A New Regime for International Commercial Aircraft (and Other Equipment) Financing : The (draft) Convention on International Interests in Mobile Equipment and the (draft) Aircraft Equipment Protocol

Ronald C.C. CUMING*

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* Professor, College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

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Aircraft financing during the period 1995-97 involved over 31 billion United States dollars. In 1996, major commercial aircraft suppliers estimated that during the next 20 years over 16,000 commercial aircraft with a total value of over one trillion dollars will be purchased by airlines principally in Asia, Africa, Eastern Europe and Latin America. Because of concerns about the legal systems of their home countries and the current uncertainty of private international law, airlines in many developing countries which must seek equipment acquisition financing from foreign sources must rely heavily on export trade credit and trade-related guarantees given by their governments. These credit facilities are costly and, in some cases, difficult to obtain.

Aircraft financing is the most significant, but not the only context in which international financing of costly mobile equipment that is taken over national frontiers is inhibited by uncertainty as to the legal rights of parties to financing transactions.

There is therefore good reason to conclude that both the availability and the cost of financing high value mobile equipment will be directly affected by the creation of an international legal structure designed to provide financiers and lessors the legal certainty that is available to domestic finance industries in countries such as Canada, the United States and the United Kingdom.[1] This conclusion induced the development of the Unidroit[2] *Convention on International Interests in Mobile Equipment*.

The Unidroit project to develop such a convention originated in a proposal[3] presented in 1988 to the Unidroit Governing Council by the Canadian member of the Council. Following the preparation of a background report[4] and a follow-up questionnaire that was sent to equipment suppliers, equipment buyers, equipment financiers and government agencies in several countries, working groups and a study group were

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1. A formal study commissioned by the Aircraft Working Group and carried out by applied economists concluded that law reform in this area could produce seven billion dollars in annual savings. See A. Saunders and I. Walter, "Proposed Unidroit Convention on International Interests in Mobile Equipment As Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol : Economic Impact Assessment," Salmon Center, New York University, September 1998.

2. The International Institute for the Unification of Law, Rome, Italy.

3. The author of this paper was the originator of the proposal for the draft *Convention* and, from the inception of work on it has acted as a member of the Study Group and Chairperson of the Registration Working Group.

4. See *Unidroit 1989 Study : LXXII* — Doc. 1, *International Regulation of Aspects of Security Interests in Mobile Equipment : Study* (Cuming report), reproduced as R.C.C. Cuming, "International Regulation of Aspects of Security Interests in Mobile Equipment" (1990-91), Uniform Law Review 63.

established to develop a draft convention dealing with international creation and regulation of security interests in movable property. The last of many meetings of the Study Group was held in November 1997 at which final approval was given to a draft *Unidroit Convention on International Interests in Mobile Equipment.*

The first session of the committee of governmental experts on a *Convention on International Interests in Mobile Equipment* will be held in Rome, Italy in February 1999.[5] Following one additional session in Montreal, Canada in September of 1999, a diplomatic conference will be held to adopt the *Convention*.

While it was assumed from the beginning that the proposed convention would apply to interests in a wide range of different types of mobile equipment, it was early recognized that the convention would play a central role in international secured financing and leasing of commercial aircraft. Consequently, early in the process, an Aviation Working Group was formed by representatives of a wide range of organizations involved in the sale, financing and use of commercial aircraft. Later, both the International Air Transport Association and the International Civil Aviation Organization became involved.

Midway through the process of preparing the *Draft Convention*, the Study Group reached the conclusion that it would be unrealistic to attempt to create a legal regime and a registry system that applied uniformly to all types of mobile equipment that might fall within its scope. At the same time, the Aviation Working Group made it clear to the Study Group it would be requesting that special features be included in the convention which have particular significance in the context of international aircraft financing and leasing. The Study Group decided that the only way to accommodate the special needs of the interests to which the proposed convention would apply was to provide a separate protocol for each type of equipment. As a result, the draft Convention on International Interests in Mobile Equipment has been structured so that its application to a particular type of equipment depends entirely upon there being a protocol for that type of equipment. Indeed, a protocol can amend the application of the Convention to interests in the type of equipment regulated by the protocol.[6] It is very likely that the *Aircraft Equipment Protocol* will be the only one that will be drafted and available for adoption along with the convention at the diplomatic conference to be held in 2000.

In the following paragraphs of this paper, the author has focused on key features of the *Draft Convention* and *Draft Aircraft Equipment Protocol* in order to demonstrate the extent to which regulation of international secured financing and leasing of commercial aircraft will be divided between the two instruments.

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5. At the date of publication of this paper, the proceedings of the Rome meeting were available. See *Draft Report, Joint Session of the Unidroit Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters Specific to Aircraft Equipment*, Unidroit CGE/Int.Int/WP/17; *Report of the Drafting Committee* Unidroit CGE/Int.Int/WP/16; and *Report of the Registration Working Group*, Unidroit CGE/Int.Int/WP/15.

6. Article II of the draft *Aircraft Equipment Protocol* provides that the *Convention* is modified relative to aircraft objects by the terms of the *Protocol.*

The following comments focus on the revised draft article of a future *Unidroit Convention on International Interests in Mobile Equipment*, (herein referred to as the "*Convention*") prepared by the Study Committee in November 1997[7] and a preliminary draft Aircraft Equipment Protocol prepared by the Aircraft Protocol Group, (hereafter referred to as the "*Protocol*") 1988[8] as modified by the a Steering and Revisions Committee in June 1998.[9]

I. THE PROBLEMS ADDRESSED

The underlying problems, stated in very simple terms, that the *Convention* would address arise in the following context. A security interest is taken under the law of State A in equipment that is thereafter moved to State B, and an issue of the validity, priority or enforcement of the security interest arises in a court of State B. The holder of the security interest is likely to face one or other of three major legal problems.[10]

The first is that State B, the state in which the validity of the security interest is called into question, may not give full recognition to the interest. It is common for courts faced with the issue of determining the validity of a foreign security interest to engage in "transposition." This involves viewing a foreign security interest in the context of domestic law and employing domestic law applicable to "similar" domestic security agreements. If there is no domestic equivalent, recognition is refused. If there is a domestic equivalent, it may have incidents different from those the security interest had in State A.

The second problem that the holder of a foreign security interest might face would result from the application of the *lex situs* by the courts of State B in cases of priority conflict. The approach traditionally applied by most courts is that the law applicable to the validity and priority of an interest is the law of the state where the equipment is located at the time the interest arises. The courts of State B may look to the law of State A to determine the validity of the security interest; however, they are likely to apply the law of State B to determine the validity and priority of a competing interest that arose when the equipment was in State B. As a result the security interest would be subjected to the priority rules of State B under which it could be subordinated to an interest acquired in State B. For example, the security interest may be subordinated because it was not registered or was not timely registered in State B as required by the law of State B.

Even if the security interest taken in State A is recognized under law of State B, there is no guarantee that the enforcement regime of State B is adequate to ensure that the

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7. *Unidroit 1997 Study : LXXII* — Doc. 35.

8. *Unidroit 1998 Study : LXXII* — Doc. 12, APG.

9. See *Unidroit 1998 Study : LXXII* — Doc. 42.

10. See generally R.C.C. Cuming, "International Regulation of Aspects of Security Interests in Mobile Equipment", *supra* note 4 at 77-89, and J.R. Shilling, "Some European Decisions on Non-Possessory Security Rights in Private International Law" (1985) 34 I.C.L.Q. 87.

security value of the collateral is realizable. The domestic law of many jurisdictions is restrictive or replete with inefficient procedures that make it very difficult for a secured party to get collateral seized and sold before it has lost much of its resale value.[11]

The ultimate goal of the Unidroit Study Group was to develop a convention designed to provide a body of international law and a registry system for interests in specified types of equipment generally taken from one State to another. The *Convention* is revolutionary in that, unlike the *Geneva Convention on the Recognition of Rights in Aircraft*, 1948, it prescribes a body of substantive law. It relies very little on domestic law.

II. THE TYPES OF EQUIPMENT TO WHICH THE CONVENTION AND PROTOCOL WILL APPLY

Article 3 of the *Convention* contains a list of types of equipment to which it applies. However, the list is not exhaustive nor does inclusion in the list mean that equipment of a specified kind will be within the scope of the *Convention*. Only when a protocol is adopted applicable to a particular type of equipment will interests in the equipment be subject to the *Convention*. What the drafters wanted to make clear, however, is that the regime of the Convention is not designed for general financing on the basis of a broadly-based security interest in the assets of a debtor. The transactions falling within the *Convention* will be ones in which specific items of equipment will be identified. Further, registrations and searches under the registry system will be by identification numbers and not debtor names.[12]

Article 1 of the *Protocol* provides that it applies to airframes,[13] aircraft engines[14] and helicopters[15] together with all accessories and installed parts, data, manuals and records. The *Protocol* uses the term "aircraft objects" to refer cumulatively to airframes, aircraft engines and helicopters. The definitions would exclude small aircraft that are generally used for non-commercial purposes. Interest in these aircraft would continue to be governed by domestic law.

III. INTERNATIONAL INTERESTS AND THE LINK TO A CONTRACTING PARTY

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11. Enforcement problems resulting from the inadequacy of national law may also arise when the equipment is located in the domicile of the obligor when default occurs.

12. However, this feature can be changed in a protocol which can establish a registry under which the debtor's name is the registration-search criterion. See Article 18 of the *Convention*.

13. An airframe must be certified to transport at least eight persons including crew or goods in excess of 2750 kilograms.

14. An jet engine must be capable of producing 1750 lbs of thrust and a turbine engine must have at least 550 rated takeoff shaft power.

15. A helicopter must be certified to transport at least five persons including crew or goods in excess of 450 kilograms.

As a result of Article 4, the *Convention* will apply when at the time of execution of the agreement creating or providing for an international interest[16] the obligor, defined in Article 1 to include the debtor, lessor or buyer, is located[17] in a Contracting State, the equipment is registered as to nationality or in a "State-authorised asset registry" in a contracting state or the equipment "otherwise has a close connection, as specified in a *Protocol*, to a Contracting State." This is so even though all factors relating to the agreement and the equipment are located in a single state. However, any State that becomes party to the *Convention* may declare that the *Convention* will not apply to "a purely domestic transaction" [Article V].

Article III of the *Protocol* provides, however, that the only connecting factor applicable under Article 4 is the "nationality registry" under the *Chicago Convention on International Civil Aviation* 1944. In addition, a contracting state will not have the right under Article W to exclude from the scope of the *Convention* and *Protocol* "purely domestic transactions" involving aircraft objects. The effect of this provision is to internationalize all financing transactions involving aircraft objects and to withdraw from domestic law the regulation of the most important aspects of these transactions.

IV. TRANSACTIONS TO WHICH THE CONVENTION AND PROTOCOL APPLY

The *Convention*, in part, adopts function rather than form as the basis for identifying the transactions that create international security interests. Article 2(2)(a) provides that the Convention applies to a "security agreement," which is defined in Article 1 in generic terms.[18] However, this approach was not applied universally. Some members of the Study Group (principally, but not exclusively, those from civil law jurisdictions) objected to having included in the definition of "security agreement" title reservation agreements in the form of conditional sales contracts and leases even though, functionally, these transactions serve the same purpose as security agreements. To accommodate this position, Article 2(2) of the *Convention* provides that it applies to three separate types of agreements : a "*security agreement*," a "*title reservation agreement*" and a "*leasing agreement*." All three terms are defined in Article 1. Interests arising under these transactions are cumulatively referred to as "international interests" [Article 2(2)].

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16. As when an interest becomes an "international interest," see Article 8.

17. The meaning of "located" is amplified in Article 5.

18. "An agreement by which a chargor grants or agrees to grant to a chargee an interest in or over an object to secure the performance of an existing or future obligation of the chargor or third person."

Fortunately, the distinctions between the types of transactions to which the *Convention* applies are, for the most part, not significant for two reasons. In the first place, the characterization of a particular agreement will depend upon the applicable law.[19] Accordingly, should the issue of characterization of a transaction in the form of a lease or title retention sales agreement come before the court of a state of the United States or a common law province of Canada,[20] the court could decide that under the *Convention* the transaction is a security agreement since in substance its function is to secure performance of an existing or future obligation. In the second place, the rules dealing with creation, registration and priorities apply equally to all three types of agreements.

The distinctions are, however, relevant in the context of default by the debtor or lessor. Where a lease or title retention agreement is involved, the remedy of the lessor or seller is to recover possession of the equipment. Where a security agreement is involved, the debtor's interest in the property is recognized through an obligation of the secured party to sell or lease the equipment or take it in satisfaction of all or part of the obligation secured and a right given to the debtor to redeem it before disposition by the secured party [Articles 9-15].

The *Convention* applies to what under the law of Canada and the United States would be characterized as a true or "non-security lease" whatever its duration. It is assumed, however, that the application of the *Convention* to certain types of leases will be further refined in protocols. Some Protocol can be expected to limit the application of the *Convention* to long term leases.

The *Convention* makes provision for assignments of registered international interests or prospective international interests and their registration [Articles 30-38].[21] The assignment can be absolute or by way of security. A priority rule is provided for cases of multiple assignments of the same interests [Article 35]. The effect of an assignment is to transfer to the assignee the rights and priorities of the assignor [Article 31(1)]. The obligor under the assigned interest is bound by the assignment and is obligated to make payment to the assignee only if an appropriate notice has been given to it and it does not have knowledge of any other person's superior right. However, if payment is made pursuant to the notice, the obligor is discharged [Article 33(2)].

While it does not provide for the creation of non-consensual interests in equipment, the *Convention* addresses priority competitions between holders of international interests and holder of non-consensual interests in equipment. Non-consensual interests include repairers' or suppliers' liens, tax liens and wage liens. Articles 39 and 40 provide two approaches to the priority status of these interests. A Contracting State may treat one or more of these interests as registerable non-consensual interests or

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19. Article 2(3) provides that whether an interest arises under a security agreement, a title reservation agreement or a lease agreement is determined by the applicable law.

20. The *Convention* has no article dealing generally with jurisdiction. It does provide a jurisdictional rule in a particular context. See Article 42. See also Article X.

21. The *Protocol* effects several other minor modifications to the basic rules applicable to assignments set out in the *Convention*. See Article XV.

as non-consensual interests the priority of which is specified in national law. Under Article 39 a Contracting State may declare at any time in an instrument deposited with the depositary a list of non-consensual interests that shall be registerable under the *Convention* as if the interests were international interests. These interests will be treated for registration and priority purposes as international interests. Under Article 40 a Contracting State may declare that specified non-consensual interests, which under its national law have priority over registered interests of the same type as an international interest, will have priority over international interests. This list of interests will be available from the appropriate registry for interests in the type of equipment affected [Article 24]. Without this declaration or until this declaration is made, such non-consensual interests in equipment will not have priority over registered international interests.

Under Article 41, a protocol may extend the application of the *Convention* to transfers of interests other than those arising under a title reservation agreement or security agreement. The *Protocol* does this. Article 1V provides a system for the registration of transfers of interests in aircraft. The priority rules of the *Convention* applicable to competing international interests (and non-consensual interests) are extended to interests arising under transfers. This represents a major extension of the *Convention* to sales transactions where no financing element is involved.

V. CREATION OF INTERNATIONAL INTERESTS

Article 8 sets out the requirements for the creation of an international interest. All that is necessary is an agreement in writing that contains a description under which the equipment can be identified. This need not be a specific item description so long as there is a formula in the agreement under which the object can be identified. What constitutes an adequate description will be specified in the applicable *Protocol*. There is no requirement that the obligor own or have an *in rem* interest in equipment at the date of execution of the agreement.

An international interest may at the same time be a domestic interest. However, the Convention will override national law with respect to matters that are expressly or impliedly addressed in the *Convention* [Article 7(3)].

The *Convention* does not contain a general choice of law rule governing the variousaspects of the contractual relationship that exists between the parties to an agreement creating an international interest. However, this is not the case with respect to the *Protocol*. Article VIII of the *Protocol* provides that the parties to an agreement permitted by the *Convention* may agree on the body of national law (other than its choice of law rules) to govern, wholly or in part, their contractual rights and obligations. The agreement need not bear a relationship to the selected body of national law. This provision has apparently been included so as to give to the parties the freedom to choose a body of highly developed contract to law to regulate their relationships.[22] In practice, it will be the

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22. Articles XXII-XXIV of the *Protocol* provide that, to the extent there is an conflict, the *Convention* and *Protocol* shall supersede the *Unidroit Convention on International Financial Leasing*, May 20, 1988, can. the *Rome Convention on the Law Applicable to Contractual*

financier or lessor of large aircraft which will dictate the law applicable to the financing or leasing contract in cases where there is any discomfort or uncertainty as to the otherwise applicable law.

Article XXI of the *Protocol* provides that a waiver of sovereign immunity with respect to any matter relating to the enforcement of rights and interests relating to an aircraft object shall be binding on the Contracting State giving the waiver. This provision is thought to be very important given the fact that a large number of the agreements that will fall within the scope of the *Convention* and *Protocol* will involve state owned airlines.

VI. DEFAULT RIGHTS AND REMEDIES

Articles 9-15 (Chapter III) of the *Convention* provide a regime of post-default *in rem* rights and remedies of secured parties that closely resemble secured transactions laws of most North American jurisdictions. However, the Articles contain qualifications designed to accommodate approaches to enforcement employed elsewhere in the world and to address what are perceived to be special needs.

Article 6 provides that the parties may agree in writing to derogate from or vary most of the rights and obligations specified by the *Convention* in Chapter III. An exclusion would likely result in the invocation of the otherwise applicable law. On the other side of the coin, Article 14 permits the parties to agree upon additional remedies not inconsistent with the "mandatory provisions of the *Convention*" and allowed by the applicable law.

The remedies given to secured parties, lessors and title retention sellers under the *Convention* must be read in the light of Article 13 which makes it clear that the procedural laws of the place of exercise of the remedy must be followed. This gives rise to an important matter. The procedural laws of many States do not permit self-help seizure; judicial involvement in seizure is required. Article 9(1), which permits self-help, must be read subject to this limitation.[23]

Obligations, June 19, 1980, O.J. 1980, L266/7 and the OAS, Fifth Inter-American Specialised Conference on Private International Law, *Inter-American Convention on the Law Applicable to International Contracts*, Done at Mexico City, March 17, 1994, OR CIDIP-V (1994).

23. Article 13 is stated to be subject to Article Y which gives to a Contacting State the power to declare that exercise of the remedies in Articles 9-11 must be pursuant to a court order.

The extent to which post-default remedy provisions of the *Convention* have been substantially modified by the *Protocol* displays considerable disquiet on the part of the drafters of the *Protocol* with the extent to which national law might apply. Most of the modifications are "precatory" provisions, i.e., provisions that apply unless, at the time of being party to the *Protocol*, a State declares they will not apply.[24]

Article 9(2) of the *Convention*, which provides a test of commercial reasonableness applicable to the exercise of the rights of repossession and sale of the collateral, is supplemented by Article XI(7) of the *Protocol* under which the parties are free to define in an agreement what is commercially reasonable. While Article 9(3) of the *Convention* requires that a secured party proposing to sell or lease collateral must give "reasonable prior notice" of the sale or lease, Article XI(3) of the *Protocol* provides that the period shall be "ten or more working days' prior notice."

Article 15(1) of the *Convention* provides that a court of a Contracting State may grant "speedy judicial relief" pending final determination of an obligee's claim where the equipment is within the territory of the state, one of the parties is located in that State or the parties have agreed to submit to the jurisdiction of the court. This could involve an order for preservation of the property, possession, control or immobilization of it or its sale or lease. Article X of the *Protocol* provides that "speedy" in Article 15(1) means, unless the parties agree otherwise, a period not exceeding 30 days from the date on which the proceedings were initiated. This feature is designed to ensure that court proceedings to obtain the relief are not drawn out over a long period of time during which the collateral may be placed in jeopardy or its value significantly diminished.[25]

Of greater practical significance is Article XI of the *Protocol* which provides that, where the obligor is subjected to insolvency proceedings under national law or has ceased to meet its obligations generally, the obligor shall either cure all defaults and agree to perform future obligations under the agreement or deliver the aircraft object to the obligee in accordance with the agreement. In addition, the obligee is free thereafter to exercise any remedies provided by the *Convention*. Under Article XII, Contracting States in which an aircraft object is situated covenant to assist in enforcing these rights. This provision is designed to protect lessors and secured financiers from the effect of insolvency law under which the rights of creditors are stayed pending approval of a plan of reorganization of the debtor. The concept is taken from Article 1110 of the *United States Bankruptcy Code*.[26]

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24. See Articles IX-XIII and and Article XXX of the *Protocol*.

25. However, under Article XXX a Contracting State may declare that it will not apply this Article wholly or in part.

26. 11 *U.S.C.*

VII. A REGISTRY FOR INTERNATIONAL INTERESTS

The *Convention* sets out a priority structure for competing interests in equipment built around the concept of publication of interests or potential interests in a registry that is open to the public. While Articles 18-27 of the *Convention* describe a skeletal structure for a registry for international interests and registerable non-consensual interests, all registries that function in the context of the *Convention* will be established under protocols. The essential features of the type of registry system contemplated by the *Convention* are those which have been developed for Canadian provincial *Personal Property Security Acts*.

The *Convention* provides for an administration structure for a registry. An intergovernmental regulator will be identified in the relevant protocol. It will establish the registry and designate the operator of the registry [Article 17]. Under Articles XVI of the Protocol, an international intergovernmental regulator designated in the *Protocol*[27] will have regulatory power over the registry but will be required to report periodically to the Contracting States. The details of the operation of the registry will be set out in regulations promulgated by the intergovernmental regulator. The *Protocol* provides some of the detail for the *Registry for International Interests in Aircraft Objects* but, for the most part, procedures will be set out in regulations.

VIII. FEATURES OF THE REGISTRY

Set out below are the essential features of a *Convention* registry. Where appropriate, modifications effected by the *Protocol* are noted.

A. Autonomous Registry

An international registry will be autonomous and will function free from the laws of the jurisdiction in which it is situated [Article 16(2)].

B. Computerized and Remote-access

Chapter IV of the *Convention* contemplates, but does not require, a computerized, remote-access registry. Under this type of registry, a registration or a search can be effected from a remote computer terminal located anywhere in the world. Under Article 17(2) of the *Convention*, a protocol may provide that Contracting States may designate operators of registration facilities in their territories to be the transmitters of the information required for registration. Under Article XVIII of the *Protocol*, Contracting States may designate operators and give them the power to limit or preclude other access to the international registry. It is expected that many States will designate their national aircraft registry offices as operators of registration facilities.

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27. Two alternative administrative structures are set out in the *Protocol*. It is the author's view that the details of these alternatives are not significant in the context of this paper.

C. Notice Registration

Notice registration, not document filing, will be used. Article 21 of the *Convention* provides that registration is effected when the "required information" is searchable. It will not be possible to register the agreement creating the international interest. While the matter is not expressly addressed in the *Protocol*, it is expected that in some Contracting States agreements will be filed with the national operators of registration facilities designated under Article 17(2) of the *Convention* and Article XVIII of the *Protocol*.

D. Pre-agreement Registration

The *Convention* provides that registration of a prospective international interest or a prospective assignment of an international interest may be effected with the consent of the party who intends to grant the interest or make the assignment [Articles 21(1)].

E. Asset-specific Registration and Searches

The registration-search criterion, in most cases, will be the manufacturer's serial number of the equipment (or some other prescribed item identifier). Article XIX(1) of the *Protocol* provides that the registration-search criterion for an aircraft object shall be its manufacturer's serial number, supplemented as provided in the regulations, to ensure its uniqueness. It is relevant to note in this context that the term "aircraft object" includes the airframe and the engines as separate items. The fact that the engines are attached to the aircraft does not mean that they will be treated as part of the airframe for registration purposes.

F. Variable Life Registration

A registering party will be able to choose the life (duration) of the registration and may extend that life by registering an amendment notice before the expiry of the original registration life [Article 22].

Article 26 of the *Convention* addresses the issue of discharge of registrations where a legal relationship to which the registration purports to relate no longer exists or never did exist. The person affected may demand discharge of the registration. However, the *Convention* provides no penalty or other consequence for failure to comply with the demand. See also Article XIX of the *Protocol.*

G. WYSYG System

The registry system contemplated by the *Convention* will operate on the principle of "what you see, you get." In other words, an interest is registered only when it is searchable. See Article 20(1).

H. Liability for Errors or Omissions

Article 27(1) of the *Convention* provides that the registry liability will be liable for loss suffered by a user of the system as a result of an error or system malfunction in the registry is to be addressed in the relevant protocol. Article addresses the matter of court jurisdiction to hear claims for damages.

IX. PRIORITIES

The approach taken in the *Convention* to priority issues parallels that found in North American personal property security law. Under Article 28, competing interests registered under the Convention rank in order of their registration and a registered interest has priority over an unregistered interest. As noted above, it will be possible under the *Convention* registration rules to effect a registration prior to the execution of a security agreement [Article 21(1)]. In this context, the date of registration of a prospective interest or assignment is the date for determining the priority status of the interest or the assignment. The priority status given to an interest extends to future advances secured by that interest. Knowledge of a prior unregistered interest does not affect the priority status of a holder of a registered interest.

A registered international interest has priority over a trustee in bankruptcy and execution or attaching creditors [Article 29(1)]. Furthermore, if under the applicable law an international interest is valid against a trustee in bankruptcy without registration, it will have the same status under the *Convention*. Accordingly, if, for example, an international interest arising under a true lease is valid against a trustee in bankruptcy under the applicable law without registration, there is no requirement that it be registered under the *Convention*.

An international interest is subordinate to an interest of a third party in the property acquired from the debtor, lessee or buyer at a time when the international interest was not registered. This is so whether the third party interest was acquired with or without actual knowledge of the unregistered international interest [Article 28(3)(b)].

As noted above, the *Convention* addresses priority competitions with non-consensual interests in equipment. Non-consensual interests declared under Article 39 to be registerable under the *Geneva Convention* are treated for registration and priority purposes as international interests. Non-consensual interests declared under Article 40 as having priority over registered interests of the same type as an international interest will have priority over international interests. Without this declaration or until this declaration is made, such non-consensual interests will not have priority over registered national interests.

X. EFFECT ON THE *GENEVA CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT* 1948

The 1948 *Geneva Convention* provides rules for the international recognition of security interests in aircraft created under national law. Although many States, including Canada, have not become parties to it, the *Convention* has been an important factor in international finance of aircraft. Consequently, an appropriate interface between it and the *Convention* is required. Article XXII of the *Protocol* has been designed to provide this. The *Geneva Convention* requires that a Contracting State recognizes rights in aircraft constituted under the "law" of the country in which the aircraft is registered for nationality purposes. Under the *Protocol*, this reference will be deemed to be a reference to the *Convention* and *Protocol* and not national law. A reference to "registration" in the *Geneva Convention* will be deemed to be registration in the *Registry for International Interest in Aircraft Objects*. Except with respect to the enforcement of *inter partes* remedies against an obligor under Articles VII and VIII of the *Geneva Convention*, the *Convention* and *Protocol* would supersede the *Geneva Convention* to the extent of inconsistency between the conventions.

XI. SUMMARY

While other conventions dealing with security interests do exist,[28] the *Convention on International Interests in Mobile Equipment* is the first to create a largely complete body of international substantive law dealing with asset-based financing. When a country becomes a Contracting State, in effect, it surrenders to an international legal regime the regulation of not only most contract and property rights of parties to an agreement creating an international interest but as well the rights of third parties affected by such an interest. The *Convention* employs the modern concepts and a simple, commercially realistic priority structure built around a modern registration system containing features which have been demonstrated to be effective and efficient in Canada.

It is safe to predict that the *Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol* will be adopted, albeit in somewhat modified form, at a diplomatic conference in 2000. It is uncertain what other protocols, if any, dealing with different types of equipment will be developed in time to be adopted at the conference. Experience with the *Convention* in the context of aircraft financing will heavily influence the attractiveness of the *Convention* to sellers and financiers of other high value, mobile equipment.

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28. See, generally, "International Regulation of Aspects of Security Interests in Mobile Equipment," *supra* note 4 at 107-122.