PRIVATE COMMERCIAL LAW CONVENTIONS AND PUBLIC AND PRIVATE INTERNATIONAL LAW: THE RADICAL APPROACH OF THE CAPE TOWN CONVENTION 2001 AND ITS PROTOCOLS

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I. INTRODUCTION

It is a remarkable circumstance that with a few honourable exceptions[1] all writers on international law in general and treaty law in particular focus exclusively on public law treaties. Private law conventions, including those involving commercial law and the conflict of laws, simply do not come into consideration. Yet such conventions, like public law conventions, are treaties between States and are governed by the 1969 Vienna Convention on the Law of Treaties and many of them are of great significance. Their distinguishing feature is, of course, that while only States are parties, private law conventions deal primarily, and often exclusively, with the rights and obligations of non-State parties. So while the treaty is international it does not for the most part commit a Contracting State to any obligation other than that of implementing the treaty in domestic law by whatever method that State's law provides, if it has not already done so prior to ratification.

Yet some private law conventions are capable of making significant innovations in the methods and effects of international law-making. This article focuses, by way of illustration, on the 2001 Convention on International Interests in Mobile Equipment ('the Cape Town Convention')[2] and its associated Protocols dealing respectively with security interests and title-retention rights in aircraft objects,[3] railway rolling stock[4] and space

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[1] For example, JG Sprankling, *The International Law of Property* (OUP 2014); J Basedow, 'Uniform Private Law Conventions and the Law of Treaties' (2006) 11(4) UnifLRev 731.

[2] Adopted 16 November 2001.

[3] 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) (the Aircraft Protocol).

[4] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Rolling Stock (adopted 23 February 2007) (the Luxembourg Protocol).

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assets.[5] The Convention and Aircraft Protocol came into force on 1 March 2006;[6] the 2007 Luxembourg Protocol, dealing with railway rolling stock, and the 2012 Space Protocol have yet to enter into force. The Convention and Aircraft Protocol have achieved remarkable success in a relatively short space of time, the Convention having received 72 ratifications and the Aircraft Protocol 65, the United Kingdom being one of the last to ratify with effect from 1 November 2015.

It is not proposed to examine any of these instruments in detail, merely to set the scene with an outline of their provisions and then go on to describe the radical, and in various respects revolutionary, features of the convention and protocols, the substantial benefits they are already producing in the field of aviation finance and the technical and organizational challenges that had to be overcome.

Professor Sir Andrew Wiles, now Royal Society Research Professor of Mathematics at the University of Oxford, devoted seven years of his life to providing a proof of Fermat's last theorem, a task which had evaded top mathematicians for 350 years. Fermat's last theorem is not in itself considered of great importance.[7] What is of huge value is the range of new mathematical techniques Andrew Wiles had to devise to overcome otherwise insurmountable problems with the proof. The Cape Town instruments, though in fact important in themselves, also bring a new dimension to international law-making through the range of devices that evolved to overcome what sometimes appeared to be intractable problems. They deal with areas of private law previously regarded as exclusively for national law, recognizing that it is necessary to think outside the boundaries of national law in devising new solutions to international problems. In particular, one of the key features of the international interest which the Convention and Protocols create is that it constitutes a right *in rem* and is a creature of the Convention, not of national law. However, the public interest both in national security and in the continuance of public services also means that there are likely to be more areas in which what is primarily a private law convention will also contain public law provisions. The Convention and Final Act also contain novel and innovative procedures to address practical difficulties in achieving international agreement, for example, the novel procedure for linguistic alignment of different language texts.

[5] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (adopted 9 March 2012) (the Space Protocol).

[6] The UN Treaty Series (2307 UNTS 285) wrongly gives the date of entry into force as 1 April 2004 by reference to the deposit of the third instrument of ratification but this overlooks art 49(1)(a) of the Convention under which all the provisions apart from those that become operative under the Vienna Convention before entry into force of the Convention as a whole come into force only when the relevant Protocol comes into force.

[7] Fermat's last theorem postulates that $x^n + y^n = z^n$ is an equation having no solutions in positive integers greater than 0 for any integer value of n greater than two.

The instruments are also of interest in that, though primarily regulating the rights and obligations of private parties, they also impose duties on Contracting States. As regards aircraft objects they resulted from collaboration between the International Institute for the Unification of Private Law (UNIDROIT), an international, intergovernmental body, and the International Civil Aviation Organization (ICAO), which was established by the United Nations to manage the administration and governance of the 1944 Chicago Convention[8] regulating international air travel. The International Air Transport Association (IATA) also played an important role as the international private organization representing the worldwide aviation industry.

II. AN OUTLINE OF THE CAPE TOWN CONVENTION

The Cape Town Convention is concerned with three categories of equipment: aircraft objects, railway rolling stock and space assets. Aircraft objects divide into airframes, aircraft engines (which are often separately financed) and helicopters.[9] Railway rolling stock consist primarily of locomotives and passenger and freight wagons but the definition in Article I(2)(e) of the Luxembourg Protocol covers a wide range of additional objects.[10] Space assets subdivide into spacecraft, payloads and parts of a spacecraft or payload,[11] though anything which is not a complete spacecraft must be capable of registration under the space registry regulations. They share the characteristics that they regularly cross national borders or orbit round the Earth and they are generally of high-unit value. This poses problems for those financing the acquisition or use of such objects through secured loans, title reservation agreements or leases. Default remedies exercisable against the debtor in one jurisdiction may be more restricted than in another or may take much longer to exercise. Security rights created under the law of a particular jurisdiction may not be recognized in others and even if they are their priority cannot be guaranteed, being dependent both on the conflict of laws rules of the forum and the content of the applicable law as determined by those rules.

The consequence of these risks for creditors is that prospective buyers or lessees of such items of equipment either cannot secure the necessary finance or have to pay significantly more for it than they would in a stable legal environment. The Cape Town Convention addresses these concerns in ways that are radical, even revolutionary. Instead of having to rely on a national interest the creditor is provided with a new animal, the international interest, which derives its force from the Convention, not from national law and can

[8] Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947).

[9] Art I Aircraft Protocol.

[10] See Sir Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment as Applied to Railway Rolling Stock* (2nd edn, UNIDROIT 2014) para 3.8.

[11] Art I Space Protocol.

be created with the minimum of formalities.[12] The Convention applies where the debtor is situated in a Contracting State at the time of the agreement[13] or alternatively, in the case of aircraft, the agreement relates to a helicopter, or an airframe pertaining to an aircraft, registered in a Contracting State which is the State of registry at that time.[14]

The Convention gives the creditor a set of basic default remedies (repossession, sale, collection of income),[15] including speedy advance relief on the production of evidence of default,[16] while the Aircraft and Luxembourg Protocols confer additional remedies of deregistration (aircraft),[17] export and physical delivery.[18] The creditor's international interest is protected by registration in the international registry, created under the provisions of the Convention.[19] Registration gives that interest priority over subsequently registered interests and over unregistered interests,[20] whether registrable or not, with exceptions in favour of non-consensual rights or interests which under a Contracting State's laws give priority over the equivalent of an international interest and are declared by that State to have priority over a registered international interest.[21] Finally, the Convention and the Aircraft Protocol contain rules to protect the creditor against the consequences of the debtor's insolvency, subject to avoidance of transactions in fraud of creditors and preferences.[22]

The benefits of these instruments are considerable. US airlines have for some time been able to securitize their receivables by the issue of enhanced equipment trust certificates because of the strong creditor protection given by Section 1110 of the Federal Bankruptcy Code.[23] In Contracting States that ratify the Cape Town Convention and Protocols such benefits will now be available to non-US airlines, making borrowing from the market significantly cheaper than bank borrowing.[24] Economic assessments estimating that such ratification would save billions of dollars a year in the cost of borrowing and in premiums for export credit insurance have been borne out by experience. For example, the Organisation for Economic Co-operation and Development permits member States of the OECD to offer a so-called Cape Town Convention discount from the minimum premium rate they are required to charge for credit insurance

[12] Arts 2, 7 Cape Town Convention.
[13] Art 3(1) and 4 Cape Town Convention.
[14] Art IV Aircraft Protocol.
[15] Art 8(1) Cape Town Convention.
[16] Art 13 Cape Town Convention.
[17] Art IX(1) Aircraft Protocol.
[18] Art IX(1) Aircraft Protocol, Art VII(1) Luxembourg Protocol.
[19] Pursuant to art 16 Cape Town Convention.
[20] Art 29(1).
[21] Art 39. The same article preserves the right of arrest or detention of an object enjoyed by a State or State entity, intergovernmental organization or private provider of public services, for payment of amounts directly relating to those services in respect of the object in question or another object (eg the so-called 'fleet lien' enjoyed in the UK by Eurocontrol).
[22] Art 30 Cape Town Convention and art XI Aircraft Protocol.
[23] US Bankruptcy Code Chapter 11, Title 11.
[24] For example on 25 June 2013 'British Airways raised funds through its first-ever enhanced equipment trust certificates (EETCs) offering to finance the purchase of 14 new Airbus and Boeing aircraft'—Reuters. 'British Airways launches debut EETC offering to finance planes' available at <http://uk.reuters.com/article/newstory-idUSL2N0F11TH20130625>.

provided that they make a prescribed set of declarations.[25] It has been estimated that the cost savings will amount to an average of between USD 7 billion and USD 8 billion over a period of 20 years, repaying the substantial resources that went into the making of the Convention many times over.[26]

The Convention is an umbrella instrument the provisions of which apply indifferently to all three categories of equipment but have been modified by each Protocol to meet the particular needs of the industry—aviation, railways or space—with which the Protocol is concerned. The Convention and Protocols are governed by five underlying principles: practicality, party autonomy, predictability, transparency and sensitivity to national legal cultures. The rules have to be workable; the provisions attach high importance to party autonomy, since the parties know best what is necessary to achieve their aims; with the high sums involved, predictability is of the utmost importance, displacing good faith as a usual canon of interpretation; the registration system is designed to ensure transparency, so that third parties are not affected by hidden liens; and the Convention and Protocols give protection to the creditor in the event of the debtor's insolvency. Finally the Convention respects the sensitivity of States to its basic legal philosophy by providing for declarations by which certain provisions apply only if States make an opt-in declaration,[27] while for certain others a State may opt out.[28]

III. SOME UNIQUE FEATURES

Just as the proof of Fermat's last theorem led Andrew Wiles to devise a range of groundbreaking mathematic techniques, so also obstacles to the creation and protection of the international interest, and the need to meet the differing requirements of aviation, railways and space, forced the progenitors of the Cape Town project to enter into fields of law previously regarded as taboo in international conventions and to invent a range of novel techniques in international law-making. In the following section, eight distinctive features will be briefly described.

A. The International Interest

1. Definition

Article 2(2) of the Convention defines an international interest in mobile equipment falling within one of the three categories as 'an interest … in a

[25] The latest set of rules prescribing the qualifying declarations is contained in the Arrangement on Officially Supported Credits (TAD/PG (2016) 1, dated 1 February 2016) Annex III, Sector Understanding on Export Credits for Civil Aircraft (ASU), Appendix II, Annex 1.

[26] Such was the impact of the Convention and Aircraft Protocol that one of the first States to ratify, in the middle of a war, was—Afghanistan!

[27] See, for example, Aircraft Protocol art XXX (1) – (3).

[28] See, for example, Convention, art 55, Aircraft Protocol art XXX (5).

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uniquely identifiable object granted by the chargor under a security agreement, vested in a person who is the conditional seller under a title reservation agreement or vested in a person who is the lessor under a leasing agreement'. The interest acquired by an outright purchaser is not an international interest and is not registrable under the Convention but the Aircraft Protocol and Space Protocols extend the third-party effects of the Convention to outright sales, which accordingly fall within the registration and priority rules as regards aircraft objects and space assets.

2. Constitution

The key point about the international interest is that it constitutes a right *in rem* and is the creature of the Convention, not of national law. Not only does it trump national law interests it must be given effect in a Contracting State even if it is of a kind not known to the law of that State or of another State whose law is applicable. In his book *The International Law of Property* Professor John G Sprankling writes:

> The concept that private actors can obtain direct property rights in objects that are located within the territory of sovereign states—solely as a matter of international law—is revolutionary.[29]

The requirements for the constitution of an international interest are set out in Article 7 of the Convention and are relatively simple. The agreement creating or providing for[30] the interest must be one which (a) is in writing, (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose,[31] (c) enables the object to be identified in conformity with the Protocol,[32] and (d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to specify a sum or maximum sum secured.

3. Relationship with national law

In most cases a security agreement, title reservation agreement or leasing agreement created in conformity with the applicable national law will also be constituted in accordance with the Convention so as to give rise to an international interest. But the international interest is the creature of the

[29] Sprankling, *The International Law of Property* (n 1) 63.

[30] 'Creating' in the case of a security agreement, 'providing for' in the case of a title reservation or leasing agreement, since in these last two cases the interest of the seller or lessor does not derive from the agreement but typically precedes it.

[31] This may arise under the applicable or by inference from the provisions of the Convention. The provision for registration of an interest held by a conditional seller or lessor implies that the conditional buyer or lessee has a power of disposal, for only the conditional seller or lessee in possession is likely to be in a position to dispose of the object, so that it is only against such a disposal that registration serves any purpose.

[32] In the case of an aircraft object the identification criteria are the manufacturer's serial number, the name of the manufacturer and the (generic) model designation (art VII).

Convention and is not dependent on national law except, of course, that the agreement must be a valid contract under the applicable law (the interaction with private international law is discussed further below). Given this, the fact that the applicable law does not recognize an interest of the kind created by the Convention is irrelevant. The national law interest continues to subsist but in most cases is subordinate to a registered international interest. There will, however, be cases where it may be necessary to rely on the national law interest. For example, while the Convention covers the proceeds of an object, 'proceeds' is narrowly defined as money or non-money proceeds of an object arising from its total or partial destruction, confiscation, condemnation or requisition.[33] So it may be necessary to invoke national law to capture general proceeds, such as the proceeds of wrongful disposition of the object by the debtor.

B. The International Registry and the Supervisory Authority

Equally striking are the provisions establishing an International Registry to record the grant, assignment, subordination and discharge of international interests.[34] To quote Professor Sprankling again:

> The registration system established under the convention is a remarkable achievement - an international mechanism for defining and coordinating security interests among private actors, independent of municipal laws. It is the first global title system for any form of property rights.[35]

The only registry currently in operation is the International Registry of Mobile Assets run by Aviareto,[36] a joint venture company of SITA[37] and the Irish government based in Dublin and operating the registry of interests in aircraft objects. The International Registry was established by the Council of the International Civil Aviation Organization (ICAO), which acts as the Supervisory Authority and as such is responsible for the appointment of the Registrar and the effective functioning of the Registry.[38]

The registration system is asset-based, so that interests can be registered only against a uniquely identified asset. As the result of meticulous planning by the industry and the Registrar and the development of advanced technology this has become a highly efficient and sophisticated registry system, which is wholly electronic and has recorded some 650,000 registrations and 720,000 searches in the 10 years of its operation. There is no human intervention at the Registry end and on average an international interest becomes searchable within 38 seconds of receipt of the data by the Registry. There are stringent

[33] Art 1(w).
[34] Ch IV Cape Town Convention.
[35] Sprankling, *The International Law of Property* (n 1) 61.
[36] See <https://www.internationalregistry.aero/ir-web/>.
[37] Société Internationale de Télécommunications Aéronautiques.
[38] See art 17(1)–(4) Cape Town Convention.

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controls on registration but anyone can make a search. ICAO, as a specialized agency of the United Nations, enjoys immunity from legal and administrative process, while the assets, documents, databases and archives of the International Registry are also inviolable,[39] subject to a right of access of a claimant against the Registry to such information and documents as are necessary to enable the claimant to pursue its claim.[40] The Registry is strictly liable not only for its own errors but for system malfunction, yet despite this, no claim has ever been made against the Registrar except for the purpose of procuring discharge of a registration wrongfully made by a party having no registrable interest, the Registrar fulfilling a neutral function and abiding by the court's decision.

C. *The Two-Instrument Approach*

Work on the three Cape Town Protocols proceeded concurrently but at different speeds. The substantial resources put into the project by the Aviation Working Group (referred to further below) meant that aviation was well ahead of rail and space. Naturally the aviation industry did not wish to be held up by the other two industry sectors. How was the problem to be overcome? There were two possibilities. One was to have a separate convention for each of the three industries. That, of course, would overcome the three-speed problem but it also had several disadvantages. First, there would be much duplication of effort, since most of the provisions in the draft Convention were equally applicable to all three categories of object. Secondly, this approach would entail a substantial degree of additional expenditure in that the substance of such provisions would have to be addressed at three separate diplomatic Conferences. Thirdly, the representation of States at such conferences would be likely to be different and the drafting would be in different hands, thus producing a serious risk that the uniformity flowing from a single convention would be lost. Finally, each convention would be encumbered with a considerable amount of technical detail, for example, the definitions of airframes, aircraft engines and helicopters and the limitation of the convention to exclude light aircraft.

The novel solution propounded by Mr Lorne Clarke, then General Counsel of IATA, was to have a single convention applicable to all three categories of equipment supplemented by separate Protocols for each category.[41] The benefits of this speedily became apparent. The unity of the equipment-neutral provisions could be maintained, whilst technical data could be left to the relevant protocol. Yet there were those who continued to press for separate conventions and the issue was not finally resolved until the opening day of

[39] Cape Town Convention, art 27.

[40] ibid, art 27(5).

[41] See generally L Clark 'The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines' (2004) 69 Journal of Air Law and Commerce 3.

the diplomatic Conference.[42] In the event the structure of an equipment-neutral umbrella Convention and equipment-specific protocols has proved of the utmost utility.

D. The Controlling Force of the Protocol

The other innovative aspect of Lorne Clarke's solution was that the Protocol would not fulfil the normal function of supplementing the main Convention, it would in fact control it. By the terms of the Convention itself, not only would its entry into force be dependent on the coming into force of the related protocol but its provisions would also take effect subject to the protocol, which could thus modify the Convention to meet the particular needs of the industry in question. This is a revolutionary approach in international law which has been remarkably effective in resolving what otherwise might have been insoluble problems.

E. The Invasion of Areas Previously Taboo

Another radical feature of the Convention is that it has invaded areas of law previously regarded as taboo, that is, matters which should be exclusively for national domestic law, in particular substantive rules on property rights, the priority of competing interests and the impact of insolvency. Property was thought too embedded in domestic law to be suitable for substantive provisions, matters relating to property being governed by national law under the *lex situs* rule. Thus the 1980 Vienna Convention on Contracts for the Sale of Goods[43] says nothing about property and is confined to contractual relationships, while the 1988 UNIDROIT conventions on international factoring[44] and international financial leasing,[45] though covering the acquisition of rights *in rem*, still shy clear of priorities and insolvency. By contrast the provisions of the Convention dealing with the priority of interests are contained in a single article, Article 29, which adopts the basic rule previously referred to that a registered interest has priority over any other interest subsequently registered and over an unregistered interest, even if it is of a kind not capable of registration. The Convention also provides that the *in rem* rights conferred by a registered international interest are to be respected in the debtor's insolvency,[46] while the Aircraft Protocol includes an option for a Contracting State to adopt by declaration powerful creditor remedies which exclude interference by the court.[47] All Contracting States except one have

[42] 16 November 2001. [43] Adopted 11 April 1980, entered into force 1 January 1988.
[44] Convention on International Factoring (adopted 28 May 1988, entered into force 1 May 1995).
[45] Convention on International Financial Leasing (adopted 28 May 1988, entered into force 1 May 1995). [46] Art 30 Cape Town Convention. [47] Art XI (Alternative A) and XII Aircraft Protocol.

made such a declaration, which is a condition of securing the economic benefits conferred by the Convention.

F. The Declaration System

Reservations are not allowed under the Convention and Protocols[48] but the two instruments embody a facility to make declarations which, though not entirely unique, differ both in character and extent from those found in other treaties. Under this facility Convention rules contrary to the settled legal philosophy of a Contracting State do not apply unless that State makes an opt-in declaration, while certain other provision can be the subject of an opt-out declaration. For example, a Contracting State may choose not to allow self-help remedies[49] and may opt out of the provisions which entitle a creditor who adduces evidence of default to speedy advance relief,[50] while the Protocol provisions on insolvency, including a strong option designed to avoid judicial intervention,[51] depend on an opt-in declaration by a Contracting State. The declarations feature was designed to ensure that States otherwise favouring the Convention might feel obliged to refuse to ratify it. Further, a Contracting State can make a declaration preserving the priority of non-consensual rights or interests given by its national law without the need to register in the International Registry or can designate non-consensual rights or interests as registrable as if they were international interests.

There is a further aspect. In its capacity as a Regional Economic Integration Organisation the European Community (EC) was and the European Union (EU) is for most purposes treated as if it were a Contracting State. As regards matters within its competence the EC/EU was/is able to control the making and content of declarations made by Member States to ensure conformity with EC/EU law.[52] That, however, has no effect on the international plane, so that UNIDROIT as depositary must accept the deposit of instruments of ratification conforming to the Convention and relevant Protocol whether or not these are in compliance

[48] The Vienna Convention is rather inconsistent in its concept of a reservation. Art 2(1)(d) defines a reservation as 'a unilateral statement, however, phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State', and it is a reservation as so defined that is prohibited by the Cape Town Convention. On the other hand, as an exception to the general rule that a State may formulate a reservation, art19(b) precludes this where 'the treaty provides that only specified reservations, which do not include the reservation in question, may be made', which indicates that a reservation is not necessarily unilateral but may be provided by the treaty itself.

[49] Art 54(2).

[50] Art 55.

[51] Protocol, art XI, Alternative A, which provides the debtor or insolvency administrator, as the case may, a grace period for remedying existing defaults and undertaking to perform future obligations, failing which the creditor is entitled to repossess the aircraft object without judicial intervention, delay or modification of the debtor's obligations.

[52] See the Declaration lodged by The European Union under the Cape Town Convention at the Time of the Deposit of its Instrument of Accession, para 5.

with EU law. Thus Ireland ratified long before the European Community[53] and because it was chosen as the site of the International Registry the European Commission had the good sense not to intervene. The same happened with Luxembourg's ratification of the Rail Protocol.[54]

G. Post-Adoption Changes

A further striking feature of the Convention is the insertion of provisions designed to allow certain limited changes to be made to the text without the need for further consultation with negotiating States. The changes in question relate to the different language versions of the text and the need to ensure that, as regards the assignment of associated rights,[55] the Convention provisions would prevail over those of the slightly later UN Convention on the Assignment of Receivables in International Trade.[56]

1. Linguistic alignment

The question of linguistic alignment arose in the following way. UNIDROIT usually works in two languages, English and French, and its drafting committees produce parallel texts (not *translations*). However, ICAO had five working languages at the time and decided to add Chinese as a sixth language of the diplomatic Conference. While a drafting Committee can cope with two languages, even one extra language would produce an exponential complexity and the work would never be completed. The solution adopted was to draft in English and then send the text down the wire from Cape Town to ICAO's bank of highly professional translators in Montreal for translation into the five other languages and transmission back to Cape Town. But the work of translators, however well qualified, cannot compare with that of a draft committee consisting of trained lawyers and, moreover, those thoroughly versed in the substantive subject-matter. The result was predictable, delegation after delegation rising to criticize the parallel texts. However, diplomatic protocol required the signature of texts in all six languages of the Conference. The neat solution adopted was to include a provision in the Final Act of the diplomatic Conference making the texts subject to verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within a

[53] The ingenuity of the Irish knows no bounds. Many years ago Irish bank staff went on strike. In almost every other country in the world this would have caused mayhem. Not in Ireland. The pubs offered their services as clearing houses for the trading of unpresented cheques, which were thus used to settle debts, contingently on their being met when the strike came to an end, as most of them were.

[54] Which ratified the Luxembourg Protocol 31 January 2012, while the EU did so 18 December 2014.

[55] Arts 31–37. 'Associated rights' mean 'all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object' (art 1(c)).

[56] (Adopted 12 December 2001) 41 ILM 777.

period of 90 days as to the linguistic changes required to bring the texts in the different languages into conformity with one another. This was done and the same technique adopted for the Luxembourg and Space Protocols.

2. How to override a later Convention

The second problem arose from the fact that although the UN Convention on the Assignment of Receivables in International Trade which had certain provisions on the assignment of rights that overlapped and were potentially inconsistent with those of the Cape Town Convention, was envisaged as reaching a diplomatic Conference first, as things worked out it was not to be adopted until a month later. How then could the Cape Town diplomatic Conference ensure that its own provisions prevailed? The solution adopted was a resolution of the diplomatic Conference that upon the deposit of the UN Convention with the Secretary General of the United Nations a new article, Article 45 *bis*, should be inserted into the Cape Town Convention providing that in case of conflict that Convention should prevail. This was a novel and ingenious method by which a convention can be made to override a subsequent convention and effective for that purpose (provided that the later diplomatic Conference does not pass a similar resolution).

Finally, the Convention, though primarily a private law convention, also contains a number of public law elements which are discussed in the following section.

IV. THE CONFLUENCE OF PUBLIC LAW AND PRIVATE LAW

Most private commercial law conventions neither confer protections nor impose obligations on Contracting States. A striking exemption is to be found in certain provisions of the Cape Town Convention and the Luxembourg and Space Protocols. These arise partly from the institutional structure set up for the International Registry, partly from the nature of some of the remedies and partly from the perceived need to protect national security and the continuity of public services.

A. Duties Imposed on Contracting States

What is striking about the Convention and Aircraft Protocol is that though these instruments are designed as private law instruments they nevertheless include provisions that impose obligations on a Contracting State, though these can be avoided by reliance on the rules governing declarations. These duties are: the availability of speedy advance relief for a creditor who adduces evidence of default;[57] the provision of the remedy of de-registration and export and

[57] Art 13 Cape Town Convention.

delivery of aircraft at the behest of the creditor where there has been default, with a requirement of expeditious administrative action, all these being subject to applicable safety laws;[58] and, under the Aircraft Protocol, timely relief to the creditor on the debtor's insolvency and the provision of insolvency assistance to foreign courts in carrying out the provisions for the protection of the creditor on the debtor's insolvency.[59] What happens if a Contracting State fails to carry out any of these treaty obligations? In contrast to the position under the Convention on the Settlement of Investment Disputes (ICSID)[60] as regards rights of investors under a bilateral investment treaty, the Cape Town Convention confers no rights of enforcement on the aggrieved creditor against the offending State, who is dependent on the willingness of its own State (if it is not the offending State) to secure redress by way of diplomatic protection after local remedies have been exhausted.

B. The Protection of the Public Interest

The Protocols have a set of provisions which are rarely found in private commercial law instruments. These are designed to protect the public interest. The Aircraft Protocol preserves rights of arrest and detention under national law, while the Luxembourg and Space Controls limit the exercise of default remedies so as to ensure the continuance of public services.[61] It is not difficult to imagine the chaos that could result from repossession of public service railway rolling stock or the termination of access to public service satellite communications. So the two Protocols restrict, albeit in different ways, the exercise of remedies that could affect the provision of public services, whilst containing provisions designed to safeguard creditors' interests.[62]

V. PRIVATE INTERNATIONAL LAW AND THE CAPE TOWN CONVENTION

It was at one time thought by a number of experts that with the growth in the harmonization of substantive law the conflict of laws would tend to wither away. That, of course, was never likely and has not happened. Indeed, what we have seen is the growth of conflict of laws conventions. But quite apart from that, the sphere of every convention is limited, so that matters falling outside its provisions or the general principles on which it is based must necessarily be left to the applicable law as determined by the conflict of laws rules of the forum. The Cape Town Convention is no exception.

[58] Arts IX and X(6) and (7) Aircraft Protocol.

[59] Arts X and XII Aircraft Protocol

[60] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[61] Art XXVII Space Protocol and art XXV Luxembourg Protocol.

[62] Luxembourg Protocol, art XXV; Space Protocol, art XXVIII.

A. The Traditional Approach to Property Rights

The long-established rule in many jurisdictions is that dealings in goods are governed by the law of the country in which the goods are situated at the time of the dealing in question (the *lex situs* rule).[63] This works well enough in many cases but it is quite inappropriate for dealings in mobile equipment, which by its nature is regularly crossing national borders and the location of which at any given time may be quite fleeting. This was brought out in the famous *Blue Sky* case[64] where mortgagees of aircraft registered in the United Kingdom but mortgaged while temporarily in The Netherlands sought their recovery in proceedings in the English High Court. Under Dutch domestic law the mortgages would have been invalid but under Dutch conflict of laws rules the validity of the mortgages was governed by the *lex registri*, ie English law, under which they were valid. Naturally the mortgagees argued that the appropriate law under English conflict of laws rules was the *lex registri*, or alternatively, if it was the *lex situs*, that the application of the doctrine of *renvoi* from Dutch law would lead to the same result, while the defendants contended that Dutch domestic law as the *lex situs* had to be applied.[65] Beatson J (now Beatson LJ) held that the *lex situs* principle had to be observed and rejected the application of *renvoi*.[66] Though this result was in line with prior decisions of the High Court it caused consternation to UK aircraft financiers, who resorted to desperate expedients, such as bringing the aircraft into UK airspace for the brief time it took to sign the documents and then flying off again. This exercise apparently cost some £70,000 a time and led to suggestions that aircraft mortgages should be made subject to New York law, which was thought (probably erroneously) to be more favourable to the mortgagee.

Satellites and other space assets gave rise to special problems, including the question of what law governs dealings in assets in outer space. Here the *lex situs* rule leads to the conclusion that there is no law governing dealings in such assets. That, indeed, was one of the arguments advanced in the ProtoStar Chapter 11 proceedings in Delaware,[67] where creditors claiming to hold security over satellites in space were met by the argument that since the priority of secured creditors depended on the applicable national law and since there was none, all creditors ranked *pari passu*. In the end a compromise was reached which involved the secured creditors giving up a significant proportion of the value of their collateral. No doubt if it had come to the crunch the court could have fashioned a deemed *situs* rule, for

[63] See, for example, Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet & Maxwell 2015) Rule 133.

[64] *Blue Sky One Ltd v Mahan Air PK Airfinance US Inc* [2010] EWHC 631 (Comm).

[65] Paras 73 and 152.

[66] See paras 151–185 for discussion of these issues.

[67] *Re ProtoStar Ltd* US Bankruptcy Court for the District of Delaware, Case No 09-12659 (MFW), motion of Official Committee of Unsecured Creditors dated 21 October 2009, para 28.

example, by treating the satellites as situated in their State of registry under the 1975 Convention on the Registration of Objects Launched into Outer Space.[68] But where the Cape Town Convention applies resort to such devices is unnecessary, because the substantive rules laid down by the Convention largely displace the need to have regard to the otherwise applicable law. This is because in terms of its application the Convention is not bounded by the conflict of laws but applies in a Contracting State regardless of the otherwise applicable law.

So strong has been the hold of the *lex situs* that it has been extended to intangibles by ascribing to them an artificial *situs*. This extension has been criticized:[69] not only do intangibles not possess a physical location but since the deemed *situs* varies according to the nature of the intangible the *lex situs* does not provide any organizing principle nor is it simple to apply. The Convention expressly deals with the assignment of rights to payment under a security agreement. In the case of space assets the main collateral relied on is not the physical object in outer space, which for obvious reasons is of limited value, but so-called 'debtor's rights', that is, the rights of the debtor against third parties for licence fees, etc, which are assigned to the creditor as additional collateral.[70] Since the registration regime is based on physical assets, the Space Protocol does not permit the independent registration of assignments of debtor's rights, but where the related international interest has been registered it enables such assignments to be recorded against the registration of the international interest, priority among competing assignments being given by order of recording rather than by order of registration of the related competing international interests. This facility is a recognition of the fact that the financing of space assets is essentially project finance rather than asset-based finance.

Nevertheless, the conflict of laws still has a role to play. Leaving aside some rather complex rules on jurisdiction, once an agreement is shown to fall within the definition of a security agreement a title retention agreement or a leasing agreement it falls to be recharacterized according to the domestic law of the forum. So a conditional sale agreement would be treated by New York law as a security agreement but by English law as merely a title reservation agreement. On the other hand, a consignment agreement, which under New York law will in some cases be characterized as a security agreement, falls outside the Convention altogether. The Protocols allow the parties to an agreement to choose the law governing their relations, though this provision does not

[68] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976).

[69] See, for example, Sir Roy Goode, 'The assignment of pure intangibles in the conflict of laws' [2015] LMCLQ 289, 292–3; P Rogerson 'The Situs of Debts in the Conflict of Laws—Illogical, Unnecessary and Misleading' (1990) 49 CLJ 441; Dicey, Morris and Collins, *The Conflict of Laws* (n 63) [22–25].

[70] See arts I, IX–XV.

apply in an EU Member State.[71] There are altogether some 20 provisions of the Convention which refer to the applicable law,[72] so that conflict rules remain indispensable.

B. The European Community/European Union as a Player

The status of the EC, now the EU, under the Convention has already been referred to. There are also provisions of the Convention and Aircraft Protocol which Member States are precluded from adopting by declaration or which they can adopt only in a limited form. The freedom of the parties to choose the forum for their disputes is exercisable only in conformity with the Brussels I Regulation (recast)[73] as interpreted by the Court of Justice of the European Union. As regards the insolvency provisions in Article XI of the Aircraft Protocol the Commission, asserting that the EC had competence because of a possible effect on the Insolvency Regulation, initially took the view that they did not mind which declarations Member States made as long as they all made the same. I persuaded the UK government that the EC had no competence over substantive insolvency law and that the Insolvency Regulation, as a conflict of laws regulation, was unaffected, and initially several other Member States took the same view. Eventually, the Commission having secured a rather weak Opinion from the EC Legal Services, that the Regulation was capable of being affected, the Member States in question withdrew their opposition as part of a deal by which they preserved their competence over substantive insolvency law and, though not able to make a declaration under Article XI, were free to enact legislation to the same effect. This the UK has done, so it has ended well, though I remain of the view that the assertion of competence was a political matter and did not rest on any sound legal foundation. Finally, Article VIII of the Aircraft Protocol gives the parties freedom to choose the applicable law to govern their relations with each other, but this applies only where a Contracting State has made a declaration, and the EU (as a deemed Contracting State) declined to do so on the basis that this could conflict with the Rome I Regulation,[74] so that EU Member States are precluded from making the declaration.

VI. FINAL REFLECTIONS

Those involved in the work of harmonization know all too well the perils of embarking on a major project and the huge effort and resources needed to bring it to fruition. That great comparative lawyer Harold Gutteridge, whose

[71] See below.

[72] See R Goode, 'The Cape Town Convention and Protocols and the Conflict of Laws' in *A Commitment to Private International Law: Essays in Honour of Hans van Loon* (Intersentia 2013) 221.

[73] Reg No 1215/2012.

[74] Regulation (EU) No 593/2008.

book on comparative law still provides, after 65 years, the most authoritative description of the practical aspects of harmonization, expressed the point succinctly in the following terms:

> Unification can only be achieved by lengthy and patient efforts which will ultimately convince those in all countries, who are in a position to sponsor and carry through changes in the law, that it is a matter of urgent necessity to take steps in order to remove sources of inconvenience and friction in the international sphere. Unification cannot be achieved by a stroke of the pen, nor can it be carried out within the four walls of law libraries, practitioners' offices or professorial studies. The ground must be very carefully surveyed, and the interests concerned must be won over before any action is undertaken.[75]

It is therefore important to have clear objectives and to establish at an early stage the likelihood of substantial benefits for interested parties. In the field of commercial law this means securing the involvement of the relevant industry sectors, in the case of the Cape Town Convention, aviation, rail and space. At an early stage three support groups were established, the Aviation Working Group, the Rail Working Group and the Space Working Group.

For a private law convention the Cape Town Convention, with its associated Protocols, was unusually complex. It was only when the Aviation Working Group, directed by Professor Jeffrey Wool (as he now is), came on the scene that the project really began to take off. Realizing the potentially large benefits to be obtained from a good Convention and Aircraft Protocol the Aviation Working Group invested a substantial amount of time and resources in the project and without their efforts, and those of the other working groups, the project would not have succeeded.

As explained, the Cape Town Convention and Protocols involve private law, public international law and the conflict of laws. The range of private law fields was extensive: the creation, perfection and priority of consensual security interests and title-retention rights and the interests of outright buyers; the provision of default remedies; the protection of non-consensual rights and interests arising under national law; the assignment of claims; the creditor's rights on insolvency. The jurisdictional questions were complex. There was also a range of difficult technical issues. How were the different types of equipment within the Convention and Protocol to be defined and limited to items of high value? What fast-track mechanism could be provided for amendments to the Convention? On what basis was the International Registry to be established? How should the insolvency provisions be structured? And what was to be the relationship between the Convention and Aircraft Protocol and the Geneva and Chicago Conventions and UNIDROIT's own Convention on International Financial Leasing? Finally, there were great

[75] HC Gutteridge, *Comparative Law* (2nd edn, Cambridge University Press 1949) 157.

technological challenges in the establishment of the Aircraft Registry, based in Dublin.

To deal with all these issues paper succeeded paper, report succeeded report, meeting succeeded meeting, and in a variety of venues: Rome, of course, Oxford, London, New York, Paris, Montreal, Cape Town, Berne, Berlin, and it was necessary to call on a wide range of expertise. There were specialist groups on public international law, insolvency law, the operation of the registry and the immunities to be given to the Supervisory Authority, and the jurisdiction provisions. Finally, the two sponsoring organizations, UNIDROIT and ICAO, worked in different fields, the former in private law, the latter in public law governing aviation safety, and each had its distinctive working methods. It was therefore important to hold joint sessions of the UNIDROIT committee of governmental experts and a Sub-Committee of the Legal Committee of ICAO to ensure that both organizations were satisfied with the result, particularly important in that the Council of ICAO was to be the Supervising Authority of the Registry.

But that was not the end of the story. What is often overlooked is that when an international instrument is adopted one is only halfway there; it is necessary to procure ratifications. And here too the Aviation Working Group (AWG) supporting the work of UNIDROIT, engaged with governments around the world urging them to ratify the Convention and Protocol and providing advice and assistance.[76] The success of these instruments is thus due not only to their intrinsic quality and economic value but also to the continuing efforts of the AWG. Finally, the meaning of the Convention and its three Protocols has been elucidated in three Official Commentaries, for aircraft, rail and space respectively, that for aircraft being now in its third edition and for rail in its second edition.[77]

What conclusions can be drawn from these instruments? First, no area of private law should any longer be regarded as taboo. Second, it is necessary to think outside the boundaries of national commercial laws in devising new solutions to international problems. Third, the public interest both in national security and in the continuance of public services means that there are likely to be more areas in which what is primarily a private law convention will also contain public law provisions. Fourth, the novel procedure for linguistic alignment of different language texts has much to commend it. Finally, it is to be hoped that in future private law conventions will be recognized as a form of treaty law!

[76] Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol Summary of National Implementation (February 2015) available on the AWG website.

[77] Sir Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, UNIDROIT 2013); Sir Roy Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock: Official Commentary* (2nd edn, UNIDROIT 2014); Sir Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Space Assets: Official Commentary* (UNIDROIT 2013).