Enforcement of security rights over seagoing ships, aircraft, and trains in international treaties

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Abstract

This article focuses on the enforcement of security rights over seagoing ships, aircraft, and trains in several international treaties. It contains a largely chronological overview of the relevant international instruments and their scope of application. In addition, this contribution addresses both the conflict-of-laws provisions and the substantive law provisions on the enforcement remedies at the secured creditor's disposal, including procedural aspects of enforcement such as notice requirements, the conditions for a purchaser to obtain 'clean title', and de- and reregistration. The comparison of existing rules offers insights for further alignment of the international legal framework for the enforcement of security rights over seagoing ships, aircraft, and trains.

I. Introduction

Over the past century, international organizations have become involved in the development of several international treaties covering different aspects of security rights over seagoing ships, aircraft, and trains.[1] This article compares those provisions in the treaties that relate to the enforcement of security rights over

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[1] We use the terms security rights and seagoing ships, aircraft, and trains rather loosely. The exact definition of the security rights and assets covered in the treaties is discussed in sections II.2, III.2, and IV.2 and may differ from one legislative instrument to the other.

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such mobile assets. Prior to this analysis, we set out different ways of framing this topic.

1. A fragmented framework per type of asset

There exists no single international convention for security rights over seagoing ships, aircraft, and trains. Rather, different international treaties have been developed for different types of asset by a variety of international organizations. There are several possible reasons for this fragmented approach. One such reason is that historically, financial backing for such assets differed: ships and aircraft were usually in private hands and so tended to be financed by the private sector, whereas trains, which have a more evident public function, mostly came to be State-owned and were financed either directly by governments or by government-supported organizations, such as Eurofima.[2] Moreover, financiers of the different types of asset used different forms of security rights, including mortgages, hypothecs, charges, leasing agreements, retention of title, and pledge.[3] Another factor standing in the way of a unitary framework is that non-consensual maritime liens often prevail over consensual security rights over ships—this is less of an issue in the aircraft and rail sectors. Then again, there has never been a single, overarching force to foster the development of a single, overarching international framework for security rights over seagoing ships, aircraft, and trains; instead, several international stakeholder groups have focused on producing their own instruments geared to promoting the interests of specific industry groups. This has inevitably resulted in a fragmented international legal framework where several different treaties exist side by side.[4]

2. A corpus of two categories of treaties

The international framework for the treaties containing enforcement provisions that form the focus of our research may be broken down into two categories of treaties. The first category largely consists of a body of earlier treaties that each cover only some aspects of the enforcement of security rights. These treaties, a principal focus of which is the conflict of laws but which also address some

[2] For a historical overview of railway industry financing, see H. Rosen, 'The Luxembourg Rail Protocol: A Major Advance for the Railway Industry', *Uniform Law Review*, 12/3 (2007), 427–48, at 427–9. About the public function of trains, see R. Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock* (2014; second edition), 3.1.

[3] O. Böger, 'The Cape Town Convention and Proprietary Security over Ships', *Uniform Law Review*, 19/1 (2014), 24–60, at 29–31; Comité Maritime International (CMI), *Essays on Maritime Liens and Mortgages and on Arrest of Ships* (1984), p 6–9, available in the Yearbooks and Documentation section of the CMI website <https://comitemaritime.org/publications-documents/cmi-yearbook/> (accessed 1 June 2022). For an instructive webinar on aircraft finance organized by the New York State Bar Association/Ireland for Law, see <https://nysba.ce21.com/ViewerUnAutheticatedLink?x=/scjAVgDe6NB0EnAb0@@12sNQ==&ce21=true> (accessed 1 June 2022).

[4] Böger (n 3) 25, for example, explains that the circumstance that the international legal framework for ships has historically been developed by specific international organizations involved in shipping is one of the main reasons that ships have not so far been included in the Cape Town Convention regime.

substantive law rules, are the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted in Brussels in 1926 (1926 Brussels Convention),[5] the Convention on the International Recognition of Rights in Aircraft, adopted in Geneva in 1948 (1948 Geneva Convention),[6] the second International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted in Brussels in 1967 (1967 Brussels Convention),[7] the third International Convention on Maritime Liens and Mortgages, adopted in Geneva in 1993 (1993 Geneva Convention),[8] and a further draft Convention on the Judicial Sale of Ships, also known as the Beijing Draft.[9] The second category of treaties consists of the Cape Town Convention on International Interests in Mobile Equipment (Cape Town Convention), the Protocol to this Convention on Matters Specific to Aircraft Equipment (Aircraft Protocol), and the Luxembourg Protocol on Matters Specific to Railway Rolling Stock (Rail Protocol).[10] These latter instruments encompass a far more comprehensive, primarily substantive law regime for security rights over mobile assets, including specific guidance on the way in which such rights may be enforced. They are also accompanied by detailed Official Commentaries that are most helpful in interpreting the Cape Town Convention and its Protocols;[11] we have not been able to find similar official guidance for the 1926, 1948, 1967, and 1993 treaties.

3. *A combination of conflict-of-laws and substantive law approaches*

The treaties contain both uniform substantive and conflict-of-laws rules, both being crucial in solving some of the complex legal problems that secured creditors may face when financing assets that cross borders.[12] Uniform substantive

[5] For the official text in French and a translation into English by the Department of State of the United States of America, see *League of Nations: Treaty Series* (1931), No 2765, 187–209.

[6] References are to the English text available in *United Nations: Treaty Series* (1958), No 4492, 152–79.

[7] For the text of this Convention in French and English, see CMI, *Lisboa I, 1985*, 26–43.

[8] References are to the English text in *United Nations: Treaty Series* (2006), Volume 2276, No 40538, 64–71.

[9] Unless indicated otherwise, references are to the fifth revision of the Beijing Draft dated 30 November 2021 as set out in the Annex to UNCITRAL 2021, A/CN.9/WG.VI/WP.94 (the 'fifth Beijing Draft').

[10] The 'umbrella' Cape Town Convention also covers 'space assets' in the Protocol on Matters Specific to Space Assets of 9 March 2012, as well as mining, agricultural and construction equipment in the Protocol on Matters Specific to Mining, Agricultural and Construction Equipment of 22 November 2019.

[11] Goode, *Official Commentary Rail Protocol* (n 2); R. Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Objects* (2022; fifth edition).

[12] Cf. T. Juutilainen, *Secured Credit in Europe: From Conflicts to Compatibility* (Oxford etc.: Hart Publishing, 2018), p 2–3 and 16–26; K. Kreuzer, 'Europäisches Mobiliarsicherungsrecht oder: Von den Grenzen des Internationalen Privatrechts', in W.A. Stoffel and P. Volken (eds.), *Conflits et harmonisation: Mélanges en l'honneur d'Alfred E. von Overbeck* (Fribourg: Éditions Universitaires, 1990), 613–41; K. Kreuzer, 'Internationale Mobiliarsicherungsrechte an Luftfahrzeugausrüstung', in I. Schwenzer and G. Hager (eds.), *Festschrift für Peter Schlechtriem*

law rules effectively minimize differences between national substantive law rules for (the enforcement of) security rights in different States. However, drafting such uniform rules for border-crossing assets proved no easy matter. The drafters faced challenges such as the complexity of security rights, the related difficulty of developing rules for every single aspect of these rights, and the circumstance that they are often closely connected with the legal tradition in any given State.[13] This was a prime reason why uniform conflict-of-laws rules also needed to be developed for security interests, which posed its own challenges.[14] When assets cross borders, a multitude of laws potentially applies, and this in turn may give rise to complications that are sometimes referred to as *conflit mobile* or *Statutenwechsel*. The *lex rei sitae*, a traditional connecting factor in the world of security rights, poses problems in this context—new connecting factors had to be devised.[15] Moreover, while enforcement is a topic situated at the intersection of substantive and procedural law, different connecting factors may be considered suitable for substantive and procedural aspects of enforcement, a matter that may be further complicated by the fact that the demarcation between these categories may vary from State to State.[16]

4. The broader international framework for (the enforcement of) security interests

The treaties concerning security rights over seagoing ships, aircraft, and trains do not stand on their own. A range of other international legislative initiatives are directly or indirectly relevant for the issue of enforcement. Some of these are set out below.

Besides the 1926, 1967, and 1993 'maritime' conventions, secured creditors may be faced with the International Convention Relating to the Arrest of Sea-

zum 70. Geburtstag (Tübingen: Mohr Siebeck, 2003), 869–902, at 869–72; J.M. Kriz, 'Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952: Part One', *Duke Law Journal*, 4 (1963), 671–95; J.M. Kriz, 'Ship Mortgages, Maritime Liens, and Their Enforcement: the Brussels Conventions of 1926 and 1952: Part Two', *Duke Law Journal*, 1 (1964), 70–94; P.M. Veder, 'Europeanisering van zekerheid op roerende zaken: tussen zekerheid en bescheidenheid', in A.L.M. Keirse and P.M. Veder, *Europeanisering van vermogensrecht* (Deventer: Kluwer, 2010), 141–97.

13 Cf. R. Goode, 'The UNIDROIT Draft Mobile Equipment Convention: Confluence of Legal Concepts and Philosophies', in Société de législation comparée (ed.), *Mélanges en l'honneur de Denis Tallon: D'ici, d'ailleurs: harmonisation et dynamique du droit* (Paris: 1999), 69–82, at 77.

14 Our conflict-of-laws analysis is limited to the applicable law. We do not consider issues regarding the competent forum or the recognition of judicial or comparable awards.

15 See R.C.C. Cuming, 'International Regulation of Aspects of Security Interests in Mobile Equipment', *Uniform Law Review*, 18/1 (1990), 63–206, at 75–107; Veder (n 12) 148–52 and 175–9; H.L.E. Verhagen, *Conflit mobile bij roerende zaken: assimilatie of transformatie? Een bijdrage over roerende zaken in het internationaal privaatrecht* (Deventer: Kluwer, 2007; Studiekring Offerhaus nr. 10), p 1–5.

16 In the context of enforcement, see A. Veneziano, 'A Secured Transactions' Regime for Europe: Treatment of Acquisition Finance Devices and Creditor's Enforcement Rights', *Juridica International*, 14 (2008), 89–95, at 93. About the difference between applicable substantive and procedural law in general, see E. Spiro, '*Forum Regit Processum*: Procedure Is Governed by the *Lex Fori*', *The International and Comparative Law Quarterly*, 18/4 (1969), 949–60, at 950–1, and more specifically about qualification issues R. Garnett, *Substance and Procedure in Private International Law* (Oxford: Oxford University Press, 2012), Chapter 3.

going Ships (Brussels, 1952) and the International Convention on the Arrest of Ships (Geneva, 1999). However, both these instruments only contain provisions for the detention of a ship by judicial process to secure claims—among others, claims arising out of 'the mortgage or hypothecation of any ship'—but neither covers 'the seizure of a ship in execution' or otherwise provides guidelines for the enforcement of security rights.[17] Likewise, besides the 1948 Convention for Aircraft, the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (Rome, 1933) may be relevant to secured creditors. This Convention does not, however, feature any rules on the enforcement of security rights, focusing instead on limitations regarding precautionary attachments in order to protect free air traffic.[18]

In addition to the treaties for seagoing ships, there are several legal instruments pertaining to inland vessels. One of these is the Geneva Convention on the Registration of Inland Navigation Vessels of 1965, annexed to which a is a protocol featuring substantive law provisions on rights in rem for such inland vessels.

Moreover, the issue of enforcement is a topic addressed in international soft law instruments, such as those developed by the United Nations Commission on International Trade Law (UNCITRAL), including the comprehensive framework for enforcement set out in the Legislative Guide on Secured Transactions of 2007 (Chapter VIII) and the Model Law on Secured Transactions of 2016 (Chapter VII). Other global soft law instruments that pay attention to enforcement of security rights include the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes of 2016 and the ongoing project of the International Institute for the Unification of Private Law (UNIDROIT) to develop 'best practices for effective enforcement'.[19]

Hence, the enforcement of security interests over seagoing ships, aircraft, and trains is part of a broader debate on the appropriate international legal framework for secured transactions. That said, the rest of this article will focus on the aforementioned corpus of conventions that contain provisions on the enforcement of security interests over these assets.[20]

[17] See Articles 1(1)(q) and (2) of the 1952 Convention and Articles 1(1)(u) and (2) of the 1999 Convention. On these treaties, see also CMI (1984) (n 3) 100–37; M. Faghfouri, *International Convention on Arrest of Ships*, <https://legal.un.org/avl/pdf/ha/icas/icas_e.pdf> (accessed 1 June 2022); Kriz, *Part Two* (n 12).

[18] J.G. Verplaetse, 'Sources of Private International Air Law', *The International and Comparative Law Quarterly*, 7/3 (1958), 405–16, at 412.

[19] See <https://www.unidroit.org/work-in-progress/enforcement-best-practices/> (accessed 1 June 2022).

[20] For further reading on a variety of international legal instruments with provisions on the enforcement of security interests, see Hague Conference on Private International Law, UNCITRAL, and UNIDROIT, *UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests: Comparison and Analysis of Major Features of International Instruments Relating to Secured Transactions* (May 2012); S. Bazinas, 'Enforcement of Security Interests in Securities under Uniform Law', in T. Keijser (ed.), *Transnational Securities Law* (Oxford: Oxford University Press, 2022; 2nd edition), Ch 4; T. Keijser, 'Enforcement of Security Interests in Transnational Commercial Law: Balancing Tradition and Innovation', in C. Benicke and S.

5. Further content

Section II focuses on the enforcement of security rights over ships under the 'earlier' maritime treaties and the fifth Beijing Draft. Section III discusses the same issue under the 1948 Geneva Convention for aircraft. Both sections set the scene by providing a brief, largely chronological overview of the relevant instruments and their scope of application. This forms the basis for a more in-depth analysis of both the conflict-of-laws and the substantive law provisions in these treaties pertaining to enforcement. Section IV offers an analysis of the enforcement of security rights regarding aircraft and trains under the regime of the Cape Town Convention and its Rail and Aircraft Protocols. Since these instruments contain primarily substantive law provisions, our research centres on those. We compare the approaches taken by the different treaties and highlight similarities and differences. Section V contains concluding remarks.

This article concentrates on the enforcement remedies at the disposal of a secured creditor with a consensual security right, such as a mortgage, hypothec, or pledge. Although the international treaties for seagoing ships extensively discuss (the enforcement of) non-consensual maritime liens, these are not part of our research. Likewise, we do not consider the circumstances under which a debtor defaults, nor do we address the arrest or attachment of seagoing ships, aircraft, or trains preceding enforcement; the distribution of the proceeds among different interested parties following enforcement proceedings; or the impact of insolvency on the exercise of enforcement remedies.[21]

II. Enforcement of security rights in the maritime treaties

1. Introduction

The maritime treaties do not provide nor aim to provide a comprehensive uniform regime for security rights. Rather than offer such a comprehensive regime, the conventions regulate selected aspects of security rights by formulating some uniform conflicts-of-law provisions and some uniform substantive law provisions, leaving the regulation of other relevant aspects to national law.

Section II.2 kicks off with a brief overview of the historical background and a short introduction to the scope of application of the maritime conventions. Section II.3 analyses the conflict-of-laws provisions for enforcement in these treaties. Sections II.4–II.6 look at the substantive law provisions regarding enforcement remedies set out in the treaties for ships, except for the 1926 Brussels Convention, which refers this topic entirely to national law (including its conflict-of-laws rules). The maritime conventions rightly presume that secured

Huber (eds.), *National, International, Transnational: Harmonischer Dreiklang im Recht (Festschrift für Herbert Kronke)* (Bielefeld: Gieseking Verlag, 2020), 947–54.

[21] We merely note that the maritime treaties and the 1948 Convention do not mention insolvency. This is different under the Cape Town regime. See Articles 30 Cape Town Convention, XI-XII Aircraft Protocol, IX-X Rail Protocol.

creditors have a (national) right to a 'forced'[22] or 'judicial'[23] sale, as a right of sale is inherent in a security right.[24] The exact content of a secured creditor's right of sale may vary from State to State. However, based on the premise that there is some kind of sale, the maritime conventions set out substantive law provisions on notifications prior to enforcement, the possibility for the purchaser of a vessel subject to enforcement to acquire the vessel free from any security rights of other creditors, and deregistration and reregistration.

2. Historical background and scope

The 1926 Brussels Convention was the first international treaty to mention the enforcement remedies available to secured creditors with a security right over a seagoing ship in a cross-border context. Work on this Convention started in 1904 at a conference of the Comité Maritime International (CMI). Its initial goal was 'to put an end—by the adoption of a uniform law—to the conflicts of law with regard to rights *in rem* and preferential rights on ships, without prejudice to such differences of law as arisen with regard to matters of national interest only'.[25] The Convention was adopted by the CMI at a diplomatic Conference in Brussels in 1926 and entered into force on 2 June 1931.[26] At this moment in time, the treaty is in force in twenty-two States.[27]

The 1926 Brussels Convention generally applies to 'mortgages, hypothecations, and other similar charges' upon 'vessels' that belong to a Contracting State,[28] and in other cases, are provided for by national law (Articles 1 and 14).[29] The Convention does not define 'mortgages, hypothecations, and other

[22] The terminology in Articles 10 and 11 of the 1967 Brussels Convention and in Articles 11 and 12 of the 1993 Geneva Convention.

[23] The terminology of the fifth Beijing Draft.

[24] See, e.g., UNCITRAL, A/CN.9/131, in Yearbook of the United Nations Commission on International Trade Law 1977, Volume VIII, 171–221, at 197–8; UNCITRAL, Legislative Guide on Secured Transactions, p 276, para 6.

[25] CMI, *Conférence d'Amsterdam* (1904), Amsterdam Conference Report, 218; also cited by F. Berlingieri, *International Maritime Conventions, Volume 2* (Abingdon, Oxon: Informa Law from Routledge, 2014), 131, footnote 1. On the main goals of the 1926 Brussels Convention, see also Kriz, *Part One* (n 12) 676.

[26] About the history of the 1926 Brussels Convention, see further Berlingieri (n 25) 131–4; and briefly L. Bleyen, *Judicial Sale of Ships: A Comparative Study* (Cham etc.: Springer International Publishing, 2015; Hamburg Studies on Maritime Affairs 36), p 9–10.

[27] See the website of the depositary (Belgium), <https://diplomatie.belgium.be/fr/traites/accords-dont-la-belgique-est-depositaire> (accessed 1 June 2022).

[28] In practice, this means vessels that are registered in a Contracting State. See Berlingieri (n 25) 9–10, 135; Bleyen (n 26) 10; CMI, *XXVIIth Conference: New York 1965*, p 77 nr 3 (equalling 'belonging to' to 'flying the flag of'); Kriz, *Part One* (n 12) 676–7 (referring to the law of the flag); UNIDROIT 2013, C.D. (92) 5 (c)/(d), para 13 (equalling the law of the flag to the law of the State of registration). See also Article 5(1) of the 1958 Geneva Convention on the High Seas. Cf. Article 17 of the Convention on International Civil Aviation of 1944 (the '1944 Chicago Convention') on the registration of aircraft and n 95.

[29] The 1926 Convention contains further specifications. E.g., Article 15 excludes vessels of war or government vessels appropriated exclusively to public service.

similar charges',[30] nor does it provide a definition of 'vessel', although Francesco Berlingieri argues that the reference to 'vessel' should be read as 'sea-going vessel'.[31]

Next in line to the 1926 Brussels Convention is the 1967 Brussels Convention, which was again drafted under the auspices of the CMI and adopted at a diplomatic Conference in Brussels in 1967. It is essentially a revised version of the 1926 Convention. The main reason for revising the 1926 Brussels Convention was its limited success from the perspective of those States that had ratified the Convention, and the fact that not a single common law State had ratified it at all. To improve the text, CMI sought to craft a broader set of uniform rules for (the ranking between) maritime liens and security rights, while provisions were also added for dealing with deregistration and reregistration and forced sale of vessels.[32] However, the 1967 Brussels Convention turned out to be even less of a success than its 1926 predecessor and never entered into force.

The CMI then opted for a further revision. A new text was drafted, discussed at a CMI conference in Lisbon in 1985, and sent to both the International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD). A joint IMO/UNCTAD working group built upon this draft and their work ultimately resulted in approval of the 1993 Geneva Convention at a joint United Nations/IMO conference in Geneva in 1993.[33] The Convention entered into force on 5 September 2004, and, at the time of writing, had 19 State Parties.[34]

The scope and content of the 1967 Brussels Convention and the 1993 Geneva Convention are very similar. The 1967 Brussels Convention generally applies to 'mortgages and "hypothèques"' upon 'all sea-going vessels' registered in a Contracting State or in a non-Contracting State (Articles 1 and 12(1)). The 1993 Geneva Convention generally applies to 'mortgages, "hypothèques" and registrable charges of the same nature' upon 'all sea-going vessels' registered in a State Party or in a State which is not a State Party, provided the latter's vessels are subject to the jurisdiction of the State Party (Articles 1 and 13(1)).[35] Neither

[30] Cf. Berlingieri (n 25) 139 about discrepancies between the wording in the official French text, namely 'hypothèques, mortgages, gages sur navires', and English terminology.

[31] About the meaning of 'vessel' in this treaty, see Berlingieri (n 25) 135; Kriz, *Part One* (n 12) 682–3.

[32] Cf. CMI, *XXVIIth Conference: New York 1965*, HYPO-1, p 76–90, for the report with which the consultation process started. Cf. also Berlingieri (n 25) 162.

[33] For more detail on the historical background of the 1993 Convention, see Berlingieri (n 25) 162–4.

[34] See the website of the depositary (the Secretary-General of the UN), <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en> (accessed 1 June 2022).

[35] Both the 1967 and 1993 Conventions contain further specifications. E.g., Article 13(2) of the 1993 Convention excludes vessels owned or operated by a State and that are used for government non-commercial services from the Convention.

Convention further defines mortgages, *hypothèques*, and registrable charges or seagoing vessels.[36]

The substantive law provisions on enforcement in the 1967 and 1993 maritime conventions only apply to the sale of a seagoing vessel that qualifies as a 'forced sale' under the conventions.[37] Neither the 1967 Brussels Convention nor the 1993 Geneva Convention define the term 'forced sale'. In both treaties, however, a 'forced sale' should probably be interpreted as a sale by the secured creditor to a third party involving a court or another 'competent authority'.[38] An entirely private sale based on the parties' agreement without any such involvement would not appear to fall within the scope of the treaties.

In 2014, the CMI Assembly again considered the topic and approved a draft Convention on the recognition of foreign judicial sales of ships, also known as the Beijing Draft, which was prepared by CMI and submitted to UNCITRAL in 2018 for further deliberation.[39] The project was conceived in 2008 and its original goal was to ensure that the purchaser of a ship in a judicial sale could be certain of receiving a 'clean title', free of security rights and maritime liens, and to enable the purchaser to delete the ship from one registry and reregister it in another.[40] Both the CMI and UNCITRAL held that no (effective) uniform legal regime existed for these issues at that time,[41] although, as we shall see in sections II.4–6, there is in fact a considerable deal of overlap between the Beijing Draft and the earlier maritime treaties. UNCITRAL aims to submit the final draft Convention to the UN General Assembly for adoption in the second half of 2022.[42]

The fifth Beijing Draft sets out its scope in Article 1, which states that the Convention governs the effects of a 'judicial sale' of a ship that confers clean title on the purchaser. Article 3(1) of the fifth Beijing Draft further delineates the scope and states that the Convention applies only to a judicial sale of a ship if (i) the sale was conducted in a State Party and (ii) the ship was physically within the territory of the State of judicial sale at the time of the sale.[43] Article 2(b) of the fifth Beijing Draft, for its part, defines a ship as 'any ship or other vessel registered in a register that is open to public inspection that may be the subject of

[36] For the purpose of the 1993 Geneva Convention, Berlingieri (n 25) 165–6, argues that the reference to a 'sea-going vessel' should be interpreted as a reference to vessels, whether registered in an inland navigation registry or a sea registry, that 'at the material time are sailing on the seas.'

[37] Article 11(1) of the 1967 Brussels Convention and Article 12(1) of the 1993 Geneva Convention.

[38] Cf. e.g. Article 10 of the 1967 Convention and Article 11 of the 1993 Convention. Cf. CMI, *XXVIIth Conference: New York 1965*, HYPO-12, p 171, where a sale by the order of a court and a forced sale are used interchangeably.

[39] CMI, *Yearbook 2019*, p 198.

[40] CMI, *Yearbook 2015*, p 279–81, 291.

[41] See CMI, *Yearbook 2015*, p 279–83; UNCITRAL 2019, A/CN.9/973, p 2–4. On the need for (further) law reform, see also e.g. W.M. Sharpe, 'Towards an International Instrument for Recognition of Judicial Sales of Ships: Policy Aspects', in CMI, *Yearbook 2013*, p 166–81.

[42] UNCITRAL 2020, A/CN.9/1047/Rev.1, para 11.

[43] Article 3(2) of the fifth Beijing Draft contains an exception for vessels owned or operated by a State and used for government non-commercial service.

an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale'.

Like the older maritime conventions, the substantive law provisions of the Beijing Draft only apply to a sale of a ship that qualifies as a 'judicial sale'. Article 2(a) of the fifth Beijing Draft helpfully defines a 'judicial sale' as a sale '(i) [w]hich is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and (ii) [f]or which the proceeds of sale are made available to the creditors'. A 'judicial sale' thus includes both the public and the private sale by a secured creditor to a third party, as long as a public authority is involved. As in the other maritime treaties, this means that an entirely private sale based solely on the agreement of the parties without any such involvement does not fall within the scope of the instrument.

Finally, security rights over ships (and their enforcement) are on the UNIDROIT agenda. In 2013, UNIDROIT included work on an additional Protocol to the Cape Town Convention for ships and maritime transport equipment in its work program.[44] The possibility of including ships in the Cape Town system was first mooted back in the 1990s, but was ultimately rejected at that time.[45] In 2022, UNIDROIT decided to prolong the low priority status for a Protocol on ships and maritime transport equipment for the triennial period of 2023–25. No formal draft Protocol is available at present, but the UNIDROIT Secretariat continues to monitor developments in this area, conduct research, and engage with the industry.[46]

3. Conflict-of-laws provisions regarding enforcement of security rights

Article 16 of the 1926 Brussels Convention emphasizes that national law, not the provisions of the Convention, determines the 'modes of procedure or methods of execution'. The reference in Article 16 to 'national law' seems to leave room for a court to determine the applicable national law according to its own national conflict-of-laws provisions. Generally, however, the applicable national law will be the law of the State where the enforcement takes place (the *lex executionis*), as there is general consensus that this law should apply to procedural enforcement issues.[47]

[44] UNIDROIT 2013, C.D. (92) 5 (c)/(d); UNIDROIT 2013, A.G. (72) 4, paras 20–3; UNIDROIT 2013, A.G. (72) 9, para 24 and p 20.

[45] See also (n 4).

[46] See UNIDROIT 2022, C.D. (101) Misc. 2, p 7; UNIDROIT 2022, C.D. (101) 4 rev., p 29. On a possible future shipping Protocol, see Böger (n 3); O. Böger, 'The Case for a New Protocol to the Cape Town Convention Covering Security over Ships', *Cape Town Convention Journal*, 5/1 (2016), 73–102; J.P. Rodriguez-Delgado, 'Security Interests over Ships: From the Current Conventions to a Possible Shipping Protocol to the UNIDROIT: *Lege Data and Lege Ferenda*', *Journal of Maritime Law & Commerce*, 49/2 (2018), 239–305.

[47] Cf. Garnett (n 16) 1–4; Spiro (n 16). In literature, also the term *lex fori* is used in this context.

Article 2 of the 1967 Brussels Convention and Article 2 of the 1993 Geneva Convention are identical, except for an additional reference to charges in Article 2 of the 1993 Geneva Convention. These provisions refer the ranking of registered security rights as between themselves and the 'effect in regard to third parties' to the law of the State of registration. In addition, they refer 'all matters relating to the procedure of enforcement' to the law of the State where enforcement takes place.[48] This last part of Article 2 of both treaties is further elaborated in Articles 11(1)(b) of the 1967 Convention and 12(1)(b) of the 1993 Convention, which hold that the remedy of sale should be effected in accordance with the law of the State where enforcement takes place in order for the purchaser of the vessel to acquire the vessel free from security rights of third parties (see section II.5 for further details about this and other conditions for such security rights to extinguish after the sale).

Article 4(1) of the fifth Beijing Draft holds that '[t]he judicial sale shall be conducted in accordance with the law of the State of judicial sale'—likewise, a reference to the *lex executionis*. The scope of this conflict-of-laws provision is limited to a judicial sale and does not, as in the maritime treaties, refer to enforcement generally.

The exact meaning of the phrases 'modes of procedure or methods of execution' in Article 16 of the 1926 Brussels Convention and 'all matters relating to the procedure of enforcement' in Article 2 of the 1967 Brussels Convention and of the 1993 Geneva Convention is unclear[49] and so, as a consequence, is their precise scope.[50] This is also true of the phrase that the judicial sale 'shall be conducted' in Article 4(1) of the fifth Beijing Draft, although this provision is limited to a judicial sale only. Arguably, these different phrases, in any case, include issues that may be seen as purely procedural, such as: how enforcement proceedings should be commenced; whom to inform and how to do so (insofar as this is not covered in the relevant Convention); and how to prove certain facts before a court.[51]

Do these conflict-of-laws provisions also encompass the topic of the enforcement remedies at a secured creditor's disposal, including whether this creditor may enforce its right through sale, appropriation, or through the management of encumbered assets? If we look at the conflict-of-laws provisions of the earlier maritime conventions, it is not clear whether they cover this topic.[52] Article

[48] Cf. UNIDROIT 2013, C.D. (92) 5 (c)/(d), paras 12–15, 31–4.

[49] Cf. UNCTAD/IMO, JIGE (III)/2, p 4, stating that the provisions of international private law in Article 2 of the 1967/1993 treaties do not call for special comment. This document was kindly provided to us by the Dag Hammarskjöld Library.

[50] The wording of Article 16 appears broader than that of the 1967 and 1993 Conventions. Cf. UNIDROIT 2013, C.D. (92) 5 (c)/(d), para 52, which emphasizes the broad scope of Article 16 of the 1926 Brussels Convention.

[51] Cf. Spiro (n 16) II (about what could generally be qualified as procedural topics) and Garnett (n 16) 144–5 (on the commencement of a proceeding), 155–8 (about notices), and 189–221 (about the issue of evidence).

[52] See Kriz, *Part One* (n 12) 676–8, who writes on p 678 that '[t]he 1926 Convention does not purport to [...] set forth the respective rights of mortgagor, mortgagee or holder of a "hypothèque." These matters are left to domestic law'. [footnote omitted].

4(1) of the fifth Beijing Draft is confined to a judicial sale, so in any case, it does not cover any other remedies, but it is likewise unclear whether this provision implies that the *lex executionis* determines whether the secured creditor has the remedy of sale. In any case, the general consensus that the procedural aspects of enforcement are regulated by the law of the place where enforcement takes place does not include the topic of the specific enforcement remedies at a secured creditor's disposal as a matter of course.[53]

The topic of enforcement remedies also does not come within the ambit of the conflict-of-laws provisions in the 1926, 1967, and 1993 Conventions about the 'recognition' of security rights that have been created in accordance with the law of the place of registration of seagoing vessels. Article 1 of the 1926 Brussels Convention stipulates that a registered security right 'shall be regarded as valid and respected' in all other Contracting Countries; Article 1 of the 1967 Brussels Convention determines that registered security rights 'shall be enforceable' in Contracting States; while Article 1 of the 1993 Geneva Convention holds that security rights 'shall be recognized and enforceable' in States Parties.[54] All these provisions, however, have a limited purpose: they merely refer the existence of security rights to the law of the place of registration of the asset, but do not cover the content of such security rights.[55] Remarkably, Article 1 of the 1926 Brussels Convention, at first, also stipulated that a security right needed to produce the same effect as it would in the country of origin, but this was considered to both difficult and unnecessary and was duly deleted from the draft.[56] We have found no indication that this approach was abandoned in the context of the 1967 Brussels Convention and the 1993 Geneva Convention. An earlier version of the Beijing Draft contained a comparable provision that, however,

[53] See, e.g., Article 12 in conjunction with Article 5(3) of the Cape Town Convention, further discussed in section IV.6, which refers the topic of additional, national enforcement remedies to the conflict-of-laws provisions of the law of the forum State. The European Group of Private International Law (EGPIL), in a report titled *The Law Applicable to Rights in Rem in Tangible Assets* (provisional draft, 31 October 2020), proposes another connecting factor for 'means of transport' for the Member States of the European Union. Its proposed Article 6 holds: 'The proprietary rights in an aircraft, vessel or railway vehicle subject to registration are governed [by] the law of the State under the authority of which the register is kept.' According to proposed Article 7(e), this law would also cover the enforcement of security rights over the assets.

[54] Article 31 of the Treaty on International Commercial Navigation Law (Tratado de derecho de navegación comercial internacional) of 19 March 1940 contains a similar provision:

> 'Las hipotecas o cualquiera otro derecho real de garantía sobre buques de la nacionalidad de uno de los Estados, regularmente constituidos y registrados según sus leyes, serán válidos y producirán sus efectos en los otros Estados.'
>
> 'Hypothecations and any other security right upon vessels with the nationality of one of the States, regularly effected and registered in accordance with its laws, shall be valid and effective in the other States.' – translation by the authors.

See A. Delić, 'The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940)', Oxford Public International Law, <https://opil.ouplaw.com/page/530> (accessed 1 June 2022).

[55] Cf. Berlingieri (n 25) 138–40 (on Article 1 of the 1926 Brussels Convention) and 166–8 (on Article 1 of the 1967 and 1993 Conventions).

[56] Berlingieri (n 25) 138–9.

referred questions concerning the recognition of a mortgage or *hypothèque* to the law of the State of the judicial sale, not to the law of registration.[57] This provision no longer appears in the fifth Beijing Draft.

Hence, were we to hold that the topic of the law determining the specific enforcement remedies at a secured creditor's disposal is covered neither in Article 16 of the 1926 Brussels Convention, nor in Articles 2 of the 1967 Brussels Convention and the 1993 Geneva Convention, nor in Article 4(1) of the fifth Beijing Draft, this would mean that the issue generally falls outside the scope of the Conventions and must therefore be resolved by national conflict-of-laws provisions.

4. Notice requirements

Notice requirements prior to enforcement are an important substantive law topic in the treaties. Article 10 of the 1967 Brussels Convention and Article 11 of the 1993 Geneva Convention require the secured creditor to give notice in the context of a 'forced sale'. Article 4 and Appendix I of the fifth Beijing Draft regulate the notice obligations of the secured creditor prior to a 'judicial sale'. Such notices prior to enforcement generally give the interested parties an opportunity to monitor the enforcement process, to cure the debtor's default, to participate in the enforcement process or, for a secured creditor with a higher-ranking security right, to take it over, or to contest the enforcement.[58]

The relevant provisions in the respective treaties specifically indicate to whom and by what time such pre-enforcement notice must be given. Compared to the 1967 Convention, the 1993 Convention contains more detailed guidance on this issue, including on the substance of the notice in Article 11(2) and the form and method to be used in notifying the relevant parties in Article 11(3). Article 4 of the fifth Beijing Draft regulates the notice obligations of the secured creditor prior to the 'judicial sale' in even greater detail than the earlier maritime treaties, as its provisions also give guidance on, for example, information of third parties on which the secured creditor may rely in its search for the information required for giving notice. Appendix I also provides for a model with 'minimum information' to be contained in a notice.

An important effect of not giving the required notice may be that pre-existing security rights will not 'cease to attach to the vessel' after the sale (Article 11 of the 1967 Brussels Convention and Article 12 of the 1993 Geneva Convention). In the fifth Beijing Draft, failure to fulfil the notice requirements of Article 4 has the effect that a 'certificate of judicial sale' may not be issued (Article 5), yet such a certificate is necessary in order to reap the '[i]nternational effects of a

[57] See the fourth version of the Beijing Draft, UNCITRAL 2021, A/CN.9/WG.VI/WP.92, Article 2(e)(ii) and footnote 4 at p 3. See also UNCITRAL 2021, A/CN.9/1053, para 47; UNCITRAL 2021, A/CN.9/1047/Rev.1, para 82 (presuming that the law applicable to a judicial sale is the law of the court that is involved).

[58] About the function of notices prior to enforcement in general, see UNCITRAL, Legislative Guide on Secured Transactions, p 286–8. Cf. Berlingieri (n 25) 184–6; CMI (1984) (n 3) 139–41.

judicial sale', as the heading of Article 6 of the fifth Beijing Draft indicates.[59] Other consequences, if any, should probably be determined in accordance with the law of the place where the enforcement takes place (Article 2 of the 1967 Brussels Convention and Article 2 of the 1993 Geneva Convention) or 'the law of the State of judicial sale' (Article 4 of the fifth Beijing Draft).

5. 'Cessation of the attachment' or 'clean title' after a sale

In addition to the notice requirements, all maritime treaties provide for rules that enable the purchaser, after the sale by a secured creditor, to receive the vessel free of any (security) rights of third parties. Article 11 of the 1967 Brussels Convention and Article 12 of the 1993 Geneva Convention determine the conditions under which security rights, liens, and other encumbrances 'cease to attach to the vessel' when a third party purchases a seagoing ship pursuant to a 'forced sale'.[60] Berlingieri clarifies that although such encumbrances cease to attach 'to the vessel', they would still attach to the proceeds of the sale, enabling secured creditors to participate in the distribution thereof in accordance with their ranking.[61] Article 5(1) of the fifth Beijing Draft sets out the conditions for the issuance of the 'certificate of judicial sale' and thus for the 'clean title' conferred on the purchaser in other State Parties (Article 6).[62]

These provisions in the 1967 and 1993 Conventions and in the fifth Beijing Draft are important as they increase the chances of a higher bid by the purchaser and may thus improve the position of the creditors among which the proceeds are distributed.[63] In order to legitimize a 'cessation of the attachment' or a 'clean title', the interests of other (secured) creditors must, of course, be taken into account. The 1967 and 1993 Conventions do so by relying on a combination of (i) notifying interested parties;[64] (ii) effecting the sale in accordance with (the procedural safeguards contained in) the law of a Contracting State;[65] (iii) requiring that the proceeds be distributed in accordance with the provisions of the Conventions;[66] and (iv) envisaging that the debt may be assumed by the

[59] See also the third version of the Beijing Draft, United Nations, A/CN.9/WG.VI/WP.90 (9 February 2021), footnote 16, which shows that different views were expressed as to the function which the notice should have under the Convention.

[60] Cf. Sharpe (n 41) 181 (point 4), who is critical of the scope of this provision in the 1993 Geneva Convention.

[61] Cf. Berlingieri (n 25) 186–7.

[62] Article 10 of the fifth Beijing Draft stipulates that the sale shall not have the effect of Article 6 if a court in another State Party determines that the effect would be (manifestly) contrary to the public policy of that other State Party.

[63] Cf. Preamble, second consideration, to the fifth Beijing Draft; Berlingieri (n 25) 186–7; CMI (1984) (n 3) 145–6, 147.

[64] Article 11(1)(b) in conjunction with Article 10 of the 1967 Convention and Article 12(1)(b) in conjunction with Article 11 of the 1993 Convention.

[65] Article 11(1)(b) of the 1967 Convention and Article 12(1)(b) of the 1993 Convention.

[66] Article 11(3) in conjunction with 11(2) of the 1967 Brussels Convention effectively requires a proper distribution of proceeds. Article 12(5) in conjunction with Article 12(1) and Article 12(2) regulates this for the 1993 Geneva Convention.

purchaser with the consent of the secured creditors.[67] The fifth Beijing Draft follows these first two requirements by referring to the requirements of the law of the State of judicial sale and those of the Convention (Article 5(1)). However, the fifth Beijing Draft does not provide for other conditions for obtaining 'clean title', such as the proper distribution of the proceeds of the judicial sale or the possibility of allowing the purchaser to assume secured claims.

6. Deregistration and reregistration of the vessel after a sale by a purchaser

Once all security rights cease to exist under the 1967 Brussels Convention and the 1993 Geneva Convention, or the purchaser acquires a 'certificate of judicial sale' reflecting a 'clean title' that should be recognized by other State Parties under the fifth Beijing Draft, the purchaser may still encounter problems if it wishes to reregister the vessel in a State of its choice—in particular, if the enforcement took place in another State. Such practical problems may, of course, also influence the price the purchaser is willing to pay.

To address this issue, Article 11(3) of the 1967 Brussels Convention and Article 12(5) of the Geneva 1993 Convention enable the purchaser of the vessel to request 'the court or other competent authority', after a 'forced sale', to issue a certificate to the effect that the vessel has been sold, in short, in accordance with the Convention and is thus free from other security rights (apart from those assumed by the purchaser). This certificate enables the purchaser to request the registrar of the register where the vessel was recorded before either to register the vessel in the purchaser's name or to issue a certificate of deregistration for the purpose of a new registration. With this latter certificate, that must be recognized by a registrar in other States, the purchaser may register the vessel elsewhere.[68] Similar to these provisions, Article 7 of the fifth Beijing Draft enables the purchaser, upon production of the certificate of judicial sale referred to in Article 5, to request that the ship (and the security rights) be deleted from the registry and a certificate of deregistration for the purpose of new registration issued,[69] that the ship be registered in the name of the purchaser,[70] or that the register be updated to include any other relevant particulars in the certificate of the judicial sale.[71] The registrar must, in accordance with the law of the relevant State Party, make these changes in the register.[72]

[67] Article 11 of the 1967 Convention and Article 12 of the 1993 Convention. This would, normally, lead to a corresponding reduction of the purchase price; see Berlingieri (n 25) 187.

[68] Cf. Berlingieri (n 25) 171 and 190.

[69] See Article 7(1)(a) and (b) of the fifth Beijing Draft.

[70] See Article 7(1)(c) of the fifth Beijing Draft.

[71] See Article 7(1)(d) of the fifth Beijing Draft.

[72] Article 7(1) of the fifth Beijing Draft contains the phrase 'without prejudice to article 6' in square brackets, so as to ensure that any requirements under national law do not affect the conferral of clean title on the purchaser; see footnote 5 of the Draft.

III. Enforcement of security rights in the 1948 Geneva Convention for aircraft

1. Introduction

Like the maritime treaties, the 1948 Geneva Convention for aircraft does not create a comprehensive uniform regime for security rights but instead regulates certain aspects of security rights by introducing some uniform conflicts-of-law provisions and some uniform substantive provisions. A number of aspects are not regulated at all and are accordingly left to national law.

Section III.2 offers a brief overview of the historical background and an introduction to the scope of application of the 1948 Convention for aircraft. Section III.3 analyses the conflict-of-laws provisions for enforcement in this treaty, while sections III.4–III.6 discuss its substantive law provisions on enforcement remedies. The latter include provisions on notification prior to enforcement, the legal consequences of a 'sale in execution',[73] and deregistration and reregistration. Like the maritime conventions, the 1948 Geneva Convention does not itself give a secured creditor the right to sell by way of enforcement, but rightly presumes that secured creditors have a (national) right of sale and provides further guidance on that basis.

2. Historical background and scope

The 1948 Geneva Convention is an important treaty for the secured creditor with a security right over aircraft. The 1948 Geneva Convention finds its origin in two proposals of the Comité international technique d'experts juridiques aériens (CITEJA), both of which were adopted by CITEJA in 1931 without acquiring formal legal status.[74] The Convention was (further) developed by the International Civil Aviation Organization (ICAO) and was eventually adopted by ICAO in 1948.[75] The primary goal of this Convention is to recognize foreign security rights over aircraft so as to make it easier for companies to obtain credit for new aircraft. Another goal is to protect the owner of the aircraft and to enhance the legal certainty regarding the ownership of aircraft.[76] The 1948 Geneva Convention entered into force on 17 September 1953 and currently has 91 State Parties.[77]

The 1948 Geneva Convention applies to 'mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness' in respect of 'aircraft' in a Contracting State, which aircraft is

[73] The terminology used in Article VII of the 1948 Geneva Convention.

[74] In more detail, see K. Rijks, *Het verdrag van Geneve betreffende internationale erkenning van rechten op luchtvaartuigen* (Excelsiors foto-offset: 's-Gravenhage, 1952), p 81–7.

[75] In more detail, see Rijks (n 74) 89–92.

[76] Rijks (n 74) 93–5.

[77] See the website of the depositary (ICAO), <https://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx> (accessed 1 June 2022).

registered in another Contracting State (Article I(1)(d) and Article XI(1)).[78] The treaty does not elaborate on the meaning of 'mortgages, hypotheques and similar rights'.[79] The term 'aircraft' is clarified in Article XVI of the Convention, which states that the term shall include 'the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom'.[80]

The substantive law provisions on enforcement in the 1948 Convention only apply to a sale of an aircraft that qualifies as a 'sale in execution' under the treaty. Like the maritime conventions, the 1948 Geneva Convention does not define the meaning of a 'sale in execution'. However, it may be inferred from Article VII(2)(b) of the Convention that a public or private sale by a secured creditor only qualifies as a 'sale in execution' if a court or other 'competent authority' is involved in the sale.[81] In our view, an entirely private sale based on the agreement of the parties without such involvement does not fall within the scope of the treaty.

3. *Conflict-of-laws provisions regarding enforcement of security rights*

The most important conflict-of-laws provision on enforcement of security rights over aircraft in the 1948 Geneva Convention is most similar to that spelled out in Article 4(1) of the fifth Beijing Draft (see section II.3). According to Article VII(1) of the 1948 Convention, the 'proceedings of a sale of an aircraft in execution' are determined by the law of the State where the enforcement by a secured creditor takes place—that is, the *lex executionis*.

The Convention gives no further guidance on the meaning of the wording 'proceedings of a sale'. K. Rijks, however, suggests that this wording should be interpreted broadly as a reference to the entire proceeding regarding a sale in execution, except for the issues dealt with in Article VII(2).[82] This probably means that the *lex executionis* determines all procedural issues, such as commencement of proceedings, notifications under national law, and issues of proof before a court, as is the case under the maritime treaties (see section II.3).

[78] The 1948 Geneva Convention contains further specifications. E.g., Article XI(2) provides that some provisions also apply to aircraft registered in the same State that applies the Convention; Article XII holds that Contracting States are allowed to enforce their laws relating to immigration, customs, or air navigation; and Article XIII states that the Convention does not apply to aircraft used in military, customs, or police services.

[79] About the meaning of this phrase, see further Rijks (n 74) 116–7.

[80] Article X(4) also contains a definition of 'spare parts'. For more details about the definition of aircraft in this Convention, see Rijks (n 74) 100–04.

[81] Rijks (n 74) 192–4.

[82] Cf. Rijks (n 74) 187, 191–2. Article VII(2)(a) determines that the date and place of the sale shall be fixed at least six weeks in advance; Article VII(2)(b) relates to recordings concerning the aircraft that should be provided to the Court or other competent authority, public notice of the sale, and private notice to the recorded owner and holders of other rights in the aircraft (see also section III.4 on notice requirements).

Mirroring the approach of Article 4(1) of the fifth Beijing Draft, the scope of Article VII(1) of the 1948 Convention is limited to enforcement by way of a sale in execution. This provision thus does not determine the law applicable to any other enforcement remedies at the secured creditor's disposal, such as whether it is entitled to enforce its rights through appropriation or through the management of encumbered assets. Whether the *lex executionis* determines whether the secured creditor has the remedy of sale is, however, unclear.

The issue of the enforcement remedies at the creditor's disposal likewise does not fall within the scope of Article I of the 1948 Geneva Convention regarding the recognition of security rights constituted in accordance with the law of the place of registration of the aircraft, as the purpose of this provision is fairly limited. Rijks explains that its objective was not to guarantee certain rights of the secured creditor against the debtor nor to give the security right the same effect in all Contracting States but rather to maintain (the ranking of) a security right when it is endangered—for example, in the context of attachment and enforcement or with regard to the deregistration of the aircraft.[83] Since there are no other conflict-of-laws provisions in the 1948 Geneva Convention that regulate the law determining the enforcement remedies at the creditor's disposal either, this topic falls outside the scope of this Convention and is left to national conflict-of-laws provisions.

4. Notice requirements

Like the maritime treaties, the 1948 Geneva Convention contains a set of rules on notice prior to enforcement. Article VII(2)(b) of the 1948 Geneva Convention requires the secured creditor to comply with information and notice obligations prior to a 'sale in execution' comparable to those featuring in the maritime conventions. The provision stipulates that both a 'public notice' and a personal notice must be given to certain interested parties. As in the maritime conventions, this provision provides guidance on when and how to give notice.

As to the consequences of failing to give the required notice, the 1948 Geneva Convention again takes an approach similar to that in the maritime conventions. In order to effect a 'transfer of the property in such aircraft free from all rights which are not assumed by the purchaser', it is necessary to start the enforcement process with the required notifications (Article VIII in conjunction with Article VII(2)(b)).[84] Other relevant legal effects of non-compliance with the notice requirements are left to the law of the place where enforcement takes place (Article VII(3) of the 1948 Geneva Convention), except that 'any sale taking place in contravention of the requirements. . .may be annulled upon demand made within six months from the date of the sale by any person suffering damage as the result of such contravention'.[85]

[83] Rijks (n 74) 117, 124–5, 141–2.

[84] On this, and other requirements for acquiring an aircraft 'free from all rights', see section III.5.

[85] Rijks (n 74) 197 argues that this is also true when the law of the Contracting State is silent on the issue.

5. An aircraft 'free from all rights' after a sale

As in the maritime treaties, Articles VII and VIII of the 1948 Geneva Convention thus enable the purchaser of an aircraft, upon a sale by a secured creditor, to obtain the aircraft 'free from all rights' of third parties.[86] 'Free from all rights' means that both higher- and lower-ranking rights extinguish after the sale, except for rights that are assumed by the purchaser. The prospect of obtaining such 'clean title' to an aircraft is intended to persuade the purchaser to make a higher bid, but of course the interests of other parties must continue to be protected.[87] However, the conditions for this 'clean title' for the purchaser in Article VII of the 1948 Geneva Convention differ from those contemplated in the maritime treaties. Article VII of the 1948 Convention resembles the relevant provisions in the maritime conventions in that it relies, in part, on the national procedural rules for the sale in execution,[88] and also requires that the notice obligations of the Convention be met.[89] Instead of requiring that the proceeds be properly distributed in general terms (see section II.5), Article VII(4) stipulates a minimum threshold: rights having priority over the claim of the executing creditor must be fully covered by the proceeds of the sale in execution or be assumed by the purchaser,[90] failing which the sale cannot be effected.[91] For the transfer of the property free from all rights, creditors with lower-ranking rights need not be paid out of the proceeds when these exceed the claims of the higher-ranking creditors.[92] The position of lower-ranking creditors is not regulated in the treaty and needs to be determined in accordance with national law.

6. Deregistration and reregistration of an aircraft after a sale by a purchaser

Unlike the maritime conventions, the 1948 Geneva Convention does not provide any assistance on the deregistration and reregistration of an aircraft by the purchaser of an aircraft. Article IX assumes that deregistration and reregistration are possible once the purchaser of an aircraft has acquired the aircraft 'free from all rights' upon a sale in execution, in line with Article VII of the Convention.[93] Article IX is not, however, intended to accommodate the needs of the purchaser but was created solely to protect the interests of other

[86] Article VI contains a limitation on the obligation for Contracting States to recognize rights or the transfer thereof if these are constituted or effected with knowledge of a sale or execution proceedings by the person against whom the proceedings are directed. On this provision, see Rijks (n 74) 190–1.

[87] Cf. Rijks (n 74) 187.

[88] Article VIII in conjunction with Article VII(1) of the 1948 Geneva Convention.

[89] Article VIII in conjunction with Article VII(2)–(3) of the 1948 Geneva Convention.

[90] Article VIII in conjunction with Article VII(4) of the 1948 Geneva Convention.

[91] Cf. Rijks (n 74) 197–9.

[92] Rijks (n 74) 200.

[93] Article IX of the 1948 Geneva Convention holds that deregistration and reregistration without meeting the requirements for 'clean title' is only possible if 'all holders of recorded rights have been satisfied or consent to the transfer'.

creditors.[94] The 1948 Geneva Convention does not create a right similar to that of the purchaser of a vessel under the maritime conventions, which would have enabled it to request a court or other relevant authority to issue some kind of certificate with a view to effectuating deregistration and reregistration in the relevant registry (see section II.6). How this (practical) effectuation takes place should therefore be determined under national law.[95]

IV. Enforcement of security rights under the Cape Town regime

1. Introduction

Compared to the maritime treaties and the 1948 Geneva Convention for aircraft, the Cape Town Convention and its Aircraft and Rail Protocols provide a far more comprehensive regime for the enforcement of security interests, with a focus on substantive law.

Section IV.2 provides a short overview of the historical background and scope of the Cape Town Convention and its Aircraft and Rail Protocols before turning to a discussion of the relevant provisions on enforcement remedies of the secured creditor. Unlike the treaties discussed in sections II and III, the Cape Town Convention and its Protocols offer the secured creditor a number of enforcement remedies.[96] Section IV.3 discusses the general enforcement remedies of the Cape Town Convention and section IV.4 focuses on the specific enforcement remedies of the Protocols for aircraft and trains, while section IV.5 covers the remedies in speedy relief proceedings. Section IV.6 shows that the applicable law may also allow additional, national enforcement remedies. Section IV.7 discusses notice requirements, the application of a standard of commercial reasonableness, and the role of national procedural law as ways of protecting the debtor's interests as well as those of third parties. Section IV.8 considers the approach of the Cape Town regime to a purchaser obtaining 'clean title' after enforcement.

2. Historical background and scope

The first steps towards the Cape Town Convention and its Protocols were taken in the late 1980s in the shape of a comparative research project dealing with the problems that can arise when granting security rights over mobile assets in a cross-border context. In 1992, a restricted UNIDROIT Working Group was set up to see whether a comprehensive Convention would be useful and feasible and to thrash out the groundwork of the Convention. In the years that followed, a UNIDROIT Study Group and several other working groups worked on specific

[94] Cf. Rijks (n 74) 131–4.

[95] The 1944 Chicago Convention (n 28) provides a general framework for registration of aircraft as to nationality and the option of deregistration and reregistration. Article 19 of the 1944 Chicago Convention leaves the effectuation of this registration to national law as well.

[96] For an overview, see Goode, *Official Commentary Aircraft Protocol* (n 11) 4.85.

topics and types of asset and further fleshed out the draft Convention and its Protocols. The instruments were primarily 'designed to overcome the problem of obtaining secure and readily enforceable rights in aircraft objects, railway rolling stock. . .which by their nature have no fixed location'.[97] Generally, party autonomy became a cornerstone of the Cape Town Convention regime. The Convention gives the parties considerable freedom to structure the creditor's remedies in the context of secured transactions concerning movable assets.[98] The drafters considered this approach beneficial for the availability of credit and appropriate for high-value equipment such as aircraft and trains.[99]

The Aircraft Protocol was initially prepared by UNIDROIT, in collaboration with the Aviation Working Group, the International Air Transport Association (IATA), and the ICAO. After further discussions at the level of a Committee of Governmental Experts, the Cape Town Convention and the Aircraft Protocol were adopted at a diplomatic Conference held under the joint auspices of UNIDROIT and ICAO in 2001.[100] Both the Cape Town Convention and Aircraft Protocol entered into force on 1 March 2006. There are currently 83 Contracting States and one acceding Regional Economic Integration Organization to the Cape Town Convention and 80 Contracting States and one acceding Regional Economic Integration Organization to the Aircraft Protocol.[101] The Aircraft Protocol is generally intended to supersede the 1948 Geneva Convention (Article XXIII of the Aircraft Protocol).[102]

The Rail Protocol was initially developed along with the Aircraft Protocol by the UNIDROIT Study Group, the Rail Working Group, and the Intergovernmental Organization for International Carriage by Rail (OTIF). After further work by the Committee of Governmental Experts, it was adopted at a diplomatic Conference under the auspices of UNIDROIT and OTIF on 23 February 2007.[103]

[97] On the reasons for developing the Convention, see A.N. Didenko, *The Cape Town Convention: A Documentary History* (Oxford etc.: Hart Publishing, 2021); R. Goode, 'The Cape Town Convention on International Interests in Mobile Equipment: A Driving Force for International Asset-based Financing', *Uniform Law Review*, 7/1 (2002), 3–15, at 4 (quote). About the purpose of the treaty, see also Kreuzer, 'Internationale Mobiliarsicherungsrechte' (n 12) 875.

[98] Didenko (n 97) 88–90.

[99] The limits of party autonomy are the subject of debate. See A. Veneziano, 'The Role of Party Autonomy in the Enforcement of Secured Creditor's Rights: International Developments', *Penn State Journal of Law & International Affairs*, 4/1 (2015), 333–49; Keijser (n 20).

[100] In further detail about the preparation of the Aircraft Protocol, see Goode, *Official Commentary Aircraft Protocol* (n 11) 1.1—1.6; Kreuzer, 'Internationale Mobiliarsicherungsrechte' (n 12) 873–5. On the historical background of the Cape Town project as a whole, see Didenko (n 97); R. Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols', *Uniform Law Review*, 17/4 (2012), 599–607.

[101] See the website of the depositary (UNIDROIT), <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/> and <https://www.unidroit.org/instruments/security-interests/aircraft-protocol/states-parties/> (both accessed 1 June 2022).

[102] With respect to rights or interests not covered or affected by the Cape Town Convention, the Geneva Convention is not superseded. On the relationship between the two treaties, see D. Hanley, 'The Relationship between the Geneva and Cape Town Conventions', *Cape Town Convention Journal*, 4/1 (2015), 103–13.

[103] In more detail about the history of the Rail Protocol, see Goode, *Official Commentary Rail Protocol* (n 2) 1.1—1.5.

Three Contracting States and one Regional Economic Integration Organization are currently parties to the Rail Protocol, but the Protocol has not yet entered into force.[104]

The material scope of the Cape Town Convention regime should be determined by reading the Cape Town Convention and its Protocols together as a single instrument. In order for the Cape Town regime to apply, the debtor must be situated in a Contracting State at the time of conclusion of the agreement, creating or providing for an 'international interest' (Article 3(1) of the Cape Town Convention).[105] Such an 'international interest' may follow from a security agreement, title reservation agreement (conditional sale), or a leasing agreement (Article 2(1)–(2) of the Cape Town Convention).[106] Moreover, the Aircraft Protocol, in contrast to the Rail Protocol,[107] also applies to 'outright' sales or prospective sales of aircraft objects (Article III of the Aircraft Protocol).

The 'international interest' may be created in 'aircraft objects', which are described as airframes, aircraft engines, and helicopters (Article 2(3)(a) of the Cape Town Convention and Articles I(2)(c) and II Aircraft Protocol) that are uniquely identifiable (Article 2(2) of the Cape Town Convention). The Cape Town regime also applies to 'international interests' in 'railway rolling stock' that is uniquely identifiable (Article 2(2) and (3)(b) of the Cape Town Convention and Article II(1) of the Rail Protocol). Article I(2)(e) of the Rail Protocol describes railway rolling stock as:

> vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.[108]

[104] See Article XXIII Rail Protocol and <https://www.unidroit.org/instruments/security-interests/rail-protocol/status/> (accessed 1 June 2022). The latest session of the Preparatory Commission for the Establishment of the International Registry for Railway Rolling Stock took place in April 2021. See <https://www.unidroit.org/work-in-progress/rail-prepcom/#1456405893720-a55ec26a-b30a> (accessed 1 June 2022).

[105] Article IV(1) Aircraft Protocol extends the application of the instrument to helicopters and airframes pertaining to an aircraft, registered in a register of a Contracting State which is the State of registry (Article I(2)(p)).

[106] In addition to this main category of interests, the regime also applies to other rights and interests, among which 'prospective international interests', 'national interests', and 'associated rights'. Article 1 of the Cape Town Convention defines these different rights and interests. See also Goode, *Official Commentary Aircraft Protocol* (n 11) 2.40.

[107] Although it is possible to register a notice of sale under Article XVII Rail Protocol, this 'shall be for the purposes of information only and shall not affect the rights of any person, or have any other effect, under the Convention or this Protocol.' See also Goode, *Official Commentary Rail Protocol* (n 2) 3.52.

[108] About the scope of the Convention, see also Goode, *Official Commentary Aircraft Protocol* (n 11) 2.31; Goode, *Official Commentary Rail Protocol* (n 2) 2.23; Kreuzer, 'Internationale Mobiliarsicherungsrechte' (n 12) 880–2.

3. *General enforcement remedies of the Cape Town Convention*

Articles 8 and 9 are the Cape Town Convention's most elaborate provisions regarding the enforcement remedies available to a secured creditor.[109] The first remedy mentioned in Article 8(1)(a) is the remedy to 'take possession or control' of secured assets when these are 'in the hands' of the debtor. This remedy will largely be intended to prepare the ground for the exercise of other remedies such as sale, granting a lease, managing or using the asset, and collecting or receiving the income or profits arising therefrom (Article 8(1)(b)-(c)).[110] The Cape Town Convention does not offer a definition of the 'right to take possession or control'; nor does the Official Commentary contain a description of this right. The Commentary does, however, emphasize that 'possession' must be given a broad meaning and is 'to be construed as covering both possession in the common law sense and *détention* in the civil law sense'.[111] Since Article 8(1)(a) refers to 'taking possession', the remedy appears to require the creditor to take an active role, but does not appear to require the debtor to take steps to deliver the encumbered asset into the hands of the secured creditor. This interpretation is in line with the interpretation of the High Court of Australia in *Wells Fargo Trust Company*, where the court held that the meaning of the wording 'give possession' as used in Article XI(2), Alternative A of the Aircraft Protocol does not impose a requirement on an insolvency administrator to effect (re)delivery to the creditor.[112] What may be expected from a debtor in this regard—for instance, what type of information the debtor is required to share in order to enable the secured creditor to exercise its right—remains unclear.

The next two remedies listed in the Convention are the right to 'sell' or 'grant a lease' of the encumbered asset (Article 8(1)(b) of the Cape Town Convention). Article 1(gg) of the Cape Town Convention defines a 'sale' as 'a transfer of ownership of an object pursuant to a contract of sale'. This sale may be a transfer of ownership to a third party, but might also be a sale to the secured creditor itself.[113] In principle, both a private sale and a public sale of the aircraft or train are permitted, as long as the sale is carried out in a commercially reasonable manner.[114] Following the definition of a 'leasing agreement' in Article 1(q) of the Cape Town Convention, a 'lease' should be seen as a right to possession or control of an object (with or without an option to purchase) in

[109] On these remedies, see also Kreuzer, 'Internationale Mobiliarsicherungsrechte' (n 12) 885–7. In light of our focus on the remedies for secured creditors (see section I.5), we do not discuss the remedies set out in Article 10 for title reservation or lease arrangements.

[110] Cf. Goode, *Official Commentary Aircraft Protocol* (n 11) 2.114 and 4.88.

[111] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.30.

[112] See High Court of Australia, *Wells Fargo Trust Company, National Association (as owner trustee) v VB Leaseco Pty Ltd (administrators appointed)*, para 42–52.

[113] See Goode, *Official Commentary Aircraft Protocol* (n 11) 4.95.

[114] Cf. Goode, *Official Commentary Aircraft Protocol* (n 11) 2.113.

return for a rental or other payment.[115] Finally, Article 8(1)(c) refers to the right to 'collect or receive any income or profits arising from the management or use of any such object', which could be exercised in combination with the right to grant a 'lease' or as a separate remedy.[116]

The remedies in Article 8 of the Cape Town Convention are available to the secured creditor to the extent that the debtor has at any time so agreed, or after the secured creditor has received a court order authorizing or directing any of the remedies (Article 8(1)–(2) of the Cape Town Convention). Unlike the treaties discussed in sections II and III, the Cape Town Convention may therefore also apply to sales effected without the involvement of a court or other competent authority. However, if a Contracting State made a declaration under Article 54(2) stating that leave of the court is necessary at any time, such leave will also be required even where the debtor has agreed to certain remedies.[117]

Article 9 of the Cape Town Convention contains the additional remedy that the asset may be 'vested in' the secured creditor in or towards satisfaction of the secured obligations. This remedy may also be referred to as the remedy of appropriation. Compared to the remedies of Article 8, obtaining and exercising the right of appropriation is subject to stricter conditions. First, the secured creditor has the right of appropriation to the extent that 'all interested persons' agree on this. Article 1(m) defines interested persons by summing up all relevant persons, among which are the debtor and any person having rights in or over the encumbered asset. Second, these persons cannot so agree at any time of their choosing, but only upon default.[118] The secured creditor may apply for a court order directing appropriation if not all interested persons agree or if the secured creditor chooses to involve the court for other reasons (Article 9(1)–(2) of the Cape Town Convention). In this case, Article 9(3) provides for additional protection of the interests of the debtor (and its other creditors)—in particular, when the value of the encumbered asset exceeds that of the secured loan.[119] Pursuant to this provision, the court may only authorize the remedy if it is convinced that the secured debt is 'commensurate with the value of the object'. The court must, for example, refuse the order in Article 9(2) when there is a secured loan of €1 million and an asset that has a value of €5 million,[120] whereas the court may permit the order if the secured loan was for €5 million and the value of the encumbered asset was €1 million.[121]

[115] Pursuant to Article 54(1), a Contracting State may declare that the creditor shall not grant a lease of the asset while the asset is situated within or controlled from that Contracting State's territory. See Goode, *Official Commentary Aircraft Protocol* (n 11) 4.91.

[116] See the example mentioned in Goode, *Official Commentary Aircraft Protocol* (n 11) 4.88.

[117] See Goode, *Official Commentary Aircraft Protocol* (n 11) 4.86.

[118] According to Article 11 of the Cape Town Convention, the parties are free to determine when the debtor defaults.

[119] Goode, *Official Commentary Aircraft Protocol* (n 11) 4.99 and 4.100.

[120] Goode, *Official Commentary Aircraft Protocol* (n 11) 4.104.

[121] In this case, the creditor retains a claim for the amount of the difference. See Goode, *Official Commentary Aircraft Protocol* (n 11) 4.100.

Neither the Convention nor the Official Commentary provide further rules on appropriation. For example, no guidance is available as to whether, how, and when the debtor should deliver the assets to the secured creditor. As these issues seem to fall outside the Cape Town Convention regime, they will be left to the applicable law (Article 5(2)–(3) of the Cape Town Convention).

4. Additional enforcement remedies of the Protocols: deregistration of the aircraft; export and physical transfer

Both the Aircraft Protocol and the Rail Protocol contain 'additional remedies' for the secured creditor. The Aircraft Protocol gives the secured creditor the additional remedy to procure deregistration of an aircraft (Article IX(1) of the Aircraft Protocol).[122] Here, unlike the approach in the maritime conventions, reregistration is left to national law.[123] Another notable difference between these conventions and the Aircraft Protocol is that the latter does not enable the *purchaser* to procure deregistration of the aircraft with a view to stimulating a higher bid by the purchaser, but grants this right to the *secured creditor* with a view to facilitating the exercise of its other enforcement remedies. Other additional remedies envisaged in both the Aircraft Protocol and the Rail Protocol are the secured creditor's right to procure export and physical transfer of aircraft and trains (Article IX(1) of the Aircraft Protocol and Article VII(1) of the Rail Protocol). According to the Official Commentary, the additional remedies are intended 'to remove the [assets] still further from the debtor's control and transfer control to the creditor'.[124]

The additional remedies may be exercised by the secured creditor after default of the debtor and when the secured creditor, in addition to agreeing on this with the debtor or receiving a court order, has received the consent in writing of all holders of a registered security interest ranking in priority to that of the secured creditor (Article IX(2) of the Aircraft Protocol and Article VII(2) of the Rail Protocol). Like the maritime conventions, the Protocols contain further guidance on how to effectuate these remedies.[125]

5. Remedies in the context of 'speedy relief' proceedings

The Cape Town system also sets out certain 'speedy relief' remedies available to a secured creditor pending final determination of its claim.[126] Article 13(1) of

[122] No such right is envisaged in the Rail Protocol.

[123] Cf. Goode, *Official Commentary Aircraft Protocol* (n 11) 3.32. National law may include the provisions of the 1944 Chicago Convention (n 28).

[124] Goode, *Official Commentary Aircraft Protocol* (n 11) 3.32 and 3.37; Goode, *Official Commentary Rail Protocol* (n 2) 3.20.

[125] See Article IX(5)–(6), and, subject to a declaration, Articles X(1), (6), (7) and XIII of the Aircraft Protocol; Article VII(5)–(6) and, subject to a declaration, Article VIII(1), (6), (7) of the Rail Protocol. For further detail on the different 'routes' to achieve deregistration and export and physical transfer, see Goode, *Official Commentary Aircraft Protocol* (n 11) 3.31 et seq. and Goode, *Official Commentary Rail Protocol* (n 2) 3.20 et seq.

[126] See Goode, *Official Commentary Aircraft Protocol* (n 11) 4.116–23, 5.57–9.

the Cape Town Convention mentions the following remedies for a secured creditor 'who adduces evidence of default by the debtor'—remedies that, again, are subject to agreement by the debtor (before or after default) and to a declaration by a Contracting State under Article 55:[127]

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.

In the context of speedy relief proceedings concerning aircraft or trains, the creditor may, in addition, have the right to sell the encumbered asset to a third party (Article X(1), (3) of the Aircraft Protocol; Article VIII(1), (3) of the Rail Protocol).[128] The remedies of sale and lease are especially remarkable as these remedies may be irrevocable, whereas interim proceedings are usually focused on conservatory measures.[129] The court that makes any order under Article 13(1) may impose such terms as it deems necessary to protect 'interested persons' (Article 13(2)).[130] The creditor and the debtor, or any other interested person, may agree in writing to exclude the application of this power of the court.[131]

6. Additional remedies permitted by applicable law

The final category of remedies that are at the disposal of the secured creditor with a security right are the 'additional remedies' under the national law that applies on the basis of the conflict-of-laws rules of the forum (Article 12 in conjunction with Article 5(3) of the Cape Town Convention). With this rule, the Cape Town Convention, in contrast to the rather general provisions in the maritime conventions and the 1948 Geneva Convention, provides for an explicit conflict-of-laws rule to determine which additional enforcement remedies are at the disposal of a secured creditor.

The Official Commentary makes it clear that the 'additional remedies' referred to in Article 12, which could also be a remedy agreed to by the parties under national law, should not be interpreted in a strict sense.[132] The Commentary makes a distinction between 'substantive remedies' (for example, to agree that 'on default the creditor [is] entitled to accelerate the debtor's liability', to call for additional security, to enter the debtor's premises and to sell the object from those premises') and 'procedural remedies' (for example, to request

[127] Under Article 55 Cape Town Convention, a Contracting State may declare that it will not, or only partly, apply such remedies.

[128] On the comparable sale of ships in interlocutory proceedings in the US, see CMI (1984) (n 3) 138–9.

[129] See Didenko (n 97) 100–1.

[130] Article 1(m) Cape Town Convention defines 'interested persons'.

[131] Article X(5) Aircraft Protocol; VIII(5) Rail Protocol.

[132] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.122–5.

'an injunction or an order for specific performance' or an 'interim payment or the preservation of property'). According to the Commentary, the law of the forum will typically determine that the applicable law to determine available 'substantive remedies' will usually be either the law governing the contract between the parties or the law of the forum State, whereas the applicable law to determine available 'procedural remedies' will be the law of the forum State.[133]

Any of the additional national remedies may only be exercised in as far as they do not contravene the mandatory safeguards of Article 15 of the Cape Town Convention (see further section IV.7). Otherwise, Article 12 does not address the question of how a specific remedy should be exercised, as this question arguably falls within the scope of Article 14 (see section IV.7.D).[134] This may lead to a situation where the law of State A, pursuant to Article 12, gives the secured creditor a specific remedy that it intends to exercise, whereas the law of State B, where the remedy is exercised in accordance with Article 14, is not familiar with this specific remedy. The solution for this problem is unclear.

7. Mandatory safeguards

A. Party autonomy and mandatory safeguards

The starting point of the Cape Town regime is that a secured creditor and debtor may at any time, by agreement in writing, derogate from or vary the enforcement remedies in the Cape Town Convention, the Protocol-specific remedies, or the remedies that stem from national law.[135] As indicated in section IV.2, this party autonomy in the context of enforcement remedies is one of the key methods devised by the Cape Town Convention to create an 'efficient, rapid, and cost-effective' secured transaction system for high-value, mobile equipment.[136] This autonomy is not absolute, however, as the enforcement remedies of a secured creditor with a security right under the Cape Town regime must meet certain mandatory safeguards aimed at protecting the interests of the debtor and of third parties.[137] Important provisions from which the parties may not derogate include notice requirements, the application of a standard of commercial reasonableness, and the requirement to follow national procedural law.[138] These mandatory safeguards are discussed below.

[133] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.122–5.

[134] Article 12 refers to Article 15, which in turn refers to Article 14. Cf. Goode, *Official Commentary Aircraft Protocol* (n 11) 2.108, which states that the exercise of 'non-Convention remedies, such as remedies under the applicable law preserved by Articles 12 and 13(4), [. . .] is subject to any restrictions imposed by the law of the place of enforcement.'

[135] See Article 15 Cape Town Convention; Article IV(3) Aircraft Protocol; and Article III Rail Protocol. Theoretically, it is also possible to expand available remedies under Article 15 of the Cape Town Convention; about the resulting overlap with Article 12, see Goode, *Official Commentary Aircraft Protocol* (n 11) 2.146.

[136] Veneziano, 'Party Autonomy' (n 99) 336.

[137] See Article 15 Cape Town Convention; Article IV(3) Aircraft Protocol; and Article III Rail Protocol.

[138] The reference in Article 15 to Articles 8(3) to (6), 9(3) and (4), 13(2) and 14 of the Cape Town Convention from which parties may not derogate, includes other topics as well, such as the

B. Notice requirements

Like the maritime treaties and the 1948 Geneva Convention for aircraft, the Cape Town Convention and its Aircraft and Rail Protocols determine when the secured creditor needs to notify whom when contemplating the application of certain remedies.[139] The core provision on notices in Article 8(4) of the Cape Town Convention applies only in the event of a sale or lease. In the event of a request for 'speedy relief' remedies (see section IV.5), there is no obligation to give notice, although the court may require notice to interested persons (Article 13(3) of the Cape Town Convention). By the same token, there is no obligation to give notice to any interested persons under the Cape Town Convention regime when a secured creditor takes possession and control, nor is such notice required for the remedy of appropriation.[140] Arguably, however, such notice might, in these cases, be required pursuant to national procedural law (Article 14 of the Cape Town Convention).

Like the maritime treaties and the 1948 Geneva Convention, Article 8(4) of the Cape Town Convention lists in detail whom to inform and how. The time limit for notices is further specified in Article IX(4) of the Aircraft Protocol (which effectively envisages a minimum period of ten working days for the notice) and Article VII(4) of the Rail Protocol (which envisages a minimum period of fourteen calendar days).[141]

Unlike the maritime treaties and the 1948 Geneva Convention (sections II.4 and III.4), the Cape Town Convention does not link specific consequences to the provision of notice. In particular, it does not determine that notice is required for a 'clean title'. The consequences of lack of notice, if any, should be determined in accordance with the applicable law.[142]

distribution of any surplus generated by enforcement. In some cases, the Protocols say otherwise, e.g. in relation to Article 13(2) (protection of interested persons in the context of relief).

139 In contrast to the maritime treaties and the 1948 Convention (see sections II.4 and III.4), Article 8(4) in conjunction with Article 8(1) of the Cape Town Convention seems limited to notice prior to the exercise of *extrajudicial* remedies. On the function of notice in general, see section II.4, and on one of its functions in the Cape Town regime, see Goode, *Official Commentary Aircraft Protocol* (n 11) 2.117.

140 On the notice requirements in the Cape Town Convention, see S. Saidova, 'The Cape Town Convention: Repossession and Sale of Charged Aircraft Objects in a Commercially Reasonable Manner', *Lloyd's Maritime and Commercial Law Quarterly*, 2 (2013), 180–98, at 192. Regarding appropriation, cf. Goode, *Official Commentary Aircraft Protocol* (n 11) 2.118.

141 The notice periods under the Cape Town regime are considerably shorter than those under Article 10 of the 1967 Brussels Convention and Article 11 of the 1993 Geneva Convention, which take a notice period of at least thirty days prior to the sale as a starting point; likewise shorter than those under the 1948 Geneva Convention for aircraft, according to which the date and place of a sale should be determined at least six weeks in advance (Article VII(2)(a)), while notice of the sale should be given at least one month before the fixed date (Article VII(2)(b)); and shorter than those mentioned in the earlier, fourth version of Appendix I of the Beijing Draft (A/CN.9/WG.VI/WP.92), which stated in Note 1: 'While 30 days would generally constitute an adequate period, the court or other public authority conducting the judicial sale may have the discretion to provide a shorter notice period (for instance where the ship faces deterioration).'

142 Goode, *Official Commentary Aircraft Protocol* (n 11) 2.291. The applicable law is the law that applies according to the rules of private international law of the forum State (Article 5(3) Cape Town Convention).

C. Commercial reasonableness

The enforcement remedies envisaged in the Cape Town Convention and the Aircraft and Rail Protocols should be exercised in a 'commercially reasonable manner'.[143] This standard also applies in the context of remedies that the parties have agreed upon[144] and in the context of interim remedies (Article 13(4) of the Cape Town Convention).

The precise meaning of 'commercial reasonableness' as used in the Convention and its Protocols must be determined in an autonomous manner, not according to its equivalent in any national legal system.[145] The test is an objective test: the manner in which remedies are exercised must be considered reasonable by a neutral observer. The requirement that remedies must be exercised in a commercially reasonable manner does not mean that the secured creditor may not take into account its own interests, for example, regarding the time and method of disposal.[146] Pursuant to Articles IX of the Aircraft Protocol and VII of the Rail Protocol, a remedy is deemed to be exercised in a commercially reasonable manner 'where it is exercised in conformity with a provision of the agreement, except where such a provision is manifestly unreasonable'. The Official Commentary adds that 'a provision that is in line with accepted international practice will normally be regarded as not manifestly unreasonable'.[147]

Because the Cape Town regime does not require the involvement of a court or other competent authority in all cases before or during enforcement, notably where the parties themselves shape the enforcement process, the regime relies on the application of the standard of commercial reasonableness after enforcement. The standard of commercial reasonableness does not feature in any of the treaties for ships or in the 1948 Geneva Convention for aircraft. Instead, these treaties primarily rely on a court or other independent third party as a method of guaranteeing optimal conduct of enforcement proceedings in the interest of the different parties involved.[148]

D. Additional conflict-of-laws provision regarding the procedural aspects of enforcement

Like the reference in the maritime treaties and the 1948 Geneva Convention to the *lex executionis*, Article 14 of the Cape Town Convention determines that

[143] Articles 8(3) Cape Town Convention, IX(3) Aircraft Protocol, and VII(3) Rail Protocol.

[144] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.123 and 2.146.

[145] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.112.

[146] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.112 and 4.93–4.

[147] Goode, *Official Commentary Aircraft Protocol* (n 11) 4.94. On commercial reasonableness in the Cape Town Convention, see also Saidova (n 140) 182–92.

[148] For a further discussion of the pros and cons of a standard of commercial reasonableness and other ways to guarantee a fair manner of enforcement, see Keijser (n 20) 950, 952 and A. Veneziano, 'The Contours of "Commercial Reasonableness" under the Cape Town Convention', *Cape Town Convention Journal*, 7 (2018), 83–92.

'any remedy. . .shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised'.[149]

Article 14 thus prescribes what law applies to the question of how to exercise a specific remedy, although the exact scope of the provision is not entirely clear.[150] The Official Commentary mentions that 'the procedure prescribed by the law' includes both 'rules of court' and 'judicial or legally prescribed administrative practice'.[151] As indicated in our remarks regarding the equivalent of this provision in the maritime conventions and the 1948 Geneva Convention, procedural topics such as commencement of proceedings, notifications under national law, and issues of proof before a court probably fall within the remit of Article 14 of the Cape Town Convention. The Commentary additionally requires that procedural law should be applied in a manner compatible with the substantive provisions of the Convention.[152] Moreover, when a Contracting State declares that no leave of the court is necessary for any of the Convention remedies (Article 54(2)), this overrides any requirement in the Contracting State that such an order must be obtained.[153] It follows from the conflict-of-laws rule set out in Article 12 (see section IV.6) that Article 14 does not prescribe the applicable law to the question of which enforcement remedies are open to the secured creditor.

8. 'Clean title' after a sale

In contrast to the maritime treaties and the 1948 Geneva Convention for aircraft, the Cape Town Convention contains no rule providing the purchaser of an encumbered asset with a completely 'clean title' after the sale by a secured creditor. It follows from Article 9(5) of the Cape Town Convention that any lower-ranking security rights extinguish after exercise of the remedy of sale or appropriation; instead, these rights will attach to the proceeds.[154] All registered higher-ranking interests will, in principle, follow the asset acquired by the purchaser (Article 29(3) of the Cape Town Convention).[155]

The lack of a provision on the conditions for a clean title in the Cape Town Convention does not, however, mean that it is impossible for a purchaser to acquire a clean title after the sale of an encumbered aircraft or train as there are, of course, other legal techniques that, from a practical perspective, result in such a

[149] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.107, 2.144–5.

[150] Cf. Goode, *Official Commentary Aircraft Protocol* (n 11) 2.144; Veneziano, 'The Contours of "Commercial Reasonableness"' (n 148) 92.

[151] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.144.

[152] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.145.

[153] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.107, 2.144.

[154] Likewise, in the context of a sale as a speedy relief measure (see section IV.5), see Articles X(4) Aircraft Protocol and VIII(4) Rail Protocol. Goode, *Official Commentary Aircraft Protocol* (n 11) 4.97, 4.103.

[155] Article 29(3) does not apply to aircraft, as the Aircraft Protocol extends to sale. For aircraft, see Articles III and XIV Aircraft Protocol and Goode, *Official Commentary Aircraft Protocol* (n 11) 2.149, 2.214 (fn 32), and 3.15.

clean title. According to the Official Commentary, a secured creditor may, in principle, sell an aircraft or train free of higher-ranking registered security rights with the consent of these higher-ranking creditors or once these creditors have been paid in full. The Commentary mentions that a secured creditor 'cannot contract to sell' the charged asset free from the higher-ranking registered security rights without first obtaining such consent or paying the higher-ranking creditors in full. Although it is not entirely clear what this means, it would seem that such a contract should be considered void.[156] In addition, Ole Böger seems to presume that the Cape Town Convention does not preclude the possibility of conferring clean title on the buyer through national law.[157]

V. Concluding remarks

This article has focused on the provisions in several treaties that relate to the enforcement of security rights over mobile assets such as seagoing ships, aircraft, and trains. We have addressed provisions on the enforcement remedies at a secured creditor's disposal, procedural aspects of enforcement such as notice requirements, the conditions for a purchaser obtaining 'clean title', and de- and reregistration. A clearer understanding of these provisions is not only helpful to those who must apply them in practice but may also offer useful insights to policy-makers.

A first observation is that the maritime treaties and the 1948 Geneva Convention for aircraft approach the issue of enforcement primarily from a conflict-of-laws point of view and address only a few substantive law matters. The Cape Town Convention and its Protocols for aircraft and trains also include certain conflict-of-laws rules, but the Cape Town regime, moreover, proposes a much more comprehensive substantive law regime for the enforcement of security interests. No such comprehensive framework is available for seagoing ships.

Second, we have found that the ambit of the relevant conflict-of-laws provisions on enforcement of security rights is rather vague. We have sought to establish whether the relevant conflict-of-laws provisions in these treaties cover (i) purely procedural aspects and (ii) the enforcement remedies at the disposal of a secured creditor. There is broad consensus on application of the *lex executionis* in respect of the procedural aspects; however, while the issue of enforcement remedies is also crucial from the point of view of a secured creditor wishing to enforce its rights, no international consensus and clearcut rules exist in relation to this topic. Lawmakers should, in our opinion, aim at providing clarity regarding the law that determines the enforcement remedies at the disposal of a secured creditor. Inspiration for such clear rules may be found in Article 12 of the Cape Town Convention, which explicitly addresses this topic, in contrast to the other treaties.

[156] Goode, *Official Commentary Aircraft Protocol* (n 11) 2.111, 4.97, 4.103.

[157] Unidroit 2013, C.D. (92) 5 (c)/(d), para 95.

A third finding with regard to substantive law is that the meaning of enforcement by way of sale differs from treaty to treaty and that only the Cape Town regime covers any other remedies that may be available to a secured creditor. The 1967 Brussels Convention, the 1993 Geneva Convention, the fifth Beijing Draft (for ships), and the 1948 Geneva Convention (for aircraft) confined themselves to just some aspects of the enforcement mechanism of 'forced sale', 'judicial sale', or 'sale in execution', terms that appear largely to coincide and to indicate a sale in which a court or another independent third party is involved. In contrast, the Cape Town regime confers the right to enforce by way of sale—including a private sale based on an agreement between the parties as well as a sale with the involvement of a court—while the Cape Town regime also provides a range of other remedies to secured creditors absent in the other treaties. Moreover, the ways in which these remedies need to be exercised are described in detail in both the Cape Town Convention and Protocols, and in the Official Commentary to these texts.

A concluding remark concerns (i) notice requirements prior to a sale; (ii) de- and reregistration of the relevant asset after the sale; and (iii) the result of enforcement in terms of the rights of a purchaser and other secured creditors. As to the first two of these issues, these present great similarities across the different treaties. International consensus is not apparent when it comes to the third issue. On the one hand, the maritime treaties and the 1948 Convention envisage the possibility for a purchaser to obtain 'clean title' after a sale by way of enforcement. This is important, as the assurance that the purchaser will, subject to certain conditions, acquire 'clean title' is likely to have a positive effect on the price that will be paid for the asset. We have found (combinations of) different strategies in these treaties to confer clean title on the purchaser of an encumbered asset and to protect the interests of various other interested parties (including other secured creditors). These strategies include (i) prior notice; (ii) proper distribution of proceeds (with a view to covering all claims to the extent that sufficient proceeds are available or that only higher-ranking claims are paid in full); and (iii) reliance on safeguards of national law. An additional way of protecting the interests of secured creditors is (iv) to continue their security rights by way of their assumption by the purchaser. The Cape Town Convention, on the other hand, does not envisage 'clean title' for a purchaser, but protects the interests of the secured creditors by determining (v) that higher-ranking creditors need to consent to enforcement or (vi) that these creditors should be paid in full.

The current international *acquis* thus offers ample inspiration for further alignment of the international legal framework for the enforcement of security rights over ships, aircraft, and trains, both from a conflict-of-laws and from a substantive law perspective.