

From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols

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The preparation of any international uniform law is a long and arduous business. The Cape Town project began as a relatively modest venture on a proposal made in June 1988 by Mr T.B. Smith QC, the Canadian member of the UNIDROIT Governing Council, to build on the *UNIDROIT Convention on International Financial Leasing*, which had been adopted the same year, and prepare an instrument focused on mobile equipment but otherwise broader in scope than the Leasing Convention. The new instrument would deal with security interests in mobile equipment, covering not only security in the traditional sense but also the interests of conditional sellers and lessors.

Now experience over the years has shown the vital importance of establishing three key factors before embarking on a project of uniform law. First, is there a problem? That may seem an obvious question but I can recall the time when UNIDROIT was very much influenced by academics – which, of course, is an excellent thing, there can never be too many academics – and the Governing Council had on its work programme a large range of projects most of which had appeared in the programme because a member of the Governing Council had had a bright idea! The existence of a problem was assumed to arise simply from differences in national laws. That rather happy-go-lucky approach was long ago abandoned, and the Governing Council will

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not approve a project unless at least three questions receive a satisfactory answer: is there a problem? is there a feasible solution? and is the project likely to receive a substantial measure of support not only from governments but from industry and other interested sectors?

This was where Professor Ron Cuming of the University of Saskatchewan came in. An international expert on secured transactions, Professor Cuming sent a letter to academic experts in 11 different countries setting out the possible parameters of the project and a set of assumptions which his enquiry to the experts was designed to test. This was followed by a detailed study¹ which, from the responses received, showed that there were indeed serious problems in the taking of security over mobile equipment and that it was desirable to have an international Convention to address these.

However, Professor Cuming was careful to point out that he had not had the time to undertake empirical research. Accordingly, a questionnaire was sent out by UNIDROIT to approximately 1,000 business and financial institutions designed to elicit the requisite empirical information. The responses indicated that from the perspective of legal practitioners and industry interests there were indeed a range of quite serious problems in the financing of mobile equipment such as aircraft objects, railway rolling stock and space assets for the resolution of which an international Convention was desirable.

The most serious problem concerned the international protection of security and related interests in mobile equipment. A security interest may be effective for this purpose if perfected under its law of origin but this is no guarantee that its efficacy will be recognised in other jurisdictions. The widely adopted conflict of laws rule is that property rights in tangible movables are governed by the *lex rei sitae*, or, as we would say in England, *lex situs*. (It will be noted that English Latin is different from European and even Scottish Latin. We are very fond of Latin in the English legal world; we put things into Latin when they are too banal to say in English.) So we looked at the *lex rei sitae* but fairly quickly concluded that it was not well suited to equipment that has no fixed *situs*, for example, aircraft flying from one jurisdiction to another in the course of its daily life or railway rolling stock crossing national boundaries every day. Nor does it work for space assets, for when in outer space these are not within the territorial boundaries of any jurisdiction. Not so long ago there

¹ R.C.C. CUMING, International Regulation of Aspects of Security Interests in Mobile Equipment (UNIDROIT Study LXXI – Doc. 1, December 1989).

was a case in New York² involving half a billion dollars of collateral, including satellites in outer space, and the secured creditor's claim to priority was met by unsecured creditors with the argument that in the absence of any law governing priorities of assets in space there was no basis for giving priority to a secured creditor over an unsecured creditor. Everyone was flummoxed by the question how to determine the applicable law and in the end the case was settled, though there were other factors involved. It was stated in one of the filed documents that the problems created by the issue of the applicable law would have been avoided if the Space Protocol had been in place.

Then there were problems about default remedies. A secured creditor³ might find that while the laws of his own country provided a range of effective and efficient remedies for default, the laws of other jurisdictions in which the creditor might wish to take enforcement action could be strongly debtor-oriented, and even a successful outcome might take months, or even years, to achieve. That, indeed, was a factor strongly influencing the question whether institutions in a particular jurisdiction could get access to credit at all and, if they could, whether it would be available at a reasonable cost. An international regime providing strong creditor protection could thus increase the availability of credit and reduce its cost.

So there was clear support for a uniform law project. Even so, we proceeded cautiously. A restricted exploratory group was set up which would take as its starting point a rule of recognition as regards the validity of security interests but would formulate substantive priority rules. A broad view was to be taken of the concept of security, embracing not only security in the traditional sense but also sales under reservation of title and leases. The group concluded that the project was both useful and feasible. It favoured the creation of a *sui generis* international interest derived from the Convention itself and constituting a right *in rem*. If this were found not to be feasible there should be a rule of recognition of a security interest created either under the law of the nationality registration of the equipment (as for aircraft) or under the law of the debtor's principal place of business. The Convention should include some basic default remedies and priority rules.

The Governing Council then established a Study Group to carry the project forward. The group appointed a two-person sub-committee consisting

² *In Re ProtoStar Ltd.*, Case No. 09-12659 (MFW), US Bankruptcy Court for the District of Delaware.

³ For brevity, "secured creditor" is used throughout to include a conditional seller and a lessor.

of Professor Hervé Synvet of the University of Paris II and myself to produce an initial draft of a few key aspects of the proposed Convention, namely the sphere of application, the creation of a new international interest, the establishment of an international register and the recognition of international interests in mobile equipment created under the Convention. We were quite proud of the succinctness of our draft, which sought to cover these basic issues in a mere five articles! That has become my definition of an optimist! We were not to know that, as the range of issues to be considered multiplied exponentially, we would end up with a Convention of 62 articles and an Aircraft Protocol of a further 77 articles – 99 articles in total.

THE PROJECT DEVELOPS

As so often happens, the project started with one vision and ended up with something radically different and altogether more ambitious. The conflict of laws approach was abandoned and the decision taken to proceed with provisions for the creation of an international interest in mobile equipment derived solely from the Convention, not from national law. The categories of equipment to be covered were narrowed to three: aircraft objects, railway rolling stock and space assets. Ships were excluded because of a perception (or as I subsequently concluded, a misconception) that these were already catered for by existing Conventions, though in respect of consensual security interests all of these were confined to rules of recognition and none of them had been very successful.⁴ The generic concept of a security interest was quickly abandoned in the light of opposition and instead three separate categories of international interest were specified, namely a security interest, the interest vested in a conditional seller and the interest vested in a lessor. What was originally planned as a debtor-based registration system was replaced by an asset-based system requiring, for the purposes of registration, unique identifiability of the object. Provision was made for the protection of non-consensual rights or interests without registration pursuant to a Contracting State's declaration. Registrable interests were extended to include prospective international interests, registrable non-consensual rights or interests (again pursuant to a declaration), assignments and prospective assignments of international interests, acquisitions of international interests by

⁴ See R. GOODE, "Battening Down Your Security Interests: How the Shipping Industry Can Benefit from the UNIDROIT Convention on International Interests in Mobile Equipment", the 1999 Donald O'May Lecture, *Lloyd's Maritime and Commercial Law Quarterly* (2000), 161-191.

legal or contractual subrogation, notices of national interests for internal transactions, and subordinations.

With these extensions it soon became clear that the problems were formidable. Prior international commercial law instruments had steered clear of what were regarded as taboo subjects: property rights, priority rules, rules affecting insolvency law in some degree. Now we were proposing to invade all these areas and, to that end, not only to create a brand-new type of interest but also to establish an international registry for its protection. Even definitions presented a problem. How to define an aircraft? an aircraft engine? How to deal with the concepts of internationality and mobility (interestingly, the Convention is entirely silent on these two issues, treating them as inherent in the categories of equipment covered).

What transformed the entire process was the involvement of Airbus Industrie and The Boeing Company, which together established the Aviation Working Group under the leadership of Jeffrey Wool, a specialist aviation finance lawyer who had already been engaged as consultant to UNIDROIT. The AWG, which is now a semi-permanent organisation and a great driving force in the project, began to come up with a series of papers, including detailed drafts, which were of inestimable value. Even so, some of the nuts were hard to crack. The aviation industry spent six months working out definitions of aircraft objects and aircraft engines and even then did not get it right the first time. Then default remedies had to be fashioned, provisions devised for the International Registry and priorities. In fact, the priority rules governing international interests are remarkably simple and are all gathered together in a single article, Article 29. The drafters eschewed the complexity of national laws and went for simplicity. More complex are the priority rules governing assignments of associated rights, that is, rights to payment or other performance under the security, etc., agreement. The rules for the International Registry proved to be complex. There had to be provisions for a Supervisory Authority to control the International Registry, the immunity of the Supervisory Authority, the liability of the registrar (strict) and provisions for insurance.

The next question arose from the fact that work on aircraft objects, railway rolling stock and space assets was proceeding under different working groups operating at different speeds. How, for example, was the work on aircraft objects to avoid being held up pending progress with railway rolling stock and space assets? That was where Lorne Clark, General Counsel of the International Air Transport Association (IATA), came up with a brilliant solution. Why not adopt a two-instrument approach: a framework Convention

which would apply to all three categories of assets without differentiation and then separate Protocols for each category of asset, which would, unusually, control the Convention, adapting it to the needs of the particular industry sector affected, while allowing each group to proceed at its own pace. Interestingly, this proved quite controversial. There were those who argued for a series of stand-alone Conventions, and the argument was so fierce that it was only on the first day of the diplomatic Conference in Cape Town that opponents of the two-instrument approach finally bowed to the will of the vast majority of delegates speaking on the issue. The advantages are manifest: a single Convention allowing of uniform interpretation of provisions not specific to a particular category of equipment, as opposed to a series of Conventions drafted by different hands; a text not cluttered by detailed technical definitions of the assets covered or the varying requirements of the different sector; and the avoidance of the need for two, or even three, diplomatic Conferences or alternatively one enormous Conference lasting for several weeks.

In collaboration with the AWG UNIDROIT advanced the project through the Study Group and various specialist groups, in particular an Insolvency Working Group, a Public International Law Working Group and an International Registry Task Force. Meanwhile UNIDROIT had been joined by IATA and finally, as co-sponsor of the project and co-organiser of the diplomatic Conference, by the International Civil Aviation Organization. Innovative features were added: a system of declarations which enabled States for whom a particular provision might run counter to its basic legal philosophy to opt into or opt out of the provision; a new default remedy of de-registration and export of aircraft; an extension of the Convention registration and priority rules to cover outright sales of aircraft objects and, later, of space assets. The AWG, IATA and ICAO also commissioned an economic impact assessment from INSEAD in Paris and the New York University Salomon Center, and the resulting report estimated that on conservative assumptions the economic gains that could be expected to result from the Convention and Aircraft Protocol would run to several billion U.S. dollars a year and would be widely shared among airlines and manufacturers, their employees, suppliers, shareholders and customers, and the national economies in which they are located.⁵

⁵ A. SAUNDERS and I. WALTER, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applicable to aircraft equipment through the Aircraft Equipment Protocol: Economic Impact Assessment* (September 1998).

Two further developments resulted from the diplomatic Conference. First, the Conference passed a resolution requesting the Chairman of the Drafting Committee to prepare an Official Commentary in collaboration with the two Secretariats, Chairmen of Conference committees and participating governments and observer organisations. The unique feature here was that instead of an Explanatory Report submitted for approval by the diplomatic Conference, which would be the normal procedure, the Official Commentary was to be prepared afterwards and the text prepared and finalised in the light of comments received. This had two great advantages. In the first place, it enabled the preparation of a much fuller and more well-informed commentary than would have been possible for a text prepared in advance. Next, if similar Official Commentaries were called for by resolutions of subsequent diplomatic Conferences (as proved to be the case at both the Luxembourg and the Berlin conferences on railway rolling stock and space assets respectively) then these could reflect new knowledge and thinking and allow the prior Official Commentaries to be revised so as to align the three texts.⁶

The second development was that UNIDROIT for the first time assumed the unique role of Depositary of instruments of ratification and the like, a particularly arduous role because of the complex system of declarations but one which it has performed to perfection.

There is no question that this vast effort has been crowned with success. We now have a Convention and Protocols for all three categories of object.⁷ The Convention itself has been ratified by 51 States plus the European Community (now the European Union) and the Aircraft Protocol by 45 States plus the European Community. In the United Kingdom the Minister for Business and Enterprise has publicly announced that the UK Government is committed to ratification of the Cape Town Convention and Aircraft Protocol, subject to some more work on costs and benefits, the aim being to complete the process as soon as possible. It is expected that a final decision will have been announced by the time this article appears. A positive statement may

⁶ The Official Commentary on the Convention and Space Protocol will be published in the first half of 2013; the third edition of the Official Commentary on the Aircraft Protocol and the second edition of the Official Commentary on the Convention and Luxembourg Protocol have been prepared and await only the formal approval by the Council of ICAO of new regulations for the aircraft registry, to which the regulations for the registry of railway rolling stock will be closely tied. These Official Commentaries will be published towards the end of 2013.

⁷ The Luxembourg Protocol, relating to railway rolling stock, was adopted in Luxembourg in February 2007; the Space Protocol in Berlin in March 2012.

encourage other European States to ratify. Australia has now announced its intention to ratify.

What are the lessons to be learned from the Cape Town experience? First, the effort involved is very substantial and should never be under-estimated. If we had known at the outset the prodigious labours that would be entailed we probably would never have embarked on the project in the first place. However, the other side of the coin is that if a uniform law project is really important it can be made to happen through a combination of expertise and sheer determination. The UNIDROIT Secretariat played a pivotal role in carrying the project forward and working indefatigably towards its conclusion. Secondly, it is critically important to involve industry experts, and building up their support, from the very outset. It would not have been possible to bring such a major project to fruition without the active participation of the various industry sectors affected, as well as government and academic experts, and bodies such as the AWG and IATA and, of course, the co-sponsor, ICAO. Thirdly, it is often assumed that the work has been completed with the adoption of the relevant international instrument and that it will secure ratification by its own self-evident quality. That is far from the case. Adoption is merely the halfway point. What is then needed is a major campaign for ratification and its implementation in domestic legislation where ratification is not self-executing. Here again, the AWG has played a major role, presenting the case for ratification to governments around the world and offering advice and assistance as to the form of ratification. Finally, I have come to realise over the years that a project is unlikely to make progress unless there is a single individual external to the Secretariat acting as a driving force to harness support and input, working with the Secretariat. In the case of Cape Town the driving force has been Jeffrey Wool, the Secretary-General of the AWG, who has worked tirelessly to bring all this about. Without his labours and his negotiating skills I doubt whether we could ever have brought this project to fruition. He has also been responsible for setting up the Cape Town Academic Project, a collaboration between the law schools of Oxford University and the University of Washington, with the co-operation of UNIDROIT and ICAO. The Project has four limbs: an annual conference devoted to Cape Town; an annual electronic Cape Town Convention Journal; a comprehensive database of Cape Town materials held at the two law schools, with an on-line reporting system; and the collation of materials on the teaching of the Cape Town Convention, whether on its own or as a component of courses on transnational commercial law, comparative law, and the like.

Within UNIDROIT's dedicated Secretariat I should like to pay particular tribute to the former Deputy Secretary-General, Martin Stanford, who has recently retired from UNIDROIT after more than 40 years of devoted service and who played a crucial role in the development of the Cape Town Convention from start to finish.

It would not be right to end without paying tribute to the Government of South Africa. The three-week diplomatic Conference in Cape Town to adopt the Convention was, to the best of my knowledge, the first diplomatic Conference ever to have been held in the African continent. Not only was it superbly organised but the hospitality was overwhelming, generating a convivial atmosphere that significantly contributed to the success of the Conference. So, *floreat* Cape Town!

