# PART 2  
A REVIEW OF THE CONVENTION

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Introduction

2.1. The principal objective of the Convention is to facilitate the efficient financing and leasing of mobile equipment. Such financing will assist in the development of cost-effective modes of transport and space assets utilising modern technologies. The Convention system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for mobile equipment that has previously been unavailable or available only at relatively high cost. A sound, internationally adopted legal regime for security, title-retention and leasing interests will encourage the provision of finance and leasing and reduce its cost. This is because the greater security offered to creditors and lessors by such a regime will lower the risk of loss, enhance the credit rating of loan and leasing receivables secured on such equipment, and enable national export credit guarantee institutions providing coverage against loss to reduce the exposure fees they charge.  

Categories of equipment covered

2.2. The Convention currently covers three categories of equipment, namely:

(1) airframes, aircraft engines and helicopters (collectively termed “aircraft objects” in Article I(2)(c) of the Aircraft Protocol);

(2) railway rolling stock; and

(3) space assets.

It was, however, envisaged that, pursuant to Article 51, which entrusts the initiative for new protocols to the Depositary, UNIDROIT, consideration would be given to the extension of the Convention to agricultural, construction and mining equipment, and Resolution No. 5 of the Luxembourg Diplomatic Conference invites States to initiate preliminary work on a future Protocol specific to these categories of equipment. The Governing Council of UNIDROIT has now approved the commencement of work on such a project.

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1 For illustrations of the potential impact of the Convention and Luxembourg Protocol on capital adequacy requirements, borrowing costs and credit exposure fees, see paragraph 3.1.
2.3. Each of the above categories of object is defined in the Protocol relating to it.

Forms of finance

2.4. Railway rolling stock are defined in Article I(2)(e) of the Luxembourg Protocol. Railway rolling stock in the course of manufacture fall within the Convention where the manufacturing process has reached the point where the object in question can be seen to be an item of railway rolling stock, though for registration purposes it is also necessary that the railway rolling stock be uniquely identifiable. The financing of railway rolling stock, as with aircraft objects and space assets, takes three principal forms: a loan secured by a security interest in the object; a sale under an agreement (title reservation, or conditional sale, agreement) in which the seller reserves ownership until payment in full; and a lease, which may be either a finance lease or an operating lease and may or may not include an option to purchase. These financing instruments need to be underpinned by a sound legal regime if they are to function efficiently so as to induce the assumption of risk and the release of funds by the private sector. The huge outlays involved in the financing of objects of the kinds covered by the Convention make it essential for the creditor (the financier, seller or lessor) to be able to have confidence that if the debtor defaults in payment or other performance the relevant legal regime will respect the creditor’s contractual and proprietary rights and provide the creditor with efficient and effective means to enforce those rights, and to secure priority for its international interest against competing claimants.

The inadequacy of conflict rules

2.5. Traditional conflict of laws rules apply the lex situs (lex rei sitae) as the law governing proprietary rights, but such a principle is unsuited to items of mobile equipment which may be constantly moving from one country to another, such as aircraft objects or railway rolling stock, while space assets and their components are often in transit prior to launch and after launch are not within the borders of any State. Different legal systems adopt differing approaches to the determination of the applicable law in this situation. Moreover, even if it were possible to devise a uniform conflicts rule, this would not overcome the disadvantage of dependence on national laws, which vary
widely from one country to another and which in some jurisdictions are highly supportive of security interests while in others they are more hostile or restrictive. This may discourage potential financiers from extending credit or may lead to substantially increased credit costs. Hence the need for an international set of rules governing security, title-retention and leasing interests in such equipment which will provide creditors with the necessary safeguards, while at the same time incorporating measures for the protection of debtors, and will within their sphere of application avoid the need to have recourse to the conflict of laws. This is not to say, however, that the conflict of laws has no role to play in the Cape Town Convention as in other uniform law conventions. There are various matters which the Convention expressly leaves to the applicable law under the rules of private international law of the forum State (see paragraph 2.54), in addition to which resort to the conflict of laws is necessary on matters not expressly dealt with by the Convention or covered by the general principles on which it is based.

Objectives

2.6. The Convention and its supporting Protocols are designed to fulfil five key objectives:

- To facilitate the acquisition and financing of economically important items of mobile equipment by providing for the creation of an international interest which will be recognised in all Contracting States
- To provide the creditor with a range of basic default and insolvency-related remedies and, where there is evidence of default, a means of obtaining speedy relief pending final determination of its claim on the merits
- To establish an electronic international registry for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and creditors in the debtor's insolvency
- To ensure through the relevant Protocol that the particular needs of the industry sector concerned are met
• By these means to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

2.7. At the heart of the Convention is the registration system it establishes, enabling a creditor to register an international interest and thereby secure priority. As will be seen, various other kinds of right or interest are also registrable. So for the most part the Convention is not concerned with unregistered interests. The priority rules usually subordinate an unregistered interest to a registered interest and they do not deal with conflicts between unregistered interests. Nevertheless there are various provisions of the Convention which do apply to unregistered interests. These include (a) all the provisions of Chapter III relating to the creditor’s default remedies, which are not dependent on registration, (b) provisions protecting a buyer acquiring the object prior to registration by a creditor (Article 29(3)) and protecting a conditional buyer or lessee against a third party registering its interest after registration of the interest of the conditional seller or lessor (Article 29(4)), (c) the provisions of Article 39 conferring on the holder of a non-consensual right or interest covered by a declaration under that Article (and thus not registrable) priority even over a registered international interest, and (d) pre-existing rights or interests covered by a declaration under Article 60(3) so far as their priority is protected during the pre-registration period.

Relationship of Convention to national law

2.8. The Convention does not displace the applicable law, it merely overrides it in a Contracting State in cases of inconsistency. The following paragraphs illustrate this point:

(1) The Convention deals with rights and obligations in private law and obligations of Contracting States relevant to the enforcement of those rights and has no impact whatsoever on rules of criminal law, tort law, or regulatory public law in national legal systems. Thus Contracting States remain free to apply and enforce their rules of criminal law and tort law, as well as regulatory measures designed to impose economic sanctions or to prevent money laundering, drug dealing, and the like, and regulations in the field of financial services law and competition
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law. This has always been taken for granted in private commercial law conventions, which make no reference to the above matters. There may, of course, be cases where a provision of the Convention specifically covers a point that would ordinarily be dealt with as a matter of public law. For example, the authorities of a Contracting State will not be able to assert against a registered international interest a lien to secure import customs fees unless this is covered by a declaration under Article 39 or registered in the International Registry following a declaration under Article 40.

(2) Detailed though they are, the Convention and Protocols have very specific objectives and do not seek to cover the whole field of asset-based secured financing, much of which will continue to be governed by national laws and the agreement of the parties. For example, it is for the applicable law to determine the validity of an agreement alleged to create or provide for an international interest, the time at which the agreement is to be considered concluded, which may be relevant for certain purposes of the Convention (see paragraph 2.66) and the circumstances in which proceeds in respect of which a creditor’s interest had priority under the Convention have ceased to be traceable, and the requirement that the grantor of the international interest should have a power of disposal may be satisfied by a power conferred by the applicable law. Again, the Convention does not address issues such as the acquisition of ownership (though transfers by way of sale are provided for in the Aircraft and Space Protocols), risk of loss or damage to objects disposed of under a contract of sale or lease or the duties of a supplier under such contracts as regards the quality of what is supplied. All these issues are left to the applicable law.

(3) The Convention itself allows considerable scope for party agreement on a range of issues, including default remedies and jurisdiction.

(4) The provisions of the Convention as to termination of an agreement are not exhaustive (see paragraph 2.69). However, a Contracting State may not impose conditions in its private law incompatible with the provisions of the Convention, such as restrictions on the creditor’s right to terminate a title reservation agreement or leasing agreement on the debtor’s default.
(5) The Convention specifically refers certain issues to the applicable law (see paragraph 2.54).

(6) A Contracting State may make a declaration under Article 39 or Article 40 as to non-consensual rights or interests provided by its law (see paragraphs 2.30(4), (5) and 2.202-2.212).

(7) Registration in the International Registry of interests which are not Convention interests, though of no effect under the Convention, may suffice under the applicable law to constitute notice of the existence of the interest, which may be relevant to priority under the applicable law.

(8) There are matters governed by the Convention the operation of which may be controlled by contractual provisions even where the Convention is silent on this. For example, where an international interest is assigned by way of security, the assignor and assignee may agree that consent to a discharge of the international interest, which would ordinarily need to be given by both parties (see paragraph 2.130), may be given by the assignee alone and recorded in the International Registry.

(9) Article 5(2) of the Convention requires reference to the general principles underlying the Convention, prior to references to the otherwise applicable law, to fill gaps in the Convention. A main source of such general principles is the preamble to the Convention. See Article 5(1).

Sources of regulation

2.9. There are four sources of regulation as regards railway rolling stock within the scope of the Convention and Protocol: the Convention itself, the relevant Protocol, and the Regulations and Procedures to be made by the Supervisory Authority governing the International Registry for railway rolling stock. Certain matters are expressly left to the applicable law (see paragraph 2.54). As a matter of international law a State becomes bound by a Convention

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2 At the time of writing the regulations for the International Registry for railway rolling stock are still in draft.
or Protocol when it has expressed its consent to be bound and the Convention has entered into force for that State as the result of securing the requisite number of consents and fulfilling any other conditions for entry into force. Consent to be bound is typically signified by deposit of an instrument of ratification or accession. Once the Convention has entered into force for that State it is bound by international law to perform its obligations under the instrument even if this conflicts with national law. However, a distinctive feature of the Cape Town Convention is that it is dependent on entry into force of the relevant Protocol (see paragraph 2.10). Certain obligations are imposed on Contracting States by the Cape Town Convention and Luxembourg Protocol, in particular the obligation under Article 13 of the Convention, crystallised by Article VIII(2) of the Protocol, to ensure the availability of speedy advance relief to a creditor who adduces evidence of default and the obligation under Articles VII to X of the Protocol to ensure that the relevant administrative authorities perform their duties to give effect to the creditor’s remedy of export and physical transfer. But most of the provisions of the above instruments confer rights and impose obligations on private parties, and these can be enforced in national courts only where brought into law in the Contracting States concerned in accordance with their national laws. This varies from State to State. In some States a treaty may be directly applicable; in others it can be brought into force by administrative action; in others still it requires implementing legislation (in this last case, most States have included a ‘prevailing law’ provision designed to ensure the primacy of the Convention over the State’s conflicting domestic law). These issues are as important for the Cape Town Convention and Protocols as for other international instruments in that it is one thing to ratify or accede to a treaty but quite another to carry it into force in national law so as to enable it to be invoked by private parties, which is essential to achieving the objectives of the Convention.

The two-instrument approach and the relationship between the Convention and the Protocol

2.10. As stated above, the Convention is not equipment-specific. Its provisions will in principle apply equally to any “object” as defined by Article 1(u), that is, to any of the categories of mobile equipment to which it relates, namely airframes, aircraft engines and helicopters, railway rolling stock and
space assets. However, under Article 49(1) the Convention does not come into force as regards any category of equipment until a Protocol has been made relating to that equipment and takes effect subject to the terms of that Protocol, so that in the case of any inconsistency it is the Protocol that prevails, a point already made explicit by Article 6(2). This is what distinguishes the protocols to the Convention from those usually known to international law, which supplement or amend the conventions to which they relate but do not control them and normally operate only within the limits set by the conventions themselves. The Regulations and Procedures do not have the same status; they are simply rules governing the operation of the International Registry and as such they are valid only so far as consistent with the Protocol and with the Convention as modified by the Protocol.

2.11. This two-instrument approach was seen to have a number of advantages. It results in a uniform set of rules for those provisions of the Convention that do not attract equipment-specific considerations, instead of having separate, stand-alone conventions for each class of equipment. This avoids duplication and inconsistency between the non-equipment-specific provisions of one convention and those of another, and allows a uniform interpretation of such provisions, regardless of the type of equipment involved. The two-instrument approach also avoids cluttering up the text of the Convention with detailed equipment-specific rules, and provides a convenient mechanism for modifying the Convention provisions by the Protocol to meet the particular needs of the industry sector involved. Finally, it has enabled the different industry sectors to proceed at different speeds, thus enabling the Aircraft Protocol to be concluded without waiting for agreement on the protocols for railway rolling stock and space assets, and the Luxembourg Protocol to be adopted without being held up by the fact that work on the Space Protocol was at that time still continuing (it has since been adopted). The Convention and Protocol are to be read and interpreted together as a single instrument (Article 6(1)).

2.12. The provisions of the Convention cannot operate independently of a Protocol to the extent that they relate to objects. All three Protocols provide that a State may not become a Party to the Protocol unless it is or becomes also a Party to the Convention, and the same applies to signature by a Regional Economic Integration Organisation. However, there is nothing to preclude a State from becoming a Party to the Convention without becoming a Party to a
Protocol, and eight States, Congo, Costa Rica, Gabon, Mozambique, Seychelles, Spain, Syria and Zimbabwe, have indeed done so with a view to later accession to one or more Protocols.

**Existing and prospective Protocols**

2.13. To date three Protocols have been concluded, the Aircraft Protocol, which relates to airframes, aircraft engines and helicopters and was adopted at the diplomatic Conference in Cape Town in November 2001 at the same time as the Convention itself; the Luxembourg Protocol, which relates to railway rolling stock and was concluded at a diplomatic Conference in Luxembourg in February 2007; and the Space Protocol, which relates to space assets and was adopted at a Diplomatic Conference in Berlin in March 2012. As stated earlier, the Governing Council of UNIDROIT has also approved proposals to initiate a project for a fourth protocol, covering mobile agricultural, construction and mining equipment. The present Commentary is for the most part confined to the Convention and the Luxembourg Protocol.³

2.14. To meet the needs of those concerned with aircraft finance and their advisers the Joint Secretariat of the 2001 diplomatic Conference (namely the Secretariats of ICAO and UNIDROIT) produced a user-friendly Consolidated Text which reproduces the combined effect of the Convention and the Aircraft Protocol. This was proposed pursuant to Resolution No. 1 of the diplomatic Conference and was considered to be a convenient text for use by those involved in aircraft equipment finance and leasing but is not a legally operative document. No consolidated texts have been produced for the Luxembourg and Space Protocols.

**Underlying principles**

2.15. The Convention and Protocols are governed by five underlying principles:

³ Under Article II of the Luxembourg Protocol the Convention and Protocol are to be known as the Convention on International Interests in Mobile Equipment as applied to railway rolling stock. There are separate Official Commentaries on the Convention and Space Protocol and the Convention and Aircraft Protocol.
• **Practicality** in reflecting the salient factors characteristic of asset-based financing and leasing transactions;

• **Party autonomy** in contractual relationships, reflecting the fact that parties to a high-value cross-border transaction in equipment of the kind covered by the Convention will be knowledgeable and experienced in such transactions and expertly represented, so that in general their agreements should be respected and enforced;

• **Predictability** in the application of the Convention, a feature which is specifically mentioned in the interpretation provisions of Article 5(1), replacing the normal reference to good faith, and is reflected in the concise and clear priority rules, which give pre-eminence to certainty and simplicity and a rule-based rather than standards-based approach;

• **Transparency** through rules which provide for registration of an international interest in order to give notice of it to third parties and which subordinate unregistered international interests to registered international interests and to the rights of purchasers;

• **Sensitivity** to national legal cultures in allowing a Contracting State to weigh economic benefits against established rules of national law to which it attaches importance, and to make declarations (a) to exclude, wholly or in part, select provisions of the Convention it considers incompatible with such principles (for example, the exercise of certain remedies pending final determination of a claim) or (b) to opt into select provisions which it considers will reinforce those principles (for example, the preservation of rights of arrest or detention of an object for payment for services in respect of that object).

**Interpretation**

2.16. Except where otherwise provided, the Convention provisions are to be accorded an autonomous interpretation and should be construed according to the intention of the States Parties as expressed in the text, not according to the
canons of interpretation of domestic law. This is clear from Article 5(1) and (2) and reflects the general rule of interpretation laid down in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (“the Vienna Convention”). Article 5(1) of the Cape Town Convention provides as follows:

“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.”

The principle of autonomous interpretation applies as much to definitions as to the substantive provisions. Thus whether an agreement falls within the Convention at all is a matter for interpretation of the definitions in the Convention, not of the applicable law. On the other hand, determination of the particular category to which the agreement belongs is a matter for the applicable law, since that is what Article 2(4) expressly provides (see paragraph 2.47). Article 5(1) emphasizes the need to promote uniformity and predictability in interpreting the Convention. The first of these, as stated above, requires interpretation according to the Convention itself, not according to rules of national law. The second requires that wherever possible the Convention should be interpreted in such a way as to avoid generating uncertainty as to its application. Article 5(2) provides a cascade approach to interpretation. The primary rule is that questions expressly settled by the Convention are to be determined according to the natural and ordinary meaning of the Convention’s provisions themselves except in cases such as those mentioned in paragraph 2.21. Questions arising from gaps in the Convention are to be settled in accordance with the general principles on which it is based. These include the following:

**Party autonomy**

2.17. Party autonomy is an underlying principle of the Convention, so that in their relations with each other the parties are free to derogate from or vary the provisions of the Convention or otherwise fashion their own rules so long as their agreement does not contravene the mandatory provisions of the Convention or the overriding mandatory rules of the forum, that is, rules which apply regardless of the otherwise applicable law.
PART 2

Availability of remedies to enforce Convention rights

2.18. Another principle is that parties on whom a right is conferred should have a remedy for its enforcement. So the jurisdiction of the courts of the place where the Registrar has its centre of administration should be regarded as extended by analogy to cases not falling within the literal meaning of Article 44(2) and (3) of the Convention (see paragraphs 4.300-4.301).

Integrity of the registration system

2.19. A third principle is preservation of the integrity of the registration system. Hence priority is given to a registered interest over an unregistered interest, and a registered assignment of associated rights over an unregistered assignment, whether or not the registering party had knowledge of a prior unregistered interest or assignment.

2.20. Only if a question relating to matters governed by the Convention cannot be determined either from its express provisions or in conformity with the general principles on which it is based is it legitimate to resort to the applicable law, by which is meant the domestic rules of the law applicable by virtue of the rules of private international law of the forum State (Article 5(3)). As to States comprising several territorial units, see paragraph 2.26. The reference to “law” requires that any choice by the parties be a national legal system (see paragraph 3.17).

2.21. Though the interpretation of a treaty must wherever possible be loyal to the text, it is legitimate to have regard to supplementary means of interpretation where the ordinary interpretation of the text leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable (Vienna Convention, Article 32). So where, as occasionally occurs in the Cape Town Convention, the text is unclear or self-contradictory it must be interpreted so as to clarify the meaning or resolve the contradiction according to the intention of the States Parties. For examples, see paragraphs 2.251 et seq., 4.350 et seq. Again, where through defective drafting a case which the text indicates was intended to be covered is omitted, it is legitimate to supply it so as to accord with the manifested intention. For examples, see paragraphs 2.207, 4.299-4.301. It may also be necessary to fill a lacuna by analogy with a case given in the text (see paragraphs 2.219, 4.300-4.301) and to
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disregard the erroneous double reference in Article 35(1) (see paragraph 4.251) or a rule of construction for which there is no relevant text and which was incorporated by mistake, as in Article 52(5)(c) of the Convention (see paragraph 2.242).

Definitions

2.22. Article 1 of the Convention contains a long list of definitions, and these are supplemented by definitions in the Luxembourg Protocol. It is important to keep these in mind at all times when reading the Convention and Luxembourg Protocol, because ordinary words are sometimes given a special meaning, such as “agreement,” “creditor” and “debtor,” while a number of phrases have been specially coined for the two instruments, such as “associated rights”, “interested persons”, “internal transaction”, “international interest”, “national interest”, “non-consensual right or interest”, “object”, “proceeds” and “writing”, and therefore can be understood only by reference to their respective definitions.

Sphere of application

2.23. In order for the Convention to apply the following conditions must be satisfied:

(1) The parties have entered into a security agreement, a title reservation agreement (that is, a conditional sale agreement) or a leasing agreement (Article 2(1), (2)).

(2) The agreement relates to equipment which, as defined by the relevant Protocol, is:
   (a) an airframe, an aircraft engine or a helicopter,
   (b) railway rolling stock, or
   (c) space assets (Article 2(2), (3)).

(3) The equipment is uniquely identifiable or, in the case of railway rolling stock, is identifiable in one of the ways specified in Article V of the Luxembourg Protocol (Article 2(2), as implicitly modified by Article V).
(4) The agreement is constituted in accordance with the formalities prescribed by the Convention (Articles 2(2), 7).

(5) The debtor is situated in a Contracting State at the time of conclusion of the agreement creating or providing for the international interest (Article 3). See paragraphs 2.24 et seq.

Where these conditions are satisfied the Convention applies in a Contracting State even if its rules of private international law would otherwise lead to the application of the law of a non-Contracting State. The Convention may also be applied in a non-Contracting State whose conflict of laws rules lead to the application of the law of a Contracting State (see paragraph 2.28). On the other hand parties to a contract cannot usually opt into the Convention by choosing it as the applicable law, since conflict of laws rules generally require that a choice of law relates to a national legal system. It is, of course, open to the parties to incorporate into their agreement as contractual terms those provisions of the Convention and Protocol relating to contractual rights and duties instead of setting such provisions out *in extenso* in the agreement, but in practice the contractual provisions will almost invariably be much more detailed than those of the Convention.

**The connecting factor**

2.24. The Convention will not apply in the absence of the connecting factor referred to in paragraph 2.23(5) above, which must be satisfied at the time of the agreement. However, to give maximum scope to the application of the Convention Article 4 provides a number of alternative ways in which the test of situation of the debtor in a Contracting State may be satisfied. So the debtor is situated in a Contracting State (a) under the law of which it is incorporated or formed, (b) where it has its registered office or statutory seat, (c) where it has its centre of administration, or (d) where it has its place of business, or if more than one, its principal place of business, or if none its habitual residence.

2.25. The words “or formed” in Article 4(1)(a) include unincorporated associations organised under the law of a Contracting State. The terms “registered office” and “statutory seat” in Article 4(1)(b), though not identical, are broadly equivalent, signifying the place under the law of which the entity has chosen to be incorporated. “Statutory seat” is to be distinguished from
“real seat”, which is the place where the entity has its centre of administration and is so described in Article 4(1)(c). “Centre of administration” will usually be the place where the company’s head office functions are performed and control is exercised. This is not necessarily the same as the “centre of main interests” under the EC Insolvency Regulation, where there is a strong presumption equating the COMI with the company’s registered office and close regard is also had to the perception of creditors. Nor is the presumption in favour of the statutory seat in the definition of “primary insolvency jurisdiction” in Article I(2)(d) of the Protocol necessarily as strong as the presumption in favour of the registered office under the Insolvency Regulation as determined by the jurisprudence of the European Court of Justice, though obviously the case law of the EC on the issue is an important point of reference. “Place of business” and “principal place of business” apply both to individuals and to corporate entities and thus provide an alternative to the centre of administration, though the principal place of business and the centre of administration may coincide.

2.26. Where a Contracting State has territorial units in which different systems of law are applicable and has made a declaration under Article 52 applying the Convention only to some of those territorial units, the debtor is situated in a Contracting State only if incorporated or formed under a law in force in a territorial unit to which the Convention applies or if it has its registered office, etc., in such a territorial unit (Article 52(5)(a)). “Law in force in a territorial unit” includes the law of the State itself so far as in force in a territorial unit. So in a federal State a corporation incorporated under federal law is situated in a Contracting State if that law is in force in the relevant territorial unit and it is a territorial unit to which the Convention has been extended by the Contracting State. Where there is no indication of the relevant territorial unit whose rules are to govern, that issue is decided by the law of the State or, if it has no rule on the matter, the law of the territorial unit with which the case is most closely connected (Article 5(4)).

2.27. If the debtor is not situated in a Contracting State at the time of the agreement, the fact that it later relocates to a Contracting State does not bring the agreement within the Convention, so registration of the agreement would have no Convention effects; it would be necessary to conclude a new agreement. Conversely, where the debtor is situated in a Contracting State at the time the agreement is concluded the debtor’s change of location to a non-
Contracting State does not affect the application of the Convention to the agreement in a Contracting State or preclude registration of the interest as an international interest. For example, if a debtor, while situated in a Contracting State, gives security over railway rolling stock under a security agreement which is governed by the Convention, and the debtor later relocates to a non-Contracting State, registers its security as an international interest and later gives security over the same asset to another creditor, then in the courts of a Contracting State the first creditor is entitled to invoke the Convention to claim priority under Article 29(1) even though the second security interest is outside the Convention and cannot be validly registered in the International Registry. So where the Convention applies in relation to an international interest it may, in a Contracting State, affect other interests which are themselves outside the scope of the Convention.

2.28. A court situated in a State which is not a Contracting State is not, of course, obliged to apply the Convention. However, it may do so if its own conflict of laws rules lead to the application of the law of a Contracting State. These may work perfectly well for contract remedies but are likely to be less satisfactory in relation to the international interest, for the primary purpose of the Convention is to lay down a regime for interests in assets which either move regularly from one State to another, as in the case of aircraft and railway rolling stock, so that the legal regime governing them is unstable, or are not situated on earth at all, as in the case of space assets, so that it may be difficult to determine what law to apply.

**Engines and components**

2.29. In contrast to the position as regards aircraft engines, railway engines\(^4\) are not treated as separate objects but constitute part of railway rolling stock, the definition of which includes accessories and components (Article I(2)(e)). Accordingly the components themselves have no separate status under the Convention, and rights in them when not installed on railway rolling stock are governed by the applicable law.\(^5\)

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\(^4\) These are to be distinguished from locomotives. See paragraph 3.8, n. 3.

\(^5\) See Article 29(7) of the Convention.
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Types of right or interest covered by the Convention

2.30. Articles 39, 40 and 60 of the Convention and various other provisions linked to those Articles refer to a “right or interest”. The terms “right” and “interest” are not defined, but in general an interest denotes a right in rem in an asset whilst a right is a personal right to possession or control of, or otherwise associated with, an asset in which the holder has no interest, as in the case of a right of detention of an object for unpaid taxes or a right to payment falling within the definition of “associated rights”. The Convention provides for protection of seven different categories of original right or interest, each of which is defined in Article 1:

(1) **International interests**, that is, interests granted by the chargor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement, other than interests arising under an internal transaction in respect of which a State has made a declaration excluding the application of certain aspects of the Convention (see (3) below). The international interest is the primary category of interest with which the Convention and the relevant Protocol are concerned. International interests may be sub-interests, that is, international interests in favour of a person that has itself been granted a higher-tier international interest. Examples of such sub-interests are the international interest arising in favour of a conditional buyer who has granted a lease and of a lessee who has granted a sub-lease. In contrast to transferred interests, which simply constitute the original interest in new hands, sub-interests are distinct lower-tier interests the registration of which has in itself no impact on the position of the holder of the higher-tier interest from which they are derived. See paragraph 2.37.

(2) **Prospective international interests**, that is, interests intended to be taken over identifiable equipment as international interests in the future but which have not yet become international interests, for example, in the case of a security agreement because the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an interest in the equipment to be charged. A prospective international

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6 As opposed to being acquired by assignment or subrogation. See paragraph 2.31.
interest may be registered as such in the International Registry but does not have effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration as a prospective international interest if that interest has not been discharged. The definition of this requires that the interest be one which is intended to be created or provided for as an international interest in the future (Article 1(y)).

(3) **National interests**, that is, interests registered under a national registration system which would be registrable as international interests but for the fact that they are created by internal transactions (as defined in the Convention) in respect of which a Contracting State has made a declaration under Article 50 excluding the application of the Convention. However, such an exclusion is of limited effect. In the first place, the national interest remains governed by the priority rules of the Convention, not those of national law (Article 50(2)) and by various other provisions of the Convention. Secondly, while it cannot be registered as an international interest, notice of it can be registered in the International Registry, thereby securing its priority in the same way as if it were a registered international interest.

(4) **Non-consensual rights or interests arising under national law and given priority without registration.** A Contracting State may make a declaration under Article 39(1) specifying those categories of non-consensual right or interest which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual rights or interests are not themselves registered in the International Registry. The appellation “non-consensual right or interest”, a phrase defined in Article 1(s), denotes a right or interest created by law, not by agreement. It is confined to a right or interest given priority under Article 39 without registration and is thus to be distinguished from a “registrable non-consensual right or interest”, described below. An interest does not become a non-consensual right or interest merely because the agreement between the debtor and creditor under which it is constituted requires the approval of the court, as in the case of a loan made to a debtor in possession after the commencement of insolvency
proceedings. It is clear that such a loan is consensual. A Contracting State may also declare that nothing in the Convention is to affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for amounts owed directly relating to those services in respect of that object or another object, and for this purpose it is irrelevant whether the right of arrest or detention is provided by law or by contract (see further paragraph 2.207).

(5) **Registrable non-consensual rights or interests arising under national law.** A registrable non-consensual right or interest is defined by Article 1(dd) as “a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40”. A Contracting State may make a declaration under Article 40 that non-consensual rights or interests arising under its law may be registered in the International Registry, and any such right or interest that is so registered is then treated for the purposes of the Convention as a registered international interest. The definition in Article 1(dd) uses the term “registrable”, not “registered”, and it is clear from the definition of “registered interest” in Article 1(bb) that the word “registrable” was chosen deliberately and encompasses registrable but unregistered non-consensual rights or interests. Nevertheless, registrable non-consensual rights or interests rank for priority under the Convention only when registered and this is the primary feature distinguishing them from non-consensual rights or interests falling under Article 39. A registrable but unregistered non-consensual right or interest thus has a very limited impact under the Convention. Indeed, its only significance lies in the fact that the holder of such an interest falls within category (iii) of the list of “interested persons” defined in Article 1(m) and as such is entitled to benefit from those provisions of Chapter III of the Convention which confer rights on interested persons where the creditor is proposing to exercise default remedies. For example, the holder of a registrable but unregistered non-consensual right or interest has a right to be given notice of a chargee’s intended sale or lease of the object on default by the debtor provided that the chargee has been given notice of the rights of the holder of the non-consensual right or interest within a reasonable time prior to the sale or lease (Article 8(4)(b)). See further paragraph 2.80(3).
(6) **Associated rights**, that is, rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Purely personal contractual rights not secured on an object are outside the scope of the Convention, though Article 39(1)(b) preserves the efficacy of contractual as well as legal rights of arrest or detention under the law of a State for sums due to a provider of public services, to the extent declared by that State under the Convention.

(7) **Pre-existing rights or interests** which are the subject of a declaration by a Contracting State under Article 60(3). See paragraphs 2.243-2.244.

**Transferred rights and interests**

2.31. In addition to the above original rights, the Convention provides means of protecting the following rights and interests acquired or prospectively acquired by the following means of transfer:

(1) **Assignments and prospective assignments** of international interests, which are registrable under Article 16(1)(b). Such assignments, if by way of security, are valid only if some or all of the related associated rights are also assigned (Article 32(2)).

(2) **Assignments of associated rights**, which are not independently registrable but are protected by registration of the assignment of the international interest to which they relate. An assignment of associated rights which is not effective to transfer the related international interest, though it may be effective under the applicable law, falls outside the Convention (Article 32(3)).

(3) **Acquisitions of international interests by legal or contractual subrogation**, which are registrable under Article 16(1)(c). Rights may be acquired by subrogation either under Article 9(4) of the Convention or under the otherwise applicable law. Typical examples of the latter are the right of a surety who has discharged the debt to take over the international interest held by the creditor and of an insurer who has paid the insured claim on loss or damage of the object to take over the insured’s interest in the object.
As to the priority of a transferred interest, see paragraph 2.151, and as to the application of the transitional provisions of Article 60, see paragraph 2.258.

2.32. Finally, where a party whose interest would ordinarily be superior to that of another party agrees to the subordination of his interest to that of the other party, the latter can register the subordination under Article 16(1)(e) and thereby secure protection against an assignee of the subordinated interest (see Article 29(5) and paragraph 2.162).

Extension by Protocol

2.33. In contrast to the Aircraft and Space Protocols, which extend the registration and priority provisions of the Convention to outright sales and prospective sales of aircraft objects, the Luxembourg Protocol merely authorises the registration of notices of sale, and such registration is for information purposes only, having no effect whatsoever under the Convention or the Protocol (Article XVII). Its sole purpose is to give notice of a sale to third parties which may or may not be relevant to the determination of priorities under national law. Article XVII does not provide for the registration of notice of a prospective sale; such registration would be pointless because it is extremely unlikely that it would be capable of producing any effects under national law.

“Agreement”, “assignment”, “prospective assignment”

2.34. An agreement means a security agreement, a title reservation agreement or a leasing agreement (Article 1(a)), including any amendments or supplements to the agreement. However, this definition does not apply if the context otherwise requires, for example in Articles 29(5), 31(4) and 38(2). It is to be contrasted with two other similar but undefined terms, namely “contract”, used in various definitions in Article 1 and in Articles 32(1)(b) and 36(1)(a), and “transaction”, used in Articles 1, 30(3)(a), 36(2)(e) and 42(1), both of which terms are much broader in scope. A security agreement is an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person (Article 1(ii)). The words “chargor” and “chargee” are not defined and are used
not in the technical sense employed in some national laws but as denoting the grantor and grantee of any form of security interest, possessory or non-possessory. A security interest is an interest created by a security agreement (Article 1(jj)) and includes a security transfer of ownership, a charge in the sense of an incumbrance which binds the asset but leaves ownership with the debtor, a pledge and a contractual lien. All four forms of security interest fall within the scope of the Convention. However, the pledge, being possessory in nature, does not feature significantly in railway finance. By contrast, a contractual lien may be taken to secure charges relating to the railway rolling stock, such as charges for storage or repair. Non-consensual rights or interests do not fall within the definition of a security interest and are dealt with separately, specifically in Article 39 and 40. A title reservation agreement (also commonly known as a conditional sale agreement) is 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 (Article 1(ll)). This is a reference to express reservation of title and is to be distinguished from a contract of sale which contains no express reservation of title but under which the transfer of ownership does not pass at the time of the contract because of rules of the applicable law, such as those under which ownership in goods not identified at the time of the contract cannot pass until they have become identified. A leasing agreement is an agreement by which one person (the lessor) grants a right of 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 payments (Article 1(q)). As to questions of characterisation, see paragraphs 2.47, 4.51-4.52. An assignment is a contract which, whether by way of security or otherwise, confers on the assignee associated rights (see paragraph 2.30(6)) with or without a transfer of the related international interest (Article 1(b)). “Assignment” is widely defined, covering not only an outright transfer and a transfer by way of security but also a pledge or a charge of associated rights. A prospective assignment means an assignment that is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain (Article 1(x)).

“Creditor”, “debtor”, “conditional seller”, “conditional buyer”

2.35. “Creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement
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(Article 1(i)) and includes a creditor’s assignees or other successors. A **conditional seller** means a seller under a conditional sale agreement (Article 1(f)). The term “creditor” is used in those provisions which apply to all three forms of agreement without differentiation. It does not include the holder of a non-consensual right or interest protected under Article 39 of the Convention or the holder of a registrable non-consensual right or interest under Article 40. Such holders are “interested persons” within the definition in Article 1(m) and as such may be entitled to receive notice of a creditor’s intention to exercise remedies under Article 8 or Article 9 and, if the court so orders, Article 13, and to invoke other rights conferred on interested persons by Articles 8 and 9.

While the Convention provides priority rules for successive international interests in favour of different creditors it does not contain any express provision for multiple creditors at the same level. However, there is nothing to preclude two or more parties from sharing an international interest as joint creditors holding a single interest or as creditors holding joint and several claims (**créances conjointes**), international interests in fractional holdings of an object (“fractional interests” – see paragraph 2.44), or separate interests ranking **pari passu**, e.g. under a loan agreement in favour of a syndicate of lenders where a lead bank or agent is appointed to monitor the loans, or the grant of a lease by two or more lessors, whether or not acting through an agent or trustee. Successive international interests may be granted in the same object, whether to the same creditor or to different creditors, to secure different obligations and in the case of different creditors will usually rank for priority in the order of registration unless they otherwise agree (see further paragraph 2.147). By contrast, the holders of fractional interests, whether under contracts of sale or by way of security, will usually rank **pari passu** because they are not in competition with each other.

2.36. **“Debtor”** means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest (Article 1(j)), that is a right or interest registrable under Article 40, whether or not registered. In jurisdictions which recognise the transfer of contracts as a whole, that is, transfer of the benefit and the burden of a contract, “debtor” includes a transferee of the debtor’s obligations. The reference to “a person whose interest in an object is burdened by a registrable non-consensual right or interest” is plainly intended to denote someone other than the chargor, conditional buyer or lessee under the
agreement, these being covered by the preceding part of the definition. The only person appearing to fit the definition for the purposes of the Convention is a creditor under the agreement whose interest is subordinated to, and thus bound by, the non-consensual right or interest where this has been registered under Article 16(1)(a) prior to registration of the creditor’s interest (see paragraph 2.80(3)). Two or more persons may be debtors under the same agreement. Whether their liability is several, i.e. separate (conjointe) or joint (unusual) or joint and several (solidaire) depends on the terms of the agreement and on the applicable law. A conditional buyer means a buyer under a title reservation agreement (Article 1(e)).

2.37. As noted earlier, transferred interests arising by way of assignment or subrogation may be separately registered against an object in order to preserve the priority of the assignee or subrogee against subsequent assignees or subrogees of the same international interest, while sub-interests need to be protected by registration in the same way as the interests from which they derive. This is necessary not to preserve priority against a subsequent international interest, as to which the holder of the sub-interest has the priority of the interest from which the sub-interest is derived, but to obtain protection against a subsequent sub-interest derived from the same interest. See paragraph 2.151.

“International interest”

2.38. An international interest is a right in rem arising under or resulting from an agreement. This indeed is the nature of an “interest” as opposed to a personal “right” (and see Article 39(1) where the two are contrasted). As noted earlier, an international interest may take one of three forms, namely an interest (a) granted by a 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 (see paragraph 2.30(1)). The proprietary character of an international interest in cases (b) and (c) is reinforced by the word “vested”. To fall within (a) the security interest must be “granted” by a chargor under a security agreement, or, as it is defined in Article 1(jj) must be an interest “created by a security agreement” and must, like the other two interests, be duly constituted under Article 7. Article 1(ii) defines “security agreement” as an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an
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object to secure the performance of any existing or future obligation of the chargor or a third person (see paragraph 2.37). Article 7 provides that an interest is constituted as an international interest under the Convention where the agreement creating or providing for the interest fulfils the requirements of that Article. So under the Convention, as in many legal systems, it is not necessary to have a grant distinct from the agreement itself. So long as the security agreement meets the requirements of Article 7 it constitutes the grant of a security interest. If, however, the agreement does not conform to the requirements of Article 7 it remains a mere contract to grant a security interest.

2.39. The provisions of the Convention relating to an international interest reflect a central purpose of the Convention, which is to create a new and *sui generis* interest which is neither derived from nor dependent on national law and to confer on the holders of rights *in rem* over the equipment a means of protecting those rights by registration in the International Registry (in the French text “garantie internationale” is likewise a coined phrase and does not denote a personal guarantee, or suretyship, as would be true of the word “garantie” if used in isolation). Thus the Convention is confined to security interests and interests arising in favour of title-retention sellers and lessors. It does not apply to outright sales under the Luxembourg Protocol, which in contrast to the other two Protocols does not extend the Convention to sales, though a notice of sale may be registered for information purposes only (see paragraph 3.52). It is important to bear in mind that the International Registry is not a title registry (see paragraph 2.111). Accordingly a company which manufactures or acquires equipment with a view to supplying it under a conditional sale or leasing agreement cannot register its title as such, merely its interest as seller or lessor once the sale or leasing agreement has been concluded. It is at that time, not the time of delivery under or in anticipation of the agreement, that the international interest comes into existence. The drafting of Article 2(2)(b) and (c) is precise. These two sub-paragraphs do not refer to an interest vested in a person *as* conditional seller or *as* lessor, because the interest derives not from the conditional sale agreement or the leasing agreement but from a prior contract of sale between the manufacturer or the supplier and the conditional seller or lessor. Under Article 2(5) an international interest in an object extends to proceeds of that object, and this is complemented by Article 29(6), which provides that any priority given by Article 29 to an interest in an object extends to proceeds. However, the term “proceeds” is confined by Article 1(w) to insurance and other loss-related
proceeds and does not cover general proceeds. See paragraphs 2.46, 2.154 and 4.29.

Assignment and novation

2.40. It is generally accepted in legal systems that while an assignment can transfer benefits, and while an assignor and an assignee can agree between themselves as to the assumption of the assignor’s obligations by the assignee, the assignor is not released from its obligations to the debtor unless the debtor consents to the release. In some jurisdictions an agreement containing a release of the assignor from its obligations under the agreement is treated as a new agreement (novation). The laws of other jurisdictions have the concept of assignment of a contract, by which all the benefits and burdens are transferred to the assignee with the consent of the other party to the contract, while yet others regard the transaction as an assignment if some of the transferred obligations remain with the assignor, for example, those accrued prior to the assignment. But whether a transaction is an assignment or a novation is to be determined from its nature as a matter of interpretation of the Convention and without reference to the applicable law. This is necessary to preserve the unity of the Convention, because a new agreement for an international interest is separately registrable, so that want of registration affects third parties and cannot be left to depend on the law governing the assignment, particularly when national laws differ so widely on the point.

2.41. “Assignment” as defined in Article 1(b) of the Convention, involves the conferment of associated rights on the assignee. As stated above, “associated rights” are “all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object”. The essence of assignment is thus the transfer of the creditor’s rights. It is clear that a new agreement between all three parties – debtor, creditor and assignee – which replaces the original agreement is not an assignment but a novation. It is also clear that a transaction in which the creditor simply transfers its associated rights and the related international interest without reference to its obligations is an assignment. But there are also hybrid transactions in which the creditor assigns its rights under the agreement and also, with the consent of the debtor, transfers its obligations, wholly or in part. Such a transaction is an assignment for the purposes of the Convention, whether or not the elements of the
transactions relating to the creditor’s obligations result in characterisation of the agreement as a novation under national law. This is because the Convention’s definition of “assignment” is independent of national law, and if an agreement has the effect of transferring associated rights from the creditor to another person it will be an assignment for the purposes of the Convention no matter how the transaction as a whole is characterised under national law.

Amendment

2.42. Even an amendment to an agreement creating or providing for an international interest may, without necessarily affecting the existing registration, give rise to a new international interest which will not be protected by the initial registration but requires to be separately registered. Examples are the following:

1. The amendment changes the agreement category (as where a pure leasing agreement is amended by an agreement for the grant of an option to purchase which under the applicable law converts the leasing agreement into a security agreement).

2. The agreement is amended to add or substitute a new item of equipment, to increase a fractional interest in an item of railway rolling stock (e.g. from five per cent to ten per cent) acquired otherwise than by assignment or subrogation, to bring in a new party as grantee or grantor of a security interest, conditional sale or lease or to extend a security interest to an obligation not previously secured.

3. A lease is extended or renewed. The extension or renewal of a lease creates a new registrable interest in favour of the lessor, and this is so even if the lease itself gives the lessee an option to extend or renew the lease, for the option may never be exercised and unless and until it is exercised the lessor has no existing international interest as regards the extension or renewal period. However, where the extension or renewal is provided for in the lease itself the lessor can register it as a prospective international interest from the outset, with no need to re-register when the extension or renewal takes effect, and if the lease provides for successive renewal periods, a single registration of a prospective international interest will cover all renewals.
(4) The rent under a lease characterised by the applicable law as a security agreement is increased by a subsequent agreement.

The factor common to all the above amendments is that the original international interest is in some way enlarged, replaced or supplemented by a new interest or a new type of interest, to the potential detriment of intervening creditors whose interests will be thereby eroded. So it is important to effect registration of the new or varied international interest in order to preserve its priority. However, the original registration remains effective to the extent that the international interest to which it relates still subsists. An assignment of rights does not constitute an amendment, since it does not change the agreement or the parties to the agreement in any way, it merely entitles the assignee to exercise the assigned rights given by the agreement. The same is true of an international interest acquired by subrogation under Article 9(1) of the Convention or under the applicable law or through some other form of transfer by operation of law, for example, on a statutory transfer or a statutory merger or amalgamation of a creditor corporation with another corporation which under the applicable law operates to transfer the international interest (see paragraphs 2.126, 2.179).

2.43. There are other kinds of amendment which do not generate a new international interest because they do not change the terms or because any additional obligations they impose are secured or provided for by the international interest under the terms of the original agreement, for example an amendment:

(1) to record that a creditor or debtor has changed its name;

(2) as to the amount, mode or time of payment under a security agreement or a related promissory note either without increasing the amount of the obligations secured or where any increase is already secured by the terms of the original agreement;

7 It should be noted that whilst an international interest held by a conditional seller or lessor may be sold or otherwise transferred outright without an assignment of the right to payment or other associated rights, an international interest created or provided for by way of a security agreement may not be transferred unless some or all of the associated rights are also assigned (Article 32(2)).
(3) as to repair or insurance of the equipment;

(4) to provide for a further advance which is already secured by the agreement or adjust the interest rate on an existing secured advance.

Amendments raise other issues which are discussed in paragraphs 2.126-2.128.

**Fractional and other shared interests**

2.44. In contrast to the position regarding aircraft objects there is no current practice of holding fractional interests in railway rolling stock, that is, interests held as a fraction or percentage of the whole. However, an international interest in railway rolling stock may be held by a single party or by multiple parties without division (see paragraphs 2.35 and 2.51).

**Prospective international interest**

2.45. The mere fact that the grant of an international interest is contemplated at some time in the future is not enough to constitute a prospective international interest. It is necessary that the parties should be negotiating with respect to uniquely identified equipment and with a view to the creation of an international interest in that equipment. The facility of registering a prospective international interest has been widely used in relation to aircraft objects, registration usually being effected no more than a day or two in advance of the closing of a transaction. A prospective international interest may arise in relation to any of the three categories specified in Article 2(2). There can thus be a prospective security interest and a prospective interest of a conditional seller or a lessor. Moreover, as stated above, on the grant of a lease containing a provision for extension of the lease term the lessor, in addition to his existing international interest as such, has a prospective international interest in the extended term, which on being granted gives rise to a new international interest. A prospective international interest need not be provided for in writing. Indeed, beyond the need for the object to be identifiable as railway rolling stock the Convention prescribes no formalities for an agreement providing a prospective international interest. However, when this ripens into an actual international interest it will require separate registration, operative from the time of that registration, unless the registration information supplied
at the time the prospective international interest was registered was sufficient for registration of an international interest (Article 18(3)). So if a prospective creditor wishes its international interest to be treated as registered retrospectively to the registration of the prospective international interest it will need to ensure that such registration contains the particulars required by the regulations for a registration of a completed international interest. The issue will not arise where, as in the case of the registry for aircraft objects, the registration requirements under the regulations do not distinguish between a prospective international interest and an actual international interest.

**Proceeds**

2.46. “Proceeds” are defined narrowly as money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition (Article 1(w)). So the term “proceeds” is confined by Article 1(w) to insurance and other loss-related proceeds. General proceeds, such as receivables arising from the sale of an object, are not covered. This is a deliberate policy decision, reflecting the fact that the Convention is essentially concerned with interests in tangible assets (aircraft objects, railway rolling stock and space assets), not with receivables as such, and if general proceeds were included they could become the subject of Convention interests without any continuing linkage with the tangible assets from which they were derived. Moreover, the assignment of the international interest by the creditor, and with it the right to any proceeds, could, if proceeds had not been given a limited meaning, produce an undesired clash with the 2001 UN Convention on the Assignment of Receivables in International Trade.

**Characterisation of the agreement**

2.47. Most legal systems outside North America distinguish sharply between security agreements and title-retention and leasing agreements, treating a conditional seller or lessor as the full owner. By contrast in the United States, Canada, New Zealand and, more recently, Australia, the law adopts a functional and economic approach, treating title reservation agreements and certain leasing agreements as forms of security and the title of the conditional seller or lessor as limited to a security interest. Given these widely contrasting
approaches it was recognised at an early stage that it would not be possible to reach agreement on a uniform Convention characterisation. Accordingly the solution adopted was to leave this to be dealt with under the applicable domestic law as determined by the rules of private international law of the forum State (Articles 2(4), 5(2), (3)). Where the applicable law is the lex fori itself the national court will be able to apply its own law to determine the characterisation issue. However, whether an interest falls within the Convention at all is to be determined by the Convention itself. So in the first instance it is necessary to determine if the interest invoked falls within the Convention’s definition of a security interest or the interest of a conditional seller or lessor under a title retention or leasing agreement. If it does, then it is for the applicable law to decide whether the interest is to be recharacterised for the purpose of subsequent provisions of the Convention, and in particular Chapter III dealing with default remedies. So a consignment of goods to a retailer for sale would normally be outside the scope of the Convention even if under the applicable law it were to be characterised as a secured transaction or a lease, because it does not cross the threshold of falling within a Convention category. Once the agreement has been characterised or recharacterised under the applicable law, it is for that law to determine whether an amendment to the agreement itself necessitates a recharacterisation, as where a leasing agreement is amended to incorporate an option to purchase.

2.48. Characterisation is relevant primarily in relation to default remedies, which differ according to whether the agreement is a security agreement on the one hand or a title reservation or leasing agreement on the other. Characterisation may also be relevant for other purposes. For example, the provisions of Article 29(4) dealing with the priority of a conditional buyer do not apply to conditional sale agreements characterised by the applicable law as security agreements, because such a characterisation precludes such agreements from being treated as conditional sale agreements for the purposes of the Convention. See Article 2(2), (4).

2.49. As stated earlier, the definition of “security agreement” is wide enough to cover most forms of security interest. Even floating security, such as the floating charge under English law or a fixed security interest under North American or New Zealand law which identifies the subject-matter only by class or as “all assets” and does not identify a specific asset, is permissible under the Luxembourg Protocol as regards the constitution of an international interest in
railway rolling stock (Article V), but it does not suffice to meet the more stringent identification requirements for registration (Article XIV). In consequence Chapters I and II of the Convention are applicable to floating security, which can thus be created under the Convention and will be effective to confer on the chargee the Convention remedies for default by the debtor, but such security will not be registrable and will have no effect on third parties under the Convention, though it may have an effect under the applicable law.

**Contractual provisions outside the Convention and Protocol**

2.50. Article 15 deals with derogation from the Convention as regards default remedies, but it is also open to the parties to impose contractual restrictions on the exercise of rights under the Convention. For example, an assignor under a security assignment could agree that its consent to registration of a discharge of the assigned international interest is not required or that the consent of the assignee alone suffices (see paragraph 2.8(8)). On the other hand there are certain requirements of the Convention which if built into the registration system cannot be excluded. For example, a purported waiver of the requirement for the debtor’s consent to registration of an international interest in an aircraft object, even though not expressly prohibited by the Convention, would simply be ineffective where, as with the International Registry for aircraft objects, a registration cannot be made without electronic transmission of the debtor’s consent.

**Parties to the agreement**

2.51. The Convention contains no provisions on the question who may be a party to an agreement creating or providing for an international interest. So nothing in the Convention precludes, for example, the grant of a security interest to multiple creditors or by multiple debtors (see paragraphs 2.35-2.36). In common law systems a trust may be established to co-ordinate fractional interests, the trustees holding the international interest, and being invested with powers of enforcement, on behalf of the various lenders or lessors. Again, equipment and receivables arising from its leasing may be included in a securitisation package in which these are vested in trustees. In all these cases the trustee, lead bank or agent may, if so empowered, register or consent to registration of an international interest on behalf of the participants. The
Luxembourg Protocol contains provisions for registrations through trustees and agents.8

Exclusions

2.52. The provisions of the Convention describing the three categories of equipment to which it is applicable are qualified in important respects by the relevant Protocol, for example, by giving definitions which are designed both to describe the type of object covered and to limit the coverage to equipment of high unit value, and by specifying the method or methods by which the requirement of unique identifiability may be satisfied. Registration is effected against an object uniquely identified in accordance with Article XIV of the Protocol. Accordingly the registration and priority provisions of the Convention do not apply to future property not uniquely identified or to proceeds other than insurance and other loss-related proceeds (as to which see paragraph 2.154). So in regard to these types of asset the creditor should perfect its interest by local registration or otherwise in accordance with the applicable law. But Chapters I to III of the Convention, which include the provisions on default remedies, apply to future property so long as the description meets the more liberal requirements of Article V (see paragraph 3.7(1)).

Mobility and internationality

2.53. The ingredients of mobility and internationality are not expressly prescribed by the Convention but are considered inherent in the nature of the equipment. The Convention thus leaves open the possibility of taking and registering an international interest in equipment which never leaves its State of origin. However, the creditor needs to be able to protect itself against the possibility of such movement and is usually not well placed to know whether or not it has taken place. Article 50 of the Convention nevertheless allows Contracting States, in respect of purely internal transactions as defined by Article 1(n), to exclude certain provisions of the Convention relating to the rights of the parties between themselves, and Article XXIX(2) of the Luxembourg Protocol adds a second type of internal transaction as regards

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8 Article IV.
railway rolling stock capable in its normal use of being operated only on a single railway system within the State concerned.

The applicable law

Matters governed by the applicable law

2.54. The purpose of the Convention is to provide uniform rules which make it unnecessary to resort to the conflict of laws on matters within the scope of the rules, including the creation, registration, enforcement and priority of international interests and the assignment of associated rights. However, there are various matters on which resort to the applicable law is necessary. Reference has already been made to the relationship between the Convention and national law (paragraph 2.8). Questions concerning matters governed by the 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 (Article 5(2)), that is, the domestic rules of the law applicable by virtue of the rules of private international law of the forum State. The Convention also leaves it to the applicable law to determine:

- whether a valid agreement exists;
- whether an agreement falling within Article 2(2) is to be recharacterised (see paragraph 2.47);
- what remedies are available additional to those provided by the Convention (Article 12);
- what procedure must be followed in the exercise of remedies (Article 14);
- acquisitions of international interests by legal or contractual subrogations for the purpose of registration (Article 16(1)(c));
- the continuance, upon installation on an object, of rights in an item (other than an object) created prior to installation (Article 29(7)(a));
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- the creation, after removal from an object, of rights in an item (other than an object) previously installed on the object (Article 29(7)(b));
- the effectiveness in the debtor’s insolvency of an international interest not registered in the International Registry (Article 30(2));
- the defences and rights of set-off available to a debtor against an assignee of associated rights (Article 31(3));
- the priority of competing assignments of associated rights in cases falling outside Article 36(1) and (2) (Article 36(3));
- the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law (Article 38(1), and see Article 50(3)); and
- the priority of pre-existing rights and interests (Article 60(1)).

In addition, there are cases where the Convention itself says nothing about the applicable law but resort is to be had to it as the residual rule under Article 5(2). For examples, see paragraph 2.8(2). The Luxembourg Protocol specifies further matters for which reference is to be made to the applicable law (see paragraph 3.14). The relationship between international interests and interests created under national law is discussed below (paragraph 2.67).

What is the applicable law?

2.55. Article 5(3) of the Convention adopts the universally applied rule that the applicable law is determined by the *lex fori*. Most legal systems allow the parties to commercial transactions a wide measure of freedom in selecting the law to govern their relations *inter se* and Article VI of the Luxembourg Protocol, like comparable provisions in the other Protocols, allows the parties to choose the law to govern their relationship where the Contracting State has made the requisite declaration, though under the proposals awaiting a decision of the Council (see paragraphs 2.260, 3.18) such a declaration will not be able to be made by Member States of the European Union (see paragraphs 3.15, 3.18). Mandatory rules of the forum which, where the *lex fori* applies, cannot be excluded by agreement of the parties do not apply where the parties exercise their rights under Article VI to choose a foreign law, though the choice of law
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takes effect subject to those mandatory rules of the forum that are overriding in the sense that they apply regardless of the otherwise applicable law (see paragraph 3.16). But nowhere, except in relation to territorial units under Article 5(4), does the Convention or any of the Protocols provide a uniform conflicts rule to determine the applicable law in the absence of party choice. That is a matter for the conflict rules of the *lex fori*, which will select the relevant *lex causae* as to substantive rights, while procedural issues will be governed by the *lex fori* itself. The customary approach in relation to substantive contractual rights is to apply the law having the closest connection to the contract, which in the absence of other factors is presumed to be the law of the place of business of the party whose performance is characteristic of the contract. That law will usually govern all aspects of the contractual relationship, including substantive validity, interpretation, performance, and remedies so far as consistent with the procedural law of the *lex fori*. Courts of Member States of the European Union are required to apply the conflict rules laid down by Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) whether or not their contract has any connection with the European Union.

2.56. As regards property rights the Convention covers most of the core elements, including the constitution, registration and priority of an international interest. Beyond the Convention’s provisions the position is more complex. The question is most likely to arise where the issue is whether a party has acquired an international interest by legal or contractual subrogation. The rule generally applied to the transfer of an interest in most kinds of tangible movable is the *lex situs* (*lex rei sitae*), that is, the law of the location of the asset at the time of the relevant dealing or other event, in this case, the event which produces the subrogation, though if there are subsequent dealings or events the law of the *situs* at the time of the last of these determines the effect, if any, of rights acquired under earlier dealings or events.

2.57. In relation to the assignment of intangible assets, such as associated rights, some legal systems ascribe an artificial *situs* to the intangible (e.g. the situation of the debtor) so as to be able to apply the *lex situs* rule to select the law governing the obligation, while others look to the law of the assignor’s place or principal place of business. In each case where the issue is not governed by the substantive rules laid down by the Convention or Protocol or
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deducible from the general principles on which it is based reference must be made to the applicable law under the rules of private international law of the forum State.

**Constitution of international interest**

2.58. All that is needed to constitute an international interest in an item of railway rolling stock is an agreement which conforms to the simple requirements of Article 7 of the Convention and Article V of the Luxembourg Protocol. This is so whether or not the international interest has any counterpart in national law or fulfils the requirements for the creation of an interest under national law. In this sense the international interest is autonomous, being derived from the Convention itself. But whether an agreement exists at all and the time when an agreement comes into existence (see paragraph 2.66) are to be determined by the applicable law, which will thus govern questions such as capacity to contract, the existence of a consensus ad idem, and the like. The applicable law may also confer a power of disposal as required by Article 7 so far as such a power cannot be derived from the Convention’s own priority rules (see paragraph 2.60(4) below). However, the formal requirements for the agreement are determined by the Convention. Under Article 7 an interest is constituted as an international interest where the agreement creating or providing for the interest satisfies four conditions:

*Writing*

2.59. The agreement must be in writing. “Writing” is defined in broad terms in Article 1(nn) to cover not only documents but also an electronically held record of information which is capable of being reproduced in tangible form on a subsequent occasion. Whether the agreement is in paper or electronic form, it must indicate by reasonable means a person’s approval of the record. This will usually be by manual or electronic signature. It may be noted that writing is required for most types of agreement, consent, notice or waiver under the Convention, including an agreement for an international interest or as to events constituting a default, derogation from the provisions of Chapter

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9 A security agreement creates an international interest, whereas a conditional sale or lease agreement merely “provides for” an international interest, since the title retained by the seller or lessor does not derive from the conditional sale or leasing agreement but is acquired independently of (and usually before entry into) that agreement.
III (default remedies), consents to registration, an assignment of associated rights, notice of assignment to the debtor, notices to interested persons, waiver of the debtor's defences and rights of set-off against an assignee, variation of priorities as between a subrogee and a competing interest, choice of forum (except so far as not required by the law of the chosen forum) and waiver of sovereign immunity. But for some types of agreement writing is not required. These include agreements providing for a prospective international interest, relief pending final determination, the variation of priority of competing interests under Article 29(5) and the exclusion of the effects of an assignment under Article 31(1). Writing is not required for a prospective international interest, nor are there any other formal requirements beyond the need for unique identification. But see paragraph 2.45.

**Power of disposal**

2.60. The agreement must relate to an object of which the chargor, conditional seller or lessor has power to dispose. The word “power” is not synonymous with “right”. An unauthorised disposition may nevertheless be effective to pass ownership or some other interest because of a rule of law to that effect, for example, where an agent, though not having actual authority to dispose of its principal’s property, sells it when having ostensible authority to do so. A power to dispose thus exists whenever the transferor is able to transfer a better title than the transferor itself possesses. This may arise either under the applicable law or under the Convention itself as a consequence of its registration and priority rules. So it is not necessary that the chargor, conditional seller or lessor should be the owner of the object.

(1) Such a party may have express or implied authority from the owner to grant a second security interest, conclude an agreement for sub-sale under title reservation or grant a sub-lease. Structured finance often involves chains of this kind.

(2) A person granting a security interest will usually have a right to grant subsequent security interests and this suffices as a power of disposal even though it is limited to granting interests junior to that of the first creditor. The question then becomes one of priority between competing security interests, which is usually determined by the order of registration in the International Registry.
(3) The person making the disposition, though not having actual authority to do so, may have an agency power, such as apparent authority, which under many legal systems gives that person a power of disposal. Many legal systems protect the bona fide recipient of goods obtaining possession from a transferor who is himself lawfully in possession but has no power of disposal or exceeds his authority to do so.

(4) Even a debtor without a right to dispose under the applicable law must, if in possession of the object, be considered as having a power to dispose under the Convention itself, and thus to agree to grant a security interest, sell or sub-sell under a title reservation agreement or grant a lease or a sub-lease, for if the position were otherwise there would be little point in making the interest of the (head) chargee, conditional seller or lessor registrable as an international interest, given that it is the debtor in possession who is usually in the best position to grant a competing interest. Indeed, a person lacking a right to dispose will rarely have a power to dispose under the Convention unless in possession of the object.

2.61. For the purpose of the above analysis the debtor’s possession (and only possession by the debtor or its agent is relevant) may be either actual (direct) or constructive (indirect), as where railway rolling stock is held in a depot to the order of a particular party, who thus has control.

2.62. In a Contracting State the law of which possesses the institution of a trust the question arises whether, where the item of railway rolling stock is held on trust, the trustee or the beneficiary has a power to dispose. All three Protocols provide that a person may enter into an agreement in a trust capacity. The use of security and other trustees is not uncommon in modern rail finance. The power of disposal of trustees holding title to railway rolling stock depends upon the applicable law and, within the limits permitted by the applicable law, on the terms of the instrument under which they are appointed. For the purposes of the Convention the power to dispose relates to the legal title, not the beneficial interest, so that the power to dispose will almost invariably be held by the trustee, not by the beneficiary.
Identifiability

2.63. The agreement must enable the object to be identified in conformity with the relevant Protocol. However, on this aspect the Luxembourg Protocol departs in an important respect from the Aircraft Protocol by making the identification requirements for the constitution of an international interest in railway rolling stock considerably more flexible than those required for registration (see paragraph 3.7(1)). For the purpose of constituting an international interest in railway rolling stock it is not necessary that the items of railway rolling stock be uniquely identifiable. For example, the Convention permits an international interest to be granted over both present and future classes of railway rolling stock. Parts II and III of the Convention are therefore capable of covering any after-acquired objects which have been completed or are in course of construction and are identifiable as railway rolling stock falling within the scope of the agreement. For registration purposes, however, the railway rolling stock must be uniquely identifiable as provided by the Protocol. It is not possible to register an international interest in unidentified present or future property. But there is nothing to preclude registration of an international interest in railway rolling stock in course of construction where the item in question can be seen to constitute an item of railway rolling stock within the definition in Article I(2)(e) of the Protocol and satisfies the requirements of the Protocol for unique identifiability.

Obligations secured

2.64. In the case of a security agreement, this must enable the secured obligations to be determined; in other words, it must be possible to ascertain from the agreement what obligations it is securing. However, it is not necessary to state a sum or maximum sum secured, nor is it necessary to identify each particular obligation; a general description suffices. It was felt that to require the statement of a maximum sum or specificity in the statement of secured obligations was neither practicable nor desirable, for in many cases the agreement will secure future obligations whose nature and quantum will not be known in advance. If the secured party had to specify a maximum sum it would simply choose a figure higher than any amount it would conceivably advance.
2.65. Registration is not a requirement for the constitution of an international interest, nor is it a guarantee than an international interest exists; the function of registration is to give notice to third parties of the existence of the international interest if it does exist and preserve the priority of the holder of the interest. Thus Chapter III of the Convention, devoted to default remedies, applies in relation to registered and unregistered interests alike, though in practice it will be rare for an interest to remain unregistered by the time a default occurs.

**Time of conclusion of agreement**

2.66. As stated earlier, the time when an agreement creating or providing for an international interest is to be considered made is determined by the applicable law. This time is relevant to those provisions of the Convention and Protocol setting out conditions that have to be satisfied at that time. Those provisions include the connecting factor under Article 3 of the Convention, the status of an interest as a pre-existing right or interest as defined by Article 1(v) of the Convention, which is relevant to Article 60; the efficacy of registration of a prospective international interest (see paragraph 2.165); and the debtor’s right to have a registration of a prospective international interest discharged where the creditor has not given value or incurred a commitment to give value (Article 25(2)). Where an agreement not identifying the railway rolling stock is completed by a supplemental agreement which does identify it then for the purposes of the Convention the agreement takes effect from the time of the supplemental agreement.

**Relationship with interests created under national law**

2.67. The Convention does not exclude the creation of security interests under national law. In most cases a security, title-retention or leasing interest created under national law will simultaneously constitute an international interest, so that the two will co-exist. However, the international interest will usually give the creditor stronger rights than a purely domestic interest. In particular a registered international interest has priority over (a) a domestic interest which is neither registered under the Convention (even if this is because it is of a kind not capable of registration or is given by a debtor not situated in a Contracting State at the time of the agreement – see paragraphs
2.23, 2.24) nor covered by a declaration under Article 39 and (b) a national interest notice of which is not registered in the International Registry.

2.68. Nevertheless there may be cases in which local registration of an interest created under national law which is also an international interest gives a measure of protection under the national law that would otherwise be denied. One such case is where local registration would preserve the creditor’s priority in regard to general proceeds of equipment, which are outside the scope of the Convention. Whether this is of any practical significance does, of course, depend on the proceeds being traceable. Where an interest is both an international interest and an interest existing under national law, failure to register or otherwise perfect it in accordance with the national law may invalidate it as a national interest if the national law so provides but cannot, within a Contracting State, impair its validity or priority as an international interest, even in the event of the debtor’s insolvency, so long as the international interest was registered prior to the commencement of insolvency proceedings. This is because the only grounds of invalidity in insolvency recognised by the Convention as applicable to such an international interest are avoidance of a transaction as a preference or a transfer in fraud of creditors (Article 30). See further paragraph 2.174. But the Convention does not, of course, operate in relation to insolvency proceedings in a non-Contracting State.

**Termination of an international interest**

2.69. An international interest in an object terminates when the agreement creating or providing for it comes to an end (whether under the Convention or under the applicable law) or the object to which the agreement relates becomes vested in the creditor or is destroyed. So the provisions of the Convention relating to termination are not exhaustive; rules of the applicable law may also come into play so far as these are consistent with the mandatory provisions set out in Article 15. Termination may thus occur under the terms of the agreement or as a result of the exercise of a default remedy under the Convention or pursuant to the applicable law. So a security interest is extinguished where all the obligations it secures have been discharged or the security has been realised and its proceeds distributed or has been released or become vested in the creditor or some other event has occurred which by the
terms of the security agreement results in discharge of the security. The mere fact that at a particular time no money is owing to the creditor does not necessarily mean that the security interest is extinguished, for it may have been given to secure continuing obligations, for example sums due on an overdrawn current account. A title reservation or leasing agreement comes to an end by termination for default under Article 10 of the Convention or (in the case of a lease) by expiry, exercise of an option to purchase or as otherwise provided by the agreement or the applicable law, and a title reservation agreement also ends on completion of payments and acquisition of title by the buyer. The exercise of an option to purchase replaces the lessor's international interest with a sale, and the same applies to completion of payments under a title reservation agreement. Sales are outside the Convention and the Luxembourg Protocol. Notice of a sale can be registered under the Luxembourg Protocol but this is for information and has no effects under the Convention or Protocol (Article XVII).

2.70. Termination of an international interest in an object does not necessarily exhaust the application of the Convention, because if, for example, the object has been destroyed and insurance proceeds have become payable international interest extends to the proceeds (see paragraph 2.46) and if there are competing claims the priority of the holder of the former interest in the object attaches to the proceeds (see paragraph 2.154). In such a case it is important for the registration of the international interest to be maintained until the creditor has received payment from the proceeds.

2.71. Just as the creation of an international interest is not dependent on registration, so also its termination is not dependent on the entry of a discharge in the International Registry. Once the international interest has come to an end its registration ceases to have any priority effects except in relation to proceeds as defined by Article 1(w) of the Convention.

Default remedies generally

2.72. The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously. Chapter III of the Convention provides a chargee with a set of basic remedies in the event of the debtor’s default. For this purpose it is not necessary for the international
interest to have been registered, since registration is required only to give notice of the international interest to third parties and to protect the priority of the international interest. A distinction is drawn between the rules governing the remedies of a chargee, which are specified in Articles 8 and 9, and those applicable to the remedies of a conditional seller or lessor, which are the subject of Article 10 and are less detailed, reflecting the fact that vis-à-vis the conditional buyer or lessee the conditional seller or lessor is the owner of the equipment" and may deal with the equipment as it pleases once the agreement has come to an end. It should, however, be borne in mind that an agreement which is a title reservation agreement or a leasing agreement within the definitions given by Article 1 of the Convention may be recharacterised by the applicable law as a security agreement, in which case it is Articles 8 and 9, not Article 10, which will apply. The Luxembourg Protocol limits the exercise of remedies in relation to public service railway rolling stock.11

2.73. The remedies conferred on a chargee by Article 8 are exercisable only to the extent that the chargor has at any time so agreed (Article 8(1)). The chargor’s agreement need not be in writing, nor does it have to refer specifically to Article 8 or to the remedies set out in that Article; an agreement in general terms, for example, “all remedies under the Convention”, suffices. As the Convention and Luxembourg Protocol are to be read as a single instrument (Convention, Article 6(1)) such terms would cover remedies under the Protocol as well as under the Convention. The chargor may also agree to the vesting of the object in the chargee in satisfaction of the secured obligations but such agreement is not effective unless given after default and it is also necessary to have agreement from other “interested persons” as defined by Article 1(m) of the Convention (Article 9(1)). By contrast, the remedies of termination and repossession under Article 10 do not require the debtor’s agreement, though a Contracting State may make a declaration under Article 54 requiring leave of the court. The Luxembourg Protocol also contains provisions about the debtor’s agreement to the exercise of remedies but these are not uniform in their wording. The additional remedies of export and

10 The conditional seller or lessor is not necessarily the owner; often it will be an intermediate party itself holding the equipment under a conditional sale agreement or lease. But in its relations with the conditional sub-buyer or sub-lessee its position is analogous to that of an owner.

11 See paragraphs 3.29 et seq.
physical transfer are available “to the extent that the debtor has at any time so agreed” (Article VII(1)) but the agreement need not be in writing and can be covered by a general formulation such as “all remedies under the Convention and Protocol”. Article VIII(3) adds to the remedies available by way of advance relief the additional remedy of sale and application of the proceeds therefrom, but this requires that the debtor and creditor “specifically agree”, so that it is necessary to refer expressly to that additional form of relief. However, the agreement need not be in writing. On the other hand Article VIII(5), which permits the parties to agree to exclude the application of Article 13(2), requires that the agreement be in writing.

2.74. Any remedy provided by the Convention is to be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised (Article 14). However, where the law of that place permits a Convention remedy to be exercised without leave of the court it is open to the Contracting State in question to make a declaration under Article 54(2) that the remedy is to be exercisable only with leave of the court (Article 54). Conversely, where the Contracting State in its declaration under Article 54(2) – a declaration which is required to be made at the time of ratification of the Protocol – declares that the remedy is to be exercisable without leave of the court this overrides any requirement in that Contracting State’s general law that requires such leave to be obtained. A Contracting State has complete freedom as to the Convention remedies within Article 54(2) that are to be covered by its declaration, so that this may relate to any one or more of the Convention remedies, or all of them, so far as falling within Article 54(2). If the Contracting State makes no declaration, the creditor is entitled to exercise self-help remedies even if these would not otherwise be permitted under that State’s law. The phrase “in conformity with the procedure prescribed …” does not allow a bar on self-help remedies to be invoked if the State in question has made no declaration requiring leave of the court. But non-Convention remedies, such as remedies under the applicable law preserved by Articles 12 and 13(4), fall outside the scope of Article 54(2) and their exercise is subject to any restrictions imposed by the law of the place of enforcement.

2.75. The parties may at any time agree in writing on the events that constitute default or otherwise give rise to the remedies set out in Chapter III. In the absence of such agreement the default must be substantial (Article 11).
Priorities to be respected

2.76. An enforcing creditor must respect priorities. So a junior chargee exercising a power of sale must either sell subject to the senior charge or obtain the senior chargee’s consent to a sale free from the charge and, where so required by the senior charge, discharge the senior debt out of the proceeds of sale. The same applies to a non-consensual right or interest covered by Article 39 and ranking in priority to the claim of the enforcing creditor. The position as to non-registrable non-consensual rights or interests covered by a declaration under Article 39 is a little more complex because of the need to establish the conditions in which and the point at which the priority attaches, these being matters governed not by the Convention but by the law of the declaring State (see paragraph 2.210).

Default remedies of chargee

2.77. Article 8 empowers the chargee, to the extent that the chargor has at any time so agreed, to:

- take possession or control of any object charged to it;
- sell or grant a lease of any such object;\(^\text{12}\)
- collect or receive any income or profits arising from the management of the object.

Alternatively, the chargee may, with or without the agreement of the chargor, apply for a court order authorising or directing any of the above. These remedies, which by implication include powers of management of the object, are exercisable not only against the debtor but against a conditional buyer or lessee from the debtor whose interest is subordinate to that of the creditor because the latter registered its international interest before registration of the international interest held by the conditional seller or lessor. See Article 29(4)(a) and paragraphs 2.156-2.160, 3.57 \textit{et seq}.

\(^{12}\) But a Contracting State may, by a declaration under Article 54, exclude the power to lease equipment while on its territory. This provision was inserted to meet the concerns of certain jurisdictions whose laws contain mandatory provisions relating to leases.
Extra-judicial remedies

2.78. Extra-judicial remedies under Article 8(1), where not precluded by a declaration of the relevant Contracting State under Article 54, are required to be exercised in a commercially reasonable manner (Article 8(3)). So on repossessing the object the creditor must take proper steps to safeguard it from loss or damage and on a sale must act in a commercially reasonable manner, though if so acting the creditor will be protected even if its efforts do not result in its obtaining the best price. Nothing in Article 8 precludes the creditor itself from purchasing the object so long as the sale is made in a commercially reasonable manner, for example at public auction or by competitive tender. A remedy is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable (ibid.). Article 8(3) is a mandatory provision (Article 15) and therefore cannot be excluded or varied by agreement. Article 8 is concerned only with private law remedies. Restrictions imposed, for example, by national safety laws are unaffected by the Convention. Article 8(3) is replaced by a more general provision in Article VII(3) of the Luxembourg Protocol.

Possession

2.79. A creditor taking possession of the object and then leasing it is, of course, entitled to collect the lease rentals and apply these in reduction of the amount due under the agreement. Alternatively the creditor may control the object directly or through an agent and collect the income, as where the creditor repossesses railway rolling stock from the debtor and continues it in service, collecting revenues for passenger fares or freight. Where the debtor has granted a lease of the object and the creditor has priority over the rights of the lessee because the creditor’s interest was registered before that of the debtor (see Article 29(4)) the creditor can either repossess the object from the lessee or, on giving notice of its rights to the lessee, take over the lease and collect the rentals payable under the lease or alternatively terminate the lease (as an exercise of the creditor’s management powers) and grant a new lease. Powers of possession and control would also include making arrangements for

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13 Subject to a declaration by the relevant Contracting State under Article 54.
custody, repair and insurance. Each of the foregoing remedies has to be exercised in a commercially reasonable manner.

Sale or lease

2.80. A chargee proposing to sell or grant a lease of an object under Article 8(1) is required to give notice to interested persons as provided by Article 8(4). This too is a mandatory provision (Article 15). “Interested persons”, defined in Article 1(m), embraces three categories:

(1) The first category is the debtor itself. Having the debtor under the agreement as a recipient of a notice seems straightforward enough. However, the definition of “debtor” in Article 1(j) includes “a person whose interest in an object is burdened by a registrable non-consensual right or interest,” that is, a non-consensual right or interest falling within Article 40. The definition uses the word “registrable” rather than “registered” and this is clearly intentional, as is apparent from the definition of “registered interest” in Article 1(cc). But for reasons already given a registrable but unregistered non-consensual right or interest is of only limited significance under the Convention (see paragraphs 2.30(5), 2.36). The position is otherwise where the non-consensual right or interest is registered ahead of an international interest. In such a case the holder of the non-consensual right or interest has priority. Moreover, the subordinate chargee falls within the definition of “debtor” in Article 1(j) and as such is an “interested person” within category (i) of Article 1(m). For example, A registers a charge in its favour, after which B registers a non-consensual right or interest and then C registers a second charge. The second chargee, whose interest is subordinated to and thus bound by the registered non-consensual right or interest, is therefore a debtor within the definition in Article 1(j) and as such is entitled to receive notice of an intended sale or lease as an “interested person” within Article 1(m)(i) rather than as an “other person having rights in or over the object” within Article 1(m)(iii). This is significant because a debtor is always entitled to notice of an intended sale or lease, whereas an “other person” within Article 1(m)(iii) is entitled to such notice only if that person has given notice of its rights to the chargee within a reasonable time prior to the sale or lease.
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(2) The second category of interested persons covers issuers of suretyship and demand guarantees, standby letters of credit and any other form of credit insurance. This needs no comment.

(3) The third category covers “any other person having rights in or over the object”. This category is very wide. It includes the holders of other registered or unregistered charges (whether senior or junior to the enforcing chargee), buyers, conditional buyers and lessees (even if their rights are junior to those of the enforcing chargee), the holders of non-consensual rights or interests under Article 39, registrable non-consensual rights or interests under Article 40, national interests notice of which has been registered under Article 20(6) and even unregistrable interests outside Article 39. This is perfectly logical in that the definition of “interested persons” is relevant only to the exercise of default remedies as set out in Chapter III of the Convention, which is not confined to registrable international interests. However, the duty to give prior notice to interested persons in this last category is confined to those who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease (Article 8(4)(b)). It would seem that for this purpose registration of an interest in the International Registry within a reasonable time prior to the sale or lease constitutes an effective notice.

2.81. Any sum collected or received by the chargee as a result of exercising any of the above remedies is to be applied towards discharge of the amount of the secured obligations (Article 8(5)). Where, after discharge of that amount and reasonable costs incurred in exercise of the remedy, there is a surplus then unless otherwise ordered by the court the chargee must distribute the surplus among holders of subsequently ranking interests which have been registered or of which the charge has been given notice, in order of priority, and pay any remaining balance to the chargor (Article 8(6)). Articles 8(4) to (6) are mandatory (Article 15). Where there are two successive charges the junior chargee is entitled to exercise the remedies of sale or lease but subject to the rights of the senior chargee. Accordingly if the senior chargee has become or becomes entitled to exercise default remedies, its enforcement rights prevail over those of the junior chargee, who will have to give way and, if it has already taken possession, to give up possession to the senior chargee. One of the functions of the requirement that the junior chargee give notice of its
intended exercise of remedies is to give the senior chargee as one of the interested persons the opportunity to step in and institute its own default measures. If this does not occur and the junior chargee sells the object it must apply the proceeds, first, in discharging the senior debt, then in taking what is due to itself, including the reasonable costs of sale, and then in distributing any surplus as described above.

2.82. Article 9 empowers the chargee to take ownership of the object in or towards satisfaction of the debt. However, the chargor and other interested persons, such as prior or subsequent chargees and guarantors, are provided with a number of safeguards. Under Article 8(4) notice of a proposed sale or lease must be given to interested persons, including the debtor. Under Article 9(1) and (2) vesting of ownership in satisfaction of the debt can occur only with the consent of all the interested persons or on an order of the court and, in the latter case, only if the court is satisfied that the amount of the secured obligations to be discharged is commensurate with the value of the object (Article 9(3), which is mandatory). But curiously there is no condition, as there is in Article 8(4), that to qualify as interested persons by having rights in or over the object the persons concerned shall have given reasonable prior notice of their rights to the enforcing chargee, and it is possible that without such notice the chargee will have no knowledge of their existence and may wrongly assume that it has all the requisite consents. Where these are lacking recourse must be had to the court by an application for a vesting order.

2.83. Since Article 9 provides for vesting of ownership “in or towards” satisfaction of the debt, the creditor remains entitled, if the value of the asset is less than the amount owing, to recover the deficiency from the debtor. By contrast, if the value is greater than the amount of the debt the creditor is not accountable to the debtor for the excess. That is why the safeguards described in paragraphs 2.80-2.81 have been built into the process. The Convention does not prescribe any mechanism for determining the value of the object, though if it is sold in a commercially reasonable manner the sale price may provide a useful guide to its value. Under Article 9(4), which is mandatory, at any time before sale or the making of a vesting order under Article 9(2) the debtor may discharge the security interest by paying the secured amount in full, subject to any lease granted by the chargee under Article 8(1)(b) or ordered by the court under Article 8(2). Where, after such default, the payment is made by an interested person other than the debtor, that person is subrogated to the rights
of the chargee (Article 9(4)) and thus acquires the security interest automatically and without any need for an assignment. Only one who is an “interested person” within Article 1(m)(ii) or (iii) is entitled to make a payment attracting rights of subrogation. See paragraph 2.80(2) and (3). Under Article 16(1)(c) the acquisition of an international interest by legal or contractual subrogation “under the applicable law” is registrable in the International Registry. In the ordinary way a reference to the applicable law in the Convention denotes a reference to law outside the Convention itself (see Article 5(2)). However, in this particular case there seems no reason why the right of subrogation conferred by Article 9(4) should not be considered a right arising under the applicable law so as to be registrable under Article 16(1)(c).

2.84. Article 9 deals only with relations between the parties and does not affect the rights of a third party such as a creditor holding a security interest ranking in priority to that of the creditor who is exercising the Article 9 remedy. The existence of such a security interest does not preclude the junior secured party from exercising its rights under Article 9 but it will have to give notice to the senior party as an “interested person” and any ownership vesting in the junior secured party will be subject to the senior party’s security interest (see Article 9(5)). By contrast, where there is a security interest ranking after that of the creditor exercising the Article 9 remedy then while notice must be given to the holder of the junior interest, who may wish to pay off the senior debt and take over the senior creditor’s interest (Article 9(4)), if this does not happen and ownership becomes vested in the senior creditor, the junior creditor’s security interest will be extinguished (Article 9(5)).

Default remedies of conditional seller or lessor

2.85. In the case of a conditional sale agreement or leasing agreement, the only remedies designated (by Article 10) are termination of the agreement, possession or control of the object or a court order authorising or directing either of the above. The provisions are much simpler because in contrast to the chargee, who has merely a security interest, the conditional seller or lessor retains full rights in the equipment. However, in the United States, Canada New Zealand and Australia conditional sale agreements and certain types of financial leasing agreement are characterised as security agreements, so that a
court in such a jurisdiction will apply the Convention rules governing security agreements.

Additional remedies

2.86. Article 12 provides that additional remedies permitted by the applicable law, including any remedies agreed by the parties, may be exercised to the extent that they are in conformity with the mandatory provisions listed in Article 15. By the applicable law is meant the domestic rules (i.e. excluding conflict of laws rules) of the law applicable by virtue of the rules of private international law of the forum State (Article 5(3)). Depending on those rules, substantive remedies will be governed either by the lex causae (typically the law governing the contract between the parties) or by the lex fori. In the case of purely procedural remedies the applicable law is always that of the lex fori.

2.87. It is therefore open to the parties to agree on cumulation of Convention remedies and those additional remedies provided or permitted by the applicable law which are not inconsistent with the mandatory provisions of the Convention. Subject to any contrary provisions of the applicable law the parties could, for example, agree that on default the creditor should be entitled to accelerate the debtor’s liability, to call for additional security, and to sell the object from the debtor’s premises. These are substantive remedies. The power of derogation is not confined to the parties to the security, title reservation or leasing agreement but covers all agreements between parties mentioned in Chapter III, including the creditor and an interested person other than the debtor.

2.88. Article 12 is not confined to substantive remedies but extends to procedural remedies given by the lex fori, for example, the grant of an injunction or an order for specific performance, an interim payment or the preservation of property, and such procedural remedies conferred by the agreement of the parties as are permitted by the lex fori.

2.89. Separate from the additional remedies referred to in Article 12 are forms of interim relief under the lex fori the application of which is preserved by Article 13(4) (see paragraph 2.102).
Relief pending final determination of the creditor's claim

2.90. Article 13(1), which may be excluded wholly or in part by a Contracting State by a declaration under Article 55, provides the creditor who adduces evidence of default with the right to speedy relief, pending final determination of its claim,\(^{14}\) to the extent that the debtor has at any time so agreed. Such relief (the nature of which is examined in paragraph 2.96) takes the form of an order for preservation of the object or its value, possession, control or custody of the object, immobilisation of the object or lease or management of the object and the income from it but not sale and application of the proceeds of sale (although all the Protocols add these remedies). Advance relief may be given by any court having jurisdiction under Article 43 of the Convention so far as that Article is not disapplied by a Contracting State’s declaration under Article 55. In exercising any remedy given by the court under Article 13(1) the creditor must act in a commercially reasonable manner (Article 8(3) as applied by Article 13(4)). The court has no power to make a vesting order under Article 9 in proceedings for advance relief. Under Article 13(2) certain safeguards are provided for the debtor and other interested persons. Before making the order the court may require notice of the request for the order to be given to any of the interested persons. These include a chargee subordinated to the holder of a registered non-consensual right or interest under Article 40, who is both a debtor within Article 1(m)(i) (see the definition of “debtor” in Article 1(j) and paragraph 2.80(1)) and an “other person having rights in or over the object” within Article 1(m)(iii) (see paragraph 2.80(3)).

2.91. It will be noted that if so agreed by the parties some of the remedies listed in Article 13(1) are exercisable by the creditor upon the debtor’s default (as defined by Article 11) without the need to resort to the court at all for advance relief. These are most of the remedies listed in Article 8(1), namely the taking of possession or control, the grant of a lease (but not sale) and management of the object and the income therefrom. It might be asked why such agreement is not sufficient in itself to enable the creditor to exercise the

\(^{14}\) For brevity, relief pending final determination is referred to hereafter as advance relief. While Article 13(4) refers to “interim relief” this description was intentionally avoided in the heading to Article 13 and in Article 13(1) so as to make it clear that the relief is a Convention relief and should not be characterised by reference to concepts of municipal procedural law. See paragraph 2.96.
remedies in question without need of a court order under Article 13. But there may be cases in which there is a dispute on the merits and the creditor is either unable to exercise self-help (whether because of practical difficulties or because such remedies are excluded by a Contracting State’s declaration under Article 54(2)) or is reluctant to do so without a judgment or order in its favour under Article 8(2) and meanwhile needs urgent judicial assistance to protect its position pending final determination of its claim.

2.92. In making an order under Article 13(1) the court may impose such terms as it considers necessary to protect the interested persons (as defined by Article 1(m)) in the event that the creditor:

(a) in implementing any order granting such relief fails to perform any of its obligations to the debtor under the Convention or Protocol (e.g. fails to exercise in a commercially reasonable manner a remedy given by the order), or

(b) fails to establish its claim, wholly or in part, on the final determination of that claim (for example, the court could as a condition of making the order require the creditor to undertake to compensate the debtor for any loss suffered by the debtor in consequence of the order if the creditor’s claim is ultimately unsuccessful).

However, except as stated above the court has no discretion to refuse the order for which the creditor has applied or to suspend the order for a period to allow the debtor time to discharge any arrears outstanding. Moreover, in the case of railway rolling stock Article 13(2) may be excluded by agreement in writing of the creditor and the debtor or any other interested person (Protocol, Article VIII(5)).

2.93. By Article 55 a Contracting State may by declaration exclude Article 13, wholly or in part.15 Moreover, even where Article 13 applies the creditor may waive its rights under that Article or elect to seek interim relief under the applicable law rather than under the Convention. In such a case Article 13(2) does not come into play, and the protection of the debtor and other interested

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15 The European Community (now the European Union) is treated as a Contracting State and has made a declaration to the effect that Articles 13 and 43 will apply only so far as in conformity with specified EU legislation. See below, paragraph 2.260.
parties will depend on the exercise of the court’s powers under the applicable law. Where Article 13(1) applies (see paragraph 2.90) the Convention does not allow the parties to exclude Article 13(2), which is mandatory, but all the Protocols override this and allow the parties to exclude Article 13(2) by an agreement in writing.

2.94. Jurisdiction to make an order under Article 13 and grant other forms of interim relief is governed by Article 43 of the Convention, discussed in paragraphs 2.214 et seq.

2.95. Article VIII of the Luxembourg Protocol contains provisions modifying those of the Convention in relation to default remedies and defining “speedy” in the context of obtaining relief under Article 13 (see paragraph 3.28(3)).

It is now necessary to look at Article 13 in more detail as it raises a number of difficult questions.

Nature of relief pending final determination (“advance relief”)

2.96. While Article 13(4) refers to “interim relief” this description was intentionally avoided in the heading to Article 13 and in Article 13(1) so as to make it clear that the relief is a sui generis Convention relief and should not be characterised by reference to concepts of municipal procedural law. This, indeed, is apparent from the fact that advance relief is available to the creditor only “to the extent that the debtor has at any time so agreed” and that the relief must be given in the form requested by the creditor and from the addition of sale as a form of advance relief in the Luxembourg Protocol (Article VIII(3)). Again, Article 13(4), which preserves the availability of “forms of interim relief other than those set out in paragraph 1” does not imply that relief under Article 13(1) is to be equated with interim relief as understood (albeit in different ways) in national legal systems, it simply reflects the fact that such interim relief is likely to include some or all of the items listed in Article 13(1). Advance relief does, however, share the characteristic of interim relief and provisional orders in national legal systems in that it is given prior to a final determination of the dispute on the merits and is not intended

16 However interim relief under Article 13(4) is characterised by the lex fori.
to prejudge the outcome of that determination. That is clear from Article 13(2), which postulates that the creditor obtaining advance relief may not succeed at the substantive hearing (see paragraph 2.92). It is in the nature of advance relief that it disturbs what would be the debtor’s rights absent default and does not purport to preserve the status quo. If the debtor succeeds in defeating the creditor’s claim at the final hearing its protection lies in compensation or some other adjustment of the parties' rights pursuant to terms imposed by the court under Article 13(2) when granting advance relief.

“Speedy”

2.97. Article 13(1) does not define “speedy”. That is left to the Protocol. See Article VIII(2) of the Luxembourg Protocol and paragraph 3.28.

Standard of proof

2.98. Article 13 is silent as to the standard of proof required to be adduced by the creditor. Since the purpose of Article 13 is to safeguard the creditor’s position pending final determination it seems clear that the creditor is not required to meet the standard of proof that would be required for a hearing on the merits, because this would render the final hearing otiose and would, indeed, be inconsistent with the concept of speedy relief, since in a contested case where the facts are complex it may take a considerable time and expense to gather the evidence required for a hearing on the merits. On the other hand the travaux préparatoires record general agreement that the words “prima facie” contained in an earlier draft should be deleted, with a number of delegations indicating that the word “clear” put in their place was acceptable but that they could also consider not including it at all,17 which indeed was the final outcome.

2.99. Three factors need to be borne in mind in considering the standard of proof of default the creditor should meet. The first is that if sufficient evidence is adduced the court has no discretion but is required to grant the creditor the order or orders it seeks. The second is that the court is concerned only with the evidence adduced, not with considerations such as whether the creditor’s

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need for the order outweighs the debtor’s interest in preserving its own rights until the final determination or whether it is unlikely that the debtor would be able to satisfy a final judgment. The third factor, which goes in the other direction, is that under Article 13(2) (which in the case of railway rolling stock may be excluded by agreement of the parties under Article VIII(5) of the Luxembourg Protocol) the court may impose such terms as it considers necessary to protect the debtor and other interested persons in the event of the creditor failing to perform its obligations to the debtor under the Convention or Protocol in implementing any order or failing to establish its claim at the substantive hearing. Balancing these factors suggests that it would be unwise to formulate any rigid standard, since much depends on the facts of the particular case. What needs to be borne in mind is that Article 13 is designed for situations of some urgency where prompt relief is necessary to avoid damage to the creditor’s interests, e.g. because the object is in danger of removal or physical or commercial deterioration. So if, for example, there is evidence of non-payment and the debtor’s defence involves disputed allegations of failure in performance by the creditor that can only be established after a trial on the merits, the court can be expected to take the view that the dispute should not preclude the grant of advance relief where this is necessary for the creditor’s protection. At the end of the day the court hearing the application under Article 13 must decide whether, in the limited time available, the creditor has adduced sufficient evidence of default to make it proper to grant the relief requested.

Variation or exclusion of Article 13

2.100. Article 13(1) is not listed as a mandatory provision in Article 15, so that the parties are free to derogate from or vary it by an agreement in writing. It is therefore open to the parties to exclude or restrict all or any of the forms of relief listed in Article 13(1). It would also seem to be open to them to agree on additional forms of advance relief to the extent that these are compatible with the concept of advance relief, for example, interim payment, entry on to premises, the conduct of searches or the provision of information by the debtor concerning the whereabouts of the asset. Sale is more problematic and is omitted from Article 13(1) because while some legal systems treat it as an available form of interim relief which is particularly useful in the case of objects that are physically perishable or commercially likely to deteriorate in value with the passage of time, a number of legal systems regard sale as an irreversible act of a kind incompatible with the concept of advance relief. It
would therefore be unwise to rely on the non-mandatory character of Article 13(1) to add sale as a form of advance relief, and so far as railway rolling stock are concerned it is unnecessary because Article VIII(3) of the Luxembourg Protocol adds a paragraph (e) to Article 13(1) providing for sale and application of proceeds therefrom as a form of advance relief if at any time the debtor and the creditor specifically agree. On the other hand a vesting order under Article 9 is very much in the nature of a final order and cannot be the subject of an order under Article 13 even if the parties purport to extend Article 13 to cover it.

2.101. The Convention does not permit the parties to derogate from or vary the effect of Article 13(2), this being a mandatory provision, not one which falls within Article 15. However, a Contracting State may exclude Article 13(2) by a declaration under Article 55, while Article VIII(5) of the Luxembourg Protocol permits the parties to exclude the application of Article 13(2) by an agreement in writing (see paragraph 3.28(3)).

**Interim relief under the *lex fori***

2.102. Under Article 13(4) nothing in Article 13 affects the application of Article 8(3) (remedies to be exercised in a commercially reasonable manner) or limits the availability of forms of interim relief other than those set out in paragraph 1. Jurisdiction to grant such relief is governed by Articles 42 and 43 (see paragraphs 2.215 *et seq.*). The grant of such interim relief is primarily governed by the *lex fori*, which might, for example, provide for orders for interim payment or the furnishing of a bond.

**Default remedies: creditors holding fractional interests and multiple creditors***

2.103. Where fractional interests are given in security, or made the subject of a title reservation or leasing agreement, in favour of different creditors each international interest is distinct. It follows that any creditor whose debtor has defaulted is entitled to exercise the remedy of sale under the Convention as regards the fractional interest over which that creditor holds security without obtaining the consent of creditors holding different fractional interests, for these are unaffected by the sale. The Convention contains no provisions on the right of such a creditor to take possession of the object, nor does it state
whether one of two or more creditors holding a single interest together can take enforcement action on its own or all must join in. These are matters for inter-creditor agreement and the applicable law. In the financing of railway rolling stock fractional interests have not yet developed but there can be divided interests in the sense of allocation of distinct portions of railway rolling stock to different holders or holdings of a single interest by multiple parties.

Procedure

2.104. Under Article 14 any remedy provided by the Convention, including a remedy under Article 13, is to be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised. So whether, for example, relief can be given ex parte in the first instance (as where there is reason to believe that the object is about to be removed from the jurisdiction and it is considered necessary to obtain an order without in the first instance giving notice to the debtor) is a matter for local procedural law. Article 14 takes effect subject to Article 54(2), so that if a Contracting State has made a declaration under Article 54(2) stating that leave of the court is not required for the exercise of remedies which under the Convention do not require an application to the court this overrides any procedural requirement for leave that would otherwise apply. Article 14 is also implicitly subject to the Convention's own procedural rules for the exercise of remedies as set out in Articles 8(4) and 9(3).

Derogation

2.105. Article 15 provides that in their relations with each other, any two or more parties referred to in Chapter III may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of Chapter III except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14. It is therefore open to the parties to exclude or modify any of the remedies conferred on the creditor or to impose restrictions on their exercise. For example, the agreement could provide that a given remedy is not to be exercised until a specified period of notice requiring the debtor's default to be remedied has expired without the remediying of the default. Article 15 could also be used to expand the available remedies and to that extent it overlaps with Article 12, discussed earlier.
PART 2

(paragraphs 2.86-2.88), which is the primary provision dealing with additional remedies.

**Debtor's right to quiet possession and use**

2.106. The Convention contains no express provision governing the debtor's right to quiet possession and use of the object as against its creditor or third parties. As against the creditor, the debtor's right to quiet possession is governed by their agreement. As against the holder of another interest it is implicit in the priority rule in Article 29(4)(b) that a conditional buyer or lessee has a right to quiet possession and use if that interest is one from which the debtor takes free under that provision. Article XI of the Luxembourg Protocol contains express provisions to that effect. The right of quiet possession may be excluded by a subordination agreement between the debtor and the holder of the other interest under Article 29(5) and, as regards railway rolling stock, by an agreement under Article XI(1)(a). See generally the discussion in paragraphs 2.156 et seq. and 3.57 et seq.

**The Supervisory Authority**

2.107. A central role is played by the Supervisory Authority, which under Article 17 of the Convention is allocated a range of powers and duties, including the establishment of the International Registry, the appointment and dismissal of the Registrar, the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry, the setting of fees, the supervision of the Registrar and the provision of a procedure for dealing with complaints concerning the operation of Registry. However, the Supervisory Authority is not empowered to adjudicate on matters relating to a particular registration, which are for the court to determine if the registrant or intending registrant and the Registrar are unable to reach agreement. The Supervisory Authority as regards the International Registry for railway rolling stock is a body to be established by representatives of States appointed as provided by Article XII of the Luxembourg Protocol. Meanwhile the Preparatory Commission set up pursuant to Resolution No. 1 made by the Luxembourg Diplomatic Conference is acting with full authority as Provisional Supervisory Authority under that Resolution. The Supervisory Authority will be advised by a Commission of Experts established pursuant to Article XII(5)
of the Protocol. Under Article 27(1) the Supervisory Authority has international legal personality where not already possessing such personality. As to the immunities and privileges of the Supervisory Authority, see paragraph 3.38.

The registration system

2.108. The registration system lies at the heart of the Convention’s system of priorities. Registration gives public notice of an international interest or a prospective international interest and enables the creditor to preserve its priority and the effectiveness of the international interest in insolvency proceedings against the debtor. Registration is not, however, either necessary for the creation of an international interest nor proof of its existence. It is of no effect under the Convention if the purported international interest has not been validly created. Rather registration of an international interest validly created ensures the priority of the international interest against subsequently registered interests and unregistered interests, regardless whether the first to register knew of an earlier unregistered interest (see Article 29(2)(a), (3)(b)). Just as registration is no guarantee of the creation or validity of the international interest, so also the fact that a registration is current does not necessarily mean that the international interest is still in existence. So if the conditional buyer under a title reservation agreement completes its payments and acquires title the interest of the conditional seller comes to an end whether or not the registration of the international interest is discharged. There are other cases in which registration and the order of registration do not determine priority:

(1) Under the Convention and the Luxembourg Protocol the buyer of an object acquires its interest in it free from an interest registered after the buyer’s acquisition (Article 29(3)(b)).

(2) Non-consensual rights or interests covered by a declaration under Article 39 retain the priority they have under the applicable law over interests the equivalent of a registered international interest (see paragraphs 2.202-2.204, 4.269).

(3) In a Contracting State which has not made a declaration under Article 60(3) the Convention does not, in proceedings in that State, apply to a
pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of the Convention (Article 60(1)). Moreover, even where a declaration has been made under Article 60(3) applying the Convention to a pre-existing right or interest, registration in the International Registry effected pursuant to that registration is not a priority point, it is merely a prerequisite of the priority of such right or interest. See paragraphs 2.243 et seq.

The International Registry as an asset-based system

2.109. The International Registry is a system based on registration of an international interest in relation to a uniquely identifiable asset, not against the name of a debtor. This, of course, restricts its scope by excluding objects that are not uniquely identifiable and unidentified after-acquired objects, that is, objects of which the debtor does not have a current power of disposal. On the other hand, it is able to record all registered dealings in the object, whether by the debtor or by any other party.

The operation of the International Registry

2.110. The operation of the International Registry is governed partly by the Convention, partly by the relevant Protocol, partly by regulations made under the Protocol and partly by rules of procedure for effecting registrations and searches. There will be a separate International Registry for each category of equipment. The International Registry for railway rolling stock is in the course of being established by the Preparatory Commission, which is empowered by the Resolution referred to in paragraph 2.107 to establish the International Registry.

International Registry not a title registry

2.111. The International Registry for railway rolling stock does not constitute a title registration system; indeed, in relation to railway rolling stock it is not even a system for registration of outright sales or other outright transfers, merely of security interests and of interests held by conditional sellers and lessors and registration of notices of sales for information purposes without Convention effects.
Consent to registration

2.112. Most kinds of registration cannot normally be validly effected, amended, extended prior to expiry or discharged without the consent of the beneficiary of the registration as provided by Article 20(1), (3). This is true even of amendments that do not affect the rights of the party whose consent is required, such as a change of name of the other party. But there is nothing to preclude the parties from giving their consent in advance, for example, in the agreement creating or providing for the international interest, and having this recorded in the International Registry. A precondition of registration is that any necessary consent has been transmitted electronically (Article 18(1)(a)). Consent is not required for the registration of the acquisition of an international interest by legal or contractual subrogation or for the registration of a registrable non-consensual right or interest or a notice of a national interest.

2.113. Registration is against the individual object, not against the debtor; hence the requirement that the object must be uniquely identifiable and the restriction of proceeds to insurance and other loss-related proceeds (Article 1(w)).

Registry system as electronic notice filing system

2.114. The registration provisions are predicated on the assumption that the system will be electronic and available on-line, so that the checking of registration applications, registration itself and responses to searches will be effected automatically by computer and will not involve human intervention. The system is thus a notice registration (or notice filing) system in that it receives data giving notice of the relevant interest, as opposed to a document registration system, which would involve the filing of copies of agreements and entry on the register of particulars consistent with the filed documents. Accordingly information held in the International Registry is kept to a minimum and it is left to the searching party to make enquiry of the creditor for further details. This system, in avoiding document filing and keeping registered information to a minimum, reduces costs and administration and also helps registrants to preserve confidentiality as regards the details of their transactions. On the other hand, since registration is against the asset, not against the debtor, it is necessarily transaction-based, with a separate registration for each registrable transaction, in contrast to a debtor-based
registration system, which can accommodate transactions by class or even all present and future registrable transactions entered into by the debtor.

*When registration takes effect*

2.115. The purpose of registration is to give notice of the existence of the registered interest, for which purpose the Convention provides a right of search as described below. As a logical concomitant, Article 19(2),(6) states that a registration, if valid, shall be complete on entry of the required information into the International Registry data base so as to be searchable according to the criteria prescribed by the Protocol.\(^{18}\) Accordingly the relevant time at which registration takes effect for priority purposes is not the time the relevant data are received by the International Registry.

*Registrable items*

2.116. Under Article 16 of the Convention the registration system covers registrations of:

- international interests;
- prospective international interests (see paragraph 2.117);
- registrable non-consensual rights and interests (explained in paragraph 2.211);
- assignments (which by definition means contractual assignments, as opposed to assignments by operation of law);
- prospective assignments;
- subordinations;
- the acquisition of international interests by legal or contractual subrogation under the applicable law;
- notices of national interests (see Article 50(2));

\(^{18}\) See Article XV(1) of the Luxembourg Protocol, which provides that the search criteria are to be established by regulations.
other items registrable by virtue of a Protocol, for example, outright sales under the Aircraft and Space Protocols and notices of sale under the Luxembourg Protocol.\textsuperscript{19}

Article 16 is not quite exhaustive even of items registrable under the Convention. Thus pre-existing rights or interests, though not falling within the above list, are registrable as a distinct category if covered by a declaration by a Contracting State under Article 60(3). See paragraphs 2.248 \textit{et seq}. Also registrable are subordinations of non-registrable interests to which the priority rules of Article 29(1) apply, namely the interest of an outright buyer, a conditional buyer or a lessee under Article 29(3), (4) (see paragraph 4.125).

\textit{Prospective international interests}

2.117. Where a prospective international interest is registered and later becomes a completed international interest it is deemed to have been registered at the time of registration of the prospective international interest and ranks for priority accordingly (Article 19(4)), no fresh registration being required. However, this is the case only if the registration information supplied was sufficient for a registration of an international interest (Article 18(3)). Regulations for the aircraft registry ensure that this is the case by applying the same information requirements to the registration of a prospective international interest as to an international interest. If at the time the international interest comes into existence the registration of the prospective international interest has been discharged the international interest must be separately registered and such registration has no retrospective effect. A search certificate merely indicates that the creditor has acquired or intends to acquire an international interest in the object without stating whether what is registered is an international interest or a prospective international interest (Article 22(3)). This puts the searching party on notice and avoids the need for a fresh certificate when the prospective international interest has crystallised into an actual international interest. Until the time of completion of the transaction the prospective debtor has the right to have the registration discharged unless the prospective creditor has given value or committed itself to so doing (Article 25(2)) (what constitutes value is determined by the applicable law). However, the registry system will not know when a prospective interest has become a full

\textsuperscript{19} Article XVII.
interest and therefore will not be able to provide the prospective debtor with a facility to have the registration discharged. Only the creditor can do this unless under the agreement between the parties the right to register a discharge has been transferred to the prospective debtor. The registration system for railway rolling stock is also expected to accommodate the grant of international interests, whether by way of security or otherwise, in multiple holdings of railway rolling stock. In addition the system is intended to encompass amendments, extensions and discharges of registrations as provided by Article 16(3) of the Convention.

2.118. Some of the above types of registration are likely to be effected before the closing of a transaction, for example prospective international interests, prospective assignments and prospective leases. After the closing there may well be registrations by a number of different parties. For example, a leasing company purchases an item of railway rolling stock with the aid of an advance from a lender secured on the rolling stock. With the lender’s consent the buyer enters into a finance lease, and the lessee then grants an operating sub-lease with the consent of the lender and sub-lessee. Such a transaction will entail, in addition to any optional registration of notice of the sale (which has no Convention effects), registration of three international interests, namely the security interest given by the buyer, the interest held by the buyer as lessor and the interest held by the lessee as sub-lessor. This is, of course, on the assumption that for each limb of the transaction the requisite connecting factor is present. The order of registrations, which can affect priorities, may be agreed at the closing. There are also situations in which a person can hold and register two distinct interests held in two different capacities. For example, if a lessee under a leasing agreement containing an option to renew the lease grants a sub-lease it can and should register both in respect of its prospective international interest arising under the option for renewal and as the holder of the international interest arising from the grant of the sub-lease.

**Limits of the registration system**

2.119. Under Article 18(1)(a) the requirements for effecting a registration are to be specified in the Protocol and Regulations. It is the Regulations rather than the Protocol which prescribe the detailed requirements for a registration. However, while it is the task of the International Registry to provide a system
that will allow registration of anything capable of registration under the Convention, the Regulations will not specify a type of registration which the technology of the International Registry cannot for the time being accommodate. The registration of an international interest does not identify the category of international interest to which the registration relates. A person making a search ascertains the type of agreement by enquiry of the registering creditor.

Validity of registration

2.120. Registration of data is no guarantee either that the data are correct or that the registration was validly made. Article 19 plainly recognises that a registration may be invalid, in the sense that though it exists it has no effect under the Convention. Article 19(1) provides for one particular ground of invalidity, namely lack of the consent required by Article 20. Other grounds are that the factual conditions needed to support a valid registration were not satisfied or that data entered in the International Registry were seriously erroneous so as to be likely to mislead (see paragraph 2.121). So, as stated earlier, registration of an international interest does not necessarily mean that the interest exists. In all such cases the entry in the International Registry is without effect. It is true that the requirement of the debtor’s consent to a registration will normally ensure that there is an interest of some kind but it could be a pre-existing interest and thus in principle outside the Convention (see Article 60(1)) or some other form of non-Convention interest, for example one falling within Article 2 of the Convention but given by a debtor not situated in a Contracting State at the time of the agreement. The not uncommon practice of registering non-Convention interests, whether because of uncertainty as to whether the interests are registrable or for other reasons, underlines the need for those searching the International Registry to be aware of its limits in that regard. In all cases of registration of a supposed international interest which does not exist or is not a Convention interest the entry in the International Registry is without effect under the Convention. Again, registration of a discharge of an international interest is no guarantee that the interest has in fact been discharged, though in this case a third party dealing with the asset is entitled to rely on the entry of discharge, which removes any Convention priority previously enjoyed by the holder of the interest recorded as discharged. In short, the Registry records cannot speak to
external facts, and verification of these may involve enquiry of the relevant parties.

**Errors in registered data and improper registration**

2.121. There is always the prospect of errors in the data placed in the International Registry. The Registrar is responsible for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers or employees or, in general, from a malfunction of the international registration system (see paragraphs 2.144, 4.177) but not for recording erroneous data in the form in which they were received. Since the system is asset-based, an error in stating the name of the debtor is unlikely to have the same misleading effects as it would in a debtor-based registration system. An error in the stated identification criteria of the object itself could have more serious effects. Whether an error invalidates a registration would seem to depend on its gravity and the extent to which it is likely that a person acting in reliance on the erroneous data would be reasonably misled.

2.122. Errors can be corrected by amendment of the registration by either party with the consent of the other (Article 20(1)). Where a registration is improperly made or is incorrect, as where the purported agreement was not validly concluded or the purported consent was not in fact given, the party affected has various options. In the first instance its remedy is to make written demand requiring the other party to procure an amendment of the registration without delay (Article 25(4)). If this demand is not complied with the party affected can apply to any court of competent jurisdiction for an order in personam requiring the other party to procure registration of a discharge. If that order is not complied with, the party obtaining it can take whatever action is available in the jurisdiction concerned for disobedience to court orders, and make a request, either directly or through the court that made the order, to a court in the Registrar’s jurisdiction to make an order directing the Registrar to discharge the registration. What the aggrieved party cannot do is to apply directly to the court of the Registrar’s jurisdiction in proceedings involving the other party, against whom that court has no jurisdiction under the Convention, though it may be able to make an order under its general jurisdiction (see paragraph 2.218). The Registrar itself normally has no power to amend or remove a registration except under an order of the court of the State where the
Registrar has its centre of administration, though there are exceptional cases where the Registrar can act on its own initiative, for example, to correct or remove a registration resulting from a systems-generated error. See further paragraphs 2.133 et seq.

2.123. The Convention does not itself prescribe the remedy for a party suffering loss or damage as the result of the improper registration or the improper refusal of the registrant to procure its discharge. In proceedings in a Contracting State that is a matter for the applicable law as determined by that State’s conflict of laws rules. See paragraph 2.227.

**Duration of registration**

2.124. Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration (Article 21). Discharge of a registration (which typically occurs on completion of payment by the debtor) must be effected by or with the consent of the party in whose favour it was made (Article 20(3)). Where the registration itself specifies the period of its duration it ceases to be effective upon expiry of the specified period without any action having to be taken by any party. The effect of discharge or expiry of registration is that a person subsequently acquiring an interest in the object is not affected by the registered interest. So if the period of a lease is five years but the specified duration of the registration is three years, a party acquiring a security interest after the expiration of the three-year period and without the registration having previously been extended is not affected by the lease, despite the fact that it still has two years to run, because it is no longer the subject of an effective registration, so that he has priority under Article 29(1), and this is so even if he knows of the existence of the lease (Article 29(2)(a)). If, however, the period of registration is extended not only during the currency of the existing registration but before expiry of the lease the priority of the lease covers the extended period.

2.125. Article 21 is not exhaustive of the events in which a valid registration ceases to have effect. Where, for example, a registered international interest has come to an end (see paragraph 2.69) its registration automatically ceases to be effective even if there has been no expiry of a specified period of registration and no discharge has been registered.
Amendment of registration

2.126. A registration may be amended by either party with the consent in writing of the other (Article 20(1)). The requirement of consent does not, however, apply to a change of name of the creditor, which does not affect the priority of the registration, whether or not the change of name is recorded. Whether a change in the holder of an interest gives rise to an amendment depends on the circumstances. In the case of an assignment of an international interest there is no amendment of the agreement, merely a transfer of the international interest which is itself registrable under Article 16(1). The same applies to a right of subrogation and a subordination. Forms of transfer by operation of law other than subrogation, for example, transfers under statutory provisions or resulting from a statutory merger or amalgamation of the creditor and another corporation into a new entity to which the international interest passes under the applicable law, are outside the registration provisions governing assignment because the definition of “assignment” in Article 1(b) is limited to contractual assignments.

2.127. An amendment involves continuance of an existing registration in modified form. It is thus necessary to distinguish an amendment from a new registration, an extension, a registration of an assignment and a discharge. A new registration can arise in various situations which do not affect an existing registration, as where there is an addition of a new debtor, a renewal of a lease, a change in the category of transaction under Article 2(2), and the like. An extension of registration merely increases its duration but does not in itself involve any other change in the registered particulars. Hence Article 20(1) refers to a registration being “amended or extended”, thus implying that an extension is not an amendment, though it is open to regulations to treat an extension as an amendment for the purposes of the regulations, as has been done with the regulations governing the Aircraft Registry. Renewal of a lease should not be dealt with by registering an extension of the existing registration, for this would give retrospective effect to the renewal, whereas as a new interest it should take its place after interests registered prior to registration of the renewal.

2.128. Similarly it is inappropriate to deal with an assignment simply by amending the original registration so as to substitute the name of the assignee for that of the assignor as if the assignor, the original creditor, had simply
changed its name. This conceals the fact of assignment and could mislead a person searching the register into thinking that it would be dealing with the original assignor rather than with an assignee. For example, an international interest is registered in favour of A, who assigns it by way of security to B. Instead of B’s being registered as an assignee the registration in favour of A is amended by substituting B’s name for that of A as holder of the international interest. If now C, proposing to advance funds and take a security assignment of the international interest, were to search the register, C would reasonably suppose that B was the same entity as A and that C would be the first assignee, whereas in fact the first assignee is B. Substitution of B’s name for that of A is not a valid registration of an assignment. The result is that C, on registering the assignment in its favour, obtains priority over B, which is the appropriate outcome. Practical problems that might arise if each assignment in a block of assignments of international interests had to be registered individually could no doubt be avoided by some system in the International Registry that could accommodate a block registration and trigger an automatic recording of the assignee’s name in place of that of the assignor wherever it appeared in the International Registry, with a notation that this results from an assignment. The essential requirement is that those making a search are not misled into thinking that what is in fact an assignment is a mere change of name of the original creditor. Extinction of an international interest, including a fractional interest if the Registry system accommodates this, entitles the debtor to have the registration discharged, and discharge will carry with it the discharge of any amendment. Thus where a fractional interest held by a party is increased by acquisition from another holder or reduced by transfer to another holder, whether by assignment or by subrogation, this constitutes an assignment and should be registered as such. Where the increase results from a further grant by the debtor it represents a new interest which is separately registrable. Where a fractional interest is extinguished or reduced by a total or partial payment a total or partial discharge should be registered (see paragraph 2.132).

Discharge of registration

2.129. Article 25 contains provisions by which a person against whom a registration has been made can procure its discharge where that person no longer owes any obligations under the agreement or, in the case of registration of a prospective international interest or a prospective assignment of an
international interest, the intending creditor or assignee has not given value or contracted to give value. This is important to the person against whom the registration has been effected, for without its discharge that person may find it difficult to raise alternative sources of finance on the security of the object. Discharge of a registration is not the only event by which the registration ceases to have effect. This occurs automatically when a specified period for duration of the registration expires or when the registered interest comes to an end.

**Consent to discharge**

2.130. Under Article 20(3) a registration may be discharged by or with the consent in writing of the party in whose favour it was made. So discharge of a registration relating to a security agreement, title reservation agreement or leasing agreement requires the consent of the creditor, that is, the chargor, conditional seller or lessor. But where the creditor holds an international interest in a debtor's fractional holding of an object the discharge of a registration of that fractional interest does not require the consent of the holders of other fractional interests, for each fractional interest constitutes a distinct subject-matter, so that the holders of the different fractional interests are not normally in competition with each other.

2.131. Where an assignment of an international interest has been registered, the written consent of the assignee is required both to discharge the registration of the assignment and to discharge the registration of the assigned agreement, and if the assignment was by way of security, so that the assignor retained a residual interest in the assigned agreement and related international interest, the consent of the assignor is also required to discharge of the registration of the assigned agreement unless the assignor has agreed that the assignee’s consent is sufficient and this agreement is recorded in the International Registry. The phrase “party in whose favour it was made” in Article 20(3) should be read as covering not only the original creditor but its assignee, for it is to be assumed that in granting the international interest the debtor intended it to be in favour of the creditor or any assignee. This interpretation is also necessary to produce a sensible result, for if the position were otherwise the assignor could destroy the assignee’s protected status as holder of a registered interest. Similarly, the consent of the assignee under a
security assignment should not be sufficient either, for discharge in reliance on such a consent would then extinguish the assignor’s own residual interest and right to revesting of the associated rights under Article 31(5) on fulfilment of the obligations secured by the assignment. Accordingly the consent of the assignor should be required unless (a) the assignor has otherwise agreed and its agreement has been recorded in the International Registry, or (b) by reason of the assignor’s default the international interest has become vested in the assignee under Article 9 of the Convention as applied by Article 34 (see paragraph 2.191) and the assignment has been registered in the International Registry, or (c) the assignment is an absolute assignment and the assignor has ceased to exist, as commonly occurs when a special-purpose vehicle established as part of a securitisation process is wound up. Again, neither the registration nor the discharge of registration of an assignment of a fractional interest held by one creditor requires the consent of creditors who are holders of the other fractional interests. All of the above is subject to the regulations and procedures of the relevant International Registry.

Partial discharge

2.132. The Convention does not make express provision for registration of a partial discharge, but there seems nothing to preclude this. A possible example is where a person holding a 50% interest in a locomotive gives security over that interest to a lender and later makes a part payment to the lender and negotiates a reduction in the lender’s security interest. This should be registered as a partial discharge. But part payment of a secured debt does not of itself affect the quantum of an interest, merely the amount secured. Any reduction in the quantum of the interest has to be negotiated.

Failure or refusal to procure discharge

2.133. What is the position where a party who is under a duty to procure discharge of a registration fails or refuses to do so? The Registrar’s function is essentially administrative; it cannot take a position as between contesting parties or engage in fine judgments as to whether an application for registration which appears on its face to be in order is defective. Moreover, the system for registering a discharge, as for registering an international interest, is purely electronic and involves no human intervention at the Registry end. So the
Registrar has no role to play in relation to a discharge dispute and can act only on an order of the court, that is, a court of the place in which the Registrar has its centre of administration (Article 44(1)). Alternatively the party seeking the discharge can apply for an *in personam* order requiring the other party to consent to the discharge, as described below. The question then is which courts have jurisdiction to grant such relief.

2.134. On jurisdictional issues relating to orders against the Registrar, the Convention strikes a delicate balance. Except in cases of insolvency exclusive jurisdiction is conferred on the courts of the place where the Registrar has its centre of administration – in the case of the International Registry for aircraft, Ireland, and prospectively in the case of the International Registry for railway rolling stock, Luxembourg. No other court can make an order against the Registrar. As a corollary, the courts where the Registrar is situated have no jurisdiction under the Convention over parties other than the Registrar, for example, parties to the agreement or alleged agreement pursuant to which a registration has been made. The Convention implicitly recognises that the courts of the Registrar’s jurisdiction are not likely to be well placed to determine factual disputes as to the status of a registration between parties both of whom may be situated in other countries. Accordingly the jurisdiction expressly conferred on the Registrar’s courts by Article 44(2) to make orders directing the Registrar to discharge a registration is confined to two cases. The first is where the person failing to respond to a demand under Article 25 for discharge of the registration has ceased to exist or cannot be found (Article 44(2)). The second is where a court having jurisdiction under the Convention has made an order requiring a person to procure the amendment or discharge of a registration and that person has failed to comply with the order (Article 44(3)). It follows that where an order sought to be made against the Registrar is based on the determination of a dispute between such parties, as where one of them alleges that a registration was improperly made, it is for the courts having jurisdiction over such dispute to adjudicate the dispute and make any appropriate order requiring a party to procure discharge of a registration, which order can then be enforced by the appropriate court in the Registrar’s jurisdiction, which will not itself take jurisdiction over the dispute between the parties except where the case falls within its ordinary jurisdiction rules, e.g. because the defendant is based in the jurisdiction. For a more detailed examination of the jurisdiction rules see paragraphs 2.214 *et seq.*
2.135. Since none of the jurisdiction rules applies in insolvency proceedings (Article 45) it would in theory seem open to a court dealing with insolvency proceedings in a place other than that in which the Registrar has its centre of administration to make an order against the Registrar requiring an entry of discharge where the court has jurisdiction to do so under its own jurisdiction rules. However, it is thought that in practice the insolvency court is very unlikely to have such jurisdiction or, if it has it, to exercise it, given that the Registrar is in a foreign country and outside the control of the insolvency court. Moreover, even where a court would otherwise have jurisdiction under its own rules it is likely to want to defer to the courts having jurisdiction where the Registrar has its centre of administration and thus confine itself to an order in personam which the party obtaining the order or the court itself can ask a court having jurisdiction in the Registrar’s country to enforce by a direction to the Registrar.

**Existing entries in the International Registry not expunged on discharge**

2.136. No registration in the International Registry for aircraft (the only one currently operative) is ever expunged. When an assignment, amendment, discharge or other event affecting a registration is registered it is allocated its own file number in the International Registry, in addition to which the file number of the international or other interest affected is recorded. In this way the whole registration history affecting a particular object can be viewed by a person making a search.

**Access to the International Registry**

2.137. The effect of Article 26 is that no person is to be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the requirements of the Convention, the Protocol, the Regulations and the Procedures. The principle of open access can be applied fully to searches but must, of course, be qualified in order to ensure that registrations are made on behalf of organisations entitled to make them by a person duly authorised by the organisation concerned. In principle registrations and searches may be made from any State, whether or not it is a Contracting State and whether the creditor is or is not situated in the State in question. There are, however, two qualifications. First, it is open to a non-
Contracting State, in theory at least, to restrict access to the International Registry by its own nationals and by others within its jurisdiction, for example as part of a prohibition against dealings with nationals of a hostile foreign State. Secondly, under Article 18(5) of the Convention the relevant Protocol may empower a Contracting State to designate an entity or entities as the national entry point or entry points through which the information required for registration shall or may be transmitted to the International Registry. A Contracting State making such a declaration may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry.

2.138. All three Protocols deal with designated entities as entry points.\textsuperscript{20} Article 18(5) applies only to registrations, not to searches, which are made direct by the parties themselves or their agents.

2.139. Where registration is through a designated entry point, it remains the case that the only relevant registration for the purposes of the Convention is that made in the International Registry. The filing of particulars locally for transmission to the International Registry does not of itself have any effect under the Convention.

Searches and search certificates

2.140. The International Registry for railway rolling stock has not yet been established but the draft regulations draw on the experience of the International Registry for aircraft, though they would provide only two kinds of search facility rather than three. The first kind of search is that prescribed by the Convention in relation to registrations under Article 16 (see paragraph 2.116) and is referred to in the Aircraft Registry regulations as a priority search.\textsuperscript{21} Where a prospective international interest has been registered the search certificate must be neutral as to whether it relates to a completed international interest or merely a prospective international interest, indicating only that the creditor named in the certificate “has acquired or intends to

\textsuperscript{20} Aircraft Protocol, Article XIX; Luxembourg Protocol, Article XIII; Space Protocol, Article XXXI.
\textsuperscript{21} Regulations and Procedures (6th edn), Sections, 7.2, 7.4.
acquire" an international interest in the object (Article 22(3)). This avoids the need for a fresh registration when a prospective international interest becomes an international interest. The second kind of search is a search for declarations, designations and declared non-consensual rights or interests, together with effective dates of ratification or accession, and copies of instruments deposited by Contracting States, which the Registry is required to maintain under Article 23, based on details and copies of documents provided by UNIDROIT as Depositary under Article 62(2)(c) of the Convention. This is referred to as a Contracting State search.22 The results of both kinds of search are issued in the form of an official search certificate. The third type of search provided by the Regulations for the Aircraft Registry is an “informational search”, a facility not covered by the Convention and designed simply as a service to the user without any priority or other Convention effects.23 This is a search against data which are not sufficient to identify a particular aircraft object but may enable the International Registry to provide a list of matching objects. The draft Regulations for the Rail Registry contain no equivalent provision.

2.141. 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 registration (Article 24). Accordingly a creditor seeking to establish its priority position need do no more in the first instance than produce the certificate of registration.

Non-Convention registrations

2.142. A registration is valid (in the sense of having effect under the Convention) only if the recorded transaction (creation of an international interest, assignment, discharge, etc.) has actually occurred and consent has in fact been given (and not merely recorded as given) as required by Article 20 of the Convention (see Article 19(1)). The Registry system is equipped to check compliance with the necessary procedures by those authorised to access the system but not to verify external facts, such as whether the interest to be registered has in fact been created or falls within Article 2 or whether the

22 Regulations, Sections 7.1, 7.5.
23 Regulations, Section 7(3).
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debtor was situated in a Contracting State at the time of the agreement. In relation to aircraft objects this has led to a practice of registering interests which are not within the Convention. In some cases this is because there is doubt as to whether an interest is registrable and it is desired to err on the side of caution or because there is insufficient time to ascertain the facts before registration is effected. In other cases, however, the parties have availed themselves of the registration machinery to register interests which are known not to be within the Convention, e.g. because they are pre-existing interests or are interests which have been granted when the relevant connection to a Contracting State does not exist at the time of the agreement. One of the reasons why this is done is to give public notice of the interests in question in order to preserve priority under the applicable law. Another is the creditor’s desire to give notice of an entire transaction only part of which is covered by the Convention. It remains to be seen whether similar facilities for registration of non-Convention interests will be available and utilised in relation to railway rolling stock.

Immunity of Supervisory Authority for errors, omissions and system malfunction

2.143. Article 27(1) confers international legal personality on the Supervisory Authority where it does not already possess this. This means that the Supervisory Authority is a subject of international law with a legal personality distinct from its members and derived from international rather than national law and that it has power to enter into agreements with States and do other things requisite for the performance of its functions under the Convention. Under Article 27(2) of the Convention the Supervisory Authority and its officers and employees enjoy such immunity from process as is specified in the Protocol (see paragraphs 3.38-3.39 as to this and as to the position of OTIF, the Supervisory Authority’s Secretariat).

24 It may be noted that Article 18(2) specifically exempts the Registrar from any duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.
Liability of Registrar

2.144. By contrast with the Supervisory Authority, the Registrar is strictly liable for compensatory damages for loss suffered from errors, omissions or system malfunction, subject to certain very limited defences. Such a liability, which does not extend to punitive or exemplary damages or any other form of damages going beyond compensation, was considered necessary in order to engender confidence in the registration system. However, there are three qualifications:

(1) The Registrar is not liable for malfunction caused by an event of an inevitable and irresistible nature which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those relating to back-up and systems security and networking (Article 28(1)). The scope for invoking this exemption from liability is likely to be very limited. See paragraph 4.177.

(2) The Registrar is also not liable for factual inaccuracy of registration information it receives or which it transmits in the form in which the information was received, nor for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry (Article 28(2)). Examples given at the Diplomatic Conference were: a person obtaining another person’s electronic certificate and using it improperly or the corruption of information on its way to the Registrar. An example of factual inaccuracy is where a person entering identifying information for an object (whether by use of the electronically provided information or by free texting) makes an error which results in the registration being associated with the wrong object. This qualification of liability is given because in general the Registrar has no control over the pre-registration activity of others and such activity is not considered part of the Registry operations. In short, the Registrar does not assume telecommunications risks. Nevertheless, the Registry is responsible for taking measures conforming to best practice to prevent unauthorised access, and the system that has been set up and developed is designed to that end.
Where the Registrar does incur a liability, compensation may be reduced to the extent that the person suffering the damage caused or contributed to it (Article 28(3)).

Article XV(5) of the Luxembourg Protocol imposes a cap on the Registrar’s liability in the absence of gross negligence or intentional misconduct. See paragraph 3.40.

By Article 28(4) the Registrar is required to procure insurance or a financial guarantee covering the liability under Article 28 to the extent determined by the Supervisory Authority, in accordance with the Protocol (see paragraph 3.40).

**Immunity from seizure of assets of International Registry**

Under Article 27(4) the assets, documents, data bases and archives of the International Registry are inviolable and immune from seizure or other legal or administrative process. However, this immunity may be waived by the Supervisory Authority (Article 27(6)), which is logical, given that all proprietary rights in the data bases and archives of the International Registry are owned by the Supervisory Authority (Article 17(4)). It would seem that other assets and documents held by the International Registry belong to the Registrar while it is in office, but on a change of Registrar those rights required for the continued effective operation of the Registry will vest in or be assignable to the new Registrar (Article 17(2)(c)). Such other assets would likewise enjoy immunity from seizure. Serious consequences for existing or intending Registry users might ensue if the position were otherwise. However, for the purposes of a claim against the Registrar under Article 28(1) or Article 44 the claimant is entitled to access to such information and documents as are necessary to enable it to pursue its claim (Article 27(5)). Without such a provision the claimant could find itself deprived of the means of establishing its claim or challenging a registration as incorrect.

**Priorities: the general rules**

As a preliminary point, priority rules almost invariably contain exceptions to the principle *nemo dat quod non habet* (*nemo plus juris ad alium*...
transferre potest quam ipse habet). So where a debtor grants an international interest to A and then grants an international interest over the same object to B, it does not follow that B acquires only what the debtor still holds, that is, an object encumbered by the international interest to A. The question is one of priority, not of validity.

2.147. The priority rules are set out in Article 29 and are few in number and for the most part simple. The only method of perfection of an international interest recognised by the Convention is registration in the International Registry. Subject to a number of exceptions discussed below, a registered interest has priority over a subsequently registered interest and over an unregistered interest. “Registered” means registered in the International Registry pursuant to Chapter V of the Convention (Article 1(bb)) and “registered interest” means a registered international interest, a non-consensual right or interest registrable and registered under Article 40 or a registered national interest specified in a notice of a national interest (Article 1(cc), (dd)). An unregistered interest is a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies and which is therefore not registrable) which has not been registered, whether or not it is registrable under the Convention (Article 1(mm)). For this purpose an interest is unregistered if it was never registered or if its registration has expired or has otherwise been discharged. The basic priority rule set out in Article 29(1) does not apply to fractional interests in an item of railway rolling stock, since each fractional interest constitutes a distinct subject-matter, so that the holders of the fractional interests concerned are not normally in competition with each other. However, there are exceptions, as where the debtor granting the fractional interests disposes of more than 100% of the item of railway rolling stock. In such a case priority is determined by the order of registration.

2.148. So far as the courts of a Contracting State are concerned a registered interest has priority over an unregistered interest even if the latter was not capable of registration for Convention purposes, for example because it was not of a registrable category or because at the time it was granted the debtor was not situated in a Contracting State (see paragraphs 2.23(5), 2.24 et seq.). Of course the courts of a non-Contracting State are not obliged to apply the Convention except so far as their own rules of private international law lead to its application. Moreover, since registration in the International Registry is the only mode of perfection recognised by the Convention, a creditor whose
interest is unregistered and whose debtor retains a power to dispose will be subordinate to a later creditor whose interest has been registered even if at the time of registration the earlier creditor had taken possession of the object, whether by way of pledge or by way of enforcement of its security.

2.149. Registration is therefore extremely important, since failure to register risks subordination of the international interest to a later interest which is registered first and to the debtor’s unsecured creditors in its insolvency. This applies not only to security interests but also to conditional sale and leasing agreements, where the need to register may seem less obvious. Nevertheless the fact that the registration system provides for the registration of the international interest held by a conditional seller or a lessor carries with it the necessary implication that the conditional buyer or lessee, though not having a right to dispose of the object, has a power to do so (see paragraph 2.60) and will therefore be able to confer priority on a third party who buys the asset prior to registration of the international interest (Article 29(3)) or who takes the asset under a conditional sub-sale agreement or a sub-leasing agreement (Article 29(4)). Moreover, a conditional seller or lessor who fails to register and later charges the object to a lender who registers the charge deprives the conditional buyer or lessee of the protection it would otherwise have had against the chargee under Article 29(4) of the Convention (see paragraph 2.156) and the concomitant right of quiet possession conferred by the Protocol. See further paragraphs 3.57 et seq. Finally, a conditional seller or lessor who fails to register runs the risk that its international interest will not be recognised under the applicable law in the event of the bankruptcy of the conditional buyer or lessee (see Article 30).

2.150. For the application of the priority rules to assignments, see paragraphs 2.192 et seq. The same rules apply to non-consensual rights or interests registered under Article 40 of the Convention as apply to registered consensual interests. Article 29 does not deal with priority as between two or more unregistered interests. That is a matter for the applicable law.

2.151. A transferred interest (see paragraph 2.31) retains its original priority, that is to say, the priority of the transferee is that of its transferor. So if a charge given by Debtor and registered in favour of A is followed by a second charge registered in favour of B and A sub-charges its interest to C, C has priority over B, whether or not the sub-charge is registered. Similarly, if two
international interests are registered over the same object, the first in favour of A and the second in favour of B, and A assigns its interest to C and B assigns its interest to D, C has priority over D, whether or not the assignment to C was registered (see Article 31(1)(b)). Nevertheless, C should register the sub-charge in the first case and the assignment in the second, not to protect itself against the grantee of another international interest from Debtor but to secure protection against a second sub-charge or a second assignment of the same interest. So if C fails to register and A makes a second sub-charge or assignment to E, E obtains priority over C. Similar considerations apply to transfers by way of legal or contractual subrogation.

2.152. The priority of the first to register applies even if the holder of the registered interest took with actual knowledge of the unregistered interest, a rule necessary to avoid factual disputes as to whether a holder did or did not have knowledge and also to obviate the inconvenience and expense of inquiries to determine whether a prior unregistered interest exists. In contrast to the position in many legal systems a purchase-money security interest – that is, an interest taken over the object to secure repayment of the sum advanced for its purchase – does not enjoy any special priority. This is because the purpose of the super-priority enjoyed by a purchase-money security interest is to protect the financier who is funding the acquisition of the asset from being subordinated to a prior security interest covering future property, but as the Convention does not cover future property not uniquely identified no special protection for the purchase-money financier is necessary. However, Article 36 of the Convention limits the priority of assignments of associated rights related to the same international interest to interests akin to purchase-money security interests.

Exceptions to the general priority rules

2.153. Leaving aside fractional interests, which in general are outside the scope of Article 29 altogether (see paragraph 2.147), there are seven exceptions to the general priority rules. These relate to outright buyers, conditional buyers and lessees, variation of priorities by agreement, the subordination of a debtor’s interest to that of its own creditor, the priority of a non-consensual right or interest under Article 39, the treatment of a prospective international interest and the priority of pre-existing rights or interests covered by a
declaration under Article 60(3). These are examined in the following paragraphs. As previously pointed out, Article 29 does not normally apply at all as between holders of fractional international interests, because there is no competition among them and they rank pari passu.

Proceeds

2.154. By Article 29(6) any priority extends to proceeds. This complements Article 2(5) under which an international interest in an object extends to proceeds of that object. So long as proceeds as defined by Article 1(w) are identifiable in the hands of the debtor the creditor has the same priority in relation to them as it had in relation to the object itself prior to its loss. So if successive international interests in railway rolling stock which is insured against loss or damage are registered, first, in favour of A and, secondly, in favour of B, A has the first claim on any insurance proceeds and B’s interest in insurance proceeds is limited to any surplus remaining after A’s claim has been paid out. However, in its application to proceeds Article 29(6) is limited to competing claims to proceeds both of which are derived from the object whose loss or compulsory acquisition gave rise to them. So Article 29(6) does not determine priority between the holder of an international interest claiming the proceeds of an insurance claim and a receivables financier who did not have an international interest in the object and claims the proceeds as original collateral or as proceeds of debts purchased by or charged to the financier. 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.

Outright buyer

2.155. Since the interest of an outright buyer is not registrable, Article 29(3) provides that the buyer takes free from an international interest not registered prior to the buyer’s acquisition of its interest. The case of purchase by an outright buyer is considered so common and important as to justify a special rule giving the buyer’s interest priority over an interest not registered until after

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25 However, the Aircraft Protocol and Space Protocol extend the registration and priority provisions of the Convention to outright sales of aircraft objects, so that the special rule in Article 29(3) of the Convention is disappplied as regards aircraft objects and space assets.
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the time of the buyer’s acquisition of the object. It is, however, an implicit condition for the application of Article 29(3) that the buyer is purchasing from a person having a power to dispose of the object. Where the buyer acquires priority under this rule the effect is to extinguish any unregistered security interest in the object and any title of the conditional seller or lessor whose interest was unregistered, since its displaced interest is not as conditional seller or as lessor (see paragraph 4.50) but simply whatever interest it had at the time of entering into the conditional sale or leasing agreement.

Conditional buyer or lessee

2.156. Article 29(4) deals with priority as between a conditional buyer under a title reservation agreement or a lessee under a leasing agreement (to both of whom the label “debtor” can be applied) and the holder of a registered interest, by which, of course, is meant a holder (“creditor”) other than the conditional buyer’s or lessee’s own conditional seller or lessor. One of the cases envisaged is a conflict between the debtor and a person to whom the creditor has charged the goods under a security agreement. The basic principle reflected in Article 29(4) is that parties shall not be affected by anything which is not on the register. It would be unfair to the creditor’s chargee to subordinate the charge to the interests of the debtor when the chargee could not discover this by a search in the International Registry because the interest of the debtor is not itself registrable. However, registration of the interest held by the creditor will give notice of the existence of the title reservation agreement or lease and thus of the interest of the debtor thereunder. Accordingly the effect of the rule laid down in Article 29(4) is that, subject to any subordination agreement between the debtor and the chargee, the priority of the former vis-à-vis the chargee is determined according to whether the international interest held by its creditor was registered before the chargee registered its interest. If it was, then the chargee takes its interest subject to the debtor’s rights. If, on the other hand, the chargee registers its interest before the creditor has registered its own interest the chargee has priority over the debtor, whose existence the chargee will not have been able to discover from a registry search. Article 29(4) applies only to a conditional buyer or lessee. So where under the applicable law the title reservation agreement or leasing agreement is characterised as a security agreement it does not constitute a conditional sale or leasing agreement for the purposes of the Convention (see Article 2(2),(4)) and the conditional buyer or lessee has to be treated as a
chargor and thus falls outside the protection given by Article 29(4). Where Article 29(4) does apply its implicit effect is to give the debtor a right of quiet possession as against the chargee as well as the creditor, a point made explicit in Article XI of the Luxembourg Protocol (see paragraphs 2.158, 3.57-3.58). Since the discharge of registration of a creditor’s international interest extinguishes its priority under Article 29 even if the interest itself remains in existence, such discharge also extinguishes the derivative protection of the debtor against the chargee under Article 29(4). This may seem hard on the debtor but is necessary in order to protect the fundamental principle of the International Registry system that third parties should be affected by a registrable interest, and thus of any derivative protection conferred by Article 29(4), only so long as the interest remains registered.

2.157. Article 29(4) also protects a sub-lessee where its sub-lessee’s international interest was registered before that of the head lessor. This follows from the fact that the sub-lessee is considered to have a power of disposal (see paragraph 2.60(4)) and this enables it to constitute an international interest in favour of the sub-lessee, who thus becomes entitled to quiet possession against the head lessor even in cases where its sub-lessee has no such entitlement. This is most likely to occur where, after granting a lease, the lessor sells the object and leases it back from the buyer. Such a lease will take effect subject to the existing lease, which then becomes a sub-lease, the buyer being the head lessor and the seller the sub-lessee. But where, as will usually be the case, it is the lessor’s international interest that is registered first, the Convention does not deal with the position of a sub-lessee where the head lessor, having consented to the grant of the sub-lease, later terminates the head lease by reason of the head lessee’s default or pursuant to some other power in the head lease. The effect of such termination on the rights of the sub-lessee is left to be dealt with by the applicable law. The same is true where a conditional seller terminates the conditional sale agreement for default after the conditional buyer has granted a lease.

2.158. Article XI of the Luxembourg Protocol extends the concept of conditional buyer and lessee rights, linked to the time of registration, to confer a right of quiet possession on the conditional buyer or lessee against a chargee over whom the conditional buyer or lessee has priority in the circumstances described above. Article XI thus makes explicit a right implicitly given by the priority rule in Article 29(4)(b) of the Convention.
2.159. Article 29(5), which permits the variation of competing priorities, and the registration thereof binding third parties, applies to the foregoing rules. So if a chargee who would otherwise have had priority over a conditional buyer or lessee agrees to hold its interest subject to the right of quiet possession of the conditional buyer or lessee, this constitutes a variation of priorities within Article 29(5) so as to subordinate the charge and entitles the conditional buyer or lessee to register the subordination, which should be done in order to bind an assignee of the subordinated chargee’s interest. The chargee’s consent to entry of the chargor into the conditional sale or leasing agreement itself does not by itself constitute an implied subordination to the right of quiet possession of the conditional buyer or lessee in the absence of any express or implied agreement for subordination between the chargee and the conditional buyer or lessee.

2.160. The discussion in the preceding paragraphs rests on the assumption that the Convention applies both to the charge and to the lease. However, this is not necessarily the case. For example, where the chargor of railway rolling stock is situated in a Contracting State but the lessee is not, then so far as concerns the courts of a Contracting State the charge is an international interest that is governed by the Convention, which, however, is inapplicable to the lease except as a pre-existing right or interest to which the Convention is potentially extended by a declaration by a Contracting State under Article 60(3). Subject to this only the security agreement given by the chargor is registrable in the International Registry. Conversely, if the lessee is situated in a Contracting State but the chargee is not, the lease constitutes an international interest while the charge is a pre-existing right or interest. In both cases the priority of the international interest, which is registrable under the Convention, over the pre-existing right or interest is governed by Article 60. Subject to any declaration by the relevant Contracting State under Article 60(3) the pre-existing right or interest will retain its priority under the applicable law over any subsequently registered international interest. Again, the courts of a non-Contracting State are not obliged to apply the Convention except where their own rules of private international law lead to its application. For an analysis of Article 60 see paragraphs 2.243 et seq.
Variation of priorities by agreement

2.161. As stated above, the priority rules laid down in Article 29 may be varied by agreement between the parties. Thus the holder of a registered interest may agree to be subordinated to the holder of a subsequently registered interest or of a prior or subsequent unregistered interest and a chargee or other party to whose interest a debtor from the chargor would otherwise be subject under Article 29(4) may agree to subordinate its interest to that of the debtor. A debtor who by agreement with a chargee contracts out of its right of quiet enjoyment vis-à-vis the chargee thereby gives a subordination within Article 29(5). Just as it is open to competing creditors to vary the priority one would otherwise enjoy over the other, so also in the negotiations leading to the closing of a transaction they may reach agreement on the order in which their respective interests are to be registered in the International Registry. Nothing precludes the subordination of an international interest to a non-Convention interest and the registration of that subordination.

2.162. A party in whose favour a subordination has been made should register the subordination in the International Registry, otherwise it will not bind an assignee of the subordinated interest (Article 29(5)). A subordination of an interest may be registered even if the subordinated interest itself has not been registered, though usually the failure to register will itself result in subordination, rendering a subordination agreement unnecessary. But a subordination agreement is required where the interest to be subordinated is one which would otherwise have priority without itself being registered and in this case the subordination agreement should be registered. For example, where a lessor who has entered into a leasing agreement and registered its international interest subsequently grants a charge under a security agreement which is then registered, the lessee would, in the absence of a subordination agreement, have priority over the chargee by virtue of the fact that its creditor had registered its interest before the registration of the security agreement (Article 29(4)(b)). But if the lessee agrees to subordinate its interest to that of the chargee, the chargee could then register the subordination. A subordination agreement between two creditors affects only the creditors themselves and, if the subordination agreement is registered, an assignee of the subordinated creditor. It does not affect the debtor, whose consent is not required and who must fulfil its obligations to both creditors.
Debtor’s interest subordinated to that of its creditor

2.163. A principle that is self-evident, though not expressly stated in Article 29, is that a debtor who itself holds an international interest cannot use its registration of that interest to assert priority over its own creditor in a manner inconsistent with the rights it has granted to the creditor. In short, it cannot deny its own creditor’s title. Thus where a supplier of railway rolling stock under a title reservation agreement registers its international interest and then charges the agreement and the railway rolling stock to another person to secure a loan, the supplier’s rights are subject to its creditor’s security interest, whether or not this is itself registered as an international interest. This is because the supplier as chargor cannot take a step which is incompatible with the security interest it has given to its chargee. Similarly, a lessee who grants a sub-lease and registers its international interest cannot thereby obtain priority over its own lessor who has failed to register or has registered later, for this would be inconsistent with the lessee’s obligations under the lease and a denial of its lessor’s title, nor can its claim priority over the lessor’s assignee, who succeeds to the position of the lessor.

Non-consensual rights or interests

2.164. Where a Contracting State has made a declaration under Article 39 as to non-consensual rights or interests which enjoy priority under its law over the equivalent of an international interest and are to enjoy priority even over registered international interests, any registered international interest will be subordinate to a non-consensual right or interest covered by the declaration. This is so even if the debtor is the subject of insolvency proceedings (Article 39(1)(a)). See paragraphs 2.202 et seq.

International interest following registration of prospective international interest

2.165. The priority of an international interest which comes into existence after the registration of a prospective international interest departs from the normal rule only in the sense that the international interest itself is never actually registered, it is merely treated as registered as from the time of registration of the prospective international interest (Article 19(4)). However, if at the time the international interest comes into existence the registration of the prospective international interest has lapsed or been discharged the
international interest must be separately registered and such registration has no retrospective effect. A search certificate must state merely that the creditor has acquired or intends to acquire an international interest in the object without stating whether what is registered is an international interest or a prospective international interest (Article 22(3)). This puts the searching party on notice and avoids the need for a fresh search and certificate when the prospective international interest has crystallised into an actual international interest. Until the time of completion of the transaction the prospective debtor has the right to have the registration discharged unless the prospective creditor has given value or committed itself to so doing (Article 25(2)). What constitutes value is determined by the applicable law.

**Pre-existing rights or interests**

2.166. Unless otherwise declared by a Contracting State under Article 60(3) the Convention does not apply to a pre-existing right or interest, as defined by Article 1(v), which retains the priority it enjoyed under the applicable law before the effective date of the Convention. This means that despite Article 29(1) a registered international interest is junior to an earlier pre-existing right or interest which is given priority under the applicable law. On the other hand it would be inconsistent with the policy of the Convention to subordinate the registered international interest to a subsequently created pre-existing right or interest (see paragraph 2.243). Article 60(3) provides for extension of the Convention and Protocol to pre-existing rights or interests for priority purposes, but in this case registration within the period prescribed by the declaration is not a priority point, only a perfection requirement for the preservation of priority of the pre-existing right or interest under the applicable law (see further paragraph 2.258). For a detailed analysis of Article 60 see paragraphs 2.243 et seq. No Contracting State has so far made a declaration under Article 60(3).

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26 “Pre-existing right or interest” refers, of course, to the definition in Article 1(v) which does not itself imply that the right or interest existed before the creation or registration of the international interest. Nevertheless Article 60(1) should be interpreted as confined to pre-existing rights or interests created prior to registration of the international interest. See below, paragraph 2.243.
Creditor in possession

2.167. As stated earlier, the only method of perfection of an international interest provided by the Convention is registration in the International Registry. The effect is that a registered security interest, for example, has priority over a prior unregistered security interest even where the first creditor has taken possession or control, e.g. under a pledge agreement or in exercise of a default remedy.

Exclusion of doctrine of accession: items other than objects

2.168. Article 29(7) concerns dealings with an item other than an object, that is, any article which is not an airframe, aircraft engine or helicopter, an item of railway rolling stock or a space asset. In relation to railway rolling stock the term covers such items as engines, equipment, components, equipment and parts where those items have not been installed on or incorporated in a railway vehicle or after installation or incorporation have been removed from a railway vehicle. It will be observed that, in contrast to aircraft engines, railway engines27 are not governed by the Convention and Protocol as separate objects. While installed on or incorporated in an item of railway rolling stock they form part of that rolling stock. While not so installed or incorporated they are outside the scope of the Convention altogether. Article 29(7) is designed to ensure that rights in an item (other than an object) are not lost by installation of the item on an object if under the applicable law those rights continue to exist after the installation, and that new rights may be created in a previously installed item which is removed where under the applicable law those rights are created. For example, railway engines, computer units and other items may become damaged or defective and may need to be replaced by other engines or spare parts which may themselves have a significant economic value. The effect of Article 29(7)(a) is that where the applicable law so provides the replacement units, which may have been financed separately and given in security to the lender, remain subject to that security interest, and do not pass by accession to the owner of the railway rolling stock on installation, where under the applicable law the security interest continues to exist after installation. Again, if an item already installed on and forming part of the

27 As opposed to locomotives. See paragraph 3.8, n. 3.
railway rolling stock (i.e. not covered by Article 29(7)(a)) is then removed and dealt with separately from the rolling stock and the dealing is effective under the applicable law to create rights in the item separate from those in the rolling stock, then under Article 29(7)(b) the Convention does not prevent the creation of those rights. Article 29(7) is not strictly a priority rule in itself but it can have priority effects in precluding the holder of a registered international interest from asserting the doctrine of accession to extinguish another creditor’s rights in the installed item or to preclude that other creditor from granting new rights after the installed item has been removed. However, the effect of Article 29(7) is likely to be limited. Many legal systems possess the doctrine of accession by which an object that becomes affixed as an accession to a more substantial object so as to be incapable of removal without significant damage to either object loses its identity and passes into the ownership of the owner of the principal object. Such a doctrine is needed to avoid situations in which the assertion of title to the accession could seriously undermine the rights of the owner of the principal object.

**Effect of the debtor’s insolvency**

2.169. The general rule is that in insolvency proceedings against the debtor (see Article 1(l) and paragraph 4.18 for the definition of “insolvency proceedings”) an international interest is effective if registered prior to the commencement of the proceedings (Article 30(1)). This, of course, presupposes that the insolvency proceedings have been opened in a Contracting State, which need not, however, be the same Contracting State as that under the law of which the international interest was created. Proceedings “against the debtor” would seem to include proceedings initiated by the debtor itself, e.g. for its own winding-up or administration, since these are in effect proceedings by the debtor against itself. The protection given by Article 30(1) extends to non-consensual rights or interests registered under Article 40 (see paragraph 2.211). “Effective” means that the property interest will be recognised and the holder of the international interest will have a claim against the asset for obligations owed, and will not be limited to a *pari passu* sharing with unsecured creditors. However this provision does not impair the effectiveness of an international interest which is effective under the applicable law (Article 30(2)). In other words, the rule in Article 30(1) is a rule of validity, not of invalidity.
2.170. The applicable law under conflict of laws rules is generally taken to be the law of the situation of the object (\textit{lex situs, lex rei sitae}) at the time of commencement of the insolvency proceedings. If under the applicable law the international interest is effective in the insolvency even if it has not been registered prior to the commencement of the insolvency proceedings, or, indeed, at all, then its efficacy in those proceedings is not affected by Article 30.

2.171. Given that an international interest is the creature of the Convention, not of national law, which will usually have nothing to say about international interests as such, Article 30(2) is to be treated as referring to the category of interest under domestic law corresponding to the category of international interest constituted under the Convention. The concept of equivalence already features in Article 39(1)(a) of the Convention.

2.172. The fact that an unregistered interest valid under the \textit{lex situs} is entitled to recognition in the insolvency proceedings as having been duly perfected does not mean that it is immune from avoidance under rules of the insolvency law. The position is simply that the insolvency court has to accept as a starting point that an interest perfected under the applicable law was duly perfected. It remains liable to avoidance on any ground applicable under the insolvency law, not merely as a preference or a transaction in fraud of creditors as specified in Article 30(3)(a). In this respect an unregistered international interest perfected under the applicable law is more vulnerable under insolvency law than a registered international interest (see paragraph 2.174).

2.173. A non-consensual right or interest covered by a declaration under Article 39 has priority over a registered international interest “whether in or outside insolvency proceedings (Article 39(1)(a)) and \textit{a fortiori} has priority over an unregistered interest (see paragraph 2.206). Accordingly the insolvency of the debtor does not affect the priority of the non-consensual right or interest where the insolvency proceedings are opened in a Contracting State.

2.174. Under Article 30(3)(a) the general rule in Article 30(1) does not protect a registered international interest from rules of insolvency law relating to the avoidance of preferences and transfers in fraud of creditors. Article 30(3) does not say what constitutes a preference or a transfer in fraud of creditors. That is left to the applicable insolvency law, which also determines what defences are
available to a claim by the insolvency administrator resulting from a transaction void or voidable as a preference or a transfer in fraud of creditors (for example, that the person against whom the claim is made acquired its interest in good faith and for value from the original transferee). Other rules of insolvency law of a Contracting State, such as the invalidation of security interests not duly registered under the law of the insolvency jurisdiction, or the rule that a payment (other than a preference or transaction in fraud of creditors) is void if made for past value during a prescribed period (période suspecte) before the commencement of the insolvency proceedings, cannot be invoked against an international interest registered before the commencement of the insolvency proceedings. On the other hand it is left to the applicable insolvency law to determine when those proceedings are deemed to have commenced (Article 1(d)). This leaves open the possibility that a registered international interest may be invalidated where under the applicable insolvency law the commencement of insolvency proceedings is made retrospective, e.g. to the time of presentation of a petition to the court for a winding-up order or, under the so-called “zero hour” rule, to the first moment (“zero hour”) of the day on which the insolvency proceedings commenced, and that time precedes the registration of the international interest. Moreover, the courts of a non-Contracting State are free to apply any grounds of avoidance provided by that State’s insolvency law. This is true also of the courts of a Contracting State if the international interest was not registered prior to the commencement of insolvency proceedings.

2.175. Under Article 30(3)(b) nothing in Article 30 affects rules of insolvency procedure relating to the enforcement of rights to property under the control or supervision of an insolvency administrator, for example, rules which, with a view to facilitating a reorganisation of the debtor, suspend or restrict enforcement of a security interest. But in a Contracting State which has made a declaration under Alternative A of the insolvency provisions of the relevant Protocol28 Article 30(1)(b) does not apply, being overridden by those

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28 Aircraft Protocol, Article XI; Luxembourg Protocol, Article IX; Space Protocol, Article XXI. Under EU law Member States of the European Union are not permitted to make a declaration under Article XI of the Aircraft Protocol but are free to achieve the same result through domestic legislation. See paragraph 2.260. It is to be expected that the European Union will apply the same rules in relation to the Luxembourg Protocol and the Space Protocol.
provisions. Article 30(3)(b) is solely concerned to preserve restraints imposed by the relevant insolvency law on the ability of the creditor to enforce its international interest against the object to which that interest relates. The pursuit of purely personal claims by the creditor, e.g. for sums due under the agreement, is not subject to any Convention rules and is governed by the ordinary rules of the applicable insolvency law. “Insolvency administrator” includes a debtor in possession if permitted by the applicable insolvency law (Article 1(k)).

2.176. The Convention does not deal with insolvency jurisdiction. That is a matter for national law, including the EC Insolvency Regulation for Member States of the European Union and, in States that have implemented it, the provisions of the UNCITRAL Model Law on Cross-Border Insolvency relating to the recognition of and support for foreign insolvency proceedings. However, Article IX of the Luxembourg Protocol contains provisions for the enforcement of creditors’ rights in insolvency under a declaration made by the Contracting State that is the primary insolvency jurisdiction as defined by Article I(2)(d) of the Protocol (see paragraphs 3.64 et seq.).

Assignment of associated rights

2.177. Chapter IX of the Convention deals with the effect, formal requirements and priority of assignments of associated rights and related international interests, and with subrogation. “Associated rights” are defined in Article 1(c) as all rights to payment or other performance by a debtor under an agreement (“agreement A”) which are secured by or associated with the object. It follows from this definition that only a creditor can assign associated rights. So an assignment by a lessee of its rights under a lease is not an assignment of associated rights within the Convention, nor is such an assignment registrable, though if the lessee has granted a sub-lease then as sub-lessor it is a creditor and the assignment of its rights as sub-lessor will be an assignment of associated rights carrying with it an assignment of the sub-lessor’s international interest (Article 31(1)) which will be registrable under Article 16(1)(b)).

2.178. It also follows from the definition that associated rights do not include (a) rights to performance by a third party or (b) rights to performance by the debtor under another contract or engagement (“agreement B”, which might consist merely of a promissory note), unless in either case the debtor is liable
under agreement A to perform the obligations of the third party or of itself imposed by agreement B. However, it is not necessary for agreement A to refer specifically to agreement B. It suffices that the obligations secured by agreement A include those arising under other agreements or promissory notes. So where agreement A secures payment of all past and future advances and the debtor undertakes to repay such advances, the rights to repayment of loans made under agreement B (whether made earlier or later than agreement A) constitute associated rights under agreement A even though agreement B is not referred to in agreement A. This is relevant to many secured loan transactions, where the primary payment obligation is contained not in the security agreement but in a separate loan agreement; nevertheless the creditor’s rights to payment, if secured by a charge under the security agreement, will constitute associated rights. “Assignment” is broadly defined so as to cover any contract which confers associated rights on the assignee with or without a transfer of the related international interest. It thus embraces both outright transfers and charges or pledges. But a novation as to the creditor’s rights, where a new agreement replaces the existing agreement, creates a new interest which should be protected by a fresh registration (see paragraphs 2.40-2.41), while a right of subrogation, which is separately dealt with in Article 38, does not constitute an assignment. Moreover it is only assignments effected by contract that fall within Chapter IX (see the definition of “assignment” in Article 1(b)).

Transfers by operation of law

2.179. Transfers by operation of law – for example, transfers under statutory provisions or on a statutory merger or amalgamation of two corporations which under the applicable law operates to transfer rights and liabilities – are outside the scope of the Chapter, since they do not fall within the definition of “assignment” in Article 1(b), which is confined to contractual assignments. Only a creditor (that is, a chargee, conditional seller or lessor) can hold and assign associated rights.

29 Article 1(b). But an assignment which is not effective to transfer the related international interest is outside the Convention (Article 32(3)).
Categories of associated rights

2.180. Associated rights may be one of two kinds:

(1) “object-related” rights, that is, associated rights that are related to the financing or leasing of an object in the sense of Article 36(2), for example, rights to payment of the price of the object, repayment of an advance for the purchase of the goods, or related obligations of the debtor under the transaction (such as indemnities and loan breakage costs resulting from an unwinding of funding arrangements because of premature termination of the agreement for default); and

(2) those that are not so related, for example, rights to repayment of a non-purchase money loan in an unrelated transaction which may have as an element security over the object but has nothing to do with its financing, rental or associated obligations.

The distinction between the former category and the latter is relevant to the priority under Article 36 of competing assignments of associated rights related to the same international interest, discussed in paragraph 2.196 below. The distinction is of no relevance to priority between assignees of different sets of associated rights related to different international interests.

Effect of assignment of associated rights

2.181. An earlier draft of the Convention had focused on the assignment of international interests and had provided that this should also transfer the associated rights, that is, all rights to payment or other performance by a debtor under an agreement which are secured by the object (in the case of a security agreement) or associated with the object (in the case of a conditional sale or leasing agreement) (Article 1(c)). Though contrary to the normal rule that a security interest is accessory to the obligation secured, this had a certain logic in that the Convention is concerned with international interests, not with assignments of receivables as such. In the end, however, though not without some pitfalls in the drafting, it was considered that the normal rule should be applied. Accordingly Article 31(1) provides that, except as otherwise agreed by the parties, an assignment of associated rights made in conformity with the prescribed formalities also transfers to the assignee the related international
interest and all the interests and priorities of the assignor under the Convention. The substantive validity of the assignment is governed not by the Convention but by the applicable law. For the position where the assigned international interest has not been registered see paragraph 2.189.

2.182. Assignments of associated rights are not as such recorded in the International Registry, though one might think otherwise from the somewhat infelicitous drafting of Article 35, which shows why it would have been preferable to ignore doctrinal purity and focus not on the assignment of the associated rights but rather on the assignment of the related international interest. In the case of an assignment by way of security, the assigned associated rights revest in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged (Article 31(5)). But where the assignee has collected from the debtor the whole or part of the sum due under the agreement the debt constituting the associated rights is to that extent extinguished and cannot be revested in the assignor. On the other hand, the assignor’s own liability will itself be pro tanto discharged.

2.183. An assignee stands in the same position as its assignor. Accordingly if the assigned interest was not itself a Convention interest it will not be converted into a Convention interest by registration of the assignment, which will therefore have no effects under the Convention. So if a pre-existing interest not covered by a declaration under Article 60 is assigned after the Convention has come into force as provided by Article 60(2)(a) it remains a non-Convention interest. Again, if associated rights arising under two registered international interests are assigned to two different assignees, each assignee takes the priority of its assignor, so that the assignee of the first assignor to register its international interest has priority (see paragraph 2.193).

2.184. The debtor is bound by the assignment, and has a duty to make payment or give other performance to the assignee where the formalities prescribed by Article 33(1) have been observed (see paragraph 2.187). Such payment or other performance is effective to discharge the debtor, though it remains entitled to assert any other ground of discharge (Article 33(2)). The debtor may assert against the assignee all defences and rights of set-off available to the debtor under the applicable law (Article 31(3)) unless it has waived them by an agreement in writing (Article 31(4)). Under the Convention
such a waiver is binding except where it purports to bar defences arising from fraudulent acts of the assignor (Article 31(3), (4)). The applicable law may limit the assignability of associated rights. A typical case is where the agreement prohibits assignment. The effect of a no-assignment clause varies from jurisdiction to jurisdiction. In some jurisdictions it precludes the assignee from asserting the assigned claim against the debtor but does not affect the validity of the transfer as between assignor and assignee, so that upon the assignor collecting payment it can be required to account to the assignee. In other legal systems the assignment is totally void even as between assignor and assignee. In yet other legal systems the prohibition against assignment is overridden in favour of the assignee, who can enforce payment against the debtor despite the prohibition, leaving the debtor only with a remedy against the assignor for breach of contract.

2.185. It is open to the parties to agree to assign the associated rights without transferring the related international interest, and this will be the effect anyway if the assignment does not conform to the requirements of Article 32, but in either case the Convention does not apply to the assignment (Article 32(3)) and the effect is left to be determined by the applicable law. But the mere omission to include the related international interest in the assignment will not have this effect, because the international interest will automatically pass with the assignment of the associated rights if made in conformity with Article 32. This is the effect of Article 31(1)(a). What the parties cannot do is assign an international interest created or provided for by a security agreement without also assigning at least some of the related associated rights, for an international interest given by way of security has no significance except in the context of the obligations which it secures. Hence Article 32(2) provides that a purported assignment of an international interest under a security agreement without inclusion of some or all of the associated rights is not valid. By contrast an international interest held by a conditional seller or lessor can be transferred without assigning any of the associated rights, but this would be of almost no commercial value to the transferee, giving it the bare holding of the international interest while the sums payable under the agreement by which it is constituted would continue to be payable to the assignor. Alternatively the interest of the conditional seller or lessor may be transferred to one party and the associated rights to another.
Partial assignments

2.186. Partial assignments of associated rights are permitted and it is then for the parties to agree as to their respective rights concerning the related international interest, but not so as adversely to affect the debtor without its consent (Article 31(2)). The parties could, for example, agree that the international interest is to be recorded as assigned into their joint names so as to secure their respective interests or that it is to remain in the sole name of the assignor (in which case the assignment will not be registered and the assignee will not benefit from the Convention’s priority rules as against a subsequent assignee) with an undertaking by the assignor to enforce its rights on behalf of the assignee at the assignee’s request or to subordinate its own rights as regards the part retained to the rights of the assignee as regards the part assigned. A partial assignment may adversely affect the debtor, as by requiring him to incur expense in paying two parties instead of one. In that case the parties to the partial assignment must obtain the debtor’s consent if this has not already been given. Failure to do so does not, however, affect the validity of the assignment as between assignor and assignee.

Formalities of assignment

2.187. Under Article 32 the formal requirements that have to be satisfied if an assignment of associated rights is to transfer the related international interest track those applicable to the creation of an international interest. The assignment must be in writing, must enable the associated rights to be identified under the contract from which they arise, and in the case of a security assignment must enable the obligations secured by the assignment to be determined in accordance with the relevant Protocol but without the need to state a sum or maximum sum secured. Where this has been done the debtor has a duty to make payment or give other performance to the assignee provided that the debtor has been given notice in writing of the assignment by or with the consent of the assignor and the notice identifies the associated rights (Article 33). In contrast to the position under Article XV of the Aircraft Protocol there is no requirement in the Luxembourg Protocol that the debtor should have consented to the assignment.
Registration of assignment or prospective assignment

2.188. An assignment or prospective assignment of an international interest may be registered in the International Registry (Article 16(1)(b)) even if the international interest itself has not been registered (see paragraph 2.189). A prospective assignment means an assignment that is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain (Article 1(x)). Registration is not necessary to preserve the priority of an assignee against an assignee of a junior international interest (see paragraph 2.193), but it is necessary if the assignee is to avoid the risk of subordination to a subsequent assignee of the same international interest (see paragraph 2.190) or is to secure protection under Article 30(1), as applied by Article 37, in the event of the assignor's insolvency. Registration of an assignment by a party requires the consent of the other party (Article 20(1)), though this need not be separate but can be embodied in the assignment itself. A precondition of registration is that the consent is transmitted electronically to the International Registry (Article 18(1)(a)). However, the debtor's consent to an assignment is not required under the Luxembourg Protocol. Obviously the registration of an assignment of an international interest is ineffective under the Convention if the purported international interest is not an international interest or its assignment is otherwise not valid.

Assignment of unregistered interest

2.189. The assignee of an international interest is entitled to have it registered, whether or not the assigned international interest has itself been registered, in order to secure a measure of priority for its assignment. This, of course, assumes that the interest is indeed an international interest. The assignment of a pre-existing interest not covered by a declaration under Article 60 is outside the Convention altogether. Article 16(1)(b) provides for the registration of assignments (and prospective assignments) of international interests, and does not say such interests have to be registered. Consistently with this, Article 31(1) provides that an assignment of associated rights transfers the related international interest. It does not say that the international interest has to be registered, nor does Article 32. It is in conformity with this that the Regulations made for the International Registry for aircraft objects permit registration of assignments of unregistered interests. The debtor's duty under
Article 33 to pay the assignee is not expressed to be dependent on registration of the international interest. Similarly default remedies are exercisable by the assignee under Article 34 even in relation to an unregistered interest.

2.190. It follows from the above that if there are no further assignments or other competing interests, an assignee is entitled to exercise remedies against the debtor even if neither the international interest nor the assignment is registered. All this is perfectly logical, because the rights and remedies of the creditor against the debtor, including those in Chapter III of the Convention, are not dependent on registration of the creditor’s international interest. Accordingly there is nothing to preclude the creditor of an unregistered interest from suing the defaulting debtor. The creditor is entitled to assign its rights and the assignee, standing in the same position as the assignor, is entitled to enforce remedies even though the assigned interest is unregistered. An assignee of an unregistered international interest who registers its assignment has priority over a subsequent assignee of the international interest who fails to register the international interest, and this is so whether or not the subsequent assignment is registered. Registration of the assigned international interest by an assignee is necessary only in order to protect the assignee against:

(1) the holder of a subsequent international interest who registers that interest, and thus obtains priority over the unregistered interest;

(2) that holder’s assignee, who succeeds to the priority of its assignor;

(3) the creditors in the debtor’s insolvency.

Assignee’s default remedies

2.191. Under Article 34, the default remedies available to an assignee under a security assignment, qua transferee of the international interest under Article 32(1), are the same remedies as those available to the original creditor under the provisions of Articles 8, 9 and 11 to 14. However, in relation to associated rights the remedies given by those provisions are exercisable only so far as such provisions are capable of application to intangible property. With one exception all remedies applicable in relation to the object, including the remedy of repossession, are available in relation to documentary intangibles, that is, those embodied in a document such that it represents the embodied rights,
which can be transferred by delivery with any necessary endorsement, for example, negotiable instruments, negotiable securities and documents of title, for these have the same possessory character as tangible property. The exception is the grant of a lease, a remedy which is clearly inapplicable even to documentary intangibles. Pure (i.e. non-documentary) intangibles are plainly not susceptible to possession or to the grant of a lease. Pure intangibles, such as rights to payment under the agreement, can be sold under Article 8(1)(b) but otherwise are simply enforceable against the debtor under Article 33 or by way of additional remedies given by the applicable law (Article 12). Since Article 34 is confined to assignments of associated rights and the related international interest made by way of security, the listed Articles of the Convention do not include Article 10, which relates to conditional sale and leasing agreements.

**Priority of competing assignments**

2.192. There may be more than one assignment of associated rights. In a Contracting State priority is determined by the Convention priority rules, not by the otherwise applicable law. In determining the priority of competing assignments it is necessary to distinguish assignments of associated rights related to different international interests from competing assignments of the same associated rights. The former are governed by Article 31 and the assignees have the same rank as their assignors; the latter are governed by Article 35 and priority is given to the first assignee to register its assignment, though the priority is qualified by Article 36. We take each of these in turn.

*Assignments of associated rights related to different international interests*

2.193. Suppose that the debtor has granted an international interest to A under agreement number 1 and a subsequent international interest in the same asset to B, under agreement number 2, A’s interest being registered first and thus having priority. A assigns its international interest and associated rights under agreement 1 to X, while B assigns its international interest and associated rights under agreement 2 to Y. Who has priority as between X and Y? The position here is straightforward. Under Article 31(1)(b) each assignee enjoys the same priority as its assignor. It follows that X has priority over Y and this is so even if X has not registered the assignment in its favour and Y has registered its assignment. Since the two assignments relate to different international interests and thus have a different content, they are not in fact
competing assignments at all but assignments of competing international interests, and registration of an assignment of one such interest has no relevance to the rights of the assignee of the other interest. The priority of the two assignments of associated rights is governed by the order of registration of their respective international interests, not by the order of registration of the assignments of those interests.

**Competing assignments related to the same associated rights**

2.194. An example is where the debtor has granted an international interest to A, who assigns that interest and the associated rights first to X and then to Y. Thus the competition is not between claimants to different associated rights related to different international interests but between claimants to the same associated rights. The case therefore falls within Article 35, not Article 31. The position here is a little more complex. The starting point, under Article 35, is that where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply mutatis mutandis, so that a registered assignment has priority over an unregistered assignment and over a later assignment. Since the definition of “assignment” in Article 1(b) is limited to contractual assignments it is the applicable law, not Article 29, which determines priorities as between a contractual assignee and an assignee by operation of law. In order for Article 35 to apply two conditions must be satisfied:

1. **At least one of the assignments includes the related international interest**

This is a condition laid down expressly by Article 35(1) and the reason for it is that if the position were otherwise neither assignee would have a right to register its assignment, since the function of registration is to record interests in equipment, not interests in associated claims in isolation, and as noted earlier an assignment of associated rights alone is outside the Convention (Article 32(3)). Accordingly if only one of the assignments includes the related international interest the assignee under that assignment has merely to register the assignment of that international interest to gain priority (see (2) below). This is the effect of Article 29(1) as applied by Article 35(1). It is also necessary that the assigned associated rights retain a linkage with an international interest. See paragraph 4.250.
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Article 29 does not regulate priorities between competing unregistered assignments, this being left to the applicable law. Similarly, since the definition of “assignment” in Article 1(b) is limited to contractual assignments it is the applicable law, not Article 9, which determines priorities as between a contractual assignee and an assignee by operation of law. Article 35(1) suffers from defective drafting in two respects. First, the phrase “at least one of the assignments includes the related international interest and is registered” implies that it is the assignment of associated rights that is registered, whereas such assignments are not registrable, only the related international interest is. Accordingly the phrase should be interpreted as if it read “and that international interest is registered”. Secondly, Article 35 has to be read as if the first reference to a registered interest were ignored (see paragraph 4.251). The effect of Article 35, with these clarifications, is that priority of the competing assignments of the associated rights and their related international interests is determined by the order in which the assignments of the international interests are registered (Article 29(1) as applied by Article 35). It is necessary that at least one of the assignments is registered. If neither assignment is registered Article 29 does not apply, because that Article, as applied by Article 35, does not regulate competing assignments of unregistered interests.

2.195. An intending assignee of associated rights may register a prospective assignment, so that when the assignment is made registration dates back to the time of registration of the prospective assignment without the need for any new registration (Article 19(3) as applied by Article 19(4)), so long as the registration information supplied would have sufficed for registration of an international interest (Article 19(4) as applied by Article 19(5)), and this may affect priorities in accordance with Article 29 as applied by Article 35.

2.196. Article 36 qualifies in two respects the priority that would otherwise be conferred by Article 35. First, it is confined to cases where the contract under which the associated rights arise states that they are secured by or associated with the object. This is to deal with the situation where, for example, an agreement secures not only the obligations for which it provides but obligations arising under a later agreement and the later agreement does not refer to the security, so that a subsequent assignee of the associated rights under the later agreement has no way of knowing that the obligations under
the later agreement are secured on or in any way connected with the equipment and ought not, therefore, to be subject to the Convention priority rules. Secondly, the priority of the first assignment is given only to the extent that the associated rights are related to an object as specified in Article 36(2), which broadly covers obligations for the repayment of purchase-money loans and the payment of the price and rentals of objects, together with all ancillary obligations under the financing transaction documents. Sub-paragraph (e) Article 36(2) refers to such ancillary obligations as “other obligations arising from a transaction” of a kind referred to in sub-paragraphs (a) to (e), which covers such matters as contract and default charges and interest, funding breakage costs, enforcement costs, and the like. It does not, however, extend to obligations arising under other contracts relating to other objects, even if the debtor has undertaken in the first contract to perform such other obligations and these are secured by the first contract. So if another contract is later entered into which is not itself object-related, as where it is for a secured loan for the debtor’s general purposes, the fact that the associated rights under that contract are also associated rights under the first contract which is object-related does not suffice to attract the application of sub-paragraph (e), and an assignee of the later contract will not enjoy the benefit of the Convention’s priority rules (see further paragraph 4.257 and Illustration 41, paragraph 4.259). Priority in such cases and in others falling outside the limits of Article 36(2) is left to the applicable law (Article 36(3)), including (where applicable) the United Nations Convention on the Assignment of Receivables in International Trade (“the UN Convention”) opened for signature on 12 December 2001.

2.197. On the assignor’s insolvency Article 30 applies as if the references to the assignor were references to the debtor (Article 37). The effect of Article 37 is that if insolvency proceedings are instituted against the assignor the title of the assignee to the assigned associated rights and related international interest is effective in the insolvency if the assignment was registered in conformity with the Convention prior to the commencement of the insolvency proceedings (Article 30(1)), that is, prior to the time when those proceedings are deemed to commence under the applicable insolvency law (Article 1(d)). In that case the assignment takes effect subject to any rules of that law relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors (Article 30(3)a)) but is not affected by any other grounds of avoidance that would ordinarily be available under the insolvency law. Nothing in Article 30 impairs the effectiveness of an unregistered international interest where that
would be effective under the applicable law (Article 30(2)) but such an interest is subject to all the avoidance rules of the insolvency law, not merely those mentioned in Article 30(3)(a)).

2.198. The assignment is also subject to any rules of procedure relating to the enforcement of rights of property which is under the control or supervision of the insolvency administrator (Article 30(3)(b)). This provision is most likely to be triggered where the assignment is by way of security and the assignor has not discharged its obligations to the assignee. Article 30(3)(b) only restricts the pursuit of claims by the assignee to property under the control of the assignor’s insolvency administrator. It does not affect the enforcement by the assignee of its rights against the debtor (i.e., associated rights) unless under the insolvency law such associated rights come under the control of the assignor’s insolvency administrator. For the general impact of Article 30(3) see paragraphs 2.174-2.175.

Subrogation

2.199. The Convention itself provides a right of subrogation, under Article 9(4). Under Article 38(1), nothing in the Convention affects the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law. Typical cases are where a surety for the debtor discharges the debt or an insurer pays out the creditor for loss of the asset the subject of the international interest. In such cases many national laws provide that the surety or insurer, as the case may be, acquires the creditor’s interest and all the other rights of the creditor under the agreement. Whether this is so in any particular case is determined not by the Convention (except in cases within Article 9(4)) but by the applicable law. Similarly it is the applicable law, not the Convention, that will determine the effectiveness of a contractual right of subrogation. However, the right of subrogation given by Article 9(4) is itself to be treated as given by the applicable law in a Contracting State and is registrable accordingly.

2.200. A party acquiring associated rights and/or the international interest by way of subrogation stands in much the same position under the Convention as an assignee. Where there are two subrogees whose subrogatory rights relate to different international interests it is the international interests, not the subrogatory rights as such, that are in competition. Accordingly each subrogee
stands in the shoes of its subrogor and thus has priority over the subrogee of a junior international interest, whether or not the first subrogee has registered its subrogation (see paragraph 2.193 for the comparable position in relation to an assignment). However, if there are two subrogees acquiring from the same subrogor in relation to the same international interest the competition is between the two rights of subrogation and priority goes to the first to register its acquisition by subrogation (Article 29(1)). This is not expressly provided by the Convention but must follow from the general principle in Article 29(1) that the order of registration determines priorities.

Variation of priorities by agreement

2.201. Article 38(2) permits parties to competing assignments and rights of subrogation to vary priorities between themselves in the same way as is provided for competing interests under Article 29(5). Again, a subordination should be registered if it is to bind an assignee or subrogee of the subordinated interest.

Non-registrable non-consensual rights or interests

Protection of priority by declaration

2.202. Under Article 39 a Contracting State may specify the types of non-consensual right or interest which, under that State’s law, have priority over an interest equivalent to that of the holder of the international interest (an “equivalent interest”) and are to have priority even over a registered international interest without themselves being registered as international rights or interests. A non-consensual right or interest is a right or interest conferred by law. A right or interest created by agreement is not a non-consensual right or interest even if entry into the agreement requires the approval of the court, as may be the case where the agreement is entered into by a debtor in possession in insolvency proceedings. An equivalent interest is an interest under a charge or held by a person who is a conditional seller under a title reservation agreement or a lessor under a leasing agreement. A State may retain or restrict its nationally preferred rights and interests arising by law, but may not use the Convention to expand these preferred rights. For example, if non-consensual rights or interests, while having priority over charges under a
Contracting State’s laws, do not have priority over the rights of conditional sellers under title reservation agreements, a declaration purporting to cover the latter would not be permitted by Article 39. However, it is not the task of the Depositary (UNIDROIT) to check whether the rights specified in a Contracting State’s declaration do indeed have priority under that State’s national law over interests equivalent to international interests, and the Depositary will accept the declaration as presented. But a declaration which purports to cover preferred interests beyond those provided by national law will to that extent have no effect under the Convention. Rights of arrest or detention conferred by contract fall outside Article 39(1)(a) and depend for their protection on a declaration by a Contracting State under Article 39(1)(b) (see paragraph 2.207).

2.203. Rights or interests covered by a declaration under Article 39 have priority over a registered international interest under the law of the declaring State even though not themselves registrable. The extent of that priority is determined by the declaration, which may retain or restrict but not expand national law. It is not necessary for a Contracting State to list all such types of non-consensual interest individually. It can simply make a declaration that all claims having priority over an equivalent interest under its existing law (Article 39(1), “generally or specifically”) or acquiring such priority in the future (Article 39(2)) are to enjoy priority over a registered international interest. But it is for the Contracting State to decide which of such claims should have priority over a registered international interest. As stated above, the categories covered by its declaration could be fewer than the categories which under its national law have priority over equivalent interests. Even where a declaration lists the categories to which it applies it will do so only in general terms, and it will be necessary to look to the law of the declaring State to see what limits are placed on the priority. For example, priority for wages may be restricted to a stated amount or to wages earned during a specified period of time. The point at which the priority attaches will likewise be governed by the law of the declaring State but will usually be when (a) the holder of the non-consensual right or interest takes possession or exercises a right of detention, or (b) insolvency proceedings against the debtor commence. See below, paragraph 2.210.
2.204. The priority over the registered international interest to which such a declaration relates is a priority given under the law of the Contracting State, not under the Convention, and is not entitled to recognition in another State except to the extent provided by that State’s conflict of laws rules.

2.205. Priority is given only if the non-consensual right or interest is covered by a declaration deposited prior to registration of the competing international interest (Article 39(3)). The purpose of this provision is to alert registrants of international interests and prospective international interests to the fact that, contrary to the normal priority rule in Article 29(1), such interests will be subordinate to non-consensual rights or interests covered by a Contracting State’s declaration. However, under Article 39(4) a Contracting State may at the time of ratification, etc., declare that a non-contractual right or interest covered by a declaration under Article 39(1)(a) is to have priority even over an international interest registered prior to the date of such ratification, etc. This provision was originally inserted to meet the concern of some States that, since they could not make a declaration under Article 39(1)(a) prior to ratification, non-consensual rights or interests declared upon ratification would be subordinate to international interests already on the register by virtue of earlier ratification by other Contracting States (i.e. States where the debtors were situated at the time of the agreement), and this prejudice to non-consensual rights or interests would become more acute for a State the later it ratified. Article 39(4) enables a Contracting State to ensure that its non-consensual rights or interests retain the priority they enjoyed under national law even vis-à-vis international interests already registered. A Contracting State’s declaration may also be expressed to cover categories of non-consensual right or interest created after the deposit of the declaration (Article 39(2)).

2.206. Article 39(1)(a) refers only to priority over a registered international interest and says nothing about the priority of non-consensual rights or interests vis-à-vis unregistered international or other interests. However, given that (a) a registered international interest has priority over an unregistered interest and (b) a non-consensual right or interest declared under Article 39 has priority over a registered international interest, it seems clear that the intention
is to give a non-consensual right or interest priority over an unregistered interest, and that Article 39(1)(a) should be read in a non-exclusive way as saying that a non-consensual right or interest has priority even over a registered (and therefore necessarily over an unregistered) international interest. That conclusion is reinforced by Article 39(3), which refers simply to “priority over an international interest”, i.e. whether registered or not.

Rights of arrest or detention

2.207. Rights of arrest or detention under national law, so far as not covered by a declaration under Article 39(1)(a) (e.g. because they are contractual and therefore outside Article 39(1)(a)), may be preserved by a declaration to the extent provided by Article 39(1)(b), which applies both to contractual rights of arrest or detention and to rights given by law, e.g. in exercise of a lien for unpaid navigation charges. The rights referred to are those of a State or State entity, intergovernmental organisation or private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owing to such entity, organisation or provider directly related to those services in respect of that object or another object. The word “other” does not imply that an intergovernmental organisation is a private provider of public services. This would be clearer if the word had either been omitted or punctuated “other, private, provider of public services”. Although the text omits reference to amounts owed to a State directly relating to such services (for example, airport and navigation fees but not general taxes owed by the debtor), these are clearly intended to be covered, following the earlier enumeration of those holding the right to payment and in line with the definition of “non-consensual right or interest” in Article 1(s). While the definition of “non-consensual right or interest” includes obligations owed to an intergovernmental organisation or a private organisation, only a Contracting State may make a declaration under Article 39. However, a lien or right of detention covered by a declaration under Article 39(1)(b) is available only while the railway rolling stock is situated within the territory of the Contracting State making such a declaration or of another Contracting State under whose conflict of laws rules the lien or right of detention is recognised.

2.208. Article 39(1)(b) contains limitations similar to those in Article 39(1)(a). It is a savings clause in that a declaration may preserve for the purpose of the Convention rights of arrest or detention given by the law of the declaring State
but may not expand these. In that regard UNIDROIT, in its Declarations Guide to the Convention and Aircraft Protocol, has encouraged Contracting States not to include the words “or another object” in their declarations where, as is the case in most jurisdictions, there is no fleet-wide right of detention under national law. Again, as under Article 39(1)(a), a declaration under Article 39(1)(b) does not confer a Convention-based right of arrest or detention entitled to recognition in other Contracting States; it takes effect solely under national law and other Contracting States are under no obligation to recognise it except insofar as their own conflict of laws rules require them to do so.

Types of declaration made

2.209. Since the only Protocol currently in force is the Aircraft Protocol, that is the only Protocol under which declarations have been made. To date the majority of the Contracting States ratifying or acceding to the Aircraft Protocol have made a declaration under Article 39(1). Most of these cover liens in favour of employees for unpaid wages (though these are usually limited to wages arising since the time of a declared default under a contract to finance or lease an aircraft object) and repairers or bailees on aircraft objects in their possession, and a small number have added government taxes. A few States have made declarations relating to the same type of lien under both Article 39 and Article 40 but distinguishing declarations as to post-default liens (which are made under Article 39) from declarations as to pre-default liens (which are made under Article 40). Several Contracting States have made a general declaration covering all categories in which priority is given over interests equivalent to international interests. Many Contracting States have also made the second form of declaration permitted by Article 39(1) relating to the preservation of rights of arrest or detention (see paragraph 2.207). As regards liens or other rights for sums due in respect of taxes, some Contracting States have made a declaration under Article 39, whilst others have made a declaration under Article 40 (see paragraph 2.211). Declarations under Article 39(1) are limited to non-contractual rights and interests. Contractual rights and interests cannot be protected by such a declaration. Some care needs to be taken with declarations under Article 39(1)(b), which refers to rights of arrest or detention of an object for sums due in respect of that object “or another object”. The declaration should omit the latter phrase if its laws do not permit arrest or detention of an object for services relating to another object. However, if the declaration is expressed to cover categories that are created
after the deposit of the declaration, as provided by Article 39(2), and the Contracting State’s law, though initially restricted to sums due in respect of the arrested or detained object, is later extended to other objects these will fall within Article 39(1)(b).

**Operation of the priority rules under Article 39**

2.210. The duty of the holder of a registered international interest to respect priorities (see above, paragraph 2.76) raises a question as to the conditions in which and the point at which the priority of a right or interest covered by a declaration under Article 39 arises. Here it is necessary to distinguish the position prior to the debtor’s insolvency from that which obtains upon the commencement of insolvency proceedings. Outside insolvency Article 39 rights will almost always take the form of a lien or a right of arrest or detention. Exercise of such a right is governed by the law of the declaring State but typically depends upon the aircraft object still being in the debtor’s possession. Where that is the case the Article 39 priority will not be exercisable against the holder of a registered international interest that has already availed itself of an enforcement remedy over the aircraft object. But if before then the holder of the Article 39 right or interest has taken possession of the railway rolling stock or has exercised a right to arrest or detain it, the attached priority of that right or interest must be respected by the holder of the registered international interest to the extent required by the law of the declaring State. That law could, for example, provide that the holder of the registered international interest could exercise a power of sale despite the attachment of the Article 39 interest provided that the sale was made subject to that interest or the claim of the holder of the interest was discharged from the proceeds of sale. There are other rights or interests, such as preferential claims for unpaid wages or for taxes, which typically arise only on the debtor’s insolvency. If the insolvency proceedings are opened in the declaring Contracting State before the holder of the registered international interest has enforced its rights against the railway rolling stock the rules applicable to such proceedings determine the priority and procedural position of the holder of the Article 39 right or interest over the registered international interest. But since any such priority is given not by the Convention but by national law, in insolvency proceedings in a Contracting State other than the Contracting State making the declaration the insolvency jurisdiction is not obliged to recognise the priority of the Article 39 right or interest except to the extent provided by its own conflict of laws rules.
Declarations providing for registration of non-consensual rights or interests

2.211. A Contracting State may also make a declaration that specified categories of non-consensual right or interest shall be registrable as if they were international interests (Article 40). Most States have made a declaration under Article 40, typically covering judgments or orders permitting attachment of equipment covered by the relevant Protocol and State liens for taxes or unpaid charges. Registration of such a non-consensual interest would, as in the case of a registered international interest, give it priority over subsequently registered interests and over unregistered interests and would also give protection under Article 30 if insolvency proceedings were opened against the debtor or the creditor.

Mutual exclusivity of Articles 39 and 40

2.212. Articles 39 and 40 are intended to be mutually exclusive in the sense that a category appearing in a declaration under Article 39(1) and thus given priority without registration ought not also to appear in a declaration under Article 40, for which registration is required unless distinguished by time (see paragraph 2.209) or in some other way.

Extension to outright sales

2.213. The Convention does not apply to outright sales, for these do not involve a debtor or the assertion of any security or proprietary interest vis-à-vis the debtor. However, Article 41 provides for the possibility of an extension of the Convention to outright sales as provided for in the relevant Protocol, thereby enabling outright buyers to take advantage of the registration machinery to register their acquisitions. The Aircraft Protocol extends the registration and priority provisions to cover outright sales.30 By contrast the Luxembourg Protocol permits only registration of a notice of sale and then only for information, without affecting the rights of any person and without any other effects under the Convention or Protocol.

30 See Aircraft Protocol, Article III.
Jurisdiction

2.214. Articles 42 to 45 contain rules as to jurisdiction which come under three heads: jurisdiction by agreement; jurisdiction to grant advance relief pending final determination of a claim pursuant to Article 13; and jurisdiction as regards claims against the Registrar. A deliberate decision was taken at the diplomatic Conference not to include in the Convention any general rule of jurisdiction. Accordingly in the absence of party choice of jurisdiction only claims under Article 13 and claims against the Registrar are covered by the Convention, and jurisdiction over other claims is determined by the *lex fori*. Moreover, it is open to a Contracting State to disapply Articles 13 and 43, wholly or in part. The declarations must specify under what conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied. For the position in regard to the European Union as a Regional Economic Integration Organisation having competence over jurisdictional matters see paragraph 2.260. The rules in Articles 42 to 45 may be summarised as follows:

*Courts chosen by the parties*

2.215. Except in relation to the grant of advance relief under Article 13 or the making of orders against the Registrar, exclusive jurisdiction for any claim brought under the Convention is given to the courts of a Contracting State chosen by the parties except where they agree that the jurisdiction is to be non-exclusive (Article 42(1)). It is open to the parties to select the courts of a territorial unit of a Contracting State provided that such territorial unit is one to which the Convention applies by virtue of Article 52 (see paragraph 2.242). But jurisdiction can be conferred by the courts of a Contracting State or a territorial unit of a Contracting State covered by Article 52. No other court falls within Article 42. The chosen forum need not have a connection with the parties or the transaction. The agreement must be in writing or otherwise in accordance with the formal requirements (as opposed to substantive requirements) of the *lex fori* (Article 42). General questions as to the validity or effect of a jurisdiction clause which falls outside Article 42 are to be determined by reference to the law applicable under the rules of private international law of the forum State.
Courts where debtor situated

2.216. The courts of the territory on which the debtor is situated have concurrent jurisdiction, pending final determination of the claim, (a) to make orders for the lease or management of the object and income from it under Article 13(1)(d); (b) to grant any other interim relief available under the *lex fori* by virtue of Article 13(4), in either case as requested by the creditor, though the jurisdiction is limited to orders which by their terms are enforceable only in the territory concerned. The parties cannot exclude the concurrent jurisdiction of the courts of the place where the debtor is situated. Where a Contracting State has made a declaration extending the Convention to one or more territorial units the debtor is considered to be situated in that Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention applies or if it has its registered office, statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention applies (Article 52(5)(a)). “Law in force in a territorial unit” includes both the law of the territorial unit itself and the law of the State of which it forms part and which has effect in that territorial unit, so that a debtor company based in a territorial unit but incorporated under federal law is considered situated in that territorial if the federal law in question is in force there.

Courts where object located

2.217. The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is located have concurrent jurisdiction to make orders requested by the creditor for advance relief, other than orders for the lease or management of the object and the income from it (Article 43(1)). It is not competent to the parties to exclude the concurrent jurisdiction of courts of the *situs* of the object. Where a Contracting State has made a declaration applying the Convention to only one or some territorial units in which different systems of law are applicable, the relevant location of the object for the purposes of the Convention (in particular, of Articles 3, 4 and 43(1)) is the territorial unit covered by the declaration (Article 52(5)(b)).
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Courts where Registrar has its centre of administration

2.218. The courts of the place in which the Registrar has its centre of administration have exclusive jurisdiction to award damages against the Registrar (e.g. for loss caused through the issue of an erroneous search certificate or failure of the registration system) and to make orders against the Registrar (Article 44(1)). It is important to note that only proceedings against the Registrar fall within Article 44. Where there is a dispute between the parties to an agreement as to the validity of a registration that is not a matter that the courts in the Registrar’s jurisdiction can adjudicate unless (a) the parties have agreed to confer jurisdiction on those courts under Article 42 or (b) the case falls within the general jurisdiction of those courts, including, within the European Union, the rules contained in Brussels I. So in relation to the registry for aircraft objects, based in Dublin, the Irish courts can adjudicate on a dispute between the parties only if they so agree or the courts have general jurisdiction as embodied in the Jurisdiction of Courts and Enforcement of Judgments Act 1998, including the rules contained in Brussels I (see paragraphs 2.220, 2.260) and the Lugano Convention. The reason why there is no jurisdiction under the Convention except in these two cases is that the Registrar is not a party of interest. It is first necessary for the dispute to be determined by a court of competent jurisdiction and only if that court makes an in personam order requiring a party to procure discharge of the registration can application be made to the court of the Registrar’s jurisdiction to enforce the order in proceedings against the Registrar (see below).

2.219. As regards such orders two specific cases are mentioned: orders requiring a registration to be discharged where the person under a duty to procure the discharge cannot be found or has ceased to exist (Article 44(2)) and orders directing amendment or discharge of a registration where a person fails to comply with an order of a court of a State having jurisdiction under the Convention, for example, an order to procure the amendment or removal of a registration improperly made, or, in the case of a national interest, a court of competent jurisdiction (Article 44(3)). But jurisdiction under the Convention is limited to the two cases mentioned above. It is therefore necessary that Article 44(1) be interpreted broadly as conferring (by analogy with Article 44(3)) a residual jurisdiction on the court where the Registrar has its centre of administration to make an order for amendment or discharge of a registration where a party has failed to comply with an order of a court of competent
jurisdiction otherwise than under the Convention requiring that party to procure the amendment or discharge of the registration. The fact that the interest for which discharge of a registration is sought does not constitute an international interest or is otherwise outside the scope of the Convention does not affect the court’s jurisdiction under Article 44; on the contrary, it is a very good reason for the exercise of that jurisdiction.

2.220. Article 44(1) also confers exclusive jurisdiction on the Registrar’s court to make orders to enforce the Registrar’s duties and obligations under the Convention, for example, its duty (a) to effect a registration properly applied for; (b) to issue a search certificate to a person making a search in due form and paying the requisite fee; and (c) to comply with directions properly given to it by the Supervisory Authority under Article 17 of the Convention. Jurisdiction in relation to claims against the Registrar outside the Convention, for example, claims arising from contracts entered into by the Registrar with the Supervisory Authority or with suppliers of goods and services, will be determined by the jurisdictional rules of the State in which the Registrar has its centre of administration. The same applies to claims by the Registrar, for which the Convention makes no provision but which could conceivably arise, such as claims for the recovery of unpaid fees. In recognition of the importance of expedition in cases in which the Registrar is involved rules of court in Ireland, where the Registrar of the International Registry for aircraft objects has its centre of administration, permit proceedings by or against the Registrar to be brought in the Commercial Court in Dublin, a division of the Irish High Court which provides an efficient and expeditious procedure for the hearing of commercial claims (Rules of the Superior Courts (Cape Town Convention) 2008, S.I. No. 31 of 2008, Order 81A). In Transfin-M Ltd v Stream Aero Investments SA and Aviareto Ltd (see text below and n. 31), where the first

31 The first known order under this provision was made by the Irish High Court in PNC Equipment Finance plc v Aviareto Ltd and Link Aviation plc, case 2012 397 MCA, 19 December 2012. In that case the court ordered the second-named Respondent to procure discharge of four registrations and the first-named Respondent, namely the Registrar, Aviareto (which did not oppose the order) to discharge such registrations, the first-named Respondent being restrained from implementing the order for 21 days to allow for the possibility of an appeal by the second-named Respondent. More recently, in Transfin-M Ltd v Stream Aero Investments SA and Aviareto Ltd 2013 No 112 MCA the High Court accepted that it could itself order procurement of discharge of a registration under its general jurisdiction rules and then direct the Registrar to give effect to that order. See below, paragraph 2.220.
defendant had wrongfully registered a non-consensual right or interest not covered by any declaration by a Contracting State under Article 40, the plaintiff sought an order from the High Court requiring the first defendant to procure discharge of the registration. The High Court held that it had jurisdiction under Order 11(f) and (g) of the Rules because the action was founded on torts committed within the jurisdiction (namely slander of title, malicious falsehood and misrepresentation) and that the order sought constituted an injunction to restrain something to be done within the jurisdiction. The High Court accordingly gave leave to serve proceedings on the first defendant outside the jurisdiction and subsequently ordered the first defendant to procure discharge of the registration, failing which the second defendant was ordered to make the discharge. This case shows that although Article 44(3) of the Convention contemplates that the *inter partes* order will normally be made by a court outside the Registrar’s jurisdiction, there is no reason why the Irish High Court could not itself make the order for discharge and then enforce it under Article 44(3).

**Insolvency proceedings**

2.221. Chapter XII confers no jurisdiction in relation to insolvency proceedings, which are a matter for the jurisdictional rules applicable in the place where the insolvency proceedings are brought. This leaves Contracting States which have adopted the 1997 UNCITRAL Model Law on Cross-Border Insolvency Proceedings free to apply its provisions without being affected by the jurisdiction rules of the Convention. But see paragraph 2.135.

2.222. In applying Articles 42 and 43 it is necessary to have regard to Article 52(5) where the relevant Contracting State has made a declaration which has the effect of excluding from the Convention one or more territorial units in which different systems of law are applicable with reference to a Contracting State. In such a case the debtor is not considered to be situated, or the object to be located, in a Contracting State, if situated or located in a territorial unit excluded by such a declaration.

**Declarations as to invalidity of registration**

2.223. The fact that only courts within the territory where the Registrar has its centre of administration can make orders against the Registrar does not, of course, mean that other courts have no power, in proceedings between
transacting parties, to make orders declaring a registration concerning one of them to be of no effect, for example because the purported international interest was not in fact an international interest or because the requisite consent to registration was not given. On the contrary, it is essential to the proper functioning of the Convention provisions that courts having jurisdiction to do so, whether by agreement of the parties under Article 42(1) or under their own jurisdiction rules, should be free to rule on the validity of registrations in order to arrive at a proper decision. As a corollary, a court of competent jurisdiction can order a party to procure discharge of the invalid registration. But an order declaring a registration to be of no effect and ordering procurement of its discharge operates only as between the parties and does not commit the Registrar to give effect to the order, though if a party against whom an order is made requiring it to procure discharge of the registration fails to do so the other party or the court itself may request a court of the place in which the Registrar has its centre of administration to direct the Registrar to discharge the registration (Article 44(3)).

Jurisdiction within the European Union

2.224. Article 55 of the Convention empowers a Contracting State to disapply the provisions of Article 13 or Article 43, wholly or in part, and provides that any such declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied. Pursuant to Article 55 the European Community, as a Regional Economic Integration Organisation treated as a Contracting State under Article 48 of the Convention, made a declaration that where the debtor is domiciled in the territory of an EC State (now an EU State), Member States bound by Council Regulation (EC) 44/2001 (Brussels I), dealing with jurisdiction and enforcement of judgments, will apply Articles 13 and 43 for interim relief only in accordance with Article 31 of that Regulation. Article 31 provides that application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under the Regulation, the courts of another Member State have jurisdiction as to the substance of the matter. For this purpose Article 31 is to be applied as interpreted by the European Court of Justice in the context of Article 24 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the

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substance of which is reproduced in Brussels I. The effect of the declaration is that a court will have jurisdiction under Article 31, and its decision on provisional measures will qualify for mutual recognition by other Member States under Article 33 and enforcement under Article 38, only if (a) the decision makes it clear that it is founded on jurisdiction under Article 31, not under its national law,32 and (b) either the court has jurisdiction as to the substance of the case or the relief that is granted constitutes provisional, including protective, measures within the meaning of Article 31.

2.225. However, the impact of the EC declaration under Article 55 is quite limited. First, it does not apply at all to cases where the debtor is not domiciled in the territory of an EC (now EU) Member State. Secondly, Article 31 of Brussels I is not engaged where the court asked to grant provisional measures is also the court having jurisdiction over the substance of the case. Thirdly, it leaves courts of a Member State free to apply that State’s own rules governing provisional measures independently of Article 31 and leaves courts of other Member States free to apply rules of recognition and enforcement available under their national law independently of Articles 33 and 38. So the overall effect of the EC declaration in relation to Articles 13 and 43 of the Convention is that a court of a Member State is free to make an order granting advance relief which falls outside the scope of Article 31 but unless the court also has jurisdiction as to the substance of the case such an order will qualify for recognition and enforcement in another Member State only to the extent that such State’s national law so provides independently of Articles 33 and 38 of Brussels I. Finally, nothing prevents a Member State from amending its national law to reflect the terms of Article 13 of the Convention and Article VIII of the Luxembourg Protocol, as has been done.

Remedies for breach of Convention obligations

2.226. The creditor’s Convention remedies in the event of default by the debtor in performance of its obligations under the agreement have been discussed earlier (paragraphs 2.77 et seq.). A quite separate question is the treatment of default in performance of the provisions of the Convention itself. Leaving on one side errors and omissions by the Registrar of the International

32 This is one of the rulings of the European Court of Justice in Case C-99/96, Hans-Hermann Mietz v. Intership Yachting Sneek BV [1999] ECR I-2277, paragraphs 55-56.
Registry (see paragraph 2.121) there are two groups of cases to be considered. The first relates to a breach of a Convention provision by a party to an agreement,\textsuperscript{33} the second to a breach by a Contracting State.

\textit{Breach of Convention by a party to an agreement}

2.227. Examples of breach of a Convention provision by a party to an agreement are the following:

\begin{enumerate}
\item A chargee’s failure to exercise Convention remedies in a commercially reasonable manner as required by Article 8(3).
\item A chargee’s failure to give prior notice in writing to interested parties of a proposed sale or lease as required by Article 8(4).
\item A chargee’s failure to distribute a surplus resulting from sale in accordance with Article 8(6).
\item Registration or discharge of registration of an international interest without the consent of the party whose consent is required under Article 20 or when the interest was never validly created or discharged.
\item Failure of the holder of an international interest or prospective international interest to procure discharge of a registration as required by Article 25.
\item Interference with the quiet possession of a debtor by a chargee subordinated to the debtor under Article 29(4)(b).
\item Breach by the debtor of its duty to make payment to an assignee as required by Article 33.
\end{enumerate}

Apart from Article 44, which provides for orders against the Registrar in cases within (5) above (without, however, addressing the position of the defaulting party), the Convention does not itself prescribe the remedies for breaches of

\textsuperscript{33} This is convenient shorthand to denote breach of national law implementing the Convention. Parties to an agreement are not, of course, parties to the Convention and cannot commit a breach of the Convention as such.
the above provisions. In a Contracting State these will simply constitute breaches of that State’s law and will attract whatever remedies that law provides, which could include payment of an amount due, damages for loss suffered through the breach, a restitutionary remedy, specific performance or injunctive relief.

**Breach of Convention by a Contracting State**

2.228. More difficult is the case where the breach is by a Contracting State. Once the Convention is in force for a Contracting State it is, of course, obliged to ensure that its domestic law gives effect to all the provisions of the Convention other than those which were the subject of a permitted opt-out by declaration or were dependent on an opt-in by declaration which the Contracting State decided not to make. Apart from this there is only one provision of the Convention which imposes obligations on a Contracting State, namely Article 13, which requires a Contracting State, except as otherwise provided by Article 55, to ensure that a creditor who adduces evidence of default by the debtor is granted speedy judicial relief pending final determination of the creditor’s claim. Several other important obligations are imposed on Contracting States under the Luxembourg Protocol, namely the provisions for co-operation with the creditor in exercising its remedies of export and physical transfer (Articles VII(5), VIII(6)), timely advance relief (Article VIII(2)), timely relief on insolvency (Article IX, Alternative A) and insolvency assistance (Article X). While this is a developing field of law, the traditional view has been that a private party cannot normally assert treaty rights direct against a Contracting State unless the treaty so provides but must invoke diplomatic protection, that is, seek to have the Contracting State of which it is a national pursue a remedy on its behalf. Since the above-mentioned provisions do not empower a creditor affected by the breach to assert rights directly against the defaulting Contracting State, the creditor must invoke the aid of the State of which it is a national to take the issue up on its behalf. That State is not under an obligation to do so, since the exercise of diplomatic protection is the prerogative of the State, not the person on whose behalf it is acting. In practice complaints by a national are pursued through informal channels.

34 As to the various duties imposed on a Contracting State by the Luxembourg Protocol, see paragraph 3.91.
Relationship with other Conventions

2.229. Article 45 bis\(^{35}\) provides that the Convention is to prevail over the UN Convention on the Assignment of Receivables in International Trade. This simply makes explicit what was implicit in Article 38(1) of the UN Convention. The main potential cause of conflict lies in Article 36 of the present Convention, relating to the priority of assignments of associated rights. However, as noted above, Article 36 is limited in scope and in relation to associated rights the two Conventions adopt broadly similar concepts. The relationship between the Convention and the 1988 UNIDROIT Convention on International Financial Leasing (“the Leasing Convention”) is left to the Protocol\(^{36}\).

Final provisions

2.230. Chapter XIV of the Convention sets out final provisions. Some of these are standard, others reflect special elements and objectives of the Convention, including the two-instrument structure and the prospect of future Protocols. The latter are briefly examined in the following paragraphs.

Regional Economic Integration Organisations

2.231. The Convention is open for signature, acceptance, approval or accession, not only by sovereign States (whether or not they were negotiating States, that is, States involved in the negotiation and adoption of the Convention) but also by a Regional Economic Integration Organisation (“REIO”) which is constituted by sovereign States and has competence over certain matters governed by the Convention (Article 48). A particular example is the European Community, now the European Union, which was involved in negotiations over the text at the diplomatic Conference in relation to the provisions on which the Community claims exclusive external competence, notably jurisdiction under the Brussels Regulation on jurisdiction and

\(^{35}\) Inserted subsequent to the Diplomatic Conference pursuant to an Annex approved by the Conference. The Annex does not form part of the published documents, its effect being exhausted after the insertion was made.

\(^{36}\) See Article XIX of the Luxembourg Protocol superseding the Leasing Convention as regards railway rolling stock.
judgments (“Brussels I” – see paragraphs 2.224-2.225, 2.233, 4.286 and insolvency under the Insolvency Regulation (see paragraphs 4.10, 4.310). Under Article 48 of the Convention any Regional International Economic Organisation has to make a declaration at the time of signature specifying the matters governed by the Convention in respect of which competence has been transferred to that Organisation.

2.232. Where the number of States is relevant in the Convention, the Regional Economic Integration Organization does not count as a Contracting State in addition to its Member States which are Contracting States. So the European Union, though in general treated as if it were a Contracting State or State Party, is not included in any count of the number of ratifications or in the computation of the twenty-five per cent of States Parties entitled to request a Review Conference under Article 61. Similar provisions are contained in Article XXXIII of the Luxembourg Protocol.

2.233. The only REIO that has so far taken advantage of Article 48 is the European Community, which signed the Convention and Aircraft Protocol on 28 April 2009 pursuant to a Council Decision of 6 April 2009 (2009/370/EC) and the Luxembourg Protocol on 10 December 2009 pursuant to a Council Decision of 30 November 2009 (2009/940/EC). For the purposes of the Convention and Aircraft Protocol the EC asserted competence over the provisions relating to choice of law (governed within the EC by the Rome Regulation, otherwise known as Rome I), jurisdiction (governed within the EC by the Brussels Regulation, otherwise known as Brussels I) and the insolvency provisions of the Aircraft Protocol (said to be subject to the Insolvency Regulation37). A similar approach is likely to be taken to the adoption of the Rail Protocol by the European Union.38

37 This was controversial but Member States agreed not to contest it on the condition that it was made clear that they retained their competence over substantive insolvency law.

38 See the European Commission's Proposal for a Council Decision on the approval, on behalf of the European Union, of the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, adopted in Luxembourg on 23 February 2007, Brussels 11.6.2013, COM(2013) 349 final. This adopts the same approach as the Decision on approval of the Aircraft Protocol, but additionally reference is made to the need to avoid duplication of International Registry data with National Vehicle Registers designed to establish a common EU numbering system.
2.234. The effect of the European Union’s accession to the Luxembourg Protocol would be to allow Member States of the European Union to ratify the Convention and Luxembourg Protocol not to commit them to do so, since most of the provisions of these instruments fall outside the competence of the EU. The Annex to the proposed Decision would preclude Member States other than Denmark from applying the Convention and Protocol otherwise than in accordance with EC/EU Regulations. However, that is a matter internal to the EU and has no effect at the international plane, so that UNIDROIT as Depositary is obliged to accept instruments deposited in conformity with the Convention and Protocol even if they are in a form incompatible with the Council’s Decision. In such a case it is for the Commission to take steps to secure compliance by the Member States concerned. The declaration deposited by the EU under the Convention would state that the EU would not make any of the declarations permitted under the Convention except for a declaration under Article 55, as to which see paragraphs 2.90 et seq. Accordingly the EU would make no declaration under Articles 39 (priority of non-registrable non-consensual rights or interests), 40 (registrable non-consensual rights or interests), 50 (internal transactions), 52 (territorial units), 53 (determination of courts), 54 (declarations concerning remedies), 57 (subsequent declarations), 58 (withdrawal of declarations) and 60 (transitional provisions). However, this would not affect the ability of EU Member States to make declarations under the above Articles, since all of these deal with matters outside the competence of the EU, which in relation to the Convention is confined to questions of jurisdiction. A separate EU declaration would preclude Member States from making a declaration under Article IX of the Luxembourg Protocol (creditor’s remedies on insolvency) but would provide that the Member States keep their competence concerning the rules of substantive law as regards insolvency, so that it would be open to a Member States to introduce domestic legislation adopting provisions to the same effect as Article IX and one of Alternatives A, B and C. Neither declaration would apply to territories of Member States in which the Treaty establishing what is now the European EU does not apply, for example, the Channel Islands.

2.235. Ratification by the EC/EU on matters within its competence neither binds nor entitles Member States to ratify as to those matters only, for under international law a State cannot ratify part only of a treaty except so far as the treaty itself so provides.
Entry into force; controlling effect of Protocol

2.236. The Convention itself requires only three ratifications. Article 49 provides for entry 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 but only, as regards a category of objects to which a Protocol applies, as from the time of entry into force of the Protocol. The third instrument of ratification was deposited by Nigeria on 16 December 2003, so that the Convention would have come into force on 1 April 2004 had a Protocol been in force at that time. However, this was not the case. Accordingly 1 April 2004 has no significance for the purpose of entry into force of the Convention.

2.237. There are a few provisions that are not object-related. They include Article 47 (signature, ratification, etc.), Article 48 (Regional Economic Integration Organisations), Article 51 (arrangements for extension to future Protocols), Article 52 (territorial units), Article 59 (denunciations), and Article 62 (Depositary and its functions). These final clauses came into force on 16 November 2001 pursuant to Article 24(4) of the Vienna Convention. The rest of the Convention entered into force, though only as regards aircraft objects, on 1 March 2006, the date of entry into force of the Aircraft Protocol (which required eight ratifications), and has effect subject to the terms of that Protocol. So the provisions of Article 49 requiring three ratifications serve only to make it clear that the Convention itself must be ratified, not merely the Protocol, a point emphasised by Article XXI(5) of the Luxembourg Protocol, which provides that a State may not become a party to the Protocol without becoming a party to the Convention. On the other hand it is open to a State to accede to the Convention without acceding to any Protocol, as has been done by several States (see paragraph 2.12), though as stated above the Convention will not apply as regards any category of object until the coming into force of the Protocol relating to that category. Only the Aircraft Protocol is currently in force. The Luxembourg Protocol as provided by Article XXIII, requires four ratifications and deposit of a certificate with the Depositary that the International Registry is fully operational. Only on such entry into force will the Convention object-related provisions apply to railway rolling stock.
Instruments of ratification, accession, etc.

2.238. To assist States intending to ratify or accede to the Convention and Luxembourg Protocol UNIDROIT is preparing a set of model instruments that can be used for that purpose.\(^3^9\) It should be noted that accession as to part of the Convention and Protocol is available only to an REIO, which is restricted to ratification of matters within its competence. States must ratify the instruments in their entirety except so far as they are permitted to make opt-out declarations.

Internal transactions

2.239. Though in principle the Convention applies even where all the elements of a transaction are located in one jurisdiction, Article 50 permits a Contracting State, when adopting the Protocol, to make a declaration excluding the application of the Convention to a transaction which is internal in relation to that State, that is, where the centre of the main interests of all parties to the transaction is situated, and the relevant object located, in that State at the time of conclusion of the transaction and the national interest created by the transaction has been registered in a national registry in the declaring State (Article 1(n), (r)). Article XXIX(2) of the Luxembourg Protocol adds a second kind of an internal transaction in relation to railway rolling stock, namely a transaction of a type listed in Article 2(2)(a) to (c) of the Convention where the relevant railway rolling stock is only capable, in its normal course of use, of being operated on a single railway system within the Contracting State concerned because of track gauge or other elements of the design of such railway rolling stock.

2.240. The effect of this exclusion of internal transactions is limited. In general terms, Article 50 disapplies most of the default provisions in Chapter III, but not the basic system for perfecting and prioritising interests. The default provisions in Articles 8(4) and 9(1) restricting sale of an object or vesting of ownership of it in the creditor apply to the national interest created by the internal transaction. The national interest may be protected by notice in

\(^3^9\) This has already been done for the Aircraft Protocol. See Model Instruments of Ratification, Acceptance, Approval and Accession for the Assistance of States in the Implementation of the Cape Town Convention and Luxembourg Protocol. See also n. 40 below.
the International Registry, and is then given the same priority as a registered international interest. The priority of an assignment of a national interest notice of which has been entered in the International Registry is controlled by the rules governing the priority of an assignment of a registered international interest. Finally, in the case of a Contracting State which has territorial units in which different systems of law are applicable and that State has made a declaration under Article 52 which has the effect of excluding the application of the Convention to one or more of those territorial units, a transaction will not be an internal transaction unless the centre of the main interests of all the parties is situated and the object is located in the same territorial unit and the territorial unit is one to which the Convention applies.

**Procedure for additional Protocols**

2.241. Protocols on railway rolling stock and space assets are specifically provided for in the Convention (Article 2(2), (3)). Article 51 provides a procedure for the preparation of other Protocols and their adoption at Diplomatic Conferences. As stated above, the Luxembourg Protocol was adopted in Luxembourg in February 2007 and the Space Protocol in Berlin in March 2012.

**Territorial units**

2.242. Article 52 contains provisions for a Contracting State which has territorial units in which different systems of law are applicable in relation to the matters dealt with in the Convention. The Contracting State may declare that the Convention is to extend to all its territorial units or only to one or more of them and may at any time modify its declaration by a later declaration (Article 52(1)). Where a Contracting State extends the Convention to one or more of its territorial units, declarations permitted under the Convention may be made in respect of each such territorial unit and may differ one from the other (Article 52(4)). If a Contracting State has not made such a declaration the Convention applies to all territorial units of that State (Article 52(3)). Provisions of this kind are sometimes referred to as “federal clauses” but the description is inaccurate in that such clauses are not confined to federal States but apply equally to States in which there is only a single sovereign legislature but there are one or more territorial units each possessing its own legal system.
To the extent that the law is the same in all territorial units because it is a uniform law or is federal law, paragraph 1 does not apply and the law will continue to operate throughout the State notwithstanding any declaration under paragraph 1 based on differences in the laws of territorial units. In relation to federal law that point was made explicit in the Space Protocol through the addition of a final paragraph to the corresponding provisions in that Protocol. The application of Articles 3 and 4 to a debtor situated or an object located in a Contracting State which has made a declaration applying the Convention only to certain designated territorial units has been discussed earlier (see paragraph 2.240). Article 52(5)(c), dealing with references to the administrative authorities in a Contracting State, was copied in error from Article XXIX(5) of the Aircraft Protocol – there are no such references in the Convention – and should be disregarded.

Transitional provisions

Preservation of priority of pre-existing right or interest

2.243. Article 60 contains important, if complex, transitional provisions. The general principle embodied in Article 60 is that unless otherwise declared by a Contracting State at any time a pre-existing right or interest is not affected by the Convention and retains the priority it enjoyed under the applicable law before the effective date of the Convention (Article 60(1)). The effect of Article 60(1) is that, subject to any declaration under Article 60(3), the holder of a pre-existing right or interest preserves its pre-Convention priority without the need to register under the Convention, even if the right or interest is of a registrable category and even if it would ordinarily be overridden by a previously registered interest under Article 29(1) of the Convention. That priority will, of course, depend on fulfilment of any perfection requirements of the applicable law, e.g. registration in a national registry. Article 60(1) is not confined to a priority issue between a pre-existing right or interest, it applies equally to a priority issue between two pre-existing rights or interests, which will likewise be governed by the applicable law, not by the Convention. Article 60(1) does not confine the concept of pre-existing interest to one arising under the law of a State that has become a Contracting State; even a pre-existing interest arising under the law of a non-Contracting State falls within Article 60(1) if the debtor was situated in a Contracting State at the time of the
agreement creating or providing for the international interest. If the position were otherwise an interest arising under the law of a non-Contracting State would not initially qualify as a pre-existing right or interest and would thus be subordinate to a subsequently registered international interest, which could not have been the intended outcome. However, the priority of a pre-existing right or interest over a registered international interest must, to make policy sense, be confined to a right or interest created or arising before the registration of the international interest, for otherwise a registered international interest initially enjoying priority in the absence of any competing pre-existing right or interest would find that priority displaced by a subsequently created pre-existing right or interest the holder of which could readily ascertain the existence of the prior international interest by an International Registry search. The purpose of Article 60(1) is to enable the holder of a pre-existing right or interest to retain its priority under the applicable law over subsequently registered international interests without having to re-perfect the pre-existing right or interest by registration in the International Registry. Conversely, the priority given to a registered international interest over an unregistered interest under Article 29(1) must, where the latter is a pre-existing right or interest, be read as confined to a pre-existing right or interest created or arising after registration of the international interest. In short, Article 60(1) must be interpreted in such a way as to ensure the stability of transactions and to avoid a change in priorities resulting either from a non-Contracting State becoming a Contracting State or from a pre-existing right or interest arising after registration of an international interest.

“Pre-existing right or interest”

2.244. A pre-existing right or interest is defined by Article 1(v) as a right or interest of any kind in or over an object created or arising before the effective date of the Convention as defined by Article 60(2)(a). So Article 60(1) preserves not only the priority of a creditor under a security agreement, title reservation agreement or leasing agreement but also the priority of the holder of other rights in or over the object, including non-consensual rights or interests. It is, however, limited to a right which is in or over an object and thus does not, for example, cover a preferential claim for wages or taxes having priority over a security interest. A Contracting State wishing to protect such a claim should make a declaration under Article 39, which could be extended to
give priority even over an international interest registered prior to that State’s ratification (Article 39(4)).

**Existing priority under the applicable law**

2.245. What is preserved by Article 60(1) is the existing priority of a right or interest under the applicable law. What is the meaning of “applicable law” in Article 60(1)? There are three possibilities: the law of the declaring State; the law determined by the conflict of laws rules of that State; and the law applicable under the *lex fori*. The first of this meanings must be rejected, for had it been intended Article 60(1) would have referred to “the law of that State” rather than the applicable law. Similarly, the second meaning must be rejected, for it is everywhere the case that the conflict rules of the forum are to be applied, so that clear language would be needed to displace this. Accordingly the reference to “applicable law” must be taken to mean the applicable law as determined by the conflict rules of the forum, that is, the applicable domestic law (see Article 5(3)). So in proceedings in a Contracting State which has not made a declaration, a pre-existing right or interest retains its priority under the applicable law as determined by the conflict rules of that State. The usual conflicts rule is that the applicable law is the law of the place where the object is situated at the time of the agreement (*lex situs* or *lex rei sitae*).

Since the applicable law in a non-Contracting State will have no concept of an international interest, the priority enjoyed by the pre-existing right or interest arising in a non-Contracting State is over the equivalent of an international right or interest. Of course, the conditions of priority prescribed by the applicable law, for example, registration in a national registry or other perfection requirements, must have been fulfilled. In other words, the mere fact that an interest is a pre-existing right or interest does not suffice to preserve its priority. It is necessary that any steps required by the applicable law to give that priority have been taken.

**“Effective date of this Convention”**

2.246. By “effective date of this Convention” is meant in relation to a debtor the time when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later (Article 60(2)(a)). A State becomes a Contracting State to a convention by consenting to be bound by the convention whether or not it has entered into
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force (Vienna Convention on the Law of Treaties 1969, Article 2(1)(f)). So the State in which the debtor is situated could become a Contracting State either before or after the Convention enters into force and it is the later of the two dates that is the effective date. It follows that a right or interest will be a pre-existing right or interest where (a) the debtor was not situated in a Contracting State at the time of the agreement, or (b) the debtor was situated in a Contracting State at the time of the agreement but the Convention had not entered into force as regards the relevant object. The Luxembourg Protocol has not entered into force in any State.

Situation of debtor

2.247. Under Article 60(2)(b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence. In contrast to Article 4, which this provision tracks, Article 60(2)(b) requires a single test of the debtor’s situation, adopting a cascade approach, so that the debtor’s situation is determined by the first test applicable, beginning with the debtor’s centre of administration if it has one. Article 4 has no relevance to the operation of Article 60.

Declaration under Article 60(3)

2.248. A Contracting State may make a declaration specifying a date not less than three years after the declaration when the Convention and Protocol will become applicable to a pre-existing right or interest for the purpose of determining priority, including the protection of any existing priority, where the right or interest arises under an agreement made at a time when the debtor was situated in a Contracting State (Article 60(3)). So the holder of a pre-existing interest affected by a declaration will have at least three years in which to protect its pre-Convention priority by registration in the International Registry. The purpose of these provisions is to avoid a situation in which post-Convention rights or interests are indefinitely subordinated to pre-Convention rights or interests the existence of which may not be readily ascertainable, while at the same time allowing creditors holding pre-Convention rights or interests a reasonable time to perfect or re-perfect their rights or interests by registering them in the International Registry so as to preserve their priority. Registration
in such a case is not itself a priority point for a pre-existing right or interest, it is simply a condition of preserving its existing priority under the applicable law over international interests, whether such interests are registered before or after the creditor’s registration under the declaration. The declaration may specify the extent and manner of application of the Convention and Protocol. The ambit of this rather open-ended discretion given to the declaring State is unclear. The word “extent” shows that the Contracting State could clearly limit the kinds of agreement to which the Convention and Protocol are to be applied, for example, to title reservation and leasing agreements, excluding security agreements, or vice versa. Less clear is the meaning of the phrase “in the manner”. This would seem to refer to such matters as the machinery by which registration is to be effected (for example, through a designated entry point), while not empowering the declaring State to dispense with registration altogether, which would undermine the whole purpose of Article 60(3).

“Arising under an agreement”

2.249. Although the definition of “pre-existing right or interest” covers any right or interest, not necessarily the equivalent of an international interest, Article 60(3) confines the scope of the declaration to pre-existing rights or interests “arising under an agreement”, that is, under a security agreement, a title reservation agreement or a leasing agreement. Other rights or interests, including non-consensual rights or interests, retain their priority under the applicable law without the need for registration under the Convention, and a declaration which purports to cover them will to that extent be ineffective. A declaration under Article 60(3) should expressly provide that as against prior interests the holder of the pre-existing right or interest retains its pre-Convention priority. No State has yet made a declaration under Article 60(3).

2.250. Where pre-existing rights arising under an agreement have been assigned, the assignee steps into the shoes of the assignor and receives the same protection as would have been received by its assignor; the assignment itself does not create any pre-existing right or interest.

Other questions of interpretation of Article 60(3)

2.251. Article 60(3) raises five other questions of interpretation:
(1) What nexus, if any, has to exist between the Contracting State making the declaration and the debtor, the creditor, the transaction or the applicable law? See paragraph 2.252.

(2) With reference to the phrase “protection of any existing priority”, is this confined to the protection of any existing priority given by the law of the declaring State? And what is the relevant date? See paragraph 2.253.

(3) What interpretation is to be given to the phrase “made at a time when the debtor is situated in a State referred to in sub-paragraph (b) of the preceding paragraph”? See paragraph 2.254.

(4) What is the date on which a declaration under Article 60(3) becomes effective? See paragraph 2.255.

(5) Which State is entitled to make a declaration? See paragraph 2.256.

2.252. As to the first of these five questions, the emphasis on the situation of the debtor in Article 60(2)(a), (b) and (3) shows that the only relevant connecting factor is the debtor’s situation at the time of the agreement, so that a Contracting State’s declarations can be made solely in relation to a pre-existing right or interest arising under an agreement concluded while the debtor was situated in the declaring State. It is necessary to read this limitation into Article 60(3) in order to make policy sense of it and to ensure consistency with declarations by other States. Other factors, such as the situation of the creditor or the State whose law is applicable to the agreement, are irrelevant to a Contracting State’s right to make a declaration under Article 60(3). Equally irrelevant is the location of the object. As to the meaning of the reference to the situation of the debtor, see paragraph 2.254.

2.253. The second question concerns the phrase “protection of any existing priority”. This can only mean an existing priority given by the law of the declaring State if this is the applicable law. Whether that State’s law governs the priority issue depends on the applicable law under the rules of private international law of the forum State. The law of the declaring State is that in force at the time of the declaration.
2.254. The third question is the significance of the phrase “made at a time when the debtor was situated in a State referred to in sub-paragraph (b)”. Construed literally it would be hard to make sense of this phrase, since there will never be a time when the debtor is not so situated. Here again, however, the phrase must be interpreted in such a way as to make policy sense and must be read in conjunction with the reference to the definition of “effective date of this Convention” in Article 60(2)(a). Properly interpreted this phrase means that the Convention and the relevant Protocol will apply to a pre-existing right or interest created by a debtor only if the debtor is situated in the declaring State (within the meaning in Article 60(2)(b)) at the time the interest was created. The debtor’s situation at the time the declaration becomes effective is irrelevant. It should be noted that Article 4 is not relevant to the determination of the debtor’s situation for the purposes of Article 60, this being separately defined by Article 60(2)(b).

2.255. The fourth question, namely the time at which a declaration under Article 60 becomes effective, is not expressly answered by the Convention but is resolved by reference to international treaty practice and by analogy to Articles 57 and 58, as described in paragraph 4.338.

2.256. The last question concerns the State which is entitled to make the declaration. The Convention is silent on this point but the emphasis on the situation of the debtor in Article 60(2)(a), (b) and (3) shows that the only relevant connecting factor is the debtor’s situation at the time of the agreement, so that a Contracting State’s declarations can be made solely in relation to a pre-existing right or interest arising under an agreement concluded while the debtor was situated in the declaring State. It is necessary to read this limitation into Article 60(3) in order to make policy sense of it and to avoid the possibility of conflicting declarations by different Contracting States. It is not without significance that this is the same connecting factor as that which governs the application of the whole Convention under Article 3. An apparently credible alternative is the State whose law is the applicable law, but that leads to uncertainty because determination of the applicable law, being a matter exclusively for the lex fori, would depend on where the proceedings are brought. It may be noted that the effect of a declaration under Article 60(3) is not to substitute the law of the declaring State for the applicable law, if different, but simply to impose a requirement of registration within the period (being not less than three years) permitted by the declaration. Equally irrelevant
to a Contracting State’s right to make a declaration under Article 60(3) are the situation of the creditor and the location of the object.

Declaration limited to priority issues

2.257. A declaration under Article 60 is limited to priority issues, so that in relation to a pre-existing interest a Contracting State may not apply the provisions of the Convention relating to relations between the debtor and the creditor or the provisions concerning insolvency. Of course, there is nothing to prevent a debtor and creditor from voluntarily replacing their agreement with a new agreement made after the effective date of the Convention, to which the Convention will then apply, though the creditor will then lose its pre-Convention priority as against previously registered interests. Unless covered by a declaration under Article 60 an interest remains a pre-existing interest, and therefore outside the Convention, even if assigned after the effective date, for the assignee succeeds to the position previously held by the assignor. It follows that the assignment itself is not covered by the Convention and its registration has no Convention effects. The same is true of the acquisition of a pre-existing interest by subrogation after the effective date. The position is otherwise in the case of a transaction by which the agreement constituting the pre-existing right or interest is terminated and replaced by a new agreement, because this creates a new international interest (see paragraphs 2.40 et seq.).

Registration and its effect

2.258. Registration of a pre-existing right or interest under an agreement within the period specified in a Contracting State’s declaration does not convert the right or interest into an international interest, nor does the registration constitute a priority point, it is merely a step necessary to preserve the priority of the pre-existing right or interest under the applicable law, so that thereafter third parties dealing with the object are alerted to the existence of the pre-existing right or interest. So pre-existing rights or interests constitute a distinct registrable category and are treated as such by the International Registry for aircraft objects even though they do not feature in the list of registrable items in Article 16(1). While failure to register the right or interest under Article 60(3) risks its being subordinated to a registered interest, the priority of a pre-existing right or interest which is registered under the Convention is not governed by Article 29(1) but remains a matter for the
applicable law. Similarly, where two pre-existing rights or interests are registered following a declaration under Article 60(3) their priority is determined not by the order of registration but by the applicable law. Given the irrelevance of the time of registration, so long as made within the period allowed by the declaration, there would seem to be no objection to a creditor’s registering its consensual interest before any declaration has been made by a Contracting State under Article 60(3), with a view to the registration taking effect under Article 60(3) upon the making of the declaration.

System of declarations

2.259. Certain provisions of the Convention are dependent on policy decisions by States. For these provisions the Convention provides a system of declarations allowing Contracting States to make choices. UNIDROIT as Depositary is required to inform all Contracting States, the Supervisory Authority and the Registrar, of each declaration and amendment or withdrawal of a declaration under the Convention or Protocol.

Because the Convention comes into force only as regards a category of object for which the Protocol is in force and all except one of the declarations for which the Convention provides relate to objects, such declarations, except in that one case, can be made only at or after ratification of the Protocol and cannot be accepted by the Depositary if made without the Protocol having been ratified. The requirement of ratification of the Protocol is expressly stated for all such declarations except those under Articles 39 and 40, where it is implicit because the declaration must be deposited with the Depositary of the Protocol, and Article 60, where it follows from Article 60(3) that the Protocol has to have been ratified before the declaration can be made. The sole exception to the requirement of ratification of the Protocol is the declaration required by Article 48 of the Convention to be made by a Regional Economic Integration

40 A declarations matrix is contained in Appendix X showing all declarations required or permitted under the Convention and Luxembourg Protocol and identifying which declarations are opt-in and which opt-out. The UNIDROIT Secretariat has published a guide to the declarations system, The system of declarations under the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Railway Rolling Stock: an explanatory memorandum for the assistance of States and Regional Economic Integration Organisations in the completing of declarations, available from the UNIDROIT website: www.unidroit.org.

41 Convention, Article 62(2)(a)(iii) and (iv), (c); Aircraft Protocol, Article XXXVII(2)(a)(iii) and (iv), (c); Luxembourg Protocol, Article XXXIV(2)(a)(iv) and (v), (c).
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Organisation at the time of ratification of the Convention as to the matters in respect of which competence has been transferred to it by its Member States.

Declarations by the EC/EU and Member States

2.260. Member States of the European Community (now the European Union) are not permitted by EC/EU law to make declarations on matters within the competence of the EC/EU.\(^{42}\) Instead, the EC/EU makes any such declarations on behalf of itself and Member States, and as a matter of EU law Member States are required to apply provisions covered by the declarations in the manner specified in the decision of the Council on the conditions of accession to the Convention. For example, the Council decision of 6 April 2009 on the accession of the EC to the Cape Town Convention stipulated that where the debtor is domiciled in a Member State of the EC, Member States bound by Council Regulation (EC) No 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters (“Brussels I”) would apply Articles 13 and 43 of the Convention on interim relief only in accordance with Article 31 of Brussels I as interpreted by the European Court of Justice in the context of Article 24 of Brussels I. Accordingly it would be a breach of what is now EU law for Member States to apply Articles 13 and 43 otherwise than in accordance with Article 31 of Brussels I. However, this is a matter internal to the EU and has no application on the international plane. Accordingly UNIDROIT as Depositary is obliged to accept instruments of ratification which accord with the Cape Town Convention and any relevant Protocol even if they do not conform to the above Council decision.

2.261. It is proposed\(^{43}\) that the EU make no declarations on matters outside its competence, such as declarations under Articles 39, 40, 50, 52, 53, 54, 57, 58 and 60. Members States would be free to make declarations under those provisions if they so wish except that a declaration under Article 54(2) is mandatory. By contrast, where the EC/EU has decided to make no declaration on a matter within its competence Member States are precluded from making any declaration themselves on such matters.

\(^{42}\) Denmark enjoys certain exemptions by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community.

\(^{43}\) See above, n. 38.
Types of declaration

2.262. Declarations under the Convention provisions are of five kinds: opt-in declarations, opt-out declarations, declarations relating to a Contracting State’s own laws, mandatory declarations and other declarations.

Opt-in declarations

2.263. These are declarations which a Contracting State is required to make if a particular provision of the Convention, as applied by a Protocol, is to have effect within that State. There is only one such provision, namely:

Article 60 Application of Convention priority rules to pre-existing rights or interests.

A declaration under Article 60(3), which a Contracting State may make at any time, must specify a date, not earlier than three years after the date on which the declaration becomes effective, when the Convention and Protocol will become applicable to pre-existing rights and interests. A declaration which fails to specify a date or specifies a date earlier than that required by Article 60(3) will not be accepted by the Depositary. The word “may” in the first line of Article 60(3) denotes that the Contracting State need not make a declaration, but if it chooses to do so it must observe the three-year minimum period requirement.

Opt-out declarations

2.264. These are declarations which a Contracting State is required to make in order to exclude the application of a particular Convention provision, as applied by a Protocol, in that State or the availability of extra-judicial relief. Opt-out declarations are required to exclude:

<table>
<thead>
<tr>
<th>Article</th>
<th>Provision</th>
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<tr>
<td>8(1)(b)</td>
<td>Power to lease a charged object while in the declaring State’s territory (Article 54(1))</td>
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<tr>
<td>Articles 8(1)</td>
<td>Extra-judicial remedies (Article 54(2), 9(1), 10) (but the making of the declaration is mandatory)</td>
</tr>
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<td>13</td>
<td>Relief pending final determination (Article 55)</td>
</tr>
<tr>
<td>43</td>
<td>Jurisdiction under Article 13 (Article 55)</td>
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Article 50 Application of the Convention to internal transactions (Article 56)

Declarations relating to a Contracting State’s own laws

2.265. These are the following:

- Article 39 Non-consensual rights and interests having priority without registration (Article 56)
- Article 40 Registrable non-consensual rights or interests (Article 56)
- Article 53 Declaration of relevant court (Article 56).

Mandatory declaration to be deposited at time of ratification, adoption, etc.

2.266. There are two such declarations. The first is the declaration a Regional Economic Integration Organisation or a Contracting State is required to make in every case under Article 48(2) relating to the transfer of competence to a Regional Economic Integration Organisation. The declaration must be made at the time of ratification or adoption of the Convention in order for its instrument of ratification or adoption to be accepted. Such a declaration has been made by the European Community. The second is the declaration under Article 54(2) as to whether remedies may be exercised only with leave of the court, but such a declaration is required to be made at the time of ratification of the Protocol and as a condition of acceptance of the instrument of ratification of the Protocol and cannot be made before or after that time.

2.267. Where a State deposits an instrument of ratification of the Convention but not of the Protocol and subsequently deposits an instrument of ratification of the Protocol together with a declaration under Article 54(2), then if prior to the deposit of the declaration the Convention has entered into force for that State the declaration is a subsequent declaration for the purpose of Article 57 and takes effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary or such longer period as is specified in the declaration (Article 57(2)); and since the Protocol cannot take effect until the declaration becomes effective this means that the shorter period that would normally apply under Article 49(2) is not applicable.
Other declarations

2.268. There is one declaration not falling within any of the above categories, namely:

Article 52 Application of the Convention to one or more territorial units (Article 56).

Effect of declaration system

2.269. The effect of the declaration system is that a Contracting State must make a declaration if:

(a) it wishes to adopt the opt-in provisions of Article 60;
(b) it wishes to use one of the opt-out provisions to exclude a provision, wholly or partly, i.e. under Article 8(1)(b) (as to leases), 9(1), 10, 13 or 43;
(c) it wishes to make a declaration related to its own laws, i.e. under Articles 39, 40 or 53;
(d) the declaration is mandatory, i.e. under Articles 48(2) and 54(2);
(e) the Contracting State wishes to apply the Convention otherwise than to all its territorial units pursuant to Article 52; or
(f) it wishes to define the relevant court under Article 53.

2.270. In all other cases the Contracting State need take no action. All declarations other than a mandatory declaration by a Regional Economic Integration Organisation under Article 48(2) or a declaration under Article 60 may be modified or replaced by subsequent declarations under Article 57 or withdrawn under Article 58. As regards Article 48(2), changes in the distribution of competence are dealt with not by deposit of a new declaration but simply by the provision of information to the Depositary under that Article. Since Article 54(2) is also mandatory there must at all times be a declaration in force under that Article. Accordingly it cannot be withdrawn unless the instrument of withdrawal is accompanied by a subsequent declaration under Article 54(2) taking effect at the same time as the withdrawal. A mandatory declaration under Article 48(2) and a declaration under Article 60
may be made only at the time of ratification, etc., of the Convention, changes to the competence of the Regional Economic Integration Organisation as embodied in a declaration under Article 48(2) to be promptly notified to the Depositary. Even where a Convention provision is expressed to permit declarations to be made at the time of ratification, they need not be made at that time but may be made subsequently under Article 57 and thereafter replaced by a new declaration under that Article or withdrawn under Article 58. The effect of Article 57, therefore, is that such declarations may be made at any time.

2.271. There is no requirement for a declaration made by one State to be accepted by other States in order to be effective (see paragraph 2.272). A Contracting State may make a subsequent declaration, other than one authorised under Article 60, but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration (Article 57) and the same applies to the withdrawal of declarations (Article 58) and the denunciation of the Protocol (Article 59). Declarations made under the Convention are deemed to have also been made under the Protocol (Article XXIX(1)), thus avoiding the need to lodge fresh declarations under the Protocol in respect of matters covered by those already made under the Convention.

2.272. These declarations are to be distinguished from reservations, which the Convention does not permit. A reservation is a unilateral declaration by a State purporting to exclude or modify the legal effect of certain provisions of a Treaty in their application to the reserving State (Article 2(1)(d) of the Vienna Convention). Unless otherwise stated in the Treaty, a reservation does not bind another State unless accepted by that State. By contrast the contents of a declaration are expressly provided for in the Cape Town Convention and a declaration does not require acceptance to bring it into force and to bind other States. The technique of declarations has been regularly employed in international conventions for many years.

2.273 Articles 39, 40 and 60(1), all of which depend on declarations by a Contracting State, provide that such declarations may be made under them at any time. Articles 50, 52, 53, 54 and 55 provide for declarations under them to be made at the time of ratification, etc. However, it is open to a Contracting State that does not do this to make a declaration subsequently under Article 57, so that the effect is the same as in the phrase “at any time”. By contrast,
declarations under Articles 48(2) and 54(2) are mandatory and must be made at the time of ratification or accession to a protocol, without which the deposit of the instrument of ratification or accession for that protocol cannot be accepted by the Depositary. It is the practice of UNIDROIT not to return the instrument of ratification in such a case unless its return is required by the depositing State but to hold it until a conforming declaration has been deposited, at which point the deposit of the instrument of ratification or accession becomes effective.

2.274. Certain opt-in declarations by a Contracting State are required to set out information relating to the declaration without which the declaration cannot be accepted by the Depositary. These are declarations under the following Articles:

Article 13 and 43 Under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied (Article 55).

Periodic reports by the Depositary

2.275. The Depositary is required by Article 61(1) to prepare reports yearly or at such other time as the circumstances may require for the States Parties as to the manner in which the international regimen established by the Convention has operated in practice, taking into account the reports of the Supervisory Authority. Similar provisions are contained in Article XXXIII(1) of the Luxembourg Protocol, which provides that such reports are to be prepared in consultation with the Supervisory Authority.

Review Conferences; amendments

2.276. Article 61(2) of the Convention provides for the holding of Review Conferences of States Parties at the request of not less than twenty-five per cent of the States Parties (Regional Economic Integration Organisations being excluded for the purpose of computing this percentage) to consider the practical operation of the Convention, judicial interpretation given to, and the application made of the terms of, the Convention and the regulations, the functioning of the international registration system and the performance of the Registrar and its oversight by the Supervisory Authority and whether any
modifications to the Convention or arrangements relating to the International Registry are desirable. Article 61(2), (3) deals with the amendment process and requires a majority of at least two-thirds of participating States. Similar provisions are contained in Article XXXIII(2) of the Luxembourg Protocol.

The Depositary and its functions

2.277. Under Article 62 of the Convention and Article XXXIV of the Luxembourg Protocol the Depositary is UNIDROIT. These provisions also lay down the functions of the Depositary, which are particularly onerous because of the elaborate system of declarations laid down by the Convention, each of which has to be examined by the Depositary and notified to all Contracting States, the Supervisory Authority and the Registrar, thus making such declarations readily searchable on the web sites of the three bodies concerned.

Modifications of the Convention

2.278. Various references have been made to the Luxembourg Protocol, which is surveyed in Part 3 and analysed article by article in Part 5. The Protocol both supplements and modifies the provisions of the Convention. The table below gathers together the main provisions of the Protocol modifying the Convention (the Convention provisions affected are shown in parentheses).

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