

The Cape Town Convention on International Interests in Mobile Equipment : a Driving Force for International Asset-Based Financing

Roy Goode *

I. – INTRODUCTION

Friday 16th November 2001 – a day to be remembered in the annals of transnational commercial lawmaking when, at a Diplomatic Conference in the beautiful city of Cape Town, no fewer than 20 States (just under one-third of the total number represented at the Conference), followed subsequently by two others, signed the *Convention on International Interests in Mobile Equipment* (the Convention) and the *Protocol on Matters specific to Aircraft Equipment* (the Aircraft Equipment Protocol).¹

There was a proposal to include the name of UNIDROIT in the title, as had been done with the 1988 *Conventions on International Factoring and International Financial Leasing*, but in a gracious gesture the Secretary-General of UNIDROIT, Professor Herbert KRONKE, expressed the wish that in tribute to the Conference host, the Government of South Africa, the Convention should become informally known as the *Cape Town Convention*. The tribute was well deserved. The South African Government organised a Conference that was truly superb in every way, from the courtesy and efficiency of all the arrangements and hard work of the staff to the warm and generous hospitality, all of which did so much to engender a feeling of mutual goodwill among the Conference delegates.

* Emeritus Professor of Law in the University of Oxford (United Kingdom); member of the UNIDROIT Governing Council; Chairman of the UNIDROIT Study Group for the preparation of the preliminary draft UNIDROIT Convention that served as the basis for intergovernmental negotiations and Chairman of the Drafting Committee at the Diplomatic Conference. The writer has been entrusted with the task of preparing the Official Commentary on the Convention and Aircraft Equipment Protocol and, after distribution to States and Organisations participating in the Diplomatic Conference, this will be published in *Unif. L. Ref. Issue 2002-2*.

¹ The texts of the Convention and Protocol are reproduced in this issue of *Unif. L. Rev.*, pp. 132 and 184, respectively.

The Convention and Protocol are the product of close collaboration between the two sponsoring Organisations, the International Institute for the Unification of Private Law (UNIDROIT), which had initiated the project many years before, and the International Civil Aviation Organization (CAO). Also closely involved in the work were, for aircraft objects, the International Air Transport Association and the Aviation Working Group; for railway rolling stock, the Intergovernmental Organisation for International Carriage by Rail (OTIF) and the Rail Working Group; and for space assets, the United Nations Commission on the Peaceful Uses of Outer Space (U.N. / COPUOS) and the Space Working Group.

The framework, objectives and key provisions of the Convention and the Aircraft Equipment Protocol in their earlier incarnations have been described in previous issues of the *Uniform Law Review*.² In essence the Convention, with its Protocols,³ is designed to overcome the problem of obtaining secure and readily enforceable rights in aircraft objects, railway rolling stock and space assets which by their nature have no fixed location, and in the case of space assets are not on earth at all. The problem is not so much one of determining what law applies – which can be resolved by a uniform conflict of laws Convention such as the 1948 *Geneva Convention on the International Recognition of Rights in Aircraft* – but rather the widely differing approaches of legal systems to security and title reservation rights, engendering uncertainty among intending financiers as to the efficacy of their rights. The result is to inhibit the extension of finance, particularly to developing countries, and to increase borrowing costs. The Convention and its supporting Protocols have five basic objectives:

- to provide for the creation of an international interest which will be recognised in all Contracting States;
- to provide the creditor with a range of basic default remedies and, where there is evidence of default, a means of obtaining speedy interim relief pending final determination of its claim on the merits;
- to establish an electronic international register for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and the debtor's insolvency administrator;
- to ensure through the relevant Protocol that the particular needs of the industry sector concerned are met;
- by these means to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

This article focuses on some key issues that arose at the Diplomatic Conference and important changes to the text submitted to the Conference.

² See "A new international regimen governing the taking of security in high-value mobile assets: the legal and economic implications", *Unif. L. Rev.*, 1999-2, a special issue devoted to the projected Convention and Protocols; Roy GOODE, "Transcending the Boundaries of Air and Space: the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment", *Unif. L. Rev.*, 1998, 52; Jeffrey WOOL, "Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: A Proposal for the Development of a Policy-Based Unification Model", *Unif. L. Rev.*, 1997, 46; Howard ROSEN, "Building a Railway to the Future – Progress on the Draft UNIDROIT/OTIF Rail Protocol", *Unif. L. Rev.*, 2001, 50; and Martin STANFORD / Alexandre DE FONTMICHÉL, "Overview of the current situation regarding the preliminary draft Space Property Protocol and its application by COPUOS", *Unif. L. Rev.*, 2001, 60.

³ The only draft Protocol ready for the Diplomatic Conference was the draft Aircraft Equipment Protocol. Preliminary draft Protocols for railway rolling stock and space assets have been prepared and are under consideration with a view to their being submitted to future Diplomatic Conferences.

II. – THE TWO-INSTRUMENT STRUCTURE

For a considerable time before the Diplomatic Conference there had been a lively debate about structure. Work had proceeded on the basis of two separate instruments: a Convention that would not be equipment-specific and a separate, and controlling, Protocol for each category of equipment covered by the Convention, namely helicopters, airframes and aircraft engines, railway rolling stock and space assets. There were those who favoured instead a series of stand-alone Conventions, one for aircraft objects, a second for railway rolling stock and a third for space assets. The single-instrument approach was felt to be more user-friendly. It did, however, possess a number of drawbacks.⁴

The issue of structure was addressed at the beginning of the Diplomatic Conference, when it soon became clear that there was overwhelming support on the one hand for the two-instrument structure but on the other for the production of a Consolidated Text which would integrate the provisions of the Convention and the Aircraft Equipment Protocol, providing users with a single text issued under the imprimatur of the Joint Secretariat and one on which they could confidently rely. The initial idea that this should be available in final form, subject to corrections, by the end of the Diplomatic Conference was eventually abandoned because of the sheer problem of keeping up with amendments to the texts, so that while Resolution No. 1 is expressed to take note of the Consolidated Text as set out in the Attachment to the Resolution, there was in fact no attachment, and the Consolidated Text was not completed until some time after the end of the Conference. It is a very skilful piece of work and in the aviation industry is likely to be the document used as a day-to-day working tool, though of course it is the Convention and the Aircraft Equipment Protocol that are the legally operative instruments.

III. – SCOPE OF CONVENTION

The Conference endorsed the position taken at the Joint Sessions⁵ to restrict the initial scope of the Convention to aircraft objects, railway rolling stock and space assets. It had at one time been thought that a fast-track procedure might be used for the adoption of the future draft Rail and Space Protocols, avoiding the need for a further Diplomatic Conference, but in the end it was concluded that this would be unacceptable to many States. Accordingly work on those two preliminary draft Protocols will proceed with a view to their being concluded at future Diplomatic Conferences. There will be a second meeting of governmental experts in Rome in June at which it is hoped to conclude a draft Rail Protocol ready for submission to a Diplomatic Conference. Work on the preliminary draft Space Protocol, though less advanced, is moving forward and the first meeting of governmental experts is expected to take place at the end of 2002 or early in

⁴ See GOODE, *supra* note 2, at 58.

⁵ The three Joint Sessions of the UNIDROIT Committee of Governmental Experts and the ICAO Legal Sub-Committee.

2003. Article 51 of the Convention prescribes a procedure for future Protocols covering other types of equipment. UNIDROIT, as Depositary, may create working groups to consider the feasibility of such Protocols and to prepare texts for consideration by States and intergovernmental and other Organisations, and when a text is considered ripe for adoption it will go to a Diplomatic Conference.

The Convention provides for protection of five different categories of interest:

(1) *International interests*, that is, interests granted by the chargor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement, other than interests arising under an internal transaction in respect of which a State has made a declaration excluding the application of the Convention. The international interest is the primary category of interest with which the Convention and the Aircraft Equipment Protocol are concerned.

(2) *Prospective international interests*, that is, interests intended to be taken over existing, identifiable equipment as international interests in the future but which have not yet become international interests, for example, in the case of a security agreement because the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an interest in the equipment to be charged. A prospective international interest may be registered as such in the International Registry but does not have effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration as a prospective international interest.

(3) *National interests*, that is, interests registered under a national registration system which would be registrable as international interests but for the fact that they are created by internal transactions in respect of which a Contracting State has made a declaration under Article 50 excluding the application of the Convention. However, such an exclusion is of very limited effect.⁶

(4) *Non-consensual rights or interests arising under national law and given priority without registration*. A Contracting State may make a declaration under Article 39 specifying non-consensual rights or interests which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual interests are not themselves registered.

(5) *Registrable non-consensual rights or interests arising under national law*. A Contracting State may make a declaration under Article 40 that non-consensual rights or interests arising under its law may be registered in the International Registry, and any such right or interest that is so registered is then treated for the purposes of the Convention as a registered international interest. Possible examples are a judgment or order affecting equipment of a category to which the Convention applies and a legal lien in favour of a repairer or warehouseman.

⁶ See *infra*, pp. 12-13.

The Convention covers not only interests within one or other of the above categories but also “associated rights”, that is, rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Associated rights do not include sums payable under other contracts, whether by the debtor or by a third person, but these can be made associated rights by including in the agreement an undertaking by the debtor to perform or procure the performance of those other contracts and by securing that undertaking on the object. Associated rights are relevant only in the context of an assignment, in which connection they gave rise to much debate and a number of additional provisions, discussed below.

Purely personal contractual rights not secured on an object are outside the scope of the Convention, though Article 39(1)(b) preserves the efficacy of rights of arrest or detention under the law of a State for sums due by a provider of public services.

IV. – THE INTERNATIONAL REGISTRY AND THE REGISTRATION SYSTEM

At the heart of the Convention is the system of registration of international interests (and of prospective international interests, registrable non-consensual rights or interests and notices of national interests) in the International Registry. The registration system is wholly automated, so that at the Registry end no human intervention is involved in checking registration applications, effecting registrations, receiving search requests and issuing search certificates. As regards aircraft objects the International Registry will be operative 24 hours a day, seven days a week,⁷ though obviously the system will have to be shut down for short periods from time to time to deal with maintenance and system malfunction. An intending creditor under an agreement relating to an existing and identified object will be able to register a prospective international interest, and the effect of this is that when this blossoms into a completed international interest it will rank for priority as from the time of registration of the prospective international interest provided this registration is still current immediately before the international interest comes into existence.⁸ No further registration will be required so long as the registration information is sufficient for registration of an international interest.⁹ To facilitate this and prevent searchers from being misled, Article 22(3) provides that a search certificate will say simply that the creditor has acquired or intends to acquire an international interest without indicating whether what is registered is an international interest or a prospective international interest. It is then for the interested third party to enquire of the registrant as to the status of the latter’s rights.

Two further issues gave rise to much debate: the immunity from suit to be enjoyed by the Supervisory Authority and the Registrar and the nature of the Registrar’s liability for errors, omissions and system malfunction. Under the provisions laid before the Diplomatic Conference the Supervisory Authority would enjoy immunity (it was for

⁷ Aircraft Equipment Protocol, Art. XX(4).

⁸ Convention, Art. 19(4).

⁹ Convention, Art. 18(3).

discussion whether this would be full or only functional immunity), while the Registrar and its officers and employees would enjoy functional immunity except for the purpose of claims against it for errors, omissions and system malfunction. In the end it was decided that the Supervisory Authority (which would have international legal personality where not possessing it already¹⁰) would enjoy such immunity as was specified in the relevant Protocol,¹¹ while the Registrar would not have immunity of any kind. Under Article XVII(3) of the Aircraft Equipment Protocol the Supervisory Authority and its officers and employees will enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise. It is envisaged that the Supervisory Authority for aircraft objects will be ICAO, which as a specialised agency of the United Nations enjoys the privileges and immunities set out in the standard clauses in the 1947 *Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations* and in Annex III, which is particular to ICAO.

It was always envisaged that the liability of the Registrar would be a strict rather than a fault-based liability and would include responsibility for system malfunction as well as errors and omissions of the Registry staff themselves. On the other hand, the liability for system malfunction was not to be absolute. Two alternative models were considered. The first is that embodied in Article 79 of the *Vienna Convention on Contracts for the International Sale of Goods* and Article 7.1.7 of the *UNIDROIT Principles of International Commercial Contracts*, namely that a party's non-performance is due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome it or its consequences. The other model, which is that adopted in Article 28 of the Convention, derives from international Conventions relating to such matters as oil pollution, the carriage of noxious substances and the like, under which the impediment must be of an "inevitable and irresistible nature." This is a stricter test, further narrowed by the requirement that the malfunction is one "which could not be prevented by using the best practices in current use in the field of electronic registry designs and operation, including those related to back-up and systems security and networking." The reason for this strict approach is the large sums of money potentially dependent on a safe and secure system for the registration and search of international interests and the need to ensure state-of-the-art technology. So the Registrar is responsible for ensuring such matters as proper design, appropriate hardware and software, regular maintenance, state-of-the-art protection against viruses and system corruption, rapid identification and rectification of a system malfunction, back-up of the data on the main site and back-up systems on other sites, and a security system to prevent unauthorised interference with stored data

¹⁰ Convention, Art. 27(1).

¹¹ Convention, Art. 27(2).

and data messages.¹² On the other hand, the Registrar is not responsible for the factual inaccuracy of information it receives or transmits in the form received.

V. – PRIORITY RULES

The priority rules are few and relatively simple. A registered international interest has priority over a subsequently registered interest and over an unregistered interest, whether or not registrable. The only exception in the text submitted to the Diplomatic Conference, apart from subordination by agreement, was that in favour of an outright buyer, whose interest is not registrable under the Convention (though it is under the Aircraft Equipment Protocol) and who is protected if acquiring the object before registration of the creditor's international interest. This exception has been retained but is now reinforced by provisions for the protection of conditional buyers and lessees, who under the original provisions were exposed to loss of their rights as the result of enforcement of a security interest in the same object given by their conditional seller or lessor. Article 29(4)(b) now provides that the conditional buyer or lessee takes free from the interest of a chargee not registered prior to the registration of the international interest held by the conditional seller or lessor. The underlying idea is the need to protect reliance on the International Registry. If, as will normally be the case, the conditional seller or lessor registers its international interest before granting the charge or before the charge is registered, the chargee will be able to learn of the existence of the conditional sale agreement or lease and ought reasonably to take its security interest subject to the rights of the conditional buyer or lessee. Where, on the other hand, the security is registered first, the chargee has no way of knowing from a search in the International Registry that the charged object has been supplied under a conditional sale or leasing agreement (indeed, this might not then have been entered into), so that in this case the chargee has priority and on default by the chargor can recover possession from the conditional buyer or lessee. In Article XVI of the Aircraft Equipment Protocol this idea is carried over into specific provisions relating to the right of the conditional buyer or lessee to quiet possession and use against the creditor and the holder of an interest subordinate to the rights of the conditional buyer or lessee.

VI. – ASSIGNMENTS

Among the more intractable set of provisions was that relating to assignments. Earlier drafts had focused on the assignment of the international interest and had provided that this would carry with it an assignment of the associated rights. This principle, which ran counter to the general principle that security is accessory to the right to payment and not the other way round, nevertheless had a certain logic, since the Convention is concerned with international interests and their assignment, not with the assignment of receivables as such, which is the province of what is now the *United Nations Convention on the Assignment of Receivables in International Trade*

¹² For further details, see the Second and Third Reports of the International Registry Task Force.

(the Receivables Financing Convention). However, in the end it was decided to adopt the more traditional approach and to make the international interest travel with the associated rights except where otherwise agreed by the parties. An assignment of the associated rights alone, without the related international interest, is outside the scope of the Convention¹³ and is thus unlikely to be very frequent.

In relation to formalities, the assignment provisions¹⁴ track those applicable to the creation of an international interest.¹⁵ Similarly, the priority of competing assignments of associated rights and the related international interests is in principle determined by the order of registration. But this is qualified in two respects.¹⁶ First, the contract under which the associated rights arise must state that they are secured by or associated with the object. At first sight this seems surprising. How can associated rights be secured by, say, a loan agreement which makes no provision for security? The answer is that they may already be secured under an earlier loan agreement which contains a cross-collateral clause securing rights not only under that agreement but under any subsequent contract and which embodies the debtor's undertaking to perform its obligations under the subsequent contract.¹⁷ If, in that situation, the associated rights under the earlier agreement are assigned to one assignee, A1, and the associated rights under the later loan contract, containing no reference to security, are assigned successively to A1 and A2, A2 will have no way of knowing that the later loan contract is connected to the object. In this case it would be unfair for A1 to be able to invoke the Convention priority rule that a registered assignment has priority over a subsequent assignment. So in such a case the priority is left to be determined by the applicable law, including (where applicable) the Receivables Financing Convention. The second qualification to the normal priority rule is that the associated rights must not merely be secured on an object but must be related to an object in the sense that they relate to an advance made (*i.e.* under a security agreement) and utilised for the purchase of the object or another object in which the assignor held another international interest transferred to the assignee under an assignment that has been registered, or the price of the object (*i.e.* under a conditional sale agreement) or the rental of the object (*i.e.* under a leasing agreement) or other obligations under any such agreement. So an assignee of associated rights will not enjoy the benefit of the Convention priority rule where its rights are to repayment of a loan made for the general purposes of the borrower and secured on an object.

13 Convention, Art. 32(3).

14 Convention, Art. 32.

15 Convention, Art. 7.

16 Convention, Art. 33(1).

17 Rights under a subsequent contract which are secured on the object but of which the debtor does not undertake performance in the earlier agreement are not associated rights in relation to that agreement.

VII. – JURISDICTION

The European Community took particular interest in the provisions relating to jurisdiction, being concerned to ensure that if there were deviations from the 2000 *EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (replacing the 1968 Brussels Convention), Member States of the European Community would have a common position. The starting point is that the courts of the jurisdiction selected by the parties have exclusive jurisdiction unless the parties otherwise agree.¹⁸ But such selection cannot exclude the concurrent jurisdiction to grant relief under Article 13 or other interim relief, which in the case of relief in the form of preservation, possession, custody or control or immobilisation of the object, or other relief in respect of the object, is the jurisdiction where the object is located, and in the case of lease or management of the object is the jurisdiction where the debtor is situated.¹⁹ Finally, only the courts of the jurisdiction in which the Registrar has its main centre of administration have jurisdiction to make orders against the Registrar.²⁰ The reasons are, first, that only such courts can exercise control, secondly, that the making of orders by other national courts would be incompatible with the international nature of the Registrar's functions, and thirdly, that the Registrar would otherwise be exposed to the inconvenience and expense of multiple proceedings in different jurisdictions and the risk of inconsistent orders. Moreover, a challenge to a registration normally involves issues between the parties rather than with the Registrar, so that the relevant jurisdiction is that appropriate to claims between the parties. Jurisdiction under the Convention is limited to the courts chosen by the parties and applications under Article 13 for relief pending final determination of the claim.

The proposed general jurisdiction clause covering cases outside Article 13 where the parties have not selected the jurisdiction was dropped in view of the difficulty of arriving at a generally acceptable formulation. Jurisdiction in such cases is determined by the *lex fori*.

VIII. – RELATIONSHIP WITH OTHER CONVENTIONS

The Convention overrides the Receivables Financing Convention as regards the assignment of associated rights related to international interests in aircraft objects, railway rolling stock and space assets.²¹ But this is of limited impact on the Receivables Financing Convention, given the limited scope of the Cape Town Convention priority rules relating to competing assignments of associated rights as described above. The

¹⁸ Convention, Art. 42(1). The agreement must be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum (Art. 42(2)).

¹⁹ Convention, Art. 43.

²⁰ Convention, Art. 44.

²¹ Convention, Art. 45 *bis*, inserted after conclusion of the Receivables Financing Convention pursuant to an Annex to the Cape Town Convention. The Annex, having served its purpose, does not form part of the published instruments.

relationship between the Convention and the 1988 *UNIDROIT Convention on International Financial Leasing* is left to be determined by the relevant Protocol.²² As regards aircraft objects, the Aircraft Equipment Protocol provides that the Convention supersedes the 1988 Convention.

IX. – RELATIONSHIP BETWEEN THE CONVENTION AND THE PROTOCOLS AND ENTRY INTO FORCE

The effect of Article 47 is that provisions of the Convention relating to an object are controlled by the Protocol covering that class of objects and the effect of Article 47 is that such provisions come into force only when the relevant Protocol comes into force, so that as regards provisions relating to aircraft objects the Convention comes into force on the day following the expiration of three months from deposit of the eighth instrument of ratification. Regional Economic Integration Organisations constituted by sovereign States and having exclusive competence over certain matters governed by the Convention may also ratify. Among these is the European Union.

X. – INTERNAL TRANSACTIONS

Although the Convention is devoted to international interests in mobile equipment, the terms “international” and “mobile” are nowhere defined, both being considered inherent in the categories of object to which the Convention applies. In earlier stages this had provoked some discussion as to whether the Convention should apply where, for example, the object in which a security interest is taken is a railway engine running round a circular track in Kansas and both the chargor and the chargee are situated in Kansas. In this situation, should the chargee have to register its interest in the International Registry in order to protect itself? There are several answers to this. First, the chargee cannot be sure that the engine will not be exported and its security interest placed at risk. Secondly, the chargee may have no way of knowing whether this has occurred. Thirdly, the policy of Article 29 is to enable intending creditors to rely on the International Registry, and thus to give priority to a registered interest over an unregistered interest even if the latter is not registrable under the Convention. To make an exception for purely domestic cases would undermine this policy. Nevertheless, to meet concerns expressed by some delegates at an earlier stage Article 50 empowers a Contracting State to make a declaration excluding internal transactions from the Convention. However, this Article is of very limited application. A transaction is an internal transaction only if the centre of the main interests of all parties is situated and the object is located in the same Contracting State, that State has a national register for registration of interests arising under the transaction and the interest in question (which the Convention terms a “national interest”) has been registered there.²³ Though a national interest does not qualify as an international interest, it continues to be governed by Articles 8(4), 9(1) and 16 as if it were an international

²² Convention, Art. 46.

²³ Convention, Art. 1(n).

interest, notice of the national interest can be registered in the International Registry, and the priority rules of Article 29 apply, so that registration protects the interest against subsequent interests, while failure to register it risks its being overridden by a subsequent registration. Finally, other provisions of the Convention relating to registered interests (e.g. Articles 30, 35(1) and 39) apply to a national interest. The application of Article 8(4) to internal transactions is rather curious, for this applies only to the proposed exercise of a power of sale or lease under Article 8(1), which will not apply! Given its complexity, the Convention contains remarkably few slips of this kind.

XI. – TRANSITIONAL PROVISIONS

There was some division of opinion as to whether the Convention should apply to interests created before its entry into force. One view was that a party who had perfected its interest under the pre-Convention applicable law ought not to be required to re-perfect under the Convention. The other view was that intending post-Convention creditors ought not to be indefinitely exposed to pre-Convention interests the existence of which they had no means of discovering. Extended debate resulted in a compromise. Article 60(1) states the general principle that the Convention does not apply to a pre-existing right or interest. Under Article 1(v) this means a right or interest of any kind in or over an object created or arising before the effective date of the Convention as defined by Article 60(2)(a), that is, in relation to a debtor the time when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later. However, the rule of non-retrospectivity is qualified by Article 60(3), which is in the following terms:

“3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.”

The purpose of the three-year period is to allow creditors ample time within which to register their pre-Convention interests in the International Registry. The declaring State may also limit the scope of its declaration. Article 60(3) was drafted at great speed on the final morning of the Diplomatic Conference to address a technical defect discovered at the last minute, and it is not free from difficulty. A full analysis will be provided in the Official Commentary. The main problem is that the Convention does not on its face require any nexus between the declaring State and the debtor, the creditor, the transaction or the applicable law. However, it cannot have been the intention to allow a Contracting State to make declarations affecting pre-existing rights or interests arising under the law of another Contracting State. It therefore seems necessary to construe Article 60(3) as confined to declarations by a Contracting State whose law governs the transaction under which the interest arises.

XII. – THE AIRCRAFT EQUIPMENT PROTOCOL

Space does not allow for more than a brief mention of the Aircraft Equipment Protocol provisions. This Protocol extends the provisions of the Convention, so far as applicable, to outright sales,²⁴ thereby enabling buyers to avail themselves of the registration facilities and priority provisions. In consequence, Article 29(3) of the Convention, which protects the outright buyer, is disapplied, for the buyer of an aircraft object can protect itself by registration. The parties can choose the law which is to govern their contractual rights and obligations.²⁵ The default remedies are extended to cover de-registration and export,²⁶ and sale and the application of the proceeds of sale are designated as an additional form of interim relief under Article 13, though only if the debtor and the creditor specifically agree.²⁷ Perhaps the most significant provision is Article XI, which lays down two alternative regimes for remedies on insolvency, dependent on a declaration by a Contracting State, which may adopt either alternative, though only in its entirety, or may make no declaration at all, and thus apply its own insolvency rules. Alternative A is the so-called hard version which requires the insolvency administrator, within whatever is specified by a Contracting State as the waiting period, to cure all defaults and agree to perform all future obligations, failing which the administrator must give the creditor the opportunity to take possession of the aircraft object. Under this alternative the court has no powers of intervention, so that Article 30(3)(b) of the Convention, which preserves the power of the court to stay enforcement (e.g. to facilitate a reorganisation of an insolvent debtor), is disapplied. Alternative B is the so-called soft option. If the insolvency administrator does not within the waiting period give the creditor the opportunity to take possession or cure all defaults and agree to perform future obligations the court may permit the creditor to take possession upon such terms, including the provision of a guarantee, as the court may order.

XIII. – CONCLUSION

The Cape Town Convention and Aircraft Equipment Protocol represent a major achievement in a field of such complexity. The international interest is a unique creation; so too is the International Registry. The Convention and the Aircraft Equipment Protocol break new ground in laying down a set of substantive rules governing speedy relief pending final determination of a creditor's claim and the priority of competing interests in mobile equipment and competing assignments of such interests. Also distinctive are the provisions relating to insolvency. An international regime which provides proper protection for security interests and title-retention rights should reduce risks for creditors, and consequently borrowing costs for debtors, and facilitate the extension of credit for the acquisition of aircraft objects, railway rolling stock and

24 Aircraft Equipment Protocol, Art. III.

25 Aircraft Equipment Protocol, Art. VIII.

26 Aircraft Equipment Protocol, Art. IX(1).

27 Aircraft Equipment Protocol, Art. X(3).

space assets, particularly in developing countries whose existing legal regimes may not be sufficiently responsive to the need of creditors to feel secure. At the same time the two instruments embody a range of safeguards for debtors to ensure that remedies are exercised in a commercially reasonable fashion, that a debtor against whom an order for interim relief is made is protected in the event that the creditor's claim is ultimately unsuccessful, and that debtors who are honouring their obligations are given a right of quiet possession against their creditors and third parties whose rights are subordinate to their own. Already several States are moving towards ratification and all the indications are that the Convention will enter fully into force in the near future.

≈ ≈ ≈

LA CONVENTION DU CAP RELATIVE AUX GARANTIES INTERNATIONALES PORTANT SUR DES MATERIELS D'EQUIPEMENT MOBILES : UNE FORCE MOTRICE POUR LE FINANCEMENT INTERNATIONAL SUR ACTIF (Résumé)

par Roy GOODE, Professeur émérite de droit, Université d'Oxford (Royaume-Uni)

Cet article présente la Convention du Cap adoptée le 16 novembre 2001 lors d'une Conférence diplomatique réunissant une soixantaine d'Etats. A cette Convention sont associés des Protocoles relatifs à des catégories d'équipements spécifiques. Le premier Protocole adopté traite des questions spécifiques aux biens aéronautiques, tandis qu'un Protocole portant sur les questions spécifiques au matériel roulant ferroviaire et un autre portant sur les questions spécifiques aux biens spatiaux suivront dans un avenir proche. Cette Convention est justifiée par la nécessité d'améliorer les conditions d'accès aux crédits, notamment pour les pays en voie de développement.

La technique de financement que se propose de promouvoir la Convention est celle du financement sur actif (asset-based financing) reposant sur la constitution d'une garantie internationale efficace grevant le bien d'équipement financé, qui est reconnue entre tous les Etats contractants. Le droit du créancier garanti porte sur bien déterminé, en garantie d'obligations déterminables. Les droits concurrents et leur ordre de priorité sur le bien sont clairement établis en centralisant leur publicité et leur inscription auprès d'un Registre international. Il s'agit d'un Registre réel (asset-based system) qui offre un service d'inscription et de consultation fonctionnant en continu, 24h/24, et utilisant les meilleures pratiques dans le domaine des registres électroniques. Enfin, le créancier garanti dispose d'une série de mesures efficaces qu'il peut mettre en œuvre en cas de défaillance de son débiteur. La Convention est, à ce titre, le cadre d'un réel équilibre contractuel dans les relations commerciales et juridiques couvertes puisqu'elle pose les règles visant à protéger le débiteur qui remplit toutes ses obligations. Ainsi, à l'exercice commercialement raisonnable des mesures s'associe l'exigence du consentement du débiteur à l'exercice de telles mesures.

La garantie internationale et le Registre sur lequel elle est inscrite constituent certainement deux innovations majeures dans un domaine aussi complexe que celui du financement international, innovations conçues pour satisfaire tant les exigences du secteur aéronautique que les attentes de nombreux Etats qui devraient mettre en œuvre prochainement les deux nouveaux instruments.

