Conflict of Laws in Aircraft Securitisation

Jurisdictional and Material Aspects of the 1998 Unidroit Reform Project Relating to Aircraft Equipment

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ABSTRACT

In June 1998, a Steering and Revisions Committee of the International Institute for the Unification of Private Law (Unidroit) fleshed out the final version of a "Draft Unidroit Convention on International Interests in Mobile Equipment". This Draft sets forth the basic framework for an international law of secured transactions in specified categories of high-value mobile equipment, such as "(a) airframes; (b) aircraft engines; (c) helicopters; (d) [registered ships;] (e) oil rigs; (f) containers; (g) railway rolling stock; (h) space property; (i) other categories of uniquely identifiable objects" (Art. 3), and an international registry system. The Convention would only enter into force between parties to equipment-specific protocols that accompany the general Convention text. The only specific protocol which has made headway to date is the "Draft Protocol on Matters Specific to Aircraft Equipment", also revised in June 1998. The *Draft Convention*, as applied through the *Draft Protocol*, particularly aims at economic benefits for the aviation industry, which has to cope with considerable financing difficulties that are, by and large, due to fragmented and internationally uncoordinated national security law frameworks for permanent *res in transitu*.

Framed by introductory and concluding remarks, the thesis is divided into five chapters. One after the other, these components will expound the generation and elaboration of the reform project, synchronise its jurisdictional aspects with the pre-existing law of international civil procedure and of conflict of jurisdictions, trace intimately related other harmonisation efforts, and briefly compare conventional and up-to-date substantive and conflict of law rules of selected Common and Civil Law jurisdictions that apply to secured transactions and their underlying contractual relationships. It will also review the essential legal characteristics of the 50 years old *Geneva Convention on the International Recognition of Rights in Aircraft* and ascertain its qualities in the light of present-day demands, before turning to the gist of substantive and uniform security and assignment law as applicable on the basis of the newly created transnational registration mechanism.

Wherever it appears necessary, I extend critical remarks, which flag possible interpretative uncertainties, application impediments, or points and formulations that are susceptible to misconceptions. The thesis neither asserts the demand of dealing exhaustively with every conceivable legal issue nor purports to offer a detailed review of pertinent jurisprudence and doctrine, but rather desires to contribute to the creation of greater awareness of problematic matters and their potentially delicate nature in order to make the prospective *loi uniforme* an easily applicable quality recipe for success.

The *Draft Convention on International Interests in Mobile Equipment* and the *Draft Protocol on Matters Specific to Aircraft Equipment* are attached in Appendices I and II. Where appropriate, citations of other proposed convention texts, uniform laws and statutes are included in the footnotes. The method of referencing follows the *Canadian Guide to Uniform Legal Citation*, 4th ed. (Scarborough, Ont.: Carswell, 1998).

RÉSUMÉ

En juin 1998, un Comité Pilote et de Révision de l'Institut International pour l' Unification du Droit Privé (Unidroit) a mis au point la version finale d'un "avant -projet de Convention d' Unidroit relative aux garanties internationales portant sur des matériels d'équipement mobiles". Ce projet trace les grandes lignes d'un droit international sur la sûreté des opérations de crédit pour des catégories d'équipement mobile de grande valeur, telles que: "(a) les cellules d'avion; (b) les moteurs d'avion; (c) les hélicoptères; (d) [les navires enregistrés]; (e) les plate-formes pétrolières; (f) les conteneurs; (g) le matériel roulant; (h) la propriété spatiale; (i) autres catégories d'objets facilement identifiables" (Art. 3), et met en place un système d'enregistrement international. La Convention n'entrerait en vigeur qu'entre des parties qui ont signé des protocoles complémentaires, spécifiques pour chaque type d'équipement. Ces protocoles accompagnent le texte général de la Convention. L'unique protocole spécifique actuellement élaboré est l'"avant-projet de Protocole portant sur les questions spécifiques relatives aux matériels d'équipement aéronautiques", qui aussi a été révisé en juin 1998. L'application de l'avant-projet de Convention par l'avant-projet de Protocole a pour objectif de favoriser l'économie de l'industrie aéronautique, qui fait actuellement face à des difficultés financières. Ces dernières sont dues à la pluralité de droits nationaux en matière de sûretés non coordonnés auxquels sont assujetis les *res in transitu* permanents.

Accompagné d'observations introductives et finales, la thèse est divisée en cinq chapitres. Elle débute par la genèse et le développement du projet de réforme, puis s'attache à la coordination juridique faite entre ses aspects juridictionnels, le droit de la procédure civile internationale et le droit des conflits de juridictions existants. Puis, elle suit pas à pas les autres efforts d'harmonisation qui ont lieu présentement et compare, brièvement, les règles de droit substantiel et de conflit des lois qui existent dans les juridictions de Common law et de droit Civil choisies pour cette étude, et qui s'appliquent aux opérations de crédit assorties de sûretés et leur relations contractuelles sous-jacentes. Par la suite, ce sont les characteristiques juridiques essentielles de la *Convention* de Genève *relative à la Reconnaissance Internationale des Droits sur Aéronef*, promulgée il y a 50 ans, qui sont réexaminées. Et, l'étude s'assurera de ses qualités au regard des exigences d'aujoud'hui. Elle étudie de manière plus approfondie le fond du droit substantiel et uniforme des sûretés et des cessions applicable sur la base du mécanisme d'enregistrement transnational nouvellement créé.

Où cela paraîtrait nécessaire, des critiques seront faites afin de démontrer où des incertitudes d'interprétation pourraient constituer des entraves, et dont les conséquences seraient préjudiciables, et où des formules utilisées pourraient prêter à confusion. Cette thèse prétend ni traiter, de manière exhaustive, de tous les aspects juridiques possibles, ni de présenter une révision complète de jurisprudences et doctrines pertinentes; elle a pour seul désir de faire jour sur les problèmes qui pourraient surgir du corps même du projet et des subtilités délicates qu' ils posent, afin de permettre une application facile de la loi uniforme future, clef de la perenité et de succès. L'*avant -projet de Convention d' Unidroit relative aux garanties internationales portant sur des matériels d'équipement mobiles* et l'*avant-projet de Protocole portant sur les questions spécifiques relatives aux matériels d'équipement aéronautiques* ont été placés en annexe de cette thèse. Lorsque des references à d'autres projets de convention, des lois uniformes et des textes de lois ont été faites, l'original du texte a été placé dans les annotations de bas de page. La mise en page a été faite conformément au *Manuel Canadien de la Référence Juridique* dans sa quatrième édition (Scarborough, Ont.: Carswell, 1998).

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[T]hy lord's a bountiful gentleman: but thou art wise; and thou knowest well enough, although thou comest to me, that this is no time to lend money, especially upon bare friendship, without securit[y].

Lucullus talking to Flaminius in
William Shakespeare, *Timon of Athens* (1607-08),
Act 3, Scene 1.

Introduction

Aircraft Financing in the Era of Globalisation

Following the end of the passage of arms in 1945, the reanimation of the international civil air transportation and the formation of an international air transport system have caused a new wave of heavy capital investment in aircraft. Shortly thereafter, in the late 1950's, technical changes in aircraft engines ("The Jet Era"[1]) have led to an unprecedented demand for aircraft financing. The advancement of technical developments and the competition for better technologies have again been significantly stimulated since the formation of Airbus Industrie in 1970 redressed the imbalance that perpetuated the American dominance in the sector of Large Civil Aircraft after World War II.[2]

I. A Need for High Performance Aircraft

Over the last two decades, the steadily increasing world population (soon up to 6 billion[3]), the augmenting mobility of international business, tourist travel and, more recently, the increasing use of air transport that accompanied the economic development in the Eastern European and Asian markets fuelled the already existing demand for bigger, faster and affordable aircraft. Against this background, the 1998 *Current Market Outlook* by the Boeing Corporation[4] and the 1998 *Global Market Forecast* by Airbus Industrie[5] have

[1] The first jet airplane was the German Heinkel He 178, which flew already in 1939.
[2] See generally D.W. Thornton, *Airbus Industrie – The Politics of an International Industrial Collaboration* (New York: St. Martin's Press, 1995); J.A. Krupski, "From Airbus Industrie to European Aerospace" (1998) 23 Ann. Air & Sp. L. 149.
[3] See United Nations Population Fund, *State of World Population Report 1998*, online: United Nations Population Fund <http://www.unfpa.org/SWP/swp98/pdffiles.htm> (date accessed : 2. 9. 1998).
[4] See Boeing Corporation, *1998 Current Market Outlook*, online: Boeing Corporation <http://www.boeing.com/commercial/cmo/index. html> (date accessed: 2. 9. 1998).
[5] See Airbus Industrie, *Global Market Forecast 1998 (1998-2017) – Sustain Growth Confirmed*, online: Airbus Industrie <http://www.airbus. com/gmf98.html> (date accessed: 2. 9. 1998) [hereinafter *GMF*].

revealed a large demand for over 16.700 jetliners to the amount of 1. 2 Trillion dollars over the next twenty years (1998-2017) - the steepest surge in jetliner production in aviation history.

It is a valuable point of view that the most recent downturn of the Asian economy, the fear of global terrorism and the loss-making discounts forced by the intense battle for market share between Boeing and Airbus might trigger a gentle decline of the jetliner industry.[6] However, extensive studies have shown that within the present open skies environment "the world's airport and air traffic management systems, already close to saturation, will not allow a corresponding increase in flight frequencies. As a result airlines will need a new type of aircraft larger and more economical than anything flying today if they are to meet growing demand for low-cost air travel between major population centres."[7] Hence, not necessarily the need of airlines to renew and extend their ageing aircraft fleets, but the development of a different type of aircraft will be the task of aircraft producers in the future. This also includes the production of more regional aircraft with flexible capacity, allowing airlines to adjust to passenger demand by avoiding overcapacities and at the same time enabling them, alongside with regional airlines, to serve minor airports.[8]

Another important example for this strong tendency in favour of innovation is that, lately, air pollution and noise levels, rising due to increasing traffic, have generated a need for more sophisticated and environment-friendlier, quiet and clean propulsion techniques, which would further reduce fuel consumption, revenue yields and aircraft noise energy output. Thus, affordable and proper aircraft engines are needed as much as appropriate airframes.

Today, despite warnings of slowing economies, aircraft has become and will remain the essential economic device, which, hand in hand with telecommunications facilities, constitutes the backbone of modern national and global economic systems.

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[6] See P. Robison & A. Rothman, "Earnings Drop at Boeing and Airbus" *The [Montreal] Gazette* (5. 9. 1998) F 2.

[7] *GMF*, *supra* note 5 at Part I – Forecast Highlights.

[8] See C.A. Shifrin, "Strong Passenger Demand Propels U.S. Regionals" Av. Wk & Sp. Tech. 148:20 (18 May 1998) 50; C.A. Shifrin, "Upswing in Jet Sales Boon to Regional Aircraft Industry" Av. Wk & Sp. Tech. 148:20 (18 May 1998) 56; P. Sparaco, "European Regionals Thrive Amid Airport Constraints" Av. Wk & Sp. Tech. 148:20 (18 May 1998) 58; "L'aviation régionale en pleine mutation" Air & Cosmos 35:1649 (13 March 1998) 20.

II. Financial Challenges

The demands put upon the aviation industry, as briefly described in the previous section, have led to a considerable rise in the individual cost of newly developed aircraft that meet those needs. Air transport services have a sensitive structure, because they often cannot generate the funds necessary to enable them to buy such high-technology devices themselves, through internal or equity financing. In addition, the retreat of governments from subsidies, which used to guarantee debts incurred by partially or wholly state owned airlines, shifts more financial pressure to the airlines. Therefore, long haul as well as regional air carriers highly depend on external financing from capital markets. They need financing methods and flexible contractual arrangements that allow the use of the equipment without immediately due payments, as this would be the case when airlines purchase directly.

Ever since the entrance of large jet aircraft on the aviation scene, the demands for capital have often exceeded the financing capacities that are available in the African, Latin American and, nowadays, Eastern European home countries of many carriers. Therefore, the need for modern aircraft adapted to a changing world of transportation gives an international dimension to investment by the financing and security branches of the aviation industry into aircraft equipment.[9] This very aspect in turn explains the crucial importance of properly drafted security arrangements for North American, Brazilian and European manufacturers.[10] Practically more important are the security requirements of institutional moneylenders, *i.e.* banks under a long-term loan arrangement or a leasing contract, when they engage in the financing risks that relate to aircraft purchase or construction contracts.

In the United States, the early need for recourse to private capital has produced highly advanced credit methods that are now used by international aircraft financiers and major airlines of the world. The preceding shift towards a genuine system of aircraft financing was done by adjustment of the already existing modes of capital funding. An elaborate framework of security provisions marked these.[11]

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[9] See S.A. Bayitch, "Aircraft Mortgage – A Study in Comparative Aviation Law of the Western Hemisphere" (1958) 13 U. Miami L. R. 152 at 153; R. Bouma, "Financing Airlines in Developing Countries" in S.A.D. Hall, ed., *Aircraft Financing*, 2nd ed. (London: Euromoney, 1993) 41.

[10] Enumerating just a few, beside the Large Civil Aircraft producers Boeing and Airbus Industrie, there are Bombardier Inc. (Canada), Embraer (Brazil) and Saab AB (Sweden). Russian and Chinese manufacturers do not seem to play a role at present, although this might change in the future. See M.J. Levick, "The Production of Civil Aircraft – A Compromise of Two World Giants" (1993) 21 Transp. L. J. 433 at 459.

[11] See Bayitch, *supra* note 9 at 153.

These security provisions generally attach "real rights"[12] on the aircraft that can only be created under a specific national law. Secured creditors face problems of enforceability in a foreign legal system whose rules of real rights are incompatible with the jurisdiction that exports the security. This fundamental difficulty is not novel to aircraft financing but of general importance in the context of secured transactions. The ruling solution for aviation matters has been provided by the conflict of law rules in the Geneva *Convention on the International Recognition of Rights in Aircraft*.[13] Still, commercial interests in facilitating credit and lowering interest costs have recently led to a higher level of conflict solution, which consists in harmonising the substantive law of securing personal property. Its purpose is the elimination of subsisting inefficiencies that are produced by legal systems, particularly in aircraft financing. The International Institute for the Unification of Private Law (Unidroit),[14] the aircraft industry, the International Civil Aviation Organisation (ICAO) and the International Air Transport Association (IATA) are currently in the process of drafting a *Convention on International Interests in Mobile Equipment*[15] and a *Protocol on Matters Specific to Aircraft Equipment*.[16]

This harmonisation of the law of secured transactions cannot perform its task efficiently without itself being conceived as a harmonious part of the larger cadre of creditor protection law, which primarily includes an elaborated insolvency scheme. International bankruptcy law has for decades been a focus of new conflict of law rules, the luxurious

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[12] Although "real property" has to be strictly distinguished from "personal property" in Common law, the term "real right" in this paper will be used as generic term to connote the "droits réels", *i.e.* those rights that are "abstract" from personal obligations and allow the secured party to specifically recover the thing and not merely to receive compensation for the loss. For the distinction between "real property" and "personal property", see R. Megarry & H.W.R. Wade, *The Law of Real Property*, 4th ed. (London: Stevens & Sons, 1975) at 10; E.L.G. Tylor & N.E. Palmer, *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1973) at 6.

[13] See *Convention on the International Recognition of Rights in Aircraft*, 19 June 1948, ICAO Doc. 7620; [1953] 4 U.S.T. 1830; T.I.A.S. 2847, 310 U.N.T.S. 151[hereinafter *Geneva Convention*].

[14] Unidroit was founded in 1926 as an auxiliary organ of the League of Nations and reestablished in 1940. See *Charter of the International Institute for the Unification of Private Law*, 15 March 1940, 15 U.S.T. 2494, T.I.A.S. 5743, 1965 U.K.T.S. 54. For its organisation and activities, see R. David, "The International Unification of Private Law" in R. David *et al.*, eds., *International Encyclopaedia of Comparative Law*, vol. 2 - *The Legal Systems of the World – Their Comparison and Unification*, c. 5 (Tübingen: J.C.B. Mohr [Paul Siebeck]; The Hague and Paris: Mouton; New York: Oceana, 1971) at 133 *et seq.*, paras. 352 *et seq.*; A. Djojonegoro, "The UNIDROIT Proposal for a Uniform Air Law – A New Aircraft Mortgage Convention?" (1997) 22:2 Ann. Air & Sp. L. 53 at 55 *et seq.*. For its activities in security law, see N.B. Cohen, "Harmonizing the Law Governing Secured Credit – The Next Frontier" (1998) 33 Tex. Int'l L. J. 173 at 181 *et seq.*

[15] See *Convention on International Interests in Mobile Equipment*, UNIDROIT 1998 Study, LXXII - Doc. 42 [hereinafter *Draft Convention*].

[16] See *Protocol on Matters Specific to Aircraft Equipment*, UNIDROIT 1998 Study, LXXIII – Doc. 3 [hereinafter *Draft AEP*].

uniformity remaining for countless years an unattainable ideal. The national rules and policies concerning the protection of debtors, creditors and the public interest in enforcement matters are simply too different. Since debtors, creditors and assets are located in different countries the questions of jurisdiction and recognition of judgements replace the determination of the applicable law in these cases. Unfortunately, most bilateral and multilateral treaties on international recognition of judgements and jurisdiction specifically exclude bankruptcy proceedings.[17] Only recently, the *European Convention on Certain International Aspects of Bankruptcy*[18] and the *European Union Convention on Insolvency Proceedings*[19], superseding the latter, have formulated the least common denominator of their signatories. However, neither of these Conventions has entered into force. In addition, the United Nations Commission on International Trade Law (UNCITRAL)[20] has presented a long-term *Model Law on Cross-Border Insolvency* for global markets in May 1997.[21]

As the preceding paragraph shows, an aviation lawyer who engages in a lawsuit, for instance, against a mortgagor, lessor or conditional purchaser[22] of an aircraft first of all would have to address the question as to what court will have jurisdiction to enforce the creditor's mortgage or his right of repossession. After a review of the Unidroit project in Chapter One this question will be exposed in Chapter Two, taking into account the influence, which an enactment of the *Draft Convention* and *Draft AEP* would have on existing jurisdiction conventions and national procedural law. Secondly, a practitioner would have

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[17] See e.g. Art. 1 (2) no. 2 of the *Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercid Matters*, 27 September 1968 (as amended by the Conventions of Accession) [1983] O.J. C. 97/2 and [1989] O.J. L. 285/1 [hereinafter *Brussels Convention*], applying among the Member States of the European Union, and of the *Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, 16 September 1988, [1988] O.J. L. 319/9 [hereinafter *Lugano Convention*], applying among member countries of the European Free Trade Association (EFTA), and most bilaterals that are not expressly concerned with bankruptcy. A bilateral agreements on bankruptcy proceedings is, e.g., the German-Austrian *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Österreich auf dem Gebiete des Konkurs- und Vergleichs-(Ausgleichs-)rechts vom 25. Mai 1979*, BGBl. II, 8 March 1985, 411.

[18] See *Council of Europe - European Convention on Certain International Aspects of Bankruptcy*, 5 June 1990, (1991) 30 I.L.M. 165 [hereinafter *Istanbul Convention*].

[19] See *European Union – Convention on Insolvency Proceedings*, 23 November 1995, (1996) 35 I.L.M. 1223 [hereinafter *Insolvency Convention*].

[20] See Cohen, *supra* note 14 at 182 *et seq.*

[21] See *UNCITRAL Model Law on Cross-Border Insolvency*, Annex I of the Report of the 30th session of UNCITRAL in Vienna (A/52/17), 12-30 May 1997 (Wien: UNCITRAL, 1997), online: United Nations <http://www.un.or.at/uncitral/ english/texts/insolven> (date accessed: 10. 9. 1998); *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, A/CN.9/442 (Wien: UNCITRAL, 1997), online: United Nations <http://www.un.or.at/uncitral/english/sessions > (date accessed: 10. 9. 1998).

[22] These are the most typical forms of securing aircraft financing transactions that have developed in Common law jurisdictions. The terminology used does not exclude equivalent Civilian non-possessory security

to consider the law that will be applicable according to the *lex fori* of that court and the substantive rules of that law. As a starting point, the question of the applicable law arises from a perspective of domestic private international law, because real securities are traditionally not subject to international rules. Such domestic conflict law is the topic of Chapter Three. The *lex specialis* of the international law applicable to secured credit according to the *Geneva Convention* provides to a large extent better solutions than the domestic conflicts of law rules. Therefore, Chapter Four will explain its mechanisms and shortcomings. The proposed *Draft Convention* and *Draft AEP* will provide a economically updated solution mechanism within the *Geneva Convention* framework and supersede domestic substantive and conflicts law and, as far as inconsistencies exist, the *Geneva Convention* within its scope of application. The substantive law embodied in the Unidroit Draft is the core of Chapter Five. The topic is vast, and the following material does nothing more than highlight the main points.

interests, such as the hypothec on movables or the fiduciary transfer of title, as will be explained below. Instead "non-possessory security" could be used as a generic term.

Chapter One

Early Stages and Conspectus of the Unidroit Project

The *Draft Convention* as applicable to aircraft equipment through the *Draft AEP* essentially reflects considerable financial improvements for the aviation finance industry and government budgets. Such basic scheme for a reduction in transaction costs has been elaborated by the Economic Impact Assessment of the Institut Européen d' Administration des Affaires (INSEAD) and the New York University Salomon Center.[23] On this authority the two combined instruments "[w]ill achieve significant economic gains. These gains will be widely shared among airlines and manufacturers, their employees, suppliers, shareholders, and the national economies in which they bare located".[24] The Draft provisions of the Convention are based upon three "asset-based financing principles" set forth in the study: the "transparent priority principle", which promotes clarity on the ranking of competing property interests; the "prompt enforcement principle", which advocates the ability of creditors to promptly enforce rights against assets generating proceeds and revenues; and the "bankruptcy law enforcement principle", which upholds the ability to enforce in the context of bankruptcy.[25] The embodiment of these fundamentals in the *Draft Convention/Draft AEP* furthers the financing capacities available, notably for developing countries, on the one hand and - conversely - export and employment in developed countries. In short: Selling aircraft becomes easier for big aircraft producers.

I. The Inception

The unification of substantive law regarding mobile equipment has been on the agenda of aviation lawyers since work for the *Geneva Convention* began in 1944. After the adoption of that Convention, it was clear that further work would be necessary in order to improve the just temporary Geneva solution. The forum for the unification work had been primarily left to the Comité International Technique d' Experts Juridiques Aériens

[23] See A. Saunders & I. Walter, *Proposed Unidroit Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol – Economic Impact Assessment* (A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center, September 1998) [unpublished] [hereinafter *Economic Impact Assessment*].
[24] Saunders & Walter, *Executive Summary ibid.* at i.
[25] *Ibid.* at ii. and at 11 *et seq.*, para. 3.1.

(CITEJA) and subsequently to ICAO, both specialist organisations for matters of aviation.

Only in 1988, the problem of international security and leasing interests in mobile equipment was tackled on a broader basis, including those assets that constitute the pith of modern economies, notably aircraft equipment, ships, space property and rolling stock. Shortly after conclusion in Ottawa of the 1988 *Unidroit Convention on International Financial Leasing*[26] the representative of the Canadian government to the Unidroit Governing Council requested this internationally most competent organism for the unification of laws to commence comprehensive work on the regulation of rights in mobile equipment. This shift of competency is a consequence of the intimate interrelation of legal rules and interests governing cross-border mobility, already known from the impact of practised maritime law on the drafting of aviation law. Furthermore, the unanswered vigorous conflict among historic concepts of legal systems, notably between Civil law and Common law,[27] becomes detrimental to trade in an era where aircraft financing is extremely international and territorial boundaries laying the foundations for these frameworks disintegrate. Hence, States are forced to elaborate uniform rules that are easy to apply to a multitude of situations. The financial risks inherent in the trade of high-value mobile equipment do not allow for jurisdictions whose legal system cannot safeguard the rights involved and thereby cause more substantial dangers, which financiers might not be ready to assume. Unidroit had to get involved.

After preliminary work undertaken from 1990 to 1992 a study group tackling this problem for a variety of capital intensive types of chattels was formed in 1993 under the auspices of Unidroit. In 1994 Airbus Industrie and Boeing took interest in the work of the

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[26] See *Unidroit Convention on International Financial Leasing*, 28 May 1988, (1988) 27 I.L.M. 931; (1987) 51 RabelsZ 736 [hereinafter *Leasing Convention*].

[27] In this thesis, the notion "Civil law" will exclusively be used to describe the traditional system of jurisprudence, which is administered following the model of the Roman *Corpus Juris Civilis*, i.e. codified law created by the enactment of legislatures. See J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law - An Introduction to Quebec Private Law* (Toronto: Edmond Montgomery, 1993) at 2 *et seq.* "Common law", on the one hand, describes the law of those jurisdictions that are traditionally based on "[t]he body of those principles and rules of action, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgements of the courts recognizing, affirming and enforcing such usages and custom[s]", *Black's Law Dictionary*, 6th ed., *s.v.* "Common law" [hereinafter *Black*], and "on those modifications and extensions of the original common law which have been introduced by statute", E. Jowitt & C. Walsh, *Jowitt's Dictionary of English Law*, 2nd ed. by J. Burke (London: Sweet & Maxwell, 1977) *s.v.* "Common law". On the other hand, it describes "that part of the law of England [at first] formulated, developed and administered by the old common law courts, based originally on the customs of the country, and unwritten. It is opposed to equit[y]." R. Bird, *Osborn's Concise Law Dictionary*, 7th ed. (London: Sweet & Maxwell, 1983) *s.v.* "Common law".

study group and formed an Aviation Working Group (AWG) to formulate, explain and promote the interests of the aviation finance. This Group is supported by manufacturers, such as Bombardier, General Electric Aircraft Engines, Pratt & Whitney, Rolls-Royce, SNECMA, and by financiers such as International Lease Finance Corporation, Chase Manhattan Bank, CIBC Wood Gundy, Crédit Agricole Indosuez, Kreditanstalt für Wiederaufbau, Deutsche Verkehrsbank, Singapore Aircraft Leasing Enterprise, GE Capital Aviation Services, the Long Term Credit Bank of Japan and Boullioun Aviation Services. In 1996, the AWG and IATA agreed to co-operate by providing co-ordinated comments on the draft instruments and to promote completion of the project vis-à-vis governments, international organisations and the aviation industry. ICAO has joined the efforts of AWG and IATA to prepare a draft Aircraft Equipment Protocol within the Aircraft Protocol Group (APG), which was formed in 1997. This Group completed its work in January 1998, and will be co-sponsoring the intergovernmental negotiations that lie ahead together with Unidroit.

The *Draft Convention* and the *Draft AEP* have been revised in June 1998 by a Steering and Revisions Committee (SRC) formed in February 1998 in accordance with a decision taken be the Unidroit Governing Council at its 77th session, held in Rome from 16 to 20 February 1998. This thesis is based on the final version of the *Draft Convention* as established by the Unidroit study group in November 1997 and revised by the SRC,[28] and the *Draft AEP* as established by the APG in January 1998 and revised by the SRC.[29]

II. Structure and Scope of the *Draft Convention*

The *Draft Convention* system has two main characteristics. Apart from the fact that it standardises substantive national law, it has a twofold structure of a basic Convention and specific supplementary protocols for the Convention, which will only come into force in respect of the particular category when the corresponding protocol is adopted.

The only protocol being elaborated so far is the *AEP*. This *Draft Protocol* covers the security regime for airframes and for aircraft engines. It refers to "aircraft object" when airframes, aircraft engines and helicopters are meant and to airframes and helicop-

[28] See *Draft Convention*, *supra* note 15.
[29] See *Draft AEP*, *supra* note 16.

ters when engines are excluded.[30] There will, however, be a separate registration system for engines.

According to Art. II of the *Draft AEP* "1.- The Convention shall apply in relation to aircraft objects as implemented by the terms of this Protocol. 2.-The Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as the Unidroit Convention on International Interests in Mobile Equipment as applied to aircraft objects." The Convention – Protocol tandem cannot be justified on grounds of easy application in the first place, because "[t]he reading and understanding of Protocols may be difficult as they would contradict or vary terms of the Convention via a series of exceptions and cross-references."[31] This difficulty may be overcome by a "series of stand-alone Conventions, each confined to a particular type of mobile equipment"[32] Yet, a frictionless application of a Protocol presupposes above all, and can be favoured by, a neat definition of mandatory and optional rules in the basic Convention and precise but not too concise language.[33] The tandem solution is also envisaged to lead to the formation of a fast track procedure for the making of additional Protocols after the conclusion of the Convention, which would be impossible in the case of stand-alone Conventions because they underlie a lengthy process of diplomatic conferences. Moreover, such agreements "would involve a good deal of duplication and also a risk of inconsistency between the general (*i.e.* non-equipment-specific) provisions of the different Conventions."[34] Compared to a single uniform convention covering all types of mobile equipment, the tandem solution "[w]ould enable the Convention to be kept down to a reasonable length and avoids cluttering it with detail; it would facilitate the extension of the Convention to new categories of equipment; it would speed up the process"[35] without going through the process of diplomatic adoption.

In conclusion, the Convention - Protocol system appears to be an adequate means of establishing a reliable legal framework that mirrors the specific institutional needs of

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[30] See the first three definitions of *Draft Convention*, *supra* note 15 Art. 1 (2) and of *Draft AEP*, *ibid.* Art. IX (1).
[31] See Department of Justice Canada, *Questionnaire for the Attention of Canadian Authorities and Industries on a Draft Convention on International Interests in Mobile Equipment and a Draft Protocol on Matters Specific to Aircraft Equipment*, 28 September 1998 [unpublished, hereinafter *Questionnaire*], Comment on question 2 at 2.
[32] *Ibid.*, question 2) (c) at 2.
[33] For a problematic case, see *Chapter Four* I. B., below.
[34] See *Questionnaire*, *supra* note 31, Comment on question 2 at 2.
[35] *Ibid.*

the financing industry with regard to mobile equipment if careful drafting is performed. Still, the presence of public policy considerations in the law of secured transactions makes the elaboration of an adaptable model law appear as an alternative.

The proposed Convention[36] and Protocol[37] moreover contain a number of optional provisions for the parties concerned and for Contracting States, which can issue a reservation[38]: the "Contractual Choice-of-Law Rule", the "Nonjudicial Remedies Rule", the "Expedited Relief Rule" and the "International Insolvency Rule".[39] These rules favour greater financing related benefits for those countries that implement them than for those that do not.[40]

Draft AEP Art. III (1) in conjunction with *Draft Convention* Art. 4 defines the scope of application of the *Draft Convention* as applied to aircraft. For this, exclusively the location of the obligor and the registration of an aircraft in a national aircraft register determine the application of the Convention to aircraft. The Convention applies, even though all factors relating to the agreement and the equipment are located in a single State, because "[t]he internationality element is considered satisfied by the mobile character of the equipment".[41] It would thereby override national law with respect to matters that are expressly or implicitly addressed in the Convention and provide new domestic law for States with less developed secured transactions law. Simultaneously, it avoids doubts as for the presence of an international case, which is an essential condition of applicability of most treaties. Such uncertainties concerning the sphere of application are well-known under the Brussels *Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*[42], the Lugano *Convention on Jurisdiction and the Enforcement of Judgements in Civil and Com-*

[36] See *Draft Convention*, *supra* note 15, Art. 6.
[37] See *Draft AEP*, *supra* note 16, Art. III (3).
[38] See *Draft AEP*, *ibid.*, Art. XXX and *Draft Convention*, *supra* note 15 Art. V, Y.
[39] See J. Wool, *Précis of Proposed Unidroit Convention on International Interests in Mobile Equipment as applicable to aircraft equipment through the Aircraft Equipment Protocol* (Appendix 1 to the *Economic Impact Assessment*, *supra* note 23) at 3, para. 3.
[40] See Saunders & Walter, *supra* note 24 at iv.
[41] R.M. Goode, "Transcending the Boundaries of Earth and Space – The Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment", update of the article published in [1998] Uniform L. Rev. 52 as Tab 3 of a *Consultation Package to the Attention of Interested Canadian Authorities, Industries and Practitioners on the July 1998 Drafts of the Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment*, 25 September 1998, [unpublished] 1 at 7. See R.C.C. Cuming, "The Draft UNIDROIT Convention on International Interests in Mobile Equipment" (1998) 30 U.C.C. L. J. 365 at 369.
[42] See *Brussels Convention*, *supra* note 17.

mercial Matters[43] and reappear in the recent Draft UNCITRAL *Convention on Assignment in Receivables Financing*.[44]

Interpretative difficulties are supposed to be solved by applying Draft Convention Art. 7, according to which the solution of matters not expressly settled has to follow the basic principles of the prospective Convention.[45] The current Draft envisages the elaboration of a commentary[46] which would certainly contribute to the avoidance of litigation, and which would have to clearly distinguish between such points that can be characterised as gaps of the Convention and others that are simply superseded. In any case, such a report can never be exhaustive and basic questions have to be covered by the Convention text itself. They cannot be left to legislative comments, because the conventional uniform law would profoundly amend national law and rather have exceptional character. Ambiguous provisions, therefore, are likely to be interpreted restrictively. The reference to the notion "applicable law" appears awkward because the applicable law is precisely the uniform law of the Convention itself. Apparently, it refers to the underlying *lex fori* or, outside in court litigation, the law chosen by the parties.

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[43] See *Lugano Convention*, *ibid.* The prevailing doctrinal approach excludes the applicability of these Conventions when only one state is involved. See, *e.g.*, B. Piltz, "Die Zuständigkeitsordnung nach dem EWG-Gerichtsstands- und Vollstreckungsübereinkommen" (1979) 32 NJW 1071; *contra* E. Jayme & Ch. Kohler, "Europäisches Kollisionsrecht 1994 - Quellenpluralismus und offene Kontraste" (1994) 14 IPRax 405 at 411.

[44] See UNCITRAL, Working Group on International Contract Practices, *Revised Articles of the Draft Convention on Assignment*, 23 April 1997, U.N. Doc. A/CN.9/WG.II/WP.93 (New York: UNCITRAL, 1997), online: American Bar Association <http://www.abanet.org/ftp/pub/buslaw/89kv_1.txt> (date accessed: 4. 9. 1998) [hereinafter *Receivables Project*],

> Article 3 [1(2)]. Internationality (1) A receivable is international if, at the time it arises, the places of business of the assignor and the debtor are in different States. An assignment is international if, at the time it is made, the places of business of the assignor and the assignee are in different State[s].

[45] See *Draft Convention*, *supra* note 15 Art. 7 (3).

[46] See Steering and Revisions Committee, *Report*, Study LXXII - Doc. 41 (Rome: Unidroit Secretariat, 1998) [unpublished, hereinafter *SRC*] at 14, para. 24.

Chapter Two

International Jurisdiction in Enforcement under the *Draft Convention* as applied through the *Draft AEP*

I. Substantive Jurisdiction and Arbitration

A. Jurisdiction on the Merits

The pre-eminent question, which has to be considered with a view to litigation, involves the choice of a court that will have jurisdiction to enforce the creditor's mortgage or its right of repossession. Jurisdiction on the merits is not the primary concern of international financiers, which are interested in safeguarding their investment energetically. Therefore, the *Draft Convention* merely contains jurisdiction rules for speedy judicial relief.

Art. 27 (2) of the *Draft Convention* provides the only exceptional rule regarding jurisdiction for a case on the merits. Art. 27 (2) regulates substantive jurisdiction for registration errors and Registry malfunctions, which are not related to the enforcement interest of creditors but may occur during the operation of the International Registry, which the *Draft Convention* sets up as one of its central features. This substantive jurisdiction shall be briefly described before interim jurisdiction will be discussed at length.

1. Registration Errors and System Malfunctions

Art. 27 (2) does not refer to default remedies of the obligee but to the malfunctioning of the International Registry. A special rule relating to a registry can also be found in Arts. 16 (3), 19 of the *Brussels/Lugano Conventions*, derogating the standard of Art. 2 (1) of those Conventions. Accordingly, in matters of validity of registration jurisdiction exclusively lies with the court of the Contracting State where the public register is kept. This is based on a universally recognised principle and secures ease of access to the register.[47] A similar rule had been incorporated in Art. XXV (3) (b) of the *August 1997 Draft* of the *AEP*[48] with reference to the liability of the aircraft Registry for errors or system malfunctions and is now included in the *Draft Convention*. Given the less elaborated system of jurisdiction rules in the *Draft Convention*, it is unclear if that jurisdiction is meant to be exclu-

[47] J. Kropholler, *Europäisches Zivilprozeßrecht*, 2nd ed. (Heidelberg: Verlag Recht und Wirtschaft, 1987) at 153, Art. 16 para. 30.

sive. Such exclusivity would be reasonable in order to avoid the risk of conflicting orders from different courts, since under present civil practice the exclusive Art. 16 (3) of the *Brussels/Lugano Conventions*[49] would not prevent the parties to an aircraft sale from proceeding under the law of a jurisdiction that permits court orders or judgements, in the absence of a real connection to the location of the Registrar or the registration facilities.[50] From a legal point of view, exclusive jurisdiction can only be legislated for substantive jurisdiction. Since Art. 27 (2) stipulates such substantive jurisdiction – distinguished from the interim jurisdiction in Art. 42 -, exclusivity, therefore, is permissible. In any case such interpretation would have to be construed restrictively because exclusive jurisdiction overrides the consensual choice of forum following Art. 17 of the *Brussels/Lugano Conventions* and Art. 42 (1) (c).[51] That follows at least from the maxim *singularia non sunt extendenda*.

2. INTERIM MEASURES AND FAULTS ORIGINATING OUTSIDE THE REGISTRY

For interim measures and for questions not related to errors or system malfunctions in the International Registry, the rule contained in Art. 42 applies generally, subject to restrictions imposed by the provisions on immunity of the international Registry, which are embodied in Art. 43. This means that a plaintiff who has suffered a loss or considers a fault or misinformation, *e.g.* after the registration of a security without a valid security agreement, has to apply for a court order *in personam* against the person against whom a remedy is sought, *i.e.* the person registering the security interest, ordering it to remove the registration.[52]

B. Arbitration

Personal property and security law in a foreign legal system is often times completely incompatible with the domestic rules according to which the real right has been

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[48] See *Protocol to the Convention on International Interests in Mobile Equipment Relative to Airframes, Aircraft Engines and Helicopters*, August 1997, (1997) 22:2 Ann. Air & Sp. L. 437 [hereinafter *August 1997 Draft*].

[49] This provision refers to national registries and does not appear to be applicable to an International Registry based on a global legal framework and on global jurisdiction rules.

[50] See *Chapter Two* II. B., below.

[51] For tenancies under Art. 16 (1), see *Sanders* v. *van der Putte*, Judgement of 14 December 1977, C-73/77, [1977] E.C.R. I-2383; A. McClellan, "The Convention of Brussels of September 27, 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" [1978] 15 C.M.L.R. 228 at 237 *et seq.* See Ph.R. Wood, *Comparative Law of Security and Guarantees* (London: Sweet & Maxwell, 1995) at 255, para. 18-29.

[52] See Goode, *supra* note 41 at 13.

created, or inadequately chokes off any efforts of realising a real right.[53] With a view to such foreseeable problems of enforceability in foreign courts another consideration of dispute resolution imposes. A solution to the enforceability problem is to avoid those courts by instead having recourse to International Commercial Arbitration through the insertion of arbitration clauses in purchase or warranty agreements. The *Draft Convention* only incidentally hints at this possibility of amicable settlement in an arbitration tribunal in Art. 42 (2). This provision states that, notwithstanding the interim jurisdiction provided for in the Convention, a substantive trial may take place in a court of another Contracting State or in an arbitral tribunal. Yet, arbitral awards only withstand judicial scrutiny in enforcement proceedings, where they respect the public policy of interested States, which is extremely influential on personal property law.[54] Hence arbitration or mediation contrary to such public policy, which, despite synergetic settlement, cannot avoid enforcement,[55] has the same effect as a court ruling which excludes recognition of foreign security interests. This includes those courts or competent authorities whose States are parties to recognition and enforcement conventions that contain public policy exceptions, such as the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[56]

II. INTERIM JURISDICTION

The *Draft Convention* and *Draft AEP* are basically, with the exception of the unification of default remedies, expedition agreements. Art. 42 (2) stipulates a competing exercise of jurisdiction between the interim court and the court passing judgement on the merits. Interim jurisdiction is the only jurisdiction dealt with in this expedition plan, save the special case of Registry malfunctions, and finds an international parallel in Art. 24 of the *Brussels/Lugano Conventions* and Art. 3138 C.C.Q., which was drafted after the model of

[53] Such a case was, *e.g.*, in the Chinese judicial system. In the meantime, considerable improvements have been made. See N. Johnston & L. Barale, "China's New Security Law" (1996) 11 J. Int'l Banking L. 31.
[54] See H.W. Baade, "The Operation of Foreign Public Law" (1995) 30 Tex. Int'l. L. J. 429 at 476 *et seq.*; G.B. Born & D. Westin, *International Civil Litigation in United States Courts* (Deventer & Boston : Kluwer, 1989) c. 10, 605 at 610 *et seq.*
[55] Enforcement consists of "coercive judicial remedies to fulfil the arbitral award". Born & Westin, *ibid.* at 619 note 79.
[56] See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. 6997, Art. V 2. (b): "Recognition and enforcement may also be refused if... [such would be]... contrary to public policy of that country"

Art. 10 of the Swiss *Federal Statute on Private International Law*.[57] Interim relief can be granted when such measures apply in the forum and relate to matters within the scope of the two Conventions.[58] Until the revision by the SRC, the *Draft Convention* did not have any article other than Art. 15 (3) dealing with jurisdiction and the *Draft AEP* mentioned Art. VIII (1) and Art. XXV (3) (b) concerning registration. The main rules relating to jurisdiction are now embodied in Arts. 42 (1) and 43 with the same wording as in the former Art. 15 (3). To this, Art. XX *Draft AEP* adds jurisdictional competence of the State of Registry.

Clarifying provisions concerning the relationship to other conventions regulating international jurisdiction have not been built into the Convention. Notably, they would be adequate for such general jurisdiction and enforcement conventions as the *Brussels/Lugano Conventions* or international jurisdiction rules of bilateral and multilateral Conventions on bankruptcy and insolvency proceedings. Although the *Draft Convention* and the *Draft AEP* do not set aside their application to insolvency and bankruptcy like the *Brussels/Lugano Conventions*[59] and even expressly regulate special remedies on insolvency,[60] they contain rules exclusively on enforcement jurisdiction. Within the *Draft AEP*, only the current Art. XII on Insolvency Assistance of the court of situation of the aircraft object implicitly recognises that jurisdiction on collective proceedings is subject to other legal sources.[61] The silence of the Unidroit framework on insolvency jurisdiction is less problematic for the their relationship to the *Brussels/Lugano Conventions*, because their Art. 57 makes clear that

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[57] For the German text, see *Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987*, BBl. 1988 I 5-60 [hereinafter *I.P.R.G.*] For an English translation, see J.-C. Cornu, St. Hankins & S. Symeonides, "Swiss Federal Statute on Private International Law of December 18, 1987 (1989) 37 Am. J. Comp. L. 193.

[58] See, *e.g.*, *Channel Tunnel Group Ltd.* v. *Balfour Beatty Construction Ltd.*, [1993] 2 W.L.R. 262, [1993] 1 Lloyd's L.R. 291 (H.L.); W. Tetley, *International Conflict of Laws* (Montreal: Yvon Blais, 1994) at 808.

[59] See *Brussels Convention* and *Lugano Convention*, *supra* note 17, Art. 1 (2) N° 2.

[60] See *Draft AEP*, *supra* note 16, Art. XI.

[61] These will notably be the *Insolvency Convention* as far as it supersedes bilateral treaties (see *Insolvency Convention*, *supra* note 19, Art. 48 [1]) and other multilateral frameworks, which will be explained later (see below, *Chapter Three* IV.). These modern international efforts provide, however, *lages generales* (see *Insolvency Convention*, *ibid.*, Art. 48 [3] and *Istanbul Convention*, *supra* note 18, Art. 38) and would be superseded by the *Draft Convention*, *supra* note 15 if it contained jurisdiction rules on insolvency. These are yet unlikely to be any different from the, as it appears, universally recognised principle which gives jurisdiction to the State of "primary insolvency" of the debtor in line with the doctrine of plurality. For this jurisdiction, see J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto & Vancouver : Butterworths, 1997) at 554, para. 422; see *Draft AEP*, *supra* note 16, Art. XI (2) (a).

specialised Conventions have priority over the 1968 Conventions as far as they contain direct rules of jurisdiction.[62]

In conclusion, the jurisdiction rules of the *Draft Convention* supersede those rules of general conventions that contain subject-matter specific jurisdiction rules to the extent that the *Draft Convention* is *lex specialis*. Conversely, the *Draft Convention* is superseded by more specific conventions, notably bilateral or multilateral treaties on bankruptcy and insolvency to the extent it does not contain insolvency specific jurisdiction rules. Art. 42 does not exclude the competence of other jurisdictions

The following paragraphs will highlight the specific jurisdiction rules of the *Draft Convention* first of all in the context of the jurisdictional area of European tradition under the *Brussels/Lugano Conventions*, which includes the United Kingdom on the one hand and in many respects extends to Quebec on the other. In a second step, comparison will be drawn to the classical rules of Common law Canada and England in cases of non-European jurisdiction conflicts, as well as to those of United States jurisdictions. It should be borne in mind that many of these rules are not necessary specific to the contemplated jurisdiction. Instead, they are based on internationally well-established jurisdiction principles.

A. Comparative Observations on the International Administration of Justice

1. Regional Co-ordination

Each State, province or territory within the European Union, Canada and the U.S. has in principle its own rules pertaining to jurisdiction. Intense interstate commerce has forced these regional entities to co-ordinate their rules of jurisdiction. The *Brussels Convention* and the *Lugano Convention* are the most important treaties co-ordinating jurisdiction within Europe. In the U.S., federal trial courts apply the rules of the state, in which they sit, provided that a federal court adjudicates the case because the parties are citizens of different states. The jurisdictional rules of the different states, provinces or territories, while not identical, are often very similar.

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[62] See S. O'Malley & A. Layton, *European Civil Practice* (London : Sweet & Maxwell, 1989) at 861 *et seq.*, paras. 33.10 *et seq.*

2. THE QUALITY OF JURISDICTION

In Common law, questions of jurisdiction have the character of a procedural remedy. "To have jurisdiction before the courts means that one has a *right in law* in the matter."[63] Hence Common law courts have traditionally applied their *lex fori* because they have subject matter competence.[64] By contrast, in Civil law, codes or special statutes frequently, but not always, grant a right, while jurisdiction is conferred by another procedural statute.[65] Similarly, the proposed uniform Canadian *Court Jurisdiction and Proceedings Transfer Act*[66] would establish the jurisdiction of a court by basing it on territorial competence.[67] Specified presumptions drafted in the *CJPTA* guide the competence for proceedings, notably those "brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the [*enacting province or territory*]."[68] The new codification in the *CJPTA* is intended to replace the generally accepted categories determining jurisdiction *ex juris*, *i.e.* outside the *forum rei*, which will be reaffirmed throughout this Chapter.

3. HIERARCHY OF JURISDICTIONS AND *FORUM NON CONVENIENS*

As it is typical for Civilian European jurisdictions, the *Brussels/Lugano Conventions* are, albeit not without difficulties of interpretation, extremely well structured according to rules of general application and rules of specific, alternative and exclusive jurisdiction. By contrast, the *Draft Convention* does not contain any hierarchical or otherwise elaborated structure of jurisdiction rules whatsoever for the newly created international area of substantive law, but simply enumerates those alternative jurisdictions that are of utmost relevance for an aircraft financier in the case of default by the debtor. In the absence of different jurisdictions under uniform law such a structure is not even necessary under the uniform jurisdiction created by the Convention, as far as substantive or procedural issues

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[63] Tetley, *supra* note 58 at 792.
[64] This brings about considerable problems in the private international law of set-offs and limitations. See G. Kegel, *Internationales Privatrecht*, 7th ed. (München: C.H. Beck, 1995) at 296 *et seq.*; Castel, *supra* note 61 at 148, para. 81. For the renouncement of that tradition in North American law of maritime liens, see Tetley, *ibid.* at 793 *et seq.* and Castel, *ibid.* at 148, para. 82.
[65] For France and the United States maritime law, see Tetley, *ibid.* at 792.
[66] See *Court Jurisdiction and Proceedings Transfer Act*, Uniform Law Conference of Canada, *Proceedings of the 76th Annual Meeting*, August 1994, Appendix C at 140, s. 2 [hereinafter *CJPTA*].
[67] See Castel, *supra* note 61 at 225 *et seq.*, para.133.
[68] *CJPTA*, *supra* note 66 s. 10 (8) (a). See Castel, *ibid.* at 227, para. 133.

are not left to domestic law. Yet, only few uniform laws can deal so comprehensively and completely with all the legal aspects it touches upon as to avoid *forum shopping*.

Forum shopping is a formula describing the phenomenon that parties choose bringing their action in the State or province whose conflict rules will result in the application of a more favourable substantive or procedural law than would be the case in another jurisdiction, but does not have legal value. Rather, the doctrine of *forum non conveniens* and the universally applied similar test defining a real and substantive connection to the forum would apply *lege fori* in order to avoid an abuse of process and limit jurisdiction.[69] This rule allows the court, employing sound discretion, to refuse to exercise its jurisdiction if it is a seriously inconvenient forum and there is a more appropriate forum available elsewhere.[70] The most considerable interests to be balanced are the private interests of the litigant and the public interest of maintaining efficient litigation.[71] The tactical behaviour of the defendants may influence the outcome of the court's *forum non conveniens* analysis. Promises to submit to the jurisdiction of the alternative forum, to waive possible time limitation objections there, to make all evidence available to the alternative forum, to finance the translation of all documentary evidence into the language of that forum and even to cover the extra expense incurred by the plaintiff, may well encourage the court to dismiss the case. Also, the possibility for the court of viewing relevant property and the enforceability of any judgement, similar to exorbitant jurisdictions in Civil law[72] may play a great role. As a limit to the exercise of jurisdiction, the doctrine of *forum non conveniens* has only recently become accepted in England[73], although not to the extent it is applied in the U.S. In England, the doctrine of *forum non conveniens* can indubitably not be entertained in any litigation

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[69] See Castel, *ibid.* at 241 *et seq.*, para. 140.

[70] See the very general definition of Art. 3135 C.C.Q. The basic Canadian case is *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897. See Castel, *ibid.* at 248 *et seq.*, para.142, for the burden of proof at 251 *et seq.*, para. 143 and, for legitimate personal advantages available to the plaintiff, at 258 *et seq.*, para.145 b; in the US, *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947); R.J. Weintraub, *Commentary on the Conflict of Laws*, 3rd ed. (Mineola, N.Y.: The Foundation Press, 1986) at 213 *et seq.*, § 4.33.

[71] See W.M. Richman & W.L. Reynolds, "Understanding Conflict of Laws", 2nd ed. (New York and Oakland, Ca.: Matthew Bender, 1993) at 135 *et seq.*, § 46 [a]; see also the list of conditions in Tetley, *supra* note 58 at 801.

[72] See *Chapter Two* II. C., below.

[73] See *Spiliada Maritime Corporation* v. *Consulex Ltd.*, [1987] A.C. 460, [1986] 3 All E.R. 843 (H.L.); Castel, *supra* note 61 at 244 *et seq.*, para. 142; E.R. Edinger, "Recent Developments in the English Law of Conflicts of Laws – The Spiliada and Aérospatiale" (1989) 23 U.B.C. L. Rev. 373; A.V. Dicey & J.H.C. Morris, *The Conflict of Laws*, vol. 1, 12th ed. by L. Collins *et al.* (London: Sweet & Maxwell, 1993) at 398 *et seq.*, r. 31 (1), (2). The authority of courts to apply the principle had, however, been recognised by *Civil Jurisdiction and Judgements Act 1982* (U. K.), 1982, c. 27, s. 49 as amended by the *Civil Jurisdiction and Judgements Act 1991* (U. K.), 1991, c. 12, schedule 2 para. 24. See Tetley, *supra* note 58 at 800.

undertaken according to the *Brussels/Lugano Conventions*, although there are uncertainties with regard to defendants that are not domiciled in a Contracting State or a more convenient forum outside the Contracting States.[74] The same exclusion applies to the civil practice according to which a court may grant antisuit injunctions in order to restrain a person within its jurisdiction from commencing or continuing proceedings in a foreign court equally likely to assume jurisdiction. This principle will continue to be applicable under the *lex fori*. It is a pre-requisite, however, that the action brought in the foreign court is so unconscionable as to constitute an abuse of process through vexatious and oppressive conduct.[75] Injunctions can be granted despite a discretionary local stay of proceedings in line with the rule *lis alibi pendns*.[76]

Interim measures and the mobility of aircraft equipment require flexibility as regards the *fora*, which are at the disposition of the plaintiff. Therefore Art. 42 (1) (a-c) *Draft Convention* embodies three alternatives for interim jurisdiction based on choice of forum (B.), location of subject matter (C.), and location of the defendant (D.), to which the *AEP* adds a traditional aircraft jurisdiction of the state of Registry in its Art. XX (E.). Problematic in a commercial context is the application of the doctrine of foreign sovereign immunity of Art. XXI *Draft AEP* (F.).

B. Party Autonomy and Prorogation of Jurisdiction, *Draft* Art. 42 (1) (c)

In practice, most secured transactions in aircraft financing or leasing contracts contain choice of jurisdiction or arbitration clauses. Most rules of civil procedure provide for service *ex juris* in such cases of an express contractual choice of forum. The freedom of transaction parties to select the forum is contemplated to apply in secured transactions under the Art. 42 (1) (c) of the *Draft Convention*. For purposes of prorogation under Art. 42 (1) (c) it is sufficient that parties submit to the jurisdiction of the court of a Contracting State. Compared to Art. 17 of the *Brussels/Lugano Conventions* neither the defendant nor the plaintiff have to be domiciled in a Contracting State.

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[74] See Tetley, *ibid.* at 800 note 35 citing Dicey & Morris, *ibid.* at 400 *et seq.*, r. 31 (4).
[75] See *Société Nationale Industrielle Aérospatiale* v. *Lee Kui Jak*, [1987] 3 All E.R. 510 (P.C.); *Amchem*, *supra* note 70; Castel, *supra* note 61 at 254 *et seq.*, para. 144; Dicey & Morris, *ibid.* at 408 *et seq.*, r. 31; Born & Westin, *supra* note 54 c. 4 C. at 242 *et seq.*
[76] See generally, Castel, *ibid.* at 259 *et seq.*, para. 146; Tetley, *supra* note 58 at 796 *et seq.*, Dicey & Morris, *ibid.* at 405 *et seq.*, r. 31; Art. 3137 C.C.Q.

Unlike this Art. 17, which monitors the choice of jurisdiction in Europe, Art. 42 (1) (c) does not stipulate exclusive jurisdiction of the prorogated court. The exclusive character of such prorogation would then have to be determined *lege fori prorogati*[77]: This form of dispute resolution would, ergo, be subject to the fundamental public policy of another court having jurisdiction.[78] Such considerations include grossly uneven bargaining positions[79] and a choice would not be possible where *de lege lata* or in line with specific case precedent only specific courts have exclusive jurisdiction,[80] or would simply have attributive character because the mere location of the defendant is a codified rule of public order, as this was the case until 1994 in Quebec.[81]

In contrast to Quebec and European courts, Canadian Common law courts have discretion as whether to stay proceedings on breach of an agreement stipulating exclusive jurisdiction, founded either in statute or in precedent.[82] Forum selection clauses are enforceable unless convincing grounds of unreasonableness or injustice exist, or where statutory provisions or precedent implementing public policy so provide, *e. g.*, in the case of third parties that are not bound by a selection clause.[83] With good reason Canadian courts appear more inclined to interpret jurisdiction as exclusive, forbearing from severe formulation requirements and thereby favouring foreseeability and avoiding uncertainty of jurisdiction in international trade.[84]

In the United States, the enforceability of forum selection agreements has only been recognised since *The Bremen* v. *Zapata Off-Shore Co.*[85] and is equally refused for unrea-

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[77] See Castel, *ibid.* at 263 *et seq.*, para. 147.
[78] See Wool, *supra* note 39 at 5, explanatory note 13.
[79] See *Fairfield* v. *Low*, [1990] 71 O.R. (2d) 599, C.P.C. (2d) 65 (H.C.J.) at 69 [hereinafter *Fairfield*] cited in Castel, *supra* note 61 at 263, para. 147.
[80] See Castel, *ibid.* at 263, para. 147.
[81] Art. 68 C.C.P. applies "nonobstant convention contraire". See, e.g., *Video Jacklan Inc.* v. *Cadieux*, [1987] R.D.J. 312 (C.A.); E. Groffier, *Précis de Droit International Privé Québécois*, 4th ed. (Cowansville, Qc.: Yvon Blais, 1990) at 247 *et seq.*, para. 250 and at 260, para. 268 [hereinafter *Précis DIPQ*]; see D. Ferland, B. Emery & J. Tremblay, *Précis de Procédure Civile du Québec* (Cowansville, Qc.: Yvon Blais, 1992) at 82, para. 84. For the innovation brought about by the last paragraph of Art. 3148 C.C.Q., which gives more party autonomy by requiring a defendant – even if it is domiciled in Quebec – to submit to Quebec jurisdiction. See E. Groffier, *La Réforme du Droit International Privé Québécois - Supplément au Précis de Droit International Privé Québécois* (Cowansville, Qc.: Yvon Blais, 1993) at 141 *et seq.*, para. 125 [hereinafter *La Réforme*].
[82] See Castel, *supra* note 61 at 261 *et seq.*, para. 147 with extensive references to jurisprudence and statutory provisions. For considerations relevant to discretion, see *ibid.* at 265, para. 148.
[83] See *Newfoundland (A.G.)* v. *Churchill Falls (Labrador) Corp. Ltd.* (1984), 49 Nfld. & P.E.I.R. 181, 145 A.P.R. 181 (Nfld. S.C. (T.D.)); see generally *Fairfield*, *supra* note 79.
[84] See Castel, *supra* note 61 at 264, para. 147.
[85] See *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see Born & Westin, *supra* note 54 c. 4 A. at 173 *et seq.* and 189 *et seq.*

sonable and unjust clauses as in cases of fraud, unequal bargaining strength, biased or seriously inconvenient forum or where other public policy considerations require it. In contrast to the less rigid Canadian jurisprudence, U.S. courts make exclusive or concurrent character of the clause strictly depending on the specific tenor of exclusion of the stipulation.[86]

From this recap of Common law rules it also becomes evident that principles of *forum non conveniens* and of contractual exemption from the stay of proceedings under *forum non conveniens*,[87] which are entirely unknown in the codes of civil procedure of Continental Europe, are likely to be applicable to forum selection clauses under the *Draft Convention*.

Neither does Art. 42 (c) contain formal requirements. Altogether, this choice of jurisdiction rule appears rather undeveloped compared to Arts. 17 of the *Brussels/Lugano Conventions* but at the same time reflects the liberal approach of Common law jurisdictions concerning party autonomy and court discretion. As a matter of fact, courts of those jurisdictions are most frequently seized in matters of secured aircraft transactions, notably under § 5-1402 of the New York *General Obligations Law*.[88] Art. 17 does not apply to provisos that prorogate to such a non-European court. Although Art. 17 applies in cases where both parties are domiciled outside Europe, it is unclear if this provision or domestic law applies in cases where one of the parties to the agreement on European forum is domi-

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[86] See the jurisprudence cited by Born & Westin, *ibid.* c. 4 A. at 173 *et seq.* notes 6, 8, 9 and 10 and accompanying text.

[87] See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as am., r. 17.02 f. iii. [hereinafter *Ontario Rules*]; Castel, *supra* note 61 at 261 *et seq.*, para. 147. For the status of *forum non conveniens* under the New York choice-of-forum clause, which will be explained instantly in the text, see D.H. Bunker, *The Law of Aerospace Finance in Canada* (Montreal : McGill University ICASL, 1988) at 323 *et seq.*

[88] See below, *Chapter Three* VI. A. 4. b. This section of the New York *General Obligations Law*, online: Senate of the State of New York <gopher://lbdc.senate.state.ny.us/0/.laws/General Obligations/GOB5-1402> (date accessed: 14. 7. 1998) [hereinafter *G.O.L.*], reads

> "§ 5-1402. **Choice of forum.** 1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state. 2. Nothing contained in this section shall be construed to affect the enforcement of any provision respecting choice of forum in any other contract, agreement or undertaking."

ciled outside Europe.[89] Arts. 42 and 43 only formulate minimum solutions. Therefore, exceptions and problematic cases remain to be resolved by the court seized.

C. The Location of the Aircraft Object, *Draft* Art. 42 (a)

The interests of creditors in a speedy availability of judicial help justify the *in rem* jurisdiction of the courts at the situation of the mobile equipment, even if the defendant is not domiciled in that jurisdiction. The mere location of aircraft equipment within the jurisdiction constitutes a close and real connection to the court seized of the matter.[90] This foundation for *in rem* jurisdiction cannot be compared to exorbitant ground of jurisdiction *in personam* over a defendant not domiciled but with an article, asset or object of the claim in that jurisdiction.[91] However, for purposes of speedy judicial relief, jurisdiction could be based even on exorbitant grounds, i.e., without genuine link to the Forum State.[92] This

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[89] For domestic law see, *e.g.*, Bundesgerichtshof (German Federal Supreme Court, BGH), 24 November 1988 - III ZR 150/87, (1990) 10 IPRax 41 [Germany]; BGH, 14 November 1991- IX ZR 250/90, (1992) 12 IPRax 377 [Germany]; Oberlandesgericht München (Court of Appeals Munich), 28 September 1989 - 24 U 391/87, (1991) 11 IPRax 46 [Germany], C. Kohler, "Internationale Gerichtsstandsvereinbarungen – Liberalität und Rigorismus im EuGVÜ", (1983) 3 IPRax 265; J. Samtleben, "Internationale Gerichtsstandsvereinbarungen nach dem EWG-Übereinkommen und nach der Gerichtsstandsnovelle" (1974) 27 NJW 1590 at 1593 (theory of reduction); for European law R. Geimer, "Ungeschriebene Anwendungsgrenzen des EuGVÜ – Müssen Berührungspunkte zu mehreren Vertragsstaaten bestehen?", Case comment on OLG München, *ibid.*, (1991) 11 IPRax 31, Kropholler, *supra* note 47 at 163 *et seq.*, Art 17 para. 4 with references; see also EuGH EWS 1994, 353; generally, see Tetley, *supra* note 58 at 807 *et seq.*

[90] For an example in national law, see § 73 (3) of the *Gesetz über die Freiwillige Gerichtsbarkeit* (German Non-contentious Jurisdiction Act), § 2369 (1) BGB (*Belegenheitsgerichtsstand*); *Mazur* v. *Sugarman*, [1939] 42 R.P. 150 (C.S. (Qc.)); Groffier, *Précis DIPQ*, *supra* note 81 at 276, para. 290.

[91] This ground of jurisdiction is advantageous from an enforcement perspective and is embodied, *e.g.*, in § 23 of the *Einführungsgesetz zur Zivilprozeßordnung vom 30. Januar 1877*, RGBl. I, 19 February 1877, *83 in der Fassung vom 12. September 1950*, BGBl. I, 1950, 533 (German Code of Civil Procedure) [hereinafter ZPO]: *Vermögensgerichtsstand.* See Kegel, *supra* note 64 at 806, § 22 II and O' Malley & Layton at 1295, para. 51.30. For Art. 3152 C.C.Q., Arts. 73 and 75 C.C.P., see Groffier, *Précis DIPQ*, *supra* note 81 at 252 *et seq.*, paras. 258 *et seq.*; *id.*, *La Réforme*, *supra* note 81 at 143 *et seq.*, para. 129 and Ferland, Emery & Tremblay, *supra* note at 88 *et seq.*, para. 90 *et seq.* It should be noted that even jurisdiction *in rem* at the location of the object is excluded under Art. 3 of the *Brussels/Lugano Conventions*, although there is a sufficiently close relationship to the forum. Jurisdiction is not exorbitant in this case. See Kropholler, *supra* note 47 at 67, Art. 3 para. 4.

[92] See Art. 3140 C.C.Q.; Kropholler, *supra* note 47 at 228 *et seq.*, Art. 24 para. 8 with references to German doctrine and judgements for the case of Art. 24 *Brussels/Lugano Conventions*, which refers to the domestic law of the state where interim measures are sought. Should this domestic law (*e.g.* §§ 919 Altern.1, 937 (1) ZPO, *ibid.*) refer to the domestic trial court for precautionary orders and at the same time Art. 24 of the *Brussels/Lugano Conventions* give competence to the trial court of another State for interim mesures and arrest the majority view in doctrine and jurisprudence allows jurisdiction based on exorbitant provisions in order not to incommode the claimant. A close connection to the trial State is, however, necessary under § 23 ZPO, *ibid.* See BGH, 2 July 1991 - XI/ZR 206/90 (1992) 12 IPRax 160 and (1991) 44 NJW 3092 [Germany]; P. Schlosser, "Einschränkung des Vermögensgerichtsstandes", Case comment on BGH, *ibid.* (1992) 12 IPRax 140; R. Geimer, "Rechtsschutz in Deutschland künftig nur bei Inlandsbezug?", Case comment on BGH, *ibid.* (1992) 45 NJW 3072; G. Dannemann, "Jurisdiction Based on the Presence of Assets in Germany – A Case Note" (1992) 41 Int. Comp. L. Q. 632.

consideration resembles a *forum non conveniens* analysis under Common law. In Anglo-Canada, territorial competence only exists in the case of a real and substantive connection between the forum jurisdiction and the defendant or the subject matter of the proceeding[93], based on the principles laid down by the Supreme Court of Canada (SCC) in *Morguard Investments Ltd.* v. *De Savoye*.[94] Only in Alberta and Newfoundland a *prima facie* reasonable cause of action is sufficient to assume jurisdiction.[95] The exceptional CJPTA categories of assumed competence also encompass the jurisdiction where personal property is physically located[96] and the jurisdiction where relief is sought in the nature of foreclosure, sale, delivery of possession, redemption or re-conveyance in relation to mortgage, charge or liens[97] on property (*lex fori executionis*).[98] These categories are absolutely relevant to the discussion of jurisdiction regarding claims in aircraft equipment and find confirmation in the Personal Property Security Legislation, which is declaratory of the law as it stood before. Procedural matters affecting the enforcement of the rights of a secured party in respect of collateral other than intangibles are governed by the law of the jurisdiction, in which the collateral is located at the time of exercise of those rights.[99] Similarly, since intangibles do not have a discernible physical *situs*, the *lex fori* applies to procedural matters, *e.g.*, rules of pleading and evidence, affecting the enforcement against intangibles.[100]

Jurisdiction *in rem* exists under the same constitutional restrictions as personal jurisdiction since prejudgement attachments of personal property have been provided for in

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[93] See *Northern Sales Co.* v. *Government Trading Corp. of Iran*, [1991] 81 D.L.R. (4th) 316 (B.C. C.A.) and the further references in Castel, *supra* note 61 at 204, para. 126 note 23.

[94] See *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (3rd) 160, [1991] 2 W.W.R. 217, 122 N.R. 81, 46 C.P.C. (2nd) 1; *Amchem*, *supra* note 70.

[95] For the corresponding *Rules of Civil Procedure* in Alberta and Newfoundland, see Castel, *supra* note 61 at 205, para. 126.

[96] See *Ontario Rules*, *supra* note 87, r. 17.02 (a); *Santa Marina Shipping Co. S.A.* v. *Lunham & Moore Ltd.*, [1978] 18 O.R. (2d) 315, 5 C.P.C. 146, 82 D.L.R. (3rd) 295 (H.C.J.); Castel, *ibid.* at 206, para. 127 a.).

[97] In this paper, the term "lien" generally is used in its primary sense of being given as a privilege by law and not by contract. See *Halsbury's Laws of England*, vol. 28, 4th ed. reissue (London: Butterworths, 1997) at 352, para. 702. Occasionally, however, it can be used as an example for a security or in the sense that it can only attach to property which is or has been the subject of a transaction between the parties, notably in a U.S. context, where the term is sometimes used more loosely. See R.S. Vasan, ed., *The Canadian Law Dictionary* (Don Mills, Ont.: Law and Business Publications, 1980) "lien" at 227; *Black*, *supra* note 27 *s.v.* "lien".

[98] See *Ontario Rules*, *supra* note 87, r. 17.02 (e); *Anderson* v. *Thomas* [1935] O.W.N. 228, [1935] 3 D.L.R. 286 (H.C.J.); Castel, *supra* note 61 at 217, para. 127 j.).

[99] See, *e.g.*, *Personal Property Security Act*, S.O. 1989 c. 16, R.S.O. 1990, c. P-10 as. am., s. 8 (1) (a) [hereinafter *O.P.P.S.A.*]; see Castel, *ibid.* at 481, para. 334.

[100] Art. 8 (1)(b) of the *O.P.P.S.A.* and the *Alberta Personal Property Security Act*, S.A. 1988, c. P.-4.05 [hereinafter *A.P.P.S.A.*]; Castel, *ibid.*; J.S. Ziegel in J.S. Ziegel & D.L. Denomme, eds., *The Ontario Personal Property Security Act – Commentary and Analysis* (Aurora, Ont.: Canada Law Book, 1994) at 96, § 8.2.

Shaffer v. *Heitner*[101] and will therefore be elaborated under IV. Exceptions only apply where claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, and in certain cases of attachment jurisdiction, such as close relation of the claim and the attached property or other minimum contacts to the forum.[102] The Unidroit Draft is in perfect harmony with this jurisdictional rule of national law.

D. *Forum Rei* - The Location of the Defendant, *Draft* Art. 42 (1) (b)

The rule originally inserted in Art. 15 (3) (b) *Draft Convention* (November 1997 version) oriented jurisdiction to the location of "one of the parties". This might result in excessively favouring the secured plaintiff by introducing an exorbitant rule *actor sequitur forum actoris* in contradiction with the universally recognised jurisdiction rule according to which the defendant's location determines the jurisdiction: *actor sequitur forum rei*.[103] Although jurisdiction could be based on the domicile of the defendant or his place of origin[104] the international consensus and, in line with it, the latest Draft Art. 42 (1) (b) expressly lay down this place of the defendant as an alternative. This forum is likely to be within the jurisdiction of enforcement, which parties to a transaction will most frequently anticipate. The same basic principle for jurisdiction in the Member States to the *Brussels/Lugano Conventions* is set out in its Art. 2 (1), in Art. 3134 C.C.Q. and Art. 68 C.C.P. Unlike these provisions, the *Draft Convention* does not attribute primary character to this rule of jurisdiction. Instead, the evolution of the draft, tending to empower the secured financier, again shows the prevalence of creditor interests with a variety of accessible fora.

The most traditional basis of judicial jurisdiction in Common law is the physical presence of the defendant, whether permanent or temporary, in the territory at the time of service of the originating process.[105] This presence normally is rooted in domicile, ordinary residence or business in the jurisdiction. According to present law, foreign airline corporations underlie Anglo-Canadian provincial or territorial jurisdiction to the extent

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[101] See *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).
[102] See Richman & Reynolds, *supra* note 71 at 127 *et seq.*, § 44 [b].
[103] See Goode, *supra* note 41 at 13. This principle traces back to Justinianus I, *Codex* (A.D. 529), C. 3, 19, 3.
[104] See F.K. von Savigny, *A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time*, trans. W. Guthrie (Edinburgh: Clark, 1869) at 67 *et seq.*; see W. Kennett, "Harmonisation and the Judgements Convention – Historical Influences", (1993) 1 Eur. Rev. Priv. L. 83 at 90 *et seq.*
[105] See Castel, *supra* note 61 at 202, para. 123; Tetley, *supra* note 58 at 795.

local rules of procedure grant service of the originating process.[106] This astonishing and elsewhere little accepted starting-point is based on English precedent. English courts have assumed jurisdiction even when the dispute is totally unrelated to England, provided that the defendant has been served with the writ in England or Wales (a few minutes in transit at an English airport are sufficient for this purpose).[107] In most Canadian provinces such is not possible. Territorial competence only exists within the scope of a real and substantive connection between the forum jurisdiction and the defendant, as explained under b. As mentioned, parties generally expect the location of the debtor of the secured claim to be the place where enforcement takes place and, hence, expect procedural issues to be governed by the *lex fori*.

For an U.S. court to have jurisdiction *in personam*, a defendant corporation must, if not incorporated, be registered in the Forum State. No federated State limits its jurisdiction to domestic corporations. In all States there are ample grounds for jurisdiction over non-consenting foreign corporations as well. For example, a foreign corporation which is carrying on substantial business activities on a regular and continuous basis in the forum State may be held to be present in that State. This means that it can be sued there as regards claims that neither have arisen in connection with the local activity of the corporation, nor have any other relationship to the Forum State.[108] If an absent foreign corporation has had some contact with the Forum State and the disputed claim has arisen out of this contract the Forum State will have jurisdiction under the terms of his long-arm statute. Limits of jurisdiction only are imposed under the constitutional requirement of due process of law[109], which requires that the defendant must have certain minimum contacts with the forum so that the bringing of the suit does not offend the "traditional notions of fair play and substantial justice."[110]

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[106] See, *e.g.*, *Ontario Rules*, *supra* note 87, r. 16.02 (1) (c): "Where a document is to be served personally, the service shall be made, on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business." See Castel, *ibid.* at 203, para. 124 with further references in note 17.

[107] See *English Common Law Procedure Act, 1852* (U.K.), 15 & 16 Vict., c. 76, ss. 18 & 19; *Rules of the Supreme Court*, Order 11; see Castel, *ibid.* at 204, para 126.

[108] See *Perkins* v. *Benguet Consolidated Mining Company*, 342 U.S. 437 (1952); *Restatement (Second) of the Law of Conflict of Laws*, § 47 (2) (1971) [hereinafter *Restatement Conflict of Laws*]; see Richman & Reynolds, *supra* note 71 at 83, § 31 [b] and at 99 *et seq.*, § 36 [c].

[109] See *International Shoe Company* v. *State of Washington*, 326 U.S. 310 (1945) [hereinafter *International Shoe*]; Richman & Reynolds, *ibid.* at 29 *et seq.*, § 20 [a].

[110] See *International Shoe*, *ibid.* at 316.; Richman & Reynolds, *ibid.* at 97 *et seq.*, §§ 35 *et seq.*

The government representatives deliberating on the version of Art. 42 (1) (b), which is finally going to be retained, have to be aware of the excessive character that the plaintiff's location would represent and bear in mind the far-reaching and internationally disturbing developments brought about by the new Italian private international law.[111] However, in practice an Art. 42 (1) (b) that allows suit against a defendant within its own jurisdiction is likely to be of minor relevance compared to the "creditor-friendly" express choice of jurisdiction or the *situs* of the equipment.

E. The State of Nationality Registration, Art. XX *Draft AEP*

The jurisdiction of the State of nationality of the aircraft is a tribute to the traditional mission of nation-States and likely to be widely accepted by States with interest in the ratification of a Convention on International Interests in Mobile Equipment.

Yet, the nationality factor appears outmoded in the context of private international business law as it has never had a significant role for economic activities and revealed obstructive to the need for flexibility of globalising business generally[112], and to the needs of aviation finance industry in particular.[113] The nationality criterion in relation to aircraft does, even if investment lawyers might be accustomed to it (*opinio juris, longa consuetudo*), not meet the requirement of foreseeability in modern aircraft financing.[114] It is a figure of public international law that has fit for human or juridical persons and vessels, but originally not for aircraft. "The first balloon flights were in 1783, but it was not until

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[111] See *Legge n. 218 del 31 marzo 1995 - Riforma del sistema italiano di diritto internazionale privato*, Gazz. Uff. Suppl. Ord. n. 68 al. n. 128, 3 June 1995, Art. 3; see P. Kindler, "Internationale Zuständigkeit und anwendbares Recht im italienischen I.P.R.-Gesetz von 1995" (1997) 61 RabelsZ 227 at 243 *et seq.* and V. Starace, "Le champ de la juridiction selon la loi de réforme du système italien de droit international privé", (1996) 85 Rev. cri. dr. internat. privé 67 at 82.

[112] The importance of the connecting factor "nationality" even for the determination of an individual's personal law in those Continental European countries where it has a long tradition is permanently diminishing, see Castel, *supra* note 61 at 83, para. 28 and at 573 *et seq.*, para. 437; Kegel, *supra* note 64 at 322 *et seq.*; J. Kropholler, *Internationales Privatrecht*, 2nd ed. (Tübingen: J. C. B. Mohr [Paul Siebeck],1994) at 248 *et seq.* and the essays in E. Jayme & H.-P. Mansel, eds., *Nation und Staat im Internationalen Privatrecht* (Heidelberg : C.F. Müller, 1990).

[113] For the recent entry into force of Art. 83*bis* of the *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6 [hereinafter *Chicago Convention*] and modern developments in the private international law and doctrine of many industrialised States, see below, *Chapter Three* VIII. For the national ownership requirements in many States, see N.M. Matte, *Treatise on Air - Aeronautical Law* (Toronto: Carswell, 1981) at 547 note 8 and accompanying text, para. 197.

[114] See also and compare, although in the context of the contract of carriage, A. Kadletz, *Conflicts of Laws in Private International Air Law* (LL.M. Thesis, McGill University Institute of Air and Space Law 1996) [unpublished] at 98 *et seq.* For the interests and expectations of parties to secured transactions, see *Chapter Three* VI. A. 2. and VIII. A., above. See also M. Milde, "Conflicts of Laws in the Law of the Air" (1965) 11 McGill L. J. 220 at 245.

the beginning of the twentieth century that international law began to assign the quality of nationality to flight instrumentalities."[115] Today, the legal status of aircraft also includes nationality for purposes of public international order. By contrast, when "personal property[, specifically mobile equipment,] has no locality"[116] it is difficult to see how it can have – for purposes of transnational private commercial law - a nationality, which traditionally is based on territoriality. Only its inherited use can explain the current "petrifaction" in Art. XX *Draft AEP*.

Jurisdiction in the State of Registration under uniform substantive law has the same effect as the execution in a foreign forum under the extraterritorial application of domestic law under the *Geneva Convention*, but does not give any substantial contribution to the question of jurisdiction. If this court applies internationally uniform law in order to suit the needs of the aircraft industry such a jurisdiction is even less justified under the most advanced Unidroit framework than it is under the less developed *Geneva Convention*.

F. An Uncertain Defence - Foreign Sovereign Immunity, Art. XXI *Draft AEP*

International lenders are "plagued by defences based on sovereign immunity".[117] Consequently, *Draft AEP* Art. XXI denies foreign States their sovereign immunity as an act of jurisdictional defence where they have waived their immunity and respected the rules on jurisdiction contained in Art. 42 and XX. Under what exact circumstances this is the case is not specified. Therefore, courts will *e g.*, have to recur to the jurisprudence developed by U.S. courts under § 1605 (a) (1) *Foreign Sovereign Immunities Act*.[118] Contracting parties can avoid uncertainties by extensive and precise drafting. Financing institutions and airlines that are more than 50 % government owned are well advised to include, and they usually do include, explicit immunity waiver clauses in their financing contract in order to free banks from trial, enforcement and prejudgement attachment risks.[119] Therefore, only such express waiver appears to be referred to. It is still unclear why the issue of

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[115] J.C. Cooper, "A Study on the Legal Status of Aircraft" in I.A. Vlasic, ed., *Explorations in Aerospace Law – Selected Essays by John Cobb Cooper 1946-1966* (Montreal: McGill University Press, 1968) 204 at 216 and following text.

[116] *Sill* v. *Worswick* (1791), 1 H.Bl. 665 at 690, Lord Loughborough C.J. See below, *Chapter Three* VIII. A.

[117] C.T. Ebenroth & L.E. Teitz "Winning (or Losing) by Default –Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions", (1985) 19 Int'l Lawyer 225 at 227.

[118] See *Foreign Sovereign Immunities Act*, 28 U.S.C. §§ 1602-1611 (1982) [hereinafter *FSIA*]; See *Verlinden B.V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D. N.Y.1980); see Born & Westin, *supra* note 54 c. 6 C. at 347 *et seq.*

sovereign immunity has not been further elaborated given the universally recognised restrictive approach to State immunity[120] and, in addition, the major difficulties in interpreting the important commercial activities exception of, *e.g.*, § 1605 (a) (2) FSIA[121] or section 5 of the Canadian *State Immunity Act 1985*.[122] Art. 10 (1) in conjunction with Art. 2 (1) (c) (i) of the *International Law Commission Draft Articles on Jurisdictional Immunities of States*[123], which clearly excludes the availability of the defence in the case of sale of goods, would certainly have provided useful guidance in this respect. Taking into account the immunity of State property from attachment, any immunity rule in secured transactions would also have to define the technical meaning of the word "property" as, *e.g.*, in s. 7 (3) SIA.[124] However, given the impression that civil aircraft financing as contemplated by the *AEP* typically is a commercial activity (*acta jure gestionis*), despite the fact that purchasing airlines might be partially state owned,[125] one might think that the Convention better contain a stipulation clarifying the exclusion of every reference to sovereign immunity. The use of this doctrine by the courts in cases where parties have not agreed on clauses waiving immunity might make extra-judicial remedies for creditors indispensable and discredit the value of the new rules elaborated by the Convention.[126]

G. Jurisdiction for Claims regarding the Contractual Performance

The jurisdiction concerning contractual claims remains untouched by rules regarding personal property rights.[127] Hence, according to § 5-1402 *G.O.L.*, courts have jurisdiction for contractual claims where a substantive choice of New York law has been made and such forum been selected. As an alternative to the *forum rei* particularly, Art. 5 no. 1 *Brussels/Lugano Conventions* refers to the jurisdiction of the place where the specific

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[119] See Born & Westin, *ibid.* c. 10 B. at 613.
[120] See H.M. Kindred *et al.*, eds., *International Law - Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Edmond Montgomery, 1993) at 284.
[121] As recognised by the Justices White, Berger, Powell and Rehnquist in *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976).
[122] See *State Immunity Act 1985*, R.S.C. 1985, c. S-18, as. am. 1991, c.41, s. 13 [hereinafter *SIA*]. For differentiation between public and commercial acts, see Kindred, *supra* note 120 at 289 *et seq.*
[123] as adopted at 43rd session, 1991 and recommended to UN General Assembly.
[124] See *SIA*, *supra* note 122 s. 7 (3): "[a] ship or cargo owned by a foreign state includes any ship or cargo in the possession or control of the state and any ship or cargo, in which the state has an interest." See Kindred, *supra* note 120 at 309.
[125] See *FSIA*, *supra* note 118 § 1603 (b); *McDonnell Douglas Corp.* v. *Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.) cert. den. 474 U.S. 948 (1985) and Born & Westin, *supra* note 54 c. 6 C. at 342 *et seq.* and at 362 *et seq.*
[126] See Ebenroth & Teitz, *supra* note 117 at 230.
[127] See Castel, *supra* note 61 at 208, para. 127 e.).

contractual obligation, which is disputed between the parties, has to be performed. This has to be determined according to the law applicable to the contract. For this purpose, the court applies its own contractual conflicts of law rules following the rule in *Tessili* v. *Dunlop*, [128] which will lead to the application of the place of performance specified by the Rome *Convention on the Law Applicable to Contractual Obligations*[129] or the uniform sales law of the *UN Convention on the International Sale of Goods*.[130] The *Tessili* judgement neither defined nor allowed the definition of a uniform European place of performance, *e.g.* the place of delivery.

In a similar way to Art. 5 no. 1 of the *Brussels/Lugano Conventions*, Art. 3148 (3) C.C.Q. stipulates that Quebec authorities have alternative jurisdiction if "one of the obligations arising from a contract was to be performed in Quebec." Canadian Common law provides comparably more alternatives. Notably, an (alleged) breach of contract within the jurisdiction,[131] the conclusion of the contract within the jurisdiction, a corresponding forum selection for proceedings in respect of contract, or the authority of the law of the jurisdiction over terms of the contract are sufficient to establish jurisdiction.[132]

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[128] See *Tessili* v. *Dunlop*, Judgement of 6 October 1976, C-12/76, [1976] E.C.R. 1473, (1977) 30 NJW 491; R. Geimer, Case comment on *Tessili* v. *Dunlop* (1977) 30 NJW 492.

[129] See *EEC Convention on the Law Applicable to Contractual Obligations*, 19 June 1980, (1980) 29 I.L.M. 1492, [1980] O.J. L. 266/1, Art. 4 (2) [hereinafter *Rome Convention*].

[130] See *UN Convention on the International Sale of Goods*, 11 April 1980, U.N. Doc. A/CONF. 97/18 Annex 1 (1980), 1489 U.N.T.S. 3, (1980) 19 I.L.M. 671 [hereinafter *CISG*], Art. 57 para. 1 a, according to which jurisdiction would follow the location of the vendor. See *Custom Made Commercial Ltd.* v. *Stawa Metallbau GmbH*, Judgement of 29 June 1994, C-288/92, [1994]E.C.R. 2949, (1995) 48 NJW 183. This however may be considered as an additional jurisdiction at the place of the vendor, unwanted by the *CISG* and the *Brussels/Lugano Conventions* - a clear argument against a qualification *lege causæ*.

[131] See *De Havilland Aircraft of Canada Ltd.* v. *Metroflight Inc.* (1978) 29 C.P.C. 225 (Ont. H.C.J.).

[132] See Castel, *supra* note 61 at 208, paras. 127 e.) and f.).

Chapter Three

Conflict of Laws in the Law of Secured Transactions

The following Chapter will give a detailed explanation and examples of the basic legal issues that arise when a secured transaction affecting an aircraft, nothing but a sophisticated form of social relation, steps out of a locally restricted single legal order and thereby gives up unity, coherence, legitimacy and proximity of the law which has given birth to it,[133] notably with regard to its sole reason of existence, which is its enforceability against a defaulting debtor.

I. Diversity of Law and Conflict of Laws

Conflict of laws situations in aircraft securitisation arise due to several essential characteristics of aviation equipment. First of all, aircraft is by nature a supranational object, destined to overcome long distances within short time and regardless of territorial and, ergo, jurisdictional boundaries. Secondly, once a manufacturer has completed the aircraft building and delivered it to its operator it is permanently mobile. Thirdly, as an object incorporating the most advanced aviation technologies, it is of high unit value and, hence, subject to personal property or other real rights, notably mobile securities. These characteristics, finally, lead to the inconvenience that every right or interest in aircraft, which is based on a national system of real transactions, comes into conflict with those foreign legal systems where that mobile right has to take effect. Aircraft securitisation, therefore, faces the problem of "polyjurality", *i.e.* the multiplicity of legal sources[134], in the realm of transnational co-ordination of the conditions of creation of personal rights and of the effects of such creation.

II. The Cost of Disharmony

The considerable amounts of funding involved in the financing of high-tech equipment reinforce the need for credit enhancement through a stable and reliable international system of secured transactions. Credit enhancement "is the art of structuring a

[133] See A. Flessner, *Interessenjurisprudenz im Internationalen Privatrecht* (Tübingen: J.C.B. Mohr[Paul Siebeck], 1990) at 50.
[134] See P. Legrand, "Against a European Civil Code" (1997) 60 Mod. L. Rev. 44 at 59.

transaction, through economic agreements and legal mechanisms, so that the transaction is seen by both the creditor and the debtor as prospectively profitable. In other words, the goal of credit enhancement is to minimise the creditor's risk of loss due to non-performance while nonetheless allowing the transaction to be profitable for the debtor."[135] The cost of disharmony in the law of secured credit generally, and among national insolvency laws more specifically, otherwise would be such that credit transactions are discouraged due to excessively high financial risks for creditors in the case of a failed transaction. Even without failure, a financier who cannot count on direct[136] or indirect[137] profits flowing from his advancement of funds because the cost of the transaction is, due to the type of security mechanism involved, higher than the profits generated by the expected return on investment does not have an incentive to engage in individual extensions of credit. Most banks and financial institutions, therefore, avoid considering mobile collateral, not to mention aircraft as a basis for granting secured loans.[138]

III. Approaches to Re-establish Harmony

Methods to overcome these in *fons et origo* legal problems are typically national, though internationally uncoordinated conflict of law rules, rules of substantive law enacted for transnational cases, conflicts of laws rules harmonised through an international legal framework of a specific convention, uniform rules of substantive domestic law for transnational cases, or plurilaterally co-ordinated rules of substantive law for transnational cases.[139] The method applied to a particular problem in private international law depends on the conceptual compatibility of several domestic laws. In the absence of such compatibility a mere co-ordination by way of national or international conflict of law rules does not lead to acceptable results. In this case, only uniform substantive law, which en-

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[135] Cohen, *supra* note 14 at 175.
[136] Direct profits are derived from interest charges in excess of the creditor's time value of the money. See *ibid.* at 174
[137] Indirect profits are derived from the financing of profitable sales of the creditor's products or services to buyers, which would otherwise not have occurred. See *ibid.*
[138] See M.J. Stanford, "Taking Security over Movables – Moving Towards an Universal System of Registration" (Address, Firenze, 3 September 1997) [unpublished] cited by Djojonegoro, *supra* note 14 at 54; see S. Lohan, "UNIDROIT Convention on Security and Leasing in Mobile Equipment", [1998] Airfinance J., Guide to Aviation Lawyers 1998 Supp. 4, online: LEXIS (Canada, CANJNL).
[139] See K.F. Kreuzer, "Europäisches Mobiliarsicherungsrecht oder: Von den Grenzen des Internationalen Privatrechts", in W. A. Stoffel & P. Volken, eds., *Conflicts and Harmonisation – Mélanges en l' Honneur d' Alfred E. von Overbeck* (Fribourg, Switzerland : Éditions Universitaires Fribourg, 1990) 613 at 613 *et seq.*

tirely redesigns national law, can smooth out the frictions between diametrically opposed traditional legal concepts.[140]

In this century there are only two international legal instruments in force with relevance for the law of aircraft securitisation. These are the Rome *Convention on the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft*[141] and the *Geneva Convention*.[142] Although the *Geneva Convention* originates in works undertaken since 1925, the *Arrest Convention* entered into force on 12 January 1937, more than 16 years prior to the *Geneva Convention*, which entered into force on 17 September 1953.

The *Arrest Convention* is an instrument of relevance for private and public aeronautical law, which outlaws the attachment of aircraft without immediately enforceable judgement or right of seizure where this would interfere with State services or disrupt commercial traffic.[143] Excepted are the cases of bankruptcy, certain offences and unlawful dispossession.[144] Its significance today, however, should not be overestimated, since it traces back to a political situation, in which aircraft transportation was a novelty and an elaborate international transportation network via air was not in existence. Here, the protection of the operator of an aircraft as an investor in transportation is only incidental to the overall purpose that navigation as such had to be protected against risks emanating from seizure, when the aircraft is ready for take off.[145] Notwithstanding, a fundamental development during that period was the germination of an official discussion about the establishment of such a transnational aviation network as a means of economic co-operation. But such system was not decided upon on a governmental level before the end of World War II.[146] To date, only about twenty States, such as Germany, the Netherlands,

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[140] For prevalence of unified substantive law over unified or not unified conflicts of law rules see K. Zweigert & U. Drobnig, "Einheitliches Kaufgesetz und internationales Privatrecht" (1965) 29 RabelsZ 146 at 147 *et seq.*; E. von Caemmerer, "Rechtsvereinheitlichung und internationales Privatrecht", Festschrift für W. Hallstein (Frankfurt : 1966) 63 at 67 cited after Kreuzer, *ibid.* at 614 note 1.

[141] See *Convention on the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft*, 29 May 1933, 129 L.N.T.S. 289; *Bekanntmachung über das zweite Abkommen zur Vereinheitlichung des Luftprivatrechts vom 17. März 1935*, RGBl. II, 22 March 1935, 301 [hereinafter *Arrest Convention*]. See the German *Gesetz über die Unzulässigkeit der Sicherungsbeschlagnahme von Luftfahrzeugen vom 17. März 1935*, RGBl. I, 22 March 1935, 385; see M. de Juglart, *Traité de Droit Aérien*, vol. 1, 2nd ed. by E. du Pontavice, J. Dutheil de la Rochère & G.M. Miller (Paris: L.G.D.J., 1989) at 343 *et seq.*, para. 588 c. 3 s. 1 § 1.

[142] See *supra* note 13.

[143] See *Arrest Convention*, *supra* note 141 Art. 2 (1).

[144] See *ibid.*, Art. 7 (breach of customs, penal or police regulations) and Art. 3 (2) (arrest undertaken by an owner who has been unlawfully dispossessed of his aircraft).

[145] See *ibid.*, Art. 3.

[146] See J.C. Cooper, "The Internationalisation of Air Transport", in I.A. Vlasic, *supra* note 115, 395.

some Scandinavian and African countries, but not the main air-faring nations are signatories to the Convention.[147]

The *Geneva Convention*, by contrast, serving the interests of investors in aircraft, addresses legal issues which are abstract from issues of public international law that are so much embedded in circumstances at the time of their enactment. For this reason it is the fundamental conventional framework for aircraft that serve as a basis of credit extension.

Despite the specific nature of the *Arrest Convention* and the *Geneva Convention*, which provide solutions adapted to the function of aircraft as an asset, not to mention their agedness, both Conventions must be analysed, in the general context of current efforts undertaken to abolish legal barriers between merging international markets and transportation systems.

IV. Panorama of Harmonisation Initiatives

The endeavours made with a view to harmonise the law in the broad field of secured transactions concentrate on specific types of secured transactions on the one hand whereas a long-term overhaul of secured transactions generally and on an international basis is envisaged on the other.

A. Financial Leasing, Factoring and Assignments in Receivables Financing

Two initiatives refined to particular business contexts emanate from Unidroit and UNCITRAL.

Unidroit has prepared the *Leasing Convention*[148] and the *Convention on International Factoring*[149] concluded in Ottawa on 28 May 1988. This body of government experts was patron of a study group, which, in November 1997 approved the *Draft Convention* and a Committee, which has revised that Draft.[150] This project is based on an initiative of the Canadian government, which for itself is rooted in the drafting process of the *Leasing Convention*, and, hence, desires as a starting point to facilitate international recognition of fi-

[147] See Ph.R. Wood, *supra* note 51 at 257, para.18-33, 257; M.de Juglart, *supra* note at 343, para. 588.
[148] See *Leasing Convention*, *supra* note 26.
[149] See *Unidroit Convention on International Factoring*, 28 May 1988, (1988) 27 I.L.M. 943 [hereinafter *Factoring Convention*].

nancial lessors' personal rights in collateral against bankruptcy trustees and creditors.[151] This Project including its system of Protocols for particular types of Mobile Equipment, notably the *AEP* is the core subject of this study.

UNCITRAL for its part, is concentrating, since 1995, on the development of a *Convention on Assignments in Receivables Financing*.[152] This Convention, partly covering the scope of the *Factoring Convention*, "would govern virtually any international assignment of a receivable and any assignment (domestic or international) of an international receivable."[153] It is valuable to see to what extent the assignment rules of the Unidroit Mobile Equipment Project anticipates solutions to assignment problems retained in the UNCITRAL Receivables Project.

B. A Secured Transactions Law for Transforming and Developing Economies

Other reform initiatives in the law of secured transactions exist under the ægis of the European Bank for Reconstruction and Development (EBRD), the American Bar Association (ABA) and the University of Maryland and would serve as the basis for enactment of modern national laws on secured transactions in Central and Eastern Europe and former Soviet Republics.[154] They are sponsored under the auspices of the World Bank for the benefit of certain Central and South American developing economies.[155] Activities of harmonisation within NAFTA are encouraged by the National Law Center for Inter-American Free Trade at University of Arizona and primarily focus on the creation of se-

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[150] See *Chapter One*, above.
[151] See Djojonegoro, *supra* note 14 at 54 referring to the address of Stanford, *supra* note 138.
[152] See *Receivables Project*, *supra* note 44; Cohen, *supra* note 14 at 182 *et seq.* and at 185 *et seq.*; see U.C.C. § 9-102 (2) (1994).
[153] See *Receivables Project*, *ibid.*, art. 1.
[154] See European Bank for Reconstruction and Development (EBRD), *Model Law on Secured Transactions*, 1994, online: European Bank for Reconstruction and Development <http://www.ebrd.com/new/misc/modlaw0.htm> (date accessed: 5. 9. 1998); Cohen, *supra* note 14 at 183 *et seq.*; American Bar Association, Central and East European Law Initiative (CEELI), *Concept Paper on Secured Transactions Law* of 24 March 1997, online: American Bar Association <http://www.abanet.org/ceeli/papers/sec.html> (date accessed: 5. 9. 1998); see J. Key, "Old Countries, New Rights" (1994) 80 A. B. A. J. 68; Cohen, *ibid.* at 184; University of Maryland, *Institutional Reform and the Informal Sector (IRIS) Project - History and Goals*, online: University of Maryland <http://www.inform.umd.edu/EdRes/Colleges/BSOS/Depts/IRIS/present.html> (date accessed: 5. 9. 1998) and University of Maryland, *Collateral Law Projects Survey*, online: University of Maryland <http://www.inform.umd.edu/EdRes/Colleges/BSOS/Depts/IRIS/survey.html> (date accessed: 5. 9. 1998); W.E. Kovacic, "The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries" (1996) 11 Am. U. J. Int'l L. & Policy 437 at 446, 460; Cohen, *ibid.* at 184 *et seq.*
[155] See J.W. Head, "Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Banks" (1996) 90 Am. J. Int'l L. 214; Cohen, *ibid.* at 185.

curity interests equivalent to those used in Canada and the United States in Mexico, notably on hypothecary securities following the example of the Quebec Civil Code.[156]

C. An International Reform of Secured Transactions Law

The only long-term international reform is envisaged by the International Secured Transactions Project of the American Law Institute, which was commenced in May 1997[157] and which is contemplated to fulfil a function similar to the United States U.C.C.

V. The Rivalry between Civil Law and Common Law

As this panoply of dynamisms illustrates, the problems faced in the undertaking of international aircraft securitisation are not isolated but a phenomenon of general nature encountered in all transnational credit transactions, which "significantly diminishes the economic output of many nations."[158] A striking feature is, however, the dominance of U.S. initiatives. Even where a European institution, such as the EBRD, tackles the necessary generalised overhaul for the Civilian Central and Eastern European jurisdictions their new concepts seem to deviate from many traditional Continental European concepts and instead are compatible with the structure of the secured transactions system embodied in the U.C.C. The same statement is true to a large extent for the *Geneva Convention* and also valid, as will be elucidated throughout this study, for the *Draft Convention* including the *Draft AEP*. From a North-American perspective, this is not surprising since "common lawyers always wished to avoid some aspects of Continental law, but they also habitually

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[156] See T.C. Nelson & R.C.C. Cuming, *Harmonization of the Secured Financing Laws of the NAFTA Partners – Focus on Mexico* 1, 4 (1995), cited in Cohen, *ibid.* at 185 note 50; R.C.C. Cuming, "Harmonization of the Secured Financing Laws of NAFTA Partners" (1995) 39 St. Louis L. J. 809.

[157] See N.B. Cohen, *The International Secured Transactions Project – A Proposal and Outline* 3 (1997) cited in Cohen, *ibid.* at 186 *et seq.*, note 57 and accompanying text.

[158] *Ibid.* at 187 citing notably the case of Bolivia, where the loss in GDP from an inadequate framework for secured transactions is estimated between 5 and 10 percent; see World Bank, Office of the Chief Economist, Latin America and Caribbean Region, *How Legal Restrictions on Collateral Limit Access to Credit in Bolivia*, Sector Report No. 13873-BO (Washington : The World Bank, 1994) at 18 *et seq.*, cited in Cohen, *ibid.* at 176 note 8; see H. Fleisig, *The Power of Collateral - How Problems in Securing Transactions Limit Private Credit for Movable Property* (Washington: The World Bank, Vice Presidency for Finance and Private Sector Development, April 1995), online: The World Bank <http://www.worldbank.org/html/ fpd/notes/43/43Fleisig.html> (date accessed: 5. 9. 1998); The World Bank, Office of the Chief Economist, Latin America and Caribbean Region, *Peru - How Problems in the Framework for Secured Transactions Limit Access to Credit*, Sector Rep. No. 15696 (Washington: The World Bank, 6 June 1997), online : The World Bank <http://www.worldbank.org/cgi-bin/waisgate?waisaction=retrieve&waisdocid=2480328057+2+0 +0> (date accessed : 5. 9. 1998).

regarded it as a companion and resource to be called upon in need, not as a stranger."[159] On the other hand it has been noted that the Common law is taking more civilised forms in the sense that approximation towards Civilian traditions takes place, notably by moving away from the procedural character toward a dominance of substantive law over legal institutions.[160] American law is even more Civilian in its systematisation and outright codification efforts of the Restatements and the U.C.C.[161] Yet the substantive Anglo-American law of personal property remains distinct and marked by its feudal origins. Moreover, the Civil law tradition currently encounters problems in its administration of justice.[162] It appears, hence, not probable that Common law will be civilised in the way taken on the European Continent, bearing in mind the clash of legal traditions, which is currently taking place in the discussion on a European Civil Code, and which would also impact on the law of secured transactions.[163] As will be further explained, the systematisation of substantive law by Unidroit cannot be regarded as such a civilisation of an entire legal system, although formal Civil law concepts appear as a matter of compromise. Rather, it crystallises and creates pragmatically those legal rules that are, as an absolute minimum, indispensable for trade in aircraft, and the protocol system avoids a blockage of amendments when there is an urgent desire for change. It is, yet, possible that even the apparent dominance of Common law may lead to international rules that can be traced back to common ideas among all European and Civil law systems and would therefore not amount to a conquest of Civil law jurisdiction by Common law concepts.

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[159] R.H. Helmholz "Continental Law and Common Law - Historical Strangers or Companions?" [1990] Duke L. J. 1207 at 1228.
[160] See H.P. Glenn, "La Civilisation de la Common Law" (1993) 45 Rev. Int. Dr. Comp. 559 at 565 *et seq.*
[161] See S. Riesenfeld, "The Influence of German Legal Theory on American Law - The Heritage of Savigny and His Disciples" (1989) 37 Am. J. Comp. L. 1; E. Wise, "The Transplant of Legal Patterns" (1990) 38 Am. J. Comp. L. Supp. 1.
[162] *Pro ratione exemplum*, see Glenn, *supra* note 160 at 575.
[163] See B. de Witte & C. Forder, eds., *The Common Law of Europe and the Future of Legal Education* (Deventer & Cambridge, MA: Kluwer, 1992); O. Lando, "Is Codification Needed in Europe? - Principles of European Contract Law and the Relationship to Dutch Law" (1993) 1 Eur. Rev. P. L. 157; A.S. Hartkamp *et al.*, eds., *Towards a European Civil Code* (Dordrecht & Boston: M. Nijhoff, 1994); M. Cappelletti, *New Perspectives for a Common Law of Europe* (Leyden & Boston: Sijthoff, 1978); Legrand, *supra* note; generally, see K. Zweigert &

VI. Account of Conflicts in the Law of Secured Credit on Movables

A. Conflicts Related to the System of Personal Property Rights

1. The Character of Secured Transactions in Common and Civil Law

Security arrangements are only reliable if an encumbrance taken under the law of a first State can be effectively enforced against movable goods that are situated in another State. When a creditor avails himself of a security against a defaulting debtor, *e.g.*, the conditional owner of the asset, and tries to recover possession according to general practice at the debtor' s *forum*, then a conflict of laws situation breaks cover.[164] The judge has to determine whether that security interest has been validly constituted and the creditor, therefore, can take that security in satisfaction under the *lex fori* of the court seized under the same conditions as in the place of creation. Prior to this process, however, problems may arise in the context of default by the lessor or debtor due to the fact that most Common and Civil law jurisdictions outside North-America differentiate strictly between the retention of title under sale and lease contracts on the one hand and security *stricto sensu* on the other. The reason for this formalism is rooted in the fundamental notion that the debtor is not considered to have rights in the collateral beyond mere possession and a difference in treatment between conditional sale and leasing and security interests for tax purposes. Therefore, conditional sale and lease are not regarded as security agreements, in contrast to U.C.C. Art. 9 and the Anglo-Canadian Personal Property Securities legislation, which look to the economic substance of the transaction rather than the legal form.[165] Due to this conceptual difference the characterisation or qualification as a security transaction and, as a consequence, the default rights of the creditor may depend on the *lex fori* of the North-American Common law or European court, provided that this

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H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed. (Tübingen : J.C.B. Mohr [Paul Siebeck], 1996) at 28 *et seq.*

[164] See *Chapter Two* I., above. For the history of conflicts of laws relating to mobile equipment see the excellent comparative analysis of Th.J.R. Schilling, *Besitzlose Mobiliarsicherheiten im nationalen und internationalen Privatrecht* (München : Florentz, 1985) at 1 *et seq.*

[165] Hence, the broad term "purchase money security interest". For the preceding aspects generally, see R.M. Goode, "Security in Cross-Border Transactions" (1998) 33 Tex. Int'l L. J. 47 at 48; Goode, *supra* note 41 at 6; Cuming, *supra* note 41 at 367 *et seq.*

court does not unexpectedly qualify according to the law of the contract or of the location of the collateral to determine the substantially applicable remedies of domestic law.[166]

2. THE *LEX REI SITÆ* RULE AND THE *CONFLIT MOBILE*

Justice to litigating creditors and purchasers is an important criterion of consideration in Conflicts of Laws cases concerning secured transactions. Their interests and expectations require that security devices are enforceable in the legal system and market where the collateral is located (which frequently coincides with the *lex fori*) and thereby become "marketworthy". To accommodate these interests, alongside with economic policy considerations of the involved State, real interests created under domestic security transactions legislation in mobile equipment, as in any other movable, traditionally underlie the applicable law of the location of the collateral, the *lex rei sitæ*.[167] When the chose in possession,[168] moves to another State the *lex rei sitæ* changes, so that from this moment only the new *lex rei sitæ* is decisive on the movable and those rights whose creation had not been completed at the time of the change. Earlier created rights continue to exist under the rule of the old *lex rei sitæ*. Only as a consequence of this change of location and of the applicable law (*Statutenwechsel, conflit mobile*[169]) the question of recognition of the conveyance or encumbrance arises.

The term "recognition" is not legally defined in this context. In traditional Private International Law, it can be characterised as the process according to which the application of foreign real rights in movable property at the forum is reconstructed in a way to

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[166] See P. Mayer, *Droit International Privé*, 5th ed. (Paris: Montchrestien, 1994) at 122, para. 167, and 116, para. 157.

[167] For general conflicts theory with regard to the *lex rei sitæ*, see H. Stoll, "Internationales Sachenrecht" in H. Amann & G. Beitzke, eds., *Einführungsgesetz zum Bürgerlichen Gesetzbuch, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, 12th ed. (Berlin: Sellier - de Gruyter, 1992) at para. 60 *et seq.* and F.K. Juenger, "Nonpossessory Security Interests in American Conflicts Law", in J.N. Hazard & W. J. Wagner, eds., *Law in the USA in the Bicentennial Era*, (1978) 26 Am. J. Comp. L. Supp. 145 at 146 *et seq.*; G. Khairallah, *Les Sûretés Mobilières en Droit International Privé* (Paris : Economica, 1984) at 146 *et seq.*, paras. 176*bis et seq.*; Mayer, *ibid.* at 418 *et seq.*, para. 644; Kegel, *supra* note 64 at 111 and 115. The fact that innocent purchasers and creditors may be mislead by the apparent ownership of the buyer has been adduced as important reason for a system geared to the *situs*. For the different solutions under conditional sales and chattel mortgages acts prior to the U.C.C., see Juenger, *ibid.* at 154.

[168] "Choses or things in possession include all things which are at once tangible, movable and visible and of which possession can be take[n]", *Halsbury's Laws of England*, vol. 29, 3rd ed. (London: Butterworths, 1962) *s.v.* "chose in possession", as distingushed from a chose in action, which refers to "[r]ights of property which, although they may be represented by a pice of paper, like a promissory note, are essentially intangible in that they can ultimately only be claimed or enforced by action, not by taking physical possession". R.A. Brown, *The Law of Personal Property*, 3rd ed. by W.B. Raushenbush (Chicago: Callaghan, 1975) at 11.

give it functionally equivalent effects within that legal order of the actual situation of the movable where jurisdiction is exercised. This has nothing to do with "recognising" the mere existence of a definite right but simply determines the applicability of foreign law. The extent to which this "transposition" (or "transplantation")[170] is granted depends on the structure of the particular right or interest that is called into question. The requirements of the distinctive idiosyncratic system of personal property and security rights in each State are so manifold that it is often difficult to award full recognition. The problems in this area appear to be due to the wide differences in legal culture as to creation of securities in mobile equipment and its consequences, between Common law and Civil law on the one hand and among Civil law jurisdictions themselves on the other. While under present law the problems rooted in the *lex rei sitæ* rule are, as will be explained in the following paragraphs, solved by the *Geneva Convention* and specific aviation legislation introduced in Civil law jurisdictions as a consequence of that treaty and, hence, only of marginal significance for the facilitation of asset-based financing and leasing of aircraft equipment from the point of view of the AWG, an overview of these problems will help clarify the role of the Aircraft Equipment Protocol within the Convention framework as the second stage of an elaborate legal mechanism.

3. The Disunity of Formal Requirements

The classical paradigm for such opposing concepts bears the fundamental idea that the transfer of title to personal property in many Civil law jurisdictions is effectuated *solo consensu*[171] and therefore has effect only *inter partes*. Similarly, although the creation of proprietary rights in Common law (absolute or by way of security) originally demanded a security transfer, delivery of possession and/or registration, an agreement *inter partes* is – subject to strict requirements - sufficient in Equity or specific legislation to create a security.[172] This maturation has undoubtedly been caused by the same increasing demand for

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[169] See generally Schilling, *supra* note 164 at 27 *et seq.* and 44 *et seq.*

[170] For the doctrine of transposition generally, see Stoll, *supra* note 167 at paras. 296 *et seq.*

[171] See art. 1453 C.C.Q., arts. 1107, 1138, 1583 C. civ. or art. 1376 Codice civ.; J. Ghestin, *Traité de Droit Civil – La Formation du Contrat*, 3rd ed. (Paris : L.G.D.J., 1993) at 330 *et seq.*, paras. 364 *et seq.*; Ch. Larroumet, *Droit Civil*, vol. 2 - *Les Biens, Droits réels principaux*, 3rd ed. (Paris: Economica, 1997) at 211 *et seq.*, paras. 373 *et seq.*; R. Sacco, "La consegna e gli altri atti di esecuzione"in R. Sacco, ed., *Trattato di Diritto Civile – Il Contratto*, vol. 1 (Torino : Utet, 1993) at 718 *et seq.*

[172] See R.M. Goode, *Legal Problems of Credit and Security*, 2nd ed. (London : Sweet & Maxwell, 1988) at 31 *et seq.* and 36; see the attachment requirements in *O.P.P.S.A.*, *supra* note 99 s. 11 (2) : identification, value, right;

credit created by industrial development which later has, in Civil law jurisdictions, led to security mechanisms without any public act of delivery or transfer.[173] As a consequence of the relativity of ownership in Common law jurisdictions[174] and the at most relative effects of the proprietary interest under Civil law transactions[175] the form of public notice ("perfection") merely serves to give *erga omnes* efficacy to those real interests that are not perfected by mere attachment, such as aircraft ("externalisation", *negative Publizität*, *publicité confortative*).[176] The first party to take the required action prevails. An unattached security is

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Bunker, *supra* note 87 at 135; U.C.C. § 9-201 (1994); *Draft* U.C.C. (July 1998), online: University of Pennsylvania <http://www.law.upenn.edu/library/ulc/ucc9/ucc9txt1. htm > (date accessed: 15 July 1998)

> "§ 9-201 **General Effectiveness of Security Agreement.** (a) Except as otherwise provided in [the Uniform Commercial Code], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditor[s]."

and *Draft* U.C.C., *ibid.*

> § 9-203 - **Attachment and Enforceability of Security Interest; Proceeds; Supporting Obligations; Formal Requisites.** (a) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. (b) Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and [(3)].

[173] See *infra* note 184 and accompanying text. See Bunker, *ibid.* at 136 note 7.

[174] M. Bridge, *Personal Property Law*, (London: Blackstone Press, 1993) at 21 *et seq.* An explanation of this "odd" notion which barely distinguishes real and personal rights is given by Goode, *supra* 172 note at 28: "The purpose of the concept is to demonstrate that the debtor cannot dispute the conferment of the real right on the creditor, and the consequent restriction on the debtor' s own dominion over the asset, but that the same is not necessarily true for third parties, some of whom may, in the absence of perfection, be able to contend that the grant of the security has no impact on them." The unenforceability of an unattached interest under Common law presupposes a valid security between the parties. See Ziegel, *supra* note 100 at 111, § 11.2.

[175] This formulation intends to describe the earlier mentioned notion of *inter partes* validity and enforceability without discrediting the absoluteness of property in the sense of plenitude of powers (*plena potestas*) which, in classic Civil law, also exists *inter partes*. See P. Crocq, *Propriété et Garantie* (Paris : L.G.D.J, 1995); *Propriété et Garantie* (Paris : L.G.D.J, 1995) at 64, para. 77 and at 68 *et seq.*, paras. 82 *et seq.* The third party opposability describes an absoluteness rooted in the notion of property as a social right, see the excellent discussion of Planiol and Ginossar in Larroumet, *supra* note 171 at 12 *et seq.*, paras. 12 *et seq.* The difficulty of the concept "relativity of ownership" or "absoluteness of property" lies in the contradiction between the Common law notion of relativity (based on feudal relations) on the one hand and the notion of absoluteness of property as being (necessarily) identical to *erga omnes* validity, which exists *e.g.* in the formalistic Germanic Law, on the other. See J. Ghestin, *supra* note 5 at 331, para. 367 note 5 and accompanying text. R. Sacco, *supra* note 5 at 740; Larroumet, *ibid.* at 208 *et seq.*, paras. 363 *et seq.* (Roman Law) and at 210 *et seq.*, paras. 369 *et seq.*

[176] See art. 2941 C.C.Q.; *Approvazione del Testo Definitivo del Codice della Navigazione, Regio Decreto n° 327 di 30 marzo 1942*, Gazz. Uff. n. 93 ed. straord., 19 April 1942, *Codice della Navigazione* (Milano: Giuffrè, 1986), as amended [hereinafter *Codice Nav.*], arts. 865 *et seq.* in conjunction with art. 2643 *et seq.* Codice civ. G. Meoli, Legislative comment on art. 2643 Codice civ. in P. Perlingieri, ed., *Codice civile annotato con la dottrina e la giurisprudenza – Libro sesto* (Torino: Utet, 1984) at 4 *et seq.* See. arts. 1141, 2279 C. civ. See *Draft* U.C.C., *supra* note 172 § 9-309 and U.C.C. §§ 9-203 and 9-303 (1) (1994) and Comment 1 for the attachment and perfection of a security interest. §§ 9-302 (1), 9-402 (1) (1994) and the *O.P.P.S.A.*, *supra* note 99 merely require perfection by filing of a financing statement, not of the secutity agreement itself : "Notice filing is simply designed to place the searcher on notice that the named, secured party *might* have a security interest in the described collateral", W. H. Lawrence, W. H. Henning & R. W. Freyermuth, *Understanding Secured Transactions* (New York & San Francisco : Matthew Bender, 1997) at 92, § 5.02 [B] referring to *Chase Bank of Florida, N.*

unenforceable against *all* third parties whereas an unperfected security is merely subordinated or not effective against third parties.[177] Applied to international aviation finance operations, this form of notification was early criticised as time consuming, unreliable as to the legal value of the title and, therefore, as provoking an immobilisation of aircraft.[178]

It is diametrically opposed to legislation which makes this act – in sequel of the absolute and very formal character of proprietary interests under Roman law - an inalienable and substantive prerequisite of the absolute validity of the real transaction, against the secured party *and* against a third party (*publicité constitutive*). Such statutes, much more preoccupied with the false wealth principle (*théorie de la solvabilité apparente*) than the aforesaid

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A. v. *Muscarella*, 582 So. 2d 1190, 14 U.C.C. Rep. Serv. 1274 (Fla. Ct. App. 1991); see also Ziegel, *supra* note 100 at 15, § 1.11. As in the case of chattel mortgages or conditional sales acts, the agreement itself must be filed where filing under federal statute is equivalent after §§ 9-104 and 9-302 (3) (a) and (4) (1994), *Draft* U.C.C., *ibid.* §§ 9-109 (c), 9-311 (a) (1). Such statute is the *Federal Aviation Act*, 49 U.S.C. § 44107 (1958), online: Cornell University <http://www.law.cornell.edu/uscode/49/44108.shtml> (date accessed: 15 July 1998), which provides for federal recordation of conveyances, leases and security instruments at the FAA central office in Oklahoma City. The relevant provision here is

> § 44108 **Validity of conveyances, leases, and security instruments.** (a) *Validity Before Filing.* - Until a conveyance, lease, or instrument executed for security purposes that may be recorded under section 44107(a)(1) or (2) of this title is filed for recording, the conveyance, lease, or instrument is *valid only against - (1) the person making the conveyance, lease, or instrument; (2) that person's heirs and devisees; and (3) a person having actual notice of the conveyance, lease, or instrument.* (b) Period of Validity. - When a conveyance, lease, or instrument is recorded under section 44107 of this title, the conveyance, lease, or instrument is *valid from the date of filing against all persons*, without other recordation, except that - (1) a lease or instrument recorded under section 44107(a)(2)(A) or (B) of this title is valid for a specifically identified engine or propeller without regard to a lease or instrument previously or subsequently recorded under section 44107(a)(2)(C) or (D); and (2) a lease or instrument recorded under section 44107(a)(2)(C) or (D) of this title is valid only for items at the location designated in the lease or instrument. (c) Applicable Laws. - (1) The validity of a conveyance, lease, or instrument that may be recorded under section 44107 of this title is subject to the laws of the State, the District of Columbia, or the territory or possession of the United States at which the conveyance, lease, or instrument is delivered, regardless of the place at which the subject of the conveyance, lease, or instrument is located or delivered. If the conveyance, lease, or instrument specifies the place at which delivery is intended, it is presumed that the conveyance, lease, or instrument was delivered at the specified place. (2) This subsection does not take precedence over the Convention on the International Recognition of Rights in Aircraft (4 U.S.T. 1830). (d) Nonapplication. - This section does not apply to - (1) a conveyance described in section 44107(a)(1) of this title that was made before August 22, 1938; or (2) a lease or instrument described in section 44107(a)(2) of this title that was made before June 20, 1948. [emphasis added]

For Canadian draft bills regarding nation-wide Civil Aircraft Register as reprinted in Bunker, *supra* note 87 at 185 *et seq.*, see *ibid.* at 183 *et seq.* note 210 and accompanying text. For the discussion of case law on the problematic question of exclusivity of the federal filing system as to default or priority of aircraft liens under U.C.C. § 9-104 (a) (1994) and *Draft* U.C.C., *ibid.* § 9-109 (c), see B. Clark, *The Law of Secured Transactions under the Uniform Commercial Code*, 3rd ed. (Boston: Warren, Gorham & Lamont, 1993) c. 1. 08 [1][b] at 1-76 *et seq.* In the UK, aircraft is a registrable charge by s. 396 *Companies Act 1985* (U.K.), 1985 [hereinafter *Companies Act*]. See Goode, *supra* note 172 at 37.

[177] For the regime in the *O.P.P.S.A.*, *supra* note 99, see Ziegel, *supra* note 100 at 111, § 11.2.

[178] See F. de Visscher, "Les Conflits de Lois en Matiere de Droit Aérien", (1934) 48:2 Rec. des Cours 285 at 311 *et seq.*

simple publication, exist foremost in Civil law jurisdictions, but can be found under Common law authority, too.[179] More iconic for Common law registration, however, is the English system of company charges under the *Companies Act 1985*, ss. 395 and 396,[180] which has no effect on validity as such.

The notification requirements have repercussions notably for the reservation of title (*i.e.* conditional sale) whose validity *in rem* in those States where it has practical importance may depend on varying degrees of formalities, such as stipulation (possibly under seal), public notification or registration.[181] In many jurisdictions concerned with the formal requirements of specificity or individualisation of the charged asset, it is also relevant for the validation of so called "after-acquired property" securities (or *sûretés sur biens à venir*) by a post-acquisition act of transfer to give *in rem* effects to the security.[182] Moreover,

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[179] This, for example, is the case for chattel mortgages to be registered in accordance with the *Bill of Sale Act (1878) Amendment Act, 1882* (U.K.), 45 & 46 Vict. c. 43, s. 8 [hereinafter *Bill of Sale Act, 1882*]. See *Halsbury's Laws of England*, vol. 4:1, 4th ed. (London: Butterworths, 1992) at 340 *et seq.*, paras. 735 *et seq.* According to the explanation of P.S. James

> [t]he particulars [*i.e.* consideration] and the [written] form are required in order to protect the creditor against usury, while registration is required in order to give the public notice of the transaction. If the document were not registered the debtor would be in a position to hold himself out to the world as more affluent man than he really is, and thus he might obtain credit on the strength of property apparently, but not really, his own.

P.S. James, *Introduction to English Law*, 12th ed. (London: Butterworths, 1989) at 493; see Ph.R. Wood, *supra* note 51 at 181 *et seq.*, paras. 13-5 *et seq.*; Goode, *supra* note 165 at 48. Latin-American States, as well, follow this practice. See Bayitch, *supra* note 9 at 169 *et seq.* Another example is Dutch law. See arts. 7:9 and 3:84 *Nieuw Burgerlijk Wetboek* (Dutch Civil Code, 1992) [hereinafter N.B.W.]; A.S. Hartkamp & M.M.M. Tillema, *Contract Law in the Netherlands* (The Hague: Kluwer, 1995) at 171 *et seq.*, paras. 248 *et seq.*; I.H.Ph. Diedericks-Verschoor, *An Introduction to Air Law*, 6th ed. (The Hague, London & Boston: Kluwer, 1997) at 178 and Mayer, *supra* note 166 at 423, para. 651, and at 427, para. 658. Although the opposing concept produces complications for the application of the *Geneva Convention*, see *Chapter Four* I. E. 3., it is conceded that "ostensible ownership" appears to be an antiquated doctrine. See Bunker, *supra* note 87 at 136. But then, there is even less justification for the *lex rei sitae* as connecting factor in aviation finance. See also Juenger, *supra* note 167.

[180] See *Companies Act*, *supra* note 176; Ph.R. Wood, *supra* note 51 at 131 *et seq.*, para. 9-34 *et seq.*; Goode, *supra* note 172 at 39 *et seq.*

[181] See Kegel, *supra* note 64 at 575; Castel, *supra* note 61 at 473, para. 327. A.V. Dicey & J.H.C. Morris, *The Conflict of Laws*, vol. 2, 12th ed. by L. Collins et al. (London: Sweet & Maxwell, 1993) at 1334, r. 185 (registration under *Companies Act*, *supra* note 176). The different rules in the countries cannot be elaborated here. For a well developed overview, see Stoll, *supra* note 167 at paras. 259 *et seq.* and, for France, at para. 266; A. Bénabent, *Droit Civil – Les Contrats Spéciaux, Civils et Commerciaux*, 3rd ed. (Paris : Montchrestien, 1997) at 89 para. 140 and at 95, para. 153; *Codice Nav.*, *supra* note 176 art. 864. It should be noted that the recordation of a leasing or conditional sales agreement in those countries where it is required is often times not possible due to severe ownership requirements imposed by national policies. See Matte, *supra* note 113 at 547, para. 197.

[182] See Goode, *supra* note 165 at 48; for the Common law rule of immediate transfer and its amendment in equity, see Goode, *supra* note 172 at 32 *et seq.*; Ph.R. Wood, *supra* note 51 at 40 *et seq.*, paras. 4-13 *et seq.*; see Bunker, *supra* note 87 at 146 *et seq.*; M. Cabrillac & C. Mouly, *Droit des Sûretés*, 3e éd. (Paris : Litec, 1995) at

closely related to the preceding aspect, many Civil law jurisdictions whose *numerus clausus* of real rights does not know non-possessory securities categorically and as a matter of principle veto the transposition of such legal figure or in case they do not comply with the severe registration requirements of the importing State in order to avoid unjustified privileges of foreign grantors of credit in its system of real rights (preservation of equal treatment of all creditors). From a North-American utilitarian perspective this reaction of Civil law can be generalised: "Codes have a Spartan quality that is unforgiving of spontaneity and insensitive to the foggy or the strange."[183] A modernisation of Civil law will certainly have to show more flexibility, although the advantages of a codification, notably reliability and foreseeability of the application of law are incontrovertible.

Examples for problematic securities, which do not fit in long-established schemes are not only the above-mentioned conditional sale, the hire-purchase and the *location-vente* but also the fiduciary transfer of title to a movable by the debtor of the main obligation as a means of security notably in Germany and the Netherlands (*Sicherungsübereignung, bezitloos pandrecht*),[184] the *hypothèque mobilière sans dépossession* in Quebec[185] and leasing because they all side-step the pledge with delivery (dispossession) of personal property (*gage avec dépossession, Faustpfandprinzip*). The reluctance of recognition in these cases can also be explained by the fact that those States often have functional equivalents in aviation law that are perfected by filing, such as the *hypothèque aérienne* in France,[186] which supersedes the common

549 *et seq.*, para. 672 and at 608 *et seq.*, para. 746 *et seq.* (art. 2130 C. civ.). See U.C.C. § 9-204 and *O.P.P.S.A.*, *supra* note 99 § 12; Ziegel, *supra* note 100 at 122 *et seq.*, § 12.

[183] M.A. Schneider, *Culture and Enchantment* (Chicago : University of Chicago Press, 1993) at 40 cited by Legrand, *supra* note at 45; see also G.H. Hoftstede, *Cultures and Organizations – Software of the Mind* (London & New York: McGraw-Hill, 1991) at 121, 116 and 121, respectively :

> And, whether as cause or effect, the presence of a civil code in Germany is not foreign to sociological findings that Germans 'have been programmed since their early childhood to feel comfortable in structured environments' and that they 'look for a structure in their organizations, institutions, and relationships which makes events clearly interpretable and predictable' to the point where 'even ineffective rules satisfy [the] people's emotional need for formal structure.',

cited by Legrand, *supra* note at 47 note 23. Legrand criticises idea of civil code in present times on grounds of arrogance, fallaciousness, backwardness and impracticality.

[184] See Ph.R. Wood, *supra* note 51 at 16 *et seq.*, para. 2-11; Schilling, *supra* note 164 at 114 *et seq.*.

[185] See arts. 2696 *et seq.* C.C.Q.

[186] See *Loi du 31 mai 1924, relative à la navigation aérienne*, J.O., 3 June 1921, Gaz. Pal. 1924:1, 949 at 950. art. 12 validity against third parties only after filing: art. 14, which refers to the law on ship mortgages (hypothèque fluviale of 5.7.1917). For the same regime for the *hypothèque maritime* under *Loi du 10 décembre 1874*, see Khairallah, *supra* note 167 at 226 *et seq.*, para. 252. For the effect of registration against third parties, see art. L. 122-7 *Code de l'aviation civile et commerciale, Décret n° 67-333 du 30 mars 1967, portant révision du code de l' aviation civile et commerciale*, J.O., 9 April 1967, 3569, implementing the *Geneva Convention*. See Cabrillac & Mouly, *supra* note 182 at 574, para. 702 governed generally same rules as hypotheque immobiliere; Khairal-

gage avec dépossession,[187] or the corresponding *ipotheca* on movables in Italian law.[188] They provide a solution to the problem of non-possessory security, but - with the exception of Quebec - typically conceptualise aircraft as immobile assets.[189] In importing Common law jurisdictions the (fleet-) mortgage on each of the aircraft in the same fleet or the English floating charge on the assets of the borrower generally[190] fulfil similar tasks.[191]

In the absence of the *Geneva Convention* the most common securities in aircraft trade, especially mortgages under the Common law of a United States jurisdiction, could not be exported and perfected in countries that do not know a comparable type of security and therefore have not created a corresponding registry. The secured investor confronts a problem of substitution and adaptation (*Angleichung*), *i.e.* the formulation of particular substantive rules for international cases.[192] The recognition and execution of the security would therefore, for instance, be possible after registration in countries based on the Anglo-American securities law, as well as Italy and France, but also in Germany whose system of real securities today allows for a fairly liberal attitude of recognition, and Quebec.[193]

In international leasing law the same difficulty merely subsists for leases created under foreign law which do not fulfil the – in the European context isolated[194] - notifica-

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lah, *ibid.* para. 174 at 142 note 155, , para. 254*bis* at 229 note 55 and accompanying text. Khairallah stresses that the French legislation anticipates the regulation of the Geneva Convention by implying the recognition in France of aircraft mortgages created abroad.

[187] See Cabrillac & Mouly, *supra* note 182 at 550, para. 672.

[188] See *Codice Nav.*, *supra* note 176 arts. 1027 *et seq.*; Stoll, *supra* note 167 at para. 337 *in fine*; Schilling, *supra* note 164 at 239 and J. Wool, "Summary and status of Unidroit law reform project relating to aircraft equipment" Airfinance J. 198 (September 1997) 82, online: LEXIS (Canada, CANJNL) at 83.

[189] In Germany, the stance is slightly different: In principle, aircraft and transfer of property in it are regarded as being subject to the law of chattels, notably to the law of arrest. Once a real right applying to it is recorded, however the law of restraining orders and of forced execution in real property applies. See E.-L. Haupt, "Fragen zur Sicherung und Zwangsvollstreckung in Luftfahrzeuge" (1974) 27 NJW 1457.

[190] See Matte, *supra* note 113 at 565; Bunker, *supra* note 87 at 146 *et seq.*, para. 197 See arts. 2715 *et seq.* C.C.Q.

[191] See Ph.R. Wood, *supra* note 51 at 16 *et seq.*, paras. 2-11 *et seq.*; Schilling, *supra* note 164 at 294 *et seq.* For other countries where floating charges are possible, see Ph.R. Wood , *ibid.* at 210, para. 15-13.

[192] For a general explanation of this solution for the culmination and gap of laws see Kegel, *supra* note 64 c.18 at 260 *et seq.* and Mayer, *supra* note 166 at 170 *et seq.*, paras. 258 *et seq.*; Kadletz, *supra* note 114 at 136 and at 138 *et seq.*

[193] Art. 2696 C.C.Q. merely stipulates a writing requirement for movable hypothecs. It should be mentioned that property in aircraft as such has always been recognised, without any registration requirements, see O. Riese, *Luftrecht – Das Internationale Recht der zivilen Luftfahrt unter besonderer Berücksichtigung des Schweizer Rechts* (Stuttgart : K.F. Koehler, 1949) at 283. For Canadian Common law jurisprudence relating to cases where registration is not required by statute, see Castel, *supra* note 61 at 473, para. 327 note 17.

[194] See Crocq, *supra* note 175 at 294 note 6, para. 338 who refers to M. Giovanoli, *Le Crédit-Bail (leasing) en Europe – Developpement et Nature Juridique* (Paris: Litec, 1980) at 413 *et seq.*, para. 516 *et seq.* Art. 1847 C.C.Q.,

tion requirements of Art. 1 (3) of the French Statute concerning the *crédit-bail*.[195] Yet, it has been held that a simple change of applicable law does not impose the same obligation upon foreign parties to a leasing contract.[196] This situation remains unchanged under the *Leasing Convention*[197] for parties to a leasing agreement that are situated in different States because the requirements of public notice imposed by the law of registration or the principal place of business of the lessee (in the case of engines) remain untouched.[198] Therefore, when an aircraft is registered in France the lessor has the obligation to seek publication of the covenant, Art. 2 of *Décret 4 juillet 1972*.[199] Although this Convention excludes from its scope the operating lease[200] and so the American leveraged lease[201], which is extremely significant for airlines, it should not be underestimated, for just the financial lease of an aircraft represents a real security for a creditor (lessor).[202] In other countries, creditors under a foreign interest - may they come from the same State as the aircraft or a third State - would in a court of that jurisdiction jeopardise the totality of their rights, whereas

however, follows in the footsteps: "The rights of ownership of the lessor may be set up against third persons only if they have been published [in the asset-register]."

[195] See *Loi n° 66-455 du 2 juillet 1966, relative aux entreprises pratiquant le crédit-bail*, J.O., 3 July 1966, 5652, as amended by *Ordonnance n° 67-837 du 28 septembre 1967 relative aux opérations de crédit-bail et aux sociétés immobilières pour le commerce et l'industrie*, J.O. 29 September 1967, 9595 and completed by *Décret n° 72-665 du 4 juillet 1972, relatif à la publicité des opérations de crédit-bail en matière mobilière et immobilière*, J.O., 14 July 1972, 7456 [hereinafter *Décret 4 juillet 1972*] and *Arrêté du 4 juillet 1972, relatif a la publicité des opérations de crédit-bail en matière mobilière*, J.O., 14 July 1972, 7457 : publication in the register of the Tribunal de commerce of the lessee' s domicile. See generally Cabrillac & Mouly, *supra* note 182 at 450 *et seq.*, para. 534; A. Bénabent, *supra* note at 513 *et seq*, paras. 881 *et seq.*, at 520, 896. See, however, Matte, *supra* note 113 at 547, para. 197.

[196] See Cass. com., 11 June 1982, [1983] Rev. crit. 450; G. Khairallah, Annotation of Cass. com., 11 June 1982, [1983] Rev. crit. 451. The arguments expounded by this jurisprudence could be extended to the *reserve de propriété*. See Stoll, *supra* note 167 at paras. 268 and 288. Traditionally, however, the absence of a public act constitutes an infringement upon art. 2078 C. civ., which prohibits the *pacte commissoire* (*constitutum possessorium*, *Besitzkonstitut*). The same principle applies strictly in Austria and Switzerland. See Stoll, *ibid.* at para. 287.

[197] See *Leasing Convention*, *supra* note 26; R.M. Goode, "Conclusion of the Leasing and Factoring Conventions-1", [1988] J. B. L. 347; J. Poczobut, "Internationales Finanzierungsleasing, Das UNIDROIT-Projekt - vom Entwurf (Rom 1987) zum Übereinkommen (Ottawa 1988)" (1987) 51 RabelsZ 681 at 710 *et seq.* Financial leasing basically describes a transaction by which a lessor selects a supplier and a collateral, leaving the main attribute of property to the lessee. The length of the period of redemption makes it specifically a financing transaction.

[198] See *Leasing Convention*, *ibid.* art. 7 (2) and (3) (b.); Poczobut, *ibid.* at 709 *et seq.*; compare art. 3105 (2) C.C.Q. : "Publication and its effects are governed by the law of the country in which the grantor is currently domiciled."

[199] See *Décret 4 juillet* 1972, *supra* note 195.

[200] The drafters considered this equipment lease as being not as problematic as a tripartite capital lease with a lessor limited to pure financing and as properly treated among such contracts as conditional sale, rental or bailment (*i.e.* the temporary transfer of possession). See Bunker, *supra* note 87 at 62; Poczobut, *supra* note 197 at 690 *et seq.*

[201] This form of leasing avoids ownership and technology risks for the airline and respects its need for operational flexibility in fleet and balance sheet structure. See Bunker, *ibid.* at 30.

[202] See Crocq, *supra* note 175 at 21, para 27.

creditors from the State of the court would see their rights protected according to the law of the court.

4. The Law Applicable to the Security Agreement

Hitherto the formal requirements of a security transfer have been elucidated mainly with respect to the real effects of that conveyance, in most legal systems intimately connected or coinciding with the security agreement. They do, yet, not concern the law applicable to the security agreement itself as far as it does not effectuate the conferment of a real right or the underlying sales or construction contract.[203] These covenants may form one single document not only in the exceptional case that the aircraft seller or manufacturer himself acts as grantor of a security[204] but often converge in tripartite aircraft purchase contracts between manufacturer, financier and purchaser. This section shall briefly delineate the omnipresent conflict guidelines developed for international aircraft sales contracts.

a. A Medley of Contractual Relationships

Aircraft financing contracts, it has been said, form typically part of a tripartite purchase contract between the aircraft manufacturer, the financing institution and the purchasing airline, corporate entity or individual or represent another multiparty agreement. Compared to simple chattel purchases the situation for aircraft sales is complicated on the manufacturer side by the fact that often times aircraft are not purchased as one whole, fully-equipped piece of technology from one manufacturer. Instead, the purchaser himself or the manufacturer who then assembles the entity acquires airframe, engines or other equipment and supplies from different speciality manufacturers either. Hence, not only would there be several bilateral contracts and choice-of-law clauses, likely to lead to a difference in the law applicable to the sale and to the security agreements between the purchaser, the respective manufacturer and the financier/lessor: The problem of severability

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[203] See Castel, *supra* note 61 at 476 *et seq.*, para. 329; Kegel, *supra* note 64 at 572 who, as far as the qualification of the abstract nature of the real transfer is concerned, declares the *lex rei sitae* applicable ("internationalprivatrechtliche Qualifikation"). This view differs from the practice of the courts in most States, which apply the *lex fori*.

[204] Only fierce competition may force manufacturers to take the financial risks associated with a security, provided that comercial benefits outweigh them. See Bunker, *supra* note 87 at 128 *et seq.*; see P. Deighton, "Sources of Finance" in *Aircraft Financing*, *supra* note 9, 15 at 27; L. Barron, "Manufacturer's Support – Current Trends", *ibid.*, 259 at 261.

(*dépeçage*) of a "*unity* of rights and obligations"[205] which ideally should form a single coherent contractual framework may require a co-ordination through the instruments of adaptation or substitution.[206] Also, legal disputes may kindle doubts as to whether the manufacturer has the quality of an agent assuming obligations for or on behalf of the purchaser or acts for itself as an acquirer.[207]

b. The Consensual Choice of Law

Although it is desirable to have a uniform contracts law applicable to the international sale of aircraft[208], a "*lex mercatoria aeronautica*"[209] that relieves international commerce "from a Babel of diverse domestic legal systems",[210] no such law exists or is needed for mere security agreements, which link the sales contract and the securitisation of the asset. Therefore, these agreements, as any contract, are in principle governed by the law selected in accordance with the proper law of contract intended by the parties (*lex voluntatis, Parteiautonomie, loi d'autonomie*)[211] and contracts of purchase of commercial and business air-

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[205] Kadletz, *supra* note 114 at 138.

[206] See *supra* note 192 and accompanying text.

[207] See Kadletz, *supra* note 114 at 135 *et seq.* reporting on information provided by Bombardier, Inc. For the extremely difficult and contrasting approaches of Civil law and Common law, especially the anomalistic doctrine of the undisclosed principal see Zweigert & Kötz, *supra* note 163 at 427 *et seq.*, notably at 433 *et seq.*; W. Müller-Freienfels, "The Undisclosed Principal" (1953) 16 Mod. L. Rev. 299; id. "Comparative Aspects of Undisclosed Agency" (1955) 18 Mod. L. Rev. 33; J. Basedow, "Das Vertretungsrecht im Spiegel konkurrierender Harmonisierungsentwürfe" (1981) 45 RabelsZ 196 and the further references, notably to Müller-Freienfels, cited by Zweigert & Kötz, *ibid.* at 427. Uniform law is envisaged by the *Convention on Agency in the International Sale of Goods*, 17 February 1983, (1984) 22 I.L.M. 249, (1984) 32 Am. J. Comp. L. 752, completing the *CISG*, *supra* note 130. See M.J. Bonell, "The 1983 Convention on Agency in the International Sale of Goods" (1984) 32 Am. J. Comp. L. 717; C. Mouly, "La Convention de Genève sur la Représentation en Matière de Vente Internationale de Marchandises" (1983) 35 Rev. Int. Dr. Comp. 829; see also Zweigert & Kötz, *ibid.* at 430 *et seq.* Space and topical limits do not permit explaining the rules of Private international Law applicable to agency in the context of aircraft purchase. Generally, see Kegel, *supra* note 64 at 452 *et seq.*, Castel, *supra* note 61 at 624 *et seq.*, paras. 482 *et seq.* and Mayer, *supra* note 166 at 481, para. 737. The Hague *Convention on the Law Applicable to Agency*, 14 March 1978, The Hague Conference on Private International Law, *Collection of Conventions (1951-1996)* (The Hague: Permanent Bureau of the Conference, 1996) no. XXVII at 252 [hereinafter *Collection of Conventions*], purports to enact uniform conflicts rules. See Kegel, *ibid.* at 457 *et seq.* and the references cited by Castel, *ibid.* at 636 note 258, para. 483.

[208] See P. Winship, "Aircraft and International Sales Conventions", (1985) 50 J. Air L. & Com. 1053 at 1060.

[209] M. Polak, "Conflicts of Law in the Air" (1992) 17 Air Law 78 at 78; see Kadletz, *supra* note 114 at 137.

[210] J.O. Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer, Netherlands : Kluwer, 1989) c. I. (General Introduction) B. (Tools for Uniformity in Application) at 1

[211] This rule is of universal acceptance. See Castel, *supra* note 61 at 477, para. 329, at 589 *et seq.*, para. 446 and at 593 *et seq.*, para. 448 *et seq.*; *O.P.P.S.A.*, *supra* note 99 s. 8 (1) (c). For the law applicable to seizure, see *Ziegel*, *supra* note 100 at 97 *et seq.*, §§ 8.3 *et seq.* For the central case *Vita Food Products* v. *Unus Shipping Co.* [1939] AC 277 (PC) [hereinafter *Vita Food*], see J. Blom, "Contracts" in M. Baer, *et al.*, eds., *Private International Law in Common Law Canada* (Toronto: Edmond Montgomery, 1997) c. 13 at 543 *et seq.*; see *Rome Convention*, *supra* note 129 art. 3 (1); Mayer, *supra* note 166 at 454 *et seq.*, para. 692; Bunker, *supra* note 87 at 321. For English Common law, which has been superseded by the *Contracts (Applicable Law) Act 1990*, S.I. 1991

craft contain without exception, an express choice of the law governing the contractual relations between manufacturer (the sales relation) and purchaser and financier and purchaser (the security relation).[212]

An explicit selection of the proper law can designate any law reasonably[213] linked to the contract and will often be the law of the manufacturer or the financing institution. No law can be chosen to evade mandatory provisions of the system of law with which the transaction is most closely and really connected and will be invalidated.[214] In exception to this jurisprudence § 5-1401 of the New York *G.O.L.* allows such choice of law without reasonable relation to that State. Therefore, in the North American law of aviation finance, including the secured sales made by Airbus Industrie via its French subsidiary to U.S. customers, it has become common to include a New York choice-of-law-clause, given the prominence of this legal centre in international commercial and aviation finance transactions.[215] In a European context, English law-selecting clauses are of general im-

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No. 707, incorporating the *Rome Convention*, *id.* at 1191 *et seq.*, see Dicey & Morris, *supra* note 181, r. 185 at 1332, at 1187 *et seq.* and 1191 *et seq.*, r. 174; F.K. Juenger, "The European Convention on the Law Applicable to Contractual Obligations - Some Critical Observations" (1981) 22 Va. J. Int'l L. 123; Kadletz, *supra* note 114 at 58 *et seq.* The rule is also the basis of the *Restatement Conflict of Laws*, *supra* note 108 §§ 187 *et seq.* See further Milde, *supra* note 114 at 243.

[212] For sales contracts, see Kadletz, *supra* note 114 at 135; J.L. Magdalénat, "Negotiating an Aircraft Purchase Contract" (1980) 5 Ann. Air & Sp. L. 155 at 158.

[213] This ambiguous term is used by U.C.C. § 1-105 (1) (1994) and has given rise to extensive interpretation efforts in doctrine and jurisprudence. It is determined according to the conflict of laws principles of "interest analysis", "most significant relationship" and "centre of gravity" and corresponds more or less to the categories of the *Restatement Conflict of Laws*, *supra* note 108, § 188. See U. Stoll, *Die Rechtswahlvoraussetzungen und die Bestimmung des auf internationale Schuldverträge anwendbaren Rechts nach den allgemeinen Kollisionsregeln des US-amerikanischen UCC und des deutschen Rechts* (Frankfurt, Bern, New York: Peter Lang, 1986) at 112 *et seq.*

[214] See *Vita Food*, *supra* note 211; Cass. civ., 19 February 1930 and 27 January 1933, S. 1933.1.41; Castel, *supra* note 61 at 594 *et seq.*, para. 449; Mayer, *supra* note 166 at 468 *et seq.*, para 710. The "closest and most real connection" is the so-called Bonython formula after *Bonython* v. *Commonwealth of Australia*, [1951] A.C. 201 at 219. For examples of the difficulties in aircraft equipment financing under the U.C.C., see B. Clark, *supra* note 176 c. 9.02[1] at 9-14 *et seq.* and the preceding note.

[215] See Bunker, *supra* note 87 at 323 *et seq.* The *G.O.L.*, *supra* note 88 reads:

> **§ 5-1401. Choice of law.** 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labour or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code. 2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

portance,[216] while Airbus Industrie applies French law. An inchoate system of secured transactions can provoke an exclusive resort to commercial arbitration.

In the absence of express stipulation, the choice of the proper law can be "inferred", *e.g.*, from a choice of forum (often New York[217]), the location of the aircraft or the headquarters of the aircraft manufacturer.[218] It should be indicated that this intermediate step presuming party intentions, which practically leaves it to the court to decide on the proper law,[219] is also known under Art. 3 of the *Rome Convention*.[220]

c. The Closest and Most Real Connection

aa. An Accessory Connection

In the case of inappropriate non-inclusion of an explicit selection, the closest and most real connection[221] to the security agreement on the cards is the choice of law governing the principal (underlying) obligation, *i. e.* the sales contract, because of their often intimate relation in terms of subject matter uniformity ("accessory connection", *accessorius sequitur naturam sui principalis*[222]).[223] The same result is likely to be obtained in those States

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[216] See A. Littlejohns, "Legal Issues in Aircraft Finance" in S.A.D. Hall, ed., *Aircraft Financing*, 2nd ed. (London: Euromoney, 1993) 281 at 285.
[217] See *supra* note 88.
[218] See Castel, *supra* note 61 at 596 *et seq.*, para. 450. For the notion "implied choice of law" and basic case law, see J. Blom, *supra* note 211 at 556 *et seq.* and 565 *et seq.*
[219] For a critique, see Bunker, *supra* note 87 at 325; Kadletz, *supra* note 114 at 63.
[220] Art. 3 (1) second sentence of the *Rome Convention*, *supra* note 129 reads: "The choice must be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."
[221] In other words, this is "the most significant relationship". See *Restatement Conflicts of Laws*, *supra* note 108, § 188 and Castel, *supra* note 61 at 592 *et seq.*, para. 447 and at 598 *et seq.*, para. 452.
[222] See Justinianus I, *Digesta* (A.D. 528-534), *D.* 34, 2, 19, 13.
[223] This has to be explained by the accessory character of securities generally. For the case of suretyship, see *Restatement Conflict of Laws*, *supra* note 108, § 194; Ziegel, *supra* note 100 at 100, § 8.4: "Reasons of policy and predictability recommend that whenever possible the personal rights and obligations of the parties and their rights and obligations in and to the collateral should be governed by the same law." C. Reithmann & D. Martiny, *Internationales Vertragsrecht*, 4th ed. (Köln: Dr. Otto Schmidt, 1988) no. 114 at 124; Mayer, *supra* note 166 at 419 *et seq.*, paras. 646 and 648 (*loi de la source*); Khairallah, *supra* note 167 at 220 *et seq.*, paras. 245 *et seq.* and at 283 *et seq.*, para. 330; Kegel, *supra* note 64 at 494. This reasoning certainly favours an application of the party autonomy to overcome the *conflit mobile* caused by the permanent relocation of mobile equipment. See below, *Chapter Three* VIII. B.; Khairallah, *ibid.* at 263 note 216 and accompanying text, para. 296. It is true that the resulting separation of the law applicable to the purely contractual relations and the one relevant for conveyance and content of real rights leads to an undesirable *cumul* of laws for the same operation and a *dépeçage* of a single contractual relationship. This, however, is an unavoidable consequence of two competing interests, the party interests on the one hand and the interests of other creditors as participants in legal transactions generally on the other.

that follow the presumption of closest connection to the habitual residence of the person effecting the characteristic performance under Art. 4 of the *Rome Convention*.[224]

It is clear that in the case of multiparty contracts, where different providers undertake several essential services, it may be difficult to ascertain such characteristic performance in the absence of an express choice of law.[225] A *dépeçage* of the contract may appear the only way of determining the applicable law.[226] Most reasonable results are, as elaborated here, likely to be obtained by applying the rule that accessories follow the principal obligation. This solution corresponds to the law parties are most likely to apply by selection clauses to the entire contractual framework and obtains the favourable result to have one single legal system that governs the interdependent contractual bonds.

bb. The Inapplicability of International Sales Law

As to the accessory applicability of substantive international sales law, the Hague *Convention on the Law Applicable to International Sales of Goods*,[227] which explicitly, but without justification, excludes the sale of registered aircraft from its scope[228] does neither cover security constellations nor foreclose recourse to the chosen substantive law for domestic security agreements. Similarly, the *CISG* is inapplicable to secured transactions. Also, it categorically excludes the sale of aircraft and of individual components of aircraft such as spare parts, engines and propellers, though only in so far as they do form a material element of the aircraft.[229] This means notably that the *CISG* could apply to the secured sale of aircraft engines, if it was wider in scope[230] and parties would have to explicitly and

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[224] See Castel, *supra* note 61 at 632 *et seq.*, para. 487, who notes that arts. 3111 *et seq.* C.C.Q. have adopted the same principles. See also J. Blom, *supra* note 211 at 576 *et seq.*; Kegel, *ibid.* at 488 *et seq.* G. C. Cheshire, *Cheshire and North's Private International Law*, 12th ed. by P. M. North & J. J. Fawcett, (London: Butterworths, 1992) at 459 *et seq.*; Dicey & Morris, *supra* note 181 at 1326 *et seq.*, r. 185 (3), explaining the difficulty of determining the characteristic performance in the case of a pledge: "[I]t is most likely that, since the pledgor's characteristic performance will normally be effected at the pledgee's place of business, then the law of the latter country may be held to apply."

[225] See Polak, *supra* note 209 at 80; Kadletz, *supra* note 114 at 138.

[226] See Polak and Kadletz, *ibid.*

[227] See *Convention on the Law Applicable to International Sales of Goods*, 15 June 1955, (1964) 510 U.N.T.S. 149 [hereinafter *HCISG*].

[228] See *ibid.* art. 1(2); see Winship, *supra* note 208 at 1061 *et seq.*

[229] See *CISG*, *supra* note 130 art. 2 (e).

[230] See R. Herber in P. Schlechtriem ed., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed. (Oxford: Clarendon Press, 1998) at 37, Art. 2 para. 35 note 72 and accompanying text and Supreme Court of Hungary, 25 September 1992, (1993) 13 J. L. & Com. 31 with critique of P. Amato, "U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application – An Early Interpretation by Hungarian Courts", (1993) 13 J. L. & Com. 1 at 16 *et seq.* and P.

clearly exclude the application of this international instrument to their contract,[231] if they want to avoid the anomalous situation of having a part of their sale governed by uniform law and the other part by a law chosen by them.[232]

d. The Formal Requirements

The security agreement also has to be scrutinised under the different angle of contractual formalities, which exist in wide variety, notably those of writing and notarisation. They serve the prevention of fraud, debtor-protection and to secure publicity to mitigate the false wealth objection.[233] Their determination habitually is based on the local law under the rule *locus regit actum*[234] or the law applicable to the substance of the contract.[235]

Yet, as has been explained, the realm of real rights in aircraft equipment, in practice, has never been left to the dominion of party autonomy.

B. Problems Related to the Hierarchy of Insolvency

The recognition of the validity of an interest in the importing State is not equivalent to the recognition of the priority[236] of that real right compared to other encumbrances created under the same law. It is still possible that a competing interest is validly created in the same State after the asset has moved there. In the absence of an avoidance of preferences, this competing real right can conceivably be attributed a preferential status or ranking according to the general priority rules of private law in the importing jurisdiction,

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Schlechtriem, *ibid.*, at 108, Art. 14 para. 8 note 26; generally, see Winship, *supra* note 208. Only in this context the applicability of the *CISG* to finance-leasing, notably to the contractual relationship between the supplier of the goods and the lessor, or the lessee in case of an assignment of the lessor' s rights to the lessee under a guarantee, becomes relevant. See Herber, *ibid.* at 22, Art. 1 para. 16.

[231] See *CISG*, *supra* note 130 art. 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate or vary the effect of any of its provisions."

[232] See Winship, *supra* note 208 at 1059.

[233] See Ph.R. Wood, *supra* note 51 at 98 *et seq.*, para. 8-1 *et seq.*; above, note 179.

[234] See Justinianus I, *Digesta*, *supra* note 222 *D.* 21, 2, 6. See also Bartolus on *ibid.* 22, 1, 1.

[235] See *Rome Convention*, *supra* note 129 art. 9. Note, however, that the *Einführungsgesetz zum Bürgerlichen Gesetzbuch in der Fassung vom 25 July 1986*, BGBl. I, 1986, 1142 (German Code on the Conflict of Laws) [hereinafter *E.G.B.G.B.*], due the abstract nature of a transfer of property ("*Abstraktionsprinzip*", § 929 B.G.B. and § 1034 Greek C.C.), exclusively requires the *lex causae* applicable to the real right to govern the form, art. 11 (5) *E.G.B.G.B.*; Ph.R. Wood, *supra* note 51 at 181, para. 13-4.

[236] In the following, the notion "priority" will be used in the sense of legal preference or precedence, describing the relative ranking of competing claims to the same property. See *Black*, *supra* note 27 *s.v.* "priority". It has to be distingushed from the French "privilège" which is equivalent to the Common law lien (see *supra* note 97) and has an even higher "priority".

which is different from the priority regime in the exporting State. For example, the German *Sicherungsübereignung* can be characterised as English floating charge and ranks after preferential creditors although it is classified before them in Germany.[237] Particularly in Civil law, the equality of creditors (*principe de l'égalité des créanciers*) can avoid preferences that are recognised in other jurisdictions. Rules of private international law have to intervene and unravel this conflict of opposability, which is so relevant for the enforcement of the security against the defaulting buyer, lessee or lienee. In the case of aircraft the shifting *lex rei sitæ* is not practicable to determine the applicable law. Rather, the law applicable specifically to aircraft encumbrances, which will be developed consecutively, have relevance. However, due to the close connection to seizure in execution and the likely application of different laws to competing securities on the same movable most courts that are competent at the *lieu de la saisie* apply the *lex fori* as the single order of priorities.[238]

In the case of insolvency, the question of opposability concerns the organisation and structure of the bankruptcy estate. Ergo, the most reasonably applicable law here typically will be the law of the place of bankruptcy determined according to the *lex fori*. Still, this law will often compete with the law applicable to the creation of the encumbrance, depending on whether the jurisdiction in question practises the doctrine of unity of bankruptcy or the doctrine of plurality.[239] In conclusion, even in the case of adaptation through registration the ownership of a creditor/lessor in an asset may not be a guarantee for a full realisation of the security. It is submitted that in the interest of aviation credit and an efficient international air transportation network the use of the law of the security is the only tenable alternative.

This upkeep of the essential effects of a foreign security through adaptation (being - as the case may be - subject to recordation) can be assumed to protect the good faith of

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[237] See Ph.R. Wood, *supra* note 51 at 195, para. 13-32. In English law the floating charge has less priority than a fixed charge or other subsequent purchasers and mortgagees. See Ph.R. Wood, *ibid.* at 175 *et seq.*, paras.12-22 *et seq.*

[238] Hence, priorities between competing claims which are governed by the same law ought to be resolved according to that law. See Khairallah, *supra* note 167 at 293 *et seq.*, paras. 346 *et seq.*; Castel, *supra* note 61 at 148 *et seq.*, para. 82; *Canada Deposit Insurance Corporation* v. *Canadian Commercial Bank*, [1993] 3 W.W.R. 302; aff'd. [1993] 8 W.W.R. 751 (Alta. C.A.); see also Mayer, *supra* note 166 at 431, para. 665.

[239] See Goode, *supra* note 165 at 48 and 51; Khairallah, *ibid.* at 295 *et seq.*, paras. 350 *et seq.*, with further references; Mayer, *ibid.* at 431 *et seq.*, para. 665, and at 434, para. 668; Bunker, *supra* note 87 at 327 *et seq.* For the theories in international insolvency law generally see Mayer, *ibid.* at 432 *et seq.*, para. 666 and Castel, *ibid.* at 553 *et seq.*, para. 422. The doctrine in maritime law of secured transactions has generally endorsed the application of the law of the security, *i.e.* the *lex banderae*, in the interest of maritime credit. See the references in Khairallah, *ibid.* at 295, para. 350 note 135.

the cross-border creditor, especially if he is not preferred, in the continuity of the security in the collateral before or upon the debtor's insolvency, as well as the good faith of those engaged in commercial and credit transactions as to the integrity of the order of collocation after the import of a security. A creditor, however, has to be aware of the fact that the notification as such in some countries favouring individual justice,[240] but not in Anglo-Canadian law,[241] implies the irrefutable presumption of cognisance of the creation of the real right (theory of constructive notice), *bona fides* of a creditor being, hence, only relevant where and to the extent that the purchaser can rely on the public faith of the record (*positive Publizität*).[242]

VII. Goods Destined to Travel and Mobile Equipment

Conflict problems in secured transactions in aircraft financing so far have been dealt with indifferent of the character of the secured movable. An aircraft can be mobile equipment once it is in operation as well as a simple movable as long as the manufacturer is involved in the completion or initial sale of the building.[243] Permanently mobile goods are distinct in character from movable goods that are sent abroad as part of an international sale generally ("goods destined to travel"). As a matter of principle, the *lex rei sitæ* is

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[240] Such countries are, e.g., England, France, Germany or Japan.

[241] For England, see *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 199 (1) (i) (ii) [hereinafter *Law of Property Act*]. But see, e.g., *O.P.P.S.A.*, *supra* note 99 s. 46 (5) (a). The theory of constructive notice is not applied in Ontario since the "[p]urpose of the registration system is to structure the process of perfection of security interests by registration, not to provide deemed notice to the world of the existence of the security interest." D.L. Denomme, in Ziegel & Denomme, *supra* note 100 at 373 *et seq.*, § 46.18. *Id.*, *ibid.* at 151, § 20. 1: "The purpose of registration requirement was to ensure that third parties receive constructive notice of the security interest so that they would not be mislead by the existence of a secret lien". The same author, *ibid.* in note 97 notes that the jurisprudence varies between the Common law provinces of Canada.

[242] See arts. 2943 (2) and 2944 (1) C.C.Q.; § 16 (1) of the German *Gesetz über Rechte an Luftfahrzeugen vom 26. Februar 1959*, BGBl. I, 1959, 57 and 233, as amended by art. 9 of *Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren (Vereinfachungsnovelle) vom 3. Dezember 1976*, BGBl. I, 1976, 3281, E. Giemulla & R. Schmid, *Recht der Luftfahrt – Textsammlung* (Neuwied, Kriftel & Berlin: Luchterhand, 1996) 329 at 333 [*hereinafter LuftfzRG*]:

> Zugunsten dessen, der ein Registerpfandrecht oder ein Recht an einem solchen durch Rechtsgeschäft erwirbt, gilt der Inhalt des Registers, soweit er diese Rechte und das Eigentum and dme Luftfahrzeug betrifft, als richtig es sei denn, daß ein Widerspruch gegen die Richtigkeit eingetragen oder die Unrichtigkeit dem Erwerber bekannt ist. Ist der Berechtigte in der Verfügung über ein im Register eingetragenes Recht (Satz 1) beschränkt, so ist die Beschränkung dem Erwerber gegenüber nur wirksam, wenn sie aus dem Register ersichtlich oder dem Erwerber bekannt ist.

See Haupt, *supra* note 189, who remarks that knowledge is not constituent of the secured transaction, that unencumbered aircraft normally are not recorded and that it depends on the circumstances of the case if the purchaser knows of the charge; Crocq, *supra* note 175 at 293 *et seq.*, paras. 338 *et seq.* with references at 294 note 3, para. 338; Schilling, *supra* note 164 at 192.

[243] See also *Chapter Three* I., above.

the law, which governs the law applicable to such movables, too. Consequently, the conditions and effects of the transfer underlie the law of the exporting State until the collateral crosses the border and the law of the country of destination from thereon. The doctrine of transposition resurfaces so that rights can be exercised only in accordance with the system of real rights in the law of destination.

In order to avoid a *conflit mobile* States whose law knows a transfer *solo consensu* and not the Germanic abstraction of real rights[244] tend to submit the applicable law to the *lex loci contractus* or the law of the contract contemplated by the parties, particularly for the retention of title. In these Civil and Common law jurisdictions, the *lex rei sitæ* can be used as an indicator in the absence of an express choice of the proper law.[245] Alternatively, the place of destination of goods (*lieu de l'exécution de l'opération*), of relevance notably for leasing contracts, is retained for imported movables.[246] This place would be identical by and large to the place of first registration of the aircraft. Such regulations, which allow the law of destination of the movable to decide if the perfection requirements are fulfilled, often avoid transposition problems by establishing so-called grace periods (*délais de grâce*). Accordingly, these formal requisites must be complied with within a deadline of several weeks or months.[247] However, in the case of exported securities,[248] which constitute the crackerjack of cases in international aircraft financing due to the power of North Ameri-

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[244] See *supra* note 235.

[245] A well developed discussion of the preceding aspects can be found in Khairallah, *supra* note 167 at 255 *et seq.*, paras. 284 *et seq.*; F.K. Juenger, *supra* note 167 at 153 *et seq.*; F.K. von Savigny, *System des heutigen Römischen Rechts* (1849) at 178 *et seq.* art. 2 (4) of the Hague *Convention on the Law Applicable to the Contractual Transfer of Property in Movables*, 15 April 1958, provides for the applicability of the law of the contract in the case of conditional sale and arts. 3 *et seq.* refers to the *lex rei sitæ* defined case by case. See *Collection of Conventions*, *supra* note 207 no. IV at 16. This Convention, signed only in French, has never been ratified by any State. The *HCISG*, *supra* note 227 is, according to its art. 5 (3) and (4), not applicable to the transfer of ownership. For the purchase money security interest, see Ziegel, *supra* note 100 at 90 note 4, § 6.1.

[246] See art. 3103 C.C.Q., *O.P.P.S.A.*, *supra* note 99 s. 6 and U.C.C. § 9-103 (1)(c) (1994).

[247] See the four-months-rule of U.C.C. § 9-103 (1) (d) (i) (1994) read in conjunction with the "domicile rule" of U.C.C. § 9-103 (3) for perfection of a security in movables in the State of the debtor's location and the "last event-rule" for perfection in the State where the ordinary collateral is located of U.C.C. § 9-103 (1) (b) on so-called Multiple State transactions. A reperfection in the state of removal (or the forum state) is necessary. Otherwise the perfection in original state is lost (file by secured party alone, U.C.C. § 9-402 (2) (a), *Draft* U.C.C., *supra* note 172 § 9-316 (a) (2). (c) 30 days in the case of a qualified change of applicable law, *i. e.* when the chattel is intended to be kept in the other jurisdiction. See Stoll, *supra* note 167 at para. 272; Lawrence, Henning & Freyermuth, *supra* note 176 at 170 *et seq.*, § 9.03[C]. This rule, however, is superseded for interstate conflicts by the recordation rules under the *Federal Aviation Act*, 49 U.S.C. § 441070 [hereinafter *FAAct*]. For *O.P.P.S.A.*, *supra* note 99 s. 5 (2), see also Groffier, *La Réforme*, *supra* note 81 at 95 *et seq.*, para. 79; art. 3104, 3103 C.C.Q.: 30 days, inspired by the *O.P.P.S.A.* and the *Uniform Property Act* Arts. 5 *et seq.*, see Groffier, *ibid.* at 95 note 79-3, para. 79. For an explanation of the difficulties prior to the reform see *id.*, *supra* note at 158 *et seq.*, paras. 159 *et seq.*; Castel, *supra* note 61 at 477 *et seq.*, para. 330.

[248] This is, *e.g.*, the case of art. 3103 C.C.Q.

can financiers, this solution is of no relevance because such grace periods often do not exist in foreign jurisdictions and cannot be enforced.

VIII. A New Rule adapted to Mobile Equipment

"Personal property has no locality."[249] This recognised statement is still valid in its employment for mobile equipment, despite the persistence of the *lex rei sitæ* in its applicability in many jurisdictions even to dynamic objects, which kept on all the more after the enactment of the *Geneva Convention*. Its intrinsic truth has led to the development of alternative connecting factors in the domestic legislation and doctrine of North-America and Europe, which overcome the *conflit mobile* but which are not necessarily susceptible to widespread international recognition. They, therefore, do not rule out the necessity of an international conventional framework.

A. The Debtor's Principal Place of Business as a Connecting Factor

Especially in the case of aircraft operating in international aviation that are, beside vessels, quasi-permanent *res in transitu*, it is difficult to ascertain the continuously alternating *lex rei sitæ* and it is wise to avoid the necessity of perfecting in each jurisdiction.[250] Furthermore, the *lex rei sitæ* does not distinguish between security over specified assets and universal security, fails in the case of security over classes of tangible assets where physical inspection is impracticable and is impossible to put to bear upon intangibles.[251] "[T]he *lex rei sitæ* rule... has outlived its usefulness in a world of interdependent markets and security over widely distributed assets."[252]

Modern doctrine in several States has, for these reasons, put efforts into developing another, not asset-based, connecting factor for contractually stipulated encumbrances which is more stable than the law of the situation of a movable means of transport. As a matter of principle, this factor has been described as the home country (*Heimatrecht*). It is, still, not clear if "home country" is meant to be the State from which the aircraft starts its operations (*lex domicilii*) or the State of registration in a record *(lex libri siti, loi du port d' at-*

[249] Lord Loughborough C.J., *supra* note 116.
[250] See Groffier, *Précis DIPQ*, *supra* note 81 at 154 *et seq.*, para. 156; Castel, *supra* note 61 at 479, para. 333.
[251] See Goode, *supra* note 165 at 49.
[252] Goode, *ibid.* at 51.

tache).[253] The latter may exceptionally differ from the State of public registration as a national on the authority Arts. 17 *et seq.* or Art. 77 of the *Chicago Convention* in conjunction with the ICAO Council Resolution of 14 December 1967[254] for aircraft jointly registered but controlled by one State under joint operation organisations (*lex patriae* or *lex banderae*, *loi du pavillon* or *loi d' immatriculation*).[255] Since an aircraft cannot have several nationalities for purposes of private law, the latter case certainly presupposes that the State performing the functions of the State of registry be regarded as the "effective" State of nationality. This dispute becomes only relevant in cases when the aircraft does not return to its country of registration and is not re-registered in the record of another State, *e. g.*, when the object is leased or chartered by another airline, in the cases of stand alone cabotage or permanent off-shore operations of an airline from a different principal place of business. Parties might be more prepared to accept the law of this principal place of business as the applicable law.[256]

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[253] This presupposes that the State in question has a central register, a problematic issue particularly for federal States. *Stant pro ratione exempla* the U.S. (for *F.A.Act* § 44107, see *supra* note 247) or Canada. Canada has, due to constitutional difficulties, not (yet) proclaimed a nation-wide asset recordation system. However, a central registry exists for purposes of *Chicago Convention*. The situation in Quebec has considerably improved since art. 2980 C.C.Q has introduced a central register for personal and movable real rights, such as movable hypothecs (art. 2700 C.C.Q.), in 1994. See *Règlement sur le Registre des Droits Personnels et Réels Mobiliers*, D. 1594-93, (1993) 125 G.O.Q. 2, 8058; L. Payette, *Les Sûretés dans le Code Civil du Quebec* (Cowansville, Qc.: Yvon Blais, 1994) at 192, para. 604, and at 193 *et seq.*, paras. 610 *et seq.*; Bunker, *supra* note 87 at 177 for the nationality registration and at 180 for the central provincial registers for movable, and Castel, *supra* note 61 at 481, para. 335, who notes that two provinces have introduced respectively, but not yet proclaimed in force, an *Aircraft Security Interests Act*, S.N.S. 1988, c. 3, S.P.E.I. 1988, c. 10 [hereinafter *Aircraft Security Interest Act* cited to S.N.S.]. These Statutes determine the validity of a security interest in an aircraft following the law of jurisdiction where the owner is located instead of the nationality, as does the *Geneva Convention*, and the debtor location, as do Common law statutes concerning asset registration, as will be explained instantly.

[254] See ICAO, Council, *Resolution on Nationality and Registration of Aircraft Operated by International Operating Agencies*, ICAO Doc. 8722-C/976.

[255] The nationality is a core connecting factor in aviation law. See art. 10 *Codice Nav.*, *supra* note 176 ; B. M. Bentivoglio, "Conflict Problems in Air Law" (1966) 119: 2 Rec. des Cours 69 at 81; A. Kadletz, "The Current Crisis of the Conflict of Laws in Private International Air Law" (1997) 22:2 Ann. Air & Sp. L. 87 at 98; Kegel, *supra* note 64 at 579, who does not distinguish between *lex libri siti* and *lex patriae*, with references to German authors. It should be noted that "home country" is most commonly used with reference to the *lex patriae* and *Heimatrecht* which determines the nationality. See Riese, *supra* note 193 at 279 note 15. Here it is used as a generic term. See Khairallah, *supra* note 167 at 230 note 61, para. 255 and at 227 *et seq.*, paras. 253 *et seq.* These notions are more confusing than helpful. See also M. Milde, "Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies", (1985) 10 Ann. Air & Sp. L. 133 at 146 *et seq.*; R. Mankiewicz, "Aircraft Operated by International Operating Agencies" (1965) 31 J. Air L. & Com. 304.

[256] An example of different central administration and principal place of business might constitute the move of low cost carriers, *e.g.* Virgin Express to transfer its headquarters while maintaining the network. See P. Marx, "En délocalisant, Virgin Express espère encore réduire ses coûts d' exploitation", *La Tribune* (26 March 1998) 13.

It should be borne in mind that in this context, again, the basic conflict of laws problem of international corporations law, *i.e.* the dispute between the Real Seat Doctrine in many states of Continental European law and the Incorporation Rule, which originates in English Common law, reappears.[257] Common law parties, one could argue, might be more prepared to accept the law of the place of incorporation, should this place differ from the place of original registration and from the principal place of business. This dispute touches upon the equally crucial question of the concept of "nationality" of a debtor company, its relevance and its definition in the relevant domestic legislation. This is a consequence of the fact that some legal systems attach nationality to a corporation created either according to the law at its real seat or according to its place of incorporation.

It is valuable to refer to the revision of Art. 9 U.C.C.,[258] whose § 9-103 (3) (b) stipulates that perfection or non-perfection of a security interest[259] is governed by the jurisdiction in which the debtor's residence or place of business is located rather than the jurisdiction of the location of the collateral. In the case of foreign air carriers their major executive office,[260] more precisely the "designated office of the agent upon whom service of process may be made on behalf of the carrier"[261] is decisive.[262] Section 7 (1) and (4) of the *O.P.P.S.A.*[263], an adaptation of U.C.C. Art. 9, refers to the debtor's principal place of

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[257] See Goode, *supra* note 165 at 51, who therefore proposes the "law of the seat *or* place of incorporation of the Debtor Company" [emphasis added]. Art. 5 of the *Draft Convention*, *supra* note 15, for the same reason, reads "[a] party is located in the State in which it is incorporated or registered or in which it has its principal place of busines[s]". This is one of the most essential problems in International Business Law, which has to be decided on urgently in the near future.

[258] National Conference of Commissioners on Uniform State Laws, July 1998 Draft *supra* note..., see Cohen, *supra* note 14 at 182 note 37. It must be borne in mind that, as far as leasing is concerned, only security leases underly U.C.C. § 9-102 (1)(a).

[259] Perfection is the process whereby the security interest is made effective against competing claims to the collateral (either by public notice or taking of possession). See *Black*, *supra* note 27 *s.v.* "perfection of security interest". For "perfection, the effect of perfection or nonperfection, and the priority of a [*i. e.* every, including nonpossessory] security interest in collateral", see *Draft* U.C.C., *supra* note 172 § 9-301 (1) and, for the competence of the jurisdiction of location for possessory security interests, U.C.C. § 9-301 (2). For perfection of a security interest under the U.C.C. generally, see B. Clark, *supra* note 176 c. 2.

[260] See U.C.C. § 9-103 (3) (c).

[261] See U.C.C. § 9-103 (3) (d).

[262] See *Draft* U.C.C., *supra* note 172 § 9-307 (b) and (j) and Juenger, *supra* note 167 at 160; generally Weintraub, *supra* note 70 at 493 *et seq.*, § 8.37 *et seq.* and Lawrence, Henning & Freyermuth, *supra* note 176 at 174 *et seq.*, § 9.04 [B]. This provision causes difficulties with respect to the *Geneva Convention*. See E. Uncyk, "International Aircraft Financing under the Uniform Commercial Code" (1969) 2 N.Y.U. J. Int. L. & Pol. 180.

[263] See *O.P.P.S.A.*, *supra* note 99. See also *A.P.P.S.A.*, *supra* note 100 s. 7 (2) and the references to other Canadian provinces in Castel, *supra* note 61 at 476 note 23, para. 328 and Bunker, *supra* note 87 at 137; M. Babe & C. Thomson, "Canadian P.P.S.A. Conflict of Laws Rules" (1996) 13 Nat. Insolv. Rev. 3; I.F.G. Baxter, "Secured Transactions and Conflicts of Laws" (1978-79) 3 Can. Bus. L. J. 57 and D.C. Tay, *Law of Ontario Personal Property Security* (1992), c. 16.

business/chief executive office at the time of creation/attachment of the security.[264] For the same purpose, Arts. 3105 and 3106 C.C.Q. refer to the law of the country where the grantor was domiciled for "a corporal movable ordinarily used in more than one country".[265] It appears from these codifications, which are all based on some form of incorporation rule,[266] that Common law jurisdictions tend to exempt the law applicable to international securities in movable from the connecting factor "incorporation".[267] For the particular area of secured transactions this argument in favour of a domiciliary nexus not only eliminates the unsettled dispute in international law of corporations, but also avoids filing in several States or the toleration of secret encumbrances. Eventually, all said reflect a more extensive application of the ancient principle *mobilia sequuntur personam* (or *mobilia ossibus inhaerent*).[268]

Private international air law reinforces the modern trend in favour of the principal place of business or, as far as the location of the real seat determines the "nationality" of the airline corporation[269] as a connecting factor. This linkage will, as long as there is no need to lease, interchange or let the object to a chartering operator, be identical to the

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[264] See Castel, *ibid.* at 479 *et seq.*, para. 333; see Goode, *supra* note 165 at 51; Bunker, *ibid.* at 320. Baxter, *ibid.* at 67 *et seq.*; Ziegel, *supra* note 100 at 94, § 7.3.

[265] Such is also, e.g., rolling stock.

[266] Even art. 3083 (2) C.C.Q. stipulates that "The status and capacity of a legal person are governed by the law of the country under which it was formed [...]" but restricts this approach by "subject, with respect to its activities, to the law of the place where they are carried out." Modern German doctrine has proposed this preferable "superposition theory" (*Überlagerungstheorie*) *de lege ferenda*.

[267] This conclusion, it must be observed, is not necessarily cogent since art. 9 U.C.C. is mainly concerned with interstate problems. Consequently, it is difficult to assess its impact on international transactions. See Juenger, *supra* note 167 at 165; Stoll, *supra* note 167 at para. 272. The incorporation theory, however, is exposed to criticism in the U.S. In New York and California, the *lex fori* is applied as an alternative. See Kegel, *supra* note 64 at 414 *et seq.*; E.R. Latty, "Pseudo-Foreign Corporations" (1955) 65 Yale L. J. 137; E. Rabel, *The Conflict of Laws - A Comparative Study*, vol. 2, 2nd ed. (Ann Arbor : University of Michigan Press, 1960) at 65; J.W. Moore & D.T. Wenckstein, "Corporations and Diversity of Citizenship Jurisdiction - A Supreme Court Fiction Revisited" (1964) 77 Harvard L. Rev. 1426. It should be noted that the applicable law to the security agreement under the art. 4 of the *Rome Convention*, *supra* note 129 may be presumed to follow the principal place of business as the country of characteristic performance. In this case it is therefore likely to be diametrically opposed to the law applicable to the transfer of a proprietary right. For the notion of accessory, see *supra* notes 222, 223 and accompanying text.

[268] See Khairallah, *supra* note 167 at 148 *et seq.*, para. 179 *et seq.* These formulas trace back to the glossator Accursius in the 12th century: *Glosa, ea vero, in lege, ea vero* (Justinianus I, *Digesta*, *supra* note 222 *D.* 17, 2, 3). See E.M. Meijers, "L'Histoire des Principes Fondamentaux du Droit International Privé à partir du Moyen Age", (1934: 3) 49 Rec. des Cours 543 at 639 *et seq.*; M. Wolff, *Private International Law*, 2nd ed. (Oxford: Clarendon Press, 1950) at 24 note 3; Schilling, *supra* note 164 at 2.

[269] From the point of view of Public International Law, see M. Milde, "The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?" (1994) 19: 1 Ann. Air & Sp. L. 401 at 422 *et seq.*; J.Z. Gertler, "Nationality of Airlines – Is it a Janus with two (or more) Faces?" (1994) 19 : 1 Ann. Air & Sp. L. 211; J.Z. Gertler, " Nationality of Airlines – A Hidden Force in International Air Regulation Equation" (1982) J. Air L. & Com. 51.

home country, *i.e.* the place of nationality registration, of the aircraft. It remains, yet, to be seen if the terminology "nationality" of an incorporated airline as such, which in Anglo-American conflict law has never had any particular significance,[270] is a concept wise to follow or rather susceptible to complete abandonment. Certainly, it may be argued that every other filing than the nationality registration of an aircraft is overly liable to capricious selection in the case of dry lease,[271] and likely to cause flags of convenience (*pavillons de complaisance, Billigflaggen*).[272] This whole issue has an important impact on parties to the *Chicago Convention* as a consequence of the recent entry into force of Art. 83*bis* of that treaty, according to which the State of the operator's principal place of business discharges the functions of safety oversight in lieu of the State of registration - subject to arrangements between the two States concerned - in the case of lease, charter or interchange.[273] However, under the regime of Art. 83*bis* the risk of flags of convenience does not appear sufficiently grave to be decisive against the admittance of the principal place of business as connecting factor, since the supervisory functions attached to the State of registry remain with that State should an aircraft be registered with a State not party to the Art. 83*bis* of the *Chicago Convention*.[274] Also, the international change of headquarters may be subject to evasion of law principles (*fraus legis, fraude à la loi, Gesetzesumgehung*) under the exporting or importing jurisdiction as far as the respective domestic system of conflict law does not provide adequate safeguards.[275] This follows the general conflict rules of contract[276] or the "pseudo-foreign corporations" jurisprudence of Anglo-American cross-border corporations law.[277] From the perspective of the above-mentioned developments in private aviation law it is true that the place of incorporation should have been taken

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[270] See Castel, *supra* note 61 at 574, para. 437.
[271] *I.e.* a lease under the terms of which the lessor does not provide, directly or indirectly, the aircrew to operate the aircraft. See *Canadian Air Carrier Regulations*, 1978 C.R.C. c. 3, s. 2; Bunker, *supra* note 87 at 39 *et seq.*
[272] See Goode, *supra* note 197 at 349; generally Ph.R. Wood, *supra* note 51 at 205 *et seq.*, para. 15-5
[273] For the background of international corporations law, see B.M. Verhaegen, "The Entry into Force of Art. 83*bis* – Legal Perspectives in Terms of Safety Oversight" (1997) 22 : 2 Ann. Air & Sp. L. 269 at 274 who, in note 24, refers to *Wood* v. *United Airlines Inc.*, 8 Avi. 17.500 (E.D. N.Y. 1963).
[274] See Verhaegen, *ibid.* at 273 *et seq.*
[275] See Mayer, *supra* note 166 at 179 *et seq.*, paras. 269 *et seq.*; Kegel, *supra* note 64 at 348 *et seq.* *Fraus omnia corrumpit* is a general principle which not necessarily known in the Private International Law of all States, *e.g.* Germany. See Kegel, *ibid.* at 349 and 352. The Common law, in principle, has more liberal attitude. See Kegel, *ibid.* at 352; E.F. Scoles & P. Hay, *Conflict of Laws* (St. Paul, Minn.: West, 1992) at 517 *et seq.*
[276] See Castel, *supra* note 61 at 594 *et seq.*, para. 449; above, *Chapter Three* VI. A. 4. b. and c.
[277] See H. Bungert, "Zur Rechtsfähigkeit US-amerikanischer Kapitalgesellschaften ohne geschäftlichen Schwerpunkt in den USA" [1995] WM 2125 at 2126 *et seq.*; *id.*, *Deutsch-amerikanisches Internationales Gesellschaftsrecht* (München: C.H. Beck, 1994) at 144 *et seq.*

into account as an alternative to the principal place of business.[278] Art. 83*bis* is insofar incomplete. However, it has to be repeated here that the place of incorporation has not been maintained as a connecting factor in Anglo-American securities law for movables. Hence, the objective real seat rule is currently a major barrier for an evasion.

From the same perspective and from the angle of Art 83*bis* it is noteworthy that the *Geneva Convention* sticks to the State of registration as the only link for recognition, without flexibility as to registered securities at the principal place of business for parties to this Convention. This point is equally basic for the conflict rules of the *Geneva Convention* and will be discussed below.

B. The Contractual Choice of the Proper Law

Instead of relating to the "home country" as connecting factor, other authors and statutes, try to avoid the change of applicable law through permitting some form of contractual choice of law.[279] This choice may be limited to transactions *inter partes*, *i. e.* the law of the location may still be relevant *erga omnes*, as in the case of a combination with grace periods (destination of goods rule for "goods in transit").[280] Where such restrictions do not apply the choice of law allows, furthermore, placing the security agreement and the law applicable to the permanent movable under the same proper law of the contract. This choice of law in an aircraft security arrangement has, however, barely a chance of being recognised by foreign courts, neither in the country of destination (even if its own law has been chosen) nor any other jurisdiction in which the case is being tried. The universal acceptance of the *lex rei sitæ* as a form of uniform law or its invariable alternative, *e.g.* the *lex libri siti*, is likely to bar this variation as long as it is not superseded by multistate agreements, because of the social policies that are implicated in the giving on security and its enforcement where the debtor is in default. During the preparation of the *Geneva Convention* this issue of applying the *lex loci contractus* was briefly being discussed as an alternative to some form of (private or public) registration. On the other hand, if social policies re-

[278] See Verhaegen, *supra* note 273 at 274.

[279] See Stoll, *supra* note 167 at paras. 277 *et seq.*, 288 and 248 as well as the references in Kreuzer, *supra* note 139 at 622 note 27 (H. Drobnig, F. Sturm); Khairallah, *supra* note 167 at 220 *et seq.*, paras. 245 *et seq.*, at 260 *et seq.*, paras. 292 *et seq.* Payette, *supra* note 253 at 226, para. 705 in case it is impossible to determine location of the movable for purposes of art. 3105 C.C.Q.; apparently also R.O. Wilberforce, "The International Recognition of Rights in Aircraft" (1948) 2 I. L. Q. 421 at 440.

quire a kind of territorial fixture then the debtor's residence or principal place of business appears to be a better solution for intangible or mobile goods than the application of the place where the collateral is situated.

C. Grace Periods for Formal Requirements

A third method of avoiding transposition problems is the establishment of so-called grace periods (*delais de grâce*). This case is not particular to permanently mobile goods but to any goods destined to travel.[281] Curiously such Canadian legislation, at the difference from its current U.S. example, stipulates that also the "effects of perfection", notably the priority rules, are governed by the law of the original jurisdiction on the grounds that parties might not always rely on the law of the new jurisdiction.[282] *Draft* U.C.C. § 9-301 is even more explicit ("perfection, the effect of perfection or nonperfection, and the priority of a security interest").

It has been explained previously that such grace periods often do not exist in foreign jurisdictions and cannot be enforced.[283]

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[280] See C.; Kreuzer, *ibid.* at 622 with references in note 29 at 623 note 30 (art. 104 (1) and (2) *I.P.R.G.*, *supra* note 57; U.C.C. § 9-105 (2) (1994) expressly excludes choice of law as far as perfection provisions are concerned); *O.P.P.S.A.*, *supra* note 99 s. 6.
[281] See *Chapter Three* VII., above.
[282] See M. Baer, "Tranfer of Movables" in M. Baer *et al.*, *supra* note 211 c. 15 at 669 *et seq.*, referring to the problematic Canadian cases, in which provinces have different priority rules (*e.g.* Ontario as opposed to Saskatchewan for the competing interests between inventory and accounts financiers).
[283] See *Chapter Three* VII., above.

Chapter Four

The Yardstick - The Geneva Convention 1948

The issue of international recognition of rights in aircraft as a method to overcome the *lex rei sitæ* problem traces back to the very first discussions on the co-ordination of private air law at the first International Conference on Private Air Law of 1925 in Paris which led to the creation of CITEJA.[284] As so many texts of maritime law, Art. 1 of the Brussels *Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages*[285] has served as a model to overcome the problems related to the incessantly changing character of modern means of air transport.[286] Based on preparatory studies commenced in 1927 a CITEJA Commission presented two separate drafts in 1931 - one on ownership and registration, the other on mortgages and real rights,[287] which were never submitted to a diplomatic conference. Shortly before the end of the Second World War, the International Civil Aviation Conference meeting in Chicago (November and December 1944) recommended the adoption of an instrument based on the two earlier texts. CITEJA then (January 1946) sent the texts to the Provisional ICAO. After further elaboration under the aegis of PICAO the drafts were presented to the second ICAO Assembly held in June 1948. Subject to the reservations of a few States the text was approved on 18 June 1948.[288]

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[284] See *Chapter One* I., above.

[285] See *International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages*, 10 April 1926, 120 L.N.T.S. 187; *Décret du 29 novembre 1935, portant promulgation 1° de la convention internationale sur la responsabilité du propriétaire du navire, signée à Bruxelles le 25 août 1924; 2° de la convention internationale pour l'unification de certaines règles relatives aux privilèges et hypothèques maritimes, signée à Bruxelles le 10 avril 1926*, J.O., 18 December 1935, D. 1936. Lég. 419. Since this Convention has never been accepted by any English speaking country there is no official English translation. The translation most frequently referred to is the one by G. Price, *The Law of Maritime Liens* (London: Sweet & Maxwell, 1940) Appendix at 239. This unofficial translation of art. 1 reads:

> Mortgages, hypothecations, and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs and registered in a public register either at the port of the vessel's registry or at a central office shall be regarded as valid and respected in all the other Contracting States.

See also the nearly identical translation by W. Tetley, *Maritime Liens and Claims* (Montreal: Yvon Blais, 1989) Appendix A at 626.

[286] See also Khairallah, *supra* note 167 at 228 *et seq.*, paras. 254 *et seq.*

[287] See CITEJA Doc. 162 at 158 and 164.

[288] For a more detailed presentation of the history of the Convention, see Matte, *supra* note 113 at 543 *et seq.*, para. 196; Wilberforce, *supra* note 279 at 422 *et seq.*; Riese, *supra* note 193 at 275 *et seq.*, the references at 276 notes 3, 4, 5 and 6; Diedericks-Verschoor, *supra* note 179 at 172 as well as the references in S.A. Bayitch, *Aircraft Mortgage in the Americas* (Coral Gables, Fla.: University of Miami Press, 1960) at 69 note 346.

The solution embedded in the *Geneva Convention* was from the beginning merely conceived as a one temporary stage in the development of an effective system for the protection of security rights on aircraft.[289] The use of the term gap for not yet achieved developments, even so they were coming about, would therefore be a rather nonchalant way of evaluating the merits of the Convention. On the contrary, a uniform system of aircraft securities as it now appears to be taking shape within the Unidroit framework has been envisaged from the beginning. Only commercial necessities and pressures, it was still considered, would favour the ratification of the Geneva instruments and, in the long run, led to a standardisation in registrable charges. The recent developments under the auspices of Unidroit are the result of such economic constraints. Notwithstanding, the input given by Unidroit and the Aviation Working Group can only be measured against the problems, for which solutions are not provided in the *Geneva Convention*.

I. A Recognition Convention

The *Geneva Convention* provides rules for real interests in aircraft created through security agreement *sub specie* personal property. It does not concern the law applicable to the security agreement or the underlying sales or construction contract.[290] The *Geneva Convention* is a recognition convention. It addresses the problems of transposition and adaptation through unification of conflict of law rules and of international civil procedure for purposes of standardised recognition. By rooting this recognition in the law of registration as to nationality (*lex patriae*) the treaty steers clear of a change of applicable law (*Statutenwechsel, conflit mobile*).[291] Instead, the national law applied to the creation of the secured transaction ("vested rights") will be respected and its effects will be brought to bear in every country of removal of the aircraft, regardless of the existence of the specific type of right in that jurisdiction (*scil.* "extraterritorial application"[292]). In modern conflict of law doctrine this has nothing to do with "recognition" of an existence as such. It is more. An enforcement of the security in foreign courts on the debtor's default through sale in exe-

[289] See Wilberforce, *ibid.* at 435.
[290] See also *Chapter Three* VI. A. 4., above.
[291] K.F. Kreuzer, "Die Inlandswirksamkeit fremder besitzloser vertraglicher Mobiliarsicherheiten – die italienische Autohypothek und das U.S.-amerikanische mortgage an Luftfahrzeugen", Case comment on BGH, 11 March 1991 – II ZR 88/90 and BGH, 7 October 1991 – II ZR 252/90, (1993) 13 IPRax 157 at 161 [Germany].
[292] The same formulation has been used by Polak, *supra* note 209 at 81.

cution or foreclosure has therefore to be deemed to produce the same effects as an execution in the State of registration ("fiction"). In other words, the *Geneva Convention* leads *de facto* to a form of "official co-operation"; hence, today, the necessity of correspondence stated in Art. XIV *Geneva Convention* appears self-evident, however revolutionary it has been in 1948.[293] In order to ensure a uniform application of the *Geneva Convention* the law of registration, not the *lex fori*, should also determine the abstract or causal nature of the transfer of the proprietary right.[294]

A. A Registration Convention

It has to be unambiguously affirmed that the Convention postulates a registration. As a consequence, the transfer of a real right in an aircraft that is not registered as to nationality cannot be completed within the *Geneva* mechanism. For purposes of a lawsuit abroad the rules of the prevailing domestic conflict of laws systems have to be put to use.

Bearing in mind the distinction between permanently mobile equipment and goods destined to travel, the aircraft in these cases cannot even be characterised as perambulatory equipment. The modern rules elaborated above[295], which avoid a change of applicable law for mobile equipment, are not directly applicable. It follows that the rules on the transfer of real rights under international sales contracts come to the point.[296] The use of the principal place of business of the transferor as a connecting factor, a modern concept that has been illustrated,[297] might as well coincide with the place of first registration.

The application of these solutions of domestic private international law means in practice that all those cases in which an aircraft manufacturer effectuates a direct secured aircraft sale for purposes of export, *i. e.* every initial sale or acquisition of a new building, which includes a change of ownership, de-recordation of title and a transfer from the construction State to the flag country (*Ersterwerb*), are not covered by the *Geneva* agree-

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[293] See Diedericks-Verschoor, *supra* note 179 at 188 *et seq.*
[294] Compare *supra* note 203.
[295] See *Chapter Three* VIII., above.
[296] See *Chapter Three* VII., above.
[297] See *Chapter Three* VIII. A., above.

ment.[298] This transfer of title is moreover a risk for the mortgagee because his mortgage is valid against subsequent purchase of aircraft from owner due to recordation.[299]

This however, as has been explained,[300] traditionally does not constitute the greater number of cases in aircraft financing. Yet, the number of acquisitions of new generation aircraft is and will be more elevated than follow-on transactions based on the need for short and medium term capacity changes and seasonal variations.

B. A Recordation Convention

Art. I (1) (i) *Geneva Convention* does not *expressis verbis* determine the law applicable to the validity of the real right.[301] It is clear, however, that the necessity to obtain application of domestic securities law in another State will, as a matter of fact, compel to an attachment in line with the substantive and formal rules of the *lex patriae*.[302] The decision to link the extraterritorial application of a security to its creation in conformity with the national country of the aircraft has been justified with the argument that in the majority of States the registration in a record (*i.e.* a "State-authorized asset register"[303]) does not have constituent function for a real right in mobile equipment. Instead, as a consequence of the relativity of ownership in these countries[304], it merely achieves such of perfection[305] and is therefore negligible.[306] Regardless of the manner of creation according to the different national laws, through mere (internal) agreement with (external) public notice or through recordation, the *Geneva Convention* requires filing to a public record for extraterritorial application of the national security interest in order to effectively safeguard the lessor's real right.[307] Although States, under Art. I (1) (ii) are not obliged to establish a nation-wide re-

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[298] See Wilberforce, *supra* note 279 at 439 *et seq.*: "The choice would appear to lie between the proper law of the contract and the State of the first registration"; Kadletz, *supra* note 114 at 145; Matte, *supra* note 113 at 568; Bentivoglio, *supra* note 255 at 80; Stoll, *supra* note 167 at para. 341.

[299] This case is problematic foremost in maritime law. See Ph.R. Wood, *supra* note 51 at 216, para.15-24.

[300] See *Introduction* II, above.

[301] See Khairallah, *supra* note 167 at 227 and 229 note 55 and corresponding text, paras. 254 *et seq.* and Bunker, *supra* note 87 at 180 on the one hand and Diedericks-Verschoor, *supra* note 179 at 188 on the other.

[302] See *Chapter Three* VI. A. 3., above.

[303] See *Draft Convention*, *supra* note 15 art. 4 (b).

[304] See *supra* note 174 and accompanying text.

[305] See above, *Chapter Three* VI. A. 3.

[306] See Riese, *supra* note 193 at 280.

[307] The Convention thereby deviates from the formalities otherwise required *lege rei sitae*, regardless of the *lex causae* of the sales contract (*loi de la source*) or the *lex loci contractus* that are normally applicable *de lege fori*. See *Rome Convention*, *supra* note 129 art. 9 (4). See also Mayer, *supra* note 166 at 422 *et seq.*, para. 651. Geneva, it can be said, introduces a constituent registration requirement for international validity in art. I (1) (i) and

cord they have to do it in order to ensure the international recognition of rights created and recorded in an asset register within their jurisdiction. This record may coincide with the nationality register[308] or be distinct from the general asset register.

C. A Priorities Convention

Once an interest is recorded in line with the *Geneva Convention* creditors must know which place the security takes in the order of collocation. It is worthy of regard that there is no such wholly elaborated creditor system in the *Geneva Convention*. Although the *Geneva Convention* contains rules on some claims that take preference over the major security devices mentioned in Art. I. It does not solve problems arising out of domestic priority rules concerning competing claims created in the importing State, which is called to recognise the validity of the interest created abroad. Instead, it simply oppresses those claims by requiring those States not to give other rights priority over those enumerated,[309] except where they coincide with salvage claims, the "extraordinary expenses indispensable for the preservation of the aircraft", certain legal and administrative expenses incurred in the common interest[310] and violations of local law.[311] The *Geneva Convention* therefore, strictly speaking, does not give priorities commensurate with the status of the right in the jurisdiction of creation, particularly since liens arising by operation of law (*e.g.* tort or damage to third parties on the surface) fiscal claims and judgement liens but also wages of flight personnel (the *superprivilège*) often rank higher than aircraft mortgages.[312] It corresponds however to the general privilege of secured rights over unsecured rights on aircraft in accordance with the most priority rules and the law on collective proceedings (*procédure col-*

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simultaneously rejects the recordation nexus in art. I (1) (ii). This contradiction degrades the basis of Geneva: the nationality connection.

[308] See Riese, *supra* note 193 at 281.

[309] See *Geneva Convention*, *supra* note 13 art. I (2).

[310] See *ibid.* art. VII (6).

[311] See *ibid.* art. XII ; Ph.R. Wood *supra* note 51 at 272 *et seq.*, para. 19-29; Bayitch, *supra* note 288 at 80 *et seq.*

[312] For Civil law, see *e.g.* arts. 2651, 2657 C.C.Q. and Bayitch, *ibid.* at 49 *et seq.* For Common law, which does not prefer tax claims or crew wages, see *O.P.P.S.A.*, *supra* note 99 s. 30, and *Draft* U.C.C., *supra* note 172 §§ 9-322, 325 and 333, in the absence of a system of priorities or default rules in the *F.A. Act*. Federal tax liens under the *Tax Liens Act*, I.R.C. § 6323(a) (1966) rank after prior perfected securities. See Lawrence, Henning & Freyermuth, *supra* note 176 at 237 *et seq.*, § 13.02. Often wages rank higher. In France, aircraft hypothecs rank higher than fiscal claims. See Cabrillac & Mouly, *supra* note 182 at 705, para. 875; Ph.R. Wood, *ibid.* at 288 *et seq.*, 20-23 *et seq.* and, for the law governing the priority of liens in domestic laws generally, at 291 *et seq.*, paras. 20-33 *et seq.* (*lex patriae* or *lex fori*).

lective) in national bankruptcy and insolvency acts.[313] If it also corresponds to the privilege of rights of repossession is doubtful, because such ancillary rights are contrary to the *ordre public* of many countries and, therfore, do not appear to be covered by the recognition system.[314]

Still, cases not covered by the *Geneva Convention*, particularly direct sales or construction contracts with the manufacturer[315] and non-privileged interests have to be solved by applying such rules, which determine the rank according to national schemes of distribution.[316] They include the first-to-register principle (*prior tempore, potior jure*[317]), ranking the claims in proportion to the value of each of them, and the possibility for buyers or lessees without knowledge of perfection to acquire rights free of a security interest (*bona fide* purchaser doctrine, *possession vaut titre*).[318] Art. IV (2) of the *Geneva Convention* replaces the golden first-to-file rule, stipulating the opposite rule of rank according to inverse time sequence. "It was inevitable that the *Geneva Convention* should attempt to eliminate as many of the locally established priorities as possible."[319]

D. The Necessity of a Central Registry

The *Geneva Convention* does not give a solution for encumbrances not recorded in line with the national registry. In the absence of a central asset-register in federal States with provincial autonomy in matters of private law it is necessary to determine the relevant law of the province or territory, which decides upon the validity of the charge. This certainly presupposes that a federal State has the constitutional competencies to oblige its federated entities to recognise validly constituted foreign rights in an imported aircraft

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[313] See *Bankruptcy and Insolvency Act 1992*, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2, ss. 81 and 136 [hereinafter *Bankruptcy and Insolvency Act*]; Ph.R. Wood, *ibid.* at 167 *et seq.*, paras. 12-4 *et seq.*, at 173, para. 12-18 for U.S. purchase money security interests and at 268, para. 19-21 for the effect of recognition; Schilling, *supra* note 164 at 148 *et seq.* In France, the privilege of the wages in the collective proceeding cannot not be ascertained without doubt, since there is jurisprudence *pro* and *contra*. See Cabrillac & Mouly, *supra* note 182 at 713 *et seq.*, paras. 892 *et seq.* note 35 and accompanying text.

[314] See Polak, *supra* note 209 at 81 *et seq.*; Kadletz, *supra* note 114 at 146.

[315] See above, *Chapter Three* A.

[316] See Cuming, *supra* note 41 at 366; Bayitch, *supra* note 9, (1959) 14 U. Miami L. R. 424, at 442; *id.*, *supra* note 288 at 82.

[317] See Justinianus I, *Codex*, *supra* note 103 C 8, 17 (18), 3 (4).

[318] See art. 2279 C. civ.; arts. 2945 *et seq.* C.C.Q.; *O.P.P.S.A*, *supra* note 99 s. 5, *Bankruptcy and Insolvency Act*, *supra* note 313 s. 75 and *Draft* U.C.C., *supra* note 172 § 9-301, 317. For England, France, Germany, the Netherlands, Japan and the U.C.C. good faith rules, see Ph.R. Wood, *supra* note 51 at 171 *et seq.*, para. 12-15 and at 173, para. 12-18.

[319] See Bayitch, *supra* note 288 at 53.

according to the *Geneva Convention*. Where this is not clear, as in Canada, provinces retain the power to enact legislation governing the recognition. Two Canadian provinces (Nova Scotia and Prince Edward Island) have adopted, though not proclaimed, *Aircraft Security Interest Acts* and have chosen the location of the owner of the aircraft at the time of creation of the interest as the connecting factor for the validity – again an affinity to the maxim *mobilia personam sequuntur*, individual or corporate.[320] Similarly, in the case of an exported aircraft the relevant territory/province should be determined according to the place of recordation in an asset-register[321] or exceptionally, where such does not exist, the principal place of business of the aircraft operator[322], the disputable nationality criteria being of no avail.

The nuances between those solutions and the aforesaid nexus to the debtor location, notably the fact that owner, debtor or operator, may often be distinct persons (*e. g.* in the case of suretyship or demise charter) should not be left out of consideration. Hence, in cases where the conditional seller or financial lessee can be registered, this law of registration might be decisive.[323] For practical purposes, it may be said, federated States or territories at least have to establish provincial central registers to facilitate international trade in aircraft. These will exist in most cases.

E. An Outdated and Incomplete, but Practicable Solution

1. The Tradition - Nationality and Recognition of Rights in Aircraft

Since the legal effects of the recordation,[324] due to Art. I (1) (i), emanate from the law of nationality registration, the determination of the legal effect "perfection"[325] of an interest underlies the same law. Should, however, the registration have constituent effect on the security according to the law of registration[326] then it is reasonable that the recog-

[320] See *Aircraft Security Interest Act*, *supra* note 253 s. 5 (1); Castel, *supra* note 61 at 481, para. 335; *supra* note 268 and accompanying text.
[321] See Stoll, *supra* note 167 para. 341; Riese, *supra* note 193 at 279 note 16, whose example United States has become obsolete after the recordation under the *F.A.Act*, *supra* note 247.
[322] See Stoll, *ibid.* at para. 341.
[323] For the United States and the Netherlands, see Ph.R. Wood, *supra* note 51 at 209, para. 15-11.
[324] See *Geneva Convention*, *supra* note 13 art. II (2).
[325] See above, *Chapter Three* VI. A. 3.
[326] This would be a condition or a result of the security interest obtaining priority over the rights of a lien creditor with respect to the collateral. See *Draft* U.C.C., *supra* note 172 § 9-307 (c). This effect serves as an automatic regulator of priorities in seizure and execution (see art. 2941 C.C.Q.), in contrast to most Com-

nition of the security be contingent upon the valid attachment of the security in step with the law of the public asset register, which can stand apart from the law of the nationality register.[327] This case has been discussed at length during the preparation of the *Geneva Convention*, but not been contemplated *de lege lata* by the nationality nexus.[328] At first hand justified with the declaratory function of recordation in the system of real rights of many States, the need for a compromise, the traditional mission of nation-States and its stability, reliability and simplicity,[329] this solution is widely accepted as the impressive number of signatories to the *Geneva Convention* demonstrates.[330]

Yet, apart from the fact that the connecting factor nationality is rather oriented towards the declaratory recordation as it is typical in Common law, it does not appear to equate with present law approaches to conflicts of laws in aircraft trade.[331]

The obsolescence of the conventional recognition concept has to be adduced in the same breath, since it intimately links to the antecedent. Its fundamental logic has rather political than legal value, often leads to confusion when efficient legal solutions have to be found and should not play a role in modern conflicts of laws doctrine.[332] This

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mon law countries, in which separate priority rules regulate competing interests. See Goode, *supra* note 172 c. 4 at 78 *et seq.* and the priority rules of *O.P.P.S.A.*, *supra* note 99 s. 30; Riese, *supra* note 193 at 280 note 17, refers to the suggestions made by the delegates of the International Chamber of Commerce and Australia, several of whose provinces and territories (notably Tasmania and Northern Territories) have enacted Chattel Securities legislation which makes a security absolutely void where parties fail to register, *e.g.*, a chattel mortgage as a bill of sale, E.I. Sykes & S. Walker, *The Law of Securities*, 5th ed. (Sydney: The Law Book Company, 1993) at 532, 534 *et seq.* and 635. This rule traces back to s. 8 of the *Bills of Sale Act, 1882*, *supra* note 179. See Goode, *supra* note 172 at 37 note 37. Another example is the Netherlands. See Diederiks-Verschoor, *supra* note 179 at 178. Those European countries that, due their concept of absolute effect of a real right (such as Germany and Greece:"*Abstraktionsprinzip*", *supra* note 235) conceivably could favour the same approach do not know such a thing as a "chattel mortgage" for mobile equipment. The developed substitutes (*e.g. Sicherungsübereignung*) generally do not require publication (but see the different European regimes, particularly as regards the conditional sale, in Stoll, *supra* note 167 at paras. 260 *et seq.* with abundant references). However, the fact that German law implementing the Geneva Convention, as in domestic real property law, attributes constituent effect to recordation (§§ 5, 15 and 16 *LuftfzRG*, *supra* note 242) demonstrates that the argument in favour of the *lex patriae* is doubtful.

[327] See *supra* note 308 and accompanying text.

[328] See de Visscher, *supra* note 178 at 313 *et seq.*

[329] See Kadletz, *supra* note 114 at 145.

[330] For a list of the parties, see Treaty Affairs Staff, Office of the Legal Adviser, Department of State, *Treaties in Force - A List of Treaties and Other International Agreements of the United States in Force on January 1, 1996* (Washington: Department of State, 1996). Since 1996 the number of parties has rapidly increased from 62 to 77 by 30 June 1998. See Attachment to State Letter LE 3/2 – 98/57 of 17 July 1998 [unpublished].

[331] See above, *Chapter Two* II. E.

[332] Originally, "recognition" was a term of art based on the principles territoriality and comity in public international law. The conventional acceptance of vested rights is, yet, an exception in private international law and, technically, is a concession to Anglo-American treaty practice. See Bayitch *supra* note 288 at 74 *et seq.* and, for the theory of vested rights as expounded by Dicey and Beale generally, Mayer, *supra* note 166 at 82 *et seq.*, paras. 110 *et seq.* and Castel, *supra* note 61 at 18 *et seq.*, para. 13. The recognition concept has pri-

is the crucial critique of the *Geneva Convention* from a present-day perspective, which will be more comprehensible when set in opposition to uniform law methodology.[333] It would be more appropriate to favour a connection to the asset register or, even more in line with modern conflicts of laws doctrine, alternatively or exclusively the law of the principal place of business of the obligor. This consequence has now been drawn by *Draft Convention and AEP*, which, taking a conceptually entirely different stance, refer to the location of the obligor in a Contracting State and alternatively to the national registration of aircraft as merely a factor indicating a close link to a Contracting State in Art. 4 (a, b) and Art. III (1), respectively. This aspect and the fact that the time of creation of real right cannot be determined in the absence of a binding recordation[334] militate against the nationality as it is used in the *Geneva Convention*. It is not understandable and has not been explained by the SRC[335] why the further alternative referring to the asset register[336] has been excluded as a close connection in Art. III (1) *Draft AEP*, which again monopolises the State of nationality.[337]

2. Legal and Judicial Pledges

Legal or judicial pledges, common above all as "hypothecs" in Civil law jurisdictions, have not been subjected to recognition, because it appeared at the time that a minimum solution is attainable only for conventional hypothecs and because of the impossibility of international recognition of the judgements on which they are based.[338]

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marily been used in Treaties of Friendship, Commerce and Navigation (FCN-Treaties). See A. Makarov, *Quellen des Internationalen Privatrechts*, vol. 2 – *Texte der Staatsverträge*, 2nd ed. (Berlin: Walter de Gruyter; Tübingen: J.C.B. Mohr [Paul Siebeck], 1960) at 346 *et seq.*; Kegel, *supra* note 64 at 427. For recognition in International Corporations Law see, for example, the German jurisprudence BGH, 21 March 1986 – V ZR 10/85, (1986) 97 BGHZ 269 at 271 *et seq.* [Germany]; H. Wiedemann, *Gesellschaftsrecht I*, 1980 at 778 *et seq.* with references; H. Bungert, *supra* note das Recht ausländischer Kapitalgesellschaften at 41 *et seq.*; C.T. Ebenroth, Legislative comment Nach Art. 10, in *Münchener Kommentar zum BGB*, vol. 7 - *Einführungsgesetz/Internationales Privatrecht*, 2nd ed. (München: C.H. Beck, 1990) Nach Art. 10 paras. 131 *et seq.* with references; J.A. Krupski, "Zur Spaltung des auf ausländische Kapitalgesellschaften mit Sitz in Spanien anzuwendenden Rechts" (1997) 96 ZVglRWiss 406 at 407 and 431; *contra* B. Grossfeld, "IPR/Internationales Gesellschaftsrecht" in H. Amann & G. Beitzke, eds., *Einführungsgesetz zum Bürgerlichen Gesetzbuch, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, 13th ed. (Berlin: Sellier - de Gruyter, 1993) at para. 173 ff with references for the recognition doctrine. It should note be used anymore.

[333] See below, *Chapter Four* II. A.

[334] See Riese, *supra* note 193 at 280; Diedericks-Verschoor, *supra* note 179 at 189.

[335] See *SRC*, *supra* note 46.

[336] See *Draft Convention*, *supra* note 15 art. 4 (b).

[337] See E. Lagerberg, *Conflicts of Laws in Private International Air Law* (Montreal: McGill University Institute of Air and Space Law, 1991) at 89.

[338] See Riese, *supra* note 193 at 285 *et seq.*; Diedericks-Verschoor, *supra* note 179 at 189.

However, it should be noted that judicial and legal pledges today are more open to being recognised in foreign courts than in 1948, because registration has become mandatory in most jurisdictions and done away with occult hypothecs.[339] The extent to which the *Geneva Convention* is excessively restrictive in this respect[340] also depends on the importance of interests of local creditors as a consequence of acts of execution or legal/judicial securities (*e.g.* liens or the *hypothèque conservatoire*). Their concerns in many instances justify an application of the *lex rei sitæ*[341] in extension of the (concealed) priorities of Art. IV of the *Geneva Convention*[342], so that even a standardisation of conflicts rules in favour of the *lex libri siti* or some other factor for determination of the home country does not appear imposing under all circumstances.[343] This view is ascertained by the flexibility, which the Convention demonstrates when it refers to other applied laws for recognition purposes[344] or when it determines the applicable law.[345]

3. Competing Creditors, *Bona Fide* Purchasers and Faith of the Record

The constituent or declaratory function of recordation as described above[346] is of relevance in cases of violation of the protective recordation provisions[347] by the State according to the law of which a security would have to be created under the *Geneva Convention*. A financing institution might conclude (as a part of a sales contract or not) a security agreement and respect the formal requirements for conferment of the interest, including recordation, in step with the national law of the aircraft. The encumbrancer still cannot bring its security interest to bear against another junior creditor of the aircraft, who files his earlier created valid, although not recorded and hence not perfected, interest in such a contingency that this is, according to the domestic law of the State of removal, attributed priority over the first-to-file financiers charge.[348] The introduction of a provision on faith

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[339] For France, see Cabrillac & Mouly, *supra* note 182 at 651, para. 806 and Khairallah, *supra* note 167 at 36, para. 39 (*Décret n° 55-22 du 4 janvier 1955, portant réforme de la publicité foncière*, J.O., 7 January 1955, 346); see art. 2725 C.C.Q.

[340] See Riese, *supra* note 193 at 286.

[341] See Kegel, *supra* note 64 at 578 *et seq.*

[342] See Diedericks-Verschoor, *supra* note 179 at 179 *et seq.* and 182 *et seq.*

[343] See Stoll, *supra* note 167 at para. 343 with further references.

[344] See *Geneva Convention*, *supra* note 13 art. IV (1).

[345] See *ibid.*, art. IV (4) (b) : *lex fori*, art. VII (1), Art. X (3) : *lex loci contractus*; See Diedericks-Verschoor, *supra* note 179 at 188.

[346] See above, *Chapter Three* VI. A. 3.

[347] See *Geneva Convention*, *supra* note 13 Art. I (1) (ii), (2) second sentence.

[348] See Wilberforce, *supra* note 279 at 428.

of the record as it exists in national laws[349] would have avoided this, certainly very theoretic contingency, but could not be agreed upon and would not have been remedied by a nexus to the *lex libri siti*, for domestic law remains untouched in this respect.

The protection of a *bona fide* purchaser of property in the aircraft against a valid, non-recorded security abroad is, although not clearly dealt with in the *Geneva Convention*, achieved by following the same mechanism as above, *i.e.* through transfer of the record from the State of purchase to the new State of nationality. On top of that, the property is secured by the fact that under the *Geneva Convention*, there is no right in aircraft which would affect property.[350]

These cases are far less problematic than still anticipated in literature. They are unrealistic from a practical point of view because every financier will file his security as a matter of perfection under his own law or the *lex patriae*, in order to secure the protection provided by Arts. I and IX, and even file for recordation in prospective countries of operation of the aircraft right away. For American and Canadian lenders, especially under the U.C.C. and *Personal Property Securities Acts*, perfection is indispensable to warrant out-of-State/Province reperfection.

Now, Art. 28 (1) and (3)(b.) *Draft Convention* invigorate the priority of registered interests over competing attaching creditors, approximating the two distinct recordation concepts through uniform domestic law.

4. ASSIGNMENT

Assignment and receivables financing has not been a subject of the harmonisation efforts undertaken in Geneva. These sophisticated securitisation methods, although recognised at the time, were not on the agenda of problems for which priority action had to be taken and cannot be characterised as a shortcoming of the *Geneva Convention*.

[349] See, *e.g.*, § 16 *LuftfzRG*, *supra* note 242.
[350] See Wilberforce, *supra* note 279 at 429; see Diedericks-Verschoor, *supra* note 179 at 178 *et seq.*

II. Uniform Law – The Centreboard of Geneva and Unidroit

Setting in at the significant but intermediary solution cornered by the *Geneva Convention*,[351] the further disadvantages of its recognition concept merit to be explained from the present-day prospect of substantive uniformity.

Apart from the fact that recognition as such does not appear to be a legal concept[352] it has been held that a unification of conflict rules within this notion is *a priori* incapable of providing a solution due to the substantive incompatibility of cross-border securities with the territorially strictly confined and precisely defined domestic creditor system.[353] Unification of substantive law appears to be the only remedy. First of all, it is a very modern tool of avoiding conflict of law problems as compared to a recognition convention based on comity and reciprocity[354] or unified conflicts rules, which at least avoid coincidences depending on the competence of the court seized (forum shopping).[355] It does not try to counter the symptoms of the legal dysfunction generated by incompatible domestic laws but ideally overrules that hindrance by a smooth universal standard. Although uniformity at first sight avoids the domination of the specific legal systems of some countries the subsequent application of uniform law by national courts often times is not undeviating, due to juridical routine or inconsistent domestic concepts.[356] This aspect appears, however, of minor importance once an international standard is achieved.

National pride and political obstacles often do not permit the unconditional ratification and implementation of uniform international documents, even if they merely apply to international cases. Given the absence of a particularly burdensome international obligation to transform existing domestic secured transactions law in the *Geneva Convention*, only the delicate situation after World War II, particularly the practical dominance of Anglo-American commercial law in aircraft financing, can explain the initial reticence of States with an extremely individual or without any system of aircraft charges and corresponding priority and privilege rules to accept the compromise achieved in Geneva. This critical stance has to be set off against reports on initial benevolence of European States

[351] See *Chapter Four* before I., above.
[352] See *Chapter Four* I. E. 1, above.
[353] See Kreuzer, *supra* note 139 at 631 *et seq.* See the text preceding note 183, above.
[354] See *Chapter Four* I. E. 1. note 332, above.
[355] See *Chapter Two* II. A. 3, above.
[356] See, with numerous references, Zweigert & Kötz, *supra* note 163 23 *et seq.* at 25 *et seq.*; R. David, *supra* note 14 at 23 *et seq.*, paras. 55 *et seq.* (Obstacles to Unification) and at 247 *et seq.*, paras. 94 *et seq.* (Interpretation and Application of Uniform Laws).

given the urgent need for an international regulation.[357] Anyhow, an all-embracing unification of substantive law was unthinkable under these circumstances. Only the gradual increase in the cost of financing technically improved aircraft and, hence, the need to provide financing institutions with secured credit and adequate enforcement protection has caused the economic impact sufficient to make States ratify the treaty. This history explains the outward *lacunae* of the compromise found in Geneva on one side[358] and the approximation of movable charges (A.) and unification in the execution procedure (B.) brought about by that Convention on the other.

A. An Undercurrent for Domestic Harmonisation

The *Geneva Convention* prompted States to introduce an aircraft mortgage in domestic substantive law as far as equivalent legal figures that could be recognised abroad did not exist at the time, because otherwise the risk that a national security be not recognised abroad would have been considerable. For instance, although German jurisprudence had in the meantime developed the functionally equivalent figure of *Sicherungübereignung* the *Bundestag*, the German parliament, introduced a registrable mortgage in the law of aircraft registration as the only aircraft charge, provoked by the fact that this fiduciary transfer of title is not susceptible of being recognised abroad in the absence of public notice.[359] In respect of all other securities the Convention unilaterally favours the application of mechanisms developed in U.S. aircraft securitisation. Still, it seems that not every developed jurisdiction has a form of non-possessory chattel mortgage, even of aircraft. In Quebec, the provisions of Section VII[360] *Special Corporate Powers Act 1914*[361], have allowed joint stock companies to create non-possessory securities by way of hypothecation in line

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[357] See Matte, *supra* note 113, at 546 note 4 and accompanying text, para. 196.
[358] See *Chapter Four* I. E., just above.
[359] For the prohibition of the *pacte commissoire* in France, see Stoll, *supra* note 167 at para. 287 *in fine* and Khairallah, *supra* note 167 at 94 *et seq.*, paras. 114 and 115.
[360] See arts. 27, 32 *et seq.*, notably art. 27:

> Toute personne morale à fonds social qui n'exploite pas d'entreprise, constituée en personne morale en vertu d'une loi ou par lettres patentes et ayant les pouvoirs d'emprunter et d'hypothéquer, et toute personne morale ainsi constituée hors du Québec si sa charte ou la loi qui la régit lui accorde ces pouvoirs, peut se prévaloir des dispositions du Code civil du Québec et consentir une hypothèque, même ouverte, sur une universalité de biens, meubles ou immeubles, présents ou à venir, corporels ou incorporels.

See also *ibid.*, s. VIII, art. 34.
[361] See *Loi sur les Pouvoirs Spéciaux des Corporations* 4 Geo. V c. 51, R.S.Q. c. P-16, R.S.Q.1964 s. 275 a. 21 as amended by R.S.Q. 1992 c. 57.

with the civil code, and notably through trust indenture providing for issues of debentures.[362]

B. A Pocket Museum of Uniform Law

To a minor extent the Convention contains substantive uniform law. According to Art. XI (2) in conjunction with Arts. II, III, IV and IX of the *Geneva Convention*, states have to standardise their domestic law as to the rules of recordation and according to Arts VII and VIII respect certain substantive standards in execution procedure. These substantive rules are an improvement with comparison to the *Arrest Convention*, which does not contain any procedural rules. The only means of realisation recognised under the *Geneva Convention* is the judicial sale in accordance with the *lex fori executionis*, affirming the general rule that the law of the court governs procedural issues.[363] This anticipates, as it was assumed at the time, the most frequent cross-border litigation situation of an Anglo-American financier suing a debtor in another Central European, Scandinavian or Romance country that only knows such public sale directed by court assistance or intervention but not the private sale, which is widely used in Common law jurisdictions and possible for the Germanic fiduciary transfer.[364] Arts. VII and VIII contain certain substantive requirements for execution under court supervision, notably detailed minimum standards for notification and publication of a sale. Subsidiarily, the proceedings of the sale of an aircraft in execution before a court are to be determined by the law of the Contracting State where the sale takes place.[365] The *Geneva Convention* has introduced the elaborate mechanisms used in Civil law jurisdictions to ensure the protection of debtors and higher-ranking creditors in execution.[366] Notably, the compulsory grace periods ("freeze"), common above all in Civil law jurisdictions and destined to avoid damage to the debtor arising from premature enforcement, have been criticised as resulting in delay and costs, and as

[362] See Bunker, *supra* note 87 at 144 note 56; see Ph.R. Wood, *supra* note 51 at 211 *et seq.*, para. 15-16.
[363] See *A.P.P.S.A.*, *supra* note 100 s. 8 (1)(a) according to which procedural issues involved in the enforcement against a collateral are governed by law of the jurisdiction in which the collateral is located at time of exercise of rights, while substantive issues (c) underly the proper law of the contract.
[364] See Ph.R. Wood, *supra* note 51 at 142, para. 10-8, at 143, para. 10-10, at 245, para. 18-6 and the presentation of arts. VII, IX and X at 271 *et seq.*, paras. 19-27 *et seq.*; Bayitch, *supra* note 316 at 442 *et seq.* For the alternatives see P. Bassenge, Legislative comment on § 930 B.G.B. in O. Palandt, *Bürgerliches Gesetzbuch*, 55th ed. (München: C.H. Beck, 1996) at 1142, § 930 para. 19: private sale, sale of the pledge in accordance with § 1233 B.G.B. or forced execution according to the ZPO, *supra* note 91.
[365] See *Geneva Convention*, *supra* note 13 art. VII (1).
[366] See Bayitch, *supra* note 288 at 84 *et seq.* for art. VII (4).

unsuitable for aircraft.[367] The *Draft Convention*, apart from recognising the private sale[368] does not contain extensive grace periods save for "reasonable prior notice"[369] and those prescribed by the *lex fori* of the court ordering the execution.[370] This optional "Nonjudicial Remedies Rule"[371] mirrors more than before the approach used in Common law, much more favourable to party autonomy. Given the reign of party autonomy in the *Draft Convention* the parties to a secured transaction should be free to ensure protection against early enforcement by stipulating grace periods in their agreement. The possibility of a post-mortgage agreement to private sale would however depend on the *lex fori* of the court.[372] Unfortunately, neither the *Draft Convention* nor the *Draft AEP* contains rules on execution procedure or on entering execution on registry of aircraft nationality.

Against this background, the mere fact that the *Geneva Convention* contains uniform enforcement rules can truly be described as far-reaching[373] and as a major achievement for the time the treaty was concluded.

Art. XI of the *Geneva Convention* does not of itself prevent a transfer to the nationality register or record of a non-contracting state, such as the UK or Japan. If a creditor executes his sale privately or without complying with minimum requirements of the *Geneva Convention*, the purchaser can register in a non-contracting state if he is otherwise eligible for registration. Yet, a non-contracting state cannot register because of Art. 18 of the *Chicago Convention*.

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[367] See Ph.R. Wood, *supra* note 51 at 145, para. 10-15; *id.*, at 271, para. 19-26.
[368] See *Draft Convention*, *supra* note 15 art. 9 (1).
[369] *Ibid.* art. 9 (3), but see *Draft AEP*, *supra* note 16, art. IX (3): "[t]en or more working day[s]".
[370] See *ibid.*, art. 13 (1).
[371] See *ibid.*, arts. 13 (2) and Y (2); Wool, *supra* note 39 at 3, para. 3 (a).
[372] See Ph.R. Wood, *supra* note 51 at 144, para. 10-13.
[373] See Bayitch, *supra* note 288 at 83

Chapter Five

The Principal Features of the *Draft Convention* as applied through the *Draft AEP*

Compared to the purpose of the *Geneva Convention* to ensure a minimum protection of creditor rights given their financial implications, the *Draft Convention* focuses primarily on economic and commercial objectives, which are attainable under an international legal standard. From a doctrinal point of view such uniformisation is, as has been mentioned, more desirable, although the legal significance, save for conceptual aspects, perfectness and technical superiority, might be minor compared to the transposition regime applied today in many modern conflict of law systems.

I. The Establishment of an International Registry

Chapters IV and V of the *Draft Convention* and Chapter III of the *Draft AEP* set out the basic organisational framework and principles for an International Registry, the manner in which registrations are to be accomplished and the system, which would be implemented to maintain those registrations and allow searches against the information maintained within the particular mobile equipment registry. The registry not only allows for a universal notification and perfection system, do away with national vetoes based on lack of such red tape, but has the advantage of providing one-stop-shopping and universal access to data relevant to aircraft securities. The system envisaged once again reflects the registration tradition of North-American registration systems. The Registry for the type of mobile equipment in question, however, will be established by the Protocol applying to it, as in the case of aircraft the *AEP*.[374] Within IATA, work on a prototype of international registry system and documentation is under way.[375] The Protocol has to identify an Intergovernmental Regulator, which will establish the registry and designate the operator of the registry.[376] The only adequate Intergovernmental Regulator in Aviation is ICAO. Hence it is this international organisation, which will monitor the performance of the international registry.

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[374] See *Draft Convention*, *supra* note 15 art. 16 (2).
[375] See Wool, *supra* note 188.
[376] See *Draft Convention*, *supra* note 15 art. 17 (1, 3).

A. Binary System versus Unitary System

For purposes of the aircraft registry it is, however, unclear whether the Intergovernmental Regulator ICAO will of itself operate the registry as the international Registry Authority (unitary system),[377] which corresponds to the current practice with few privatised aircraft registries, or whether it should contract out the right to register to an independent operator, a "newly created independent special purpose affiliate of the International Air Transport Association", which would then be accountable to the Contracting States united in ICAO (binary system).[378] Such was a joint AWG/IATA Recommendation, which purported to accelerate and facilitate the development of a functioning registry system, wholly owned by the carriers collaborating in IATA and not by governments ("corporatisation").[379] It was, yet, never question to delegate regulatory competencies to the Registry[380] or to attempt a privatisation, which would reduce welfare losses by dismantling a registry monopoly.[381]

The entity would be organised to have no greater duty (fiduciary or otherwise) to IATA members than to any other person or entity in the performance of its function as the entity responsible for the operation of the central registry.[382] The solution of transferring functional competence for operational activities to a private entity is clearly advantageous from the perspectives of efficiency, synergy and economies of scale. It is this issue of disciplining overly bureaucratic administrations with regard to investment and personnel management, which has initiated the modern trend towards privatisation. Besides the efficiency issue, main objectives are cost-consciousness implemented through the application of user charges instead of the public budget, the attraction of a sufficient number of

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[377] See *Draft AEP*, *supra* note 16 art. XVI, Alternative A, (1).

[378] See *ibid.* art. XVI, Alternative B, (2).

[379] See Wool, *supra* note 188; for the terminology, see F. Schubert, "The Corporatization of Air Traffic Control – Drifting between Private and Public Law" (1997) 22:2 Ann. Air & Sp. L. 223 at 229 *et seq.* It is completely unclear what the concrete legal form that entity would have. The idea of joint venture suggests some form of multinational corporation.

[380] For such an example (the Irish aviation authority), see Schubert, *ibid.* at 238 note 60. For three models of privatisation, see E.S. Adams, S.H. Nickles, S. Sande & W.R. Shiefelbein, "A Revised Filing System – Recommendations and Innovations" (1995) 79 Minn. L. R. 877 III. A. 3. at 914 *et seq.*:

> "Under these models, secured parties could file directly with a private vendor, who would then forward the information to the appropriate [intergovernmental] record keeping office... ; secured party could file with ... [an intergovernmental] filing office, which would then forward information to the private vendor, or secured parties could file with a private database established to supplant the... [intergovernmental] filing office..., without further official oversight by [an intergovernmental] filing office."

[381] See also Adams, Nickels, Sande & Shiefelbein, *ibid.* at 925 *et seq.*

[382] See *Draft AEP*, *supra* note 16 art. XVIII, Alternative B, para. 3 (b).

well-qualified private agents instead of registry staff, without constraints of public service and with customer-orientation through the application of commercial practices.[383]

These reactions to commercial needs and the argument that it would be "against natural justice" for operators to regulate themselves compete with the public interest in a reliable recordation system, illustrated notably by the question of faith on the record, and, therefore, the necessity to maintain as much government control as possible. Consequently, regulatory competence and supervisory functions of the government, *e.g.*, by applying penalties, have existed and continue to exist even in the most liberal systems.[384]

B. Advocation of an Affiliation with ICAO

ICAO has expressed strong reservations against a binary system and legal experts are sceptical about the pretension that the "independent special purpose affiliate" of IATA (the Registry Operating Entity) is vested with authority to operate an international registry.[385] Also, it has been pointed out, that potential Contracting States might not endorse a system, which confers operation powers to a private organisation not established formally as an International Organisation – a conclusion in complete contrast with the intentions of AWG/IATA in view of a commercially oriented registration system. IATA is a worldwide non-governmental organisation of scheduled airlines, a trade association whose purpose is to promote air transport and to provide means of collaboration among air transport enterprises,[386] but traditionally without direct relation to the manufacturers of financing institutions. From the point of view of aircraft securitisation it is an association of individual debtors. The intense collaboration with the AWG, industry and within the APG with a view to achieve overall support from airlines and governments towards a rapid completion of the Draft instruments is a new step in the development of IATA. This give-and-take is certainly important from a financing perspective. It is, however, not decisive on a special purpose entity under the aegis of IATA operating the International Registry, against which "[n]o court may take orders or give judgements or ruling[s]".[387]

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[383] For the example Air Traffic Control, see Schubert, *supra* note 379 at 239 *et seq.*
[384] See Schubert, *ibid.* at 239 *et seq.*
[385] Letter from the director of ICAO Legal Bureau to the chairman of the Aircraft Protocol Group (11 July 1997), cited by Djojonegoro, *supra* note 14 at 58 note 47; Wool, *supra*.
[386] Act of Incorporation – An Act to Incorporate the International Air Transport Association, Statutes of Canada 1945 c. 51 (Assented to 18th December, 1945 section A as amended by Statutes of Canada, 1974-75-76, c. 111 (Assented to 27th February 1975) s. 3 (a) and (b). Articles of Association, art. III (1) and (2).
[387] *Draft Convention*, *supra* note 15 art. 43.

Yet, IATA is subject to the jurisdiction of Canada and can only be exempted from the Convention requirements when the relevant *AEP* modifies the *Draft Convention*. Art. 16 (2) and Art. 43, like the former Art. 17 (4), do not explicitly allow a modification by the Protocol. While the Convention explicitly delegates specific supplementary matters or allows the regulation of other relevant matters to the *Draft AEP* ("the Protocol may provide for", "may contain" or "may prescribe"), it is unclear to what extent the Convention may be substantially modified by the *AEP*. Apparently, Art. U (1)(b), which subjects the Convention framework "to the terms of that Protocol" is being interpreted – systematically questionable – to allow for substantive framework modifications although the Convention articles in question do not specify their mandatory or optional character with relation to the Protocols.[388] Ergo, from a purely legal point of view, IATA for itself does not seem to bear authority for the operation of the International Registry.

Materially, it is not absolutely indispensable to entirely privatise the Registry Operator. Potential disadvantages of a corporatised registration infrastructure notably result from the realistic risk of a significantly elevated price of services compared to a public registration system,[389] which *in extremis* can lead to so-called "rent-seeking behaviour" on the part of the registry, *i.e.* "the expenditure of resources to search out existing monopoly rights or to lobby for the creation of new monopoly rights" instead of efficiency gains.[390] These risks can certainly be counterbalanced by a sound exercise of regulatory functions regarding user charges by ICAO: A useful parallel may be drawn to the fee structure applied to private Air Traffic Control (ATC).[391] However, an effective international system, which meets the needs of creditors, third parties or any other person would, from the outset, have to rely on paperless electronic filing and on computer retrieval technology as is the case in the modern North-American personal property registration systems, *e.g.*, Al-

[388] But see Cuming, *supra* note 41 at 387 note 2: "It was noted by the Aircraft Protocol Group that [article 17 (3, 4)] is an example of the type of provision that was envisaged as being subject to [article U (b)] and that may, therefore, find itself modified by the terms of a protocol." See also the footnote to *Draft Convention*, *supra* note 15 art. 17.
[389] See R.J. Wood, "The Evolution of the Personal Property Registry - Centralization, Computerization, Privatization and Beyond" (1996) 35 Alberta L. Rev. 45 at 55.
[390] R.J. Wood, *ibid.* at 56 note 43 and accompanying text.
[391] See, e.g., W. Stoffel, "The Privatization of Air Traffic Control in Germany" (1996) 21:2 Ann. Air & Sp. L. 279 at 292.

berta, British-Columbia or Iowa.[392] Such a system "is privatising itself" when the majority of searches are conducted through electronic communication systems.[393] Also, it might be argued that International Organisations that combine conflicting interests of States are less bureaucratic as compared to national administrations, which are not conventionally bound or accountable to their partner States. A positive example for an efficient multinational speciality organisation appears to be the European Organisation for the Safety of Air Navigation (Eurocontrol).[394] A modern public registry administered by ICAO or a speciality organisation subordinated to ICAO in close co-operation with the business partners may therefore well suit business needs, if it implements effective regulation, corporate culture, adequate modes of financing including safeguards providing for financial autonomy,[395] the user-charge concept, synergies and economies of scale.

In the end, the problematic question of funding is likely to be decisive on the form of the operator. Since the system will work on a cost-recovery basis, not on a profit system,[396] particularly the initial set-up costs will have to be advanced. The version of the *Draft AEP* used in this study indeed schedules for a simple system of user fees, but not for annual fees[397] and stipulates that the fees to be paid by users of the system according to the initial fee schedule will be used to recover the costs of "designing and implementing the International Registry system."[398] These fees will supposedly included the insurance premiums to be paid in order to protect against eventual strict liabilities.[399] However, it is unclear which institution or country will advance the funds until the cost recovery can be initiated, because neither ICAO nor IATA appear to have the financial means of introducing and establishing the Registry for the first time. The aircraft industry and financiers may under these circumstances prefer the association of its business partners as the organisation upon which resources for the registry establishment are entrusted. A compromise might be found by establishing a binary system with an intergovernmental op-

[392] See Alberta *Chattel Securities Registries Act*, S.A. 1983, c. C-7.1; B.C.P.P.S.A., S.B.C. c. 36, §1 (1989 as amended by S.B.C. c. 11, § 1 (e) 1990; Iowa Code § 554.9402 (1994); Adams, Nickles, Sande & Shiefelbein, *supra* note 380 at 892 *et seq.*
[393] See R.J. Wood, *supra* note 389 at 57
[394] Although he questions the future of the Maastricht Upper Area Control Centre (at 240 note 68), Schubert, *supra* note 379 at 240 *et seq.*, apparently favours a multinational entity in a public glove in its conclusion.
[395] Such a safeguard is, e.g.. the insurance requirement imposed by *Draft Convention*, *supra* note 15 Art. 17 (5)(e).
[396] See *Draft AEP*, *supra* note art. XIX (3) in conjunction with *Draft Convention*, *ibid.* art. 17 (4).
[397] See *Draft AEP*, *ibid.* in contrast to the former art. XXIV (1) *Draft AEP*.
[398] See *ibid.*

erator composed of representatives delegated by Contracting States who exercise control of management, without a contractual framework under International Law of Treaties but in line with the Registry Regulations[400] while independent from the Regulator. In this respect it should be borne in mind that IATA could only formally be said to have an entirely private character. *De facto* many airlines today are still government controlled and their representation in IATA has quasi-governmental character. On this basis, an International Registry could be established by creating a private law entity charged with public functions.

C. The Operational Characteristics of the Registry

The centralised functions of the aircraft registry will be operated and administered on twenty-four hour basis[401] and accessible from registration facilities in respective territories of the Contracting States.[402] These States would possibly continue to record the respective consensual interest or the non-consensual real right created under national law in their local facilities, which would be networked to the central registry for purposes of forwarding information.[403] Other states with less developed registration facilities might prefer to simply forward their filing information to the central database.[404] The exact features will certainly have to be more elaborated in the *Draft Convention*. It is likely that details will be left to the contracting states, so that the system would vary from country to country.

The medium of transmission of the information required for registration will be specified in the Registry Regulations.[405] More far-reaching is the increasing volume of registrations and demands for more current search information caused by the centralisation. Considerable efficiency gains would be the result if staff did not have to manually input the data.[406] This fact is very likely to lead to sophisticated computer system, elec-

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[399] See *Draft Convention*, *supra* note 15 art. 17 (5) (e); below, *Chapter Five* I. D.
[400] See *Draft Convention*, *ibid.* art. 17 (4).
[401] See *Draft AEP*, *supra* note 16 art. XIX (4).
[402] See *Draft Convention*, *supra* note 15 art. 17 (2).
[403] See *August 1997 Draft*, *supra* note 48 art. XXI (3); Adams, Nickles, Sande & Shiefelbein, *supra* note 380 III A. 1, 2. b. Figures 1 and 2 at 911 *et seq.*
[404] See Adams, Nickles, Sande & Shiefelbein, *ibid.*. For the function of an international register as a domestic register, see *Chapter Five* III., below, notes 434, 435 and accompanying text.
[405] See *Draft Convention*, *supra* note 15 art. 19, *Draft AEP*, *ibid.*, art. XIX (5) and the prospective *Registry Regulations.*
[406] See R.J. Wood, *supra* note 389 at 52 *et seq.*

tronic document management techniques, remote registration and access.[407] Also, the Regulations may specify to what extent and under what conditions telephone searches are possible and if a lawyer or employee of a financial institution would be capable of registering, amending or discharging a registration and search the computer database from his or her office desktop or laptop via secure, private communications networks (so-called "Value Added Network"). Search criterion for aircraft would be the "manufacturer's serial number, as supplemented to ensure uniqueness"[408] or the name of the declaring Contracting State for non-consensual interests.[409]

The International Registration, implemented by a first-to-file principle after the model of North-American securities legislation, has a considerable significance for the determination of priorities, as far as consensual interests are concerned. However, neither the *Draft Convention*[410] nor the *Draft AEP*[411] specify if a mere notice filing through financing statements is required as this is recommendable from the facilitation perspective that underlies the whole convention framework or if the traditional filing of the security agreement shall prevail, notably with regard to conditional sale and lease agreements.[412] This question will apparently be addressed by the Registry Regulations.

D. Liability and Immunities of the International Registry, Draft Art. 27

The Registry is internally accountable to and subject to rectification by the Intergovernmental Regulator,[413] whereas it is externally in principle immune from legal process under government responsibility principles.[414] Art. 16 (2) endows the International Registry with international legal personality subject to international law and able to maintain claims. Primary purpose of such endowment in an international instrument is, though, not to allow proceedings in court but to make sure that the Registry be internationally recog-

[407] Art. 20 (1, 6) of the *Draft Convention*, *supra* note 15, expressly refers to data bases as means of maintenance.
[408] See *ibid.* art. 20 (6) in conjunction with *Draft AEP*, *supra* note 16 art. XIX (1) and the prospective Registry Regulations.
[409] See *Draft Convention*, *ibid.* art. 24 second sentence in conjunction with Art. 40.
[410] See *ibid.* arts. 18 *et seq.*
[411] See *Draft AEP*, *supra* note 16 art. XIX; *August 1997 Draft*, *supra* note 48 art. XXIII (1).
[412] For Canada, see Denomme, *supra* note 241 at 307 *et seq.*, part IV and at 334 *et seq.*, § 45; for the U.S., see U.C.C. § 9-402 Comment 2; Lawrence, Henning & Freyermuth, *supra* note 176 at 92 *et seq.*, § 5.02 [B].
[413] See *ibid.*, art. 17 (6).
[414] See *ibid.*, art. 27 (3).

nised as a legal personality, which a non-Contracting State cannot ignore.[415] This legal personality is the basis for granting external immunity, which can only be lifted in the case of an express immunity waiver.[416] The characteristic of jurisdictional immunity gives the international Registry a status similar to ICAO as a specialised agency of the United Nations[417] and thereby approaches ICAO more than IATA as an association of Canadian law.

A traditional justification for granting immunity has been the objective of guaranteeing financial independence. An important, if not the core feature for the creation of a financially autonomous international registration system[418] is the requirement of insurance against liabilities imposed on the Registrar, if need be subject to precision given by the Intergovernmental Regulator.[419]

The *Draft Convention* includes a novel type of liability for errors and omissions in the operation and administration of the Registry. This liability is set forth in Art. 27 as strict liability, because the provision merely requires an error or omission. Thereby the drafters attribute the correct functioning of international registration more importance than domestic registration and ATC, which in most countries are liable only in negligence or gross negligence. This regime can only be justified with its direct relation to immunity, because the strict liability obviates the need to argue on negligence in court. On the other hand such debts make it indispensable to create a registry with a stable financial background and autonomy, including an adequate insurance policy. This strict liability does not exclude that legal actions be brought to determine "the compensatory damages for loss incurred" in the jurisdiction where the Registrar or the operators of the registration facilities are situated.[420] Also, liability issues with regard to the prospective electronic features of the registration system appear to be covered by this provision, even if more straightforwardness in this respect appears desirable.[421]

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[415] The theoretical background of international legal personality cannot be explained in all depth. See M. Singer, "Jurisdictional Immunity of International Organisations - Human Rights and Functional Necessity Concerns" (1996) 36 Va. J. Int'l L. 53 at 67 *et seq.*
[416] See *Draft Convention, supra* note 15 Art. 27 (3, 4).
[417] For the jurisdictional immunity of the U.N., see Singer at 84 *et seq.*
[418] See *Chapter Five* I. B. note 395 and accompanying text, above.
[419] See, *Draft Convention, supra* note 15 Art. 17 (5) (e).
[420] See *ibid.* Art 27 (1) second sentence and (2).
[421] For Canada, see the *P.P.S.A.* liability provisions.

If such liability indeed absolutely requires to accord immunity to the Register cannot be affirmed with absolute certainty. "As long as municipal court monetary judgements against an international organisation are limited to order the organisation to pay the debts and damages incurred within the jurisdiction, there can be no serious argument that its financial independence is threatened."[422] Also, the impartiality argument in favour of immunity is inconclusive in financial matters, since immunity might result in inattentiveness, generating debts, damages and *de facto* partiality.[423] Other issues could be raised, although they are less crucial for purposes of an international Registry, which, by reason of its very technical nature, seems less sensitive to political influence.[424] At long last only a strict application of the functional necessity doctrine[425] will produce an acceptable outcome.

II. The Creation of an International Interest

The second basis for a uniform law of secured transactions is the creation of an international interest in Art. 8, which would be independent form various categories of similar national interests but coexist with them.[426] An international interest does not need recognition, because under a worldwide secured transactions law, or at least law binding among a large number of Contracting States, there exists no different legal system which would have to recognise that interest. However, since there will be States who have ratified the *Geneva Convention*, but not the Mobile Equipment Convention, there will be a need use the recognition framework for aircraft registered in a nationality register and recorded in the domestic and the international asset register.

All that is necessary for the constitution of an international interest is an agreement in writing that identifies the secured obligations, contains a description under which the equipment can be identified, typically by serial number,[427] and relates to an object in respect of which the debtor has power to enter into the agreement.[428] As the uniform law

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[422] M. Singer, "Jurisdictional Immunity of International Organisations – Human Rights and Functional Necessity Concerns" (1996) 36 Va. J. Int'l L. 53, at 130 *et seq.*, particularly at 131.
[423] See Singer, *ibid.* at 132.
[424] For the "common interest of member States" argument and the special protection argument, see Singer, *ibid.* at 127 *et seq.* and 133.
[425] See Singer, *ibid.* at 65 *et seq.* The functional necessity doctrine "entitles an international organisation to precisely the jurisdictional immunity that it strictly needs to enable it to pursue its purposes without undue interference". *Ibid.*, at 138.
[426] See Stanford, *supra* note 138; Cuming, *supra* note 41 at 369.
[427] See *Chapter Five* I. C., above.
[428] See *Draft Convention*, *supra* note 15, art. 8; Goode, *supra* note 41 at 8.

generally, this provision will be of particular benefit to countries hostile to non-possessory securities or secured transactions generally, or in a state of development in their treatment of security interests.[429] The current wording of *Draft* Art. 8 (b, c) and Art. XIX (1) is confined to a single equipment object and thereby appears to exclude the floating charge, if not the fleet mortgage from recognition as an international interest, an impression that would be worthwhile clarifying in interpretative materials.

III. The Substantive Uniform Law

The *Draft Convention* and Aircraft Protocol apply to any transfer of proprietary rights in an aircraft, *i.e.* lease and sub-leases (excluding wet leases), conditional sales, secured transactions and transfers of aircraft equipment. As regards the transfer of the secured object by the debtor *Draft AEP* Art. V goes a step beyond ss. 39, 48 *O.P.P.S.A.*, because the secured party need not re-file to maintain perfection regardless of whether or not it had prior notice of the transfer, similar to U.C.C. §§ 9-306 (2) and 9-402 (7).[430] Instead the transferee to the debtor's interest is entitled to register: If the rights of a debtor may be alienated and purchased in good faith, regardless of a possible breach of covenant to the contrary, the secured party – a third party to be protected - cannot be expected to safeguard the reliability of the notice registry.[431]

The instruments also cover the assignment of international interests and associated rights. The Draft rules apply without regard to national registration and therefore eliminate problems that may arise due the application of domestic conflict of law rules to initial sale situations under the *Geneva Convention*.[432] The international recordation supersedes the time-consuming and expensive requirements in the national laws of different countries relating to perfection of property interests in aircraft equipment. However, the registration system established is of itself a perfection system. As under the *Geneva Convention*, the original ownership of the manufacturer as such, established in accordance with the *lex patriae*, is, as it appears, not an international proprietary interest to be recorded ac-

[429] See *Chapter Three*, VI. A. 3. and IV. B., above; Goode, *ibid.*
[430] See Denomme, *supra* note 241 at 382, § 48.1 and 390, § 48-9.
[431] For the different reasoning in the *O.P.P.S.A.*, *supra* note 99, see Denomme, *ibid.* at 382, §48.1.
[432] See *Chapter Four* I. A., above.

cording to the *Draft Convention*, but will be universally respected without saying.[433] The registration as to nationality for purposes of the *Chicago Convention* also remains untouched.

In the case of those States, which do not have a central nation-wide asset register established one could argue that the international record takes the function of such a national asset-register of the country where the aircraft is registered as to nationality under the *Geneva Convention*. This view certainly presupposes the continued validity of the *Geneva Convention* under an optional international recordation under the *Draft Convention/AEP*. This viewpoint is moreover advocated by the fact that the *Draft AEP* Art. III (2) declares the applicability of the *AEP* to domestic transactions, regardless of *Draft Convention* Art. V, which authorises a Contracting State to declare the inapplicability of the recordation rules to such commerce.[434] From this provision and the optional nature of recordation[435] it can be inferred that the "international" record is reputed to constitute a domestic central record, which otherwise would coexist with the international register.

A. The Basic Rules Applicable to Corporeal Securities

1. SUBSTANTIVE DEFAULT REMEDIES

Rights of enforcement and remedies in the case of default which normally underlie the proper law of contract selected by the parties have been uniformly defined in the Art. 9 *et seq.* of the *Draft Convention* and applied to aircraft in Art. IX *Draft AEP*. Art. 12 of the *Draft Convention* stipulates that the parties to the security agreement may define the type of default which gives right to the exercise of the remedies specified in the relevant preceding and following articles. In the absence of such an agreement or a definition of default Art. 12 (2) clarifies that default at least has to be substantial in character. The concept of substantiality or fundamental breach is known to most legal systems as a condition for the resolution of the contract as opposed to mere damages.[436] In financing transac-

[433] See Riese, *supra* note 193 at 283.
[434] See Cuming, *supra* note 41 at 369.
[435] See *Draft Convention*, *supra* note 15 art. 18 ("may").
[436] See, e.g., *CISG*, *supra* note 130 art. 25, 325 (1) sent. 2, 326 (1) sent. 3, (2) B.G.B., art. 1455 Codice civ. and art. 1184 C. civ. as developed by the French jurisprudence, art. 1604 (2) C.C.Q., and for Common law G.H. Treitel, *The Law of Contract*, 8th ed. (London : Sweet & Maxwell, 1991) at 689 *et seq.*; *Bentsen & Taylor, Sons & Co.*, [1893] 2 Q.B. 274 (C.A.); *Cochman* v. *Hill*, [1947] K.B. 554, [1947] All E.R. 103, (C.A.); *Cehave NV* v. *Bremer Handelsgesellschaft mbH (The Hansa Nord)*, [1976] Q.B. 44, [1975] 3 W.L.R. 447, [1975] 3 All E.R. 739, (C.A.).

tions, this concept applies above all to the termination of the title reservation agreement or the lease agreement.[437] Moreover, it serves as a minimum protection for the debtor of the main obligation from the harsh consequences of a default that, foreseeably, does not refer to any substantial ingredient of his security relationship – *deminimis non curat praetor*.[438] Although this solution does not exclude litigation as it might have been avoided by an exclusive characterisation of the types of default in the *Draft Convention/AEP*, it follows the legal framework found in Anglo-American jurisdictions. Here, the notion of default is not defined, leaving it to the autonomy of the parties themselves and to the Common law. Failure to make payment when due will be the most frequent case, but parties can only safeguard adequate protection against foreseeable risks by carefully drafting their security agreement.[439] In the remaining cases the line between substantial and minor default is likely to be drawn in accordance with distinction between condition and warranty in Common law of contracts.[440]

The remedies available upon the occurrence of default in the exercise of the secured obligation are treated separately for the chargee[441] and conditional seller or lessor,[442] because the latter, although functionally serving the same purpose as security agreements, are not treated as security agreement in Civil law.[443] The additional aircraft-specific remedies of Art. IX *Draft AEP*, however, cannot make such a distinction because they apply to any type of non-possessory interest. The remedies available in all these cases of secured transactions basically reflect non-judicial self-help remedies available under Common law, thus affirming the commercial interest of the biggest air-faring nations and the essential devices to safeguard creditor interests. The secured party may, however, in any circumstance, notably what in Common law is known as "breach of the peace", apply for a "court order authorising or directing" any of the remedies as it is known in Civil law.[444]

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[437] See *Draft Convention*, *supra* note 15 art. 11.
[438] See Justinianus I, *Digesta*, *supra* note 222 *D.* 4, 1, 4.
[439] See art. 1594 C.C.Q.; Lawrence, Henning & Freyermuth, *supra* note 176 at 329 *et seq.*, § 17.01 with a list of the most common events of default at 330.
[440] The court, therefore, has to respect the principle of proportionality, good/bad faith of a party, certainty for the parties and the axiom *pacta sunt servanda*.
[441] See *Draft Convention*, *supra* note 15 art. 9.
[442] See *ibid.*, art. 11.
[443] See *Chapter Three* VI. A. 1., above.
[444] *Ibid.* art. 9 (1) (d), Art. 11 sentence 2. Liability after breach of the peace during repossession, which will often constitute a tort, is not addressed in the *Draft Convention*, but will be assessed after the *lex loci delicti*, often times identical to the location of the collateral. Jurisdiction will lie with the court of the same State, see *e.g.* art. 5 no. 3 *Brussels/Lugano Conventions*.

The chargee may take repossession,[445] deregister the aircraft equipment from the relevant nationality register and export it[446], simply proceed to a sale or the granting of a lease of the equipment following seizure[447] or, additionally, take it in satisfaction of all or part of the obligation secured subject to a right given to the debtor to redeem it before disposition by the secured party.[448] The exercise of "any one or more" of these remedies allows, therefore, by agreement or court order for the classical foreclosure, whereby the mortgagee/chargee forces the sale of the mortgagor's property in satisfaction of a debt in order to acquire absolute ownership title[449] or for what in U.S. terminology is called "strict foreclosure", *i. e.* the termination of the rights of the mortgagor in and the absolute transfer of title to property to the mortgagee on default in payment, without any sale of property.[450] In addition, the chargee may collect or receive income arising from the management or redeployment of the secured aircraft equipment. These sums shall then be applied towards discharge of the amount of the secured obligation.[451]

The right to redemption in *Draft* Art. 10 (3) before disposition of collateral corresponds to the solution retained by the foreclosure proceedings under U.C.C. §§ 9-504, 9-506[452] and is designed to prevent the sale from producing a sales price well below the fair market value of the equipment. This economic consideration also requires that the secured party can sell by auction or by any other method that is commercially reasonable, and it can sell for cash or on credit.[453] Should a private sale through commercial channels, however, produce higher realisation on the collateral for the benefit of all parties, then a

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[445] See *ibid.* art. 9 (1) (a); U.C.C. § 9-503 (1994). For the necessity of this means of enforcement, see Ph.R. Wood, *supra* note 51 at 246 *et seq.*, para. 18-8.
[446] See *Draft AEP*, *supra* note 16 art. IX (1) (a) and (b) .
[447] Without necessarily taking repossession. See *Draft Convention*, *supra* note 15 art. 9 (1) (b).
[448] See *ibid.* art. 10.
[449] See *Black*, *supra* note 27 *s.v.* "foreclosure"; see Ph.R. Wood, *supra* note 51 at 18-2, 242 *et seq.* In classical Common law, foreclosure is a proceeding available only in equity and rather rare. See Ph.R. Wood, *ibid.* at 138 *et seq.*, para. 10-3.
[450] See art. 10 (1); see U.C.C. § 9-505 (2) (1994); see Lawrence, Henning & Freyermuth, *supra* note 176 at 369 *et seq.*, § 18.04.
[451] See *Draft Convention*, *supra* note 15 art. 9 (4).
[452] See Lawrence, Henning & Freyermuth, *supra* note 176 at 347, § 18.02 and 371, § 18.05.
[453] See *Draft Convention*, *supra* note 15 art. 9 (2) sentence 2 and U.C.C. § 9-504 (3) which includes reasonable prior notice as developed by the American jurisprudence under the U.C.C. See, *e.g.*, *Consul Leasing Partners, Ltd.* v. *Consolidated Airways, Inc.*, 742 F.2d 1095, 39 U.C.C. Rep. Serv. 9 (7th Cir. 1983), *Ford & Vlahos* v. *ITT Commercial Finance Corp.*, 885 P.2d 877, 25 U.C.C. Rep. Serv. 2d 630 (Cal. 1994) and some versions of U.C.C. § 9-504. See Lawrence, Henning & Freyermuth, *ibid.* at 348, § 18.02 [A] [1] and, for further case law on notice of sale, at 355 *et seq.*, § 18.02 [B]. Reasonableness also applies to the time of sale.

public auction is commercially unreasonable.[454] *Draft* Art. 10 (4) corresponds to U.C.C. § 9-504 (4), which encourages participation in foreclosure sales and thus accrues to the benefit of the debtor, provides that the purchaser acts in good faith.

Art. 13 affirms the general rule that procedural aspects of the *lex loci executionis* have to be respected in the absence of a uniform procedural law, notably in cases where leave of the court has to be granted for the exercise of remedies if the Contracting State of exercise has made a corresponding reservation.[455] However even these procedural rules will be partially set aside by the Nonjudicial Remedies Rule or the setting of a timetable under the Expedited Relief Rule. An express reference or delimitation to that treaty would further an easy application of the Convention with regard to the substantive procedure rules of Arts. VII and VIII of the *Geneva Convention*.[456]

These measures constitute a considerable improvement for creditors who are provided greater assurance than can be guaranteed by often lengthy and costly court rulings. Notably the self-help deregistration safeguards the creditor against political risks frequently involved in cross-border-financing: Foreign aviation authorities might confiscate the collateral, refuse to issue the necessary aircraft export licenses or authorisations or take other actions which prevents or delays the realisation of the creditor's rights to repossession.[457]

The drafters of the *Convention/AEP* meritoriously have not underestimated the frictions, which a system of self-help remedies may cause with classical Civil law systems whose *ordre public* traditionally does not allow repossession of secured assets without judicial guidance or court rulings.[458] To accommodate the interests of Civil law jurisdictions an optional provision has been inserted according to which such public interference through leave of the court may be required by the Contracting State where the remedy is to be exercised provided that State has declared a reservation under Art. Y (2) of the *Draft*

[454] See U.C.C. § 9-504 (1994), Comment 1, supporting *United States* v. *Willis*, 593 F.2d 247, 25 U.C.C. Rep. Serv. 1178 (6th Cir. 1979).
[455] See *Draft Convention*, *supra* note 15 art. 13 (2) in conjunction with *Draft AEP*, *supra* note 16 art. Y.
[456] See *Draft Convention*, *ibid.*, art. XXII (3); above, *Chapter Four* II. B.
[457] See W.W. Eyer, "The Sale, Leasing and Financing of Aircraft" (1979) 45 J. Air. L. & Com. 217 at 245; Djojonegoro, *supra* note 14 at 60. For the necessity of facilitated deregistration from the foreign register upon default, see Ph.R. Wood, *supra* note 51 at 246 *et seq.*, para. 18-8.

Convention.[459] The seller under a retention of title agreement and the lessor has interest in terminating their agreement with the debtor in order to recover possession of the asset. For this purpose they have a special interest in deregistration and export, but not necessarily in selling or leasing, the collection of income and proceeds and the application of proceeds. These remedies may be particular to the realisation of a security in line with the concrete stipulations of the security agreement in question under the applicable law and, for purposes of uniformity, had to be explicitly elaborated in the *Draft*. For securities based on ownership rights as the conditional sale or the lease, these rights are the essence of ownership. Art. 11, hence does not mention such rights based on the reasoning that, "except under select Common law systems, the ownership of an asset necessarily implies the right to sell or lease the asset, and that specifying these rights might have the undesirable consequence of limiting or qualifying broad ownership rights".[460]

The remedies may be excluded or varied by the transaction parties as between themselves, without affecting, however, the rights and interests of third parties. Moreover, additional remedies available under applicable national laws, including such agreed upon by the parties may be exercised, if they are consistent with the *Convention* and the *AEP*.[461] The usual remedies of foreclosure sale or lease may therefore, be complemented by remedies under national laws, e. g. the conveyance of title to the insurer in exchange for a settlement cheque in the case of complete wreckage of the collateral.[462]

2. INTERIM REMEDIES

A standard provision in international assignment of jurisdiction with respect to interim juridical remedies of Art. 15 (1) is Art. 42 (2) *Draft Convention*.[463] When the obligee adduces *prima facie* evidence of default by the obligor, speedy judicial relief prior to a full trial on the merits of the case in those States enumerated in Art. 42 (1) can be granted regardless of the jurisdiction where the ultimate liability under the main cause of action

[458] Notably, the taking of possession is in contradiction to the French *ordre public* rule that prohibits the *pacte commissoire*, i.e. the stipulation that authorises the creditor to seize the charged chattel in the case of failure of payment. See Cabrillac & Mouly, *supra* note 182 at 437, para. 524 and, for the case of hypothecs, at note 23.
[459] See *Draft Convention*, *supra* note 15 art. 13 (2); see Djojonegoro, *supra* note 14 at 59.
[460] See Wool, *supra* note 39 at 6, explanatory note 8.
[461] See *Draft Convention*, *supra* note 15 art. 14.
[462] See Lawrence, Henning & Freyermuth, *supra* note 176 at 346 note 28, § 18.02.
[463] See *Chapter Two* II., above.

would be examined (General Expedited Relief Rule[464]). It has been explained previously that a similar regulation can be found within the frameworks of the *Brussels/Lugano Conventions* and in national law. Such provisos presuppose by all means that a foundation of speedy relief exists in domestic law, which retains reference or subsidiary quality.

a. Common Law and Civil Law Models

Such national prototypes are, *e.g.*, the *Mareva* Injunction in English Common law[465] or the conservatory arrest (*saisie conservatoire*) in Quebec, France, the Netherlands or Germany. Both can be obtained to prevent the aircraft leaving the jurisdiction prior to judgement.[466] Jurisdiction to determine the case on the merits in this case has to be determined independently according to the general principles of the *Brussels/Lugano Convention*, but may also guide, as in domestic law,[467] the jurisdiction for expedited relief.

Canadian courts have followed English practice and have granted interlocutory injunctions, generally on *ex parte* basis in order to restrain a defendant resident within the jurisdiction from taking his or her assets out of the jurisdiction pending judgement.[468] Injunctions can be granted with extraterritorial effect where there is a real and substantial risk that any judgement obtained by plaintiff would be frustrated by the transfer or concealment of the assets outside the jurisdiction.[469] However, the mere presence of the defendant's assets within the territorial jurisdiction of the court is not sufficient to establish personal jurisdiction for *Mareva* purposes.[470]

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[464] See Wool, *supra* note 39 at 3, para. 3(b).

[465] See *Mareva Compania Naviera S.A.* v. *Int. Bulk Carriers S.A.*, [1975] 2 Lloyd's L.R. 509 (C.A.); today, see *Supreme Court Act 1981* (U.K.), 1981, c. 54, s. 36(3).

[466] See *Allen* v. *Jambo Holdings*, [1980] 1 W.L.R. 1252 (C.A.); Ph.R. Wood, *supra* note 51 at 256, para. 18-32; art. 733 *et seq.* C.C.P., specifically art. 2748 C.C.Q. in conjunction with art. 734 (5) C.C.P. See J. Tremblay, Ch. Belleau, Ch. Dubreuil, D. Ferland & P. Tessier, *Collection de Droit (1997-1998)*, vol. 2 (*Preuve et Procédure*) (Cowansville, Qc.: Yvon Blais, 1997) 139 *et seq.* at 142; *Banque Royale du Canada* v. *Ardoisières de Bedford Ltée.*, [1995] J.E. 1346 (S.C.C.); arts. 67 *et seq.* of *Loi n° 91-650 du 9 juillet 1991, portant réforme des procédures civiles d'exécution*, J.O., 14 July 1991, 9228 as applied through arts. 210 *et seq.* of *Décret n° 92-755 du 31 juillet 1992, instituant de nouvelles règles relatives aux procédures civiles d'exécution pour l'application de la loi n° 91-650 du 9 juillet 1991, portant réforme des procédures civiles d'exécution*, J.O., 5 August 1992, 10530.

[467] See, *e.g.*, § 919 1. Alt. in conjunction with § 943 ZPO, *supra* note 91.

[468] See, *e.g.*, *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 101; *Judicature Act*, R.S.A. 1980 c. J-1, s. 13(2); Castel, *supra* note 61 at 151 note 122, para 86.

[469] See Castel, *ibid.* at 151, para. 86.

[470] For such exporbitant jurisdiction in several Continental European states, see above, *Chapter Two* II. C.; P. Michell, "The *Mareva* Injunction in Aid of Foreign Proceedings" (1996) 34 Osgoode Hall L. J. 741 at 749 *et seq.* The question, whether Canadian court may order injunction in aid of a foreign proceeding, pending judgement abroad and its eventual enforement here, is still unsettled. See Michell, *ibid.* at 780 *et seq.*

Many of the United States allow prejudgement attachments for clear money demands to preserve the property before commencement of ordinary proceedings. This may confer jurisdiction on the merits if there are other minimum contacts.[471]

b. The Innovation - Interim Relief for Aircraft Financiers

Seeing that until today there is no equivalent to the Brussels *International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships*[472] in aviation law and that the *Arrest Convention* presently has only relative importance the interim judicial remedies proposed by Art. 15 symbolise a major advancement in the direction of an acceptable international investor protection and are intended to supersede the Arrest Convention.[473] Compared to the European jurisdiction conventions,[474] the *Draft Convention/AEP* are particularly innovative as remedies included in Art. 15 (1) *Draft Conv.* and Art. IX (1) *Draft AEP* will be available to the obligee regardless of the existence or the exact features of such remedies in the domestic law of the court dealing with the interim measure. Art. X of the *Draft AEP* provides the essential characteristic of expedited relief under the *Draft Convention/AEP*: The provision guarantees a binding timetable according to which a court shall render a final ruling, not subject to appeal, with respect to the remedy claimed by the secured party (Specific Expedited Relief Rule).[475] Comparably strict guidelines rarely exist in domestic rules on civil procedure, neither with respect to process duration nor as regards the absence of an appealable decision or ruling.[476] However, they result in a considerable facilitation of asset-based financing and leasing. The time frame currently envisaged requires that such speedy relief be accorded within thirty days after the lodging of the appropriate instrument initiating the court proceedings, but would be subject to further consideration by governments.

Analogous to the Nonjudicial Remedies Rule, the International Insolvency Rule and the Contractual Choice-of-Law Rule, also Expedited Relief would only apply pro-

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[471] See *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); Richman & Reynolds, *supra* note 71 at 128 and 130, §§ 44[b][2] and 44 [b][4] with further references in note 16; see generally Weintraub, *supra* note 70 at 199 *et seq.*, §§ 4.25 *et seq.*

[472] See *International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships*, 10 May 1952, 439 U.N.T.S. 193; Ph.R. Wood, *supra* note 51 at 252 *et seq.*, paras.18-20 *et seq.*

[473] See *Draft AEP*, *supra* note 16 art. XXIII.

[474] See *Chapter Two* II. before A., above.

[475] See Wool, *supra* note 39 at 3, para. 3 (b).

[476] See, *e.g.* the German provisions on arrest in §§ 916 *et seq.* ZPO, *supra* note 91.

vided that the State in which judicial relief is sought has not issued a reservation[477] and that the parties have not excluded speedy proceedings in their transaction documents.[478]

3. Priority Rules and Remedies on Insolvency

Drafted after the model of Anglo-American securities legislation the priority rules follow the first-to-file principle. Only declared categories of preferred non-consensual creditors, such as material men and tax creditors, are not required to register in order to have priority over the recorded rights, provided they are not subject to registration requirements in national laws.[479]

The validity of a recorded interest against the equipment user's trustee, liquidator or syndic in bankruptcy (*redressement judiciaire*, *Konkurs*) as the very core function of preferences and priorities, was undisputed under the *Geneva Convention* and is again confirmed in Art. 29 of the *Draft Convention*.[480] Space and topical limits of this paper do not allow developing the essential characteristics of bankruptcy procedures and execution in much detail. Also, due to the complexity of this issue it is impossible to make absolute statements of universal value. It is, yet, worthwhile to mention that the *Draft Convention* merely contains uniform default remedies for enforcement (*Einzelzwangsvollstreckung, vente forcée isolée*)[481] but nothing on bankruptcy standardisation. The *Istanbul Convention*[482] and the recent *Insolvency Convention*[483] both determine international jurisdiction for a primary bankruptcy according to the centre of the debtor's main interests[484] and a second bankruptcy in any other State where the debtor has an establishment. The applicable law, as matters of procedure generally, follows the *lex fori*.[485] Art. 11 of the *Insolvency Convention* leaves the effects of insol-

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[477] See *Draft Convention*, *supra* note 15 art. Y.
[478] See *Draft Convention*, *ibid.* art. 6 in conjunction with art. 12 (1), 15 (1) ("may") and art. III (3) in conjunction with art. X (1) *Draft AEP*; *August 1997 Draft*, *supra* note 48 art. XIII (3); Wool, *supra* note 39 at 3, para. 3 (b).
[479] See *Draft Convention*, *ibid.* arts. 39 and 40. This measure is an internationally necessary improvement compared, e.g., to the O.*P.P.S.A.*, which is not applicable to liens by operation of statute or law. See Ziegel, *supra* note 100 at 70, § 4.2. For the statutory priority of possessory liens over security interests, except express stipulation to the contrary, see *Draft* U.C.C., *supra* note 172 § 9-333.
[480] See Ph.R. Wood, *supra* note 51 at 167 *et seq.*, paras. 12-4 *et seq.*; Schilling, *supra* note 164 at 148 *et seq.* for the laws of Germany, Austria, the Netherlands, France, Belgium, Luxembourg, Italy, England and the United States; see also *Insolvency Convention*, *supra* note 19 arts. 6 and 7.
[481] For the rules in national laws see Schilling, *supra* note 164 at 163 *et seq.* and 169 *et seq.*; Cabrillac & Mouly, *supra* note 182 at 727 *et seq.*, paras. 905 *et seq.*
[482] See *Istanbul Convention*, *supra* note 18.
[483] See *Insolvency Convention*, *supra* note 19.
[484] See *Istanbul Convention*, *supra* note 18 art. 4 and *Insolvency Convention*, *supra* note 19 art. 3.
[485] See Mayer, *supra* note 166 at 434 para. 668; Castel, *supra* note 61 at 559 *et seq.*, para. 426.

vency proceedings on the rights of a debtor in an aircraft to the law of the Contracting State under whose authority the register is kept. Should the *Draft Convention* enter into force which does not contain such rules the parallel rules of the domestic record would apply. The law of recordation hereafter governs the protection of a bona fide purchase.[486] Hence, again no positive substantive international standard is created.[487]

The *Draft Convention* is, as a starting point, no exception to this, but achieves a minimum protection for secured aircraft financiers, since in most cases bankruptcy takes domestic secured creditors as it finds them on the date of opening of proceedings or petition date respectively. A security interest that is enforceable under non-bankruptcy law will, subject to certain limits depending on the type of security and bankruptcy system in the respective country[488], also be respected in bankruptcy.[489] Particularly crucial is the impact of the concrete features of the common pledge (*gage général*) with rateable share among creditors (*principe de l' égalité des créanciers*) in the respective Civil law jurisdiction.[490] Disregarding the honours taken by the *Geneva Convention* rights, as far as bankruptcy proceedings in a jurisdiction bulldoze the distinction between secured and unsecured creditors in favour of a new distribution and preference system the Unidroit priorities, par-

[486] See *Draft Convention*, *supra* note 15 art. 14.

[487] For preceding aspects generally, see I.F. Fletcher, "The European Union Convention on Insolvency Proceedings – An Overview and Comment, with U.S. Interests in Mind", (1997) 23 Brook. J. Int'l. L. 25, cited after by Goode, *supra* note 165 at 51 note 14.

[488] *E.g.* stay of remedies or avoidance powers under the U.S. *Bankruptcy Act*, 11 U.S.C. § 362 and § 544 (1978). See Lawrence, Henning & Freyermuth, *supra* note 176 at 272 *et seq.*, § 16.03 and at 283 *et seq.*, § 16.04; *Bankruptcy and Insolvency Act*, *supra* note 313, ss. 91 *et seq.*, espacially s. 95; for the difficulties in Quebec see Payette, *supra* note 253 at 54 *et seq.*, paras. 165 *et seq.*

[489] See Lawrence, Henning & Freyermuth, *ibid.* at 270, § 16. 02 [C]; F. Sage & D. Chabbi, *Sûretés Réelles, Garanties Assimilables et Redressement Judiciaire* (Paris: L.G.D.J., 1996) at 154 *et seq.*, paras. 163 *et seq.* for the conditional sale (*clause de réserve de propriété*) under *Loi n° 80-335 du 12 mai 1980, relative aux effets des clauses de réserve de propriété dans les contrats de vente*, J.O., 12 May 1980, J.C.P. 1980.III.49868 and leasing (*crédit-bail*); Khairallah, *supra* note 167 at 99 *et seq.* para. 121. The main characteristics of selected European insolvency processes explains Schilling, *supra* note 164 at 144 *et seq.* For the only partially codified and rather confusing French *classement sur les biens meubles*, see Cabrillac & Mouly, *supra* note 182 at 703, paras. 872 *et seq.*: - *privilèges généraux, i.e. frais de justice, [hypothèque aérienne], privilèges du Trésor de premier rang, privilèges de droit civil* (art. 2101 C. civ.), *privilèges du Trésor de second rang*; - rank established by judicial precedent according to the quality of the security combined with their date of creation.

[490] See arts. 2644 *et seq.* C.C.Q. in conjunction with arts. 604, 613 and 615 C.C.P.; Payette, *supra* note 253 at 30, paras. 92 *et seq.*; Schilling, *ibid.* at 166 *et seq.*; Sage & Chabbi, *ibid.* at 217 *et seq.*, paras. 229 *et seq.*; Bunker, *supra* note 87 at 135 *et seq.*; Mayer, *supra* note 166 at 431, para. 665 according to whom "[l]e gage général des créanciers semble être universellement reconn[u]". The value of the notion common pledge certainly depends on the perspective of the debtor or creditor. For the debtor or trustee in bankruptcy the patrimony/estate is generally exposed to creditor satisfaction and has to be administered carefully. From this angle the concept has barely legal significance. For the secured creditor, "common pledge", taken literally, can mean distribution proportional to his claim only and no preferential treatment in insolvency. By and large,

ticularly when applied to domestic transactions[491], constitute a significant modification to the equality of all creditors. This means, too, that the *Draft Convention* would overrule the permanent jurisprudence of most courts favouring the *lex fori* in order to determine if the foreign encumbrance prevails over domestic insolvency law in conflict situations.[492] Depending on the jurisdiction in question this can affect every conceivable security, notably non-possessory rights in aircraft equipment.[493] In any event, the common pledge remains untouched.

Outside the *Draft* system of default remedies and priorities, which deals with preferred chargee only, these players in aviation finance have no reason to touch upon a standard for unsecured creditors in execution, *i. e.* the contrast between the Romance common pledge and the priority principle in German, Austrian and Anglo-American Law. Moreover, simple enforcement of security interests has not constituted a major problem in the context of aviation financing.[494] On the basis of these specific purposes of the aircraft industry and the extremely delicate and precarious character of bankruptcy law the drafters of Unidroit and the AWG had good reason to leave such issues to other fora.

Notwithstanding, the interests of aircraft financiers are substantially championed by the International Insolvency Rule, a rule of substantive uniform law elaborated in the current Art. XI *Draft AEP*. The provision, according to which the equipment user must both cure all defaults under the transaction document and agree to perform all its future obligations or return the aircraft equipment to the financier/lessor subject to a short time period, is modelled after § 1110 of the U.S. *Bankruptcy Code*. This Section is reputed the single largest saver of funds in aviation finance and leads to a considerable increase in value of the airline stock.[495] For example, Air Canada has a comparative disadvantage set against U.S. carriers in the absence of an equivalent proviso in Canadian insolvency law.

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the notion of common pledge is more confusing than helpful in explaining the comparative status of securities in specific execution and in bankruptcy. It is, hence, not used in Common law jurisdictions.

[491] See *Draft Convention*, *supra* note 15 art. V.

[492] See *Chapter Three* VI. B., above.

[493] See Payette, *supra* note 253 at 58, para. 178, at 64 para. 196 and, for the *Bankruptcy and Insolvency Act*, *supra* note 313, at 70, para. 211.1. For the collocation in the French *redressement judiciaire*, see Cabrillac & Mouly, *supra* note 182 at 712 *et seq.*, paras. 891 *et seq.*: - *superprivilège des salariés*; - *privilège de la procédure collective* after art. 40 *Loi n° 85-98 du 25 janvier 1985, relative au redressement et la liquidation judiciaires des entreprises*, J.O. 26 January 1985, 1097 modified by art. 29 *Loi n° 94-475 du 10 juin 1994, relative à la prévention et au traitement des difficultés des entreprises*, J.O., 11 June 1994, 8440; - *hypothèque aérienne*; - *privileges de droit commun*.

[494] See Cuming, *supra* note 41 at 367 note 3.

[495] See Saunders & Walter, *supra* note 23 at 16 *et seq.*, para. 4.4; K. Hoff-Patrinos, "Aviation Finance Revisited - The 1994 Amendments to Section 1110 of the Bankruptcy Code" (1995) 69 Am. Bankr. L. J. 167.

However, the implementation of the *AEP* in this respect will heavily depend on policy decisions taken by governments. The *Convention/AEP* will not cover special rules such as fraudulent or preferential transfer rules applicable in bankruptcy.[496] Since the *AEP* is extremely cost oriented. The registration under the *Draft Convention* allows for pre-filing of prospective security interest in parallel to North-American securities legislation. This rule favours the creditor, who can establish his priority position before committing itself to any financing and finalise his transaction free from concerns that the obligor might be dealing with another lender at the same time.[497] The registration has a merely search-initiating function. Hence, actual knowledge of a prior taken security interest that has not been filed is entirely irrelevant.[498] The first party to file wins the "pure race".[499] Since physical inspection of an aircraft is impracticable and an airline cannot be regarded as a "buyer in the ordinary course of business" the corresponding Common law rules regulating the *bona fide* purchase of a perfected security interest cannot apply.[500] Art. 28 (2) clarifies that the priority protection for filing, in line with the rule *nemo dat quod non habet*[501], defeats the classical rules of Common and Civil law on good and bad faith based on actual knowledge, possession and value given.[502] It is, although common in France and Italy, far from being universally recognised that recordation of rights in chattels in a public register excludes the good faith in the ownership of such right.[503] Here, again, a Common law concept, the protection of the secured party overcomes a basic Civil law principle, the protection of the *bona fide* purchaser.

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[496] See Wool, *supra* note 39 at 2, para. 2 (d) and at 6, explanatory note 11.
[497] See Lawrence, Henning & Freyermuth, *supra* note 176 at 195, § 10.01; U.C.C. § 9-312 Comment 5.
[498] See *Draft Convention*, *supra* note 15 art. 28 (3)(b).
[499] See Lawrence, Henning & Freyermuth, *supra* note 176 at 195, § 10.01; U.C.C. § 9-307 (1); *State of Alaska, Div. of Agr.* v. *Fowler*, 611 P.2d 58, 29 U.C.C. Rep. Serv. 696 (Alaska, 1980); Schilling, *supra* note 164 at 190 *et seq.*
[500] See *Draft Convention*, *supra* note 15 art. 28 (3) (a); *O.P.P.S.A.*, *supra* note 99 ss. 28 (6, 7); U.C.C. § 1-201 (9); Schilling, *ibid.* at 190 *et seq.*
[501] See J. Faure on Justinianus I, *Institutiones* (A.D. 528-534) 1, 5, *pr.* no. 1 and, for the rule *nemo plus juris ad alium transferre potest quam ipse habet*, Justinianus I, *Digesta*, *supra* note 222 *D.* 50, 17, 54.
[502] See Schilling, *ibid.* at 176 *et seq.*, for the Common law exceptions to the rule "*nemo dat quod non habet*" at 188 *et seq.*, for art. 2279 C. civ. at 180 *et seq.* and for German law at 183 *et seq.*
[503] *E.g.* for Italy (art. 1156 Codice civ.), see Schilling, *ibid.* at 186 and 196, and for Switzerland, *ibid.* at 195. In countries, which traditionally do not have any form of asset-recordation the protection of the "honest participants in legal transactions" clearly prevails. See, *e.g.*, § 16 *LuftfzRG*, *supra* note 242.

B. The Specific Rules Applicable Incorporeal Securities - Assignment

1. Assignment as a Means of Security

Arts. 30 *et seq.* of the *Draft Convention* deal extensively with the voluntary assignment of recorded international interests, absolute or by way of security. The sophisticated means of securing credit through intangible property (choses in action) is common in all modern economies since the late 19th century.[504] Yet, it has not been dealt with for purposes of the *Geneva Convention*, obviously because it has not played a major role as a pre-eminent security in aircraft financing after 1945. In present-day financial transactions it is only "one of several forms which the production factor equity can take"[505] and is indispensable to every system of secured transactions, including the *Draft Convention*. Agreements over aircraft financing transactions often contain an assignment of the lessor's payment claims against the lessee in the event of default by the lessor. In this case the secured party can receive payments directly from the lessee, dislodging the lessor's interest in the equipment.

2. A Reform of Private International and Substantive Assignment Law

The *Draft Convention* provides for substantive assignment law that displaces the conflict of law rules in Art. 12 of the *Rome Convention* and in conventional Common law. These rules will be discussed under point a. By and large, the *Draft Convention* lays down standards that are not much innovation compared to the substantive Common and Civil law assignment that is currently practised. Such national law is the focus of point b. The customary core axiom underlying assignment law is the principle of debtor protection.[506]

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[504] For the unequal developments in Continental Civil and English Common law see H. Kötz, "Rights of Third Parties. Third Party Beneficiaries and Assignment", in A. T. von Mehren, ed., *International Encyclopedia of Comparative Law*, vol. 7 - *Contracts in General*, c. 13 (Tübingen : J.C.B. Mohr [Paul Siebeck]; Dordrecht, Boston, Lancaster : Martinus Nijhoff, 1992) at 54 *et seq.*, ss. 61 *et seq.*; Zweigert & Kötz, *supra* note 163 at 439 *et seq.*

[505] Zweigert & Kötz, *ibid.* at 439 [translation by the author of this work].

[506] See Zweigert & Kötz, *ibid.* at 443; Kötz, *supra* note 504 at 85, para. 93 *et seq.*; Ph.R. Wood, *supra* note 51 at 173 *et seq.*, para. 12-19.

a. Comparative Principles of Conflict Solution in Transnational Assignment Law

aa. *A Civilian Line – The Rome Convention*

It has been said earlier in this study that the *lex rei sitæ* is unhelpful in relation to intangible claims and security interests.[507] It is widely accepted that the law that governs the relations between the assigned debtor (*debitor cessus*) and the assignor should apply to singular assignments. This law is notably relevant for the determination of the creditor in order to protect the debtor from disadvantages that may arise as a consequence of the application of a law foreign to his contractual relations. It is also of considerable interest to the parties to the assignment, who are normally prepared to see the law of the assigned claim employed and expect that the assignment remains enforceable against the debtor under the same law.[508] Accordingly, *Rome Convention* Art. 12 (2) generally stipulates that the proper law of the debtor chose governs the "assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged".[509] The conflict of law rules of the Common law of England have been "civilianised" since the *Rome Convention* was enacted in 1991, although they did not differ much from what is now framed as an article. Art. 12 (2) is in keeping with the Common law conflict of law rule that the assignability, the necessity of notifying the debtor, the question whether the equitable assignee is required to join the assignor in a suit, and the solution of priority conflicts between competing assignments or mortgage of claims are governed by the proper law of the assigned claim.[510] The application of this law is an adequate and sufficient safeguard for purposes of debtor protection.[511]

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[507] See *Chapter Three* VIII. A., above.
[508] For German and Swiss Law, see E. Rabel, *The Conflict of Laws - A Comparative Study*, vol. 3, 2nd ed. (Ann Arbor: University of Michigan Press, 1964) at 395.
[509] See *Rome Convention*, *supra* note 129 art. 12 (2).
[510] See *Le Feuvre* v. *Sullivan* (1855), 10 Moo. P.C. 1 at 13. For the relevant precedents and for jurisprudence and doctrine, see Dicey & Morris, *supra* note 181 at 981, r. 120 and Castel, *supra* note 61 at 482 *et seq.*, para. 340; art. 3120 C.C.Q.; Ph.R. Wood, *supra* note 51 at 191, para. 13-24. As for art. 33 *E.G.B.G.B.*, *supra* note 235, incorporating art. 12 of the *Rome Convention*, *ibid.*, into German law, see A. Heldrich, Legislative comment on Art. 33 *E.G.B.G.B.* in Palandt, *supra* note 364 at 2309, Art. 33 para. 2.
[511] See H. Stoll, "Anknüpfung bei mehrfacher Abtretung derselben Forderung", Case comment on BGH, 20 June 1990 - VIII ZR 158/89, (1991) 11 IPRax 223 at 226 [Germany].

In exception to this principle, considerations of public policy[512] may occasionally require to give a fictional site to claims and security interests that do not have a physical situation. For contract debts this is the place where the debtor is located.[513] It appears that under English law this *situs* prevails when debtor protection, notably the risk to pay twice, requires it, as in the case of attachments and garnishments of a debt.[514] A similar derogation is practised in France and Japan. French and Japanese courts insist on their formal debtor notification requirement when the debtor resides within their jurisdiction, regardless of the fact that the law applicable to the assigned claims be different. This publicity is not only destined to protect the unsecured creditor against false wealth but intends to protect the debtor of the receivable.[515]

An alternative to the proper law approach is conceivable for the mentioned schism among successive assignees. Courts have taken on the implementation of a "homeward trend" (*Heimwärtsstreben*)[516] by falling back upon the *lex fori*.[517] Indeed, this response can correspond to the parties' interest in admitting only such priorities that are known at the location of the asset.

bb. *Assignment Contract and Intention to Cede - The Universal Assignment*

By referring to assignment contracts, Art. 12 (1) uses language applied in civil codes[518] but usually not operated in Common law, which only refers to the manifest intention to make an assignment.[519] Hence, although an assignment in Common law may be regarded as a contract (security agreement) and, therefore, the "proper law of the assignment"[520] may apply answering Art. 12 (1), it is more probable that Anglo-Canadian juris-

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[512] See *Rome Convention*, *supra* note 129 arts.7 and 16.
[513] See Ph.R. Wood, *supra* note 51 at 189, para. 13-20.
[514] See Dicey & Morris, *supra* note 181 at 985 *et seq.*, r. 121; Ph.R. Wood, *ibid.* at 190, para. 13-22.
[515] See Ph.R. Wood, *ibid.* at 191, para. 13-23.
[516] *I.e.* the natural tendency to apply conflict rules to transnational facts of case in the light of the legal ideas that are familiar to the tribunal in the sense of "the mind sees what the mind has means of seeing." See Honnold, *supra* note 210. The term "homeward trend" is attributed to A. Nussbaum, *Deutsches Internationales Privatrecht* (Tübingen: J.C.B. Mohr, 1932) at 42 *et seq.*; Flessner, *supra* note 133 at 117 *et seq.*; Kadletz, *supra* note 114 at 78 *et seq.*
[517] For the unclear *ratio decidendi* of *Kelly* v. *Selwyn*, [1905] 2 Ch. 117 at 122, see Castel, *supra* note 61 at 483 note 71, para. 340 and Dicey & Morris, *supra* note 181 at 981 note 98, r. 120 and the central case *Republica de Guatemala* v. *Nunez*,[1927] 1 K.B. 669 (C.A.).
[518] See, *e.g.*, the German *Abtretungsvertrag*, § 398 B.G.B..
[519] See *Restatement (Second) of the Law of Contracts*, § 317 (1) (1981) [hereinafter *Restatement Contracts*]; Kötz, *supra* note 504at 57, para. 64 and, for the distinction between assignment and the underlying contract, at 58, s. 66.
[520] For formalities, the *lex loci cessionis* would come to the point.

dictions outside the scope of the *Rome Convention* put to use the principle, in line with which the place of the assignment or the domicile of the parties decides the applicable law.[521]

A meaningful illustration of this conflict rule is the clash of securities, which frequently occurs where the bulk assignment of accounts receivable, *i.e.* of claims for the payment of money, (*Globalzession*) and the assignment of an after-acquired claim as part of a conditional sales agreement (*verlängerter Eigentumsvorbehalt*) are competing for priority. In this case of an assignment of future claims there is no debtor interest that could possibly be impaired. "These devices illustrate the fact that priority is a matter connected with the assignor rather than with the debtor."[522] Ergo, the U.C.C.[523] and the Canadian P.P.S. legislation[524] stipulate that perfection is governed by the law at the principal place of business of the debtor of the assignment and, thereby, submit the question of priority to the law of the assignor.

By contrast, the *Bundesgerichtshof*[525] erroneously held that the law of the assigned claim, which constitutes the security should be applied in these cases although it does not have any interest whatsoever in being applied. Rather, the conditional vendor, the assignee of the accounts receivable and unsecured creditors rely on the protection granted by the legal order at the location of the assignor in the case of his insolvency. This is, hence, the only sufficiently stable and predictable connecting factor.[526]

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[521] See Castel, *supra* note 61 at 483, para. 340 with jurisprudence in note 68. This view finds support for cases of universal assignment of all rights and claims and the extended reservation of proprietary rights under German Law *e.g.* by Stoll, *supra* note 167 at paras. 291 *et seq.*, quoted in Kegel, *supra* note 64 at 564. See instantly in the text.

[522] Rabel, *supra* note 508 at 428.

[523] See U.C.C. § 9-103(3)(b) (1994).

[524] See, *e.g.*, *O.P.P.S.A.*, *supra* note 99 s. 7(1)(a)(i).

[525] See BGH, 20 June 1990 - VIII ZR 158/89, [1991] IPRax 248 [Germany]. According to the BGH the law governing the relations between the assigned debtor and the assignor also has to be applied to the question of whether the assignment of a future claim is valid in bankruptcy of the assignor.

[526] For a general critique of the German jurisprudence, see Stoll, *supra* notes 511 and note 167 at paras. 291, 292; R.A. Leflar, L.L. McDougal III & R.L. Felix, *American Conflicts Law*, 4th ed. (Charlotteville, Va. : Michielo, 1986) at 526 : "Uniformity and predictability based on commercial convenience are the prime considerations in making the choice of governing law for this problem." See also *Receivables Project*, *supra* note 44

> Article 28. Law applicable to conflicts of priority (1) The priority among several assignees obtaining the same receivables from the same assignor is governed by the law [governing the receivable to which the assignment relates] [of the country in which the assignor has its place of business]. (2) The [priority between an assignee and] [the effectiveness of an assignment as against] the insolvency administrator is governed by the law [governing insolvency] [of the country in which the assignor has its place of business]. (3) The [priority between an assignee and] [the effectiveness of an assignment as against] the assignor's creditors is governed by the law of the country in which the assignor has its place of business.

A noteworthy comparable spring of misapprehensions is the wording of Art. 12 (1). The stipulation disregards the abstract character of the assignment in Germanic jurisdictions.[527] It is therefore unclear if this provision is at all applicable to the real transfer of the debtor or if this case is covered by Art. 12 (2).[528]

cc. *Common Law and the Rome Convention – An Evaluation*

In English security law the assignment of claims is referred to as Common law mortgage of receivables, which transfers ownership to the assignee, or as the fixed charge over receivables in Equity (*i.e.* by transfer, declaration of trust or the direction to make payment to the creditor[529]), a simple encumbrance which does not allow the assignee to be paid out of the charged fund.[530] Assignments of documentary intangibles can take the form of a mortgage, a contractual charge or a pledge but are not covered by the *Rome Convention*.[531] Hence, similar rules as applied to the form of assignment of ordinary choses in possession apply in principle to documentary intangibles. U.C.C. § 9-103 (3) and Canada's *P.P.S.A.*[532] on the contrary do not make any fundamental difference between intangibles, mobile equipment and accounts, and select the whole law of the debtor's chief place of business or executive office. This choice of law rule runs parallel to the modern doctrine concerning movables, but cannot be justified by the avoidance of a *conflit mobile*. Instead it is simply regarded as the law the parties most likely look at, provides certainty and predictability and, in the end, is debtor protection in the sense that its legal environment remains untouched by the assignment. It is furthermore not so much different from the *lex causae* solution of the *Rome Convention*, because the agreement creating the interest objectively is most closely connected to the location of the debtor.[533] The European solution appears, after all, more favourable to party autonomy than its American equivalent in security law, while maintaining - through the formulation of presumptions - more certainty than the contractual conflict of law rules condensed in the *Restatement Conflict of Laws*.[534]

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[527] For en excellent explanation of the "principle of abstraction", see Kötz, *supra* note 504 at 59 *et seq.*, para. 67; Zweigert & Kötz, *supra* note 163 at 442 *et seq.*
[528] See Heldrich, *supra* note at 2309, Art. 33 para. 2 with references; Stoll, *supra* note 511.
[529] See Goode, *supra* note 172 at 111 *et seq.*
[530] *Ibid.* at 117.
[531] See *Rome Convention*, *supra* note 129 art. 1 (2) (c).
[532] See, e.g., *O.P.P.S.A.*, *supra* note 99 s. 7.
[533] See *Rome Convention*, *supra* note 129 art. 4 (2).
[534] See *Restatement Conflict of Laws*, *supra* note108; see also Castel, *supra* note 61 at 593, para. 447.

The *Draft Convention* purports to uproot these principles through substantive law that supersedes domestic standards concerning validity and priority of competing assignments. It has to be seen here, to what extent the new standards provide a more elaborated approach than the ones offered in national laws, notably whether time consuming and costly formalities have been reduced.

b. A Balance of Material Assignment Law

aa. *Civil Law – Debtor Notification*

In classical civil code jurisdictions assignments are concluded *solo consensu* and *inter partes* "entre le cédant et le cessionnaire" (*effet relatif du contrat*, Art. 1689 C. civ.). For purposes of perfection (*opposabilité aux tiers*), the venerated notion of debtor protection requires that the validity of the assignment not only depend on private writing (*acte sous seing privé*) or a notarial document (*acte notarié*), *e. g.* Art. 1341 C. civ.[535], but above all on publicity by giving notice to the debtor as in Art. 1690 C. civ. (*signification*, *acceptation*) and Art. 1641 C.C.Q.[536] At the same time the priorities among competing assignees in principle depend on the date of the assignment in line with the first-to-cede principle, because the debtor divests himself of his right to the initially assigned receivable: There is nothing he could possibly transfer to a second assignee. From this, there is no *bona fide* purchase on the assumption of the continuing creditor position in the person of the assignor. Still, in the law of secured transactions of many Civil law countries the priorities of successively secured choses in action hang on the date of formal notification to the debtor, as in Art. 1690 C. civ. and the similar provisions in the civil codes of other Romance legal systems, such as Arts. 1260 *et seq.* Codice civ.[537] These provisions not only serve the obligor but also concern the protection of the assignor's present and future creditors. Still, notification of the debtor in its function as a condition of the validity has often times been criticised as inflexible and superfluous for credit transactions. Hence, in order to simplify the procedure of obtaining credit functional equivalents to voluntary assignments in legisla-

[535] Omissions are sanctioned by the exclusion of witnesses, see Kötz, *supra* note 504 at 74, para. 84 note 414 for the famous exception *commencement de preuve par écrit*.
[536] See Kötz, *ibid.* at 76 *et seq.*, para. 86; Ph.R. Wood, *supra* note 51 at 190, para. 13-21; arts. 1637 *et seq.*, 1641 C.C.Q. "[a]s soon as the debtor has acquiesced in it or received a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment which may be set up against the assignor."
[537] For 1690 C. civ., see Kötz, *ibid.* at 94 *et seq.*, paras. 100 *et seq.*; Zweigert & Kötz, *supra* note 163 at 447; art. 1265 Codice civ.

tion, jurisprudence and legal practice circumvent this red tape. Those are the *subrogation conventionnelle* according to Arts. 1249, 1250 no.1 C. civ.[538] and the incorporation in a negotiable instrument (*bordereau*) after Art. 4 of the Loi Dailly of 2 January 1981.[539] However, the debtor can adduce good faith in the status of his creditor as for liberating payment and avail himself of all those defences applicable to the original creditor at the time of the assignment.[540]

bb. *Common Law - Recordation*

The countries of the Common law tradition abandon the Civilian button-down concept that a pledge of a receivable must be notified to the debtor for effects of validity. Instead they require filing by the secured creditor.

The English Common law requires assignments of receivables, apart from the general writing requirement for purposes of validity and enforceability, to carry notification to the debtor[541] or registration, as in the case of general assignment of book debts in s. 344 *Insolvency Act 1986* (U.K.), 1986 and in ss. 395 and 396 *Companies Act*.[542] Here, as in Equity, the notification has no effect whatsoever on the validity of assignments as such, which corresponds to the law in some Germanic jurisdictions, such as Germany and the Netherlands.

As to priorities, the well-known first-in-time, first-in-right rule applies.[543] The priorities between successive assignments depend *a tort et a travers* on the perfection according to the mentioned notification requirements[544] under the perennial Equity rule in *Dearle* v. *Hall*[545], according to which "successive assignments taken in good faith and for value

[538] See Zweigert & Kötz, *ibid.* at 448; Kötz, *ibid.* at 80 *et seq.*, paras. 89 *et seq.*
[539] See *Loi n° 81-1 du 2 janvier 1981, facilitant le crédit aux entreprises*, J.O., 3 January 1981, 150 as modified by *Loi n° 84-46, relative à l' activité et au contrôle des établissements de crédit du 24 janvier 1984*, J.O. 25 January 1984, 390; see Kötz, *ibid.* at 79 *et seq.*, para. 88.; Zweigert & Kötz, *ibid.* at 448; Crocq, *supra* note 175 at 303 *et seq.*, para. 348.
[540] See art. 1240 C. civ.; art. 1643 C.C.Q.; §§ 404, 407 B.G.B.; Zweigert & Kötz, *ibid.* at 444 *et seq.*
[541] See *Law of Property Act*, *supra* note 241 s. 136 (1); Kötz, *supra* note 504 at 78, para. 87; Zweigert & Kötz, *ibid.* at 449 *et seq.* This provision does not have much practical value since is can be upheld as "equitable assignment" without any formalities. For Canada (Ontario), see Ziegel, *supra* note 100 at 60, § 2.2.5.3. (*Conveyancing and Law of Property Act, 1990*, R.S.O. 1990 c. C-34, s. 53).
[542] See *Companies Act*, *supra* note 176; Goode, *supra* note 172 at 112 *et seq.*; Kötz, *supra* note 504 at 74 *et seq.*, para. 85.
[543] However, for an important German public policy exception to this rule in the case of competing suppliers and holders of bulk assignments see Kötz, *ibid.* at 98 *et seq.*, para. 105.
[544] For the structural function of the notification in the process of perfection, see *supra* note 241.
[545] See *Dearle* v. *Hall* (1828), 3 Russ. 1, 38 E.R. 475 (Ch.) [hereinafter *Dearle*].

rank in the order in which notice is given to the debtor."[546] Similar to the reasoning behind the Civil law notification provisions this priority rule has been justified on the grounds that the assignment of intangibles should be treated on the same footing as tangible movables, title to which passes only if possession is delivered to the transferee. The rule also provides a method by which an assignee can discover previous dispositions of the debt through protecting an assignee that inquired of the debtor as to previous notices and received a negative answer.[547]

By contrast, the American U.C.C. and Canadian *P.P.S.A.* do not contain any formal requirements such as notification of debtor and, in parallel to the aforesaid special statutory registration requirements, today generally measures priorities after the first-to-file principle.[548] Only to a certain extent preserves the U.S. an idea of possessory pledge of receivables by allowing protection if the assignor is foreign.[549] To boot, U.S. law accepts isolated assignments of accounts and general intangibles should not have to be perfected by filing.[550] A different question is *vis-à-vis* whom of the several assignees the debtor can discharge the security. U.C.C. § 9-318 (3), Draft U.C.C. § 9-406 (a) (July 1998) and *O.P.P.S.A.* s. 40 (2) stipulate that notification does not cut off the debtor's right to pay his original creditor until reasonable notice has been given.[551] In all jurisdictions the obligor is entitled to claim all those substantive defences and rights of set-off against the assignee that were available against the assignor out of the contract as assigned.[552]

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[546] Kötz, *supra* note 504 at 95, s. 102; see also Zweigert & Kötz, *supra* note 163 at 451; Ph.R. Wood, *supra* note 51 at 191, para. 13-24; Goode, *supra* note 172 at 119. The *bona-fide* purchaser must not be a so-called volunteer. For this aspect and value given under the *Law of Property Act*, *supra* note 241, s. 205 (1) (xx) (xxi), see Stoll, *supra* note 511 at 224 note 10 with references.

[547] See Kötz, *ibid.* at 95, s. 102; Zweigert & Kötz, *ibid.* at 452; Ziegel, *supra* note 100 at 229, § 30.2

[548] U.C.C. §§ 9-301, 9-312 [5] [a] (1994), *O.P.P.S.A.*, *supra* note 99 ss. 30 (1), 47. For U.C.C. assignment generally, see Kötz, *ibid.* at 57, s. 63 and, for priority contests in the federated States prior to the enactment of the U.C.C., at 96 *et seq.*, s. 103.

[549] In this circumstance notice must be given to account debtor to take debt completely out of possession of assignor. See Ph.R. Wood, *supra* note 51 at 127, para. 9-25.

[550] See Ph.R. Wood, *ibid.*

[551] See Ziegel, *supra* note 100 at 303, § 40.3 and B. Clark, *supra* note 176 at § 11.03[2]; Germanic, French and Italian jurisditions come to similar results, *e.g.*, within §§ 407, 408 B.G.B., art. 1264 Codice civ. See Zweigert & Kötz, *supra* note 163 at 442, 444 and 447.

[552] See Kötz, *supra* note 504 at 88 *et seq.*, s. 79; Zweigert & Kötz, *ibid.* at 450; Ziegel, *ibid.* at 300 *et seq.*, § 40.2 referring in note 4 to Goode, *supra* note 172 at 116 and, for the unclear terminology of "equities" used in the *Law of Property Act*, *supra* note 241 s. 136, at 165; U.C.C. § 9-318 (1); *O.P.P.S.A.*, *supra* note 99 s. 40 (1); *Restatement Contracts*, *supra* note 316 §§ 336 and 338 (1981); § 404 B.G.B.

c. Modern Assignment Law of the Draft Convention

From a dogmatic standpoint it is meritorious that the *Draft Convention* does not make any allusion to notification for purposes of validity or priority but carries on the reformation work undertaken over the last two decades.[553] The more fundamental explanations for the solution retained in the *Draft Convention* pursuant to the modern Common and Germanic law paragons can be summarised as follows.

First of all, notification cannot be justified with the argument of debtor protection. Not only an assignment in writing for evidence purposes, but also the fact that the acquisition is subject to defences that are available by the debtor against the assignor, are entirely sufficient for an efficient safeguarding of debtor interests. Moreover, contrary to the arguments in favour of Art. 1690 C. civ. or the rule in *Dearle*, "no debtor is obliged to give prompt, correct and complete information on already made notifications to an unknown assignee"[554] or to answer at all. Hence, there is no reason for expecting the transferee *in contrahendo* to infer from a negative answer that the assignor is still holder of the chose in action. Finally, parties to a transaction of receivables have a valid interest not to notify the transfer immediately to the debtor. The ideal solution, for all the reasons stated in the preceding paragraphs, is the recordation in a publicly accessible register as provided for in the optional Unidroit asset registration system,[555] paralleling the Annex to the *Receivables Project*[556] and following the systems of the Netherlands,[557] Great Britain and the USA.[558]

In Art. 33 (1), the notice of assignment merely serves to determine the moment from which the debtor cannot discharge his debt by paying the transferor of the receivable, but has to pay the assignee. This ensures the minimum debtor protection and the

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[553] See for reform proposals Kötz, *ibid.* at 81, para. 90;

[554] See Zweigert & Kötz, *supra* note 163 at 452.

[555] See *Draft Convention*, *supra* note 15 art. 32.

[556] See *Receivables Project*, *supra* note 44

> Section III ... The Working Group has failed so far to reach agreement on a rule dealing with conflicts of priority. Draft articles 23 and 24, as well as draft articles 1 to 6 of the annex to the draft Convention, constitute an effort to assist the Working Group in resolving this difficult issue. They are based on the assumption that a registration-based approach can provide more certainty and address more adequately conflicts of priority than any other system based on the time of the assignment or of notification of the debtor (no system can provide full certainty...).

[557] See § 3 : 239 N.B.W., *supra* note 179.

[558] For the sum of the preceding aspects, see Zweigert & Kötz, *supra* note 163 at 452 *et seq.*; with good reason R.M. Goode, *Commercial Law* (Harmondsworth: Penguin Books/Allen Lane, 1982) at 762 remarks : "It is high time that the rule in *Dearle* v. *Hall* was abolished."

certainty that is unquestionably imperative in internationally secured transactions. The *Draft Convention* constitutes an improvement of existing Anglo-American law and affirms the precedents of the *Reichsgericht* as it unequivocally makes the assignor the person from whom the notice has to emanate - the most unfailing connecting point to justify the defeat of the obligor's good faith.[559] The assignee does not remain entitled to register[560], although the parties might stipulate otherwise.

Art. 33 does, however, not mention the consequences of a breach of the obligor's duty to pay the assignee. This duty calls to mind the strict interpretation of Art. 1690 C. civ.[561] The clarification of this vagueness is that the obligor cannot discharge his debt. In the absence of notice, no duty exists and a payment to the assignor is always liberating. Only Art. 37 hints at the type of further features likely to apply in national laws: The assignee can tackle actions based on the universal principle of unjust enrichment (*enrichissement sans cause, ungerechtfertigte Bereicherung*) against the assignor, notably those rooted in the equitable constructive trust, or the Common law action for money had and received and, in tort, conversion against his bank[562]; the *actio de in rem verso*[563] or the *Eingriffskondiktion*.[564] Art. 33 (3) expressly stipulates that priorities are not affected by notification and, consequently, underlie the common first-to-register rule of *Draft* Art. 28.

C. Security or Suretyship Agreement, Sales Contract and Subordination Agreement

Art. VIII *Draft AEP* affirms that the contractual choice of the law applicable to the contractual rights and obligations under "an agreement or a contract of sale or a related suretyship contract or subordination agreement" are governed by the proper law of the contract convened by the parties. However, this express stipulation is only declaratory

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[559] See *Draft Convention*, *supra* note 15 art. 33(1)(a); Ziegel, *supra* note 100 at 303 note 17, § 40.3 and Reichsgericht (Supreme Court of the German Empire, RG), 23 September 1921 – II 61/21, (1921) 102 RGZ 385 at 387 [Germany]; RG, 21 September 1910 – V 587/09 (1911) 74 RGZ 117 at 120 [Germany]; H. Heinrichs, Legislative comment on § 407 B.G.B. in Palandt, *supra* note 364 at 471, § 407 para. 6 for further case law.

[560] Compare *Draft Convention*, *supra* note 15 art. 21 (1) with *Preliminary Draft Convention on International Interests in Mobile Equipment* (November 1997), Cuming, *supra* note 41 Appendix at 376 art. 21 (1) [e].

[561] See Cass. civ., 20 June 1938, D.P. 1939.1.26; Cass. civ., 27 November 1944, D. 1945.78; Zweigert & Kötz, *supra* note 163 at 446.

[562] See Goode, *supra* note 172 at 120. For comparative perspectives, see Zweigert & Kötz, *ibid.* at 555 *et seq.* (unjust enrichment) and at 561 *et seq.* (constructive trust).

[563] To be distinguished from the *répétition de l' indu* (arts. 1376 *et seq.* C. civ.; arts. 2033 *et seq.* Codice civ.: *pagamento dell' indebito*), Zweigert & Kötz, *ibid.* at 546 *et seq.*; see for the distinction between "a thing not due" and the more general "unjust enrichment" in Quebec arts. 1491 *et seq.* C.C.Q.

[564] See Zweigert & Kötz, *ibid.* at 444 (§ 816 (2) B.G.B.) and, generally, at 541 *et seq.*

of the rules already in force under *Geneva Convention* and the domestic laws of the Contracting States. However, it must be observed that also the contractual choice-of-law rule is optional in character and, according to Art. XXX depends on the opposition of State reservations particularly to Art. VIII (2), which clarifies that it refers to substantive rules of domestic law and not to those of private international law. Art. VIII does not pick up the second sentence of the former Art. XVI,[565] which eliminates any requirements on specific relationships of the contractual agreement and the transaction to the conventionally designated law. The international recognition of subordination agreement as a form of assignment (*cession de priorité*), which varies or waives normal priority rules,[566] in the *Draft Convention*,[567] contributes to the accomplishment of the international personal property security regime.

[565] See *August 1997 Draft*, *supra* note 48 art. XVI.
[566] See Goode, *supra* note 172 at 23 *et seq.*; Ziegel, *supra* note 100 at 67, § 2.5; *O.P.P.S.A.*, *supra* note 99 s. 38.
[567] See also *Draft Convention*, *supra* note 15 art. 21 (2).

Conclusion

It has been said that in the English tradition law is not regarded as a subject of science, in German terminology *Rechtswissenschaft*.[568] It is procedural, and therefore very practical in character. So is the Unidroit reform proposal. It is only adapted to the practical needs of the aviation industry, which traditionally, but not exclusively, grows from states with Common law jurisdictions. Although differences between Common law jurisdictions themselves and Civil law jurisdictions have been recognised as regards the notion of "security interest" and the corresponding differences in remedies, both *Drafts* essentially contain language used in North American Law of secured transactions. It is characteristic of the current *Drafts* that hardly any Civilian experts were involved. Certainly for good reasons, the *Drafts* are inspired by the Uniform Commercial Code, and a list of defined terms might favour understanding, but only neutral wording that takes notice of civil code terminology, beside the necessity of being persuasive in substance, can ensure an acceptance by the rest of the (rather Civilian) legal world. Similar arguments apply to the surely necessary system and precision improvements, because the *Draft Convention/AEP* would have the character of a code in many countries and directly modify civil codes. For this aspect again, although it is overly detailed, the *Draft* U.C.C. could serve as an example, combined with the other international instruments, which have been mentioned in this study.

However, the *Drafts* should not be underestimated because they tackle a unification that touches upon the most fundamental and economically crucial issues of private international law. It channels harmonisation efforts in many areas of transnational commercial law into the direction of a single conventional framework, develops capital markets and can truly be labelled a millennium project. The *Geneva Convention* has laid the foundations for the Unidroit initiative and only recently increased in importance. It will, pending accession to the *Convention* and *Protocol*, for a considerable time and even thereafter remain the basis for international trade in aircraft. In the interest of rapidly accelerating legal measures to the speed of aviation technology the *Drafts* remarkably encourage the principle of party autonomy in jurisdictional and material aspects, and reduce the inter-

[568] See P. Stein, "The Tasks of Historical Jurisprudence" in N. MacCormick and P. Birks, *The Legal Mind - Essays for Tony Honoré* (Oxford : Clarendon Press, New York : Oxford University Press, 1986) 293 at 293.

vention of juridical institutions of states to a minimum. The principal place of business of the debtor is taking over the residual nationality registration as a connecting factor, which also retains importance for the determination of jurisdiction. A full-scale registry privatisation on an international level involves institutional problems and should not be undertaken in order to maintain a secure level, not only of oversight, but also of immediate control. The *lex rei sitæ* only subsist in the conflict of jurisdictions. Finally, the long overdue reduction of rigid formalities in security and assignment law could lead to a new *ius commune*.

The Project, however, must prove, just as much as Civilians must learn, to be receptive to a pluricentric world taking into account that there is no commonality of experience in legal and economic imperatives, and that the export of certain concepts from Common law jurisdictions does not correspond to societal needs in importing Civilian jurisdictions, which are very diverse among themselves. Such could either lead to a refusal of the convention system as a whole or to a sector-specific law only for aircraft securitisation. An implementation, advantageous from a conceptual perspective, will, in any circumstance, for the foreseeable future not diminish international plurality of law and differences in the application of law in that area.[569] International law is made to consider, coordinate, recognise and refuse competing and conflicting human interests of different parts of the world. Once, Voltaire said: "We resemble the monkeys more than any other animal by the gift of imitation, the frivolity of our ideas, and by our inconstancy which has never allowed us to have uniform and durable laws."[570] The Unidroit Reform Project relating to International Interests in Mobile Equipment will show if such cognisance and intense comparative exchange of frivolous ideas will make a difference for today and tomorrow.

[569] See H. Kötz, "Rechtsvereinheitlichung - Nutzen, Kosten, Methoden, Ziele" (1986) 50 RabelsZ 1.
[570] Voltaire, *The Philosphical Dictionary*, trans. H.I. Woolf (New York: Knopf, 1924) *s.v.* "Laws".

APPENDIX I

PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

UNIDROIT 1998, Study LXXII - Doc. 42

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

In this Convention the following words are employed with the meanings set out below:

"agreement" means a security agreement, a title reservation agreement or a leasing agreement;

"applicable law" means the law applicable by virtue of the rules of private international law;

"assignment" means a consensual transfer, whether by way of security or otherwise, which confers on the assignee rights in the international interest;

"associated rights" means all rights to payment or other performance by the obligor under an agreement or a contract of sale secured by or associated with the object;

"buyer" means a buyer under a contract of sale;

"chargee" means the grantee of an interest in an object under a security agreement;

"chargor" means the grantor of an interest in an object under a security agreement;

"conditional buyer" means the buyer under a title reservation agreement;

"conditional seller" means the seller under a title reservation agreement;

"contract of sale" means a contract for the sale of an object which is not an agreement;

"court" means a court of law or an administrative or arbitral tribunal established by a Contracting State;

"Intergovernmental Regulator" means, in respect of any Protocol, the intergovernmental regulator referred to in Article 17(1);

"international interest" means an interest to which Article 2 applies and which is constituted in conformity with Article 8;

"International Registry" means the international registry referred to in Article 16(3);

"leasing agreement" means an agreement by which one person ("the lessor") grants a right to possession or control of an object (with or without an option to purchase) to another person ("the lessee") in return for a rental or other payment;

"object" means an object of a category listed in Article 3;

"obligee" means the chargee under a security agreement, the conditional seller under a title reservation agreement or the lessor under a leasing agreement;

"obligor" means the chargor under a security agreement, the conditional buyer under a title reservation agreement, the lessee under a leasing agreement [or the person whose interest in an object is burdened by a registrable non-consensual right or interest];

"prospective assignment" means an assignment that is intended to be made in the future, whether or not upon the occurrence of an uncertain event;

"prospective international interest" means an interest that is intended to be created or provided for as an international interest in the future, whether or not upon the occurrence of an uncertain event;

"prospective sale" means a sale which is intended to be made in the future, whether or not upon the occurrence of an uncertain event;

"Protocol" means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;

"registered" means registered in the International Registry pursuant to Chapter V;

"registered interest" means an international interest [or a registrable non-consensual right or interest] registered pursuant to Chapter V;

["registrable non-consensual right or interest" means a right or interest registrable pursuant to an instrument deposited under Article 39;]

"Registrar" means, in respect of any category of object and associated rights to which this Convention applies, the person designated under Article 17(3);
"regulations" means regulations made, pursuant to the Protocol, by the Intergovernmental Regulator under Article 17(4);
"sale" means a transfer of ownership pursuant to a contract of sale;
"secured obligation" means an obligation secured by a security interest;
"security agreement" means 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 any existing or future obligation of the chargor or a third person;
"security interest" means an interest created by a security agreement;
"surety" means any guarantor, surety or other credit insurer under a guarantee (including a demand guarantee and a standby letter of credit) or credit insurance given to the chargee;
"title reservation agreement" means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;
"unregistered interest" means a consensual [or non-consensual right or] interest [(other than an interest to which Article 40 applies)] which has not been registered, whether or not it is registrable under this Convention; and
"writing" means an authenticated record of information (including information sent by teletransmission) which is in tangible form or is capable of being reproduced in tangible form.

Article 2

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

2. For the purposes of this Convention, an international interest in mobile equipment is an interest in an object of a category listed in Article 3:

(a) granted by the chargor under a security agreement;

(b) vested in a person who is the conditional seller under a title reservation agreement; or

(c) vested in a person who is the lessor under a leasing agreement.

3. Whether an interest to which the preceding paragraph applies falls within-sub-paragraph (a), (b) or (c) of that paragraph is to be determined by the applicable law. An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

Article 3

This Convention applies in relation to an object, and associated rights relating to an object, of any of the following categories:

(a) airframes;
(b) aircraft engines;
(c) helicopters;
(d) [registered ships;]
(e) oil rigs;
(f) containers;
(g) railway rolling stock;
(h) space property;
(l) other categories of uniquely identifiable object.

Article 4

This Convention shall apply when at the time of the conclusion of the agreement creating or providing for the international interest:

(a) the obligor is located in a Contracting State; or

(b) the object to which the international interest relates has been registered in a nationality register [, or a State-authorised asset register,] in a Contracting State or otherwise has a close connection, as specified in the Protocol, to a Contracting State.

Article 5

For the purposes of this Convention, a party is located in a State if it is incorporated or registered or has its principal place of business in that State.

Article 6

In their relations with each other, the parties may, by agreement in writing, derogate from or vary the effect of any of the provisions of Chapter III, except as stated in Articles 9(2)-(6), 10(2) and (3), 13(1) and 14.

Article 7

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble,* to its international character and to the need to promote uniformity and predictability in its application.

2. [In the interpretation of this Convention, regard is to be had to the commentaries on the Convention and the Protocol.]

3. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

CHAPTER II

CONSTITUTION OF AN INTERNATIONAL INTEREST

Article 8

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

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

* The preamble will be drafted in due course.

CHAPTER III

DEFAULT REMEDIES

Article 9

1. In the event of default in the performance of a secured obligation, the chargee may exercise any one or more of the following remedies:

(a) take possession or control of any object charged to it;
(b) sell or grant a lease of any such object;
(c) collect or receive any income or profits arising from the management or use of any such object;
(d) apply for a court order authorising or directing any of the above acts.

2. Any remedy given by sub-paragraph (a), (b) or (c) of the preceding paragraph shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where the court determines that such a provision is manifestly unreasonable.

3. A chargee proposing to sell or grant a lease of an object under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed sale or lease to interested persons.

4. Any sum collected or received by the chargee as a result of exercise of any of the remedies set out under paragraph 1 shall be applied towards discharge of the amount of the secured obligations.

5. Where the sums collected or received by the chargee as a result of the exercise of any remedy given in paragraph 1 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall pay the excess to the holder of the international interest registered immediately after its own or, if there is none, to the chargor.

6. In this Article and in Article 10 "interested persons" means:

(a) the chargor;
(b) any surety;
(c) any person entitled to the benefit of any international interest which is registered after that of the chargee;
(d) any other person having rights subordinate to those of the chargee in or over the object of which notice in writing has been given to the chargee within a reasonable time before exercise of

the remedy given by paragraph 1(b) or vesting of the object in the chargee under Article 10(1), as the case may be.

Article 10

1. At any time after default in the performance of a secured obligation, the chargee and all the interested persons may agree, or the court may on the application of the chargee order, that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2. The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is reasonably commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.

3. At any time after default in the performance of a secured obligation and before sale of the charged object or the making of an order under paragraph 1, the chargor or any interested person may discharge the security interest by paying the amount secured, subject to any lease granted by the chargee under Article 9(1). Where, after such default, the payment is made in full by an interested person, that person is subrogated to the rights of the chargee.

4. Ownership or any other interest of the chargor passing on a sale under Article 9(1) or passing under paragraph 1 of this Article is free from any other interest over which the chargee's security interest has priority under the provisions of Article 28.

Article 11

In the event of default by the conditional buyer under a title reservation agreement or by the lessee under a leasing agreement, the conditional seller or the lessor, as the case may be, may terminate the agreement and take possession or control of any object to which the agreement relates. The conditional seller or the lessor may also apply for a court order authorising or directing either of these acts.

Article 12

1. The parties may provide in their agreement for the kind of default, or any event other than default, that will give rise to the rights and remedies specified in Articles 9 to 11 or 15.

2. In the absence of such an agreement, "default" for the purposes of Articles 9 to 11 and 15 means a substantial default.

Article 13

1. Subject to paragraph 2, any remedy provided by this Chapter shall be exercised in conformity with the procedural law of the place where the remedy is to be exercised.

2. Any remedy available to the obligee under Articles 9 to 11 which is not there expressed to require application to the court may be exercised without leave of the court except to the extent that the Contracting State where the remedy is to be exercised has made a declaration under Article Y or in the Protocol.

Article 14

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

Article 15

1. A Contracting State shall ensure that an obligee who adduces *prima facie* evidence of default by the obligor may, pending final determination of its claim, obtain speedy judicial relief in the form of [one or more of] the following orders:

(a) preservation of the object and its value;
(b) possession, control, custody or management of the object;
(c) sale or lease of the object;
(d) application of the proceeds or income of the object;
(e) immobilisation of the object.

2. Ownership or any other interest of the obligor passing on a sale under the preceding paragraph is free from any other interest over which the chargee's security interest has priority under the provisions of Article 28.

3. Nothing in this Article shall limit the availability of any form of interim judicial relief under the applicable law.

CHAPTER IV

THE INTERNATIONAL REGISTRATION SYSTEM

Article 16

1. An International Registry shall be established for registrations of:

(a) international interests, prospective international interests [and registrable non-consensual rights and interests];

(b) assignments and prospective assignments of international interests; and

(c) subordinations of interests referred to in sub-paragraph (a) of this paragraph.

2. [The International Registry shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes under this Convention.]

3. Different registries may be established for different categories of object and associated rights. For the purposes of this Convention, "International Registry" means the relevant international registry.

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

[Article 17

1. The Protocol shall designate an Intergovernmental Regulator ** to exercise the functions assigned to it by this Chapter, Chapter V and the Protocol.

2. The Protocol may provide for Contracting States to designate operators of registration facilities in their respective territories. Such operators shall be transmitters of the information required for registration and, in such capacity, shall constitute an integral part of the registration system of this Convention. The Protocol may specify the extent to which the designation of such an operator shall preclude alternative access to the International Registry.

3. The Intergovernmental Regulator shall establish the International Registry, designate the Registrar and oversee the International Registry and the operation and administration thereof. ***

4. The manner in which such oversight is conducted, the responsibilities of the Registrar and operators of registration facilities and the fees to be paid by users of the international registration system shall be prescribed in the Protocol and/or from time to time in the regulations.

5. The Registrar shall:

(a) operate the International Registry efficiently and responsibly;

(b) perform the functions assigned to it under this Convention, the Protocol and the regulations;

(c) report to the Intergovernmental Regulator on its performance of these functions and otherwise comply with the oversight requirements specified by the Intergovernmental Regulator;

(d) maintain financial records relating to its functions in a form specified by the Intergovernmental Regulator; and

(e) insure against liability for its acts and omissions in a manner acceptable to the Intergovernmental Regulator.

6. The Intergovernmental Regulator shall have power to require acts and omissions which are in contravention of this Convention, the Protocol or the regulations to be rectified.

7. The Protocol and/or the regulations may prescribe the procedures pursuant to which the Registrar and operators of registration facilities may request advice from the Intergovernmental Regulator regarding the exercise of their respective functions under this Convention, the Protocol and the regulations.]

** The present text assumes that the Intergovernmental Regulator and the operators of the International Registry will be different bodies. However, as indicated in the preliminary draft Protocol on Matters specific to Aircraft Equipment, an alternative to be considered is an unitary International Registry Authority which would act as both operator and regulator (cf. Article XVI(1) of that text which provides as follows:

Alternative A

[1. - [The International Registry shall be regulated and operated by the International Registry Authority.] [The International Registry shall be regulated by the International Regulator and operated by the Registrar.]] .

*** It was noted by the Aircraft Protocol Group that Article 17(3) is an example of the type of provision which was envisaged as being within Article U(b) and which may therefore find itself modified by the terms of a Protocol.

CHAPTER V

MODALITIES OF REGISTRATION

Article 18

The Protocol and regulations may contain conditions and requirements, including the criterion or criteria for the identification of the object, which must be fulfilled in order:

(a) to effect a registration; or

(b) to convert the registration of a prospective international interest or a prospective assignment of an international interest into registration of an international interest or of an assignment of an international interest.

Article 19

The information required for a registration shall be transmitted, by any medium prescribed by the Protocol or regulations, to the International Registry or registration facility prescribed therein.

Article 20

1. A registration shall take effect upon entry of the required information into the International Registry data base so as to be searchable.

2. A registration shall be searchable for the purposes of the preceding paragraph at any time when:

(a) the International Registry has assigned to it a sequentially ordered file number; and

(b) the registration, including the file number, may be accessed at the International Registry and at each registration facility in which searches may be made at that time.

3. If an interest first registered as a prospective international interest becomes an international interest, the international interest shall be treated as registered from the time of registration of the prospective international interest.

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

5. The International Registry shall record the date and time a registration takes effect.

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

Article 21

1. An international interest which is a security interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered by or with the consent in writing of the chargor or assignor or intending grantor or assignor, as the case may be. Any other type of international interest may be registered by the holder of that interest.

2. The subordination of an international interest to another international interest may be registered by the person in whose favour the subordination is made.

3. A registration may be amended, extended prior to its expiry or discharged, by or with the consent in writing of the party in whose favour it was made.

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

Article 22

Registration of an international interest remains effective for the period of time [specified in the Protocol or the regulations as extended in conformity with Article 21(3)] [agreed between the parties in writing].

Article 23

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

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

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

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

[Article 24

The Registrar shall maintain a list of the categories of non-consensual right or interest declared by Contracting States in conformity with Article 40 and the date of each such declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol and regulations to any person requesting it.]

Article 25

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

(a) that it has been so issued; and

(b) of the facts recited in it, including the date and time of a registration under Article 21.

Article 26

1. When the obligations secured by a security interest [or the obligations giving rise to a registrable non-consensual right or interest] have been discharged, or the conditions of transfer of title under a title reservation agreement have been fulfilled, the obligor may, by written demand delivered to the holder of such a registered interest, require the holder to remove the registration relating to the interest.

2. Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending grantor or assignor may by notice in writing, delivered to the intended grantee or assignee at any time before the latter has given value or incurred a commitment to give value, require the relevant registration to be removed.

[CHAPTER VI

LIABILITIES AND IMMUNITIES OF THE INTERNATIONAL REGISTRY

Article 27

1. Any person suffering loss by reason of any error or system malfunction in the International Registry shall be entitled to an indemnity in respect of such loss. The measure of liability shall be compensatory damages for loss incurred as the result of the act or omission.

2. The courts [of the Contracting State[s] in which the Registrar or the operators of registration facilities, as the case may be, [is] [are] situated] shall have jurisdiction to resolve any disputes arising under this Article.

3. Subject to paragraph 1, the International Registry, the Registrar and staff of the International Registry, the Intergovernmental Regulator and the operators of registration facilities and the staff thereof shall, in the exercise of their functions, enjoy immunity from legal process except:

(a) to the extent that the International Registry expressly waives such immunity; or

(b) as otherwise provided by agreement with a State in which the International Registry is situated.

4. The assets, documents and archives of the International Registry shall be inviolable and immune from seizure or legal process except to the extent that the International Registry expressly waives such immunity.]

CHAPTER [VII]

EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

Article 28

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

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

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

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

3. The buyer of an object acquires its interest in it:

(a) subject to an interest registered at the time of its acquisition of that interest; and

(b) free from an unregistered interest even if it has actual knowledge of such an interest.

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

5. Any priority given by this Article to an interest in an object extends to insurance proceeds payable in respect of the loss or physical destruction of that object [and to amounts paid or payable by any Government or State entity in respect of the confiscation, condemnation or requisition of that object.]

Article 29

1. An international interest is valid against the trustee in bankruptcy of the obligor if prior to the commencement of the bankruptcy that interest was registered in conformity with this Convention.

2. For the purposes of this Article and Article 37, "trustee in bankruptcy" includes a liquidator, administrator or other person appointed to administer the estate of the obligor for the benefit of the general body of creditors.

3. Nothing in this Article affects the validity of an international interest against the trustee in bankruptcy where that interest is valid against the trustee in bankruptcy under the applicable law.

CHAPTER [VIII]

ASSIGNMENTS OF INTERNATIONAL INTERESTS AND RIGHTS OF SUBROGATION

Article 30

1. The holder of an international interest ("the assignor") may make an assignment of it to another person ("the assignee") wholly or in part.

2. An assignment of an international interest shall be valid only if it:

(a) is in writing;

(b) enables the international interest and the object to which it relates to be identified;

(c) in the case of an assignment by way of security, enables the obligations secured by the assignment to be identified.

Article 31

1. An assignment of an international interest in an object made in conformity with the preceding Article transfers to the assignee, to the extent agreed by the parties to the assignment:

(a) all the interests and priorities of the assignor under this Convention; and

(b) all associated rights [so far as such rights are assignable under the applicable law].

2. Subject to paragraph 3, an assignment made in conformity with the preceding paragraph shall take effect subject to:

(a) all defences of which the obligor could have availed itself against the assignor; and

(b) any rights of set-off in respect of claims existing against the assignor and available to the obligor at the time of receipt of a notice of the assignment under Article 33.

3. The obligor may by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph.

4. In the case of an assignment by way of security, the assigned rights revest in the assignor, to the extent that they are still subsisting, when the security interest has been discharged.

Article 32

The provisions of Chapter V shall apply to the registration of an assignment or prospective assignment of an international interest as if the assignment or prospective assignment were the international interest or prospective international interest and as if the assignor were the grantor of the interest.

Article 33

1. To the extent that an international interest has been assigned in accordance with the provisions of this Chapter, the obligor in relation to that interest is bound by the assignment, and, in the case of an assignment within Article 31(1)(b), has a duty to make payment or give other performance to the assignee, if but only 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 or other performance].

2. Irrespective of any other ground on which payment or performance by the obligor discharges the latter from liability, payment or performance shall be effective for this purpose if made in accordance with the preceding paragraph.

3. Nothing in the preceding paragraph shall affect the priority of competing assignments.

Article 34

In the event of default by the assignor under the assignment of an international interest made by way of security, Articles 9, 10 and 12 to 15, in so far as they are capable of application to intangible property, apply as if references:

(a) to the secured obligation and the security interest were references to the obligation secured by the assignment of the international interest and the security interest created by that assignment;

(b) to the chargee and chargor were references to the assignee and assignor of the international interest;

(c) to the holder of the international interest were references to the holder of the assignment; and

(d) to the object included references to the assigned rights relating to the object.

Article 35

Where there are competing assignments of international interests and at least one of the assignments is registered, the provisions of Article 28 apply as if the references to an international interest were references to an assignment of an international interest.

Article 36

Where the assignment of an international interest has been registered, the assignee shall, in relation to the associated rights transferred by virtue of the assignment, have priority over the holder of associated rights not held with an international interest to the extent that the first-mentioned associated rights relate to:

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

(b) the price payable for the object; or

(c) the rentals payable in respect of the object; and

(d) the reasonable costs referred to in Article 9(5).

Article 37

1. An assignment of an international interest is valid against the trustee in bankruptcy of the assignor if prior to the commencement of the bankruptcy that assignment was registered in conformity with this Convention.

2. Nothing in this Article affects the validity of an assignment of an international interest against the trustee in bankruptcy where that interest is valid against the trustee in bankruptcy under the applicable law.

[Article 38

1. Subject to paragraph 2, nothing in this Convention affects rights or interests arising in favour of any person by operation of principles of legal subrogation under the applicable law.

2. The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests.]

[CHAPTER [IX]

NON-CONSENSUAL RIGHTS AND INTERESTS

Article 39

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

Article 40

A non-consensual right or interest (other than a registrable non-consensual right or interest) which under the law of a Contracting State would have priority over an interest in the object equivalent to that held by the holder of the international interest (whether in or outside the insolvency of the obligor) has priority over the international interest to the extent, and only to the extent that:

(a) such priority is set out by that State in an instrument deposited with the depositary of the Protocol and that instrument has been deposited with the depositary prior to the time when the registration of the international interest takes effect; 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.]

[CHAPTER [X]

APPLICATION OF THE CONVENTION TO SALES

Article 41

The Protocol may provide for the application of this Convention, wholly or in part and with such modifications as may be necessary, to the sale or prospective sale of an object.]

CHAPTER [XI]

JURISDICTION

Article 42

1. A court of a Contracting State has jurisdiction to grant judicial relief under Article 15(1) where:

(a) the object is within [or is physically controlled from] the territory of that State;

(b) [one of the parties] [the defendant] is located within that territory; or

(c) the parties have agreed to submit to the jurisdiction of that court.

2. A court may exercise jurisdiction under the preceding paragraph even if the trial of the claim referred to in Article 15(1) will or may take place in a court of another State or in an arbitral tribunal.

[Article 43

A court of a Contracting State to which Article 42(1) applies has jurisdiction in all proceedings relating to this Convention, but no court may make orders or give judgments or rulings against or purporting to bind the International Registry.]

[CHAPTER [XII]

RELATIONSHIP WITH OTHER CONVENTIONS][****]

CHAPTER [XIII]

[OTHER] FINAL PROVISIONS

Article U

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the ...

[****] It is thought that the only existing Conventions needing to be dealt with in Chapter XII are the Unidroit Convention on International Financial Leasing and, possibly, the Unidroit Convention on International Factoring. It is thought that relations between this Convention and other equipment-specific Conventions should be left to each Protocol.

instrument of ratification, acceptance, approval or accession but only applies as regards any category of object listed in Article 3:

(a) as from the time of entry into force of the Protocol;

(b) subject to the terms of that Protocol; and

(c) as between Contracting States Parties to that Protocol.

2. This Convention and the Protocol shall be read and interpreted as a single instrument.

Article V

A Contracting State may declare at the time of signature, ratification, acceptance, approval of, or accession to the Protocol that it will not apply this Convention in relation to [a purely domestic transaction].***** Such a declaration shall be respected by the courts of all other Contracting States.

Article W

[Insert provision for accelerated procedure to finalise further Protocols]

[Article X

A Contracting State shall declare at the time of ratification, acceptance, approval of, or accession to the Protocol the relevant "court" or "courts" for the purposes of Article 1 of this Convention.]

Article Y

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval of, or accession to the Protocol that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.

2. A Contracting State may declare at the time of signature, ratification, acceptance, approval of, or accession to the Protocol that any remedy available to the obligee under Articles 9 to 11 which is not there expressed to require application to the court may only be exercised with leave of the court.

***** To be defined by taking account of the location of the object and the parties.

Article Z

A Contracting State may declare at the time of signature, ratification, acceptance, approval of, or accession to the Protocol that it will not apply the provisions of Article 15, wholly or in part.

[Remaining Final Provisions to be prepared by the Diplomatic Conference]

APPENDIX II

PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

UNIDROIT 1998, Study LXXIID – Doc. 3

THE CONTRACTING STATES TO THIS PROTOCOL,
MINDFUL of the demand for, and utility of aircraft equipment and the need to finance the acquisition and use thereof as efficiently as possible,
RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these transactions by establishing clear rules to govern them,
BELIEVING that such rules must (i) reflect the principles underlying asset-based financing and leasing of aircraft objects and (ii) provide transaction parties with autonomy to allocate risks and benefits to the extent consistent with the policy decisions made by Contracting States in this Protocol,
CONSCIOUS of the need for an international registration system as an essential feature of the legal framework applicable to international interests in aircraft equipment,
CONSIDERING it necessary to implement the Unidroit Convention on International Interests in Mobile Equipment so as to meet the requirements of aircraft finance and the purposes described above,
HAVE AGREED upon the following provisions relating to aircraft equipment:

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article I

Defined Terms

1. Terms used in this Protocol and defined in Article 1 of the Convention are employed herein with the meanings there stated.

2. In this Protocol the following terms are employed with the meanings set out below:

"aircraft" means airframes with aircraft engines installed thereon or helicopters;

"aircraft engines" means aircraft engines (other than those used in military, customs or police services) powered by jet propulsion or turbine technology and:

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

(b) in the case of turbine-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent, together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto;

"aircraft objects" * means airframes, aircraft engines and helicopters;

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* In accordance with the preliminary draft Convention, the body of this preliminary draft Protocol employs the term "object" rather than the term "equipment", although the latter is used in the title of the instrument (and, for consistency with that title, in the preamble). Consideration should be given to the adoption of a consistent terminology in the two instruments.

"airframes" means airframes (other than those used in military, customs and police services) that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport:

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

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

"authorised party" means the party referred to in Article XIII(2);

"Chicago Convention" means the Convention on International Civil Aviation, signed at Chicago on 7 December 1944, as amended;

"common mark registering authority" means the authority maintaining the non-national register in which an aircraft of an international operating agency is registered in accordance with Article 77 of the Chicago Convention;

"deregister the aircraft" means delete the registration of an aircraft from a national aircraft register;

"Geneva Convention" means the Convention on the International Recognition of Rights in Aircraft, signed at Geneva on 19 June 1948;

0"helicopters" means heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes and which are type certified by the competent aviation authority to transport:

(a) at least five (5) persons including crew; or

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

"insolvency date" means the date referred to in Article XI(1);

["International Registry Authority" means the permanent international body designated as the International Registry Authority under this Protocol;]

["International Regulator" means [the permanent international body designated as the International Regulator under this Protocol] [the entity designated as the International Regulator in Article XVI(1)];]

"national aircraft register" means the national register in which an aircraft is registered pursuant to the Chicago Convention;

"national registry authority" means the national authority, or the common mark registering authority in a Contracting State which is the State of registry responsible for the registration and de-registration of an aircraft in accordance with the Chicago Convention;

"primary insolvency jurisdiction" means the insolvency jurisdiction of the State in which the centre of the obligor's main interests is situated;

"prospective sale" means a sale that is intended to take effect on the conclusion of a contract of sale in the future;

["Registrar" means [the entity designated as the Registrar under this Protocol] [the entity initially designated or subsequently appointed or re-appointed as the Registrar, as the case may be, as specified in Article XVI];]

"State of registry" means in respect of an aircraft the State, or a State member of a common mark registering authority, on whose national aircraft register an aircraft is entered under the Chicago Convention; and

"suretyship contract" means a contract entered into by one of the parties as surety for the obligations of the obligor under an agreement.

Article II

Implementation of Convention as regards aircraft objects

1. The Convention shall apply in relation to aircraft objects as implemented by the terms of this Protocol.

2. The Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as the Unidroit Convention on International Interests in Mobile Equipment as applied to aircraft objects.

Article III

Sphere of Application

1. The reference in Article 4(b) of the Convention to a "nationality register" is to be construed as a reference to a national aircraft register. No other "close connection" to a Contracting State shall be applicable for the purposes of that paragraph.

2. Notwithstanding the provisions of Article V of the Convention, this Protocol shall apply to [a purely domestic transaction].

3. In their relations with each other, the parties may, by agreement in writing, derogate from or vary any of the provisions of Articles IX(1), X or XI(1) - (6).

Article IV

Application of Convention to sales

The following provisions of the Convention apply *mutatis mutandis* in relation to a sale and a prospective sale as they apply in relation to an international interest and a prospective international interest:

Article 16(1) other than sub-paragraph (c);
Articles 18 - 20;
Article 23;
Articles 25 and 27;
Chapter VII; and
Article 40.

Article V

Formalities and effects of contract of sale

1. An agreement is a contract of sale for the purposes of this Protocol if it:

(a) is in writing;

(b) relates to an aircraft object in respect of which the transferor has power to enter into the agreement; and

(c) identifies the aircraft object.

2. A contract of sale transfers the interest of the transferor in the aircraft object to the transferee according to its terms.

3. A sale may be registered by either party to the contract of sale in the International Registry by or with the consent in writing of the other party.

Article VI

Representative capacities

A party to an agreement or a contract of sale may enter into an agreement, or register a related interest in an aircraft object in an agency, trust or other representative capacity. In such case that party is entitled to assert rights and interests under the Convention to the exclusion of the party or parties represented.

Article VII

Description of aircraft objects

A description of an aircraft object that contains its manufacturer's serial number, the name of the manufacturer and its

model designation is sufficient to identify the object for the purposes of Article 8(c) of the Convention and Article V(1)(c) of this Protocol.

Article VIII

Choice of law

1. The parties to an agreement or a contract of sale or a related suretyship contract or subordination agreement may agree on the law which is to govern their rights and obligations under the Convention, wholly or in part.

2. The reference in the preceding paragraph to the law chosen by the parties is to the rules of law in force in the designated State other than its rules of private international law.

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article IX

Modification of default remedies provisions

1. In addition to the remedies specified in the provisions of Articles 9(1), 11 and 15(1) of the Convention, the obligee may in the circumstances specified in such provisions:

(a) deregister the aircraft; and

(b) export and physically transfer the aircraft object from the territory in which it is situated.

2. The obligee may not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the obligee.

3. (a) Article 9(2) of the Convention shall not apply to aircraft objects.

(b) A new Article 14bis shall be inserted after Article 14 of the Convention, to read as follows:

"1. Any remedy given by this Convention shall be exercised in a commercially reasonable manner.

2. An agreement between an obligor and an obligee as to what is commercially reasonable shall, subject to paragraph 3, be conclusive.

3. An obligee may not take possession or control of an aircraft object in a manner which contravenes public order. For these purposes, the disruption of air transport shall not in itself be deemed a contravention of public order."

4. A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons is deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 9(3) of the Convention. The foregoing shall not prevent a chargee and a chargor from agreeing to a longer prior notice period.

Article X

Definition of Speedy Judicial Relief

1. For the purposes of Article 15(1) of the Convention, "speedy" in the context of obtaining judicial relief means 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.

2. The remedies specified in Article IX(1) shall be made available by the national registry authority and other administrative authorities, as applicable, in a Contracting State no later than three working days after the judicial relief specified in the preceding

paragraph is authorised or, in the case of judicial relief authorised by a foreign court, approved by courts of that Contracting State.

Article XI

Remedies on insolvency

1. For the purposes of this Article, "insolvency date" means the earliest date on which one of the events specified in paragraph 2 shall have occurred.

2. This Article applies where:

(a) any insolvency proceedings** against the obligor have been commenced by the obligor or another person in a Contracting State which is the primary insolvency jurisdiction of the obligor; or

(b) the obligor is located in a Contracting State and has declared its intention to suspend, or has actually suspended payment to creditors generally.

3. Within a period not exceeding [thirty/sixty] days from the insolvency date the obligor shall:

(a) cure all defaults, and agree to perform all future obligations under the agreement and related transaction documents; or

(b) give possession of the aircraft object to the obligee [in accordance with, and in the condition specified in the agreement and related transaction documents].

4. Where possession has been given to the obligee pursuant to the preceding paragraph, the remedies specified in Article IX(1) shall be made available by the national registry authority and other administrative authorities, as applicable, no later than three working days after the date on which the aircraft object is returned.

5. No exercise of remedies permitted by the Convention may be prevented or delayed after the period specified in paragraph 3.

6. No obligations of the obligor under the agreement and related transactions may be modified [in the insolvency proceedings] without the consent of the obligee.

7. No rights or interests, except for preferred non-consensual rights or interests listed in an instrument deposited under Article 40 of the Convention, shall have priority in the insolvency over registered interests.

Article XII

Insolvency assistance

The courts of a Contracting State in which an aircraft object is situated shall expeditiously co-operate with and assist the courts or other authorities administering the insolvency proceedings referred to in Article XI in carrying out the provisions of that Article.

Article XIII

De-registration and export authorisation

1. Where the obligor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the national registry authority, that authorisation shall be so recorded.

2. The person in whose favour the authorisation has been issued ("the authorised party") or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1), and may do so only in accordance with the authorisation. Such authorisation may not be revoked by the obligor without the consent in writing of the authorised party.

** The phrase "insolvency proceedings" will need to be defined.

3. The national registry authority and other administrative authorities in Contracting States shall expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX.

Article XIV

Modification of priority provisions

[1.] Article 28 of the Convention applies with the omission of paragraph 3.

[2. Article 28(5) of the Convention applies with the insertion of the words "and to amounts payable by any Government or State entity in respect of the confiscation, condemnation or requisition of that object" immediately following the words "physical destruction of that object".] ***

Article XV

Modification of assignment provisions

1. Article 30(2) of the Convention applies with the following being added immediately after sub-paragraph (c):

"(d) is consented to in writing by the obligor, whether or not the consent is given in advance of the assignment or specifically identifies the assignee."

[2. Article 31(1)(b) of the Convention applies with the omission of the words "so far as such rights are assignable under the applicable law".]

[3. Article 33(1) of the Convention applies with the omission of sub-paragraph (c)].

*** Consideration should be given to an optional provision for compensation in respect of such governmental acts to be paid before they are performed in order to reduce political risk.

[4. Article 36 of the Convention applies with the omission of the words following the phrase "not held with an international interest"]. ****

CHAPTER III

REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AIRCRAFT OBJECTS

Article XVI

Regulation and operation of Registry

Alternative A

[1. [The International Registry shall be regulated and operated by the International Registry Authority.] [The International Registry shall be regulated by the International Regulator ***** and operated by the Registrar.]] ******

**** Article 36 of the preliminary draft Convention, as may be modified by this preliminary draft Protocol, will have important implications for the competing rights of a receivables financier and an asset-based financier. Consideration should be given to the appropriate rule in the context of aviation financing.

***** Further consideration needs to be given as to whether the appropriate term is *International* Regulator or *Intergovernmental* Regulator.

****** The two bracketed provisions in this Alternative A are mutually exclusive, so that if the decision is to have an International Registry Authority references in other Articles to the International Regulator and the Registrar will be deleted, whilst if the latter are adopted references to the International Registry Authority will be deleted.

Alternative B

[1. The International Registry shall be regulated by the Council of the International Civil Aviation Organization or such other permanent body designated by it to be the International Regulator.

2. The initial Registrar hereby designated to operate the International Registry shall be a newly created, independent special purpose affiliate of the International Air Transport Association.

3. The initial Registrar shall be organised in consultation with the International Regulator. Its constitutive documents shall contain provisions that:

(a) restrict it to acting as Registrar and performing ancillary functions; and

(b) ensure that it has no greater duties (fiduciary or otherwise) to members of the International Air Transport Association than to any person or entity in the performance of its functions as Registrar.

4. The initial Registrar shall operate the International Registry for a period of five years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or re-appointed at regular five-year intervals by the [Contracting States] [International Regulator].]

[2./5. Article 17(1) and (3) of the Convention apply as modified by the preceding paragraphs of this Article.]

Article XVII

Basic regulatory responsibilities

1. The [International Registry Authority] [International Regulator] shall act in a non-adjudicative capacity. This shall not prevent the [International Registry Authority] [International Regulator] from undertaking the functions specified in Article 17(6) and (7) of the Convention.

2. The [International Registry Authority] [International Regulator] shall [be responsible to the Contracting States, and shall report thereto on its regulatory [and oversight] functions. Such reports shall be made on a yearly basis or more frequently as the [International Registry Authority] [International Regulator] deems appropriate.]

[3. The initial regulations shall be promulgated by the [International Registry Authority] [International Regulator] on entry into force of this Protocol.]

Article XVIII

Registration facilities

1. At the time of ratification, acceptance, approval of, or accession to this Protocol, a Contracting State may, subject to paragraph 2:

(a) designate its operators of registration facilities as specified in Article 17(2) of the Convention; and

(b) declare the extent to which any such designation shall preclude alternative access to the International Registry.

2. A Contracting State may only designate registration facilities as points of access to the International Registry in relation to:

(a) helicopters or airframes pertaining to aircraft for which it is the State of registry; and

(b) registrable non-consensual rights or interests created under its domestic law.

Article XIX

Additional modifications to Registry provisions

1. For the purposes of Article 20(6) of the Convention, the search criterion for an aircraft object shall be its manufacturer's serial

number, supplemented as necessary to ensure uniqueness. Such supplementary information shall be specified in the regulations.

2. For the purposes of Article 26(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to effect a removal thereof no later than five working days after the receipt of the demand described in such paragraph.

3. The fees referred to in Article 17(4) of the Convention shall be determined so as to recover the reasonable costs of operating the International Registry and the registration facilities and, in the case of the initial fees, of designing and implementing the international registration system.

4. The centralised functions of the International Registry shall be operated and administered by the [International Registry Authority] [Registrar] on a twenty-four hour basis. The various registration facilities shall be operated and administered during working hours in their respective territories.

5. The regulations shall prescribe the manner in which the following provisions of the Convention shall apply:

Article 17(6) and (7);
Article 18;
Article 19;
Article 22;
Article 23(1) and (2);
Article 24; and
Article 25.

CHAPTER IV

JURISDICTION

Article XX

Modification of jurisdiction provisions

For the purposes of Articles 42 and 43 of the Convention, a court of a Contracting State also has jurisdiction where that State is the State of registry.

Article XXI

Waivers of sovereign immunity

A waiver of sovereign immunity from jurisdiction of the courts specified in Article 43 of the Convention or relating to enforcement of rights and interests relating to an aircraft object under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

CHAPTER V

RELATIONSHIP WITH OTHER CONVENTIONS

Article XXII

Relationship with 1948 Convention on the International Recognition of Rights in Aircraft

1. Where a Contracting State is a party to the Geneva Convention:

(a) the reference to the "law" of such Contracting State for the purposes of Article I (1)(d)(i) of the Geneva Convention should be to such law after giving effect to the Convention;

(b) for the purposes of the Geneva Convention, the term "aircraft" as defined in Article XVI of that Convention shall be deleted and replaced by the terms "airframes," "aircraft engines" and "helicopters" as defined in this Protocol; and

(c) registrations in the International Registry shall be deemed to be regular recordations "in a public record of the Contracting State" for the purposes of Article I (1)(ii) of the Geneva Convention.

2. Subject to paragraph 3, the Convention shall, for the Contracting States referred to in the preceding paragraph, supersede the Geneva Convention to the extent, after giving effect to the preceding paragraph, of inconsistency between the two Conventions.

3. The provisions of the preceding paragraph shall not apply to Articles VII and VIII of the Geneva Convention where an obligee elects to exercise remedies against an obligor in accordance with those Articles [and provides the court with written evidence of that election.]

Article XXIII

Relationship with 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft

The Convention shall, for Contracting States that do not make a declaration under Article Y(2) of the Convention, supersede the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft.

Article XXIV

Relationship with 1988 Unidroit Convention International Financial Leasing

The Convention shall supersede the 1988 Unidroit Convention on International Financial Leasing as it relates to aircraft objects.

CHAPTER VI

[OTHER] FINAL PROVISIONS*******

******* It is envisaged that, in line with practice, draft Final Provisions will be prepared for the Diplomatic Conference at such time as governmental experts have completed their preparation of the draft Protocol. The proposals for draft Final Provisions set out in the Addendum to this preliminary draft Protocol below are in no way intended to prejudge that process but simply to indicate the suggestions of the Aircraft Protocol Group on this matter. Particular attention is drawn to Article XXXI(3) and XXXIII(3) (limiting the effect of any future declaration or reservation and denunciation respectively as regards established rights) and Article XXXIV (establishing a Review Board and contemplating review and revision of this Protocol).

ADDENDUM

CHAPTER VI

[OTHER] FINAL PROVISIONS

Article XXV

Adoption of Protocol

1. This Protocol is open for signature at the concluding meeting of the Diplomatic Conference for the Adoption of the Draft Protocol to the Unidroit Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment and will remain open for signature by all Contracting States at [....] until [....].

2. This Protocol is subject to ratification, acceptance or approval of Contracting States which have signed it.

3. This Protocol is open for accession by all States which are not signatory Contracting States as from the date it is open for signature.

4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.*

* It is recommended that a resolution be adopted at, and contained in the Final Acts and Proceedings of, the Diplomatic Conference, contemplating the use by Contracting States of a model ratification instrument that would standardise, *inter alia*, the format for the making and/or withdrawing of declarations and reservations.

Article XXVI

Entry into force

1. This Protocol enters into force on the first day of the month following the expiration of [three] months after the date of deposit of the [third] instrument of ratification, acceptance, approval or accession.

2. For each Contracting State that ratifies, accepts, approves or accedes to this Protocol after the deposit of the [third] instrument of ratification, acceptance, approval or accession, this Protocol enters into force in respect of that Contracting State on the first day of the month following the expiration of [three] months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article XXVII

Territorial Units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which this Protocol extends.

3. If a Contracting State makes no declaration under paragraph 1, this Protocol is to extend to all territorial units of that Contracting State.

Article XXVIII

Temporal Application

This Protocol applies in a Contracting State to rights and interests in aircraft objects created or arising on or after the date on which this Protocol enters into force in that Contracting State.

Article XXIX

Declarations and Reservations

No declarations or reservations are permitted except those expressly authorised in this Protocol.

Article XXX

Declarations disapplying certain provisions

A Contracting State may declare at the time of ratification, acceptance, approval of, or accession to this Protocol that it will not apply any one or more of the provisions of Articles VIII and X to XIII of this Protocol.

Article XXXI

Subsequent Declarations

1. A Contracting State may make a subsequent declaration at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of [twelve] months after the date of deposit of the instrument in which such declaration is made with the depositary. Where a longer period for that declaration to take effect is specified in the instrument in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of that subsequent declaration.

Article XXXII

Withdrawal of Declarations and Reservations

Any Contracting State which makes a declaration under, or a reservation to this Protocol may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of [three] months after the date of the receipt of the notification by the depositary.

Article XXXIII

Denunciations

1. This Protocol may be denounced by any Contracting State at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiration of [twelve] months after the date of deposit of the instrument of denunciation with the depositary. Where a longer period for that denunciation to take effect

is specified in the instrument of denunciation, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of that denunciation.

Article XXXIV

Establishment and responsibilities of Review Board

1. A five-member Review Board shall promptly be appointed to prepare yearly reports for the Contracting States addressing the matters specified in sub-paragraphs (a)-(d) of paragraph 2. [The composition, organisation and administration of the Review Board shall be determined, in consultation with other aviation interests, jointly by the International Institute for the Unification of Private Law and the International Civil Aviation Organization].

2. At the request of not less than twenty-five per cent of the Contracting States, conferences of the Contracting States shall be convened from time to time to consider:

(a) the practical operation of this Protocol and its effectiveness in facilitating the asset-based financing and leasing of aircraft objects;

(b) the judicial interpretation given to the terms of the Convention, this Protocol and the regulations;

(c) the functioning of the international registration system and the performance of the [International Registry Authority] [Registrar and its oversight by the Intergovernmental Regulator]; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

Article XXXV

Depositary arrangements

1. This Protocol shall be deposited with the [....].

2. The [....] shall:

(a) inform all Contracting States which have signed or acceded to this Protocol and [....] of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made in accordance with this Protocol;

(iii) the withdrawal of any declaration;

(iv) the date of entry into force of this Protocol; and

(v) the deposit of an instrument of denunciation of this Protocol together with the date of its deposit and the date on which it takes effect;

(b) transmit certified true copies of this Protocol to all signatory Contracting States, to all Contracting States acceding to the Protocol and to [....];

(c) provide the [International Registry Authority] [Registrar] with the contents of each instrument of ratification, acceptance, approval or accession so that the information contained therein may be made publicly accessible; and

(d) perform such other functions customary for depositaries.

APPENDIX

FORM OF IRREVOCABLE DE-REGISTRATION AND EXPORT REQUEST AUTHORISATION

[Insert Date]

To: [Insert Name of National Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

The undersigned is the registered [operator] [owner]* of the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration [number] [mark] [insert registration number/mark] (together with all installed, incorporated or attached accessories, parts and equipment, the "aircraft").

This instrument is an irrevocable de-registration and export request authorisation issued by the undersigned in favour of [insert name of obligee] ("the authorised party") under the authority of Article XIII of the Protocol to the Unidroit Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment. In accordance with that Article, the undersigned hereby requests:

(i) recognition that the authorised party or the person it certifies as its designee is the sole person entitled to:

(a) obtain de-registration of the aircraft from the [insert name of national aviation registry] maintained by the [insert name of aviation authority] for the purposes of Chapter III of the Chicago Convention of 1944 on International Civil Aviation; and

(b) export and physically transfer the aircraft from [insert name of country]; and

(ii) confirmation that the authorised party or the person it certifies as its designee may take the action specified in clause (*i*) above on written demand without the consent of the undersigned and that, upon such demand, the authorities in [insert name of country] shall co-operate with the authorised party with a view to the speedy completion of such action.

The rights in favour of the authorised party established by this instrument may not be revoked by the undersigned without the written consent of the authorised party.

Please acknowledge your agreement to this request and its terms by appropriate notation in the space provided below and lodging this instrument in [insert name of national registry authority].

[insert name of operator/owner]

_____

Agreed to and lodged this [insert date]

By: [insert name of signatory]
Its: [insert title of signatory]

_____

[insert relevant notational details]

* Select the term that reflects the relevant nationality registration criterion.

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