## 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.¹

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.

Pursuant to Article 51, which entrusts the initiative for new protocols to the Depositary, UNIDROIT, for consideration, a draft Protocol on mining, agriculture and construction equipment (“the MAC Protocol”) has been approved by the Governing Council of UNIDROIT for examination and adoption at a diplomatic Conference which is to be held in Pretoria in November 2019.

2.3. Each of the above categories of object is defined in the Protocol relating to it.

¹ For examples of the potential impact of the Convention and Aircraft Protocol on capital adequacy requirements, borrowing costs and credit exposure fees, see paragraph 3.1.
Forms of finance

2.4. The financing of aircraft objects 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 are constantly moving from one country to another, such as aircraft objects and railway rolling stock, while space assets and their components are often in transit prior to launch. 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 substantive law 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 2.71), 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. But as is made clear by Article 5, the conflict of laws should be invoked only as a last resort.

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 and credit insurance premiums to the advantage of all interested parties.

2.7 Experience with the Convention and Aircraft Protocol, which have been adopted by what is now the EU and many States, is that these instruments are achieving many of these objectives. Thus for States that ratify with the requisite
set of declarations (including strong creditor remedies in the event of the debtor’s insolvency), risks and costs are significantly reduced and aircraft receivables become marketable, with enhanced ratings by rating agencies, through the issue by a pass-through trust of enhanced equipment trust certificates (promissory notes) on the market secured by the aircraft and receivables. This corporate debt facility, previously the almost exclusive prerogative of US airline issuers, is now open to airlines elsewhere.

2.8. 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) provisions relating to 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. However, the Aircraft Protocol extends the Convention to cover outright sales and consequently disappplies Article 29(3).

2.9. The Convention is not confined to international interests; it contains rules governing a variety of interests, consensual and non-consensual, as well as associated rights, that is, rights to payment or other performance under an agreement which are secured by or associated with the object. See paragraph 2.40.

Relationship of Convention to national law

2.10. The Convention applies to the exclusion of otherwise applicable law where the two conflict. However, it is not a comprehensive code and therefore
coexists with other sources of law where no such conflict is present. 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. It does not address, and is generally not intended to affect 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 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, and Article 27 of the 1969 Vienna Convention on the Law of Treaties (the “Vienna Convention”) expressly provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. For example, the authorities of a Contracting State will not be able to assert against a registered international interest a lien or right of detention 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. Again, if a Contracting State’s criminal law makes it an offence to repossess equipment without a court order but that State has made a declaration under Article 54(2) of the Convention stating that remedies may be exercised without leave of the court then in transposing the Convention into domestic legislation the State is implicitly modifying its criminal law.

(2) While for States parties to it the 1948 Geneva Convention on the International Recognition of Rights in Aircraft (the “Geneva Convention”) is superseded by the Cape Town Convention the 1948 Convention continues to apply with respect to rights or interests not covered by the Cape Town Convention (Article XXIII). See paragraphs 5.9, 5.110.

2.11 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. See paragraph 2.71.

Sources of regulation

2.12. There are four sources of regulation as regards aircraft objects within the scope of the Convention and Protocol: the Convention itself, the relevant Protocol, and the Regulations and Procedures made by the Council of ICAO as Supervisory Authority and governing the International Registry for interests in aircraft objects (hereafter “the International Registry”). Certain matters are expressly left to the applicable law (see paragraph 2.71). As a matter of international law a State becomes bound by the Convention 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 Convention 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 2.14).

2.13. Certain obligations are imposed on Contracting States by the Cape Town Convention and Aircraft Protocol, in particular the obligation under Article 13 of the Convention, as crystallised by Article X(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 IX to XIII of the Aircraft Protocol to ensure that the aircraft registry and other administrative authorities perform their duties to give effect to the creditor’s remedy of de-registration and export. But most of the provisions of the above instruments relate to rights and obligations that Contracting States agree to provide for 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 law. This varies from State to State.

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2 See Article 17(2) of the Convention and Section 15 of the Regulations relating to the International Registry for aircraft objects. The draft 8th edition, approved by the Council of ICAO subject only to minor editorial changes by the ICAO Secretariat, is expected to come into force by early 2020. It is reproduced in Appendix III with the kind permission of ICAO. It is accessible on ICAO’s website at https://www.ICAO.int and on Aviareto’s website at https://www.aviareto.aero/.
In some States a treaty may be directly applicable as domestic law; 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

2.14. 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 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.

2.15. 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 allowing the Aircraft Protocol to be concluded without waiting for agreement on the protocols for railway rolling stock and space assets (see Resolution No. 3 of the Cape Town diplomatic Conference inviting the negotiating States to work towards expeditious adoption of the latter Protocols), and for 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)).

2.16. 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 also is or becomes a Party to the Convention, and the same applies to signature by a Regional Economic Integration Organisation. However, since ratification of the Convention is not dependent on its entry into force (if the position were otherwise no Convention would ever enter into force!) there is nothing to preclude a State from becoming a Party to a Convention without becoming a Party to the Protocol, and several States did so with a view to later accession to one or more Protocols. Some of these have since ratified the Aircraft Protocol. There are five States who have ratified the Convention but not the Aircraft Protocol, namely Costa Rica, Republic of Moldova, Seychelles, Syrian Arab Republic and Zimbabwe. It is the current practice of UNIDROIT to advise States ratifying the Convention only that this will come into force on after ratification of the relevant Protocol.

Existing and prospective Protocols

2.17. 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 above, the text of a fourth Protocol, the “MAC Protocol”, has been approved by the Governing Council of UNIDROIT and is to come before a diplomatic Conference in Pretoria in November 2019.
The Protocols: comparisons and contrasts

2.18 The policy adopted for Protocols coming after the Aircraft Protocol has been to treat that Protocol as the prototype and avoid drafting changes, even for the purpose of clarifying the text, except so far as necessary to reflect the particular needs of the industry concerned or to correct drafting errors, for example, the inconsistency between paragraphs 1 and 2 of Article XIV of the Aircraft Protocol (see paragraph 3.98). Adherence to this policy has the advantage that the same interpretation can be applied to all equipment-neutral provisions of the Protocols.

2.19 The differences among the three existing Protocols and the draft MAC Protocol stem partly from the different subject-matter, partly from the perceived desirability or otherwise of extending the Convention to cover outright sales and partly, in the case of the Space Protocol, from the creditor’s need to capture as additional collateral sums due to the debtor from third parties by way of rent, licences, etc. (“debtor’s rights”), payable for the lease of or access to the space asset. The simple identification criteria under the Aircraft Protocol - manufacturer’s serial number, name of the manufacturer and its model designation - are not adequate for railway rolling stock, space assets or mining, agricultural and construction equipment, for each of which additional criteria have had to be fashioned. In contrast to the Aircraft Protocol, both the Luxembourg Protocol and the Space Protocol incorporate provisions designed to ensure that a creditor cannot use its default remedies to cut off access to equipment used to provide public services. Both the Aircraft Protocols and the Space Protocol extend the Convention to cover outright sales, but perceived practical problems led the proponents of the Luxembourg Protocol and the draft MAC Protocol to substitute for registration of sale the registration of notices of sale having no Convention effects but possible effects under national law. Protection of an assignment of debtor’s rights to the creditor, not achievable by an independent registration in a system geared to the registration of physical assets, is attained by provisions enabling such assignments to be recorded against the registration of the international interest to which they relate. Finally, the propensity of some items of mining, agricultural and construction equipment to
become affixed to land raises questions, unique to such equipment, as to the respective rights of the holder of an international interest and the landowner. 3

The present Commentary is for the most part confined to the Convention and the Aircraft Protocol. 4

2.20. To meet the needs of those concerned with aircraft finance and their advisers the Joint Secretariat of the 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 prepared 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.

**Entry into force; controlling effect of Protocol**

2.21 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.

2.22. 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

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3 See the Official Commentary on the Convention and Luxembourg Protocol (2nd edition), paragraph 3.52.

4 Under Article II of the Aircraft Protocol the Convention and Protocol are to be known as the Convention on International Interests in Mobile Equipment as applied to aircraft objects. There are separate Official Commentaries on the Convention and Luxembourg Protocol and the Convention and Space Protocol.
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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 XXVI(5) of the Aircraft Protocol, Article XXI(5) of the Luxembourg Protocol and Article XXXVI(5) of the Space Protocol, all of which provide 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 the Protocol, as has been done by several States (see paragraph 2.16), 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.

Underlying principles

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

- **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**

2.24. 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 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 2.63). 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 2.29. 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

2.25. 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.

Availability of remedies to enforce Convention rights

2.26. 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) of the Convention (see paragraph 2.283).

Integrity of the registration system

2.27. 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 to an assignment of associated rights related to a registered assignment of an international interest over one related to an unregistered assignment of an international interest, whether or not the registering party had knowledge of a prior unregistered interest or assignment.

2.28. 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 refer 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)). But domestic law should be resorted to only as a last resort and on matters that cannot be
resolved by a purposive interpretation of the Convention or recourse to the general principles underlying its provisions (see paragraph 2.23). As to States comprising several territorial units, see paragraph 2.35. The reference to “law” requires that any choice by the parties be a national legal system (see paragraph 3.27).

2.29. 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 2.309 et seq., 4.363 et seq. and, as regards the Aircraft Protocol, paragraph 3.98. 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 an example, see paragraph 2.268. It may also be necessary to fill a lacuna by analogy with a case given in the text (see paragraphs 4.311-4.313) and to disregard the erroneous double reference in Article 35(1) (see paragraphs 2.255(2), 4.261), an erroneous cross-reference in Article X(6) of the Protocol (see paragraph 3.39) or a rule of construction for which there is no relevant text and incorporated by mistake, as in Article 52(5)(c) of the Convention (see paragraphs 2.308 and 4.338).

Definitions

2.30. Article 1 of the Convention contains a long list of definitions, and these are supplemented by definitions in the Aircraft Protocol. It is important to keep these in mind at all times when reading the Convention and Aircraft 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. There are also certain terms which are not defined, in particular “person”, “item” and “possession”.

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(1) “Person”. This term covers individuals, partnerships and other unincorporated associations or group of individuals having the capacity to hold rights and incur duties under their personal law, whether or not they have legal personality, as well as corporations, States and State entities.

(2) “Item” In this Official Commentary, except where the context otherwise, “item” is used as a general term to cover any item of equipment or part of equipment. However, Article 29(7) of the Convention and Article XIV(4) of the Aircraft Protocol, the only places in which the word is used in these instruments, are confined to items other than objects, thus excluding airframes, aircraft engines and helicopters.

(3) “Possession” At various points the Convention and Protocol refer to the debtor’s holding of an object as “possession”. So Article 1(q) of the Convention defines a leasing agreement as one by which a person (the lessor) grants a right of possession or control to another (the lessee), while Article XVI(1) of the Protocol confers on the debtor a right to quiet possession and use of the object. The word “possession” (in the French text, possession) must here be given a broad meaning. In civil law systems, for example, the concept of possession requires a combination of factual possession of an object and an intention to hold it as owner, so that an equipment lessee is not a possessor but a “detainer” (détenteur) whose rights are in essence contractual rather than proprietary. But both have rights that can be asserted against third parties other than those with a better right. The word “possession” is therefore to be construed as covering both possession in the common law sense and détention in the civil law sense and it is so used elsewhere in this Commentary except where the context otherwise requires.

Sphere of application

2.31. 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 (Article 2(2));

(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 paragraph 2.33.

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 2.37). On the other hand, while parties to a contract are free to select the law of a Contracting State as the law governing their contractual relations they 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. In a Contracting State the Convention and Protocol must be applied in conformity with any declarations made by that State. See further paragraph 2.73.

2.32. Neither the Convention nor the Protocol distinguish commercial from consumer transactions, though in practice the criteria that have to be satisfied in order for an object to fall within these instruments will have the effect of excluding most non-business transactions.
The connecting factor

2.33. The Convention will not apply in the absence of the connecting factor referred to in paragraph 2.31(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 six 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. Any of these suffices as the connecting factor. It is not necessary for the connecting factor to be satisfied in relation to a prospective international agreement; the relevant time is when the prospective agreement ripens into an actual agreement.

2.34. 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 a matter of autonomous interpretation of the Convention and is not necessarily the same as the “centre of main interests” (COMI) as defined by the EU Insolvency Regulation (recast)\(^5\), 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)(n) of the Protocol necessarily as strong as the presumption in favour of the registered office under the Insolvency Regulation (recast) as determined by the jurisprudence of the European Court of Justice, which is nevertheless an important point of reference (see further paragraphs 3.122-3.124). “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.

2.35. 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)). Under Article IV(1) of the Aircraft Protocol, a connecting factor alternative to the debtor’s situation in a Contracting State is that the agreement relates to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of Registry (see paragraph 3.17).

2.36. 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 an aircraft object under a security agreement which is governed by the Convention and is registered in the International Registry, and the debtor later relocates to a non-Contracting State and 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.

2.37. A court situated in a Contracting State is obliged to give effect to an international interest constituted under Article 7 of the Convention even if the international interest is not of a kind recognized by that Contracting State, the agreement creating or providing for it is governed by the law of a non-Contracting State, the creditor is situated in a non-Contracting State or the court’s order affects the rights of a person in a non-Contracting State. By contrast 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, the debtor was situated in that State (or, in the case of an airframe, the aircraft was registered in that State) at the time of making of the agreement and the other conditions for the application of the Convention are satisfied. These rules 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.

Aircraft engines

2.38. For the most part the Convention does not apply to aircraft, defined in Article I(2)(a) of the Aircraft Protocol as airframes with aircraft engines installed thereon or helicopters, but to airframes, aircraft engines and helicopters. However, for the purpose of registration and de-registration airframes are treated as aircraft even if without installed engines and therefore are to be so treated in relation to the remedy of de-registration given by Article IX(1) of the Protocol. Aircraft engines are treated separately from the airframes on which they may be installed since they are highly valuable, mobile independent units and are increasingly dealt in and financed separately and frequently interchanged. They are therefore unsuited to traditional legal rules by which ownership of an object annexed to or removed from a larger object passes to or from the owner of the latter by the principle of accession or severance, and under the Convention they are treated as separate objects. By contrast, aircraft engines installed on a helicopter are treated as components of the helicopter, not as distinct objects, and do not fall within the definition of “aircraft engines” in
Article I(2)(b) of the Aircraft Protocol (see paragraphs 3.6, 3.9, 3.11). However, helicopter engines are aircraft engines prior to installation on a helicopter or after removal from a helicopter and before re-installation. Since helicopter engines, like engines installed on airframes, may move in and out of the aircraft it is common practice to register international interests in them without regard to whether at the time of the agreement they were or were not installed on the helicopter. See further paragraphs 3.9-3.11.

Components

2.39. Aircraft objects are defined in the Aircraft Protocol as including all components, but the components themselves have no separate status under the Convention or Protocol, and rights in them when not installed on an airframe, aircraft engine or helicopter are governed by the applicable law. See further paragraphs 3.10-3.11.

Types of right or interest covered by the Convention

2.40. 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 aircraft for airport dues) 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 (Article 2(2)), 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

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6 See Article 29(7) of the Convention, Article XIV(4) of the Aircraft Protocol and paragraphs 3.10, 3.12. For the status of helicopter engines, see paragraphs 3.9-3.11.

7 As opposed to being acquired by assignment or subrogation. See paragraph 2.41.
and the relevant Protocol are concerned. The nature of the international interest is discussed in more detail in paragraph 2.48. 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 or absence of 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 2.207.

(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 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 registration has not been discharged (Article 19(4)). The definition of this requires that the interest be one which is intended to be created or provided for as an international interest “upon the occurrence of a stated event, whether or not the occurrence of the event is certain” (Article 1(g)). However, no event need be stated where the only element of futurity is the debtor’s acquisition of the power to dispose of an identified object at the time the agreement is concluded, the reduction of an oral agreement to writing or the removal of an engine from a helicopter in which an international interest has been granted, prior to which removal the engine is not an object (see paragraph 3.11). Each of these events is an essential element of the constitution of an international interest which is automatically provided when the debtor acquires the object, the oral agreement is reduced to writing or the engine is removed from the helicopter, as the case may be. But in every case where the future event is intended to be an event outside what is required by Article 7 it must be stated, otherwise the international interest will take effect unconditionally.
(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 relevant declaration is that of the Contracting State in whose territory the aircraft object is situated at the time the non-consensual right or interest is sought to be exercised (see paragraph 2.263). The majority of Contracting States have made declarations under Article 39(1)(a), principally relating to liens in favour of unpaid repairers and unpaid employees, with a smaller number covering all prior-ranking non-consensual rights or interest and a smaller number still covering liens for unpaid taxes. 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 and receives the approval of the court, as in the case of a court-approved secured loan made to a debtor in possession after the commencement of insolvency proceedings. It is clear that the security for such a loan is consensual, being created by agreement of the
parties, not by law. 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 (as to other objects, see paragraph 2.271), and for this purpose it is irrelevant whether the right of arrest or detention is provided by law or by contract (see further paragraph 2.268). Again, such a declaration merely preserves rights of arrest or detention, it does not expand them. The phrase “other public provider” does not imply that an intergovernmental organisation is a private provider of public services. See paragraphs 2.268 and 4.285.

(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. As to the meaning of “registered” and “registered interest” see paragraph 2.48. The registration of a non-consensual right or interest pursuant to a Contracting State’s declaration under Article 40 is effective only in those cases where the applicable law is that of the declaring State. Most declarations under Article 40 relate to the attachment of aircraft objects under a court order to satisfy a judgment debt and liens or other rights relating to taxes or unpaid charges, and the applicable law will usually be the law of the State where the object is situated at the time the registrable non-consensual right or interest attaches to it. 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(cc) 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 2.115(3). But the Convention remedies themselves are
not available to the holder of a registrable non-consensual right or
interest, which secures only those rights conferred by the law of the
declaring State. See Articles 1(s) and 25(1).

(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 (see paragraph 2.241). 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 2.309 *et seq.*

**Transferred rights and interests**

2.41. In addition to the above original rights, the Convention provides means
of protecting 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). An assignment of an
international interest created or provided for by way of security is 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)(e). 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 2.209, and as to the application of the transitional provisions of Article 60 see paragraphs 2.309 et seq.

2.42. 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 (Article 29(5) and paragraph 2.220).

**Extension by Protocol**

2.43. The Aircraft Protocol extends the registration and priority provisions of the Convention to outright **sales** and **prospective sales** (see paragraphs 2.276 and 3.16) of aircraft objects. Outright sales are not themselves international interests, for they do not fulfil any security or title-retention function, but the aviation and space industries considered it useful to take advantage of the registration system to facilitate the protection and priority of outright buyers, thus obviating the need for the special priority rule in Article 29(3). There are many reasons why it is important that sales be registered (see paragraph 3.99). The registrability of outright sales makes it possible for a buyer to hold two distinct registrable interests in the same aircraft. See paragraphs 3.103-3.106.
“Agreement”, “assignment”, “prospective assignment”

2.44. An agreement means a security agreement, a title reservation agreement or a leasing agreement (Article 1(a)), including any amendments of 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 encumbrance which binds the asset but leaves ownership with the debtor, a pledge and a contractual lien, which differs from a pledge only in that the asset is delivered to the creditor not as security but for some other purpose, such as storage or repair, so that the contractual provision secures future obligations. 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 aviation finance. By contrast a contractual lien may be taken to secure charges relating to the aircraft object, 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 Articles 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
As to questions of characterisation, see paragraphs 2.63, 4.57-4.58. A leasing agreement must be distinguished from a “wet lease” agreement under which possession or control of the equipment is retained by the “lessor”. An agreement of this kind, however described, does not confer possession or control and is not a leasing agreement, simply a contract, from which it follows that the “lessor” does not hold an international interest. An assignment is a contract which, whether by way of security or otherwise, confers on the assignee associated rights (see paragraph 2.40(6)) with or without a transfer of the related international interest (Article 1(b)). The phrase “with or without a transfer of the related international interest” is relevant only to outright assignments, because an assignment of associated rights by way of security is outside the Convention if it is not effective to transfer the related international interest (Article 32(3)). “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 (see paragraph 2.24). This definition is relevant only to the provisions of Chapter IX of the Convention relating to the assignment of associated rights, with or without a transfer of the related international interest. The assignment of an international interest as such is governed as to registration by Chapter IV and as to priorities by Article 29 as applied by Article 35(1). The assignment of associated rights presumptively carries with it an assignment of the related international interest (Article 31(1)). However, such an assignment is not itself registrable, the International Registry being confined to tangible objects, which is why Article 16(1)(b) refers to the registration of assignments of international interests. It is clear from Article 32 that an assignment of an international interest is distinct from an assignment of associated rights and that an outright assignment can be made without any assignment of the 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”

2.45. “Creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement (Article 1(i)) and includes a creditor’s assignees or other successors. A conditional seller means a seller under a title reservation 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 2.59) 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 2.202). By contrast, the holders of fractional interests in an aircraft object, whether under contracts of sale or by way of security, are not usually in a priority situation (see paragraphs 2.213, 3.97) because they are not in competition with each other.

2.46. “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 2.115(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. The debtor need not be the owner; it may, for example, be a chargee granting a sub-charge or a lessee granting a sub-lease. Further, ownership may be vested in any kind of person, including a special purpose vehicle (SPV) established to acquire ownership and grant security. A **conditional buyer** means a buyer under a title reservation agreement (Article 1(e)).

2.47. 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 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 2.255.

**“International interest”; “registered interest”**

2.48. 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 2.40(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 object to secure the performance of any existing or future obligation of the chargor or a third person (see paragraph 2.44). 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. For example, if a 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 and will at most create a prospective international interest (see paragraph 2.40(2)). Non-consensual rights or interests fall outside the definition of international interest and are dealt with by separate provisions of the Convention, specifically Articles 39 and 40.

Though an international interest is a proprietary interest it needs to be perfected by registration in order to preserve its priority against subsequent international interests. “Registered” means registered in the International Registry pursuant to Chapter V and “registered interest” means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V. It may seem odd to include reference to a national interest, given that national interests are not themselves registrable. Nevertheless the inclusion is necessary in order to preserve the application to a national interest of the priority rules of the Convention (Article 50(2),(3)) governing internal transactions under which such national interests arise. The effect of an unregistered international interest is not necessarily confined to relations between the parties, which would make it barely distinguishable from a purely personal right. Even an unregistered international interest may be effective under national law as regards categories of third party not having a proprietary right, for example, an unsecured creditor, or against a party with a proprietary right which under the applicable law is subordinate to an international interest established earlier in time.

2.49. 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, though under the Aircraft Protocol the registration and priority provisions are extended to such sales and it is important for buyers to utilise such extension in order to preserve priority. It is also important to bear in mind that the
International Registry is not a title registry (see paragraph 2.152). Accordingly where a company which manufactures or acquires equipment supplies it under a conditional sale or leasing agreement the international interest resulting from the agreement is whatever interest the company has immediately after entering into the conditional sale or leasing agreement. This may or may not be an ownership interest (see paragraph 2.50). Though the registry is not a title registry this will not in practice limit its utility significantly – indeed, in some respects it may enhance it (see paragraph 3.100) – whereas failure to register a sale could have serious consequences in the shape of loss of priority to another buyer.

2.50. The drafting of Article 2(2)(b) and (c) is precise. These two subparagraphs do not refer to an interest vested in a person as conditional seller or as lessor, because the interest derives not from the title reservation agreement or the leasing agreement but from a prior contract of sale between the manufacturer or the supplier and the conditional seller or lessor. So where the owner of equipment leases it then although the grant of the lease is what brings the international interest into existence it is the grantor’s ownership, not merely its rights as lessor, that constitutes the international interest the priority of which is protected by registration. Where, in the case of an aircraft object, the lessee sells outright to a buyer who registers the purchase pursuant to the Aircraft Protocol the title of the original owner who failed to register its international interest is not merely subordinated but wholly extinguished. Once the international interest has come to an end, whether by discharge of the debtor’s obligations or by termination following a breach and subsequent exhaustion of the lessor’s Convention remedies (see paragraph 2.96), the creditor reverts to its previous position, e.g. as “unencumbered owner”.

2.51. 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 2.211 and 4.33.

“Sale”; “contract of sale”

2.52. The meaning of the terms “sale” and “contract of sale” is discussed in paragraph 2.276.
Assignment and novation

2.53. 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, a unitary transfer by which all the benefits and burdens are transferred to the assignee with the consent of the other party to the contract, this being required for the effectiveness of the assignment of the benefits as well as the burdens, 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, which does not give rise to a new international interest, or a novation, which does, 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. A change of debtor or creditor otherwise than by assignment (and there are jurisdictions where a transfer of obligations can take place by assignment without constituting a novation) clearly gives rise to a new agreement. See further paragraphs 2.54 et seq. The distinction between an assignment and a novation is significant in that the priority rules in Article 35(1) governing successive assignments of the same international interest do not apply to a novation, which creates a new claim distinct from that of the claim previously assigned.

2.54. “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 transfers 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. This is not altered by the fact that under Article XV of the Aircraft Protocol the debtor’s consent to the assignment is required, for this requirement is purely a term of the agreement between creditor and debtor and is not part of a new tripartite agreement involving the assignee. See further paragraph 4.8 and Illustrations 1 and 2.

2.55. Though the definition of assignment in Article 1(b) is focused on the assignment of associated rights rather than of the international interest to which they relate Article 32 makes it clear that there can be an assignment of an interest which is distinct from an assignment of associated rights, the former being dealt with in Article 32(1), the latter in Article 32(2). Indeed, an assignment of associated rights is not registrable as such, only an assignment of the international interest and Article 16(1)(b) is to be construed accordingly. However, an assignment of an international interest by way of security is of no effect unless some or all associated rights are transferred (Article 32(2)).

Amendment

2.56. 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 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 aircraft object (e.g. from five per
cent to ten per cent) 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 or a new obligation, e.g. the provision of additional finance.

(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 reregister 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

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8 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)).
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creditor corporation with another corporation which under the applicable law operates to transfer the international interest (see paragraphs 2.178, 2.243).

2.57. Where a pre-existing right or interest, which under Article 60(1) falls outside the Convention, is amended after entry into force of the Convention in the relevant State in such a way as to give rise to a new interest, as indicated in paragraph 2.56, this will constitute an international interest governed by the Convention and ranking for priority according to the time of its registration. By contrast, the capture of after-acquired property under the provisions of an agreement creating a pre-existing right or interest is simply an application of that agreement and does not trigger a new international interest.

2.58. There are 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;

(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 2.178-2.180.

Fractional and other shared interests

2.59. An interest acquired in an aircraft object under a contract of sale may be held by a single party or by multiple parties without division. But it is also not uncommon for the acquired title to be split among co-owners in specified
fractions or percentages, often termed “fractional interests”.\(^9\) Similarly, an international interest may not be in the entire interest in the object but may be in a fractional interest, as where a person acquiring a fractional interest under a contract of sale gives security over that interest. Fractional interests are not expressly dealt with in the Convention, but nothing precludes each such interest from being treated as the subject of a separate international interest under the Convention. Each sale of a fractional interest in an aircraft object is separately registrable as a sale in the International Registry, so that if an aircraft object is sold as to 40% to A, 20% to B and 30% to C three sales are registrable in the International Registry. Similarly each purchase of a fractional interest may be financed by a different creditor which takes security over the particular fractional interest it has financed and each such security constitutes a distinct international interest and is registrable as such. So if A gives security over its 40% interest to X, B gives security over its 20% interest to Y and C gives security over its 30% interest to Z, this results in three international interests each of which is separately registrable as such. See further paragraphs 3.80 and 3.97. Section 5.15 of the Regulations also provides that an increase or decrease in a fractional interest by virtue of a sale or an assignment of an international interest is to be registered as such. See paragraphs 2.45 and 2.67. There is no current practice of holding fractional interests in a space asset.

2.60. Shared interests must be distinguished from multiple interests. For example, a sub-lease gives rise to a distinct international interest in favour of the sub-lessee running in parallel with the international interest created by the head lease. The exercise of an option to purchase contained in a lease does not give rise to a new international interest, since it results in an outright sale which is outside the scope of the Convention.\(^10\) For the priority of competing assignments and rights of subrogation, see paragraphs 2.253 \textit{et seq.}

**Prospective international interest**

2.61. 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

\(^9\) Fractional interests in an aircraft object (airframe, aircraft engine or helicopter) are not to be confused with fractional ownership of an entire aircraft under national law.

\(^10\) The position is otherwise in relation to sales of aircraft objects. See paragraphs 3.51, 3.98.
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 an actual or prospective aircraft object (“prospective” in the sense that an asset is not an “object” within the Convention definition until there is an international interest relating to it) the Convention prescribes no formalities for an agreement providing a prospective international interest. Where the only bar to an immediate international interest is that the agreement is not in writing, the debtor has not yet acquired a right to dispose of the identified aircraft object or the subject of the prospective international interest is an engine installed on a helicopter which does not become an object until its removal, the contract between the parties will create a prospective international interest to take effect as an international interest on reduction of the agreement to writing or on the debtor’s acquisition of a power of disposal or removal of the installed engine from a helicopter, without any such an event having to be expressed in their written or oral agreement. Any other conditions will, of course, need to be agreed, in line with the definition in Article 1(y) which refers to “the occurrence of a stated event.” If the international interest does not relate to an engine installed on a helicopter, all the elements of Article 7 are satisfied and no condition of futurity is stated, the international interest takes effect unconditionally. Where a prospective international interest ripens into an actual international interest it will require separate registration, operative for priority purposes 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)), as will almost invariably be the case because of the Registry regulations and the system itself (see paragraph 2.159). 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.

Though for statistical purposes the registrant is required to state whether what is being registered is an international interest or a prospective international interest this is not a requirement of the regulations themselves, so that an erroneous statement will not vitiate the registration, while a search is neutral as to whether the registration is of an international interest or a prospective international interest (see paragraph 3.57). This is in conformity with Article 22(3), which provides that a search certificate merely state that the creditor “has acquired or intends to acquire” an international interest without indicating whether what is registered is an actual or a prospective international interest even if this is ascertainable from the registration information. Such a provision is necessary in order to ensure the efficacy of Article 19(4) which is designed to obviate the need for a second registration. Without Article 29(3) a certificate would have to state whether what was being registered was a prospective international interest or an international interest and a statement of the former would become misleading if the prospective international interest became an international interest. For brevity the certificate issued by the International Registry simply states “international interest” but an explanatory note states that in conformity with Article 22(3) this is not intended to indicate whether what is registered is an international interest or a prospective international interest. A similar note appears in a search certificate referring to a sale or an assignment. As to the latter, see paragraph 2.238.

Where, following registration of a prospective international interest that has not yet ripened into an international interest, an international interest is granted to another party this will initially have priority over the prospective international interest but will become subordinated to the latter when it becomes an international interest, this being treated as registered as from the time of registration of the prospective international interest (Article 19(4)).

Proceeds

2.62. “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 (“the UN Assignments Convention”).

Characterisation of the agreement

2.63. Most legal systems 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. 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.
2.64. 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).

2.65. As stated earlier, the definition of “security agreement” is wide enough to cover most forms of security interest. However, the requirement of identifiability under Article 7 excludes floating security, such as the floating charge under English law or a fixed security interest under the laws of the United States, Canada, New Zealand and Australia which identifies the subject-matter only by class or as “all assets” and does not identify a specific asset.

Contractual provisions outside the Convention and Protocol

2.66. 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, a lease with an option to purchase could contain a provision that the lessee is not to register a prospective sale; 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. On the other hand there are certain requirements of the Convention which have to be built into the registration system and cannot be excluded. In particular, 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, is simply ineffective, because a registration cannot be made without electronic transmission of the debtor’s consent. See further paragraph 3.76.

Parties to the agreement

2.67. 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 2.45-2.46 and 2.59).
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 Aircraft Protocol contains provisions for registrations through trustees and agents, and the International Registry for aircraft objects accepts such registrations, as well as the registration of fractional and partial interests (see paragraph 3.80) and for the discharge of such interests.

Exclusions

2.68. 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. So in the case of aircraft objects, Article VII of the Aircraft Protocol provides that the manufacturer’s serial number, manufacturer’s name and model designation of the object are necessary and sufficient to identify the object. Registration is effected against an object so identified. Accordingly the Convention does not apply to future property not uniquely identified or to proceeds other than insurance and other loss-related proceeds. In relation to aircraft objects identifiability is necessary not only for the registration but also for the constitution of the international interest, so that the Convention does not apply to future property not uniquely identified or to proceeds other than insurance and other loss-related proceeds. 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. The position is otherwise under the Luxembourg Protocol and the Space Protocol, the provisions of which as to identification for the purpose of constitution of the international interests are very flexible. Unusually, however, the Space Protocol makes the registrability of an international interest in payloads and parts of a spacecraft or

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11 See Article VI.
payload under the Space Registry regulations a condition not only of registration but of the application of the whole Convention and Protocol.

**Mobility and internationality**

2.69. 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, to exclude certain provisions of the Convention relating to the rights of the parties between themselves.

2.70. In principle, therefore, mobility is not an independent condition of the application of the Convention, merely a characteristic of the categories of equipment covered, nor is mobility to be confused with any concept of movable property in national law. So the fact that in some legal systems a registered aircraft is treated as an immovable is irrelevant to the application of the Convention; if the position were otherwise a State ratifying the Convention and Aircraft Protocol would nevertheless find that it did not apply! However, it is necessary that the object retains its physical separability. If this is lost then any international interest is in principle extinguished. This situation could arise in relation to railway rolling stock but is most likely to occur in the case of MAC equipment, and Article VII of the draft MAC Protocol currently contains alternative provisions some of which may cut across the analysis given above. Article 29(7) of the Convention leaves the question of accession of an item other than an object to be dealt with by the applicable law (see paragraphs 2.227, 2.231). However, under Article XIV(3) of the Aircraft Protocol ownership of or another right or interest in an aircraft engine is not affected by its installation on or removal from an aircraft, overriding any provision of the otherwise applicable law that would otherwise apply a doctrine of accession (see paragraph 2.231).

**The applicable law**

2.71. The purpose of the Convention is to provide uniform rules which make it both unnecessary and impermissible 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, except so far as the Convention otherwise provides or as regards issues on which it is silent and cannot be determined by the general principles on which it is based. However, though recourse to the applicable law should only be as a last resort there are various matters on which resort to the applicable law is expressly mandated by the Convention or is otherwise necessary. Reference has already been made to the relationship between the Convention and national law (paragraph 2.10). 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 (Article 5(3)). The cases involving recourse to the applicable law fall broadly into two groups: matters which the Convention expressly refers to the applicable law and other matters which are not addressed by the Convention and cannot be determined from the general principles on which it is based.

Matters expressly referred to the applicable law

2.72. The Convention expressly leaves it to the applicable law (which may be the substantive law or the procedural law of the relevant State, depending on the issue to be resolved) to determine:

- whether an agreement falling within Article 2(2) is to be recharacterised and the time when it is considered made (see paragraph 2.63);

- 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), subject, however, to the mandatory declaration under Article 54(2) as to whether the leave of the court is required where not so provided by the Convention;

- 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));

• 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), (4);

• 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));

• the range of non-consensual rights or interests provided by its law which are to have priority over a registered international interest (Article 39) or are to be registrable as if they were international rights or interests (see paragraphs 2.40(4),(5)); and

• the priority of pre-existing rights and interests (Article 60(1)).

Matters not addressed by the Convention or determinable from the general principles on which it is based

2.73. On matters where the issue is not determinable from the text of the Convention or the principles on which it is based, resort is to be had to the applicable law as the residual rule under Article 5(2). For example, it is for the applicable law to determine:
A REVIEW OF THE CONVENTION

(1) whether an agreement alleged to create or provide for an international interest satisfies the conditions for a valid contract, including capacity to contract, consensus *ad idem* and conformity with fundamental public policy, but not the validity of an international interest constituted under a valid agreement falling within Article 2 and in accordance with the formalities prescribed by Article 7 of the Convention;

(2) the time at which the agreement is to be considered concluded, which may be relevant for certain purposes of the Convention (see paragraph 2.91);

(3) the circumstances in which proceeds in respect of which a creditor’s interest had priority under the Convention have ceased to be traceable;

(4) except in cases within Article 9(4), whether an international interest has been acquired by legal or contractual subrogation;

(5) assignments by operation of law;

(6) risk of loss of or damage to objects disposed of under a contract of sale or leasing agreement or the duties of suppliers under such contracts;

(7) the validity of a trust purporting to establish a trust capacity under Article VI of the Protocol.

The Convention contains various provisions under which a Contracting State may make declarations of different kinds affecting the way in which the Convention will apply within that State.\(^{12}\)

**Other matters influenced by the applicable law**

2.74. 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. The Convention itself allows considerable scope for party agreement on a range of issues, including default remedies and jurisdiction. The provisions of the Convention as to termination of an agreement are not exhaustive (see paragraph 2.95). However, a Contracting State may not impose conditions in its private law incompatible with the provisions of the Convention, such as

\(^{12}\) As to the States that may make a declaration, see paragraph 2.327.
restrictions on the creditor’s right to terminate a title reservation agreement or leasing agreement on the debtor’s default. Finally, registration in the International Registry of interests which are not Convention interests or registrable non-consensual rights or 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. However, improper or improperly continued registration, by casting a shadow on the title of the owner, may expose the registrant to liability under the applicable law, e.g. for slander of title or a similar tort.

*The impact of contractual provisions*

2.75. 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, a lessor under a leasing agreement containing an option to purchase may wish to procure the lessee’s undertaking not to register a prospective sale (which is registrable under the provisions of the Aircraft Protocol applicable to sales), so as to avoid clouding the lessor’s title if it wishes to repossess and sell the object on the lessee’s default.

The Aircraft Protocol specifies further matters for which reference is to be made to the applicable law (see paragraph 3.24).

The relationship between international interests and interests created under national law is discussed below (paragraph 2.92).

*What is the applicable law?*

2.76. Article 5(2) 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 VIII of the Aircraft Protocol allows the parties to choose the law to govern their relationship where the Contracting State has made the requisite declaration, though such a declaration may not be made by Member States of the European Union. 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 VIII to choose a foreign law, though the choice of law 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 3.26). 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.

2.77. 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. However, in the case of aircraft objects some jurisdictions apply the lex registri, that is, the law of the State of nationality registration, which has the advantage of certainty and stability.

2.78. 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. Whatever rule governs assignment is also likely to govern the acquisition of associated rights (as opposed to the related international interest) by legal or contractual subrogation. In each case where the issue is not governed by the substantive rules laid down by the Convention or
Protocol or 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**

2.79. All that is needed to constitute an international interest in an aircraft object is an agreement which conforms to the simple requirements of Article 7 of the Convention and Article VII of the Aircraft 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 2.91) 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*, the impact of illegality, 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 2.84).

2.80. However, the formal requirements for the agreement are determined not by the applicable law but 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*

2.81. 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 III (default

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13 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.
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 2.61.

**Power to dispose**

2.82. The agreement must relate to an object of which the chargor, conditional seller or lessor has power to dispose. “Dispose” is to be interpreted broadly as covering every form of consensual disposition, including an outright sale, a sale under reservation of title, a lease, assignment of a lease or sub-lease, a charge or sub-charge or the delivery of possession under a pledge or conferment of a contractual lien on a repairer, warehouse or other party in possession for the purpose of custody, repair or otherwise. The word “power” includes, but is not limited to, a right to dispose. An unauthorised disposition may nevertheless be effective to pass ownership or some other interest because of a rule of the applicable law or of the Convention itself to that effect. Different laws may govern the right to dispose and the power to dispose. The right to dispose arises primarily under the law governing the relationship pursuant to which the right arises. So if the right to dispose is given by contract then the law governing the contract will determine the right to dispose. The right may also arise under the provisions of the Convention, in particular those relating to the exercise of default remedies. A power to dispose is also by inference embedded in the Convention itself (see paragraph 2.84), in addition to which a power to dispose may be conferred by the otherwise applicable law, usually the law of the place where the object is situated at the time of the disposition (*lex situs*).

**Right to dispose**

2.83. A right to dispose exists whenever the party making the disposition (a) is the unencumbered owner of the object or (b) where not precluded by the
terms of the agreement transfers to a third party a limited interest no greater than the interest than it holds itself or (c) if transferring a greater interest, does so with the authority of all those having a superior right. So it is not necessary that the chargor, conditional seller or lessor should be the owner of the object. The right to dispose may arise under the applicable law or under the Convention. The following are examples:

(1) A conditional buyer or lessee may have express or implied authority from the owner to conclude an agreement for sub-sale under a title reservation agreement or grant a sub-lease or assignment of the 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 right 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) A dealer holding inventory subject to a title reservation agreement or a charge may have express or implied authority from the creditor to sell items of inventory in the ordinary course of business.

(4) An agent, trustee or other representative may have a right to dispose under the terms of the instrument appointing him and/or under the law governing that instrument (see paragraph 2.87).

(5) Under Article 8(1)(b) of the Convention the creditor has a right to sell or lease an object on default by the debtor.

**Power to dispose without a right to dispose**

2.84. Most legal systems have rules which in given conditions enable a non-owner who is lawfully in possession to pass a good title to an innocent buyer. A power to dispose thus exists whenever the transferor is able to transfer a better title than the transferor itself possesses. Exceptions to the principle nemo dat quod non habet may arise either under the applicable law or under the Convention itself as a consequence of its registration and priority rules. For example, under the applicable law (usually the lex situs):
(1) 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;

(2) 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.

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 (a) that it is the debtor in possession who is usually in the best position to grant a competing interest and (b) that Article 29(2) makes knowledge of an earlier unregistered interest irrelevant to the priority of the first to register. Most legal systems, even those that adopt the possession vaunt titre principle, limit the protection of the buyer to one who acquires in good faith and without knowledge of the prior interest. Accordingly if “power to dispose” were limited to dispositions under national law Article 29(2) would in most cases be deprived of effect and Article 29(1) would be redundant. It is therefore implicit in Article 29(2) that the debtor has a power to dispose derived from the Convention itself. It may be noted that a person lacking a right to dispose will not have a power to dispose under the Convention unless in possession of the object, though it may have under the applicable law.

2.85. 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 aircraft or aircraft engines are held in a hanger or warehouse to the order of a particular party, who thus has control.

2.86. A conditional buyer or lessee loses the power of disposal where the conditional sale or leasing agreement has been terminated, e.g. for default, and the object has been repossessed or otherwise taken into the creditor’s control. See paragraph 2.174.

2.87. Article VI of the Aircraft Protocol (and a similar provision is included in the other Protocols) provides that a person may enter into an agreement or a
sale, and register an international interest in, or a sale of, an aircraft object in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention. The representative may accordingly invoke remedies against the debtor under the Convention, whether or not the international interest has been registered, and after registering the international interest may assert priority against competing interests on behalf of the creditors. See further paragraphs 3.82 et seq.

**Identifiability**

2.88. The agreement must enable the object to be identified in conformity with the relevant Protocol. Under the Aircraft Protocol unique identification is required not only for registration purposes but also for the constitution of the international interest. Given the practice in aviation finance it was not thought necessary to differentiate between creation and perfection of the international interest for identification purposes. Subsequent Protocols, however, have distinguished between requirements for creation of an international interest and those for registration. Creation only concerns the parties themselves, who therefore have no need for precise identification. Accordingly all Protocols other than the Aircraft Protocol contain provisions enabling equipment to be identified by type rather than individually and also permitting international interests in after-acquired property, including floating charges. All that is necessary is that such property can be identified as falling within the scope of the agreement. Thus with the exception of the Aircraft Protocol (as to which see paragraph 2.150) the addition of a new object under an after-acquired property clause is an application of the agreement, not an amendment of it, and thus does not give rise to a new international interest. Identifiability is a crucial requirement for the purposes of registration because the registration system is asset-based. It is thus not sufficient for those purposes that (as in the common case of security over future property) the asset can be identified as falling within the scope of the security agreement. It is necessary that the object be specifically identified in the agreement itself, including an amendment to the agreement. It is left to the relevant Protocol to determine the identification criteria, since these are likely to be equipment-specific (see paragraph 3.73). The Convention applies not only to completed objects but to those in the course of manufacture where they have reached the stage at which they can be seen to fall within one of the categories of object listed in Article 2(2), (3), and satisfy the criteria for unique identification.
Obligations secured

2.89. A security agreement 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.

2.90. Registration is not a requirement for the constitution of an international interest, nor is it a guarantee that 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

2.91. 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 and the alternative connecting factor under Article IV(1) of the Aircraft Protocol; 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 2.223); 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 aircraft object 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

2.92. 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 (whether or not of a kind registrable under the Convention) which is neither a pre-existing right or interest nor a non-consensual right or interest covered by a declaration under Article 39 and (b) a national interest notice of which is not registered in the International Registry.

2.93. 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. Another case is where registration would ensure priority over an interest not previously registered either in the national registry or in the International Registry.

2.94. 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 2.235. But the Convention does not, of course, operate in relation to insolvency proceedings in a non-Contracting State.
Termination of the agreement

2.95. The only provision of the Convention dealing with termination of the agreement is Article 10, which provides that in the event of default under a title reservation agreement or a leasing agreement the conditional seller or lessor may (a) subject to any declaration that may be made by a Contracting State under Article 54 (that is, a declaration that leave of the court is required) terminate the agreement and take possession or control of any object to which the agreement relates or (b) apply for a court order authorising or directing any of these acts. The parties may agree in writing as to the events that constitute a default, otherwise it must be a default which substantially deprives the creditor of what it is entitled to expect under the agreement. These provisions relate only to termination for default and are not exhaustive. Termination may thus occur pursuant to the applicable law or under the terms of the agreement so far as in conformity with 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 not only by termination for default under Article 10 of the Convention but (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 except in the case of aircraft objects and space assets, in respect of which the registration and priority provisions of the Convention have been extended to sales by the Aircraft Protocol and the Space Protocol. As will be seen (paragraph 2.96) termination of the agreement does not by itself extinguish the international interest or the creditor’s right to maintain its registration.
Termination of an international interest

2.96. An international interest in an object terminates when (a) the agreement creating or providing for it comes to an end (whether under the Convention or under the applicable law) and (b) the creditor has recovered possession or control of the object and/or any proceeds and has exhausted all other default remedies conferred on it by the Convention in relation to the object (see paragraph 2.97). Only then is any other interested person entitled to apply for registration of the international interest to be discharged (see paragraph 2.97). 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 and do not restrict the right of termination of a title reservation agreement or leasing agreement given by Article 10.

2.97. As indicated above, termination of the agreement does not by itself put an end to the international interest created or provided for by the agreement. This is because the effect of termination is only prospective, ending the rights and duties of the parties as to future performance but not affecting their pre-termination rights and obligations. Accordingly the creditor is entitled to exhaust all the remedies provided by the Convention under Articles 8-11, so far as these relate to the object, before the debtor or any other interested party can apply for discharge of the registration, and until such discharge or expiry of a time-limited registration this remains effective (Article 21). Article 10 itself makes it clear that the Convention remedy of repossession survives termination of the agreement. Moreover, until the creditor has exhausted its remedies under the Convention in relation to the object and/or its proceeds continued registration of the international interest is essential to preservation of the creditor’s priority. For example, so long as the lessee remains in possession it retains a power of disposal and the lessor needs continued priority as against a transferee from the lessee. Further, the creditor’s priority extends to proceeds (as defined by Article 1(w) of the Convention), so that even after total destruction of the object or its total or partial confiscation, condemnation or requisition the creditor remains entitled to assert its priority as regards any insurance proceeds or compensation paid. Even repossession of the object in an undamaged state does not necessarily extinguish the international interest, because there may remain uncollected income or profits arising from the lease of the object under Article 8(1)(b) or the management or use of the object which are recoverable under Article 8(1)(c)
2.98. The above analysis is subject to one caveat. Where a registration is time-limited (and there have been no such registrations to date), as where the registration of a five-year lease is limited to that period, the registration ceases to have effect (Article 21).

2.99. 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 and the creditor’s Convention remedies have been exhausted (see paragraph 2.97) its registration, even if undischarged, ceases to have any priority effects. Conversely, the discharge of a registration does not extinguish the international interest, it merely reconverts it from a perfected into an unperfected interest. This follows from the fact that registration is merely a perfection requirement, not a condition of the constitution of the international interest (see paragraph 2.90).

**Default remedies generally**

2.100. 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. However, where the debtor or a secured creditor has an interest in any surplus resulting from sale this must be effected in a commercially reasonable manner (see paragraph 2.121). It should, however, be borne in mind that an agreement which is a title reservation agreement or a leasing agreement within

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14 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.
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.

2.1. 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
the Aircraft 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. Whether the remedies are exercisable by self-help or require leave
of the court depends on the declaration made by the relevant Contracting State
under Article 54(2). Such a declaration has priority over any procedural rules
application under Article 14.

What constitutes default

2.102. By “default” is meant a breach of the agreement. 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. Such stipulated events may include acts
or omissions which are not in themselves breaches of the agreement, for
example, the debtor’s insolvency. In the absence of such contractual provision
“default” means a default which substantially deprives the creditor of what it is
entitled to expect under the agreement (Article 11).

Default remedies of chargee

2.103. Under Article 8(1) of the Convention a chargee may exercise any one or
more of the following remedies:

(a) take possession or control of any object charged to it;

(b) sell or grant a lease of any such object;\(^\text{15}\)

\(^{15}\) But a Contracting State may, by a declaration under Article 54(1), 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. However, only one
State, China, has made a declaration under Article 54(1).
(c) collect or receive any income or profits arising from the management or use of any such 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 2.215-2.216, 3.108 et seq. For the remedies of a conditional seller or lessor, see paragraph 2.121.

2.104. The requirements for exercise of these remedies are discussed in paragraphs 4.85 et seq. Two points may be noted at this stage. First, where there are successive charges, any of the chargees may exercise the remedy of sale where this is made subject to the rights of higher-ranking creditors, whose interests will not be affected. But to effect a sale free from the interests of senior creditors it will be necessary either to secure their consent or to settle their claims. Secondly, the Aircraft Protocol, in addition to prescribing additional remedies, modifies Article 8 in various important respects (see paragraphs 3.30 et seq.).

2.105. Under Article 9 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.

Additional remedies

2.106. The Aircraft Protocol adds two further remedies to those set out in Chapter III, namely de-registration and export and physical transfer (see paragraphs 3.31 et seq.). The 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 de-registration and export and physical transfer are available “to the extent that the debtor has at any time so agreed” (Article IX(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 X(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 X(5), which permits the parties to agree to exclude the application of Article 13(2), requires that the agreement be in writing.

**Mode of exercise of remedies**

2.107. There are two overriding provisions governing the exercise of remedies. First, under Article 8(3) any remedies set out in Articles 8(1) and 13 must be exercised in a commercially reasonable manner (see paragraph 2.112), a provision extended by Article IX(3) of the Protocol to cover all remedies, though under both provisions 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. Secondly, 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). So the remedy of possession of an aircraft object will generally have to be exercised in conformity with the procedural law of the place where the object is located (see paragraph 2.144). However, where the law of that place would otherwise permit a Convention remedy to be exercised without leave of the court it is open to the Contracting State in question to state in its declaration under Article 54(2) – a declaration which is required to be made at the time of ratification of the Protocol – that the remedy is to be exercisable only with leave of the court (Article 54). Conversely, where the Contracting State makes a declaration 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. The great majority of Contracting States have made declarations that leave of the court is not required. In the case of insolvency proceedings in a Contracting State which has made a declaration under Article 54(2) requiring leave of the court for the exercise of remedies and has then gone on to opt for Alternative A of Article XI of the Aircraft Protocol, the Contracting State must be taken to have intended to exclude the creditor’s remedies under Alternative A from the scope of its declaration under Article 54(2). Given that Articles 8(2) and 9(2) gives the creditor a right to apply to the court for an appropriate default remedy even
where self-help would be available, there is an obligation on the forum to ensure that its rules of procedure make any such remedy available.

2.108. 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). 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.

2.109. A declaration under Article 54(2) can distinguish between remedies by providing, for example, that the exercise of the remedy of possession requires leave of the court while the remedy of termination of a title reservation or leasing agreement does not. Less clear is whether a declaration can be made (a) that a remedy can be exercised without leave of the court except in stated conditions or (b) that a remedy is exercisable only with leave of the court where stated conditions apply. It would seem that a declaration should state either that leave of the court is required or that it is not and that as regards any one remedy restrictions on the exercise of self-help remedies (e.g. avoidance of a breach of the peace on repossession) or limitation of the circumstances in which leave of the court is required are a matter for local law and statements about them in a declaration under Article 54(2), while not invalidating the declaration, should be treated as mere surplusage.

2.110. A declaration under Article 54(2) is a mandatory declaration which must be made at the time of ratification, etc, and is a precondition of acceptance by UNIDROIT of the instrument of ratification. Article 54(2) does not apply to additional remedies agreed upon by the parties under Article 12. Article 53 empowers a Contracting State to make a declaration as to the relevant “court” or “courts” that are to have jurisdiction under Article 43, though these must be courts as defined by Article 1(h), namely a court of law or an administrative or arbitral tribunal established by that State. Some States have referred in their declarations to all courts established by law, some have identified specific judicial courts, others have included administrative courts and arbitral tribunals. Declarations as to the latter should, in conformity with the definition of “court”
in Article 1(h), be construed as confined to arbitral tribunals established by the declaring State, as opposed to private arbitral tribunals.

Priorities to be respected

2.111. 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 registered non-consensual right or interest covered by Article 40 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 2.265).

Extra-judicial remedies

2.112. 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. Commercial reasonableness is based on an autonomous Convention interpretation, not on the concept of commercial reasonableness in any particular national legal system, so that in a Contracting State the exercise of a remedy which meets the Convention test of reasonableness cannot be struck down because of a more stringent test under national law. It is the manner of exercise of the remedy that is required to be reasonable, not the outcome from the viewpoint of the debtor, and the creditor is entitled to have regard to its own interests, for example, as to the time and method of disposal, in exercising the remedy of sale. However, the test is an objective one - whether the manner of exercise would be considered reasonable by the neutral observer familiar with the usages of the market - not whether it is considered reasonable in the mind of the creditor. Repossession of an object in a manner that is violent or otherwise constitutes a breach of the peace would not constitute enforcement in a commercially reasonable manner (see paragraph 2.107).
2.113. 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), which is replaced by a more general provision in Article X(3) of the Protocol (see paragraph 3.47(1)), is a mandatory provision (Article 15) and therefore cannot be excluded or varied by agreement. Article 8(3), being exercised only with the manner of exercise of remedies, does not affect the freedom of the parties under Article 11 to agree what constitutes default. Article 8 is concerned only with private law remedies. Restrictions imposed, for example, by national safety laws are unaffected by the Convention.

Possession

2.114. 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 an aircraft 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\(^{16}\) 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 custody, repair and insurance. Each of the foregoing remedies has to be exercised in a commercially reasonable manner.

Sale or lease

2.115. 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).

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\(^{16}\) Subject to a declaration by the relevant Contracting State under Article 54(2) that leave of the court is required.
This too is a mandatory provision (Article 15). The Convention does not determine whether “give notice” requires that the notice be received or merely that it be dispatched. That would appear to be a procedural matter to be determined by the *lex fori*. “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 paragraph 2.40(5). 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 “any 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.

(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.
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.

2.116. A buyer from a chargor of an aircraft object should register the sale in order to preserve its priority against a subsequent interest (Protocol, Article XIV(1)).

2.117. 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 chargee 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 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.

2.118. 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.

2.119. Since Article 9 provides for vesting of ownership in the chargee “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 paragraph 2.118 have been built into the process. The Convention does not prescribe any mechanism for determining the value of the object. 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) 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 2.115(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).

2.120. 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)). But in the case of an aircraft object the buyer should register the sale in order to preserve its priority (Protocol, Article XIV).

Default remedies of conditional seller or lessor

2.121. 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. Whether the agreement must be expressly terminated before possession is taken or whether on the other act the act of taking possession is to be regarded as an implied termination of the agreement are matters to be determined by the applicable law and the terms of the agreement. The conditional seller or lessor
may not terminate the agreement or repossess an object without a court order where this is required by a declaration made by a Contracting State under Article 54(2) and the remedy is to be exercised in that State. Because equipment subject to a title reservation or leasing agreement not characterised as a security agreement belongs to the conditional seller or lessor, who is free in principle to do what it likes with its own asset, the exercise of commercial reasonableness does not apply to rerepossession under Article 10 or, normally, to a subsequent sale. However, where the conditional seller or lessor is not the only person having an interest in the proceeds of sale, as where it has agreed to hold any surplus for the buyer or lessee or where the equipment is subject to a security interest given by the conditional seller or lessor, the sale must be effected in a commercially reasonable manner where this is required by the law of the place where the remedy is to be exercised, or under Article IX(3) of the Protocol.

Additional remedies

2.122. 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.

2.123. 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, to enter the debtor’s premises and to sell the object from those 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. However, the requirement of commercial reasonableness imposed by Article 8(3) is a mandatory provision the effect of which the parties cannot derogate from or vary. This applies also to
additional remedies agreed by the parties under Article 12 to the extent to which these are linked to the non-derogable remedies under Article 15., for example, entry on to and sale from the debtor's premises.

2.124. 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.

2.125. 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 2.140).

Relief pending final determination of the creditor’s claim

Overview

2.126. 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,\(^\text{17}\) to the extent that the debtor has at any time so agreed. Such relief (the nature of which is examined in paragraph 2.132) 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 Article X(3) of the Aircraft Protocol adds these remedies as regards aircraft objects). 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) and extended to remedies generally by Article IX(3) of the Protocol). The court has no power to make a vesting order under Article 9 in proceedings for advance relief (see

\(^{17}\) 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 further paragraph 3.47(3).
paragraph 2.138). Under Article 13(2) certain safeguards are provided for the debtor and other interested persons (see paragraph 2.128). 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 2.39) and an “other person having rights in or over the object” within Article 1(m)(iii). Article X(5) of the Protocol provides that the creditor and the debtor may agree in writing to exclude the application of Article 13(2) of the Convention (see paragraph 5.59).

2.127. 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 unless this is required by a Contracting State’s declaration under Article 54(2). 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 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. Article 13 does not apply to the additional remedies of de-registration and export and physical transfer provided by Article IX(1) of the Aircraft Protocol. This is because these remedies are exercised through the registry or administrative authorities, not the courts, and are purely documentary in character. Further, a distinct time frame is provided in that Article XIII(4) of the Protocol requires expeditious co-operation of the relevant authorities, whilst in cases where the debtor is in insolvency or insolvency-related proceedings covered by Alternative A of Article XI the remedies must be made available within five working days after the date on which the creditor notifies the relevant authorities that it is entitled to procure those remedies in accordance with the Convention.
2.128. In making an order under Article 13(1) the court may under Article 13(2) 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, and the fact that the grant of an order for speedy relief would not allow the debtor time to remedy its default is irrelevant. Moreover, in the case of aircraft objects Article 13(2) may be excluded by agreement in writing of the creditor and the debtor or any other interested person (Protocol, Article X(5)).

2.129. By Article 55 a Contracting State may by declaration exclude Article 13, wholly or in part.\(^\text{18}\) Such an exclusion operates only to preclude applications under Article 13 in the declaring State. Only a small number of States have made declarations disapplying Article 13. 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 parties will depend on the exercise of the court’s powers under the applicable law. Where Article 13(1) applies (see paragraph 2.126) the Convention does not allow the parties to exclude Article 13(2), which is mandatory, but as stated

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\(^\text{18}\) The European Community (now the European Union) is treated for most purposes 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 2.288.
above the Aircraft Protocol allows the parties to exclude Article 13(2) by an agreement in writing.

2.130. 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 2.277 et seq.

2.131. Article X(2) of the Aircraft 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 ).

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”)**

2.132. 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 Aircraft Protocol. 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 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 2.128). 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

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19 However interim relief under Article 13(4) is characterised by the *lex fori*. 

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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”

2.133. Article 13(1) does not define “speedy”. That is left to the Protocol, which defines “speedy” as “such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.” See Article X(2) of the Aircraft Protocol and paragraph 3.47(3). For most forms of relief most Contracting States have specified a period of ten working days, reflecting the perceived urgency of applications under Article 13. It is not open to the debtor to complain that exercise of the remedy within the specified period is commercially unreasonable. The debtor’s protection lies in the conditions the court may impose under Article 13(2) or, where that has been excluded by a written agreement under Article X(5) of the Protocol, any protective provisions of the procedural law of the place where the remedy is to be exercised (Article 14). See paragraphs 2.144-145.

2.134. It will be apparent that the date of filing of the application marks the latest time by which a claim for the substantive relief is to be considered “pending”. But this would not, it is thought, preclude an application made before the date of filing in those jurisdictions which permit this under their procedural rules.

Standard of proof

2.135. Article 13 is silent as to the standard of proof required to be adduced by the creditor. The initial question is whether the standard of proof is to be determined as a matter of autonomous interpretation of the Convention or, as a matter of substantive law, by the applicable law or alternatively, as a matter of procedure, by the lex fori, with characterization being determined by the latter. The fact that advance relief is a distinct Convention concept clearly indicates that the court entertaining the application is free to make its own evaluation of the evidence without reference to its own domestic law, though in practice it may well find it convenient to apply the latter, and without considering the otherwise applicable law. This conclusion is reinforced by the fact that the very limited time available to the court for making its decision precludes reference to
substantive national law, particularly where this would have to be established by expert evidence.

2.136. 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,20 which indeed was the final outcome.

2.137. Four 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. So the court is concerned only with the evidence of default, not with considerations such as whether the creditor’s need for the order outweighs the debtor’s interest in preserving its own rights until the final determination or whether it is likely or unlikely that the debtor would be able to satisfy a final judgment. The second factor is that Article 13 is designed for situations of great urgency where prompt relief is necessary to avoid damage to the creditor’s interests, e.g. because the object is in danger of removal, cannibalization or physical or commercial deterioration. The third, equally important, factor is that the time available for the adducing of evidence is extremely limited. For example, where the application is for an order for possession most States have made a declaration that the time within which an order is to be made is ten working days. That demonstrates the urgency of the procedure and is, of course, a fact that would not have been before the delegates when rejecting the inclusion of a prima facie test at the diplomatic Conference. This short time limit is likely to mean in practice that if the creditor adduces evidence of non-payment, which is the most common and most easily proved kind of default, that will suffice, since a defence based, for example, on an

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assertion that the aircraft object was defective or that delivery was late will inevitably have to be determined at the substantive hearing on the merits, in the absence of an admission by the creditor that the assertion is true. The fourth factor is that under Article 13(2) (which in the case of aircraft objects may be excluded by agreement of the parties under Article X(5) of the Aircraft Protocol) the court may impose such terms as its 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. So even if the debtor raises substantial grounds of defence which cannot be investigated in time for the hearing of an application under Article 13 the debtor is not left unprotected.

Variation or exclusion of Article 13

2.138. 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 aircraft objects are concerned it is unnecessary because Article X(3) of the Aircraft 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.

2.139. 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 X(5) of the Aircraft Protocol permits the parties to exclude the application of Article 13(2) by an agreement in writing (see paragraph 3.47(3)).

Interim relief under the \textit{lex fori}

2.140. 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 Article 43 (see paragraphs 2.277 \textit{et seq.}). The grant of such interim relief is primarily governed by the \textit{lex fori}, which might, for example, provide for orders for interim payment or the furnishing of a bond.

Protective measures under Article 13(2)

2.141. Reference has already been made (paragraph 2.128) to the power of the court entertaining an application under Article 13(1) to provide safeguards for the debtor and other “interested persons” in the event of the creditor failing to perform any of its obligations to the debtor under the Convention or Protocol or failing to establish its claim, wholly or in part, at the substantive hearing (Article 13(2)). Such safeguards are designed in particular for cases where there is doubt whether the creditor’s financial position is such that it will be able to meet any compensatory claim subsequently established by the debtor. It would clearly be unjust to make an order in favour of a creditor that is teetering on the brink of insolvency without imposing conditions, because the order has the potential to damage the debtor’s business, if not force the debtor into insolvency. The court’s protective power is very wide; it may “impose such terms as it considers necessary to protect the interested persons”. For example, it could not only exact an undertaking from the creditor to pay damages in the event that it fails to succeed but require this to be reinforced by a guarantee or performance bond from a third party. It is not only the debtor who can be protected by such an order. Any “interested person” as defined by Article 1(m) of the Convention may invoke Article 13(2). A guarantor of the debtor’s obligations obviously has a particular interest in receiving protection.

2.142. The courts of other Contracting States have a duty to recognise orders under Article 13 made by a court having jurisdiction under Articles 42 and 43,
but enforcement of such orders is a matter to be determined by the law of the jurisdiction in which the remedy is sought to be exercised (Article 14), including provisions of that law as to the enforcement of judgments and orders of another State. For example, within the European Union the provisions of Chapter III of Brussels I (recast)\(^{21}\) bind all Member States of the EU. Indeed, a judgment or order made by the courts of a Contracting State which is a Member State of the EU must be enforced by the courts of other EU Member States whether or not they are Cape Town Contracting States. See further paragraphs 2.144-2.145.

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

2.143. Where fractional interests are given in security or are 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.

**Procedure**

2.144. 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 for the purposes of the Convention the exercise of remedies is a procedural matter to be governed by the procedural rules of the *lex fori*, not by those of the *lex causae*. This applies as much to self-help remedies as to judicial remedies. So whether, for example, relief can be given *ex parte* in the first instance (as where the claim is for possession of the object and 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

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matter for local procedural law. Almost always this will be the *lex fori*, since it is the forum courts that have control over the exercise of remedies within their jurisdiction. This applies not only to remedies relating to the object but also the remedy of termination under Article 10 in those jurisdictions (mostly civil law jurisdictions) in which leave of the court is required for termination of a contract and the requirement has not been dispensed with by a declaration under Article 54(2). Whether a particular requirement is a matter of procedure or substance is not always easy to determine but in any event is to be resolved by the *lex fori*. “Procedure” includes rules of court (for which purpose see the definition of “court” in Article 53) and judicial or legally prescribed administrative practice. However, 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).

**The relationship of Article 14 to substantive provisions of the Convention**

2.145. In a Contracting State the procedural law to be applied in accordance with Article 14 must be applied in a manner that is compatible with the substantive provisions of the Convention. For example, procedural law must not be utilised to undermine the substantive remedies given by Articles 8 to 10 of the Convention. Again, Article 13 is paramount in that an order by a court which has jurisdiction to make an order under Article 13 must be respected by other courts exercising jurisdiction under Article 14. Subject to this, Article 14 is complementary to Article 13. Reference has been made in the previous paragraph to the obtaining of *ex parte* orders. Another example is an order made for sale of the aircraft object under Article 13 as expanded by the Protocol. If, for example, the law of the place where the sale is to be effected provides for sale by auction, not by private agreement, then the object must be sold by auction.

**Derogation**

2.146. 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 remedying 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 (paragraphs 2.122-2.123), which is the primary provision dealing with additional remedies. To the extent that additional remedies agreed by the parties are linked to the remedies from which derogation is not permitted these too are subject to the requirement of commercial reasonableness under Article 8(3).

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

2.147. 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 XVI of the Aircraft 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 aircraft objects, by an agreement under Article XVI(1)(a). See generally the discussion in paragraphs 2.215 et seq. and 3.108 et seq.

**The Supervisory Authority**

2.148. 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 the Registry. However, the Supervisory Authority is not empowered to adjudicate on matters relating to a particular registration, which are for the court to determine. The Supervisory Authority as regards the International Registry for aircraft objects is the Council of ICAO. It is advised by a Commission of Experts of the Supervisory Authority of the
International Registry (CESAIR) established pursuant to Article XVII(4) of the Aircraft Protocol. Under Article 27(1) the Supervisory Authority has international legal personality where not already possessing such personality. ICAO, as a specialised agency of the United Nations, already possesses international legal personality (see paragraphs 4.179, 4.181). As to the immunities and privileges enjoyed by ICAO, see paragraph 3.49. It was necessary to have a body performing the functions of the Supervisory Authority before the Convention and Aircraft Protocol entered into force in order to establish regulations for the International Registry and for that purpose a Preparatory Commission was established, pursuant to Resolution No. 2 of the diplomatic Conference, to act with full authority as Provisional Supervisory Authority, under the guidance and supervision of the ICAO Council. The Council itself assumed the role of Supervisory Authority upon the Convention and Aircraft Protocol entering into force.

The registration system

2.149. 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 or 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:

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22 But in the case of certain space assets registrability is a condition of application of the Convention and Protocol. See above, paragraph 2.68.

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(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)). This provision does not apply in relation to aircraft objects since the extension of the Convention to sales makes it unnecessary (see paragraphs 2.214, n. 25, 3.15).

(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 2.263-2.264, 4.279).

(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 declaration is not a priority point, it is merely a prerequisite of the preservation of the priority of such right or interest. See paragraphs 2.309 et seq.

(4) The order of registration of successive sales does not normally attract the priority rules because the parties in the chain of sales are not in competition with each other and if the registration are effected in the order in which the sales are made it is the last registration rather than the first that will show the party currently entitled. See paragraphs 3.96, 3.99.

The International Registry as an asset-based system

2.150. 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 registrable dealings in the object, whether by the debtor or by any other party.
A registration does not guarantee its own validity. Where, for example, the person registering an interest as an international interest is not the true holder of that interest or where the interest is one that is granted by a debtor with no power to dispose or falls outside the Convention because, for example, neither the connecting factor under Article 3 of the Convention nor that under Article IV of the Protocol is present, the registration is of no effect.

The operation of the International Registry

2.151. 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 Procedures for effecting registrations and searches. The Procedures for the Aircraft Registry, which like the Regulations themselves require the approval of the Council of ICAO, provide the detail for implementation of the Regulations. There will be a separate International Registry for each category of equipment. For details of the International Registry established for aircraft objects, which is the only registry currently in existence, see paragraphs 3.52 et seq. Resolution No. 4 of the diplomatic Conference encouraged all negotiating States, international Organisations and private parties, such as the aviation and financial industries, to assist the developing negotiating States in any appropriate way, including facilities and know-how necessary to use the International Registry, so as to allow them to benefit from the Convention and the Aircraft Protocol as early as possible.

International Registry not a title registry

2.152. The International Registry is a registry of international interests, not a title registry; indeed, under the Convention it is not even a registry of outright sales or other outright transfers, merely of security interests and of interests held by conditional sellers and lessors. Entry as the holder of an international interest does not necessarily mean that the holder is the owner of the aircraft object; indeed, there will be many cases where the holder is not the owner, as where it is a lessee who has granted a sub-lease. The Aircraft Protocol extends the

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23 The draft Regulations and Procedures for the International Registry for aircraft objects (8th edition), approved by ICAO subject only to minor editorial changes by the ICAO Secretariat and described in more detail in paragraphs 3.54 et seq., are reproduced in Appendix III by kind permission of ICAO. The International Registry publishes a User Manual containing comprehensive guidance on the operation of the Registry. The latest edition was published in May 2018.
Convention registration provisions to outright sales, but this extension does not convert the system into a title registration system, it merely establishes the priority of the buyer’s interest in an aircraft object as against a competing interest. Similarly, an assignor of associated rights under an assignment carrying with it an international interest is not necessarily the person who has best title to those rights, while the registration of a sale does not necessarily show that the buyer is the owner or that the seller had a power to dispose.

Access to the International Registry; consent to registration

2.153. Access to the International Registry is open to anyone for making searches who opens an account with the Registry as a guest user but for obvious reasons there are strict controls on use of the International Registry to effect registrations (see paragraphs 3.58 et seq. 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. However, under the registration system for aircraft objects notification of a name change is effected independently of any registration. Upon being notified of the name change the registrar carries out checks similar to those used when an account is to be established. The name change is approved by a registry official, and from that time on any search will show the old name as a note at the bottom of the certificate. Where a consent to a registration is required it is necessary that this be registered electronically (Article 18(1)(a)); it is not sufficient that the requisite party has given its consent in advance, for example, in the agreement creating or providing for the international interest, for there is no mechanism for having this recorded in the International Registry. This does not apply to a debtor’s consent to assignment under Article XV of the Aircraft Protocol, which is outside the scope of 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. Nor does the sale by the holder of an interest in a fraction of an aircraft object (“fractional interest”) require the consent of holders of other fractional interests, which are normally unaffected by the sale (see paragraph 3.97).

The fact that a registrable non-consensual right or interest can be registered without consent - for the obvious reason that there is no agreement and thus no party to an agreement - has led to abuse on the part of persons registering a non-
consensual right or interest which is not covered by a declaration of a Contracting State. Rules of the International Registry are designed to provide certain checks against this (see paragraph 3.59).

2.154. Registration is against the individual object, not against the debtor; hence the requirement that the object must be uniquely identifiable (see paragraph 3.73) and the restriction of proceeds to insurance and other loss-related proceeds (Article 1(w)). The order of registrations is important and in a series of interconnected transactions may be agreed between the parties or made subject to an inter-creditor priority agreement, as is common in the case of aviation financing (see paragraph 2.219). The Closing Room facility established by the International Registry for aircraft objects provides a useful mechanism by which the order of registrations can be agreed by the parties and effected electronically in the Closing Room prior to being released to the International Registry. See paragraph 3.88.

Registry system as electronic notice filing system

2.155. The registration provisions are predicated on the assumption that the system is electronic and available on-line, and that the registering party has a valid digital certificate (see paragraph 3.63), the electronic consent and data necessary for registration have been received and the registering party has authority to register. 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

2.156. 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.24 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 (which in the case of a registration relating to an aircraft object is a stage prior to the furnishing of electronic consents, failing which the registration process is aborted) but the time these become accessible by way of search or would be accessible if the system were functioning properly. Therefore users should search to confirm every registration and should not rely on email or other notification received from the registry. But see paragraph 2.159 as to prospective international interests.

Registrable items

2.157. Under Article 16 the registration system is intended to accommodate registrations of:

- international interests;
- prospective international interests (see paragraph 2.159);
- registrable non-consensual rights and interests (explained in paragraphs 2.273 et seq.);
- assignments (which by definition means contractual assignments, as opposed to assignments by operation of law);

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24 See Article XX(1) of the Aircraft Protocol, which prescribes the search criteria, and Article XV(1) of the Luxembourg Protocol and Article XXX of the Space Protocol, which provide that the search criteria are to be established by regulations. In the ordinary way a registration becomes searchable almost immediately after electronic receipt by the International Registry.
- 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));
- other items registrable by virtue of the Aircraft Protocol, namely outright sales or prospective sales.\(^{25}\)

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 paragraph 2.325. 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 4.133). though in the case of aircraft objects outright sales are registrable under the Aircraft Protocol.

**Assignment of international interest**

2.158. The rules governing the assignment of an international interest are not free from complexity. In the first place, the word “assignment” in Article 16(1)b) does not refer to an assignment as defined by Article 1(b), that is, an assignment of associated rights, but to the assignment of the international interest, as envisaged by Article 32(2). Secondly, Article 16(1)(b) is confined to contractual assignments, as is clear from the reference to the consent of the parties in Article 20(1). Thirdly, an assignment created or provided for by a security agreement is not valid, and accordingly its registration is not effective, unless some or all of the related associated rights are also assigned (Article 32(3)). But this is not the only situation in which the question of validity arises. If the holder of an international interest assigns it to A, is it then competent to make a second assignment, to B? The answer to this question is straightforward. The issue is one of priority, not validity. Priority goes to the first to register (Article 29(1) as

\(^{25}\) Article III.
applied by Article 35). So the effect of the assignment to B is a question of priority, not of validity. What, however, is the situation where the assigned international interest has ceased to exist, as where the debtor’s obligations have been fully discharged or where the creditor’s own interest is derived from a higher-ranking creditor, as in the case of a lease to the creditor and a sub-lease by the creditor), and has been terminated? In this case there is no international interest capable of being assigned. It follows that any purported assignment of the associated rights is also devoid of effect (Article 32(3)).

Prospective international interests

2.159. 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(4)). 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, while for statistical purposes, but not as a requirement of the regulations, the registrant is asked to indicate whether the interest being registered is an international interest or only a prospective international interest, though this is captured only in the system and is not shown on the search certificate (see paragraph 2.195) and an erroneous indication does not vitiate the registration. 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 (for the position as to registration of prospective assignments, see paragraph 2.195). 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 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 it has registered a transfer of the right to consent to a discharge to another person, such as an assignee. In the case of an assignment by way of security the assignor has a residual interest in what is assigned but the registration system for aircraft objects can only accommodate the designation of one person as having the right to consent to a discharge. However, the assignor can protect itself by stipulating in the assignment that the assignee shall not consent to a discharge without the assignor’s consent. See further paragraphs 3.90 et seq.

2.160. The registration system for aircraft objects also accommodates fractional interests in aircraft objects under contracts of sale and the grant of international interests, by way of security or otherwise, in fractional holdings of an aircraft object. In addition the system encompasses amendments, extensions and discharges of registrations as provided by Article 16(3) of the Convention.

2.161. 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 sales. After the closing there may well be registrations by a number of different parties. So a leasing company purchases an aircraft with the aid of an advance from a lender secured on the aircraft. 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 respect of the airframe and separately of each aircraft engine (see paragraphs 3.11, 3.58), the registration of the sale and 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-lessee. 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, for which purpose the Closing Room facility established by the International Registry provides a very convenient mechanism (see paragraph 3.88). There are also situations in which a person can hold and register two distinct interests held in two different capacities. For example, a buyer of an airframe who then grants a lease can register both the sale and the international interest arising on the grant of the lease. Similarly if a lessee under a leasing agreement containing an option to purchase grants a sub-lease it can register both as a prospective buyer and as the holder of the international interest arising from the grant of the sub-lease. The question whether registration of one interest protects the registrant against the
consequences of failing to register the other is discussed in paragraphs 3.103 et seq.

**Limits of the registration system**

2.162. 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 (and there may be registrations outside the Convention – see paragraph 2.197), the Regulations will not specify a type of registration which the technology of the International Registry cannot for the time being accommodate. See paragraph 3.78.

2.163. 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.

**Registration no guarantee of its own validity**

2.164. 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 or legal 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. So, as stated earlier, registration of an international interest does not necessarily mean that the interest exists. 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. Similarly, a registration initially valid may cease to be effective because the international interest no longer exists and no remedies remain exercisable in respect of it. The following paragraphs examine issues arising from
an irregular registration and from the maintenance of a valid registration when it should have been discharged.

**Types of irregular registration**

2.165. There are four main categories of case where a registration is initially irregular or becomes irregular through failure to register a discharge. The consequence of the irregularity will depend upon the circumstances.

(1) Errors in the registered data and their correction

(2) Irregular registration of non-Convention consensual interests

(3) Improper registration of non-consensual rights or interests

(4) Maintenance on the register of an interest that has ceased to exist.

**Errors in the registered data and their correction**

2.166. 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 2.199, 4.187) but not for recording or transmitting 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, though in the case of the International Registry for aircraft objects this is substantially reduced by the use of data supplied to the International Registry direct by the aircraft manufacturers (see paragraph 3.73). 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. On this basis the test would be whether the error is seriously misleading in an objective sense regardless whether a particular searcher was in fact misled.

2.167. 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 discharge or 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 2.282). 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 2.181 et seq., 3.91.

Registration of non-Convention consensual interests

2.168. 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 (see paragraph 2.164) the entry in the International Registry is without effect under the Convention. Moreover, it may expose the registrant to legal liability as improperly casting a shadow on the title of the person having an ownership or other interest in the object. 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 is not the responsibility of the Registrar and may involve enquiry of the relevant parties. As will be seen, however, there are certain checks built into the system (see generally paragraph 3.59).
Improper registrations of non-consensual rights or interests

2.169. Particular problems have arisen in several cases in respect of improper registrations of a non-consensual right or interest under Article 40 of the Convention (improper registration by the purported holder of an international interest), the remedies for which are discussed in paragraph 2.171. Registration of such interests requires the digital signature of the registrant but not the consent of anyone else, since the registrant is not a debtor and there is no relationship between the creditor and the registrant unless the creditor is itself the registrant. So it is not unknown for a non-consensual interest to be registered which has not been the subject of a declaration by a Contracting State. The International Registry now maintains records of all Contracting States and of all declarations, so that the system requires the person attempting to register a non-consensual right or interest to identify the Contracting State by whom the declaration purports to have been made as the State under whose law the non-consensual right or interest is said to arise and to provide documentary evidence pertaining to it (see paragraph 3.59). Further, a non-consensual right or interest can only be registered by an approved person (see generally paragraph 3.59).

2.170. The fact that an improper registration by a third party has no effect under the Convention is of little consolation to the holder of an international interest, since the registration casts a shadow on the holder’s title. Whether and in what conditions this is actionable is to be determined by the applicable law as determined by the conflict rules of the lex fori. On the basis that an improper registration adversely affecting the holder of an international interest is a tort under Irish law committed in Ireland the Irish courts have in several cases assumed general jurisdiction to make an in personam order directing the registrant to have the improper registration discharged and where this is not done within the time permitted the High Court has then made an order directing the Registrar to discharge the registration. See below, paragraphs 2.171, 2.273, and 2.282.

Remedies for improper registration

2.171. The Convention does not itself prescribe the remedy for a party suffering loss or damage as the result of the improper registration. That is a matter for the applicable law as determined by the forum State’s conflict of laws rules. That law may provide that an intentional misuse of the registration system so as to cast a shadow on the title of the holder of a registered international interest is actionable. An application for an in personam order requiring the registrant to
procure discharge of the improper registration can be entertained by any court having competence under its own jurisdiction rules and if the order is made by a court outside Ireland the Irish High Court can order the Registrar, either under Article 44(3) of the Convention where the foreign court has jurisdiction under Article 42 (jurisdiction by agreement) or, where it does not, under Article 44(1), to discharge the registration (see paragraph 4.312). But the Irish High Court will assume jurisdiction itself over a foreign registrant under its general jurisdiction rules wherever leave is given for service of the proceedings on the registrant outside the jurisdiction under one or other of the provisions of Article 11 of the Rules of the Superior Courts. Such leave is granted ex parte on the basis of supporting affidavits based on the fact that the improper registration constitutes the tort of slander of title or malicious falsehood or misrepresentation under Irish law, committed in Ireland; that the relief sought is for an injunction as to something to be done within the jurisdiction or that the registrant is a necessary party to proceedings brought against the Registrar for an order requiring discharge of the registration. However, the issue of jurisdiction has never been tested. In most cases the respondent does not attend and even where it does its challenge to the application has never so far been based on want of jurisdiction. See further paragraphs 2.284-2.285.

**Failure to discharge a registration lawfully made but ceasing to have effect**

2.172. It is not only improper registrations that my cause difficulty but registrations lawfully made which should have been discharged. There is no problem with time-limited registrations, since these include a lapse date shown in the priority certificate, rendering it unnecessary to record a discharge. Difficulties may arise, however, where (a) the obligations secured by the international interest have been discharged, or (b) the international interest has otherwise ceased to exist. See paragraphs 2.173 and 2.174.

**Remedies for improper failure to discharge an authorized registration**

2.173. Where an international interest has come to an end because the debtor has fulfilled its obligations under the agreement or the conditions of transfer of title under a registered title reservation agreement have been fulfilled Article 25(1) of the Convention imposes on the holder of the interest an obligation to procure its discharge on written demand by the debtor delivered to or received at the creditor’s address stated in the registration. Where this obligation is not met the Irish High Court has jurisdiction under Article 44(2) to make an order
directing the Registrar to discharge the registration. This is the straightforward case. More difficult is the situation where the agreement creating or providing for the international interest has been terminated by default.

2.174. An international interest does not necessarily cease to exist merely because the agreement creating or providing for it has been terminated by default. The creditor remains entitled to exercise the default remedies under Articles 8-10 and until these have been exhausted, together with any claim to proceeds (see paragraph 2.97), the Convention remains applicable and the international interest continues in force and its registration remains valid. But upon the exhaustion of the remedies relating to the aircraft object and proceeds the international interest is extinguished and the debtor loses its power to dispose under the Convention, having lost possession. For example, C, a creditor outside Ireland, has registered an international interest arising under a lease granted to D and subsequently exercises a right to terminate the lease and repossess the aircraft object because of D’s default and there are no other remedies remaining to be exercised, e.g. collection of income under Article 8(1)(c) or of proceeds as defined by Article 1(w). The Convention makes no express provision for the discharge of the registration in these circumstances. No problem arises unless and until another creditor wishes to make a registration, in which case that creditor will want C’s registration to be discharged. There seems no reason why such a creditor should not be entitled to apply for discharge of the registration on the grounds that it casts a shadow on the priority status of the international interest which that creditor has registered or wishes to register. The Irish High Court, which has sole jurisdiction over the International Registry, can also exercise jurisdiction over C on any of the grounds which under rules of court permit service on D out of the jurisdiction, for example, that the continued registration constitutes the tort of slander of title committed in Ireland.

2.175. More complex is the situation where D has granted a sub-lease to E and C terminates the head lease. The effect of such termination depends on the applicable law. If this provides that termination of the head lease automatically terminates the sub-lease at a time when no remedies remain to be exercised by the sub-lessee against the sub-lessee then if D fails to procure discharge of the registration of the international interest arising under the sub-lease C should apply to the Irish High Court for an order for discharge under Article 44 (see paragraph 2.171). But where under the applicable law the sub-lease remains binding on C (e.g. because it was authorized and under the applicable law the
sub-lease is not dependent on continuance of the head lease) and E becomes a direct lessee of C on the terms of the sub-lease, the result is that there is a transfer of D’s interest to C by operation of law. Where under the applicable law this transfer takes effect by subrogation this is protected by Article 38(1) and is registrable under Article 16(1)(c) of the Convention. Where on the other hand the applicable law treats the transfer not as a subrogation but as an assignment by operation of law this does not fall within any registrable category and C is at risk of subordination to a third party to whom E disposes of the aircraft object and who registers the disposition. In such a case C should seek a contractual assignment from D and register this under Article 16(1)(b). Failing this, D’s ability to have its interest protected by registration will depend on whether the Irish High Court considers that it has general jurisdiction to make an order against D to execute the necessary assignment and, in the event of non-compliance, have the assignment executed by another person, e.g. an officer of the court, enabling the court to exercise its Convention jurisdiction under Article 44 to direct that the assignment be registered.

**Duration of registration**

2.176. 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 by or with the consent of the party in whose favour it was made (Article 20(3)). As to the transfer of a right to consent to a discharge as regards the Aircraft Registry, see paragraph 3.90. 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 not to extinguish the international interest but to convert it into an unperfected interest, so 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.
2.177. 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 2.96) 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

2.178 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. For provisions of the regulations of the International Registry for aircraft objects governing amendments, see paragraphs 3.81 et seq. Forms of transfer by operation of law, 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 both the registration provisions governing assignment and the priority rule in Article 35 governing the priority of competing assignments, because the definition of “assignment” in Article 1(b) is limited to contractual assignments. Where, however, under the applicable law a transfer by operation of law constitutes a subrogation the transferee’s acquisition of the international interest is registrable under Article 16(1)(c) of the Convention and priority of the subrogation as against assignees will be determined by the order of registration under Article 29(1). See paragraph 2.172.

2.179. An amendment involves continuance of an existing registration in modified form. It is thus necessary to distinguish an amendment from a new registration, 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 by substituting a later lapse date 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. However, as noted above, an extension falls within the definition of amendment for the purposes of the Regulations (see further paragraph 3.81). 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.

2.180. 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 with priority going back to the time of A’s registration 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, subject to Article 36 (see paragraph 2.257). Similar considerations apply to acquisition of an international interest by subrogation. Section 5.6 of the Regulations provides for a facility for registering a block assignment to avoid the need for registration of individual assignments but no such facility has been introduced, and the registration of multiple assignments can usually be achieved through the Closing Room. Extinction of an international interest, including a fractional interest, entitles the debtor to have the registration discharged, and discharge will carry with it the discharge of any amendment. Thus where a fractional interest in an aircraft object 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 total or partial payment a total or partial discharge should be registered (see paragraph 2.187 as to partial discharge).

**Discharge of registration**

2.181. A registration may and should be discharged (a) following extinguishment or termination of the international interest or registered non-

consensual right or interest to which it relates, (b) in the case of a time-registered lease by its reaching the lapse date, (c) following an agreement for discharge or (d) pursuant to a court order where the registration is invalid or otherwise improperly made or, though validly made, has been improperly maintained when the interest to which it relates no longer exists. A prospective international interest or assignment may be discharged before the creditor or assignee has given value or incurred a commitment to give value. All these cases are covered by Article 25, which is buttressed, in the case of the International Registry, by its Regulations and Procedures (see paragraphs 3.90 and 4.171).

2.182. Article 25(1) contains provisions by which a person against whom a registration has been made in respect of a security agreement, a registered non-consensual right or interest or a title reservation agreement can procure its discharge where that person no longer owes any obligations under the agreement or in respect of the non-consensual right or interest, Article 25(3) contains similar provisions in respect of discharged obligations arising in connection with a national interest. Under Article 25(2) a prospective creditor or a prospective assignee must without undue delay, procure discharge of the registration after demand by the intending debtor or assignor where 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. Article 25(1) does not apply to a registration in respect of a leasing agreement because a lease comes to an end either by termination or by expiry, not by fulfilment of financial obligations. Finally, under Article 25(4), where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made must without undue delay procure discharge or amendment of the registration after written demand by the debtor. A registration may be incorrect ab initio or become incorrect because it relates to an interest which has been satisfied or otherwise come to an end, as on expiry of a lease.

2.183. There are two other cases, which fall outside Article 25. First, in the case of sales, to which the Convention is extended by the Aircraft Protocol, the period of registration is unlimited and the provisions on discharge do not normally apply, since the transfer to the buyer is an outright transfer and not limited in time. The rule is different, however, in the case of a prospective sale, which may be discharged pursuant to the electronic consent of the buyer or the transferee of the right to consent to discharge. Second, in exceptional cases, such
as system malfunction, a registration may be discharged by the Registrar on its own initiative (see paragraph 3.90).

2.184. Article 25 suffers from a major lacuna in that the only persons entitled to procure a discharge are the debtor, an intending debtor and an intending assignor. But the holder of an international interest has, if anything, an even stronger interest in procuring discharge of an improper registration adversely affecting the holder’s interest, for example, one who has registered an international interest it does not hold or the registrant of a purported non-consensual right or interest wrongly registered under Article 40. These cases have to be addressed instead through a broad interpretation of Article 44(1) under which the courts of the jurisdiction where the Registrar has its centre of administration (in the case of the Registrar of the International Registry for interests in aircraft objects, the Irish High Court) should be treated as having jurisdiction to enforce an *in personam* order of a competent jurisdiction requiring discharge of the registration, by analogy with Article 44(3).

2.185. Though Article 44(3) envisages an order by a foreign court what has happened in practice is that the Irish High Court has assumed jurisdiction under its general jurisdictional rules (see paragraph 2.171) and has then made an order which results in transfer to the Commercial Court to exercise jurisdiction under Article 44(1) to order the discharge. See generally paragraphs 2.284 *et seq.* and 4.309 *et seq.*

2.186. 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, for example of a lease, expires (though in practice limited period registrations are not often made, because the parties will not know in advance when the registered interest will come to an end (see paragraph 2.96) and therefore when it will be appropriate to discharge the registration. Discharge of registration of an international interest does not in itself terminate the international interest, it merely reconverts it into an unperfected interest with a consequent risk of loss of priority (see paragraph 2.176).

**Partial discharge**

2.187. The Convention does not make express provision for registration of a partial discharge, but there seems nothing to preclude this and such registrations are accepted in the International Registry for aircraft objects. A possible example
of a partial discharge is where a person holding a 50% interest in an airframe 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

2.188. 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)), which in the case of the Aircraft Registry is the High Court in Dublin. 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.

2.189. 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. 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. However, such a court may have jurisdiction under its own jurisdiction rules. The Irish High Court has, in relation to aircraft objects, implicitly upheld in a number of cases the argument advanced on behalf of the holder of an adversely affected international interest that it has jurisdiction over a foreign registrant under its Rules of Court. See paragraph 2.171.
2.190. 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, 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

2.191. No registration in the International Registry for aircraft (the only one currently operative) is ever expunged with the sole exception that the Registrar may reverse a name change and remove the name change history where satisfied that no such name change took place (Regulations, Section 5.16). 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. Most registrations may be discharged. At one time it was even possible to register a discharge of a discharge but this was meaningless because once a registration has been discharged it cannot be reactivated and a fresh registration is necessary. Section 5.8.5 now makes it clear that a discharge of a discharge may no longer be registered.

Access to the International Registry

2.192. 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 must, of course, be 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. Regulations and Procedures governing the International
Registry for aircraft objects rightly place a heavy emphasis on security and the prevention of unauthorised access. See paragraphs 3.58 et seq. By contrast the principle of open access applies fully to searches, which, subject to the opening of a “guest user account” with the International Registry, can be made by any member of the public, and no consent of any other person is required. 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. Indeed, there is nothing to preclude registration and search from outside Earth altogether, for example from a space station. Further, it does not appear to be necessary to effect registration directly through a human agent; it could be done on the registrant’s behalf automatically by the use of artificial intelligence or a smart contract built into a blockchain or other authorised automated technology able to access the appropriate private key. 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. Regulations made by the International Registry for aircraft are designed to ensure that such requirements are not by-passed by a registrant who improperly seeks to register directly. However, the Regulations allow users to by-pass the entry point if the procedures of that entry point do not allow it to receive an entry point code in the case of an authorised entry point or if not permitted to be used in the case of a direct entry point.

2.193. Article 18(5) applies only to registrations, not to searches, which are made direct by the parties themselves or their agents.

2.194. 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

2.195. The International Registry for aircraft objects provides four kinds of search facility, two of which are official in the sense of being prescribed by the Convention, whereas the third is not. They are described in paragraph 3.89. 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 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. A similar rule applies to prospective sales (see paragraph 3.107) but by a drafting oversight the requirement of neutrality of the certificate under Article 22(3) (see paragraph 2.159) is not carried over to prospective assignments of an international interest, to which Article 22(3) does not expressly apply. On the face of it, therefore, a search certificate should state whether the registration relates to an actual or prospective assignment. But this would defeat the object of Article 19(4) as applied to assignments by Article 19(5), the very purpose of which is to avoid the need for a second registration. Accordingly the intention of Article 19(5) must be to extend the effect of Article 22(3) to cover assignments and Article 22(3) should be construed accordingly.

2.196. 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 (“priority search certificate”). Under the Regulations for the International Registry relating to aircraft objects the results of an informational search, which is outside the Convention, are given without responsibility on the part of the International Registry and are not embodied in a search certificate.

Non-Convention registrations

2.197. 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, consent has in fact been given (and not merely recorded as given) as required by Article 20 of the Convention (see Article 19(1)) and the registration is searchable. 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 debtor was situated in a Contracting State at the time of the agreement.\textsuperscript{26} 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 where the jurisdiction in question does not itself have a registration system. Another is the creditor’s desire to give notice of an entire transaction only part of which is covered by the Convention. With a view to ensuring that those searching the International Registry are not misled, Section 3.2 of the Regulations relating to the registration of interests in aircraft objects emphasizes that whether a registration falls within the scope of the Convention or Aircraft Protocol depends on the underlying facts, and that while, for example, there is no technical impediment to the registration of pre-existing interests such registrations have no effect under the Convention or Protocol except where, by virtue of a declaration under Article 60(3) of the Convention, registration is required.

**Immunity of Supervisory Authority for errors, omissions and system malfunction**

2.198. 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. ICAO already enjoys international legal personality as a specialised agency of the United Nations (see

\textsuperscript{26} 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.
paragraphs 4.179, 4.181). 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 paragraph 3.49).

**Liability of Registrar**

2.199. 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. However, there are four 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 paragraphs 4.187-4.188.

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 Cape Town 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.
(3) As stated earlier (paragraph 2.10) the Convention, as a private law Convention, does not affect mandatory rules of public law, so that the Registrar cannot be required to carry out registrations which would be unlawful in the State where the International Registry is based.

(4) 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)).

A further exemption from liability is provided by Section 14.1 of the Regulations, under which “loss suffered” for the purpose of Article 28(1) of the Convention does not include loss or damage resulting from lack of access where this is precluded because the International Registry is undergoing maintenance outside peak periods or because of technical or security problems, as set out in the Procedures. 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. The present cover for the Aircraft Registry is USD 200 million.

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

2.200. 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)). The International Registry for aircraft objects is not a legal entity, so the reference to “assets, documents, data bases and archives of the International Registry” means those held by the Registry but belonging, as regards the data bases and archives, to the Council of ICAO as Supervisory Authority. It would seem that other assets, such as computers, software and peripheral devices, and documents not forming part of the archives, 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**

2.201. 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. However, for brevity the term “priority” is here used in an extended sense to cover cases where a party is not merely subordinated but loses its interest altogether, as where a lessor fails to register its international interest and the lessee, being in possession, sells the object outright to a third party. In such a case the lessor’s unregistered interest in the object, which could be the interest of an absolute owner, is extinguished. The rules discussed below relate to the priority of international interests and registered non-consensual rights or interests. There are separate provisions governing the priority of assignments. See paragraphs 2.253 et seq.

2.202. The general 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)). See paragraph By extension it also includes a registered pre-existing right or interest covered by a Contracting State’s declaration under Article 60(3). An unregistered interest is a consensual interest or a non-consensual right or interest (other than an interest to which Article 39 applies that 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.

2.203. The priority rules in Article 29 do not apply to successive interests which are not in competition with each other. So generally Article 29 has no application to fractional interests (see paragraphs 2.213 and 3.97) or to successive sales where the seller does not remain in possession (see paragraphs 3.96 and 3.99). Nor does Article 29 apply to competing interests both or all of which are unregistered.

2.204. The priority rules do not distinguish sales of inventory from sales of equipment. Accordingly a buyer of high-value equipment from a dealer is expected to search the registry and protect its own interest by registration under the Protocol. However, the draft MAC Protocol contains provisions specifically relating to inventory.

2.205. So far as the courts of a Contracting State are concerned a registered interest has priority over an unregistered interest (other than a pre-existing right or interest – see Article 60) 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 2.31(5), 2.33 et seq.). Article 29(1) thus overrides priority rules under national law, whether those rules are of a Contracting State or non-Contracting State. 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. In practice a debtor who is not in possession will not have a power to dispose under the Convention, though it may have such power under the applicable law. Finally, a creditor who fails to register does not secure recognition of the effectiveness of its international interest under the Convention pursuant to Article 30(1) of the Convention and such recognition will be dependent on the applicable law (Article 30(2)).
2.206. 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, coupled with the fact that (contrary to the general rule in national legal systems) the registrant’s knowledge of a prior unregistered interest is irrelevant, carries with it the necessary implication that the conditional buyer or lessee in possession, though not having a right to dispose of the object, has a power to do so (see paragraph 2.84) 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)). The sub-purchaser or sub-lessee would in turn, if in possession, have power to sell or otherwise dispose of the object in favour of a third party who, upon registration of the disposition, would take priority over the unregistered interest vested in the conditional seller or head lessor. In the case of an aircraft object, where the Aircraft Protocol extends the Convention to outright sales, a sale by a debtor in possession, once registered, would extinguish the title of the creditor holding the unregistered interest even if that creditor had previously registered its own purchase (see paragraph 3.104). Moreover, a conditional seller or lessor who fails to register and later charges the object to a lender who registers the charge, while subordinating the sub-seller or sub-lessee to the rights of the disponee who registers, has no effect on the registered interest of the conditional seller or head lessor. Similarly, a chargee of a sub-lease cannot gain priority over a chargee of a head lease even if the charge of the head lease is registered afterwards, because the sub-lease is derived

2.207. In the previous paragraph it was assumed that it was the conditional seller or head lessor who had not registered its international interest. But where this has been registered but the interest of a sub-seller or sub-lessee has not then a disposition by the sub-purchaser or sub-lessee, while subordinating the sub-seller or sub-lessee to the rights of the disponee who registers, has no effect on the registered interest of the conditional seller or head lessor. Similarly, a chargee of a sub-lease cannot gain priority over a chargee of a head lease even if the charge of the head lease is registered afterwards, because the sub-lease is derived
from the head lease. In short, Article 29 only affects priorities of interests of the same degree.

2.208. The same rules apply to the priority of a non-consensual right or interest registered under Article 40 of the Convention vis-à-vis another non-consensual right or interest or a competing international interest 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.

2.209. A transferred interest (see paragraph 2.41) 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.

2.210. 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.

**Proceeds**

2.211. 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. “Proceeds” is narrowly defined 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, this would produce an undesired clash with the UN Assignments Convention. So long as proceeds as defined by Article 1(w) are identifiable in the hands of the debtor or a junior creditor 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 an aircraft object 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. This is a matter for the applicable law. Whether proceeds which are no longer in the hands of the debtor or a junior creditor or which have become commingled with other assets of the debtor remain traceable is answered not by the Convention but by the applicable law. Proceeds will usually take the form of money paid or transferred into a bank account. Whether the creditor’s claim to the proceeds is subject to bank set-off in respect
of liabilities owed by the debtor to the bank is again a matter for the applicable law.

Exceptions to the general priority rules

2.212. Leaving aside fractional interests, which in general are outside the scope of Article 29 altogether, 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.

2.213. 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. But see paragraph 3.97.

Outright buyer

2.214. 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 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 2.49) but simply whatever interest it had at the time of entering into the conditional sale or leasing agreement.

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27 However, the Aircraft Protocol extends 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 disapplied as regards aircraft objects.
Conditional buyer or lessee

2.215. 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 interest 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 XVI of the Aircraft Protocol. 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.
2.216. 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 2.82(4)) and this enables it to constitute an international interest by leasing to 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 (see paragraph 2.221). 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. Article XVI of the Aircraft 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 XVI thus makes explicit a right implicitly given by the priority rule in Article 29(4)(b) of the Convention.

2.217. 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.

2.218. 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 an aircraft object 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 as a Convention registration 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 2.309 et seq.

Variation of priorities by agreement

2.219. 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.

2.220. 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

2.221. 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 an aircraft object under a title reservation agreement registers its international interest and then charges the agreement and the aircraft object to another 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 it claim priority over the lessor’s assignee, who succeeds to the position of the lessor.
Non-consensual rights or interests

2.222. 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 in a case where the applicable law is that of the declaring State. This is so even if the debtor is the subject of insolvency proceedings (Article 39(1)(a)). See paragraphs 2.234 et seq.

International interest following registration of prospective international interest

2.223. 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)). This means that a subsequent international interest registered before the prospective international interest has ripened into an actual interest has initial priority, but this will be displaced if and when the earlier, prospective, international interest becomes an actual international interest. 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

2.224. 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 2.309). 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 paragraphs 2.325 et seq.). For a detailed analysis of Article 60 see paragraphs 2.309 et seq.

**Creditor in possession**

2.225. 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, provided that the debtor still had a power of disposal at the time of grant of the later interest, which will not be the case under the Convention, because of the absence of possession, but could, perhaps, occur under agency powers under the applicable law.

**Promotion through termination of a prior-ranking interest**

2.226. Where a registered international interest terminates, whether by completion of payment by the debtor or by termination by the creditor, as where a lessor terminates a leasing agreement by reason of the lessee’s default and its Convention remedies have been exhausted (see paragraph 2.97), the next ranking creditor is promoted to the priority position previously held by the

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28 “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 2.310.
creditor of the terminated interest. This is the case even if no entry of discharge of that interest has been placed on the register.

Exclusion of doctrine of accession: items other than objects

2.227. 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 aircraft objects the term covers such articles as spare parts which are not themselves aircraft engines, modules installed on engines, computers, audio and visual systems, and the like. Article 29(7) is designed to ensure that rights of a person in an item (other than an object) held prior to its installation on an object are not affected by installation of the item on an object if under the applicable law those rights continue to exist after the installation, and new rights may be created in a previously installed item which is removed where under the applicable law those rights are created. For example, computer units and other items may become damaged or defective and may need to be replaced by other units or spare parts which may themselves have a high economic value. Article 29(7) applies not only to international interests but to non-consensual rights or interests registered under Article 40 and national interests under Article 50 notice of which has been registered in the International Registry.

2.228. 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 or otherwise become subject to the rights of the owner of, or to another creditor holding a security interest in, the airframe or aircraft engine. In the case of the holder of the other security interest this remains valid but is subordinated to the pre-installation interest of the other creditor in the item. The word “person” is not confined to third parties but includes the debtor itself, so that although in practice the security agreement is likely to capture subsequent installations by the debtor it remains the case that, if the applicable law so provides, the debtor will retain ownership of the installed item subject only to the security interest. “Installed” is to be contrasted with “incorporated” and “attached” and denotes accessories removable without any, or any significant, damage to the object or the accessory (see paragraph 2.231). So Article 29(7)(a) excludes only the widest concept of the accession doctrine (see paragraph 2.231) and does not apply to items that are not merely installed but attached or incorporated. A second question is the meaning of “does not affect”. Does it
mean that the international interest does not apply to all to the item where the other person’s rights over it continue under the applicable law or merely that those rights have priority over the international interest. An earlier draft of what is now Article 29(7)(a) formulated this in priority terms, providing that the Convention “does not determine priority as between the holder of an interest in an item held prior to its installation on an object and the holder of an international interest in that object.” That was intentionally changed to the present text in order to make it clear that the international interest does not apply to the installed item at all, even as a junior interest, so it cannot be asserted even against the debtor. Again, if an item already installed on and forming part of the airframe or aircraft engine (i.e. not covered by Article 29(7)(a)) is then dealt with separately from the airframe or aircraft engine and the dealing is effective under the applicable law to create rights in the item separate from those in the airframe or aircraft engine, 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. Many legal systems possess the doctrine of accession, though what constitutes an accession differs from jurisdiction to jurisdiction (see paragraph 2.231). The accession doctrine is needed to avoid situations in which the assertion of title to the installed object could seriously undermine the rights of the owner of the principal object. That is why Article 29(7)(a) leaves it to the applicable law to determine whether, in regard to installed items other than aircraft objects, the accession rule should be displaced.

The “person” whose rights are stated not to be affected by the installation if preserved by the applicable law covers not only a competing creditor but the debtor itself. That, however, is unlikely to benefit the debtor, whose rights as owner remain subject to the international interest it has granted over the airframe under the agreement with the creditor, which typically will cover both present and future installed items. These, not being objects but simply part of the airframe, are not subject to individual asset identification requirements.

29 See DCME doc No 45, paragraph 1, in Acts and Proceedings of the Diplomatic Conference at page 207.
2.229. Article 29(7) is replicated in Article XIV(4) of the Aircraft Protocol. This was thought necessary to avoid items other than objects being swept up into the definition of “airframes” in Article I(2)(e) of the Protocol.\(^{30}\) However, it does not apply to installed or removed aircraft engines, for these are not mere components but distinct Convention objects that do not form part of the airframe on which they are installed, interests in them being separately registrable. Hence Article XIV(3), unlike Article XIV(4), does not leave ownership or other rights in installed engines to be dealt with by the applicable law; it lays down a positive rule that such rights are not affected by the aircraft engine’s installation on or removal from the airframe.

2.230. Article XIV(3) of the Aircraft Protocol contains a special rule for aircraft engines. Ownership of or another right or interest in an aircraft engine is not affected by its installation on or removal from an aircraft, so that (in contrast to the position under Article 29(7)) this is the case even if under the applicable law the engine would otherwise have passed to the owner of the airframe by a rule of accession (see paragraph 2.231).

2.231. The definitions of “aircraft engines”, “airframes” and “helicopters” in Article I of the Aircraft Protocol are all expressed as including “all installed, incorporated or attached accessories, parts and equipment” (but the definition of airframes excludes aircraft engines). The terms “installed”, “incorporated” and “attached” are not defined but appears to be intended to denote different degrees of association between the accessory and the principal object. On this basis “installed” means that the accessory can be removed without any, or any significant, damage either to the object or to the accessory, while “incorporated” is at the other end of the spectrum, denoting an absorption of the accessory into the object such that the accessory loses its identity and “attached” refers to the intermediate position where the accessory retains its identity but cannot be detached without significant damage to the object or the accessory.

In some legal systems accession is equated with an accessory that is “attached” as described above. In other legal systems, however, “accession” has a broader meaning, covering any accessory physically united or connected with another object in a way as not to lose its identity, whether or not its severance would cause damage to either object. Under this conception an installed engine would constitute an accession even though readily removable without causing

\(^{30}\) *ibid*, at page 208.
significant damage. In yet other jurisdictions title to the installed object may pass, or other rights be acquired, by the owner of the principal object without the need to invoke any doctrine of accession, as where it suffices that the association of the subsidiary object with the principal object serves to enhance the utility of the latter, and its removal to reduce such utility, otherwise than on a purely temporary basis. Given that the stated purpose of Article XIV(3) is to preclude the application of the doctrine of accession to installed aircraft engines, it must be concluded that for the purposes of the Convention and Protocol aircraft engines, when installed, would have been treated as accessions, or otherwise as passing into the ownership of, or becoming subordinated to the rights of, the owner of the principal object, but for the provisions of Article XIV(3).

**Effect of the debtor’s insolvency**

2.232. The general rule is that in insolvency proceedings against the debtor (see Article 1(l) and paragraphs 3.118 and 4.21 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 2.273). “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. The applicable law under conflict of laws rules is generally taken to be the law of the situation of the object (*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. Given that an international interest is the creature of the

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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.

2.233. The fact that an unregistered interest valid under the *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 2.236).

2.234. 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 *a fortiori* has priority over an unregistered interest (see paragraph 2.267). 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.

2.235. Under Article 30(3(a)) the general rule in Article 30(1) does not protect a registered international interest from rules of 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.

2.236. 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 Protocol Article 30(3)(b) does not apply, being overridden by those 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)).

2.237. The Convention does not deal with insolvency jurisdiction. That is a matter for national law, including the EU Insolvency Regulation (recast) 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 (1997) (the “UNCITRAL Model Law”) relating to the recognition of and support for foreign insolvency proceedings. However, Article XI of the Aircraft

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32 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 3.138.
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)(n) of the Protocol (see paragraphs 3.117 et seq.).

Registration of assignment or prospective assignment of international interest

2.238. 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 2.239). 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 2.234), 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 2.240) or is to secure protection under Article 30(1), as applied by Article 37, in the event of the assignor’s insolvency. The conversion of a registered prospective assignment into an actual assignment does not require fresh registration and the assignment is treated as registered from the time of registration of the prospective assignment provided the registration was current immediately before the assignment (Article 19(4),(5)). This follows the rule for registration of a prospective international interest. However, by a drafting oversight the neutrality of a search certificate as to international interests under Article 22(3) (see paragraph 2.195) is not expressly extended to prospective assignments but should be treated as applicable by analogy to these, for otherwise Article 19(5), designed to obviate the need for a second registration, will be undermined. For brevity the search certificate issued by the International Registry refers only to “assignment” but an explanatory note states that this is not intended to indicate whether what is registered is an assignment or a prospective assignment. 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 under Article XV of the Aircraft Protocol need not be communicated to the International Registry electronically, this being outside the scope of Article 18(1)(a). 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**

2.239. 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 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.

2.240. 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:
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.

Assignment of associated rights

2.241. 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-lessee it is a creditor holding a registrable international interest and the assignment of its rights as sub-lessee will be an assignment of associated rights carrying with it an assignment of the sub-lessee’s international interest (Article 31(1)) which will be registrable under Article 16(1)(b)). The provisions as to the assignment of associated rights do not apply to sales.

2.242. 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 transfer of the related international interest.\(^{33}\) It thus embraces both outright transfers and charges. 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 2.53-2.54), 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

2.243. 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.

Categories of associated rights

2.244. 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

\(^{33}\) Article 1(b). But an assignment which is not effective to transfer the related international interest is outside the Convention (Article 32(3)). Moreover, only assignments and prospective assignments of the international interest are registrable under Article 16(1)(b).
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 2.257 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**

2.245. 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, it was considered that the normal rule should be applied, a decision which led to complicated and not altogether successful drafting. 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. There are no prescribed formalities for the assignment of associated rights but if these are to be effective to transfer the related international interest, without which the Convention will not apply to the assignment (Article 32(3)) the assignment must conform to Article 32, which tracks Article 7 relating to the constitution of an international interest except that there is no reference to a power to dispose. Just as the substantive validity of an agreement as a contract creating or providing for an international interest is governed by the applicable law (see paragraph 2.79), so also the substantive validity of an assignment is governed of associated rights is governed not by the Convention but by the applicable law, which will thus apply to such matters as the effect of a contractual prohibition of assignment or of overriding rules of public policy. For the position where the assigned international interest has not been registered see paragraph 2.239.
2.246. 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 might 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.

2.247. 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 right or 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 pre-existing right or 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 2.261).

2.248. 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 2.251). 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(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 clauses 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.

2.249. 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 if it is by way of security (Article 32(3)) and in that case 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 in theory 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 in theory be transferred to one party and the associated rights to another but with the same limited effect.

Partial assignments

2.250. 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; duties of debtor**

2.251. Under Article 32 there are no formal requirements for the assignment of associated rights as such but if such an assignment is to transfer the related international interest it must comply with the formalities prescribed by Article 32(1), which track those applicable to the creation of an international interest except that there is no requirement of a right to dispose. 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). Article XV of the Aircraft Protocol adds a requirement that the debtor has consented in writing to the assignment, although that consent may be general and may be given in advance.

**Assignee’s default remedies**

2.252. Under Article 34, an assignee under a security assignment, *qua* transferee of the international interest under Article 32(1), has 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). Article 34 does not apply to the additional remedy of de-registration and export provided by Article IX(1) of the Aircraft Protocol (see paragraphs 3.31 et seq.), but it is open to the assignee of the associated rights to stipulate with the assignor that the latter should appoint the assignee its designee under the irrevocable de-registration and export request authorisation (IDERA) annexed to the Protocol. The assignee would then be the sole person entitled to exercise the remedy. 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

2.253. 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 of the related international interest, though the priority is qualified by Article 36. We take each of these in turn.

Assignments of associated rights related to different international interests

2.254. 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.

Assignments of associated rights related to the same international interest

2.255. 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, partly because the decision of the diplomatic Conference to treat the assignment of associated rights as the principal assignment and the assignment of the international interest as auxiliary, though in accordance with doctrine in general law, failed to take account of the fact that the Convention registration provisions related solely to tangible equipment, not to associated rights. The key point to bear in mind is that contrary to what is stated in Article 35 assignments of associated rights are not registrable, only assignments of the related international interest, and it is the order of registration of the latter that determines the priority of competing assignments of the associated rights. The starting point, under Article 35, is that where there are competing assignments of associated rights, at least one of the assignments includes the related international interest and the assignment of that international interest is registered (see (2) below), the provisions of Article 29 apply mutatis mutandis, so that failure to register the assignment of an international interest subordinates the assignee to a subsequent registering assignee not only as to the international interest but also as to the associated rights. 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 4.259.

(2) **The assignment of the related international interest is registered**

Article 29 does not regulate priorities between competing unregistered assignments of international interests, this being left to the applicable law. So the assignment that includes the related international interest must be registered. 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. 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 assignment of the related international interest. Accordingly the phrase should be interpreted as if it read “and the assignment of 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 4.261). 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. Article 19(5) applies to prospective assignments the provisions of Article 19(4) to the effect that upon the prospective international interest becoming an actual international interest it is treated as registered from the time
of registration of the prospective international interest without the need for a separate registration. To ensure the efficacy of this provision Article 22(3) provides that a search certificate is to indicate only that the named creditor “has acquired or intends to acquire” an international interest without stating whether what is registered is an international interest or a prospective international interest. Without this provision the intention to avoid the need for a second registration and a second search would be frustrated. Unfortunately, through a drafting oversight Article 22(3) was not extended to cover prospective assignments. But given the clear intention manifested by Article 19(5) to treat prospective assignments in the same way as prospective international interests it is thought that Article 22(3) should be applied to prospective assignments by analogy.

2.256. Where there are successive assignments of an international interest each carrying with it the associated rights, the priority of the assignments of the associated rights is determined by the order of registration of the assignment of the related international interests. Where a prospective assignment of an international interest has been registered and later crystallises into an assignment the 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 of the assignments of the related associated rights in accordance with Article 29 as applied by Article 35.

2.257. 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) of 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 paragraphs 4.267 et seq. and Illustration 45, paragraph 4.269). 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 UN Assignments Convention.

2.258. On the assignor’s insolvency Article 30 applies as if the references to the debtor were references to the assignor (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)).

2.259. 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 paragraph 2.235.

Subrogation

2.260. The Convention itself provides for a right of subrogation, in 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, which in a Contracting State includes Article 9(4) itself. 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.

2.261. 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 2.254 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. 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

2.262. 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

2.263. Under Article 39(1)(a) a Contracting State may by declaration 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. Declarations under Article 39(1)(a), other than those applying to all priority-ranking non-consensual rights or interests, typically cover non-consensual liens in favour of repairers of the aircraft object for unpaid repair charges or employees for unpaid wages. A Contracting State’s declaration is relevant only where and so long as the aircraft object is situated in that State. This has no necessary connection with the lex situs rule in the conflict of laws; it is because the Article 39(1)(a) priority (which need not be given over all categories of international interest but could, for example, be confined to security interests) is a purely national priority exercisable only within the territory of the declaring State through possession or control of the aircraft object in that State by the lien creditor. A non-consensual right or interest is a right or interest conferred by law. A right or interested 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 2.268).

2.264. Rights or interests covered by a declaration under Article 39(1)(a) 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 2.272.

Priority is a national law priority

2.265. The priority over the registered international interest to which such a declaration relates is a priority given not under the Convention itself but under the law of the Contracting State in respect of non-consensual rights or interests

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34 UNIDROIT has published a Declarations Memorandum (UNIDROIT 2011, DC9/DEP - Doc 1 Rev 4) which, in giving guidance to States as to the declarations system, also includes model declaration forms. Forms 1 and 2 are model forms of declaration under Article 39(1)(a).
in an aircraft object situated within that State, and such priority is not entitled to recognition in another State to which the aircraft object has moved except to the extent provided by that State’s conflict of laws rules.

*International interests registered prior to a Contracting State’s declaration*

2.266. 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)).

2.267. 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

2.268. Rights of arrest or detention under national law, so far as not able to be 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. So charges payable not to a Contracting State but to an organisation such as the European Organisation for the Safety of Air Navigation (“EUROCONTROL”) on behalf of a Contracting State that is a member of EUROCONTROL or other organisation concerned, if they are to be covered, need to be included in a declaration by that Contracting State. However, the availability of a lien or right of detention covered by a declaration under Article 39(1)(b) applies only while the aircraft object 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. Article 39(1)(b) provides that nothing in the Convention is to affect the rights referred to above. Accordingly those rights override any inconsistent priority given by the Convention. As under Article 39(1)(a), rights under Article 39(1)(b) are purely local; they involve possession or control of an aircraft object located within the territory of the declaring State and are not exercisable outside that
State. It follows that it is that State’s declaration that is the relevant declaration for the purpose of Article 39(1)(b).

2.269. 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.

2.270. The arrest of an aircraft object denotes its being taken into legal custody, typically by the issue of a warrant of arrest. Detention consists of some overt act, such as the issue of a detention notice and its presentation to the captain of the aircraft and/or affixation to the aircraft, signifying that the aircraft may not be removed, and this may be reinforced by placing a block in front of the aircraft to prevent its departure. In contrast to a lien the exercise of a right of detention does not entail the taking or retention of possession. Rights of detention usually include detention of aircraft documents such as manuals and log books (and see the definitions of “aircraft”, “airframes”, etc, in Article 1(2) of the Convention) and typically arise in three situations:

(1) Detention to secure payment of route charges for air navigation services provided in respect of aerodrome control, approach control and en route control

(2) Detention to secure airport charges (landing, parking and take-off, and baggage handling)

(3) Exercise of contractual rights of detention under an agreement, with or without the authority of a court order.

The EUROCONTROL fleet lien (which is available only in UK but is recognised by Article 39(1)(b)) entitles EUROCONTROL, through the UK
Civil Aviation Authority, to secure the payment of route charge by detaining not only the aircraft to which the charges relate but all other aircraft forming part of the same fleet of which the person in default is the operator at the time the detention begins but only while on the aerodrome on which the charges were incurred.

Objects affected and types of declaration made

2.271. Declarations made under the Convention, including those under Article 39, affect only those categories of object covered by a Protocol that is in force. At present only the Aircraft Protocol is in force, so that Convention declarations currently relate only to aircraft objects. Once the requisite number of ratifications has been reached for other Protocols declarations under the Convention will automatically apply to the objects they cover. Almost all Contracting States ratifying or acceding to the Aircraft Protocol have made declarations under Article 39 and/or Article 40. Several Contracting States have made declarations under Article 39(1)(a) expressed to cover all categories of non-consensual right or interest in which priority is given over interests equivalent to international interests, others have specified liens in favour of unpaid repairers on aircraft objects in their possession, either generally or limited to aircraft repairers, and/or liens in favour of unpaid employees (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). A minority of States have added liens for government unpaid taxes or levies relating to aircraft objects and some of these States have preserved rights of arrest and detention under Article 39(1)(b) for the same kind of taxes, so that after or in addition to detaining the aircraft the State or State entity concerned could take and retain possession by way of exercise of a non-contractual lien. 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). 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 Article 39(1)(b) and paragraph 2.268). 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 2.273). Declarations under Article 39(1)(a) are limited to non-contractual rights and interests. Contractual rights and interests cannot be protected by such a declaration, whereas rights of arrest and detention are not so limited. 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). The majority of Contracting States have made declarations under Article 40, most of these covering the rights of a person obtaining a court order permitting attachment of an aircraft object in satisfaction of a legal judgment or relating to liens or other rights of a State or State entity relating to taxes or other unpaid charges on an object. A few States have used Article 40 rather than Article 39 to cover liens in favour of workers for unpaid wages, whilst a small number of States have made declarations under Article 40 covering all non-consensual rights or interests not subject to their declarations under Article 39.

Operation of the priority rules under Article 39

2.272. The duty of the holder of a registered international interest to respect priorities (see above, paragraph 2.111) 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 in which the aircraft object is situated but depends on the object being within the possession or control of the lien or arresting creditor. So 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 aircraft object 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 aircraft object 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. Insolvency laws of a State generally recognise rights in rem of a creditor or third party in respect of assets belonging to the debtor and situated in another State at the time of opening of the insolvency proceedings. See, for example, the EU Insolvency Regulation (recast), Article 8.

Declarations providing for registration of non-consensual rights or interests

2.273. 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. In contrast to the creation of an international interest, which depends on the debtor’s situation in a Contracting State or registration of a helicopter, or of an aircraft to which an airframe pertains, in a Contracting State, the connecting factor under Article 40 is simply that the declaration is made by a Contracting State whose law is applicable to the issue in question under the conflict rules of the forum (see paragraph 2.327). This will usually be the law of the place where the object is situated at the time the registrable non-consensual right or interest attaches to it. While Section 5.4(b) of the registry regulations requires that information to effect registration include the name of the Contracting State under whose laws the non-consensual right or interest arises it is no function of the International Registry to check whether that State’s law is the applicable law in relation to any given registration. This means that registration by itself does not tell the full tale; it may or may not be effective depending on whether what is registered falls within a category covered by the declaration of the Contracting State whose law is applicable to the issue under consideration (see paragraph 2.153). Any person entitled to benefit from such a
declaration by having a registrable non-consensual right or interest may register it under Article 40 regardless of the debtor’s situation or the State of registry and without the usual need to obtain the debtor’s electronic consent. There have been several cases of improper registration of non-consensual rights or interests that were not covered by a declaration under Article 40, necessitating application to the Irish High Court by the holder of the registered international interest to discharge the registration of the non-consensual right or interest, and the regulations of the International Registration governing such registrations have been tightened with a view to preventing abuse (see paragraph 3.59). But the International Registry is not equipped to undertake manual checks of data, the registration system being entirely electronic.

2.274. Article 40 relates only to registration and consequential priorities and protection from insolvency under Article 30. It does not touch relations between the parties or entitle the registrant to the exercise of Convention remedies.

**Mutual exclusivity of Articles 39 and 40**

2.275. 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.

**Extension to outright sales**

2.276. 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 and, as a consequence, prospective sales. Under Article 1(gg) of the Convention “sale” means a transfer of an object pursuant to a contract of sale and Article 1(g) defines a contract of sale as “a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in (a) above”, i.e. is not a security agreement, a title reservation.

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35 Article III. The default provisions are, of course, inapplicable in the context of an outright sale. See paragraph 3.15.
agreement or a leasing agreement. In other words, it is an outright sale. A prospective sale is a sale which 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(z)), and it may be registered, with potential priority effects (see paragraph 3.107). Under Article 1(g) “contract of sale” means “a contract for the sale of an object which is not an agreement as defined in (a) above”, i.e. is not a security agreement a title reservation agreement or a leasing agreement. In other words, it is an outright sale. A sale, as opposed to a gift, imports a transfer for value, that is, a price, though not necessarily a money price. So any form of value suffices, including an exchange, or barter. The transfer for value must be pursuant to a contract of sale. See also paragraph 5.21.

Jurisdiction

2.277 Articles 42 to 44 contain rules as to court 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. “Court” means a court of law or an administrative or arbitral tribunal established by a Contracting State (Article 1(h)). Within this definition a Contracting State may designate by declaration under Article 53 the “court” or “courts” which are to have jurisdiction. 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 2.288. A court having exclusive jurisdiction under Articles 42 to 44 may not decline it on the ground of forum non conveniens.

The rules in Articles 42 to 44 may be summarised as follows:
 Courts chosen by the parties

2.278. 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 to a transaction 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 2.280). But jurisdiction can be conferred only 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(2)). 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.

2.279. There is a presumption that the selected jurisdiction is exclusive, and in that event courts of other Contracting States must decline jurisdiction over the claim in question. Where, on the other hand, the parties agree that the selected jurisdiction is to be non-exclusive, courts of other Contracting States remain free to exercise jurisdiction in accordance with their own jurisdictional rules. Whilst courts of other Contracting States must recognise jurisdiction exercised by the courts of another Contracting States under Articles 42 and 43 the Convention does not deal with enforcement of judgments in proceedings under those Articles. These are matters for the conflict rules of the forum, including, for courts of EU Member States, Brussels I (recast), except where the Hague Convention on Choice of Court agreements applies (see below). The enforcing court is, however, obliged to treat the judgment or order to be enforced as having been made by court of competent jurisdiction.

A question for consideration is the relationship between Articles 42 and 43 of the Convention and the 2015 Hague Convention on Choice of Court Agreements. The effect of Article 26 is that where a State is a party to both conventions then in case of inconsistency the provisions of the Cape Town Convention prevail, but subject to this the Hague Convention applies. One consequence of this is that the duty of recognition extends to the recognition
and enforcement of judgments of a court having exclusive jurisdiction under the choice of court agreement (Article 8). A second consequence is incorporation of the principle of severability of the jurisdiction clause from the rest of the contract, so that the validity of an exclusive choice of court agreement cannot be contested on the ground that the contract is not valid (2015 Hague Convention, Article 3(d)), though the position would be otherwise if the alleged ground of invalidity affects the choice of court agreement itself, as where a party asserts that its signature to the entire agreement, including the choice of law clause, was forged. For the relationship between Articles 13, 42 and 43 of the Cape Town Convention and Brussels I (recast) see paragraph 2.328.

Courts where debtor situated

2.280. 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 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 unit if the federal law in question is in force there.

Courts where object located

2.281. 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)).

Courts where Registrar has its centre of administration

2.282. 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 (recast) (see paragraph 2.288) and the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Lugano II”), which binds Member States if what is now the EU 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 (European Communities) Act 1998, including Brussels I (recast). 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). However, in approving the reasoning in affidavits supporting an application for an in personam order in proceedings to which the Registrar is a party, the Irish High Court has implicitly accepted that proceedings against the wrongful registrant fall within its general jurisdiction, based on leave to effect service on the registrant outside the jurisdiction under Order 11 of the Rules of the Superior Courts. Moreover, that jurisdiction may
be exercisable even in proceedings to which the Registrar is not a party, as where there is a claim for damages for slander of title. Article 6 of Brussels I (recast) provides that where, in proceedings brought in a Member State, the defendant is domiciled in a non-EU Member States the Member State’s jurisdictional rules apply. See also paragraph 2.284.

2.283. As regards such orders two specific cases are mentioned: orders requiring a registration to be discharged where a person fails to respond to a demand under Article 25 (a demand to procure the discharge) and that person 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. Each is very limited. Article 25 is confined to a demand by the debtor, so that Article 44(2) does not apply to a demand by the holder of a registered international interest whose title is impaired by an improper registration, while no court has jurisdiction under the Convention except so far as conferred by agreement of the parties under Article 42. 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. Since the improper registration is effected in Ireland the Irish High Court has accepted that it has jurisdiction make an order \textit{in personam} against the registrant in exercise of the court’s general jurisdiction and then, if that order is not complied, make an order under Article 44(1) of the Convention directing the Registrar to discharge the registration.\footnote{See paragraphs 2.284, 4.312.} In such proceedings the Registrar usually takes no position, simply undertaking to abide by whatever order the court may make. However, the Registrar may occasionally make an active intervention in order to
assist the court where there appears to have been an abuse of the registration system. Of course, if the registrant has been dissolved, as has happened in at least two cases, the preliminary step is dispensed with and application can be made directly for an order under Article 44(1). As stated earlier, the High Court’s jurisdiction has not so far been tested.

2.284. 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. 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* (above, n. 27), where the first 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, 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 in exercise of its general jurisdiction and then have the matter transferred to the High Court’s specialist Commercial Court to make an *in personam* order under

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the High Court’s Convention jurisdiction to enforce the order previously made under Article 44(3). There have, indeed, been several Irish cases in which this procedure has been adopted, relying on the above or other grounds of jurisdiction, for example, that the registrant is a necessary or proper party brought against some other person, that is, the Registrar. An additional ground of jurisdiction, not so far invoked, would appear to be provided by Article 24(3) of Brussels I (recast), under which, in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept have jurisdiction, regardless of the domicile of the parties. An application for transfer to the Commercial Court is not compulsory and even if made will not necessarily be granted, and there have been cases in which the order in personam was made without transfer to the Commercial Court. Cases not dealt with by the Commercial Court are assigned to the Miscellaneous Common Law Applications list.

Jurisdiction in relation to claims against the Registrar outside the Convention, for example, claims arising from contracts entered into by the Registrar with suppliers of goods and services, will normally 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. But this is not always the case. For example, the contract between the parties may provide for disputes to be determined by arbitration, whilst there may also be contracts expressed to be governed by a law other than Irish law.

**Insolvency proceedings**

2.285. 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 UNCITRAL Model Law free to apply its provisions without being affected by the jurisdiction rules of the Convention. But see paragraph 2.237.

2.286. 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**

2.287. 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**

2.288. 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. Only a few Contracting States have made such a declaration. 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 Brussels I (recast), dealing with jurisdiction and enforcement of judgments, will apply Articles 13 and 43 for interim relief only in accordance with Article 35 of that Regulation. Article 35 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 35 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 Recognition and Enforcement of Judgments in Civil and Commercial Matters (the “Brussels Convention”), the substance of which is reproduced in Brussels I as replaced by Brussels I (recast).

2.289 The effect of the declaration is that a court will have jurisdiction under Article 35, and its decision on provisional measures will qualify for mutual recognition by other Member States under what is now Article 36 and enforcement under what is now Article 40, only (a) if the court has jurisdiction over the merits of the claim or (b) there is a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the court before which those measures are ought. In particular, if the order is for interim payment of a contractual consideration, repayment of the sum ordered must be guaranteed if the plaintiff is unsuccessful (which means that the defendant must be subject to the jurisdiction of the court making the order) and if the order relates to assets of the defendant it must be confined to assets located or to be located within the territorial jurisdiction of the court to which the application is made.

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Remedies for breach of Convention obligations

2.290. 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 2.100 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 Registry (see paragraph 2.199) there are two groups of cases to be considered. The first relates to a breach of a Convention provision by a party to the agreement, the second to a breach by a Contracting State.

40 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.
Breath of a Convention provision by a party to an agreement

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

(1) A chargee’s failure to exercise Convention remedies in a commercially reasonable manner as required by Article 8(3).

(2) 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).

(3) A chargee’s failure to distribute a surplus resulting from sale in accordance with Article 8(6).

(4) 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.

(5) Failure of the holder of an international interest or prospective international interest to procure discharge of a registration as required by Article 25.

(6) Interference with the quiet possession of a debtor by a chargee subordinated to the debtor under Article 29(4)(b).

(7) Breach by the debtor of its duty to make payment to an assignee as required by Article 33.

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 the above provisions. Where the applicable law is that of 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

2.292. 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 and its courts and administrative bodies give 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 positive 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 Aircraft Protocol, namely the provision for timely advance relief (Article X(2)), timely relief on insolvency (Article XI, Alternative A), insolvency assistance (Article XII) and de-registration and export (Article XIII). There is, of course, no problem to the extent that these obligations have been implemented in domestic law, which the transacting parties can then invoke. In other cases the position is more difficult. 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 direct against the defaulting Contracting State, the creditor must invoke diplomatic protection, that is, the aid of the State of which it is a national to take up the issue 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. This is because in taking up a case on behalf of one of its nationals the State is considered to be asserting its own substantive and procedural rights to ensure respect for the rules of international law. Complementary rights of the national have been proposed but not yet adopted. Moreover, where there are reasonably available local remedies open to the creditor then under customary international law these must be exhausted before the creditor can resort to diplomatic protection. For example, where a Contracting State has implemented the Convention and Protocol but an

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41 As to the various duties imposed on a Contracting State by the Aircraft Protocol, see paragraph 3.147.
administrative body is blocking de-registration pursuant to an IDERA the
creditor must first bring proceedings in its local courts or a higher administrative
tribunal before it can seek diplomatic protection. In practice complaints by a
national are pursued through informal channels.

Types of breach

2.293. The types of act or omission capable of constituting a Contracting State’s
breach of its obligations under the Convention or Protocol are many and
various. First and foremost, a Contracting State has a duty to ensure that on or
before the time its ratification takes effect it has effectively given full effect to
the ratified instrument or instruments in its national law in accordance with that
law’s constitutional requirements. In a country where international treaties are
fully self-executing nothing more needs to be done. More usually, it is necessary
to enact implementing legislation, and it is quite common to do this in advance
of ratification in order to avoid the risk that the legislation will not be passed,
thus placing the Contracting State in breach of its international obligations.
Particular difficulties may arise in federal States where the ability of the federal
authorities to ensure compliance by individual state legislatures may be limited.
Conformity with the Convention and Protocol requires also that the
implementing provisions override existing inconsistent legislation and that any
subsequent legislation is, or is to be construed as, conforming legislation.

2.294. Reference has already been made to the duty to make available the
remedy of advance relief within the time specified in the declaration of the
relevant Contracting State. Similarly the remedies of de-registration and export
varied. must not be made subject to legal or administrative requirements going
beyond those provided by the Protocol. A deliberate refusal by the courts of a
Contracting State to apply a particular provision of the Convention or Protocol,
for example, denial of a Convention remedy on the ground that no such remedy
exists under local law, would also place the Contracting State in breach of its
international obligations if the offending decision was not rectified by the appeal
process or by legislation. On the other hand, room must be allowed for differing
interpretations of a provision of an international instrument. The mere fact that
the courts of a Contracting State adopt in good faith an interpretation contrary
to that adopted by the majority of courts of other States does not place the
Contracting State in breach. There are many cases in national legal systems where
a judge’s minority view is later upheld as being the correct view.
Relationship with other Conventions

2.295. Article 45 bis\(^{42}\) provides that the Convention is to prevail over the UN Assignments Convention. This simply makes explicit what was implicit in Article 38(1) of the UN Assignments 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.\(^{43}\)

Final provisions

2.296. 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

2.297. 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 Brussels I (recast) (see paragraphs 2.288, 4.298) and choice of law under Rome I (see paragraphs 3.25, 3.29). Under Article 48 of the Convention any Regional International Economic Organisation has to make a declaration at the time of

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\(^{42}\) 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.

\(^{43}\) See Article XXV of the Aircraft Protocol superseding the Leasing Convention as regards aircraft objects.
signature specifying the matters governed by the Convention in respect of which competence has been transferred to that Organisation.

2.298. 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 XXVII of the Aircraft Protocol.

2.299. The only REIO that has so far taken advantage of Article 48 is the European Community, which acceded to 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). The EC asserted competence over the provisions relating to choice of law (governed within the EC by Rome I), jurisdiction (governed within the EC by Brussels I, replaced by the 2012 EU Regulation (Brussels I recast)) and the insolvency provisions of the Aircraft Protocol (said to be subject to the EU Insolvency Regulation (recast)). The effect of the Community’s accession is to allow Member States of the European Union to ratify the Convention and Aircraft Protocol but does not commit them to do so, since most of the provisions of these instruments fall outside the competence of the EU. Annex II of the Council’s Decision precludes Member States other than Denmark from applying the Convention and Protocol otherwise than in accordance with EC 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.

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44 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, leaving only choice of law and jurisdiction within the EU’s competence. See further paragraphs 3.138-3.139.
EU law not relevant to ratification on the international plane

2.300. The declaration deposited by the EC under the Convention states that the Community will not make any of the declarations permitted under the Convention except for a declaration under Article 55, as to which see paragraph 2.328. Accordingly the EC has made 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 does not affect the ability of Member States of what is now the European Union 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.

2.301. The declaration also states that the Member States keep their competence concerning the rules of substantive law as regards insolvency, though a separate EC declaration under the Aircraft Protocol precludes Member States from making a declaration under Article XI. Neither declaration applies to territories of Member States in which the Treaty establishing the European Community does not apply, for example, the Channel Islands.

2.302. [Under international law a State cannot ratify part only of a treaty except so far as the treaty itself allows. So when the EC acceded to the Convention and Aircraft Protocol it had to ratify the entirety of the instruments, not merely those in respect of which it had competence under EC law. The division of competence between what is now the EU and its Member States has effects only at regional level, that is, under EU law, and has no relevance on the international plane. Three consequences flow from this. First, UNIDROIT as Depository is obliged to accept instruments of ratification deposited by an EU Member State whether or not these conform to EU law. Accession by the EC/EU to Cape Town instruments is necessary only to enable EC/EU Member States to ratify in conformity with EC/EU law. Secondly, accession by the EC/EU to Cape Town instruments did not and does not bind Member States to ratify as a matter of EC/EU law because most of the matters covered by the instruments fall within the exclusive competence of Member States. Thirdly, since membership of the EU is not relevant to a State’s ability to ratify an international instrument the departure of the UK from the EU, assuming this happens, does not affect
its ratification of the Cape Town Convention and Protocol so as to require fresh ratification.

**Instruments of ratification, accession, etc.**

2.303. To assist States intending to ratify or accede to the Convention and Aircraft Protocol UNIDROIT has prepared a set of model instruments that can be used for that purpose.\(^{45}\) States must ratify the instruments in their entirety except so far as they are permitted to make opt-out declarations. The same is true of an REIO. The fact that it has limited competence in its relations with its Member States is not relevant on the international plane. So when the European Community ratified the Cape Town Convention it ratified the entire instrument even though within the EC its competence was limited.

**Internal transactions**

2.304. Though in principle the Convention applies even where all the elements of a transaction are located in one jurisdiction, Article 50(1) 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. Very few Contracting States have made declarations under Article 50(1). Such a declaration may apply to all types of object or only to some of them (Article 50(1)), but declarations so far made cover all objects. However, while a declaration under Article 50(1) may designate the types of object (i.e. types of aircraft object, railway rolling stock or space asset) to which it will apply it cannot select only some provisions of the Convention relating to *inter partes* rights, it must exclude all of them. An internal transaction is a transaction of a type listed in Article 2(2)(a) to (c) 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)). The purpose of this last requirement is to ensure that a national registration system is in place through which a national interest registered on that system may be transmitted to the International Registry. However, not only is there no requirement in the Convention or the rules of the International Registry precluding the creditor from effecting registration without going

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\(^{45}\) Model Instruments of Ratification, Acceptance, Approval and Accession for the Assistance of States in the Implementation of the Cape Town Convention and Aircraft Protocol.
through the national registry system but, paradoxically, all three Protocols preclude the designation of an entry point for the transmission of information required for registration of notice of a national interest. See Aircraft Protocol, Article XIX; Luxembourg Protocol, Article XIII; Space Protocol, Article XXXI. To date five Contracting States have made declaration under Article 50. In the case of transactions relating to aircraft objects the meaning of location in relation to internal transactions is crystallised by Article IV(2) of the Aircraft Protocol (see paragraph 3.17). “National interest” means an interest held by a creditor in an object and created by an internal transaction covered by a declaration under Article 50(1). An internal transaction may be a security agreement, a title reservation agreement or a leasing agreement. The title of the conditional seller or lessor does not derive from the conditional sale or leasing agreement but exists independently of, and usually before, the agreement is made. However, such an agreement is correctly described as “creating” the interest because, like an international interest, the national interest comes into existence only upon the making of the conditional sale or leasing agreement.

2.305. 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 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. Article 50(2) has no application to the additional Protocol remedies of de-registration, export and physical transfer. Finally, in the case of a Contracting State that has territorial units in which different systems of law are applicable and 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.

2.306. The internal logic of Article 50 is that relations between parties (whether debtor and creditor, assignor and assignee or debtor and assignee) are left to the applicable law, which therefore applies to default remedies (including the
remedies of de-registration, export and physical transfer), derogations under Article 15 and the assignment provisions of Articles 31-34, while provisions relating to third parties (entitlement to notice under Articles 8(4) and 9(1, and provisions relating to registered interests, such as amendments under Article 20, discharges under Article 25 and priorities under Articles 29 and 35), are governed by the Convention. But the reference to Article 8(4) is hard to understand, given that the remedy of sale and other remedies do not apply to an internal transaction the subject of a declaration under Article 50, so that the question of an intended sale does not arise under the Convention. Registration of notice of a national interest confers in all Contracting States the priority prescribed by Article 25.

Procedure for additional Protocols

2.307. Protocols on railway rolling stock and space assets are specifically provided for in the Convention (Articles 2(2), 2(3), 49). 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. A draft Protocol on mining, agricultural and construction equipment is expected to come before a diplomatic Conference in the second half of 2019, the first to require the procedure prescribed by Article 51 of the Convention.

Territorial units

2.308. 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 in a Contracting State which has made a declaration applying the Convention only to certain designated territorial units has been discussed earlier (see paragraph 2.305). Article 52(5)(c), dealing with references to the administrative authorities in a Contracting State, was copied in error from Article XXIX(5)(c) of the Protocol – there are no such references in the Convention – and should be disregarded.

**Transitional provisions**

*Preservation of priority of pre-existing right or interest*

2.309. 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)). Article 60(1) thus has both a general effect and a specific effect. The Convention “does not apply” to a pre-existing right or interest, and this “retains the priority” it enjoyed under the applicable law. So the general effect is not confined to priorities. It means, among other things, that the insolvency provisions of Article 30 of the Convention and Article XI of the Protocol do not apply to a pre-existing right or interest. This is so even where a Contracting State has made a declaration under Article 60(3) (see paragraphs 2.324 et seq.), since such a declaration can only relate to priorities and, furthermore, to priorities outside insolvency, because it is aimed at priority rules arising under the registration system, not the disturbance of pre-insolvency entitlements by rules of insolvency law.

2.310. 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 and a registered international 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"

2.311. 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)). Where a contract providing for a pre-existing right or interest extends to after-acquired property and such property is acquired after the Convention enters into force in the relevant State this constitutes collateral falling under the contract and does not give rise to an international interest. By contrast, where collateral is added after entry of the Convention into force in the relevant State pursuant to an agreement concluded after such entry then this constitutes an agreement for the provision of an international interest.

Existing priority under the applicable law

2.312. 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 these 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. Where the forum State is a party to the Geneva Convention the pre-existing interest will be governed for priority purposes by the law of the State of nationality registration at the time of the agreement; and it may well be that a similar rule would be applied in a forum State under its general conflict rules even if that State was not a party to the Geneva Convention. Where this is not the case, the usual conflicts rule is that the applicable law is the law of the place where the aircraft 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”

2.313. 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 force (Vienna Convention 5.110., 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 (and for aircraft objects, the aircraft was not subject to nationality registration) in a Contracting State at the time of the agreement, or (b) the debtor was situated in a Contracting State (or, for aircraft objects, the aircraft is registered in a Contracting State) at the time of the agreement but the Convention had not entered into force as regards the relevant object, which in the case of aircraft objects is 1 March 2006.

Situation of debtor

2.314. 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 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)

2.315. 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, 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). A declaration under Article 60(3), being relevant only to priorities, does not extend to the insolvency provisions of the Convention and Protocol, which remain inapplicable to a pre-existing right or interest. A declaration under Article 60(3) may not be modified by a subsequent declaration under Article 57 or withdrawn under Article 58.

“Arising under an agreement”

2.316. Although the definition of “pre-existing right or interest” in Article 1(v) 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.

2.317. 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)

2.318. 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 2.319.

(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 2.320.

(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 2.321.

(4) What is the date on which a declaration under Article 60(3) becomes effective? See paragraph 2.322.

(5) What are the pre-existing rights or interests in respect of which a Contracting State is entitled to make a declaration under Article 60(3)? See paragraph 2.323.

2.319. 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 within Article 60(2)(b). 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 immaterial to the relevance of a Contracting State’s declaration under Article 60(3). Equally irrelevant is the location of the object. It is true that under Article IV of the Aircraft Protocol this is an alternative to the situation of the debtor but that is purely for the purposes of satisfying the connecting factor under Article 3 and cannot be read into Article 60 so as to allow the law of the State of nationality registration of the aircraft object as an alternative. As to the meaning of the reference to the situation of the debtor, see paragraph 2.314.

2.320. 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.

2.321. 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).

2.322. The fourth question, namely the time at which a declaration under Article 60 becomes effective, is not expressly answered by the Convention but
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is resolved by reference to international treaty practice and by analogy to Articles 57 and 58, as described in paragraph 4.352.

2.323. The last question concerns the pre-existing rights or interests in respect of which a Contracting State is entitled to make a declaration under Article 60(3). 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, the location of the object and, in the case of an aircraft object, the State of its nationality registration. It is true that under Article IV of the Aircraft Protocol this is an alternative to the situation of the debtor but that is purely for the purposes of satisfying the connecting factor under Article 3 and cannot be read into Article 60 so as to allow the law of the State of nationality registration of the aircraft object as an alternative.

Declaration limited to priority issues

2.324. 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 2.53 et seq.).

Registration and its effect

2.325. 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 as regards earlier competing interests, 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 subsequent registered interest, the priority of a pre-existing right or interest, registered under the Convention, in relation to earlier interests 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, in relation to existing competing interests, of the time of registration of a pre-existing right or interest, 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

2.326. An important element of the Convention and its associated Aircraft Protocol is the system of declarations allowing a Contracting State to make choices that will preserve adherence to their fundamental legal philosophy, for example, a rule against the exercise of self-help remedies. Without this ability States otherwise well-disposed to the Convention might have felt unable to ratify it. Some declarations militate in favour of debtors, such as those requiring the leave of the court for the exercise of remedies, while others are designed to strengthen the protection of creditors, for example, in precluding judicial intervention to prevent recovery of possession on insolvency of the debtor under Alternative A of Article XI of the Aircraft Protocol where the default is not remedied by the insolvency administrator within a specified period (see paragraphs 3.132 et seq.). Declarations made under the Convention affect only those categories of object covered by a Protocol that is in force. At present only the Aircraft Protocol is in force, so that Convention declarations currently relate only to aircraft objects. Once the requisite number of ratifications has been reached for other Protocols declarations under the Convention will automatically apply to the objects they cover.

2.327. Three questions arise in relation to declarations. First, which Contracting States can make a declaration under a particular provision? Secondly, where two or more Contracting States have power to make a declaration, which Contracting State’s declaration is relevant (“the relevant declaration”) in any particular case and for that purpose what is the relevant time for answering this question? Thirdly, on which other States is the declaration of a Contracting State binding? In answer to the first question, most declarations may be made by any Contracting State. There are two exceptions. A declaration under Article 48 can be made only by a regional economic integration organisation falling within the scope of that Article; and a declaration under Article 52 can be made only by a Contracting State which has territorial units in which different systems of law

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46 A declarations matrix is contained in Appendix XI showing all declarations required or permitted under the Convention and Aircraft 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 Aircraft Equipment: 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. For the pattern of declarations made by Contracting States to date see Appendix XII.
are applicable in relation to matters dealt with in the Convention. The second question has to be answered by reference not to the time of the declaration itself but to the time at which and the forum in which the issue arises. Of the eleven declarations provided for by the Convention, in only two cases is the relevant declaration that of the Contracting State whose law is applicable to the issue in question under the conflict of laws rules of the forum, namely declarations Article 40 (registrable non-consensual rights or interests) and Article 54(1) (precluding grant of a lease by the chargee). In the remaining eight cases a declaration by a Contracting State as to:

1. Article X(5) of the Protocol providing for the exclusion by written agreement of Articles 13 and 43 relating to advance relief and jurisdiction to grant such relief operates only to preclude applications for advance relief in the declaring State;

2. Article 39(1)(a) as to the priority of a non-registrable non-consensual right or interest is the relevant declaration only where and so long as the aircraft object is situated in the territory of the declaring State at the time the non-consensual right or interest is sought to be exercised (see paragraph 2.263);

3. a right of arrest or detention under Article 39(1)(b) is the relevant declaration only where and so long as the aircraft object is situated in the territory of the declaring State at the time the right of arrest or detention is sought to be exercised (see paragraph 2.268);

4. Article 50 relating to internal transactions where that State’s law is the applicable law is the relevant declaration only where the three elements required for an internal transaction are satisfied at the time when the applicability of the Convention in relation to the issue in question arises;

5. Article 53 as to the relevant courts or courts is the relevant declaration only in cases where it is the jurisdiction of the court of the declaring State that is invoked under Article 42, or under Article 13 or 43 (so far as not excluded by declaration under Article 55);

6. Article 54(2) as to whether the leave of the court is required for the exercise of a remedy is the relevant declaration only in relation to a
remedy sought to be exercised in that State (Article 14, and see further below);

(7) Article 55 excluding the application of Article 13 or Article 43 or both is the relevant declaration only in proceedings brought in that State or to proceedings in another Contracting State to enforce an order made by a court of the declaring State;

(8) Article 60(3) to preserve the priority of a pre-existing right or interest is the relevant declaration only in relation to a pre-existing right or interest arising under an agreement concluded while the debtor was situated in the declaring State (see paragraphs 2.319 et seq).

Article 14 provides that subject to Article 54(2) any remedy provided by the Convention is to be exercised in accordance with the procedure prescribed by the law of the place where the remedy is to be exercised. The Convention remedies - possession, control or management of the object under Article 8 or 10, vesting of title under Article 9 and advance relief under Article 13(1)(a)-(c) - are all object-related (in rem) remedies and accordingly, in the absence of party choice of jurisdiction under Article 42 or Article 43(1), will be exercisable only in accordance with the procedural rules of the Contracting State where the object is located and where the courts will have control (see Article 43(1)). This is true also of any additional forms of interim relief sought under Article 13(4) so far as these are in rem remedies, whereas the exercise of in personam remedies such as payment will normally have to conform to the procedural rules of the place where the debtor is situated, though if the parties have chosen another forum under Article 43(1) where such remedies are exercisable it will be that forum. By contrast to remedies under Article 13(1)(a)-(c), the remedy of lease or management of the object under Article 13(1)(d) is conceived as being in personam, the grant of a lease (as opposed to delivery under the lease) being contractual in nature, so that in the absence of party choice of jurisdiction under Article 42 or Article 43(2)(b) it is the courts of the Contracting State on the territory of which the debtor is situated that have jurisdiction, though any order must provide that it is to be enforceable only in the territory of that Contracting State. Exercise of all these remedies is thus expressly classified as a procedural issue for the purposes of the Convention, not as a substantive issue to be determined by the lex causae. But Article 14 is expressed to be subject to Article 54(2). This means that the procedure must be consistent with the declaration made by the forum State itself under Article 54(2), so that the procedural rules
cannot be utilised to require leave of the court where the declaration provides that remedies are to be exercisable without such leave, while conversely the procedural rules cannot permit self-help where the declaration requires leave of the court.

As regards the third question, the general principle is that a relevant declaration has to be respected by all other Contracting States and will also be respected by a non-Contracting State whose conflict of laws rules lead to the application of the law of a Contracting State, whether or not the declaring State. However, a declaration under Article 39(1) of the Convention has no effect in another Contracting State unless its conflict of laws rules lead to the application of the law of the declaring State.

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

2.328. 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.\(^{47}\) Instead, the EC/EU, if it so decides, makes any

\(^{47}\) 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.
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 and Aircraft Protocol stipulated that where the debtor is domiciled in a Member State of the EC, Member States bound by 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 the Brussels Convention (see paragraphs 2.288-2.289). 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 what is now Article 35 of Brussels I (recast). 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. See paragraph 2.300. While Brussels I (recast) does not apply to the recognition and enforcement of judgments, where a Contracting State is party both to the Cape Town Convention and to the 2015 Hague Convention the courts of a Cape Town Contracting State have a duty to recognise and enforce judgments given by a court having jurisdiction under an exclusive jurisdiction clause (see paragraph 2.279).

2.329. The EU will 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 are 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.

2.330. 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*

2.331. 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. Opt-in declarations are designed for provisions of the Convention of particular sensitivity to a State. There is only one such provision in the Convention, namely:

**Article 60(3)** 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. However, as regards space assets Article 60 is disapplied by the Space Protocol.

**Opt-out declarations**

2.332. 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. Such declarations relate to provisions on which States are likely to be less sensitive than for opt-in declarations, so that the onus is on a Contracting State that has concerns about the provision in question to opt out of it. Opt-out declarations are required to exclude:

- **Article 13** Relief pending final determination (Article 55)
- **Article 43** Jurisdiction under Article 13 (Article 55)
- **Article 50** Application of the Convention to internal transactions (Article 56)

**Declarations relating to a Contracting State’s own laws**

2.333. These are the following:

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

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

2.334. 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.

2.335. 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

2.336. 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). |
2.337. 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, 43 or 50;
(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.

2.338. 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.
2.339. There is no requirement for a declaration made by one State to be accepted by other States in order to be effective (see paragraph 2.340 but the extent to which it binds other Contracting States depends on the particular provision (see paragraph 2.327) 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(2)) and the denunciation of the Protocol (Article 59(3)). Declarations made under the Convention are deemed also to have been made under the Protocol (Article XXXI), thus avoiding the need to lodge fresh declarations under the Protocol in respect of matters covered by those already made under the Convention. 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. 48

2.340. 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 merely determine the application of the Convention in the declaring Contracting State (see paragraphs 2.31, 4.349). A declaration does not require acceptance to bring it into force and to bind other States Parties. A declaration under Article 60(3) may not be modified by a subsequent declaration under Article 57 or withdrawn under Article 58. The technique of declarations has been regularly employed in international conventions for many years.

2.341. 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,

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48 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); Space Protocol, Article XLVIII(2)(a)(iii) and (iv), (c).
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.

2.342. 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:

Articles 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

2.343. 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 XXXVI of the Aircraft Protocol, which provides that such reports are to be prepared in consultation with the Supervisory Authority.

Review Conferences; amendments

2.344. 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) deal with the amendment process and requires a majority of at
least two-thirds of participating States. Similar provisions are contained in Article XXXVI of the Aircraft Protocol.

**The Depositary and its functions**

2.345. Under Article 62 of the Convention and Article XXXVII of the Aircraft 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**

2.346. Various references have been made to the Aircraft 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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