Rationalizing the Cape Town Convention and Aircraft Protocol's First-to-Register Rule and Its Exceptions in the Context of Aviation Finance

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RATIONALIZING THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL’S FIRST-TO-REGISTER RULE AND ITS EXCEPTIONS IN THE CONTEXT OF AVIATION FINANCE

JOLYN ANG YI QIN*

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I. INTRODUCTION

FOR MANY, aircraft evoke a visceral thrill and sense of romance as they push the limits of human experience and transcend geographical boundaries on a regular basis. To aviation financiers, however, the inherent internationality and mobility of aircraft equipment (i.e., airframes, aircraft engines, and helicopters)\(^1\) present special challenges. The quality of internationality is intensified by the fact that several capital markets often finance a single aircraft given the airline industry's heavy dependence on external finance,\(^2\) as well as the industry trend of airframes being "dealt in and financed separately" from aircraft engines.\(^3\) The internationality and mobility of aviation finance makes it difficult for creditors to exert a degree of control


over the equipment that they finance and "protect themselves against the possibility of [unauthorized] movement," especially when they are not even well-positioned to know when movement takes place.\(^4\)

This difficulty is exacerbated by the lack of uniformity across jurisdictions with regards to secured transactions law. Without uniformity, the means of creating security interests (creation), their "effectiveness against third parties" (perfection), their priority vis-à-vis other interests (priority), and the rights and remedies available to creditors to enforce them (enforcement) will differ from jurisdiction to jurisdiction.\(^5\) The traditional *lex rei sitae* rule governing proprietary rights,\(^6\) which "applies the law . . . of the jurisdiction in which the mobile asset is situated to determine [legal] questions," addresses the lack of uniformity problem to a certain extent, but is clearly "unsuited to [highly] mobile equipment" such as aircraft equipment because the applicable law would change far too frequently.\(^7\)

Taking into account the high credit risk—the business of aircraft repossession is even said to carry mortal risk—creditors may refuse to lend or charge higher interest on loans. In an effort to "induce the assumption of risk and the release of funds"\(^8\) as well as reduce the cost of financing mobile equipment such as aircraft objects, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) authorized the creation of a study group in 1992 to draft uniform rules on international aspects of security interests in mobile equipment, a project that started from a 1988 proposal made by its Canadian member, Mr. T.B. Smith QC.\(^9\) Over

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the years, the project developed into a comprehensive international convention accompanied by three protocols, each dealing with a particular category of equipment.10 The International Civil Aviation Organization (ICAO), International Air Transport Association (IATA), and the Aviation Working Group (AWG)11 together accomplished the work concerning aircraft equipment that culminated in the signing of the Convention on International Interests in Mobile Equipment (Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Aircraft Protocol) in 2001.12 After receiving the requisite number of ratifications, both entered into force in 2006. Singapore ratified both the Convention and the Aircraft Protocol in 2009.13

The other two protocols dealing with railway rolling stock and space assets, the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg Protocol) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Space Protocol), were signed in 2007 and 2012, respectively, but have yet to enter into force and are outside the remit of this article.14

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Acorn to Oak Tree]. The motive of “reducing borrowing costs” was later enshrined as one of the five key objectives of the Convention and its protocols. See Goode, Explanatory Report and Commentary, supra note 3, at 2–3.


12 Goode, From Acorn to Oak Tree, supra note 9, at 602–04.


The "hub-and-spoke" convention-protocol approach has previously been adopted in a few other conventions, but the Cape Town Convention's use of protocols is unprecedented.15 The Convention enters into force with respect to a particular state only when that state has acceded to both the Convention and a protocol, and the Convention will only enter into force for that state with respect to the category of assets covered by the acceded protocol.16 Further, the Convention takes effect subject to the provisions of the protocol,17 with Article 6(1) stating that the Convention and an individual protocol "shall be read and interpreted together as a single instrument" and Article 6(2) stating that, with respect to a particular type of asset, the provisions of the protocol relating to such asset will trump any inconsistent provision contained in the Convention.18 This unique use of protocols, which "ensure[s] that the Convention's provisions can be adapted to the specific needs of particular sectors,"19 underlines the importance of conceiving the legal regime governing security interests in aircraft equipment as a single set of rules contained in the Convention and Aircraft Protocol.

The Convention and Aircraft Protocol established comprehensive creation, perfection, priority, and enforcement rules governing aircraft equipment, while incorporating elements of both secured transactions law and insolvency law,20 but the focus of the article is on the perfection and priority rules, specifically the first-to-register rule that grants a registered interest priority over any other subsequently registered or unregistered interest. The concept of a registration system with a first-to-register prior-

15 Mark J. Sundahl, *The "Cape Town Approach": A New Method of Making International Law*, 44 COLUM. J. TRANSNAT'L L. 339, 354-58 (2006). Sundahl categorized protocols prior to the Convention's protocols into (1) protocols of signature that address detailed technical matters; (2) protocols of amendment used to modify or change the provisions of the base convention; (3) optional protocols providing for obligations that supplement obligations contained in the base convention; and (4) framework protocols that provide substance to existing treaty obligations. The Convention's protocols do not belong to any of these categories, playing a primary role alongside the Convention instead of a mere supporting role that the Convention can do without.


18 Cape Town Convention, supra note 16, art. 6.


20 Deschamps, supra note 5, at 51–52.
ity rule is not new; it is a key feature of Article 9 of the Uniform Commercial Code (UCC Article 9), which governs secured transactions in all fifty states of the United States. Nevertheless, the International Registry and first-to-register rule established by the Convention and Aircraft Protocol pose unique problems that do not arise in the context of domestic secured transactions law, which ought to be carefully scrutinized and mitigated.

The single, restricted objective of this article is to rationalize and defend the Convention and Aircraft Protocol’s first-to-register rule despite its problems, which this author believes have been adequately considered by the drafters of the Convention and Aircraft Protocol and addressed by the exceptions to the rule.

Part II provides a basic overview of the relevant workings of the Convention and Aircraft Protocol. Part III will distill the key principles underlying the Convention and Aircraft Protocol’s first-to-register rule that justify its adoption upon a comprehensive examination of the secured transactions law in several domestic jurisdictions as well as international and regional efforts at harmonization. Part IV will underline problems with the Convention and Aircraft Protocol’s first-to-register rule, and Part V will show how the exceptions within the Convention and Aircraft Protocol comprehensively address the problems. Singapore’s experience with the Convention and Aircraft Protocol will be referred to as and when necessary to substantiate or illustrate arguments.

II. OVERVIEW OF THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL

To summarize, the Convention and its protocols have three main features: they (1) provide for the creation of an “international interest” recognized in all contracting states; (2) establish an international register for the registration of international interests which will give notice of their existence to third parties and enable creditors to preserve priority against subsequently registered interests, unregistered interests, and insolvency administrators; and (3) provide creditors with a range of basic default remedies and a means of obtaining speedy interim relief pending final determination of its claim where there is evidence

21 Id. at 57–58.
22 See infra Part IV.
Because the focus of this article is on the first-to-register rule, this Part will only elaborate at length with regard to the first two features.

A. Creation of an "International Interest"

At the heart of the Convention and its protocols is the concept of an "international interest," a sui generis security interest in mobile equipment that is "‘autonomous’ in the sense that it neither derives from nor depends upon any . . . national law." Its creation depends solely on compliance with the requirements of the Convention, which tells us that an "international interest" is created by a security agreement, a title reservation agreement, or a leasing agreement, so long as the agreement creating or providing for the interest is in writing, "relates to an object of which the [creator of the interest] has power to dispose," and enables the object and secured obligations to be identified. While the international interest does not derive from national law, "it is the applicable national law [that] determines whether the object is one of which the chargor, conditional seller, or lessor has power to dispose."

An international interest may concurrently constitute a security interest under national law such that both will co-exist, but an interest falling within Article 2 and constituted in accordance with the formal requirements of Article 7 of the Convention is an international interest enforceable between parties in any contracting state regardless of whether it has any counterpart in national law or fulfills the requirements for creation of an interest under national law. For example, a lease not made for security purposes will not constitute a security interest in some jurisdictions such as the United States where UCC Article 9 governs, but

25 Cape Town Convention, supra note 16, art. 2(2).
26 Id. art. 7.
27 “A ‘conditional seller’ means a seller under a title reservation agreement.” Cape Town Convention, supra note 16, art. 1(f).
28 Goode, The UNIDROIT Mobile Equipment Convention, supra note 17, at 234.
29 Id.
may nonetheless constitute an international interest under the Convention. In any case, "creditor[s] will usually find it advantageous to rely on the interest in its capacity of an international interest," which normally "give[s them] stronger rights than under national law."  

B. Perfection by Registration in an International Registry

For an international interest to benefit from the priority rules of the Convention and the Aircraft Protocol, it must be registered with the International Registry.

Given that the Convention is primarily concerned with consensual security and quasi-security interests, it does not apply to outright sales, and, consequently, the International Registry is primarily a security registry. However, as will be elaborated on later, the Aircraft Protocol extends the scope of the Convention to encompass outright sales to secure for such sales the benefits of the Convention's registration and priority rules. This does not turn the International Registry into a title registry because registration under the International Registry does not grant title upon registration, but it does aid the International Registry's effectiveness as a security register that purports to reduce credit risk. If a creditor cannot even be sure that the party seeking credit is the owner of an aircraft object, he may be reluctant to lend even if he is aware of security interests in the object.

The International Registry was established and supervised by the ICAO, which assumed the functions of Supervisory Authority provided by the Convention and Aircraft Protocol, but is run by the Registrar, a separate entity from the Supervisory Authority appointed by ICAO at regular five-year intervals. The first-appointed and current Registrar is Aviareto Ltd., a joint

30 Deschamps, supra note 5, at 52.
31 Goode, The UNIDROIT Mobile Equipment Convention, supra note 17, at 234.
33 Aircraft Protocol, supra note 1, art. III. See infra Part V(B) for more on outright sales.
34 Deschamps, supra note 5, at 62.
35 Cape Town Convention, supra note 16, art. 17; Aircraft Protocol, supra note 1, art. XVII; see also Goode, Official Commentary on the Aircraft Protocol, supra note 23, at 343–44.
36 Cape Town Convention, supra note 16, art. 17(2); Aircraft Protocol, supra note 1, art. XVII(5).
venture between SITA SC\textsuperscript{37} and the Irish government, which operates out of Dublin, Ireland.\textsuperscript{38}

"Registration is against the individual [aircraft] object, not against the debtor," which explains "the requirement that the object must be uniquely identifiable" in order for an international interest to be created.\textsuperscript{39} Airframes and engines are treated separately; hence, where a single transaction providing for a registrable interest in an airframe and attached engines is involved, separate registrations are needed for the airframe and each of the engines.\textsuperscript{40}

For registration of an interest or prospective interest—advanced filing is hence permitted—in an aircraft object to be effected, basic information about a transaction or prospective transaction must be transmitted to the International Registry,\textsuperscript{41} and the information must be entered into the International Registry's database so as to be searchable.\textsuperscript{42}

Registration is "notice-based"\textsuperscript{43} and the Registrar is not expected to review filings to assess their legal adequacy or investigate who is making the submission.\textsuperscript{44} "[T]he Registrar is only liable for loss suffered directly resulting from an error or omission of the Registrar or from a malfunction of its system except where the malfunction is due to a force majeure event or could not have been prevented by using current best practices."

A number of contracting states have designated an exclusive national entry point for accessing the International Registry for the purpose of harmonizing national registration systems with


\textsuperscript{39} GOODE, EXPLANATORY REPORT AND COMMENTARY, supra note 3, at 6.

\textsuperscript{40} Id. at 22.

\textsuperscript{41} Id. at 26.

\textsuperscript{42} Id.; Cape Town Convention, supra note 16, art. 19(2).

\textsuperscript{43} Id. art. 17(2)(i).

\textsuperscript{44} Jane K. Winn, The Cape Town Convention’s International Registry: Decoding the Secrets of Success in Global Electronic Commerce, 1 CAPE TOWN CONVENTION J. 25, 40 (2012).

\textsuperscript{45} Cape Town Convention, supra note 16, art. 28(1).
the International Registry, but most states have not, permitting registrations directly with the International Registry.

Electronic and accessible online on a 24/7 basis "unless it is unavailable due to maintenance or unforeseen circumstances," the International Registry provides notice to the world of the existence or potential existence of registrable interests affecting aircraft objects, but it must be emphasized that the priority of a registered interest is not dependent on the state of knowledge of third parties.

C. ARTICLE 29(1)'S BRIGHT-LINE FIRST-TO-REGISTER RULE

The basic priority rule of the Convention, as enshrined in Article 29(1), is that "a registered interest has priority over any other interest subsequently registered and over an unregistered interest." "Registered" means registered in the International Registry. "Registered interest" means a registered international interest, a non-consensual right or interest (NCRI) registrable or registered under Article 40 of the Convention, or a registered national interest specified in a notice of a national interest.

Sequence of registration merely determines priority. As observed by Wool, it is "not an aspect of, or a condition to, the creation or validity of that interest or its enforceability. Thus, if an interest has not been validly created[, ] . . . or if the factual predicate to that interest is false, the act of registration will not rectify such defects."

46 For example, in the United States, a transaction party must first register the aircraft object with the Federal Aviation Administration in order to receive a transaction code that can then be used to register the aircraft object with the International Registry. Winn, supra note 44, at 40-41.
47 Id.
48 Id. at 40.
49 Cuming, supra note 38, at 28.
50 Cape Town Convention, supra note 16, art. 29(1).
51 Id. art. 1(bb).
52 Id. art. 1(cc).
53 See infra Part V(E) for more on NCRI, i.e., non-consensual rights or interests.
54 Cape Town Convention, supra note 16, arts. 1(cc), 1(dd).
55 According to Article 1(r) of the Cape Town Convention, a "national interest" is an interest held by a creditor in an object and created by an international transaction covered by a declaration under Article 50(1). Id. art. 1(r).
56 Id. arts. 1(cc), 1(dd).
57 Wool, supra note 7, at 540.
58 Id.
Article 29(1) embodies a bright-line first-to-register rule that gives priority to a registered interest over an unregistered interest, regardless of whether it is capable of being registered,\(^{59}\) even if the holder of a registered interest had knowledge of an earlier unregistered interest and even as regards value given with such knowledge.\(^{60}\)

The granting of priority without taking into account the state of knowledge of the registrant follows the approach taken by UCC Article 9.\(^{61}\) Article 29(1)’s rejection of a doctrine of notice, constructive or otherwise, also has a counterpart in the English company charges registration system\(^{62}\) in which “most mortgage[s] or charge[s] created by a company are void against a liquidator, administrator, or creditor of the company . . . unless they are registered against the debtor at Companies House within the prescribed period.”\(^{63}\) However, there are important differences between the two registration systems, key of which is the type of priority that they grant. UCC Article 9’s first-to-register rule grants positive priority whereby priority is determined by sequence of registration, whereas the English Companies Act’s registration requirements grant negative priority whereby priority depends on sequence of creation but registration is necessary to protect that priority.\(^{64}\) Thus, the Convention’s registration system more closely resembles UCC Article 9’s registration system.

III. DISTILLING KEY PRINCIPLES UNDERLYING ARTICLE 29(1)’S BRIGHT-LINE FIRST-TO-REGISTER RULE

As mentioned above, the predominant influence behind the Convention and Aircraft Protocol’s International Registry and bright-line first-to-register rule is UCC Article 9, which was almost wholly adopted in many Canadian provinces and precipitated reform legislation in many other jurisdictions such as

\(^{59}\) Cape Town Convention, supra note 16, art. 1(mm).

\(^{60}\) Id. art. 29(2).

\(^{61}\) Deschamps, supra note 5, at 58.

\(^{62}\) See In re Monolithic Building Co. [1915] 1 Ch. 643 (A.C.).


\(^{64}\) For more on the differences between the UCC and English registration systems, see Chapter 4 of GERARD MCCORMACK, SECURED CREDIT AND THE HARMONISATION OF LAW (2011).
Across the Atlantic, many European jurisdictions also have registration systems for security rights in tangibles, with a couple of notable exceptions being Germany and the Netherlands. But they differ greatly from UCC Article 9 in terms of purpose, coverage, and efficiency. This can perhaps be attributed to the fact that the “notion of publicity with respect to security rights in movables has had varying acceptance in Europe, being generally rejected in Germany and playing a limited but significant role in [countries like] Belgium and France and a substantial role in [countries like] Norway.”

Apart from its impact on domestic secured transactions laws, UCC Article 9 also formed the basis of other efforts toward international and regional harmonization, such as the European Bank for Reconstruction and Development Model Law on Secured Transactions (EBRD Model Law) and the United Nations Commission on International Trade Law Legislative Guide on Secured Transactions (UNCITRAL Legislative Guide). Of note, for the purposes of this article, is the EBRD Model Law principle that the existence of a security right over property must be effectively publicized and the UNCITRAL Legislative Guide’s recommendation of the implementation of a UCC Article 9-inspired registry and first-to-register rule, which was recently followed up with the UNCITRAL Guide on the Implementation of a Security Rights Registry.

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66 As observed in Eva-Maria Kieninger & Harry C. Sigman, Introduction, in Cross-Border Security Over Tangibles 1, 8 (Eva-Maria Kieninger & Harry C. Sigman eds., 2007), submission to the tax authority of a copy of a non-authentic deed of pledge with respect to an “undisclosed” pledge is required in the Netherlands. However, this cannot be viewed as “registration” as used in this article because such submission is not to a searchable public record and is merely a device to provide a date certain as an alternative to use of an authentic deed.

67 Id.

68 Sigman, supra note 65, at 59; see infra Part II(a) (for more on the concept of publicity).


70 Id. at 212–13.


What are the key principles underlying the UCC Article 9-inspired, positive priority-granting bright-line first-to-register rule found in various domestic, regional, and international secured transactions laws and in Article 29(1) of the Convention? As indicated in Part I, the controlling purpose of the Convention and Aircraft Protocol is the facilitation of access to low-cost credit by reducing credit risk. Article 29(1)’s bright-line first-to-register rule furthers this purpose by increasing transparency, making the law more certain, improving efficiency, and allocating risk to parties best able to mitigate it. Furthermore, it is compatible with aviation finance where non-possessory security interests are taken over highly mobile equipment.

A. Transparency Through Publicity

A significant benefit of registration-based priority rules like a first-to-register rule accompanied by a public register, regardless of the form of the registry and the type of priority it grants, is that it increases transparency of security interests, which is one of the Convention’s five underlying principles. A registration system has therefore been viewed as a “substitute for dispossessing of a pledgor” in serving the publicity function of warning creditors to inquire further before extending credit. Rules that grant priority, both positive and negative, ensure the completeness of the register by making parties take their registration obligations seriously.

Transparency through publicity reduces the possibility of fraud on creditors and, as a result, mitigates credit risk. Without a public register that “suffices to warn that a creditor may, presently or thereafter, claim a security interest” in the relevant object, “[unsecured] creditors may be misled by want of registration into extending credit which they would not otherwise have granted.” In the context of Singapore’s negative priority-granting company charges registration system, which is based on the English system, it has been said that “[t]he enactment of a public register of charges was intended to protect [un-

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75 GOODE, EXPLANATORY REPORT AND COMMENTARY, supra note 3, at 2.
74 Id. at 3.
75 Kieninger & Sigman, supra note 66, at 40.
76 Id.
77 Sigman, supra note 65, at 59.
secured] creditors from losing priority to undisclosed proprietary interests created by way of security.”79

B. LEGAL CERTAINTY AND PREDICTABILITY

A bright-line first-to-register rule “establishes an objective marker, a date [i.e., the date that a registration is made] certainly not subject to private manipulation, which can be, and in most cases is, used as a priority determinant.”80

In eliminating “the use of subjective knowledge standards [that] would invite factual disputes and unnecessarily increase litigation-related costs and risks,”81 the bright-line first-to-register rule is a “clear and concise priority rule” that reflects another of the Convention’s underlying principles—“predictability in the application of the Convention,” which emphasises “certainty and simplicity and a rule-based rather than standards-based approach.”82 When creditors can rest assured that they will not “unwittingly and unfairly lose their legitimate rights . . . due to the peculiarities or inadequacies of local law . . .,”83 they will be more willing to extend credit—and at a lower cost.

Transactions that will benefit from increased levels of legal predictability are not confined to transactions for initial acquisition of new aircraft equipment.84 “Capacity adjustment” transactions such as leasing and selling used aircraft equipment that primarily affect short-term and medium-term capacity requirements of airlines will also benefit.85 The growth of airline alliances and the accompanying increased use of code-sharing arrangements highlight the importance of facilitating such capacity adjustments.86 This is true for Singapore Airlines, which has code-sharing agreements with several airlines, mainly members of the Star Alliance.87

80 Sigman, supra note 65, at 59.
81 Wool, supra note 7, at 535.
82 Goode, Explanatory Report and Commentary, supra note 3, at 3.
83 Arundell & Wilson, supra note 3, at 285–86.
85 Id.
86 Id.
C. Efficiency

In general, improved efficiency within a secured transactions legal framework translates to lower credit cost. A bright-line first-to-register rule improves efficiency by reducing investigation costs for creditors (i.e., the costs of investigating a potential debtor’s affairs to ensure that the potential debtor is credit-worthy).\(^88\) These cost savings cannot be underestimated in the context of cross-border secured transactions. As observed by Wool, “the opposite rule—unregisterable interests prevailing over registered international interests—would require the holder of an international interest to search for all categories of potential interests in all relevant jurisdictions.”\(^89\) This provides a stark contrast to a simple search on the International Registry, which, like Article 9’s registry, is “publicly and inexpensively accessible.”\(^90\) At this juncture, it is pertinent to note that “[t]he primary sources of information for a prospective extender of commercial credit are the debtor’s loan application and the debtor’s books and records . . . supplemented, as appropriate, by information obtained directly from other creditors and other public or private sources of credit information.”\(^91\) Hence, investigation costs savings are derived mainly from easier and cheaper credit information verification instead of credit information gathering.

Efficiency is also enhanced in allowing creditors to protect their security interests at a lower cost. Rather than taking steps to protect their interests in all relevant jurisdictions, which can be time-consuming and expensive, a creditor only needs to prepare information once and register it with one registry. Following the approach taken by UCC Article 9, both the International Registry’s substantive information and procedural requirements are not so extensive and onerous so as to entail significant costs and delays.\(^92\)

Electronic registration and searching “allows the registry to be operated with virtually no personnel and at virtually no cost, and allows filing and searching to be accomplished on a virtually

\(^88\) Wool, supra note 7, at 535.
\(^89\) Id.
\(^90\) Sigman, supra note 65, at 59.
\(^91\) Kieninger & Sigman, supra note 66, at 42.
\(^92\) See Int’l Civil Aviation Org. [ICAO], Regulations and Procedures for the International Registry, at § 5, ICAO Doc. 9864 (5th ed. 2013) (providing substantive information and procedural requirements).
real-time basis; minimum human intervention also serves to minimize the risk of human error.”

D. ALLOCATION OF RISK TO PARTIES BEST ABLE TO MITIGATE RISK

A bright-line first-to-register rule punishes a creditor who fails to register by granting a subsequent creditor priority even if the latter knew of the former's interest. It therefore serves as a “powerful inducement” to creditors to (1) “structure their transaction in a manner that fits within the legal framework,” and (2) comply with the registration requirements in order to reap the full benefits that registration accords and reduce their priority risk.

Alternatively, a creditor may decide that withholding funds may be the best option to mitigate priority risk after a thorough examination of a credit application. In this regard, a bright-line first-to-register rule “supports due diligence on the part of a prospective supplier of credit, as it serves efficiently to assist in the discovery of potentially competing security interest.”

Therefore, even though the Convention and Aircraft Protocol's registration system does not remove all credit risk, creditors are well-placed to take necessary measures to mitigate the risk by using mechanisms within the system.

E. COMPATIBILITY WITH AVIATION FINANCE

It has been argued that the bright-line first-to-register rule in UCC Article 9 was designed more with tangible goods in mind rather than receivables because the transparency, predictability, and efficiency benefits attached to the rule are far more significant when the rule is applied to tangibles. The rule therefore

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93 Kieninger & Sigman, supra note 66, at 48.
94 Goode, Principles of Corporate Insolvency Law, supra note 78, at 608-09.
95 Wool, supra note 7, at 535.
96 See id. at 516; Goode, Explanatory Report and Commentary, supra note 3, at 36.
97 Kieninger & Sigman, supra note 66, at 42.
98 See, e.g., Thomas E. Plank, Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing, 68 Ohio St. L.J. 231, 267 (2007) (arguing that in the context of receivables, registration provides no meaningful information to subsequent searchers in many cases, and in other cases any minimum informational benefits for some subsequent searchers do not outweigh the costs imposed by the registration requirement. This is because receivables "only exist because there is a third person, the obligor to whom a loan was made (either cash, prop-
naturally lends itself to the subject of the Convention—security measures taken for mobile assets.

Moreover, these benefits are magnified when the equipment is high-value mobile equipment that moves frequently across national borders. As Davies observed, "[t]he availability of recourse to asset-based security is especially important to the aviation industry not least because of the strong residual value of an aircraft but also the length of time involved in the financing of it as well as the amounts lent. . ."100 Enforcing non-possessory security rights against aircraft equipment becomes "something of a lottery" if the priority rules are not standardized across countries given the mobility and internationality of aircraft equipment.101 The bright-line first-to-register rule is thus highly compatible to aviation finance.102

IV. IDENTIFYING PROBLEMS WITH ARTICLE 29(1)'S BRIGHT-LINE FIRST-TO-REGISTER RULE

Notwithstanding the above-mentioned principles, in justifying the adoption of the Convention and Aircraft Protocol’s bright-line first-to-register rule, some have pointed toward the costs of establishing, maintaining, and using a registry,103 monopoly profits earned by first-registered creditors,104 time zone problems;105 and the inequitable treatment of non-registrable interests in opposing the rule.106 Of these concerns, the focus of

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100 Id.


102 Practicality is another of the Convention’s five underlying principles. See GOODE, EXPLANATORY REPORT AND COMMENTARY, supra note 3, at 3.


104 Kieninger & Sigman, supra note 66, at 47.


106 See Wool, supra note 7, at 535 (addressing those opposed to the Convention and Aircraft Protocol’s bright-line first-to-register rule on the basis of inequitable treatment of non-registrable interests).
this Part will be the last two, which are unique to the Convention's first-to-register rule because it is applied to international interests and not domestic interests. The first two concerns are common criticisms leveled at first-to-register rules even within the context of domestic secured transactions law, which, in the opinion of this author, are non-concerns that should be categorically dismissed.

A. Costs of Establishing, Maintaining, and Using a Registry

It has been argued that it is expensive to establish and maintain a register because of the costs incurred in performing searches and preparing registrations.\(^{107}\) However, experience has demonstrated that the costs of establishing an electronic notice filing registration system are low, that costs of operating such a system are low and covered by minimal registration fees, and that the costs incurred in performing searches and registrations are typically only a small fraction of the due diligence and documentation costs routinely incurred in secured credit transactions.\(^{108}\)

In addition, there are concrete checks on cost in place for the International Registry.\(^{109}\) Article XX(3) of the Aircraft Protocol mandates that it operates on a cost-recovery basis and ICAO, the Supervisory Authority, "sets and reviews its fees, taking into account" its operating costs and potential liability.\(^{110}\) As of the writing of this article, the charge for a priority search fee is $22 and the cost of setting up an account and making a registration is a paltry $380.\(^{111}\) These costs are surely far outweighed by the costs of performing due diligence without a registration system in place.\(^{112}\)

B. Monopoly Profits

It has also been asserted that the first-to-register rule unaccompanied by a maximum amount requirement gives the first-

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\(^{107}\) Padfield, supra note 103.
\(^{108}\) Kieninger & Sigman, supra note 66, at 48.
\(^{109}\) See Winn, supra note 44, at 40.
\(^{110}\) Id.
\(^{112}\) See Plank, supra note 98, at 257–58 (discussing the lack of information available only from financial statements and the costs of conducting further due diligence).
registered creditor an unacceptable monopoly position. According to this line of reasoning, the first-to-register rule forces a debtor who had previously given registered security over an object to obtain additional credit from the first-registered creditor, who is able to charge an exorbitant rate because other creditors are reluctant to lend when their interests rank behind the first-registered interest in the priority queue. This allows first-registered creditors to earn monopoly profits that drive up the cost of credit, and brings about overly exclusive relationships between creditors and debtors that stifle competition within the aviation finance market. Presumably persuaded by the above line of reasoning, the UNCITRAL Legislative Guide suggests the adoption of a maximum amount requirement should a state determine that it is helpful to facilitate subordinate lending.

However, this concern is also highly overstated. As reasoned by Sigman and Kieninger, a willing new creditor can pay off the first-registered creditor when there is active competition among sources of credit. The first-registered creditor would also, more often than not, be the best source for additional credit because it is already familiar with the debtor, allowing it to save on investigation costs that would be incurred by a new creditor. Furthermore, the creditor would likely be eager to extend additional credit at competitive rates to a good customer in order to maintain the relationship. When a debtor’s credit-worthiness is in question, first-registered creditors have even been known to refuse to extend fresh credit altogether and voluntarily enter into subordination agreements with subsequent creditors.

Kieninger & Sigman, supra note 66, at 47.
117 Id.
118 Id.
C. Time Zones

Before the Convention and Aircraft Protocol entered into force, there were concerns that a first-to-register rule would give an undue advantage to parties in the same time zone as the International Registry because information transmitted to the International Registry needs to be entered into its database before registration is deemed effective.\textsuperscript{120}

This concern proved to be groundless because the International Registry, modeled after the most advanced modern electronic registries for security interests, allows registration data to be transmitted directly to the database “[o]nce authority to access the [International Registry] and the requisite consents have been obtained.”\textsuperscript{121} Registry staff members are not administratively involved in the entry or amendment of registration data in the database or in the discharge of a registration.\textsuperscript{122} Given that the International Registry is electronic and accessible on a 24/7 basis, creditors all over the world are placed on equal footing with respect to their ability to protect their interests under the Convention and Aircraft Protocol.

This ability will soon be enhanced by the introduction of an updated International Registry website, which will change the registration process from one where registrations submitted for entry into the database become effective on “an object-by-object and registration-by-registration basis,” to a transactional system of registration where submission for registrations by a user may be made in multiples, either with only one common registration to be effected for multiple aircraft objects or with multiple registrations to be made on one aircraft object.\textsuperscript{123} ICAO has approved a new regulation—Section 5.18 of the Sixth Edition of the Regulations and Procedures for the International Registry—that allows for the establishment of a “closing room,”\textsuperscript{124} an electronic folder separate from the database that allows users “to assemble all of the information and consents required to effect one or more registrations against one or more aircraft objects, and to establish the chronological order in which such registra-

\begin{thebibliography}{99}
\bibitem{120} Crans, \textit{supra} note 105, at 282.
\bibitem{121} Cuming, \textit{supra} note 38, at 54.
\bibitem{122} \textit{Id.}
\bibitem{124} \textit{Id.} at 166–67.
\end{thebibliography}
tions should take effect, all prior to the release of such registrations into the International Registry data base.”

Parties, regardless of where they are located, will henceforth not only be able to effect registrations anytime, but also ensure that all multiple interests in one or more aircraft objects have the same time stamp and same priority status for purposes of the first-to-register rule.

D. **Subordination of Non-Registrable Interests to Registered Interests: Clash Between Purely National Interests and Internationally-Recognized Interests**

Last but not least, it has been argued that it is inequitable that holders of interests over aircraft equipment that are not registrable under the Convention but registrable under national law lose their national law priority to subsequent registered interests. The clash here is not between national interests and international interests as defined narrowly in Article 2(2) of the Convention. Instead, it is between non-registrable, purely national interests and registrable international interests defined broadly to encompass Article 2(2) international interests and national interests recognized by the Convention and Aircraft Protocol, such as declared NCRIs and interests covered by declarations made under Article 50(1). To avoid confusion, this broad definition of international interests shall be termed “internationally recognized interests.”

To the above argument, Jeffrey Wool, Secretary General of the AWG and expert consultant to UNIDROIT on international aviation finance matters, made three counter-arguments. He argued that (1) “the definition of an international interest, together with a contract of sale, is sufficiently broad to pick up all customary types of transactions involving the financing and leasing of aircraft objects;” (2) “transaction parties, being aware of the Convention/Aircraft Protocol . . . can simply structure their

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125 *Id.* at 168.
127 See infra Part V(E) (for more on NCRIs, i.e., non-consensual rights or interests).
128 Cape Town Convention, *supra* note 16, art. 50(1).
129 Wool, *supra* note 7, at 535.
transactions in a manner that fits within the legal framework;" and (3) allowing non-registrable interests to prevail over registered international interests would result in unjustifiably high investigation costs because a priority search will have to be done in all relevant jurisdictions.\textsuperscript{150}

These are all valid counter-arguments, but the fact that Wool relied on presumptive assertions and countervailing policy considerations demonstrates that this concern, unlike the other three, has not been satisfactorily refuted by empirical observations or negated by technology.

V. ADDRESSING THE PROBLEMS: EXCEPTIONS TO ARTICLE 29(1)'S BRIGHT-LINE FIRST-TO-REGISTER RULE

Part IV established that Article 29(1)'s bright-line first-to-register rule's subordination of non-registrable interests to registered interests is problematic from an equity point of view, but it is important to recognize that the rule is not a standalone rule.\textsuperscript{151} The Convention and Aircraft Protocol's priority regime constitutes not just Article 29(1)'s first-to-register rule but also several exceptions to the rule.\textsuperscript{152} The question is, therefore, whether the numerous exceptions laid out within the Convention and Aircraft Protocol adequately address this outstanding concern regarding inequitable treatment of non-registrable interests.\textsuperscript{153}

A. PROCEEDS

An interest in proceeds is not independently registrable under the Convention, but an international interest in an aircraft object extends to proceeds,\textsuperscript{154} and any priority granted by Article 29(1) to an interest in an object extends to proceeds,\textsuperscript{155} with "proceeds" being confined by definition to "money or non-money proceeds arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation, or requisition."\textsuperscript{156} Insurance proceeds are an exam-

\textsuperscript{150} Id.
\textsuperscript{152} Id.
\textsuperscript{153} For a detailed examination of every single exception, see id.
\textsuperscript{154} Cape Town Convention, supra note 16, art. 2(5).
\textsuperscript{155} Id. art. 29(6).
\textsuperscript{156} Id. art. 1(w).
ple of such proceeds.\textsuperscript{137} If successive international interests in an aircraft object insured against loss or damage are registered, the first-registered creditor will have the first claim on insurance proceeds ahead of later-registered creditors.\textsuperscript{138}

Article 29(6) extends the coverage of Article 29(1)'s first-to-register rule to non-registrable competing claims to proceeds only when both claims are derived from international interests in the object whose loss or compulsory acquisition gives rise to the proceeds.\textsuperscript{139} It does not determine priority between competing claims to proceeds when one of the claimants does not have an international interest in the object and bases his claim on a national security interest, such as when proceeds are claimed as proceeds of debts purchased by or charged to a receivables financier.\textsuperscript{140}

The narrow definition of “proceeds” seemingly gives substance to the concern that non-registrable interests are being unfairly subordinated to international interests, but a review of the Convention’s drafting process reveals that it was not a drafting oversight but an intentional move backed by solid countervailing reasons.\textsuperscript{141}

Given that registration under the Convention “is against the individual object, not against the debtor,”\textsuperscript{142} proceeds must be uniquely identifiable in the hands of the debtor just like an object in order for an international interest to be registrable against them.\textsuperscript{143} Only insurance and loss-related proceeds fit the bill.\textsuperscript{144} General proceeds such as receivables arising from a sale of an object subject to a Convention international interest are difficult to isolate once they leave the debtor’s hands or become commingled with the debtor’s other assets, and it is arguable that tracing should be left to domestic law rather than a highly specialized international instrument focused on specific types of

\textsuperscript{137} Goode, \textit{The Priority Rules}, \textit{supra} note 131, at 98.
\textsuperscript{138} Id.
\textsuperscript{139} See \textit{id}.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 108; \textit{see also} Mark J. Sundahl, \textit{International Secured Transactions and Insolvency}, 40 \textit{Int’l Law.} 381, 390 (2006) (comparing the broad definition of “proceeds” in Article 9 of the UCC to the narrow definition in the Convention).
\textsuperscript{142} GOODE, EXPLANATORY REPORT AND COMMENTARY, \textit{supra} note 3, at 6.
\textsuperscript{143} ROY GOODE, \textit{CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND DRAFT PROTOCOL THERETO ON MATTERS SPECIFIC TO SPACE ASSETS: EXPLANATORY NOTE} 10 (July 2011).
\textsuperscript{144} Id.
mobile assets. Allowing registration of general proceeds would broaden the Convention and its protocols' "scope beyond aircraft objects, railway rolling stock and space property." The essential point is that "the Convention and its protocols are concerned with security and quasi-security interests in, and sales of, physical, uniquely identifiable assets, and with rights to payment or other performance linked to registered international interests and sales, not with general receivables financing," which the drafters of the Convention and the protocols were keen to leave to a later convention—the 2001 United Nations Convention on the Assignment of Receivables in International Trade.

B. OUTRIGHT SALES

Outright sales are not registrable under the Convention, but it was considered necessary to give special protection to a buyer who takes before registration of an international interest because outright sales are common transactions. Article 29(3) of the Convention therefore excludes an outright buyer from the first-to-register rule, allowing it to acquire its interests free from an unregistered interest even if it had notice of it.

However, Article III of the Aircraft Protocol made Article 29(3) of the Convention redundant by extending the registration and priority rules of the Convention to outright sales so that Article 29(1) gives a registered sale priority over (1) subsequently registered or unregistered international interests and registrable NCRIs; (2) non-registrable NCRIs not protected by a declaration under Article 39; (3) non-registrable interests; and (4) subsequently registered or unregistered national interest notices.

In addition, "Article XIV(1) of the Aircraft Protocol provides the same priority rule for competing sales by the same seller as does Article 29(1) of the Convention for competing international interests" and follows Article 29(2) of the Convention in making it clear that knowledge of a prior unregistered interest

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145 Id. ("Whether proceeds which have left the debtor's hands or have become commingled with other assets of the debtor remain traceable is answered not by the Convention but by the applicable law.").
147 Goode, The Priority Rules, supra note 131, at 108.
148 Id. at 98.
149 Cape Town Convention, supra note 16, art. 29(3).
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does not affect priority. To illustrate, if S sells an aircraft object to A, who registers the sale in the International Registry and then wrongfully sells the same object to B, A retains its interest free of B. If B registers before A even if he had knowledge of the unregistered sale to A, B has priority. Article XIV(1) does not apply to successive sales, which is where S sells to A, who subsequently sells to B, because there is no priority issue—the buyers are not in competition with each other.

Assuming every sale is registered to protect against fraudulent sales, nothing turns on the order of registrations, and in this sense, the International Registry is not a title registry that grants title upon registration. Nevertheless, the combined effect of Articles III and XIV of the Aircraft Protocol is first, to enable outright buyers to take advantage of the registration system to protect their interests and safeguard themselves against fraudulent sales, and second, to allow prospective creditors to safeguard themselves against debtor fraud where a party purports to grant a security interest over an object not actually owned by him because, presumably, the last registration of sale will indicate the current title-holder. It is for these reasons that the Space Protocol followed the Aircraft Protocol's lead in making the same extension to outright sales of space assets and the Rail Working Group proposed that the Luxembourg Protocol do the same for outright sales of railway rolling stock.

Outright sales hence represent a unique category of transactions where the clash between non-registrable interests and registered interests is resolved by making some non-registrable interests registrable.

C. CONDITIONAL BUYERS AND LESSEES

Conditional buyers and lessees, who are the debtors granting security to creditors, also do not have registrable interests

151 Id.
152 Id.
153 Id.
154 Id.
155 Id.
156 Aircraft Protocol, supra note 1, art. III.
157 Id. art. XIV.
158 Space Protocol, supra note 10, art. IV.
159 RAIL WORKING GRP., PROPOSAL TO INCLUDE CONTRACTS OF SALE IN THE DRAFT RAIL PROTOCOL (Feb. 2007).
160 See Cape Town Convention, supra note 16, art. 1(e) (meaning “a buyer under title reservation agreement”).
under the Convention; instead Article 29(4) of the Convention allows them to rely on any priority enjoyed by their creditors—the conditional sellers and lessors—against a third-party claimant.\footnote{Goode, The Priority Rules, supra note 131, at 98.} For instance, if a lessor grants a lease of an airframe, registers its interest under the Convention, and then charges the airframe to a third-party creditor who registers the charge under the Convention, the lessee takes free from the chargee’s interest because the interest of the lessor was registered before that of the charge even if the lessee was unable to register its interest.\footnote{Id.}

The Aircraft Protocol buttresses the protection accorded to conditional buyers or lessees by giving them a right of quiet enjoyment.\footnote{Aircraft Protocol, supra note 1, art. XVI.}

\section*{D. Exclusion of the Doctrine of Accession}

The Convention governs airframes, aircraft engines, and helicopters, and only rights in these aircraft equipment are registrable under the Convention.\footnote{Id. arts. I(c), II.} This raises the question of what happens to creditor rights in items like computers, which are installed into aircraft equipment. A doctrine of accession by which ownership of an object that becomes incorporated in a larger object passes to the owner of the principal object exists in some legal systems, but Article 29(7) makes it clear that the Convention does not recognize such a doctrine.\footnote{Goode, The Priority Rules, supra note 131, at 99.}

Article 29(7) leaves ownership or other rights in installed items to be dealt with by the applicable law.\footnote{Id.} If under the applicable law the rights in an item held prior to its installation continue to exist after installation, a holder of a registered interest is precluded from asserting the doctrine to extinguish a creditor’s national law rights in the installed item\footnote{Cape Town Convention, supra note 16, art. 29(7)(a).} or to preclude the granting of new rights under national law after the installed item has been removed.\footnote{Id. art. 29(7)(b).}

Article 29(7) therefore provides relief to holders of non-registrable, purely national rights in items. It does not apply to items
such as aircraft engines that are themselves registrable objects
governed by the Convention.169

E. NON-CONSENSUAL RIGHTS OR INTERESTS

Under Article 39 of the Convention, a contracting state is per-
mitted to declare that certain categories of NCRIs, which have
priority over an interest equivalent to an international interest,
are to have priority over registered international interests.170 Al-
though Article 39 only grants declared NCRIs priority “over reg-
istered international interests, it must follow a fortiori that the
non-consensual rights or interests have priority over unregis-
tered interests as well.”171 Many countries, including Singapore,
have duly made such declarations.172

Most declarations under Article 39(1) (a) relate to non-con-
sensual liens in favor of workmen and warehousemen for work
done to or services rendered in relation to objects in their pos-
session.173 Within the aviation context, mechanic’s liens often
arise “with respect to repair or other services enhancing or pre-
serving the value of the aircraft.”174 The primary purpose of giv-
ing such liens priority even over a perfected security interest is
that it would be “unfair to allow the secured creditor to benefit
[from the addition or preservation of value] without pay-
ment.”175 In contrast, declarations under Article 39(1) (b) relate
to detention rights, which, unlike liens, are not based on posses-
sion.176 Detention rights can arise in aviation from a variety of
circumstances ranging from unpaid airport charges and air navi-

169 Goode, The Priority Rules, supra note 131, at 99 (explaining Article XIV(3) of
the Aircraft Protocol “does not leave ownership or other rights in installed en-
gines to be dealt with by the applicable law; it lays down a positive rule that such
rights are not affected by the aircraft engine’s installation or removal from the
airframe.”).
170 Cape Town Convention, supra note 16, art. 39(1)(a).
171 Goode, The Priority Rules, supra note 131, at 100.
172 Declarations Deposited Under the Cape Town Convention on International Interests
173 Goode, The Priority Rules, supra note 131, at 100; see also Grant Gilmore,
Security Interests in Personal Property (1965) at 889–91 (citing examples of
the workman’s lien, warehouseman’s lien on stored goods, and common carrier’s
liens on shipped goods).
174 John Pritchard & David Lloyd, Analysis of Non-Consensual Rights and Interests
under Article 39 of the Cape Town Convention, 1 CAPE TOWN CONVENTION J. 3, 8
(2013).
175 Goode, The Priority Rules, supra note 131, at 100.
176 Pritchard & Lloyd, supra note 174, at 7.
gation charges, lack of necessary licenses, unpaid tax, and even crime and war. "Accordingly, the primary purpose for a detention right can vary considerably." Article 40, on the other hand, allows contracting states to declare certain categories of NCRIs registrable and subsume them to regulation under the Convention and Aircraft Protocol as if they were international interests. Article 40 does not make these NCRIs international interests; it merely allows them to be treated as international interests for priority purposes under the Convention and Aircraft Protocol. Article 39 and Article 40 are therefore different. Article 39 exempts NCRIs declared under it from the Convention and Aircraft Protocol's registration requirements and the first-to-register rule, but these NCRIs are not entitled to recognition in other contracting states unless the conflict-of-law rules of the state so require because the priority granted by such exemption is not a Convention priority but one given by the law of the declaring state. On the other hand, Article 40 applies the Convention's priority rules to NCRIs registered under one Convention, which will have effect in actions and priority disputes in all contracting states. Nonetheless, both aim to alleviate the harsh operation of the bright-line first-to-register rule on national non-registrable interests.

F. PRE-EXISTING RIGHTS OR INTERESTS

"Unless otherwise declared by a [contracting] state, the Convention does not apply to a pre-existing right or interest [(PERI)], which retains the priority it enjoyed under the applicable law before the effective date of the Convention." A PERI refers "to a right or interest of any kind in or over an object created or arising before the effective date of [the] Convention," which is the later of the date the Convention "enters into force or the time when the [state] in which the debtor is

177 Id. at 10.
178 Id.
179 Cape Town Convention, supra note 16, art. 40.
180 Id.
182 Cape Town Convention, supra note 16, art. 1(cc) (the definition of "registrable interest" includes a registrable NCRI).
183 Id. art. 60(1).
184 Id. art. 1(v).
situated becomes a [c]ontracting [s]tate.”185 Holders of non-registered rights and interests in aircraft objects created or arising before the effective date of the Convention are then protected from having their rights subrogated to a later-created registered interest.

VI. CONCLUSION: BALANCING CONFLICTING POLICY CONSIDERATIONS

By most accounts, the Convention and Aircraft Protocol have been remarkably successful in harmonizing the law governing secured transactions in aircraft equipment, boasting sixty and fifty-four contracting states respectively to date.186 This has been attributed to the innovative use of protocols in a “hub-and-spoke” convention-protocol approach,187 unprecedented involvement of industry players in the drafting process,188 and the priority given to commercial expediency over the more traditional approach of harmonization that is guided by the idea of drafting an instrument that represents a common ground or compromise between common law and civil law systems.189

The economic promise held by the Convention and Aircraft Protocol appears to have been fulfilled as indicated by the positive results of various independent studies commissioned by the AWG that attempt to assess and quantify the economic benefits of the Convention and Aircraft Protocol.190 For example, a 2009 independent study found that “ratification and effective implementation of the [Convention and Aircraft Protocol by national authorities resulted] in significant risk reduction to lenders to secured aircraft financing transactions.”191 Additionally, a 2010 independent study submitted to the government of the United

185 Id. art. 60(2)(a).
189 Gopalan, supra note 188, at 268.
191 Id.
Kingdom found that "accession to and effective implementation of the Convention and Aircraft Protocol will result in decreased credit risk and lower credit cost in their economy." Although more empirical quantitative studies may be required to prove beyond doubt the purported economic benefits of the Convention and Aircraft Protocol, the consensus at present is that ratification of the Convention and Aircraft Protocol brings with it more economic benefits than costs. If the lifetime of the Convention and Aircraft Protocol is too short for a conclusive empirical quantitative study, it is noteworthy that UCC Article 9, the predominant influence behind the Convention and its protocols, has been credited with "unleashing a stream of capital that contributed to the American post-war boom" by encouraging lending by financial institutions.

In Part III, this article explained how the Convention and Aircraft Protocol's International Registry and bright-line first-to-register rule contribute to their chief objective of facilitating efficient financing of transportation equipment by providing a sound legal regime that reduces credit risk to an extent that induces financiers to assume risk and release funds. This objective is furthered by increased transparency, legal certainty, and efficiency; efficient risk-allocation; and practical compatibility with aviation finance that the Convention and Aircraft Protocol's International Registry and bright-line first-to-register rule offers. Parts IV(A) and (B) completed the cost-benefit analysis by showing that concerns about the economic costs of a registration system working in tandem with a first-to-register rule are groundless.

However, unless one takes the often-discredited utilitarian approach, net economic benefit cannot be the only consideration in the design of any national or international legal regime. Often, some economic benefit must be eschewed in the name of equity. The discomfort with inequity is at the heart of the more persuasive criticisms directed at the Article 29(1)'s bright-line first-to-register rule—that it disadvantages certain classes of creditors, whether they are creditors living in different time zones from the register or creditors holding non-registrable, na-


193 Sundahl, supra note 15, at 345.

194 GOODE, EXPLANATORY REPORT AND COMMENTARY, supra note 3, at 2.
tional interests not recognized by the Convention and Aircraft Protocol.\textsuperscript{195}

In Parts IV(C), (D), and V, this article sought to demonstrate that the technical workings of the electronic International Registry and the exceptions to the bright-line first-to-register rule contained within the Convention and Aircraft Protocol adequately address the concerns regarding equity. These exceptions operate in various ways: (1) making non-registrable interests registrable such that the Convention and Aircraft Protocol’s priority rules apply to them as if they were registrable international interests (e.g., outright sales and Article 40 NCRIs);\textsuperscript{196} (2) making declared non-registrable interests exempt from the Convention and Aircraft Protocol’s priority rules (e.g., Article 39 NCRIs);\textsuperscript{197} (3) allowing some holders of non-registrable interests to rely on the Convention and Aircraft Protocol’s priority rules without independent registration of these interests (e.g., insurance and loss-related proceeds and conditional buyers and lessees);\textsuperscript{198} (4) exempting non-registrable interests from the Convention and Aircraft Protocol’s priority rules without registration (e.g., PERIs);\textsuperscript{199} and (5) preventing holders of international interests from asserting a common property law doctrine to extinguish non-registrable interests (e.g., exclusion of doctrine of accession).\textsuperscript{200} Nevertheless, they share a common purpose—alleviating the harsh operation of Article 29(1)’s bright-line first-to-register rule on non-registrable interests.

In fact, these numerous exceptions have been criticized for limiting the predictability and efficiency benefits of the first-to-register rule, but a balance has to be struck where there are conflicting policy considerations.

Aside from equity, Article 39 has also been justified on the basis that “affording certain creditors the protection of priority NCRIs will facilitate the smooth day-to-day provision of aviation services to the public” because “the laws of many jurisdictions grant priority to NCRIs covering fees accrued by operators that fund governmental services such as air traffic control and airport operations as well as expenses incurred by operators for

\textsuperscript{195} See discussion supra Part IV.
\textsuperscript{196} Goode, The Priority Rules, supra note 131, at 100.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 98.
\textsuperscript{199} Id. at 100.
\textsuperscript{200} Id. at 99.
equipment maintenance." The fact that the existence of a separate international convention governing receivables factored into the Convention and Aircraft Protocol's drafting decision to decline the creation of an exception for interests in general proceeds indicates that inter-convention coherency is another policy consideration that must be taken into account in international law-making. Ultimately, the law of cross-border secured transactions is extremely broad and the Convention and its protocols constitute an ambitious attempt at harmonizing the highly specific area of security interests in high-value mobile transportation assets. To extend the scope of the Convention and its protocols to general proceeds that have no continuing linkage with the object from which they were derived would be to overstep the original mandate into that of another international regime.

The exceptions balance the conflicting policy considerations with legal devices such as Article 39's declaration requirements, which make non-registrable interests more transparent so that financiers "have a fair opportunity to factor the resulting risk and uncertainty into decisions about whether to provide support to the [s]tate's operators and at what price and on what terms and conditions." In conclusion, this article submits that the bright-line first-to-register rule and its exceptions contained in the Convention and Aircraft Protocol strike an adequate balance between the conflicting considerations of economic benefit, equity, provision of necessary public services, and inter-convention coherency. In order to definitively pronounce on the normative desirability of the bright-line first-to-register rule and its exceptions, an empirical study of how they have functioned in practice to identify any unforeseen practical problems is necessary, but that is for a future article. For a start, this article has demonstrated that this rule and its exceptions stand up well to rigorous theoretical analysis.

201 Pritchard & Lloyd, supra note 174, at 13. Many jurisdictions have specifically declared unpaid governmental taxes and charges as NCRIs under Article 39(1)(a), and declared under Article 39(1)(b) that the Convention does not affect the right of governmental or private providers of public services to arrest or detain an aircraft object in accordance with applicable domestic law for payment directly relating to such services in respect of such object. Id. at 13 n.51.

202 See id. at 13.

203 Id.
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