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Jurisdiction and choice of law under the Cape Town Convention and the Protocols thereto

Karl F. Kreuzer*

By introducing a new supranational substantive law institution in the form of an 'international interest' the Cape Town Convention and the Protocols thereto eliminate, within their material scope of application, the need for conflict of laws rules. However, as the Convention/Protocol-regime is not a complete codification, recourse to provisions designating the gap-filling substantive rules remains unavoidable. In this respect, with the exception of a provision in the Protocols authorizing the parties to choose the law applicable to their contractual obligations, the Convention and the Protocols refrain from establishing autonomous conflict of laws rules. Instead, Article 5 of the Convention generally refers to the conflict of laws rules of the forum State for issues not settled under the Convention or the relevant Protocol in order to determine the applicable substantive law provisions. The rare jurisdictional rules of the Convention – choice of court agreement, concurrent jurisdiction in cases of urgency, orders against the Registrar – aim at guaranteeing the enforceability of rights acquired under the Convention.

1. Introduction[1]

The Cape Town Convention on International Interests in Mobile Equipment (the 'Convention' or 'CTC' synonymously) introduces, together with the Protocols thereto (the 'CTC-instruments', 'CTC-regime' or 'CTC-system'), a new substantive law institution in the form of an 'international interest' to improve the conditions for the financing of high value mobile equipment. Hence, the very purpose of the CTC-instruments is not the unification of municipal jurisdictional, conflict or substantive law rules but the creation of an optional transnational property instrument regarding specific mobile equipment. By creating such a *sui generis* uniform substantive law instrument the CTC-regime does not interfere with existing national security interests but intends to elude as far as possible the need to have recourse to conflict of laws provisions. In fact, the traditional common conflict of laws provision, that is, the *situs*-rule obviously is not suitablefor items of mobile equipment which have no stable site but are typically crossing state and/or legal system borders or, in the case of space assets, are not physically located at all within the territory of any state.

However, the substantive law rules of the CTC-regime do not set up a completely self-sufficient legal system, not even an autarkic codification of asset-based secured financing. Thus, the CTC-regime depends for many issues on complementary national substantive rules and hence the need for provisions designating those complementary rules remains. The complementary regime has to build on the agreement of the parties and on existing municipal legal systems – both at the substantive and procedural law levels. The CTC-regime is like a floor added on top of an existing building: the use of this top-floor depends on the infrastructure of the whole building. In principle, the necessary complementary rules already exist in the form of the law in force in the forum. The courts of the forum State apply their own (autonomous or heteronomous) law to decide whether they have jurisdiction and if so, what substantive

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[1] Articles of the Convention are in Arabic, those of the Protocols in Roman numerals. Articles without any specification are referring to the Convention.

rules to apply by virtue of their conflict of laws rules. Hence, *prima facie*, there is no need, under the CTC-regime, to expressly provide for the way to determine the complementary (procedural or substantive) rules. Accordingly, some uniform substantive law conventions contain neither jurisdictional nor conflict of laws provisions.[2] However, other pertinent conventions incorporate jurisdictional and other procedural rules (for example, *lis pendens*, recognition)[3] as well as general[4] and/or specific[5] convention-related provisions on conflict of laws. Often, but not always, the general[6] or specific[7] uniform conflict of laws rules refer to the national law of the forum including the rules relating to conflict of laws. In other cases the reference designates specific substantive law rules.[8] In any case, in the framework of substantive law conventions, jurisdictional and conflict of laws rules play a marginal role only. This is true also for the CTC-regime.

On the whole, the general policy of the drafters of the CTC-system can be expressed as follows: rules on jurisdiction and conflict of laws are inserted only where they seem to be necessary to achieve the CTC-objectives. Significantly, the pertinent general conflict of laws rules (Article 5(2)–(4)) form an annex to the rule on the interpretation (that is, application) of the Convention (Article 5(1)). While the CTC-instruments are basically designed for typical border crossing equipment, the internationality of a case is not a legal prerequisite for the applicability of the Convention; thus, the latter is available even for purely internal cases. For both (internal and transnational situations) the CTC-instruments do not remove existing national legal instruments but add a new *sui generis* tool.

To avoid any misunderstanding (1) the terms national law, municipal law, domestic law or internal law (encompassing procedural, conflict and substantive law rules) are used in this paper synonymously in opposition to international law, and (2) the term substantive law is used in opposition to conflict of laws and procedural law (both in international and national law). Throughout the CTC-instruments the term 'Contracting State'is used in the sense of 'State Party'.This use does not follow the terminology established in international law according to which the term 'Contracting State' means 'a State which has consented to be bound by the treaty, *whether or not the treaty has entered into force*', while 'State Party'means 'a State which has consented to be bound by the treaty and for which the treaty *is in force'*.[9] As the provisions of the CTC-regime, though enacted by States, are eventually directed to,binding and empowering national courts and legal or natural persons, the applicability of the CTC-regime presupposes the entering into force of the CTC-instruments in the State concerned. Therefore, for reasons of clarity, I will not follow the terminology of the CTC-regime ('Contracting State') but that of established international law ('State Party').

2. Jurisdiction

(a) Jurisdiction under the Convention

In matters relating to jurisdictional issues all courts of the world apply their *lex fori*. So, in principle, there is no absolute need, in the CTC-regime, for rules on jurisdiction.

[2] For example, *International Convention on Maritime Liens and Mortgages* (1993).

[3] For example, Article 31 *Convention on the Contract for the International Carriage of Goods by Road* (CMR, 1978); Article 21 *Convention on the Contract for the International Carriage* of *Passengers and Luggage by Road* (CVR, 1973*)*.

[4] For example, *Convention concerning International Carriage by Rail* (COTIF) of 9 May 1980 in the version of the Protocol of 3 June 1999: Article 8 'National law § 1 … § 2 In the absence of provisions in the Convention, national law shall apply. § 3 'National law' means the law of the State in which the person entitled asserts his rights, including the rules relating to conflict of laws.'

[5] For example, Articles 27 § 2, 29 *International Convention for the transportation of Passengers* (CIV).

[6] For example, COTIF (n 4).

[7] For example, Article 12 CVR (n 3).

[8] For example, Article 13 CVR (n 3).

[9] Article 2(1)(g) and (f) *Vienna Convention on the Law of Treaties* of 23 May 1969.

Nevertheless, the CTC-system contains some jurisdictional provisions, where such uniform rules seem necessary in order to implement the CTC-objectives. These rules are confined to the Convention, except Article XXX of the Aircraft Protocol[10] (adaption of speedy relief-competence in respect of helicopters and airframes).

The CTC-provisions on jurisdiction (Articles 42 to 44) are restricted to claims brought under the CTC and confined to fora requiring specific situations; remarkably, in contrast to the last draft, a general fall-back rule of jurisdiction has not been included in the CTC-system. The specific jurisdictional rules incorporated into the Convention cover three different situations, two of them relating to the courts of State Parties: jurisdiction conferred by agreement of the parties (Article 42) and jurisdiction to grant relief pending final determination of a claim pursuant to Article 13 (Article 43). The third situation relates to jurisdiction conferred on the courts of the State in which the Registrar has its centre of administration. Consequently, for jurisdictional purposes, we have to differentiate between (i) the courts of State Parties and (ii) the 'courts of the place in which the Registrar has its centre of administration' (the 'Registrar's court(s)') which may or may not be located in the territory of a State Party. Article 45 expressly excludes the application of the jurisdictional provisions of the Convention to insolvency proceedings.

(i) Jurisdiction conferred on the courts of State Parties (Articles 42 and 43)

The Convention grants jurisdiction in respect of claims under the CTC-regime to the courts of a State Party in two instances only: prorogation of jurisdiction (Article 42: 'Choice of forum') and speedy relief pending final determination of the case (Article 43: 'Jurisdiction under Article 13'). Article 42 is a general jurisdictional rule covering all possible proceedings between parties to a transaction under the CTC while Article 43 relates only to a very particular situation. Claims not covered by the Convention, for example ordinary claims in negligence, have to be decided by the courts determined by virtue of the municipal jurisdictional rules of the forum State.

(α)Article 42: Choice of forum (forum prorogatum)

Article 42 builds on the principles of party autonomy and predictability, proclaimed in the Preamble and in Article 5 of the Convention, by granting the parties to a transaction under the Convention the possibility of choosing the courts of a State Party as the forum. While the term 'transaction' is not defined in the Convention it obviously covers any contract falling within the material scope of the Convention, for example agreements regarding international interests but also subordination agreements, assignments and contractual subrogations. The determination of the forum by the parties has to be seen in connection with the general reference in Article 5(2) and (3) to the rules of private international law of the forum State for the designation of the applicable substantive law. Thus, by choosing the (exclusively) competent courts of a State Party the parties determine, at the moment of the conclusion of a transaction, the applicable conflict rules and in that way indirectly or, by virtue of a choice of law agreement, even directly the governing substantive law. Thus the parties are able to build a harmonized legal arena.

Subject to Articles 43 (jurisdiction to grant advance relief under Article 13) and 44 (orders against the Registrar), Article 42 authorizes the parties to a transaction under the CTC to agree on the jurisdiction of *the* courts or of a *specific* court of a State Party regarding any claim brought under the Convention. The chosen forum need not have a connection with the case. The jurisdiction of the court(s) chosen by the parties is exclusive unless the parties have otherwise agreed (Article 42(1)

[10] Aircraft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town, 2001) (the 'Aircraft Protocol').

phrase 2). The exclusivity of the conferment of jurisdiction intends to avoid inconsistent judgments of different competent courts. Any agreement on the choice of forum must be in writing or otherwise in accordance with the formal requirements of the *lex fori* (Article 42(2)). The latter possibility has been inserted in order to comply with Article 23(1)(b) and (c) of the EU-regulation No 44/2001[11] which recognizes formal requirements according with practices established between the parties or in international trade or commerce. Hence, a jurisdiction agreement is valid as to its form when it is either in written form or abiding by the formal requirements of the law of the chosen forum, irrespective of the characterization of the issue as a procedural or as a substantive law question.

Whereas the Convention has itself set the requirements for the formal validity of choice of jurisdiction agreements, it has not laid down the conditions regarding the material validity of jurisdiction clauses covered by Article 42; for example, what is a materially valid consensus, interpretation in the case of ambiguity, validity or invalidity of the choice of court agreement where the connected main agreement is void. Consequently, such issues are governed by the *lex fori*, either as a procedural or as a substantive law issue, in the latter case governed by the substantive law determined by the conflict of laws rules of the forum State.

An exclusive choice of court agreement concluded under the Convention displaces the pertinent national jurisdictional rules of State Parties. This is especially relevant in cases where the national rules for the choice of court by the parties are more restrictive than those contained in Article 42. As Article 42 encompasses 'any claim brought under this Convention' the rule may even include claims of more or less proprietary character that possibly do not fall within the scope of municipal choice of forum provisions which may be strictly confined to contractual issues.

[11] Now Article 25(1)(b) and (c) Regulation (EU) No 1215/2012,OJ L 351/1.

Article 42(1) grants (exclusive) jurisdiction 'in respect of any claim brought under this Convention'. Where a choice of jurisdiction clause copies this wording *verbatim*, it seems conclusively to confine the exclusive competence to claims based on the CTC-regimeitself. However, choice of jurisdiction clauses, which do not copy the text of the Convention referred to but use unspecific general wording, for example,referring to the settlement of any dispute in connection with a particular legal relationship or agreement, should be interpreted as including the specific CTC-regime claims.[12]

The wording of Article 42(1) makes clear that a prorogation agreement selecting the courts of a State which is not a party to the CTC-regime does not bind the courts of State Parties. Whether and to what extent such a choice of jurisdiction clause is valid has to be determined by the *lex fori*.[13]

Qualifications regarding Article 42[14]

As Article 42 is subject to Article 43, the parties to a choice of court agreement can never exclude the special *fora* granted by the latter Article.[15] The competences granted by Article 43 are mandatorily concurrent with the jurisdiction of courts chosen by the parties (Article 43(1), (2)). Thus, in the (regular) case of exclusive jurisdiction of the courts chosen by the parties under Article 42 the exclusive jurisdiction turns into concurrent competence as far as interim relief under Article 43 is concerned.[16] Furthermore, the jurisdiction, whether exclusive or not, of the selected court under Article 42 does not encompass (exclusive

[12] Cf also Roy Goode, *Convention on international interests in mobile equipment and Protocol thereto on matters specific to aircraft equipment. Official Commentary* (third edn, UNIDROIT 2013) (the "Official Commentary") 4.282.

[13] Cf also Official Commentary, Goode (n 12) para 4.283.

[14] Ibid para 4.281.

[15] Hans-Georg Bollweg/Karl Kreuzer, 'Das Luxemburger Eisenbahnprotokoll' (2008) 28 *Praxis des Internationalen Privat- und Zivilverfahrensrechts* 176, 185.

[16] Official Commentary, Goode (n 12) para 4.290.

or non-exclusive) jurisdiction to make orders against the Registrar because the court(s) of the Registrar's centre of administration are exclusively empowered to make such orders (Article 44(1)).

(β) Article 43: Orders of relief pending final determination

The 'subjective' jurisdictional rule in Article 42 is complemented by various 'objective' jurisdictional provisions conferring 'emergency' jurisdiction on the courts of State Parties (Article 43). The *ratio legis* for these special *fora,* granted independently of any choice of court agreement, is to guarantee the speedy enforceability of 'emergency' orders. The court(s) of a State Party selected by the parties or, failing such an agreement, the courts of the forum State may not be in a position to speedily enforce their orders of relief pending final determination because the pertinent object or debtor may not be situated within the territory of those courts. Especially mobile security assets may be located outside the territory of the ordinarily competent courts (selected or not). In these cases, the complementary (concurrent) jurisdiction conferred by Article 43 either on the *forum rei sitae* or on the *forum debitoris* seems to be not only useful but imperative.

The court(s) of a State Party on the territory of which the object is situated (*forum rei sitae*) have jurisdiction under Article 43(1) to grant relief in situations where enforcement measures concern the object itself in the form of (i) preservation of the object and of its value (Article 13(1)(a)), (ii) conferment of possession, control over or custody of the object (Article 13(1)(b)), and (iii) immobilisation of the object (Article 13(1)(c)). The court(s) of a State Party on the territory of which the debtor is situated (*forum debitoris*) are (concurrently with a *forum prorogatum*) competent under Article 43(2) to grant relief where the enforcement needs acts that can be performed by the debtor only and where the judge's order limits the enforcement on the territory of that State Party; the relief may take the form of lease or, except where covered by the jurisdiction of the *forum rei sitae*, of management of the object and of the income therefrom (Article 13(1)(d)). The Convention does not explicitly define, neither in general nor for the purposes of Article 43, the place where the debtor is situated. However, the definition of the situation of the debtor, formulated in Article 4 for the purpose of defining the sphere of application of the Convention, seems suitable also for the purposes of Article 43(2)(b).[17] The forms of judicial relief just enumerated are not conclusive, that is, other relief orders may be granted by the *forum rei sitae* (Articles 43(1) and 13(4)) or by the *forum debitoris* (Articles 43(2) and 13(4)).

The jurisdiction under Article 43 is recognized even if the final determination of the claim referred to in Article 13(1) will or may take place in a court of another State Party or in an arbitration court (Article 43(3)).

Article XXI of the Aircraft Protocol, the sole provision relating to jurisdiction in a Protocol, confers (concurrent) jurisdiction on the courts of a State Party to make orders under Article 13 (speedy judicial relief) in relation to helicopters and airframes pertaining to an aircraft, for which that State Party is the State of Registry. Article XXI merely complements the corresponding jurisdictional provisions of the Convention in order to adapt the regime to the specificities of the aircraft sector.

By virtue of Article 55 a State Party may declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The EU has made such a declaration.

[17] Official Commentary, Goode (n 12) para 4.290; Benjamin von Bodungen, *Mobiliarsicherungsrechte an Luftfahrzeugen und Eisenbahnrollmaterial im nationalen und internationalen Rechtsverkehr* (Lit 2009) 314; Matthias Creydt, 'Die Regelungen des Internationalen Privat- und Zivilverfahrensrecht im Hinblick auf das Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung und den dazugehörenden Protokollentwurf über Weltraumvermögenswerte' (2004) 24 *Praxis des Internationalen Privat- und Zivilverfahrensrechts* 499.

(ii) Jurisdiction conferred on the courts of the Registrar's State (Article 44)

The 'subjective' jurisdictional rule in Article 42 is complemented not only by an 'objective' special forum for speedy judicial relief (Article 43) conferred on the courts of State Parties but also by an 'objective' jurisdictional rule introducing a special forum relating to judicial proceedings or orders against the Registrar (Article 44). In these cases jurisdiction under the Convention is bestowed on the Registrar's court(s), whether or not they are located in the territory of a State Party. The Protocols do not contain provisions on the jurisdiction of the Registrar's courts.

Of course, by the mere conferment of (exclusive) jurisdiction on the 'courts of the place in which the Registrar has its centre of administration' the State in which this centre is located does not become a State Party. But, in principle, a treaty, like any agreement, is conferring rights and imposing duties only on State Parties, that is, States in which the treaty has entered into force. Other ('third') States are not affected. Hence, in my view, the conferment of jurisdiction on the Registrar's courts has to be construed as a *stipulatio in favorem tertii* (agreement in favour of a State not party to the CTC) involving as legal effect that rulings passed by a Registrar's court must be recognized by the courts of State Parties as if such rulings were decisions of a State Party's court. It is up to the Registrar's State whether or not to accept this basis for its jurisdiction in proceedings against the Registrar. A better foundation would be appropriate legislation enacted by the State hosting the Registrar's office,[18] which could simply adopt the content of Article 44 of the Convention. The reason for the exceptional conferment of jurisdiction, by the Convention, on the Registrar's courts as such, is simply the possibility that the Registrar's centre of administration may be established in a State not party to the CTC-regime. For the Aircraft Protocol this exception is irrelevant because Ireland, on the territory of which the Aircraft Protocol Registrar's centre of administration is established, acceded to the CTC-instruments on the day when the Registry became fully operational (1 March 2006).

Where the Registrar's State is a party to the CTC, Article 44 turns, for that State, from a prerequisite for the recognition/enforcement of the Registrar's courts' rulings in CTC-States ('indirect jurisdiction') into direct jurisdiction for the Registrar's courts.

The Registrar's courts are acting either as trial courts regarding claims against the Registrar 'in personam' (Article 44(1), Section 2(a)(ii)(α) below) or as enforcement courts regarding relief orders against the Registrar to effectuate discharge of entries (Article 44(2) and (3), Section 2(a)(ii)(β) below). As already pointed out, a choice of forum agreement under Article 42 cannot exclude the specific *fora* introduced in Article 44.

(α) Exclusive jurisdiction of the courts of the Registrar's State regarding claims against the Registrar in personam (Article 44(1))[19]

Article 44(1) confirms the standard jurisdiction rule '*actor sequitur reum*' but transforms it into an exclusive forum in order to protect the Registrar against legal proceedings possibly instituted all over the world. Furthermore, the rule has the purpose of concentrating highly specialized issues in *one* forum.

By virtue of Article 44(1) the Registrar's courts (in the case of the International Registry for Aircraft established in Dublin) have exclusive jurisdiction to award damages or make orders against the Registrar. Under Article 28(1) the Registrar is liable for compensatory damages in the case of loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system. There is no other express provision in the Convention for orders

[18] This has been done by Ireland. Cf also Official Commentary, Goode (n 12) para 4.299.

[19] See also s 14 of the *Regulations* and s 15 of the *Procedures for the International Registry*.

requiring the Registrar to comply with its obligations under the CTC-regime.[20] However, questions concerning matters governed by the Convention which are not *expressly* settled in the CTC-regime are to be resolved in the first place in conformity with the general principles on which the CTC-system is based and only in the absence of such principles in conformity with the applicable law (Article 5(2)). This prevalence of the CTC-regime over the applicable law extends to jurisdictional issues (cf Section 3(a)(i) below). One of the inherent general principles of any convention is its functionality and effectiveness in order to achieve its objectives. The core purpose of the CTC-regime is to provide an effectively functioning system of an international interest that is 'recognised and protected universally' (Preamble). Undoubtedly, one crucial aspect of the effective protection of an interest is its enforceability. An unenforceable interest is not protected. Therefore, enforceability is a general principle for the interpretation/application of the Convention.[21] Consequently, any interest protected under the Convention must be enforceable. Hence, by virtue of Article 44(1), interpreted in light of the general principles underlying the Convention, the Registrar's courts have exclusive competence to make orders to enforce any right resulting from any duty of the Registrar under the Convention,[22] for example the Registrar's duty to issue a search certificate to a person entitled to such a certificate or to carry out properly given directions by the Supervisory Authority under Article 17.

Jurisdiction in relation to claims against or by the Registrar arising independently of the Convention, for example, regarding contracts with suppliers of goods or services, will be determined by the relevant *lex fori*.

(B) Exclusive jurisdiction of the courts of the Registrar's State regarding relief orders against the Registrar to effectuate discharge (Article 44(2) and (3))

Article 44(2) and (3) contain relief rules which expressly confer exclusive jurisdiction on the courts of the state of the Registrar to make orders directed at the Registrar requiring it to effectuate an entry in two situations: (i) where a person obliged under Article 25 to procure the discharge of a registration has ceased to exist or cannot be found (Article 44(2)), and (ii) where a person has failed to comply with an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration (Article 44(3)). In the latter case the courts of the Registrar's State are acting as enforcement authorities for *in personam* orders made by a court of competent jurisdiction.

However, there are situations where parties are entitled to an *in personam* order for an amendment or a discharge of a registration which are not covered by the specific rules in Article 44(2) and (3). For example, under Article 44(2), the persons entitled to apply for discharge of a registration include only the debtor (or intending debtor) but no other interested party, for example, a junior chargee wishing to have a satisfied senior charge recorded as discharged.[23] And under Article 44(3) an order by the Registrar's court directing the Registrar to give effect to an order against a person having failed to comply with an order of a court relating to a registration presupposes that the latter court has jurisdiction *under the Convention*, except with respect to national interests. But the Convention grants jurisdiction only under Article 42 (choice of court agreement) and Article 43 (speedy judicial relief in emergency situations). In the absence of such circumstances no court has jurisdiction under the Convention. Thus, for example, a creditor wrongly recorded with respect to an international interest as subordinated to another creditor has no legal means to have the false registration corrected.[24]

[20] Official Commentary, Goode (n 12) para 4.295(d).

[21] Ibid paras 4.61, 4.63.

[22] See ibid paras 4.297; 2.256(4).

[23] Cf ibid para 4.285, for a further example, see para 4.295 (a).

[24] See ibid para 4.295 (c).

As already pointed out, the Registrar's courts are exclusively competent to order entries in cases where the person obliged to effectuate an entry is out of reach or not willing to procure the entry. As this is the *ratio legis* underlying the specific rules (Article 44(2) and (3)) of the Convention one has to induce (by analogy especially with Article 44(3)) from these specific rules a general residual rule conferring on the Registrar's courts the competence to direct the Registrar to enter, amend or discharge a registration where a party has failed to comply with a corresponding order of a court of competent jurisdiction.[25] Therefore, Roy Goode is right in proposing to interpret Article 44(1) broadly and to treat the Registrar's courts 'as having (under paragraph 1 and by analogy with paragraph 3 of the Article) a residual power, on the application of any person who has obtained an *in personam* order … or at the request of the court making the order, to direct the Registrar to amend or discharge an improper or incorrect registration.'[26] This interpretation is conclusive because otherwise not all creditors would be in a position to enforce judicial orders given under the Convention in their favour. A rejection of such rules would result in a case of denial of justice under the CTC-regime.

(III) Residual jurisdiction under the Convention: Lex processualis fori (fall-back jurisdiction)

In the absence of explicit (Articles 42 through 44) or implicit[27] uniform jurisdictional rules under the CTC-regime the pertinent domestic (autonomous or regionally unified) jurisdictional provisionsof the forum State apply. In this context, Article 45 expressly clarifies that the jurisdictional rules of the Convention are not applicable to insolvency proceedings. Accordingly, the jurisdictional provisions of the municipal *lex concursus* apply, that is the law in force at the place where the insolvency proceedings are brought. The underlying *ratio legis* is that national or regional insolvency regimes are homogenous and strictly mandatory. Particularly, there is no room for a choice of forum by the parties. In such matters, no interference by heteronomous legal sources would be tolerated by State Parties.

As to universally applicable uniform jurisdictional rules, the 'Judgments Project', undertaken since 1992 by *The Hague Conference*, encompassing both international jurisdiction of courts and the recognition and enforcement of their judgments abroad, has failed. The ambitious initial endeavour was scaled down to an instrument regarding choice of court agreements in transnational cases. The result was the conclusion of *The Hague Convention of 30 June 2005 on Choice of Court Agreements*. Until now, this instrument is the sole treaty on jurisdiction with universal scope of application. However, this Hague Convention has not yet entered into force.[28] Therefore, one can state that the jurisdictional rules of the CTC-regime today are the only ones, except for those relating to family matters, which are in force on a virtually worldwide level.

(b) Jurisdiction of the courts of third States: Lex processualis fori

Jurisdiction of the courts of third States, that is, States other than State Parties or the State in which the Registrar has its centre of administration, is exclusively based on the *lex processualis fori*.

3. Choice of Law

As a supranational substantive law instrument the international interest supersedes, in its scope of application, any conflict of laws rule. However, the CTC-regime does not construct an autarkic codification of asset-based secured

[25] Cf also ibid para 2.156 (4).

[26] Ibid para 4.296.

[27] That is, derived from general CTC-principles by virtue of Article 5(2).

[28] Actual status (V/2013): 1 ratification; 2 signatures. In 2012, however, a re-launch of work on the original Judgments Project was agreed. *The Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods* and the *Convention of 25 November 1965 on the Choice of Court* are not yet in force.

financing. Therefore, questions concerning matters within the scope of the CTC-regime not expressly or implicitly settled by its substantive law provisions or by agreement of the parties have to be resolved by domestic substantive law rules. The gap-filling domestic substantive law rules may be determined either directly by uniform CTC-conflict of laws provisions or indirectly by referring to municipal conflict of laws rules. The Convention mainly follows the latter method. Accordingly, in principle, the Convention does not establish uniform conflict of laws rules directly determining the applicable substantive law but designates the governing domestic substantive rules indirectly by giving the gap-filling mandate to the private international law rules of the forum State (Article 5(2) and (3)). The only exception is Article 5(4) which deals with the situation that a State comprises several territorial units, each of which has its own rules of (substantive) law.

The Protocols adopt a partially different approach insofar as they introduce a single uniform conflict of laws provision allowing the parties to choose the (substantive) law to govern their contractual relations. However, this rule applies only where the forum state Party has made a declaration in that respect (Articles VIII of the Space Protocol,[29] VI of the Rail Protocol[30]) or did not make an opt-out declaration (Article VIII of the Space Protocol). For the rest, the Protocols follow the gap filling-method of the Convention by determining the applicable substantive law through issue-specific uniform conflict of laws rules referring to the private international law provisions of the forum State. Thus, in principle, neither the Convention (except Article 5(4)), nor any of the Protocols provide 'objective' uniform conflicts rules directly determining the applicable substantive law. Instead, they regularly refer to the private international law rules of the forum State.

As far as matters not governed by the CTC-regime are concerned, for example, the transfer of ownership of objects, it is evident that the applicable substantive law has to be determined by the conflict of laws rules of the forum State. This is not a gap of the CTC-system.

(a) Choice of law under the Convention

As already indicated, resort to private international law rules is needed only regarding matters not settled by (express or implied[31]) substantive rules of the CTC-regime. As to the pertinent private international law rules, the Convention does not, in opposition to the Protocols (cf Section 3 (b) below), contain primary conflict of laws rules (Article 5(3)), except Article 5(4) phrase 2 which relates to territorially split legal systems (cf Section 3(a) (ii) below).

(i) Uniform general reference to the gap-filling applicable law (Article 5(2) and (3)): indirect determination of the governing domestic substantive law

Article 5(2) implicitly reproduces the standard solution regarding the relationship of international uniform instruments to the law in force in the relevant State Parties. The Convention and the Protocols thereto prevail over the (autonomous or heteronomous) law applicable in a State Party so far as the latter law relates to issues settled by the former instruments: prevalence of the uniform CTC-regime, subsidiarity of domestic law.[32] This principle is implied in the three step-ranking of legal sources contained in Article 5(2): (i) explicit provisions of the CTC-regime, (ii) implicit CTC-provisions derived from the general principles of the CTC-regime described in the Preambles and Article 5(1), and (iii) the applicable (domestic) law. This prevalence of the CTC-regime pursuant Article

[29] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 2012) (the 'Space Protocol').

[30] Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (Luxembourg, 2007) (the 'Rail Protocol').

[31] That is, derived from general CTC-regime principles.

[32] Cf Official Commentary, Goode (n 12) paras 4.61-4.65.

5(2) apparently applies to the entire pertinent municipal law, encompassing both procedural (especially jurisdictional) and substantive rules. In contrast, Article 5(3) obviously deals with substantive rules only, as courts always apply their own procedural rules; in principle, rules referring to foreign procedural rules do not exist. While modern uniform *conflict of laws* conventions regularly exclude choice of law rules by directly referring to the substantive rules of the designated legal system,[33] Article 5(3) states that any reference in the Convention to the applicable law designates the domestic (substantive) rules of the law 'applicable by virtue of the rules of private international law of the forum State'. 'Forum State' means here 'forum State Party' because only the courts of a State Party are bound by Article 5(3) of the Convention. In contrast, the (substantive) law designated by the conflict of laws rules of the Forum State Party needs not be the law of a State Party.[34]

The refusal of the Convention to directly determine the applicable domestic substantive law is wise because it avoids an overall interference with the private international law autonomy of the forum State Party. However this restraint of the Convention is not a complete one because the references to the applicable law 'are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State' (Article 5(3)). As 'domestic rules' means, in the Convention, *substantive* law rules,[35] Article 5(3) modifies those municipal conflict of laws rules which do not refer to the substantive provisions (transmission provision, *Sachnormverweisung*) but to the choice of law rules of the designated State (comprehensive reference, *Gesamtverweisung*). In this way the Convention excludes problems of *renvoi*. Thus, the substantive law designated by the private international law rules of the forum State Party serves as fall-back regime for any question within the scope of but not (explicitly or implicitly) settled by the CTC-regime. For example the following issues within the scope of the CTC-regime[36] are governed by the substantive law determined under the conflict of laws of the forum State Party by virtue of the general clause in Article 5(2) and (3) or a special reference to the applicable law for specific matters (see Section 3(a)(ii) below):

- contractual capacity;
- *consensus ad idem*, and time at which an agreement is to be considered concluded;
- validity of an agreement alleged to create or provide for an international interest;
- power of disposal of a grantor of an international interest;
- power of representation;
- priority of concurrent non-registered international interests;
- transfer of ownership;
- assignments by operation of law (*ex lege*).

(ii) Various uniform references to the gap-filling applicable law with respect to specific matters: indirect determination of the governing domestic substantive law

As already mentioned, issues relating to matters covered but not (explicitly or implicitly) settled by the CTC-regime have to be settled by the applicable law (Article 5(2)), defined in Article 5(3) as the domestic substantive provisions applicable by virtue of the private international law rules of the forum State Party. In principle, this general fall back-reference would have been sufficient to fill the gaps of the CTC-regime. Nevertheless, the CTC-instruments

[33] For example, (Hague) Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (2006), Article 10: 'In this Convention, the term 'law' means the law in force in a State other than its choice of law rules.' *Verbatim* coinciding (Hague) Protocol on the Law Applicable to Maintenance Obligations (2007) Article 12.

[34] Official Commentary, Goode (n 12) para 4.64.

[35] Ibid para 4.64.

[36] As to the following examples see especially Roy Goode, *Convention on international interests in mobile equipment and Protocol thereto on matters specific to space assets. Official Commentary* (UNIDROIT 2013) para 2.9.(3). See also the general report on the Space Protocol adopted in Berlin: Hans-Georg Bollweg/ Simon Schultheiß, 'Das Berliner Weltraumprotokoll' (2012) 61 *Zeitschrift für Luft- und Weltraumrecht* 389.

add numerous issue-specific references to the applicable law, in the sense of references to the choice of law rules of the forum State Party. Such issue-specific references to the applicable law include, for example:[37]

- characterisation of an agreement in respect of an international interest as a security agreement or title reservation agreement or leasing agreement (Article 2(2) and (4));
- remedies in addition to those provided by the CTC-regime (Article 12);
- (registering of) acquisitions of international interests by legal or contractual subrogations under the applicable law (Article 16(1)(c));
- legal treatment of rights in items installed on or removed from an object for example, an airframe (Article 29(7)(a)(b));
- effectiveness in the debtor's insolvency of an international interest effective under the applicable law (Article 30(2));
- defences and rights of set-off available to the debtor against an assignee of associated rights (Article 31(3));
- priority of competing assignments of the associated rights in all cases other than those settled under Article 36(1) and (2) (Article 36(3));
- acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law (Article 38(1));
- priority rights or interests obtained under the applicable law before the effective date of the Convention (Article 60(1)).

A unique case, in the Convention, of a reference to municipal *procedural* law is laid down in Article 14: remedies provided by the Convention have to be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

[37] Cf also Oliver Heinrich/Erik Pellander,'Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung' (2013) 33 *Praxis des Internationalen Privat- und Zivilverfahrensrechts* 384, 390 fn 108, 109.

(iii) General references in the case of non-unified legal systems (Article 5(4)): direct or indirect determination of the governing domestic substantive law

Article 5(4) deals with the situation where a State comprises several territorial units with diverging systems of (substantive) law regarding the issue at stake (non-unified legal system). In such a case the Convention follows the standard modern solution:[38] in the absence of an indication, in the CTC-system, of the relevant territorial unit the identification thereof is left to the choice of law rules in force in the non-unified legal system. Failing any such rule, the (substantive) law of the territorial unit with which the case is most closely connected applies. Thus, under this three step rule, the first step consists in an issue-specific (implied) uniform conflict of laws rule directly designating the relevant territorial unit, that is, the applicable partial legal system (Article 5(4) phrase 1). Failing such a direct designation, Article 5(4) phrase 1 (*in fine*) leaves the determination of the relevant territorial unit, that is, of the territorially limited legal system, to the (interregional) choice of law rules of the multisystem-State (indirect determination of the applicable substantive law). The third sub-rule is, like the first one, a uniform rule (Article 5(4) phrase 2) which directly designates the relevant territorial unit or partial legal system. But in contrast to the defined connecting factor(s) of the first sub-rule, the linking factor in Article 5(4) phrase 2 is an undefined *principle* designating the territorial unit which is most closely connected with the case ('proximity principle').

[38] Cf, for example, Introductory Act to the German Civil CodeArticle 4(3):'If referral is made to the law of a country having several partial legal systems, without indicating the applicable one, then the law of that country will determine which partial legal system shall be applicable. Failing any such rules, the partial legal system to which the connection of the subject matter is closest shall be applied.'

(b) Choice of law under the Protocols

(i) General uniform choice of law rule (Articles VI of the Rail Protocol, VIII of the Aircraft Protocol and the Space Protocol): direct determination of the governing domestic substantive law by agreement of the parties

While the Convention's choice of law provisions refer, except Article 5(4) phrase 2, to the private international law rules of the forum State (indirect determination of the applicable substantive law), all Protocols include an authentic conflict of laws rule in the form of a choice of law agreement by the parties directly designating the governing domestic substantive law. In the first two Protocols (Articles VIII of the Aircraft Protocol; VI of the Rail Protocol) the pertinent conflict rules are opt-in provisions. In the Space Protocol the rule has been inverted into an opt-out provision (Articles VIII(1), XLI(2)(a) of the Space Protocol). This inversion is presumably due to the experience that the State Parties to the Aircraft Protocol have regularly made opt-in declarations (Article XXX(1) of the Aircraft Protocol), among them important States like Canada, China, India, Indonesia, Nigeria, and South Africa. The European Union did not opt in because the corresponding Article 3 of the *Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations* (*Rome I*)[39] is more restrictive than Article VIII of the Aircraft Protocol.

Under the Protocols, choice of law agreements of the parties are admissible to govern their contractual relations only. Thus, third parties are not affected by such agreements. The rule allowing the parties to choose the law governing their contractual relationship is, with minor alterations as to the scope of the provision, congruent in all three Protocols. The parties are allowed to agree on the law which is to govern their contractual rights and obligations with respect to agreements constituting international interests.[40] Article VIII(2) of the Aircraft Protocol extends the scope of the rule to contracts of sale and Article VIII(2) of the Space Protocol additionally covers rights assignments and rights reassignments (but not assignments of an international interest or assignments of associated rights). All these extensions include related guarantee contracts and subordination agreements. The *ratio legis* of the rule is to give the parties the power to choose the law applicable to their contractual rights and obligations to the extent the latter are connected to a transaction covered by the CTC-regime. Therefore, any contract integrated by reference into any of the enumerated contracts is covered by the rules on choice of law agreements.[41]

The choice of law agreement of the parties, which may cover the contract wholly or in part and which may be concluded in writing or not, is taken to refer, unless otherwise agreed, to the substantive law of the designated State or, where that State comprises several territorial units, of the designated territorial unit (Article VIII(3) of the Aircraft Protocol and of the Space Protocol, Article VI(3) of the Rail Protocol). This solution avoids *renvoi* problems and has become the standard rule in modern private international law codifications.[42] The choice of law agreement has to be respected by the courts of all State Parties having adopted (Aircraft Protocol, Rail Protocol) or not declined (Space Protocol) the Protocol's choice of law clause. In other State Parties and third States the domestic private international law rules apply. Where the forum State Party and the State whose law has been chosen do not coincide, the designated law has to be applied by the courts of the forum as it would be applied by the courts of the State the law of which has been chosen. In this respect it does not matter whether the foreign *lex causae* is that of a State Party or of a third State and whether the *lex causae* is of autonomous or

[39] OJ EU 2008 L 177/6.

[40] Encompassing, by virtue of Article 1(a), security agreements, title reservation agreements, and leasing agreements.

[41] Cf Official Commentary, Goode (n 36) para 5.38.

[42] Cf, for example, Rome I regulation (39) Article 20: 'Exclusion of renvoi. The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.'

heteronomous origin. In particular, the forum's courts have to apply the pertinent CTC-rules where the *lex contractus* chosen by the parties is that of a State Party. The only barrier for the application of the foreign *lex contractus* is the *ordre public* of the forum including internationally mandatory domestic rules applicable regardless of the otherwise governing foreign law.

(ii) Various uniform references to the gap-filling applicable law with respect to specific matters: indirect determination of the governing domestic substantive law

In addition to the special references in the Convention itself (Section 3(a)(ii) above) the Protocols contain special conflict of laws rules expressly referring for specific matters to the applicable law, that is the substantive law designated by the private international law provisions of the forum State. Most of these special references are common to all Protocols:

- Remedies on insolvency Alternative A:
  - entitlement of the creditor to any other form of interim relief available under the applicable law (Article XI(5)(b) of the Aircraft Protocol, Article IX(5)(b) of the Rail Protocol, Article XXI(6)(b) of the Space Protocol);
  - authority of the insolvency administrator under the applicable law to terminate the agreement (Article XI(11) of the Aircraft Protocol, Article IX(11) of the Rail Protocol, Article XXI(11) of the Space Protocol);
- Remedies on insolvency Alternative B:
  - opportunity of the creditor to take possession of or control and operation over the asset, in accordance with the applicable law (Article XI(2)(b) of the Aircraft Protocol, Article IX(3)(b) of the Rail Protocol, Article XXI (2)(b) of the Space Protocol);
  - taking of any additional step or the provision of any additional guarantee, permitted under the applicable law, by the court (Article XI(3) of the Aircraft Protocol, Article IX(4) of the Rail Protocol, Article XXI(3) of the Space Protocol);
- Remedies on insolvency Alternative C:
  - taking possession of the railway rolling stock by the creditor in accordance with the applicable law (Article IX(3)(b) of the Rail Protocol);
- Debtor provisions:
  - liability of a creditor for any breach of the agreement under the applicable law (Article XVI(2) of the Aircraft Protocol, Article XI(2) of the Rail Protocol, Article XXV(2) of the Space Protocol).

A few references are confined to the Space Protocol:

- preservation, under the CTC-regime, of legal or contractual rights of an insurer to salvage recognised by the applicable law (Article IV(3) of the Space Protocol);
- determination, by the applicable law, of the defences and rights of set-off available to the obligor against the creditor (Article X(2) of the Space Protocol).

(c) Uniform law and choice of law under the forum

(i) Uniform law

Uniform law instruments in force in a State directly or indirectly designated by CTC-conflict rules may supersede the CTC-regime where both the referring State and the State referred to are State Parties to both instruments. Therefore, a short glimpse at the relevant legal situation seems appropriate. As the Convention and the Protocols thereto introduce, on a universal level, a general substantive law regime for specific high value mobile objects, the CTC-instruments should supersede all concurrent international (substantive or private international law) instruments so far as the latter affect rights or interests in objects acquired under the CTC-regime. However, it is well known that very few concurrent universal conventions relating to contracts or property exist.[43] In our context, apparently, the most important one is the (Geneva) *Convention on the*

[43] Cf *United Nations Convention on the Assignment of Receivables in International Trade* (2001): The CTC-regime prevails as it deals with the assignment of

International Recognition of Rights in Aircraft (1948). But this admittedly outdated treaty is displaced by the Convention and the Aircraft Protocol thereto as they relate to aircraft, as defined in the Aircraft Protocol, and to aircraft objects, except with respect to rights or interests not covered or affected by the CTC-regime (Article XXIII of the Aircraft Protocol). Furthermore, with respect to financial leasing, the *UNIDROIT Convention on International Financial Leasing* (Ottawa 1988)[44] preserves the validity of the lessor's real rights in the equipment against the lessee's trustee in bankruptcy and against creditors, including creditors who have obtained an attachment or execution, provided that potential requirements as to public notice under the applicable law are met (*Ottawa Convention*, Article 7). The CTC-regime supersedes, to the extent of any inconsistency, the *Ottawa Convention* insofar as it relates to aircraft objects (Article XXV of the Aircraft Protocol), to space assets (Article XXXIV of the Space Protocol), and to railway rolling stock (Article XIX of the Rail Protocol). The Convention and the Rail Protocol supersedes the *Convention concerning International Carriage by Rail* (COTIF 1980/1999) insofar as the latter is inconsistent with the former instruments (Article XX of the Rail Protocol). Conversely, Article XXXV of the Space Protocol makes clear that the CTC-regime, as applied to space assets, does not affect State Party rights and obligations under the existing *United Nations outer space treaties* or under instruments of the *International Telecommunication Union*.

(ii) Municipal choice of law rules

Domestic *substantive* laws relating to obligations and security rights are diverging all over the world. In contrast, on the level of conflict of laws, harmony between the municipal laws of most States largely reigns.

This is especially true for contract law insofar as national and international (supranational) private international law systems nowadays allow the parties to choose the *lex contractus*, though often in a somewhat more restricted way than in the CTC-Protocols. The conflict of laws rules applicable in the absence of a choice of law by the parties varied widely in the past but seem nowadays to be converging on the connecting principle of proximity, which means applying the law having the closest connection to the case. With respect to contracts, the principle of proximity normally results in a presumption in favour of the law of the place of business (habitual residence) of the party whose performance is characteristic of the contract concerned. The *lex contractus,* determined by agreement or otherwise, governs all contractual issues from the (formally and materially) valid conclusion and interpretation to the normal effects (rights and obligations) and the effects of non-performance and termination.

With respect to tangible assets, that is, property matters, the selection, by the parties, of the applicable law is admitted virtually nowhere, at least as far as relations with third parties are concerned. In contrast, harmony reigns with respect to the 'objective' connecting factor. It is virtually recognized all over the world that proprietary issues relating to tangible assets are governed by the *lex situs* (*lex rei sitae*), that is, the law in force in the location of the asset at the time of the relevant dealing or event. However, this apparent harmony regarding the conflict of laws rule does not solve the problems caused, for transnational transactions, by the divergences of municipal substantive law which often result in the non-recognition of well acquainted rights at the moment an object enters a territory where another legal system is in force. Therefore, in the case of means of

receivables which are associated rights related to international interests in aircraft objects, railway rolling stock, and space assets (Article 45bis CTC); - *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft* (1933): The CTC-regime prevails as it relates to aircraft, as defined in the Aircraft Protocol (Article XXIV).

[44] Cf, for example, Ronald Cuming, 'Legal Regulation of International Financial Leasing: The 1988 Ottawa Convention' (1989-1990) 7 *Arizona Journal of International and Comparative Law* 39; Roy Goode, 'Conclusion of the Leasing and Factoring Conventions' (1988) *Journal of Business Law* 347; Martin Stanford, 'The UNIDROIT Convention on International Financial Leasing adopted in Ottawa on May 26, 1988' (1989) *World Leasing Yearbook* 58.

transport which typically move across borders (such as aircraft, vessels and railway rolling stock), most jurisdictions replace the *lex rei sitae* with the *lex originis* which usually means the law of the State of nationality registration or the *lex libri siti*.[45] This approach avoids any change of jurisdiction or applicable law and the problems resulting therefrom.

In the absence of special (national or international) private international law rules for proprietary issues relating to space assets the *lex libri siti* seems also suitable for space assets which obviously have no location on the territory of a State after launching. This approach is in line with the principles of space law. In respect of space assets Article VIII of the *UN Outer Space Treaty* (1967) provides that ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the earth. The Treaty does not contain provisions relating to *dealings* regarding the ownership of a space asset while it is in space. Whereas the lack of such rules does not directly matter for the CTC-regime because ownership as such is outside of its scope, the issue may be relevant to the power to dispose of space assets. In the absence of relevant uniform substantive law rules, dealings regarding the ownership of a space asset including the power to dispose of it are governed by the applicable municipal substantive law. Abiding by the *ratio legis* of the *situs* rule, the applicable substantive law should be that of the jurisdiction which exerts control over the asset. By virtue of Article VIII of the *UN Outer Space Treaty* control over space assets is in the hands of the State which is the State of registry under the 1975 *Registration Treaty*. Hence, the *lex libri siti,* the law in force at the place of the registry[46], should apply to all registered space assets, whether they are in space or on the ground. Unregistered space assets should be governed by the *lex situs*-rule while on Earth or, when the dealing occurs when it is in space, by the *lex domicilii debitoris* (centre of main interests of the debtor).

4. Concluding remarks

The international interest, introduced by the CTC-regime, constitutes a new transnational substantive law instrument to facilitate the financing of the acquisition and of the use of high value mobile equipment. Technically, the CTC-system only sets up a basic legal framework confined to rules absolutely necessary for the functioning of the new instrument. Hence, the CTC-regime does not establish a self-sufficient legal system settling all issues which may emerge. Consequently, the CTC-system leaves blanks to be filled in by national substantive law rules determined by choice of law provisions. Apart from the case of territorially split legal systems, the Convention does not generally determine the blank-filling domestic substantive rules directly, by original uniform conflict of laws provisions, but indirectly by uniform references to the conflict of laws rules of the Forum State (Party) which then designate the applicable substantive law provisions, either those of the

[45] See, for example, Introductory Act to the German Civil Code Article 45(1): '(1) Interests in airborne, waterborne and rail borne vehicles are governed by the law of the country of origin. This is 1) as to aircraft the country of their nationality, 2) as to watercraft the country where they are registered, otherwise the home port or home location, 3) as to rail vehicles the country of licensing. (2) … .' For further references see Kreuzer, 'Gutachtliche Stellungnahme zum Referentenentwurf eines Gesetzes zur Ergänzung des Internationalen Privatrechts (außervertragliche Schuldverhältnisse und Sachen) - Sachenrechtliche Bestimmungen', in Dieter Henrich (ed), *Vorschläge und Gutachten zur Reform des deutschen internationalen Sachen- und Immaterialgüterrechts* (Mohr 1991) 37 (at 110 et seq.). See also Recommendation 205 of the *UNCITRAL Legislative Guide on Secured Transactions* (2010, available at: http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf) which proposes 'that, if a security right in a tangible asset is subject to registration in a specialized registry …, the law applicable … is the law of the State under whose authority the registry is maintained … .'

[46] The term '*lex registri*', occasionally used, is incorrect, as the term '*registrum*' does not exist in Latin.

Forum State (Party) or of any other State, party to the Convention or not. So, the Convention mainly leaves it to the private international law rules of the Forum State (Party) to determine the complementary substantive law rules. A (potential) interference by the Convention with the choice of law rules of the forum State (Party) is the specification, by Article 5(3), that the forum's references to the applicable law have to be treated as transmission provisions excluding the application of choice of law rules of the designated *lex causae*-State. A (non mandatory) general exception to the indirect gap-filling method of the Convention is introduced by the Protocols in allowing the parties to specific transactions covered by a Protocol to agree on the substantive law which is to govern their contractual relations, whether the chosen law is or is not that of a State Party. As the Protocols permit the designation by the parties of the governing law *unconditionally* the corresponding municipal private international law rules may be modified by the relevant Protocol. In contrast, the *supranational* substantive law rules of the CTC-regime have no impact at all on the State Party's substantive law as corresponding provisions do not exist under national law.

Looking at the sources of law, the CTC-regime is conceived as a two- or three-layer system: first (on top): the Convention and the pertinent Protocol thereto; second: the municipal (both choice of law and substantive law) rules of the forum State Party (*lex fori* = *lex causae*); or, where applicable, third: the substantive rules of a third State, party or not party to the CTC-regime, in the case of *renvoi* by the forum State Party's choice of law provisions. Where the parties have chosen, under a Protocol, the (substantive) law of a specific State, a two-layer regime conclusively applies.

To sum up, in contrast to its innovative substantive law rules, the CTC-regime does not invent original uniform choice of law provisions and grants them only a complementary and marginal role.

The jurisdictional rules of the Convention are mainly designed as tools for facilitating the enforcement of rights acquired under the CTC-regime. They especially enable the parties to determine the court which appears to them the best one to settle possible disputes (Article 42). Furthermore, Article 43 guarantees that courts suitable to make orders for speedy relief and enforcement thereof are available, independently of a choice of court agreement. Finally, the exclusive jurisdiction of the courts of the State in which the Registrar has its centre of administration, which may or may not be a State Party, for issues concerning the Registrar and particularly for the implementation of orders concerning the registry, likewise intends to ease enforcement (Article 44). By complementing and possibly modifying the jurisdictional system of the forum State Party, the jurisdictional rules of the Convention enhance the opportunities for creditors to realise their rights under the Convention.