The Relationship between the MAC and the Rail (Luxembourg) Protocols to the Cape Town Convention and Domestic Secured Transactions Law

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While all of the protocols of the Cape Town Convention involve some interaction with domestic general secured transactions law, this is particularly true of the Rail Protocol and the MAC Protocol. This article maps where interactions are likely to arise, and focuses on two particular areas: the scope of the Protocols as regards the assets and transactions covered, and the effect of registration under domestic law and the Convention. The practical impact of the fact that a piece of equipment does, or may, fall within one or other of the protocols is assessed, concluding that there are many advantages to financiers in the additional application of the Cape Town regime, while the potential cost of double registration or double searching (itself a matter of choice for the financier) is likely to be outweighed by the benefits. While the domestic benefits of ratification for a State’s market participants will, to some extent, depend on how far the Convention’s advantages of clarity, certainty and a very robust registration regime already exist in the domestic law, the added advantage of the internationality of the CTC system provides an additional reason for ratification.

Keywords: Cape Town Convention, Rail Protocol, MAC Protocol, Domestic Secured Transactions Law, registration, enforcement

I. INTRODUCTION

While all of the protocols of the Cape Town Convention¹ (‘CTC’, ‘Convention’) involve some interaction with domestic general secured transactions law, this is particularly true of the Rail Protocol² and the Mining, Agricultural and Construction (‘MAC’) Protocol.³ The secured financing and leasing of aircraft is governed by a

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separate regime in many states, and is often excluded from a state’s general secured transactions law if this is in statutory form. However, unless and until a state ratifies the Rail Protocol or the MAC Protocol (the ‘Protocols’), the secured financing and leasing of MAC equipment and railway rolling stock will typically be governed by the domestic law that governs secured transactions and leasing in general.

If a state does ratify either Protocol, there will, therefore, be points of interaction between the resulting CTC regime and the applicable domestic law. Some of these arise as a matter of law (for example, the two registration regimes may not align perfectly, so that a lender might need to register in two regimes to achieve optimal protection) and some as a matter of fact (for example, some of the equipment acquired by a farmer may fall under the MAC Protocol regime and some may not).

This article summarizes the presentations and discussion of a panel at the Cape Town Convention Academic Project Conference held in September 2019 in which some particular interactions were considered. It is not a comprehensive review of all potential interactions, although it gives a general ‘map’ of where interactions are likely to arise. Although it is directly referable to the conference panel, it takes into account the adoption of the MAC Protocol to the Cape Town Convention at the Diplomatic Conference in Pretoria in November 2019.

Section II of the article considers the map of likely points of interaction. Section III discusses the scope of the Protocols in two contexts. The first is where some aspects of the financing of a debtor’s equipment are likely to fall under the CTC regime (plus the domestic law regime) and some under the domestic law regime. The second is where the treatment of particular types of transactions under the CTC regime may be different from that of the domestic law regime. Section IV of the article considers the application of the domestic and CTC registration regimes, and, particularly, the situation where a lender will need to consider whether it registers under both regimes. Section V considers the importance for a state of ratification of the Rail and MAC Protocols, and section VI concludes.

This article assumes that, in the situations under discussion, the state in which the debtor is situated has ratified both the Rail and the MAC Protocol. For ease of

4. See, for example, the UK Mortgages of Aircraft Order 1972. Under German law the registration regime for aircraft mortgages follows that for the registration of mortgages over real estate; the same approach is taken in Indonesia where a hypothec (a form of security interest which otherwise can only be taken over immovable property) can be taken over an aircraft.

5. See, for example: Ethiopia Movable Property Security Rights Proclamation 2019, s 3(2); Indonesian Fiducia Law 1999, art 3(c); Kenya Movable Property Security Rights Act 2017, s 4(2); Pakistan Financial Institutions (Secured Transactions) Act 2016, s 3(d); Philippines Personal Property Security Act 2017, s 4; Zambia Movable Property (Security Interests) Act 2016, s 3(3); Zimbabwe Movable Property Security Interests Act 2017, s 5(5). Some reformed statutes do not make this express exclusion, for example, the Australian Personal Property Securities Act 2009 and the New Zealand Personal Property Securities Act 1999.

6. Members of the panel, which was chaired by Professor Louise Gullifer, were Dr Marek Dubovec (NatLaw), Professor Teresa Rodriguez de la Heras Ballell (Universidad Carlos III, Madrid), Professor Benjamin von Bodungen (German Graduate School of Management and Law, Bird & Bird, Rail Working Group), John Wilson (International Finance Corporation (World Bank Group). Many thanks are due to Professor Benjamin von Bodungen who commented very helpfully on this article.

7. See section II below.

8. For the CTC to apply at all, the debtor must be situated in a Contacting State: CTC, Article 3(1).
explanation, throughout this article, it will be assumed that the domestic law of that
state is applicable to all aspects of a situation. However, in a situation where there
is any degree of internationality, this may well not be the case. Instead, what domestic
law is applicable to any particular aspect of the situation will depend on the relevant
certainty of laws rules.

II. LIKELY POINTS OF INTERACTION BETWEEN THE MAC OR RAIL
PROTOCOLS AND DOMESTIC SECURED TRANSACTIONS LAW

As mentioned above, one point of interaction between the Protocols and domestic law
is at the edge of the scope of the Protocols: on one side of the line only domestic law
applies, on the other both the Protocol and domestic law applies. How that line is
defined, therefore, is one point of interaction. Another point of interaction arises
where the equipment that is the subject matter of a transaction is covered by one or
other of the Protocols. In this situation, a secured transaction or a lease will normally
create two parallel interests: a domestic law interest and an international interest.
Whether this happens will, of course, depend on whether the criteria for creation of
each type of interest are fulfilled. Domestic law will govern the domestic interest,
and the international interest will be governed by the appropriate CTC regime. A cred-
itor will (normally) have a free choice which interest it wishes to rely upon. For exam-
ple, in order to rely upon a remedy available under the CTC, it will need to rely on
the international interest. In most cases, it will be more beneficial for it to rely on the
international interest.

The following paragraphs consider points of interaction in relation to that interna-
tional interest. The first, which is discussed in section IV below, relates to registration.
Another is where the Convention or the relevant Protocol expressly leaves an issue to
the applicable law, which means the domestic law applicable under the conflict of laws
rules of the forum. For example, under Article 2(4) of the CTC, applicable law will
determine whether an international interest is an interest granted under a security
agreement, vested in a conditional seller under a title reservation agreement or vested
in a lessor under a leasing agreement. This characterization is particularly relevant for
determining whether the remedies under Article 8 or those under Article 10 are
applicable.

Another example is that a creditor can exercise any remedies under the applicable
law as long as they are not inconsistent with the mandatory provisions of the CTC, and

9. The nature of the situation discussed will, of course, vary according to the context of the
discussion.
10. CTC, Article 5(3).
11. For the criteria for creation of an international interest under the protocols, see CTC,
Article 7 in conjunction with Article V of the MAC Protocol or Rail Protocol. The criteria
for creation of a domestic interest will depend on domestic law.
12. These remedies are set out in Chapter III of the CTC. Their availability in any given Con-
tracting State will depend on whether that State has made a declaration under Article 54.
13. See section III.C below.
14. CTC, Article 5(3). For a list of matters referred to the applicable (domestic) law under the
Convention, see Roy Goode, Convention on International Interests in Mobile Equipment and
Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock: Official Commen-
tary (2nd edn, UNIDROIT 2014) para 2.54.
any CTC remedy must be exercised in accordance with the procedural (domestic) law of the place of enforcement.15 More generally, although a question not expressly settled by the CTC is to be settled in conformity with the principles on which the Convention is based, in the absence of such principles a question is to be decided in conformity with the applicable law, although given the importance of the principles on which the CTC is based, this fallback provision is likely to be used only as a matter of last resort.16

Another point of interaction is that certain provisions of the CTC and the protocols only apply if a declaration is made by a ratifying state (‘opt-in’), or apply only unless a declaration is made (‘opt-out’). If the provision does not apply for either of these reasons, then the applicable domestic law applies. One important example can be found in both the Rail and MAC Protocols. This is the article providing for a remedial regime on the insolvency of the debtor. Article IX of the Rail Protocol includes three alternative regimes which can be chosen by a ratifying state by declaration, but the state also has the option of making no declaration, in which case domestic insolvency law will govern, if applicable. Article X of the MAC Protocol, which includes just one regime (equivalent to Alternative A in the Rail Protocol), will only apply if a declaration is made, and otherwise domestic law will apply, if applicable. Another example can be found in the MAC Protocol in relation to MAC equipment which is held as inventory.17 A state that does not wish the CTC regime to apply to such equipment (probably because it has a settled and well-functioning system of secured transactions law in relation to inventory used as collateral) can make a declaration that an interest in inventory where the dealer is the debtor is not an international interest.18 The applicable secured transactions domestic law will therefore apply to the secured financing of such inventory.

A third example relates to where MAC equipment becomes associated in some way with immovable property. The MAC Protocol defines ‘immovable-associated property’ as equipment that is so associated with immovable property that an interest in the property extends to the equipment under the domestic law of the state where the immovable property is situated19 (referred to as ‘domestic law’ in this paragraph and the next). Domestic law will therefore govern the question of whether the relevant article (Article VII) applies at all.

Article VII contains three Alternatives from which a ratifying state can choose, which determine whether the Protocol applies to immovable-associated equipment, that is, to whether the rules of the Protocol as to creation, existence, priority or enforcement of an international interest apply to an interest in that equipment. Alternative A provides a factual test which determines this matter; it therefore excludes any application of domestic law to this issue. Under Alternative B, domestic law is relevant to, but not entirely determinative of, this issue. First, if the equipment has lost its individual identity under domestic law, then that law will determine questions as to whether an international interest can be created, whether an interest already created has ceased to

15. CTC, Articles 12 and 14.
17. That is, by a dealer for sale or lease in the ordinary course of business, see Article I(2)(n).
18. MAC Protocol, Article XII(2).
19. MAC Protocol, Article I(2)(k).
exist or is subordinated to other rights or interests in, or is otherwise affected by the association with, the immovable property. If the equipment has not lost its individual identity under domestic law, under Alternative B paragraph 4 an interest in the immovable property (the land interest) has priority over a registered international interest (the international interest) if the land interest was registered under domestic law before the international interest was registered in the International Registry and the equipment became associated with the immovable property before the international interest was registered. Alternative C leaves all the issues mentioned in this paragraph to domestic law.

III. SCOPE OF THE PROTOCOLS

1. When do the Convention and the Protocol apply?

The CTC regime only applies if certain conditions are fulfilled. If the regime does not apply, an international interest will not be created and the lender will only have a domestic interest (if the domestic law requirements are fulfilled). Some of the conditions are found in the Convention and are common to all types of equipment covered by the CTC protocols, and some are specific to each protocol. The scope of each protocol is defined by the type of equipment to which it relates.

a. Railway rolling stock

The Rail Protocol only applies to ‘railway rolling stock’ which is defined as ‘vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto’. This is a wide definition, and is purely factual, so that the purpose of the equipment which falls within the factual definition seems irrelevant. However, only ‘vehicles’ fall within the definition, and it is arguable that a ‘vehicle’ is something that conveys people or goods, in which case the purpose could be relevant in some cases. Thus, although the very extensive core of this definition covers equipment that would be thought of as forming part of a passenger or freight railway system, there will be penumbral cases in which a piece of equipment falling within the definition could be used for purposes other than as part of a passenger or freight railway system, and, therefore, may be used by a business which mainly uses other equipment which does not fall within that definition.

20. For example, the sphere of application in Article 3 of the CTC.
21. The Convention only applies to ‘objects’ (Article 2(2)) which are those listed in Article 2(3) (including railway rolling stock) and now also the category of object known as ‘MAC equipment’.
22. Rail Protocol, Article II(1).
23. Rail Protocol, Article I(2)(e). For a detailed discussion, see Goode (fn 14) para 3.9.
b. **MAC equipment**

The MAC Protocol does not apply to all equipment that could be colloquially described within the terms ‘mining, agricultural and construction equipment’. Since such equipment could be of very low value, and given that the preamble to the Convention, as well as Article 51, makes it clear that the Convention scheme is intended to apply to high value equipment, a method was devised whereby the MAC Protocol would only apply to equipment that was likely to be of high value. The MAC Protocol only applies to an object that falls within a Harmonized System (‘HS’) code listed in one of three annexes to the Protocol, irrespective of the purpose for which the object is used. In relation to an interest in any other equipment, only domestic secured transactions law applies. Thus, again, there is scope for a particular business to require financing for equipment which falls within one of the annexes and also for equipment which does not fall within any of the annexes.

c. **Parts, accessories etc.**

It will be seen that the definition of railway rolling stock includes all accessories and parts (various types of which are expressly mentioned) ‘in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto’. The definitions of MAC equipment also include ‘all installed, incorporated or attached accessories, components and parts … and all data, manuals and records relating thereto’. The reference to ‘parts’ is qualified in the MAC Protocol, in that parts which fall within a separate HS Code are treated separately, and an international interest in such a part would have to be registered separately. However, the definitions in both Protocols only include parts and accessories that are installed, incorporated in or attached to the object. Thus, as the Official Commentary states, ‘[r]ights in components … prior to installation or after removal are outside the scope of the Convention (since they do not constitute “objects” …) and are governed by the applicable [domestic] law’. Again, therefore, it could be possible for a business to have some parts or accessories, for example, spare tracks for a bulldozer, which do not fall within the Protocol until they are affixed to the bulldozer itself. Domestic secured transactions law would apply to an interest taken in those tracks. The extent to which the rights of a holder of that domestic law interest (if a different person from the holder of the international interest in the bulldozer) is affected by the affixation of the tracks to the bulldozer is a complex issue, and has been explored elsewhere.

d. **Intangible assets**

The Convention and its Protocols, in general, do not apply to interests in intangible property, even when such property is closely connected with equipment to which

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25. See Article II(1) and definitions in Article I(2)(a), (b) and (o). A ratifying state could declare that the protocol only applied to one or two of the three annexes if it so chose (Article II(2)).
27. MAC Protocol, Article I(2)(a), (b) and (o).

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the protocols do apply.30 One exception to this is that the objects are defined to include
data, manuals, and records related thereto, which could be in intangible form. While
not expressly stated in the text of the Protocols or the Official Commentary, the equip-
ment would also include any technology that is inherent to that equipment and would
be generally understood to be an integral part of the goods, such as electronic crane
controls to monitor load weights and control lifting operations.31

An international interest in an object does extend to its ‘proceeds’32 but ‘proceeds’
are very narrowly defined to mean ‘money or non-money proceeds of an object arising
from the total or partial loss or physical destruction of the object or its total or partial
confiscation, condemnation or requisition’.33 An international interest in equipment
will not extend to the proceeds of sale of that equipment,34 unless the sale is in the
course of enforcement of a remedy, in which case the proceeds are to be applied
towards discharge of the secured obligation.35 Any interest in any other type of pro-
ceeds, such as receivables, cash or non-money proceeds, will be governed purely by
domestic law, as will the question as to whether the domestic law interest in the equip-
ment36 extends automatically to its proceeds (however this concept is defined in
domestic law).

e. Pre-existing rights

The Convention contains transitional provisions which provide that (unless a ratifying
state has declared to the contrary) the Convention does not apply to a right or interest
in an object created before the ‘effective date’ (a ‘pre-existing right or interest’). What
constitutes the ‘effective date’ is laid out in the Convention and the relevant Protocols,37
and a state, by declaration, can provide for a grace period within which a pre-existing
right or interest, if registered in the International Registry during that period, can retain
its priority over international interests. Of course, the pre-existing right or interest will
have been created under the domestic law, and will continue to be governed by that
law, including its priority position, even if subsequently registered in the International
Registry during the grace period.38 The effect of the transitional provisions is just that
that priority position cannot be changed by the application of the rules of the CTC
and the relevant protocol.

2. Transactions covered by the CTC and protocols

a. TRAs and leases

In some states, the scope of the types of transactions which fall under the CTC and the
Protocols is wider than those which would be said to fall within domestic secured
transactions law. The CTC covers not only security interests granted by debtors

30. An exception is the Space Protocol, which is not considered here.
31. For example, for equipment falling under HS 842620 – Tower cranes.
32. CTC, Article 2(5).
33. CTC, Article 1(w).
34. See Goode (fn 14) para 2.46.
35. CTC, Article 8(5).
36. This interest is likely to exist in parallel to the international interest, see section II above.
37. CTC, Article 60; Rail Protocol, Article XXVI; MAC Protocol, Article XXVII.
38. See Goode (fn 14) para 4.354.
who already own the equipment, but interests under title reservation agreements (TRAs) and leases. In some jurisdictions, TRAs do not fall within domestic ‘secured transactions law’, and are not registrable. In many more jurisdictions, leases which are not finance leases do not fall within domestic ‘secured transactions law’ and may not be registrable. This state of affairs is recognized to some extent in the Convention itself, since the remedial regime available for TRAs and leases is different from that available for ‘charges’ (security interests). Rather than, as in the case of charges, including a panoply of different remedies, the former regime merely permits the conditional seller or lessor to terminate the agreement and to take possession or control of the object.

There are two potential consequences flowing from the discussion in the previous paragraph. The first is that a decision has to be made whether any particular transaction falls within the ‘charge’ category or the ‘TRA/lease’ category, since the available remedies are different. As mentioned above, this decision will be governed by the applicable domestic law. Thus, in a state where the domestic law treats TRAs as security interests for all purposes, they will fall within the ‘charges’ remedial regime. In a state where a TRA results in title being retained by the seller, it will fall within the TRA remedial regime. The second consequence is that, however a state treats TRAs and leases in its domestic regime, the interest of the conditional seller or lessor can be registered in the International Registry and the consequences of the CTC registration regime, including those of failure to register, will apply to it.

b. Sales

The interest of a buyer under a sale of railway rolling stock or MAC equipment is not an international interest under either Protocol. It therefore cannot be registered and the buyer cannot obtain the priority benefits of registration. While the CTC provides for the situation in which equipment which is subject to an international interest is sold, it does not provide for, first, the situation in which railway rolling stock or MAC equipment is sold to one person and then sold, by the same seller, to another, 39. The core idea of this is an agreement under which title does not pass until the price of the object is paid. However, the definition of ‘title reservation agreement’ in Article 1(ll) of the CTC is much wider than this, see Louise Gullifer, ‘A Comparison of the Position of Buyers under the Cape Town Convention, the Three Existing Protocols and the Draft MAC Protocol’ (2017) 6 Cape Town Convention Journal 97, 100 and Howard Rosen, ‘Commentary on “A Comparison of the Position of Buyers under the Cape Town Convention, the Three Existing Protocols and the Draft MAC Protocol”’ (2017) 6 Cape Town Convention Journal 122, 126–9.
40. For a definition of ‘leasing agreement’ see CTC, Article 1(q).
41. Article 8 of the CTC includes several remedies for a chargee, which must be exercised in a commercially reasonable manner.
42. CTC, Article 10. There is no obligation of commercial reasonableness in exercising this remedy.
43. See section III.C below.
44. A sale is treated as creating an international interest under the aircraft protocol for some purposes. See Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (adopted 16 November 2001, entered into force 1 March 2006) 2367 UNTS 517 (‘Aircraft Protocol’) Article III.
45. See section III.C.ii below.
46. See CTC, Article 29(3): the buyer acquires the equipment subject to a registered interest and free from an unregistered interest irrespective of any questions of knowledge.
or, second, where such equipment is sold to one person and then an international interest is granted in that equipment by the seller to another person. In the first situation, the ‘taking free’ rule in the CTC that applies to buyers will not apply where the seller does not have the right or power to dispose of the equipment.\(^{47}\) In the second situation, the CTC expressly requires the debtor to have ‘power to dispose’ of the equipment.\(^{48}\) Whether the seller or grantor has the right or power to dispose of the equipment is a matter for the applicable domestic law. Domestic law is likely to have, as a basic rule, the principle of *nemo dat quod non habet*, which means that a non-owner cannot confer good title on a buyer. However, many domestic laws include exceptions to this principle; for example, where the seller remains in possession and the second buyer is in good faith and has no knowledge of the first sale. If the situation falls within such an exception, the second buyer will take free from the interest of the first buyer. The possible relevance of the ability of a buyer of railway rolling stock or MAC equipment to register a ‘notice of sale’ in the International Registry to the analysis in this paragraph is discussed below.\(^{49}\)

3. The practical effect of the scope of the Protocols

This section assumes that the MAC and Rail Protocols have been ratified and implemented in State X, and that the domestic law of State X is the applicable law for all aspects of the situation discussed.

a. Financing a single object

If a single piece of equipment is being financed or leased, the result of the limited scope of the Protocols is that the financier or lessor must consider whether the CTC regime applies or not. If the result of this deliberation is ‘no’, there will be several consequences. First, the financier or lessor must ensure it has complied with all the requirements for the creation of a domestic security interest or lease, since it will not have an international interest even if it complies with the CTC requirements. Second, it must make sure it complies with domestic perfection requirements for the same reason. Third, it must be aware that it will be subject to the priority rules of State X. Fourth, it must take into account that it will only be able to enforce its interest under the domestic law of State X. Depending on the provisions of this law, this may mean that the financier or lessor has less opportunity for extra-judicial enforcement, or will be subject to a less favourable regime than under the CTC if the debtor becomes insolvent. The financier or lessor will have to take these factors in relation to priority and enforcement into account when deciding whether to enter into the transaction, and, if so, the terms on which it is prepared to do so.

47. This is despite the fact that the wording of Article 29(3)(b) could be said to apply to such a situation, see Gullifer (fn 39) 97, 104–05; Roy Goode, ‘The Power to Dispose under the Cape Town Convention and Aircraft Protocol’ (2017) 6 Cape Town Convention Journal 2.

48. Again, Article 29(1) of the CTC might, on first glance, be thought to give priority to the holder of the international interest, if registered, but this is qualified by Article 7(b) which requires that the debtor has the ‘power to dispose’ of the object. See Gullifer (fn 39) 97, 104–05; Goode (fn 47) 2.

49. See section IV.C.
If the CTC regime does apply to the piece of equipment, the financier, to obtain an international interest, will have to comply with the requirements for creating an international interest.\(^50\) If an international interest is created, the financier gets most of the benefits of the CTC regime, in particular, the remedial system. The extent to which this is an advantage will largely depend on how effective the remedial system is under the law of State X, but the added advantage of having an international interest is that if the equipment moves outside State X to another Contracting State, the financier will still have the benefit of the CTC remedial system.

The main decision the financier has to make is whether to register the interest in the International Registry. This is for two reasons. First, if it does not make this registration, its international interest will not be valid on the insolvency of the debtor (although its domestic interest will be if the interest is perfected according to the law of State X). Second, the financier risks another creditor obtaining an international interest in the equipment, and registering it in the International Registry, which would result in that second creditor obtaining priority over the financier under the CTC priority rules.\(^51\) The financier would have to decide whether this was a real risk. All other benefits of having an international interest (most notably, the favourable remedial regime) apply even when an international interest is not registered.

Even if the financier or lessor concludes that the CTC regime does apply to the piece of equipment, it will need to be aware that its international interest in the equipment will not extend to certain related assets, such as proceeds of sale or other associated receivables,\(^52\) and accessories which are not affixed to the piece of equipment.\(^53\) It will therefore, probably, want to make sure that it has a proprietary right to have recourse to such assets under the law of State X (whether by the creation of a domestic law security interest over such assets or by another method such as a title transfer device). In relation to proceeds, it may be that under the law of State X, the domestic security interest over the piece of equipment will extend automatically to these, and so all the financier will have to do is to ensure that its domestic interest is effectively created and perfected under that law. The notion of proceeds to which such automatic extension applies varies from state to state, but generally it does not encompass any receivables generated by the use of equipment. Alternatively, if there is no automatic extension, the financier may have to take a separate domestic law interest in the proceeds. In relation to unaffixed accessories or parts, it may have to consider carefully the priority position if any other creditor is likely to have a domestic law interest in these, such as a seller on retention of title terms.\(^54\)

\(b.\) Financing many objects of a business

As mentioned above, the limited scope of the Protocols means that it is reasonably likely that a business, particularly in the mining, agricultural or construction sectors (as opposed to the rail sector) will have some equipment which falls under the CTC regime and some which does not. One might think that a financier, asked to finance a ‘mixed’ group of equipment, would have to decide whether to operate under both regimes, making sure that it has drawn the line between the two in the right place, or whether to just operate under the domestic law. However, the financier’s choice

\(^{50}\) See fn 11 above.

\(^{51}\) See CTC Article, 29(1): a registered interest has priority over an unregistered interest.

\(^{52}\) See section III.A.iv above.

\(^{53}\) See section III.A.iii above.

\(^{54}\) This issue is discussed in detail in Dubovec (fn 29).
is more straightforward that this. If it complies with the relatively simple requirements for the creation of an international interest,\textsuperscript{55} which it may well comply with without even intending to do so, it will have an international interest in any piece of equipment which, as a matter of the CTC regime, falls within the relevant protocol. The financier does not need to intend the CTC regime to apply. Apart from the financier’s decision about registration discussed in the next paragraph, the first time the question of whether an international interest has been created will arise is if and when the financier wishes to enforce its interest.

The main choice a financier has to make is whether to register any international interest it may have in any particular piece of equipment in the International Registry. Here, in order to make an informed choice, the financier does have to consider whether the equipment falls within the scope of one of the Protocols. However, there is probably nothing to stop registration of an interest even if the equipment eventually turns out not to fall within any Protocol. In that case, the financier will just not get the benefits of registration, as outlined above.\textsuperscript{56}

Thus, although the delineation of scope could in some circumstances be difficult to draw, the fact that some of the financed assets fall within the scope of the relevant Protocol (in which case the financier obtains domestic law protection and CTC protection) and some of them do not, produces advantages for the financier, and very few disadvantages. The main possible disadvantage is that the financier may take the view that it has to register the interest twice, once domestically and once in the International Registry, and it is to this issue that this paper now turns.

IV. REGISTRATION

1. Double registration?

The discussion in this section assumes that the states mentioned in the examples have ratified both the Rail Protocol and the MAC Protocol, and also, as before, that their own domestic law is the applicable law in all aspects of the situation not governed by the CTC.

a. The two interests

As mentioned above, when an international interest in railway rolling stock or MAC equipment is created, it is likely that a parallel domestic interest (either a security interest or an interest based on the retention of title) is also created. For example, in a common law jurisdiction such as England and Wales, when an international interest which falls into the category of ‘charge’ under Article 2 of the CTC is created in a railway carriage, it is very likely that a domestic law legal mortgage is also created in that carriage. If a lessor grants a lease over a mechanical shovel in a civil law jurisdiction, there is also likely to be a lease interest created under domestic law. In both these cases, the creation of the domestic law interest will depend upon any necessary domestic requirements being satisfied.

\textsuperscript{55} There has to be a written agreement which identifies the object (the Rail and MAC Protocols permit identification by type, so identification is not onerous), or a written agreement that provides that it covers ‘all present and future’ property.

\textsuperscript{56} See section III.C.i.
Most states, with some notable exceptions such as Germany,\textsuperscript{57} have a registration regime covering at least some types of non-possessory security interests, although as mentioned above, some states do not have a registration regime for devices based on retention of title, including leases. Where an international interest is created in a piece of relevant equipment, it may be necessary to register the parallel domestic interest in a domestic registry in order to ‘perfect’ it.\textsuperscript{58} ‘Perfection’ here means making the interest effective against third parties, including making it effective against any insolvency officer (and therefore all unsecured creditors) were the debtor to become insolvent. In some jurisdictions, it may even be compulsory to register a domestic interest, so that it is a criminal offence not to do so.\textsuperscript{59} The international interest can also be registered in the International Registry. As mentioned above,\textsuperscript{60} this brings mainly two advantages: priority over any interests registered later in the International Registry and any interests not registered in that Registry (the priority advantage),\textsuperscript{61} and effectiveness on the insolvency of the debtor (the insolvency advantage).\textsuperscript{62}

\textit{b. The decisions of the holder}

In the typical case where an international interest and a parallel domestic law interest are both created, the holder of these interests has to make some decisions about registration. First, it needs to decide whether the domestic interest is registrable at all. If it is not (for example, it is a lease and leases are not registrable under the domestic law) then it has to decide whether or not to register the international interest in the International Registry to obtain the two advantages mentioned above. If the domestic law lease is valid in the insolvency of the lessee, the holder will not normally need the insolvency advantage. The holder will have to assess how important the priority advantage is to it, that is, how likely it is that another person will take an international interest in the equipment and register it in the International Registry, and weigh this up against the cost and effort involved in registration in the International Registry. Since registration in the International Registry is very likely to be a streamlined and easy process, the priority advantage is likely to outweigh any registration costs, though this would depend as well on the level of registration fee and the value of the equipment.\textsuperscript{63}

If the parallel domestic interest is registrable, the holder has to decide whether to register that interest in the domestic registry, and whether to register the international interest in the International Registry. If it chose to register in the domestic registry (and

\textsuperscript{57} In Germany there is no registration regime for non-possessory security interests over movables in general, including railway rolling stock and MAC equipment. Non-possessory security interests over ships and aircraft are registrable in the same way as such interests over land: ships and aircraft are treated as immovable property for this purpose.

\textsuperscript{58} In some jurisdictions, it may be necessary to register a domestic law security interest in order to create it, for example, under the South Korean Act on Security over Movable Property and Claims 2012 (see article 7(1)) and the Thai Business Security Act 2015 (see sections 5 and 13).

\textsuperscript{59} See, for example, section 878(1) of Kenya’s Companies Act 2015 (non-registration of a company charge is a criminal offence on the part of the charger).

\textsuperscript{60} See section III.C.i.

\textsuperscript{61} CTC, Article 29(1).

\textsuperscript{62} CTC, Article 30(1).

\textsuperscript{63} It is possible that a piece of equipment could fall within the MAC or Rail Protocols, and still be of low value. With MAC equipment, for example, this could be because it is being acquired second or third hand. If the equipment is of low value, the costs of registration might outweigh the priority advantage.
this gave validity in the insolvency of the debtor) then the cost/benefit debate will be as in the previous paragraph. The holder could, though, chose to register in the International Registry, and obtain both the priority\(^{64}\) and insolvency advantages. It would then have to consider whether there were any additional benefits in also registering in the domestic registry, namely, whether there were any consequences of not doing so except loss of priority to other interests and invalidity on the insolvency of the debtor. If, for example, non-registration in the domestic registry was a criminal offence, the holder would need to register in the domestic registry. As mentioned above, the definition of ‘proceeds’ under the CTC is very narrow.\(^{65}\) If the domestic interest extends automatically to proceeds, more widely defined, under domestic law (or if it is possible to create a domestic security interest that expressly includes proceeds), the holder may well want to register the domestic interest in order to obtain the priority and insolvency advantages in relation to such proceeds. Another possible benefit of domestic registration is in case the registration in the International Registry were invalid, for example, because the serial number was entered incorrectly. This is a greater danger in relation to MAC equipment, for example, than for registration of an international interest in an aircraft, where a registrant may be able to choose a serial number from a drop-down menu. Such a facility is unlikely to be available in the MAC International Registry.

Thus, analysed from the perspective of the holder, ‘double registration’ (ie registration in both the International Registry (the international interest) and the domestic registry (the domestic interest) is never ‘compulsory’: it is a matter of choice for the holder, depending on the perceived advantages, which will, in themselves, depend on the content of the domestic law, the costs of registration in the respective registries and, possibly, other factors. However, one can also analyse the issue from the perspective of potential financiers who will want to search a registry to discover whether the equipment is subject to any interests.

c. The decisions of the searcher

The potential financier will first need to decide whether the relevant equipment falls within either the Rail or the MAC Protocol. If the equipment falls under both Protocols, it should search the Rail Registry as the MAC Protocol defers to the Rail Protocol in case of an overlap.\(^{66}\) If it does not fall within either Protocol, it will need to search in the domestic registry or conduct other form of due diligence where a registration system has not been established or the domestic law does not require registration of certain types of transactions. As a matter of law, the International Registry is irrelevant as, even if the interest has been registered there out of an abundance of caution, the CTC priority and insolvency advantages will not apply. However, as a matter of fact, a registration in the International Registry may reveal to a searcher the potential existence of a transaction, and this would be a reason for searching the International Registry even if the potential financier thinks that the equipment does not fall within either Protocol.

\(^{64}\) Article 29 in this context gives priority to the registered interest over both unregistered international interests and all other unregistered interests (ie domestic law interests).

\(^{65}\) See text to fn 33.

\(^{66}\) See Article II(3) of the MAC Protocol.
If the financier concludes that the equipment definitely falls within a Protocol, it can safely rely on a search in the relevant International Registry, provided that it itself is intending to take and register an international interest. If there are no entries on the International Registry, the searching financier can take and register its own international interest, and will have priority over all other interests, international or domestic, because of the priority advantage. In these circumstances, it will be irrelevant whether any previous interests are registered in the domestic registry. There are three caveats to this. First, if the searching financier is interested in knowing whether there are likely to be interests in the proceeds it would need to search in the domestic registry. Second, if the searching financier is contemplating not registering its interest in the International Registry, it will need to search the domestic registry, since its priority position will effectively be governed by domestic law. Third, a prospective financier might want to discover whether there are any domestic law interests in the equipment, even if it would, by registering in the International Registry, have priority over such interests. There are a number of reasons for this. For example, on enforcement of a first ranking interest under the CTC, the enforcing creditor will need to engage to some extent with holders of lower ranking interests. Further, it enables the prospective financier to check whether the information the debtor has given it as to whether there are any interests in the equipment is correct. If it is not correct, the prospective financier may decide not to continue with the transaction.

If the search of the International Registry reveals a previously registered international interest, the searching financier will need to react accordingly, either by refusing to proceed with the transaction, or by finding out details from the registered holder of the international interest (probably by asking the debtor to pass on a request for information) and, potentially, coming to some sort of agreement with that holder.

If the financier is unsure whether the equipment falls within either Protocol, it will need to search both registries. This is because the analysis in either of the previous paragraphs might apply, and the financier will not know which analysis is correct. It might well be easier for a financier to search both registries than to come to a final decision as to whether the equipment falls within a Protocol. However, it may want to know this information for other reasons, such as those discussed above.

2. Data flows between registries

One way of reducing costs, both for those registering in two registries and searching two registries, is for information registered in one registry to flow automatically to the

67. CTC, Article 29.
68. This statement would not necessarily be true during the ‘grace period’ referred to in relation to prior interests in section III.A.v above, since a prior interest could be registered in the International Registry at any time in that grace period and retain its priority position that it previously had under domestic law.
69. See sections III.A.iv and IV.A.i.
70. It will have to give notice of sale to any such holders who have given notice of their rights to the enforcing creditor (Article 8(4)(b)) and distribute any surplus value on enforcement to such holders (Article 8(6)). There is also a possibility that the holder of a lower ranking interest will commence enforcement (under domestic law) before the first ranking creditor does, and, while this cannot alter the priority ranking of the creditors, such enforcement could cause practical difficulties for the first ranking creditor as it will have to enforce its interest over the proceeds of enforcement rather than the equipment itself.
other registry. While the main question as to whether such data flow is achievable is a technological one, since it will depend on interoperability between computer systems, there are also legal and practical questions as to how this could be achieved. The most sophisticated solution is for there to be a common interface between the two registries, that is, between the International Registry on the one hand, and each national registry on the other. Given the differences in technological systems that exist between national registries, this raises many complex issues: a common interface that works for one state may not work for another. Moreover, some national registries may have a debtor-based system, where entries are indexed by an identifier of the debtor, rather than an asset-based system, where entries are indexed by the serial number of the equipment (or another identifier) as in the International Registry.

Interconnectivity might be more easily achieved where there is a designated national entry point for registration in the International Registry. A state can, when ratifying, designate one or more entry points, through which information shall or may be transmitted to the International Registry. Such an entry point could be made compatible with the domestic registry, so that an application to register in the International Registry also effected a registration in the domestic registry. A much simpler system might achieve many of the benefits of interconnectivity without raising difficult technical issues. For example, a domestic registry could provide a service to searchers whereby it searched the International Registry and provided information about any entries in that registry on the same search certificate as that relating to entries on the domestic registry.

If the analysis in section IV.A above is correct, there are relatively few situations in which double registration or double searching will be needed, and a decision as to whether to actually do either activity is largely a matter of weighing costs and benefits. The extent to which the existence of a data flow system changes this calculation will depend on whether it can significantly reduce costs or not: if it can, any concerns about the expense of double registration or searching will be allayed.

3. Notices of sale

The Aircraft Protocol to the Cape Town Convention treats a sale of an aircraft object as an international interest, which can be registered in the International Registry. Thus, the priority advantages and the insolvency advantages (if any) apply to a registered sale. Rather than taking this approach, both the Rail Protocol and the MAC Protocol enable notices of sale of equipment to be registered in the International Registry for the purposes of information only. There are at least three reasons for this. First, while such a registered notice has no effect on priority under the CTC rules, it could have an effect on the priority position of a later secured creditor or a second buyer (if

72. Some national registries have a system which indexes by both debtor identifiers and asset identifiers.
73. See Rail Protocol, Article XIII; MAC Protocol, Article XVI.
74. See Rail Protocol, Article XVII; MAC Protocol, Article XX.
75. See Gullifer (fn 39) 97, 118–19.
equipment were sold twice by the same seller) under the applicable domestic law. Second, registration of such a notice provides a cheap and easy factual method for a buyer to publicize its interest, and for potential secured creditors or buyers to check whether the debtor or seller has power to dispose of the equipment. Third, pragmatically, registration of notices of sale will bring extra income to the International Registry, which would have a beneficial effect to its users.

Only the first of these reasons involves the application of domestic law. As noted above, the CTC, as applied by the Rail and MAC Protocols, does not provide a priority rule for the situation where equipment is sold to one buyer and then to another, and, where equipment is sold to a buyer and then the seller grants an international interest to another person, the CTC merely requires that the debtor has ‘power to dispose’ of the equipment. Whether there is ‘power to dispose’ is a matter for the applicable domestic law.

Not surprisingly, the response of domestic law to a voluntary registration of a buyer’s interest can vary enormously from state to state. The situation in which it could potentially respond is where A appears to own a piece of relevant equipment, and sells it to a buyer (B) or grants a security interest in it to a creditor (C), without revealing that (A) has already sold the equipment to D. In many jurisdictions, B, if in good faith and without notice of the sale to D, will take free of D’s interest, although this is often qualified by a requirement that A be in possession of the equipment at the time of the sale to B. In some jurisdictions, C, if in good faith and without notice, will take free of D’s interest in some circumstances, although in many jurisdictions, the fact that A has no ‘rights in the collateral’ will prevent the grant of a security interest to C.

If a notice of the sale by A to D has been registered in the International Registry, this could, under some domestic laws, count as some kind of notice to B or C. For example, a domestic law could take the view that B or C was expected to check any available register to see if there were any interests affecting the equipment. If B or C had checked the International Registry, they would be held to have actual notice of D’s interest, and, if they did not, they might be held to have some kind of constructive or deemed notice. It is also possible that the fact that the interest had been made public by registration in the International Registry could, in some jurisdictions, prevent B or C being in good faith. However, the application of a jurisdiction’s ‘taking free’ rules is likely to be very fact dependent. One relevant fact could be that the registration of the notice of sale was voluntary and not compulsory.

V. THE IMPORTANCE FOR A STATE OF RATIFICATION OF THE RAIL AND MAC PROTOCOLS

Secured transactions law is one element of a state’s credit infrastructure. Its purpose is to provide a framework whereby creditors can extend finance in confidence that they have sufficient legal rights against assets to enable them to be repaid if the debtors default. The more confidence creditors have, the more they will be willing to extend credit, and the lower the cost at which they will be willing to do so. The robust CTC regime is designed to provide these benefits of more and cheaper credit in relation to

76. See section III.B.ii.
77. In this paragraph, this general term includes leasing law, which is often more specialist than secured transactions law and, where both are statutorily codified, is likely to appear in a separate piece of legislation.
the financing of high value mobile equipment, while general secured transactions law reform has as its purpose the introduction of a regime to provide these benefits to a state’s businesses more generally.

Agencies involved in secured transactions law reform, such as the World Bank Group, see the CTC rail and MAC regimes as complementing their domestic law efforts, by adding an international framework for important equipment and cross-border transactions. The internationality is particularly important where equipment is imported or where financing comes from outside the state. The CTC regime also complements domestic reform in two specific ways. The first relates to registration. Where a state has not yet introduced, or completed the introduction of, a modern secured transactions registry, the CTC rail and MAC regimes provides an extremely efficient and robust registration system for international interests in the equipment falling within the Protocols. Where a state has introduced a modern registry, this can be coordinated with the CTC registration regime in a way which maximizes the economic benefits. The second relates to enforcement. Even a reformed domestic regime may not provide optimal enforcement rights, at least in practice, and the efficient CTC remedial regime will therefore provide advantages to those financing or leasing equipment which falls within the Rail and MAC Protocols.

VI. CONCLUSION

This article draws out and builds on the themes discussed by the panel at the Cape Town Convention Academic Project Conference held in September 2019. While, as shown in section II above, there are a number of situations in which domestic law will, or may, be relevant where an international interest is created in railway rolling stock or MAC equipment, this paper particularly focuses on two particular areas: the scope of the Protocols as regards the assets and transactions covered, and the effect of registration under domestic law and the Convention. The practical impact of the fact that a piece of equipment does, or may, fall within one or other of the protocols is assessed.

As a result of this assessment, certain conclusions can be drawn. First, in many cases where an international interest is created, a parallel domestic one will also be created. To the extent that this is the case, this lessens the importance of the fact that, as in any line drawing, there may be some uncertainty as to whether a particular piece of equipment falls within a protocol, and that any given business may have some financed equipment which falls within a protocol and some that does not. A financier or lessor will have the benefit of domestic law in any event (providing it takes steps to create and perfect a domestic law interest) and, in relation to equipment in which an international interest is created, it will have the added benefits of the CTC remedial regime, and, if it registers in the International Registry, the priority advantage.

79. As pointed out in section IV.A.1 above, where the consequences of non-registration in a domestic law regime are just loss of priority and ineffectiveness on insolvency, a secured creditor with an international interest will only need to register in the International Registry and not in the domestic registry, unless it wants to protect an interest in the proceeds.
80. The ‘priority advantage’ is explained in section III.C.2 above.
This argument could be reversed, however, and the financier or lessor could be seen as suffering a disadvantage to the extent that the financed or leased equipment did not fall within one of the Protocols. This disadvantage is also present in relation to the proceeds of equipment which do not fall within the narrow definition of ‘proceeds’ in the CTC. The extent to which there is such a disadvantage will depend on the nature of the domestic law. If the domestic secured transactions law includes similar protections for secured creditors as the CTC (for example, robust priority rules linked to an effective registration system, a strong remedial regime permitting out of court enforcement) the difference is less marked. On the other hand, if a domestic regime does not, for example, have a registration system for security interests whereby a secured creditor can publicize its interest and ensure priority over other interests, the creditor is much better off if its interest is an international interest and it can obtain these advantages by registering in the International Registry.

It should also be noted (though not discussed in detail in this article) that the holder of an international interest will be able to enforce that interest according to the CTC regime in any Contracting State: this may well not be the case for the holder of just a domestic interest.

Another conclusion, arising from the discussion in section IV.A, is that those financing debtors in relation to railway rolling stock or MAC equipment in ratifying states will not necessarily be subject to requirements of double registration or double searching. In many cases, the decision to register or search in two registries is a matter of choice, and the benefits are either marginal or can be assessed as a cost/benefit calculation. To the extent that registration in either the International Registry or the domestic registry is cheap, easy and quick, the cost side of this calculation is usually easily outweighed by the benefits. The cost could be reduced even more were a system of data flow between the two types of registries to come into being.

The panel at the Cape Town Convention Academic Project Conference in 2019, and now this paper, has contributed to the debate as to the interaction between the Cape Town Convention regime and domestic law as regards financing and leasing of equipment which, in the absence of a CTC regime, is likely to be covered by general secured transactions and leasing laws. The advantages of the CTC regime of clarity, certainty and a very robust registration regime, which are likely to lead to economic benefit, can be seen in a domestic context. As shown by the analysis in this article, the extent of these advantages in any given state will depend on how far they are also included in the domestic law regime. If, for example, the domestic registration regime is sufficiently robust, the only issue is how coordinated it is with the CTC regime. If it is not, the CTC regime can provide a robust regime in relation to equipment within the scope of the protocols. In both cases, the added advantage of the internationality of the CTC system, whereby a harmonized regime applies in all Contracting States, facilitates cross-border financing and importation transactions and provides an additional reason for ratification.