INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

EN

GOVERNING COUNCIL
92nd session
Rome, 8 - 10 May 2013

UNIDROIT 2013
C.D. (92) 5 (c)/(d)
Original: English
March 2013

Item No. 5 on the agenda: International Interests in Mobile Equipment –

(b) Possible preparation of other Protocols to the Cape Town Convention

(ii) Ships and maritime transport equipment

(iii) Off-shore wind power generation and similar equipment

(memorandum prepared by the Secretariat)

Summary	*Consideration of the current international and cross-border legal issues concerning proprietary security over ships and off-shore power generation equipment and similar assets; evaluation of the suitability of the secured transactions regime under the Cape Town Convention system for an application to these types of asset; recommendations for further work by the UNIDROIT Secretariat in relation to the extension of the Cape Town Convention system through the preparation of new Protocols covering ships and off-shore wind power generation equipment and similar assets*
Action to be taken	*To take note of the proposal to conduct further feasibility studies concerning the preparation of new Protocols to the Cape Town Convention system covering ships and off-shore wind power generation equipment and similar assets and to make recommendations as to whether the UNIDROIT Secretariat should allocate resources to such studies which would be conducted in close co-operation with industry representatives and outside experts*
Related documents	*UNIDROIT 2013 –C.D. (92) 13*

Table of Contents

Executive summary 4

Introduction 7

A. Ships and maritime transport equipment 8

1. Economic significance of consensual security over ships 8

2. Main issues of proprietary security over ships in a cross-border context 9
(a) Application of the flag law as governing law for consensual security over ships and exceptions to this rule 9
(b) Different types of consensual security rights under national law 10
(c) Different perfection requirements under national law 11
(d) Determination of priority on the basis of registration 12
(e) Relationship to registration in debtor-indexed registers for proprietary security 13
(f) Governing law for issues of priority between consensual security over ships 13
(g) Non-consensual maritime liens 14
(h) Priority as between maritime liens and consensual security rights 14
(i) Governing law for maritime liens and their priority status 15

3. Responses in market practice 16

4. Existing and projected international instruments regarding proprietary security over ships 17
(a) Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926 17
(b) Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1967 18
(c) Geneva Convention on Maritime Liens and Mortgages of 1993 19
(d) Conventions on the Arrest of Ships of 1952 and 1999 20
(e) Proposal for a European Register of Ships (Euros) 20
(f) Proposal for an International Instrument for the Recognition of Judicial Sales of Ships 21

5. Suitability of the Cape Town Convention System for consensual security over ships 21
(a) Overview of the main aspects of the secured transactions regime under the Cape Town Convention 22
(b) Ships and maritime equipment as registrable assets 23
(c) Uniform rules on registration requirements 24
(d) Uniform priority rules as between competing consensual security rights 24
(e) Enhanced publicity under an electronic register 25
(f) Existence of international organisations as possible Supervisory Authorities 25
(g) Double registration requirements 25
(h) General restriction in respect of consensual security 26
(i) Limited regulation of issues of non-consensual security 26
(j) Avoiding conflicts with other international instruments concerning enforcement issues (arrest and judicial sales) 27
(k) Retention of title and leasing 28
(l) Different remedies on default for mortgages and hypothecations 28
(m) Jurisdiction 29

6. Recommendation: Further feasibility study on the preparation of a new Protocol to the Cape Town Convention covering ships and maritime equipment 29

B. Off-shore wind power generation and similar equipment 30

1. Some economic and technical background data 30
(a) Growing market share for off-shore wind power generation and demand for financing 30
(b) Different types of off-shore wind energy installations 31

2. Legal status of off-shore waters 31

3. Issues concerning the determination of the applicable law 32
(a) Applicable property law regime for wind energy equipment in the territorial sea 33
(b) Applicable property law regime for wind energy equipment in exclusive economic zones or continental shelf zones: Specific conflict-of-laws provisions 33
(c) Applicable property law regime for wind energy equipment in exclusive economic zones or continental shelf zones: Application of general principles 34
(d) Application of the law of the flag or home State 36
(e) Application of the law of debtor-indexed registers 37
(f) Wind energy equipment on the high seas 37
(g) Cross-border transport of off-shore wind energy equipment 37

4. Issues concerning property law and secured transactions law 38
(a) No real property rights in off-shore waters 38
(b) Status of off-shore wind energy equipment as fixtures of real property 39
(c) Security over off-shore energy equipment in legal systems with asset-specific registration 41
(d) Security over off-shore wind energy equipment in legal systems with debtor-indexed registration 42
(e) Security over off-shore wind energy equipment in legal systems allowing security ownership of movable property without direct transfer of possession 43

5. Responses in market practice 44

6. Suitability of the Cape Town Convention system for off-shore wind power generation and similar equipment 45
(a) International security interest in off-shore energy equipment 46
(b) Publicity by registration under the Cape Town Convention system 46
(c) Registrability of parts of off-shore wind power generation equipment 47
(d) Retention of title 47
(e) Transfer of security interests and refinancing of off-shore wind energy equipment 48
(f) Security assignment of wind farm operators' revenue claims 48

7. Recommendation: Further feasibility study on the preparation of a new Protocol to the Cape Town Convention covering off-shore wind power generation and similar equipment 49

Executive Summary

This preliminary study suggests that UNIDROIT should consider conducting feasibility studies concerning the preparation of additional Protocols to the Cape Town Convention, covering

(i) ships and maritime equipment; and

(ii) off-shore wind power generation and similar equipment.

This preliminary study concerns both types of asset, and identifies considerable obstacles impeding the efficient and reliable operation of secured transactions in cross-border situations in the current non-harmonised legal environment. In both cases, the Cape Town Convention system suggests itself as a suitable solution on which to base efforts to achieve the international harmonisation of laws.
Both feasibility studies should be conducted by UNIDROIT as from the outset, in close co-operation with the relevant international organisations and on the basis of intensive consultations with representatives of the industry. This should allow proper consideration of the peculiarities and economic realities of the relevant markets and should help to further identify both the areas where the market prefers traditional approaches to secured transactions law and the issues where support for law reform is strongest.

Ships and maritime equipment

The field of secured transactions concerning ships in a cross-border context is traditionally riddled with problems stemming from the lack of international harmonisation of national proprietary security law regimes concerning ships. The preparation of a new Protocol to the Cape Town Convention covering ships and maritime equipment could be of enormous advantage to market participants in this field, most prominently:

(i) by harmonising the requirements and details of registration of consensual security rights over ships, thereby doing away with the widely divergent procedures for the perfection of ship mortgages currently obtaining under the various national laws (see below, nos. 22 ss. and 77 ss.);

(ii) by enhancing the publicity given to the registration of consensual security over ships through the introduction of a modern, efficient system of registration operated electronically, the workability of which has already been proven in practice for security rights in aircraft (see below, nos. 83 s.); and

(iii) by harmonising the rules on the priority status as between consensual security rights over ships, thereby enhancing certainty in commercial transactions since parties would no longer need to consider the risk attending the fact that each national legal system has its own rules concerning the priority status of such rights, for example, rules in relation to the availability and effects of advance notices or the treatment of security rights registered on the same date. Clearly, this could greatly affect the value of any such security interest, especially in view of the fact that the conflict-of laws rules in this area are not identical either and refer to different applicable laws (see below, nos. 25 ss., 31 ss. and 80 ss.).

A new Protocol to the Cape Town Convention covering ships and maritime equipment also offers at least a good opportunity to introduce harmonised solutions for other aspects of the law of proprietary security over ships where the current standard of the various national legal systems appears to lag behind the broader developments in the area of secured transactions internationally. Such a new Protocol could solve the problems currently encountered because of double registration requirements (see below, nos. 28 ss. and nos. 86 s.), harmonise the available remedies on default (see below, no. 19 and nos. 98 s.) and could provide a coherent regulation for other types of secured transactions that are based upon a retention of title instead of the granting of a security rights (see below, nos. 20 s. and nos. 96 s.).

While several international instruments have already been developed dealing with issues of proprietary security over ships, these instruments have had only limited success in solving the problems referred to in the preceding paragraphs (see below, nos. 49 ss.). To some extent, this is due to the fact that those instruments have attempted also to regulate the highly disputed area of non-consensual security over ships (maritime liens), where no broad international consensus has been achieved so far. Additionally, the approach to consensual security taken in those other international instruments merely provides for the international recognition of security rights created under national law and as thus must appear less recommendable than the approach taken by the Cape Town Convention, which provides for an international interest with uniform rules on creation, third party effectiveness, priority and remedies, thereby dispensing with the need to fulfil, for instance, divergent formal requirements for registration under the various national laws.

Obviously, the extension of the Cape Town Convention system to ships would primarily focus on consensual security and would not directly touch upon existing divergences between national laws as to the creation and priority status of maritime liens (except in so far as such non-consensual security is partly brought within the scope of the Convention rules by means of a separate declaration by a Contracting State under Arts. 39 s., see below, nos. 89 ss.). Even though this is certainly another very prominent problem in a cross-border context, the limited scope which a new Protocol would have in this respect may be expected to raise its chances of finding broader support by leaving out issues where international consensus is unlikely to emerge (see below, no. 88). A similar restrictive approach could be suggested concerning a number of minor issues where the position of the Cape Town Convention could be understood as differing from traditional preferences in the field of security over ships, for instance issues concerning the exercise of the remedy of sale of the collateral or the general enforceability of jurisdiction clauses. However, these issues would be best addressed in more detail in the feasibility studies themselves once more input has been gathered from market participants concerning their experiences with the present status of the law (see below, nos. 92 ss. and 100 s.).

Off-shore wind power generation and similar equipment

In recent years, the generation of electricity by off-shore wind farms has developed into an important industry. Its relevance is expected to increase even more in the wake of rising demand for renewable energy sources (see below, nos. 108 ss.). This in its turn creates enormous demand for financing and here, the availability of an efficient regime for proprietary security over off-shore wind power generation and similar equipment may be expected to reduce financing costs and increase the availability of secured credit.

At this point in time, however, the law of proprietary security over off-shore wind energy equipment as embodied in the various national legal systems is beset by significant problems, amongst others problems concerning the determination of the applicable law for off-shore assets (see below, nos. 124 ss.) and concerning the effect of general principles of property law on the availability of movable property security rights over wind power generation assets erected in an off-shore location (see below, nos. 142 ss.). The diversity of national legal regimes for proprietary security, especially with regard to divergent rules on the registrability of security rights over movable assets, which can result in the ineffectiveness of security interests created in one jurisdiction once the asset concerned is transported to another jurisdiction, is a further factor adding to the difficulties experienced in cross-border transactions relating to offshore wind energy equipment (see below, nos. 148 ss.).

This unsatisfactory State of the law of proprietary security over off-shore wind energy equipment, both in a national and a cross-border context, could be amended through the preparation of a further Protocol to the Cape Town Convention covering off-shore wind power generation and similar equipment. Most prominently, this would

(i) provide for an international security interest governed by the rules of the Convention and largely independent from the application of uncertain national rules of private international law (see below, nos. 168 ss.);

(ii) by specifically providing for the registrability of an international security interest in items of off-shore wind energy equipment, ensure that these assets can be subject to movable property security rights, regardless of the assets' installation in or as fixed offshore constructions (see below, nos. 169 ss.);

(iii) support the availability of vendor credit concerning off-shore wind energy equipment by ensuring that the seller's rights in equipment delivered under a retention of title agreement are not lost following the off-shore installation of the equipment and by providing for a privileged status of the seller in the case of the buyer's default (see below, nos. 174 and 172 s.); and

(iv) provide the opportunity to include also security rights over revenue claims of the off-shore wind park operators, thereby overcoming, for this particular practice area, the huge divergences between the various national legal systems relating to the perfection and priority rules applicable to security over receivables (see below, nos. 176 ss.).

The details of such an additional Protocol to the Cape Town Convention should be developed in close co-operation with industry representatives and outside experts, especially in order to obtain further input concerning the technical aspects of this type of equipment, *e.g.*, as regards the severability of various parts of wind turbines. Their advice would also allow to evaluate the degree of support to be found in market practice for some of the more secondary aspects of the extension of the Cape Town Convention system, such as the promotion of vendor credit and security over revenue claims.

Introduction[1]

1. With the adoption of the Space Protocol to the Cape Town Convention in 2012 (Berlin Protocol), the secured transaction regime set in place by the Cape Town Convention was completed for all three categories of objects listed in Art. 2(3) of the Cape Town Convention (airframes, aircraft engines and helicopters, railway rolling stock and space assets). However, these three categories of object do not cover all the types of mobile equipment commonly used as collateral and likely to be used in a cross-border context, which would make them especially suitable for regulation in an international instrument. This, therefore, is a question that should be considered by UNIDROIT and its member States, to ascertain whether the existing system of proprietary security under the Cape Town Convention should be extended to other types of mobile equipment to be covered in additional Protocols to the Cape Town Convention.

2. Two types of mobile asset that are especially prominent candidates potential extension of the system of proprietary security under the Cape Town Convention are ships and maritime transport equipment as well as off-shore power generation assets and similar equipment. As to ships and maritime transport equipment, the economic significance of non-possessory proprietary security has always been strong. Registration systems for proprietary security in ships are common worldwide; and given the quasi-natural cross-border aspect of the shipping industry, security rights over ships have already in the past been the subject of other international instruments aiming to harmonise the relevant national regimes, whether in the form of hypothecation, mortgages or maritime liens.

3. Off-shore power generation assets and similar equipment have in recent years rapidly gained importance as assets used as collateral in a cross-border context, based upon technological progress and the growing demand for renewable energy. The installation of these highly finance-intensive assets in off-shore areas gives rise to significant problems in applying the national rules of proprietary security law, and while some legal systems have developed their own national approaches towards the solution of these problems, there has not as yet been any significant attempt at legal harmonisation on an international level.

4. In its suggestions for projects and activities to be included in the UNIDROIT Work Programme for the triennium 2014-2016, the UNIDROIT Secretariat mentions the preparation of feasibility studies concerning the possible extension of the proprietary security system under the Cape Town Convention to ships and maritime transport equipment and off-shore power generation assets and similar equipment.[2] The Governing Council is invited to consider these proposals at its 92nd session (Rome, 8-10 May 2013), taking into account the outcome and recommendations of this preliminary study. Should the Governing Council propose the inclusion of these topics in the Work Programme, the issue would then be submitted to the General Assembly for approval at its 72nd session in late 2013.

[1] This preliminary study has been prepared by *Ole Böger, Richter am Landgericht Bremen,* in his temporary capacity as Legal Officer at the UNIDROIT Secretariat.

[2] UNIDROIT 2013 –C.D. (92) 13, paras. 17–21.

A. Ships and maritime transport equipment

5. In the first stages of the project that was later to become the Cape Town Convention, it was envisaged that security over ships and maritime transport equipment could be covered.[3] However, these expectations subsequently failed to materialise. Even in the early stages of the project, considerable criticism was voiced concerning the extension of the system of the future Convention on Interests in Mobile Equipment to ships, criticism which was at that time also shared by the maritime industry itself. The main thrust of the arguments advanced against the inclusion of security over ships was summarised in a Secretariat memorandum of August 1996.[4] First, the preparation of international rules governing ships and shipping was described as an issue that was traditionally the preserve of specific international organisations with full participation of shipping circles. Second, it was feared that there might be conflicts with the then newly drafted International Convention on Maritime Liens and Mortgages which was adopted by the 1993 Geneva Conference of the United Nations and the International Maritime Organization.

6. In the afore-mentioned 1996 memorandum, the Secretariat argued that the merits of the inclusion or exclusion of ships under the UNIDROIT Convention system could best be assessed only once the rules of the Convention had been finalised. Now that the system of the Cape Town Convention has become a resounding success, the Secretariat takes the view that the need and feasibility of extending to ships the internationally harmonised rules for proprietary security under the Cape Town Convention should be revaluated. This is particularly so given the fact that the 1993 International Convention on Maritime Liens and Mortgages has not attracted wide-spread participation, whereas the Cape Town Convention enjoys strong support both from States and, especially, from the aircraft industry. The issue was raised at the 91st session of the Governing Council in May 2012.[5]

7. This preliminary study identifies and describes the main legal obstacles faced by market participants in the shipping industry concerning security over ships and maritime transport equipment in cross-border situations, and gives an overview of the status and development of internationally harmonised rules in this field of law. The study then goes on to consider whether market practice has found or could find alternative solutions in the absence of internationally harmonised rules and whether the extension of the Cape Town Convention system to ships could be a suitable response to the legal challenges in this respect. Depending on further consideration by the Governing Council and the General Assembly, these issues would then have to be researched in greater depth in a feasibility study to be conducted in close co-operation with the relevant bodies of the shipping industry as a first step towards the possible preparation of a new draft Protocol under the procedures laid down in Article 51 of the Cape Town Convention.

1. Economic significance of consensual security over ships

8. The history of consensual proprietary security rights over ships stretches back to the Middle Ages and well beyond into antiquity. At all times and places, the shipping business has required financing, and the ships themselves, as the most valuable assets involved in this business, were objects that were particularly suited to serve as collateral for advances by third party credit-givers.[6]

---

[3] See Article 2(1)(c) of the first set of draft articles of a future UNIDROIT Convention on Interests in Mobile Equipment, March 1996, Study LXXII – Doc. 24. The classical point of reference for the argument in favour of the inclusion of security over ships in the scope of this instrument was presented by *Goode*, Battening down your security interests: How the shipping industry can benefit from the UNIDROIT Convention on International Interests in Mobile Equipment, in: Lloyd's Maritime and Commercial Law Quarterly 2000, 161 ss.

[4] Study LXXII – Doc. 29.

[5] See UNIDROIT 2012 – C.D. (91) 15, paras. 43 and 138.

[6] This general argument is the rationale for any harmonisation of proprietary security rights over ships, see, *e.g.*, *Berlingieri*, The 1993 Convention on Maritime Liens and Mortgages, in: Lloyd's Maritime and Commercial Law Quarterly 1995, 57.

The enormous growth of worldwide shipping over the past decades of globalisation of trade and commerce has further multiplied the demand for financing and there is no discernible trend away from the practice of using vessels and other maritime transport equipment as collateral under secured credit arrangements.

9. As in all instances of proprietary security, the practice of using ships as collateral provides security for the lender and thus lowers the credit risk involved in any advances; this in turn helps to reduce the cost of the credit for the loan-taker, since the reduced credit risk can be expected to be reflected in lower interest rates. At the same time, there is no restriction of the possibility to use the ship in the maritime trade even though it is subject to a proprietary security interest in favour of the lender. Shipping finance is, of course, often regarded as a particular field of commerce, primarily due to the volatility of earnings, its highly cyclical nature and the resulting occurrences of over-capacities, which affect freight rates, the demand for new shipbuilding and, indirectly, also the value of the ships that could be used as collateral. However, while these factors often limit the application of a conventional credit analysis to ship financing, the reduction of transaction costs through the reduction of inefficiencies of the law remains an advantage in any financing environment.

10. The advantages of an efficient system of consensual non-possessory security over ships are of particular importance for the maritime industry in emerging markets, where credit may be scarce and where the market participants may lack access to funding other than the use of the ships themselves as collateral. At the same time, the legal systems of some emerging markets have not yet developed sufficiently sophisticated legal tools to ensure the legal certainty in relation to the creation, effectiveness, priority status and enforcement of security interests over ships demanded by the financing industry, especially in an international context. In other words, the maritime industry in emerging markets would stand to gain enormously from any international harmonisation effort to promote international standards in this field of law.

2. Main issues of proprietary security over ships in a cross-border context

11. While the role of secured finance in the maritime industry is economically of primary importance, the use of ships as collateral for secured credits gives rise to a number of legal problems, especially in a cross-border context. These problems at least potentially raise the cost of securing credit by means of proprietary security interests over ships as collateral and can, in some situations, even adversely affect the availability of ships as collateral for secured transactions.

(a) Application of the flag law as governing law for consensual security over ships and exceptions to this rule

12. The acceptance of foreign property interests, especially if created or perfected under the requirements of foreign law or if providing different or more extensive rights than are known under domestic property law, is traditionally one of the most complicated issues of private international law. The widespread prevalence of the reference to the law of the *situs* of the collateral concerned as a rule of international property law in general is evidence of the reluctance of national property law regimes to accommodate the application of foreign property law and to recognise the existence and effects of proprietary interests under a foreign law.

13. As concerns consensual security over ships, however, there has been a broad development in the direction of international co-operation. As a general rule, most legal systems across the world have accepted the principle that the creation and third party effectiveness of consensual proprietary security over ships is governed by the law of the flag, *i.e.* the law of the State where ownership of

the vessel is registered, regardless of the forum or the law of the place where the ship is located at any certain moment.[7]

14. While this general reference to the law of the flag would in principle be sufficient to provide certainty for the market participants as concerns the applicable law, it should be noted that this general rule is not without exceptions. First, at least a handful of jurisdictions are still reported not to recognise ship mortgages under a foreign law of the flag.[8] Apart from the general conceptual issues concerning the recognition of foreign property law interests as referred to above, this reluctance presumably stems from the fact that specific policy issues arise in relation to proprietary security over ships in connection with the various non-consensual maritime liens arising under national laws:[9] legal systems might be tempted to seek to ensure that the value of the ship as an object encumbered by such maritime liens, which often arise in favour of local creditors, is not diminished by the recognition of foreign consensual security rights. Even though this is clearly a minority position, it causes considerable legal uncertainty for the holder of a consensual proprietary security over a vessel since it will often be difficult to foresee to which ports the ship will travel in the course of its operation and where, consequently, an action concerning the enforcement of security rights might be brought.

15. The second restriction to the general rule on the application of the flag law as governing law for consensual security over ships concerns the scope of the rule itself. As will be shown in more detail below, in some legal systems issues of priority are regarded as procedural and thus subject to the application of the law of the forum.

(b) Different types of consensual security rights under national law

16. The law of consensual security rights over ships is characterised by the diversity both of the security interests used in international market practice and their legal effects.

17. In part, this is due to reasons of legal history: Until the 18th century, the traditional type of consensual security over ships under the Common Law was the contract of bottomry, under which the owner of a ship borrowed money for repairs of the ship or for the purchase of cargo, pledging the keel or bottom of the ship, *pars pro toto*, as security for repayment in relation to a specific voyage. The creditor lost its money if the vessel was lost during the voyage for any of the reasons agreed between the parties. The greater demand for financing that arose with the advent of steel-hulled ships then led English law to allow the use of the concept of the (legal) mortgage also in relation to ships. Originally, the ship mortgage was understood as involving a transfer of ownership to the secured creditor, subject to a re-transfer upon satisfaction of the secured obligation. Even when, at a later stage,[10] the ship mortgage was regarded as a mere transfer of security to the secured creditor (as opposed to ownership), the requirement that the mortgage had to be registered in the shipping register was upheld.

18. Civil law systems, however, were originally hostile to the use of non-possessory consensual security interests in relation to ships. The principle of possession was regarded as central to the pledge over movables and hypothecation was restricted to immovables. It usually required intervention by the legislator to change this situation, and only from the 19th century onwards was ship hypothecation introduced by statute in various civil law jurisdictions.[11]

---

7 For a general overview, see *Carbone*, Conflits de Lois en Droit Maritime, in: Recueil des cours 340 (2010), 63, at 253 ss. See also, for instance, the situation in England: *The Angel Bell* [1979] 2 Lloyd's Rep 49; Germany: *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code), Art. 45(1) Nr. 2; United States: 46 USC Sec. 31301(6)(B).

8 See the references by *Wood*, Conflict of Laws and International Finance, ed. 2, London 2007, para. 14-075.

9 See below, nos. 35 ss.

10 See the English Merchant Shipping Act of 1854.

11 For French law see *Bonassies and Scapel*, Droit Maritime, ed. 2, Paris 2010, at 383.

19. These historical differences have resulted in differences in the legal positions conferred by ship mortgages and hypothecs. While both types of security interest give the secured creditor a position of access to privileged satisfaction of the underlying secured claims from an enforcement into the vessel, the holder of a ship mortgage traditionally has a stronger position in relation as to the enforcement of its rights. Upon default, the mortgagee can exercise a right to possession of the ship, exercise control over the ship and enjoy its earnings (while also being liable for expenses)[12] and satisfy the secured claim out of the proceeds of an out-of-court sale of the ship.[13] The holder of a ship hypothec, on the other hand, can traditionally exercise its rights only through judicial enforcement, typically by way of a judicial sale,[14] unless the parties have contractually provided for a power of sale for the creditor, which has been reported as being common in the market practice.[15] Several civil law systems, however, eventually adapted their legislation so as to grant the holder of a ship hypothec such rights as are available to the mortgagee of a ship.[16] Moreover, it should be noted that mortgagees will often prefer the method of judicial sale over out-of-court sale of the ship since, in the former case, the ship can be sold free of other encumbrances (especially maritime liens) and the mortgagee need neither give any warranties to the buyer nor face any potential liability vis-à-vis the original owner of the vessel in the event of failure to achieve the best possible sales price.

20. While this legal instrument is of enormous importance as a financing tool in other industries, the use of retention of ownership agreements is uncommon in secured transactions in relation to ships[17] (as opposed to cargo, equipment and freight) and the concept of retained ownership is generally difficult to align with a register of title.[18]

21. Leasing agreements, however, are commonly used in shipping finance. Under contracts known as "bareboat charter" or "demise charter", the owner of the ship (acting as lessor) effectively leases the ship to the charterer (lessee) for a period of time during which the charterer assumes the use, control, crewing, maintenance, operation, insurance, and all other aspects involved in the operation of the vessel in exchange for rental payments. Generally, however, such contracts envisage that at the end of the charter term, the ship is to be returned in the same condition as it was received excepting ordinary wear and tear,[19] and where leasing contracts do not cover the entire commercial life of the asset concerned, they are usually not regarded as secured transactions, but as mere operational leasing contracts.[20]

(c) Different perfection requirements under national law

22. In dealing with consensual proprietary security interests over ships, most legal systems agree that to achieve third party effectiveness in general (often referred to as perfection of the security),[21] there is a requirement of publicity, usually by means of registration. Registration of consensual proprietary security interests over ships usually takes place in the title register for the vessel

---

12 See for English law *Beale, Bridge et al.,* The law of security and title-based financing, ed. 2, Oxford 2012, para. 18.37.

13 See, *e.g.*, the Australian Shipping Registration Act 1981, Sec. 41.

14 See, for Germany: *Schiffsregistergesetz* (Ship Register Act), § 47; see generally on this distinction *Filippi*, I diritti reali di garanzia sulla nave nell'ambito del diritto materiale uniforme, in: Scritti in Onore di Francesco Berlingieri, Diritto Maritimo 112 (2010), Vol. 1, 485, at 510; *Mandaraka-Sheppard*, Modern Maritime Law, ed. 2, London 2009, at 370.

15 See *Filippi*, preceding footnote, at 512.

16 See, for instance, the preferred ship mortgage under Greek Legal Decree 3899 of 1958.

17 For the use of the ship mortgage as a means of security for the acquisition of ships see *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 2.22.

18 See for the discussion in Italy *La Rosa*, in: Bonilini and Confortini, Codice Civile, ed. 3, Turin 2009, Art. 2684 *sub* 3.

19 See *Schoenbaum*, Admiralty and Maritime Law, ed. 4, St. Paul 2004, 676.

20 See *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 7.44.

21 See generally von Bar and Clive (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Vol. VI, Munich 2009, IX.–3:101 Comment A; for US-American law see Uniform Commercial Code (UCC) Secs. 9-301 ss.

concerned.[22] English law also allows equitable mortgages over ships without a registration requirement under the Merchant Shipping Act 1995, but due to their low priority status their value as a security right is limited;[23] moreover, especially for smaller ships, there is often an exemption from the requirement of registration of the ship and of any security rights created over it.[24]

23. The formal requirements to be fulfilled in order to effect the registration of a proprietary security interest in a ship vary according to the jurisdiction concerned.[25] While some jurisdictions require either notarisation of the security agreement or mortgage deed[26] or attestation of the shipowner's signature,[27] other jurisdictions insist on the use of prescribed forms.[28] Moreover, the different legal systems allow the application for registration to be made at different places, especially as regards the possibility to effect a registration outside the territory of the flag State. While some jurisdictions allow applications for registration in a foreign consulate of the flag State,[29] others restrict such possibilities to certain consulates in the most important port cities.[30]

24. In addition to publicity by registration, some legal systems require a copy of the mortgage document to be kept on board the ship as well. This requirement is also prescribed by the Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926, Art. 12,[31] but failure to comply with this requirement does not necessarily invalidate the mortgage.

(d) Determination of priority on the basis of registration

25. While it is a common feature of systems of publicity for security interests by registration that the registration system not only governs the third party effectiveness of the security interests in general, but also determines the order of priority between competing security rights, the details of the priority rules concerning consensual security over ships vary as between different legal systems. Some legal systems, for example, provide that rights registered at the same date have equal ranking.[32] In other legal systems, the order of priority is determined by the order of registration, giving rights registered at the same date, but before other rights, priority over the latter.[33]

26. Some legal systems allow forms of provisional or advance registration intended to ensure that the priority of a proprietary security is not overridden in the period of time before registration is effective, but the details of such forms of provisional or advance registration vary.[34]

---

22 See, for instance, England: Merchant Shipping Act 1995, sch. 1, para. 7; France: *Bonassies and Scapel* (*op. cit.* fn. 11), at 385; *Simler and Delebecque*, Les sûretés, ed. 6, Paris 2012, at 657; Germany: *Schiffsregistergesetz* (Ship Register Act), §§ 8 and 3; United States: 46 USC Sec. 31321(a)(1); see, however, below, nos. 28 ss. for exceptions where there is a requirement to register in a company register.

23 See, generally, *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 14.37.

24 See for English law *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 14.34.

25 For a comparative treatment of the various formal requirements under the different legal systems worldwide see *French*, The Ship Mortgage, in: Stephenson Harwood (eds.), Shipping Finance, ed. 3, London 2006, 125-224.

26 See, for instance, Greece: *Vrelis*, Private International Law in Greece, Alphen aan de Rijn 2011, 118; see also the requirements under the German *Schiffsregisterordnung* (Ship Register Order), § 37(1) concerning the consent of the shipowner.

27 See the Norwegian *Lov om sjøfarten* 1994 (Maritime Code), Sec. 15(2).

28 See England: Merchant Shipping Act 1995, sch. 1, para. 7(2).

29 See Panama: *Ley del Comercio Maritimo* 2008 (Maritime Commerce Act), Art. 250.

30 See Greece, cf. *Wood*, Comparative Law of Security Interests and Title Finance, ed. 2, London 2007, para. 28-041.

31 For this instrument, see also below, nos. 49 ss.

32 See Sweden: *Sjölag* 1994 (Maritime Code), Chap. 3, Sec. 12; see also Norway: *Lov om sjøfarten* 1994 (Maritime Code), Sec. 23(2).

33 See England: Merchant Shipping Act 1995, sch. 1, para. 8(1); Germany: *Schiffsregistergesetz* (Ship Register Act), § 25(1); New Zealand: Ship Registration Act 1992, Sec. 40(1).

34 See England: the Merchant Shipping (Registration of Ships) Regulations 1993, Reg. 59, allows the registration of a (renewable) notice by an intending mortgagee which has the effect of securing the priority position if the mortgage is registered within 30 days; under the law of Panama, such a priority position can be secured for 6 months, see *Ley del Comercio Maritimo* 2008 (Maritime Commerce Act), Art. 252.

27. At times, there are exceptions to the general rule on the determination of priority of competing security interests on the basis of their registration, where it is provided that regardless of the order of registration, consensual security interests acquired by a secured creditor who knew or should have known of the existence of an earlier security interests cannot take priority over the earlier security interests.[35]

(e) Relationship to registration in debtor-indexed registers for proprietary security

28. In many jurisdictions worldwide, there are not only asset-specific registers such as registers for ships or other high value mobile assets, but also general debtor-indexed registers for proprietary security. For all or certain types of security provider, all (or at least most) types of proprietary security interest are entered into one register, which is searchable for all the security interests created by specific debtors. This gives rise to the issue of co-ordination of registration requirements in asset-specific ship registers and such general debtor-indexed registers.

29. The various jurisdictions have found different solutions for this problem. There would seem to be a recognisable trend in favour of precedence of registration in the asset-specific register, for instance on the basis of an exemption of security over ships from the scope of the security interests that are registrable in the general debtor-indexed register.[36]

30. Nevertheless, the legal systems of several other important shipping jurisdictions require proprietary security rights over ships to be registrable both in the asset-specific register and in the general debtor-indexed register, for instance the companies registry which contains all charges and mortgages created by a company.[37] In some of these legal systems, registration in the debtor-indexed register determines the third party effectiveness of the security in general, while registration in the asset-specific register provides protection against loss of priority vis-à-vis competing security interests.[38]

(f) Governing law for issues of priority between consensual security over ships

31. The priority position of a consensual proprietary security interest in relation to competing security rights over the same collateral is one of the most important aspects of any proprietary security right. The reliability of the secured position conferred upon a secured creditor through the creation of a consensual proprietary security interest is greatly compromised by any lingering uncertainty as to the determination of the legal regime under which the priority position of the security interest is to be decided.

32. However, there is no unanimity among legal systems worldwide as to the governing law for these issues of priority. Many legal systems apply the same conflict-of laws rule that predominantly determines the status of consensual proprietary security over ships, *i.e.* they decide issues of priority as between consensual security over ships according to the law of the flag.[39]

33. Some other jurisdictions, however, do not share this view. Emphasising the procedural role of the determination of priority in the process of enforcing security rights, the law of the forum is applied and there is no submission to the application of any foreign law of the flag.[40]

---

35 See Norway: *Lov om sjøfarten* 1994 (Maritime Code), Sec. 24(1).

36 See, *e.g.*, US-American UCC Sec. 9-311 (a), exempting all assets whose encumbrances are subject to registration of in an asset-specific register from registration requirements in the general debtor-indexed register.

37 See the English Companies Act 2006, Secs. 860, 861(5) (as from 6 April 2013, these provisions are to be replaced by Secs. 859A, 859I(1) and (2) on the basis of The Companies Act 2006 (Amendment of Part 25) Regulations 2013).

38 See the situation in England: *Beale, Bridge et al.* (*op. cit.* fn. 12), paras. 14.41/45; *Wood*, Conflict of Laws (*op. cit.* fn. 8), para. 28-030.

39 See, for instance, Norway: *Lov om sjøfarten* 1994 (Maritime Code), Sec. 75(2) no. 1.

40 See, for instance, Canada: *Todd Shipyards Corp v Altema Compania Maritima SA (The Ioannis Daskalelis*) [1974] SCR 1248; New Zealand: Ship Registration Act 1992, Sec. 70. This approach is also favoured in the general treatise by *Carbone* (*op. cit.* fn. 7), at 255 s.

34. In Germany, there is some dispute as to this issue. Most legal writers favour the application of the general rule on the application of the law of the flag for issues of priority of consensual security rights over ships,[41] but others have raised concerns. Since German law provides that in determining the priority status of non-consensual security rights, the law of the location of the ship (*lex rei sitae*) should be decisive,[42] some scholars argue that conflicts might arise in the event of two different priority regimes being applied in situations where there are several non-consensual and consensual security rights. To avoid such conflicts, the law of the location of the ship should also govern the priority status of consensual security rights.[43]

(g) Non-consensual maritime liens

35. Additionally, it should be noted that apart from consensual proprietary security interests, ships are often also subject to maritime liens. Such maritime liens are non-possessory proprietary security interests entitling their holders to privileged satisfaction of certain claims against the owner of the vessel (in addition, under some legal systems there are also statutory rights of retention, allowing a creditor to retain possession of the ship until payment of its claims). Some of the claims secured through a maritime lien are claims arising in contractual situations, such as claims for wages; others arise by operation of law, such as claims for liability in tort. Regardless of the nature of the secured claim, the maritime lien itself arises by operation of law, *i.e.* it is not dependent upon an agreement of the parties to this effect; by the same token, the general publicity requirements for consensual proprietary security over movables (see above, primarily registration) do not apply.

36. Maritime liens arise under the various national legal systems in various situations. There are some situations in which there is widespread agreement that a claim against the shipowner deserves to be secured through an *ex lege* security right, especially where seamen's and masters' wages, salvage and damages caused by the ship are concerned. In other cases, however, there is no such unanimity and the lists of maritime liens differ as between the various legal systems, a main area of dispute being claims for necessaries, *i.e.* bunkers, supplies, repairs, and towage, as well as claims for cargo damage and general average.[44]

(h) Priority as between maritime liens and consensual security rights

37. The existence of maritime liens can have considerable impact on the position of a competing secured creditor under a consensual proprietary security right over the vessel concerned. It is important to note that the priority status of maritime liens vis-à-vis competing security rights does not follow the usual rules of priority: Instead of an order of priority following the order of time of the conflicting security interests, maritime liens often take precedence over earlier proprietary interests.

38. Again, the exact priority status of maritime liens vis-à-vis conflicting interests in the same vessels is a matter that is decided differently under the various legal systems, for instance concerning the issue of which types of maritime lien and privilege should override consensual

---

41 *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code), Art. 45(1) Nr. 2; *Kreuzer*, Die Vollendung der Kodifikation des deutschen Internationalen Privatrechts, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht 65 (2001), 383, at 455.

42 See *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code), Art. 45(2) sent. 2 *juncto* Art. 43(1).

43 See *Wendehorst*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, ed. 5, Munich 2010, Art. 45 EGBGB para. 81; the legislator, however, appears to have favoured the contrary view, see the German government's reasons for the draft Bill on the private international law of non-contractual obligations and property law of 01 Feb. 1999 (*Gesetz zur Neuregelung des Internationalen Privatrechts für außervertragliche Schuldverhältnisse und für Sachen*), BT-Drucks 14/343, at p. 18.

44 Such claims are secured by maritime liens, for instance, in the United States, see 46 USC Secs. 31301(4) and (5)(B), 31342(a)(1), and France, see *Code des transports* Art. L5114-8, whereas under English law, there is no such protection for these types of claims, see the restricted list in *The Ripon City* [1897] P. 226, at 242; *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 6.166.

proprietary security rights over ships.[45] Generally, this issue has proved to be highly contentious in past attempts to harmonise the law of proprietary security interests over ships; decisions as to the priority of maritime liens primarily reflect policy decisions of the legal systems concerned.

(i) Governing law for maritime liens and their priority status

39. Finally, another intensely debated issue is the issue of determination of the applicable law governing maritime liens and their priority status. Given the differences as between national legal regimes concerning the circumstances in which maritime liens arise and as to their priority status vis-à-vis competing security interests, these private international law issues can be extremely relevant in practice. However, the conflict-of-laws rules applied under the various legal systems worldwide vary significantly in this regard and there are at least three main approaches concerning the governing law for maritime liens and their priority status.

40. In some legal systems, the law of the forum governs the existence and priority of maritime liens, regardless of whether the circumstances which may have given rise to a claim secured by a maritime lien have any connection to the forum State.[46] Instead, it is argued that a maritime lien is primarily of a procedural character and as such should be governed by the law of the forum. Effectively, this approach protects holders of a consensual proprietary security right that is recognised under the forum law from having to give precedence to a maritime lien under the priority rules of a foreign law and it is therefore often criticised as being, amongst others, biased in favour of banks and other credit financiers.

41. Several other legal systems emphasise the relationship between the maritime lien and the underlying claim that is secured by this proprietary security. Under these legal systems, the maritime lien is regarded as an issue of substantive law and is governed by the *lex causae* of the underlying claim, *i.e.* the law that is applicable for the claim that is secured by this non-possessory security.[47] Thus, under this approach, neither the location of the ship at the moment when proceedings are initiated nor the choice of the forum affect the application of the law that determines whether a maritime lien has come into existence. However, there are additional conflict-of laws rules regarding the priority status of maritime liens vis-à-vis conflicting security interests. With a view also to avoid inconsistencies where several maritime liens arising under different national laws could all claim priority over each other under their own national laws, the priority status of the maritime liens amongst competing security interests is determined according to the rules of the forum.[48] Under a variant of this rule, the application of the law of the place where the ship is located at the moment of the proceedings is referred to: this will often be identical to the law of the forum.[49]

---

[45] For a comparison between the order of priority in the United Kingdom and the United States see *Tetley*, Maritime Liens in the Conflict of Laws, in: Nafziger and Symeonides (eds.), Law and Justice in a MultiState World: Essays in Honor of Arthur T. von Mehren, Ardsley 2002, 439-457; under French law, all privileged maritime liens enjoy priority over consensual proprietary security rights in the ship, see *Code des transports* Art. L5114-13, whereas privileges under the general law rank behind all ship mortgages, see Art. L5114-14.

[46] See, *e.g.*, England: *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221 (PC); France: *Bonassies and Scapel* (*op. cit.* fn. 11), at 406; Australia: *Morlines Maritime Agency Ltd v the Proceeds of Sale of the Ship Skulptor Vuchetich* [1997] FCA 1627. For further references see *Clarke*, Transport by Sea and Inland Waterways, in: David *et al.* (eds.), International Encyclopedia of Comparative Law, Vol. III, chap. 26 (1994), para. 62.

[47] See, for instance, Canada: *Todd Shipyards Corp v Altema Compania Maritima SA (The Ioannis Daskalelis*) [1974] SCR 1248; Germany: *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code), Art. 45(2) sent. 1; United States: *Dresdner Bank AG v MV Olympia Voyager* 463 F3d 1210 (11th Cir 2006). See also the references given by *Clarke* (*op. cit.* fn. 46), para. 68.

[48] See, for instance, Canada: *Todd Shipyards Corp v Altema Compania Maritima SA (The Ioannis Daskalelis*) [1974] SCR 1248; United States: *The Scotia,* 35 F. 907, 911 (S.D.N.Y. 1888). See also *Clarke* (*op. cit.* fn. 46), para. 75.

[49] See Germany: *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code), Art. 45(2) sent. 2 *juncto* Art. 43(1).

42. A third solution that is favoured by another group of legal systems is the application of the law of the flag instead of the law of the forum and the law governing the secured claim.[50] The advantage of such a rule is that it offers a precise and predictable criterion to determine the applicable law. However, given the widespread use of flags of convenience where shipowners choose to register a vessel under the laws of a State without any relevant existing links to the ship, there will often be no substantial connection between the law of the flag and the circumstances that give rise to a claim secured by a maritime lien. Under a variant of this approach, consensual proprietary security rights are protected against the effects of maritime liens under a foreign law by a rule providing that the latter interests can take precedence over a consensual proprietary security under the priority rules of the law of the flag only if the same result would be obtained under the law of the forum.[51]

3. Responses in market practice

43. Since the issues of proprietary security over ships in a cross-border context are primarily proprietary or procedural in nature, there is only limited scope for solving the problems described in the preceding paragraphs in market practice on the basis of contractual agreements.

44. As to maritime liens arising under national law as an *ex lege* security right for underlying claims in the context of contractual relationships (*e.g.*, contracts for the repair of ships), market practice has attempted to secure the application of a legal system favourable to the creation of a maritime lien by operation of law as security for such contracts by including tailored choice-of-law clauses in the contracts from which the underlying obligations arise. Such a choice of law can effectively determine the applicable property law regime, at least where, under the conflict-of-laws rules of the relevant forum, the determination of the existence of a maritime lien is regarded as an issue to be determined under the law applicable to the secured obligation.[52]

45. While possible in principle, the choice of the flag has not risen to prominence as a tool that could be used in market practice for purposes of the choice of the law applicable to consensual security rights over ships. This is because the choice of register for a ship also governs the safety regulations, labour laws and other rules under which the ship is operated and these bodies of rules are of primary importance in choosing the State in which to register the ship.

46. To a large extent, therefore, the main method in practice which can be used by the parties to achieve more favourable treatment of their proprietary security rights is to attempt to ensure that proceedings are conducted in a jurisdiction that recognises these security rights and awards them preferred priority status. In shipping law, such forum shopping practices are primarily connected to the location of the vessel. Depending upon the type of proprietary security, different strategies are applied by the secured creditors: while holders of a ship mortgage will attempt to ensure that the ship travels to a port in a favourable jurisdiction, creditors under a maritime lien such as repairers will often exercise their possessory lien before the ship leaves port in order to prevent it travelling to a jurisdiction where the maritime lien might not be recognised or might have a less preferential priority status.

47. As to the varying requirements for the registration of consensual proprietary security interests over ships, market participants have recourse to extensive comparative summaries of the different registration requirements. Again, the legal nature of these requirements allows no room for market participants to develop their own solutions to bridge the differences between the relevant legal orders.

---

[50] See, *e.g.*, Greece: *Vrelis* (*op. cit.* fn. 26), 118; Italy: *Codice della Navigazione* (Maritime Act), Art. 6. For further references see *Clarke* (*op. cit.* fn. 46), para. 66.
[51] See the Netherlands: *Burgerlijk Wetboek* (Civil Code), Art. 10:160(2).
[52] See above, paras. 39 ss.

4. Existing and projected international instruments regarding proprietary security over ships

48. The issues arising in the context of proprietary security over ships have over the years been the subject of repeated attempts to achieve international harmonisation. However, as will be shown in the following short survey, most existing international instruments in this field of law have not proved a universal success in terms of global support. Others instruments, although adopted by numerous legal systems, leave out many of the important and contentious legal issues of proprietary security, suggesting that there is still scope and demand for an instrument which addresses the afore-mentioned issues at an international level.

(a) Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926

49. One of the first major efforts at harmonisation in the field of proprietary security over ships was the 1926 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages adopted by the Comité Maritime International (hereinafter: the 1926 Convention), which entered into force in 1931. 28 States are Parties to this Convention;[53] four States have declared their denunciation of the 1926 Convention.[54].

50. In terms of consensual security rights over ships, the 1926 Convention provides that mortgages and hypothecations must be recognised if they are effected and registered in accordance with the requirements of the law of the flag.[55] The 1926 Convention thus enshrines the conflict-of-laws principle that consensual security rights in ships are to be governed by the law of the flag, which is now widely recognised.

51. The 1926 Convention did not, however, lay down a unified regime for the creation and third party effectiveness of ship mortgages and hypothecations. It indirectly endorses a registration requirement by limiting the scope of application of its conflict-of-laws principle to registered consensual security rights over ships, but it is silent as to details and formalities of the registration system, which are left to the law of the Contracting State to which the ship belongs. The 1926 Convention also refers to a requirement that documents concerning the registered consensual security rights must be carried on board.[56] However, while the Convention provides that the mortgagee may not be held liable for failure to comply with such requirements, the precise nature and form of the documents in question is left to be prescribed by national law.

52. Similarly, the 1926 Convention does not regulate the effects of a ship mortgage or hypothecation that is valid and effective under the applicable national law. Instead, the Convention provides that its provisions do not "affect in any way the competence of tribunals, models of procedure or methods of execution authorized by the national law."[57] This broad formula would include details of the enforcement of mortgages and hypothecs as an issue to be left to the national law.

53. The priority status of consensual proprietary security is not comprehensively addressed by the 1926 Convention. While it is provided that ship mortgages, hypothecations and other registered

[53] Algeria, Argentina, Belgium, Brazil, Cuba, Denmark, Estonia, Finland, France, Haiti, Hungary, Iran, Italy, Lebanon, Luxembourg, Madagascar, Monaco, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Syria, Turkey, Uruguay, Zaire.
See http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf.
[54] Denmark, Finland, Norway and Sweden.
[55] See the text of Art. 1 of the 1926 Convention:
Mortgages, hypothecations, and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or at a central office, shall be registered as valid and respected in all the other contracting countries.
[56] Art. 12.
[57] Art. 16.

charges rank below maritime liens enumerated in the Convention,[58] there is no rule concerning the priority of these ship mortgages, hypothecations and other registered charges as between each other.

54. The 1926 Convention does, however, provide detailed regulation of maritime liens. The Convention contains a catalogue of the types of claim secured by maritime liens,[59] including, amongst others, claims for expenses incurred for the preservation of the vessel,[60] whose status as a claim secured by a maritime lien is much disputed amongst the various legal systems world-wide.[61] Under the provisions of the 1926 Convention, such maritime liens generally take precedence over consensual security rights over ships;[62] the 1926 Convention also contains additional priority rules concerning the status as between several maritime liens.[63]

(b) Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1967

55. The 1926 Convention was intended to be replaced by the Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1967 (hereinafter: the 1967 Convention), which, however, never entered into force. Only five States are Parties to this instrument.[64]

56. With regard to consensual security rights over ships, the 1967 Convention follows an approach that is broadly similar to the 1926 Convention and refers the enforceability of registered mortgages and hypothecations on ships in general to the law of the flag.[65] However, going beyond the 1926 Convention, the 1967 Convention requires registration to be in a public register, provides that the secured creditor must be named in the register or in documents deposited with the register (unless the security is to bearer), and that the amount to be secured must be specified in the register or in documents deposited with the register.[66]

57. The effects and ranking of ship mortgages and hypothecations as between themselves are generally referred to the law of flag in the 1967 Convention;[67] enforcement issues are left to the law of the forum.[68] However, the 1967 Convention lays down some specific rules including a provision that deregistration of a ship should not be allowed under national law without the written consent of the holders of registered security rights in the ship,[69] as well as rules on the judicial sale of a ship.[70]

---

[58] Art. 3.
[59] Art. 2.
[60] See Art. 2(1).
[61] See above, *para*. 36.
[62] See Art. 3.
[63] Arts. 5 and 6.
[64] The signatory States are: Denmark, Morocco, Norway, Sweden, Syria.
See http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf.
[65] Art. 1(a).
[66] See the text of Art. 1 of the 1967 Convention:
Mortgages and "hypothèques" on sea-going vessels shall be enforceable in Contracting States provided that:
(a) such mortgages and "hypothèques" have been effected and registered in accordance with the law of the State where the vessel is registered;
(b) the register and any instruments required to be deposited with the registrar in accordance with the law of the State where the vessel is registered are open to public inspection, and that extracts of the register and copies of such instruments are obtainable from the registrar, and
(c) either the register or any instruments referred to in paragraph (b) above specifies the name and address of the person in whose favour the mortgage or "hypothèque" has been effected or that it has been issued to bearer, the amount secured and the date and other particulars which, according to the law of the State of registration, determine the rank as respects other registered mortgages and "hypothèques".
[67] Art. 2.
[68] Art. 2, last half-sentence.
[69] Art. 3.
[70] Arts. 10, 11.

58. Like the 1926 Convention, the 1967 Convention contains detailed regulation of maritime liens by setting up a catalogue of maritime liens and by making specific provision for their preferred priority status.[71] The 1967 Convention no longer refers to maritime liens for expenses incurred for the preservation of the vessel and for master's contracts as did the 1926 Convention, but allows the Contracting States to provide for a maritime lien for claims for repairs of a ship, which could be given priority over registered proprietary security rights, but which would be extinguished once the repairer was no longer in possession of the ship.[72]

(c) Geneva Convention on Maritime Liens and Mortgages of 1993

59. In response to what was regarded as the failure of the 1926 and 1967 Conventions to attract broad support amongst legal systems worldwide, another harmonisation effort was undertaken with the Geneva Convention on Maritime Liens and Mortgages of 1993 (hereinafter: the 1993 Convention) that was supported by the International Maritime Organisation and the United Nations Conference on Trade and Development. The Convention entered into force in 2004; 11 States had signed by 1994,[73] and there are now 17 States Parties.[74]

60. With regard to issues of consensual security rights over ships, including their ranking as between themselves, the provisions of the 1993 Convention follow the model of the 1967 Convention, referring the enforceability of registered proprietary security over ships in general to the law of the flag[75] and providing that registration must be in a public register, that the secured creditor must be named in the register or in documents deposited with the register (unless the security is to bearer) and that the maximum amount to be secured must be specified in the register or in documents deposited with the register, if this is so required under the law of the flag or if the security agreement specifies such an amount.[76] The priority of such consensual registered security rights as between themselves is generally referred to the law of the flag,[77] while enforcement follows the law of the forum,[78] subject to rules prohibiting the deregistration of a ship without the consent of the registered secured creditors[79] and rules on the judicial sale of a ship, which are more detailed than the rules under the 1967 Convention as regards the notice to be given to interested parties before a judicial sale.[80]

---

[71] Arts. 4 to 9.
[72] Art. 6(2).
[73] These signatory States are: Brazil, China, Denmark, Finland, Germany, Guinea, Morocco, Norway, Paraguay, Sweden, Tunisia.
[74] Parties to the 1993 Convention are: Albania, Benin, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Serbia, Spain, St. Kitts and Nevis, St. Vincent and the Grenadines, Syria, Tunisia, Ukraine, Vanuatu.
See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&lang=en.
[75] Art. 1(a).
[76] See the text of Art. 1 of the 1993 Convention:
Mortgages, "hypothèques" and registrable charges of the same nature, which registrable charges of the same nature will be referred to hereinafter as "charges" effected on seagoing vessels shall be recognized and enforceable in States Parties provided that:
(a) such mortgages and "hypothèques" have been effected and registered in accordance with the law of the State where the vessel is registered;
(b) the register and any instruments required to be deposited with the registrar in accordance with the law of the State where the vessel is registered are open to public inspection, and that extracts of the register and copies of such instruments are obtainable from the registrar, and
(c) either the register or any instruments referred to in paragraph (b) above specifies the name and address of the person in whose favour the mortgage, "hypothèque" or charge has been effected or that it has been issued to bearer, the amount secured, if that is a requirement of the law of the State of registration or if that amount is specified in the instrument creating the mortgage, "hypothèque" or charge, and the date and other particulars which, according to the law of the State of registration, determine the ranking in relation to other registered mortgages, "hypothèques" and charges.
[77] Art. 2.
[78] Art. 2, last half-sentence.
[79] Art. 3.
[80] Art. 11.

61. As regards non-consensual maritime liens, the regime of the 1993 Convention closely resembles that of the 1926 and 1967 Conventions in that it sets up a catalogue of maritime liens and provides that such liens rank before consensual registered security interests. The main differences with the earlier Conventions include[81] the downgrading of maritime liens for port dues and similar claims vis-à-vis other maritime liens,[82] the exclusion of maritime liens for oil pollution damages[83] and the downgrading of the priority of maritime liens for repair claims under national law, which no longer rank before registered consensual security interests.[84]

(d) Conventions on the Arrest of Ships of 1952 and 1999

62. As to the specific issue of the arrest of ships, two international instruments have been adopted: the Brussels Convention relating to the Arrest of Seagoing Ships of 1952 (hereinafter: the 1952 Convention), which entered into force in 1956 and now has over sixty States Party plus their dependent territories,[85] and the Geneva Convention on the Arrest of Ships of 1999 (hereinafter: the 1999 Convention), which entered into force in 2011, but has only ten States Party.[86]

63. Both the 1952 and the 1999 Conventions are concerned exclusively with the issue of the arrest of ships, determining, amongst others, the types of maritime claim on the basis of which a ship may be arrested[87] and describing further conditions for the exercise of the right of arrest against a ship, such as whether and when the owner or demise charterer of the ship must, at the moment of arrest, be held liable for the underlying claim, or whether and when the right of arrest can be exercised on the basis of a maritime lien or a consensual security securing the maritime claim.[88] Both Conventions expressly provide that the right of arrest under the provisions of the Conventions may not be construed as creating a maritime lien.[89]

64. Being restricted to the conditions of the right of arrest and to the exercise of this procedural remedy, both the 1952 and the 1999 Conventions have only a very limited bearing upon substantive issues of proprietary security interests over ships.

(e) Proposal for a European Register of Ships (Euros)

65. In 1989, the European Commission proposed a Council Regulation establishing a Community-wide ship register (Euros) to exist alongside the present national registers. In its amended proposal of 1991,[90] however, the Commission clarified that the introduction of the additional European register was not intended to affect the property rights in ships, which should continue to be governed by the laws of the national flag member State.[91] Instead, the proposed Regulation focussed on the setting of standards for the eligibility for registration in a common register[92] and other issues such as manning, crew and labour regulation.[93]

---

[81] For a more detailed description of these differences between the 1926 and 1967 Conventions and the 1993 Convention, see *Berlingieri* (*op. cit.* fn. 6), at 62 ss.
[82] Art. 4(1)(d).
[83] Art. 4(2).
[84] Art. 6(c), for the right of retention in such situations see Art. 7.
[85] Among these States are: Belgium, Denmark, Egypt, Finland, France, Germany, Greece, Italy, the Netherlands, Nigeria, Norway, Portugal, Russia, Spain, Sweden, United Kingdom. For a complete list see http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf.
[86] Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and Syria.
See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&lang=en.
[87] See the text of Art. 1(1) in both Conventions, which is drafted significantly wider in the 1999 Convention. On the application of these rules in national jurisprudence see, *e.g.*, for France: *Bonassies*, La Cour de Cassation Française et la Convention de 1952 sur la saisie conservatoire des navires de mer, in: Scritti in Onore di Francesco Berlingieri, Diritto Maritimo 112 (2010), Vol. 1, 216, at 219.
[88] See the text of Art. 3 in both Conventions.
[89] See the text of Art. 9 in both Conventions.
[90] COM(91) 483 final, published in OJ 1992 No. C 19/10.
[91] See Art. 23 of the proposed Regulation.
[92] Arts. 3 s.
[93] See Section 3 of the proposed Regulation.

66. These efforts to introduce a European register were subsequently abandoned, on the grounds that an additional registration system would be of doubtful value and that a unified register would for the time being be premature given the lack of harmonisation of the economic, tax and social policies of the Member States.[94]

(f) Proposal for an International Instrument for the Recognition of Judicial Sales of Ships

67. The Comité Maritime International is currently working on a projected International Instrument for the Recognition of Judicial Sales of Ships. A second working draft of this proposed instrument was discussed at the Comité Maritime International's conference in Beijing in October 2012.[95]

68. The present draft covers the judicial sale of ships in general. It provides, amongst other matters, that notice must be given to interested parties prior to a judicial sale,[96] that a judicial sale has the effect of extinguishing all rights and interests in the ship that existed prior to the judicial sale, [97] and that a judicial sale carried out in accordance with the provisions of the proposed instrument must be recognised in the Contracting States as having the effect of transferring title to the ship to the purchaser and extinguishing all consensual and non-consensual security rights in the ship unless assumed by the purchaser.[98]

69. It should be noted that the question of judicial sale is addressed both by the 1967 and 1993 Conventions. The proposed new instrument does not differ, in general terms, from these 1967 and 1993 previous Conventions as concerns the requirements and effects of a judicial sale, apart from clarifying certain specific issues. The arguments advanced as justifying an additional international instrument include the following:[99] the 1967 and 1993 Conventions cover judicial sale only as a type of enforcement of rights under proprietary security rights in ships, whereas the proposed instrument would be broader in scope. Moreover, it is submitted that even at the risk of overlap with the 1967 and 1993 Conventions, an additional, stand-alone instrument on judicial sale would be opportune. The limited success of the 1993 Convention and the scant likelihood of many further accessions argue in favour of an international instrument on judicial sales that avoids the internationally disputed issues of maritime liens which, as experience shows, has proved something of an obstacle to broad support, however welcome such broader solutions would be from the standpoint of international legal harmonisation and efficiency of cross-border transactions.

5. Suitability of the Cape Town Convention system for consensual security over ships

70. The preceding paragraphs of this preliminary study have sought to illustrate that many of the main issues concerning proprietary security over ships in a cross-border context are not satisfactorily addressed by the existing international instruments in this field of law. As a result, additional efforts to harmonise the laws at an international level are all the more called for. A closer analysis of the existing body of international instruments in this field, however, not only highlights the unsatisfied need for international solutions for the problems that arise in cross-border shipping practice, but also, to some extent, points to the strategies that could be successful in avoiding the

[94] See the Opinion of the European Economic and Social Committee of 26 April 2007, COM(2006) 275 final, published in OJ 2007 No. C 168/50.
[95] The draft can be downloaded from the webpages of the Comité, see under www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html.
[96] Draft Art. 3.
[97] Draft Art. 4.
[98] Draft Art. 7.
[99] See the paper by *Sharpe*, Towards an International Instrument for Recognition of Judicial Sales of Ships – Policy Aspects, which can be downloaded from the webpages of the Comité, see under www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html.

lack of international success that has characterised most of the previous harmonisation efforts in this field of law.

71. For some of the issues referred to above, specifically the creation, third party effectiveness, priority and effects of consensual proprietary security interests over ships, the secured transactions system set in place by the Cape Town Convention recommends itself as a suitable solution capable of being addressed in an additional Protocol to the Convention. While such an additional Protocol would obviously not solve the cross-border issues raised by divergent national rules on maritime liens and their priority, a harmonisation project thus limited in scope stands a greater chance of success than previous attempts at achieving comprehensive international regulation of proprietary security interests over ships. The preparation of a new Protocol under the Cape Town Convention system would tap into a proprietary security regime whose workability in practice is beyond doubt, a decided advantage over the drafting from scratch of a completely new instrument. Nevertheless, while the legal regime set up under the Cape Town Convention system in general is certainly suitable for an extension to security over ships, a number of issues remain concerning which a possible additional Protocol would need to be adapted to specific peculiarities of maritime law, on the basis of the outcome of further research into traditional market preferences.

(a) Overview of the main aspects of the secured transactions regime under the Cape Town Convention

72. The legal regime for secured transactions as developed in the Cape Town Convention and the existing three Protocols for the different types of mobile asset referred to in Art. 2(3) of the Convention includes the following characteristics, among others:

- the Convention covers the creation of an international interest in mobile assets (Art. 2(1))
- international interests include:
    - interests granted under a security agreement (Art. 2(2)(a))
    - interest of the seller under a title reservation agreement (Art. 2(2)(b))
    - interest of the lessor under a leasing agreement (Art. 2(2)(c))
- international interests are constituted with only a requirement of written form (Art. 7(a)), registration of an international interest ensures priority over interests that are registered subsequently or not at all (Art. 29) and effectiveness of the interest in insolvency (Art. 30)
- remedies of the secured creditor in the case of default include for all types of international interests the taking of possession of the collateral, the sale of the collateral, the granting of a lease of the collateral and the collection of income or profits from the collateral (Art. 8)
- a seller or lessor may in the event of default also terminate the sale/leasing contract and take possession of the object (Art. 10)
- the secured creditor may apply for relief pending final determination of its claim; the relief may include, amongst others, an order for the immobilisation of the collateral (Art. 13)
- remedies generally are to be exercised in conformity with the procedural provisions of the forum (Art. 14)
- the registration of the international interests covered by the Convention system is to be effected in an International Register specifically established for this purpose (Art. 16)
- the International Register is to operate under a Supervisory Authority (Art. 17)
- the requirements for registration are comprehensively regulated (Art. 18)
- the operation of the register is regulated, ensuring, amongst others, the possibility for any person to request a search of the register by electronic means (Art. 22)

- there is an elaborate regime governing the assignment of rights to payment secured or associated with the collateral (associated rights) (Arts. 31 ss.)
- Contracting States may nominate non-consensual security rights which are to have priority over registered consensual interests (Art. 39)
- Contracting States may nominate non-consensual security rights which are to be registrable as if they were international interests under the Cape Town Convention system and which are then to be regulated accordingly (Art. 40)
- jurisdiction clauses are upheld and the jurisdiction conferred under such a clause is, at least if the parties so choose, treated as exclusive (Art. 42), subject to the exception that also the courts of the location of the asset concerned have jurisdiction for interim relief orders (Art. 43); in the absence of a jurisdiction clause, jurisdiction is determined under the laws of the forum State
- the legal regime for any type of mobile asset is determined under the provisions both of the Cape Town Convention and of the applicable Protocol; in case of inconsistencies, the Protocol prevails (Art. 6(2))

73. The following paragraphs will deal in more detail with several main aspects of the application of the secured transactions regime under the Cape Town Convention as summarised in the preceding paragraph to ships and maritime equipment.

(b) Ships and maritime equipment as registrable assets

74. While the operation of an asset-specific system of registration of proprietary security rights (real folio)[100] can raise problems in relation to assets that are difficult to identify individually, no such difficulties are to be expected in relation to ships: Seagoing ships are traditionally objects of registration requirements under national law. National shipping registers would in any case not be set aside by the introduction of an additional Protocol to the Cape Town Convention: The determination of a law of registration under a national flag would still be relevant for, amongst others, labour and safety regulations. While the introduction of an additional Protocol to the Cape Town Convention would include the establishment of an International Register, this register would only cover security interests over ships.

75. The establishment of an International Register would, obviously, entail the requirement of defining which ships should be covered by the registration system. Under the Protocol on Matters Specific to Aircraft Equipment, for instance, the type of aircraft is defined by reference to technical measures.[101] A similar approach could be adopted for ships by including a reference to a minimum tonnage requirement; alternatively, a cross-reference might be made to the definition of the term "ship" under Article 2 of the Geneva Convention on Conditions for the Registration of Ships of 1986[102] (that Convention is not yet in force, fifteen States have become Parties to it),[103] or the scope of application of the additional Protocol could be defined by reference to the scope of the registration requirement under the applicable national shipping registers.

---

[100] For the method of operation of the registers under the Cape Town Convention system see *Goode*, Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment, Official Commentary, ed. 2, Rome 2008, paras. 2.70 ss.

[101] See Art. I(2)(b), (e) and (l).

[102] The text of the definition is as follows:
"'Ship' means any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons."

[103] Parties to the Convention are: Albania, Bulgaria, Cote d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Liberia, Lybia, Mexico, Morocco, Oman, Syria.
See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&lang=en.
According to its Art. 19, the Convention shall enter into force 12 months after the date on which not less than 40 States, the combined tonnage of which amounts to at least 25 per cent of the world tonnage, have become Contracting Parties to it.

76. With regard to other types of maritime equipment, especially container fleets, the need for secured financing is equally obvious, but registration raises additional issues of delimitation, for instance in relation to containers used in a non-shipping environment. Further research and consultations with market practitioners would be required to identify possible additional types of maritime equipment suitable for inclusion in a registration system based upon register entries relating to individual assets.

(c) Uniform rules on registration requirements

77. The existence of uniform rules in respect of the requirement and procedures for the registration of security interests under the Cape Town Convention system would be among the main advantages of a proposal for an additional Protocol covering ships and maritime equipment. Currently, there are not only differences as to the applicable requirements and procedures for registration under national law, but moreover, the general application of the conflict-of-laws principle to the determination of these matters by the law of the flag is not entirely clear-cut.

78. Agreement on harmonised requirements and procedures for registration under an international instrument would solve both these issues and market participants wishing to take security over a vessel under a foreign flag would no longer face the additional costs and effort of ascertaining and complying with procedural requirements under a foreign law. Application of these harmonised rules would enable them simply to rely on the fact that a court would not subject their security interest to the registration requirements of another legal regime.

79. It should also be noted that, while the 1967 and 1993 Conventions also contained some references to minimum publicity requirements, the effects of harmonising the requirements and procedures for the registration of security interests under the Cape Town Convention system would be different. The 1967 and 1993 Conventions primarily address the international recognition of consensual security rights that continue, however, to be governed by their own law under the system of these Conventions. The Conventions merely contained minimum requirements, but left the details of the registration system to the national law.[104] This means that market participants must comply with the requirements of the various national legal systems (a circumstance guaranteed to raise transaction costs and increase the risk of inadvertent failure to comply with the required registration formalities, especially in cross-border situations). By creating an international interest governed by the rules laid down in the Cape Town Convention system itself, the preparation of a new Protocol to the Cape Town Convention would eliminate these risks,[105] the workability of the harmonised registration procedures under the Cape Town Convention system having already been proven in practice.

(d) Uniform priority rules as between competing consensual security rights

80. The extension of the Cape Town Convention system to ships would also include the application of uniform priority rules as between competing consensual security interests over ships, providing for increased predictability for market participants concerning the status of their consensual proprietary security interest vis-à-vis other conflicting ship mortgages or hypothecations.

81. Parties would no longer face the risks stemming from the fact that the priority status of their proprietary security rights would follow slightly different rules under the various national legal systems and that there was no international consensus on the determination of the applicable law for this issue, whether it be the law of the flag or the law of the forum.

---

[104] On the legislative technique of these instruments, see *Carbone* (*op. cit.* fn. 7), at 114.
[105] See generally *Goode,* Official Commentary (*op. cit.* fn. 100), para 2.5.

82. It should be noted that the introduction of the uniform priority rules as between competing consensual security rights under the Cape Town Convention system should not cause any problems as concerns the lack of harmonisation in relation to the system of priority for non-consensual security.[106] Since only the priority of consensual security rights as between themselves (and other interests specifically brought within the ambit of the Convention)[107] is regulated under the Cape Town Convention, no conflicts can arise through the application of other priority rules concerning non-consensual security rights and the relationship between consensual and non-consensual security, which will all be dealt with under the legal system applicable under the conflict-of-laws rules of the forum.

(e) Enhanced publicity under an electronic register

83. An International Register set up under the Cape Town Convention system operates electronically and allows direct, around-the-clock access for searching purposes for anyone interested in its content.[108]

84. Such a system avoids the cost, expense and delay that beset shipping registers operated on a paper basis, since these do not allow direct user access. By improving access to the register, its publicity function is greatly enhanced compared to that of registers operated by traditional methods. While there would obviously no need for an international instrument to change the *modus operandi* of national registration systems, the preparation of an additional Protocol to the Cape Town Convention could accelerate law reform in this respect and could also serve as proof that existing misgivings about the electronic operation of registers of proprietary security are unjustified.

(f) Existence of international organisations as possible Supervisory Authorities

85. The Cape Town Convention system envisages a Supervisory Authority for the International Register. In the field of shipping law, several organisations that have in the past been involved in legal harmonisation projects might be considered as possible Supervisory Authorities (Comité Maritime International, International Maritime Organisation and the United Nations Conference on Trade and Development).[109]

(g) Double registration requirements

86. Since the provisions of an international instrument can claim preference over the application of national law, the rules of the Cape Town Convention that provide for the creation, priority status and insolvency effectiveness of registered international instruments that fulfil the Convention requirements [110] cannot allow the conflicting operation of national requirements of an additional registration of proprietary security rights over ships in a national debtor-indexed register (especially a Companies Register).

87. It has been reported, however, that in some jurisdictions operating a debtor-indexed register for all types of security of specific debtors (specifically companies) where the system of registration of security in aircraft under the Cape Town Convention and the Protocol on Matters Specific to Aircraft Equipment has come into force, double registration of security over aircraft both in the Dublin register under the Cape Town Convention system and the debtor-indexed register (Companies Register) remains usual, see for instance the practice in Ireland. Further research would

[106] See the concerns raised in the German legal literature, above, no. 34.
[107] See Arts. 29 and 39 s. and below, nos. 88 ss.
[108] See Art. 22, see also the Regulations for the International Registry under the Cape Town Convention, regs. 3.4 and 7.
[109] On the role of these international governmental and non-governmental organisations in general, see *Carbone* (*op. cit.* fn. 7), at 83 ss.
[110] See Arts. 7, 29 and 30.

be needed to establish whether this practice is preferred by market participants or whether the legal effects of registration in the International Register vis-à-vis competing registration requirements under national law, as set out in the preceding paragraph, should ideally be clarified in a possible additional Protocol.

(h) General restriction in respect of consensual security

88. The Cape Town Convention system primarily addresses only consensual proprietary security rights.[111] The Cape Town Convention is not intended to harmonise the rules on the creation and effects of non-consensual security rights. Thus, an additional Protocol covering ships and maritime equipment would not harmonise the law of maritime liens, their priority status or the conflict-of-laws rules pertaining to these non-consensual interests. While this would have the consequence that an additional Protocol to the Cape Town Convention covering ships and maritime equipment would not assist the harmonisation of laws in this field of law where the divergence of national approaches most obviously demonstrates the potential value of cross-border legal co-operation, it should be borne in mind that it was this very divergence which has so far proved to be an insurmountable obstacle to the success of major harmonisation efforts in this field of law. As a consequence, a policy of self-restriction appears advisable, as has also been argued in relation to the current project concerning an International Instrument for the Recognition of Judicial Sales of Ships.

(i) Limited regulation of issues of non-consensual security

89. One exception to the rule referred to in the preceding paragraph concerns two provisions in the Cape Town Convention that to some extent cover issues of non-consensual proprietary security. Further research concerning existing preferences in the shipping industry would have to be undertaken and a more restricted approach might be suggested in order to steer clear of divergent national policy considerations in relation to the status of maritime liens.

90. First, Art. 39(1)(a) allows each Contracting State to deposit with the Depositary a list of categories of non-consensual rights or interests that have priority over an interest equivalent to a registered international interest under the national law of the Contracting State and which are to have priority over registered international interests under the Convention. This provision does not harmonise the conditions for the creation of the non-consensual rights covered in that list; and such a right will only arise if the conflict-of-law rules of the forum determine the law of the Contracting State concerned as the regime governing the issue of the creation of non-consensual security rights. Also, the Convention does not attempt to harmonise these conflict-of-laws rules. However, the priority status of this non-consensual security right is determined on the basis of the provisions of the Convention but following the position of the Contracting State concerned as expressed in the declaration deposited with the Depositary. In effect, this comes close to a rule under which the determination of the priority status of the non-consensual security is to be determined under the rules of the same law that governs its creation. While there are several legal systems which refer the issues of creation and priority of non-consensual security over ships to the same applicable law,[112] other jurisdictions apply different conflict-of-laws rules to these matters.[113] Further research may therefore be neede as to whether there is a strong preference internationally in the area of security over ships for one or the other rule; alternatively Art. 39 could be made subject to a rule in the additional Protocol, according to which the non-consensual interests covered in the declaration of the Contracting State concerned are to enjoy a privileged priority position as indicated in the declaration only if, according to the conflict-of-laws rules of the forum, the issue of the priority status of non-consensual security rights is to be governed by the laws of the Contracting State concerned or under

[111] See the international interests covered by Art. 2.
[112] For instance the law of the flag, see above, no. 42, or the law of the forum, see above, no. 40.
[113] For instance, the legal regime governing the secured claim is applicable also to the creation of the non-consensual security, while the priority status of the latter is determined under the law of the forum, see above, no. 41.

any other legal regime under which such a priority position is awarded to these non-consensual security interests.

91. Secondly, according to Art. 40 each Contracting State may deposit with the Depositary a list of non-consensual security interests which will be registrable under the Convention as if they were registrable international interests and which will be regulated accordingly. This includes the determination of the priority status according to the order of registration.[114] While Art.40 does not go as far as Art. 39 in conferring preferred priority status on the interests covered by this provision, it is to be noted that its effect is that an interest thus covered can no longer be treated as enjoying generally lower priority ranking than consensual proprietary security interests in the same asset, even if this would be the position if the conflict-of-laws provisions of the forum and the applicable legal regime for the determination of the priority status of this type of non-consensual security were applied. Again, further research would be needed to see whether a more restrictive provision as that outlined in the preceding paragraph might be preferable, *i.e.* whether the priority position of this type of non-consensual security should be determined according to these rules only if the conflict-of-laws rules of the forum require the issue of the priority status of non-consensual security rights to be governed by the laws of the Contracting State concerned or by any other legal regime under which an equivalent priority position is awarded to these non-consensual security interests.

(j) Avoiding conflicts with other international instruments concerning enforcement issues (arrest and judicial sales)

92. Since issues pertaining to the arrest of ships are covered by the 1952 and the 1999 Conventions (the former having come into force in a substantial number of States), any conflicts between an additional Protocol to the Cape Town Convention and existing international instruments in this respect should be avoided. This applies also to matters of judicial sales which are dealt with in the current project of an International Instrument for the Recognition of Judicial Sales of Ships.

93. Generally, the Cape Town Convention provides that the exercise of any remedies under the Convention should follow the procedural rules of the law of the forum.[115] This general rule ensures that the provisions of the law of the forum take precedence over those of the Convention, including any rules provided by international instruments concerning arrest and judicial sales to which the forum State gives effect.

94. It would appear, however, that some additional rules should be included in a possible new Protocol, both in relation to arrest and judicial sales, designed to iron out any inconsistencies between the proprietary security regime under the Cape Town Convention and the afore-mentioned international instruments. First, in terms of the arrest of ships, it would appear that in particular, the rules on the immobilisation of the object as a form of relief pending final determination[116] would need to be aligned with the rules of the 1952 and 1999 Conventions.

95. Secondly, it should be noted that while the Cape Town Convention generally refers to the remedy of 'sale' of the collateral,[117] this remedy should, on the basis of its effects under the Convention, be understood as what is commonly regarded an authorisation to effect a private sale, conferring on the buyer title free of the rights of the following persons: the debtor, the enforcing secured creditor and junior secured creditors.[118] The Cape Town Convention does not address the possibility of a judicial sale under which the buyer would acquire a completely clean title. Given the traditional preference for judicial sales in the field of security over ships, it might be useful to clarify

[114] See Art. 29.
[115] See Art. 14.
[116] See Art. 13(c).
[117] See Art. 8(1)(b).
[118] *Arg. e* Art. 8(6); see also the Protocol on Matters Specific to Aircraft Equipment, Art. X(4) for a sale in the course of procedures regarding relief pending final determination.

that the Cape Town Convention system is not intended to preclude the exercise of the remedy of judicial sale, if so provided for under the national law or the applicable international instruments.

(k) Retention of title and leasing

96. While the Cape Town Convention system firmly acknowledges the use of retention of title and leasing as alternative agreements on which to base proprietary security,[119] the issue requires further research as to whether the international shipping finance industry would welcome the possibility of retention of title agreements concerning ships. As of now, such agreements are certainly most unusual and it should be assessed whether the advantages of such an additional possibility of structuring secured finance agreements concerning ships would outweigh the difficulties that might arise in other areas of shipping law by virtue of the introduction of such a concept, such as the distribution of responsibilities, consequences for the applicable flag, etc.[120]

97. There is a similar need for further research as far as leasing is concerned. Leasing agreements are common currency in shipping (bareboat/demise charter)[121] and it would certainly need to be ascertained whether there is any significant demand for any changes to the current market practice that would follow from the application of the Cape Town Convention system (including its registration requirements) even for leasing contracts without an option to purchase,[122] also taking into consideration that, due to the existence of national shipping registers, where ownership remains registered in the register of the home State even though the ship might carry the flag of another State to which it is chartered,[123] the argument of enhanced publicity for proprietary security might be less compelling in this context.

(l) Different remedies on default for mortgages and hypothecations

98. As referred to earlier,[124] a distinction is traditionally made between the remedies available under a mortgage over a ship, on the one hand, and under the hypothecation of a ship, on the other hand. There is, however, some evidence that suggests that several national regimes are committed to overcoming this distinction.

99. The Cape Town Convention for its part makes no distinction between the remedies available to a secured creditor holding an international interest (other than that of a retention of title seller or lessor).[125] While this reflects a modern functional approach to proprietary security, some further research would appear useful to establish whether market practice would prefer to uphold the traditional distinctions as concerns consensual security rights over ships or whether there is sufficient demand for some rationalisation of the available remedies that would justify undertaking an effort towards law reform in this respect.

---

[119] See Art. 2(2).
[120] In this regard, due consideration is to be given to the specific nature of shipping law: while particularly suitable for harmonised solutions at an international level due to its intrinsically international nature, many of its institutions have primarily grown out of practices developed in the market and this dominance of market practice is necessarily also reflected in the provisions contained in the international instruments pertaining to issues of shipping law: see *Carbone*, Accordi interstatali e diritto marittimo uniforme, in: Diritto Maritimo Vol. CX (2008), 351, at 352.
[121] See for French law *Oilleau*, Le crédit tirè du navire, Marseille 2010, at 512 ss.
[122] See Art. 1(q).
[123] For an example of the possibility to register ships operated under a demise charter see New Zealand Ship Registration Act 1992, Sec. 8(1)(b). For the distinction between the registration of ownership and the registration of the flag in relation to demise/bareboat-chartered ships in general see *Nöll*, in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Berlin 2009, § 1 SchiffsRG para. 62.
[124] See above, no. 19.
[125] See Art. 8(1).

(m) Jurisdiction

100. The Cape Town Convention specifically protects the enforceability of jurisdiction clauses, *i.e.* agreements of the parties concerning the choice of the forum.[126] While there is a recognisable trend internationally in the direction of upholding and enforcing jurisdiction clauses (see also the Hague Convention on Choice of Court Agreements of 2005, which is, however not yet in force[127]), there are still a number of legal systems that do not necessarily uphold such agreements whatever the circumstances of the case, specifically where one of the parties seeks to bring an action in a forum other than that chosen in the jurisdiction clause and where the court accepts that the actual forum is a clearly more appropriate venue.

101. At the same time, it is to be noted that as to the specific issue of whether a court at the place where a ship has been arrested may exercise jurisdiction for a decision on the merits of the case, both the 1952 and 1999 Conventions provide for the enforceability of jurisdiction agreements.[128] Again, further research would be needed to evaluate whether there is sufficient demand for broader law reform in this respect that would uphold jurisdiction agreements even beyond the scope of the 1952 and 1999 Conventions in respect of all the issues governed by a new Protocol to the Cape Town Convention.

6. Recommendation: Further feasibility study on the preparation of a new Protocol to the Cape Town Convention covering ships and maritime equipment

102. The results of this preliminary study can be summarised as follows. The law of secured transactions concerning ships in a cross-border context gives rise to a number of legal problems, which to a large degree arise from different national regimes in respect of the creation, third party effectiveness and priority of consensual proprietary security over ships and of the respective conflict-of-laws regimes. Harmonising the law in this field might be expected to enhance certainty in cross-border secured transactions, to reduce the cost of secured credit and thus to allow for the provision of additional financing to the shipping industry. While previous attempts at law reform specifically in relation to consensual proprietary security over ships have not had the hoped-for success, the preparation of a new Protocol to the Cape Town Convention would provide a workable solution for many of the problems currently encountered in this field of law and would probably stand a greater chance of success than previous harmonisation efforts, since it would not touch upon the highly disputed area of maritime liens.

103. It is therefore recommended to conduct a further feasibility study concerning the preparation of a new Protocol to the Cape Town Convention system covering ships and maritime equipment, to be conducted in close co-operation with industry representatives and outside experts. Such a feasibility study would identify both the areas where there is demand for the extension of the Cape Town Convention system and the areas of the law of proprietary security over ships where there is no such sufficient demand. With a view to avoid the fate of some of the previous harmonisation efforts in respect of the law of proprietary security over ships, it would appear advisable steer clear of the latter areas in any new for law reform project, an approach that might possibly also entail the exclusion of some of the Cape Town Convention rules in the new Protocol with a view to concentrating on the core provisions regarding the creation, third party effectiveness and priority of consensual security rights, where both the demand for and chances of success of a harmonised solution appear to be the stronger.

---

[126] See Art. 42.
[127] While the European Union and the United States of America have signed the Convention, the only party to the Convention is Mexico.
[128] See Art. 7(3) of the 1952 Convention and Art. 7(1) of the 1999 Convention.

B. Off-shore wind power generation and similar equipment

104. In the course of just a few decades, the generation of electricity by off-shore wind power installations has undergone enormous technological progress and is now widely regarded as being at least potentially a major contributor to the energy supply of many coastal economies, particularly in view of the growing demand for renewable energy. However, market participants have encountered a number of significant problems in financing and operating off-shore wind power generation equipment, amongst others as regards the determination of the applicable law, the application of general rules of property law and, especially, the rules on proprietary security interests. Both market participants and scholarly writers advocate law reform in relation to these issues. However, while some jurisdictions have introduced specific provisions dealing with some of these problems, there has not as yet been any significant attempt towards legal harmonisation at an international level.

105. On 10 September 2011, the Secretariat received a proposal by the German Federal Ministry of Justice to consider the preparation of an additional Protocol to the Cape Town Convention on matters specific to off-shore wind power generation and similar equipment. It was explained that in Germany, the industry had expressed interest in the possibility of arranging for registered security rights especially regarding wind-energy equipment. The growth of the market for renewable energies was said to create an enormous need for investment, which could be facilitated through the availability of effective proprietary security rights. The German Federal Ministry of Justice expressed its interest in the preparation of an international instrument with harmonised rules on proprietary security for such equipment.

106. The Secretariat has taken note of this proposal and prepared a preliminary study, primarily intended to provide an overview of some of the economic and technical background data and to identify the main legal concerns currently faced by the industry. The question will subsequently be addressed as to whether there are adequate alternative legal solutions, or whether the afore-mentioned issues would be better dealt with under the Cape Town system by preparing a new Protocol to the Convention, covering off-shore wind power generation and similar equipment. Depending on further consideration by the Governing Council and the General Assembly, these issues would then have to be researched in greater depth in a feasibility study to be conducted in close co-operation with practitioners from the off-shore wind energy industry as a first step towards the possible preparation of a new draft Protocol under the procedures laid down in Art. 51 of the Cape Town Convention.

1. Some economic and technical background data

107. Since off-shore wind power generation is a fairly recent development, some general remarks concerning its economic relevance and the main technical varieties of installations used for the off-shore exploitation of wind energy are probably in order.

(a) Growing market share for off-shore wind power generation and demand for financing

108. By the end of 2009, less than twenty years after the construction of the first off-shore wind power plant in Denmark in 1991 (eleven wind turbines of 0.45 MW (Megawatt) each), an off-shore wind power capacity of 2,100 MW had already been installed globally. Even so, this amounted to only 1.3 % of the installed global wind power capacity (on-shore and off-shore combined).[129]

[129] See the Special Report of the Intergovernmental Panel on Climate Change, Renewable Energy Sources and Climate Change Mitigation (2012), para. 7.3.1.3, available for download under http://srren.ipcc-wg3.de/report/IPCC_SRREN_Full_Report.pdf.

109. However, the total volume of wind power capacity continues to grow. The member States of the European Union have set as a target that cumulative consumption of renewable energy in all member States should result in an overall 20% share of renewable energy across the European Union.[130] For off-shore wind energy alone, these action plans include a combined total volume of 44,000 MW.[131] In Europe as a whole, some estimates expect the market for off-shore generation to grow to 100 billion euros by 2020.[132]

110. Currently, off-shore wind energy installations have a cost of approximately 2.5 to 4 million euros per installed MW. A complete, 400 MW wind park may therefore involve costs of up to 1 billion euros, mainly for the wind turbines themselves, followed by the laying of foundations and the installation of undersea cables.[133] These costs might in the future be reduced due to the learning curve in the industry, but they clearly indicate the enormous need for financing in this industry sector.

(b) Different types of off-shore wind energy installations

111. A large variety of technical equipment and installations is used for purposes of off-shore power generation. The issue of secured financing for off-shore power generation equipment, especially in the renewables sector, generally focusses on wind energy installation, where three main technical models may be distinguished.[134]

112. The most common type of off-shore wind energy installation consist in wind power plants (wind turbines) built as fixed structures, either on a monopile (single column) base, or based upon a tripod piled structure, the latter type of construction allowing the off-shore structure to be erected in deeper waters than the former.

113. In shallower waters, gravity base structures can be used, where there is no fixed connection between the wind energy installation and the seabed: instead, the weight of the wind turbine's base keeps the structure in place.

114. Floating wind turbines are wind turbines mounted on floating structures moored undersea. Such wind turbines could be used in areas where the depth of the water renders fixed structures a technical or economic impossibility. However, while several trial installations have been constructed, this technology is not yet commonly used in practice. It is hoped that the advantages accruing from being able to access stronger winds will outweigh the additional cost of the floating structures and power distribution systems.

2. Legal status of off-shore waters

115. As to the legal status of off-shore waters, the following main classification applies, which is primarily based on the provisions of the 1982 United Nations Convention on the Law of the Sea.

116. First, each coastal State may claim territorial sovereignty over its *territorial sea*, which can be extended to a breadth of 12 nautical miles from the coast baseline.[135]

---

[130] See the national action plans as submitted to the European Commission, available under http://ec.europa.eu/energy/renewables/action_plan_en.htm.
[131] See the compiled data in wab Windenergy Agency, Industry Report 2011, available under http://www.wab.net/images/stories/PDF/broschueren/WAB_Industry__Report_2011.pdf.
[132] See the data in wab Windenergy Agency, Questions and Answers on Offshore Wind Energy (2012), available under http://www.wab.net/images/stories/PDF/downloads/Questions_and_answers_22Jan13.pdf.
[133] See the data in wab Windenergy Agency, Questions and Answers on Offshore Wind Energy, see preceding footnote.
[134] See, for an overview, the Special Report of the Intergovernmental Panel on Climate Change (*op. cit.* fn. 129), para. 7.7.3.6.
[135] Arts. 3 ss of the Convention.

117. Secondly, adjacent to each State's territorial sea area, there is the *contiguous zone* which may be extended to a breadth of 24 nautical miles from the coast baseline.[136] In this zone, coastal States can exercise the control necessary to prevent and punish any infringements of their customs, fiscal, immigration or sanitary laws and regulations within their territory or territorial sea.

118. Thirdly, each State may, beyond and adjacent to its territorial waters, lay claim to an *exclusive economic zone* with a breadth of 200 nautical miles from the coast baseline.[137] Unlike the territorial waters, the exclusive economic zone does not form part of the territory of the coastal State, but the latter has sovereign rights especially concerning the exploitation of natural resources in this zone, including wind energy, the construction of installations for this purpose and their regulation.[138]

119. Fourthly, each coastal State may exercise sovereign rights over the *continental shelf zone*, which is defined as "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".[139] There is a partial or complete overlap of the continental shelf zone and the exclusive economic zone and the coastal State enjoys equivalent sovereign rights concerning the exploitation of natural resources in the continental shelf zone as in the exclusive economic zone.[140]

120. Finally, all waters not falling under one or more of the preceding classifications form the *high seas*,[141] concerning which no State may validly claim sovereignty[142] and where each State, whether a coastal State or a landlocked State, enjoys freedom to build installations.[143]

3. Issues concerning the determination of the applicable law

121. As referred to above, the current practice of secured financing for off-shore wind energy equipment has encountered a number of complicated legal issues, concerning both the determination of the governing law and the application of the property and secured transactions law rules of the relevant legal system. The following paragraphs are intended as an overview of the

---

[136] Art. 33 of the Convention.
[137] Arts. 55 ss of the Convention.
[138] The relevant provisions of the Convention are contained in the following parts of Arts. 56 and 60:
Article 56 - Rights, jurisdiction and duties of the coastal State in the exclusive economic zone
1. In the exclusive economic zone, the coastal State has:
(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
(i) the establishment and use of artificial islands, installations and structures;
(...)
Article 60 - Artificial islands, installations and structures in the exclusive economic zone
1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
(a) artificial islands;
(b) installations and structures for the purposes provided for in article 56 and other economic purposes;
(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.
(...).
[139] Art. 76 of the Convention.
[140] See Arts. 77 and 80 of the Convention, the latter declaring the provisions referring to the exclusive economic zone to be applicable *mutatis mutandis* to the exercise of sovereign rights in the continental shelf zone.
[141] Art. 86 of the Convention.
[142] Art. 89 of the Convention.
[143] Art. 87(1)(d) of the Convention.

various aspects of the determination of the applicable law in different factual situations. It will become clear that in many situations, the determination of the governing law gives rise to considerable difficulties, leaving the parties with substantial uncertainties concerning the property law regime that might govern their interests in the various types of off-shore wind energy equipment.

(a) Applicable property law regime for wind energy equipment in the territorial sea

122. Where wind energy equipment is located in the territorial sea, there is a broad consensus concerning the determination of the applicable property law regime in general. The territorial sea forms part of the sovereign territory of the coastal State[144] and under the general rule on the application of the *lex rei sitae*, *i.e.*, the law of the place where the asset is located, the applicable property regime for wind energy equipment in the territorial sea is the law of the relevant coastal State.

123. Even in this relatively straightforward situation, however, some additional problems arise in determining the applicable law, for instance, in relation to perfection requirements for non-possessory proprietary security or concerning the cross-border transport of assets that are subject to a proprietary security right. These issues will be dealt with below, nos. 134 s. and no. 137, respectively.

(b) Applicable property law regime for wind energy equipment in exclusive economic zones or continental shelf zones: Specific conflict-of-laws provisions

124. The determination of the applicable law is somewhat more complicated where the off-shore wind energy equipment is located in an exclusive economic zone or a continental shelf zone outside the territorial sea of any coastal State. Traditional notions that the location of an asset within the sovereign territory of a State should result in the application of this State's property law regime to the status of any rights in or over the asset concerned encounter difficulties when applied to such a situation. Several divergent approaches to this problem can be distinguished in the various national jurisdictions; the following paragraphs will look at the situation in legal systems that have developed specific rules dealing with the applicable law for off-shore energy installations.

125. First, some legal systems have included specific provisions in their conflict-of-laws regimes for off-shore installations and the property law applicable to this type of asset in general. The new Romanian Civil Code of 2009/2011, for instance, specifically provides that off-shore installations located in the continental shelf zone of a State are to be regarded as immovable property for the purposes of the application of the Romanian conflict-of-laws provisions, thereby impliedly referring to the application of the law of the coastal State.[145] Such general rules (*allseitige Kollisionsnormen* or "all-sided" conflict-of-laws rules) fall firmly within the spirit of international co-operation and allow a reference both to the respective State's own law (if the equipment is located in the exclusive economic zone/continental shelf zone of that State) or to the law of another State (if the equipment is located in a State different from the State of the forum). For these reasons, the introduction of such rules has been suggested in the legal literature also in some legal systems that do not yet have such rules expressly dealing with the property law status of off-shore assets.[146]

---

[144] See above, no. 116.
[145] In fact, this rule (CC Art. 2613(2)) does not expressly refer to the law of the coastal State, but this result follows from the fact that immovables are generally subject to the law of the *situs* (CC Art. 2613(1)) and that CC Art. 2613(2) refers to the location of these platforms in the continental shelf zone *of a State* (emphasis added).
[146] See, *e.g.*, for German law *Gottschall*, Die Besicherung von Offshore-Windkraftanlagen nach deutschem und US-amerikanischem Recht, Cologne 2011, at 168 s.

126. Secondly, other legal systems have statutory provisions extending the scope of application of their own property law regime to off-shore installations located in their exclusive economic zones or continental shelf zones, for instance, United States law.[147] Such rules are not necessarily included in the relevant legal system's private international law codifications, if any, but could also formally be part of the national property law regime. Functionally, however, such rules constitute one-sided conflict-of-laws rules (*einseitige Kollisionsnormen*), determining the applicable law at least in such situations in which, under these provisions, the conditions for the application of the substantive law of the forum are fulfilled. For any proceedings brought before the courts of the same coastal State in whose exclusive economic zones or continental shelf zones the wind energy equipment is located, such one-sided conflict-of-laws rules provide a sufficient solution for the problem of determining the applicable law. However, difficulties remain where the proceedings are brought in another jurisdiction, which might not have a comparable conflict-of-laws provision, or where the off-shore equipment is not located in the forum State's exclusive economic zones or continental shelf zones, a situation that is not dealt with under this type of provision.[148]

(c) Applicable property law regime for wind energy equipment in exclusive economic zones or continental shelf zones: Application of general principles

127. Where a legal system does not have specific conflict-of-laws provisions such as those referred to above, the issue of determining the governing property law regime for wind energy equipment located in exclusive economic zones or continental shelf zones is often somewhat disputed and complicated. Leaving aside for the moment the question as to whether, at least in certain circumstances, specific conflict-of-laws principles referring to the law of the flag or registration could be applied, the legal doctrine has developed various approaches to the application of the general principles of private international law in this situation.

128. There appears to be near-unanimous agreement that the mere fact that an asset is located outside the territorial sea of a coastal State cannot have as a consequence that no property law regime is applicable at all. It has in fact been suggested that the applicability of each legal system's property law regime to assets located outside the sovereign territory of the State concerned should depend on the existence of a provision to this effect.[149] However, the consequences of such a restrictive approach hardly seem realistic and – certainly from the point of view of a court deciding upon a matter falling under its jurisdiction – the conflict-of-laws provisions in private law should probably be generally understood as determining which of several conflicting legal regimes can be applied, not whether any system at all should be applied.[150]

129. The solution apparently favoured by the majority of legal writers is that even in the absence of specific rules to this effect, the law of the coastal State in whose exclusive economic zone or continental shelf zone the wind energy equipment is located should also govern the proprietary rights in the equipment concerned.[151] It is arguable, for instance, that the licenses and

[147] See the US-American Outer Shelf Act, 43 USC § 1333.
[148] Under the general principles of private international law, it might be possible to apply an one-sided conflict-of-laws rule on the basis of an extensive interpretation as an all-sided conflict-of-laws rule, but this depends upon the details of the individual rule: see generally, *Kegel and Schurig*, Internationales Privatrecht, ed. 9, Munich 2004, at 302; *von Hoffmann and Thorn*, Internationales Privatrecht, ed. 9, Munich 2007, at 177 ss.
[149] See *Risch*, Windanlagen in der Ausschließlichen Wirtschaftszone, Berlin 2006, at 162 ss.
[150] See *Kegel and Schurig* (*op. cit.* fn. 148), at 18; *Wurmnest*, Windige Geschäfte? Zur Bestellung von Sicherungsrechten an Offshore-Windanlagen, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht 72 (2008), 236, at 246 s.
[151] There is an especially broad discussion of this issue in the German academic literature, but the reasoning of the following authors appears to be largely based upon general concepts of private international law: *Gottschall* (*op. cit.* fn. 146), at 50 ss.; *Böttcher*, Das Meer als Rechtsraum – Anwendbarkeit deutschen Sachenrechts auf Offshore-Windkraftanlagen und Möglichkeiten der Kreditsicherung, in: Rheinische Notar-Zeitschrift 2011, 589, at 595; *Reichert-Facilides*, Eigentumsschutz und Verwertung von Windenergieanlagen in der ausschließlichen Wirtschaftszone, in: Wertpapier-Mitteilungen 2011, 1544, at 1549; *Wurmnest* (*op. cit.* fn. 150), at 248; *Wendehorst* (*op. cit.* fn. 43), Art. 45 EGBGB para. 22 (fn. 27). Concerning German law, the afore-mentioned

authorisations and administrative regulations under the law of the coastal State which are applicable to wind energy equipment in this State's exclusive economic zone or continental shelf zone constitute such a close connection between the off-shore equipment and the law of the relevant coastal State that this law should also apply to the property law status of the off-shore equipment. Additional support for this position could also be derived from Art. 60(2) of the United Nations Convention on the Law of the Sea,[152] which provides in general terms that the coastal State has exclusive jurisdiction over any installations for the purposes of the use of natural resources in its exclusive economic zone.

130. Given the fact that there is no reported case law on this issue, however, the matter clearly cannot be regarded as settled. It should be noted that the application of other traditional criteria of private international law would lead to markedly different results.[153] There could, for instance, also be a reference to the home law of the owner of the asset concerned, reflecting the general understanding of the determination of the applicable law for movables in areas outside the sovereign territory of a State which at least in the past enjoyed strong support among the most pre-eminent scholars internationally.[154] Alternatively, it has been discussed whether the property law regime for wind energy equipment outside the territorial sea should be determined by reference to the last location of the asset concerned inside the territorial sea,[155] based upon an analogy to the rule in Art. VIII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1967 (Outer Space Treaty), according to which property rights in assets launched into outer space are not affected.[156] Finally, it could also be considered whether to apply the traditional rule of private international law that the property law regime for assets on board of ships should be the law of the transporting ship,[157] which could obviously lead to enormous problems in practice, especially where wind energy installations have been constructed from material transported by different ships.

131. In view of the existence of these divergent approaches (and the lack of case law concerning off-shore wind energy installations), there remains considerable legal uncertainty as to the governing law in those jurisdictions that do not have a specific statutory provision on the applicable law for off-shore wind energy installations. Matters are not made less complicated where the afore-mentioned criteria are argued to be alternatively or cumulatively applicable, *e.g.*, on the basis of a general reference to the law of the State in whose exclusive economic zone or continental shelf zone the wind energy equipment is located, complemented by a subsidiary reference to the law of the owner of the equipment in situations where this law has the closer connection to the case.[158]

---

authors favour the application by analogy of the *situs*-rule in Art. 43 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code).

[152] See above, fn. 138.

[153] See for a more detailed discussion of these approaches *Reichert-Facilides* (*op. cit.* fn. 151), at 1548 s.; *Böttcher* (*op. cit.* fn. 151), at 593 ss.

[154] See, *e.g.*, *Kegel*, Internationales Privatrecht, ed. 6, Munich 1987, at 13 (in later editions of this monography, however, this approach was no longer followed, see ed. 9 (*op. cit.* fn. 148), at 18).

[155] See,for a critical review of such a reasoning, *Reichert-Facilides* (*op. cit.* fn. 151), at 1548; *Böttcher* (*op. cit.* fn. 151), at 593 s.; for the reference to the last on-shore location in general, see *Kegel and Schurig* (*op. cit.* fn. 148), at 18.

[156] See the text of Article VIII:

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. 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. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

[157] See for this rule in general, *Venturini*, Property, in: David *et al.* (eds.), International Encyclopedia of Comparative Law, Vol. III, chap. 21 (1974), para. 12; *Wendehorst* (*op. cit.* fn. 43), Art. 43 EGBGB para. 110; in Germany, this rule has also been acknowledged in the case law of the Federal Supreme Court, see *Bundesgerichtshof*, decision of 02 Feb. 1961, BGHZ 34, 227, 229.

[158] Such an approach has been suggested for German law by *Gottschall* (*op. cit.* fn. 146), at 60 s.

(d) Application of the law of the flag or home State

132. At least in certain situations, also the law of the flag or home port/State, *i.e.*, the traditional private international law rule concerning the property law regime for ships used in trans-border transport,[159] is to be considered as an appropriate property law regime for off-shore wind energy equipment. It has been argued that this rule could be applied whenever assets, whether floating or as fixed constructions, are used in different sea locations or on the high seas, which could include off-shore installations such as oil platforms and off-shore wind turbines, if located outside the territorial sea or exclusive economic or continental shelf zones.[160] However, this is certainly not a foregone conclusion: at least the traditional and natural understanding of the term 'ship' could be argued to infer that the asset concerned is specifically designated for movement,[161] which is hardly the case in relation to wind energy equipment, at least where not constructed on a floating platform.[162] Moreover, at least in general, the reference to a home State or home port is not necessarily as meaningful for wind energy equipment as it is for ships, since there is not generally a comparable registration requirement.

133. It should be noted, however, that the afore-mentioned reasoning does not have the same weight if the relevant jurisdiction's provisions concerning its shipping register allow the registration of off-shore assets other than ships in the strict sense. Many legal systems allow the registration of off-shore oil platforms in their shipping registers,[163] and there is strong support in the legal literature for extending the scope of national ship registers to off-shore wind energy equipment.[164] Such a rule, especially where limited to wind energy equipment owned by nationals of the relevant State or to equipment located in the relevant State's territorial sea or exclusive economic zone or continental shelf zone, would then also have to be understood as a one-sided conflict rule: where a State allows a certain kind of wind energy equipment to be entered into an asset-specific register for proprietary rights under its own law, this must be understood as impliedly providing for the application of this State's property law regime.[165] Whether the registration of wind energy equipment in the shipping register of State A would necessarily have the effect that in proceedings in State B the latter State's conflict-of-laws rules would refer to the application of the law of State A, however, must be regarded as an open issue, since a court in State B is likely to decide the question of the registrability of off-shore wind energy equipment on the basis of its own conflict-of-laws provisions.[166] Thus, registration in a foreign register could be argued to be irrelevant for the determination of the applicable law, if under the relevant conflict-of-laws provisions of the forum off-shore wind energy equipment is not regarded as a registrable asset.

---

[159] See, generally, *Venturini* (*op. cit.* fn. 157), para. 10; for England, see: *Collins et al.*, Dicey, Morris and Collins on the Conflict of Laws, ed. 14, London 2006, Vol. 2, paras. 22E-057 s. (for ships outside the territorial sea); Germany: *Stoll*, in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Berlin 1996, Int SachenR para. 375; Italy: *Codice della Navigazione* (Maritime Act), Art. 6. This approach has also been generally recommended under the UNCITRAL Legislative Guide on Secured Transactions (2010), Rec. 205 (chap. X, no. 37). See also the references concerning the applicable proprietary security regime above, no. 15.

[160] *Wendehorst* (*op. cit.* fn. 43), Art. 45 EGBGB para. 22.

[161] See the definition of the term "ship" under Art. 2 of the Geneva Convention on Conditions for the Registration of Ships of 1986, above, fn. 102; cf. also *Stoll* (*op. cit.* fn. 159), Int SachenR para. 373.

[162] See for this reasoning as an argument against the application of the conflict-of-laws principles for ships to fixed off-shore energy equipment, *Gottschall* (*op. cit.* fn. 146), at 48 s.

[163] Germany: see *Nöll* (*op. cit.* fn. 123), § 1 SchiffsRG para. 9 (disputed, for details concerning the practice of the registration of floating off-shore platforms in Germany see *Gottschall* (*op. cit.* fn. 146), at 103 ss.); Norway: *Lov om sjøfarten* 1994 (Maritime Code), Sec. 39 (this provision expressly covers fixed installations).

[164] See for German law *Gottschall* (*op. cit.* fn. 146), at 170 ss.; *Böttcher* (*op. cit.* fn. 151), at 600 s.; *Wurmnest* (*op. cit.* fn. 150), at 260 s.

[165] Such a rule is often also explicitly spelled out, see, *e.g.*, the German *Schiffsregistergesetz* (Ship Register Act), § 1.

[166] For limitations of the application of such a conflict-of-laws provision referring to the law of the State of registration, see also UNCITRAL Legislative Guide on Secured Transactions (2010), chap. X, no. 38; *Mayer and Heuzé*, Droit international privé, ed. 10, Paris 2010, at 502.

(e) Application of the law of debtor-indexed registers

134. In legal systems which require the owner of an asset who grants a proprietary security right in this asset to register this security right in a debtor-indexed register as a condition for the perfection of the security, *i.e.*, for its achieving third party effectiveness in general,[167] the conflict-of-laws provisions of these legal systems commonly provide that the owner's home law is to govern the perfection requirements for any security interests granted by the owner, regardless of the location of the collateral.[168] Such a conflict-of-laws rule would have the effect that where the owner of some off-shore wind energy equipment grants a proprietary security right in the off-shore assets and the owner is required under its home law to register this security right in a debtor-indexed register, the perfection of the security is governed by the owner's home law in relation to all the owner's assets world-wide (in so far as they are covered by the system of registration in view of the type of assets concerned). Some legal systems operating such debtor-indexed registers sometimes even provide a specific conflict-of-laws rule establishing that, where there is no comparable registration requirement under the owner's home law, the rules of the law of the debtor-indexed register are applicable for security rights granted by foreign owners.[169]

135. While these rules, if universally adhered to, could establish a clear-cut and reliable conflict-of-laws regime accommodating the need for commercial certainty in the field of off-shore wind energy installations, the reality appears to be different: The courts of a forum State that does not have a requirement of perfection through registration in a debtor-indexed register are unlikely to hold that perfection requirements for security rights in assets located in the forum State jurisdiction are to be governed by the law of the debtor-indexed register, especially if this had as a consequence that security rights that are effective under the laws of the forum State would have to be treated as ineffective on the basis of the application of the foreign law.[170] To include elements that are peculiar to some substantive law systems of secured transactions in the process of determination of the applicable law under the relevant conflict-of-laws regime must increase the risk of international disharmony in determining the applicable law.

(f) Wind energy equipment on the high seas

136. For wind energy equipment located on the high seas, there can be no reference to the law of any coastal State exercising any sovereign rights concerning the relevant sea area. However, there do not as yet appear to be any fixed wind turbines on the high seas,[171] whereas for floating wind turbines on the high seas classification as a ship (with the consequence of inclusion in the national shipping register and the application of the law of the flag) might appear to be the most convincing solution.

(g) Cross-border transport of off-shore wind energy equipment

137. A further conflict-of-laws issue in relation to security rights over off-shore wind energy equipment is that, while off-shore wind energy turbines are usually installed for permanent stationary use, there are a number of instances involving cross-border transport of off-shore wind

[167] For the terminology see above, fn. 21.
[168] See England: Companies Act 2006, Secs. 860 and 866(1) (under the version due to take effect as from 06 Apr. 2013 on the basis of The Companies Act 2006 (Amendment of Part 25) Regulations 2013, there is no longer any express provision to this effect, the application of the registration requirement under the Companies Act to overseas property is a consequence of the general extension of the registration requirement under Sec. 859A(1) to all charges created by a company, subject only to limited exceptions, *e.g.*, under Sec. 859A(6)); US-American UCC Sec. 9-301(1); *Wood*, Conflict of Laws (*op. cit.* fn. 8), para. 14-046.
[169] See US-American UCC Secs. 9-307(c) *juncto* 9-301(1). In England, a similar requirement (the so-called *Slavenburg* register) has been largely abolished in 2011, see the Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011, *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 10.63.
[170] See *Beale, Bridge et al.* (*op. cit.* fn. 12), paras. 10.44 and 22.76.
[171] See above, no. 114.

energy equipment, *i.e.*, transport involving crossing the borders of States including their territorial sea. For example, there might be a cross-border transport of (parts of) a wind turbine from the territory of one State to another prior to the turbine's transport to its permanent off-shore location; parts of the wind turbine might be brought on-shore for repair purposes and this repair work might be undertaken in the territory of a State other than that where the equipment was originally built; the wind turbine or parts thereof might be dismantled and sold on for re-erection in a different location (often in the course of re-powering, *i.e.* the installation of higher-capacity equipment at the original location). In some of such situations, depending on the circumstances of the case, the general principles of private international law concerning *res in transitu* could be applied, *i.e.* the principle that the current location of an asset does not determine the applicable property law regime, where assets in transit or intended for export are concerned, which should instead be subject to the law of the country of origin or destination.[172] In other situations, however, the cross-border transport might result in a change of the applicable law. As far as proprietary security rights in the assets are concerned, the consequences of such a change typically depend upon the type of proprietary security that existed before the transport and this issue will therefore be dealt with in more detail below, in the context of the different types of security interest used under the various national laws for proprietary security over off-shore wind energy and similar equipment.

4. Issues concerning property law and secured transactions law

138. Apart from the problem of determining the applicable law, the secured financing of off-shore wind energy equipment also raises difficult issues of property law in general and of proprietary security law under the relevant national legal systems. Thus, even where – for example for wind turbines installed in the territorial sea – the applicable rules of private international law allow the governing law in general to be determined with reasonable certainty, the fact that the wind energy equipment is located off-shore and the possibility of a cross-border transport can cause additional difficulties under the applicable substantive law.

(a) No real property rights in off-shore waters

139. The first such legal issue concerning proprietary security over off-shore wind energy equipment under the substantive rules of the applicable property law regime arises from the fact that technically speaking, such equipment is often permanently fixed to the seabed. Where permanent structures are erected on land, the appropriate type of proprietary security right would usually be a real property right, *i.e.*, an interest in immovable property, and not a personal property right, *i.e.*, an interest in movable property. However, it is difficult to see how any person could hold real property rights concerning off-shore waters.

140. Generally speaking, a principle that can be traced back to Roman law is that the sea is a natural commons that cannot be made subject to the property rights of any person.[173] This principle is still applied also in relation to the exclusive economic zones and continental shelf zones and prevents the existence of private property rights in parts of the seabed,[174] including ownership rights held by the coastal State.[175]

---

[172] See *Kegel and Schurig* (*op. cit.* fn. 148), at 774 s; *Stoll* (*op. cit.* fn. 159), Int SachenR para. 368.
[173] See *Wurmnest* (*op. cit.* fn. 150), at 249 with further references to the German Pandectist literature.
[174] See for German law *Wurmnest* (*op. cit.* fn. 150), at 252; for the discussion in the United States see *Salcido*, Law Applicable on the Outer Continental Shelf and in the Exclusive Economic Zone, in: American Journal of Comparative Law 58 (2010), 407, at 427.
[175] See for English law, *Plant*, Offshore wind energy development: the challenges for English law, in: Journal of Planning & Environment Law 2003, 939, at 955.

141. Concerning the territorial sea, the legal position is as follows: ownership of the seabed of the territorial sea is usually claimed for itself by the coastal State.[176] Even where individual pieces of the seabed in the territorial sea are registered, the State usually does not allow ownership by private persons.[177] Effectively, this rules out the possibility that security rights over off-shore wind energy equipment could be taken out in the form of real property rights.

(b) Status of off-shore wind energy equipment as fixtures of real property

142. Since real property security rights cannot be used in relation to off-shore assets (see the preceding paragraphs), the only type of security interest that could possibly be available in relation to off-shore wind energy equipment is security rights in movable property. This raises the issue as to whether the fact that off-shore wind energy equipment is usually directly connected to the seabed[178] could exclude the possibility that these types of off-shore wind energy equipment could still be subject to separate movable property rights: traditionally, where movable property is permanently fixed as a construct erected on immovable property, it is assumed that the assets concerned can no longer be regarded as movable property that is subject to separate property rights.[179]

143. Some legal systems have developed specific solutions to this problem. Where it is explicitly provided that the ship register can cover fixed off-shore installations as well,[180] this implicitly clarifies that the fixed construction of this type of off-shore installation does not affect the possibility that it is or remains the subject of rights that are registrable in the shipping register, *i.e.*, ownership and proprietary security rights over movable assets.

144. Alternatively, other legal systems follow a more general approach to the registrability of fixtures, *i.e.*, movable corporeal assets that have become so related to particular real property that a proprietary interest in them should no longer be of a personal property nature.[181] Under the US-American UCC, for instance, there are generally several possible methods of obtaining a proprietary security over fixtures: apart from the possibility of a security interest in the land, which would then extend to the fixture as well and which would have to be registered in the relevant land register,[182] security rights over fixtures can, notwithstanding their fixed connection to land, also be created as personal property security rights registrable either in the relevant real estate register (fixture filing)[183] or in the general debtor-indexed register under UCC Art. 9.[184] Since the former two alternatives are impracticable where there is no land register for the real property concerned, security rights over off-shore wind energy equipment could be registered at the debtor's seat regardless of whether they would under the general rules have to be regarded as items of personal property or as fixtures to real property that have lost their nature as separate pieces of personal

[176] In England, ownership of the territorial sea is claimed by the Crown, see *Plant*, preceding footnote, at 945 (fn. 35); Marston, The incorporation of continental shelf rights into United Kingdom law, in: International & Comparative Law Quarterly 45 (1996), 13, at 23; for German law see *Bundesgerichtshof* 22 June 1989, BGHZ 108, 110; *Böttcher* (*op. cit.* fn. 151), at 596 s.; for the situation in the United States, see the decision *United States v Texas*, 339 U.S. 707 (United States Supreme Court 1950).
[177] See, for German law, *Wurmnest*, (*op. cit.* fn. 150), at 250 s.
[178] The reasoning in the following paragraphs does not apply to floating off-shore wind turbines, see above, no. 114. The question of whether a distinction concerning the application of the principles in the following paragraphs has to be made between wind turbines erected as fixed structures and gravity-based structures (see above, nos. 112 s.) will be discussed below, no. 146.
[179] This position can be traced back to the traditional maxim of Roman law "*quicquid plantatur solo solo cedit*" (whatever is affixed to the soil belongs to the soil): see for an overview *Jickeli and Stieper*, in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Berlin 2012, § 94 BGB para. 1. For modern German law see *Bürgerliches Gesetzbuch* § 94 (with exceptions contained in § 95); for the situation in the United States see *Reconstruction Finance Corp. v Beaver County*, 328 U.S. 204 (United States Supreme Court 1946) (as real property are regarded land, buildings and fixtures essential to a building's operations).
[180] See Norway: *Lov om sjøfarten* 1994 (Maritime Code), Sec. 39.
[181] See for the terminology, *e.g.*, US-American UCC Sec. 9-102(a)(41).
[182] See UCC Sec. 9-502(c).
[183] UCC Secs. 9-501(a)(1)(B), 9-502(b).
[184] UCC Secs. 9-501(a)(2), 9-502(a).

property in the construction process, a question which, also in the United States, must be regarded as disputed.[185]

145. In legal systems lacking such provisions as referred to in the preceding paragraphs, the general principles of property law determine whether or not fixed off-shore wind energy equipment is to be regarded as movable property, a situation which must give rise to considerable legal uncertainty. Obviously, even if the legal system concerned would generally be to recognise the continuing existence of movable property rights in assets that have become fixed to the ground, the need for economically practicable solutions argues in favour of allowing separate movable property rights to continue to exist in such off-shore equipment.[186] The legal reasoning on which this position is often based is that off-shore wind energy equipment is installed on the basis of concessions given out by the relevant coastal State for a limited period of time, upon the termination of which the concession-holder is required to dismantle the equipment and may use it elsewhere.[187] This reasoning, however, is certainly not self-evident, considering that the wind energy equipment will often have reached the end of its economic life cycle by the end of the concession period, so that it would be difficult to argue that it could have any significant economic relevance after it was dismantled.[188] Moreover, it could in principle also be argued that the off-shore location of the wind turbine is likely to be used permanently for the production of wind energy, based upon an extended or renewed concession, so that not even the limitation of the concession period can be regarded as an indicator of the non-permanent nature of the construction.

146. Where it is necessary to apply the relevant legal system's rules on the accession of personal property to real property, a distinction may have to be made between gravity-based wind energy equipment and such structures that are erected on a monopile (single column) base or a tripod piled structure fixed to the seabed. For gravity-based wind turbines, it may often be easier to argue that such equipment is not permanently constructed on the seabed since there is no fixed connection between the wind turbine and the seabed.[189] However, it may also be argued that for off-shore wind energy equipment, the lack of a fixed connection between the basis and the seabed should not be regarded as decisive due to the costs of the construction on location (including the base) and the costs and difficulties of transporting the wind energy equipment to another location;[190] the gravity-based wind turbine could be regarded as being – at least effectively – as permanently erected at its off-shore location as a wind turbine that is built on one or more columns grounded in the seabed.

147. In the absence of any case law directly concerned with off-shore wind energy equipment,[191] the issue must be regarded as unresolved, as economic practicalities could be thought to be in

[185] In the discussion concerning on-shore wind energy equipment is has been argued that such equipment should generally be regarded as fixtures (see *Harrel* a.o., Emerging Commercial Law and UCC Issues for the Next Farm and Business Credit Crisis, in: Drake Journal of Agricultural Law 17 (2012), 89, at 107), while there is also case law suggesting that only the foundations of fixed wind turbines are fixtures, whereas the tower, machinery and turbine are not (see *Energrey Enterprises v Oak Creek Energy Systems* 119 B.R. 739, at 742 (United States District Court, Eastern District of California 1990)).

[186] Especially where the wind energy equipment is located outside the territorial sea where no real property rights in the seabed exist, the characterisation of the equipment as a fixture that is not capable of being the object of separate personal property rights might have the consequence that no proprietary security rights in the equipment could exist at all once it has been fixed to the seabed.

[187] See for German law *Böttcher* (*op. cit.* fn. 151), at 599; *Gottschall* (*op. cit.* fn. 146), at 101 s.; *Wurmnest* (*op. cit.* fn. 150), at 257 ss.

[188] See, for the reasoning that where personal property has been attached to real property for the full length of the foreseeable lifespan of the movable assets, the personal property can no longer be regarded as having been attached for non-permanent, transitory purposes, the decision of the German *Reichsgericht* 13 Jan. 1937, RGZ 153, 231, at 236; *Jickeli and Stieper* (*op. cit.* fn. 179), § 95 BGB para. 11. For a contrary view in the German legal literature, see *Stresemann*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, ed. 6, Munich 2012, § 95 BGB para. 12.

[189] See *Gottschall* (*op. cit.* fn. 146), at 100.

[190] See also *Wurmnest* (*op. cit.* fn. 150), at 253.

[191] Reported cases cover on-shore wind energy equipment, see, for instance, *Energrey Enterprises v Oak Creek Energy Systems* 119 B.R. 739, at 742 (United States District Court, Eastern District of California 1990) and the German appellate court decision OLG Schleswig, 26 Aug. 2005, Wertpapier-Mitteilungen 2005, 1909 (both arguing in favour of the continuing existence of separate property rights in the wind energy equipment or at least

conflict with general principles of property law where no specific statutory rule clarifies the issue of the availability of personal property security rights over off-shore wind energy equipment. In addition to the distinction between different types of construction of wind turbines as referred to in the preceding paragraphs, it might even be that the nature of the wind energy equipment as personal property or as a fixture to real property may have to be answered differently in respect of different parts of an off-shore wind turbine.[192]

(c) Security over off-shore energy equipment in legal systems with asset-specific registration

148. Where a legal system allows the registration of security rights over off-shore energy equipment in an asset-specific register, such as where a ship register under national law is extended to fixed off-shore oil platforms, this provides a solution for several of the legal issues that have been described in the preceding paragraphs. Where it is specifically provided[193] that certain off-shore assets can be registered in the national register,[194] this is to be regarded at least as a one-sided conflict-of-laws provision in favour of the proprietary security law of the jurisdiction concerned;[195] it also clarifies that under this State's property law rules, fixed off-shore energy equipment can be made subject to the security rights in movables that are registrable in the ship register.

149. However, the registrability of security rights over off-shore energy equipment in an asset-specific register such as a national ship register serves as a solution for the practical problems of secured financing in relation to off-shore assets primarily in a national context alone. In a cross-border context, the limitations of such a solution on a national basis soon become apparent. Apart from the fact that the lack of harmonisation of the various ship registers might of itself cause obstacles in cross-border transactions,[196] problems could arise especially where proceedings are brought in another jurisdiction which does not recognise the registrability of security rights over fixed off-shore equipment in a ship register.[197] For example, where machinery from an off-shore wind turbine registered in the ship register of country A is removed and brought for repairs to country B (or where prior to installation at sea, the half-finished wind turbine is brought from country A to country B for further work), it is not entirely certain that the security right over the machinery would be upheld if country B followed the traditional approach to security over movable tangible assets by not having a system of publicity by registration for this type of asset and requiring the secured creditor to hold direct possession of the collateral instead.

150. Additionally, the possibility to register off-shore energy equipment in a national ship register does not address the issue whether different parts of the wind turbine could be subject to security rights held by different secured creditors. Such a possibility could be especially relevant in granting vendor credit, where a supplier of machinery to be installed in a wind turbine chooses to deliver its product without prior payment of the purchase price, but retains ownership in the parts instead. In

---

in parts thereof).

[192] See the distinction in the case *Energrey Enterprises v Oak Creek Energy Systems* 119 B.R. 739, at 742 (United States District Court, Eastern District of California 1990), referred to above, in fn. 185; a similar distinction (including the tower as part of the real property, at least unless exceptionally the permanency of the construction is denied) has been suggested in the German academic literature concerning on-shore wind energy equipment, see *Stresemann* (*op. cit.* fn. 188), § 94 BGB para. 18.

[193] It is doubtful whether the same reasoning applies where registrations in relation to off-shore assets are merely allowed without being specifically provided for, since in such situations it could probably not be assumed with sufficient certainty that such effects as are referred to below were intended by the legislator in relation to this specific type of assets.

[194] See Norway: *Lov om sjøfarten* 1994 (Maritime Code), Sec. 39.

[195] See above, no. 133.

[196] See for this reasoning in the context of security over ships above, nos. 22 ss. It is submitted, however, that in relation to off-shore energy equipment this lack of harmonisation between the various national registers could be regarded as less of an obstacle to cross-border transactions due to the relatively higher value of the assets concerned and the lesser frequency of the registration of consensual security rights.

[197] See above, no. 137.

the absence of specific provisions covering these factual situations, the general rules under the national legal systems would have to be applied. These are highly divergent,[198] with additional difficulties caused by the off-shore location of the wind energy equipment both as concerns the determination of the governing property law and the question of its application to the assets concerned.[199]

151. Finally, it should be considered that the extension of the scope of application of national ship registers to fixed off-shore wind energy equipment could also imply that other rules normally associated with the registration in a national ship register are applicable, such as national labour and safety provisions for shipping, which are not necessarily appropriate for wind energy equipment.

(d) Security over off-shore wind energy equipment in legal systems with debtor-indexed registration

152. Registration of proprietary security rights over off-shore wind energy equipment in debtor-indexed registers appears even less useful than registration in an asset-specific register under national law for the solution of the issues of secured financing of such equipment in a cross-border context. While the requirement to register security rights over all the property owned by a debtor/security provider in a debtor-indexed register in the debtor/security provider's home country, *e.g.*, the English Companies Register[200] or the general register provided for under the US-American UCC Art. 9,[201] generally operates under the legal system concerned as a conflict-of-laws rule referring the requirements of perfection to the home law of the debtor/security provider,[202] it does not contain any solutions for other relevant issues of private international law, such as the determination of the applicable property law regime in general.

153. The registrability of security rights over off-shore wind energy equipment under a general debtor-indexed register likewise is not necessarily of assistance as regards the issue of whether such security rights would have to be regarded as real or movable property security rights. Unless the status of off-shore energy equipment is specifically addressed[203] or it is specifically provided that the

---

[198] For the diversity of solutions under the various national laws, see the following three examples: under Swedish law, for instance, a retention of ownership ceases to be effective once the assets concerned are affixed to other goods, see *Håstad,* Swedish Report, in: Eva-Maria Kieninger (ed.), Security Rights in Movable Property in European Private Law, Cambridge 2004, at 279.
In Austria, on the other hand, the combination only exceptionally results in a change of the proprietary status where the separation would be impossible or too costly in view of the values concerned, see *Mader*, in: Kletčka and Schauer, Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, Vienna 2010, § 415 para. 3; for such situations, § 415 of the *Allgemeines Bürgerliches Gesetzbuch* (Civil Code) provides that the former owners of the separate assets become co-owners of the combined asset, and the parties generally cannot contractually stipulate that a seller under a retention of ownership agreement obtains a better position as concerns its proprietary rights in the combined assets, see *Riedler,* Eigentumsvorbehalt, in: Apathy, Iro and Koziol (eds.), Österreichisches Bankvertragsrecht, Band IX: Kreditsicherheiten Teil II, ed. 2, Vienna and New York 2012, at 256.
Finally, under German law, movable assets that are combined with each other cease to be the object of separate property rights only where the separation would have as a consequence that the parts could no longer be used in an economically reasonable manner; for an overview of the criteria applied, see *Stresemann* (*op. cit.* fn. 188), § 93 BGB paras. 9 s. and 12. For such situations, the *Bürgerliches Gesetzbuch* provides that the owner of the subordinate asset loses its ownership rights, see §§ 947, 93. However, on the basis of the principles developed for the case of specification, the parties may stipulate that the former owner of a retention of ownership device becomes the owner of the asset resulting from the combination, see *Bundesgerichtshof* 19 Oct. 1966, BGHZ 46, 117, 118 s.

[199] As has been discussed above, no. 145, it is often argued that the general rules on the accession of movable property to land might need to be adapted when applied to the installation of wind energy equipment in off-shore waters. It could conceivably be argued that this should also affect the application of the general rules concerning the installation of machinery in buildings.

[200] Companies Act 2006, Sec. 860(1) (with effect as from 06 Apr. 2013 to be replaced by Sec. 859A(1) on the basis of The Companies Act 2006 (Amendment of Part 25) Regulations 2013).

[201] UCC Sec. 9-310(a).

[202] See above, no. 134.

[203] Similar to the provision under the Norwegian *Lov om sjøfarten* 1994 (Maritime Code), Sec. 39, which, however, concerns an asset-specific register.

secured transaction regime also applies where movable property is fixed to land,[204] this classification would have to be based upon the general property law principles of the jurisdiction concerned, whose application to these issues is often rather complicated.[205]

154. Again, additional problems can be expected where, for instance, parts of the off-shore wind energy equipment are brought from the off-shore location to the territory of another State. If this State generally recognises proprietary security rights over movable assets only if the secured creditor exercises direct possession or if publicity is provided for the security in an asset-specific register, the courts of this State, should they apply their own law as to the merits of the case, are not likely to recognise the registration in a foreign debtor-indexed register as being equivalent to the requirements of the applicable law of the forum.

155. As in the case of asset-specific registers, the registration of security rights over off-shore wind energy equipment in a debtor-indexed register does not solve issues pertaining to the installation of machinery or parts of the wind turbine that are subject to security rights created in favour of other secured creditors or that have been delivered under a retention of ownership agreement. Again, such issues would have to be determined under the general property law rules of the relevant legal system. The mere fact that the parties in the debtor-indexed register agree on the registration of a security right in a part of the wind turbine only does not have any bearing on the question of whether the applicable property law regime allows this part to be the object of separate property rights that are independent from the property rights in the remainder of the wind turbine.

156. Finally, another problem arising in practice is that debtor-indexed registers for proprietary security in movables often appear to be ill-suited as regards security over highly valuable off-shore wind energy equipment due to the cost structure of such registers: Where, for example, the registration fees are 1.5 percent of the value,[206] such a calculation of costs might be appropriate for assets of a lower value, where such a percentage might better reflect the relative operating costs of the register, whereas such a registration fee would be prohibitively high for a wind park with a total investment of up to one billion EUR.

(e) Security over off-shore wind energy equipment in legal systems allowing security ownership of movable property without direct transfer of possession

157. In some legal systems, there is no general requirement of registration for proprietary security rights in movables and the demand for non-possessory security in market practice has been answered by the recognition of transfer of (security) ownership without direct transfer of possession to the secured creditor. The transfer of indirect possession suffices for the security transfer of ownership, which allows the collateral to remain in the possession of the debtor/security provider.[207] Thus, security ownership in off-shore wind energy equipment could, under the general rules of such a legal system, be transferred by mere agreement between the secured creditor and the debtor/security provider. If such a transfer is completed before the equipment is transported to the off-shore location, the advantage is that the effects of this disposition are more likely to be determined under the laws of the State in which the transfer took place, whereas a transfer of proprietary rights in equipment that is already installed at the off-shore location (for instance during

[204] See US-American UCC Sec. 9-501(a)(2),
[205] See above, nos. 142 ss.
[206] As is the case in Denmark.
[207] See, especially, Germany, where ownership can be transferred for security purposes without a direct transfer of possession under the *Bürgerliches Gesetzbuch*, §§ 929, 930, see *Oechsler*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, ed. 6, Munich 2009, Anh. §§ 929-936 BGB no. 3; the situation is similar in Greece, where it is also possible to transfer ownership for security purposes with an indirect transfer of possession under the Civil Code (*Astikos Kodikas*) Arts. 1034, 977, cf. *Christodoulou and Poulou,* Greek Report, in: Eva-Maria Kieninger (ed.), Security Rights in Movable Property in European Private Law, Cambridge 2004, at 444 s.

a refinancing transaction) could raise problems concerning the determination of the applicable property law regime.

158. Due to the lack of any specific provisions on the status of off-shore equipment, both the issue of the determination of the governing property law regime and its application to off-shore wind energy equipment concerning its classification as real or personal property are left to be decided under the general principles, which means that, as long as there is no established case law as to these issues, the parties have to deal with considerable risks and uncertainties.[208] The same applies to the question as to whether parts of the wind turbine could remain subject to separate security rights or retained ownership by the vendor even after its installation at the off-shore location.

159. The lack of publicity by registration also has the disadvantage that prospective creditors cannot easily ascertain, by consulting a register, whether or not any of the debtor's off-shore wind energy assets are already encumbered; this may be expected to raise the cost of secured credit for the debtor, at least in cross-border transactions. Moreover, the use of the legal instrument of security ownership has the specific disadvantage that, once the debtor has transferred the ownership of off-shore wind energy equipment to a secured creditor, the creation of additional lower-ranking security rights in the same collateral is effectively excluded, since the debtor is no longer the owner of the collateral.[209]

160. Where assets that are subject to such a security right that does not fulfil any publicity requirements are brought into another jurisdiction and the courts of that jurisdiction hold that the security right is subject to the law of the forum, there is a risk that the security right will not be regarded as effective if it does not fulfil the publicity requirements under the law of the forum. A security ownership created under German law without registration or direct possession by the secured creditor will not be upheld as a proprietary security right under the laws of another jurisdiction where non-possessory proprietary security rights over movables are subject to a requirement of publicity by registration.[210]

5. Responses in market practice

161. In market practice, several strategies have been developed in an attempt to solve these issues, notably the uncertainties concerning the applicable regime of proprietary security and the differences between the types of proprietary security right recognised under the various legal systems. One such strategy consists in conducting all proprietary transactions in the country of origin of the wind energy equipment, *i.e.*, payment to the owner is made and a security right for the financier created before the equipment is shipped to the off-shore location. This makes it more likely that, in the event of a later dispute concerning the validity and effectiveness of the creation of the security interests over the equipment, a court will refer these issues to the law of the country of origin, so that the parties have merely to make sure that they fulfil the relevant requirements under this law. Similarly, parties would tend to avoid transporting the assets through the territory of jurisdictions that would not uphold the existing security rights, especially if this involved further work on the assets concerned, giving rise to the risk that the property law status of the assets might be determined under the law of this *situs*. On the other hand, suggestions that wind energy assets be transported prior to their installation through the territory of a State whose legal system is regarded as being favourable to the creation and effectiveness of security rights in off-shore wind energy equipment hardly seem practical in view of the costs involved. In any case, the potential relevance

[208] See above, nos. 127 ss. and 142 ss.
[209] To some extent, this issue can be solved by giving the debtor a right to the return of parts of the collateral, once these are no longer necessary to cover the creditor´s secured obligations (See the German law *Freigabeanspruch*, *Bundesgerichtshof* 27 Nov. 1997, BGHZ 137, 212; *Oechsler* (*op. cit.* fn. 207), Anh. §§ 929-936 BGB no. 30).
[210] See *Stoll* (*op. cit.* fn. 159), Int SachenR para. 346.

of such strategies is somewhat limited, both in relation to the methods used to determine the applicable law for wind energy equipment installed off-shore and concerning the consequence of a change of the applicable law following, for instance, the transportation of parts of the wind energy equipment to the territory of another State for repair or replacement purposes.

162. To avoid the risk of off-shore wind energy equipment being regarded as a fixture to real property and thus, at least in some jurisdictions, no longer the subject of personal property security rights, it is sometimes suggested that the documentation used by the parties should emphasise that the wind energy equipment or at least parts thereof may be used even beyond the end of the concession period for the wind farm concerned.[211] However, even where parts of a wind turbine could be used elsewhere after that period, it might be argued that, given the relatively low remaining value of dismantled wind energy equipment, the primary economic purpose of the wind energy equipment should be assumed to have been fully exploited at the location of its first installation.

163. Another strategy intended to avoid both the high cost of registrations of security rights over movable property in some jurisdictions and the risk of the ineffectiveness of such security rights in cross-border situations is to use special purpose vehicles (SPV) instead of proprietary security rights over the assets themselves. Ownership of the off-shore wind energy equipment is transferred to a subsidiary company (the SPV) of the wind farm operator. As security for credit granted to the wind farm operator, its creditors then acquire charges over the shares of the SPV held by the wind farm operator. If the need for re-financing should arise, these encumbrances could then be transferred to a new creditor without any need for a disposition affecting property rights in the off-shore equipment.

164. This use of a SPV, however, has several obvious disadvantages. First, the creditors do not hold direct rights in the off-shore wind energy equipment. Even where it is provided in the SPV's articles of association that it may not transfer the equipment and may not conduct any other business activities (which would carry the risk of the SPV incurring obligations of its own, thereby reducing the value of the secured creditors' security over the SPV shares), creditors cannot be absolutely certain that these prohibitions will be respected; moreover, as the owner of off-shore wind energy equipment, the SPV could become statutorily liable, for instance, for environmental damage caused by that equipment. Secondly, there is at least some risk that, in the event of the insolvency of the wind farm operator, any transfers of property to the SPV could be reversed, for example as transactions at an undervalue.[212] Moreover, at least in some jurisdictions, the enforcement of security rights over shares is rather cumbersome, excluding for instance the possibility of a private sale of the shares.[213]

165. No viable strategies are reported in relation to the specific problems pertaining to vendor credit and retention of ownership agreements concerning parts of off-shore wind energy equipment. As yet, these types of financing have not become common currency in this industry and vendors relinquish their proprietary rights (whether to the wind farm operator or a financing company) at the moment of delivery.

6. Suitability of the Cape Town Convention system for off-shore wind power generation and similar equipment

166. As will be shown in the following paragraphs, the extension of the Cape Town Convention system, the main characteristics of which have been summarised above, no. 72, through the

[211] Cf. *Wurmnest* (*op. cit.* fn. 150), at 258 s.
[212] See *Beale, Bridge et al.* (*op. cit.* fn. 12), para. 7.139
[213] See especially Germany, *Bürgerliches Gesetzbuch*, §§ 1277, 1245.

preparation of a new Protocol covering off-shore power generation and similar equipment, suggests itself as a suitable solution for the numerous legal issues raised by secured transactions concerning this type of equipment.

167. Generally speaking, it should be noted that while off-shore wind energy equipment may not be as mobile as the assets currently covered by the existing Protocols to the Cape Town Convention (or as ships), the fact that this equipment is installed outside the territory of the coastal State and is likely to be re-transported to the territory of that or anothe coastal State after dismantling should be sufficient to regard this equipment as mobile in the sense of the Cape Town Convention,[214] not least since the Official Commentary itself points out that the mere possibility of cross-border movement triggers the need for protection under the Convention.[215]

(a) International security interest in off-shore energy equipment

168. The Cape Town Convention provides for international security interests over the assets concerned, *i.e.*, the status of proprietary security rights over the collateral is determined under the Convention and the applicable Protocol thereto.[216]

169. As to the issues currently facing cross-border secured transactions over off-shore equipment, the two main advantages of the Convention approach are the following. First, there is no longer any need to determine the governing law for these assets under conflict-of-laws provisions whose application to off-shore equipment is not entirely unproblematic.[217] As between Contracting States, the transport of the equipment from the territory of one State to another would likewise no longer involve a change in the applicable legal regime and the risk that security rights would no longer be regarded as effective due to a lack of compliance with the perfection requirements of the new *situs*.[218]

170. Secondly, while the effects described in the preceding paragraph could also be achieved through harmonised conflict-of-laws provisions, the introduction of an international security interest over off-shore assets also constitutes a solution for problems arising in connection with the application of general rules on the accession of movable property to land:[219] If a new Protocol to the Cape Town Convention system provides for the creation of an international security interest over off-shore assets, the existence of this interest must be respected by the property law regimes of the Contracting States. This would rule out any interpretation of the national rules of property law according to which no personal property rights can exist in off-shore assets once they are fixed to the seabed.

(b) Publicity by registration under the Cape Town Convention system

171. The extension of the Cape Town Convention system to off-shore wind energy equipment would include the establishment of a system of registration of security interests in such assets in a worldwide register to be established for this purpose.[220] Especially as compared to the current practice of using an SPV[221] or non-registered security ownership of off-shore wind energy equipment,[222] the introduction of a system of publicity by registration would ensure that creditors can obtain reliable information concerning the eventual availability of the off-shore equipment for

[214] See the reference to mobile equipment in Art. 2(1) of the Convention.
[215] *Goode*, Official Commentary (*op. cit.* fn. 100), para. 2.41.
[216] Art. 2; see also *Goode*, Official Commentary (*op. cit.* fn. 100), para 2.42.
[217] See above, nos. 127 ss.
[218] See above, nos. 149, 154 and 160.
[219] See above, nos. 142 ss.
[220] Art. 16(1) of the Convention.
[221] See above, nos. 163 ss.
[222] See above, nos. 159.

the satisfaction of their claims and thus help lower credit costs. The efficient operation of the system of registration under the Cape Town Convention system has already been proven in practice.

(c) Registrability of parts of off-shore wind power generation equipment

172. Introducing a system of registration for off-shore wind energy equipment would also allow a distinction to be made between different parts of off-shore wind turbines, in relation to which separate security interests could be registered in the register, for example allowing the generator or the rotor to be encumbered by security rights in favour of other secured creditors without incurring the risk that after installation, these parts could no longer be the subject of separate property rights under a given national property law regime,.[223] A specific provision to that effect has been included in the Space Protocol, which provides that in cases where space assets are docked or installed upon each other (or removed), ownership or other rights and interests in the space assets are not affected.[224] By providing for a separate registrability of certain parts of off-shore wind energy equipment, the application of the Cape Town Convention system could provide a solution for cases where, for instance, some parts of the machinery or of the energy grid have been acquired using credits from a creditor other than the main financier of the wind park or where some parts have been acquired on the basis of vendor credit, the ownership of these parts being retained by the seller until the purchase price has been paid.

173. The details of such registrability of different parts of off-shore wind energy equipment would obviously need further elaboration, especially where the individualisation of the various parts in which separate security interests could be created is concerned. As was done in preparing the Space Protocol, further information would have to be collected in close consultation with practitioners and industry representatives concerning, amongst others, the technical specifications of the various parts of off-shore wind energy equipment, the production by different manufacturers and the practicability of individual replacement of these parts.

(d) Retention of title

174. Apart from (standard) security interests granted to the secured creditor under a security agreement, the Cape Town Convention also contains a regime for leasing and title reservation agreements concerning mobile assets, granting, amongst others, special status to the reservation of title upon default by the debtor by allowing the holder of the retained ownership right to reclaim the asset from the debtor[225] and by providing that where the title reservation agreement is registered first, the seller's priority position vis-à-vis competing secured creditors is ensured.[226] Combined with the separate registrability of parts of off-shore wind energy equipment, this protection of the holder of retained ownership rights resembles the privileged position of vendor credit in many of the major legal systems.[227] It is often assumed that sellers do not have the same opportunity as general

[223] See above, nos. 150, 155 and 158.
[224] Art. III of the Space Protocol.
[225] See Art. 10(a); since the Convention leaves the classification of the international interest as a security granted under a security agreement or as retained ownership under a leasing or title reservation agreement to be decided under the otherwise applicable law (Art. 2(4)). Art. 10(a) will not apply where the applicable law follows a functional unified approach towards proprietary security (see, *e.g.*, US-American UCC Sec. 1-201(37)) and regards the rights of the seller under title reservation agreements not as retained ownership, but merely as a security interest with a specific priority status, see *Goode*, Official Commentary (*op. cit.* fn. 100), para. 4.101.
[226] See *Goode*, Official Commentary (*op. cit.* fn. 100), paras. 4.71 s. It is to be noted that due to the asset-specific operation of the register under the Convention, security rights in the after-acquired property of the debtor in general cannot be registered. The possibility to register security over after-acquired property of the debtor in general is one of the main reasons why secured transaction regimes with debtor-indexed registers often include a specific priority rule ensuring the priority, *e.g.*, of the security retained by the seller under a conditional sale also vis-à-vis earlier security interests granted in relation to the same collateral by the debtor (see, for instance, US-American UCC Sec. 9-324(a)). This rule therefore has no direct counterpart under the Cape Town Convention.
[227] See generally *Wood*, Comparative Law of Security Interests (*op. cit.* fn. 30), para. 33-063.

financiers of the buyer to obtain a first-ranking security right in the buyer's assets in general and therefore deserve specific protection as concerns any proprietary interest which they might retain in the sold assets themselves.[228] By making such protection available also to sellers of off-shore wind energy equipment, a relevant new Protocol to the Cape Town Convention can be expected to strengthen the potential role of vendor credit in this particular field and thereby open up new sources of financing to the off-shore wind energy industry.

(e) Transfer of security interests and refinancing of off-shore wind energy equipment

175. The Cape Town Convention system also includes detailed rules on the assignment of associated rights, *i.e.*, the rights secured by the international interest or the right to payment of the purchase price for an asset that is subject to a registered title reservation agreement,[229] and on the transfer of the international interest as a consequence of such an assignment.[230] These provisions could also applied in the context of the refinancing of off-shore wind energy equipment, thereby avoiding the legal risks presently encountered concerning the transfer of proprietary rights in an asset at an off-shore location.[231]

(f) Security assignment of wind farm operators' revenue claims

176. Apart from security over the off-shore wind energy equipment itself, the financiers of off-shore wind farm operators typically also seek to acquire security rights over the revenue claims which these operators obtain for the electricity generated by the off-shore wind farm. Since these claims are closely connected to the physical off-shore assets, and since the value of the one to a large extent depends upon the other, it might be considered to include these revenue claims under the rules of a new Protocol to the Cape Town Convention dealing with off-shore wind energy equipment.

177. Such an approach could find inspiration in the rules of the Space Protocol which also cover the assignments of the debtor's rights to payments related to the mobile assets covered by the Protocol. The Space Protocol regulates the formal requirements for the assignment, allowing the assignment to be constituted by mere agreement in writing,[232] without any requirement of notification of the third party debtor, *i.e.*, the person owing to the debtor under the claim that is assigned.[233] Such assignments may be registered; [234] registration is then regarded as a requirement for the effectiveness of the assignment in the debtor's insolvency[235] and registration determines the order of priority between competing interests in the same claims.[236]

178. By providing for these harmonised perfection and priority rules for assignments in this particular market, to adopt this approach also for claims related to off-shore wind energy equipment would solve the difficulties currently arising in cross-border transactions due to divergences between the national legal regimes for the assignment of claims (*e.g.*, concerning the requirement or effects of notification of the third party debtor as regards the effectiveness and priority status of the assignment[237] or the divergent requirements of registration under national law[238]). However, further

---

[228] See for this argument in the case law of the German *Bundesgerichtshof,* decisions of 14 July 2004, Neue Juristische Wochenschrift 2005, 1192, at 1194; 27 Mar. 2008, BGHZ 176, 86, at 98.
[229] See the definition in Art. 1(c) and *Goode*, Official Commentary (*op. cit.* fn. 100), paras. 4.216 ss.
[230] Arts. 31 ss.
[231] See above, no. 157.
[232] Art. IX of the Space Protocol.
[233] Art. X(1) of the Space Protocol provides that the transfer of rights is effective where the requirements of Art. IX are met, which does not include a reference to the notification of the third party debtor.
[234] Art. XII(1) of the Space Protocol.
[235] Art. XII(2) of the Space Protocol *juncto* Art. 30 of the Convention.
[236] Art. XIII(1) of the Space Protocol.
[237] For the diversity of solutions under the various national laws, see the following examples. Many jurisdictions still follow the traditional notion that notification of the third party debtor is generally a requirement for the third party effectiveness of the security assignment and that notification also determines the order of priority: see, for

consultation with practitioners and industry representatives would be needed to assess the extent of their support, if any, for the introduction of a special regime for the assignment of claims in this specific market and the scope of revenue claims connected to the off-shore wind energy assets that could potentially brought under such a regime.

7. Recommendation: Further feasibility study concerning the preparation of a new Protocol to the Cape Town Convention covering off-shore wind power generation and similar equipment

179. The use of off-shore wind power generation equipment as collateral in secured transactions raises complicated legal issues relating to the determination of the applicable property law regime, and to the application of traditional property law principles concerning the possibility of the continuing existence of movable property rights after the affixation of goods to the ground and relating to the question of whether security rights created in an asset fulfilling the perfection requirements of one legal regime can still be recognised once the governing property law regime has changed. In the absence of specific rules concerning these issues, solutions have to be developed on the basis of the application of general principles of law to the highly specific matter of off-shore wind energy equipment. In view of the growing importance of the off-shore wind power generation market, the resulting legal uncertainty is inacceptable. Harmonisation of the law of proprietary security over such assets on the basis of the principles of the Cape Town Convention system would provide certainty as to the possibility of and requirements for the creation of effective security rights in off-shore wind power generation equipment or parts thereof, would protect the position of secured creditors even in the case of the removal of parts of the machinery, and would provide publicity for such security rights. It is therefore recommended that the further feasibility studies to be conducted concerning the preparation of a new Protocol to the Cape Town Convention system should not only cover ships and maritime equipment, but also off-shore wind power generation and similar equipment.

---

instance, Austria: *Oberster Gerichtshof* 30 Nov. 2006, BankArchiv - ÖBA 2007, 735 (for book debts, notification can be replaced by a note in the books of the chargor, see *Koziol and Welser*, Grundriss des bürgerlichen Rechts, Vol. 1, ed. 13, Vienna 2006, at 409); Italy: *Codice Civile* Arts. 1265, 2914 Nr. 2; Scotland: *Bell,* Commentaries on the Laws of Scotland, ed. 5, Edinburgh and London 1826, vol. V, chap. II, s. II, § 2. Also under English law, where there are several assignments, that assignee has priority who, if acting in good faith, was the first to notify the debtor, see *Dearle v Hall* (1828) 3 Russ 1; *Beale, Bridge et al.* (*op. cit.* fn. 12), paras. 14.09 ss.
In other jurisdictions, however, the notification of the third party debtor has ceased to be of primary importance, see France: notification has been largely replaced by the transfer under the *Loi Dailly* (now *Code monétaire et financier* Art. L313-27) which requires a list of the claims that are to be assigned (bordereau) to be handed over to the security assignee (see *Legeais*, Droit commercial et des affaires, ed. 19, Paris 2011, at 411 ss.; *Simler and Delebecque* (*op. cit.* fn. 22), at 605). In Germany, the notification of the account debtor is relevant only for a charge over a claim under *Bürgerliches Gesetzbuch* § 1280, while the effectiveness against third parties and the priority status of a security assignment only depend upon the time of the conclusion of the agreement between the parties, without any further requirements needing to be fulfilled: see *Bundesgerichtshof* 14 July 2004, Wertpapier-Mitteilungen 2005, 378.

[238] Many traditional systems of registration for proprietary security in movables do not extend to claims: see, for instance, registration in England under the Bills of Sale Act 1878, Sec. 4; in France even the general registered non-possessory pledge (*gage sans dépossession*) under *Code Civil* Arts. 2338 *juncto* 2333, which was introduced as recently as 2006, does not cover claims, see *Aynès and Crocq*, Les sûretés, ed. 6, Paris 2012, at 225; *Leavy,* National Report France, in: Harry C. Sigman and Eva-Maria Kieninger (eds.), Cross-Border Security over Receivables, 2009, at 133 s.
There is, however, a recognisable trend in more modern systems of registration for proprietary security that security over claims is subject to a registration requirement as well: see, in England, the express provision in the Companies Act 2006, Sec. 860(7)(f) (for the introduction of a general registration requirement for all charges created by a company under The Companies Act 2006 (Amendment of Part 25) Regulations 2013, see above fn. 168; charges over claims are still expressly regulated, however: see the requirement to indicate whether a charge is created over intangible assets under Sec. 859D(2)(e)(ii)); for the US-American UCC, see the broad reference to personal property in general in Secs. 9-310(a) and 9-109(a)(1). The same applies to the registration of security rights over a company or an enterprise as a whole, which usually also covers the book debts of the debtor, see England: Companies Act 2006 Sec. 860(7)(g) (as from 06 Apr. 2013, on the basis of The Companies Act 2006 (Amendment of Part 25) Regulations 2013: Sec. 859A(1), see above fn. 168); Sweden: *Lag om företagshypotek* of 2008 (Enterprise Charge Act), chap. 2, § 1.

180. Also in relation to security over off-shore wind power generation and similar equipment, industry representatives and outside experts should be involved in the preparation of the feasibility study as early as possible, so as to provide further input concerning the technical aspects of this type of equipment, *e.g.*, as regards the severability of various parts of wind turbines, and to identify for which other legal issues apart from introduction of a unified international interest in this type of equipment there would be sufficient support, *e.g.*, concerning a regime promoting vendor credit or security assignments of the wind farm operators' revenue claims related to the off-shore wind energy equipment.

* * *