PART 4
ANNOTATION OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

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CONVENTION
ON INTERNATIONAL INTERESTS
IN MOBILE EQUIPMENT

THE STATES PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,

HAVE AGREED upon the following provisions:
Comment

4.1. The Preamble identifies the primary object of the Convention as being to facilitate the asset-based financing and leasing of mobile equipment of high value or particular economic significance by providing an international regime for the enforcement, registration and protection of international interests in such equipment. The emphasis is therefore on an approach which responds to the practices and needs of the providers and users of asset-based financing and leasing in relation to mobile equipment, and in particular aircraft objects, railway rolling stock and space assets.

4.2. The second paragraph of the Preamble reflects the importance attached to predictability through clarity of rules. That is why the reference to good faith in international trade which features in Article 7(1) of the 1980 Convention on Contracts for the International Sale of Goods and other commercial law conventions has been replaced in Article 5 by a reference to predictability. This is also assisted by the separate underlying principle of party autonomy. The Convention seeks to provide specific answers to the legal issues faced, rather than setting out general standards which are susceptible to widely differing judicial interpretation. Justified reliance by transaction parties on these clear rules, as drafted, is the basic intent. But some general standards have been found necessary, for example, the requirement of commercial reasonableness in the exercise of remedies (though here again a provision in the agreement between the parties on what is commercially reasonable is determinative unless the provision itself is considered by the court to be manifestly unreasonable).

4.3. The third paragraph, which focuses on the need to recognise and protect interests in high-value mobile equipment, goes to the very raison d'être of the Convention, namely to provide a set of uniform rules for the creation, perfection and priority of international interests in such equipment, in order to overcome the serious problems arising from differences among legal regimes on these issues and the inadequacy of the traditional lex rei sitae principle when applied to equipment constantly moving from one State to another.

4.4. The fourth paragraph stresses the desired economic benefits to all interested parties, as to which see paragraphs 2.1, 2.4-2.5.
4.5. The fifth paragraph of the Preamble reflects two further policies of the Convention, namely its reflection of the principles of asset-based financing and leasing and its recognition of the need for a high degree of party autonomy. The essence of such financing is the reliance placed by the creditor, when making its credit decision, on its ability to have effective recourse to an asset and its value to safeguard itself against the risk of default by the debtor. A secure and efficient legal regime for recovery by the creditor of assets held under security, title retention and leasing agreements helps to reduce risk, increase access to finance and lower borrowing costs. Similarly, party autonomy is central to the philosophy of the Convention. The Convention is predicated upon a respect for mercantile practice as reflected in contracts and an interpretation of contracts in line with their accepted commercial meanings. At the same time, safeguards have been provided to protect the debtor against manifestly unreasonable contractual provisions or behaviour and to allow a Contracting State to disapply certain provisions where it feels that these run counter to its fundamental policies.

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1 — Definitions

In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:

(a) “agreement” means a security agreement, a title reservation agreement or a leasing agreement;

(b) “assignment” means a contract which, whether by way of security or otherwise, confers on the assignee associated rights with or without a transfer of the related international interest;

(c) “associated rights” means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object;
(d) “commencement of the insolvency proceedings” means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;

(e) “conditional buyer” means a buyer under a title reservation agreement;

(f) “conditional seller” means a seller under a title reservation agreement;

(g) “contract of sale” means a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in (a) above;

(h) “court” means a court of law or an administrative or arbitral tribunal established by a Contracting State;

(i) “creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;

(j) “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;

(k) “insolvency administrator” means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;

(l) “insolvency proceedings” means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation;

(m) “interested persons” means:
(i) the debtor;
(ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;
(iii) any other person having rights in or over the object;

(n) “internal transaction” means a transaction of a type listed in Article 2(2)(a) to (c) where the centre of the main interests of all parties to such transaction is situated, and the relevant object located (as specified in the Protocol), in the same Contracting State at the time of the conclusion of the contract and where the interest created by the transaction has been registered in a national registry in that Contracting State which has made a declaration under Article 50(1);

(o) “international interest” means an interest held by a creditor to which Article 2 applies;

(p) “International Registry” means the international registration facilities established for the purposes of this Convention or the Protocol;

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

(r) “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);

(s) “non-consensual right or interest” means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an
obligation to a State, State entity or an intergovernmental or private organisation;

(t) “notice of a national interest” means notice registered or to be registered in the International Registry that a national interest has been created;

(u) “object” means an object of a category to which Article 2 applies;

(v) “pre-existing right or interest” means a right or interest of any kind in or over an object created or arising before the effective date of this Convention as defined by Article 60(2)(a);

(w) “proceeds” means 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;

(x) “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;

(y) “prospective international interest” means an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor's acquisition of an interest in the object), whether or not the occurrence of the event is certain;

(z) “prospective sale” means 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;

(aa) “Protocol” means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;
(bb) “registered” means registered in the International Registry pursuant to Chapter V;

(cc) “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;

(dd) “registrable non-consensual right or interest” means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40;

(ee) “Registrar” means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(2)(b);

(ff) “regulations” means regulations made or approved by the Supervisory Authority pursuant to the Protocol;

(gg) “sale” means a transfer of ownership of an object pursuant to a contract of sale;

(hh) “secured obligation” means an obligation secured by a security interest;

(ii) “security agreement” means 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;

(jj) “security interest” means an interest created by a security agreement;

(kk) “Supervisory Authority” means, in respect of the Protocol, the Supervisory Authority referred to in Article 17(1);

(ll) “title reservation agreement” means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;
(mm) “unregistered interest” means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention; and

(nn) “writing” means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.

Comment

4.6. This Article contains a comprehensive list of defined terms and the Convention and Luxembourg Protocol must be read in the light of these. Certain terms used in the Convention are not defined, either because it was considered that their meaning is clear from defined terms to which they are related (e.g. “buyer”, “chargee”, “chargor,” “seller”) or from the context or the nature of the categories of object to which the Convention applies. So there are no definitions of the terms “international” and “mobile equipment” (see paragraphs 2.53, 4.317). Other terms are not in the list of definitions in the Convention because they had to be worked out in the context of an equipment-specific Protocol. Thus “railway rolling stock” is defined only in the Protocol, not in the Convention.

4.7. “agreement” – a term covering all three types of agreement creating or providing for an international interest, and used in those provisions where it is not necessary to distinguish one type from another, notably Articles 3(1), 7, and 60(3). “Agreement” is to be contrasted with “contract”, a term not defined but used in Articles 32(1)(b) and 36(1)(a) to cover, for example, a loan agreement in respect of which the repayment obligation is secured not by the loan agreement itself but by a prior security agreement under which the debtor agrees to perform all its obligations under other contracts, present or future. “Agreement” is also to be contrasted with “contract of sale”, which is separately defined and denotes a contract of outright sale (see paragraph 4.13), and with undefined terms such as “contract” (see Articles 1, 32(1)(b) and
“assignment” – this definition relates to the assignment of associated rights (see paragraph 4.9) which is the subject of Chapter IX of the Convention. “Assignment” is here used in a broad sense to cover any form of contract by which associated rights are conferred on another, whether by outright transfer of ownership, security transfer of ownership or a pledge or charge of the associated rights creating a right in rem without a transfer of ownership. Whether a particular contract constitutes an assignment for this purpose is a matter to be determined by an autonomous interpretation of the Convention, not by the applicable law. Thus, while in many common law jurisdictions a mere agreement to assign is treated as equivalent to assignment where the intended transfer is not dependent on a future uncertain event, the definition of assignment in Article 1(b) plainly requires that the contract transfers or otherwise confers the rights and does not merely provide for their conferment at a future time. So an agreement to assign would be registrable only as a prospective assignment. It is also necessary to distinguish an assignment, which leaves intact the agreement to which it relates, from a novation, which involves replacement of the agreement by a new agreement, whether between the same parties or between different parties. There are hybrid transactions in which the creditor assigns its rights under the agreement and also, with the consent of the debtor counterparty, transfers its obligations, wholly or in part, to another party, who assumes them in place of the assignor. Such a transaction, even if a novation under the applicable law as regards the obligations assumed by the new party, is an assignment as regards the transferred creditor’s rights (see Illustration 1, paragraph 4.48). The definition covers both an assignment which also transfers the related international interest, as will be the effect under Article 31(1) if the parties do not otherwise agree, and an assignment of the associated rights alone where the parties so agree. The latter is not, however, governed by the Convention. The definition is limited to contractual assignments and does not apply to assignments by operation of law, for example, assignments under statutory provisions or resulting from a statutory merger or amalgamation of two corporations.

“associated rights” – these are rights to payment or other performance secured by or associated with the object. Associated rights are “secured by” a
security agreement or “associated with” a title reservation or leasing agreement. They include rights to repayment of a loan or to payment of the price under a title reservation agreement or rentals under a leasing agreement, as well as rights to other forms of performance, such as insurance and repair of the object, breakage costs, indemnities, and the observance of negative obligations, such as a prohibition on the disposal of leased objects without the lessor’s consent. But associated rights are confined to the obligations of the debtor itself under the agreement, including undertakings in the agreement to perform other contracts; obligations of third parties – and, indeed, of the debtor itself under other contracts with the creditor or with third parties – are not associated rights, even though secured by the agreement, unless the debtor also undertakes performance of those obligations in the agreement. However, it is not necessary that the agreement refer specifically to such other contracts. It suffices that the obligations undertaken in the agreement extend to those arising under other contracts, as where the agreement contains provision for repayment of all sums due and to become due to the creditor, whether under the agreement or any other contract, and secures payment of such sums. Where the debtor does undertake these obligations, the effect is that associated rights under the other contracts become associated rights also under the agreement referring to them. That, however, does not suffice to make associated rights under the other contracts object-related rights if they do not have that status under the contracts concerned. See paragraph 2.196 and Illustration 41, paragraph 4.259.

4.10. “commencement of the insolvency proceedings” – the time at which they are deemed to commence under the applicable insolvency law. The definition is relevant to Article 30(1) under which an international interest is effective in insolvency proceedings if registered in the International Registry prior to the commencement of the insolvency proceedings. The applicable insolvency law is determined by the conflict of laws rules of the forum, which include, in Member States of the European Community, the EC Insolvency Regulation. Article I(2)(c) of the Luxembourg Protocol defines “insolvency-related event” as encompassing not only the onset of insolvency but also the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings or to exercise

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remedies under the Convention is prevented or suspended by law or State action.

4.11. “conditional buyer” – the buyer under a title reservation agreement; to be contrasted with the term “buyer” used in Article 29(3) of the Convention.

4.12. “conditional seller” – the seller under a title reservation agreement as defined in Article 1(ll), as opposed to an outright seller under a sale as defined in Article 1(gg) of the Convention.

4.13. “contract of sale” – this phrase, which appears elsewhere in the Convention only in the definition of sale (see paragraph 4.39), denotes a contract for the sale of an object by a seller to a buyer which is not a security agreement, a title reservation agreement or a leasing agreement (Convention, Article 1(g)). It therefore does not include contracts in which title is expressly reserved to the seller until completion of payment or fulfilment of other conditions, nor does it include a lease with an option to purchase or a security transfer of ownership (mortgage). Where the effect of the contract is to transfer ownership without further conditions having to be satisfied it also constitutes a sale (see paragraph 4.39). However, contracts of sale are not confined to contracts under which ownership passes to the buyer when the contract is made. There are many contracts of sale in which there is no reservation of title but the transfer of ownership is dependent on the fulfilment of conditions specified by the general law, for example, that where the goods referred to in the contract are not identified at the time of the contract and identification depends on some act of allocation (appropriation) by the seller or buyer ownership passes only when that act is performed. Until then there is merely a contract. But once ownership has been transferred pursuant to the contract there is a sale (see paragraph 4.39). Contracts of sale are not as such regulated by the Convention at all. Under Article XVII of the Luxembourg Protocol notices of sale may be registered in the International Registry for railway rolling stock but this registration is for information only and does not affect the rights of any person or have any other effect under the Convention or Protocol. In contrast to Article 3 of the 1980 Convention on Contracts for the International Sale of Goods, the Cape Town Convention offers no guidance on the distinction between a contract for the manufacture and sale of an object and a contract for the supply of services. That is left to the applicable law, and national legal systems vary as to the test that is to be applied.
4.14. “court” includes an administrative or arbitral tribunal established by a Contracting State but does not include a private administrative or arbitral tribunal. Under Article 53 a Contracting State may declare the relevant “court” or “courts” for the purposes of the present Article and Chapter XII. It is, however, implicit in the Convention that the designated body is one which fulfils judicial or quasi-judicial functions.

4.15. “creditor” – the term is used to denote the person to whom obligations are owed under an agreement where the relevant provision of the Convention does not distinguish between one form of agreement (e.g. a security agreement) and another (e.g. a title reservation agreement or leasing agreement). See, for example, Articles 3(2), 11 and 13. “Creditor” includes an assignee or other successor in title. It does not, however, include the holder of a non-consensual right or interest under Article 39 or a registrable non-consensual right or interest under Article 40. Such a holder is covered by the definition of “interested persons” in Article 1(m). See paragraphs 4.19, 2.30(5), 2.35, 2.72.

4.16. “debtor” – primarily the person who owes obligations under an agreement. In legal systems which recognise the transfer of obligations as effective to impose on the transferee a liability to the creditor – for example, in civil law systems which have the concept of assignment of contract, where both the benefit and the burden are assigned – “debtor” includes a transferee of the debtor's obligations. “Debtor” also includes a person whose interest in an object is burdened by a registrable non-consensual right or interest within Article 40 of the Convention. The only provisions to which this limb of the definition is relevant are Articles 8(4), 9(3) and (4) and 13(3) relating to “interested persons”, which are defined in Article 1(m) in terms which include the debtor. See paragraphs 2.30(5), 2.36, 2.80(1).

4.17. “insolvency administrator” – a person authorised to administer the reorganisation or liquidation, i.e. in an insolvency proceeding as defined by the next paragraph. The term is a neutral one covering persons designated in various ways in national insolvency systems, for example, trustee in bankruptcy, liquidator, provisional liquidator, administrator. The inclusion of a “debtor in possession” reflects the bankruptcy laws of some States by which the conduct of the business of an insolvent debtor undergoing reorganisation is authorised to be left in the hands of its management. A person not authorised in a collective insolvency proceeding, for example, one appointed
by a secured creditor under the terms of a security agreement or by a group of creditors under an informal workout arrangement, is not an insolvency administrator for the purposes of the Convention.

4.18. “insolvency proceedings” – this phrase covers all forms of collective proceeding in which the debtor’s assets are subject to control or supervision by a court for the purposes of reorganisation in insolvency or liquidation. National legal systems classify such proceedings in different ways. Some distinguish between bankruptcy (in the sense of individual insolvency proceedings) and liquidation or winding-up (in the sense of insolvency proceedings involving companies); some distinguish insolvency (meaning a failure to fulfil civil law debt obligations) from bankruptcy (meaning a failure to perform payment obligations arising from commercial dealings), some distinguish judicial from administrative insolvency proceedings. All these are covered by the definition in Article 1(l) so long as:

(1) the proceeding is a collective proceeding, as opposed to an enforcement remedy primarily available to a particular creditor, such as receivership;

(2) the debtor’s assets and affairs are subject to control or supervision by a court (which as defined in Article 1(h) includes a State administrative tribunal), as opposed to control solely by the debtor and its creditors in an informal moratorium or “workout”; and

(3) the purpose of the control or supervision is either

   (a) reorganisation of the debtor, namely a reordering of its affairs with a view to its restoration to profitable trading or to improving the position of creditors on a subsequent liquidation; or

   (b) immediate liquidation, involving collection and realisation of the debtor’s assets and distribution of the proceeds among creditors in accordance with the relevant insolvency law.

4.19. “interested persons” – the definition of “interested persons” is relevant to denote the persons who (a) have to be notified under Article 8(4) of an intended sale or lease of the charged object by the chargee or (b) in the absence
of a court order, have to give their consent under Article 9(1) to the vesting of
the object in the chargee in satisfaction of the debt or (c) are required by the
court entertaining a request by the creditor for advance relief under Article 13
to be given notice of the request. The definition covers three categories of
interest holder. In the first is the debtor itself, which includes not only the
agreement debtor but a person whose interest is burdened by a registrable non-
consensual right or interest (see paragraphs 4.16, 2.30(5), 2.36, 2.80); in the
second, issuers of suretyship and demand guarantees, standby letters of credit
and other forms of credit insurance; in the third, “any other person having
rights in or over the object.” This last category is very wide. It includes
chargees under security agreements (other than chargees whose interest is
burdened by – i.e. subordinated to – the registrable non-consensual right or
interest and who are thus debtors within the first category), buyers, conditional
buyers and lessees, holders of non-consensual rights and interests under Article
39, and holders of non-consensual rights or interest registrable under Article
40 and of national interests notice of which is registrable under Article 20(6).
All these categories of interest holder are covered by the definition, whether
they are senior or junior to the enforcing creditor. Even the holders of
unregistered rights or interests fall within the third category of “interested
persons” and as such are entitled to receive notice under Article 8(4) of a
chargee’s intention to sell or grant a lease of an object provided that the
creditor has been given notice of their rights within a reasonable time prior to
the sale or lease. This reflects the fact that Chapter III of the Convention,
dealing with the creditor’s default remedies, is not confined to registered
international interests.

4.20. “internal transaction” – a definition relevant only to Article 50, under
which a Contracting State may by declaration exclude, albeit within narrow
limits, the application of the Convention to internal transactions. In summary,
an internal transaction is a security agreement, title reservation agreement or
leasing agreement in respect of which (a) the centre of main interests of all
parties is situated and the equipment is located in the same Contracting State at
the time of conclusion of the contract and (b) the interest created by the
transaction has been registered in a national registry in the declaring State. Such
an interest is referred to as a national interest (see paragraph (r) of the present
Article and paragraph 4.24). The requirement that it be registered in a national
registry is designed to ensure that there is a mechanism through which notice
of the national interest can be transmitted to the International Registry so as to
secure the comprehensive application of the Convention’s first-in-time priority provisions. This objective is partially defeated by Article XXIX(2) of the Luxembourg Protocol, which extends the definition of “internal transaction” to situations which do not involve local registration (see paragraph 3.66). Most of the default provisions are inapplicable to internal transactions, and the national interest arising under an internal transaction cannot be registered as an international interest, but it can be protected by registration of notice of a national interest, to which the priority rules apply in the same way as to international interests. Except in cases within Article XXIX(2), an agreement in respect of which the interest has not been registered in a national register is not an internal transaction and cannot, therefore, be excluded from the Convention by a declaration under Article 50. See further paragraph 4.24.

4.21. “international interest” – a key phrase, meaning an interest to which Article 2 applies, and therefore an interest arising under an agreement which conforms to the formalities prescribed by Article 7 (as to prospective international interests, see paragraph 4.31). An international interest may be held by a single creditor or by multiple creditors, including creditors holding international interests in different fractional interests. Registrable non-consensual rights or interests are not international interests but may be registered in the International Registry and then rank for priority as if they were international interests, though the default provisions of Chapter III do not apply to them or to non-consensual rights or interests under Article 39. Similarly, national interests arising under internal transactions are not international interests but if protected by a notice in the International Registry enjoy the same priority status as a registered international interest. The interest of an outright buyer is not an international interest but is protected against prior unregistered interests by Article 29(3) as regards railway rolling stock, differing in this respect from the position under the Aircraft Protocol. For the various ways in which a new international interest can arise, see paragraph 2.39. Under the Luxembourg Protocol a person may hold and register an international interest as trustee for one or more beneficiaries, or as agent for one or more principals (see paragraph 5.10).

4.22. “International Registry” – the registry established under the Convention by the Supervisory Authority to record international interests and other registrations provided by Article 16. Article 16(2) of the Convention
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envisages separate international registries for different categories of object. The international registry for railway rolling stock will be based in Luxembourg.

4.23. “leasing agreement” – this covers leases and sub-leases of entire or fractional interests, with or without an option to purchase, and, indeed, any agreement by which one person grants to another a right to possession or control of an object in return for a rental or other payment, whether or not the transaction would be characterised by national law as a leasing agreement, though under Article 2(4) it is left to the applicable law to determine whether the agreement is to be recharacterised as a security agreement or a title reservation agreement for the purposes of the Convention. “Possession” is to be construed in a broad Convention sense, not in terms of national law, and is therefore wide enough to cover what would in some jurisdictions be regarded as mere detention. However, an agreement is not a leasing agreement, even if so called in commercial usage, if possession is retained by the lessor and the lessor is merely providing services. Thus a “wet lease” of railway rolling stock, by which the lessor provides not only the rolling stock but the crew, maintenance and insurance, the rolling stock remaining under the control of the lessor, is not a leasing agreement within the Convention. Again, a consignment agreement by which equipment is consigned to a wholesaler or retailer for resale and without a rental charge or other payment is not a leasing agreement.

4.24. “national interest” – an interest created by an internal transaction covered by a declaration under Article 50(1). An interest arising under the law of a Contracting State but not registered in a national registry of that State is not a national interest for the purposes of the Convention because the transaction under which it arises is not an internal transaction as defined by Article 1(n). Accordingly, the transaction is fully covered by the Convention and cannot be excluded by a declaration under Article 50(1), and this is so whether the non-registration is because the interest is not registrable under the national law or the chargee has failed to register it or because the Contracting State concerned has no national registration system in place at all. Even a local registered interest is not a national interest if the Contracting State has made no declaration with respect to it. However, as noted earlier, national interests are governed by the Convention’s perfection and priority rules. See further paragraph 4.20.
4.25. “non-consensual right or interest” – this definition is confined to non-consensual rights or interests falling within Article 39 and therefore having priority without registration if covered by a Contracting State’s declaration under that Article. A registrable non-consensual right or interest falls within Article 40, where it has a somewhat broader meaning and could, for example, cover a judgment or order. “Interest” denotes a right in rem, whereas “right” is a broader term capable of embracing a purely ad rem personal right enforceable by recourse to the object, e.g. a right of seizure, detention or sale given by law or a right of recourse by way of execution of a judgment or order of a court. Excluded from the definition are purely personal contractual rights not constituting interests in an object and these are outside the Convention altogether, though Article 39(1)(b) enables a Contracting State to make a declaration that nothing is to affect rights of arrest or detention of an object, whether contractual or given by law, for payment of amounts owed to a provider of public services directly relating to those services in respect of that object or another object.

4.26. “notice of a national interest” – the means by which a national interest arising under an internal transaction can be protected by entry of the notice in the International Registry. The first-in-time rule applies to the registration of a notice of a national interest as it does to registration of an international interest.

4.27. “object” – a generic term for any article of equipment within the scope of Article 2 of the Convention and therefore covering an airframe, aircraft engine, helicopter, railway rolling stock and space assets, whether completed or in course of manufacture so as to be sufficiently identifiable (see paragraph 2.63). An aircraft as such is not an object for the purposes of the Convention unless it is a helicopter. Similarly, “object” does not include a train, only a wagon, a carriage or a locomotive. An engine installed on an airframe (as opposed to one installed on a helicopter) is a separate object and does not form part of the airframe. By contrast, in the case of railway rolling stock, as with helicopters, an engine (other than a locomotive) is not a distinct object but is part of the railway rolling stock on which it is installed. See paragraph 3.8, n. 3.

4.28. “pre-existing right or interest” – a right or interest created or arising before the effective date of the Convention (as defined by Article 60(2)(a)) and therefore unaffected by the Convention except in a Contracting State that has
made a declaration under Article 60 and then only for the purposes of determining priority under the Convention. The definition is not confined to international interests but applies to any interest capable of being protected by the Convention and also any interest capable of being overridden by it, which extends to all unregistered interests created under national law except so far as the Convention otherwise provides.

4.29. “proceeds” – narrowly defined so as to be limited to proceeds arising from total or partial loss or destruction of the object (e.g. insurance proceeds) or total or partial confiscation, condemnation or requisition. An international interest in an object extends to proceeds (Article 2(5)) and any priority given by Article 29 to an interest in the object extends to proceeds (Article 25(6)). General proceeds, such as receivables arising from sale of an object subject to a security agreement, are not within the Convention, since this would broaden its scope beyond aircraft objects, railway rolling stock and space assets, and would also, where an international interest was assigned and the object was later sold, cut across the 2001 UN Convention on the Assignment of Receivables in International Trade. An international interest in an object extends to proceeds (Article 2(5)) and any priority given by Article 29 to an interest in the object extends to proceeds (Article 25(6)).

4.30. “prospective assignment” – an assignment of associated rights intended to be made in the future upon the occurrence of a stated event and registrable under Article 16(1)(b). Under Article 35 the priority rules governing international interests apply mutatis mutandis to assignments, with the result that when the assignment is in due course made it is treated as registered as from the time of registration of the prospective assignment and ranks for priority accordingly. For the meaning of “prospective” see paragraphs 4.31 and 4.32.

4.31. “prospective international interest” – an interest intended to be created or provided for as an international interest in the future on the occurrence of a stated event. The mere intention of one or both parties to create an international interest at some time in the future is not sufficient to give rise to a prospective international interest. It is necessary that the prospective international interest relate to an object which is identifiable in accordance with the identification criteria prescribed by the relevant Protocol. This means that the object must either be in existence or have reached the stage of manufacture at which it can be seen to be equipment of a type falling within the Convention
and identifiable so as to distinguish it from other such equipment. A prospective international interest can arise in a variety of contexts, for example, with respect to equipment to be given in security or supplied on lease or subject to an existing lease containing a provision for renewal, which would create a new international interest in favour of the lessor (see paragraph 2.40(3)). Article 16(1)(a) enables a person intending to take security over an identified object to register a prospective international interest and thereby preserve a priority position, in that if the international interest later comes into being under the relevant agreement it is treated for priority purposes as registered at the time of registration of the prospective international interest (Article 19(4)).

So long as the registered particulars are sufficient for a completed international interest no second registration is required when the international interest comes into being (for example, when the only element lacking was the debtor’s power of disposal and the debtor acquires a power to dispose of the object). This is reinforced by Article 22(3), the effect of which is that a person searching the International Registry will not be able to differentiate between an international interest and a prospective international interest, because the search certificate will state merely that the creditor named in it has acquired or intends to acquire an international interest in the object identified. In either case, a searching party knows that it risks not having the highest priority – and must make further inquiries of the parties. Among other things, this concept will facilitate the closing of transactions by permitted pre-filings, which, however, require the consent of both parties to a transaction.

4.32. “prospective sale” – a sale intended to be made in the future upon the occurrence of a stated event. The Convention does not itself contain provisions governing sales or prospective sales but Article 41 provides that it may be applied to them by virtue of a Protocol (as has been done under the Aircraft and Space Protocols but not the Luxembourg Protocol) with the effect that where a prospective sale is registered and the sale is duly completed it is treated as registered from the time of registration of the prospective sale. The discussion in paragraph 4.31 as to the meaning of “prospective” applies also to a prospective sale. So the fact that a leased asset might be sold to the lessee even if there is no provision for this in the lease does not entitle the lessee to register a prospective sale. It is necessary that the subject-matter of the prospective sale be identified, whether in the lease itself or in some separate agreement, in accordance with the identification criteria laid down in the relevant Protocol.
An agreement for sale under which ownership is to pass on when certain subsequent contractual or legal conditions for the transfer of ownership have been fulfilled is registrable as a prospective sale. So too is an option to purchase in a lease.

4.33. “Protocol” – the protocol applicable to a particular category of object. There are currently three protocols, the Aircraft Protocol, the Luxembourg Protocol and the Space Protocol.

4.34. “registered” – registered in the International Registry pursuant to Chapter V. An interest is to be treated as registered only if it is validly registered, that is, registered in conformity with Article 20 (see Article 19(1)). A registration is not valid if the consent prescribed by Article 20 is lacking or if the interest to which it relates was never validly created in the first place, which in the case of an international interest requires, amongst other things, conformity with Article 7 (modified for railway rolling stock by Article V of the Luxembourg Protocol) and connection to a Contracting State as provided by Article 3 of the Convention. A registration is complete only when it becomes searchable (Article 19(2)).

4.35. “registered interest” – this denotes any interest registered pursuant to Chapter V, whether as an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest. This definition is relevant primarily to the priority rule in Article 29(1) and its application to assignments under Article 35(1) and internal transactions under Article 50(2) of the Convention and Article XXIX(2) of the Luxembourg Protocol.

4.36. “registrable non-consensual right or interest” – a right or interest created by the law of a Contracting State, as opposed to agreement, which by virtue of a declaration made by that State under Article 40 can be registered in the International Registry as if it were an international interest. A typical example is the lien of a judgment creditor. Registrable non-consensual rights or interests are to be distinguished from those having priority under Article 39 without registration.
4.37. “Registrar” – an entity or other person, natural or legal, appointed by the Supervisory Authority (or if otherwise provided by the relevant Protocol, designated by that Protocol) to run the International Registry.

4.38. “regulations” – regulations made or approved by the Supervisory Authority pursuant to the Protocol. The function of the regulations is to prescribe the detailed requirements for the operation of the International Registry, including requirements for registrations, searches, the functions of the Registrar and fees payable. Regulations, together with any associated procedures, are thus the bottom tier of the rule-making structure. They are relevant only to matters within the purview of the International Registry and will usually be made pursuant to a Protocol, not directly under the Convention. There are currently no regulations for the registries for railway rolling stock and space assets as these have yet to be established.

4.39. “sale” – a transfer of ownership pursuant to a contract of sale. The transfer of ownership may take place at the time of and by virtue of the contract itself, which thus operates both as a contract and as a sale, or it may take effect at a later time, for example, where equipment not identified at the time of the contract becomes identified by some later contractual act. Outright sales are outside the scope of the Convention itself but the registration and priority provisions have been extended to such sales by Article III of the Aircraft Protocol pursuant to Article 41 of the Convention. By contrast, Article XVII of the Luxembourg Protocol goes no further than allowing registration of notices of sale, which are for the purposes of information only and do not affect the rights of any person or have any other effect under the Convention or Protocol. “Sale” is confined to a transfer of ownership under a contract of sale. The buyer’s completion of payment and fulfilment of other title transfer provisions under a title reservation agreement and the lessee’s exercise of an option to purchase contained in a lease bring a contract of sale into existence and simultaneously a sale under that contract. By contrast, a sale under statutory provisions or other rules of law is outside the scope of the Convention and Protocols.

4.40. “secured obligation” – an obligation secured by a security interest as defined by paragraph (jj) of this Article. The definition is relevant to Articles 8(5), 9 and 34(a).
4.41. “security agreement” is widely defined so as to cover an agreement for (a) a pledge (though the latter would be unusual as it involves delivery of actual or constructive possession to the creditor), (b) a security transfer of title, (c) a charge or other form of consensual security, and (d) a contractual lien, such as a lien for repair or storage charges. It includes an agreement for security for future as well as existing obligations, and security for performance of the obligations of a third party as well as of the chargor. In the United States, Canada, New Zealand and Australia a title reservation agreement constitutes a security agreement and a leasing agreement may do so in certain conditions.

4.42. “security interest” – an interest created by a security agreement. See Articles 8(6), 9 and 25(1). In the jurisdictions referred to above this will include the interest reserved by a seller under a title reservation agreement and may include the interest of a party who is the lessor under a leasing agreement.

4.43. “Supervisory Authority” – the body responsible for setting up the International Registry, appointing and dismissing the Registrar, promulgating the regulations and fulfilling the other functions specified in Article 17. The Supervisory Authority for the International Registry for railway rolling stock is a body to be established by representatives of States Parties as provided by Article XII of the Luxembourg Protocol. Its Secretariat will be the Intergovernmental Organisation for International Carriage by Rail (OTIF).

4.44. “title reservation agreement” – an agreement for sale (often called a conditional sale agreement) by which the transfer of ownership is retained by the seller until the fulfilment of payment and/or other conditions specified in the agreement. This is to be contrasted with “contract of sale”, under which ownership is to pass under normal rules of law governing the transfer of ownership where the seller does not reserve title. It is for the applicable law to determine whether a title reservation agreement within the definition in Article 1(ll) is to be recharacterised as a security agreement for the purposes of the Convention.

4.45. “unregistered interest” means any interest, whether consensual or non-consensual, which has not been registered in the International Registry, whether or not it is registrable, except for a non-consensual interest which a Contracting State declares under Article 39, is to have priority, without registration, even over a registered international interest. The essential point is that under Article 29(1) a registered international interest has priority over an
unregistered interest as defined above. The fact that the unregistered interest
may not itself be capable of protection by registration is irrelevant; the superior
ranking of the registered international interest lies at the heart of the protection
which the Convention is designed to provide. There are three major excep-
tions: under Article 29(3) an outright buyer of an object takes free from an
international interest not registered at the time of the purchase (this rule is
disapplied in the Aircraft and Space Protocols, since the buyer of an aircraft
object or space asset can register its interest in the object or asset); under
Article 29(4) a conditional buyer or lessee can shelter under the registration of
its conditional seller or lessor; and a non-consensual right or interest covered
by a declaration under Article 39 has priority even though not registered in the
International Registry.

4.46 “writing” is defined widely so as to embrace not only documents but
also electronic and other forms of teletransmission. However, the teletrans-
mission must indicate by reasonable means a person’s approval of the record
and must be capable of reproduction in tangible form on a subsequent
occasion. In most cases this will be by manual or electronic signature.

4.47 Some terms are not defined, either because their meaning is generally
considered to be self-evident or because they are equipment-specific and thus
left to be defined in the Protocol. But one of these worthy of mention is
“person,” which embraces both natural and legal persons and thus covers
individuals, partnerships and other unincorporated associations if having legal
personality, corporations, States, State entities and other bodies having the
capacity to hold rights and incur duties.

4.48. Illustration 1

O agrees to lease a locomotive to L under an agreement providing for
payment of rentals to O throughout the period of the lease. The lease
agreement is registered in the International Registry as an international
interest. Subsequently it is agreed that O will transfer its interest as lessor to T
(by virtue of a transfer by O of all of its rights under the lease agreement
arising after the date of transfer, but with a reservation of all such rights and
interests in respect of the period preceding the date of transfer), that O and L
will each release the other from all future obligations under the lease and that
such obligations will be assumed by T to L and by L to T. O’s obligations to
I, under the lease agreement are to remain in force in respect of matters arising prior to the date of transfer. This amounts to an assignment, not a new agreement, and this is regardless of any different characterisation that might be given by the applicable law. Had the transfer to T resulted in O’s no longer holding any rights or obligations under the leasing agreement (as would be the case if O were fully released from the lease by L and vice versa), it would amount to a new agreement (novation) which would have the effect of discharging the existing international interest and would constitute a new international interest requiring separate registration as such.

Article 2 — The international interest

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

2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

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

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

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

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. The categories referred to in the preceding paragraphs are:

   (a) airframes, aircraft engines and helicopters;

   (b) railway rolling stock; and

   (c) space assets.
4. The applicable law determines whether an interest to which paragraph 2 applies falls within sub-paragraph (a), (b) or (c) of that paragraph.

5. An international interest in an object extends to proceeds of that object.

Comment

4.49. Article 2 defines an international interest in mobile equipment. For an interest to qualify as an international interest the conditions set out in paragraph 2 must be satisfied, except that in the case of railway rolling stock the requirement of unique identifiability is implicitly overridden by Article V of the Luxembourg Protocol. The “effects” referred to in Article 2(1) include default remedies, perfection and priority requirements, and effectiveness in the debtor’s insolvency. The Convention does not specify any requirements of mobility or internationality. These elements are considered to follow from the nature of the object. If the connecting factor in Article 3, as elaborated by Article 4, is satisfied, the Convention applies without further conditions. See also paragraphs 4.317-4.318 as to internal transactions. Article 51 contains provisions for extension of the Convention, through future Protocols, to additional items of equipment.

4.50. In order to fall within the Convention the interest must fall within one of the three categories specified in Article 2(2). That is to be determined by applying the Convention’s own definitions (Article 1(ii), (f) and (q)) and its autonomous rules of interpretation of these, not by reference to national law (see Article 5(1) and paragraphs 2.47-2.48). Hence the initial characterisation is prescribed by the Convention itself. But this is purely for the purpose of determining whether the interest is a Convention interest at all. Once it is established that the interest does fall within one of the three categories specified in Article 2(2), its characterisation for the purposes of subsequent provisions of the Convention, and in particular those of Chapter III relating to default remedies, is determined by the applicable law. So for those purposes the Convention does not determine whether an agreement is a security agreement, a title reservation agreement or a leasing agreement. If, for example, a leasing agreement containing an option to purchase is characterised by the applicable law as a security agreement, then Article 10 of the Convention, not
Articles 8 and 9, will apply. The drafting of sub-paragraphs (b) and (c) is precise. These sub-paragraphs do not refer to an interest vested in a person as conditional seller or as lessor because the interest of the conditional seller or lessor derives not from the conditional sale or leasing agreement but from a prior acquisition from the manufacturer or other supplier.

4.51. Law in certain jurisdictions, notably those of the United States, Canada, New Zealand and Australia, characterises conditional sale agreements and certain types of leasing agreements as security interests. Other legal systems treat conditional sellers and lessors as full owners and draw a sharp distinction between security agreements and title retention and leasing agreements. Given the impracticability of securing agreement on a uniform approach to characterisation, this is left to the applicable law, 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)), i.e. excluding the rules of private international law of the applicable law and thus excluding renvoi. As stated above, characterisation is primarily relevant to determine which of the provisions of Chapter III of the Convention apply. Most of the other provisions of the Convention apply equally to all three forms of agreement.

4.52. In Illustration 2 (paragraph 4.54) the title reservation agreement is also a security agreement under New York law. If New York law applies, the effect of Article 2(2) is that the agreement is to be treated only as a security agreement and not also as a title reservation agreement for the purposes of the Convention. In other words, once category (a) of Article 2(2) is found to be applicable, neither (b) nor (c) can be applied. So a New York court would not apply Article 10 and a French court would not apply Article 8 or 9.

4.53. An international interest in an object extends to its proceeds, though this term is narrowly defined by Article 1(w) (see paragraph 4.29). In consequence any priority enjoyed by the holder of the international interest under Article 29 covers the proceeds, a point expressly made by Article 29(6).

4.54. 

Illustration 2

S in Paris agrees to sell a locomotive to B in New York under a title reservation agreement to which the Convention applies. If a New York court were to apply New York law to characterise the agreement it would treat it as...
a security agreement. If a Paris court were to apply French law to the characterisation issue it would treat the agreement as a title reservation agreement. Accordingly, if a question were to arise under Chapter III of the Convention relating to default remedies, then on the assumption that the United States and France had adopted the Convention and each court was applying its own law, a New York court would apply Article 8 or 9, as appropriate, while a French court would apply Article 10.

Article 3 — Sphere of application

1. This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.

2. The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

Comment

4.55. Article 3 provides the requisite connecting factor to a Contracting State, namely the fact that the debtor is situated in that State at the time the agreement is concluded. If this condition is not met, the Convention does not apply. If it is met, the Convention does apply. No further conditions have to be satisfied. In particular, it is not necessary that the creditor be situated in a Contracting State.

4.56. Paragraph 1 of this Article is to be read with Article 4. The relevant time for determining whether the requirement of the present Article is satisfied is the time the agreement is made. If the debtor is then situated in a Contracting State the requirement is met, and the Convention does not cease to apply merely because the debtor moves to a non-Contracting State. Conversely, the Convention does not become applicable merely because the debtor becomes situated in a Contracting State after entering into the agreement.
Article 4 — Where debtor is situated

1. For the purposes of Article 3(1), the debtor is situated in any 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.

2. A reference in sub-paragraph (d) of the preceding paragraph to the debtor's place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

Comment

4.57. Article 4 sets out six alternative ways in which the test of situation of the debtor in a Contracting State may be satisfied. The purpose of this wide range of factors is to give maximum scope to the application of the Convention. However, where paragraphs (a)-(c) are inapplicable and the debtor has more than one place of business, the Convention applies only if the principal place of business is situated in a Contracting State.

4.58. The words “or formed” in sub-paragraph (a) include unincorporated associations organised under the law of the Contracting State in question. The terms “statutory seat” and “registered office” in sub-paragraph (b), though not identical in meaning, are broad equivalents, the former featuring in some national laws and international instruments, the latter in others, and, depending on the jurisdiction, may be the same as the place where, or under the law of which, the entity is incorporated or formed. “Statutory seat”, signifying the law under which the entity has chosen to be incorporated, is to be distinguished from “real seat”, which is the place where the entity has its central administration, but the distinction is of no significance under Article 4 because
the place of central administration is covered by Article 4(1)(c). “Centre of administration” will usually be the place where the company’s head office functions are performed and control is exercised. This is not necessarily the same as the “centre of main interests” (COMI) under the EC Insolvency Regulation, where there is a strong presumption equating the COMI with the company’s registered office and close regard is also had to the perception of creditors. “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.

4.59. Where a Contracting State has territorial units with different systems of law applicable in relation to matters dealt with in the Convention and exercises its power under Article 52 to apply the Convention only to one or some of those territorial units, the debtor is considered to be situated in a Contracting State only if incorporated or formed under a law in force in a territorial unit to which the Convention applies (Article 52(5)(a)). “Law in force in a territorial unit” covers not only the law of the territorial unit itself but the law of the State so far as in force in that territorial unit. So in a federal jurisdiction a debtor company having a registered office or statutory seat, etc., in a territorial unit to which the Convention applies is to be considered situated in that State even if it is incorporated not under the law of the territorial unit but under federal law in force in the State in question.

4.60. Article 4 applies only for the purposes of Article 3(1). It is therefore inapplicable to Article 1(n) (which refers to the centre of main interests of the parties), Article 43(2)(b) (which contains no test for determining the debtor’s situation), Article 52(5)(a) (see paragraph 4.324) and Article 60(2)(b) (which applies a cascade approach (see paragraph 4.351).

**Article 5 — Interpretation and applicable law**

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.
2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

Comment

4.61. Paragraphs 1 and 2 express what have become standard principles of interpretation as exemplified by Article 7(1) of the 1980 United Nations Convention on Contracts for the International Sale of Goods ("the Sales Convention") except that predictability has been substituted for good faith, which in high value cross-border financing transactions is considered to create unacceptable uncertainty. The general principles on which the Convention is based include, as stated in the Preamble, predictability, party autonomy, and the protection and ready enforceability of security, title retention and lessor interests in equipment, all of which are designed to promote the overriding objective of the Convention, namely to promote the asset-based financing and leasing of mobile equipment.

4.62. Paragraph 1 is an instruction to national courts to avoid national concepts in interpreting the texts.

4.63. Under paragraph 2, the “general principles” described in the comments on the Preamble are the first and primary source for gap-filling. These principles are those that underlie asset-based financing and leasing, namely, prompt enforcement, visibility of transactions through registration in the
International Registry and clear priorities, together with predictability and party autonomy.

4.64. Where there are matters which are not settled by the express terms of the Convention or the principles on which it is based, these must be settled by the applicable law, by which is meant the domestic law of the State whose law is applicable by the rules of private international law of the forum, so that problems of renvoi are avoided. The law thus determined must be the law of a State (see paragraph 3.14) but need not be the law of a Contracting State. Recourse may also be made to the objects set out in the Preamble in identifying the principles underlying the Convention. For a list of matters referred to the applicable law see paragraph 2.54. For determination of the applicable law see paragraphs 2.55-2.57.

4.65. Paragraph 4 provides for the determination of the applicable law in the case of a State comprising several territorial units each having its own rules of law in respect of the matter to be decided. This paragraph is not confined to federal States; it applies to all States having two or more law districts. Where there is no indication of the relevant territorial unit, then what has to be applied is the law of the territorial unit selected by the law of the State or, if none, of the territorial unit with which the case is most closely connected. Thus in the first instance the conflict rules of the lex fori are applied and will usually lead to the law of the appropriate territorial unit, either because it has been specifically chosen by the parties or because objective factors lead to the application of that law. Where the conflict rules of the lex fori provide no solution, the internal conflict rules of the multi-territorial State must be applied. If there are no such rules, the court must apply the substantive law of the territorial unit with which the case has the closest connection. These three categories are not exhaustive. It is possible to have a case in which none of them apply, as where the parties select the law of a multi-unit State which has no connection with the case and do not specify or indicate the means of determining a particular territorial unit, and the State itself has no internal conflict rules. The Convention offers no solution to exceptional cases of this kind. The parties’ designation of the applicable law being ineffective for want of certainty, the only solution is to leave the matter to be resolved by the lex fori in the light of all factors considered relevant by the court.
Article 6 — Relationship between the Convention and the Protocol

1. This Convention and the Protocol shall be read and interpreted together as a single instrument.

2. To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.

Comment

4.66. The effect of this Article is that the Convention must be interpreted as if the provisions of the relevant Protocol were read into it. Whilst Article 49 spells out the overriding character of the relevant Protocol as regards the conditions for entry into force of the Convention, paragraph 2 of the present Article affirms the primacy of the Protocol in all questions that may arise concerning the interpretation of the two instruments. Any inconsistency is to be resolved in favour of the Protocol. For example, whilst Article 18(1) of the Convention provides that the criteria for identification of the object are to be specified by the Protocol and regulations, there is nothing to preclude the Protocol from leaving such criteria to be determined exclusively by the regulations.

CHAPTER II

CONSTITUTION OF AN INTERNATIONAL INTEREST

Article 7 — Formal requirements

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

(a) is in writing;

(b) relates to an object of which the chargor, conditional seller or lessor has power to dispose;

(c) enables the object to be identified in conformity with the Protocol; and
(d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

Comment

4.67. Article 7 prescribes the formalities that are both necessary and sufficient for an agreement creating or providing for the international interest – “creates” in the case of a security agreement, “provides for” in the case of a title reservation agreement or leasing agreement, where the creditor’s interest does not derive from the agreement but precedes it. These formalities, which may not be added to by national law, are designed to be as simple as possible, but if they are not complied with then the interest is not validly constituted as an international interest under the Convention (see Article 2(2)) and a purported registration of it in the International Registry has no effect, even as a prospective international interest (see paragraph 2.30(2)). Conversely, registration is not a condition of the constitution of an international interest but is merely designed to give notice of the international interest to third parties.

4.68. Given the relatively simple requirements of Article 7, it is likely that in most cases an interest validly created under national law will also constitute an international interest, so that the two interests will come into being at the same time. In that case the creditor will continue to enjoy the rights given to it by national law in relation to the national interest, subject only to the qualification that if the interest is not also registered as an international interest the creditor risks loss of priority under Article 29(1). However, neither the debtor nor creditor may assert national law rights which conflict with the Convention (see Illustrations 3 and 4).

4.69. The constitution of the international interest derives from the Convention, not from national law. It follows that an international interest comes into existence where the conditions of Article 7 are satisfied even if these would not be sufficient to create a security interest under the otherwise applicable law and even if the international interest is of a kind not known to that law. Conversely, if the conditions of Article 7 are not satisfied, no international interest is created even if the conditions for the creation of a comparable interest under the applicable law are fulfilled. However, the
applicable law governs capacity to contract, the material validity of the agreement (including such questions as the existence of the agreement and the effect of factors such as mistake or illegality) and the question whether the object is one of which the chargor, conditional seller or lessor (the creditor) has power to dispose so far as this question is not determined by the Convention itself (see paragraph 4.71). The Convention and Aircraft Protocol apply the same unique identification criteria for the constitution of an international interest as for its registration. However, the Luxembourg and Space Protocols differentiate between the two, on the basis that as between the parties there is no need for precise identification; it suffices that the object or objects can be seen to fall within the scope of the agreement, which can therefore cover multiple objects and after-acquired objects.

4.70. “Writing” covers any record of information which is either in tangible form or capable of being reproduced in tangible form on a subsequent occasion and indicates by reasonable means a person’s approval of the record (Article 1(nn)). It is thus not confined to agreements in document form but includes teletransmissions held in a permanent record. However, the record must be authenticated, for example by a manual or electronic signature.

4.71. “Power to dispose” includes, of course, a right of disposal, as where the debtor, seller or lessor is either the owner of the object or authorised by the owner to dispose of it. But “power” is wider than “right” and covers all cases where, under the applicable law or under the Convention, the creditor has the ability to make a disposition which is binding on the owner even if the owner has not authorised it, as where the disposition is by an agent acting in excess of its actual authority or where, by reason of some other exception to the nemo dat quod non habet principle (e.g. in many jurisdictions, delivery to a bona fide purchaser by a creditor who held possession with the consent of the owner), the disposition overrides the owner’s title (in the case of an outright disposition) or subordinates it (in the case of a disposition by way of security).

4.72. While the power to dispose usually arises under the applicable law, it may also arise under the Convention. It is, for example, implicit in the Convention rules governing the registration and priority of the interest held by a conditional seller or lessor that the conditional buyer or lessee is to be considered as having a power to dispose, and thus to grant a security interest.
which, if registered before the interest of the conditional seller or lessor, will
take priority over a security interest granted by the conditional seller or lessor,
for if the position were otherwise there would be little point in making the
interest of the conditional seller or lessor a registrable international interest. The
whole purpose of the registration system is to give transparency as to the
existence of international interests and other registrable interests and to avoid
secret interests. The word “dispose” covers every form of disposition
encompassed within the power and relevant to the transaction between the
debtor and the creditor, whether taking the form of a grant of a security
interest, a sale under a reservation of title or a lease. Thus it is not necessary for
a lessor to be the owner of the object; it may itself be a lessee with a right or
power to grant a sub-lease. Again, the fact that the chargor has granted a prior
charge does not deprive it of the power to grant one or more subsequent
charges, which under the Convention will rank in order of registration
(Article 29(1)).

4.73. A security agreement must enable the secured obligations to be
determined but need not state a sum or maximum sum secured. It is common
for security agreements to secure all sums from time to time advanced, since
the amount to be advanced is not necessarily known at the outset. Any
requirement to state a maximum sum would merely induce the creditor to play
safe by stating a sum wildly in excess of the amount likely to be required. A
third party wishing more information should ask the chargee. Moreover, the
statement of the maximum sum secured would be of limited informative value,
as it would not show the amount outstanding at any one time. The reference to
“sum or maximum sum” in paragraph (d) of Article 7 does not imply that only
monetary obligations can be secured by the agreement, for the definition of
“security agreement” in Article 1(ii) refers to a charge to secure “the
performance of any existing or future obligations of the chargor or a third
person,” and in the case of assignment Article 33(1) refers to the debtor’s duty
to make payment “or give other performance”. The reference to “sum or
maximum sum” is inserted solely to remove doubt in those jurisdictions whose
national law requires that the sum or maximum sum secured be stated (see
Illustration 5, paragraph 4.76). Ultimately, however, the breach of a non-
monetary obligation, if not cured by performance by the debtor, gives rise to a
money claim, such as the cost of performance by the creditor or diminution in
the value of the object because of non-performance.
4.74. **Illustration 3**

D charges a fleet of railway wagons to C to secure an advance of the price of the engine under an agreement constituted in accordance with Article 7. The applicable law is the law of Ruritania, which is a Contracting State. D defaults and C institutes proceedings in Ruritania for recovery of possession. D’s defence is that the charge is void because (as is the case) Ruritanian law does not recognise the validity of a non-possessory security over movable property. This defence must be rejected. The charge derives its validity from the Convention, not from national law.

4.75. **Illustration 4**

D and C enter into a leasing agreement relating to railway rolling stock which is both an agreement for an international interest and a leasing interest governed by the law of State X. After default by D, C terminates the agreement under Article 10(a) of the Convention. Assuming that under the law of X termination of a leasing agreement requires one prior month’s notice and the approval of the rail authority, D cannot validly assert these national law provisions against C’s exercise of its rights under Article 12.

4.76. **Illustration 5**

A security agreement states that it secures “all obligations owed by D to C under all contracts, now or in the future.” This satisfies Article 7(1)(d) since the definition of “security agreement” expressly contemplates that it may secure future obligations and the obligations can be determined in that all obligations are covered by the security.

4.77. **Illustration 6**

O leases a locomotive to D but fails to register its international interest. D wrongfully sells the locomotive to E. Since D, though only a lessee, has a power of disposal for the purposes of the Convention, E acquires an overriding title displacing that of O (see Article 29(4)(b)).
CHAPTER III

DEFAULT REMEDIES

Article 8 — Remedies of chargee

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:
   (a) take possession or control of any object charged to it;
   (b) sell or grant a lease of any such object;
   (c) collect or receive any income or profits arising from the management or use of any such object.

2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.

3. Any remedy set out in sub-paragraph (a), (b) or (c) of paragraph 1 or by Article 13 shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.

4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:
   (a) interested persons specified in Article 1(m)(i) and (ii); and
   (b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.
5. Any sum collected or received by the chargee as a result of exercise of any of the remedies set out in paragraph 1 or 2 shall be applied towards discharge of the amount of the secured obligations.

6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall 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.

Comment

4.78. This Chapter prescribes the basic default remedies of a chargee (Articles 8 and 9), a conditional seller or lessor (Article 10) and any of them (Articles 12 and 13). An additional remedy, export and physical delivery, is provided by Article VII(1) of the Luxembourg Protocol in respect of railway rolling stock. Where the agreement relates to public service railway rolling stock as defined by Article XXV(1) of the Luxembourg Protocol, a Contracting State may, in the conditions laid down by that Article, declare that it will continue to apply, to the extent specified in its declaration, rules of its law precluding, suspending or governing the exercise of any of the remedies specified in Chapter III of the Convention (see paragraphs 3.30 et seq.). Apart from Article XXV extra-judicial remedies are available only to the extent agreed by the parties but they can agree them at any time. The parties are free to agree on the events constituting default or otherwise giving rise to default remedies. It would, for example, be open to them to say that the lessor under a leasing agreement can terminate it for any delay in payment by the lessee or upon the occurrence of an event which is not in itself a breach of the agreement at all, such as the transfer of control of the lessee company to a third party. This is a further example of the principle of party autonomy underlying the Convention. However, in the absence of agreement “default” means a default which substantially deprives the creditor of what it is entitled
to expect under the agreement (Article 11). Parties can exercise additional remedies given by the applicable law so far as not inconsistent with the mandatory provisions of Chapter III (Article 12).

4.79. In principle, all the remedies listed in Articles 8 and 9 which do not refer to the court may be exercised by extra-judicial means or by recourse to the court, as the creditor chooses. But to accommodate the concerns of those States where extra-judicial remedies are considered objectionable, Article 54(2) requires a Contracting State to declare whether or not any remedy which under the Convention does not require application to the court is to be exercisable only with leave of the court. Moreover, the Convention does not affect rules of criminal law or tort law in national legal systems. Where the debtor denies that it is in default or contends on other grounds that the remedies have not become exercisable, the creditor has the option of seeking advance relief under Article 13 pending final determination of its claim.

4.80. Articles 8 and 9 are more detailed than Article 10 because a chargee, unlike a conditional seller or lessor, is not the full owner of the object but has merely a security interest. It should, however, be borne in mind that in the United States, Canada, New Zealand and, more recently, Australia, conditional sale agreements and certain types of lease are treated as security agreements, so that in proceedings involving the law of any such jurisdiction the court will apply Articles 8 and 9, not Article 10.

4.81. The remedies available under Article 8(1), to the extent that the chargor has so agreed, are: to take possession or control of any charged object; to sell or grant a lease of any such object; and to collect or receive any income or profits arising from the management or use of any such object. Where the object is in the hands of the debtor, the creditor may take possession of the object, let it out on lease and collect the rentals. But these remedies are exercisable not only against the debtor but also against a conditional buyer or lessee from the debtor whose interest is subordinate to that of the creditor because the creditor’s international interest was registered before the debtor registered its own international interest (see Article 29(4)(a)). So if the debtor has granted a lease of the object, the creditor is entitled to take over the lease and give notice to the lessee, requiring it to pay the rental income to the creditor rather than to the debtor or alternatively negotiate a new lease with the lessee or terminate the lease and repossess the object or grant a new lease to
another lessee. The creditor may also recover from the debtor any such income received by the debtor after the creditor has given notice to the debtor of its intention to collect the income.

4.82. Article 8(1) does not in terms empower the creditor to borrow on the security of the object, but many legal systems allow this, within defined limits, even before the debtor has defaulted, and if such a remedy is provided by the applicable law or is given by provisions of the agreement which are compatible with the applicable law then Article 13 permits its exercise so far as not inconsistent with the mandatory provisions of Chapter III as set out in Article 15.

4.83. Chapter III is concerned only with remedies exercisable against the debtor and third parties holding an international interest subordinate to that of the enforcing creditor. Remedies against other parties, for example, a surety or an issuer of a documentary credit, are regulated not by the Convention but by the applicable law. However, to the extent that the applicable law limits the surety’s liability to that of the debtor the provisions of Chapter III may be material in determining the extent of the surety’s liability under the applicable law.

4.84. Of the four remedies available to a chargee under this Article, one, the right to grant a lease of the object, is subject to Article 54(1), by which a Contracting State may declare that the chargee shall not a grant a lease of the object while it is situated within or controlled from that State’s territory.

4.85. The extra-judicial remedies specified in Article 8 are not automatic; they are given only to the extent that the chargor has at any time so agreed. The chargor’s consent may be given in the security agreement itself or at any time thereafter. However, no agreement is required for recourse to the court. Paragraphs (3) to (6) are designed for the protection of the debtor and other interested persons and are thus made mandatory by Article 15, which means that they cannot be excluded or varied by agreement.

4.86. Remedies must be exercised in a commercially reasonable manner, but if the mode of exercise conforms to a provision of the security agreement which is not manifestly unreasonable the exercise of the remedy is deemed to fulfil this requirement (Article 8(3)). Article 8(3) is confined to the remedies of a chargee under Article 8(1); there is no comparable provision governing the remedies of
termination and possession by a conditional seller or lessor under Article 10, since in these cases the creditor is simply exercising a right to recover its own property. The Convention does not, of course, entitle the creditor to use violence or other unlawful means or affect the criminal liability of a creditor who uses such means. In the case of railway rolling stock, Article 8(3) is replaced by a more general provision in Article VII(3) of the Luxembourg Protocol.

4.87. The phrase “manifestly unreasonable” is a signal to courts that they should not lightly disturb the bargain made by the parties. Established commercial practice is relevant to whether a provision in a security agreement is “manifestly unreasonable”. A provision that is in line with accepted international practice will normally be regarded as not manifestly unreasonable.

4.88. The sale or lease of the object by the creditor concerns not only the debtor but other “interested persons” as defined by Article 1(m), namely guarantors, issuers of letters of credit and credit insurance, and other persons having rights in or over the object, such as other registered chargees, whether under charges prior or subsequent to that of the chargee exercising the remedy, and holders of unregistered charges or unregistered non-consensual rights or interests under Article 39, or other unregistered rights or interests. The chargee will always be aware of the interest of the debtor, any sureties and any charges registered prior to its own registration, and will have to give notice to them and to the holder of any subsequent registered interest, but it will not necessarily be aware of prior or subsequent unregistered charges or of other unregistered interests. So the creditor is not obliged to give notice to the holder of such a charge or interest, or of any other unregistered interest subsequent to its own, unless that holder gives notice of its rights to the chargee within a reasonable time prior to the sale or lease. It would seem that for this purpose registration of an interest is to be treated as notice of it to the creditor (see also paragraph 2.80(3)). The selling chargee will also need to search the register before making distributions. Nothing in Article 8 precludes the chargee itself from purchasing the object provided that the sale is conducted in a commercially reasonable manner, for example, at public auction or by competitive tender.

4.89. To underline the accessory nature of those international interests which are security interests, and to prevent the chargee receiving a windfall from the exercise of the remedies given by Article 8, any sum collected or received by the chargee in exercise of its remedies goes towards discharge of the amount of
the secured obligations and any surplus goes to the holder of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, with any remaining balance being paid to the chargor (Article 8(5) and (6)). Subject to discharge of any prior-ranking non-consensual right or interest under Article 39 the order of priority will follow that laid down in Article 29, that is, the chargee exercising the right of sale will pay any surplus to holders of registered charges subsequent to its own in the order in which their charges appear on the register. Only after the registered charges have been satisfied will an unregistered chargee of whose interest the selling chargee has notice become entitled to a payment. If any balance still remains it is to be paid to the debtor.

4.90. Where there are successive security interests, the remedies can be exercised not only by the senior chargee but by any one of the chargees. A sale by the senior chargee overrides junior security interests, which then attach to the proceeds. By contrast, a sale by a junior chargee takes effect subject to a senior registered security interest, unless this released or the senior creditor is paid in full. However, the junior creditor cannot contract to sell the charged object free from the senior charge without first obtaining the consent of the senior charge and, where so required, paying the senior charge the amount necessary to discharge the senior charge.

4.91. Illustration 7

Debtor charges a locomotive successively to C1, C2, C3 and C4. The charges to C1, C2 and C4 are registered in the order in which they were created, while C3 did not register its charge but gave notice of it to C1, who also has notice of a non-consensual right or interest in favour of C5 under Article 39. Debtor having defaulted, C1 gives notice to all the other creditors referred to above of its intention to sell the locomotive and then sells it and collects the proceeds. These must, so far as sufficient, be distributed in the following order: C5, C1, C2, C4, C3, Debtor. If the sale had been effected by C2, the purchaser would obtain a title overriding the interests of C3 and C4 but subject to the interests of C5 and C1.
Article 9 — Vesting of object in satisfaction; redemption

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2. The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

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

4. At any time after default as provided in Article 11 and before sale of the charged object or the making of an order under paragraph 2, the chargor or any interested person may discharge the security interest by paying in full the amount secured, subject to any lease granted by the chargee under Article 8(1)(b) or ordered under Article 8(2). Where, after such default, the payment of the amount secured is made in full by an interested person other than the debtor, that person is subrogated to the rights of the chargee.

5. Ownership or any other interest of the chargor passing on a sale under Article 8(1)(b) or passing under paragraph 1 or 2 of this Article is free from any other interest over which the chargee’s security interest has priority under the provisions of Article 29.
Comment

4.92. This Article provides machinery by which the object given in security can be vested in the chargee in or towards satisfaction of the secured obligations. For the protection of the debtor and interested persons, particularly in cases where the object substantially exceeds the value of the secured debt, this remedy is exercisable only with the agreement of all the interested persons, including the debtor itself, or alternatively on an order of the court. Moreover (and this is in contrast to all other remedies under the Convention), such agreement cannot be made in advance, but only after the default has occurred. Though paragraph 2 is not expressly limited to cases where the debtor is in default, it provides for a court order as an alternative to the agreement of all parties under paragraph 1 after default has occurred, and paragraph 2 must likewise be taken to be conditioned on the debtor’s default.

4.93. The effect of paragraph 3 is that an order under paragraph 2 can be made only if, first, the chargee has applied for the remedy and, secondly, the court is satisfied that the amount of the secured debt is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons, e.g. a higher-ranking chargee (see Illustration 9, paragraph 4.98). The purpose of this provision is to avoid a situation in which, without the consent of all interested persons, the chargee obtains a windfall as the result of the chargor’s default. Where the value of the object is greatly in excess of the debt owed to the chargee, the court must refuse to make a vesting order (see Illustration 8, paragraph 4.97). If the amount of the secured debt exceeds the value of the object, the court may permit vesting “towards satisfaction” of that debt. In that case, the creditor retains its deficiency claim. This is contrary to the usual rule in common law jurisdictions that foreclosure (as a vesting order is termed) extinguishes the debt. The parties cannot dispense with the need for the consent of other interested persons under Article 9(1) since the power of derogation is limited to the relations between the parties themselves. Moreover, Article 9(3) is a mandatory provision which cannot be excluded or varied by agreement (Article 15).

4.94. The chargor continues to have a right to discharge the security interest by paying the amount of the secured debt in full before the chargee has exercised its power of sale. While paragraph 3 of the Article refers only to payment of the amount secured rather than discharge of the secured
obligations and therefore does not in terms cover non-monetary obligations, the position ultimately as regards breaches of these is that the debtor must either cure them or pay compensation, so that in almost every case the secured obligations are discharged by payment. On sale the right to discharge the security interest is lost. It is not, however, extinguished by the chargee’s lease of the object. In such a case the chargor can still discharge the security interest, subject to the rights of the lessee.

4.95. An interested person other than the debtor who discharges the debtor’s obligation in full is subrogated to the rights of the chargee. This reflects a rule common in national legal systems and one which is preserved by Article 38 (see Illustration 11, paragraph 4.100). The acquisition of an international interest by legal or contractual subrogation is registrable under Article 16(1)(c) if it arises “under the applicable law”. Normally in an international Convention references to the applicable law are used to denote a law other than the Convention itself. But in this particular case there seems no reason why, in a Contracting State, the right of subrogation given by Article 9(4) should not be treated as a right given by the applicable law so as to enable the acquisition of the chargee’s interest by an interested person paying off the debt to be registered under Article 16(1)(c).

4.96. Upon sale of the object by the chargee or its vesting in the chargee, the buyer or the chargee (as the case may be) takes free from any interest subordinate to that of the chargee but subject to any interest having priority over that of the chargee (see Illustration 7, paragraph 4.91, Illustration 12, paragraph 4.101).

4.97. Illustration 8

The chargee has a charge over a railway locomotive to secure a debt of 500,000 euro. The locomotive has a value of approximately one million euro. The chargee wishes to take the locomotive in satisfaction of the debt but the chargor objects. The court must refuse to make an order under Article 9, since the value of the locomotive greatly exceeds the amount of the debt.

4.98. Illustration 9

The facts are as in Illustration 8 except that, to secure full ownership of the railway coach, the chargee has to pay a little under five hundred thousand
euro to discharge a security interest having priority over its own security interest. The value of the coach being only a little over the aggregate of the amount due to the chargee and the sum paid to discharge the prior security, there is no objection to the court making a vesting order.

4.99. Illustration 10

The facts are as in Illustration 8 except that the value of the coach is 100,000 euro less than the outstanding debt. Upon the court making an order vesting in the chargee ownership of the coach the chargee remains entitled to sue the debtor for the shortfall.

4.100. Illustration 11

C advances US$ 30 million to D on the security of a fleet of railway wagons and a guarantee of the debt by S. The debt is repayable by five instalments of US$ 6 million each and on default in payment of any one instalment the full outstanding balance becomes immediately payable. As each railway wagon becomes identified in accordance with Article XIV of the Luxembourg Protocol, C registers an international interest in respect of that wagon. D defaults in payment of the second instalment and C calls upon S as surety to pay the full balance of US$ 8 million together with outstanding interest and charges. Upon making this payment S becomes subrogated to C’s rights to the benefit of the charge to secure the amount it has paid under its guarantee and can register its right of subrogation as provided by Article 16(1)(c).

4.101. Illustration 12

D charges a locomotive successively to A, B and C, whose interests are registered as international interests in that order. D defaults in its obligations to B, who sells the locomotive to T in accordance with Article 8. T obtains ownership free from C’s charge but subject to the charge given to A. The position would be otherwise if A had not registered its charge until after B’s registration, for B would then have priority under Article 29(1) and would sell free from A’s charge.
Article 10 — Remedies of conditional seller or lessor

In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may:

(a) subject to any declaration that may be made by a Contracting State under Article 54, 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 either of these acts.

Comment

4.102. As owner of the object, the conditional seller or lessor needs only the remedies of termination of the agreement and possession. The creditor may apply to the court for the exercise of these remedies or may resort to self-help without recourse to the court and in the latter case, the consent of the debtor is not required. In this respect also Article 10 differs from Articles 8 and 9. However, leave of the court is required in order to exercise these or other remedies where a Contracting State has made a declaration to that effect under Article 54(2). But the exercise of other remedies, such as sale or lease, does not require leave of the court. The debtor does not have any interest in any surplus resulting from sale except so far as the parties agree. This Article will not be applied to title reservation agreements in jurisdictions such as the United States, Canada, New Zealand and Australia, which treat a title reservation agreement, or the particular leasing agreement under consideration, as a security agreement. The same is true of forms of lease treated as security agreements in those jurisdictions.

4.103. A sub-lessee whose sub-lessee registers its international interest before the head lessor has registered its own international interest is protected by Article 29(4) (see paragraph 2.156). However, in other cases the Convention does not determine the effect of termination of a title reservation agreement or leasing agreement on a sub-interest, such as a lease by the conditional buyer or a sub-lease by the lessee. That is left to the applicable law and the terms of the head agreement. See paragraph 2.155. The remedies given by this Article may
be exercised without a court order except so far as stated otherwise in a declaration made by a Contracting State under Article 54(2).

4.104. The remedies given by this Article may be exercised without a court order except so far as stated otherwise in a declaration made by a Contracting State under Article 54(2). Termination of the agreement under Article 10 is only one of various ways in which an international interest can come to an end. See paragraph 2.69.

Article 11 — Meaning of default

1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.

2. Where the debtor and the creditor have not so agreed, “default” for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

Comment

4.105. In most cases the agreement itself will specify “events of default” that are to attract the remedies in Chapter III. Typically these are not confined to the debtor’s failure to perform its obligations but extend to non-default events reflecting the allocation of risk, whether internal (such as the debtor’s insolvency) or external (such as adverse changes in taxation law). Paragraph 1 establishes the binding nature of such an agreement.

4.106. In the unusual case where the agreement does not specify the default or other events giving rise to remedies, the default must be serious in the sense of substantially depriving the creditor of its legitimate contractual expectation. What the creditor is entitled to expect under the agreement is to be determined as at the time the agreement is concluded, not in the light of subsequent events. The typical default in the case of a debtor is the failure to make payment within the time set by the agreement. Where paragraph 2 applies, delay in payment will not normally be considered a substantial default unless it
is clear from the terms of the agreement that the creditor attaches importance to punctual payment or the delay in payment is substantial, persistent or intentional. Terms the breach of which may be considered a substantial default, depending on the circumstances, include insurance of the object and its maintenance in good repair. An unauthorised disposal of the object in defiance of the creditor’s interest in it is likely to be considered a substantial default within the meaning of paragraph 2.

Article 12 — Additional remedies

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

Comment

4.107. All the Convention remedies available to the creditor are remedies exercisable over or in relation to the object. Where the applicable law confers additional remedies or permits the additional remedies agreed by the parties, then those remedies may be exercised in addition to the Convention remedies to the extent that they are not inconsistent with the provisions of Articles 8(3)-(6), 9(3) and (4), 13(2) and 14, which are mandatory (Article 15). Such remedies would typically include the right to payment of accrued sums, acceleration of liability for future sums, damages for breach of the agreement (including liquidated damages, so far as these are recoverable under the applicable law), interest, and specific performance of non-monetary obligations. Article 12 is not confined to substantive remedies but applies to procedural remedies, such as the grant of an injunction or an order for specific performance, an interim payment or the preservation of property. In this respect there is some overlap with Article 13 as regards advance relief and the availability of other forms of interim relief.
Article 13 — Relief pending final determination

1. Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:

   (a) preservation of the object and its value;
   (b) possession, control or custody of the object;
   (c) immobilisation of the object; and
   (d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

2. In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons 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 this Convention or the Protocol; or
   (b) fails to establish its claim, wholly or in part, on the final determination of that claim.

3. Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.

4. Nothing in this Article affects the application of Article 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1.
Comment

4.108. Article 13, together with its related Luxembourg Protocol provision, Article VIII, as regards railway rolling stock, is considered a particularly important one from an economic perspective. Yet it may raise policy issues, and thus may be excluded by a Contracting State by a declaration under Article 55. See also Article 43 and paragraphs 4.296, 4.331.

4.109. This Article builds on forms of relief pending final determination (which for brevity will be referred to as advance relief) commonly available in national legal systems but it is to be interpreted in accordance with the Convention, not by reference to national law (see paragraph 2.104). Where the creditor’s right to exercise a default remedy under the Convention is disputed by the debtor, it may take some considerable time – perhaps years – before the court is able to make a final determination on the merits of the claim. Meanwhile the creditor risks loss or deterioration of the object and is deprived of the opportunity to obtain income from it. Such delays obviously reduce the value of the security, and the prospect of their occurring would influence a prospective creditor’s evaluation of the risk. This Article is intended to address these problems by providing speedy judicial relief pending such final determination. The relief may be given by any court having jurisdiction under Article 43 of the Convention so far as that Article has not been disapplied by a Contracting State by its declaration under Article 55. Article 13 does not define “speedy”. In the case of railway rolling stock that is left to Article VIII(2) of the Luxembourg Protocol (see paragraph 3.28(3)). The essential characteristic of such relief is that it does not prejudge the outcome of the dispute. It follows that the creditor is not required to meet the standard of proof needed for a decision on the merits, which make the final hearing otiose. It is necessary only that sufficient evidence of default is adduced to enable the court, having regard to the need for prompt action to protect the creditor’s interests, to conclude that it is proper to grant the relief sought. The creditor has to show evidence of the debtor’s default. If the court is satisfied that there is such evidence it must grant the creditor such one or more of the orders listed in Article 13(1) as the creditor requests. However, the chargee cannot obtain an order for management of the object as well as an order under sub-paragraph (a), (b) or (c). The procedure, including the availability of an order ex parte in the first instance, is governed by the lex fori under Article 14.
ARTICLE 13 – RELIEF PENDING FINAL DETERMINATION

4.110. There are two qualifications designed for the protection of the debtor and other interested persons. First, the court may impose such terms as it considers necessary to protect them where the creditor:

(a) in implementing any order, fails to perform an obligation under the Convention, e.g. by selling the object at a gross undervalue or otherwise in a manner which is not commercially reasonable (see also paragraph 4.112); or

(b) fails to establish its claim, wholly or in part, on the final determination of the claim, as where the court concludes that the debtor was not in default at all.

Such protection could take various forms, including an undertaking to pay damages to the debtor, or to the holder of a non-consensual right or interest under Article 39 or a registrable non-consensual right or interest under Article 40, for loss resulting from the order if the creditor fails to establish default on the substantive hearing or the provision by the creditor of a bond or demand guarantee covering its potential liability for breach of a Convention obligation and/or damages pursuant to the above undertaking. Secondly, the court may, before making the order, require notice of the creditor’s request to be given to any of the interested persons as defined in Article 1(m). This is as far as the discretionary power of the court goes. It has no general power to refuse a requested order or to suspend an order to allow the debtor time to pay any arrears outstanding.

4.111. The remedies listed in Article 13(1) do not include sale of the object and application of the proceeds of sale. Such remedies are, however, available in relation to railway rolling stock if at any time the debtor and the creditor specifically agree (Luxembourg Protocol, Article VIII(3)). The court has no power to make a vesting order under Article 9 in proceedings for interim relief.

4.112. Article 13 does not dispense with the duty on a chargee to act in a commercially reasonable manner pursuant to Article 8(3), for example, in the way it makes a sale pursuant to the order of the court, but by the terms of Article 8(3) itself the exercise of a remedy in conformity with a provision of the security agreement is deemed to be exercised in a commercially reasonable manner except where such a provision is manifestly unreasonable. The phrase “manifestly unreasonable” is a signal to courts to be cautious before intervening to disturb the bargain made by the parties.
4.113. The creditor remains entitled to invoke any other form of interim relief that may be available under the *lex fori*, e.g. an order for interim payment by the debtor.

4.114. Where Article 13(1) applies the parties cannot exclude Article 13(2), which is mandatory (Article 15), except that in relation to railway rolling stock they may agree in writing to exclude it (Luxembourg Protocol, Article VIII(5)). It would be open to the parties by agreement to exclude Article 13(1), leaving the creditor to its remedies under the applicable law, and in that event Article 13(2) would not, of course, apply. There is in any event nothing to preclude the creditor from invoking self-help remedies given by the Convention without need to have resort to the court at all except in a Contracting State which has made a declaration under Article 54(2) requiring the leave of the court.

4.115. *Illustration 13*

O supplies a fleet of railway wagons to B pursuant to a title reservation agreement under which the price is payable by 10 annual instalments of US$ 2 million. The agreement provides that on default in payment of any instalment the entire balance of the price shall immediately become repayable. B pays the first instalment but nothing thereafter, despite repeated reminders. O institutes proceedings against B in Ruritania, where the railway wagons are situated, for recovery of the wagons and the outstanding balance of the price. T is exercising a lien over the wagons for servicing and repairs. Anxious to ensure that the wagons are brought back into service as quickly as possible so as to generate revenue, O agrees to pay the amount needed to discharge the lien and applies to a court in Urbania, where B has its centre of main interests, for an order under Article 13 for possession of the wagons pending final determination of O's claim. B does not deny non-payment of instalments after the first but contests O's claim, asserting for the first time that there were serious defects in the wagons and that the losses B has suffered could exceed the amount of the instalments in arrear. Examination of this claim, which O disputes, is likely to take some considerable time while experts are engaged, reports exchanged, the alleged losses quantified, pleadings finalised and arrangements made for the hearing. On these facts O is entitled
to the relief it seeks, subject to such terms as the court may impose for B’s protection in the event that O’s claim at the trial is unsuccessful. The fact that the final determination of the proceedings will be by a court in Ruritania does not preclude the court in Urbania from granting such relief (Article 44(3)).

Article 14 — Procedural requirements

Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

Comment

4.116. Any remedy provided by Chapter III is to be exercised in accordance with the procedural law of the place of exercise. This Article is concerned with procedure, not with substantive law, and therefore does not affect the exercise of extra-judicial remedies under Article 8 except in a Contracting State which has made a declaration under Article 54(2) requiring leave of the court, in which case the remedy may be exercised only with such leave (see Illustration 15, paragraph 4.118). Conversely, where a State makes a declaration under Article 54(2) that remedies are to be available without leave of the court, then the creditor cannot be required to institute court proceedings to enforce a remedy. However, other procedural law may be applicable, for example, a legal requirement that an administrative approval must be obtained (see Illustration 14, paragraph 4.117). Again, the lex fori governs the question whether advance relief under Article 13 can be given ex parte in the first instance where the urgency of the situation requires. In relation to railway rolling stock, where a Contracting State has made a declaration adopting Alternative A of Article IX of the Luxembourg Protocol, Article 14 is effectively excluded by paragraph 9 of Alternative A.

4.117. Illustration 14

Under the pre-Convention law of State X, a creditor may not take possession of railway rolling stock or any part thereof without first obtaining a court order and then, if possession is ordered, obtaining administrative approval of
the railway authority. Under Article 54(2), State X declares that leave of the court is not required. Thus, the creditor merely needs the administrative approval of the railway authority, which may not deny the same on grounds of there being no court order.

4.118. *Illustration 15*

Under the pre-Convention law of State Y, no court order is required in exercising remedies. State Y, however, makes a declaration under Article 54(2) that a court order is needed. The declaration supersedes that State’s pre-Convention law as regards the exercise of remedies under the Convention.

**Article 15 — Derogation**

In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.

**Comment**

4.119. This Article embodies the general principle of party autonomy. The parties are free to exclude or vary any of the provisions of this Chapter except for those listed in the present Article as mandatory, namely those relating to:

(a) exercise of chargee’s remedies in a commercially reasonable manner (Article 8(3));

(b) required notice of intended sale by chargee (Article 8(4));

(c) application of proceeds of sale by chargee (Article 8(5));

(d) application of surplus (Article 8(6));

(e) restrictions on vesting of charged object in chargee (Article 9(3));

(f) debtor’s right to redeem the object by payment prior to sale (Article 9(4));
(g) imposition by court of terms for speedy judicial relief (Article 13(2));

(h) exercise of remedies in accordance with procedural law of place of exercise (Article 14).

4.120. The power of derogation is limited to the relations between the parties, who cannot, of course, make an agreement which affects the rights of third parties. So the debtor’s consent to vesting of ownership of the object in the chargee under Article 9(1) does not dispense with the need for the consent of other interested persons or alternatively an order of the court. Similarly, while competing creditors can vary the priority rules as between themselves (a point reinforced by Article 29(5)), they cannot by their agreement affect the priority of other parties.

CHAPTER IV

THE INTERNATIONAL REGISTRATION SYSTEM

Article 16 — The International Registry

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

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

   (b) assignments and prospective assignments of international interests;

   (c) acquisitions of international interests by legal or contractual subrogations under the applicable law;

   (d) notices of national interests; and

   (e) subordinations of interests referred to in any of the preceding sub-paragraphs.
2. Different international registries may be established for different categories of object and associated rights.

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

Comment

4.121. Article 16 provides for the establishment of the International Registry, which occupies a central role in the Convention. There will be different registries for different categories of object (as provided for by paragraph 2 of this Article) and each will have its own Supervisory Authority and Registrar. The International Registry for aircraft objects is based in Dublin and is run by Aviareto, a joint venture company of the Irish government and SITA, as Registrar under the supervision of the Council of ICAO, the Supervisory Authority. The registry for railway rolling stock is in the course of being established.

4.122. Registration in the International Registry is against an identified asset, not against the debtor. It is for this reason that as regards railway rolling stock the Convention is confined to uniquely identifiable objects and does not extend to unidentified future property of the debtor or to proceeds other than those resulting from loss, confiscation, and the like. But an asset-based system has the advantage of enabling a person making a search to discover the existence of all registered interests affecting the object, not merely those granted by the debtor. At the time the Convention and Aircraft Protocol were concluded it was not perceived that while unique identification is essential for registration purposes there is no reason why, for the purposes of the constitution of an international interest and the application of Chapter III of the Convention (which affects only the relations between the parties inter se) it should not suffice that the object in question can be seen as falling within the scope of the agreement, however broadly the subject-matter is defined. Accordingly the Luxembourg Protocol, relating to railway rolling stock, distinguishes between the requirements for the constitution of an international interest, which are flexible and allow for an interest in classes of assets or all
assets and in future property, and the requirements for registration, which require unique identification.

4.123. The registration system for railway rolling stock has not yet been developed but is expected to follow an approach similar to the registration system for aircraft objects. The registration systems are designed to be electronic systems in which registrations and searches are effected, and consents to registrations transmitted, by computer-to-computer transmission without the need for human intervention at the Registry end. Prescribed data are entered on the register and no contract documents or copies are filed or presented for filing. The system is thus a “notice filing” system, not one requiring the filing of documents or the registration of specific transactions, and gives brief particulars of a registered interest, leaving it to the person effecting the search to obtain further information by enquiry of the creditor. Prospective international interests as well as existing international and other interests are registrable. No further registration is needed when a prospective international interest becomes an international interest if the filed particulars are sufficient for the latter (see Article 18(3)). Thus a search certificate will state merely that the registrant has acquired or intends to acquire an international interest without stating which of these is applicable. But even if the registration information states that it relates only to a prospective international interest, a search certificate must not indicate this (see Article 22(3) and paragraph 4.156). A person searching the register will obtain any further information it requires by enquiry of the registrant. These factors facilitate a notice filing system which is both efficient and economic in cost terms as well as helping to preserve the confidentiality of contract documents. See also paragraph 4.133.

4.124. Sub-paragraphs (a)-(e) of paragraph 1 list the types of agreement that may be entered in the International Registry. In relation to title reservation and leasing agreements it should be noted that the registration is not a title registration as such but rather the interest held by a person who is a conditional seller or lessor. Accordingly, while the interest of the conditional seller or lessor in the object does not derive from the agreement but is acquired before and independently of the agreement, that interest does not become registrable until the conditional sale or leasing agreement conforming to the Convention has been concluded. As to the registration of prospective international interests, see paragraph 4.144.
4.125. Assignments and prospective assignments of an international interest are registrable under sub-paragraph (b). There is nothing to prevent registration of an assignment of an international interest even if that interest has not itself been registered as an existing or prospective international interest, and this will protect the assignee against subsequently registered and unregistered assignees who do not procure registration of the international interest, but not against displacement by the holder of a subsequent international interest who registers its international interest first or the assignee of such holder or against creditors in the debtor’s insolvency (see paragraph 2.190). Sub-paragraph (b) is confined to contractual assignments (see the definition of “assignment” in Article 1(b)) and does not apply to assignments by operation of law. Sub-paragraph (c) deals with acquisitions of international interests by legal or contractual subrogation under the applicable law, which for this purpose includes subrogation under Article 9(4) of the Convention itself. Sub-paragraph (d) provides for the registration of notices of national interests, that is, interests created by an internal transaction covered by a declaration under Article 50(1) and (a) registered in a national registry of a Contracting State or (b) falling within Article XXIX(2) of the Luxembourg Protocol. Internal transactions the subject of a Contracting State’s declaration remain subject to Articles 8(4), 9(1) and the rules governing registration (in this case, registration of notice of their existence under paragraph (d) and Article 20(6)) and priorities but the remaining provisions of the Convention do not apply to them. See Article 50 and paragraphs 4.317 et seq. Sub-paragraph (e) of paragraph 1 provides for registration of subordinations of interests. Although this refers only to subordination of interests referred to in sub-paragraphs (a) to (d), it must be read in conjunction with Article 29(5) which requires registration of a subordination of interests referred to in that Article if such subordination is to bind an assignee of the subordinated party. Article 29(5) extends to priorities between a registered interest and the interest of an outright buyer, a conditional buyer or a lessee. Accordingly, the clear intention is that subordination agreements relating to such priorities are registrable in addition to subordinations within Article 16. Similar considerations apply to subordinations under Article XI of the Luxembourg Protocol. The list in Article 16 is not quite exhaustive even of Convention registrations in that a pre-existing right or interest to which the Convention is extended by a declaration by a Contracting State under Article 60(3) is registrable as a distinct
category. Moreover, subordination agreements relating to non-Convention interests referred to in Article 29 are registrable (see Article 29(5)).

4.126. A registration may be amended, extended or discharged as provided by this Chapter, and references to “registration” are to be construed accordingly. Registration of a discharge does not mean removal from the register – no registration is ever expunged – but entry of a new file on the International Registry linked to the file of the discharged registration, so that the Registry will contain a full history of entries.

4.127. Registration is not an element in the constitution of an international interest: it is merely a perfection requirement designed to give public notice of the interest and to preserve the holder’s priority. Conversely, registration of a purported international interest which does not in fact exist has no legal effect under the Convention. Since registration can only be effected with the debtor’s consent, which must be electronically communicated before the registration can be accepted, the registration of a non-existent international interest will normally arise only if the consent was never effectively given or the agreement was not validly created under the applicable law or the parties agreed to register an interest to which the Convention did not apply. Similarly, the fact that a registration is current does not necessarily mean that the international interest is still in existence. A registration relating to an agreement under which the debtor’s obligations have been discharged and an improper registration may be discharged with the consent of the party who effected it as provided by Article 25 or by the Registrar pursuant to an order of a court in which the Registrar has its centre of administration (Article 44(1)). Except in the case of system malfunction the Registrar has no power to register a discharge without such consent or a court order. Whether the improper registration gives rise to a claim for damages by the person against whom the registration was wrongfully made or any other person adversely affected by the registration is not answered by the Convention and is a matter for the law of the Contracting State in which the proceedings are brought.

Article 17 — The Supervisory Authority and the Registrar

1. There shall be a Supervisory Authority as provided by the Protocol.
2. The Supervisory Authority shall:

   (a) establish or provide for the establishment of the International Registry;

   (b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar;

   (c) ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;

   (d) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;

   (e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;

   (f) supervise the Registrar and the operation of the International Registry;

   (g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;

   (h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;

   (i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and

   (j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.
3. The Supervisory Authority may enter into any agreement requisite for the performance of its functions, including any agreement referred to in Article 27(3).

4. The Supervisory Authority shall own all proprietary rights in the data bases and archives of the International Registry.

5. The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to it by this Convention, the Protocol and the regulations.

Comment

4.128. The International Registry is operated by a Registrar appointed by and acting under the superintendence of a Supervisory Authority. In the case of railway rolling stock, the Supervisory Authority is a body to be established by representatives appointed by States Parties in accordance with Article XII of the Luxembourg Protocol. Meanwhile the Preparatory Commission set up pursuant to Resolution No. 1 of the Luxembourg diplomatic Conference has full power to act as Provisional Supervisory Authority. The Supervisory Authority has power not only to appoint but also to dismiss the Registrar. The right of dismissal and the Registrar’s entitlements on the premature termination of its role are among the matters one would expect to be controlled by the terms of the Registrar’s appointment. In that context, the Supervisory Authority and the Registrar would no doubt wish to consider either the waiver of the Supervisory Authority’s immunity from suit or some contractually agreed dispute resolution mechanism. While the Supervisor Authority exercises supervisory powers over the Registrar and can deal with complaints about the operation of the International Registry it is not entitled to adjudicate on a particular registration or to give directions to the Registrar to change any data relating to a particular registration. This is a matter exclusively for negotiation between the Registrar and the party concerned and, failing agreement, for the courts of the place where the Registrar has its centre of administration (see Article 44). Among the Supervisory Authority’s other functions are the publication of regulations, the setting and periodic review of fees and oversight of the International Registry’s efficiency of operations.
4.129 The Supervisory Authority is also given power to enter into an agreement with the host State under Article 27(3) as to exemption from taxes and other privileges. See paragraphs 3.38, 4.172 and 4.174. For the immunities and privileges of the Supervisory Authority see Article 27(2), (3) and paragraphs 4.171-4.172.

4.130 The Registrar is responsible for the efficient operation of the International Registry in conformity with the Protocol and of regulations made under it. This includes the measures necessary to ensure that the Registry system is kept up-to-date and in good working order.

4.131 Article 17(2)(c) is designed to ensure that on a change of Registrar the new Registrar will be able to enjoy all the rights, including intellectual property rights, needed for the continued efficient operation of the International Registry. The Supervisory Authority is in a position to ensure this not only by contract but by reason of its ownership of proprietary rights in the data bases and archives of the International Registry under paragraph 4 of this Article.

CHAPTER V

OTHER MATTERS RELATING TO REGISTRATION

Article 18 — Registration requirements

1. The Protocol and regulations shall specify the requirements, including the criteria for the identification of the object:

   (a) for effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 20);

   (b) for making searches and issuing search certificates, and, subject thereto;

   (c) for ensuring the confidentiality of information and documents of the International Registry other than information and documents relating to a registration.
2. The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.

3. Where an interest registered as a prospective international interest becomes an international interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.

4. The Registrar shall arrange for registrations to be entered into the International Registry database and made searchable in chronological order of receipt, and the file shall record the date and time of receipt.

5. The Protocol may provide that a Contracting State may designate an entity or entities in its territory as the 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 designation may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry.

Comment

4.132. While the ensuing Articles prescribe various matters relating to registrations and searches in the International Registry, the detail is left to be supplied by the relevant Protocol (see, in relation to railway rolling stock, Chapter III of the Luxembourg Protocol) and regulations and procedures issued pursuant to the Protocol.

4.133. The registration system for registrations affecting railway rolling stock is expected to follow broadly in the wake of the system for registrations relating to aircraft objects. The International Registry for aircraft objects is an asset-based system, that is, registrations are effected against uniquely identified assets, not against the names of debtors. The system is designed to be a low-cost electronic system in which all registration applications, checking of applications entries, searches and the issue of search certificates are effected by
computer without the need for human intervention. Accordingly, as stated earlier, the system is based on “notice filing”, that is, the filing of particulars which give notice to third parties of the existence of a registration, leaving them to make enquiries of the registrant for further information, as opposed to a system which requires presentation and/or filing of agreements or other contract documents or copies. The regulations for the rail Registry are expected to adopt a similar approach. In the absence of an electronically filed consent to the amendment or discharge the Registrar can act only on an order by a court in the country where the Registrar has its centre of administration (Article 44(1)).

4.134. A further consequence of the electronic nature of the system is that in principle, the International Registry cannot be concerned with facts external to the transmitted data. In particular, while an electronic transmission of consent to the registration is required under paragraph 1(a) of this Article, paragraph 2 provides that the Registrar is not to be under a duty to enquire whether a consent to registration has been given or is valid. Articles 19(1) and 20(1) together are designed to protect the debtor or purported debtor from the consequences of a registration made without its written consent. In the absence of consent a registration will be of no effect (Article 19(1)). However, the Convention provisions on validity are limited. In the first place, the only ground of invalidity mentioned is non-conformity of a registration with the requirements of Article 20 dealing with consent to registration. It is, however, clear that there other grounds of invalidity for the purposes of the Convention, such as the fact that the agreement for the international interest was not validly made or that the registered interest was not a Convention interest but a pre-existing interest not covered by a declaration under Article 60 or an interest granted by a debtor not situated in a Contracting State at the time of the agreement. Secondly, the only remedy expressly given by the Convention for an invalid registration is its discharge, either with the consent of the party in whose favour it was made or as the result of obedience by that party to an order of a court of competent jurisdiction or pursuant to an order against the Registrar under Article 44(1) by a court of the place where it has its centre of administration. Other remedies are a matter for the applicable law.

4.135. Paragraph 3 provides that where an interest registered as a prospective international interest becomes an international interest, no further registration is required if the registration information is sufficient for registration of an
international interest. It will not be sufficient if, for example, it fails to state, in the case of a security agreement, the obligations secured. On the other hand, the fact that the registration refers only to a prospective international interest and does not, for example, take the form of a statement that the registrant “has acquired or intends to acquire” an international interest avoids the need for a fresh registration when the international interest comes into being. It is to give effect to this principle that Article 22(3) provides that a search certificate is not to state whether what is registered is an international interest or a prospective international interest even if this is ascertainable from the registration particulars. The onus is on the searcher to ascertain the facts from the person in whose favour the registration was made.

4.136. Under paragraph 4, registrations are to be effected in chronological order of receipt, the computer recording the time of registration. Registrations in the International Registry for aircraft objects are timed to the second. Registration, if valid, is complete when the registered data become searchable within the meaning of Article 19(3) and this will determine the priority of the international interest under Article 29, as well as the priority of other interests appearing on the register, i.e. registered notices of national interests and registrable non-consensual interests registered under Article 40. Article 18(4) is a rule for the protection of the searching party, not the registering party.

4.137. Under paragraph 5, the Protocol may empower a Contracting State to designate an entity or entities as the compulsory or optional national entry point or points for transmission of registration information to the International Registry instead of allowing or requiring registrations to be transmitted to the International Registry direct. For example, a Contracting State may wish to utilise an existing national registration system, modified to enable or require the holder of a national interest which also constitutes an international interest to make one input to the national entry point that will simultaneously procure registration of the national interest and transmission of details of the international interest to the International Registry. In relation to railway rolling stock, Article XIII of the Luxembourg Protocol provides for the designation of national entry points. However, Article XIII does not allow a Contracting State to designate an entry point for notices of national interests, or of registrable non-consensual rights or interests, arising under the law of another State. Moreover, use of a national entry point may not be made compulsory for registrations in respect of notices of sale. Provisions for designated entities
entry points are also contained in Article XIII of the Luxembourg Protocol and Article XXXI of the Space Protocol. Such a designation is unlikely to be effective unless made by a State which has the necessary degree of control either over the object, as where in the case of railway rolling stock the intending registrant is a national of that State or the rolling stock is situated in that State.

4.138. While it is open to any Contracting State to impose its own requirements and restrictions for access to its designated entry points, nothing in the Convention prevents a Contracting State from making its designated entry points available to any intending registrant, whether or not that registrant or the interest it wishes to register has any connection with the Contracting State in question. It is therefore open to a Contracting State to make its designated entry points available to foreigners in respect of international interests and other registrable interests created or arising under foreign law, though in relation to railway rolling stock, as previously mentioned, an entry point may not be designated for notices of national interests and registrable non-consensual interests arising under foreign law. Designated entities are not part of the International Registry and their operations are governed exclusively by national law, which will determine the conditions for use of the designated entry points, though these should not be such as to impair the efficiency of the registration system. Similarly, the liability of a designated entity and any requirements for insurance are matters for national law.

4.139. The designation of national entry points is limited to registrations. Searches are made direct from any access point available to the searcher.

4.140. The registration system is open to all those who comply with the registration requirements, a point underlined by Article 26. Accordingly, access to the International Registry system is open to those situated in a non-Contracting State as it is to those in a Contracting State. But the International Registry is not a public registry for matters relating to registrations. For obvious reasons, elaborate security precautions have been taken to ensure that only authorised entities and users approved by authorised entities can effect registrations or access the International Registry on registration matters. By contrast, the principle of open access applies fully in relation to searches, which can be made by any member of the public. Registration requirements include not only those of the Convention and Protocol but any more detailed
requirements prescribed by regulations and implementing procedures. Thus, as stated earlier, the International Registry for aircraft objects has an elaborate system of approvals, authorisations, and the like designed to ensure that registrations are effected only by those entitled to do so, and it is likely that the International Registry for railway rolling stock will adopt a similar approach.

**Article 19 — Validity and time of registration**

1. A registration shall be valid only if made in conformity with Article 20.

2. A registration, if valid, shall be complete upon entry of the required information into the International Registry data base so as to be searchable.

3. A registration shall be searchable for the purposes of the preceding paragraph at the time when:
   
   (a) the International Registry has assigned to it a sequentially ordered file number; and
   
   (b) the registration information, including the file number, is stored in durable form and may be accessed at the International Registry.

4. If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest provided that the registration was still current immediately before the international interest was constituted as provided by Article 7.

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

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

4.141. The effect of paragraph 1 is that a registration is valid only if made in conformity with Article 20, that is, by or with the written consent of the person specified in paragraph 1, 2 or 3 of that Article or by the person specified in paragraph 4, 5 or 6. This important control, which will be buttressed by regulations, means that a registration made by a person not entitled to do so is invalid and consequently is incapable of affecting the rights of third parties. This will be the position where, for example, the creditor registers an international interest without the debtor's written consent. The risk of this, however, is limited since prior electronic transmission of the debtor's consent is likely to be made a condition of registration under the regulations.

4.142. There are other controls against an invalid registration. A registration cannot be validly made of an international interest if no agreement has been made creating or providing for the interest or if the interest has not been constituted as an international interest in accordance with Article 7. Similarly, a registration of a registrable non-consensual right or interest or of a notice of a national interest has no effect unless the right or interest is effective under the relevant national law. But these are not matters of concern to the Registry, which in a wholly electronic registration system cannot be responsible for investigating facts.

4.143. Registration takes effect not from the time of transmission of the data or receipt of the data by the International Registry but from the time the registration is searchable. This rule is necessary in order to prevent third parties from being misled by a clear search. A registration is searchable at the time when the International Registry has assigned to it a sequentially ordered file and the registration number, including the file number, is sorted in durable form and may be accessed at the International Registry (Article 19(3)). In the ordinary way the interval between transmission of data and entry in searchable form is likely to be short. If registration is delayed through a systems failure, the intending registrant, if suffering loss (e.g. through a loss of priority as the result of its registration being improperly recorded as discharged), may have a claim against the Registrar under Article 28.

4.144. Article 16(1) allows registration of a prospective international interest, that is, an interest which is intended to be created or provided for in an object
as an international interest in the future upon the occurrence of a stated event, for example, the debtor’s acquisition of an interest in the object (Article 1(y)).

Given that registration is effected against identified assets, a prospective international interest can be registered only in relation to an identifiable object and with the written consent of the prospective debtor. The purpose of Article 19(4) is to allow an intending creditor to protect its priority pending the creation of the international interest, so that when that interest comes into being its priority will run from the time of registration of the prospective international interest. So long as the registration particulars suffice to cover the completed international interest (see paragraph 4.135) and the registration of the prospective international interest was still current immediately before the international interest was constituted (i.e. any period specified in the registration as its duration has not expired), no further registration is required to reflect the transformation of the prospective international interest into an actual international interest. So the international interest itself is never registered at all, it is merely deemed to have been registered.

4.145. Illustration 16

D is negotiating with C for a loan on the security of a locomotive owned by D, the locomotive being identified by the parties in accordance with Article VII of the Luxembourg Protocol. On 1 April, with D’s written consent, C registers a prospective international interest. On 2 May C charges the locomotive to X as security for an advance by X, who registers its international interest. On 1 June D concludes a security agreement with C by which C acquires an international interest in the locomotive. Assuming that the registered particulars adequately and accurately cover what would be required for registration of C’s international interest, no further registration information need be filed and C’s international interest is to be treated as if registered on 1 April, with the result that C has priority over X. Having had notice of C’s prospective international interest by reason of its registration, X should have been aware that its initial priority was liable to be displaced and should have sought an agreement from C to subordinate its interest, wholly or in part.
4.146. **Illustration 17**

The facts are as in Illustration 16 except that after the charge in favour of X and before C has given value or committed itself to give value to D, D breaks off negotiations for the loan and at D’s request C procures discharge of the registration of the prospective international interest. Subsequently negotiations between C and D are resumed and C advances funds on the security of the locomotive. X has priority over C, whose registration had ceased to be current before its international interest was created.

**Article 20 — Consent to registration**

1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.

2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.

3. A registration may be discharged by or with the consent in writing of the party in whose favour it was made.

4. The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee.

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

6. A notice of a national interest may be registered by the holder thereof.
Comment

4.147. This Article states the person or persons by whom or with whose consent a registration may be effected. This differs according to the nature of what is to be registered. International interests and prospective international interests, together with assignments and prospective assignments of international interests, may be registered, and the registration extended, by either party but only with the written consent of the other party. This provides an important safeguard against improper registration, particularly given the reference in Article 18(1)(a) to prior electronic transmission of consents required by Article 20. Such electronic transmission (which is specifically prescribed by Article 18(1)(a)) satisfies the requirement of a consent in writing (see the definition of “writing” in Article 1(nn)). By contrast, registration of a subordination may be effected either by the subordinated party or, with that party’s written consent, by the beneficiary of the subordination. A registration may be extended only during the currency of the existing registration. See further paragraph 4.153. Discharge of a registration must be done by or with the written consent of the party in whose favour the registration was made (see paragraph 4.148). The idea linking the treatment of all these situations is that the person whose interests would be adversely affected by the entry on the register must either procure the registration itself or give its written consent to this being done by the other party. In relation to the remaining three categories, only the holder of the right or interest may register it.

4.148. Article 20(3) provides that a registration may be discharged “by or with the consent in writing of the party in whose favour it was made”. Where a registered international interest has not been assigned it may be discharged by or with the consent of the creditor. Where, however, it has been assigned the position is a little more complex. There are two discharges that may have to be considered, discharge of the international interest and discharge of the assignment. In relation to the former, the phrase “in whose favour it was made” must be taken as covering the creditor and any assignee. Therefore, where a registered international interest has been assigned, the registration of the international interest can be discharged only with the consent of the assignor and the assignee. If the position were otherwise the assignor, by giving its consent to a discharge, could extinguish the assignee’s priority. If the assignment was by way of security only, so that the assignor retains an interest in what has been assigned, the assignor’s consent is also required to registration
of a discharge of the international interest. However, in the case of the aircraft registry it has not been found possible to accommodate the fact of multiple consents within the registration system. It remains to be seen whether, by the time the rail registry comes into operation, this problem will have been resolved. Certain other cases in which consent ought not to be required are set out in paragraph 2.112. Discharge of an assignment requires the consent of the assignee.

4.149. National interests are interests arising under internal transactions which the relevant Contracting State has elected to exclude from the Convention by making a declaration under Article 50(1). But such a declaration does not exclude the whole of the Convention; its main effect is to disapply (with two exceptions) the provisions of Chapter III dealing with default remedies. The registration and priority rules will continue to apply. So the holder of a national interest may secure the benefit of the registration provisions and priority rules by registering a notice of its national interest, in which event the national interest will prevail over a subsequently registered international interest under Article 29(1) as applied by Article 50(2).

4.150. The Convention permits registration of a right of subrogation, whether arising under the Convention itself or under national law. Only one provision of the Convention creates a right of subrogation, namely Article 9(4), under which an interested person other than the debtor who pays in full the amount secured by a security interest is subrogated to the rights of the chargee. But Article 38 makes it clear that nothing in the Convention prevents the acquisition of an international interest by subrogation, whether by operation of law or by agreement, under the applicable law; and the present Article empowers the subrogee to register the international interest so acquired.

4.151. Illustration 18

G has guaranteed a loan by C to D secured by a charge on an underground train. D defaults and G pays off the debt pursuant to its guarantee. Under Article 8(4) of the Convention G acquires the benefit of C’s charge and is entitled to be registered in place of C as the holder of the international interest in the train created by the charge.
Article 21 — Duration of registration

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

Comment

4.152. This Article does not prescribe any period for the duration of a registration. Instead, the parties may agree on the period and incorporate this into the registered data. Whether or not they do so, registration ceases to be effective after it has been discharged.

4.153. Under Article 20(1), any period of registration agreed by the parties may be extended prior to its expiry by either party with the written consent of the other. It is necessary for the agreed extension to be transmitted to the International Registry in the prescribed form during the currency of the existing registration, that is, before the expiry of the period (if any) specified as the duration of the existing registration. If this is done the registered interest retains its priority as from the time of the original registration. But once the agreed period has expired it is too late to extend it, and it will be necessary to effect a new registration which will rank for priority from the time it takes effect. Registration can be extended only as regards a currently registered interest. For example, renewal of a lease gives rise to a new international interest for the renewal period requiring a new registration; it cannot be dealt with by extension of the existing registration.

4.154. Destruction of the object does not of itself result in discharge of a registration. Indeed, continuance of the registration may be important in order to maintain the priority of the creditor’s claim in respect of loss-related proceeds under Article 29(6).

Article 22 — Searches

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

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

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

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

3. A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate whether what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information.

Comment

4.155. The International Registry is a registry to which all those complying with the regulations and procedures of the Registry are entitled to have access, whether to make a registration or a search (see Article 26). While it is open to Contracting States to designate an entity or entities as the entry point or entry points through which a registration shall or may be effected (see paragraphs 4.137-4.139), searches will be able to made directly from any point of computer access to the International Registry. All information recorded in the International Registry in conformity with the registration requirements may be searched.
4.156. A search certificate must be issued in response to a request even if there is no information in the International Registry relating to the subject-matter of the search. In that event the certificate must contain a statement to that effect. All searches are made and search certificates issued electronically. 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 is a necessary corollary of the provisions of Article 18(3) dispensing with the need for a further registration when a prospective international interest becomes an international interest, for in the absence of such further registration the International Registry will have no way of knowing whether a registered prospective international interest has become an international interest.

4.157. As to the evidentiary value of certificates and purported certificates, see Article 24.

Article 23 — List of declarations and declared non-consensual rights or interests

The Registrar shall maintain a list of declarations, withdrawals of declaration and of the categories of non-consensual right or interest communicated to the Registrar by the Depositary as having been declared by Contracting States in conformity with Articles 39 and 40 and the date of each such declaration or withdrawal of declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol and regulations to any person requesting it.

Comment

4.158. The Convention contains several provisions entitling a Contracting State to make declarations applying or disapplying certain provisions of the Convention or specifying other matters (see paragraphs 2.248 et seq.; 2.259 et
This Article relates to such declarations and withdrawals of them as well as two forms of non-consensual right or interest. The first of these are those non-consensual rights or interests having priority without registration by virtue of a declaration under Article 39 and the second those non-consensual rights or interests registrable by virtue of a declaration under Article 40. The purpose of the present Article is to make the International Registry a central point which users can consult to ascertain the existence of such declarations and withdrawals of declarations and non-consensual rights and interests instead of their having to make a separate search through the declarations held by the Depositary. Hence the requirement in Article 62(2)(c) that the Depositary will supply the Supervisory Authority and the Registrar with details of, among other things, all declarations deposited with it, and all withdrawals or amendments of such declarations, so that these can be accessed through the International Registry. UNIDROIT, which is the Depositary, treats designation of an entry point as a declaration.

Article 24 — Evidentiary value of certificates

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

(a) that it has been so issued; and
(b) of the facts recited in it, including the date and time of a registration.

Comment

4.159. A person holding a document which purports to be a certificate issued by the International Registry need not adduce evidence that it was in fact so issued, unless the authenticity of the document is challenged and the prima facie presumption displaced by evidence which shifts the burden of proof to the person relying on the document.

4.160. A certificate issued by the International Registry is prima facie proof of the facts recited in it, including the date and time of registration, but evidence is admissible to show that the certificate does not correctly state the facts. A
person reasonably misled by an erroneous certificate may be entitled to pursue a claim against the Registrar under Article 28(1), as where the certificate wrongly states that there is no registered international interest against an object, thereby leading the person to whom the certificate is issued to advance funds in the belief that it will be the first registered holder of an international interest.

Article 25 — Discharge of registration

1. Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

2. Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.

3. Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

4. Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its
discharge or amendment after written demand by the
debtor delivered to or received at its address stated in the
registration.

Comment

4.161. The effect of paragraph 1 is that where the obligations covered by a
registered interest have been performed, the debtor may require the holder of
the interest to procure discharge of the registration. Discharge does not mean
removal of an entry from the International Registry but rather entry of another
file recording the discharge and identifying the file which is the subject of the
registration. By this means the International Registry maintains a historical
record of all registrations affecting a particular interest. Paragraph 3 applies the
same rule to a national interest that has been discharged. The phrase “its
address” in paragraph 1 of this Article refers, of course, to the address of the
holder of the interest. As to the registration of a discharge where there has
been an assignment, see paragraph 4.148.

4.162. Paragraph 2 deals with the case where a registration of a prospective
international interest or a prospective assignment has been registered. If the
intending creditor or assignee has neither given value nor incurred a
commitment to give value, the prospective debtor or assignor is entitled to
have the registration discharged (see Illustration 19, paragraph 4.165). But
without a court order only the prospective creditor or assignee can procure the
discharge, since the registry system will not know whether the prospective
international interest or prospective assignment has become a completed
international interest or assignment. The position on discharge of prospective
international interests and prospective assignments is otherwise where such
value has been given or promised in a binding undertaking (see Illustration 20,
paragraph 4.166). Whether value has been given or committed is a question for
the law applicable to the legal relations between the parties. If the intending
creditor has not actually given value by the time of the intending debtor’s
request for a discharge, the question of the intending creditor’s commitment to
give value in relation to a planned transaction is unlikely to arise, because by
making the request the debtor is indicating that it does not wish to proceed
with the transaction and is thus implicitly releasing the intending creditor from
any commitment it might otherwise have had.
4.163. Paragraph 4 deals with registrations incorrectly made and provides that the debtor is entitled to require these to be removed or amended.

4.164. Although Article 25 says nothing about the enforcement of a duty imposed by that Article, it is clear that a court of competent jurisdiction under the Convention, if applicable, or under national law if the Convention jurisdiction provisions do not apply, can make an order against any person in whose favour a registration has been made to procure its amendment or discharge, whether the registration relates to an international interest, a prospective international interest, an assignment, a prospective assignment, or anything else on the register. The only case in which a court has jurisdiction to make such an order under the Convention is where the parties have so agreed in conformity with Article 42(2). In such a case, the party affected by the improper registration should apply to the court on which jurisdiction has been so conferred for an order directing the defendant to take the necessary steps. If that order is not complied with, then in addition to the sanctions available for non-compliance a court in the place where the Registrar has its centre of administration may (but is not obliged to) order the Registrar to take such steps as will give effect to the order made in the defendant's jurisdiction (Article 44(3)). Where the parties have not made an agreement as to jurisdiction, the remedy of the party affected by the improper registration is to apply to a court having jurisdiction under its national law for an in personam order directing the defendant to procure amendment or discharge of the registration and, if this is not complied with, to apply to a court in the Registrar's jurisdiction, directly or through the court making the order, for an order directing the Registrar to amend or discharge the registration. See further paragraph 4.297.

4.165. Illustration 19

D is negotiating a loan from C to be secured on a railway wagon. With D's written consent, C registers a prospective international interest. Subsequently D decides not to proceed with the transaction. Assuming that C has not given value, D is entitled to require C to procure discharge of the registration.

4.166. Illustration 20

C agrees to lend 10 million euro to D on the security of identified railway rolling stock which D is in the course of acquiring and advances 1 million
euro of this sum immediately. With D’s written consent, C registers an international interest. Before D has completed its acquisition of the rolling stock it decides not to proceed with the loan transaction as regards the balance of 9 million euro and requests C to arrange for discharge of the registration. C, having given value to the extent of 1 million euro, is entitled to refuse.

Article 26 — Access to the international registration facilities

No person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter.

Comment

4.167. This Article makes it clear that any person, whether or not situated in a Contracting State, who complies with the requisite regulations and procedures and payment of the prescribed fees may have access to the International Registry to make registrations and searches. However, in terms of access to the International Registry a distinction is to be drawn between registrations and searches. The principle of open access applies to searches, so that any member of the public may make a search. This is not true of matters relating to registrations. On the contrary, for reasons which are self-evident precautions have to be taken to ensure that only those authorised to enter data are able to do so. Further, the Protocol may provide for a Contracting State to designate an entity or entities in its territory through which, with certain exceptions, registration information shall or may be transmitted to the International Registry (Article 18(5)). This has been done under the Luxembourg Protocol (Article XIII). All registrations and searches will be effected, and all search certificates issued, in electronic form.

4.168. Under Article XV(4) of the Luxembourg Protocol, the centralised functions of the International Registry are to be operated and administered by the Registrar on a 24-hour basis.
CHAPTER VI

PRIVILEGES AND IMMUNITIES OF THE SUPERVISORY AUTHORITY AND THE REGISTRAR

Article 27 — Legal personality; immunity

1. The Supervisory Authority shall have international legal personality where not already possessing such personality.

2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative process as is specified in the Protocol.

3. (a) The Supervisory Authority shall enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State.

(b) For the purposes of this paragraph, “host State” means the State in which the Supervisory Authority is situated.

4. The assets, documents, data bases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.

5. For the purposes of any claim against the Registrar under Article 28(1) or Article 44, the claimant shall be entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.

6. The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.

Comment

4.169. The Supervisory Authority for the International Registry for railway rolling stock is to be a body to be established by representatives of States Parties as provided by Article XII of the Luxembourg Protocol. Meanwhile the Preparatory Commission for the establishment of the International Registry for railway rolling stock set up pursuant to Resolution No. 1 of the Luxembourg
diplo\textit{matic Conference has power to act with full authority as Provisional Supervisory Authority. A Supervisory Authority not already enjoy\textit{ing international legal personality will acquire it under this Article by virtue of its designation.}

4.170. The attribution of international legal personality to the Supervisory Authority has two principal effects. First, the Supervisory Authority is a subject of international law in its own right, with a legal personality distinct from that of its members, and its “personal” law is international law.\(^2\) This entitles it to assert claims at the international level directly rather than through the intermediation of its members and it is similarly exposed to direct liability for non-performance of any obligations so far as not covered by any immunity conferred by the Protocol under Article 27(2) of the Convention. Secondly, it has power to enter into agreements with States or other parties, and do other things, so far as is requisite for the performance of its functions under the Convention and the relevant Protocol. In the case of entry into agreements this power is expressly conferred by Article 17(3) both in general terms and with specific reference to an agreement with the host State pursuant to Article 27(3).

4.171. Article 27(2) leaves the question of immunity of the Supervisory Authority to be determined by the Protocol. However, the Luxembourg Protocol does not address the immunity of the Supervisory Authority (see paragraph 3.38). But OTIF, which is the Supervisory Authority’s Secretariat, enjoys privileges and immunities under its Headquarters Agreement with the Swiss Government.

4.172. Exemption from taxes and other privileges in the State where the Supervisory Authority is situated are left to be determined by the Headquarters Agreement, pursuant to Article 27(3) of the Convention.

4.173. The same applies to the Registrar, whose exemptions and immunities as to the documents and other assets owned by the Registrar are the same as those provided to the Supervisory Authority under Article 27(3) of the Convention.

\(^2\) Though when it enters into transactions, such as the acquisition of property, goods or services, the applicable law will generally be the national law determined by the conflict of laws rules of the forum.
ARTICLE 28 – LIABILITY AND FINANCIAL ASSURANCES

Convention and to the International Registry under Article 27(4) of the Convention (Protocol, Article XII(9)). As to the latter, see paragraph 4.174.

4.174. While the Registrar does not itself enjoy immunity from process, the assets, documents, data bases and archives of the International Registry are inviolable and immune from legal or administrative process (under Article 17(4) all proprietary rights in the data bases and archives are owned by the Supervisory Authority). However, the inviolability of the proprietary data bases and archives owned by the Supervisory Authority, and of the documents and other assets owned by the Registrar, is subject to the qualification that a person making a claim against the Registrar under Article 28(1) or Article 44 is entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.

4.175. It is also the responsibility of the Supervisory Authority to ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar. These would include any intellectual property rights necessary for the continued operation of the Registry.

4.176. Paragraph 6 enables the Supervisory Authority to waive any inviolability and immunity that would otherwise be enjoyed in relation to the assets, documents, data bases and archives of the International Registry. Quite apart from this provision the Supervisory Authority may be asked to include in its contracts – e.g. with the Registrar and with other suppliers of goods and services – a provision waiving the inviolability and immunity, so far as this is necessary under the applicable law.

CHAPTER VII

LIABILITY OF THE REGISTER

Article 28 — Liability and financial assurances

1. The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international
registration system except where the malfunction is 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 related to back-up and systems security and networking.

2. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information 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.

3. Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.

4. The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority, in accordance with the Protocol.

Comment

4.177. In principle, the liability of the Registrar is not dependent on fault but is a strict liability imposed not only for errors or omissions of the Registrar and its staff but for system malfunction. This standard is necessary since the system is electronic, and, in such a system, ensuring its proper design and operation is an essential function of the Registrar. However, the Registrar’s liability is not absolute. In the first place, the Registrar is not liable for a malfunction caused by an event of an “inevitable and irresistible nature” which could not be prevented by best practice in design, operation or security. Though unforeseeability of the adverse event is not a stated precondition of the Registrar’s exemption from liability, the exemption is narrowly defined. It is not sufficient that the malfunction results from the failure of the Supervisory Authority to ensure the existence of an efficient electronic registration system.
as required by Article 17(2)(i) or that the Supervisory Authority and the Registrar took all reasonable steps to appoint competent experts to design and construct the system. The malfunction must be caused by an event which is unavoidable and insurmountable even with best practices in current use in the field of electronic design and operation. This *force majeure* concept is capable of including such events as war, insurrection, terrorist attack, and natural disaster. But with an electronic system employing off-site back-up facilities and distributed networking as required by best practice it is likely that only in very exceptional cases will events of the kind described be considered of an “inevitable and irresistible” nature.

4.178. Among best practices that the system needs to reflect are the following:

- Hardware and software appropriate to a web-based, high-speed, reliable system, able to receive data from and transmit data to all time zones and accessible 24 hours a day (Luxembourg Protocol, Article XV(4))
- Accurate receipt and transmission of data in the form in which data are received (see paragraph 4.179)
- Regular maintenance arranged to cause minimum dislocation to the working of the International Registry
- State-of-the-art protection against viruses and system corruption
- Rapid identification and rectification of a system malfunction
- Back-up of data on the main site
- Back-up systems on other sites, so that if the system goes down on the main site alternative sites can be used
- Security systems to prevent unauthorised interference with stored data and data messages
- Adherence to internationally required standards in areas such as information technology security management, business continuity and quality control.
4.179. The Registrar is not liable for the factual inaccuracy of information it receives or transmits in the form in which the Registrar received it. Even in a manually operated registration system in which transaction documents are inspected, it is not possible for the registry to investigate facts, its role being essentially administrative. In an automated registration system with no human intervention in the registration and search processes there is even less scope to check the accuracy of information received. The Registrar is entitled to assume the correctness of data received and to transmit such data in search certificates without liability. This does not, however, exempt the Registrar from ensuring that the system embodies up-to-date security features designed to verify that registration information comes from an authorised person. The Registrar is also not responsible for acts or circumstances arising prior to receipt of registration information, since these are outside the Registry system. So the Registrar incurs no liability for errors or system malfunction in a national entry point.

4.180. The Registrar’s liability is limited to compensatory damages for loss suffered. This excludes an award of punitive or exemplary damages. Damages may be reduced by the claimant’s contributory negligence. Article XV of the Luxembourg Protocol provides that the Registrar’s liability for loss under Article 28(1) of the Convention is not to exceed the value of the railway rolling stock to which the loss relates and also sets an overall limit of liability of 5 million Special Drawing Rights in any calendar year or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.

4.181. The Registrar is required to cover its prospective liability by insurance or a financial guarantee to the extent determined by the Supervisory Authority, in accordance with the relevant Protocol. Under Article XV(7) of the Luxembourg Protocol, the amount of the insurance or financial guarantee is to be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the prospective liability of the Registrar. See paragraph 3.40.
CHAPTER VIII

EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

Article 29 — Priority of competing interests

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

2. The priority of the first-mentioned interest under the preceding paragraph applies:
   (a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and
   (b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

3. The buyer of an object acquires its interest in it:
   (a) subject to an interest registered at the time of its acquisition of that interest; and
   (b) free from an unregistered interest even if it has actual knowledge of such an interest.

4. The conditional buyer or lessee acquires its interest in or right over that object:
   (a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and
   (b) free from an interest not so registered at that time even if it has actual knowledge of that interest.

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

6. Any priority given by this Article to an interest in an object extends to proceeds.

7. This Convention:

(a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation; and

(b) does not prevent the creation of rights in an item, other than an object, which has previously been installed on an object where under the applicable law those rights are created.

Comment

4.182. This Article lays down a set of priority rules governing a registered interest in relation to other registered interests and to every kind of unregistered interest, whether or not registrable. By virtue of the definition of “registered interest” in Article 1(cc), these rules apply not only to an international interest but also to a registrable non-consensual right or interest registered in the International Registry and a national interest notice of which has been so registered. Article 29 also applies to determine the priority of competing assignments falling within Article 35. Given the size of transactions within the scope of the Convention, the aim is to provide a very small number of simple, objective and comprehensive rules, and to avoid some of the complexities found in national legal systems. Article 29 does not normally apply to the holders of different fractional interests, since each interest is distinct so that usually they are not in competition with each other (see paragraphs 2.35, 2.130), but fractional interests are not normally encountered in rail financing. Other exceptions to the general priority rules are discussed in paragraphs 2.153 et seq. Article 29 is concerned solely with the priority of what may be termed Convention interests (international interests, registrable non-consensual rights or interests and national interests the subject of a notice which is registered) vis-à-vis other interests, whether or not the latter are
Convention interests. Outright sales are not registrable either under the Convention or under the Luxembourg Protocol.

4.183. Paragraph 1 embodies two priority rules. First, as between registered interests priority goes to the first to be registered (Illustration 21, paragraph 4.198). Registration is therefore a priority point, not merely a perfection requirement. Pre-existing rights or interests covered by a declaration under Article 60(3) constitute an exception to this (see paragraph 2.258). Where a registered prospective international interest becomes an actual international interest, it is deemed to have been registered at the time of registration of the prospective international interest and to have priority from that time (see Article 19(4) and paragraph 4.144 and Illustrations 16 and 17, paragraphs 4.145 and 4.146). In these cases there is no actual registration of the international interest as such. Secondly, subject to paragraphs 3 and 4 of Article 29, a registered interest has priority over an unregistered interest. This is so whether or not the unregistered interest is registrable under the Convention (see the definition of “unregistered interest” in Article 1(mm) and Illustration 22, paragraph 4.199).

4.184. A registered interest has priority over an earlier unregistered interest even if this was known to the holder of the registered interest at the time of registration. The purpose of this and the previous rule, which find their counterpart in a number of legal systems, is, first, to reflect the principle that all creditors are deemed to know of a registered interest, secondly, to obviate the expense and inconvenience of investigating the possible existence of a prior interest, and, thirdly, to avoid factual disputes as to whether the second creditor did or did not know of the earlier unregistered interest. For the same reason, a registered interest securing further advances has priority over a subsequent interest (whether registered or not) even as regards advances made with knowledge of the later interest (Illustration 23, paragraph 4.200). By the same token, registration of an interest in a national registry is irrelevant to the ordering of priorities under Article 29.

4.185. The purpose of registration is, of course, to give the creditor protection against the competing claims of third parties. Registration is not necessary to protect the creditor against its own debtor, who will, of course, be aware of the agreement into which it has entered. So the fact that a chargee or lessor fails to register its international interest does not in any way affect its rights against its
chargor or lessee. Similarly, a lessee who grants a sub-lease cannot gain priority over its lessor by registering its interest as sub-lessor prior to registration by the head lessor. This is also a particular application of the general principle that a debtor cannot act in a manner inconsistent with the rights it has granted to its creditor and in particular cannot, by being the first to register, in effect deny its own creditor’s title (see paragraph 2.163). However, a lessee, as has been seen, has a power to dispose for the purposes of the Convention (see paragraph 4.72), and this includes a power to grant a sub-lease, whether or not the lessee has a right to do so under the terms of the head lease. It follows that a sub-lessee can invoke Article 29(4) to secure protection against the head lessor where the sub-lessor’s international interest was registered before the registration of the head lessor’s international interest.

4.186. Paragraph 3 introduces the first of two exceptions to the general rule that even an unregistrable interest is displaced by a subsequent registered 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. However, it is an implicit condition of the application of Article 29(3) that the seller had 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, where the international interest was in respect of a conditional sale or leasing agreement, any title of the conditional seller or lessor whose interest was unregistered, since its displaced interest is not as conditional seller or lessor (see paragraph 4.50) but simply whatever interest it had at the time of entering into the conditional sale or leasing agreement. See Illustration 24, paragraph 4.201.

4.187. Paragraph 4 provides a rather different kind of exception to the general rule referred to above. It is designed to deal with two situations: the grant of a charge by the conditional seller or lessor and the grant of a lease followed by a sale and lease-back from the buyer, who then becomes the head lessor taking subject to the terms of the existing lease.

(1) Charge by conditional seller or lessor

4.188. In this first situation a conditional seller or lessor charges its interest to its creditor under a security agreement and, following default, the chargee seeks
to recover the object from the conditional buyer or lessee in possession. The rule here is that the conditional buyer or lessee is protected if the interest of its conditional seller or lessor was registered before the registration of the charge but is not protected if the charge was registered first. This rule, which is in substance a rule of priority as between chargee and conditional buyer or lessee, is designed to protect the integrity of the registration system. Registration by the conditional seller or lessor puts a subsequent chargee on notice of the existence of the title reservation or leasing agreement. So while a conditional buyer or lessee does not itself possess a registrable interest, it can rely on the registration of its conditional seller or lessor (Illustrations 25 and 26, paragraphs 4.202 and 4.203).

4.189. In keeping with the principle that a party should not be affected by an unregistered interest even if knowing of it (see paragraph 4.184), paragraph 4 of the present Article follows paragraph 2(a) in making it clear that the protection of the conditional buyer or lessee is not affected by its prior knowledge of the unregistered charge. In what is likely to be the more common case where the chargee takes its interest and registers it before the chargor enters into the conditional sale or leasing agreement, the conditional buyer or lessee is not protected from enforcement of the charge, the existence of which the conditional buyer or lessee could have ascertained by searching in the International Registry.

4.190. The basic rules, however, may be varied by contract, with the variation registered as a subordination (as contemplated by Article 29(5)), thereby binding third parties. Article XI(1) of the Luxembourg Protocol builds on these provisions to give the conditional buyer or lessee of railway rolling stock a right of quiet possession, to the extent set out in the agreement, not only as against its conditional seller or lessor but also against a chargee or other holder of an interest taking subject to the rights of the conditional buyer or lessee under Article 29(4). A subordination agreement affects only the parties to it and an assignee of a registered subordination. It does not affect the debtor, whose consent is not required and who must fulfil its obligations to both creditors.

4.191. Since the right of quiet possession of the conditional buyer or lessee vis-à-vis the chargee is dependent on the fact that the conditional seller or lessor registered its international interest before the chargee registered its own
international interest, discharge of the registration of the former international interest extinguishes the right of quiet possession as against the chargee (though not as against the conditional seller or lessor), in line with the principle that priorities and other rights against third parties derived from a registration come to an end when the registration is discharged. This rule is necessary to protect the integrity of the registration system.

(2) Sale and lease-back

4.192. Where there is a lease and a sub-lease, the head lessor will normally register its interest before the sub-lessee has registered. There may, however, be cases in which the sub-lessee’s interest is registered first. This is most likely to occur where, after granting a lease and registering an international interest, the lessee sells the object and leases it back from the buyer. Such a lease will take effect subject to the existing lease, which then takes effect as a sub-lease, the buyer being the head lessor and the seller the sub-lessee. The effect of Article 29(4)(b) is that the sub-lessee is entitled to quiet possession both as against the sub-lessee and as against the buyer as head lessor, subject to the terms of any subordination agreement. The normal rule that a lessee cannot, by being the first to register, gain priority over its own lessor, and that in consequence a sub-lessee is not protected by Article 29(4)(b), does not apply in this case, because at the time the entity that has since become the sub-lessee registered its international interest the purchaser was not on the scene.

4.193. Holders of competing interests may vary the priority between themselves by agreement, but an assignee of a subordinated interest is not bound by the subordination unless it was registered prior to the assignment, for otherwise the assignee would assume that it was acquiring the status of the senior creditor (see Illustration 27, paragraph 4.204). Though Article 29(5) does not expressly state that the assignee’s actual knowledge of an unregistered subordination is irrelevant, the policy consideration underlying paragraphs 2(a) and 4(b) is equally applicable, so that the assignee will not be affected by an unregistered subordination even if knowing of it at the time of the assignment.

4.194. By Article 29(6), any priority given by this Article extends to proceeds as defined by Article 1(w), which in effect confines the priority to insurance and other loss-related proceeds, as opposed to proceeds of a disposition of the object. See paragraph 2.154 and Illustration 28, paragraph 4.205. In its
article to proceeds, the priority rule is limited to competing claims to proceeds both of which are derived from the object whose loss, etc., gave rise to the proceeds. So Article 29(6) does not, for example, determine priority as between the holder of an international interest claiming insurance proceeds in the form of a claim on the bank into which these have been paid and a receivables financier who has never had an interest in the object and will usually be unaware that the proceeds are insurance proceeds, and simply asserts a right to such proceeds as buyer or chargee of debts due to the holder’s debtor. Such a priority dispute is to be determined in accordance with the applicable law. Any priority given by Article 29(6) may be lost if the proceeds cease to be identifiable, as where they are paid into a bank account and thereafter paid out as part of the debtor's general expenditure. Whether proceeds remain identifiable is again a matter for the applicable law.

4.195. Article 29 does not regulate priority between competing unregistered interests. That is left to the applicable law, though any priority given by the applicable law is liable to be displaced if the holder of one such interest subsequently registers it in the International Registry.

4.196. Paragraph 7(a) deals with the case where an item which is not itself an object (i.e. is not an aircraft object or a unit of railway rolling stock or a space asset as defined in the relevant Protocol) becomes installed on an object. Examples are a computer, an audio system or video system installed in a rail coach or an engine in a multiple unit train, or spare parts incorporated into a locomotive (Illustration 29, paragraph 4.206). In all these cases, the installation or incorporation does not affect pre-existing rights if these are preserved by the applicable law. The position is otherwise where under the applicable law the right to the installed or incorporated items passes under the doctrine of accession to the owner of the rail coach or locomotive as the principal asset. In such a case, the person who previously had an interest in such items loses its title to them and they become vested in the owner of the coach or locomotive or, if this has been charged, become subject to the charge if this covers accessions.

4.197. Paragraph 7(b) concerns the case where a person deals with an item, not itself an object, which has previously been installed on an object, and is directed to the situation where the item is dealt with separately from the object on which it is installed. (If it is dealt with as part of the object itself there is, of
PART 4

course, no problem to be resolved.) The effect of Article 29(7)(b) is to ensure that where the applicable law so provides, rights in such items prior to installation may be created in them after removal from the railway rolling stock. But if, under the applicable law, a doctrine of accession applies to the engine modules, or other items in question (not constituting an object), any pre-existing rights in them will be lost. Many States have adopted a doctrine of accession, and this can be justified not only doctrinally but also because without such a doctrine the principal object could be seriously impaired if a party claiming an interest in a component, e.g. as a supplier selling under reservation of title, were to assert its interest. However, there may be cases where the applicable law would allow such an interest to continue to subsist despite the annexure to the principal object.

4.198. Illustration 21

D gives a charge over railway rolling stock to C1 on 1 February and to C2 on 2 March. C2 registers its charge on 3 March, while C1 registers its own charge on 6 March. C2 has priority and this is so even if it knew of the charge in favour of C1.

4.199. Illustration 22

D is the owner of a locomotive based in Ruritania. Under Ruritanian law, X has a non-possessory lien to secure a judgment debt under a judgment given by a Ruritanian court. Subsequently, D charges the locomotive to C to secure an advance and C registers the charge. C’s registered international interest has priority over X’s earlier lien even if this is not registrable under the Convention. The position would be otherwise if Ruritania had made a general declaration under Article 39 covering the priority of unregistered judgment debts or had made a declaration under Article 40 of the Convention providing for the registration of judgment debts in the International Registry and X had registered its judgment debt before C had registered its charge.

4.200. Illustration 23

D charges a fleet of trains to C1 to secure present and future advances. C1 advances 20 million euro and registers an international interest against each carriage and locomotive. Subsequently, D charges the same fleet of trains to C2, which advances 15 million euro and gives notice of its charge to C1.
Later, C1 makes a further advance to D of 5 million euro. C1 has priority over C2 both as to the 20 million euro advance and as to the 5 million euro advance. C2 could avoid this situation by negotiating a subordination of C1’s charge to the extent of C2’s advance.

4.201. **Illustration 24**

O, the owner of a locomotive, leases it to L. Before O has registered its interest, L wrongfully sells the locomotive to B. B displaces O as owner, and this is so even if B knew of O’s international interest.

4.202. **Illustration 25**

The facts are as in Illustration 24 except that L, instead of selling the locomotive, wrongfully sub-leases it to SL and then registers its international interest. Subsequently, O registers its interest. O has priority over L (who cannot supplant its own lessor) but holds its interest subject to the lease to L, which may, however, be terminable because of L’s wrongful behaviour. Nevertheless, O cannot exercise default remedies against SL, who is protected by Article 29(4).

4.203. **Illustration 26**

O leases a railway wagon to L, registers its international interest and then charges the wagon to C. C takes its charge subject to the lease to L, whose lessor, O, registered first and who is thus protected under Article 29(4)(b). The position would be otherwise if C had registered first, whether because O had not then granted the lease to L and therefore had no registrable interest or because it failed to register before C.

4.204. **Illustration 27**

D gives a charge on a freight train to C1, who registers it, and a second charge to C2, who also registers. Later, C1 agrees to subordinate its charge to that of C2. However, C2 fails to register the subordination agreement. Subsequently, C1 assigns its charge to A. A has priority over C2 and this is so whether or not A knew of the subordination agreement.
4.205. Illustration 28

D charges a locomotive to C1 and C2 in succession, C1’s charge being registered first. Subsequently, the locomotive, which was insured against loss, is destroyed in an accident. C1 has a prior claim to the insurance proceeds. If these exceed the amount of the debt owed to C1, the balance is payable to C2 to the extent of its claim, any surplus being payable to D.

4.206. Illustration 29

An audio system leased by A to L is installed on a locomotive which is owned by D and has been charged to C. Later, S supplies spare parts under a conditional sale agreement and these are incorporated into the locomotive but subsequently removed and held in store. Paragraph 7(a) of this Article makes it clear that the Convention does not affect A’s rights over the audio system where under the applicable law those rights continue to exist despite the installation in the locomotive, and that if the applicable law so provides, S’s interest in the spare parts continues notwithstanding their incorporation into the locomotive and their subsequent removal.

Article 30 — Effects of insolvency

1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.

3. Nothing in this Article affects:

(a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
(b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

Comment

4.207. An international interest is in principle effective in insolvency proceedings against the debtor if registered in the International Registry prior to the commencement of the insolvency proceedings, that is, the time at which those proceedings are deemed to commence under the applicable insolvency law (Article 1(d)). This is so even if the international interest would otherwise be void for want of compliance with local perfection requirements.

4.208. The effect of Articles 40 and 50(2) is that the protection given by paragraph 1 of the present Article extends to registered non-consensual rights or interests and to national interests protected by notice on the International Registry, in either case where the registration was effected prior to the commencement of the insolvency proceedings and was in conformity with the Convention.

4.209. By paragraph 2, even an international interest not so registered may be effective under the applicable law. In other words, paragraph 1 provides a rule of validation, not of invalidation. In this context, “that interest” means the interest as recognised by the applicable law, not the international interest as such, which is the creation of the Convention, not of the applicable law. “Effective” means that the international interest will be recognised as proprietary in nature and therefore in principle rank ahead of the claims of unsecured creditors. So an effective international interest may not be set aside or subordinated for the benefit of the debtor, the insolvency administrator or the estate, or other claimants, except as provided by Article 30(3) (see paragraph 4.210). “Applicable law” means the domestic law determined by the rules of private international law of the forum State (Article 5(3)), which in this case is the insolvency forum. The conflicts rule almost invariably applied to determine the acquisition of rights in tangible movables is the lex situs (lex rei sitae), the situation of the asset at the relevant dealing or event, which in this case is the commencement of the insolvency proceedings. Where the insolvency jurisdiction is that of a State which is a Contracting State the law of which adopts this conflict rule, then if at the above time the asset was situated
in a State other than that in which the insolvency proceedings have been commenced and an interest equivalent to the international interest was duly perfected under the law of that State even though not registered in the International Registry, it will be treated as perfected for the purpose of the insolvency proceedings. In other words, Article 30(1) does not disturb the status of an interest perfected under the applicable law and this status will be respected in the insolvency. That reflects the general principle that the starting point of insolvency law is to respect pre-insolvency entitlements. However, the insolvency jurisdiction remains entitled to apply any rules of its own insolvency law rendering perfected interests void or liable to be set aside, and in this case, unlike that of the registered international interest, any grounds of avoidance may be applied, not merely avoidance as a preference or a transaction in fraud of creditors. See Illustration 30, paragraph 4.213.

4.210. Paragraph 3 preserves the effect of certain specific rules of insolvency law, namely those relating to the avoidance of preferences (see paragraph 4.211) and transfers in fraud of creditors, and of rules of insolvency procedure designed to limit the enforcement of security or other property rights in the interests of the general body of creditors, for example, by imposing an automatic stay on the enforcement of security and other in rem rights in order to facilitate a reorganisation (see paragraph 4.212 and Illustration 31, paragraph 4.214). However, in relation to railway rolling stock, paragraph 3 gives way to Article IX, Alternative A, paragraphs 9 and 10, of the Luxembourg Protocol in a Contracting State which has made a declaration applying Alternative A, with the effect that in such a case no stay or other impediment to the exercise of the creditor’s remedies may be imposed.

4.211. Article 30(3)a) is confined to the avoidance of preferences and transfers in fraud of creditors. It follows that other grounds of avoidance that would ordinarily be applicable cannot be invoked to impeach an international interest effective under Article 30(1) or (2). Similarly, the international interest cannot be subordinated to another right or interest under the insolvency law unless that other right or interest is a non-consensual right or interest covered by a declaration under Article 39(3) deposited prior to the registration of the international interest or is a right of arrest or detention preserved under Article 39(1)(b). However, it is for the applicable insolvency law to determine what constitutes a preference or a transaction in fraud of creditors and also the time
at which the insolvency proceedings are deemed to have commenced (see Article 1(d)).

4.212. Article 30(3)(b) states that nothing in the Article affects “rules of procedure relating to the enforcement of rights to property” in the insolvency context. So it remains open to courts of the insolvency jurisdiction to apply rules which restrict or suspend the enforcement of security, the institution of proceedings against the debtor, and the like, in order, for example, to preserve the debtor’s business or its value for the benefit of all creditors. However, as regards railway rolling stock, Article IX of the Luxembourg Protocol overrides such rules and thus displaces Article 30(3)(b) (see Illustration 31, paragraph 4.214).

4.213. Illustration 30

In January C1 advances 1 million euro to D on the security of a railway wagon and registers its security interest as an international interest. In September C2, an unsecured creditor of D for a loan of 1 million euro, is concerned that D may be on the verge of insolvency, takes a charge on another wagon also situated in Ruritania to secure the loan and registers its international interest. In October, by which time D has declared a cessation of payments, C3 takes an international interest in a locomotive to secure a contemporaneous loan of 2 million euro but fails to register this as an international interest. All the railway rolling stock items were situated in Ruritania at the time the various interests in them were granted. C1 did not register its charge in the Ruritanian register of charges and under Ruritanian law this invalidates the charge in the event of the debtor's insolvent liquidation. The other two international interests were registered in the requisite Ruritanian register of charges and are considered duly perfected under Ruritanian law.

In November a court in Urbania, which has ratified the Convention and the Luxembourg Protocol but has not made a declaration under Article IX of the Protocol, makes a winding-up order against D on the ground of insolvency and appoints an insolvency administrator. Under Urbanian law, a transfer made by a debtor after cessation of payment to its creditor is of no effect and a security interest given for past value within a period of six months will be set aside as a preference on the application of the insolvency administrator. The Urbanian insolvency administrator applies to the insolvency court for an order declaring (a) that the interest in favour of C1
is of no effect because it is invalid under Ruritanian law as the \textit{lex situs}; (b) the international interest in favour of C2 should be set aside as a preference; 
(c) the interest in favour of C3 is ineffective because it was not registered in the International Registry and also offends against a rule of Urbanian insolvency law which invalidates transfers made after cessation of payments by the debtor; and (d). Article 30(1) precludes the insolvency court from treating the registered international interest in favour of C1 as ineffective in the insolvency even if it is void under Ruritanian law. The interest in favour of C2 may be set aside as a preference by virtue of Article 30(3)(a). The international interest in favour of C3, not being registered in the International Registry, falls outside the protection given by Article 30(1) but is valid under Ruritanian law as the \textit{lex situs} and must therefore be treated by the Urbanian insolvency court as duly perfected. However, it is subject to the avoidance provisions of Urbanian insolvency law relating to transfers after cessation of payments even though this ground of avoidance is not one specified in Article 30(3)(a).

4.214. \textit{Illustration 31}

C, which has leased some railway wagons to D, registers its interest in each wagon in the International Registry as an international interest. Subsequently, in insolvency proceedings opened in a Contracting State in which D’s centre of main interests is situated, an insolvency administrator is appointed with a view to a reorganisation of D. Under the insolvency law the effect of the appointment is to stay all enforcement measures against D. C cannot exercise its normal remedy of repossession under Article 10 so long as the stay continues in force unless the Contracting State in question has made a declaration applying Alternative A of Article IX of the Luxembourg Protocol, in which case no stay may be granted or continued in force after the date specified in paragraph 2 of Alternative A.
CHAPTER IX

ASSIGNMENTS OF ASSOCIATED RIGHTS AND INTERNATIONAL INTERESTS; RIGHTS OF SUBROGATION

Article 31 — Effects of assignment

1. Except as otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 also transfers to the assignee:
   (a) the related international interest; and
   (b) all the interests and priorities of the assignor under this Convention.

2. Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph but not so as adversely to affect the debtor without its consent.

3. Subject to paragraph 4, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.

4. The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.

5. In the case of an assignment by way of security, the assigned associated rights vest in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.
Comment

4.215. This Chapter deals with the effect, formal requirements and priority of assignments of associated rights and of the related international interests as well as with subrogation. Only a creditor (i.e. a chargee, a conditional seller or a lessor) can hold and assign associated rights. So an assignment by a lessee *qua* lessee is not within the Convention, though if the lease contains an option to purchase the lessee is a prospective buyer and can register and assign its rights as such, while a lessee who grants a sub-lease can, as sub-lessee, effect an assignment of its associated rights and a transfer of its international interest, and the assignment and transfer would be governed by the present Chapter. “Assignment” is widely defined so as to include the pledge or charge of associated rights and related international interests. However, it is limited to contractual assignments and does not include assignments by operation of law. Associated rights are defined in Article 1(c) as rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Associated rights therefore do not include (a) rights to performance by a third party, or (b) rights to performance by the debtor itself under a separate contract or engagement (such as an engagement embodied in a promissory note), unless in either case the debtor undertakes in the agreement itself to perform the obligations of the third party or of itself under the other contract or engagement.

4.216. Rights are secured by the object when the agreement is a security agreement by which the chargor grants security over the object to the chargee. Typically what is secured is repayment of a loan with interest and charges, but all rights against the debtor which arise under the agreement and are secured on the object are associated rights, whether they are rights to money or to a non-monetary performance. They may include – in addition to repayment of the loan and contract interest – default interest, maintenance, repair and insurance of the object, indemnities against breaches of covenant, and obligations of the debtor (but not of third parties) under other contracts secured on the object under a cross-default clause and incorporated into the agreement as obligations under that agreement (see paragraph 4.218).

4.217. Rights are associated with the object, as opposed to being secured on it, where they are rights to payment or other performance (for example, maintenance, repair and insurance) by a conditional buyer under a title
reservation agreement or a lessee under a leasing agreement. Rights of the creditor to performance by the debtor which is unrelated to the transfer of ownership under a conditional sale agreement or the debtor’s right to retain possession under a leasing agreement are not associated rights. This is because under the terms of the agreement non-performance does not affect the transfer of ownership or confer on the creditor the right to repossess the object.

4.218. Also included in associated rights are rights to performance by the debtor or a third party under another contract provided that (a) the debtor undertakes in the agreement to perform or procure performance under that other contract, and (b) the rights to such performance are secured on or associated with the object to which the agreement relates, as where a security agreement secures indebtedness under other contracts or a title reservation agreement provides for ownership to pass to the conditional buyer when it has performed its obligations to the conditional seller under that or any other title reservation agreement. But rights to performance under other contracts are not associated rights in relation to the agreement merely because they are secured by or associated with the object to which the agreement relates; it is also necessary that the debtor shall have undertaken in the agreement to perform them or procure their performance. See paragraph 4.9.

4.219. It is important to distinguish assignments of two sets of associated rights related to different international interests from successive assignments of the same set of associated rights arising in relation to a single international interest. Where there are two sets of associated rights which are related to different international interests, it is the international interests, not the assignments themselves, that are in competition; the case is governed by Article 31 and each assignee stands in the shoes of its assignor in terms of priority (Article 31(1)(b). Accordingly, priority as regards the associated rights depends not on the order of registration of the assignments of the related international interests but on the order of registration of the international interests themselves. It may be noted that if only one of the assignments of associated rights includes the international interest, the assignee of that assignment has only to register it in order to obtain priority, the other assignment being outside the Convention altogether (Article 32(3)). Priority under Article 31 is not limited by Article 36. The situation is quite different where there is a single set of associated rights related to the same international
interest. Here the competition is between the assignments themselves, and assuming that at least one of the assignments is registered Article 35 applies, it is irrelevant whether the international interests have been registered, and priority goes to the assignee who is the first to register, subject, however, to Article 36. Under that Article it is necessary to distinguish associated rights that are related to the financing or leasing of an object in the sense of Article 36(2) (hereafter termed “object-related rights”) from those that are not. The distinction is significant in that an assignee of rights that are not object-related cannot invoke the priority that would otherwise be given by Article 35 (see paragraphs 4.253-4.257). However, the distinction is of no relevance to cases within Article 31.

4.220. Except as otherwise agreed by the parties, the assignment of associated rights transfers to the assignee the related international interest (i.e. that of the chargee, conditional seller or lessor) and all the interests and priorities of the assignor under the Convention (Illustration 33, paragraph 4.231). This follows the rule, common in legal systems, that security does not exist in the abstract but is accessory to the rights secured and therefore travels with those rights. See also paragraph 2.181.

4.221. It is, however, open to the parties to agree on an assignment of the associated rights without a transfer of the security or other international interest. For example, a conditional seller under a title reservation agreement providing for payment of the price by instalments could agree to assign its rights to future instalments without transferring ownership of the object to which the agreement relates. The effect of an assignment of associated rights divorced from the related international interest is that the Convention does not apply to the assignment at all (Article 32(3)). This is a logical consequence of the fact that the Convention is devoted to international interests and registrations affecting international interests. It is not concerned with assignments of receivables as such. These fall within the purview of national law, including the 2001 UN Convention on the Assignment of Receivables in International Trade as and when in force in a Contracting State. However, Article 32(3) must be read subject to Article 35, which gives a registered assignee of associated rights coupled with an international interest priority over an assignee of associated rights assigned in isolation from the international interest, though this priority is conditioned and qualified by Article 36. See paragraphs 4.253 et seq.
4.222. The Convention does not permit the transfer of an international interest created by a security agreement without an assignment of at least some of the associated rights. See Article 32(2).

4.223. There is nothing to preclude the assignment of an unregistered international interest and, if there were no further assignments or competing interests, such assignment would entitle the assignee to exercise default remedies against the debtor even if neither the international interest nor the assignment were registered. Registration of the assignment of an unregistered international interest would protect the assignee against subsequently registered and unregistered assignees who do not procure registration of the international interest but not against displacement by the holder of a subsequent international interest who registers its international interest first or the assignee of such holder or against creditors in the debtor’s insolvency (see paragraph 2.190).

4.224. Where, as will be the case in the absence of agreement to the contrary, the assignment of the associated rights carries with it the related international interest, the assignee obtains the same priority status as its assignor. So if railway rolling stock is given in security to A, B and C under successive security agreements and registrations are effected in the same order, then an assignment by A of the associated rights under its security agreement with the debtor transfers to the assignee A’s international interest and the priority of that interest over the interests of the later registrants, B and C. Despite this, A’s assignee should register the assignment in order to safeguard itself against the possibility of its interest being lost or subordinated in favour of a subsequent assignee of the same international interest who registers first. However, in this case the priority of the subsequent assignee is dependent on the contract under which the associated rights arise stating that they are secured by or associated with the object, and is limited by Article 36 to object-related rights as set out in Article 36(2).

4.225. The parties can agree on a partial assignment of the assignor’s associated rights, e.g. the right to some but not all future instalments or rentals. However, the rights assigned must be identifiable under the contract from which they arise (Article 32(1)(b)) and must be identified before the debtor can be called upon to pay the assignee (see Article 33(1)(b)). On a partial assignment it is for the parties to agree on their respective rights concerning
the related international interest, though so far as their agreement would adversely affect the debtor it requires the debtor’s consent. That consent may be a general consent and may be given in advance. So the parties could agree that the security under a security agreement or ownership reserved under a title reservation agreement is to be shared and that the existing registration should be amended to show the assignor and assignee as co-chargees or co-owners. In the absence of agreement, determination of the respective rights of assignor and assignee as regards the related international interest is to be determined by the applicable law. Where Article VI of the Protocol applies, and the agreement takes the form of a subordination, the law applicable is that contractually selected.

4.226. The concept of a partial assignment presupposes assignment of part of a single set of associated rights, as opposed to assignment of the associated rights under one of two separate contracts between the same parties. However, where in the agreement the debtor undertakes to perform its obligations under other contracts as well, the associated rights under the agreement incorporate the rights to payment or other performance under those other contracts, so that an assignment by the creditor of its rights under another such contract constitutes a partial assignment of its rights under the first agreement. It is then for the creditor and the assignee to agree as to their respective rights concerning the related international interest (Article 31(2)), to which both have claims (Illustration 35, paragraph 4.233). Failing agreement, the question has to be determined by the applicable law; it is not a question determined by the Convention. See paragraph 4.225.

4.227. The Convention does not itself contain any provisions as to defences or rights of set-off other than waiver of these (see paragraph 4 of this Article and paragraph 4.228). Apart from waiver clauses, which, under the principle of party autonomy, are binding under Article 31(4) of the Convention, the availability of defences and rights of set-off is left to the applicable law. This would also determine the effect of contractual provisions prohibiting assignment, which in some legal systems are ineffective against the assignee.

4.228. Paragraph 4 of the present Article recognises the common practice of including a provision by which the debtor waives defences and rights of set-off against the assignee, in order to make claims more readily transferable. Such waiver is permitted and binding except for defences arising from fraudulent
acts on the part of the assignor. So where the Convention applies, then subject to the above exception the debtor’s waiver of defences or rights of set-off will be effective even if this would not be recognised under the otherwise applicable law.

4.229. Where an assignment is by way of security and the secured obligations are discharged, the assigned associated rights still in existence revest in the assignor automatically without the need for any instrument of reassignment. See Illustration 34, paragraph 4.232.

4.230. Illustration 32

C advances funds to D for the purchase of a locomotive, taking a charge over the locomotive to secure repayment. Subsequently, C enters into a new agreement with D by which C agrees to make a further advance on the security of the locomotive. C’s rights to payment under each agreement constitute associated rights in relation to that agreement but the rights to payment under the second agreement are not associated rights in relation to the first agreement since they are not rights under that agreement. The position would be otherwise if in the first agreement D had also agreed to perform obligations imposed by future agreements and the charge secured further advances.

4.231. Illustration 33

O, the owner/lessor of an item of railway rolling stock, registers its international interest and subsequently assigns its rights under the leasing agreement (associated rights) to A by way of an outright assignment. The effect of the assignment is to transfer to A not only the associated rights but also, in the absence of agreement to the contrary, the international interest previously vested in O. Absent such agreement, A becomes entitled to be registered as assignee of the international interest, enjoying the same priority as that previously enjoyed by O, and to collect the rentals under the lease, subject to any defences or rights of set-off available to the lessee under the applicable law, e.g. for non-conformity of the rolling stock with the specifications in the leasing agreement, so far as these have not been waived by the lessee by the terms of the lease or in some other writing.
4.232. **Illustration 34**

The facts are as in Illustration 33 except that the assignment is by way of security. After A has collected some of the rentals outstanding under the leasing agreement, O discharges its debt to A, whereupon the railway rolling stock and the right to the remaining rentals become revested in O.

4.233. **Illustration 35**

C advances money to D for the purchase of a number of railway carriages. In the loan agreement D undertakes to perform all its obligations to C under that agreement and any other contract entered into between the parties, and a cross-default clause provides that any default by D under any such other contract shall be a default under the loan agreement. D's obligations under the agreement are secured by a charge on the carriages, and C registers its international interest in each carriage. Subsequently, C makes a non-purchase-money loan to D under a separate loan contract and later assigns its rights under that contract to A. Even if the loan contract makes no reference to security, D's obligations under this loan contract are secured by the charge given in the earlier loan agreement, because these include an undertaking to perform all obligations to C under any subsequent agreement. C's assignment of its rights under the subsequent loan agreement is an assignment of associated rights that carries with it the related international interest under Article 31(1)(a) so that both C and A have rights in such international interest. The assignment of the loan contract is also a partial assignment of the associated rights under the earlier agreement (see paragraphs 4.225-4.226), so that Article 31(2) applies and it is for C and A to agree as to their respective rights concerning the international interest, in default of which this is determined by the applicable law.

4.234. **Illustration 36**

D gives C1 a charge over a railway wagon to secure advances and very soon afterwards obtains further funds from C2, giving C2 a second charge. C2 is the first to register its charge as an international interest, after which C1 registers the charge in its favour. C1 assigns the associated rights arising under its security agreement to A1, who registers the assignment. C2 later assigns the associated rights under its agreement to A2, who registers the assignment. In the absence of agreement to the contrary each assignment also transfers
the related international interest. Despite the fact that both the assignment to A2 and its registration were the second in time A2 has priority, standing in the shoes of C2, who was the first to register its international interest. The order of the assignments and of their registration is irrelevant because where the assignments relate to different international interests each assignee’s priority depends on that of its assignor. The position would be otherwise if the assignment to A2 was not in conformity with Article 32, e.g. because it failed to give details enabling the secured obligations to be determined, for in that situation it would fall outside the Convention (Article 32(3)) and A1 would have priority.

4.235.  Illustration 37

C leases a locomotive to L, who agrees to make a series of rental payments. C registers its rights as lessor as an international interest. C charges the right to the rentals to A1, who fails to register the charge as an assignment of the related international interest pursuant to Article 31(1)(a). Under a subsequent transaction, C assigns the rentals to A2 by way of sale but A2 fails to register the assignment of the international interest. A1 has priority under Article 35.

4.236.  Illustration 38

D grants security interests over a locomotive to C1 and C2 in succession, and the interests are registered as international interests in that order. C2 assigns its rights to payment to S, who registers the related interest. Subsequently, C1 assigns the rights under its agreement to T, who registers that assignment. Under Article 31(1)(b), T succeeds to C1’s priority and therefore has priority over S even though S’s assignment was registered first.

Article 32 — Formal requirements of assignment

1. An assignment of associated rights transfers the related international interest only if it:
   
   (a) is in writing;
   
   (b) enables the associated rights to be identified under the contract from which they arise; and
(c) in the case of an assignment by way of security, enables the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured.

2. An assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights also are assigned.

3. This Convention does not apply to an assignment of associated rights which is not effective to transfer the related international interest.

Comment

4.237. Paragraph 1 contains rules for the constitution of an assignment under the Convention, prescribing the conditions in which the assignment of associated rights transfers the related international interest, and tracks the formal requirements laid down in Article 7 for the creation of an international interest except that what has to be identified is not the object (which is already identified) but the associated rights. This requires identification of the contract from which the associated rights arise. The term “contract” is used here instead of “agreement” because the rights may arise from a separate contract with the debtor which the debtor additionally agrees to perform as a term of the security or other agreement (in the absence of such a term the rights are not associated rights under the agreement).

4.238. Failure to comply with paragraph 1 has the effect that the related international interest does not pass to the assignee and the assignment then falls outside the scope of the Convention altogether (see paragraph 3 of the present Article and paragraph 4.221) and its efficacy outside the Convention will depend on the applicable law.

4.239. An assignment of an international interest created by a security agreement is not valid unless some or all of the associated rights are also assigned, though not necessarily in the same assignment. The reason for this rule is that the function of a security agreement is to secure payment or other performance, and if the international interest is held by a chargee to whom none of the
secured rights have been assigned it is not securing anything. The position is otherwise in the case of an international interest held by a conditional seller or lessee, who could, in theory at any rate, sell the object subject to the rights of the conditional buyer or lessee under the conditional sale or leasing agreement without assigning to the purchaser its rights of payment under the conditional sale or leasing agreement.

**Article 33 — Debtor's duty to assignee**

1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor in relation to those rights and that interest is bound by the assignment and has a duty to make payment or give other performance to the assignee, if but only if:

   (a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor; and

   (b) the notice identifies the associated rights.

2. Irrespective of any other ground on which payment or performance by the debtor discharges the latter from liability, payment or performance shall be effective for this purpose if made in accordance with the preceding paragraph.

3. Nothing in this Article shall affect the priority of competing assignments.

**Comment**

4.240. This Article sets out the conditions in which the debtor comes under a duty to make payment or give other performance to the assignee. It is to be read subject to the debtor’s right to raise substantive defences and rights of set-off under the applicable law to the extent that this right has not been waived by an agreement in writing. Such a waiver is binding under Article 31(4), which overrides any contrary provisions of national law. See paragraph 4.228.
Article 33 does not apply to an assignment which is ineffective to transfer the related international interest. Such an assignment is governed by the applicable law, including the 2001 UN Convention where this has become part of the applicable law.

4.241. The debtor must have been given notice of the assignment in writing by or with the authority of the assignor and the notice must identify the associated rights to which it relates. But in contrast to the position under Article XV of the Aircraft Protocol, it is not necessary that the debtor shall have consented to the assignment. In this respect, the Luxembourg Protocol follows the general rule in national legal systems.

4.242. A debtor who pays or performs when so required by paragraph 1 obtains a good discharge from liability. The debtor may also obtain a good discharge on payment or performance where the conditions of paragraph 1 have not been satisfied. For example, most legal systems allow the debtor to assert against the assignee any defences it could have asserted against the assignor and may also allow the debtor to set off against the assignee’s claim any cross-claim the debtor has against the assignor arising from dealings between the debtor and the assignor prior to the debtor’s receipt of notice of the assignment. The effect of paragraph 1 is simply that the debtor cannot be required to perform if the conditions of that paragraph have not been fulfilled. But this does not disable the debtor from performing in favour of the assignee in other cases, though if it is found that the person claiming to be the assignee does not have the best right to payment or performance, the debtor may then have to perform again in favour of the person having the best right. A debtor who receives notices of assignment from two assignees should invoke local procedural rules governing its duty in such a case.

4.243. Even where the debtor does give a valid performance in favour of an assignee, this does not affect the rights of another assignee who has priority. In such a case, the latter would be able to pursue whatever remedy was available against the junior assignee under the applicable law.
Article 34 — Default remedies in respect of assignment by way of security

In the event of default by the assignor under the assignment of associated rights and the related international interest made by way of security, Articles 8, 9 and 11 to 14 apply in the relations between the assignor and the assignee (and, in relation to associated rights, apply in so far as those provisions are capable of application to intangible property) as if references:

(a) to the secured obligation and the security interest were references to the obligation secured by the assignment of the associated rights and the related international interest and the security interest created by that assignment;

(b) to the chargee or creditor and chargor or debtor were references to the assignee and assignor;

(c) to the holder of the international interest were references to the assignee; and

(d) to the object were references to the assigned associated rights and the related international interest.

Comment

4.244. This Article is confined to assignments by way of security which transfer both the associated rights and the related international interest. It has no application to an assignment of associated rights in isolation, this being outside the Convention (Article 32(3)).

4.245. This Article confers on the assignee default remedies in relation to the object corresponding to those given by Chapter III to the holder of an international interest on the debtor’s default. So on the assignor’s default the assignee may, for example, sell or otherwise transfer its rights to payment or other performance under the assignment and apply under Article 13 for relief pending final determination of its claim. The default remedy provisions also apply to the associated rights themselves to the extent that
they are documentary intangibles (see paragraph 2.191), while the rights to payment or other performance due or to become due under the agreement can be sold but otherwise are simply enforceable against the debtor under Article 33 or through whatever additional remedies of an assignee are given by way of security are left to the terms of the assignment and the applicable law (Article 12).

4.246. However, the default provisions apply only in the relations between assignor and assignee and do not affect the rights of the debtor. Accordingly, any sale or further assignment by the assignee will take effect subject to the rights of the chargor, conditional buyer or lessee to the extent that it is entitled to quiet possession as against the assignee. In relation to railway rolling stock, this right is made explicit in Article XI of the Luxembourg Protocol.

4.247. Illustration 39

O leases a locomotive to L, registers an international interest in the locomotive and then assigns that interest and the associated rights to A by way of security for a loan from A repayable by instalments. O defaults in payment of an instalment and A thereby acquires the right to sell the locomotive or, subject to L’s rights under the lease agreement, lease it to another party and receive the rentals. If A sells the locomotive, the purchaser acquires it subject to L’s rights as lessee in possession and becomes entitled to collect the rentals while the lease is current and thereafter to take possession of the locomotive. The position is similar if A leases the locomotive to T, who takes its lease subject to the existing lease in favour of L. L’s lease then becomes a sub-lease, so that T becomes L’s lessor, with the consequent right to collect rentals from L and to recover the locomotive in the event of a default by L within the meaning of Article 11, while T has to pay rentals to A under the head lease.

**Article 35 — Priority of competing assignments**

1. Where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply as if the references to a registered interest were references to an assignment of the
ARTICLE 35 – PRIORITY OF COMPETING ASSIGNMENTS

associated rights and the related registered interest and as if references to a registered or unregistered interest were references to a registered or unregistered assignment.

2. Article 30 applies to an assignment of associated rights as if the references to an international interest were references to an assignment of the associated rights and the related international interest.

Comment

4.248. This Article is confined to competing assignments of associated rights arising under the same international interest where at least one of the assignments includes the international interest and the assignment of that interest (see paragraph 4.251) is registered. Where there are competing international interests, an assignee succeeds to the priority position of its assignor (see Article 31(1)(b)) and therefore does not need to register the assignment in order to protect itself against the holder of a subsequent international interest or an assignee of that interest (see paragraph 4.224). The position is otherwise where there are competing assignments of the same international interest, when an assignee who fails to register or delays registering the assignment in its favour will be postponed to a subsequent assignee who registers first. This follows from the fact that the competition is between assignments, not between international interests, and it is to the competing assignments that Article 29(1) is applied by paragraph 1 of the present Article. However, the priority of the first assignee is qualified by Article 36. Article 35 does not apply to a competition between a contractual assignment and an assignment by operation of law, which is outside the definition of “assignment” in Article 1(b). A priority issue arising from such competing interests is governed by the applicable law.

4.249. Priority conflicts involving only associated rights assigned in isolation from the international interest are outside the scope of the Convention since such rights are not susceptible to registration (Article 32(3)). Accordingly, the assignee who takes an assignment of both the international interest and the associated rights has only to register the assignment in order to have priority over an assignee of associated rights assigned in isolation so long as, and to the extent to which, the registered assignee’s associated rights remain linked to the
assigned international interest (see paragraphs 4.220, 4.250). So it is only if (a) both of the competing assignments relate solely to the associated rights (as can be done by agreement – see Article 31(1)) or (b) neither of the competing assignments is registered, that the present Article and, indeed, the Convention as a whole have no application. This is a reflection of the fact that the Convention does not regulate the priority of registrable but unregistered interests inter se (see paragraph 4.195). The fact that the international interest itself has not been registered is irrelevant.

4.250. Since the registration system is concerned only with the registration of interests in an object, not with associated rights as such, the priority given to an assignee of associated rights is dependent on their continuing linkage to an international interest. An assignee of associated rights assigned in isolation from an international interest has nothing to register and cannot protect itself against loss of priority to an assignee of associated rights coupled with an international interest who registers the assignment. Similarly, if associated rights initially assigned with an international interest become detached from that interest, as where the assignee of a conditional sale agreement and associated rights itself assigns the international interest while retaining part of the associated rights, these fall outside the Convention, and cease to be protected by the Convention against loss of priority, because they are no longer linked to a registered interest.

4.251. Paragraph 1 of Article 35 is confusing in two respects. First, Article 35(1), in the phrase “and is registered”, implies that it is the assignment of the associated rights that is registered, whereas such assignments are not registrable. Accordingly, Article 35(1) should be interpreted as if it read “and the assignment of that international interest is registered”. Secondly, Article 35 incorrectly requires references to a registered interest in Article 29 to be treated in two different ways: (1) as if they were references to an assignment of the associated rights and the related registered interest and (2) as if they were references to a registered assignment. This involves ascribing two different meanings to the same reference in the same Article. The first of these references is clearly an error, because an assignment (including an unregistered assignment) of associated rights and the related international interest plainly cannot be equated with a registered assignment. Accordingly, the first meaning ascribed has to be disregarded and only the second meaning applied. This suffices to give the intended effect which, transposing from Article 29(1), is
that a registered assignment has priority over a subsequently registered assignment and over an unregistered assignment. However, the priority conferred by this rule is qualified by Article 36. Moreover, where a registered assignment of associated rights does not fall within Article 36, its priority against another assignee of those rights is governed not by the Convention but by the applicable law (Article 36(3)), and the same is necessarily true of the competing claims to the related international interest itself. See Illustration 40, paragraph 4.258.

4.252. Article 29 as applied by Article 35 does not regulate priorities between competing unregistered assignments of international interests. Accordingly, in order for Article 35 to apply two conditions must be satisfied: at least one of the assignments includes the related international interest and the assignment of that international interest is registered. There is nothing to preclude the assignment of an unregistered international interest, but an assignee who fails to register the international interest as well as the assignment risks subordination (see paragraph 2.190).

Article 36 — Assignee’s priority with respect to associated rights

1. The assignee of associated rights and the related international interest whose assignment has been registered only has priority under Article 35(1) over another assignee of the associated rights:
   (a) if the contract under which the associated rights arise states that they are secured by or associated with the object; and
   (b) to the extent that the associated rights are related to an object.

2. For the purposes of sub-paragraph (b) of the preceding paragraph, associated rights are related to an object only to the extent that they consist of rights to payment or performance that relate to:
(a) a sum advanced and utilised for the purchase of the object;

(b) a sum advanced and utilised for the purchase of another object in which the assignor held another international interest if the assignor transferred that interest to the assignee and the assignment has been registered;

(c) the price payable for the object;

(d) the rentals payable in respect of the object; or

(e) other obligations arising from a transaction referred to in any of the preceding sub-paragraphs.

3. In all other cases, the priority of the competing assignments of the associated rights shall be determined by the applicable law.

Comment

4.253. If it stood alone, the effect of Article 35, through its application of Article 29(1), would be that the priority given to a registered assignment of a registered international interest over an unregistered assignment or a subsequently registered assignment of the same international interest would extend to all rights secured by or associated with the former interest. In other words, the security would be enforceable for the entirety of the secured obligations before junior assignees could resort to the object for payment of sums due to them. Article 36 qualifies that priority in two ways: first, by requiring that the contract under which the associated rights arise states that they are secured by or associated with the object and, secondly, by restricting the priority to associated rights relating to the financing transaction. For examples, see Illustrations 40 and 41, paragraphs 4.258 and 4.259. For Article 36 to apply it is necessary that Article 35 applies, in other words, that at least one of the competing assignments includes the related international interest (whether or not that interest is registered) and that at least one of the assignments has been registered.
Disclosure of international interest

By definition, associated rights are rights to payment or other performance by the debtor under an agreement – that is, a security agreement, a title reservation agreement or a leasing agreement – which are secured by or associated with the object (Article 1(c)). However, in Article 36(1)(a) the broader word “contract” is used. This is intended to cover the case where the debtor has an obligation under one agreement to perform not only the obligations under that agreement but also those incurred to the creditor under any other contract or engagement (Illustrations 40 and 42, paragraphs 4.258 and 4.260), whether or not the other contract or engagement is specifically referred to in the first-mentioned agreement (see paragraph 2.178). The right to performance of such obligations, if secured by or associated with the object, thereby becomes part of the associated rights under the original agreement (see paragraphs 4.9 and 4.215-4.218). Accordingly, in the ordinary way it would not be necessary for the subsequent loan contract to state that the rights under it were secured, this result having already been achieved by the original agreement. An assignee of the later contract which provided simply for a non-purchase-money loan and contained no reference to security would therefore have no reason to know that the loan was secured on or in any way related to an object and would thus be entirely ignorant of the existence of the international interest. It would be unfair to apply the Convention’s priority rules so as to subordinate that assignee to the rights of an earlier assignee of the associated rights and related international interest. In such a case those priority rules are disapplied and priority is left to be determined by the applicable law (Illustration 40, paragraph 4.258). This result can be avoided only by an express statement in the later contract that the associated rights assigned under that contract are secured by or associated with the object. The mere fact that the assignee has been made aware of this from other sources is irrelevant. As with Article 29, the purpose is to avoid factual disputes as to whether the assignee did or did not have knowledge of the linkage with the object.

Article 36(1)(a) addresses only a priority dispute between competing assignees of associated rights relating to the same international interest where at least one of the assignments includes the related international interest and the assignment of the international interest is registered. Article 36(1)(a) does not deal with priority as between the original holder of the international
interest who enters into a separate loan agreement not referring to security and an assignee of that agreement where there has been no other assignment of the associated rights and international interest to a prior assignee. In this case, though the fact will be unknown to the assignee unless informed of it, the assignment constitutes a partial assignment of the associated rights under the original agreement, so that the respective rights of the assignor and the assignee in the object fall to be determined, in the absence of agreement, by the applicable law (see paragraph 4.226 and Illustration 35, paragraph 4.233). The assignee may be further protected by provisions of national law requiring an assignor to disclose to its assignee facts relevant to the assigned rights, including in this case the fact that the assigned rights are associated rights under an earlier agreement in favour of the assignor and are secured by the assignor’s registered international interest. Also outside the scope of Article 36, and indeed of the Convention, is the case where there are competing assignments of associated rights relating to the same international interest and one or both of these include the international interest but neither assignment is registered. But the fact that the international interest is not registered does not affect the application of Article 36.

(2) Restriction of priority to object-related rights

4.256. The second qualification of the general priority rule is that a registered assignee of an international interest and associated rights has priority over another assignee of the same international interest and associated rights (whether a subsequent assignee or a prior assignee under an unregistered assignment) only to the extent that the associated rights are object-related within the meaning of Article 36(2). In broad terms, associated rights are object-related where they represent (a) payment of the price of the object (or in certain conditions another object), the advance of a loan for the purchase of that object or of another object, or the rental of an object (rental and price may be combined, as in the case of a lease with an option to purchase), or (b) other obligations arising from a title reservation agreement, purchase-money loan agreement or leasing agreement, including maintenance, repair and insurance, and obligations of the debtor or a third party under other contracts which are incorporated as an obligation of the debtor under the agreement (Illustration 42, paragraph 4.260). The purpose of this restriction is to avoid giving the assignee a Convention priority to rights to payment which, though secured on an object, are unrelated to its acquisition or rental or the purchase of another
ARTICLE 36 – ASSIGNEE’S PRIORITY WITH RESPECT TO ASSOCIATED RIGHTS

Object, as, for example, an advance on the security of equipment already acquired by the chargor with its own or a third party’s funds. The Convention is concerned essentially with international interests; it is no part of its purpose to regulate priorities between general receivables financiers. The priority between two assignees of non-object-related associated rights will be determined not by the Convention but by the applicable law (see Illustration 44, paragraph 4.262), including any applicable provisions of the 2001 UN Convention on the Assignment of Receivables in International Trade.

4.257. Article 36(2) lists five categories of object-related associated rights:

(a) A sum advanced and utilised for the purchase of the object

It is not sufficient that the advance is made for the purchase of the object; it is necessary that the debtor shall actually have applied it to that purpose if the Convention priority rule is to apply. Often, a relatively small part of the funds advanced will be utilised to acquire equipment to be installed on an object or spare parts. While they are not technically part of the object until installed, for the purposes of this provision, such funds will generally be considered utilised for purchase.

(b) A sum advanced and utilised for the purchase of another object in which the assignor held another international interest if the assignor transferred that interest to the assignee and the assignment has been registered

This category is designed to cover cross-collateralisation, that is, a provision in a security agreement by which the international interest secures not only the debtor’s obligations under that agreement but also obligations to repay obligations of a purchase-money type (broadly defined – see Article 36(2)(e)) under another contract or contracts (earlier or later) giving rise to another international interest which is transferred to the assignee under an assignment that is then registered. Provided that the agreement also incorporates an undertaking by the debtor to perform its obligations to the creditor under the other contract or contracts, so that the right to performance of those obligations forms part of the creditor’s associated rights under the agreement, the assignee under the registered assignment has priority over a subsequent assignee both in relation to any advance under the assigned agreement which is utilised for the purchase of the object to which that agreement relates and in relation to any advance of a purchase-money type.
under another agreement for the purchase or use of another object. See Illustration 40, paragraph 4.258.

(c) The price payable for the object

(d) The rentals payable in respect of the object

Sub-paragraphs (c) and (d) are self-explanatory.

(e) Other obligations arising from a transaction referred to in any of the preceding sub-paragraphs

In fact, the preceding sub-paragraphs refer to obligations (which may conveniently be referred to as primary obligations) rather than transactions. However, the intent is clear, namely to pick up all ancillary obligations of the debtor under a transaction involving a security agreement, title reservation agreement or leasing agreement under which the primary obligations arise, including contract and default interest and charges, funding breakage costs, enforcement costs, sums payable under indemnities, and the like. But obligations under separate contracts not connected to the object-related rights cannot be regarded as falling within sub-paragraph (e), even if the debtor under the first-mentioned agreement has undertaken in that agreement to perform them and the agreement secures their performance so that they are associated rights under that agreement as well as under the other contract, for this would be to subvert the whole purpose of the requirement that to secure priority the associated rights have to be object-related. Accordingly, unless the associated rights under the other contract are themselves object-related, an assignee of those rights will not qualify for priority. See Illustration 40, paragraph 4.258.

4.258. Illustration 40

C advances money to D for the purchase of railway rolling stock and takes a security interest in the rolling stock to secure repayment of the advance and all other obligations of D to C under the agreement (including default interest and breakage costs) or any other contract entered into between them, D undertaking in the agreement to perform also its obligations under all such other contracts. C registers its interest as an international interest and subsequently assigns its rights under the agreement, together with the international interest, by way of security, first to A1 and secondly to A2. Subsequently, C makes a further advance to D for the purchase of a second
ARTICLE 36 – ASSIGNEE’S PRIORITY WITH RESPECT TO ASSOCIATED RIGHTS

item of railway rolling stock. The loan agreement does not provide for security on the second item, nor does it refer to the fact that the further advance is secured under the earlier loan agreement. C assigns its rights under the second loan agreement to A1, who registers its assignment, and then to A3, who makes no registration. The priority of the competing assignments to A1 and A2 relating to the purchase-money advance for the first engine and other obligations of D under the first loan agreement (including default interest and breakage costs) is determined by the order of registration, both conditions of Article 36(1) being satisfied. The Convention does not determine priority as between A1 and A3 as regards the assignments of the loan agreement relating to the purchase-money advance for the second item of railway rolling stock because, while the requirements of sub-paragraph (b) of Article 36(1) are fulfilled, those of sub-paragraph (a) are not, since in the absence of any statement in the second loan agreement assigned to A3 that it is secured on the object, A3 has no way of knowing that the loan is connected to an international interest in favour of C and no reason to search the International Registry. Priority as between A1 and A3 as to the associated rights, and therefore as to the related international interest, is determined by the applicable law, not by the Convention, and the ordinary priority rule in Article 35 is displaced.

4.259. Illustration 41

The facts are as in Illustration 40 except that the second loan by C to D is for D’s general purposes and the loan agreement states that the loan is secured on the second item of railway rolling stock. A1 registers the assignment and later the assignment to A3 is registered. In this case, the requirements of sub-paragraph (a) are satisfied but not those of sub-paragraph (b), since the advance is for general purposes and is not related to an object. Accordingly, while the Convention determines priority as between A1 and A2, it does not determine priority as between A1 and A3, which is governed by the applicable law.

4.260. Illustration 42

C advances money to D for the purchase of a locomotive, and D gives C a security interest in the locomotive to secure D’s obligations under the loan agreement and under any other contract between them, D undertaking in the loan agreement to perform also its obligations under any such other contract. Subsequently, C makes a further loan to D under a new loan agreement, the
loan being made for the purchase of another locomotive. The new loan agreement states that C’s rights under it, in addition to being secured on the second engine, are also secured on the first engine under the earlier loan agreement. C’s associated rights under the first agreement include its rights to repayment under the second agreement, so that if C assigns its rights under the first agreement to A1, who registers the assignment, and later to A2, A1 has priority both as to the first advance and as to the second advance. The position would be otherwise if the first loan agreement, though securing future as well as existing indebtedness, did not incorporate an undertaking by D to fulfil its obligations under subsequent contracts, for the rights to performance of those agreements, though associated rights under such contracts, would not be associated rights under the first agreement.

4.261. Illustration 43

Lessor leases railway rolling stock to Lessee under a leasing agreement and registers its interest in the rolling stock as an international interest. The agreement provides for payment of rentals, interest on arrears and the expenses of any repossession following default. Lessor assigns its associated rights and international interest to A1 and A2 in succession and both assignments are registered. Priority as between A1 and A2 is determined by the order of registration both as to the rentals and as to any default interest and repossession expenses, these being object-related under sub-paragraphs (d) and (e) of Article 36(2).

4.262. Illustration 44

C advances money to D for D’s general purposes under a loan agreement which provides for the grant of a security interest in a fleet of trams owned by D to secure D’s repayment obligation under the loan agreement. C registers its international interest in each tram and later assigns its rights under the loan agreement by way of security, first to A1 and secondly to A2. Both assignments are registered, A1 registering its assignment first. Ordinarily, A1 would have priority under Article 35 as the first to register, but as the associated rights assigned to A1 are not related to an object as required by Article 36(1)(b), the Convention priority rules do not apply and the priority as between A1 and A2 is determined by the applicable law both as to the associated rights and as to the related international interest.
Article 37 — Effects of assignor’s insolvency

The provisions of Article 30 apply to insolvency proceedings against the assignor as if references to the debtor were references to the assignor.

Comment

4.263. The effect of this Article is that if insolvency proceedings are instituted against the assignor then the assignee’s title to the assigned international interest and to the associated rights (see Article 35(2)) is to be treated as effective in the proceedings if registered in the International Registry prior to the commencement of the insolvency proceedings or if otherwise effective under the applicable law. “Effective” means that the proprietary effect of the assignment is recognised and will be respected in the insolvency of the assignor as overriding the claims of the assignor’s general creditors and as protected against attack by the insolvency administrator or other claimants. This, however, is subject to the rules of insolvency law and the procedure specified in Article 30. If, for example, the assignment were made in fraud of the assignor’s creditors, nothing in the present Article would preclude the assignment from being set aside under a provision of the applicable insolvency law invalidating assignments in fraud of creditors. But rules of insolvency law other than those relating to the avoidance of preferences and transfers in fraud of creditors may not be invoked to defeat or qualify the registered assignee’s title to the international interest and associated rights. The position is otherwise if the assignment was not registered. See paragraph 4.209.

Article 38 — Subrogation

1. Subject to paragraph 2, nothing in this Convention affects the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law.
2. The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

Comment

4.264. Chapter IX of the Convention deals only with transfers of associated rights and the related international interest by way of assignment, by which is meant a contractual assignment, as opposed to an assignment by operation of law (Article 1(b)). A right of subrogation is conferred by Article 9(4) of the Convention and national laws commonly confer a separate right of subrogation, typically as the result of a payment to the creditor by a third party such as a guarantor or insurer, who then stands in the shoes of the creditor. Subrogation may occur either by operation of law (as in the case of a discharge of the debtor’s secured obligations by a guarantor) or by contract between the creditor and the third party. This Article makes it clear that the rights of the subrogee under the applicable law are unaffected. To the extent that those rights include succession to the international interest previously held by the creditor, the subrogee becomes entitled to have such rights entered in the International Registry (see Article 16(1)(c)). For this purpose there seems no reason why the right of subrogation conferred by Article 9(4) should not be regarded as conferred by the applicable law and be registrable accordingly (see paragraph 2.83). In principle, a subrogee stands in the position of the original holder of the interest and acquires the same priority as that holder in relation to other holders (see Illustration 45, paragraph 4.266), so that registration of the subrogation is unnecessary in order to protect a subrogee of a registered international interest against a holder of an unregistered or subsequently registered interest or against a subrogee of such holder. But as between competing subrogees acquiring rights to the same international interest (a position normally likely to arise only where the applicable law recognises a right of subrogation for partial performance by the party claiming the right), priority will be determined by the applicable law, though if the priority is varied
by a subordination agreement this will not bind an assignee from the subordinated party unless the subordination was registered (Article 38(2)).

4.265. Paragraph 2 permits subordination between a subrogee and the holder of a competing interest. These subordinations are binding upon the parties and bind third parties, when registered in advance of subsequent interests. This extends the rule set out in Article 29(5) to this context, reflecting the Convention’s approach of bringing complex inter-creditor priorities within its terms on the basis of (a) party autonomy, where third parties are unaffected, and (b) first-in-time registration, where third parties are affected. There may be an agreement for subordination of a prospective subrogation, but since prospective subrogations do not constitute a registrable category there can be no registration of a subordination agreement relating to a prospective subrogation (see Illustration 46, paragraph 4.267). This does not matter as between the parties to the subordination agreement but could affect priorities vis-à-vis an assignee of the subordinated subrogee (see paragraph 4.260). The parties to the agreement could, however, stipulate that on the subrogation taking effect, the subordinated creditor may not register its acquisition of the international interest by subrogation without simultaneously registering the subordination.

4.266. Illustration 45

C1 advances money to D on the security of a locomotive and registers its international interest. Subsequently C2 makes a loan to D on the security of the same locomotive and a guarantee by G. C2 registers its international interest. D defaults in payment of sums due under the second loan agreement and C2 demands payment from G under its guarantee. G pays in full and under the applicable law becomes subrogated to the rights of C2, which are subordinate to those of C1.

4.267. Illustration 46

D enters into two security agreements, with C1 and C2, to secure the repayment of advances for the acquisition of a locomotive. C1 and C2 register their respective international interests, C1 registering first. The debt owing to C1 is guaranteed by bank Y. D defaults on the loan to C1 and Y is called upon to make payment on its guarantee, upon which it would acquire C1’s international interest by subrogation under the applicable law. Meanwhile C2 has been asked
to make a further advance to D but will only do so if C1’s prior-ranking interest is subordinated. Until Y has made payment under the guarantee any subordination must be agreed between C2 and C1, not between C2 and Y, because it is not possible to register a prospective acquisition of an international interest by subrogation or a subordination of that interest.

CHAPTER X

RIGHTS OR INTERESTS SUBJECT TO DECLARATIONS
BY CONTRACTING STATES

Article 39 — Rights having priority without registration

1. A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically:

   (a) those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State’s law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and

   (b) that nothing in this Convention shall 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 payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

2. A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.
3. A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession.

Comment

4.268. Paragraph 1(a) of this Article is confined to non-consensual rights or interests (as defined by Article 1(s)) in respect of which the relevant Contracting State has not made a declaration under Article 40 and which are therefore not registrable in the International Registry. Non-consensual rights or interests covered by a declaration under this Article have priority over registered interests and by necessary implication unregistered international and other interests as well (see paragraph 2.206). However, the priority is not a Convention priority but one given by the law of the declaring State. It is therefore not entitled to recognition in another Contracting State unless the conflict of laws rules of that State so require.

4.269. The non-consensual rights or interests capable of a declaration under the present Article are limited to those which, under the law of the Contracting State, have priority without registration over an interest equivalent to that of the holder of an international interest, that is, equivalent to the interest of a chargee, conditional seller or lessor. Such non-consensual rights or interests may be in respect of either secured or unsecured claims. The Convention may not be used as a vehicle to expand such 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. The priority of non-consensual
rights may thus be retained or restricted, in either case, by a declaration, which may be general (including contemplation of future preferences) or specific. The effect of not making a declaration, or not covering a class, under Article 39 and not pursuing the alternative course of registering pursuant to a declaration under Article 40 (see paragraphs 4.281 et seq.) is that a registered international interest will have priority. The basic principle is that of retention of priority by publicising preferred non-consensual rights and interests, thus permitting financing parties to assess and price these risks.

4.270. Examples of rights under Article 39(1)(a) are non-consensual liens in favour of repairers for repairs to objects in their possession or for unpaid wages due from insolvent employers (which, though usually unsecured, are in some States given priority even over the claims of secured creditors) and non-consensual liens on railway rolling stock for unpaid terminal charges. Another possible example is a lien for unpaid taxes. In such a case, the Contracting State, if it has not included such claims in a declaration under Article 40 (as will usually be the case as regards liens for unpaid taxes), may by declaration under the present Article ensure that such claims, though not registered in the International Registry, have priority even over a registered international interest (see Illustration 47, paragraph 4.279). Even where a Contracting State’s declaration identifies the category of non-consensual right or interest covered, this will not of itself suffice to show whether in a particular case a non-consensual right or interest exists, because the law of the declaring State will almost invariably impose limits and other conditions on the priority given by its law, as, for example, by restricting the amount of unpaid wages enjoying the priority.

4.271. Rights of arrest or detention given by the law of a State for payment of amounts due to a provider of public services, e.g. to arrest or detain an item of railway rolling stock for unpaid charges, can be covered by a declaration under paragraph 1(a) if given priority under the relevant national law over interests equivalent to that of the holder of a registered international interest. Alternatively, a Contracting State can make a declaration under Article 39(1)(b) (see paragraph 4.275). This is the only way of protecting rights of arrest or detention given by contract, since these fall outside Article 39(1)(a). The words “such entity” in the third line of Article 39(1)(b) omit reference to the State itself, but this is clearly a slip (see paragraph 2.207) and the phrase should be construed as if it read “such State or State entity”. As with rights under Article
39(1)(a) (see paragraph 4.269), such rights of detention or arrest are given not by the Convention but by the law of the State in question. Such rights are therefore not entitled to recognition in another Contracting State unless the conflict of laws rules of that State so require.

4.272 While the definition of non-consensual right or interest includes one securing an obligation to an intergovernmental or private organisation, to qualify for a declaration under Article 39(1)(a) or (b), the priority (in the case of (1)(a)) or right of detention or arrest (in the case of (1)(b)) must arise under the national law of the declaring State. No declaration may be made by an intergovernmental or private organisation, nor may it be made by a State relating to obligations to such an organisation which do not enjoy priority, or attract a right of arrest or detention, under national law.

4.273. The purpose of requiring the declaration is to alert holders and prospective holders of international interests to categories of non-consensual right or interest which, contrary to the general rule in Article 29(1), will have priority even though unregistered and, indeed, even if unsecured. Two conditions are necessary to attract the application of this Article. First, the equivalent consensual interest must be one over which the non-consensual right or interest has priority under the applicable law. Secondly, the Contracting State must declare the non-consensual right or interest as one which is to have priority over a registered international interest. It is therefore open to a Contracting State to make a declaration covering a narrower range of non-consensual rights or interests than that provided under its law for an equivalent interest, but not a broader range.

4.274. It is not necessary for a declaration to list such categories individually. It would, for example, be open to a Contracting State to declare that all non-consensual rights or interests which under the law of that State have priority over the rights of secured creditors are to have priority, without registration, over registered international interests.

4.275. Article 39(1)(b) empowers a Contracting State to make a declaration preserving the right of the provider of public services (whether itself a State, State entity, intergovernmental organisation or private organisation) to arrest or detain an object for payment of amounts directly related to those services in respect of that object or another object, for example, one in the same fleet. But
a declaration may not be expressed to cover “another object” unless the declaring State’s law so provides. This sub-paragraph is of particular importance in those cases where the right of arrest or detention is given by contract and cannot, therefore, be protected by a declaration under Article 39(1)(a). Article 39(1)(b) is drafted in terms wide enough to cover charges collected by an intergovernmental organisation in its own name, but the declaration can only be made by a Member State and the right of arrest or detention must be given by the law of that State. There are some small drafting infelicities in Article 39(1)(b), such as the word “other” before “private provider” when the preceding parties are public providers (contrast the definition of “non-consensual right or interest” in Article 1(s), which does not use the word “other”); and the reference to parties to whom payment of amounts is due should match the earlier enumeration and include the State itself, not merely a State entity. Again, the definition of “non-consensual right or interest” shows the intention that obligations owed to a State should be covered. Article 39(1)(b) should be construed accordingly. A Contracting State should be careful not to make a declaration under Article 39(1)(b) covering services in relation to an object other than that detained unless the law of that State permits it.

4.276. A declaration may be modified from time to time, for example, by adding, removing or modifying categories of non-consensual right or interest specified in the declaration prior to its modification.

4.277. The deposit of a declaration or modification of a declaration cannot affect the priority of international interests already registered (see Illustration 47, paragraph 4.279). This follows the fundamental principle that the holder of a registered international interest should be entitled to rely on what is on the International Registry at the time of its registration. However, by exception to this rule it is open to a Contracting State to make a declaration at the time of its ratification, etc., securing the priority of a non-consensual right or interest over an international interest registered prior to the ratification.

4.278. A Contracting State may also make a declaration that is expressed to cover not only categories of non-consensual right or interest then having priority under its national law but any new categories that are created in the future. This avoids the need to deposit a new declaration, or a modification of an existing declaration, to add a new category each time there is a change in the law.
4.279. **Illustration 47**

Under the law of Domitia, a Contracting State, claims for taxes have priority over the claims of secured creditors. Before Domitia has deposited a declaration under this Article covering such claims, D gives C1 a charge over identified railway rolling stock to secure an advance and C1 registers the charge as an international interest. Later, Domitia makes a declaration under this Article that claims for unpaid taxes, capped at six per cent of the proceeds of railway rolling stock, are to have priority over a registered international interest. Thereafter, D gives a second charge over the same rolling stock to C2, from whom it has also borrowed money, and C2 registers the charge as an international interest. Some time afterwards D, having made default in respect of both loans, goes into insolvent liquidation, and C1 sells the rolling stock. The preferential claims for unpaid taxes are subordinate to the charge in favour of C1 but have priority over the charge to C2 up to the six per cent cap.

4.280. **Illustration 48**

Under the laws of Domitia, a railway authority has the right to detain an item of railway rolling stock for unpaid terminal charges accrued in relation to the use of that specific item. Domitia makes a declaration under Article 39(1)(b) that purports to cover a right of detention for amounts due to a railway authority relating to the entire fleet of railway wagons. Domitia International Railways owes 100,000 euro to a railway authority in Domitia in respect of the terminal charges for two railway wagons, wagon 1 and wagon 2. Of that 100,000 euro owed, 70,000 euro relates to the use of wagon 1 and 30,000 euro relates to the use of wagon 2. The railway authority in Domitia detains wagon 2. It may only detain that wagon until 30,000 euro is paid, not 100,000 euro. If the government attempts to arrest wagon 1 in Ruritania in order to recover the additional 70,000 euro, another Contracting State, the law selected by the conflicts of laws rules of Ruritania, not the Convention, will determine whether to recognise such asserted extraterritorial right of detention.
Article 40 — Registrable non-consensual rights or interests

A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.

Comment

4.281. This Article enables a Contracting State to extend the application of the Convention so as to allow designated categories of non-consensual right or interest to be registered as if they were international interests. Examples are judgments or orders for the attachment of the debtor’s equipment, whether by way of execution of a judgment debt or otherwise. State liens for unpaid taxes have also been made the subject of declarations by Contracting States. In contrast to Article 39, which permits a general description of categories in a declaration made under that Article, the present Article requires the categories of registrable non-consensual right or interest to be listed. Where a non-consensual right or interest within a registrable category is registered in the International Registry, it has effect thereafter in all respects as if it were an international interest, and therefore has priority over a subsequently registered international interest or an unregistered interest (Article 29(1)). If it is not registered it will be subordinate to a registered international interest, but its priority as against an unregistered interest is not governed by the Convention but is to be determined by the applicable law.

4.282. A Contracting State may at any time modify a declaration, as by adding, removing or altering categories.
ARTICLE 42 – CHOICE OF FORUM

CHAPTER XI

APPLICATION OF THE CONVENTION TO SALES

Article 41 — Sale and prospective sale

This Convention shall apply to the sale or prospective sale of an object as provided for in the Protocol with any modifications therein.

Comment

4.283. The purpose of this Article is to enable a Protocol to allow outright buyers of equipment to obtain the benefit of the registration system and the priority secured by registration. It also permits use of the Protocol to allow registration of a sale which has only to conform to the formal requirements of the Protocol. However, some parts of the Convention – in particular, the provisions of Chapter III dealing with default remedies – are not appropriate to outright sales. Thus the Aircraft and Space Protocols, in extending the Convention to sales and prospective sales (Article III), do not include Chapter III in the list of applied provisions. The Luxembourg Protocol does not extend the Convention to sales.

CHAPTER XII

JURISDICTION

Article 42 — Choice of forum

1. Subject to Articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties.
2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.

Comment

4.284. This Article is a general jurisdiction provision covering “any claim” under the Convention. It embodies the general principle of party autonomy. There is no other Article in the Convention providing for the exercise of general jurisdiction. The selected jurisdiction is exclusive. It is, however, open to the parties to agree that the jurisdiction selected is to be non-exclusive. Where exclusive, the provision precludes courts of other Contracting States from accepting or asserting jurisdiction. The Article is concerned with choice of jurisdiction by parties to a “transaction”, a term which is not defined but covers not only an agreement creating or providing for an international interest but any other contract falling within the scope of the Convention, including a subordination agreement, an assignment and a contractual subrogation. The Article does not, of course, confer jurisdiction over disputes with third parties. A choice of law agreement must be in writing or otherwise in accordance with the law of the chosen forum.

4.285. There are, however, two qualifications. First, this Article does not exclude any jurisdiction conferred by Article 43 in relation to relief under Article 13 (relief pending final determination). Secondly, it does not empower the parties to confer jurisdiction (exclusive or non-exclusive) to make orders against the Registrar where the court selected is not in a place where the Registrar has its centre of administration.

4.286. The parties are free to confer jurisdiction on the courts of any Contracting State, whether or not it has a connection with the parties or the transaction. It is not necessary for the agreement to refer specifically to claims “under the Cape Town Convention”. It suffices that the forum selection clause covers all matters arising in connection with the agreement, which would include claims under the Convention as well as those outside it. This provision overrides contrary national law. But under Article 42(2), they must do so in writing or otherwise in accordance with the formal requirements of the lex fori. Article 42(2) was inserted in order to ensure conformity with Article 23 of the European Community Council Regulation No. 44/2001 of 22 December 2000.
on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels I") which replaces the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and binds all Member States of the European Community. It is only requirements as to form which are governed by the lex fori. Issues of substantive validity of the forum selection agreement are governed by the applicable law.

4.287. The Convention does not, of course, deal with the conferment of jurisdiction on the courts of a non-Contracting State. In such a case, the effectiveness of the jurisdiction clause is determined by the lex fori and it is for the forum court to decide whether it will take jurisdiction.

4.288. Article 44 is not confined to the courts of a Contracting State, thereby covering the possibility that the Registrar will have its centre of administration in a non-Contracting State. See paragraph 4.303.

4.289. The Convention makes no provision for cases where the parties have not made a choice of forum and the claim is not for interim relief under Article 13 or for an order against the Registrar under Article 44 but is, for example, for breach of a duty imposed on the creditor under Article 8 or Article 9 or is a claim by a person other than the debtor for the correction or discharge of a registration, as where a junior chargee wishes to have a satisfied prior charge recorded as discharged. Jurisdiction in such cases is determined by the lex fori, including any external rules having effect under the lex fori by reason of ratification of an international convention or by a regulation made by the European Community as regards a Member State. A provision in the draft Convention expressly providing for jurisdiction under the lex fori of a Contracting State was removed at the diplomatic Conference. This leaves it free to a court of a non-Contracting State to make orders under the Convention in cases outside the Convention jurisdiction rules, for example, where the applicable law is the law of a Contracting State.

4.290. Illustration 49

Creditor and Debtor have entered into a security agreement in writing creating a security interest over railway rolling stock. The interest is duly registered as an international interest. The agreement provides that the
courts of Ruritania are to have jurisdiction over all claims arising under the Convention and all other disputes arising under or in connection with the agreement. Debtor is situated in Urbania, the rolling stock is currently in Ruritania. Creditor institutes proceedings in Urbania for loss caused by damage to the rolling stock through the negligence of Debtor and also applies to a court in Ruritania for an order under Article 13 permitting it to take possession of the rolling stock for default in payment. Debtor contends that the Urbanian courts have no jurisdiction, because the agreement confers jurisdiction on the courts of Ruritania and by Article 42(1) such jurisdiction is deemed to be exclusive unless otherwise agreed. The contention that the Urbanian courts have no jurisdiction must be rejected. An exclusive choice of jurisdiction cannot oust the concurrent jurisdiction of the courts of another Contracting State in which the rolling stock is situated to make orders under Article 13(1)(b) (see Articles 42(1) and 43(1)). The claim in negligence is not a claim covered by the Convention and is a matter to be determined by the lex fori in the light of the exclusive jurisdiction clause.

Article 43 — Jurisdiction under Article 13

1. 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 situated have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(4) in respect of that object.

2. Jurisdiction to grant relief under Article 13(1)(d) or other interim relief by virtue of Article 13(4) may be exercised either:

   (a) by the courts chosen by the parties; or

   (b) by the courts of a Contracting State on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.
3. A court has jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 13(1) will or may take place in a court of another Contracting State or by arbitration.

Comment

4.291. This Article is confined to jurisdiction to entertain claims by a creditor for speedy judicial relief under Article 13(1) pending final determination of the creditor’s claim and other forms of interim relief available under the lex fori. The forms of relief set out in Article 13(1)(a), (b) and (c), together with other forms of interim relief in respect of the object (see paragraph 4.288), are seen as being of an in rem nature, and thus dependent on party agreement or on the object being within the territory of the Contracting State from whose courts relief is sought. By contrast, relief under Article 13(1)(d) is conceived as operating in personam, so that in the absence of party agreement what is required is that the debtor be situated in the territory of the forum State and the enforcement sought limited to that territory by the terms of the order granting relief. In either case, the jurisdiction is concurrent with that chosen by the parties under Article 42(1).

4.292. Jurisdiction to grant other forms of interim relief under Article 13(4) depends on the nature of the relief sought. If it is interim relief in respect of the object, then it shares the in rem characteristic of relief under Article 13(1)(a), (b) and (c) and falls within the concurrent jurisdiction of the courts of the Contracting State in the territory of which the object is situated. If, on the other hand, it is interim relief which is not in respect of the object, as, for example, a claim for an interim payment by the debtor towards alleged arrears under the agreement, then under Article 43(2) that is a matter for the courts of the Contracting State on the territory of which the debtor is situated, which have concurrent jurisdiction with the courts of the jurisdiction selected by the parties under Article 42.

4.293. The concurrent jurisdiction of the courts of the Contracting State to grant relief under Article 13 where the object is situated (Article 43(1)) or where the debtor is situated (Article 43(2)(b)) cannot be excluded by a choice of forum clause under Article 42(1) (see paragraph 4.285), though it is for the creditor to decide whether to invoke that jurisdiction.
4.294. Article 43 does not provide any test for determining the situation of the debtor, nor is Article 4(1) directly applicable, for the alternative tests of situation laid down in that Article are solely for the purposes of Article 3(1). However, there is no reason why a court should not have regard to these in determining whether the debtor is situated within the territory of that court’s State for the purpose of the exercise of in personam jurisdiction.

4.295. It is not necessary that the court from which relief is sought under Article 13 shall be the tribunal making the final determination of the claim. This may be a court in another Contracting State or a tribunal having its seat in any State. Article 43(3) is silent as to the position where the final determination is to be made by the court of a non-Contracting State. It would seem that in such a case, there is no reason why the courts of a Contracting State should not be able to grant relief under Article 13.

4.296. Under Article 55, a Contracting State may declare that it will not apply the provisions of Article 13 or Article 43 or both, wholly or in part. A Contracting State should take care to ensure that any decision as to a declaration under one of these Articles is consistent with the decision under the other. For example, a Contracting State making a declaration excluding Article 13 will also want to exclude Article 43.

Article 44 — Jurisdiction to make orders against the Registrar

1. The courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.

2. Where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration, the courts referred to in the preceding paragraph shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order
directed to the Registrar requiring the Registrar to discharge the registration.

3. Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration, the courts referred to in paragraph 1 may direct the Registrar to take such steps as will give effect to that order.

4. Except as otherwise provided by the preceding paragraphs, no court may make orders or give judgments or rulings against or purporting to bind the Registrar.

Comment

4.297. Article 44(1) confers on the courts of the place in which the Registrar has its centre of administration exclusive jurisdiction to award damages or make orders against the Registrar. There are various reasons for excluding the jurisdiction of other courts. In the first place, the Registrar would ex hypothesi be outside the territorial jurisdiction and control of those courts. Secondly, to allow such orders would be incompatible with the international character of the Registrar’s functions. Thirdly, the Registrar would be exposed to multiple proceedings in different States, with consequent burdens and expense as well as the risk of conflicting orders by courts in different jurisdictions. Finally, a challenge to a registration will normally be based on issues between the parties, not with the Registrar. It is for these reasons that this Article confers exclusive jurisdiction on the courts of the place where the Registrar has its centre of administration. However, this applies only to claims against the Registrar. Claims by the Registrar, for example for unpaid fees, fall within the ordinary jurisdictional rules of the forum. Where a foreign court having jurisdiction under the Convention or, in the case of a national interest, a court of competent jurisdiction, has made an in personam order requiring a person to procure amendment or discharge of a registration (e.g. because under the applicable law the debtor had no power to dispose of the object to which the registration relates), the court where the Registrar has its centre of administration may (but is not obliged to) make the order of the foreign court
effective by directing the Registrar to make the appropriate amendment, registration or discharge. It should be noted that the jurisdiction of such court under the Convention is not exercisable over parties other than the Registrar. In cases where the Registrar is not the party of interest and the dispute concerns the parties to the agreement, as where one party asserts that a registration against its asset was improperly effected by the other party, the court where the Registrar has its centre of administration has no jurisdiction over the parties under the Convention unless they have so agreed under Article 42(1) or Article 43, and cannot deal with a claim to have the registration discharged unless a court of competent jurisdiction has made an *in personam* order to that effect. There could, of course, be cases where the court in the Registrar’s country has jurisdiction over the parties under its general jurisdiction rules, as where the defendant is based in that country, but this is distinct from its Convention jurisdiction.

4.298. Article 44(2) and (3) make specific provision for the following awards and orders against the Registrar:

(a) awards under Article 28 for payment of compensatory damages for errors, omissions and system malfunction;

(b) orders under Article 44(2) directing the Registrar to discharge a registration where the discharge is one to which a debtor is entitled under Article 25(1) or an intending debtor or intending assignor is entitled under Article 25(2) and the creditor fails to take the necessary action or has ceased to exist or cannot be found;

(c) orders under Article 44(3) to amend or discharge a registration following the failure of the registrant to comply with an order of a foreign court having jurisdiction under the Convention or, in the case of a national interest, a court of competent jurisdiction, directing the registrant to effect the amendment or discharge of the registration.

4.299. There are, however, various situations not covered by Article 44(2) and (3). For example:

(a) Article 44(2) requires an application by the debtor or intending debtor to procure discharge of a registration and does not extend
to an application by other interested parties, for example, an intending assignor who has invoked Article 25(2) of the Convention or a junior chargee who wishes to have a satisfied senior charge recorded as discharged;

(b) Article 44(3) refers to non-compliance with “an order of a court having jurisdiction under this Convention”, but in the absence of party choice under Article 42 no court has jurisdiction under the Convention (though it may have under its own jurisdiction rules) to make an order to enforce obligations under Article 25, or, indeed, under any Article other than Article 13 (as stated above, the proposed Article on general jurisdiction was dropped at the diplomatic Conference);

(c) Articles 25 and 44(2) and (3) give no right to a creditor wrongly recorded as subordinated to another creditor to have the registration corrected;

(d) apart from the award of damages under Article 28, there is no express provision in Article 44 for orders requiring the Registrar to comply with its obligations under the Convention.

4.300. As regards cases (a), (b) and (c) above, since no court other than that of the place of the Registrar’s centre of administration has jurisdiction to make orders against the Registrar, an aggrieved party, though able to obtain an in personam order from a court of competent jurisdiction requiring the defendant to procure the amendment or discharge of the incorrect registration, would, in the absence of a broad reading of Article 44(1), have no means of procuring correction of the registration if the order so obtained were not complied with. The courts of the Registrar’s jurisdiction should therefore be treated as having (under paragraph 1 and by analogy with paragraph 3 of the Article) a residual power, on the application of any person who has obtained an in personam order as described above or at the request of the court making the order, to direct the Registrar to amend or discharge an improper or incorrect registration. It is likely that resort to this residual jurisdiction will only rarely be necessary; and the condition that the applicant must first have obtained an order in its favour from a court of competent jurisdiction ensures that the courts of the State where the Registrar has its centre of administration (which have jurisdiction under the Convention only over the Registrar, not over other parties) are not
themselves involved in the determination of registration issues arising between the parties, this falling within the province of courts having jurisdiction under the Convention or under the *lex fori*. Of course, a court where the Registrar is based may be able to adjudicate disputes between the parties under their general jurisdiction based, for example, on the defendant having its place of business within the jurisdiction of the court, but that will not attract the court’s powers under the Convention.

4.301. Cases within paragraph 4.299(d) above should also be regarded as falling within the residual jurisdiction of the courts where the Registrar has its centre of administration. Thus, Article 44(1) should be interpreted as conferring exclusive jurisdiction on the Registrar’s court to make orders to enforce the Registrar’s duties under the Convention, for example, its duty (a) to issue a search certificate to a person making a search in due form and paying the requisite fee, and (b) to comply with directions properly given to it by the Supervisory Authority under Article 17 of the Convention. The fact that an interest registered in the International Registry is not an international interest, and was therefore not registrable under the Convention, far from depriving the court of jurisdiction under Article 44 to discharge the registration, is a good ground for the court to make a discharge order.

4.302. There remain obligations of the Registrar arising independently of the Convention, for example, under contracts with the Supervisory Authority or with the suppliers of goods or services. Jurisdiction over claims for breach of such obligations is a matter to be dealt with under the domestic law of the State where the Registrar has its centre of administration.

4.303. There is no requirement that the Registrar should have its centre of administration in a Contracting State, though problems could arise if it did not. This is a factor which the Supervisory Authority can take into account in deciding whom to appoint as Registrar. If the Registrar were in the jurisdiction of a non-Contracting State, jurisdiction would have to be conferred by the law of that State independently of the Convention.
Article 45 — Jurisdiction in respect of insolvency proceedings

The provisions of this Chapter are not applicable to insolvency proceedings.

Comment

4.304. Since insolvency proceedings are placed outside the scope of this Chapter, it is in theory open to the insolvency court of another jurisdiction to make orders direct against the Registrar if having jurisdiction to do so under the lex concursus. It is thought that in practice, it is unlikely to have jurisdiction or, if it has it, to exercise it, though where appropriate it could make an order in personam in the same way as any other court and invoke the assistance of the courts of the Registrar’s jurisdiction to procure amendment or discharge of a registration by the Registrar.

CHAPTER XIII

RELATIONSHIP WITH OTHER CONVENTIONS

Article 45 bis — Relationship with the United Nations Convention on the Assignment of Receivables in International Trade

This Convention shall prevail over the United Nations Convention on the Assignment of Receivables in International Trade, opened for signature in New York on 12 December 2001, as it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.

Comment

4.305. This Article was inserted subsequent to the diplomatic Conference pursuant to an Annex approved by the Conference which provided for its
insertion after deposit of the UN Convention with the Secretary-General of the United Nations. Its purpose is to make explicit what is implicit in Article 38(1) of the UN Convention, namely, that to the extent of any inconsistency between the two Conventions, this Convention supersedes the UN Convention. While such an inconsistency could occur in the context of associated rights related to an international interest in an aircraft object, railway rolling stock or space assets and assigned with the international interest, the provisions of the two Conventions will usually lead to the same result.

4.306. The impact of this Article on the UN Convention is very limited, reflecting the fact that the Cape Town Convention is concerned with international interests, not with assignments of receivables as such. So the Convention does not cover assignments detached from the related international interest, and under Article 36(3) it defers to the UN Convention or other applicable law as regards associated rights which do not satisfy the conditions stated in Article 36(1).

**Article 46 — Relationship with the UNIDROIT Convention on International Financial Leasing**


**Comment**

4.307 Article XIX of the Luxembourg Protocol provides that the Convention supersedes the Leasing Convention as it relates to railway rolling stock.
CHAPTER XIV

FINAL PROVISIONS

Article 47 — Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature in Cape Town on 16 November 2001 by States participating in the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held at Cape Town from 29 October to 16 November 2001. After 16 November 2001, the Convention shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article 49.

2. This Convention shall be subject to ratification, acceptance or approval by States which have signed it.

3. Any State which does not sign this Convention may accede to it at any time.

4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.

Comment

4.308. This Article applies from the time of adoption of the text of the Convention (Article 24(4) of the Vienna Convention), that is, from 16 November 2001. The effect of Article 47(3) is that a non-signatory State may accede before as well as after the Convention comes into force.

4.309. At the closing ceremony of the diplomatic Conference, 20 States signed the Convention and Aircraft Protocol. There have since been additional signatories and numerous ratifications and accessions. UNIDROIT as Depositary has prepared Model Instruments of Ratification for the guidance of States intending to ratify the Convention and Protocols.
Article 48 — Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.

Comment

4.310. This Article enables a Regional Economic Integration Organisation (“REIO”) constituted by sovereign States (for example, the European Community) to sign, accept, approve or accede to the Convention, but only to the extent it has exclusive competence (see paragraph 4.311) over matters covered by the Convention. The European Community, for example, has
issued two regulations, the Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “Insolvency Regulation”) and the Brussels Regulation on jurisdiction and judgments (“Brussels I”), which touch on matters covered by the Convention. Only the Community and not its Member States has competence to conclude international agreements which affect those regulations. For this reason, it was necessary to include an appropriate provision permitting the European Community (and any other REIO in a similar situation) to become a Party to the Convention. Similar provisions are included in the Protocols.

4.311. In view of the importance of this matter, REIOs are to declare their sphere of competence at the time of adherence to the Convention or, as regards matters covered by the Luxembourg Protocol in relation to railway rolling stock, at the time of adherence to the Protocol (Article XXII(2)). They must specify the matters governed by the Convention in respect of which “competence has been transferred to that Organisation by its Member States.” Thus, the declaration should be made only where, as the result of the transfer of competence, the REIO has exclusive competence in relation to the specified matters and Member States no longer have independent authority to legislate concerning them.

4.312. References to a Contracting State, etc., apply to an REIO where the context so requires. There are in fact very few provisions of the Convention where the context does so require. However, there are some provisions affecting REIOs in the same way as States, for example, receipt of communications concerning future Protocols under Article 51, and denunciation of the Convention under Article 59. Moreover, an REIO can make declarations under the Convention, as has been done by the European Union in making declarations pursuant to Article 48(2) and Article 55 of the Convention and Article XXVII(2) and Article XXX(5) of the Aircraft Protocol, and a similar declaration is likely to be made under the Luxembourg Protocol. See paragraphs 2.233 – 2.234, 3.104.
Article 49 — Entry into force

1. This Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies:

   (a) as from the time of entry into force of that Protocol;
   (b) subject to the terms of that Protocol; and
   (c) as between States Parties to this Convention and that Protocol.

2. For other States this Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of their instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies and subject, in relation to such Protocol, to the requirements of sub-paragraphs (a), (b) and (c) of the preceding paragraph.

Comment

4.313. Paragraph 1 provides for entry into force for those States whose ratifications are effective to bring the Convention into force; paragraph 2 concerns States adhering to the Convention after it has entered into force.

4.314. This Article states the controlling power of the relevant Protocol. Paragraph 2 states that the Convention takes effect subject to the terms of the Protocol. This provision is complementary to Article 6, which provides that the instruments are to be read together as a single instrument and that, in the case of a conflict, the Protocol controls.

4.315. The Convention requires three ratifications in order to enter into force but even then comes into force only as regards a category of object to which a Protocol applies and then only when the Protocol has come into force. So
ARTICLE 50 – INTERNAL TRANSACTIONS

although the deposit of the third instrument of ratification by Nigeria on 16 December 2003 would have brought the remaining provisions of the Convention into force on 1 April 2004 if any of the provisions of a Protocol had by then entered into force, this was not the case. It follows that 1 April 2004 has no significance for the purposes of the Convention, which came into force only on 1 March 2006, when the Aircraft Protocol came into force (see Article XXVIII of the Aircraft Protocol) and then only as regards aircraft objects. Accordingly, the requirement of three ratifications for the Convention serves simply to emphasise that the Convention is a separate instrument which itself requires ratification by three States and is not brought into force simply by ratification of a Protocol. That is emphasized by Article XXVI(5) of the Aircraft Protocol and Article XXI(5) of the Luxembourg Protocol, which provide that a State may not become a Party to the Protocol unless it is or becomes a Party also to the Convention. The Convention is not yet in force as regards railway rolling stock. There are a few Final Provisions which are unrelated to objects and operate independently of a Protocol, including 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). Under Article 24 of the Vienna Convention most, if not all, these provisions came into force on the adoption of the text of the Convention on 16 November 2001.

4.316. The provisions of the Convention relating to objects cannot operate independently of the relevant Protocol, so that as regards these it does not come into force until the Protocol has come into force. The Aircraft Protocol, which required eight ratifications, came into force on 1 March 2006, on which date all the remaining provisions of the Convention came into effect. The Luxembourg Protocol, which requires four ratifications, and the Space Protocol, which requires 10 ratifications, are not yet in force.

Article 50 — Internal transactions

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of objects or some of them.
2. Notwithstanding the preceding paragraph, the provisions of Articles 8(4), 9(1), 16, Chapter V, Article 29, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.

3. Where notice of a national interest has been registered in the International Registry, the priority of the holder of that interest under Article 29 shall not be affected by the fact that such interest has become vested in another person by assignment or subrogation under the applicable law.

Comment

4.317. The requirements of mobility and internationality are considered inherent in the nature of the equipment covered by the Convention and are not specifically stated. This allows the possibility of the Convention applying to a transaction which is purely internal in that all the parties and the object itself are situated in the same Contracting State at the time of conclusion of the contract (see Article 1(n)). Such a situation will not occur as regards objects in space, and is unlikely to occur in the case of aircraft objects but could arise as regards railway rolling stock, for which Article XXIX(2) of the Luxembourg Protocol makes special provision (see paragraph 4.320). The practical problem is that a transaction which is internal when the agreement is made may become international the next day as the result of movement of the object from one country to another. Moreover, the creditor may have no means of knowing whether or not this has occurred. Further, a transaction which is international can derive from one which is internal, as where a leasing agreement is domestic but the lessee grants a sub-lease to a party in another Contracting State. Hence the Convention takes a practical approach in covering all transactions within Article 2 even if in some cases this catches internal transactions. Nevertheless it is open to a Contracting State to make a declaration under Article 50(1) that the Convention is not to apply to a transaction which is an internal transaction in relation to that State with regard to all types of object or some of them. Such a declaration may be made at the time of ratification, etc., but if not made then it may be made subsequently under Article 57. The effect is the same as the more concise formulation in Articles 39 and 40 that the declaration may be
made at any time. Any declaration once made can be supplemented or replaced by a subsequent declaration under Article 57 or withdrawn under Article 58.

4.318. Article 50 has a limited effect. It does not affect the Convention’s basic registration and priority structure, discussed below. It applies only where the declaring State has a national registry for the recording of interests of the kind created by the transaction and that interest (termed a national interest in the Convention – see Article 1(r)) has been registered in the national registry. Although a national interest cannot be an international interest, it is governed by Articles 8(4) (as to which see paragraph 4.319), 9(1) and 16 as if it were an international interest, notice of the national interest can be registered in the International Registry, and, most importantly, the priority rules of Article 29 apply to the national interest, so that registration of a notice of the national interest protects it against subsequently registered interests and unregistered interests, while failure to register such a notice results in loss of priority under Article 29(1). Other provisions of the Convention applicable to internal transactions are those relating to registered interests, e.g. Articles 30, 35(1) and 40.

4.319. Since Article 50 refers only to paragraph 4 of Article 8, thereby impliedly excluding the other paragraphs, paragraph 4 in its application to internal transactions must be construed as if the words “under paragraph 1” were omitted.

4.320. Article XXIX(2) of the Luxembourg Protocol provides that for the purposes of Article 50(1) of the Convention an internal transaction shall also mean, in relation to railway rolling stock, a transaction of a type listed in Article 2(2)(a) to (c) of the Convention where the relevant railway rolling stock is only capable, in its normal course of use, of being operated on a single railway system within the Contracting State concerned, because of track gauge or other elements of the design of such railway rolling stock.

Article 51 — Future Protocols

1. The Depositary may create working groups, in co-operation with such relevant non-governmental organisations as the Depositary considers appropriate, to assess the feasibility of extending the application of this
Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.

2. The Depositary shall communicate the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organisations, and shall invite such States and organisations to participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.

3. The Depositary shall also communicate the text of any preliminary draft Protocol prepared by such a working group to such relevant non-governmental organisations as the Depositary considers appropriate. Such non-governmental organisations shall be invited promptly to submit comments on the text of the preliminary draft Protocol to the Depositary and to participate as observers in the preparation of a draft Protocol.

4. When the competent bodies of the Depositary adjudge such a draft Protocol ripe for adoption, the Depositary shall convene a diplomatic conference for its adoption.

5. Once such a Protocol has been adopted, subject to paragraph 6, this Convention shall apply to the category of objects covered thereby.

6. Article 45 bis of this Convention applies to such a Protocol only if specifically provided for in that Protocol.
Comment

4.321. The Convention is at present confined to aircraft objects, railway rolling stock and space assets (for all three of which Protocols have been concluded). The present Article allows for extension of the Convention to additional categories of equipment of a kind not specified in Article 2(3) each member of which is uniquely identifiable. The process laid down is that the Depositary (UNIDROIT) will create working groups to assess the feasibility of preparing future Protocols and to prepare drafts for UNIDROIT to communicate to all States Parties to the Convention and other States and intergovernmental and non-governmental organisations referred to in Article 51(2) and (3). These will be invited to participate in intergovernmental negotiations for the preparation of a draft Protocol on the basis of the preliminary draft, and when the Governing Council of UNIDROIT considers that the draft is ripe for adoption, UNIDROIT will convene a diplomatic Conference for its adoption.

Article 52 — Territorial units

1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them and may modify its declaration by submitting another declaration at any time.

2. Any such declaration shall state expressly the territorial units to which this Convention applies.

3. If a Contracting State has not made any declaration under paragraph 1, this Convention shall apply to all territorial units of that State.

4. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in respect of each such territorial unit, and the declarations made in
respect of one territorial unit may be different from those made in respect of another territorial unit.

5. If by virtue of a declaration under paragraph 1, this Convention extends to one or more territorial units of a Contracting State:

   (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which this Convention applies or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which this Convention applies;

   (b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which this Convention applies; and

   (c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which this Convention applies.

Comment

4.322. Article 52 embodies what are sometimes loosely referred to as federal clauses. However, it is not confined to federal States, in which legislative power is distributed between the federal legislature and the State or provincial legislatures, but applies to any State in which different systems of law are applicable in relation to the matters dealt with in the Convention. It is open to a Contracting State to make a declaration extending the Convention to all its territorial units or only to one or more of them. If it does not make a declaration, the Convention applies to all the territorial units. A declaration under this Article, even if not made at the time of ratification, etc., can be made thereafter under Article 57 (see paragraphs 2.273 and 3.101) and can be supplemented or replaced by a subsequent declaration under that Article or withdrawn under Article 58. If a declaration as to territorial units is withdrawn and not replaced, the effect is that the Convention becomes applicable to all territorial units of the Contracting State concerned. 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.

4.323. Declarations under the Convention provisions (see paragraphs 2.259 et seq.) may be made in respect of each territorial unit and may differ as between one territorial unit and another. See paragraph 2.242.

4.324. Where a declaration under Article 52(1) covers only one or some of a State’s territorial units but not all, the effect of Article 52(5) is that the debtor is to be considered as situated, and the object as located, 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, statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention applies (see Illustration 50, paragraph 4.325). Paragraph 5(a) corresponds to Article 4 except for the omission of the reference to the principal place of business where the debtor has more than one place of business. Since this sub-paragraph envisages only one place of business, it is thought that for a debtor with more than one such place the reference is to the principal place of business, as in Article 4. “Law in force in a territorial unit” covers not only the law of the territorial unit of a State but the law of the State itself so far as in force in that territorial unit. So in a federal State in which the Convention applies to some but not all territorial units, a corporation is to be considered situated in that State if it is incorporated (a) under the law of a territorial unit to which the Convention applies or (b) under federal law in force in a territorial unit to which the Convention applies where that is the relevant territorial unit. Where there is no indication of the relevant territorial unit, that question is determined by the law of the State or, if it has no rule, the law of the territorial unit with which the case is most closely connected (Article 5(4)). Paragraph 5(c), which deals with references to the administrative authorities in a Contracting State, was copied from the Aircraft Protocol and its retention is an error, since the Convention itself nowhere refers to administrative authorities. Accordingly, the sub-paragraph should be disregarded and as regards railway rolling stock reference should be made instead to Article XXIV(5)(c) of the Luxembourg Protocol.
4.325. Illustration 50

Ruritania is a Contracting State with three territorial units, each having its own system of law, namely Rus, Urbs and Terra. Ruritania has made a declaration applying the Convention to Terra but not to Rus or Urbs. Creditor enters into an agreement with Debtor, who is situated exclusively in Urbs at the time the agreement is concluded, to lease to Debtor a railway wagon located in Terra. The Convention does not apply, since for the purposes of Article 3(1) the debtor is not situated in a Contracting State.

4.326. Illustration 51

The facts are as in Illustration 50 except that Debtor is, at the time of the agreement, a corporation incorporated under provisions of Ruritanian law in force in Terra, which under Ruritanian law is the relevant territorial unit. The Convention applies.

Article 53 — Determination of courts

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant “court” or “courts” for the purposes of Article 1 and Chapter XII of this Convention.

Comment

4.327. Article 1(h) defines a court as a court of law or an administrative or arbitral tribunal established by a Contracting State but not a private administrative or arbitral tribunal. The present Article empowers a Contracting State to declare the relevant court or courts which are to have jurisdiction under the Convention. It is not intended to allow such a declaration to cover private tribunals or even public administrative tribunals so far as these are not fulfilling judicial or quasi-judicial functions. If a declaration under this Article is not made at the time of ratification, etc., it may be made subsequently under Article 57 (see paragraph 2.273), and any declaration made may be supplemented, modified or replaced by a subsequent declaration under that Article or withdrawn under Article 58.
Article 54 — Declarations regarding remedies

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.

2. A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

Comment

4.328. One of the default remedies conferred on the chargee by Article 8(1) and on any creditor by Article 13(1) is the granting of a lease of the object. Paragraph 1 of the present Article empowers a Contracting State to make a declaration excluding this remedy while the charged object is situated within or controlled from its territory. The phrase “controlled from” is primarily directed at satellites, which though in space are controlled from Earth. The purpose of Article 54(1) is to allow a Contracting State whose laws include mandatory provisions as to leases to preserve the effectiveness of those provisions.

4.329. Paragraph 2 of this Article requires a Contracting State to make a declaration whether remedies which under the Convention would be available without leave of the court (for example, possession and sale) are to be exercisable only with leave of the court or whether on the other hand such remedies may be exercised without such leave. This Article reflects the fact that while some States have no objection to the extra-judicial exercise of remedies, others require court control, and leaves it to each Contracting State to decide which alternative to choose. A declaration under Article 54(2) is mandatory. It must be made at the time of ratification, etc., and is a precondition of acceptance by UNIDROIT of an instrument of ratification by the State concerned. This is so whether or not a Contracting State chooses to make a declaration under Article 54(1). It is for each Contracting State to decide which
of the Convention remedies falling within Article 54(2) should be covered by its declaration. Article 54(2) does not apply to additional remedies agreed upon by the parties under Article 13. The exercise of these will be governed by the law of the place where their enforcement is sought and no declaration either need or can be made under Article 54(2) in relation to them.

4.330. A declaration under Article 54(1) may be made, and a declaration under Article 54(2) must be made, at the time of ratification, etc., but if a declaration under Article 54(1) is not made then it may be made subsequently. See paragraph 4.334.

Article 55 — Declarations regarding relief pending final determination

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The 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.

Comment

4.331. Article 55 represents the outcome of discussions with European Community representatives at the diplomatic Conference. Their concern was to ensure that if there were deviations from the Brussels Regulation on jurisdiction and judgments, the Member States of the Community should adopt a common position. Other Contracting States may have different reasons for making a declaration under this Article. As to declarations by the European Community (now the European Union), see paragraph 2.260.

4.332. Contracting States need to ensure that any declaration under one of the two Articles referred to is compatible with the other Article and/or declarations under it. For example, a Contracting State which has made no declaration excluding any part of Article 13 could not sensibly make a declaration excluding Article 43, for the effect would be to render the
ARTICLE 56 – RESERVATIONS AND DECLARATIONS

Convention silent on questions of jurisdiction to grant relief under Article 13. Similarly, to retain Article 43 as regards forms of relief under Article 13 excluded by a declaration under the present Article would deprive Article 43 of any meaning in relation to such relief.

4.333. Articles 13 and 43 may be excluded wholly or in part by a Contracting State’s declaration. Again, partial exclusions under one of these Articles need to be consistent with the scope of application of the other Article. In order to ensure transparency, the declaration is required to specify (a) the conditions under which the non-excluded part of the relevant Article will be applied, or otherwise (b) forms of interim relief available in the declaring State other than those provided by Article 13(1). The word “applied” at the end of the Article should be construed as “available”, since it is for the court in each case to decide whether such other form or forms of relief should be given and in what conditions.

4.334. A declaration under this Article may be made at the time of ratification, etc. If not, it may be made subsequently under Article 57. A declaration, once made, may be supplemented, modified or replaced by a subsequent declaration under Article 57 or withdrawn under Article 58.

Article 56 — Reservations and declarations

1. No reservations may be made to this Convention but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.

2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.

Comment

4.335. A reservation differs from a declaration in that it is a unilateral act by a Contracting State purporting to exclude or modify a Treaty provision (Article 2(1)(d) of the Vienna Convention), and, unless authorised by the Treaty, is not binding on other States unless they accept it (Article 20 of the Vienna
Convention), whereas a declaration applying or excluding a provision of the Convention is authorised by the Convention itself and requires no acceptance.

4.336. No reservation is permitted by the Cape Town Convention, but declarations may be made as authorised by the Articles listed in Article 56(1) and may be replaced by a subsequent declaration under Article 57 or withdrawn under Article 58. In addition, Article 40 permits the modification of declarations made under that Article. As to the time when a declaration may be made, see paragraph 2.273.

4.337. All declarations made under the Convention except those made by a Regional Economic Integration Organisation under Article 48 are on an equipment-specific basis. The Convention therefore provides for all declarations to be made at the time of adherence to the Protocol, not the Convention. For example, Contracting States may, and undoubtedly will, make different declarations under Article 39 of the Convention in respect of different categories of equipment. Article XXIX(1) of the Luxembourg Protocol provides that declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57 and 58, are deemed to have been made under the Protocol unless stated otherwise. This avoids the need to lodge fresh declarations under the Protocol. Declarations have been made by the European Community, and will in future be made by the European Union, only on matters within the competence of the EC/EU and where they are so made, or where no declaration is made by the EC/EU on matters within its competence, Member States are precluded from making declarations themselves. On other matters Member States have freedom of choice as to declarations except, of course, those that are mandatory.

4.338. This Article does not state when a declaration takes effect. International treaty practice, as exemplified by Article 97(3) of the Sales Convention, Article 43(3) of the UN Convention and three instruments of the Depositary, UNIDROIT – namely Article 21(3) of the Leasing Convention, Article 19(3) of the 1988 UNIDROIT Convention on International Factoring and Article 15(3) of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – shows that a declaration notified to the Depositary prior to or upon entry into force of the Convention for the declaring State takes effect simultaneously with such entry into force, while a declaration notified to the Depositary subsequently (as is permitted for
ARTICLE 57 – SUBSEQUENT DECLARATIONS

declarations under Articles 39 and 40) takes effect on the first day of the month following the expiration of six months after receipt of the notification by the Depositary. This period corresponds to the period specified in Article 57 for the coming into effect of a subsequent declaration and in Article 58 for the coming into effect of the withdrawal of a declaration.

4.339. For the different rule governing the effective date of a denunciation, see Article 59(2).

4.340. Those wishing to ascertain the content of declarations made by Contracting States will be able to do so either by communicating with the Depositary, UNIDROIT, or any Contracting State (see Article 62(1), (2)(a)), or by searching in the International Registry (see Articles 23 and 62(2)(c)). The Depositary has issued a guide to the declarations system (see paragraph 2.259, n. 40) which Contracting States will find very helpful.

Article 57 — Subsequent declarations

1. A State Party may make a subsequent declaration, other than a declaration authorised under Article 60, at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.

2. Any such subsequent declaration shall take 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. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.
Comment

4.341. A State which has made a declaration may make a subsequent declaration supplementing, replacing or modifying the earlier declaration but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration. This qualification is necessary to ensure the stability of acquired legal rights. See also Article 40, which contains specific provision for modification of a declaration made under that Article. By virtue of Article 48(3), this Article applies also to a Regional Economic Integration Organisation in respect of its declaration under Article 48(2).

4.342. By way of exception, once a declaration has been made under Article 60 no subsequent declaration may be made under that Article.

4.343. As to the effective date of a subsequent declaration, see paragraph 4.338.

Article 58 — Withdrawal of declarations

1. Any State Party having made a declaration under this Convention, other than a declaration authorised under Article 60, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take 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.

2. Notwithstanding the previous paragraph, this Convention shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

Comment

4.344. Similarly, a declaration may be withdrawn but not so as to affect rights or interests arising prior to the effective date of the withdrawal. See paragraph 4.341.
4.345. As to the effective date of withdrawal of a declaration, see paragraph 4.338.

Article 59 — Denunciations

1. Any State Party may denounce this Convention by notification in writing to the Depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which notification is received by the Depositary.

3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

Comment

4.346. By denouncing the Convention, a State Party to the Convention communicates its withdrawal from the Convention. This takes effect 12 months after receipt of the denunciation by the Depositary but does not affect rights and interests arising prior to that time, nor does it affect other States Parties to the Convention except in their relations with the denouncing State. The same applies to an REIO that had adopted the Convention. See Article 48(3).

Article 60 — Transitional provisions

1. Unless otherwise declared by a Contracting State at any time, the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.
2. For the purposes of Article 1(v) and of determining priority under this Convention:

   (a) “effective date of this Convention” means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later; and

   (b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.

Comment

4.347. Paragraph 1 of this Article sets out the general principle that unless otherwise declared by a Contracting State, the Convention does not apply to a pre-existing right or interest, which retains its priority under the applicable law. Any such declaration is controlled by the provisions of Article 60(3). Once made, a declaration under Article 60 may not be modified by a subsequent declaration or withdrawal (see Articles 57(1) and 58(1)), since this could affect vested rights. Under Article 1(v), “pre-existing right or interest” means a right or interest created or arising before the effective date of the Convention (as defined by Article 60(2)(a)) and therefore unaffected by the Convention except in a Contracting State that has made a declaration under Article 60(3). The
effective date of the Convention for the purposes of determining priority is the later of the time the Convention enters into force as provided by Article 49 and the time when the State in which the debtor is situated becomes a Contracting State. By the applicable law 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)). Where the forum State is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, the pre-existing interest will be governed for priority purposes by the law of the State of nationality of 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.

4.348. As to entry into force of the Convention, see paragraph 4.315.

4.349. Though Article 60(2)(b) does not identify the relevant time of the debtor’s situation, it is obvious from Article 1(v) that the right or interest will not be a pre-existing right or interest if the debtor is not situated in a Contracting State at the time when the right or interest is created or provided for, even if the debtor later moves to a Contracting State and thereby establishes the effective date of the Convention for that debtor. This is spelled out in Article XXVI of the Luxembourg Protocol.

4.350. Subject to the effect of a declaration under Article 60, a pre-existing right or interest is outside the scope of the Convention for all purposes. Accordingly, in the absence of a relevant declaration under Article 60, issues arising in relation to a pre-existing right or interest are governed by the applicable law, and the holder of the right or interest is neither affected by nor entitled to invoke any of the provisions of the Convention, whether relating to remedies for default, priorities, or otherwise, though holders of pre-existing rights or interests may have access to the Registry system to make precautionary or other registrations. However, to make policy sense of Article 60(1) the priority of a pre-existing right or interest over an international interest must be confined to an international interest not registered by the time the pre-existing right or interest arises (see paragraph 2.243). 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), which states that in relation to a debtor “effective date of the Convention” is the time when it enters into force or the time when the
Contracting State in which the debtor is situated becomes a Contracting State, whichever is the later. Since the definition in Article 1(v) relates to an object, the first of these two times is conditioned by Article 49(1), so that the date of the Convention’s entry into force as regards any category of object is the time when the Protocol relating to that category came or comes into force. To date, the only Protocol in force is that relating to aircraft objects, which came into force on 1st March 2006, which is the first of the two time periods mentioned above as regard such objects. Where a pre-existing interest is assigned after the effective date of the Convention, the assignee stands in the position of the assignor, no new interest is created and the interest assigned remains a pre-existing interest and thus outside the scope of the Convention unless covered by a declaration under Article 60 or modified in such a way as to create a new international interest.

4.351. In applying Article 60(1), it is necessary to designate a single test of the debtor’s situation. Article 60(2)(b) applies a cascade approach, so that the debtor’s situation is determined by the first test applicable, beginning with the centre of administration if the debtor has one. Article 4 has no relevance to the operation of Article 60.

4.352. It is open to a Contracting State to make a declaration at any time under Article 60 applying the priority rules (but not other provisions) of the Convention and the relevant Protocol to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in Article 60(2)(b), a condition explained below. But the date specified as that on which the Convention priority provisions are to apply in relation to pre-existing rights or interests must not be earlier than three years after the date when the declaration becomes effective. 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 within which to perfect or re-perfect their rights or interests by registering them in the International Registry, thereby preserving the priority of such rights or interests (see paragraph 4.353). When the specified period (which may be longer than three years) has elapsed, the Convention priority provisions in Article 29 will come into force in the declaring State even for rights and interests existing before the effective date of the Convention as defined by Article 60(2)(a), but
only to the extent of the declaration. It will therefore be open to the declaring State to exclude specified pre-existing rights or interests from the scope of its declaration.

4.353. Any declaration made under Article 60 must preserve the pre-existing priority of a pre-Convention interest for a creditor who re-perfects by registration in the International Registry within the specified (minimum three-year) period. Such re-perfection ensures not only the Convention priority of the creditor’s pre-Convention right or interest against subsequently registered rights or interests and unregistered rights or interests, but also the continuance of any pre-Convention priority enjoyed by the creditor over another right or interest even if that right or interest was registered in the International Registry prior to the creditor’s registration. So registration is merely a re-perfection requirement, not a priority point. Conversely, failure to register within the specified period means that the pre-Convention priority of the creditor’s right or interest over the other right or interest will be lost if the holder of the other right or interest registers first. Although the definition of “pre-existing right or interest” covers any right or interest, not necessarily the equivalent of an international interest, Article 60(3) confines the preserved priority to pre-existing rights or interests “arising under an agreement”, that is, under a security agreement, a title reservation agreement or a leasing agreement. A declaration will be ineffective to the extent that it covers other rights or interests, for example non-consensual rights or interests, which preserve their priority without the need for registration under the Convention.

4.354. Registration of a pre-existing right or interest within the period specified in a Contracting State’s declaration does not convert the interest into an international interest, nor does the registration constitute a priority point; it is merely a step necessary to preserve the priority of the pre-existing right or interest under the applicable law.

4.355. 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 earlier 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 novation, because this creates a new international interest (see paragraphs 2.40 -2.43).

4.356. Paragraph 3 of this Article raises a number of intricate questions, discussed in paragraphs 2.248 et seq.

4.357. Illustration 52

The Convention has come into effect. Prior to that D had granted a security interest in favour of C1 to secure a loan for the purchase of a locomotive. The security agreement was governed by the law of Ruritania, a State which has not made a declaration under Article 60(3). After the entry into force of the Convention D grants a security interest in the same locomotive to C2, who registers it in the International Registry. Article 29(1) of the Convention does not apply and the priority of the two security interests is determined by the applicable law.

4.360. Illustration 53

The Convention has come into effect. D grants a security interest in a railway engine to C1 and later grants a security interest in the same engine to C2. Both security interests were given when the railway engine was located in Ruritania. Ruritanian law required perfection of a security interest by registration in a national registry and gave priority to the first to register. C2 registered its security interest first and thereby obtained priority. Ruritania makes a declaration under Article 60 providing for re-perfection of existing interests by registration in the International Registry within four years of the date of the declaration, subject to which the existing priority of those interests under Ruritanian law will be preserved. C1 registers its interest in the International Registry three years after the date of the declaration and C2 registers its interest six months after the registration of C1’s interest. C2, though the last to register, has priority, since its registration within the four-
year period has the effect of preserving its pre-Convention priority under Ruritanian law. Article 29(1) does not apply, registration under the Convention being simply a condition of preserving pre-Convention priority, not a priority point.

4.361. **Illustration 54**

The facts are as in Illustration 53 except that C2 registers its interest five years after the date of the declaration. C1 has priority under Article 29(1) of the Convention.

4.362. **Illustration 55**

C holds a pre-existing interest in a locomotive. After the effective date of the Convention as defined by Article 60(2), C assigns its interest to A. This does not change the character of the interest as a pre-existing interest. A merely steps into C's position.

4.363. **Illustration 56**

C1 is the holder of a security interest in a locomotive granted in and perfected under the law of Urbania, a non-Contracting State. That interest is perfected on 1 February. C2, the debtor in the foregoing transaction, is the holder of an international interest constituted under the Convention by virtue of a lease of such locomotive to a debtor who is situated in Ruritania, a Contracting State. That interest is registered with the International Registry on 5 March. C3 is the holder of a security interest in such locomotive by virtue of a second charge granted by C2 and perfected on 1 April under the law of Urbania. If the question of priority arises in a Contracting State, the interest of C1 would (if but only if recognized by the conflicts rules of such Contracting State) have priority over that of C2, and the interest of C2 would (in all events under the Convention) have priority over that of C3, all by virtue of Article 60(1) and the principle that, in its application, such interests rank in accordance with the order in which they have been perfected, whether or not the Convention governs the perfection of such interests.
Article 61 — Review Conferences, amendments and related matters

1. The Depositary shall 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 in this Convention has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.

2. At the request of not less than twenty-five per cent of the States Parties, Review Conferences of States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:

   (a) the practical operation of this Convention and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;
   
   (b) the judicial interpretation given to, and the application made of the terms of this Convention and the regulations;
   
   (c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and
   
   (d) whether any modifications to this Convention or the arrangements relating to the International Registry are desirable.

3. Subject to paragraph 4, any amendment to this Convention shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of Article 49 relating to its entry into force.
4. Where the proposed amendment to this Convention is intended to apply to more than one category of equipment, such amendment shall also be approved by at least a two-thirds majority of States Parties to each Protocol that are participating in the Conference referred to in paragraph 2.

Comment

4.364. Article 61 sets out the machinery for keeping the Convention under review and providing an efficient mechanism to revise the Convention in the light of evolving practices or problems identified in its interpretation. The basic objective of these processes is to ensure that the Convention remains effective in facilitating asset-based financing and leasing. The primary responsibility in the first instance lies with the Depositary, which must take into account reports of the Supervisory Authority and must act in consultation with the Supervisory Authority when convening a Review Conference. This can be done only if requested by at least 25 per cent of the States Parties, that is, States which have become bound by the Convention as the result of their adherence to it and the Convention coming into force via the entry into force of the relevant Protocol. Amendments must be approved by at least a two-thirds majority of States participating in the Review Conference and enter into force on ratification, etc., by three States.

Article 62 — Depositary and its functions

1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (UNIDROIT), which is hereby designated the Depositary.

2. The Depositary shall:

(a) inform all Contracting States of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
(ii) the date of entry into force of this Convention; the

(iii) each declaration made in accordance with this Convention, together with the date thereof;

(iv) the withdrawal or amendment of any declaration, together with the date thereof; and

(v) the notification of any denunciation of this Convention together with the date thereof and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all Contracting States;

(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and

(d) perform such other functions customary for depositaries.

Comment

4.365. Paragraph 1 of this Article designates UNIDROIT as the Depositary.

4.366. Paragraph 2(a)-(c) lists the specific responsibilities of the Depositary, which are quite onerous in view of the number and diversity of declarations for which the Convention provides. Before accepting the deposit of any instrument, the Depositary has to be satisfied that it is accompanied by any mandatory declaration. To help intending Contracting States, UNIDROIT has published a Declarations Memorandum, together with Model instruments of ratification. Other responsibilities include the transmission to Contracting States of certified true copies of the Convention in each of the six authentic language texts (English, Arabic,
Chinese, French, Russian and Spanish) and the furnishing of information to Contracting States about deposits of instruments of ratification, etc., date of entry of the Convention into force, deposits of declarations and withdrawals and amendments of declarations.

4.367. Also imposed on the Depositary is the duty to provide the Supervisory Authority and the Registrar with a copy of each instrument and declaration so as to enable them to know which States have become Contracting States, and to enable the Registrar to maintain a list of declarations as required by Article 23.

4.368. Similar duties are imposed on the Depositary in relation to the Aircraft Protocol under Article XXXVII, the Luxembourg Protocol under Article XXXIV and the Space Protocol under Article XLVIII.

4.369. Finally, the Depositary is required to perform “such other functions [as are] customary for depositaries”. These include keeping custody of the original texts of the Convention and Protocols and of instruments of ratification, etc., and declarations; receiving signatures of the Convention and Protocol; examining each signature and each instrument to ensure that it is in proper form and in accordance with the Convention and relevant Protocol; and registering the Convention with the Secretariat of the United Nations upon its coming into force (Article 77(1) of the Vienna Convention). The Depositary is also in a position to give guidance on such matters as the standards it employs to determine the acceptability of instruments and the format of declarations to be deposited with it, and has issued a guide to the declarations system (see paragraph 2.259, n. 40) which Contracting States will find very helpful.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.
DONE at Cape Town, this sixteenth day of November, two thousand and one, in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another.

Comment

4.370. The six texts were duly authenticated by the President of the Conference as being linguistically aligned, and all are equally authentic.