autonomy rule. The transaction parties are free, with agreement in writing, to derogate. It should also be noted that this provision will not restrict the right of the transaction parties to prosecute their ongoing litigation on the merits of any dispute. The main provision expressly contemplates the ongoing determination of rights and liabilities.

Of utmost importance, the standard for speedy judicial relief is sui generis. It is an international norm created by virtue of the Convention/Aircraft Protocol and is not dependent upon, derived from, or to be interpreted in light of national interim relief rules. That said, the provision is not exhaustive. It will not

---

184 See Convention, supra note 3, art. 14(1) (authorising "(a) preservation of the [aircraft] object and its value; (b) possession, control, or custody of the [aircraft] object; (c) immobilisation of the [aircraft] object; (d) sale, lease or management of the [aircraft] object; (e) application of the proceeds or income of the [aircraft] object") (footnote omitted).
185 See id.
186 See id.
187 See id. art. Z.
188 Aircraft Protocol, supra note 5, art. X.
189 See id. art. XXX (noting that contracting states may decide not to apply any one or more of the provisions of Article X of the Protocol).
190 See Convention, supra note 3, art. 5 (permitting derogation from any article in Chapter III except as stated in Articles 8(2)-(6), 9(3)-(4), 12(1), and 13).
191 See supra notes 184-86 and accompanying text.
192 Such rules are typically grounded in principles of equity in general, with the object of preventing irreparable damage in particular. The availability of national provisional or injunctive relief is generally a matter for the courts, which are given wide discretion. Fairness, rather than commercial predictabil-

https://scholarship.law.upenn.edu/jil/vol20/iss3/6
limit the availability of any form of interim relief other than those set out in Article 14(1) of the Convention.\textsuperscript{193}

On a technical note, the drafting of the relevant provision has given rise to an ambiguity of sufficient importance that has been highlighted in the Economic Impact Assessment as follows:

It is therefore necessary to point out a problematic ambiguity in the formulation of the [speedy judicial] relief rule in the draft text. \textit{If not clarified in a manner consistent with the prompt enforcement principle, it would reduce [the contemplated] financing-related benefits.} That ambiguity ... relates to the bracketed wording [in Article 15(1) of the convention] that suggests that the listed default remedies need not be cumulative. It is integral to our analysis that the full set [of] remedies, including the ability to sell or re-deploy aircraft equipment and realize and apply the resulting proceeds, [is] promptly available to financiers and lessors in countries that accept the optional expedited relief rule. To the extent economic considerations are a primary consideration, that Article should be reformulated to ensure that \textit{any and all} specified default remedies are promptly available.\textsuperscript{194}

This ambiguity has been highlighted for governmental consideration and correction.\textsuperscript{195}

\textbf{4.3.6. Insolvency-Related Provisions}

The Convention/Aircraft Protocol contains a number of provisions relating to insolvency proceedings. First, an international interest is valid against the trustee in bankruptcy\textsuperscript{196} of the obligor if, prior to the commencement of the bankruptcy, that interest, is sought. The purpose of the expedited relief rule in \textit{Convention, supra} note 3, art. 14, as interpreted by the Aircraft Protocol Group, is different in kind from that of national injunctive relief. The expedited relief rule serves the object of commercial predictability by setting out an objective standard (prima facie evidence of default) triggering remedies against the aircraft object. \textit{Id.}

\textsuperscript{193} See \textit{id.} note 3, art. 14(4).

\textsuperscript{194} International Interests, \textit{supra} note 183, at 12.

\textsuperscript{195} See SRC M.1 Report, \textit{supra} note 55, at 17.

\textsuperscript{196} See \textit{Convention, supra} note 3, art. 28(2)(b).
was registered in conformity with the Convention/Aircraft Protocol.\textsuperscript{197} This provision, developed from similar wording in the International Financial Leasing Convention,\textsuperscript{198} seeks to ensure that the proprietary nature of the international interest represented by a registration will neither be set aside, because its form would not otherwise be recognised in insolvency proceedings in a contracting State, nor subordinated in such proceedings on account of a failure to comply with otherwise applicable national "perfection" requirements. The provision is intended to validate, rather than invalidate. It would not affect the validity of an international interest against the trustee in bankruptcy where that interest would be valid under applicable insolvency law.\textsuperscript{199} Finally, the provision will not override special national insolvency rules that might invalidate or subordinate a fraudulent or preferential transfer.\textsuperscript{200}

Second, and reflecting another basic criterion identified in the Economic Impact Assessment,\textsuperscript{201} the Convention/Aircraft Protocol contains a provision\textsuperscript{202} expressly permitting the reservations of contracting States\textsuperscript{203} that would, \textit{inter alia}, require an obligor to cure all defaults or give possession of the aircraft object to an obligee within a specified period\textsuperscript{204} from the defined insolvency date.\textsuperscript{205} It also provides that no exercise of remedies permitted by the Convention/Aircraft Protocol may be prevented or delayed in the context of insolvency proceedings after the specified period. In addition, the provision would prevent obligations of an obligor relating to an international interest from being modified.

---

\textsuperscript{197} See id. at 28(1).
\textsuperscript{198} See International Financial Leasing Convention, supra note 37, art. 7(1).
\textsuperscript{199} See Convention, supra note 3, art. 28(3).
\textsuperscript{200} While there is no express language to that effect, preserving this area of insolvency law was intended. See SRC M.1 Report, supra note 55, at 20.
\textsuperscript{201} See International Interests, supra note 183, at 11.
\textsuperscript{202} See generally Aircraft Protocol, supra note 5, art. XI.
\textsuperscript{203} See id. art. XX.
\textsuperscript{204} See id. art. XI(3) (containing a bracketed reference to "thirty/sixty" days).
\textsuperscript{205} The definition of "insolvency date" is the earlier of the commencement of "insolvency proceedings" or a date on which an obligor declares its intention to suspend, or has actually suspended, payment to creditors generally. See id. art. XI(1), (2). The latter conjunct is intended to address, \textit{inter alia}, circumstances in which a national airline is not permitted to enter insolvency proceedings.
in the insolvency proceedings without the consent of an obligee. Lastly, it sets out the priority of the international interest in insolvency proceedings.\footnote{206}{See infra notes 238-40 and accompanying text.}

This is perhaps the clearest example in the Convention/Aircraft Protocol of the need for a policy-based decision by contracting States. The reservation mechanism will permit that decision-making. Few, if any, areas of commercial law are more policy-laden than insolvency law.\footnote{207}{Cf. Thomas M. Gaa, Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?, 27 INT’L L. 881, 893-95 (1993).} Questions of incentives and disincentives to commercial enterprises, employment policy and equity are directly implicated. It is equally clear, however, that financial institutions recognise that insolvency—when liabilities exceed assets—presents precisely the circumstance in which previously-bargained-for rights are needed. Insolvency laws that prevent or modify security-type and leasing rights result in greater risk to financial institutions which, in turn, pass on their risk to borrowers in the form of higher interest and leasing rates.

This insolvency provision was inspired by a provision contained in U.S. bankruptcy law.\footnote{208}{See 11 U.S.C. § 1110 (1998). See generally Glenn S. Gerstell & Kathryn Hoff-Patrinos, Aviation Financing Problems Under Section 1110 of the Bankruptcy Code, 61 AM. BANKR. L.J. 1 (1987); Louis B. Goldman et al., Repossessing the Spirit of St. Louis: Expanding the Protection of Sections 1110 and 1168 of the Bankruptcy Code, 41 BUS. LAW. 29 (1985).} That provision has demonstrably contributed to the historically and comparatively low funding costs of aircraft financing transactions in the United States.\footnote{209}{See Economic Implications, supra note 6, at 331-34.}

Third, the Convention/Aircraft Protocol contains a provision, again permitting an opt-out reservation, requiring courts of a contracting State in which an aircraft object is situated to “expeditiously cooperate” with the courts or other authorities administering the principal insolvency proceedings\footnote{210}{See Aircraft Protocol, supra note 5, art. I (defining “primary insolvency jurisdiction”). The definition was drafted in a manner consistent with the corresponding concept in the European cross-border insolvency regulating instrument. See European Union: Convention on Insolvency Proceedings, Nov. 23, 1995, art. 3(1), 35 I.L.M. 1223 (1996) [hereinafter EU Insolvency Proceedings Convention].} with respect to an obligor.\footnote{211}{See Aircraft Protocol, supra note 5, art. XII.} This provision is in line with current international efforts in the field of insolvency cooperation, and is particularly
appropriate in this context given the extreme mobility of aircraft objects. 212

4.4. Effects of International Interests as Against Third Parties: Priority Rules

While national legal rules relating to the position of holders of competing property interests in aircraft objects are complex, their basic function is, or should be, straightforward. First, they should provide predictable results as to priority in the case of dispute: that is, they should provide transparency as to the existence and ranking of interests. Second, risk should be allocated to those best able to protect their own interests in the priority scheme. Third, any overriding public policy consistent with the general objective of facilitating aircraft financing should be accommodated. These notions are reflected in the proposed priority rules under the Convention/Aircraft Protocol. A secondary, but important, objective was to address priority issues with simple and clear rules.

4.4.1. First-to-File Principle

Subject to the discussion below relating to non-consensual rights and interests, 213 the baseline priority rule is that the first to file wins, regardless of a party’s knowledge of a competing interest. 214 This rule is bright-line: a registered interest has priority over any other interest subsequently registered and over an unregistered interest, whether or not the unregistered interest is eligible for registration. 215 It is designed to achieve commercial predictability.

The selection of this potentially harsh rule is best understood in light of the allocation of risk concept noted above. Given the

212 See EU Insolvency Proceedings Convention, supra note 210; Model Law on Cross-Border Insolvency, UNCITRAL, A/CN.9/XXX/CRP.2/ADD.2 (1997). This topic is also the subject of attention by the International Bar Association and the American Law Institute. For a summary of the latter project, see American Law Institute, Transnational Insolvency Project: International Statement of United States Bankruptcy Law, Discussion Draft 1-6 (1996).

213 See infra notes 219-27 and accompanying text.

214 See Convention, supra note 3, art. 27(1)-(2).

215 See id. art. 1 (defining “unregistered interest,” which is used in the basic priority rule, art. 27(1), to include an interest not registrable under the Convention). See also SRC M.1 Report, supra note 55, at 8.
role of the future international registry system discussed below, information will be available worldwide on a twenty-four hour basis. One will need only to search the international registry for potentially competing interests in order to fully assess the priority risk in a particular transaction. Having eliminated informational problems through objective, technical means, the drafters concluded that the use of subjective knowledge standards would only invite factual disputes and unnecessarily increase litigation related costs and risks.\(^{217}\)

Mention should be made of the thinking behind the subordination of unregistrable interests since the result may seem inequitable. Why should a party that is unable to register under the international system lose its national law priority? The response is threefold. First, the definition of an international interest, together with a contract of sale, is sufficiently broad to pick up all customary types of transactions involving the financing and leasing of aircraft objects.\(^{218}\) Second, transaction parties, being aware of the Convention/Aircraft Protocol and the relevant categories of international interests, can simply structure their transactions in a manner that fits within the legal framework. Third, the opposite rule—unregisterable interests prevailing over registered international interests—would require the holder of an international interest to search for all categories of potential interests in all relevant jurisdictions. This would significantly reduce the efficiency associated with an international registry system.

4.4.2. Treatment of Nonconsensual Rights and Interests

The arguments in favour of a first-to-file rule are grounded in the availability of searchable information and, in light of that information, the facility to protect one’s interest by registration or withholding funds, as appropriate. The paradigm is that of a borrower fraudulently entering into multiple financing and leasing transactions with common collateral.\(^{219}\) Holders of nonconsensual rights and interests, i.e., rights and interests arising as a mat-

\(^{216}\) See infra notes 241-52 and accompanying text.

\(^{217}\) Cf. Economic Implications, supra note 6, at 324 (suggesting that use of the only exception to the first-to-file principle be limited to maximize the benefits of the Convention/Aircraft Protocol).

\(^{218}\) See supra notes 103-05, 111 and accompanying text.

\(^{219}\) Cf. WOOD, supra note 12, ¶ 1-5 (discussing the “false wealth” objection to security).
ter of law, are in a different position. Their rights and interests are based on a policy that the greater good is served by preferring their interests to those of others, often without the existence of their preferred interest being available to those adversely affected by it.

The Convention/Aircraft Protocol contains several provisions addressing nonconsensual rights and interests. These provisions are set out in square brackets to indicate that inclusion of this category in the priority scheme requires further consideration. The position of the Aircraft Protocol Group is that nonconsensual rights and interests should be included in the general priority scheme on the basis of the draft provisions currently in the texts. The reasoning is that inclusion will enhance the utility of the international registry system. Of equal importance, the particular provisions reflect a sensitivity to the potential policy concerns of contracting States.

The first relevant provision provides contracting States with the option of setting out categories of nonconsensual rights and interests that shall be registrable in the system as if the right or interest were an international interest. If a State concludes that certain nonconsensual rights and interests would be treated fairly by participating in a first-to-file regime, they can so indicate in their ratification instrument. Categories likely to be included by select contracting States will be those that fairly prevail over subsequent, but not preexisting, consensual interests. Execution creditors may fit that profile.

The second relevant provision permits contracting States to retain the full preference of nonconsensual rights and interests (other than those declared registrable by that contracting State) despite nonregistration. There are limits. Under the national law of that contracting State, such rights and interests must have priority over a registered interest conceptually similar to an international interest without any act of publication. These preferences would be retained through the mechanism of a declaration in a ratification instrument. They would, however, be so retained

---

220 Principal examples are rights and interests in favour of repairers, tax creditors, and execution creditors.
221 See Convention, supra note 3, ch. IX; SRC M.1 Report, supra note 55, at 38.
222 See Convention, supra note 3, art. 37.
223 See id. art. 38(1)(b).
only to the extent of such declaration, meaning a contracting State could, by making a limited declaration, circumscribe the extent of the preference. While this provision builds in the possibility of preferred secret liens, thus lessening overall transparency, and permits the possibility of wider preferences for nonconsensual interests than those under the Geneva Convention, it was felt that a flexible framework that provides contracting States with alternatives was appropriate. Notwithstanding that flexibility, it is clear that a decision to declare wide preferences will have adverse economic implications for a contracting State and its airlines.

One issue that has been raised, but not yet addressed, is the question of supranational nonconsensual liens such as those in favour of the European Organisation for the Safety of Air Navigation (EUROCONTROL). This particular issue will undoubtedly be the subject of further governmental consideration.

4.4.3. Implications of Asset-Based Registry for Priority Rules

As the international registry system will be asset, rather than debtor, based, rules of decision for fewer priority conflict scenarios are required. In addition to priorities relating to interests in the aircraft object, the Convention/Aircraft Protocol will address priorities relating to payment rights directly associated with the registered interests, that is, payment undertakings under financing or leasing documents. The treaty will not, however,

---

224 See id. art. 38(1)(a).
225 Cf. Geneva Convention, supra note 19, arts. IV, VII(5).
226 See Economic Implications, supra note 6, at 323-25.
228 See Aircraft Protocol, supra note 5, art. VII. Cf. Convention, supra note 3, art. 15(3).
229 See Convention, supra note 3, art. 34.
230 See id. art. 1 (defining “associated rights”).
deal with priorities relating to proceeds, other than qualified pro-
cceeds, or unrelated receivables. To the extent these issues
arise in the context of aircraft financing or leasing transactions,
they will be addressed through the gap-filling provision, by oth-
erwise applicable law (meaning national law), and, in the case of
receivables, the proposed UNCITRAL Convention on the sub-
ject, if that instrument becomes law in due course.

4.4.4. Subordinations

The party autonomy principle is again evident in provisions
permitting intercreditor priority subordinations. Parties to com-
plex financing and leasing transactions will have the ability to
vary their competing interests in a particular aircraft object. An
assignee of a subordinated interest will not be bound "unless, at
the time of the assignment, a subordination had been registered
relating to that agreement." In addition, the Conven-
tion/Aircraft Protocol permits the holders of international inter-
est and sureties or other persons with subrogation rights to
contractually vary their respective priorities.

---

21 See id. art. 27(5). It will also extend to payments made by governments
in respect to confiscation, condemnation, and requisition. See also id. art. 1 (de-
defining "qualified proceeds"); Aircraft Protocol, supra note 5, art. XIV.

22 See generally Goode, supra note 7, at 70.

23 See Revised Articles of Draft Convention on Assignment in Receivables Fi-
nancing: Remarks and Suggestions, UNCITRAL, A/CN.9/WG.II/ WP. 98
(1998). Governments will need to take a view on the relationship between the
draft UNCITRAL Convention and the provisions in the Convention/Aircraft
Protocol addressing "associated rights." See SRC M.1 Report, supra note 55, at
36-37.

24 See Convention, supra note 3, arts. 27(4), 36(2) ("The priority . . . may be
varied by agreement. . . .”).

25 Id. art. 27(4).

26 While surety arrangements are not specifically designed, they are in-
cluded in the provision addressing subrogation. See id. art. 36.

27 See id. Because this provision was originally featured in the Aircraft
Protocol and moved, in abbreviated form, to the Convention, it appears in the
latter in square brackets. See SRC M.1 Report, supra note 55, at 10, 21.
4.4.5. Insolvency Rules

The above-described insolvency rule\(^\text{238}\) contains a subclause with insolvency implications. It states that, with one exception, no rights or interests shall have priority in the insolvency over a registered interest.\(^\text{239}\) That exception relates to the nonconsensual rights or interests declared as preferential, in the insolvency context, by contracting States.\(^\text{240}\)

4.5. International Registry System

4.5.1. Function of the Registry

An international registry system will be established under the Convention/Aircraft Protocol.\(^\text{241}\) It will serve as the instrumentality for determining the priority of conflicting property interests in aircraft objects.\(^\text{242}\) Notices of international interests, prospective international interests,\(^\text{243}\) and registrable non-consensual interests, inter alia,\(^\text{244}\) may be registered, amended, and discharged

\(^{238}\) See generally Aircraft Protocol, supra note 5, art. XI (describing remedies of insolvency), and the description thereof contained in supra notes 202-05 and accompanying text.

\(^{239}\) See id. art. XI(7).

\(^{240}\) See id.; cf Convention, supra note 3, art. 38 (noting that a non-consensual right or interest has priority over an international interest to the extent, and only to the extent that: (a) such priority is specified by that State in a declaration; and (b) the non-consensual right or interest would, under the domestic law of that State, have priority over a registered interest of the same type as the international interest without any act of publication.

\(^{241}\) See Aircraft Protocol, supra note 5, ch. III, IV.

\(^{242}\) See Convention, supra note 3, art. 27(1) ("A registered interest has priority over any other interest subsequently registered and over an unregistered interest."). The relevant definitions of these terms and expressions are linked to registration or nonregistration in the international registry system created by the Convention/Aircraft Protocol. See id. art. 1.

\(^{243}\) For a summary of the function and nature of prospective international interests and other perspective interests, see infra notes 309-14 and accompanying text.

\(^{244}\) Notices of contracts of sale and prospective contracts of sale may be registered. See Aircraft Protocol, supra note 5, art. IV (rendering Convention Article 16(1) (other than subparagraph (c)) and Articles 18-20 applicable to contracts of sale). Assignments of international interests, and prospective assignments, may also be registered. See Convention, supra note 3, art. 15(1)(b). Parties have the facility to register subordinations to protect their positions against third parties. See id. art. 15(1)(c).
in the international registry. The sequential ordering of registration is the sole criterion for all priority determinations not involving preferred non-consensual rights and interests. Even the latter, in category form, will be available through the international registry as a matter of information to assist in transaction risk assessment.

Priority setting, while indispensable, is the exclusive function of the international registry system. Two matters outside the scope of the international registry system are noteworthy. First, registration of interests is not, as in select systems of laws, an aspect of, or a condition to, the creation or validity of that interest or its enforceability inter se. Similarly, if an interest has not been validly created under the Convention/Aircraft Protocol, or if the factual predicate to that interest is false, the act of registration will not rectify such defects. Registration is not a prophylactic. While regulations will be promulgated to minimise the risk of incorrect or inaccurate filings in the international registry—and, depending on their final form, may do so materially—the legal effect of such a filing is insignificant. Registration puts searchers on notice of the potential existence of superior interests, and enables a registrant to establish its priority, but goes no further.

See Convention, supra note 3, arts. 15(1)(a), 15(4).

See id. art. 23. This provision is linked to the provision requiring the declaration of non-consensual rights and interests as a condition to containing their national law preference. See id. art. 37.


See generally Convention, supra note 3, art. 16(4) (describing responsibilities that would be prescribed in the regulations). For the requirement that initial regulations be promulgated, and entered into force coincident with the entry into force of the Aircraft Protocol, see Aircraft Protocol, supra note 5, art. XVII(3).

The extent to which that risk will be minimised will be directly related to the level of factual review included in the conditions to registration. See infra notes 280, 380 and accompanying text.

If, by way of example, a prior registration, having satisfied the conditions to registration, nonetheless evidences an invalid interest (e.g., by reason of the obligor's lack of "power to dispose," Convention, supra note 3, art. 7(b)), the registration's potential for priority is not realised. In practice, this is a fall-back legal protection. The searching party, on notice of the prior interest, will make the relevant inquiries regarding the prior registration prior to funding.

By virtue of the comprehensiveness of the proposed priority system, the universe of possible superior interests is limited to (i) previous registered
It is dissimilar, for example, from commonly encountered land registries, the basic function of which is to quasi-guarantee title and other property interests.

Second, the international registry, as a system concerned solely with property interests in aircraft equipment, does not address the basic subject matter of the Chicago Convention: the framework applicable to the regulation of international civil aviation.

4.5.2. Nature of the Registry

Reflecting the principal objective of facilitating asset-based financing and leasing, the international registry will be asset-based, rather than debtor-based. Registrations, defined to include amendments and discharges, are made against specifically identified airframes, aircraft engines, or helicopters. That identification will be the manufacturer’s serial number, as supplemented in accordance with the aircraft registry regulations to ensure uniqueness. Manufacturer’s serial numbers will also constitute the principal search criterion.

international interests or registrable non-consensual rights and interests and (ii) preferred non-consensual rights and interests arising in a contracting State that declared that preference in its ratification instrument (a catalogue of such declarations to be available on-line at the international registry or its registration facilities). See supra notes 213-27 and accompanying text.


253 See supra note 227 and accompanying text.

254 See Convention, supra note 3, art. 15(4).

255 See Aircraft Protocol, supra note 5, art. XIX(1). The need for uniqueness-ensuring supplemental information in the aircraft registry regulations arises as a result of the manufacturer’s serial number allocation system of one of the major aircraft manufacturers. That system is designed to ensure uniqueness regarding a particular model number type only.

256 See id.
4.5.3. Structure of the Registry

The basic structure of the international registry system was a subject that attracted the particular attention of the Aircraft Protocol Group. In light of the work on the subject undertaken by a subgroup of the study group tasked with addressing registry matters, yet seeking to provide governments with a range of options on this fundamental matter, the Aircraft Protocol Group set out two alternative formulations of the basic structure provision. Its views were summarised as follows:

Two alternative formulations of Article [XVI] of the Aircraft protocol have been inserted into the text. That Article addresses the general structure of the proposed international registry system. Square brackets have been placed around these alternative provisions to indicate both their provisional nature and the need for further consideration.

Alternative A has been prepared with a view towards leaving governmental experts with maximum flexibility in their consideration of the structure of the proposed international registry system. That alternative itself contains two mutually exclusive bracketed provisions. The first provision contemplates a unitary registry structure, that is, a structure in which an intergovernmental entity both operates and regulates the registry. That intergovernmental entity would be accountable to the contracting states. The second provision contemplates a binary registry structure. Such a structure is the type envisaged by the convention. In a binary registry structure, the operational and regulatory functions are separate. While the regulator of the system would be intergovernmental and

---

257 See generally Summary Report, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Working Group to Consider the Legal and Technical Issues Raised by the Establishment of an International Register, UNIDROIT 1997 Study LXXIIc - Doc. 3 (June 1997) (documenting the study group's discussion on issues dealing with an international register).
accountable to the [c]ontracting [S]tates, the operator could well be a private sector service provider acting under the supervision and oversight of the intergovernmental regulator. Alternative A does not, moreover, suggest the identity of the entities to perform the operational and/or regulatory functions. The objective of leaving maximizing flexibility again underlies this aspect of Alternative A.

Alternative B, conversely, seeks to provide governmental experts with guidance and detail on a possible international registry system. It adopts the binary registry structure approach. It then identifies both the Council of the International Civil Aviation Organization or a body designated by it as a potential intergovernmental regulator, and a newly created, special purpose independent affiliate of the International Air Transport Association as a potential initial registrar. These entities have been identified, for consideration by governments, based on their respective significant roles in international civil aviation. The objectives of expediting governmental consideration of the new system and the creation of the proposed registry underlie this aspect of Alternative B. 258

Whether the unitary registry structure, employing a single International Registry Authority 259 as both the operator and regulator of the international registry, or the binary registry structure, distinguishing between the operator of the system, the Registrar, 260 and its regulator, the International Regulator, 261 is ulti-

258 APG M.1 Report, supra note 61, at (vii). See also SRC M.1 Report, supra note 55, at 35-36 (calling on governments to consider the relative advantages and disadvantages of the unitary registry structure and the binary registry structure).

259 See Aircraft Protocol, supra note 5, arts. I (defining “International Registry Authority”), XVI (first bracketed provision in Alternative A).


mately selected by governments, other constitutional features of
the international registry system are the same.

The international registry shall have international legal person-
ality and legal capacity to exercise its functions. In performing
such functions, the international registry will not be subject to
any particular national law, and will be entitled to certain limited
immunities. These concepts also apply to the registration facili-
ties, discussed immediately below, solely in their operation as
such.

When ratifying the relevant instrument, contracting States
have the option of designating operators of registration facilities,
which are essentially points of input to the international regis-
try. They constitute an integral part of the international regis-
try system and, accordingly, will follow the uniform aircraft
registry regulations, rather than national regulatory law and prac-
tice, in performing their functions under the Convention/Aircraft Protocol international registry system. Operators
of registration facilities, in all probability national civil aviation
authorities, will transmit the information required for registration
to the international registry. In the event a contracting State
designates registration facilities, it shall specify the extent to which
such designation precludes alternative access to the system, that
is, filings directly with the international registry. A contracting
State may designate registration facilities as points of access only
in relation to (a) "helicopters or airframes pertaining to aircraft"
of its nationality and (b) "registrable non-consensual rights or in-
terests created under its domestic law." Since aircraft engines
have no independent nationality under the Chicago Convention,
no country can require registrations relating to aircraft engines

262 See Convention, supra note 3, art. 15(2). In a similar vein, a question for
governments is whether the International Regulator (or the International Reg-
istry Authority acting in that capacity, as the case may be) should also have in-
ternational legal personality. See SRC M.1 Report, supra note 55, at 36.
263 Cf. Convention, supra note 3, arts. 26(3)-(4) (stating exceptions to im-
munities from legal processes).
264 See infra notes 265-70 and accompanying text.
265 See Convention, supra note 3, art. 16(2); Aircraft Protocol, supra note 5,
art. XVIII(1)(a).
266 See Convention, supra note 3, art. 16(2).
267 See id. art. 16(3)-(5).
268 See id. art. 16(2); Aircraft Protocol, supra note 5, art. XVIII(1)(b).
269 Aircraft Protocol, supra note 5, art. XVIII(2).

https://scholarship.law.upenn.edu/jil/vol20/iss3/6
through its registration facilities. Under the current draft, all registrations relating to aircraft engines must therefore be made directly with the international registry.270

To summarise the relevant relationships, the contracting States to the Convention/Aircraft Protocol, through those instruments, create and agree to the international registry system regarding those matters set out in the Convention/Aircraft Protocol. The instruments are the constituting documents. Contracting States delegate regulatory and oversight responsibility to the regulator of the system. Contracting States are the sovereigns; the regulator, whatever form it takes, is accountable to the contracting States.271 The regulator, in turn, regulates the operator of the international registry, including registration facility operators, whether these functions are undertaken by it (unitary registry structure) or another (binary registry structure). Operators of registration facilities, if declared by a contracting State, undertake their responsibilities under the Convention/Aircraft Protocol as part of the international registry system.

These relationships can be usefully illustrated by reference to the aircraft registry regulations. The Convention/Aircraft Protocol requires that certain items be included in the regulations promulgated by the regulator.272 As the instruments are constitutive, such matters must be included. These particular matters have been agreed to by contracting States. Revisions to the aircraft registry regulations are made by and at the discretion of the regulator,273 subject to its reporting responsibilities to contracting States.274 The operators of the international registry and registration facilities are required to perform their respective functions in accordance with the aircraft registry regulations as amended from time to time and are accountable in this regard to the regulator.

270 Cf. id. (implying that since aircraft engines are not specified in Article XVIII, the default is to the general provisions requiring registration directly with the Registrar or the International Registry Authority, as the case may be).
271 See id. art. XVII(2).
272 See id. art. XIX(5).
273 See id. art. XIX(5).
274 See supra note 271 and accompanying text.
4.5.4. Responsibilities of Operators/Regulators

The operator of the international registry has five broad responsibilities under the Convention/Aircraft Protocol. First, it operates the international registry efficiently and responsibly, and does so on a twenty-four hour basis. Second, it performs the various functions assigned to it under the Convention/Aircraft Protocol and aircraft registry regulations. Third, the operator reports to the regulator on the performance of its functions and otherwise complies with specified oversight requirements. Fourth, it maintains financial records relating to its functions in a form specified by the regulator. Finally, it ensures against liabilities for its acts and omissions in a manner acceptable to the regulator.

As indicated, the regulator, accountable to contracting States, is to regulate and oversee the operators of the system. It will issue the initial aircraft registry regulations and revise the same from time to time as appropriate.

In addition, while the regulator will act in a nonadjudicative capacity, it will have power to require acts and omissions that are in contravention of the Convention/Aircraft Protocol or aircraft registry regulations to be rectified. Pursuant to procedures to be set out in the aircraft registry regulations, the regulator will, at the request of the registrar, provide advice regarding the exercise of functions under the Convention/Aircraft Protocol and aircraft registry regulations.

275 See Convention, supra note 3, art. 16(5).
276 See also Aircraft Protocol, supra note 5, art. XIX(4). The various registration facilities will be operated and administered during working hours in their respective territories. See id.
277 The requirement may raise select issues in the case of intergovernmental operation of the International Registry or its registration facilities. Cf. Preliminary Draft Aircraft Protocol (Aircraft Protocol Group), supra note 63, art. XXV (allowing a contracting State to disapply certain provisions of the Convention).
278 See Convention, supra note 3, art. 16(6); Aircraft Protocol, supra note 5, art. XIX(5) (providing that matters relating to the correction of such acts and omissions be addressed in the aircraft registry regulations).
279 See Convention, supra note 3, art. 16(7); Aircraft Protocol, supra note 5, art. XIX(5) (providing that matters relating to the request and issuance of such advice be addressed in the aircraft registry regulations).
4.5.5. Modalities of Registration and Systems Implications

The aircraft registry regulations will set out the conditions and requirements that must be fulfilled in order to effect a registration or convert the registration of a prospective interest into an actual one. These conditions to registration are not to be confused with requirements to effect a registration. Once the conditions are satisfied, the registration is made. It becomes effective "upon entry of the required information into the international registry database so as to be searchable." A registration is searchable when it has been assigned a sequentially ordered file number, and it, together with that number, may be accessed at all points in the international registry system.

Numerous matters relating to the functioning of the international registry system are to be determined. They will be addressed in the aircraft registry regulations, including (a) the medium of information transmission to the international registry or registration facilities, (b) the duration of a registration, (c) the requirements for requesting or conducting a search of the international registry, and (d) the form of certificates to be issued by the international registry. Such certificates will be prima facie proof of facts contained therein.

---

280 See Convention, supra note 3, art. 17; Aircraft Protocol, supra note 5, art. XIX(5) (providing that the conditions for registration be specified in the aircraft registry regulations). For a discussion of the significance of the concept of conditions to registration, see infra note 379 and accompanying text.

281 Convention, supra note 3, art. 19(1).

282 See id. art. 19(2).

283 See id. art. 18; Aircraft Protocol, supra note 5, art. XIX(5).

284 See Convention, supra note 3, art. 21; Aircraft Protocol, supra note 5, art. XIX(5). The Aircraft Protocol Group, in its final text, expressed the view that the duration of a registration should be indefinite. See Preliminary Draft Aircraft Protocol (Aircraft Protocol Group), supra note 63, art. XXX(10).

285 An issue to be determined is whether remote access searches, beyond a search made at the local registration facilities, will be permitted. One factor relevant to that determination will be its impact on system security, an issue requiring further design work on the international registry system. For notes on the prompt need for such work, see SRC M.1 Report, supra note 55, para. 146.

286 See Convention, supra note 3, art. 22(1); Aircraft Protocol, supra note 5, art. XIX(5).

287 See Convention, supra note 3, art. 24; Aircraft Protocol, supra note 5, art. XIX(5).

288 See Convention, supra note 3, art. 24.
4.5.6.  Errors and Omissions

The operator of the international registry and its registration facilities is liable for its errors and omissions and for system malfunctions. Any person suffering resulting loss is entitled to an indemnity in an amount equal to its compensatory damages. Such liability must be insured against in a manner satisfactory to the regulator. These provisions are essential to building confidence in the international registry system, particularly during its infancy. In the event the registrar is an intergovernmental body, and in the case of the operators of registration facilities, consideration must be given to the most appropriate means of addressing these liability and insurance requirements.

The courts in which the registrar or the operators of registration facilities are located shall have jurisdiction to resolve any issue relating to errors and omissions liability. Such courts, however, will not apply national law but rather the international standard established by the Convention/Aircraft Protocol.

4.5.7.  Registry Fee Structure

Questions have been asked regarding the aggregate costs and additional transaction costs likely to be associated with the creation and use of the international registry system.

The texts provide that the cost of creation and operation will be financed by user fees, and that the fee schedule will be determined on a cost recovery basis. Operating the system will therefore not be a source of profit for the operator. The fee structure will be set out by the regulator in the aircraft registry regulations. While, for the reasons discussed below, more pre-

---

289 See id. art. 26(1). It will be for governments to consider whether the liability regime should be based on strict liability. See SRC M.1 Report, supra note 55, para 132.
290 See Convention, supra note 3, art. 26(1).
291 See id. art. 16(5)(e).
292 See id. art. 26(2).
293 This is a primary example of the type of provision on which official commentary is essential. See infra notes 372-79 and accompanying text. The contours of this new international standard need further development and elaboration.
294 See Convention, supra note 3, art. 16(4); Aircraft Protocol, supra note 5, art. XIX(3).
295 See Convention, supra note 3, art. 16(3)-(4).
cise comments cannot fairly be made at this stage, those in the process to date expect that, by excluding a profit component, individual transaction fees will not be affected in an adverse material manner.

4.6. Assignments of International Interests

4.6.1. Validity Requirements

The Convention/Aircraft Protocol sets out sui generis creation criteria for assignments of international interests. An assignment, which may be absolute or by way of security, is valid if, and only if, it is in writing, enables the international interest and object to which it relates to be identified, and, in the case of a security assignment, enables the obligations secured by that assignment to be identified.

4.6.2. Effect of Assignment

A valid assignment, to the extent agreed to by the parties to that assignment, assigns all the interests, including the rights to payment under the transaction documents, and priorities of the assignor under the Convention/Aircraft Protocol.

When the assignment is made by way of security, in the event of default by an assignor, an assignee may exercise a set of remedies analogous to those held by a chargee under a security agreement.

An obligor is bound to an assignment, and, accordingly, has a duty to make payment and give other performance to an assignee, if (a) the obligor has been given notice of the assignment in writing by or with the authority of the assignor; (b) the notice identifies the international interest; [and (c) the obligor does not have actual knowledge of any other person’s superior right to payment

See infra Part 5.2.

The points made above regarding the nature and sui generis interests and their relationship to national law are equally applicable to assignments. See supra notes 92-102, 144 and accompanying text.

Consideration should be given as to whether a provision analogous to Convention Article 7(b) (referring to the power of the assignor to dispose of an object) is appropriate in this context.

See Convention, supra note 3, art. 29(2).

See id. note 3, art. 29(2).

See id. art. 30(1).

See id. art. 32.
or other performance]. That consent may, but need not, be given in advance.

In the event of competing assignments, priority vis-à-vis an assignor will be determined on a first-to-file basis. As with international interests, a registered assignment shall be valid against the trustee in bankruptcy of the assignor. Once again, this is a validating, rather than invalidating, rule. It does not render an assignment that would be valid against the trustee without filing invalid.

4.6.3. Defenses and Set-off Rights

On the question of the availability of obligor defenses and set-off rights, the party autonomy principle is followed. An obligor may, by agreement in writing, waive all or any defenses and rights of set-off previously available against an assignor. Absent such an agreement, an assignee takes subject to all such defences, set-off rights, and restrictions on assignment contained in the agreement.

4.7. Prospective Interests

The Convention/Aircraft Protocol permits the registration of several types of prospective interests. A prospective international interest is an international interest, whose assignment or sale 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."

This concept is primarily designed to facilitate the efficient closing of transactions by allowing prefilings. Prefilings both put others on notice of future interests and ensure the priority of the

---

302 Convention, supra note 3, art. 31; Aircraft Protocol, supra note 5, art. XV(2). The Aircraft Protocol disapplies the provision in the Convention conditioning the binding of an obligor to an assignment not having knowledge of any other person's superior right to payment or other performance. See Aircraft Protocol, supra note 5, art. XV(2).

303 See Aircraft Protocol, supra note 5, art. XV(1).

304 See Convention, supra note 3, art. 33.

305 See id. art. 35(1).

306 See id. art. 35(2).

307 See id. art. 30(3).

308 See id. art. 30(2).

309 See id. art. 1 (defining "prospective international interest," "prospective assignment," and "prospective sale").
registrant. In the event the prospective interest becomes an actual interest and satisfies the conversion conditions to be provided in the aircraft registry regulations, the priority of that interest will be determined with reference to the date of the filing of the prospective interest. In order to safeguard the interests of obligors, the intending grantor may require the intended grantee of a prospective interest to remove the relevant filing at any time "before the latter has given value or incurred a commitment to give value."

The concept of a prospective assignment is also intended to permit registration of a future assignment in favour of a surety that is conditioned upon its payment under a credit support document. In that a surety has incurred a commitment to give value, a grantee cannot require removal of the registration. The priority would relate back to the date of the filing of the prospective assignment.

4.8. Rights of Subrogation

In addition to having the ability to ensure the priority of a surety by filing a prospective assignment, the Convention/Aircraft Protocol contains two other bracketed provisions of significance to a surety. First, it is confirmed that nothing in the Convention/Aircraft Protocol affects rights or interests arising "by operation of principles of legal subrogation under the applicable law." Second, priorities between a surety and the holder of a competing interest (or another surety) may be varied by agreement.

310 See id. art. 17(b); Aircraft Protocol, supra note 5, art. XIX(5).
311 See Convention, supra note 3, arts. 19(3), 27(1).
312 Id. art. 25(2); see Aircraft Protocol, supra note 5, art. XIX(2) (requiring that steps be taken to remove the prospective registration no later than five working days after receipt of the removal demand).
313 See Convention, supra note 3, arts. 1 (defining "prospective assignment"), 15(1)(a).
314 One justification for revising and simplifying the detailed provision of the final draft Aircraft Protocol, which is produced by the Aircraft Protocol Group and addresses surety contracts, was the expressed view that the concept of prospective international interests would serve as a vehicle for the registration of interests reflecting export credit support arrangements customary in aircraft financing transactions. See Preliminary Draft Aircraft Protocol (Aircraft Protocol Group), supra note 63, art. XIV.
315 Convention, supra note 3, art. 36(1).
316 See id. art. 36(2).

4.9.1. Preliminary Comments

The Convention/Aircraft Protocol contains several important provisions addressing jurisdiction. The inclusion of jurisdictional provisions, a subject originally recommended by aviation sector representatives, and subsequently agreed to by the study group, is designed to enhance commercial predictability, render dispute resolution more efficient, and generally increase the value of the treaty instruments. The decision to address this technically complex and policy-laden subject matter was not taken lightly. A conclusion was reached that the benefits outweighed the potential difficulties.

4.9.2. Bases of Jurisdiction

The first provision addressing jurisdiction is narrow. It relates solely to which courts have jurisdiction to grant judicial relief under the expedited judicial relief rule. Four bases are provided. They are courts of a contracting State where (a) “the [aircraft] object is within [or is physically controlled from] the territory of that State,” (b) “the defendant is situated within that territory,” (c) “the parties have agreed to submit to the jurisdiction of that court,” or (d) that State is the State of the Chicago Convention nationality registry for the aircraft. These courts may exercise jurisdiction even if litigation of the dispute will or may take place in another State or arbitral tribunal.

The second provision, set out in square brackets to indicate its provisional nature, addresses the courts that have “jurisdiction in all proceedings relating to this [Convention/Aircraft Proto-

---

318 Convention, supra note 3, art. 40(1)(a). For issues associated with a forum non conveniens basis of jurisdiction, see SRC M.1 Report, supra note 55, at 34.
319 Convention, supra note 3, art. 40(1)(b).
320 Id. art. 40(1)(c).
321 See Aircraft Protocol, supra note 5, art. XX. This additional basis of jurisdiction is in line with both the spirit of the Chicago Convention and prevailing rules of private international law. Cf. European Communities: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1990, art. 16(3), 29 I.L.M. 1413, 1422.
322 See Convention, supra note 3, art. 40(2).
It confers such jurisdiction on each of the courts referred to in clauses (a)-(d) of the preceding paragraph. This jurisdiction does not empower such national courts to make orders, give judgments, or issue rulings that purport to bind the international registry, as it is an international body.

4.9.3. Issues for Further Consideration

It is the view of the Aircraft Protocol Group that the above-described broad bases of jurisdiction and the general jurisdiction provision are appropriate in this treaty. Governments will need to consider the desirability of this approach. Should they concur, there are several questions that naturally follow.

First, should the jurisdictional grounds set out in the Convention/Aircraft Protocol be exhaustive or, alternatively, should they be additive to other grounds that may exist under rules of private international law? Second, should the grounds of jurisdiction set out in the Convention/Aircraft Protocol be exercisable exclusively or concurrently? Third, if exclusively, what is the hierarchy of the four different grounds of jurisdiction? For example, in line with the party autonomy principle, should the courts to which the parties have submitted rank be first in that hierarchy? If so, what if, as a result of the movement of the aircraft object, one of the transaction parties seeks urgent judicial relief in the location to which the aircraft has moved? Fourth, if the grounds of jurisdiction are exercisable concurrently, is a rule lis alibi pendens needed to address petitions for urgent judicial relief in several courts?

4.10. Relationship with Other Conventions

4.10.1. Convention on International Civil Aviation

One misconception about the Convention/Aircraft Protocol and its international registry system must be promptly and thoroughly dispelled. Use of the terms “registry” and “registration”...
has, among certain observers, raised concern that the operation of the Convention/Aircraft Protocol may affect matters within the scope of the Chicago Convention. By virtue of its scope and universal membership, the Convention is rightly regarded as the constitution of the system of international civil aviation. 328

This is simply not the case. The misunderstandings are attributable to the historical linkage between the Geneva Convention and the Chicago Convention, 329 and differing usages of the term "registered" in these instruments and in the Convention/Aircraft Protocol. 330 With one narrow exception, which neither requires amendment to the Chicago Convention nor raises policy issues, there is no subject-matter overlap between the Convention/Aircraft Protocol and the Chicago Convention. The Convention/Aircraft Protocol does not purport to regulate any aspect of international civil aviation.

The one narrow exception relates to the default remedy provision in the Convention/Aircraft Protocol. This provision permits an obligee to de-register the aircraft from its nationality register 331 and the related provision, on which a reservation is permitted, that makes use of an internationally sanctioned request authorisation to expedite and facilitate that de-registration. 332 The relationship arises by virtue of the provision in the Chicago Con-

---

328 See generally Matte, supra note 252; Kotaite, supra note 252.
329 The Geneva Convention requires its contracting States to recognise certain interests constituted in accordance with the law of the State in which the aircraft was registered as to nationality at the time of creation. See Geneva Convention, supra note 19, art. I(1). The nationality of an aircraft, in turn, is addressed internationally by the Chicago Convention. See Chicago Convention, supra note 2, ch. III.
330 In the Chicago Convention, registration and nationality are coextensive and are jointly linked to basic regulatory responsibility. Registration has public function implications; that is, it is an act of consequence under public international law. Registration under the Convention/Aircraft Protocol, conversely, is simply the instrumentality to enhance rights derived from private international law. Governments might consider using alternative clarifying terminology in the Convention/Aircraft Protocol.
331 See Aircraft Protocol, supra note 5, art. IX(1)(a); see also supra notes 158-59 and accompanying text.
332 See Aircraft Protocol, supra note 5, art. XIII; see also supra notes 178-81 and accompanying text.
vention that, in effect, points to the law of the country of nationality to determine the rules applicable to de-registration. 333

No amendment to the Chicago Convention is required because the terms of the relevant article in that instrument are unaffected. The laws of the country of nationality registration will continue to determine de-registration criteria. The Convention/Aircraft Protocol simply requires that its contracting States give effect, by implementing legislation if necessary 334 to the above-identified provisions as a matter of national law. 335

These provisions should not raise Chicago Convention policy concerns since they are consistent with the purposes of the Chicago Convention in general, and the regulatory aspects of its nationality provisions in particular. 336 In simplest terms, the exclusive nationality of an aircraft imposes safety and operational regulatory responsibilities on the country of nationality registration. 337 In the context of aircraft financing and leasing default remedies, deregistration, by definition, relates to a change in ownership and/or use of an aircraft. In other words, the regulation-justifying nexus will be altered.

In two respects, adoption of the Convention/Aircraft Protocol should be affirmatively embraced by the international civil aviation regulatory community. First, the treaty will facilitate the financing, and thus acquisition and use, of newer, safer aircraft equipment. 338 The policy value of this adoption cannot be overstated.

Second, and more speculatively, one can plausibly argue that delinking the system applicable to property rights in aircraft from safety and operational regulatory responsibility will actually

333 See Chicago Convention, supra note 2, art. 19 ("[T]he transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.").
335 See supra note 333 and accompanying text.
336 For a discussion of possible policy-based amendments to the Chicago Convention, including its nationality provisions, see Milde, supra note 252.
337 See generally Chicago Convention, supra note 2, art. 12, chs. III-VI.
338 See generally Economic Implications, supra note 6 at 351-52.
promote the basic purposes of the Chicago Convention.\textsuperscript{339} Depending upon a variety of factors,\textsuperscript{340} the Convention/Aircraft Protocol, through its general upgrade of commercial law, may lessen the incentive of financiers and lessors to demand "off-shore" structured financing. In broad terms, that is a transaction in which, in an attempt to avoid application of perceived inadequate commercial and/or insolvency laws of the country of airline domicile or operations, foreign nationality registration is sought. In effect, this is not dissimilar to shipping flags of convenience, a concept in tension with the historical regulation of international civil aviation.

\textbf{4.10.2. Convention on the International Recognition of Rights in Aircraft}

The relationship between the Convention/Aircraft Protocol and the Geneva Convention is a critical issue for the international aviation community. In sharp contrast to the Chicago Convention, the subject matter of the Geneva Convention, property rights in aircraft, is shared with that of the Convention/Aircraft Protocol. Yet there are important, indeed fundamental, conceptual differences between the two instruments. These differences, perhaps best explained by reference to their histories and the circumstances surrounding their development, are worth highlighting before turning to the relevant provision addressing their relationship.

Four conceptual differences are of particular note. First, whereas the Geneva Convention is principally, though not exclusively, a recognition of rights instrument, the Convention/Aircraft Protocol lays down substantive rules regarding se-
secured transactions and leasing. One cannot doubt that reaching international agreement in 1948 on the notion of one State's recognition of rights duly constituted under the laws of, and recorded in a bona fide public record of, another was a significant accomplishment. In the early post-war period, it is fair to describe the Geneva Convention as groundbreaking for that reason alone. Moreover, the Geneva Convention does contain several important substantive provisions, including select default remedies and priority rules. While certain States have taken issue with aspects of one or more of these provisions, they too represented forward-looking law-making. All that said, 50 years have passed since the Geneva Convention was adopted, and, more important for our purposes, internationally developed and widely accepted asset-based financing and leasing techniques have become the centre piece of modern and forward-looking aircraft financing.

Second, the Geneva Convention takes as its starting point a nationally created property interest, whereas the Convention/Aircraft Protocol uses an international interest. Once again, the Geneva Convention approach was both necessary and appropriate in 1948, particularly given the historical and textual linkages between it and the Chicago Convention and the latter's utilisation of the notion of nationality. The reasoning in sup...

341 Compare Geneva Convention, supra note 19, art. I(1) with Convention, supra note 3, chs. II, III, and VII.

342 See generally Geneva Convention, supra note 19. For the view that the conflict of laws system embodied in the Geneva Convention was, in essence, an attempt to reconcile the U.S. secured transactions system, which at the time utilised a wide variety of financing structures and did not require filing or other publication of conditional sales contracts and other forms of quasi-security and the European system which developed from ship financing precedent and required a high degree of formalism, see Carl Svernlöv, Security in Aircraft: The Scandinavian Systems, 17 ANNALS AIR & SPACE L. 369, 369-95 (1992).

343 See, e.g., Geneva Convention, supra note 19, art. VII.

344 See, e.g., id. art. IV.

345 In particular, the States have taken issue with the absence of priority to state tax and other fiscal claims. See Svernlöv, supra note 342, at 374.

346 Compare Geneva Convention, supra note 19, art. I(1)(i) with Convention, supra note 3, arts. 2, 7.

347 See supra note 329 and accompanying text. For evidence of the deeper historical linkage between the two instruments, see Resolution of the Final Act of the International Civil Aviation Conference, Part V (bridging the relevant work the Comité International Technique d'Experts Juridiques Aérians.
port of an internationally created interest is the same as that mentioned above: the recognition and encouragement of international asset-based and leasing financing techniques and structures. It also reflects the fact that, because of global market forces and industry trends, aircraft have increasingly fewer permanent and inextricable links to any particular country. The importance of airline capacity management through subleasing is but one example.

Third, and an extension of the previous point, the Geneva Convention relies upon rights and interests recorded in national registries, whereas the Convention/Aircraft Protocol makes use of an international registry system. In effect, the decision to ratify the Convention/Aircraft Protocol represents a contracting State's decision to internationalize public notification of property rights in aircraft. It is an act of sovereignty. Moreover, ongoing responsibility for the regulation of the international registry system is merely delegated to the international regulator, the latter remaining accountable to contracting States.

Fourth, whereas the Geneva Convention, while making provisions for the security of storaged spare engines in broad and nontechnical terms, views engines as part of a larger composite aircraft, the Convention/Aircraft Protocol regards aircraft engines as distinct, valuable, and separately financiable assets. Current engine practice, including greater use of engine pooling and interchange agreements and broader engine or "thrust" management techniques, justifies the approach adopted in the Convention/Aircraft Protocol.

(CITEJA), completed in 1931 with the future work leading to the Geneva Convention).

Cf. Milde, supra note 252, at 423-24 (stating that the concept of "nationality" of aircraft and [its] impact on the application of other provisions of the Chicago Convention... requires profound re-thinking and modernisation to serve the changed and changing conditions of international civil aviation.) (emphasis added).

See Economic Implications, supra note 6, at 344.

See supra notes 271-74 and accompanying text.

See Aircraft Protocol, supra note 5, arts. XVI, XVII.

See Geneva Convention, supra note 19, art. X.

See id. art. XVI (defining an aircraft to include engines intended for use in the aircraft, whether installed therein or temporarily separated therefrom).

See supra notes 119-21 and accompanying text.

With the foregoing as background, attention now turns to the actual coordinating provisions and the thinking of the Aircraft Protocol Group. As a starting point, a basic decision was made to ensure the continued existence of the international legal relationship of State parties to the Geneva Convention. A second principle was that the two instruments should be coordinated to the extent practicable. Most important in this regard, the basic choice of law notion in the Geneva Convention was retained in a manner consistent with the primacy of the substantive provisions in the Convention/Aircraft Protocol. In effect, parties to the Geneva Convention will continue to recognise rights constituted in accordance with the "law" of other contracting States, but where such States are party to the Convention/Aircraft Protocol, that law shall include the substance of the Convention/Aircraft Protocol. A third principle was that transaction parties would retain the option, by an act of election, to exercise certain contractual default remedies under the relevant provisions of the Geneva Convention. Finally, and recognising the importance of asset-based financing and leasing, the Convention/Aircraft Protocol would supersede the Geneva Convention on all residual matters.

4.10.3. Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft

The Rome Convention on Precautionary Arrest is designed to prevent the precautionary arrest of aircraft where doing so would seriously disrupt air transport or interfere with State aviation-related services. In view of the definition of precautionary arrest, an exercise of non-judicial remedies under the Convention/Aircraft Protocol would result in the violation of the Rome Convention on Precautionary Arrest. Accordingly, there is a provision in the Convention/Aircraft Protocol for and among contracting States to both instruments. For countries that do

356 See Aircraft Protocol, supra note 5, art. XXII.
357 See id. art. XXII(1).
358 See id.
359 See id. art. XXII(3); see also APG M.1 Report, supra note 61, at vii.
360 See Aircraft Protocol, supra note 5, art. XXII(2).
361 See Convention for Unification, supra note 83, art. 3(1).
362 See id. art. 2(1).
363 See Aircraft Protocol, supra note 5, art. XXIII.
not enter a reservation in respect of non-judicial remedies, the Convention/Aircraft Protocol shall supersede the Rome Convention on Precautionary Arrest. For countries that do enter that reservation, their existing Rome Convention on Precautionary Arrest treaty relationships are unaffected.

4.10.4. **UNIDROIT Convention on International Financial Leasing**

Among contracting States to both instruments, the Convention/Aircraft Protocol shall supersede the International Financial Leasing Convention as it relates to aircraft objects. While the Convention/Aircraft Protocol builds on the International Financial Leasing Convention, there is a direct subject-matter overlap between these two instruments. In the view of the Aircraft Protocol Group, the Convention/Aircraft Protocol is clearly a superior instrument. Moreover, select provisions in the first instrument have raised concerns in the international aviation financing community.

4.10.5. **Regional Conventions**

A provisional decision has been made not to address the relationship between the Convention/Aircraft Protocol and various regional conventions with subject-matter overlap, including the recent contractual choice of law conventions and European jurisdictional conventions. The issue of whether a multilateral convention of this type should address regional instruments must be considered, particularly when a regional treaty is subsequent in time and/or has a more narrow subject.

4.11. **Select Final Provisions**

The Aircraft Protocol Group envisaged that, in line with UNIDROIT practice, a draft of the final provisions would be prepared for the eventual diplomatic conference at such time as the Convention/Aircraft Protocol had been completed. Nevertheless, the Aircraft Protocol (but not the Convention) contains a set of final provisions set out in an addendum. The inclusion of

---

364 See id. art. XXIV.

365 The item, raising basic treaty-making and institutional questions, will be subject to further consideration by governments. See SRC M.1 Report, supra note 55, at 38.
such provisions was in no way intended to prejudge the customary process but simply to indicate the suggestions of the Aircraft Protocol Group on the matter. A few of the final clauses that attracted the attention of the Aircraft Protocol Group are as follows:

4.11.1. Entry into Force

The question of how many ratifications\(^\text{366}\) are required to bring the Aircraft Protocol into effect is to be determined. A provision of the protocol suggests that the protocol would enter into force following the deposit of the third instrument of ratification, acceptance, approval, or accession\(^\text{367}\). This provision indicates that a relatively small number of ratifications should be required given the particular nature of this instrument and the fact that broad international acceptance, while highly desirable, is not a condition of its effectiveness in contracting States.

4.11.2. Temporal Application

The Aircraft Protocol applies to rights and interests in aircraft objects created or arising on or after the date on which the Aircraft Protocol enters into force in that contracting State.\(^\text{368}\) Earlier in the developmental process, consideration was given to the application of the Convention to existing transactions. This application was considered, in part, to facilitate a system of priorities that would provide answers to virtually all possible priority disputes for aircraft objects currently in operation.

It was ultimately thought that such an approach, which would require transfer registrations from current registries to the new international registry, presented several major problems.\(^\text{369}\) As a starting point, it was recognised that unless parties that failed to make transfer registrations were subordinated to subsequent registered interests, no transitional rules would result in definitive priority rules regarding aircraft objects subject to previous financing arrangements. The view of the Aircraft Protocol Group was that

\(^{366}\) The term ratification is being used broadly to include acceptance, approval, or accession. *But cf. Aircraft Protocol*, supra note 5, art. XXV(4) (treating ratification as distinct from acceptance, approval, or accession).

\(^{367}\) See id. art. XXVI(1).

\(^{368}\) See id. art. XXVIII.

\(^{369}\) See APG M.1 Report, supra note 61, at viii.
it would be inequitable to jeopardise the vested rights of parties under existing transactions. It was believed, moreover, that efforts to minimise this problem by governmental assistance, such as having national aviation authorities take responsibility for effecting transfer registrations, were likely to be resisted on practical grounds. Finally, the Aircraft Protocol Group recognised the potential cost that the transitional rules would impose on transaction parties, particularly airlines, including the legal costs of ensuring compliance.

4.11.3. Effect of Subsequent Declarations or Denouncements

The Aircraft Protocol contains provisions to the effect that no future denunciation of the instrument, or subsequent declaration relating to it, shall adversely affect the rights and interests arising prior to the effective date of such denunciation or declaration. These provisions seek to address one risk area in transactions, namely the political risk. Absent this provision, by governmental action, the Convention/Aircraft Protocol may be rendered inapplicable. This provision, while preserving a government's prerogative to subsequently denounce or declare the instrument, will ensure that transaction parties are able to rely on the legal position at the time their transaction commences.

4.11.4. Review Board and Conferences of Contracting States

See discussion above for the description of, and rationale for, a standing review board and specifically contemplated review conferences of contracting States.

4.12. Commentary

It has been the long-standing position of representatives of the aviation sector, confirmed by the Aircraft Protocol Group and contained in previous drafts of the Aircraft Protocol, that the Convention/Aircraft Protocol should be: (a) rule— rather than

370 See Aircraft Protocol, supra note 5, arts. XXXI (discussing effect of subsequent declarations), XXXIII (discussing effect of denunciations).
371 See supra notes 85-89.
372 See AWG/IATA Joint Comments, supra note 16, at 3-5.
373 See Preliminary Draft Aircraft Protocol (Aircraft Protocol Group), supra note 63, art. III.
standards—based; and (b) supported by persuasive, interpretive aids.\textsuperscript{374}

In particular, the development of, and mandatory reference to, a commentary has been seen as essential given the overriding and fundamental objective of enhancing commercial predictability. Toward the laudable end of simplicity, many important points have not been addressed with a sufficient level of detail. Examples include:

(i) articulation of the "general principles" underlying the texts referred to in the gap-filling provisions;\textsuperscript{375}

(ii) select aspects of the relationship between the instrument and national law;\textsuperscript{376}

(iii) the parameters of the notion of public order as a limitation on the availability of nonjudicial remedies;\textsuperscript{377}

(iv) the absence of any requirement to establish a reasonable relationship between a law chosen on contractual matters and the transaction and/or parties;

(v) a statement of the \textit{sui generis} nature of the expedited judicial relief rule; and

(vi) greater detail on the international standard applicable to error and omission liability of the International Registry.

Short of the diplomatic conference’s adoption of a commentary, a prospect raising procedural and timing issues, efforts should be made to give the commentary the appropriate pedigree and linkage to the development of the texts to ensure a very high degree of persuasive authority. To achieve this objective, it has been suggested that the above-described steering and revisions committee take responsibility for organizing the preparation of the commentary, communicating it to and inviting comments from governments, and preparing the final version.\textsuperscript{378} The desirability of this arrangement is a matter to be considered by governments.

\textsuperscript{374} See AWG/IATA Joint Comments, \textit{supra} note 16, at 3-5.

\textsuperscript{375} See \textit{Convention}, \textit{supra} note 3, art. 6(2)-(4).

\textsuperscript{376} See \textit{supra} note 144 and accompanying text.

\textsuperscript{377} See \textit{supra} notes 166-69 and accompanying text.

\textsuperscript{378} The authority to be given to the commentary and, if agreed in principle, the procedure by which it will be prepared are to be considered by governments. See SRC M.1 Report, \textit{supra} note 55, at 32.
5. SUMMARY OF PRINCIPAL ISSUES TO BE CONSIDERED BY GOVERNMENTS

5.1. Confirmation of Broad Objectives

The threshold question to be considered by governments during the intergovernmental negotiations relating to the Convention/Aircraft Protocol is whether facilitating the asset-based financing and leasing of aircraft objects is the central objective. If so, the next question is whether the reservation mechanism is an appropriate vehicle for promoting that objective, while at the same time preserving the ability of States to output select provisions that may raise policy issues. The third question is whether there are more appropriate means of balancing economic versus non-economic considerations that do not result in a “least common denominator” treaty of marginal commercial value. In view of the complexity of the instruments, it is worth raising these questions in direct terms since many issues will need to be answered with reference to guiding first-principles. One example in this regard is the current ambiguity in the expedited judicial relief rule.

5.2. Structure and Establishment of the International Registry System

Perhaps the subject requiring the most work will be related to the structure and development of the international registry system. As a starting point, a basic decision is required regarding the question of whether a unitary registry structure or a binary registry structure will be put in place. Secondly, the question as to the necessary conditions to registration must be answered. This question is of more than theoretical importance. It actually reflects the weighing of accuracy versus efficiency objectives, and their balance against system cost issues. For example, a system that seeks high accuracy by imposing stringent conditions on registration, including legal or factual review by qualified professionals, will be more costly than one that places efficiency as its primary object. This calculation, in turn, impacts the fees paid by...
end users. Finally, there is the obvious matter of actually creating the international registry system. Waiting until complete consensus is reached on all other items regarding these complex instruments would unnecessarily delay the process.

5.3. Jurisdictional Questions

It is far from customary to address jurisdictional questions in a commercial law treaty. The benefits of doing so in this case are evident, and it would be unrealistic to downplay the issues associated with their inclusion. In light of the objectives of the Convention/Aircraft Protocol, it is hoped that governments make available their best experts to contribute constructively to the jurisdictional and other private international law elements of this mixed private-public international law instrument.

6. Conclusion

A critical juncture in the UNIDROIT initiative has been reached: the commencement of the intergovernmental negotiation process co-sponsored by UNIDROIT and ICAO. This article has provided an overview of the draft treaty instruments to be considered during the first stage of that process, and has highlighted issues likely to attract significant attention. It is hoped that these issues will be constructively considered by a cross-section of government officials, air transport industry participants, and leading academics with a view toward broadening and deepening the consensus necessary to bring about a change in law of the magnitude contemplated by the Convention/Aircraft Protocol. Such cooperation has been the hallmark of this process to date and, in the author's view, is a major reason why a material improvement in the international legal framework applicable to aircraft financing is within reach.