

**CHALLENGES TO EFFECTIVE TREATY-MAKING
IN CONTEMPORARY TRANSNATIONAL COMMERCIAL LAW:
LESSONS FROM THE CAPE TOWN CONVENTION**



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ABSTRACT

CHALLENGES TO EFFECTIVE TREATY-MAKING IN CONTEMPORARY TRANSNATIONAL COMMERCIAL LAW: LESSONS FROM THE CAPE TOWN CONVENTION

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DPhil in Law, Trinity Term 2017**

This thesis is the first detailed and comprehensive research of the history of the 2001 Convention on International Interests in Mobile Equipment (the ‘Convention’ or ‘CTC’) and its protocols. It is submitted that the quality of response to the various challenges of the treaty-making process can serve as a measure of a convention’s success, and that the unique characteristics of the CTC make it a prime target for such research. The author identifies and analyses the most problematic issues in the process of development of the Convention and its protocols, including the latest draft protocol on mining, agricultural and construction equipment. This research focuses on the documentary history of the CTC and its Aircraft Protocol (as the only protocol currently in force), relying primarily on the materials published by UNIDROIT and other international organisations, and shows that not all of the challenges found an adequate response in the Convention. Nonetheless, the shortcomings pale in comparison with the Convention’s achievements: the CTC has created a highly effective machinery for regulating international interests in mobile assets. The author does not perform empirical ex post analysis of implementation of the Cape Town Convention, but this thesis will form a solid background for such research in the future. This study, apart from its scholarly importance, has clear practical value: its conclusions (including a number of treaty-making lessons originating from this research) can assist governmental officials, representatives of international organisations and legal advisors (both external and internal) participating in the treaty-making process and, it is hoped, will strengthen the attractiveness of conventions as an instrument of harmonising commercial law in the future.

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APG	– Aircraft Protocol Group
ASU	– Sector Understanding on Export Credits for Civil Aircraft
AWG	– Aviation Working Group
CEAL	– Center for Economic Analysis of Law
CIS	– Commonwealth of Independent States
CISG	– 1980 United Nations Convention on Contracts for the International Sale of Goods
CMI	– International Maritime Committee
CTC	– 2001 Convention on International Interests in Mobile Equipment
CTCAP	– Cape Town Convention Academic Project
EBRD	– European Bank for Reconstruction and Development
EMEA	– Europe, the Middle East and Africa
ESOA	– EMEA Satellite Operators Association
EU	– European Union
EUROCONTROL	– European Organisation for the Safety of Air Navigation
GBP	– United Kingdom Pound Sterling
HS	– Harmonized Commodity Description and Coding System
IATA	– International Air Transport Association
ICMA	– International Capital Market Association
ICSID	– International Centre for Settlement of Investment Disputes
IMO	– International Maritime Organization
INSEAD	– European Institute of Business Administration
ISDA	– International Swaps and Derivatives Association
ITU	– International Telecommunication Union
LBMA	– London Bullion Market Association
LIBOR	– London Interbank Offered Rate

OECD – Organisation for Economic Co-Operation and Development
OTIF – Intergovernmental Organisation for International Carriage by Rail
PECL – Principles of European Contract Law
REWG – Restricted Exploratory Working Group
SRC – Steering and Revisions Committee
UCC – Uniform Commercial Code
UN – United Nations
UNCITRAL – United Nations Commission on International Trade Law
UNCTAD – United Nations Conference on Trade and Development
UNIDROIT – International Institute for the Unification of Private Law
UPIC – UNIDROIT Principles of International Commercial Contracts
USD – United States Dollar
WCO – World Customs Organization

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Challenges to effective treaty-making in contemporary transnational commercial law: lessons from the Cape Town Convention

Professions of faith in the unification of the law or parts of the law abound; technical studies from expert hands are rare.

- Kurt Nadelmann¹

CHAPTER I. INTRODUCTION

Amidst the variety of sources of transnational commercial law,² treaties (or conventions)³ have always stood out as a distinct category: not simply due to the fact that they were at the forefront of unification, but thanks to their ability to create a degree of uniformity which is beyond the reach of any other instrument. In areas where flexibility is viewed as undesirable or downright dangerous for the prospects of unification, treaties remain the instrument of choice.

Multilateral conventions constitute the most ambitious form of unification: one, which, if successful, is capable of establishing a harmonised legal regime on a regional, or, theoretically, even on a global scale. Projects of this magnitude warrant particular attention, as both the challenges and potential benefits can be significant. Given the amount of resources and effort required to bring to life a multilateral treaty, one would expect that the cost of mistakes in such projects is much higher, compared to other methods of harmonising commercial law. Continuous unsuccessful harmonisation attempts might discourage everyone involved in this tedious work, from governments to private industry actors. Once this is accepted, a study of the history of the most

¹ Kurt Nadelmann, 'Book Reviews: Comparative Law. By H.C. Gutteridge. Cambridge University Press, 1946, pp. xvi, 208.' (1948) 96 U Pa L Rev 448, 449.

² See Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (2nd edn, Oxford University Press 2015) 31-34.

³ In this thesis, the two terms are used interchangeably.

successful multilateral treaties becomes a stepping stone towards the improvement of international lawmaking in the relevant field.

In the area of commercial law, no other instrument has gone as far, and achieved as much, as the 2001 Convention on International Interests in Mobile Equipment (the ‘Cape Town Convention’, or ‘Convention’, or ‘CTC’).⁴

1.1 An outline of the Cape Town Convention: unique features of the treaty

The CTC has been hailed as ‘the most successful international secured transactions instrument ever implemented’⁵ and as ‘one of the most ambitious international commercial law instruments ever to have been fashioned in the field of private transnational law’.⁶ What makes the Convention so special?

The high ambition of the CTC stems from its Preamble, which reflects the desire of contracting states to facilitate asset-based financing and leasing transactions by establishing clear rules to govern them. To achieve this, the Convention creates a comprehensive international legal regime protecting secured creditors, conditional sellers and lessors in certain categories of high value mobile equipment.⁷ This new regime is based on unique CTC mechanics: the treaty provides for the creation of an entirely new type of proprietary interest (labelled ‘international interest’), the existence and effects of which do not rely on the existence and validity of its counterparts arising through the

⁴ This thesis examines the history of the Cape Town Convention. Therefore, when used to refer to this treaty prior to its adoption, mentions of ‘the Convention’ or ‘the CTC’ should be read as references to the (then) current draft of this instrument.

⁵ Charles W. Mooney, ‘Cape Town Convention’s Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application, The Essay’ (2014) 55 Va J Int’l L 163-186, 166.

⁶ See Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 1.

⁷ In doing so, the Convention goes further than was initially envisaged by its authors: the CTC was at first conceived as an instrument that would provide greater legal certainty to holders of security and certain quasi-security interests (eg sellers under title retention agreements) in mobile assets in situations when these assets cross national borders.

application of national laws. This *sui generis* concept of international interest is unique and has no equal in the history of international lawmaking.

Notably, the Convention's scope is not limited to the creation of a new type of proprietary interest: the latter is immediately integrated into a comprehensive international system of priorities that supersedes existing domestic regimes. This system of priorities is triggered by the registration of the international interest in a dedicated central international registry, which is another unique feature of the CTC.⁸ This new international system of priorities gives international interests surprising reach: once registered, they rank ahead of their national law counterparts, even if the latter are not registrable in the international registry (with limited exceptions).

To ensure that the interests of financiers are adequately protected regardless of any differences between domestic legal regimes, the Convention establishes dedicated rules on remedies exercisable upon default of the debtor, providing the creditors with peace of mind and lowering the cost of credit for their clients. In addition, the CTC contains a variety of provisions (eg articles on assignment of associated rights, or subordination of international interests) enhancing legal certainty, but at the same time providing sufficient flexibility for asset finance providers in dealing with their counterparties.

Currently the Cape Town Convention applies to three types of mobile equipment: aircraft objects (airframes, aircraft engines and helicopters), railway rolling stock and space assets. In light of the different physical characteristics of these asset types and varying financing techniques applied within the relevant industries, the

⁸ The international registry for aircraft equipment has had an enormous success among private actors: it has recorded over 700,000 registrations – see paragraph 3.3.2 in Appendix to ICAO, *ICAO A39-WP/422 LE/14 (2016)*. See also Ludwig Weber, 'Public and private features of the Cape Town Convention' (2015) 4 *Cape Town Convention Journal* 53-66, 53.

Convention is supplemented by a number of protocols which contain asset-specific provisions (the ‘Aircraft Protocol’,⁹ the ‘Rail Protocol’,¹⁰ and the ‘Space Protocol’¹¹).¹² The combination of a baseline convention and asset-specific protocols creates a two-level ‘umbrella’ structure, which ensures continuity of the ‘core’ provisions of the CTC, while at the same adding a degree of flexibility and potential for future expansion and providing states with the freedom to apply the CTC only to some, but not all types of mobile equipment covered by the Convention.

To date, the Convention has been ratified by 73 contracting states, while the Aircraft Protocol has been ratified by 67 contracting states.¹³ The success of the CTC within the aviation industry¹⁴ has recently prompted a further expansion of the scope of the Convention: the fourth (draft) protocol on agricultural, construction and mining equipment (the ‘MAC Protocol’) is now nearing adoption.

1.2 Relevance of legal history research

Despite the obvious successes, almost sixteen years after the adoption of the Convention, some difficult questions remain unanswered. If the Convention is so innovative and

⁹ 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (adopted on 16 November 2001).

¹⁰ 2007 Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (adopted on 23 February 2007).

¹¹ 2012 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (adopted on 09 March 2012).

¹² The historical aspect of this thesis mentioned above (n 4) equally applies to the protocols.

¹³ The EU has acceded to both instruments separately from its Member States under Article 48 of the CTC and Article XXVII of the Aircraft Protocol as a Regional Economic Integration Organisation. These articles were introduced at a late stage following a request by the EU, in order to address matters on which it had exclusive competence (such as jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, insolvency proceedings and law applicable to contractual obligations). Later, in 2014, the Rail Protocol was similarly approved by the EU in accordance with its Article XXII.

¹⁴ In terms of sheer number of ratifications, the Convention is the second most ratified substantive (as opposed to conflict of laws) commercial law treaty in the world, second only to the 1980 United Nations Convention on Contracts for the International Sale of Goods (‘CISG’), which currently has 87 contracting states.

successful, then why does it only apply within a single (aviation) industry? If the benefits of the Convention are clear, then why has the shipping industry not reversed its negative attitude towards the CTC? Has the Convention achieved its original objects and purposes? These problems challenge the very idea that the CTC and all of its protocols, taken *as a whole* (as opposed to the combination of the Convention and the Aircraft Protocol only), can be considered a success. More importantly, they highlight another, more difficult issue: what is the appropriate test to measure the success of a commercial convention in general, and the CTC in particular?

Different criteria can be used to assess whether a particular commercial treaty has been successful,¹⁵ both quantitative and qualitative: the number of ratifications,¹⁶ popularity among end-users, the economic benefit generated by the new instrument, or even the degree of incorporation of a convention's concepts into other instruments. These factors, however, share a common feature: they rely on empirical ex-post analysis of treaty implementation carried out on different levels (from the almost technical, such as calculating ratifications, to the more sophisticated, such as by reference to actual economic effects generated by the treaty). While empirical research of this kind might have significant scientific value, it is posited in this thesis that the first step towards assessing the success of a convention should be different: before analysing the degree of implementation of treaty provisions one should assess their adequacy from the perspective of the convention's underlying objectives and challenges.

¹⁵ See, eg, Herbert Kronke, 'International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice' (2000) 5 Uniform Law Review 13, 15-16.

¹⁶ The history of transnational commercial law treaty-making suggests that this approach alone is not a reliable measure of success of a treaty: the CISG, with its 87 contracting states, is so commonly excluded from application by parties to a contract that this phenomenon has become the subject of significant academic interest; see Lisa Spagnolo, *CISG exclusion and legal efficiency* (Kluwer Law International 2014).

The main difficulty with the suggested approach lies in the proper identification of these underlying objectives and challenges. The former are often reflected in the preamble or otherwise expressed in the text of a treaty itself, but the exercise should go beyond examining such nominal values. On the one hand, the relevant provisions are usually drafted last and used for the purposes of gap-filling. On the other hand, they generally reflect the *status quo* which emerged at the end of all the relevant discussions and negotiations, without capturing the changes introduced at various stages of development, as well as different agendas pursued by the relevant stakeholders. Instead, identification of the underlying goals and objectives should be free from any labels and compromise solutions adopted by the relevant formulating entities at the end of the development process. As for the challenges, there is no uniform approach to their analysis and no agreed methodology.

It is suggested in this thesis that only a comprehensive analysis of the history of development of the relevant convention can identify the *actual* underlying objectives of the convention and challenges associated with its development, track their evolution and eventually assess whether these have been properly addressed by the relevant instrument. Indeed, the analysis of implementation patterns or economic benefits alone would be inconclusive. On the one hand, an instrument which does not produce a satisfactory solution to its underlying problems might still be commonly used by the private parties, especially in a situation when there is no working alternative.¹⁷ On the other hand, a

¹⁷ See, eg, the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (the '1926 Brussels Convention') and 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (the '1967 Brussels Convention') prior to the adoption of the Cape Town Convention (as post-adoption the CTC became such an alternative).

treaty proposing an appropriate and rational solution may be disregarded by the industry for reasons which have little to do with the quality of such solution.¹⁸

Despite the above concerns about the degree of success of the Convention (such as the application of the CTC solely within the aviation industry), the author posits that there already exists a ‘critical mass’ of sufficient evidence required to bring the study of the Cape Town Convention to the next level, ie analysis of the degree of its success. First, the CTC stands out among substantive commercial law conventions due to its novel ideas and high adoption rate.¹⁹ Second, as the Convention is relatively new, both the relevant documents and the people involved in the development process are more accessible. Third, the Cape Town Convention is still developing, with the MAC Protocol in the making, and thus a comprehensive research inevitably tackles the present-day issues that will shape the future of international interests in mobile equipment. Fourth, as shown in the following section 1.3, the treaty has attracted significant attention among academics, but no comprehensive research of its history has been prepared so far.

1.3 Timeliness of legal history research: literature overview

The most authoritative source of information about the Convention and each protocol has been produced by Professor Sir Roy Goode in the form of three official commentaries authorised by the governments which adopted the relevant instruments.²⁰ The CTCAP, a

¹⁸ See section 3.3 and the corresponding discussion relating to the opposition from the shipping circles to the idea of extending the scope of the CTC to ships.

¹⁹ See n 14.

²⁰ See Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013); Roy Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock: Official Commentary* (2nd edn, International Institute for the Unification of Private Law (UNIDROIT) 2014); Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets: Official Commentary* (International Institute for the Unification of Private Law (UNIDROIT) 2013). References in this thesis to the ‘Official Commentaries’ should be read as references to all of the three existing

joint undertaking between the University of Oxford Faculty of Law and the University of Washington School of Law, has been authorised to issue annotations to the Official Commentary on the Convention and its Aircraft Protocol. The annotations do not form part of the Official Commentary, but constitute a neutral and informed analysis and are meant to tackle those questions that the Official Commentary does not fully address.²¹

Existing dissertations focus largely on the Aircraft Protocol,²² with some notable exceptions.²³ Theses rarely go beyond doctrinal analysis of the provisions of the Convention, fragments of comparative law research and certain issues of implementation, which is common for early stages of treaty research.

The monographs on the Cape Town Convention are rare and also generally focus on doctrinal analysis of the law.²⁴

Journal articles largely focus on the only protocol currently in force (the Aircraft Protocol),²⁵ although the Rail²⁶ and Space²⁷ Protocols are getting increasingly more

commentaries, and references to a single ‘Official Commentary’ should be read as references to the specific commentary, as the context requires.

²¹ See University of Oxford Faculty of Law and University of Washington School of Law, ‘The Cape Town Convention Academic Project’ <www.ctcap.org> accessed 02 June 2017.

²² See Peter Devinsky, ‘Speedy Relief? The Default Remedies as set out in the Cape Town Convention and the Aircraft Protocol’ (LLM thesis, Institute of Air and Space Law, McGill University, Montreal 2010); Eric Lippé, ‘Are You In or Out? The Impact of Declarations Under the Cape Town Convention/Aircraft Protocol on Achieving Global Legal Uniformity of Aircraft Financing Law’ (LLM thesis, Institute of Air and Space Law, McGill University, Montreal 2009); Pleotian Uttarachai, ‘The Legal Impacts of the Cape Town Convention on Aircraft Financing Transactions’ (LLM thesis, Institute of Air and Space Law, McGill University, Montreal 2010); Niclas Von Planta, ‘The Aircraft Protocol to the Cape Town Convention on Aircraft Financing: a Civil Lawyer’s Perspective’ (LLM thesis, Institute of Air and Space Law, McGill University, Montreal 2011); Jeremy Ari Day, ‘The Repoman Cometh: the Implications of U.S. Airline Experience Under Section 1110 of the Bankruptcy Code for the Convention on International Interests in Mobile Equipment’ (PhD thesis, The Fletcher School of Law and Diplomacy 2009).

²³ See Sanam Saidova, ‘Security Interests Under the UNIDROIT Convention on International Interests in Mobile Equipment 2001’ (PhD thesis, University of Nottingham 2012); Anna Zenyakina, ‘The International Legal Unification of Ways of Securing Obligations in the Purchase of Movable Assets’ (PhD thesis, Russian Foreign Trade Academy 2013).

²⁴ See Mark J. Sundahl, *The Cape Town Convention: Its Application to Space Assets and Relation to the Law of Outer Space* (Martinus Nijhoff Publishers 2013).

attention, in anticipation of their possible ratification in the future. More recently, several articles have addressed the prospects of adoption of the draft MAC Protocol.²⁸ The scope of publications is quite broad and covers a variety of topics: conflict of laws,²⁹ insolvency provisions of the CTC,³⁰ treatment of intangible assets under the

²⁵ See John Atwood, 'The Cape Town Convention: The New Dublin International Registration System In Practice' (2010) 43 *Uniform Commercial Code Law Journal* 637; Lorne S. 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, Part 1 *Journal of Air Law and Commerce* 3; Ronald C.C. Cuming, 'The International Registry for Interests in Aircraft: An Overview of its Structure' (2006) 11 *Uniform Law Review* 18; Sandeep Gopalan, 'Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol' (2003) 29, Part 1 *North Carolina Journal of International Law and Commercial Regulation* 59; B. Patrick Honnebier, 'The Cape Town Convention and the Aircraft Equipment Protocol Protecting the Registered Secured Interests of Airline Lessees' (2005) 30, *Numb 1 Air and Space Law* 27; Giulia Mauri, 'The Cape Town Convention on Interests in Mobile Equipment as Applied to Aircraft: Are Lenders Better Off Under the Geneva Convention?' (2005) 13, *Numb 5 European Review of Private Law* 641; Charles W. Mooney, 'Relationship Between the Prospective Unidroit International Registry, Revised Uniform Commercial Code Article 9 and National Civil Aviation Registries' (1999) 4 *Uniform Law Review* 335; Sanam Saidova, 'The Cape Town Convention: Repossession and Sale of Charged Aircraft Objects in a Commercially Reasonable Manner' [2013] *Lloyds Maritime and Commercial Law Quarterly* 180.

²⁶ See Hans-Georg Bollweg and Katharina Schnell, 'Liability of the Registrar for the Registration of International Interests Pursuant to the Luxembourg Railway Protocol' (2007) 12 *Uniform Law Review* 559; Steven L. Harris, 'The International Rail Registry' (2007) 12 *Uniform Law Review* 531; Herbert Kronke, 'Introduction: The Luxembourg Protocol to the Cape Town Convention: a Pillar for the Bridge to the Future of Rail Transportation' (2007) 12 *Uniform Law Review* 420; Howard Rosen, 'The Luxembourg Rail Protocol: a Major Advance for the Railway Industry' (2007) 12 *Uniform Law Review* 427.

²⁷ See Lutfiie Ametova, 'International interest in space assets under the Cape Town Convention' (2013) 92 *Acta Astronaut* 213; Anna Maria Balsano, 'Modernising Secured Transactions Law: a Viewpoint from the European Space Agency' (2003) 8 *Uniform Law Review* 375; Souichirou Kozuka and Fuki Taniguchi, 'An Economic Assessment of the Space Assets Protocol to the Cape Town Convention' (2011) 16 *Uniform Law Review* 927; Martin J. Stanford, 'The Availability of a New Form of Financing for Commercial Space Activities: the Extension of the Cape Town Convention to Space Assets' (2012) 1 *Cape Town Convention Journal* 109; Mark J. Sundahl, 'The Cape Town Convention and the Law of Outer Space: Five Scenarios' (2014) 3 *Cape Town Convention Journal* 109.

²⁸ See Henry Deeb Gabriel, 'The MAC Protocol: we aren't there yet – how far do we have to go?' (2015) 4 *Cape Town Convention Journal* 67; Charles W. Mooney, 'The MAC Protocol: some comments and a challenge' (2015) 4 *Cape Town Convention Journal* 76.

²⁹ See William J. Glaister and others, 'Lex Situs after Blue Sky: is the Cape Town Convention the Solution?' (2012) 1 *Cape Town Convention Journal* 3; Karl F. Kreuzer, 'Jurisdiction and Choice of Law Under the Cape Town Convention and the Protocols Thereto' (2013) 2 *Cape Town Convention Journal* 149; Alan McCarthy and Marie O'Brien, 'Article 13 of the Cape Town Convention and Article 31 of Regulation No. 44/2001: An EU Law Perspective' (2014) 3 *Cape Town Convention Journal* 33; Jeffrey Wool and Andrej Jonovic, 'The relationship between transnational commercial law treaties and national law - A framework as applied to the Cape Town Convention' (2013) 2 *Cape Town Convention Journal* 65.

³⁰ See David G. Mayer and Frank L. Polk, 'A Test of the Cape Town Convention: Useful Tool in Debtor Insolvencies and Defaults or a Trap for the Unwary' (2009) 2 *Corporate Rescue and*

Convention,³¹ priorities,³² remedies,³³ the role of the international registry,³⁴ economic analysis of the CTC.³⁵ Over time, jurisdiction-specific literature has emerged to address the issues of implementation of the Convention in various countries (eg, Argentina,³⁶ Australia,³⁷ Belgium,³⁸ Croatia,³⁹ Germany,⁴⁰ Hungary,⁴¹ Italy,⁴² Netherlands,⁴³ Russia,⁴⁴ Spain⁴⁵) and regions (CIS,⁴⁶ EU,⁴⁷ Latin America⁴⁸).

Insolvency 237; Charles W. Mooney, 'Insolvency Law as Credit Enhancement: Insolvency-Related Provisions of the Cape Town Convention and the Aircraft Equipment Protocol' (2004) 13 *International Insolvency Review* 27; Kristin van Zwieten, 'The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives' (2012) 1 *Cape Town Convention Journal* 53.

³¹ See Roy Goode, 'The treatment of intangible assets under the Cape Town Convention and Protocols' (2013) 2 *Cape Town Convention Journal* 41.

³² See Michel Deschamps, 'The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol: A comparative law analysis' (2013) 2 *Cape Town Convention Journal* 51; Roy Goode, 'The Priority Rules Under the Cape Town Convention and Protocols' (2012) 1 *Cape Town Convention Journal* 95; John Pritchard and David Lloyd, 'Analysis of Non-Consensual Rights and Interests under Article 39 of the Cape Town Convention' (2013) 2 *Cape Town Convention Journal* 3.

³³ See Gilles Cuniberti, 'Advance Relief Under the Cape Town Convention' (2012) 1 *Cape Town Convention Journal* 79; Dean N. Gerber and David R. Walton, 'De-registration and Export Remedies under the Cape Town Convention' (2014) 3 *Cape Town Convention Journal* 49; Howard Rosen, 'Public Service and the Cape Town Convention' (2013) 2 *Cape Town Convention Journal* 131; Anna Veneziano, 'Advance Relief Under the Cape Town Convention and Its Aircraft Protocol: A Comment on Gilles Cuniberti's Interpretative Proposal' (2013) 2 *Cape Town Convention Journal* 185.

³⁴ See Martin Fleetwood and Peter Bloch, 'The Cape Town International Rail Registry and the Development of State Registries' (2014) 3 *Cape Town Convention Journal* 95; William B. Piels and Tan Siew Huay, 'Generation II Of The International Registry Website The Closing Room: A Transactional Approach to Registrations' (2013) 2 *Cape Town Convention Journal* 165; Jane K. Winn, 'The Cape Town Convention's International Registry: Decoding the Secrets of Success in Global Electronic Commerce' (2012) 1 *Cape Town Convention Journal* 25.

³⁵ See Anthony Saunders, Anand Srinivasan and Ingo Walter, 'Innovation in International Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention' (2006) <<http://ssrn.com/abstract=894027>> accessed 02 June 2017; Jeffrey Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention' (2012) 17 *Uniform Law Review* 633.

³⁶ See Rogelio N. Maciel, 'The Cape Town Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment: An Argentine Perspective' (2004) 29 *Air and Space Law* 219.

³⁷ See Nicholas Humphrey and Vernon Nase, 'The Cape Town Convention 2001: An Australian Perspective' (2006) 31 *Air and Space Law* 5.

³⁸ See Giulia Mauri and Birgitta van Itterbeek, 'Belgian Aircraft Finance New Perspectives - Why Belgium Should Ratify the Cape Town Convention on International Interests in Mobile Equipment and Its Aircraft Specific Protocol' (2004) 29 *Air and Space Law* 208; Giulia Mauri and Birgitta Van Itterbeek, 'The Cape Town Convention on International Interests in Mobile Equipment and Its Protocol on Matters Specific to Aircraft Equipment: a Belgian Perspective' (2004) 9, Part 3 *Uniform Law Review* 547.

The aviation industry has produced CTC-related documentation aimed at practitioners,⁴⁹ while the CTCAP is developing educational and self-instructional materials.⁵⁰

Despite the apparent scholarly and practical interest in the Cape Town Convention across the globe, no comprehensive study of the history of this treaty has been produced to date. In fact, any published accounts of the history of CTC development are rare, rudimentary and lack in-depth analysis.

³⁹ See Tatjana Josipović, 'The Rail Protocol and Croatian Secured Transactions Law' (2007) 12 *Uniform Law Review* 489.

⁴⁰ See Eva-Maria Kieninger, 'Effects in Insolvency of the International Interest in Mobile Equipment: a German Perspective' (1999) 4 *Uniform Law Review* 397; Peter Sester and Stephan Haag, 'The Implementation of the Cape Town Convention into German Law' [2005] *Zeitschrift Fur Luft Und Weltraumrecht* 493.

⁴¹ See Attila Harmathy, 'The Regulation of Secured Transactions under the Future Unidroit Convention: a Hungarian Point of View' (1999) 4 *Uniform Law Review* 433.

⁴² See Giuseppe Tucci, 'Towards a Transnational Commercial Law for Secured Transactions: the Preliminary Draft Unidroit Convention and Italian Law' (1999) 4 *Uniform Law Review* 371.

⁴³ See B. Patrick Honnebier, 'The New International Regimen Proposed by Unidroit as a Means of Safeguarding Rights in Rem of the Holder of an Aircraft under Netherlands Law' (2001) 6 *Uniform Law Review* 5; B. Patrick Honnebier, 'The Dutch Real Rights Can Be the Basis of International Interests under the Convention of Cape Town, Just Like Their Equivalent American Security Interests' (2004) 12 *European Review of Private Law* 46.

⁴⁴ See Alexander Silikov, 'The Russian Federation and the Cape Town Convention: the Aviation Protocol' (2010) 15 *Uniform Law Review* 133.

⁴⁵ See Teresa Rodríguez de las Heras Ballell, 'The Accession by Spain to the Cape Town Convention: a First Assessment' (2014) 19 *Uniform Law Review* 1.

⁴⁶ See Ludwig Weber and Artur Eberg, 'The Cape Town Convention and Its Implementation in Russia and the Commonwealth of Independent States (CIS)' (2014) 39 *Air and Space Law* 1.

⁴⁷ See Berend Crans, 'The Implications of the EU Accession to the Cape Town Convention' (2010) 35 *Air and Space Law* 1; B. Patrick Honnebier, 'The Convention of Cape Town on International Interests in Mobile Equipment: The Solution of Specific European Property Law Problems' (2002) 10 *European Review of Private Law* 377; Sjef Van Erp, 'The Cape Town Convention: a Model for a European System of Security Interests Registration?' (2004) 12 *European Review of Private Law* 91.

⁴⁸ See John M. Wilson, 'Movable Equipment Financing in Latin America: Application of the OAS Model Law, the Cape Town Convention and the Luxembourg Rail Protocol' (2007) 12 *Uniform Law Review* 473; Rafael Castillo Triana, 'The Relevance of the Luxembourg Protocol for Central and South America' (2007) 12 *Uniform Law Review* 461.

⁴⁹ See the Practitioners' Guide to The Cape Town Convention and The Aircraft Protocol; the Summary of National Implementation; the Implementation Resource Materials. Available at <www.awg.aero/projects/capetownconvention> accessed 02 June 2017.

⁵⁰ Available at <www.ctcap.org> accessed 02 June 2017.

It is submitted that a detailed research of the history of the Cape Town Convention would be a timely and important addition to the current body of academic literature, as it can provide a solid background for future study of this treaty. There are two distinct features of the approach adopted by the author, which set it apart from the existing literature relating to the CTC. First, the Cape Town Convention is not viewed as a static set of provisions: the research covers the whole process of development of the instrument up to its adoption (but without conducting any kind of empirical implementation-related research or pure doctrinal analysis of the final text as adopted). Second, legal history is not merely referred to in this thesis for illustrative purposes: it is the main method of present research employed for the purposes of finding a satisfactory answer to the research question.

1.4 Methodology

In this thesis, the author identifies the key challenges in the making of the Cape Town Convention, matches them with their respective solutions, and also analyses the existing alternatives and explains the reasons behind the particular choices made by the developers of the CTC to critically assess the adopted solutions.

An attempt to examine the history of the CTC by applying some generic list of key treaty-making challenges has proven impracticable for three reasons.

First, there is no agreed approach and taxonomy for such analysis. The works of leading academics (Sir Roy Goode, Herbert Kronke, Harold Cooke Gutteridge, Rene David, John Honnold) examine various types of challenges (often without distinguishing between those applicable to unification of commercial law generally and those relating to the treaty-making process in particular), either without any classification as such, or by grouping only some of them for ease of review. The challenges identified in the existing

literature range from issues of planning and organisation (David,⁵¹ Goode,⁵² Gutteridge⁵³), conceptual and technical problems, such as issues of drafting and language differences (Goode et al),⁵⁴ and difficulties of implementation (Kronke)⁵⁵ to the importance of cooperation and balance of interests among states and various stakeholders (Goode)⁵⁶ and the delicate matter of negotiations conducted during the process of treaty-making (Sebenius)⁵⁷.

Second, even if some general taxonomy of treaty-making challenges was developed, its value would be questionable, since every convention is unique and faces very specific (rather than generic) challenges.

Third, the limitations of the thesis format do not permit the author to prepare a detailed analysis of every single challenge involved in the development of the Cape Town Convention.

For these reasons, the author has performed a detailed analysis of the documentary history of development of the Convention and its protocols, relying primarily on the materials published by UNIDROIT and other international organisations, and identified those challenges which appeared most difficult to resolve.

⁵¹ See Goode, Kronke and McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (2nd edn, Oxford University Press 2015) 202-203.

⁵² Roy Goode, 'Reflections on the Harmonisation of Commercial Law' (1991) *Uniform Law Review* 54, 71-72.

⁵³ See Harold C. Gutteridge, *Comparative Law: an Introduction to the Comparative Method of Legal Study & Research* (2nd edn, Cambridge: At the University Press 1949) 171-182.

⁵⁴ Goode, Kronke and McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (2nd edn, Oxford University Press 2015) 207-209.

⁵⁵ Kronke, 'International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice' (2000) *5 Uniform Law Review* 13, 18-19.

⁵⁶ Roy Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) *54 Int'l & Comp LQ* 539, 558-560.

⁵⁷ James K. Sebenius, *Negotiating the Law of the Sea* (Harvard University Press 1984).

1.5 Limitations of research

A comprehensive documentary history research of all the provisions of the CTC is not possible within the limited format of a doctoral thesis. As a result, the author had to limit the scope of this research as follows.

First, there is no analysis of challenges of implementation arising after adoption of the Convention and its protocols, such as seeking ratifications, post-adoption domestication of the treaty and its transposition into national legal systems. The complexity of these matters is worthy of an entirely separate study.

Second, there is no discussion of psychological challenges or analysis of various technical aspects of treaty-making, such as drafting techniques, style and terminology, or preparing instruments in multiple languages.

Third, the discussion of various challenges is limited to those matters which generated the most difficulties during the development of the CTC and focuses primarily on the defining features of the Convention listed in section 1.1 above. Most discussions relate to the development of the Convention and the Aircraft Protocol (as the only protocol currently in force), although other protocols and their history are commonly referred to for comparison or to illustrate specific challenges.

1.6 Principal difficulties

Two principal factors could negatively affect this research and its outcome: limited availability of certain historical records and the fact that the Convention is still developing due to its ‘umbrella’ structure. These have been properly tackled by the author as follows.

First, to produce a comprehensive analysis of the treaty-making process, the author obtained the permission to examine the documents stored in the archives of UNIDROIT in Rome. Many of these materials have never been published and provide a unique account of the events preceding the adoption of the CTC.

Second, the author attended the key development sessions for the preparation of the MAC Protocol. This allowed this thesis to tackle some of the current issues that may affect the future of the CTC and eventually produce much more practical results (as opposed to reflections on the past long gone). As explained in the following section, the results of this research may actually be used in preparation of future protocols to the Convention.

1.7 Contributions of research

This thesis is the first academic research focusing exclusively on the documentary history of the Cape Town Convention and the covered protocols. It provides an in-depth analysis of the history of development of the Convention, which may prove useful in the interpretation of the CTC.⁵⁸ This thesis will also assist in preparation of the new protocols under the Cape Town Convention,⁵⁹ as well as new annotations to the Official Commentaries of Sir Roy Goode.

Due to the fact that the research tackles the views of various actors in the treaty-making process, this thesis will be useful not only for academics, but also government officials, representatives of international organisations and legal advisors (both external and in-house). It is the author's hope that the conclusions and suggestions expressed

⁵⁸ According to Article 32 of the 1969 Vienna Convention on the Law of Treaties the preparatory work of the treaty and the circumstances of its conclusion constitute 'supplementary means of interpretation' of a treaty.

⁵⁹ In addition to the ongoing work on the development of the MAC Protocol, the CMI is currently exploring the feasibility of extending the application of the CTC to ships: see *Report for the CMI Assembly - 9th June 2015*.

herein will also be of use to practitioners all over the world and that this research will strengthen the attractiveness of treaty-making as an instrument of harmonising commercial law.

1.8 Structure of the thesis

The remainder of this thesis is arranged into chapters as follows.

Section 1.9 of this Chapter I provides a general overview of the history of development of the Cape Town Convention and its protocols.

Chapter II addresses the principal substantive challenges that affected the development of the fundamental concepts shaping the CTC, such as the notion of international interest and the test of internationality.

Chapter III analyses the problem of selecting asset types covered by the Convention.

Chapters IV focuses on the establishment of the structure of the CTC.

Chapters V and VI examine the key challenges in crafting the key provisions determining the application of the Convention *inter partes* and as against third parties.

Chapter VII addresses the impact of both the commercial factors and state sensitivities on the development of the CTC.

Chapter VIII tackles various process-management challenges relevant to the Convention.

Chapter IX lists the conclusions and summarises the results of the research.

Appendix I provides a graphical representation of some of the key milestones of the treaty-making process associated with the Cape Town Convention.

In the interests of brevity and clarity, the text of all chapters includes short form references to the various reports and working papers. For this reason, Appendix II contains a table of concordance between the full and short forms of such references.

1.9 A brief outline of the history of the Cape Town Convention

The Convention and its adopted protocols were developed by UNIDROIT (in collaboration with various stakeholders, including the respective industry groups and international organisations) in a multi-stage process. The CTC and the Aircraft Protocol were the first instruments to complete all of the relevant stages as follows.

The first – and also longest – stage (1988 – 1998) involved the discussion of the main concepts and ideas in dedicated working groups, culminating in the development of the draft Convention and Aircraft Protocol.⁶⁰

During the second stage (1999-2000) the draft instruments were scrutinised by governmental representatives at committees of governmental experts.⁶¹

Finally, the revised drafts were finalised and adopted during the Cape Town Diplomatic Conference in 2001.

The Rail and Space Protocols were adopted during the dedicated diplomatic conferences held in Luxembourg (in 2007) and Berlin (in 2012), respectively. At the time of completion of this thesis, the MAC Protocol only reached the second stage: the second session of governmental experts is scheduled for October 2017.

The key milestones in the development of the Convention and its protocols are listed in a single timeline, which can be found in Appendix I.

⁶⁰ The functions of the various working groups are examined in section 8.1.

⁶¹ All mentions in this thesis of the ‘governmental expert stage’ should be read as references to this second step, as applicable to the CTC or the relevant protocol, depending on the context.

CHAPTER II. DEFINING THE SCOPE OF THE CONVENTION

2.1 *Identifying the problem*

Two key problems formed the basis of the UNIDROIT initiative to prepare a convention on certain international aspects of security interests in mobile equipment: (i) inappropriateness of the *lex situs* rule in the context of regulating security interests in assets frequently moved between states and (ii) widely differing approaches to the regulation of security interests (in the broad sense) under national laws. This section 2.1 focuses on these issues to reveal the complexities of legal regulation underlying the Cape Town Convention.

2.1.1 *Origins of the Convention: the lex situs conundrum*

The UNIDROIT's activity concerning the development of a convention in the area of international regulation of security interests in mobile equipment was set in motion by the proposal of the Canadian Government (the 'Canadian Proposal')¹ considered during the 67th session of the UNIDROIT Governing Council in June 1988,² which was based on three key considerations. First, existing international conventions showed that security interests (or real rights generally) could, in principle, be subject to international regulation in the form of a treaty.³ Second, an attempt to create a broad international agreement regulating security interests generally would be 'entirely unrealistic' in light

¹ The text of the proposal was prepared by Ronald Cuming and was kindly provided to the author by the UNIDROIT Secretariat as an attachment to *Letter from Malcolm Evans to Willem Vis* (22 July 1988).

² Unidroit, *Governing Council C.D. 67 - Doc. 18 (1988)* 52-53.

³ By way of example, Article 7 of the 1988 UNIDROIT Convention on International Financial Leasing (the 'Financial Leasing Convention') provides for limited recognition of lessor's real rights in bankruptcy as well as against creditors and Article I(1)(d) of the 1948 Convention on the International Recognition of Rights in Aircraft (the '1948 Geneva Convention') provides for recognition of certain 'mortgages, hypothèques and similar rights in aircraft'.

of UNCITRAL's recent attempt to harmonise the laws on security interests,⁴ which had failed due to its overly ambitious nature: it was seen as an attempt to create a model law for most aspects of both international and domestic security interests. Third, existing research suggested that both the role, and demand for, security interests in international trade were likely to increase.⁵ In light of the above factors, the paper of the Canadian Government concluded with a proposal for a feasibility study for a project 'directed toward the preparation of a convention on certain international aspects of security interests in mobile equipment'.⁶

It stands to mention that the past examples cited in the Canadian Proposal offered little guidance as to how far the unification could proceed regarding the coverage of substantive rules: the Financial Leasing Convention was still too young to be called a success (the UNIDROIT Governing Council was considering the proposal of the Canadian Government less than a month after the adoption of the treaty), and the 1948 Geneva Convention was, in essence, a conflict of laws instrument, with few substantive rules. Hence, the UNIDROIT Governing Council took a cautious approach and initiated a feasibility study to identify the international elements involved in the various types of secured transactions used to finance mobile equipment, assess the corresponding problems, the likelihood of addressing such problems in an international convention and measure the potential support for such convention.⁷

⁴ UNCITRAL project examining the feasibility of developing model rules for security interests in movables (1968 – 1980) (the 'UNCITRAL Project'). It should be noted that UNCITRAL did not abandon attempts to prepare such model rules: its efforts culminated in the adoption of the 2016 UNCITRAL Model Law on Secured Transactions.

⁵ United Nations, *Report of the Secretary-General: study on security interests (A/CN.9/131) (1978)* 213.

⁶ See n 1.

⁷ Unidroit, *Governing Council C.D. 67 - Doc. 18 (1988)* 57.

It should be noted that the proposal of the Canadian Government focused on a single type of instrument as a vehicle for the purposes of the harmonisation effort, namely an international convention: no alternative or ‘fallback’ mechanisms were considered from the very beginning. It is not contrary to common logic to presume that, as a result, the ambit of the proposed instrument would focus on conflicts of law issues, particularly in light of the fiasco of the UNCITRAL Project, which had considered the creation of a model law, ie certainly a less ambitious undertaking compared to a convention (although the same cannot be said about the scope of the UNCITRAL Project, which had attempted to cover the whole area of personal property security law).

The follow-up study (the ‘Study’) to the Canadian Proposal referred to above, also prepared by Ronald Cuming (but this time at the request of UNIDROIT), as it appears, was based on a series of presumptions directly relating to the prospects of creating substantive international rules governing security interests in movable property: (i) the level of international regulation in the sphere of security interests in movable property was minimal; (ii) national laws regulating security interests in movable property were complex and diverse; (iii) past attempts to harmonise this area of law by way of creation of a model law had failed; (iv) further harmonisation in the area was possible only in specific areas of commercial activity, provided that they would benefit from such harmonisation,⁸ (v) development of a generic international security interest in movables generally was likely to fail.⁹

Harmonisation of substantive rules governing security interests was not seen as a practicable solution from the start: the prospects of ‘overcoming national parochialism’

⁸ Unidroit, *Study LXXII - Doc. 1 (1989) 2.*

⁹ *ibid* 3.

in this area of the law seemed highly unlikely.¹⁰ The most logical step in the circumstances seemed to be in the direction of harmonising conflict of laws provisions of national legal systems, with a view to promoting uniformity: ‘If the conflict of laws rules are substantially similar, there is no need to have substantive international law to secure uniformity of approach’.¹¹ Cuming stressed, however, that ‘uniformity’ should not be seen as the only objective of unification: ‘Uniformly *inappropriate* conflict of laws rules are of no assistance to those whose economic interests depend upon commercially reasonable and fair treatment under the laws of nations in which those interests are being asserted’.¹² In other words, the conflict of laws rules not only need to be harmonised: they must contain a solution which is satisfactory for the particular legal relationship.

In his study Cuming examined the connecting factor applied in the majority of European jurisdictions to in rem rights, *lex situs* (ie the law of the country in which the asset is located), and found it inadequate in a situation when an asset subject to a security interest created in State A was moved to State B.

First, in this scenario the apparent simplicity of *lex situs* would disappear, as the same connecting factor would point to an entirely different, and often unpredictable, jurisdiction. Apparently, the degree of unpredictability would increase in cases of assets frequently moving from country to country.

Second, the *lex situs* approach would inevitably lead to the ‘transposition’ problem: whenever the movable asset subject to a security interest created in one country is moved to another state, one needs to compare the status of the foreign security interest with the various security interests allowed under the new *situs* to find the most similar

¹⁰ ibid 5.

¹¹ ibid 6.

¹² ibid (emphasis added).

equivalent, either to establish its priority position, or to identify an appropriate remedy in situations when the law of the new *situs* does not provide for a corresponding remedy.¹³ This would have a detrimental effect on predictability: the secured party could end up having less control over collateral moved to another country, compared to the laws of the state in which the security interest was initially created.

Third, a highly problematic area for *lex situs* would relate to mandatory registration and public notice requirements applicable to domestic security interests: if the latter must be registered to ensure efficacy or priority, then foreign security interests are likely to be subject to the same requirements (the contrary would imply that the interests of foreign secured creditors are placed higher than those of their domestic counterparts).¹⁴ While multiple solutions to the problem were identified, all of them required specific substantive law provisions regulating the applicability of domestic public notice requirements to foreign security interests.

According to Cuming, the disruptive effects of *lex situs*¹⁵ could be minimised if a more appropriate choice of law rule was elected to govern the security interests in mobile assets. At the time, examples of displacement of *lex situs* existed both in international instruments and domestic laws of some states. The prevailing connecting factor in the US and Canada, as well as under the 1965 Convention on the Registration of Inland Navigation Vessels¹⁶ (the ‘1965 Geneva Convention’) was *lex debitoris* (ie the

¹³ ibid 8.

¹⁴ ibid 9.

¹⁵ During the review of Cuming’s report by the UNIDROIT Governing Council in 1989 Roy Goode noted another inadequacy of the *lex situs* rule in situations where the debtor creates security not over a single object, but over the totality of its assets: in this situation the creditor would most likely search the registry at the debtor’s location, rather than attempt to physically locate all the relevant assets and then identify the law applicable to *in rem* rights (See Unidroit, *Governing Council C.D. 68 - Doc. 26 (1989)* 33).

¹⁶ Although the convention formally applies the *lex registri* connecting factor (Article 10 of Protocol No 1), a vessel can only be registered in one state and only provided that this state is either (i) the

law of the country in which the debtor is located or has its place of business), whereas the relevant international aviation¹⁷ and maritime¹⁸ conventions favoured *lex registri* (ie the law of the country of the relevant register in which the asset is registered).

Both *lex debitoris* and *lex registri* were not without their own flaws, however. Essentially, each of them required the state in which the mobile asset was located to relinquish the application of its own laws with respect to security interests created over such asset in favour of the law of the location of the debtor or the law of the country where the asset was registered.¹⁹ In addition, certain financiers would lack the sophistication to check the laws and records of countries other than the *situs*, whereas the creation and maintenance of an international registry for the purposes of providing public notice of security interests seemed entirely unrealistic at the time.²⁰

2.1.2 *Seeking solutions to the lex situs problem*

2.1.2.1 *Recognition as a necessary element of conflict of laws unification*

During his analysis of the feasibility of conflict of laws unification in the area of security interests in mobile equipment Cuming emphasised that uniformity of approach should be supplemented by conflict of laws rules that give a ‘reasonable measure of assurance’ that (i) the security interest created over mobile equipment is not easily lost when such

territory from which the operation of the vessel is habitually directed, (ii) the country of nationality or habitual residence of the owner of the vessel, or (iii) the territory on which the owner of the vessel has its registered office or the principal place of business management (Article 3(1)). Effectively this results in the application of the *lex debitoris* connecting factor.

¹⁷ See Articles I(1) and II(2) of the 1948 Geneva Convention.

¹⁸ See Article 1 of the 1926 Brussels Convention and Article 1 of the 1967 Brussels Convention.

¹⁹ Unidroit, *Study LXXII - Doc. 1 (1989)* 27.

²⁰ *ibid.*

equipment crosses the national border and (ii) the persons who acquire interests in such equipment in the state to which it is taken are also duly protected.²¹

It is, of course, debatable whether the ‘reasonable measure of assurance’ referred to above was obtainable through the use of uniform conflict of laws rules alone. The latter can only go as far as to identify the national legal system governing a certain legal relationship: the rules of that legal system themselves remain untouched and unregulated.

Nevertheless, Cuming ended up making a crucial point: a common conflict of laws approach alone would be insufficient for the purposes of a system of international rules regulating security interests in mobile equipment. In addition, it would be essential to ensure the continued validity of security interests through recognition, regardless of the type of connecting factor used.²² Indeed, the need for a system of recognition inevitably arises whenever it is physically possible that the same connecting factor (even if uniformly adopted by all states) leads to the application of the law of more than one jurisdiction. Even if *lex debitoris* or *lex registri* is universally applied, courts may still have a dilemma as to which system of law to choose: the law to which the relevant connecting factor points at the time of proceedings (State A), or the law to which the same connecting factor pointed at some earlier time (State B) since the location of the debtor has changed or the asset was reregistered in another registry. Application of the connecting factor by reference to the position existing at the time of proceedings (State A) is inadequate in the sense that it does not provide a necessary degree of predictability (it disregards the fact that the security interest could have been created when the debtor was located, or the asset was registered, in an entirely different state). The need to

²¹ *ibid* 6.

²² *ibid* 28.

preserve commercial certainty²³ firmly points towards the application of the laws of State B, supplemented by a rule on recognition of the validity of security interests created under those laws. Depending on the selected conflict of laws provision, this would involve recognition of security interests in cases of change of the asset's location, change of debtor's location or change of the relevant register.

In order to ascertain the function of recognition as part of unification of conflict of laws provisions, consider the following example.

Example 1

A financier having its place of business in State X is planning to grant a loan to a borrower whose place of business is in State Y. The loan is to be secured by mortgage over an asset which regularly moves between States X, Y and Z.

Prior to unification of conflict of laws rules, all *in rem* rights in mobile assets under the laws of State X are regulated by *lex debitoris*, whereas under the laws of States Y and Z *lex situs* applies to *in rem* rights.²⁴ As a result, the laws of State X mandate the application of the laws of State Y to the security interest regardless of the location of the asset, whereas the conflict of laws rules of States Y and Z require the application of the relevant substantive rules of States X, Y or Z, respectively (with a potential of applying the laws of any other state where the asset may end up).

Following unification of connecting factors States X, Y and Z all apply the same connecting factor to security interests in mobile equipment, *lex debitoris*. The use of the new connecting factor alone results in greatly increased predictability, as the now-harmonised conflict of laws provisions of all states lead to the application of the

²³ The importance of this factor is the subject of detailed analysis in section 7.1.1.

²⁴ For the purposes of this example, it is assumed that no *renvoi* applies in any of the cases.

substantive security laws of the same country (State Y), which is unlikely (although not impossible) to change. From the investor's perspective, compliance with the requirements of substantive law rules of States X or Z yields no added benefit: insofar as the security agreement follows the rules of State Y, it will be valid and enforceable in all states (potentially subject to public policy rules of the forum and other limitations of the availability of certain remedies not known to the laws of the forum, but these additional concerns are irrelevant for the purposes of this example).

In this scenario, in addition to the above unification, in order to address the rare situations when the debtor changes its place of business, contracting states additionally agree to recognise the security interests which were validly created in accordance with the connecting factor at the time of their creation, even if at the time of the court proceedings brought by the financier the debtor is located in a different state. However, even without such recognition, the position of the creditor would not be materially prejudiced, since the change of debtor's location is more difficult and potentially time-consuming (compared to the movement of the relevant asset), easier to track and less likely to occur in the first place.

The obvious downside of this scenario lies in practicability: States Y and Z would be required to relinquish the right to apply their own substantive laws to security interests over objects located within their territory and are thus likely to resist unification in the first place.²⁵ Another problem arises from the need to apply foreign rules, including the rules on remedies, which may not be known to the domestic legal systems of the states in which enforcement of security is sought (potentially with the politically

²⁵ Although in this particular factual scenario State Y may find attractive the extension of the application of its own laws (due to the fact that the debtor appears to be located in State Y, which is completely incidental), in many other situations this will not be the case.

unwelcome result of allowing foreign secured creditors greater protection compared to what is permitted domestically).

2.1.2.2 Recognition as alternative to full conflict of laws unification

Even though the unification of conflict of laws rules applicable to security interests in mobile equipment, coupled with a system of recognition referred to in the previous paragraphs was certainly less ambitious than harmonisation of substantive rules, Cuming's proposal did not contemplate major revision of conflict of laws rules adopted by states. Instead, the study suggested an even more limited solution: a system of recognition of security interests validly created under the domestic laws of other countries. This solution did not entail any mandatory unification of connecting factors, except for one important scenario: since the ultimate objective was to ensure the recognition of validly created national security interests, it was necessary to provide for a uniform solution to the problem of identification of rules governing the validity of such security interests.²⁶ The solution, according to Cuming, would lie in the abolition of the *lex situs* rule in favour of *lex debitoris*.²⁷

Example 2

To identify the different role of recognition envisaged in Cuming's proposal consider the following example.

The starting position is the same as in Example 1 prior to unification, however in this scenario there is no subsequent unification of conflict of laws rules of States X, Y and Z: they continue to apply *lex debitoris* and *lex situs* respectively. Instead, the legal

²⁶ In the absence of such uniform connecting factor courts tasked with recognising foreign security interests would have absolutely no indication as to which system of law to analyse for compliance with and would have to search all jurisdictions for signs of compliance with their respective criteria or arbitrarily select such system of law.

²⁷ See Appendix A in Unidroit, *Study LXXII - Doc. 1 (1989)* iii.

harmonisation here is limited to a single rule on recognition, whereby security interests validly created under *lex debitoris* are to be recognised and enforced by all participating states.

For obvious reasons, this approach is much less intrusive from the perspective of States Y and Z: if there is no security interest validly created under the laws of State Y (or, similarly, if such security interest exists, but is not asserted by the creditor), States Y and Z do not have to relinquish the authority to apply their own substantive rules to the security interest when the asset subject to such security interest ends up in their territory. In this scenario, recognition is not merely an accompanying element of conflict of laws unification aiming to enhance legal certainty (which was the case in Example 1): it is rather an end in itself, as states are free to keep their conflict of laws rules, which are only qualified by the obligation to ensure recognition.

From the financier's perspective, however, this 'light-touch' unification provides a level of certainty which is substantially similar to that of Example 1 (assuming that the problem of foreign remedies unknown to the enforcing court's legal system may apply equally in either scenario): in order to ensure validity of the security interest in other countries, it is sufficient to comply with the laws of State Y. Thus, predictability is achievable through much less interference with the domestic legal system and is less likely to attract opposition from States Y and Z.

A possible alternative to the above concept of recognition could be the creation of a separate *sui generis* international interest governed by the new convention, but the prospects of this approach were not considered at the early stage of the project: in

Cuming's own words, the objective of the future convention 'would *not* be to create a supra-national security interest'.²⁸

2.1.3 *Feasibility of adopting a universal functional approach to security interests*

According to Cuming's research, an international regime of recognition of foreign security interests would not be workable in the absence of a functional approach to security interests (ie a regime whereby the rules governing proprietary interests in mobile assets apply to transactions involving the use of such assets to secure payment or performance of obligation regardless of the form such transactions may take²⁹): 'an undertaking to recognize all foreign generic security interests in mobile equipment would appear to be a sine qua non of a new international structure designed to accommodate modern mobile equipment financing'.³⁰

This approach implied that in addition to transactions commonly categorised as creating security interests, such as contractual mortgages and charges, the broad concept of 'security interest' would cover both title reservation agreements and leases having the function of security,³¹ which, as shown below, would run contrary to the laws of many jurisdictions.

The proposal to establish an international functional approach to security interests in mobile equipment was first put to the test in the questionnaire prepared by the UNIDROIT Secretariat, together with Ronald Cuming, in 1990 (the 'Questionnaire')³² for the purpose of rectifying the principal deficiency of Cuming's report, namely the lack

²⁸ *ibid* (emphasis added).

²⁹ This approach was at the time reflected in Article 9 of the US Uniform Commercial Code and certain Canadian Personal Property Security Acts.

³⁰ Unidroit, *Study LXXII - Doc. 1 (1989)* 28.

³¹ *ibid*.

³² Unidroit, *Study LXXII - Doc. 2 (1989)*.

of substantial empirical analysis.³³ The document did not merely attempt to assess the commercial need for harmonisation in the area of security interests in mobile equipment: it tested the preliminary legal conclusions made in Cuming's Study.³⁴

Despite the initial inference that the new convention would not create any kind of supra-national security interest,³⁵ the Questionnaire nevertheless offered two alternative proposals by which the harmonisation could be achieved: (i) development of an 'entirely new type of secured financing device for use where financing involves collateral in the form of equipment of a kind generally moved from one State to another' or (ii) 'recognition of a generic concept of security interest that encompasses all financing devices used in States...whether or not those devices are conceptualised as such under the laws of the State in which they are used'. The vast majority of respondents (44) supported the latter option, while only 14 sought an entirely different financing vehicle.³⁶

2.1.4 *Transactions falling within the ambit of the new convention*

Preference towards the use of functional approach to identify the categories of transactions covered by the new convention was subsequently affirmed by the UNIDROIT Restricted Exploratory Working Group (REWG) in 1992:

'Security interest' should be defined in functional terms, thus avoiding the problems created by differences in the concept of security interest and should encompass, for example, reservation of title under sale agreements as well as security by way of mortgage or charge.³⁷

³³ Cuming's original assumptions had been tested only by way of inviting comments from a small group of experts.

³⁴ The Questionnaire was distributed between February and July 1990 in all UNIDROIT member states, as well as in Brazil, Iceland and New Zealand and among a number of international organisations.

³⁵ See Appendix A in Unidroit, *Study LXXII - Doc. 1 (1989)* iii.

³⁶ Unidroit, *Study LXXII - Doc. 3 (1991)* 9-10.

³⁷ Unidroit, *Study LXXII - Doc. 5 (1992)* 4.

Only consensual non-possessory security interests (ie those in which the debtor is left in physical possession of the asset)³⁸ were to be covered by the new convention.³⁹ A similar approach was developed in the course of the first session of the UNIDROIT Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment (the ‘Study Group’) in 1993: this time, in addition to title reservation agreements, the Study Group for the first time considered the feasibility of covering finance leases, but eventually decided to postpone the decision on that matter.⁴⁰

The above notwithstanding, subsequent discussions and commentaries received by the Study Group revealed multiple conceptual differences between various legal traditions,⁴¹ particularly with respect to the different treatment of title reservation and leasing agreements by the systems of Civil law, which distinguished the right of ownership from security interests as ‘fundamentally opposed’ categories.⁴² In response to these concerns, the Sub-Committee for the Preparation of a First Draft established by the Study Group (the ‘First Draft Subcommittee’) introduced two substantive changes into the project. First, it was decided that the new convention should be expressed as establishing uniform rules for ‘interests’ (as opposed to ‘security interests’). Second, the subcommittee adopted for the first time the technique that would later persist throughout the whole process of development of the Cape Town Convention: formal separation of interests arising under security agreements from interests created by virtue of a title retention agreement. As a result, all the ‘interests’ were divided into two distinct categories: security interests *stricto sensu*, on the one hand, and interests arising from

³⁸ For reasons of exclusion of possessory interests see Unidroit, *Study LXXII - Doc. 11 (1994)* 8.

³⁹ Unidroit, *Study LXXII - Doc. 5 (1992)* 4.

⁴⁰ Unidroit, *Study LXXII - Doc. 7 (1993)* 5.

⁴¹ See, eg, Unidroit, *Study LXXII - Doc. 8 (1993)* 31; Unidroit, *Study LXXII - Doc. 11 (1994)* 7; Unidroit, *Security Interests Study Group Sub-committee 1st session Misc. 2 (1994)* 3.

⁴² Unidroit, *Study LXXII - Doc. 6 Add. 3 (1993)* 1.

retention of title and leasing agreements, on the other.⁴³ Drawing a distinction between the latter two categories in the text of the new convention was considered unnecessary, so long as they were subject to the same rules.⁴⁴ This change marked the formal departure from the concept of a single security interest defined ‘by looking at the intention and economic effect of the transaction rather than at its particular legal form’⁴⁵ and was subsequently reflected in the first set of draft articles of the future Convention.

The first set of draft articles prepared in 1994 differentiated between two types of agreements: a ‘security agreement’ and a ‘title reservation agreement’.⁴⁶ The former was defined as ‘an agreement which secures performance of an existing or future money obligation owed by one person...to another’.⁴⁷ The latter covered both leases and title reservation agreements and was defined as ‘an agreement by which mobile equipment is supplied on lease (with or without an option to the lessee to buy the equipment) or is agreed to be sold on terms that ownership does not pass from the seller to the buyer until payment of the sums specified by the agreement’.⁴⁸ The combined effect of both definitions was to accommodate the needs of both legal traditions: although the ‘security agreement’ was still defined in functional terms by reference to its economic purpose,⁴⁹ jurisdictions which respected the distinct nature of title retention and lease agreements could continue to do so.

⁴³ Unidroit, *Study LXXII - Doc. 12 (1994)* 5.

⁴⁴ *ibid.*

⁴⁵ Unidroit, *Study LXXII - Doc. 7 (1993)* 4.

⁴⁶ Unidroit, *Study LXXII - Doc. 13 (1994)*.

⁴⁷ Article 1(2)(d) in *ibid.*

⁴⁸ Article 1(2)(e) in *ibid.*

⁴⁹ cf Uniform Commercial Code Article 1-201(37); Personal Property Security Act, Revised Statutes of Saskatchewan, 1978.

Without challenging the need to differentiate between security interests *stricto sensu* and title reservations (in the broad sense, as defined by the Study Group in 1994),⁵⁰ the AWG in 1995 proposed a more technical approach, whereby the two groups were separated on the grounds of allocation of title over the relevant asset. Under this concept, a ‘security interest’ would be defined as ‘a writing containing obligations...the non-performance of which entitles the interest holder to seize specifically identified assets title to which resides, or will reside, with the interest holder’s contract counterparty in such writing’. In contrast, a ‘title reservation’ would mean ‘a writing containing obligations...the non-performance of which entitles the interest holder to seize specifically identified assets title to which resides, or will reside, with such interest holder’.⁵¹ This new approach captured the common characteristics of title reservation and leasing agreements at a fundamental level: in both types of transactions the ownership vests in the creditor, rather than the debtor. Whereas this solution reached the same objectives as the separation envisaged in the first set of draft articles,⁵² it abandoned differentiation based on specific transaction mechanics. Despite its conceptual soundness, the proposal of the AWG was never reflected in any of the drafts of the Convention, partly because of the later decision to separate leasing transactions as a separate category not falling under the heading of ‘title reservation agreements’.⁵³

One problem with the differentiation proposed in the first set of draft articles,⁵⁴ which successfully transferred to the second revision of the same in 1995,⁵⁵ lay in the

⁵⁰ Unidroit, *Study LXXII - Doc. 12 (1994)* 5.

⁵¹ Unidroit, *Study LXXII - Doc. 16 (1995)* 12.

⁵² Unidroit, *Study LXXII - Doc. 12 (1994)* 5.

⁵³ The special concerns of the leasing industry which resulted in the formal separation of leases are discussed in section 2.1.4.1 below.

⁵⁴ Article 1(2)(b) in Unidroit, *Study LXXII - Doc. 13 (1994)*.

⁵⁵ Unidroit, *Study LXXII - Doc. 18 (1995)* 6.

fact that it treated in the same manner interests ‘arising under’ both security agreements and title reservation agreements. Conceptually this is not accurate, as the interests created by the former are those of the creditor (ie the party which gets the benefit of the security interest), whereas the only interest a title reservation agreement can possibly create is that of the debtor, since the creditor already holds title to the asset and does not require additional authority over it to be created in its favour.⁵⁶ That is not to say, however, that the ‘interest’ of seller or lessor, which in effect is the right of ownership, cannot be displaced by a security interest: such technique was used in the 1993 EBRD Model Law on Secured Transactions, which in Article 9.1 created a mechanism whereby an unpaid vendor, by operation of law, loses the title to the object of sale (which title is transferred to the purchaser) and instead simultaneously obtains a charge over the same object.⁵⁷ This issue was subsequently acknowledged by the First Draft Subcommittee⁵⁸ and addressed in the next revision of the first set of draft articles of the future convention, in which the interest of the seller in a title reservation agreement was expressed as being ‘retained’ by the seller (Article 1(2)(b)).⁵⁹

In addition, the same set of draft articles abolished the previous practice of treating title reservation and leasing agreements under a single heading, recognising the special characteristics of leasing transactions, which are discussed in the next section.

2.1.4.1 Leasing agreements

In his Study, Cuming, who advocated the functional approach to the definition of security interests, envisaged that the future convention would cover two types of leases:

⁵⁶ Unidroit, *Study LXXII - Doc. 19 (1995)*; Unidroit, *Study LXXII - Doc. 19 Add. (1995)* 3.

⁵⁷ See Article 9.1 of the 1993 EBRD Model Law on Secured Transactions.

⁵⁸ Unidroit, *Study LXXII - Doc. 21 (1995)* 7.

⁵⁹ Unidroit, *Study LXXII - Doc. 22 (1996)* 1.

(i) hire-purchase contracts under which the seller leases equipment to a buyer who intends to purchase it and (ii) leases which under the applicable law are characterised as security agreements.⁶⁰ A functional approach would effectively cover leases having the effect of creating security over the leased object and exclude ‘true leases’ (ie leases which do not serve such function). Difficulties associated with this concept surfaced very quickly.

The distinct nature of lessors’ rights

Members of the leasing industry demonstrated their firm opposition to assimilation of leases to security transactions from the early stages of development of the Convention, on the basis that the lessor’s ownership right should not be confused with a ‘security interest’.⁶¹ In light of these concerns the UNIDROIT Study Group, which in its first session approved the functional approach as applied to the concept of security interests, decided to defer the consideration of finance leases specifically (leases without the function of creating security were not expected to be covered by the future convention in the first place).⁶²

The initial step in formal separation of leases was taken by the First Draft Subcommittee, which replaced the reference to ‘security interests’ with a more neutral one, covering ‘interests’ generally and decided to address both title retention agreements and leasing agreements as a separate (but single) category.⁶³ Concerned with the opposition emanating from the leasing industry, the subcommittee did not follow the

⁶⁰ See Appendix A in Unidroit, *Study LXXII - Doc. 1 (1989)* ii.

⁶¹ See comments of the French Finance Houses Association in Unidroit, *Study LXXII - Doc. 6 (1993)* 4; see also comments of the European Federation of Equipment Leasing Company Associations in Unidroit, *Study LXXII - Doc. 6 Add. 3 (1993)* 1.

⁶² Unidroit, *Study LXXII - Doc. 7 (1993)* 5.

⁶³ Unidroit, *Study LXXII - Doc. 12 (1994)* 5.

recommendation of Jan-Hendrik Roever⁶⁴ to implement, *mutatis mutandis*, an approach similar to that used in Article 9.1 of the 1993 EBRD Model Law on Secured Transactions.⁶⁵

In the next two drafts leasing agreements appeared under the heading of ‘title reservation agreements’, together with title retention agreements *stricto sensu*.⁶⁶

The special case of ‘true leases’

The decision to merge both leases and sales with reservation of title into a single category was problematic because, unlike title retention sales, which primarily⁶⁷ serve the function of creating security, leases are less homogeneous in this sense and may as well be concluded solely for the purposes of renting the relevant equipment. The inclusion of all types of leases within the scope of the new convention would therefore mean extending its reach to matters which may have nothing to do with security interests in the first place. This issue could remain a simple policy matter, but the accumulated practical experience dictated otherwise. Differentiation between the two types of leases had proven so difficult that in 1992 Cuming questioned the usefulness of separation of leases based on their purpose: ‘experience in North America indicates the futility of attempting to distinguish between ‘true leases’ and ‘security leases’ without clear statutory guidance’.⁶⁸

Four different solutions to the problem emerged in the early stages of development of the Convention. The first was inspired by the recent experience of the

⁶⁴ Unidroit, *Study LXXII - Doc. 11 (1994)* 11.

⁶⁵ See n 57.

⁶⁶ See Unidroit, *Study LXXII - Doc. 13 (1994)* and Unidroit, *Study LXXII - Doc. 18 (1995)*.

⁶⁷ An exception would be a contract whereby the transfer of title to the purchaser is subject to an event other than payment.

⁶⁸ Unidroit, *Study LXXII - Doc. 4 (1992)* 5.

EBRD, which had completely excluded leases from the scope of its 1993 Model Law on Secured Transactions in view of perceived impossibility of drawing a convincing distinction between various leases.⁶⁹ The second was formulated by Thomas Whalen, who, essentially for the same reasons, suggested that all leases should be covered by the future convention.⁷⁰

The third and fourth solutions were proposed by Ronald Cuming, in whose view, this problem, which had resulted in ‘a great deal of litigation and considerable confusion’, was not a good reason to exclude from the scope of the future convention a whole range of leases that were de facto financing transactions. Such exclusion would inevitably result in uneven application of the treaty in different legal systems: the North American jurisdictions would characterise certain leases as functionally security agreements falling under the convention, whereas courts adopting a more formalistic approach would not look beyond the form the transaction has taken.⁷¹ Two solutions were envisaged by Cuming. The first would be to make it clear in the text of the convention that the functional concept of ‘security interest’ was intended to cover finance leases. The second would be to provide in the convention a set of specific tests to determine which categories of leases would be regulated by the new instrument.⁷² Both options were problematic, however: the former did not address the problem of uncertainty which had plagued the North American jurisdictions, whereas the latter would inevitably result in some functionally security devices being left out. As a result, Cuming suggested an alternative definition of ‘security lease’, which essentially characterised as a security instrument any leasing transaction which: (i) included the

⁶⁹ Unidroit, *Study LXXII - Doc. 11 (1994)* 9.

⁷⁰ Unidroit, *Study LXXII - Doc. 10 (1994)* 10.

⁷¹ Unidroit, *Study LXXII - Doc. 8 (1993)* 11.

⁷² *ibid.*

lessee's obligation to purchase the leased asset or an obligation to renew the agreement for a term amounting to all or substantially all of the remaining economic life of the equipment; (ii) automatically transferred the title over the leased asset to the lessee after the payment of all, or a specified number of, periodic payments; (iii) effectively gave the lessee a right of possession over the leased asset for all or substantially all of the remaining economic life of the equipment; (iv) gave the lessee the right to purchase the leased asset at a price that was substantially below the market value of the equipment at the date such right was exercised; or (v) permitted the lessee to renew possession of the leased asset at a price that was substantially below the market rental cost of the equipment at the date such right was exercised.⁷³

The First Draft Subcommittee did not establish a firm position, but provisionally considered two criteria that could be used to limit the types of leasing agreements covered by the future convention: (i) an option to purchase the leased asset and (ii) a term of the lease exceeding three years.⁷⁴ Nonetheless, the lack of an agreed position on the matter gave the Drafting Group⁷⁵ a certain degree of freedom; as a result, neither of the above two requirements were reflected in the following two drafts: the minimum duration was omitted, while the leasing agreements, as defined, included even transactions without an option to purchase the leased asset.⁷⁶ Effectively, these drafts covered all types of leasing arrangements.

Opinions relating to the possibility of excluding certain types of leases expressed by various commentators and international organisations in the run-up to the

⁷³ ibid 12-13.

⁷⁴ Unidroit, *Study LXXII - Doc. 12 (1994)* 5.

⁷⁵ In this thesis, mentions of the 'Drafting Group' should be read as references to the specific drafting group operating at the time in question prior to the governmental expert stage – see section 8.1.2.

⁷⁶ Unidroit, *Study LXXII - Doc. 13 (1994)*; Unidroit, *Study LXXII - Doc. 18 (1995)*.

third session of the First Draft Subcommittee were noticeably divided. One group called for the exclusion of ‘true leases’: on the one hand, the latter were seen as creating conceptual difficulties in jurisdictions that did not recognise the security function of leasing transactions,⁷⁷ on the other hand, it was feared that the requirement of registration, if adopted in the future convention as a requirement of validity and/or priority of lessor’s interest in bankruptcy, would be excessive when applied to true leases (particularly to those of short term duration).⁷⁸ The other group expressed a general preference towards the inclusion of all leases, mainly for the reason of increased certainty resulting from such solution: even in those legal systems which recognised ‘security leases’ the problems of characterisation eventually increased financing costs.⁷⁹ In addition, from the perspective of aviation industry transactions, the requirement of registration, even as applied to short term leases, would not be seen as a major hurdle, given the relative high costs of aircraft equipment. In contrast, even if a special exception for short term leases were introduced, this would, as a minimum, provide a disincentive to enter into short term leases, not to mention the dual system of rules regulating long term and short term leases resulting from such decision.⁸⁰

The feasibility of limiting the types of leasing agreements covered by the future convention was next revisited during the third session of the First Draft Subcommittee, which not only reopened the discussion on this matter, but finally separated leasing transactions from title retention agreements.⁸¹ The adopted decision to consider the idea of excluding from the scope of the Convention short term leases (provisionally identified

⁷⁷ Unidroit, *Study LXXII - Doc. 14 Add 2 (1994)* 1; Unidroit, *Study LXXII - Doc. 14 Add 4 (1994)*.

⁷⁸ Unidroit, *Study LXXII - Doc. 19 Add. (1995)* 4.

⁷⁹ Unidroit, *Study LXXII - Doc. 16 (1995)* 13; Unidroit, *Study LXXII - Doc. 17 (1995)* 5; Unidroit, *International Interests Study-Group Sub-committee 3rd session Misc. 1 (1995)* 1.

⁸⁰ Unidroit, *Study LXXII - Doc. 16 (1995)* 13.

⁸¹ Unidroit, *Study LXXII - Doc. 21 (1995)* 7.

as those not exceeding three years) was reflected in the next draft, in which a ‘leasing agreement’ was defined as ‘agreement by which one person...leases an object (with or without an option to purchase) to another person...for a period of not less than [three] years’.⁸²

The second session of the UNIDROIT Study Group held in 1996 essentially confirmed the same position. Leasing agreements covered by the future convention were not supposed to be limited by any kind of specific criteria for a number of reasons. On the one hand, if only certain categories of leases were within the scope of the Convention, parties to the relevant contracts would inevitably attempt to exploit the criteria used to draw a distinction between the two categories. At the same time, the future Convention, as an instrument promoting asset-based financing in various forms, needed to offer sufficient flexibility to commercial parties in structuring their transactions. On the other hand, the AWG, which represented the aviation industry, held a strong view that all leases should be covered by the future Convention for reasons of its own. First, the Convention remedies were expected to apply equally to all types of leasing transactions. Second, it was important to avoid complex characterisation with a view to enhancing predictability in the application of the Convention. Third, the application of priority rules established by the Convention would be unclear unless all leases were included in its scope.⁸³ Fourth, in an asset (as opposed to debtor-based) register filing of all types of leases was a practical solution to the above problems.⁸⁴ Fifth, even a distinction of finance leases based on whether or not the lessor was an authorised financial institution (as a possible differentiating factor) would not always work: in some jurisdictions such authorisation was not required, whereas in the area of

⁸² Unidroit, *Study LXXII - Doc. 22 (1996)* 2.

⁸³ The development of the Convention’s priority rules is discussed in section 6.1.

⁸⁴ The development of the Convention’s registration system is discussed in section 6.2.

aviation finance most high-value leasing transactions were carried out by special purpose vehicles.⁸⁵

The Study Group concluded that the only workable way of distinguishing between types of leases could be based on the concept of the minimum term of the lease and, thus, the basic definition of ‘leasing agreement’ (which incorporated a three-year duration requirement) would remain unchanged, but exceptions could, in principle, be established for certain industries (eg for aircraft).⁸⁶ The concern was that the terms of the (then) current draft permitted the lessee even under a one-day lease to give good title to any third party, provided that the lessor’s interest had not been registered under the Convention.⁸⁷

Following the third session of the UNIDROIT Study Group in 1997 the mandatory minimum term of a lease agreement (provisionally of a three-year duration) was deleted from the text of the Convention and replaced with a proviso that a minimum term may be set out in the corresponding protocol to the same.⁸⁸ This proviso, however, was soon removed after the fourth session of the Study Group held later in the same year, thus abolishing the last remaining limitation on the types of leases covered by the Convention.⁸⁹ With the exception of a number of minimal technical corrections,⁹⁰ the resulting broad concept of ‘leasing agreement’ was later adopted in the final text of the Convention.⁹¹

⁸⁵ Unidroit, *Study LXXII - Doc. 27 (1996)* 19.

⁸⁶ *ibid* 18.

⁸⁷ See Article 19(3) in Unidroit, *Study LXXII - Doc. 24 (1996)*.

⁸⁸ See Appendix: Definitions (c) in Unidroit, *Study LXXII - Doc. 35 (1997)*.

⁸⁹ See Article 1(i) in Unidroit, *Study LXXII - Doc. 37 (1997)*.

⁹⁰ cf Article 1(n) in Unidroit, *Study LXXII - Doc. 39 (1998)*.

⁹¹ See Article 1(q) of the CTC.

2.2 *Proposing a solution: the concept of international interest*

This section 2.2 focuses on the origins of the concept of ‘international interest’, which emerged as an alternative to an international system of recognition of foreign security interests. Despite the fact that a preference in favour of creation of a new international financing vehicle was expressed by the Study Group quite early, the concept of ‘autonomous’ international interest, reflected in the final text of the Convention, emerged significantly later, at the suggestion of the Drafting Group.

2.2.1 *International interest as alternative to recognition*

Despite the fact that both the initial Study prepared by Ronald Cuming in 1989⁹² and the responses to the Questionnaire of the UNIDROIT Secretariat⁹³ clearly favoured the idea of setting up an international system of recognition of domestic security interests, the idea to establish an entirely new type of security interest appeared as early as in 1988, when Georges Droz, Secretary General of the Hague Conference on Private International Law, suggested that the attention should be focused on the creation of ‘a new security interest which would facilitate international relations’.⁹⁴ In 1991 Droz reiterated his idea, noting that ‘the problem existed not only of recognition of security interests’: domestic laws of different countries were extremely diverse and afforded them different degrees of priority. As a result, the establishment of an ‘entirely new security interest’ would have the advantage of mitigating the conflict of laws problems.⁹⁵ It became apparent that whatever direction the UNIDROIT project would take, it would, by necessity, have to deal with this diversity, whether by adopting a functional approach (which would

⁹² See Appendix A in Unidroit, *Study LXXII - Doc. 1 (1989)* iii.

⁹³ It will be recalled that the vast majority of respondents (44) supported recognition, whereas only 14 sought an entirely different financing vehicle – see Unidroit, *Study LXXII - Doc. 3 (1991)* 10.

⁹⁴ Unidroit, *Governing Council C.D. 67 - Doc. 18 (1988)* 56.

⁹⁵ Unidroit, *Governing Council C.D. (70) 22 (1991)* 61.

essentially require the future Convention to include the appropriate criteria to identify the qualifying security interests), by listing all types of security interests subject to recognition, or otherwise.

In 1992, the REWG considered two alternative directions for the future Convention. One would involve recognition of domestic security interests validly created under the laws of the state of nationality registration of the equipment (*lex registri*) or under the law of the state in which the debtor has its place of business (*lex debitoris*), where both such states would be parties to the treaty. At the same time, the characteristics of the security interests subject to recognition would be specified in the future Convention, rather than in domestic law.⁹⁶ The other option, which at the time was not considered essential for the success of the new instrument, involved the creation of a new ‘international security interest’ recognised in all states parties to the future Convention and registrable in an international registration system. This interest would possess three key characteristics: (i) it would be a right *in rem*, (ii) it would give its holder the right to follow the equipment into the hands of third parties, subject to applicable priority rules, and (iii) it would give the secured party a right to payment from the proceeds of disposition of the equipment in preference to other creditors, subject to applicable priority rules.⁹⁷

As can be seen, in each case the criteria with which the relevant interest had to comply were not expected to be left to applicable law: they would be listed directly in the future Convention. It should be noted, however, that despite this similarity the consequences of the two approaches would not be similar. In case of establishment of an ‘international security interest’ the validity (or invalidity) of the relevant interest under

⁹⁶ Unidroit, *Study LXXII - Doc. 5 (1992)* 5.

⁹⁷ *ibid* 4.

domestic law would have no bearing on the validity of the same under the Convention: as a result, there would be no pressure to account for the various concepts of ‘security interest’ existing in domestic law. In contrast, a system of recognition, in order to be effective, had to cover a variety of financing devices used in national legal systems, ensuring that even transactions not considered as security agreements under the laws of some states would still fall under the treaty, as the recognition depends first and foremost on the validity of the relevant interest under the domestic law.⁹⁸

Transition to the idea of an ‘international security interest’ occurred during the first session of the UNIDROIT Study Group in 1993,⁹⁹ which for the first time established the elements required to create such interest: (i) agreement in writing to create security, signed by or on behalf of the debtor and containing a description of the relevant asset and (ii) registration.¹⁰⁰ In 1994 the REWG added a third element: ‘value’¹⁰¹ and provisionally decided that all three elements could be provided in any order, with priority going back to the time of filing in the register.¹⁰² In addition, in order to accommodate the concerns of jurisdictions outside North America which did not recognise the functional approach, it was decided to refer to the new international security interest in a more neutral manner, by omitting the word ‘security’.¹⁰³

In 1994, the Drafting Group produced the first set of draft articles of the future Convention, which was based on the decisions adopted by the Study Group and the REWG.¹⁰⁴ This draft distinguished between two different concepts: ‘interest’ and

⁹⁸ Unidroit, *Security Interests Study Group 1st session Misc. 5 (1993)* 1.

⁹⁹ Unidroit, *Study LXXII - Doc. 7 (1993)* 4.

¹⁰⁰ *ibid* 5.

¹⁰¹ This requirement, probably inspired by Article 9 of the UCC, was not used subsequently.

¹⁰² Unidroit, *Study LXXII - Doc. 12 (1994)* 6.

¹⁰³ *ibid* 5.

¹⁰⁴ Unidroit, *Study LXXII - Doc. 13 (1994)*.

‘international interest’. The former was defined as ‘an interest arising under a security agreement or a title reservation agreement’, whereas the latter was established as a result of registration of an ‘interest’ in accordance with the draft Convention.¹⁰⁵ Although this draft aimed to reflect the earlier decision that registration should be one of the elements necessary to create an international interest,¹⁰⁶ the approach taken by the Drafting Group raises a number of questions resulting from the above duality, particularly with respect to the legal nature of the ‘interest’ which has not been registered. Four possible explanations can be brought forward.

First, the ‘interest’ in this case identifies the domestic security interest arising by virtue of applicable law. Second, it could refer to the security interest which the relevant agreement purported to create (ie without regard to the applicable law). Third, it could be seen as a mere fiction established in the draft for the sole purpose of identifying that ‘something’ which could subsequently be registered with the result of creating an ‘international interest’. Fourth, it could as well be an entirely new type of security interest created by virtue of the draft Convention. The first of the above explanations is problematic, as it would ultimately make the ‘international interest’ dependent on the validity of the relevant interest under the domestic law. The second and third options seem plausible, but do not strictly follow from the draft text, according to which the ‘interest’ should ‘arise’ (ie come into existence) from the relevant agreement. The fourth explanation seems the most conceptually coherent, but implies that the draft Convention creates two different kinds of interests completely independent from domestic law, only one of which is ‘international’.

¹⁰⁵ Article 1(2)(b) and 1(2)(c) in *ibid.*

¹⁰⁶ In this draft the other elements identified by the Study Group and the REWG as mandatory were considered as requirements for registration: see Article 3 in *ibid.*

The second draft prepared in 1995 adopted a different approach to the creation of the ‘international interest’. First, the latter no longer relied on the ‘intermediary’ concept of ‘interest’. Three elements were sufficient to establish an ‘international interest’: (i) an agreement in writing signed by or on behalf of the parties, (ii) a description of the equipment in the agreement sufficient to enable it to be identified and (iii) debtor, lessor or seller (respectively) having ‘rights’ in the equipment.¹⁰⁷ Second, registration was no longer a condition for the creation of the ‘international interest’. As a result, the fact of registration no longer transformed an ‘interest’ into an ‘international interest’: it was only necessary to ensure priority as against third parties (absent registration the draft Convention would have effect only as between the parties to the relevant underlying agreements).¹⁰⁸ Despite many technical refinements, the draft was not free from certain inconsistencies relating to the concept of ‘international interest’. Although the requirements for the creation of an ‘international interest’ were moved to a separate Article 3,¹⁰⁹ the interface between such interest and the underlying security, title reservation or leasing agreement remained unclear, as Article 3 itself made no reference to the relevant agreements. In other words, the draft separated the concept of ‘interest’ (which directly related to the underlying agreements)¹¹⁰ from the concept of ‘international interest’ (which no longer had a definition and was mentioned in Article 3 solely in the context of its creation), but failed either to establish a certain connecting factor between the two,¹¹¹ or to provide a standalone definition of ‘international interest’.

¹⁰⁷ See Article 3(1) and 3(2) in Unidroit, *Study LXXII - Doc. 18 (1995)*.

¹⁰⁸ *ibid* 3.

¹⁰⁹ See Article 3 in *ibid*.

¹¹⁰ See Article 1(3) in *ibid*.

¹¹¹ It will be recalled that in the first draft the ‘international interest’ was defined as an ‘interest’ which has been registered under the draft Convention.

In 1995, the First Draft Subcommittee provisionally decided to abolish the idea that an ‘international interest’ was created under the draft Convention: instead, the decision was made to convert the corresponding provisions of Article 3(1) into conditions for the application of the draft Convention itself.¹¹² Effectively, this change meant that the draft Convention would simply apply to the interests complying with the requirements of the (then) current Article 3(1). This decision was problematic, however, as it obscured one of the principal mechanics of the document, namely the origination of the ‘international interest’. As long as such interest was created by the draft Convention itself, the latter had to make it clear at which point the ‘international interest’ came into existence. Otherwise, confusion with domestic security interests arising under the applicable law would be unavoidable.

Following the deliberations of the First Draft Subcommittee, the Drafting Group produced a revised text, which incorporated a number of significant changes. First, it included a new Article 1(1), which was modelled on Article 2 of the Convention for the European Patent for the Common Market¹¹³ and introduced, for the first time, the concept of ‘autonomous’ character of the ‘international interest’.¹¹⁴ Second, this draft eliminated the problem of lack of correspondence between an ‘interest’ and an ‘international interest’: the latter emerged directly out of the relevant agreement.¹¹⁵ Third, the conditions necessary for the constitution of the ‘international interest’ previously listed in Article 3(1)¹¹⁶ were revised (by adding a requirement to state the obligation secured in case of a security agreement) and attributed an entirely different function: in the new

¹¹² Unidroit, *Study LXXII - Doc. 21 (1995)* 7.

¹¹³ Convention for the European Patent for the Common Market (Community Patent Convention) and Implementing Regulations [1989] OJ L 401/10.

¹¹⁴ Unidroit, *Study LXXII - Doc. 22 (1996)* 1.

¹¹⁵ See Article 1(2) in *ibid.*

¹¹⁶ Unidroit, *Study LXXII - Doc. 18 (1995)*.

draft they became conditions for the application of the draft Convention rules on remedies, registration, priorities and transfer of international interests.¹¹⁷ However, as the draft Convention lost all the requirements for the creation of the ‘international interest’, it became impossible to identify the moment in time when such interest arose in the first place. Given the autonomous nature of the latter, one could assume that it emerged at the same time as the relevant (security, title reservation or leasing) agreement was concluded, irrespective of whether or not the same agreement gave rise, by virtue of application of any national system of law, to any other (domestic) interest. In other words, by virtue of Article 1(2) alone, the international interest would arise under the relevant agreement even if such agreement did not identify the relevant asset or if the chargor, seller or lessor did not have sufficient rights in the same.¹¹⁸

However, such conclusion would be at odds with the newly adopted definition of ‘prospective international interest’ in Article 4,¹¹⁹ the purpose of which was to provide for a situation when the party under the relevant agreement (ie the chargor, seller or lessor) was lacking the necessary authority (ie corresponding rights) in the equipment at the time of the agreement to encumber (under the security agreement), sell (under the title reservation agreement) or lease (under the leasing agreement) the relevant asset. Such party, as a result of the combined effect of Articles 14, 17 and 19(5),¹²⁰ would be in a position to register its ‘prospective international interest’ so that, upon the chargor, seller or lessor obtaining the necessary rights in the asset, priority would run from the date of such registration. The very concept of ‘prospective international interest’ was

¹¹⁷ cf Article 6 in Unidroit, *Study LXXII - Doc. 22 (1996)*.

¹¹⁸ This strange result might as well be merely a theoretical problem as in both of these cases none of the key provisions of the draft Convention on remedies, registration or priorities would apply by virtue of Article 6.

¹¹⁹ See Article 4(b) in Unidroit, *Study LXXII - Doc. 22 (1996)*.

¹²⁰ See Articles 14, 17 and 19(5) in *ibid*.

based on the assumption that in order for the (full) ‘international interest’ to arise it was not sufficient to enter into the corresponding (security, title reservation or leasing) agreement: as a minimum, the relevant party had to have appropriate rights in the asset. As a result, the concept of ‘prospective international interest’ established in the draft Convention came in direct conflict with Article 1, which did not envisage any requirements for the constitution of an ‘international interest’ other than the existence of a particular agreement, whereas Article 6 merely listed the conditions necessary for the application of certain provisions of the draft Convention, without affecting the constitution of the ‘international interest’ as such.

2.2.2 Autonomous character of international interest; relationship between an international interest and interests created under national laws

The emergence of the concept of ‘autonomous’ international interest deserves a separate mention, first, because it did not follow logically from the discussions held within the UNIDROIT Study Group, and second, because initially it created a great deal of confusion.

In 1995 members of the First Draft Subcommittee agreed that there were two different options to ensure the validity of the international interest against the debtor’s trustee in bankruptcy and unsecured creditors: (i) registration in the international register established by the draft Convention, or (ii) perfection of the same in accordance with the perfection requirements of the applicable law determined by the conflict of laws rules of the bankruptcy or attachment forum.¹²¹ This approach did not separate an international interest from its counterpart arising out of national law, since it was one and the same interest registrable under the draft Convention and capable of being perfected under

¹²¹ Unidroit, *Study LXXII - Doc. 21 (1995)* 7.

national law. This duality, although attractive as a concept, created complications for the legal nature of the international interest, which was basically assimilated with the relevant national law counterpart. On the one hand, the international interest was supposed to be registrable in accordance with the applicable law. On the other hand, domestic laws did not (and could not, unless explicitly overridden by the Convention to that end) provide for the perfection of some kind of *sui generis* interest created by the Convention, even assuming that the Convention would purport to create one (which was not the case at the time). It follows that the ‘international interest’, as identified by the First Draft Subcommittee, was none other than a domestic interest capable of being registered under the Convention.

Nonetheless, the Drafting Group, which later met to incorporate the decisions taken by the First Draft Subcommittee, ended up formulating the concept of ‘autonomous’ international interest,¹²² which was incompatible with the duality of registration and perfection agreed by the latter. The resulting international interest was finally detached from its national law counterpart and neither affected it, nor depended on its validity. This elegant solution was not, however, endorsed by all members of the Study Group: in 1996 Charles Mooney and Thomas Whalen prepared a memorandum requesting to reinstate the approach which had been agreed by the First Draft Subcommittee. Two arguments were put forward.¹²³ On the one hand, it was submitted that ‘there [was] nothing inconsistent about the Convention recognising that the same agreement may create an interest that is enforceable under two different regimes’.¹²⁴ On the other, it was believed that the Convention’s priority rules in Article 19(4) would

¹²² See Article 1(1) in Unidroit, *Study LXXII - Doc. 22 (1996)*.

¹²³ Essentially the same arguments were reiterated by the same later in 1997 – see Unidroit, *Study LXXII - Doc. 32 Add. 3 (1997)* 2.

¹²⁴ Unidroit, *Study LXXII - Doc. 26 Add. 1 (1996)* 7.

subordinate any interest not registered as an international interest to a trustee in bankruptcy.¹²⁵ Neither of the two assertions is valid, however.

First, while it was of course technically possible to establish a system in which the same interest was enforceable under domestic law as well as under an international regime, such system would involve either (i) the perfection (or other type of validation) of an international interest created by the Convention in the national legal systems of states or (ii) the registration of national interests as international interests in the international registry. The former option is unduly intrusive into national law, especially given the availability of the second option. Conversely, the latter makes registration in the international register dependent on the validity of the domestic interest under the applicable law: otherwise there is simply no interest to register (since the international interest and the domestic interest are one and the same, one does not exist without the other). But this would run counter to another important feature of the dual registration system supported by Mooney and Whalen: ‘if the chargee, seller or buyer [*sic*] is concerned that the interest will be ineffective under local law, it can ensure effectiveness by making an international registration’.¹²⁶ The only working scenario in which the validity of the international interest could be assured regardless of the validity of the corresponding interest under domestic law would, by implication, involve international registration of some freestanding concept detached from the national interest and, as far as practicable, from national laws generally. It is conceivable that such freestanding concept could take several forms: (i) an entirely new interest regulated by the Convention, (ii) an interest which the relevant agreement purported to create (ie a fiction created by reference to the terms of the agreement alone, independently of any domestic

¹²⁵ ibid.

¹²⁶ ibid.

law), or (iii) an agreement of the parties to create the relevant interest. Although complete exclusion of national laws from the equation would probably be impossible (as the very existence of an agreement would depend on domestic law, unless regulated by the Convention as well), all of these options would allow to disregard invalidity of the domestic interest. But assimilation of the latter with the international interest, which was inherent in the decision of the First Draft Subcommittee, would preclude such result.

Second, the priority rule disputed by Mooney and Whalen had already been prepared with the ‘autonomous’ character of the international interest in mind and was not concerned with effects of bankruptcy on domestic security interests in the first place.¹²⁷ The confusion can probably be explained by the fact that in their analysis of this provision the commentators relied on the idea that the international interest and the domestic security interest were essentially a single whole.

The matter of constitution of an international interest was debated during the second session of the UNIDROIT Study Group held in 1996. Concerns regarding the very concept of ‘creation’ of international interests in the context of sellers and lessors were voiced on the basis that the interests of these two groups in the assets sold under title retention agreements or leased under leasing agreements did not technically ‘arise’ out of such agreements. Nevertheless, the Study Group decided that the term ‘creation’ was justified: the intention behind the text of Article 1(1) was to provide for automatic, simultaneous creation of an international interest upon the entry into the relevant agreements.¹²⁸ The resulting international interest would be ‘autonomous’ in the sense that it ‘would be treated as a sui generis right in rem with its own distinctive characteristics that derived from the future Convention and not from national systems of

¹²⁷ See Article 19(4) in Unidroit, *Study LXXII - Doc. 24 (1996)*.

¹²⁸ Unidroit, *Study LXXII - Doc. 27 (1996)* 11.

law'.¹²⁹ The key function of the term 'autonomous' was to avoid any assimilation of the international interest with any other interest, right or authority, however defined, arising under national law: the international interest would arise under the qualifying agreement automatically and in parallel to any domestic interest, or, if the application of domestic law does not result in the creation of any national interest at all, regardless the absence of any such domestic interest. Despite the high importance attributable to the 'autonomous' nature of an international interest, the Study Group considered that the text of Article 1(1) did not convey the intended purpose well enough and requested amendment.¹³⁰

The draft which emerged following the second session of the UNIDROIT Study Group completely excluded the explicit reference to the 'autonomous' character of an international interest, without any substitute wording to take up its place.¹³¹ The same draft corrected the inconsistency noted earlier in this section in connection with the concept of 'prospective international interest' introduced¹³² by the Drafting Group: the four criteria applicable to the relevant agreements (written form, rights of the chargor, seller or lessor in the equipment, description of asset and identification of the secured obligation), previously formulated merely as conditions for the application of the draft Convention rules on remedies, registration, priorities and transfer of international interests,¹³³ were this time reinstated (with certain technical amendments) as requirements for the creation of international interests.¹³⁴ As a result, the earlier

¹²⁹ *ibid.*

¹³⁰ The second sentence of Article 1(1) stated: 'The international interest shall be of an autonomous character and shall have effect throughout the territories of Contracting States'. See Unidroit, *Study LXXII - Doc. 24 (1996)*.

¹³¹ See Article 1(1) in Unidroit, *Study LXXII - Doc. 30 (1996)*.

¹³² See n 119 and the relevant discussion.

¹³³ See Article 6 in Unidroit, *Study LXXII - Doc. 22 (1996)*; similarly see Article 6 in Unidroit, *Study LXXII - Doc. 24 (1996)*.

¹³⁴ See Article 7 in Unidroit, *Study LXXII - Doc. 30 (1996)*.

presumption about automatic creation of the international interest regardless of the relevant formalities, which was valid for the previous draft, could not be applied to the new text: in order for the international interest to emerge at all, each of the four requirements had to be satisfied first. This change warrants another look at the concept of ‘prospective international interest’.

As was noted previously in this section,¹³⁵ the original purpose behind the idea of ‘prospective international interest’ was to permit registration of what may be referred to as ‘international interests in the making’ (or, in the words of the Chairman of the UNIDROIT Study Group, ‘international interests in negotiation’)¹³⁶ in situations when the party under the relevant agreement (ie the chargor, seller or lessor) was lacking the necessary authority (ie corresponding rights) in the equipment at the time of its conclusion. In its second session the UNIDROIT Study Group revised this concept and agreed a new approach substantially similar to that utilised in Article 9 of the UCC: (i) the draft Convention was to permit registration of incomplete international interests which did not satisfy all the corresponding requirements, (ii) the various elements necessary for the creation of the international interest were to be capable of being satisfied in any order, and (iii) once all such elements were in place thereby constituting a full international interest, priority would be determined by reference to the date of initial filing.¹³⁷ This new approach was expected to exclude the need for a concept of ‘prospective international interest’, references to which were indeed removed in the following draft,¹³⁸ but soon reintroduced to ensure that priority of the fully constituted international interest would run from the moment of registration of the prospective

¹³⁵ See n 119 and the relevant discussion.

¹³⁶ Unidroit, *Study LXXII - Doc. 40 (1998)* 10.

¹³⁷ Unidroit, *Study LXXII - Doc. 27 (1996)* 17.

¹³⁸ See Appendix IV to *ibid.*

international interest.¹³⁹ The Drafting Group expanded the relevant definition to cover situations when *any* of the elements required for the constitution of an international interest (and not just rights in the relevant asset) were missing, essentially describing the ‘prospective international interest’ by reference to the intent to eventually create a complete international interest.¹⁴⁰

The above discussions and revisions, with technical and drafting improvements, shaped the concept of ‘international interest’ reflected in the final text of the Convention. These elements and their role evolved significantly over time, particularly in light of its autonomous nature. Interestingly, subsequent attempts to expressly provide for such ‘autonomous’ character in the body of the Convention never made it into the final text.¹⁴¹ As a result, the issue of coexistence of an international interest with its national law counterparts generated significant confusion during development of the CTC.¹⁴²

2.3 Evolution of the concept of internationality

At the core of the concept of ‘internationality’ lies a presumption that the development of an international convention is only justified when matters regulated by the future instrument involve some form of foreign element, and that a convention should not apply to legal relationships considered genuinely ‘internal’ or ‘domestic’ from the national law perspective. The idea of a mandatory test of internationality emerged at an early stage of development of the CTC and remained pertinent throughout all stages of development of

¹³⁹ See Articles 19, 27 and Appendix to Unidroit, *Study LXXII - Doc. 30 (1996)*.

¹⁴⁰ *ibid.*

¹⁴¹ Examples include Article 1(1) in Unidroit, *Study LXXII - Doc. 22 (1996)*; Article 1(1) in Unidroit, *Study LXXII - Doc. 24 (1996)*; Article 2(4) in Unidroit, *Study LXXII - Doc. 39 (1998)*; Attachment to Unidroit, *Study LXXII - Doc. 45 / Study LXXIHD - Doc. 6 (1998)*.

¹⁴² See the comments from the French Association of Banks, Professor Klein and Professor Stoufflet in Unidroit, *Study LXXII - Doc. 36 (1997)* 4-5, 51; comments from the Federal German Association of Banks in Unidroit, *Study LXXII - Doc. 36 Add. 1 (1997)* 1; comments by Isabel Collaco in Unidroit, *Study LXXII - Doc. 40 (1998)* 27.

the instrument and its protocols. Multiple concepts and combinations of relevant factors were considered at various stages (including actual movement of assets, physical location of assets, location of parties, physical characteristics of assets). This section explains the evolution of the test of internationality during the development of the Cape Town Convention.

2.3.1 *Emergence of the test of 'internationality'*

The Canadian Proposal¹⁴³ underlying the UNIDROIT's decision to initiate a feasibility study relating to the future Convention in 1988 was prepared on the assumption that an international treaty would be justified because 'security interests in mobile equipment may involve international elements', such as cross-border dealings between the parties or movement of equipment used as collateral from one state to another.¹⁴⁴ As noted in section 2.2.1 above, at the early stages it was not quite clear which direction the development of the future treaty would take: recognition of domestic security interests or the creation of an entirely new international financing vehicle for mobile equipment.¹⁴⁵ While both options required some indication as to when the future Convention would apply, this concern was particularly relevant in the latter scenario. A new, convention-regulated financing device was not expected to completely displace the domestic rules governing security interests in movables: 'it [was] clear that the Convention [was] to apply only to security agreements that give rise to or have the potential to give rise to situations which require international regulation'.¹⁴⁶ As a result, the new treaty would create a legal regime operating in parallel with the existing domestic regulation. However, in order for this regime to be effective, the future Convention would have to

¹⁴³ See n 1.

¹⁴⁴ *ibid.*

¹⁴⁵ See, eg, Unidroit, *Study LXXII - Doc. 3 (1991)* 10; Unidroit, *Study LXXII - Doc. 5 (1992)* 4.

¹⁴⁶ Unidroit, *Security Interests Study Group 1st session Misc. 5 (1993)* 1.

contain clear rules permitting the parties engaged in financing transactions to determine *ex ante* which system of rules should apply: the new treaty or the domestic laws. A system permitting the identification of the applicable legal regime only on an *ex post* basis was clearly not feasible, as commercial parties obviously rely on prior assessment of their respective rights and obligations, priority and enforceability of the relevant security interests.¹⁴⁷ These concerns became increasingly relevant after the formal transition to the concept of freestanding Convention-regulated regimen for international interests.¹⁴⁸ As one of the commentators noted at an early stage of development of the Convention, ‘meeting the test of internationality while preventing the protections of the convention from being nullified by municipal law [was] perhaps the *most* difficult issue’ in development of the future treaty.¹⁴⁹

The most obvious method of delineating the scope of the Convention regulating international security interests in mobile equipment was based on the nature of the equipment in question. This nature could be determined by reference to a number of factors. First, certain types of assets, such as satellites, were seen as essentially international given their unique area of operation (outer space). Second, physical characteristics of equipment, such as the ability to ordinarily cross national borders could indicate a greater need for international regulation. Third, high unit value of the equipment alone could be considered as sufficient to invoke the international regime to protect the holders of interests in such equipment.¹⁵⁰

In 1993, the Study Group examined two alternative approaches to the test of ‘internationality’. According to the first one, the future Convention was to apply to

¹⁴⁷ See *ibid* 2.

¹⁴⁸ Unidroit, *Study LXXII - Doc. 7 (1993)* 4.

¹⁴⁹ Unidroit, *Study LXXII - Doc. 9 (1994)* 12-13 (emphasis added).

¹⁵⁰ See Unidroit, *Security Interests Study Group 1st session Misc. 5 (1993)* 2.

security interests in all types of ‘mobile equipment’ (ie by reference to the physical characteristics of the asset), regardless of whether or not any international element was involved, and even in a purely domestic situation.¹⁵¹ The second one, favoured by the majority, involved bifurcation in the application of the Convention provisions depending on the existence or absence of an international factor: the application of the treaty *ab initio* would depend solely on the physical characteristics of the equipment (ie whether or not the equipment was of a kind normally moving between states), whereas the substantive rules would only come into play once the equipment has actually crossed national borders and a dispute emerged in the new jurisdiction. Prior to the emergence of the latter kind of internationality (ie actual movement of the asset) the relevant rules of applicable domestic law would govern all matters relating to remedies or priority. This more conservative approach gathered greater support in view of perceived difficulties in persuading governments to accept an international convention governing transactions which had ‘no international element other than that they involve mobile equipment that is capable of being moved from one State to another’.¹⁵²

The separation suggested by the Study Group thus created two different concepts: ‘potential internationality’ (essentially limited to a simple ‘mobility’ test), necessary for the application of the future Convention to the relevant international interest immediately upon its creation, and ‘actual internationality’, required for the application of the relevant priority and remedy rules. The requirement of a second (active) internationality, however, created uncertainty and complexity. First, lenders advancing funds secured by an international interest in essentially mobile assets could be discouraged from providing financing as their priority position (or available remedies)

¹⁵¹ Unidroit, *Study LXXII - Doc. 8 (1993)* 18.

¹⁵² *ibid.*

would change depending on the location of the asset controlled by the debtor: in such cases creditors would be inclined to limit the debtor's right to remove the asset from the jurisdiction. Likewise, debtors would prefer the freedom to use the asset without such restrictions.¹⁵³ Second, certain assets could frequently change the applicable regime, by shuttling between the 'home' state and other jurisdictions, which would create monitoring issues and further increase complexity.¹⁵⁴ In light of the difficulties arising from the proposed internationality regime a number of alternative solutions emerged.

In 1994 Charles Mooney proposed an alternative test to determine the situations which could be considered 'purely domestic' and thus warranted exclusion from the scope of the future Convention. According to the suggested approach, the Convention's registration and priority rules were not applicable to a scenario whereby (i) the debtor created a security interest in accordance with the law of a contracting state while located in that state and (ii) the debtor had its place of business in that state. The future Convention would be triggered only when the equipment actually moved to another state or the interest was registered in the international registry established by the future Convention.¹⁵⁵ This test narrowed the list of 'purely domestic' situations by excluding interests registered under the treaty even when the asset did not move outside the relevant jurisdiction: it was posited that as long as both the debtor and the secured party voluntarily chose the Convention regime and gave notice to the world, the decision to apply the treaty should control. The solution had two key benefits: first, it reflected the key commercial concept of party autonomy; second, it would greatly enhance predictability, giving financiers the opportunity to avail themselves of the Convention

¹⁵³ See Unidroit, *Study LXXII - Doc. 6 Add. 2 (1993)* 1; Unidroit, *Study LXXII - Doc. 10 (1994)* 2.

¹⁵⁴ See United Nations, *Report of the Secretary-General: study on security interests (A/CN.9/131) (1978)* 210; Unidroit, *Study LXXII - Doc. 9 (1994)* 1.

¹⁵⁵ Unidroit, *Study LXXII - Doc. 10 (1994)* 2.

protections from day one in cases when the laws of the *situs* did not provide enough assurance to the creditor.¹⁵⁶ The downside of this approach is that any third party wishing to protect itself would inevitably have to check the international registry for existing registration (and register its own interest first) even in a purely domestic scenario, although this concern is obviously less acute in commercial financing involving sophisticated parties.

A different solution was suggested by Jan-Hendrik Roever, who proposed two alternative criteria of internationality: (i) internationality of transaction and (ii) location of places of business of the parties in different countries.¹⁵⁷ The second alternative was conceptually similar to the test of ‘mobility’ applied by the Study Group in the sense that it did not guarantee that the equipment would eventually move between states, and can thus be considered another type of ‘potential internationality’.

Ronald Cuming, on the basis of a number of case scenarios, proposed a different test, which would involve consideration of a subjective element, namely ascertaining the actual intention of the parties to the relevant security agreement. In his view, the enforcement rules of the future Convention were supposed to apply, even if the equipment remained within the same jurisdiction, in situations when the circumstances of the case evidenced the intention of the parties to the security agreement to use the equipment primarily outside the country of its original *situs*. In contrast, the Convention’s protections were not supposed to be available to the secured party in a similar situation if the intention of the parties was to use the equipment primarily within the same country, disregarding occasional instances of use in other states.¹⁵⁸ The apparent

¹⁵⁶ *ibid* 3.

¹⁵⁷ Unidroit, *Study LXXII - Doc. 11 (1994)* 6.

¹⁵⁸ Unidroit, *Study LXXII - Doc. 8 (1993)* 29.

difficulty associated with this approach is its lack of predictability, as any attempt to apply it would necessarily involve an element of court discretion.

A fourth, and more radical solution, was suggested by The Boeing Company: ‘given the futility of separating domestic from international aircraft finance transactions, the convention would apply even in a purely domestic context’.¹⁵⁹

In view of expressed concerns, the First Draft Subcommittee significantly expanded the list of ‘non-domestic’ situations which made possible the application of the Convention’s priority and remedy rules.¹⁶⁰ Two new scenarios giving rise to the Convention’s protections were envisaged, in addition to the actual movement of the equipment: (i) a situation when at the time of conclusion of the security agreement both parties had their places of business in different states and (ii) a situation when the security agreement expressly provided that the relevant equipment would move between different states.¹⁶¹ It should be noted that the latter scenario differed significantly from the solution suggested by Cuming earlier¹⁶² in that the subjective element (ascertaining the actual intention of the parties) was replaced with reference to the express terms of the contract for the purposes of enhanced predictability. It is critical to stress the importance of this additional criterion, as it created the only opportunity for a secured party located in the same country as the debtor to guarantee its priority over foreign creditors in a situation when the equipment did not move outside its *situs* at all: absent this proviso the draft Convention would create a rather unwelcome mechanism clearly favouring foreign

¹⁵⁹ Unidroit, *Security Interests Study Group Sub-committee 1st session Misc. 3 Add. (1994)* 2.

¹⁶⁰ This decision was later reflected in the first set of draft articles of the Convention – see Article 4 in Unidroit, *Study LXXII - Doc. 13 (1994)*.

¹⁶¹ Unidroit, *Study LXXII - Doc. 12 (1994)* 4.

¹⁶² See n 158.

creditors to the prejudice of the domestic ones (as the latter would not be in a position to protect their priority vis-à-vis competing creditors located abroad).

The report of the First Draft Subcommittee¹⁶³ does not make it clear whether, in order to satisfy the internationality requirement, the equipment needed only to cross national borders or was also required not to return back into the country of its initial *situs*. Nonetheless, the first set of draft articles adopted the latter, more restrictive approach: the situation was considered ‘non-domestic’ only when at the time of the proceedings the equipment ended up in a state different from the *situs* of such equipment at the time of conclusion of the agreement.¹⁶⁴ The result of this approach was that (in a situation when neither of the other two internationality criteria applied) even an aircraft regularly travelling two times a day between two bordering countries (and remaining in each state for an equal amount of time), one of which was the country of its original *situs* at the time of the security agreement, would satisfy the internationality requirement necessary for the application of Convention’s protections only fifty percent of the time.

Overall, the internationality requirement in the first set of draft articles remained rather strong, despite the revisions proposed by the First Draft Subcommittee. The only effective way for the financier to control the fulfilment of the test of internationality (and, as a result, obtain the Convention’s protections) was through the terms of the relevant agreement. In addition, the rules concerning the effects of international interests were drafted as prohibitive provisions which completely blocked the application of the relevant rules, unless one of the three ‘non-domestic’ exceptions applied.¹⁶⁵

¹⁶³ See n 161.

¹⁶⁴ See Article 4(2)(c) in Unidroit, *Study LXXII - Doc. 13 (1994)*.

¹⁶⁵ See Articles 4 and 5 in *ibid.*

2.3.2 *Decline of internationality under the Convention*

This position was reversed during the second session of the First Draft Subcommittee, which considered Article 4 of the draft articles (which listed the ‘non-domestic’ criteria) obsolete in light of the inherently ‘international’ character of mobile equipment.¹⁶⁶ This decision was expected to provide greater certainty for third parties, which would be in a position to determine *ex ante*, simply by looking at the type of equipment, whether or not it might be subject to the effects of the Convention, without the need to know the place of business of the parties to the relevant financing arrangements. In addition, the financiers located in the same country as the debtor would no longer have to rely on the express terms of the agreement¹⁶⁷ to guarantee the application of the Convention’s protections in order to protect themselves against competing interests of foreign creditors, who automatically satisfied the international requirement (as established in the previous draft) by virtue of their location in another country.¹⁶⁸

At the same time, the First Draft Subcommittee was not yet prepared to abandon the idea that purely domestic transactions were to be excluded. It was felt that governments would have a particularly strong interest in the application of their own domestic laws in a situation when (i) both the secured party and the debtor were carrying on business in the same state, (ii) the equipment never left that state and (iii) enforcement proceedings were instituted in that same state. It was agreed that in this situation the Convention’s remedy provisions would not apply, but only as between the parties to the relevant agreement: the Convention itself would continue to be effective in relations

¹⁶⁶ Unidroit, *Study LXXII - Doc. 15 (1995)* 6.

¹⁶⁷ See Article 4(2)(b) in Unidroit, *Study LXXII - Doc. 13 (1994)*.

¹⁶⁸ See Article 4(2)(a) in *ibid.*

involving third parties.¹⁶⁹ Three important observations must be made. First, the very logic of the Convention's internationality rules was thus reversed: the prohibitive rules of Article 4 requiring specific 'non-domestic' exceptions were effectively being replaced with a generally permissive rule allowing automatic satisfaction of the internationality requirement, subject only to a substantially limited 'domestic transaction' rule. Second, the text of the report suggests that, in order to avoid the application of the 'domestic' exception, it was sufficient for the equipment to leave its original jurisdiction at least once: even upon return to that initial jurisdiction the situation would no longer be considered 'domestic'.¹⁷⁰ Third, the First Draft Subcommittee considered a special exemption from the 'domestic transaction' rule (essentially constituting an exception to what already served as an exception), which would permit the Convention protections to apply in a purely domestic scenario with respect to particularly high cost assets: it was feared that without access to the Convention's remedies financiers in countries with unsophisticated secured financing laws would be left without adequate protection.¹⁷¹

Before the Drafting Group had an opportunity to implement the above changes, UNIDROIT received a memorandum prepared jointly by a newly formed association of major aircraft financing market participants, the AWG, represented by Airbus Industrie and The Boeing Company, and strongly suggesting the abolition of any internationality requirement whatsoever in respect of aircraft due to the fact that aviation financing transactions were *per se* international. Four reasons were given for such proposal: (i) high mobility of aircraft, (ii) high complexity of aircraft financing, (iii) the need for commercial certainty and predictability and (iv) the need to eliminate prejudice towards

¹⁶⁹ See paragraph 9(xvi) Unidroit, *Study LXXII - Doc. 15 (1995)* 6-7.

¹⁷⁰ *ibid* 6.

¹⁷¹ *ibid* 7.

domestic financiers who could find themselves unable to tap into the Convention regime.¹⁷²

Perhaps as the result of the position taken by the aviation industry, the next draft set of articles of the future Convention¹⁷³ did not contain any rules concerning internationality, particularly with respect to the ‘domestic transaction’ exceptions agreed by the First Draft Subcommittee. Nevertheless, the discussions concerning the test of internationality did not stop and subsequently three different lines of thought emerged. The first one was expressed by the increasingly active aviation industry represented by the AWG and IATA, which supported the idea of total abolition of the test of internationality in relation to aircraft equipment, essentially on the basis of the earlier assertion that aircraft equipment was *per se* international.¹⁷⁴ The second one suggested a more cautious approach, stressing the need to account for the possible reluctance of governments to relinquish the application of their domestic laws to essentially internal transactions, even if the latter covered mobile equipment.¹⁷⁵ The third one noted the vital importance of the ‘validation’ principle whereby failure to register an international interest should not subordinate the relevant domestic interest to the trustee in bankruptcy in a purely domestic situation,¹⁷⁶ but was effectively resolved via the concept of ‘autonomous’ international interest (see discussion in section 2.2.2 above).

¹⁷² Unidroit, *Study LXXII - Doc. 16 (1995)* 7.

¹⁷³ Unidroit, *Study LXXII - Doc. 18 (1995)*.

¹⁷⁴ Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 8.

¹⁷⁵ See Unidroit, *Study LXXII - Doc. 17 (1995)* 9; Unidroit, *International Interests Study Group Subcommittee 3rd session Misc. 3 (1995)*.

¹⁷⁶ See Unidroit, *Study LXXII - Doc. 26 Add. 1 (1996)* 6; Unidroit, *Study LXXII - Doc. 32 Add. 3 (1997)* 2; Unidroit, *International Interests Study Group Subcommittee 3rd session Misc. 3 (1995)* 3.

The revised drafts¹⁷⁷ of the future Convention prepared by the Drafting Group in the run-up to the second session of the Study Group in 1996 followed the approach of the second draft and did not contain any specific rules on internationality. The Study Group eventually confirmed the established *status quo*, without any reference to the ‘purely domestic’ exception: ‘it should be sufficient that the equipment was mobile as defined in Article 2 of the Convention, because essentially this meant equipment that by its nature moved regularly from one country to another’.¹⁷⁸ The resulting draft reflected this position and also contained no specific rules concerning internationality.¹⁷⁹

2.3.3 *Declarations on purely domestic transactions*

The matter of internationality was revisited in the 1997 draft of the CTC, which was supplemented with a new Article W permitting states to make a declaration that they would not apply the Convention in relation to a ‘purely domestic transaction’.¹⁸⁰ As was later explained by the Chairman of the Study Group, this new provision was introduced to deal with a case of eg ‘a train in one State running round a circle in such a way that it would never leave that State’s boundaries’.¹⁸¹ In other words, a purely domestic transaction was one in which ‘there was never any movement across...national frontiers’.¹⁸² At the time the idea of a ‘domestic’ exception was not, strictly speaking, novel: as noted earlier,¹⁸³ in 1995 the First Draft Subcommittee considered the same issue and came up with a three-prong test.¹⁸⁴ Nonetheless, the new provision did not

¹⁷⁷ See Unidroit, *Study LXXII - Doc. 22 (1996)*; Unidroit, *Study LXXII - Doc. 24 (1996)*.

¹⁷⁸ Unidroit, *Study LXXII - Doc. 27 (1996)* 7.

¹⁷⁹ Unidroit, *Study LXXII - Doc. 30 (1996)*.

¹⁸⁰ Unidroit, *Study LXXII - Doc. 37 (1997)*.

¹⁸¹ Unidroit, *Study LXXII - Doc. 40 (1998)* 26.

¹⁸² *ibid.*

¹⁸³ See n 169.

¹⁸⁴ See Unidroit, *Study LXXII - Doc. 15 (1995)* 6.

establish any particular criteria that had to be satisfied in order to constitute a ‘purely domestic transaction’: the decision was left to the governmental experts, despite several proposals to abolish this concept altogether.¹⁸⁵

Limited progress was achieved during First¹⁸⁶ and Second¹⁸⁷ Joint Sessions¹⁸⁸ and no attempt to identify purely domestic transactions (which were renamed to ‘purely internal transactions’) was made. Instead, at the end of the Second Joint Session the Drafting Committee¹⁸⁹ proposed an alternative draft of Article V, which essentially left the matter of identifying such transactions in the hands of contracting states, as the latter were given the authority not only to declare that the Convention would not apply to a purely internal transaction, but also to specify the types of transactions falling under this category.¹⁹⁰ Such a broad provision carried with it the danger that states, in the absence of clear criteria defined in the Convention, would use it as a loophole to exclude whole classes of transactions, regardless of whether or not they were truly devoid of a genuine international element.

The problem of internationality was one of the most difficult issues during the Third Joint Session held in 2000.¹⁹¹ The discussion was opened by the proposal of the

¹⁸⁵ See Unidroit, *Study LXXII - Doc. 43 / Study LXXIID - Doc. 4 (1998)* 6; Unidroit, *Study LXXII - Doc. 49 / Study LXXIID - Doc. 9 (1999)* 2.

¹⁸⁶ Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 17.

¹⁸⁷ See paragraph 5:37 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

¹⁸⁸ In this thesis, the terms ‘First Joint Session’, ‘Second Joint Session’ and ‘Third Joint Session’ refer to the three consecutive sessions of governmental experts held in 1999 and 2000 in the run-up to the Cape Town Diplomatic Conference to adopt the Convention and the Aircraft Protocol.

¹⁸⁹ In this thesis, mentions of the ‘Drafting Committee’ should be read as references to the specific drafting committee operating at the time in question under the auspices of the relevant session of governmental experts or during the diplomatic conference (as the context requires) – see section 8.1.2.

¹⁹⁰ See Article V of Attachment F in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

¹⁹¹ See Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

French delegation, which aimed to reintroduce the test of internationality in a very strong form.¹⁹² The idea was to alter in several ways the list of requirements in Article 3 that had to be met before the Convention could apply. The initial criteria (as drafted prior to the application of new the proposal) were very lenient: it was sufficient if the obligor was situated in a contracting state or (alternatively) if the relevant object had a connection with a contracting state. The suggested changes were substantial. First, at the time of the agreement creating or providing for an international interest, both parties had to have their places of business in different countries, such countries being contracting states.¹⁹³ Second, both legs of the test were to become cumulative. The level of disagreement was such that it was decided to convene a special working group to examine the relevant provisions in more detail and provide recommendations. Eventually three principles were formulated.¹⁹⁴

First, a transaction was deemed ‘purely internal’ if at the time of the agreement (i) the creditor and debtor were located in the same contracting state and (ii) the object was registered or situated in that contracting state. Second, contracting states could make a declaration preventing the application of the Convention to purely internal transactions, in which case, however, parties to an agreement would still be able to invoke the Convention by agreement. Third, parties to an agreement covered by the above declaration would have the right to give notice to the international registry of the relevant national interest, in which case the Convention priority rules would apply.

¹⁹² Unidroit, *Unidroit CGE/Int.Int./3-WP/17 ICAO Ref. LSC/ME/3-WP/17 12/03/00 (2000)*.

¹⁹³ In this respect, the proposal was modelled after Article 1(1) of the CISG; Article 2 of the 1988 UNIDROIT Convention on International Factoring and Article 4 of the 1995 UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit.

¹⁹⁴ See Unidroit, *Unidroit CGE/Int.Int./3-WP/27 Corr. ICAO Ref. LSC/ME/3-WP/27 27/03/00 (2000)*.

While the second principle did not gather enough support, the first and the third of them formed the basis of the revised concept of internationality, which had the following characteristics. First, the test of internationality was met if the relevant (security, title reservation or leasing) agreement related to the types of equipment to which the Convention applied. Second, states were permitted to make declarations in respect of internal transactions,¹⁹⁵ but could not freely determine which transactions were considered ‘internal’.¹⁹⁶ Third, the test to determine what constitutes an ‘internal transaction’ involved two elements: (i) location of both parties to the agreement in the same contracting state and (ii) location of the relevant object in the same contracting state, each at the time of conclusion of the transaction.¹⁹⁷ Fourth, declarations made by contracting states with respect to internal transactions did not prevent the application of certain provisions of the Convention (including rules on priority) to such transactions.¹⁹⁸

The issue of internal transactions was subsequently discussed during the Cape Town Diplomatic Conference. These discussions added two principal changes. First, the ability of contracting states to make a declaration on internal transactions was limited to situations when such contracting states had in place the registration machinery by which notices of national interests could be transmitted to the international registry.¹⁹⁹ This change resulted from the fact that a declaration on internal transactions by a contracting state effectively made it impossible for the relevant parties to register an international interest under the Convention and thus it was considered prudent to require some assurance that parties to internal transactions would be in a position to protect their

¹⁹⁵ See Article S(1) Attachment C Appendix I in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

¹⁹⁶ See Article 1(q) Attachment C Appendix I in *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ See Article S(2) Attachment C Appendix I in *ibid.*

¹⁹⁹ See Article 1(n) of the CTC.

priority position should the need arise. This echoes the previous concerns about the need to avoid jeopardising the position of domestic financiers.²⁰⁰ Second, although contracting states were not in a position to redefine what constituted an ‘internal transaction’, it was agreed that they should nevertheless be given the opportunity to choose whether to exclude the application of the Convention to all such transactions or only with respect to certain objects.²⁰¹ This was a departure from the ‘all or nothing’ approach, which emerged at the conclusion of the Third Joint Session.

Nonetheless, the added flexibility of this provision has not been utilised by states to this date: each of the existing declarations under Article 50(1) of the CTC excluded the application of the Convention to all internal transactions in their entirety.²⁰² Furthermore, the possibility of limiting the list of objects to which the internal transaction exception applies could not override the aforementioned ‘gateway’ requirement that interests under all internal transactions should be registered in the relevant national registries. As a result, objects for which no domestic registration systems were in place, could not be excluded even pursuant to a declaration under Article 50(1) of the CTC. The lack of local registration systems for rolling stock made

²⁰⁰ See n 161 and the relevant discussion in section 2.3.1.

²⁰¹ See Article 50(1) of the CTC.

²⁰² See paragraph 4 in Unidroit, ‘Declarations Lodged by The People’s Republic of China (PRC) under the Cape Town Convention at the Time of the Deposit of its Instrument of Ratification’ <<http://www.unidroit.org/status-2001capetown?id=463>> accessed 02 June 2017; paragraph 3 in Unidroit, ‘Declarations Lodged by the United Mexican States under the Cape Town Convention at the Time of the Deposit of its Instrument of Accession’ <<http://www.unidroit.org/status-2001capetown?id=476>> accessed 02 June 2017; paragraph 3 in Unidroit, ‘Declarations Lodged by the Republic of Panama under the Cape Town Convention at the Time of the Deposit of its Instrument of Ratification’ <<http://www.unidroit.org/status-2001capetown?id=484>> accessed 02 June 2017; paragraph (iv) in Unidroit, ‘Declarations Lodged by the Republic of Turkey under the Cape Town Convention at the Time of the Deposit of its Instrument of Ratification’ <<http://www.unidroit.org/status-2001capetown?id=492>> accessed 02 June 2017; paragraph 1 in Unidroit, ‘Declarations Lodged by Ukraine under the Cape Town Convention at the Time of the Deposit of its Instrument of Accession’ <<http://www.unidroit.org/status-2001capetown?id=493>> accessed 02 June 2017.

this concern particularly relevant for the rail industry²⁰³ and later resulted in the implementation of an alternative test for ‘internal transactions’ based solely on physical characteristics of the asset, to which the requirements of mandatory national registration did not apply. This new test was based on a single factor: whether or not the object was only capable, in its normal course of use, of being operated on a single railway system within the contracting state concerned.²⁰⁴ Interestingly, a similar ‘immobility’ test was not reproduced in the most recent draft of the MAC Protocol,²⁰⁵ even though the assets covered by the latter may be even less transportable compared to rolling stock.²⁰⁶

²⁰³ See footnote 58 in Unidroit, *Study LXXIIIH - Doc. 8 (2003)* 52.

²⁰⁴ See Article XXIX(2) of the Rail Protocol.

²⁰⁵ Unidroit, *Study 72k - CGE1 - Doc. 2 corr. (2017)*.

²⁰⁶ See section 3.4 below.

CHAPTER III. SELECTING THE ASSET TYPES COVERED BY THE CONVENTION

Difficulties surrounding the legal status of security interests created over assets moving across national borders (the *lex situs* problem) formed the basis of the UNIDROIT initiative to develop a new international treaty focusing specifically on mobile equipment. Seeking the most appropriate formula to restrict the application of the CTC to a limited and clearly identified group of assets was one of the key challenges in delineating the scope of the Convention: according to Jan-Hendrik Roever, the problem of properly defining ‘mobile equipment’ was ‘the most intriguing question of the whole exercise’ that determined the outcome of many other issues.¹

3.1 Evolution of the concept of mobile equipment

As noted in section 2.1.1 above,² the Canadian Proposal acted as a catalyst for the development of the CTC and right from the start did not envisage any instrument for the suggested harmonisation other than an international convention. It concluded, however, that the new instrument should have a limited scope: ‘Such a project should be narrow in scope and should be undertaken only if it can be demonstrated that there is a commercial need for further international regulation in this area’.³ It was thus suggested that the new convention should be limited to security interests in ‘mobile equipment’, although no definition or explanation of the term was provided.

The Study⁴ prepared by Ronald Cuming as a follow-up to the Canadian Proposal was based on a hypothetical scenario in which ‘valuable mobile equipment’

¹ Unidroit, *Study LXXII - Doc. 11 (1994)* 5.

² See n 1 in section 2.1.1.

³ *ibid.*

⁴ Unidroit, *Study LXXII - Doc. 1 (1989)*.

subject to a security interest created in one country was moved across national borders to another state.⁵ Nonetheless, no attempt to define ‘mobile equipment’ was considered feasible at the time:

Should a decision be taken to prepare a draft convention, it will be a matter for the participants in that undertaking to determine on the basis of empirical information what types of movables should be included in the definition.⁶

The early attempts to determine the defining criteria of ‘mobile equipment’ can be tracked all the way back to Cuming’s Study and Questionnaire in 1989-1992. First, in the Questionnaire, designed to test his preliminary conclusions and assumptions, Cuming occasionally referred to movables ‘of a kind generally moved from one State to another’⁷ suggesting a certain degree of frequency of movement of equipment subject to the future convention. Second, following the analysis of responses to the Questionnaire, Cuming stressed that the term ‘mobile equipment’ was not by itself a generic reference to a particular type of goods – it was only meant to ‘describe the *use* to which the goods [were] being put by the debtor’.⁸ In other words, movables held as consumer goods, rather than equipment, were to be excluded.

These two factors formed the basis of two parallel processes in determining the subject matter of the future convention: (i) defining the generic concept of ‘mobile equipment’ and (ii) examining various specific types of mobile equipment. These are considered in sections 3.1.1 and 3.1.2, respectively.

⁵ ibid 4.

⁶ ibid 5.

⁷ Unidroit, *Study LXXII - Doc. 2 (1989)* 8.

⁸ Unidroit, *Study LXXII - Doc. 4 (1992)* 2 (emphasis added).

3.1.1 *Generic concept of mobile equipment*

Both the REWG in 1992 and the Study Group in 1993 essentially reproduced the two criteria identified by Cuming: the mobile equipment had to be (i) of a kind normally moving from one state to another in the ordinary course of business and (ii) held by the debtor for business use (as opposed to consumer goods or inventory).⁹ Both legs of the test, however, created practical difficulties in satisfying the main objective identified by the REWG, namely that ‘the equipment should be identifiable from the terms of the security agreement as being of a kind governed by the Convention’.¹⁰ In other words, parties to an agreement creating a security interest, as well as any third party needed an easy way of determining whether the asset in question was covered by the new instrument or not, particularly in light of an early decision to incorporate directly into the Convention priority rules regulating the priority of convention-specific security interests and any other *in rem* security interests (other than non-consensual interests).¹¹

The ‘mobility’ test, as formulated by the REWG and the Study Group, did not depend on the actual movement of the asset in question: what mattered was whether the type of equipment was generally moved across national borders. One obvious difficulty here was the lack of clarity as to the minimum frequency of movement required to satisfy the test.¹² The other problem lay in the variance generated by its application in countries of different sizes:¹³ in Liechtenstein almost any movable asset would probably satisfy the above test of ‘mobility’, whereas in Russia even airplanes would not always meet the criterion (especially in the case of medium and short-range models).

⁹ See Unidroit, *Study LXXII - Doc. 5 (1992)* 3; Unidroit, *Study LXXII - Doc. 7 (1993)* 4.

¹⁰ Unidroit, *Study LXXII - Doc. 5 (1992)* 3.

¹¹ *ibid.* 6.

¹² For concerns about lack of certainty see, eg, Unidroit, *Study LXXII - Doc. 9 (1994)* 5.

¹³ This problem was identified by Jan-Hendrik Roever in Unidroit, *Study LXXII - Doc. 11 (1994)* 6.

The ‘business use’ test had two distinct problems as well. On the one hand, it excluded from the scope of the future convention certain very high-value assets used for non-business purposes, such as personal aircraft and pleasure boats.¹⁴ On the other, the purpose for which many assets were used would not be apparent for any third party and could change with time, so that some kind of characterisation rule would be necessary to ensure that a subsequent change in the use of the asset would not jeopardise the validity of the international interest and the priority position of the financier.¹⁵

Even the combination of both tests did not result in a workable solution, as certain (relatively) small value assets, such as cars, small trucks and minor construction equipment ended up within the scope of the future Convention. This would impose on any potential financier in these items the burden of making searches in the international registry system envisaged at the early stage of development of the CTC.¹⁶

As can be seen from the above examples, the two legs of the test did not cancel out each other’s deficiencies. On the one hand, some ‘big ticket’ items (eg private jets) ended up outside the scope of the Convention. On the other, certain small value assets, conversely, would find themselves covered by the new treaty. Several extra tests were proposed to address these deficiencies.

The first solution was suggested by Cuming and took the form of an additional requirement – a test of ‘self-propulsion’. It was thought that equipment capable of self-propulsion would ensure that only items of significant value are covered by the new convention. The problem with this proposal, however, was that some very valuable equipment that was not capable of self-propulsion (such as containers, drilling equipment

¹⁴ Unidroit, *Study LXXII - Doc. 8 (1993)* 3.

¹⁵ *ibid* 4.

¹⁶ Unidroit, *Study LXXII - Doc. 5 (1992)* 5.

and railway rolling stock) would be excluded.¹⁷ In addition, this test did not really solve the issues with some of the (relatively) low cost equipment, such as cars and small trucks.

The second solution revolved around specifying a minimum (threshold) cost of equipment, such as \$50,000, as proposed by Thomas Whalen in 1994.¹⁸ This approach offered a meaningful way of limiting the scope of the future convention, but required a reliable and publicly available source of pricing information for all eligible assets (such as the manufacturer's original price).¹⁹ At the same time, the solution was highly problematic, as it could induce pressure on the manufacturers to increase the prices of certain items to ensure that they are covered by the new convention, especially if the treaty offers enhanced creditor protection mechanisms.

The deficiencies surrounding the early attempts to define 'mobile equipment' suggested that a more flexible approach to selecting the object of the new treaty might be necessary. A possible solution, suggested by Cuming in 1993, included not only the tests of mobility, business use and self-propulsion, but also a set of caveats, either expanding (eg in the case of high value consumer goods) or narrowing (eg in the case of low cost trucks) the scope of the future convention.²⁰

Interestingly, the first draft articles of the Convention did not reflect the new proposals.²¹ The concept of 'mobile equipment' revolved around the tests of 'mobility'

¹⁷ Unidroit, *Study LXXII - Doc. 8 (1993)* 5.

¹⁸ Unidroit, *Study LXXII - Doc. 9 (1994)* 5.

¹⁹ *ibid.*

²⁰ Unidroit, *Study LXXII - Doc. 8 (1993)* 5.

²¹ See Article 1, Article 2(a) and Article 3 in Unidroit, *Study LXXII - Doc. 13 (1994)* 1.

and ‘business use’,²² but with one exception: the draft articles provisionally²³ applied to ‘pleasure craft’.²⁴ The challenges underlying the concept of ‘mobile equipment’, however, remained largely unanswered.

Two changes were proposed by the First Draft Subcommittee in 1994. First, the ‘mobility’ test was to be amended to refer to equipment normally ‘used’ in different countries (as opposed to equipment normally ‘moved’ across borders).²⁵ This change had two reasons. On the one hand, it allowed better differentiation between equipment and inventory (as the latter was not supposed to be covered by the Convention). On the other hand, it excluded assets intended to be moved to some fixed destination in another country, never to be moved again.²⁶ Second, the Study Group for the first time agreed to draw up a list of assets falling within the scope of the Convention.²⁷ Although no decision was made as to whether the list would be exclusive or merely by way of example, this was a serious departure from the previous approach, which was built around the general concept of ‘mobile equipment’.

As a reflection of the above decisions of the First Draft Subcommittee, the revised draft articles of the Convention incorporated two alternative (and mutually exclusive) approaches to defining its object: (i) a closed list of assets and (ii) a combination of a general concept of ‘mobile equipment’ and a non-exhaustive list of eligible assets.²⁸ Apparently, both options were problematic. The former lacked

²² This formula emerged from the agreement of the First Draft Subcommittee to implement a ‘broad approach to the definition of mobile equipment...with specific exclusions rather than defining mobile equipment in terms of a limited list’. See Unidroit, *Study LXXII - Doc. 12 (1994)* 4.

²³ The term ‘pleasure craft’ was included in square brackets.

²⁴ See Article 3 in Unidroit, *Study LXXII - Doc. 13 (1994)* 2.

²⁵ Unidroit, *Study LXXII - Doc. 15 (1995)* 4.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ See two alternative wordings of Article 2 in Unidroit, *Study LXXII - Doc. 18 (1995)* 5.

flexibility on several levels. On the one hand, some categories of equipment (eg oil rigs or agricultural equipment) were not uniform, and included both mobile and immobile assets. As a result, an attempt to include these categories in the scope of the Convention would make the list of assets overly inclusive (and vice versa). On the other hand, failure to include some categories of equipment (for whatever reason) in the scope of the treaty would make it difficult, if not impossible, to change the decision after its adoption.²⁹ A combination of a general concept and a non-exhaustive list of eligible assets essentially had one major drawback: the lack of certainty (although somewhat reduced by having the list of eligible equipment included in the definition).³⁰

Strictly speaking, any attempt to define the scope of the future treaty by reference to some general concept, such as ‘mobile equipment’, generated uncertainty as to whether certain unspecified or unforeseen categories of assets were ‘in’ or ‘out’. At a policy level, a decision had to be made on the basis of the overall preference for greater certainty, on the one hand, or flexibility, on the other. Such a decision was made during the third meeting of the First Draft Subcommittee in 1995: the vote in favour of a closed list of assets covered by the convention was unanimous.³¹

This new approach, reflected in the next draft set of articles of the new Convention,³² reduced the term ‘mobile equipment’ to a mere label used in the name of the treaty, with no substantive value. In order to determine whether the Convention applies, parties no longer had to be concerned about the asset’s mobility or the purposes for which it was used: it was sufficient that the asset belonged to one of the categories listed in the draft Convention. The change of direction, however, brought with it not only

²⁹ Unidroit, *Study LXXII - Doc. 19 Add. (1995)* 2.

³⁰ *ibid* 3.

³¹ Unidroit, *Study LXXII - Doc. 21 (1995)* 6.

³² See Article 2 in Unidroit, *Study LXXII - Doc. 22 (1996)*.

enhanced clarity – it reduced the scope of the new treaty and, by extension, its potential economic impact.³³ Nevertheless, the greater certainty resulting from the transition to a closed list of assets trumped other concerns in light of the decision to implement an international public notice system (in the form of an international registry) and the corresponding need to ensure that third parties were in a position to know in advance which objects were governed by the new convention.³⁴

As a result of the above developments, the concept of ‘mobile equipment’ was replaced by a closed list of assets governed by the Convention, but ultimately did not lose all of its relevance. Having limited the scope of the treaty to specific groups of objects, the developers of the CTC had to ensure that the Convention would remain open to adjustment to cover other groups of assets should such need arise in the future. To address the problem of lack of flexibility, the First Draft Subcommittee considered introducing rapid amendment procedures already implemented in existing international conventions.³⁵ A similar provision in the Convention was seen as a workable solution: the developers could initially focus only on those assets for which there was immediate industry and governmental interest, whereas the treaty could be amended in the future by way of a simplified procedure, as necessary.³⁶ At the same time, it remained unclear how to ensure that the overall scope of the Convention is not diluted by various adjustments, creating uncertainty: the treaty would, as a whole, continue to focus on mobile equipment only. It became clear that the concept of ‘mobile equipment’ would have to be

³³ Unidroit, *Study LXXII - Doc. 26 Add. 2 (1996)* 11.

³⁴ Unidroit, *Study LXXII - Doc. 27 (1996)* 16.

³⁵ See Article XVIII of the 1969 International Convention on Civil Liability for Oil Pollution Damage, which envisages the convening of an *ad hoc* conference for the purposes of amending the treaty at the request of no less than one third of contracting states. See also Article 45 of the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, which has a similar provision.

³⁶ See Unidroit, *Study LXXII - Doc. 27 (1996)* 16.

retained in some form, this time not as the main criterion of the Convention's applicability, but rather as a residual category preventing unlimited expansion of the latter.

The essential characteristics of 'mobile equipment' as a residual category took significant time to crystallise. The earliest draft of the corresponding provision was prepared by the Drafting Group in 1997 and incorporated only two main characteristics: (i) unique identification ('is uniquely identifiable')³⁷ and (ii) actual mobility ('habitually moves from one State to another in the ordinary course of business').³⁸ However, this new draft went much further than just listing the relevant criteria: the developers decided to switch to a dual structure based on the main convention and a set of asset-specific protocols.³⁹ This change made the application of the Convention to any type of assets (ie those named in the text of the treaty as well as those forming part of the residual category) dependent on the existence and entry into force of a specific protocol and practically eliminated uncertainty created by the open-ended nature of the residual category of 'mobile equipment'.⁴⁰ As a result, third parties would not have to rely on the generic description of 'mobile equipment' listed among other asset types – eventually only the existence (or absence) of a protocol determined the applicability of the new

³⁷ The matter of unique identification was a key requirement for the operation of an asset-based international registry and had a different impact on the various types of mobile equipment: while the identification of aircraft objects was relatively straightforward (as a reference to the serial number, manufacturer's name and model designation was sufficient at all times), other asset types were not so homogeneous and required additional workaround solutions (see, eg, Article XIV of the Rail Protocol and Article XXX of the Space Protocol). The constraints of the thesis do not permit a detailed analysis of the issue of unique identification: the exclusion of this element is justified on the basis that the particulars of unique identification are specified in the registry regulations prepared after the adoption of the Convention and the relevant protocols, and that the more complex matters concerning the unique identification of asset types other than aircraft objects cannot be properly assessed due to the fact that no other registry is currently in operation.

³⁸ See Article 2(1)(i) in Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*.

³⁹ The reasons behind this change and the corresponding challenges are discussed in CHAPTER IV.

⁴⁰ Article 2(2) states that the Convention 'shall not come into force as regards any category of object until there is in force a Protocol relating to such category'.

treaty to any object whatsoever. This fundamental change of approach greatly reduced pressure on the developers in formulating the criteria of the residual category, which lost its definitive nature and now acted merely as guidance. Despite this, the concept of ‘mobile equipment’ was subject to the same scrutiny by the commentators as before.⁴¹ Some reviewers noted the need to refer to assets of ‘high value’ only⁴² and even suggested introducing a certain minimum threshold value of eligible objects.⁴³ Others recommended to focus on objects ‘used for business or professional purposes’ only.⁴⁴

In late 1997, the Study Group revised the scope of the draft Convention once more, taking a different approach to the concept of ‘mobile equipment’. First, the test of mobility was no longer limited to the residual category of equipment – it applied even to the asset categories that were listed in the Convention itself. Second, the actual mobility test (‘habitually moves from one State to another in the ordinary course of business’) was slightly relaxed by reference to the intent to engage in regular movement of assets (‘which is to be regularly moved’), rather than their actual movement, although it is not quite clear whether the object would fail to meet the test if later no movement in fact took place.⁴⁵ This lack of certainty was noted by the Steering and Revisions Committee (‘the SRC’)⁴⁶ in 1998 and, as a result, the test of mobility was finally deleted from the text of the Convention entirely.⁴⁷ Whether or not an asset actually moved across borders

⁴¹ The author acknowledges that this might, to some extent, be the result of certain confusion among reviewers as to whether the new concept of ‘mobile equipment’ was actually a residual category or merely an additional test used to qualify the asset types already expressly listed in the draft Convention. See, eg, paragraph 42 and paragraph 46 in Unidroit, *Study LXXII - Doc. 36 (1997)* 12.

⁴² See paragraph 42 in *ibid.*

⁴³ See Unidroit, *Study LXXII - Doc. 36 Add. 1 (1997)* 1.

⁴⁴ See paragraph 43 in Unidroit, *Study LXXII - Doc. 36 (1997)* 12.

⁴⁵ See Article 3 in Unidroit, *Study LXXII - Doc. 39 (1998)*.

⁴⁶ The role of the SRC is discussed in section 4.2 (n 62 and the relevant discussion) and section 8.1.1.

⁴⁷ See paragraph 19 and paragraph 22 in Unidroit, *Study LXXII - Doc. 41 (1998)* 12.

(or beyond any national jurisdiction, in the case of objects located in space) was deemed irrelevant: the ‘typically mobile character’ of each of the relevant categories listed in the draft Convention was sufficient to bring them within its scope.⁴⁸

While it was true that the asset types enumerated in the text of the treaty could be seen as essentially mobile by nature (and that, as a result, an extra mobility requirement might be unnecessary), the decision to remove the test of mobility in its entirety had a serious impact on the residual category of mobile equipment, which was reduced to a mere reference to ‘other categories of uniquely identifiable object’.⁴⁹ As a result, the draft Convention lost virtually all of the safeguards against potentially unlimited expansion of its scope in the future, except for the requirement that the assets should be subject to unique identification.⁵⁰

This loss of the mobility requirement was not, however, seen as an impediment by the governmental experts during the First Joint Session. Furthermore, the fact that the Convention would not apply to any asset category without a dedicated protocol⁵¹ was considered a sufficient guarantee of legal certainty and, as a result, the list of various asset types governed by the draft Convention was completely removed from its text.⁵² Thanks to this change, the residual category of mobile equipment, which had previously been reduced to a single test of unique identification, effectively became the only⁵³

⁴⁸ See paragraph 19 in *ibid.*

⁴⁹ See paragraph 22 in *ibid.*

⁵⁰ This is best illustrated by the revised Article 3 (as read in conjunction with Article U) in Unidroit, *Study LXXII - Doc. 42 (1998)*.

⁵¹ See n 39. The ‘umbrella’ structure of the CTC and its protocols is discussed in greater detail in CHAPTER IV.

⁵² Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 7.

⁵³ One may argue that another safeguard was incorporated in the preamble of the draft Convention, which spoke of ‘the need to acquire and use *high value* mobile equipment’ (emphasis added), but the legal effects of the preamble remained very limited (as evidenced by Article 6 of Attachment D (Appendix I) in *ibid.*) and did not directly affect the categories of objects to which the draft Convention applied.

restriction on the types of objects regulated by the new treaty.⁵⁴ The exclusion of the list of eligible assets from the draft Convention was approved by the Second Joint Session, subject to the consensus decision to somewhat limit the scope by reference to objects of ‘high value’ only. At the same time, the location and wording of this new high cost criterion was left to the determination of the Drafting Committee, which, nonetheless, did not make any changes to the substantive criteria of mobile equipment in Article 2(2),⁵⁵ keeping the only reference to ‘high value’ equipment in the preamble.⁵⁶ As a result, the draft Convention remained potentially open to any types of movable objects, from cars to personal computers.

The resulting possibility of almost indefinite expansion of the scope of the new convention created a lot of debate during the Third Joint Session. The French government stressed the need to restore the list of assets regulated by the Convention to avoid extending its scope to mobile equipment ‘of lesser importance’, noting that the reference to ‘high value’ had no ‘real legal value’ due to the fact that it was located in the preamble.⁵⁷ In addition, UNCITRAL, which contemplated the adoption of a new treaty regulating assignment of receivables, insisted on the reintroduction of a list of eligible assets in order to ensure that the UNIDROIT convention would not be concerned with other, non-high value objects, thereby eliminating the potential for overlap between the two instruments.⁵⁸ In UNCITRAL’s view, any uncertainty, including the residual category of ‘any uniquely identifiable equipment’, should have been eliminated to avoid conflict with its own treaty. To reconcile the existing draft with the above proposals, the

⁵⁴ See Article 2(2) of Attachment D (Appendix I) in *ibid*.

⁵⁵ See Article 2(2) of Attachment F (Appendix I) in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

⁵⁶ See Preamble of Attachment F (Appendix I) in *ibid*.

⁵⁷ Unidroit, *Unidroit CGE/Int.Int./3-WP/4 ICAO Ref. LSC/ME/3-WP/4 (2000)* 4.

⁵⁸ Unidroit, *Unidroit CGE/Int.Int./3-WP/10 ICAO Ref. LSC/ME/3-WP/10 (2000)* 2.

UNIDROIT Secretariat suggested an alternative approach, which was quite similar to the earlier drafts of the Convention: a list of particular asset types governed by the treaty accompanied by a residual concept of mobile equipment restricting any further extension of scope.⁵⁹ While this approach was not new, the proposed characteristics of objects potentially falling into the catch-all clause appeared much more restrictive. To be eligible for inclusion in the scope of the treaty, the assets would not have to be merely uniquely identifiable – only ‘high value capital infrastructure equipment’ would qualify.⁶⁰ The UNIDROIT proposal was accepted by the governmental experts with certain minor adjustments: the list of assets was reduced to airframes, aircraft engines, helicopters, railway rolling stock and space property, while the residual category was qualified by the word ‘mobile’ and moved to a separate article.⁶¹ The resulting draft (in particular Article 2 and Article U)⁶² reflected these changes, except for the UNIDROIT Secretariat’s reference to objects relating to ‘capital infrastructure’, thereby limiting the scope of any future expansion of the Convention to assets simultaneously possessing three characteristics: (i) mobility, (ii) high value and (iii) unique identification. This three-prong test is reflected in the final text⁶³ of the CTC.⁶⁴

Despite the extensive discussion and difficulties surrounding each criterion, the Convention eventually got rid of any attempt to define in greater detail the residual category of ‘mobile equipment’, which, contrary to the overall spirit of the treaty,

⁵⁹ Unidroit, *Unidroit CGE/Int.Int./3-WP/14 ICAO Ref. LSC/ME/3-WP/14 (2000)* 2.

⁶⁰ *ibid.*

⁶¹ Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 8.

⁶² See Attachment C (Appendix I) in *ibid.*

⁶³ The difficulties surrounding the selection of particular asset types and, in particular, the wording of Article 2(3) of the CTC, are discussed in section 3.1.2.

⁶⁴ See Article 2(3) and Article 51(1) of the CTC.

intentionally retains an element of uncertainty.⁶⁵ On the one hand, this seems justified, given the need to explore the possibilities for expanding the scope of the CTC in the future (particularly in light of the ongoing development of the new protocol on mining, agricultural and construction equipment). On the other, the vagueness of the relevant criteria (especially the one of ‘high value’) may pave the way to the inclusion of peculiar groups of assets in the future, such as high-end portable computers (since these are mobile by nature, have unique serial numbers and often cost as much as an automobile). This is the result of transition to the dual (convention/protocol) structure and, in particular, Article 49(1), which makes the application of the Convention to any group of assets dependent on the existence and entry into force of a specific protocol. Eventually, the existence or absence of market demand and the interests of various stakeholders will determine what new asset types may be covered by the CTC – the Convention has simply left its door open.

3.1.2 Specific types of equipment

The three asset types reflected in the final text of Article 2(3) the CTC represent only a fraction of the various categories of equipment originally considered by the developers. The first attempt to identify objects fitting the new convention revealed numerous options, from ships to computers.⁶⁶ The difficulties in formulating a single workable

⁶⁵ One could argue that the residual category of ‘mobile equipment’ was retained merely to convey the basic idea behind the asset types covered by the Convention, devoid of any independent legal significance. This is certainly true for the three categories listed in Article 2(3) of the CTC. As for the other types of mobile equipment, this residual category serves a ‘gatekeeping’ function under Article 51(1) of the Convention concerning the possibility of adoption of new protocols. It is important to note that this residual test remains an autonomous Convention-regulated concept not based on any domestic classification of the relevant assets. In the context of the draft MAC Protocol, however, this conclusion is put to the real test in light of the problem of land-associated objects – see n 124 in section 7.2.

⁶⁶ In the review of the responses to his Questionnaire Cuming lists the following assets identified by the respondents: trucks, automobiles, railway rolling stock, construction equipment, earth moving equipment, industrial machinery, oil drilling equipment, agricultural equipment, ships, vessels and floating equipment, aircraft, containers, computer equipment, graphic arts equipment,

definition of ‘mobile equipment’ mentioned in the previous section called for a more flexible approach: certain important assets (eg pleasure craft) satisfied some (high value, mobility), but not all (no business use) of the relevant criteria (and thus should have been included by express reference); others (eg ships) satisfied all criteria, but for other reasons⁶⁷ had to be excluded (also by express reference).

Although the first set of draft articles of the Convention did not list any specific asset categories,⁶⁸ proposals to forego generality in favour of increased certainty appeared rather quickly.⁶⁹ In response to these proposals the First Draft Subcommittee initially considered incorporating a list of eligible assets directly into the Convention,⁷⁰ seeking inspiration from the responses to Cuming’s Questionnaire (which, as noted in the previous paragraph, identified a wide variety of asset types) and later unanimously agreed to switch to a closed list formula.⁷¹ Despite the numerous available options and types of equipment identified by Cuming, all the subsequent drafts⁷² leading up to the governmental expert stage retained the same categories of mobile equipment: aviation assets (aircraft, engines and, later, helicopters), ships, oil rigs, containers, railway rolling

telecommunication equipment, recreation vehicles and trailers – see Unidroit, *Study LXXII - Doc. 4 (1992)* 3.

⁶⁷ The exclusion of ships is discussed in section 3.3.

⁶⁸ See Article 1(2)(a) and Article 1(3) in Unidroit, *Study LXXII - Doc. 13 (1994)*.

⁶⁹ In his comments Thomas Whalen noted that a general definition was ‘too general’ and should be further limited by reference to types of equipment – see Unidroit, *Study LXXII - Doc. 14 Add 1 (1994)* 1. Rolf Herber, in turn, stressed the need for the industry to know which particular asset types could potentially be subject to the new convention in order to determine whether or not to consult the public notice (registration) system to be created by the treaty – see *ibid* 2.

⁷⁰ Unidroit, *Study LXXII - Doc. 15 (1995)* 4.

⁷¹ Unidroit, *Study LXXII - Doc. 21 (1995)* 6.

⁷² See Article 2(1) in Unidroit, *Study LXXII - Doc. 22 (1996)*; Article 2(1) in Unidroit, *Study LXXII - Doc. 24 (1996)*; Article 2(1) of Appendix IV in Unidroit, *Study LXXII - Doc. 27 (1996)*; Article 2(1) in Unidroit, *Study LXXII - Doc. 30 (1996)*; Article 2(1) in Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*; Article 2(1) in Unidroit, *Study LXXII - Doc. 35 (1997)*; Article 2(1) in Unidroit, *Study LXXII - Doc. 37 (1997)*; Article 3(1) in Unidroit, *Study LXXII - Doc. 39 (1998)*; Article 3(1) in Unidroit, *Study LXXII - Doc. 41 (1998)*; Article 3(1) in Unidroit, *Study LXXII - Doc. 42 (1998)*.

stock and space assets (satellites, later replaced with ‘space property’). There is limited documentary evidence as to the exact reasons for the early exclusion of other types of mobile equipment starting from the very first draft in 1996 incorporating the closed list,⁷³ however several important observations should be made. First, the lower cost items, such as computer equipment, arguably did not possess sufficient value to be covered by the convention:⁷⁴ at its third session 1995, the First Draft Subcommittee agreed to consider ‘possible techniques for limiting the application of the proposed Convention to big – ticket [*sic*] items’.⁷⁵ Second, certain assets, such as cars and trucks, created difficult characterisation issues, as it was very hard to draw a distinction between vehicles used as equipment (ie in business not for resale) and vehicles used as consumer goods.⁷⁶ Third, construction and other similar equipment incapable of self-propulsion possessed questionable international mobility: while these assets were indeed moved across national borders, quite often this was done only to deliver them to a stationary operating area, never to be moved again to another country.⁷⁷

In light of these legitimate concerns, the inclusion of oil rigs and containers seemed somewhat problematic. On the one hand, certain oil rigs share the limited mobility characteristics of construction equipment (as they are not moved to a new location). On the other hand, containers come in different forms and sizes, and it is unclear whether a certain item can be said to possess sufficiently high value. To address

⁷³ See Article 2(1) in Unidroit, *Study LXXII - Doc. 22 (1996)*.

⁷⁴ The idea that eligible assets should be of sufficiently high value was considered one of the baseline concepts in identifying the object of the CTC throughout the whole development process. See Unidroit, *Study LXXII - Doc. 8 (1993)* 4; Unidroit, *Study LXXII - Doc. 9 (1994)* 5; Unidroit, *Study LXXII - Doc. 12 (1994)* 4; Unidroit, *Study LXXII - Doc. 16 (1995)* 3.

⁷⁵ Unidroit, *Study LXXII - Doc. 21 (1995)* 6.

⁷⁶ Unidroit, *Study LXXII - Doc. 4 (1992)* 2.

⁷⁷ A clear preference for essentially movable assets follows from the decision of the First Draft Subcommittee to refer to equipment ‘used’ in several jurisdictions as opposed to equipment ‘moved’ across national borders – see Unidroit, *Study LXXII - Doc. 15 (1995)* 4. However, see section 3.4.

these difficulties, the next drafts qualified both types of assets with additional criteria: mobility for oil rigs ('oil rigs not intended to be permanently immobilised') and minimum size for containers ('containers with a cubic capacity of not less than x').⁷⁸

During the review of various asset types at its second meeting in 1996 the Study Group re-examined the feasibility of expanding the list of eligible equipment, considering a variety of options, from lorries and omnibuses to air-cushion vehicles and computers.⁷⁹ At that time the draft Convention remained still open for expansion by way of adding additional types of equipment to the definitive list, subject only to the satisfaction of three criteria:⁸⁰ (i) high value, (ii) mobility (frequent use on a cross-border basis) and (iii) unique identification required for the functioning of the new international registry.⁸¹ Yet, perhaps more importantly, the Study Group acknowledged the need to ascertain the desirability of the inclusion of additional asset types by consulting the relevant industries. This practical solution both imposed pressure on the various stakeholders in the corresponding sectors (as well as developers of the CTC) and acted as a maturity test for the industries in question. Those failing to demonstrate the immediate demand for inclusion of the relevant group of assets would have to rely on the draft Convention's rapid amendment provisions.⁸² The window of opportunity to expand the list of eligible types of mobile equipment was closing.

⁷⁸ See Article 2(1)(d) and Article 2(1)(e) in Unidroit, *Study LXXII - Doc. 22 (1996)*. See also Article 2(1)(d) and Article 2(1)(e) in Unidroit, *Study LXXII - Doc. 24 (1996)*. Later the relevant qualification criteria were moved to the definitions section: see, eg, Part III(a) and Part III(c) of Appendix in Unidroit, *Study LXXII - Doc. 30 (1996)*.

⁷⁹ Unidroit, *Study LXXII - Doc. 27 (1996)* 15.

⁸⁰ *ibid* 16.

⁸¹ The challenges relating to the establishment and operation of the international registry are discussed in section 6.2.

⁸² Unidroit, *Study LXXII - Doc. 27 (1996)* 16. See also Article 2(2) in Unidroit, *Study LXXII - Doc. 24 (1996)*.

In early 1997 the Study Group adopted a decision⁸³ to switch to a dual (convention/protocol) structure.⁸⁴ The new approach recognised the specific characteristics and financing needs of the parties to asset finance transactions involving different types of mobile equipment and was based on the notion that the future Convention would come into force with respect to those types of assets for which there would be in force a separate protocol.⁸⁵ As a result, the problem of securing industry support became even more acute, since preparation of specific protocols required input from the various stakeholders involved in financing transactions within the relevant sector. This pragmatic approach allowed the developers to focus on assets in sectors where the industry was both ready and willing not only to use the Convention, but also to apply the necessary pressure on the governments during adoption and implementation. This was not, however, the only reason to seek the support within the relevant business circles. First, only the industry could provide the appropriate definition of each type of mobile equipment (as was demonstrated by the difficulties in differentiating airframes from aircraft engines – see section 3.2 below). Second, it could help introduce certain additional criteria (such as weight or capacity) limiting the scope of the new convention to objects of high value.⁸⁶ Third, the industry was best placed to suggest the appropriate mode of asset identification required for the operation of an asset-based (as opposed to

⁸³ See Introductory Note in Unidroit, *Study LXXIID - Doc. I (1998)* 1.

⁸⁴ The reasons behind transition to the umbrella structure and the corresponding challenges are examined in CHAPTER IV.

⁸⁵ This change was first reflected in Article 2(2) of Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*.

⁸⁶ Reliance on objective criteria for limiting the categories of eligible equipment eliminated the risk of price manipulation and artificial inflation for the purposes of subjecting the assets to the protections established by the draft Convention.

debtor-based) registry.⁸⁷ Fourth, it could propose additional rules specific to a particular category of mobile equipment.⁸⁸

As a result of the above developments, by the start of the governmental expert stage an interesting *status quo* emerged with respect to the list of asset types covered by the draft Convention. On the one hand, it was clear that industry involvement was the decisive factor in determining which objects should be governed by the new treaty for reasons identified in the previous paragraph. On the other hand, the list of eligible assets remained open-ended due to the rapid amendment mechanics incorporated into the text based on the residual category of mobile equipment discussed in section 3.1.1.⁸⁹ This eased the pressure on the relevant industries, keeping the treaty open for future expansion. On top of this, the draft Convention only applied to those asset groups for which there was in force a corresponding protocol.⁹⁰ This factor acted both ways: it demanded industry involvement, but at the same time made the list of specific types of assets enumerated in the text of the convention indicative, rather than definitive. The resulting construct made the effects of any shrinking or expansion to the list of eligible assets practically irrelevant from the purely legal perspective: eventually the protocol would determine which objects are covered. Therefore, the changes that followed during the governmental expert stage were largely driven by political, procedural and technical concerns, rather than strictly legal considerations.

⁸⁷ See section 6.2.

⁸⁸ Unidroit, *Study LXXII - Doc. 40 (1998)* 6.

⁸⁹ See Article 3(i) and Article W in Unidroit, *Study LXXII - Doc. 42 (1998)*.

⁹⁰ See Article U in *ibid.*

Against this background, the decision to get rid of the list of specific assets adopted during the First Joint Session⁹¹ does not look so surprising: according to the UNIDROIT Secretariat, the only reason for this was ‘delegations’ preference for a more concise and hence more elegant drafting’.⁹² Another concern against enumerating eligible assets was voiced at the Third Joint Session: during adoption, accession or ratification the list could be seen by governments as a ‘political promise’ to ensure the application of the Convention to all types of objects named in it. Likewise, the reincorporation of the list during the Third Joint Session was a result of a political compromise to alleviate the concerns expressed by UNCITRAL, which was working on a draft convention on assignment in receivables financing.⁹³ In order to avoid potential clash of the two instruments, UNIDROIT favoured the idea of specific exclusion from the UNCITRAL’s document of assignments of receivables to the extent that these became associated rights in connection with the financing of those types of assets which were subject to the draft Convention.⁹⁴ Despite the fact that UNCITRAL itself admitted the absence of purely legal concerns resulting from the need to have a working protocol in order for the Convention to apply to any kind of mobile equipment, both UNCITRAL and UNIDROIT favoured the reintroduction of a list of specific assets as a matter of policy, namely for the sake of added clarity.⁹⁵ The resulting consensus achieved by the delegates of the Third Joint Session consisted of a coherent three-part structure: (i) a closed list of assets (aviation objects, railway rolling stock and space property),⁹⁶ (ii) a

⁹¹ Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 7. See also Article 2(2) of Appendix I in *ibid.*

⁹² Unidroit, *Unidroit CGE/Int.Int./3-WP/14 ICAO Ref. LSC/ME/3-WP/14 (2000)* 1.

⁹³ See n 58.

⁹⁴ See Appendix to Unidroit, *Unidroit CGE/Int.Int./3-WP/14 ICAO Ref. LSC/ME/3-WP/14 (2000)*.

⁹⁵ See Unidroit, *Unidroit CGE/Int.Int./3-WP/10 ICAO Ref. LSC/ME/3-WP/10 (2000)* 2 and Unidroit, *Unidroit CGE/Int.Int./3-WP/14 ICAO Ref. LSC/ME/3-WP/14 (2000)* 2.

proviso stating that the Convention applies only to those types of equipment for which there is in force a protocol,⁹⁷ and (iii) a simplified procedure for the adoption of new protocols to the Convention.⁹⁸

The matter of listing various categories of equipment, surprisingly, generated a lot of debate during the final stage of development of the CTC, during the Cape Town Diplomatic Conference. While there was virtually no disagreement as to the open-ended nature of the list of eligible assets and the pivotal role of protocols in defining the scope of the Convention, questions remained about the best textual implementation of this approach. The proposals suggested various alternatives, from complete removal of the list of different types of equipment to re-opening the list again. However, two main factors decided the eventual outcome of the discussion: one policy matter and one matter of drafting. The first was formulated by the Rail Working Group,⁹⁹ which stressed the need to retain in the text of the Convention itself express references to those types of equipment which were backed by the industries already working on corresponding protocols (namely, the rail and space industries).¹⁰⁰ Removal of the relevant assets from the CTC could be seen as a bad message to the various stakeholders that could hinder the progress made up to that moment. The second issue (a matter of drafting) was resolved thanks to the proposal of the United Kingdom representative, who suggested a

⁹⁶ See Article 2(3) of Appendix I to Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

⁹⁷ See Article R of Appendix I to Attachment C in *ibid*.

⁹⁸ See Article U of Appendix I to Attachment C in *ibid*.

⁹⁹ The Rail Working Group is a rail industry association established to represent the position of the rail industry relating to adoption and implementation of a dedicated protocol on railway rolling stock. It enjoyed the status of observer during the Cape Town Diplomatic Conference to adopt the Convention and the Aircraft Protocol and during the Luxembourg Diplomatic Conference to adopt the Rail Protocol.

¹⁰⁰ The Convention was adopted during the Cape Town Diplomatic Conference alongside a single protocol only – the Aircraft Protocol. The Rail and Space Protocols were adopted later, in 2007 and 2012, respectively.

minimalist, yet effective, approach to combining the three key elements identified in the preceding paragraph, namely a list of assets, the primacy of protocols and a mechanism for the adoption of new protocols: the latter was supplemented with a proviso stating that whenever a new protocol in respect of equipment not listed in the Convention was adopted, the Convention would, as a whole, apply to such equipment. This provision was considered desirable, as the closed list of eligible assets, taken separately, created the impression of limiting the scope of the CTC only to those three categories of equipment.¹⁰¹

In retrospect, the listing of specific types of assets (which can be grouped into three categories: aircraft, railway rolling stock and space objects) in the text of the CTC did not achieve much in terms of substance – but it provided UNCITRAL,¹⁰² governments, as well as the rail and space industries with a degree of certainty that was needed at the final stage to achieve the adoption of the draft Convention and to preserve the momentum in developing new protocols. The challenges surrounding the key asset categories covered by the adopted protocols were unique and cannot all be addressed in this thesis. For this reason, the following sections focus on issues specific to three types of mobile equipment: (i) aircraft objects (as the only type of equipment covered by a protocol currently in force), (ii) ships (as the type of equipment perfectly matching the Convention criteria, but at the same time not covered by a protocol), and (iii) mining, agricultural and construction equipment (as the first (and so far the only) type of assets not expressly mentioned in the CTC, but attempted to be included in the scope of the

¹⁰¹ This solution can be found in Article 51(5) of the CTC.

¹⁰² In addition to a closed list of assets with respect to which the Convention prevails over the 2001 UN Convention on the Assignment of Receivables in International Trade (Article 45 bis of the CTC), Article 51(6) expressly states that for any other types of mobile equipment the CTC will only have similar priority if it is provided for in the corresponding protocol.

Convention pursuant to Article 51, and also due to the fact that the draft MAC Protocol is going to become the most recent addition to the ‘family’ of CTC protocols).

3.2 *Aircraft*

The Aircraft Protocol was the only protocol ready for adoption alongside the CTC in 2001, perhaps suggesting that the issues surrounding this category of assets were less pronounced, compared to others. This is true only to a certain extent. On the one hand, aircraft easily satisfied the criteria of high cost and mobility¹⁰³ and operated within a consolidated industry that took an early interest in the UNIDROIT’s project to develop an international convention on international interests in mobile equipment.¹⁰⁴ On the other, aircraft equipment created unique challenges for the developers of the CTC – they are addressed further in this section.

3.2.1 *Existing international rules affecting aircraft finance*

Existing international regulation in the area of aviation finance created the first notable difficulty for the UNIDROIT project to develop the Convention. The idea that the *lex situs*¹⁰⁵ approach is inappropriate for security interests over aircraft had already been recognised and reflected in the 1948 Geneva Convention, which provided for the international recognition of ‘mortgages, hypothèques and similar rights in aircraft... created as security for payment of an indebtedness’ when such rights were constituted in

¹⁰³ See, eg, Unidroit, *Study LXXII - Doc. 1 (1989)* 16.

¹⁰⁴ Among the respondents to Cuming’s Questionnaire in 1990 were both the aircraft manufacturers (Airbus Industrie, France) and the aircraft operators (Air Portugal, Portugal; Air New Zealand Limited, New Zealand). The Boeing Company joined the discussions in 1994 – see Unidroit, *Security Interests Study Group Sub-committee 1st session Misc. 3 (1994)*. The Boeing Company and Airbus Industrie subsequently established an international working group (AWG) to produce a representative industry view on the future Convention, which also included leasing companies, engine manufacturers and banks – see Unidroit, *Study LXXII - Doc. 16 (1995)* 1.

¹⁰⁵ For a more detailed discussion of the various connecting factors in the context of mobile equipment see section 2.1.1.

accordance with the law of the state of registration¹⁰⁶ of the aircraft at the time of their creation and ‘regularly recorded in a public record’ of the state of registration of the aircraft.¹⁰⁷ The 1948 Geneva Convention essentially addressed the *lex situs* problem and, from this perspective alone, the UNIDROIT project did not look particularly attractive.¹⁰⁸

Nevertheless, the aviation industry, represented by the AWG, took a broader view of the aircraft financing mechanisms and the risks associated with them: the new UNIDROIT convention was considered as an opportunity to change the existing international regime by addressing its deficiencies. First, the 1948 Geneva Convention was mostly a conflict of laws instrument, the effectiveness of which for financiers ultimately depended on the different national laws regulating the matters of creation, perfection¹⁰⁹ and priority:¹¹⁰ if such national laws were weak or non-existent, the value of the recognition mechanics established by this treaty diminished greatly. Furthermore, the state of registration of aircraft was free to deny the recording of any security rights that could not be constituted under its domestic law.¹¹¹ Second, the absence of a working system of recording security interests in the state of registration of aircraft made their recognition impossible.¹¹² Third, the 1948 Geneva Convention treated aircraft engines on

¹⁰⁶ Registration of aircraft is governed by the 1944 Convention on International Civil Aviation (the ‘Chicago Convention’), which does not permit simultaneous registration of aircraft in more than one state – see Article 18 of the Chicago Convention.

¹⁰⁷ Article I(1)(d) of the 1948 Geneva Convention.

¹⁰⁸ Although the 1948 Geneva Convention was not (and is still not) ratified by a number of key jurisdictions (such as Canada, India, Indonesia, Japan, Russia and the UK), by 1989 it had come into force in 53 states – see ICAO, ‘Convention on the International Recognition of Rights in Aircraft Signed at Geneva on 19 June 1948’ (http://www.icao.int/secretariat/legal/List%20of%20Parties/Geneva_EN.pdf) accessed 02 June 2017. Against this background, the prospects of greater success of an entirely new international treaty at the time were questionable at best.

¹⁰⁹ According to Article I(1)(i), the security rights must be constituted according to the law of the state in which the aircraft is registered.

¹¹⁰ Article II(2) states that the effects of security rights recognised under the treaty are determined in accordance with the laws of the state in which these rights are recorded.

¹¹¹ Article II(3) of the 1948 Geneva Convention.

¹¹² Article I(1)(ii) of the 1948 Geneva Convention.

par with any other spare parts¹¹³ and imposed onerous requirements for the recognition of security rights in them: they had to be not only identified as being subject to a security right, but also stored in a specific location at all times.¹¹⁴ These requirements were seen by the industry as ‘unrealistic’ in light of their high cost and established operating practices whereby engines were frequently removed from the airframe and replaced with spare engines from an engine ‘pool’.¹¹⁵ Fourth, the 1948 Geneva Convention had no clear provision on the treatment of lease assignments and other contract rights, which were widely used in aviation finance practice.¹¹⁶ Fifth, it did not address the risks of secured creditors in case of bankruptcy of the party providing security. In broad terms, the 1948 Geneva Convention created a degree of legal certainty by specifying which law governs the security interests over aircraft (*lex registri*), but did almost nothing in terms of enhancing that law.¹¹⁷

Other aviation conventions did not promote aircraft financing either. The Chicago Convention, whilst in force in most states across the globe, did not allow simultaneous registration of an aircraft in more than one jurisdiction, but permitted transfers of registration between states.¹¹⁸ Both the initial registration and the transfer of registration, however, were governed by the domestic laws of the relevant country,¹¹⁹ which left in the hands of contracting states a significant degree of discretion regarding the registration-related rule-making. Consequently, the domestic laws could have a

¹¹³ See Article X(4) of the 1948 Geneva Convention.

¹¹⁴ Article X(1) of the 1948 Geneva Convention.

¹¹⁵ Unidroit, *Study LXXII - Doc. 16 (1995)* 19.

¹¹⁶ *ibid* 15.

¹¹⁷ For a more comprehensive account of the criticism of the 1948 Geneva Convention and the circumstances of its adoption see Donal Hanley, ‘The relationship between the Geneva and Cape Town conventions’ (2015) 4 Cape Town Convention Journal 103, 106.

¹¹⁸ Article 18 of the Chicago Convention.

¹¹⁹ Article 19 of the Chicago Convention.

serious bearing on the ability of the secured party to immobilise the aircraft by restricting its de-registration (eg by requiring the consent of the airline/other party).¹²⁰ Another treaty, the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the ‘Rome Convention’), restricted the ability of the secured party to seize the aircraft ‘actually put in service on a regular line of public transportation and indispensable reserve aircraft’, as well as aircraft ‘assigned to the transportation of persons or property for hire, when it is ready to depart for such transportation’ (except where the attachment involves a debt incurred for the trip and that trip is the one which the aircraft is about to make).¹²¹

Against this background, it does not seem surprising that the aviation industry showed an interest in the UNIDROIT project, seeing it as an opportunity to set a certain minimum level of protection of the secured party in aircraft finance transactions that was not possible under the existing combination of international and domestic rules. In its first submission to UNIDROIT the AWG expressly stated that, in its view, ‘the value of the proposed convention [was] directly related to the extent to which its terms... result in an increase in the availability of credit, and/or a reduction in the cost of such credit, to owners/operators of aircraft equipment’.¹²² This highly practical approach later resulted in the significant expansion of scope of the Convention to cover matters beyond recognition of foreign security interests, basic remedies and priorities. Yet more importantly for this section, the aviation industry saw the UNIDROIT convention as a

¹²⁰ Unidroit, *Study LXXII - Doc. 16 (1995)* 31.

¹²¹ Articles 3(1)(b) and 3(1)(c) of the Rome Convention.

¹²² Unidroit, *Study LXXII - Doc. 16 (1995)* 5.

new opportunity to change the existing rules – and was willing to support the idea in anticipation of significant financial gains.¹²³

3.2.2 *Definition of ‘aircraft’: aircraft engines*

Despite the active involvement of the industry, the development of an appropriate definition of ‘aircraft’ in the context of the draft Convention was not a simple task. In its first formal submission to UNIDROIT the AWG avoided any attempts to come up with the relevant definition,¹²⁴ but noted the distinct characteristics of aircraft engines (also undefined at the time)¹²⁵ as parts of an aircraft that warranted special treatment (contrary to their classification as any other spare parts of an aircraft in the 1948 Geneva Convention).¹²⁶ First, engines themselves formed an extremely valuable asset category: the proportion of their value to the overall value of an aircraft was ranging between 15% to 20%, with the acquisition costs of new jet engines varying between USD 2.5 million and USD 10 million.¹²⁷ Second, engines were subject to special engine pooling arrangements whereby they were removed from the airframes and replaced with other engines taken from a pool – a practice implemented for operational purposes, often in violation of contractual prohibitions.¹²⁸ These pooling arrangements were not uniform: some contemplated a transfer of title over a dismantled engine to the corresponding pool, while others did not (subject to the applicable domestic contract and accessions laws).¹²⁹ Third, national laws differed greatly when determining whether an attachment to an asset

¹²³ The matter of economic benefit analysis is addressed in greater detail in section 7.1.2, whereas the effects of the involvement of various industries in the development of the CTC are discussed in section 8.3.

¹²⁴ See footnote 5 in Unidroit, *Study LXXII - Doc. 16 (1995)* 3.

¹²⁵ See footnote 43 in *ibid* 19.

¹²⁶ Article X(4) of the 1948 Geneva Convention.

¹²⁷ See footnote 44 in Unidroit, *Study LXXII - Doc. 16 (1995)* 19.

¹²⁸ *ibid*.

¹²⁹ See footnote 45 in *ibid*.

becomes a part of that asset.¹³⁰ Fourth, the interests of engine financiers could differ from the interests of other aircraft financiers, since engines could be subject to separate security arrangements that did not cover the aircraft as a whole.¹³¹

These factors combined raised two key policy concerns. On the one hand, it became clear that engines formed a distinct group of aviation assets that needed to be covered by the future Convention, even though their actual function did not differ from that of other spare parts. At the time, the specific nature of aircraft engines was recognised not only by the financiers and their clients: the recently adopted Financial Leasing Convention treated the engines as separate from the aircraft (as a whole) for the purposes of determining the applicable law regulating the public notice requirements.¹³² On the other hand, the engine pooling arrangements and differing national laws on accession of parts to the main asset came in direct conflict with the ‘title tracking approach’¹³³ advocated by the AWG, whereby a financier holds an interest in a specific engine, regardless of its physical location, installation on or detachment from any airframe.¹³⁴ Given the lack of an internationally accepted standard in engine financing and the widely differing national laws on accession, and in order to collate the views of the engine manufacturers and financiers, the AWG convened a small aircraft engine

¹³⁰ By way of example, in Germany the act of installation of an engine on an aircraft effectively resulted in the transfer of ownership over the engine to the aircraft owner – see Annex 3 in *ibid* 42.

¹³¹ *ibid* 19.

¹³² cf Article 7(3)(b) and Article 7(3)(c) of the Financial Leasing Convention. It should be noted, however, that the express reference to aircraft engines in the Financial Leasing Convention was a last-minute change introduced only at the adoption stage: the final draft prepared in the run-up to the Diplomatic Conference in Ottawa mentioned ‘all other [mobile] equipment [normally used in more than one State]’ generally – see draft Article 5(3)(a) and 5(3)(b), as well as paragraphs 95 and 96 in Unidroit, *Study LIX - Doc. 48 (1987)* 52.

¹³³ It should be noted that the ‘title tracking approach’ suggested by the AWG was not limited to the recordation of security interests against a specific engine: the proposed registration system was expected to cover title transfers as well.

¹³⁴ Unidroit, *Study LXXII - Doc. 16 (1995)* 19. The ‘title tracking approach’ was seen as a more appropriate alternative to a ‘title transfer’ system, whereby engines are legally viewed as part of an airframe to which they are attached.

subgroup (the ‘Engines Subgroup’) consisting of representatives of Rolls Royce, GE Aircraft Engines, the International Lease Finance Corporation, Snecma and Pratt & Whitney. Having acknowledged its potential drawbacks (such as the increased administrative burden resulting from the need to work out appropriate engine-specific contractual restrictions), the Engines Subgroup unanimously approved the title tracking approach: the enhanced clarity resulting from such a system would ‘far outweigh’ any increased costs, whereas the mechanisms established by the new convention would set a market standard in the (engine financing) area where there had been none.¹³⁵ At the same time, the costs associated with the title tracking system were seen as prohibitive for any other category of aircraft parts other than engines: ‘the number of types of parts, let alone the number of all parts, would be too great to manage’.¹³⁶

The recommendations of the AWG concerning the separation of aircraft engines were reflected in the revised draft articles of the Convention prepared in 1995, which covered both ‘aircraft’ and ‘aircraft engines’; however, since the industry had not proposed a clear definition for either category, the two terms created uncertainty: the former was broader and could absorb the latter entirely. This problem was promptly addressed by the AWG in its second memorandum to UNIDROIT, which avoided overlapping terms by referring to ‘aircraft engines’ and ‘airframes’ separately.¹³⁷ Such bifurcation was retained in the final text of the CTC,¹³⁸ whereas the Aircraft Protocol supplements these two terms with another two: ‘aircraft’¹³⁹ (meaning airframes with

¹³⁵ See Annex 3 to *ibid* 42.

¹³⁶ *ibid* 43.

¹³⁷ Unidroit, *Study LXXII - Doc. 23 (1996)* 9.

¹³⁸ Article 2(3)(a) of the CTC.

¹³⁹ Article I(2)(a) of the Aircraft Protocol.

aircraft engines installed on them, as well as helicopters) and ‘aircraft objects’¹⁴⁰ (a catch-all term for each of airframes, aircraft engines or helicopters, taken separately). These new terms were introduced for drafting purposes and terminological accuracy: the second was needed to avoid listing each asset type at all times, while the first one is used primarily¹⁴¹ in the context of aircraft registration and de-registration¹⁴² – a process of terminating the nationality registration under the Chicago Convention, which does not treat aircraft engines separately from the airframes and refers to ‘aircraft’ as a whole¹⁴³ (whether taken as a separate category or any sub-division thereof, such as aeroplanes, airships, ornithopters or rotorcraft).¹⁴⁴

3.2.3 *Definition of ‘aircraft’: helicopters and helicopter engines*

As was briefly mentioned in the previous paragraph, the Aircraft Protocol treats helicopters as ‘aircraft’, on par with airframes with installed aircraft engines. Considering the classification of aircraft in Annex 7 to the Chicago Convention, this requires no further explanation: all rotorcraft (let alone helicopters) are, by definition, a sub-category of ‘aircraft’¹⁴⁵ and are registrable as such (as to nationality) in the

¹⁴⁰ Article I(2)(c) of the Aircraft Protocol.

¹⁴¹ For a detailed summary of the various applications of the term see paragraph 5.3 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 429. The term is rarely used for purposes not connected with aircraft registration: examples include Articles XXIII/XXIV regulating the conflicts between the CTC and other aviation treaties, as well as Article XIV(3), which preserves the rights and interests in an aircraft engine ‘upon installation on or removal from an aircraft’. For some reason, the latter example is not listed in paragraph 5.3 of the current edition of the Official Commentary, which, on the face of it, purports to be exhaustive.

¹⁴² De-registration is an aircraft-specific remedy available to the financier under Article IX of the Aircraft Protocol that is used to ‘ground’ an aircraft and effectively prevent its exploitation by the operator.

¹⁴³ In other words, aircraft engines, unlike aircraft taken as a whole, do not have a nationality based on registration under the Chicago Convention.

¹⁴⁴ See section 2 (Classification of Aircraft) in Annex 7 to the Chicago Convention (Aircraft Nationality and Registration Marks).

¹⁴⁵ Annex 7 to the Chicago Convention is cited not only for the purposes of suggesting an authoritative classification of aircraft: the definition of ‘aircraft’ in the Aircraft Protocol (Article

corresponding state registries. By the same logic (namely that any helicopter is an aircraft *ipso facto*), one might expect helicopter engines to be another form of ‘aircraft object’ under the Convention, particularly in light of the very broad definition of ‘aircraft engines’.¹⁴⁶ The Official Commentary supports this approach, explaining that a helicopter engine is indeed an ‘aircraft engine’, but with a twist: this categorisation is true only for engines not installed on a helicopter. Upon installation on a helicopter, states the Official Commentary, the engine ceases to be an ‘aircraft engine’.¹⁴⁷ This variable treatment of helicopter engines is unfortunate and needs to be addressed both from a doctrinal and historical perspective.

The Official Commentary cannot change the actual text of the instruments it covers and thus does not go beyond the textual analysis of the CTC and the Aircraft Protocol in its coverage of helicopter engines. More specifically, the dual nature of the latter is explained by reference to the three types of ‘aircraft object’ recognised by the Aircraft Protocol: airframes, aircraft engines and helicopters. The commentary seems to suggest that the distinction follows from the fact that helicopters, unlike other aircraft under the Aircraft Protocol, are not ‘split’, for the purposes of the Convention, into separate elements (such as airframes and engines), each of which can be subject to a separate international interest. In the case of aircraft other than helicopters such separation means that, in order to create security over the whole aircraft, the international interest would have to be created separately in respect of each of its frame and engines. The same approach, however, would not work in the context of helicopters: in terms of

I(2)(a)) is based on (but is not limited to) the corresponding definition in the Chicago Convention: “‘aircraft’ means aircraft *as defined for the purposes of the Chicago Convention* which are either airframes with aircraft engines installed thereon or helicopters’ (emphasis added).

¹⁴⁶ See Article I(2)(b) of the Aircraft Protocol.

¹⁴⁷ See paragraph 3.8 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 170.

the CTC and the Aircraft Protocol, there is no difference between an international interest over a helicopter with or without engines installed on it, since the ‘aircraft object’ here remains unchanged – a helicopter (with any spare parts, including engines, attached to it).

The author appreciates the practical difficulties surrounding helicopter financing transactions resulting from the threefold classification of aircraft objects in the Aircraft Protocol and agrees that the Official Commentary provides an acceptable workaround solution to what appears (as explained later in this section) to be a textual oversight. At the same time, the author proposes an alternative approach (based on the idea that a helicopter engine does not have to stop being an ‘aircraft object’ upon installation on a helicopter), which considers both the drafting history of the Aircraft Protocol, and the interplay between the various terms. Five reasons for this approach are suggested.

First, the fact that the definition of ‘helicopters’ incorporates any and all parts installed thereon (including engines) does not *ipso facto* rule out the possibility of creating an international interest over an engine fitted onto a helicopter: the contrary is true only if an interest in an engine cannot coexist with an interest in a helicopter on which such engine is installed. The latter, however, is quite possible, as is demonstrated in the following hypothetical scenarios.¹⁴⁸

Scenario 1

A financier (Party A) obtains an international interest over a helicopter as security over its loan to the borrower. The market value of the helicopter (including its engine) is USD 1,000,000 (with the engine taking up 20% of the overall value). The amount of financing

¹⁴⁸ Each scenario is prepared assuming zero transaction and enforcement costs.

provided by Party A (and secured by the international interest over the helicopter) is USD 1,000,000.

Party B has also provided a loan to the same borrower and obtains an international interest over the aircraft engine installed on the same helicopter. The amount of financing provided by Party B (and secured by the international interest over the engine) is USD 200,000.

Under the CTC, Party A has priority over Party B. At the time of creation of both international interests the engine is installed on the helicopter.

In this situation, Party A has created an international interest over the helicopter following its analysis of its total value (including the installed engines). The engine (which is installed on the helicopter) is subject to two interests: the first-ranking interest in favour of Party A covering the whole helicopter (including the engines) and the second-ranking interest over the engine in favour of Party B. Even if Party A has priority over all other creditors (including Party B), it bears the risk that at the time of enforcement (on default by the borrower) the helicopter would be stripped of its engine (in breach of contractual prohibitions in the relevant security agreement), reducing the overall recovery amount. In this case, party A would be able to recover less than originally anticipated and Party B would be able to recover the full amount by enforcing against the engine.

If the engine is not detached, Party A recovers in full and Party B recovers nothing.

In this scenario, each of the parties faces the risk of losing its security, in part (Party A) or in full (Party B), depending on whether the engine is installed or detached

upon execution. This result is undesirable, but can be avoided by adjusting the financing model.

On the one hand, Party A can reduce the amount of financing provided to the borrower by the sum recoverable from enforcement against the engine (in this case by USD 200,000). If, upon enforcement, the engine remains installed on the helicopter, Party A, upon enforcement against the helicopter would have to distribute the surplus to subsequently ranking creditors (in this case Party B).

Alternatively, if Party A is not willing to reduce the amount of financing, then such party could create two interests: a first-ranking interest over the helicopter and a separate interest over the engine. In this case, even following detachment of the engine, Party A would still be ranking ahead of other creditors in terms of priority.

Overall, Party A, as the first-ranking interest holder, is able to protect its priority. Party B, however, has to check the financing amount secured by the interest over the helicopter as a whole: if, upon enforcement against the helicopter (with its engines installed), Party A is able to keep the full amount (ie when the secured obligation is USD 1,000,000), then Party B recovers nothing.

Scenario 2

The parties and financing arrangements are the same as in Scenario 1, but this time under the CTC Party B has priority over Party A.

In this situation, Party B would recover the full amount secured by the international interest over the engine, whereas Party A would again recover less than the full amount – but this time it would not come as a surprise for Party A (as its interest was second in priority to that of Party B).

If the engine is not detached from the helicopter, Party B would still be able to recover its full amount, whereas Party A would recover the remaining amount (as expected initially).

In this scenario, the first-ranking creditor (Party B) is able to protect itself, whereas Party A can adjust its financing amount by the amount recoverable during enforcement against the engine (which is to be expected from any second-ranking creditor). In a sense, the situation is similar to Scenario 1, except that in Scenario 1 the second ranking creditor (Party B) is essentially gambling on the engine being removed from the helicopter to recover anything.

Eventually, both scenarios are feasible. The position of Party B in Scenario 1 is dictated by the threefold classification of ‘aircraft object’ and can be adjusted only by amending the Convention.

This being said, the Official Commentary provides a slightly different outcome. Let us now consider the same scenarios, but this time apply the interpretation given in the Official Commentary.

Scenario 1

In light of the special treatment of helicopter engines installed on a helicopter in the Official Commentary, neither Party A, nor Party B is in a position to create an international interest over the engine, since, just like in the original Scenario 1, it remains installed on the helicopter.¹⁴⁹

Following the removal of the engine, Party A, which has only one international interest over the helicopter as a whole, would still recover less than initially expected. To

¹⁴⁹ This condition is necessary to test the practicability of this solution, as the Convention preserves interests created over engines prior to installation on an aircraft – see Article XIV(3) of the Aircraft Protocol.

address this problem, the Official Commentary suggests a helpful workaround solution in the form of ‘prospective international interest’ that would automatically create an international interest over the engine upon its detachment. Thus, Party A is able to create both an international interest over the helicopter and a prospective international interest over the installed engine to preserve its priority.

If the engine is not detached, then Party B has no international interest under the Convention, with no means of enforcing security against the engine: for the purposes of the CTC it does not even have a second-ranking interest. This does not change the position of Party B if the secured obligation of Party A equals the amount recoverable upon enforcement against the aircraft as a whole. However, should Party A retain surplus upon enforcement, then Party B is actually in a much worse position: it does not possess a standalone international interest in the engine (since the engine has never been detached from the helicopter).¹⁵⁰

Scenario 2

Since neither party is able to create an international interest over the engine that is installed on the helicopter in question, Party B is in a difficult situation: despite being the first financier to attempt creating security over the corresponding asset (in this case the engine) it will be able to enforce its security over the engine if and only if (i) it creates a prospective international interest and (ii) the engine becomes detached from the helicopter during enforcement.

However, if the engine is not detached, Party B will never be able to recover its financing amount under the Convention, since engines installed on a helicopter are not

¹⁵⁰ Knowing this, Party B could of course attempt creating a second ranking international interest over the helicopter as a whole, although the feasibility of such solution is questionable in light of the disproportionately low amount of financing provided by Party B compared to the value of the collateral (as a whole).

treated as ‘aircraft engines’, as noted in the Official Commentary. There is no way for Party B to protect its financing other than by making arrangements with the other financiers or creating security over the helicopter as a whole. The latter option might not seem that problematic at first: after all, Party B cannot claim more than it is owed. However, since the Convention does not contain any special provisions relating to future advances made by the same creditor, then, depending on the wording of relevant agreement, Party B, by advancing additional amounts, may upon enforcement claim up to the entirety of proceeds from the sale of the helicopter.¹⁵¹ In this race to be the first, where neither financier can enforce against a dedicated part of the bigger whole (and thus recovery is always against the entire helicopter), the second-ranking creditor ends up gambling all the time, as it cannot predict future advances made by the first-ranking creditor.

Overall, under this approach the engine financier is in a weaker position and ought to seek alternative means to preserve its financing. Yet, the main point of the above exercise was to show that an alternative interpretation of the threefold classification of ‘aircraft objects’ is in fact possible and would not produce results that are devoid of commercial sense.

Second, a documentary history analysis does not provide a clear evidence of the reasons behind the odd treatment of ‘helicopters’ in the Aircraft Protocol.

In its initial submission to UNIDROIT in 1995 the AWG made it clear that the future convention on international interests in mobile equipment would have to treat aircraft engines differently from the other types of spare parts, but refrained from

¹⁵¹ This is possible if the relevant secured obligations can be determined under the agreement, as per Article 7(d) of the CTC. However, there is no need to state the sum or the maximum sum secured. See paragraph 4.73 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 277.

suggesting a definition for ‘aircraft engines’¹⁵² or even ‘aircraft’.¹⁵³ Unfortunately, it is not at all clear what types of aircraft are discussed in the AWG paper: aeroplanes only or other types of aircraft as well (eg airships, rotorcraft, ornithopters). The fact that no attempt was made to define the term probably suggests that this matter simply required additional consideration by the AWG.

In 1996, the AWG prepared its second memorandum, which proposed for the first time a ‘bifurcation of aircraft into airframes and aircraft engines’,¹⁵⁴ whereby ‘the appropriate base definition... should be “airframe” rather than aircraft’.¹⁵⁵ The focus of the AWG at the time was on developing a definition for both terms that would, first, limit the scope of the Convention to objects that are more expensive, advanced and ‘commercial’ and, second, be objective by nature. As a result, ‘airframes’ were defined by reference to their capacity to transport passengers (or cargo)¹⁵⁶ and ‘aircraft engines’ – by reference to the corresponding propulsion power and technology.¹⁵⁷ Neither definition was restricted by references to a particular sub-category of aircraft (eg aeroplanes) and, theoretically, any airframe or engine meeting the corresponding physical characteristics would qualify. The only other limitation was based on the purpose for which the assets were used (objects used for military, customs or police purposes were excluded).

The same memorandum by the AWG also contained the first ever proposal to add ‘helicopters’ as a separate category of objects within the Convention. Several points should be stressed here. First, helicopters were not specifically considered by the AWG

¹⁵² See footnote 43 in Unidroit, *Study LXXII - Doc. 16 (1995)* 19.

¹⁵³ See footnote 5 in *ibid* 3.

¹⁵⁴ Unidroit, *Study LXXII - Doc. 23 (1996)* 8.

¹⁵⁵ *ibid*.

¹⁵⁶ See paragraph (4) in Annexure to Annex 1 in *ibid*.

¹⁵⁷ See paragraph (2) in Annexure to Annex 1 in *ibid*.

when it was contemplating the bifurcation of ‘aircraft’ into airframes and engines, as is clear from the caveat made by the AWG: ‘we reserve at this stage on the questions of whether and to what extent the recommendations of the aviation working group ought to apply with equal force to helicopters’.¹⁵⁸ Second, the inclusion of ‘helicopters’ was – at the time – provisional in nature, since the term remained in square brackets.¹⁵⁹ Third, the term ‘helicopters’ was added without a corresponding definition.¹⁶⁰

The first mention of ‘helicopters’ as a separate category within the text of the draft Convention was added by the Drafting Group during its session held on 13 and 15 April 1996, which coincided with the second meeting of the Study Group.¹⁶¹ As in the case of the second memorandum of the AWG, no definition of the term was provided.¹⁶² As a result, helicopters were in an awkward position: apparently, the aviation industry had some thoughts about this asset category, but there was no clarity about how to proceed with this knowledge. More importantly, there seemed to be no guidance on how to distinguish helicopters from all other aircraft (to which the bifurcation into airframes and aircraft engines applied and seemed to create no objections). Perhaps as a result of this odd *status quo*, a peculiar drafting change occurred in October 1996: the Drafting Group separated all definitions in the draft Convention into three parts: ‘definitions common to all categories of object’, ‘definitions exclusive to aircraft property’ and ‘other definitions’.¹⁶³ Both ‘airframes’ and ‘aircraft engines’ formed the second part (aircraft-specific definitions), while ‘helicopters’ (still undefined) were swept into the third group,

¹⁵⁸ *ibid* 23.

¹⁵⁹ See footnote 18, as well as paragraph (3) in Annexure to Annex 1 in *ibid* 8.

¹⁶⁰ See paragraph (14) in Annexure to Annex 1 in *ibid*.

¹⁶¹ See Article 2(1)(c) in Appendix IV to Unidroit, *Study LXXII - Doc. 27 (1996)*.

¹⁶² See paragraph (i) in Part I of the ‘Appendix’ to Appendix IV in *ibid*.

¹⁶³ See Appendix in Unidroit, *Study LXXII - Doc. 30 (1996) 23-25*.

alongside ‘containers’, ‘oil rigs’, ‘railway rolling stock’, ‘registered ships’ and ‘satellites’.¹⁶⁴

Following the transition to a dual convention/protocol structure,¹⁶⁵ all the asset-specific definitions were moved to the relevant protocols: ‘there was agreement that the Protocol was the best place for defining the different categories of assets encompassed by the future Convention’.¹⁶⁶ As a result, the definition of ‘helicopters’ was introduced only in the draft Aircraft Protocol prepared by the Aircraft Protocol Group.¹⁶⁷ This definition formed the third element of the threefold classification of ‘aircraft objects’ that exists in the final text,¹⁶⁸ but was rather different from the other two (airframes and aircraft engines) in the sense that it referred to an actual flying machine, rather than its elements of construction. Unlike airframes and aircraft engines, only helicopters were given a non-circular definition, ie a definition that does not use the defined term as part of itself.¹⁶⁹ This definition reproduced, almost word-for-word, the definition of ‘helicopter’ in Annex 7 to the Chicago Convention and added certain threshold physical characteristics, such as minimum carrying capacity.¹⁷⁰

While it is clear that the authors of the definition of ‘helicopter’ relied on the text of Annex 7 to the Chicago Convention, it is puzzling why no attempt to reconcile all three ‘aircraft objects’ was made in light of the well-developed terminology found in that

¹⁶⁴ *ibid.*

¹⁶⁵ See CHAPTER IV.

¹⁶⁶ Unidroit, *Study LXXII - Doc. 35 (1997)* 4.

¹⁶⁷ See Article 1(2)(l) in Unidroit, *Study LXXIID - Doc. 1 (1998)* 5.

¹⁶⁸ Article I(2)(c) of the Aircraft Protocol.

¹⁶⁹ ‘Airframes’ and ‘aircraft engines’ were essentially defined, respectively, as airframes and aircraft engines meeting certain physical characteristics – see Article 1(2)(d) and Article 1(2)(b) in Unidroit, *Study LXXIID - Doc. 1 (1998)* 3-4.

¹⁷⁰ The only change was in the form of replacing the word ‘aircraft’ with the word ‘machine’, presumably made due to the fact that the draft Aircraft Protocol had already incorporated the term ‘aircraft’ in the sense that was narrower than that used in Annex 7 to the Chicago Convention.

document. The key problem with the term ‘helicopter’ used in parallel with ‘airframes’ and ‘aircraft objects’ is that the former represents a specific type of aircraft characterised by the technology used to support it in the air, whereas the latter two are merely elements of construction of aircraft. Annex 7 to the Chicago Convention divides all aircraft into two groups: those which are ‘lighter-than-air’¹⁷¹ and those which are ‘heavier-than-air’.¹⁷² Both groups are then sub-divided further into categories, depending on whether the aircraft is power-driven or not. Even if the AWG, which proposed the bifurcation of aircraft into airframes and aircraft engines, only considered power-driven aircraft (thus excluding balloons, gliders and kites), there is still a substantial variety of aircraft with airframes and engines that could potentially qualify under the Convention (assuming they meet the minimum requirements of carrying capacity or power, respectively): airships, aeroplanes, ornithopters and rotorcraft (gyroplanes and helicopters). The lack of any specificity relating to the types of aircraft of which the qualifying airframes and aircraft engines form part makes the inclusion of ‘helicopters’ as standalone ‘aircraft objects’ redundant. On the one hand, there is no evidence that ‘aircraft engines’ were never intended to include helicopter engines: in 1997, the Russian Federation Aviation Working Group¹⁷³ came up with a proposal to classify helicopter engines as a standalone category of aircraft objects,¹⁷⁴ but this idea never made it into any of the drafts, let alone the final text of the Convention. On the other hand, there is no documentary evidence suggesting that ‘airframes’ were never intended to include helicopter airframes

¹⁷¹ These are defined as aircraft ‘supported chiefly by [their] buoyancy in the air’ (eg balloons).

¹⁷² These are defined as aircraft ‘deriving [their] lift in flight chiefly from aerodynamic forces’ (eg aeroplanes).

¹⁷³ A group of domestic producers and carriers formed in Russia under the aegis of the national chamber of industry and commerce positioning itself (at the time) as a counterpart to the AWG.

¹⁷⁴ Unidroit, *Study LXXII - Doc. 31 (1997)* 1.

(especially given that helicopter airframes are still ‘airframes’ in every sense of the word).¹⁷⁵

Interestingly, the odd classification of ‘helicopters’ as ‘aircraft objects’ was discussed by the governmental experts during the Third Joint Session: a proposal was made to reconsider the latter definition, since ‘helicopters constituted both aircraft and aircraft objects’.¹⁷⁶ Unfortunately, this proposal was never reflected in any of the subsequent drafts. The odd categorisation created confusion among the participants: one delegation, noting that helicopters were a subset of the broader category of ‘aircraft’ under the Chicago Convention, proposed ‘broadening the list of categories of equipment to include “aircraft” as a whole’.¹⁷⁷ The suggestion was dismissed, as the draft Convention ‘was concerned with the financing of aircraft objects and... airframes and aircraft engines [were]... subject to... separate security’.¹⁷⁸ Unfortunately, the discussion did not transition to a more conceptual level, which would no doubt reveal the internal inconsistencies among the three types of ‘aircraft objects’.

The above historical analysis does not give a conclusive explanation of the reasons behind the classification of ‘helicopters’ as standalone ‘aircraft objects’. If nothing else, it shows that the problems surrounding the threefold structure of the latter term were not given sufficient attention at the development stage. The absence of detailed recorded conceptual and comparative analysis of each group of ‘aircraft

¹⁷⁵ See Chapter 04: Helicopter Components, Sections, and Systems in Federal Aviation Administration, *FAA Helicopter Flying Handbook (FAA-H-8083-21A)*. See also various technical studies: H. van Der Ven and others, ‘A modelling framework for the calculation of structural loads for fatigue life prediction of helicopter airframe components’ (2012) 23 *Aerospace Science and Technology* 26-33; Charles A. Yoerkie, ‘Helicopter airframe vibration transmission modeling using statistical energy analysis (SEA)’ (1983) 74 *The Journal of the Acoustical Society of America* S69-S69; T. Sreekanta Murthy, ‘Optimization of Helicopter Airframe Structures for Vibration Reduction - Considerations, Formulations, and Applications’ (1991) 28 *J Aircr* 66-73.

¹⁷⁶ Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 7.

¹⁷⁷ See paragraph 56 in *ibid* 8.

¹⁷⁸ *ibid*.

objects’, the constant focus on the bifurcation of aircraft into airframes and engines, as well as the late inclusion of ‘helicopters’ in the form of an ill-explained add-on to an otherwise well-functioning classification is more likely to create the impression of a drafting oversight than a product of a thought-out strategic thinking process.

Third, most evidence cited by the Official Commentary is circumstantial and can be countered.

The first and the second arguments¹⁷⁹ in the Official Commentary basically refer to the definition of ‘aircraft’, which – admittedly – does not have a specific reference to engines installed on a ‘helicopter frame’. However, it has already been noted that such a reference is not necessary (as any ‘helicopter frame’ is an airframe *ipso facto*). Furthermore, the classification of a helicopter as ‘aircraft’ chronologically appeared only after the emergence of the threefold classification of ‘aircraft objects’,¹⁸⁰ which means that the term ‘aircraft’ was not needed to explain the bifurcation of a single craft into a frame and its engines – its function was different: to address matters relating to registration and de-registration governed by the Chicago Convention, which only concerns aircraft as a whole (rather than their elements of construction). In other words, the definition of ‘aircraft’ is not built around splitting an aircraft into separate ‘aircraft objects’: it was needed to create a category which operated within the framework of the Chicago Convention. Only when combined, airframes and aircraft engines could form such a category, whereas for helicopters taken separately no splitting/combining was necessary: they were aircraft *ipso facto*. This also explains why the definition of ‘helicopter’ does not include a specific reference to engines installed on a helicopter (the

¹⁷⁹ See paragraph 3.8 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 170.

¹⁸⁰ The first threefold classification of ‘aircraft objects’ appeared (under the heading ‘aircraft property’) in paragraph (3) of Annexure to Annex 1 in Unidroit, *Study LXXII - Doc. 23 (1996)*.

second argument in the Official Commentary). The third argument¹⁸¹ focuses on the definitions of ‘airframes’ and ‘helicopters’, among which only the former excludes engines from the list of other accessories. As was previously explained, these two terms are conceptually different (the former refers to an element of construction, while the latter represents an entire flying machine) – and the definitions merely reflect this.

A possible alternative interpretation of helicopters in this context – which in the absence of conclusive historical records is as good as any other – is that ‘helicopter’ as a separate ‘aircraft object’ is to be understood only as a combination of a helicopter airframe and all of its engines installed on it. This conclusion is reinforced by the following considerations. First, a helicopter is not defined as an element of construction – instead, it is a flight-capable ‘machine’. Neither airframes, nor engines possess these characteristics separately: they can only support themselves in flight upon combining into a single whole – aircraft. Second, in order to be able to support itself in the air a helicopter must have its engines installed on it – otherwise its elements of construction can still be treated as ‘airframe’ and ‘aircraft engine(s)’, respectively. Finally, this outcome avoids the awkward situation when the same asset – a helicopter engine – is treated as an ‘aircraft object’ in one situation (when detached), yet fails to qualify as such in another (when installed on a helicopter airframe).

Fourth, the unfortunate drafting of the Convention and the Aircraft Protocol has led to the adoption by the Official Commentary of an odd approach: ‘aircraft engines’ are deemed to incorporate helicopter engines, despite any specific reference to that end, whereas the same logic does not apply to ‘airframes’.

¹⁸¹ See paragraph 3.8 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 170.

Fifth, in light of the special treatment of helicopter engines in the Official Commentary, Article XIV(3) of the Aircraft Protocol preserves the relevant interest over a helicopter engine only on installation (ie when an interest is created prior to installation onto a helicopter airframe), but not on removal, since it is impossible to create an international interest over an installed helicopter engine. Such limitation restricts the sphere of application of Article XIV(3) and is unfortunate.

The author posits that above five reasons, taken together, suggest that helicopter engines could, in fact, be treated as separate aircraft objects even when installed on a helicopter frame. This view would simplify the position of engine financiers by opening a direct route to registering international interests in helicopter engines regardless of their location – a factor which is generally beyond the control of the financier (particularly in light of the Convention’s practice of eliminating uncertainty, eg in the case of getting rid of the various ‘internationality’ tests).¹⁸² There is, of course, a possible counter-argument that if things were so simple, then helicopters would not be treated as a separate type of ‘aircraft objects’: the Aircraft Protocol would thus refer to ‘airframes’ and ‘aircraft engines’ only. The author’s answer to this critique is based on the documentary history of the Aircraft Protocol, which does not provide a single meaningful argument to support the separate treatment of helicopters. If nothing else, this unfortunate situation could be explained by the lack of attention to the relevant asset-specific definitions. As a result, all parties – the practitioners and the author of the Official Commentary alike – end up being kept hostage to the unfortunate drafting of Article I(2)(c) of the Aircraft Protocol.

The solution found in the Official Commentary is an excellent way of handling the inconsistency of the protocol’s text, as it provides a workable solution resolving most (although not all) problems of the private parties. However, the author believes that the

¹⁸² See Section 2.3.2.

language of Article I(2)(c), which appears illogical and inherently inconsistent, is in need of revision once the opportunity presents itself, eg in case of a review conference convened pursuant to Article XXXVI(2) of the Aircraft Protocol. Of course, it is highly doubtful that a review conference would be convened solely for the purpose of addressing this particular issue (particularly in the absence of clear pressure from the relevant financing circles), but attracting attention to this issue may end up at least clarifying the actual reasons behind the unfortunate drafting of Article I(2)(c). After all, these actual reasons might have been quite convincing – but if that is the case, they should be brought to light.

3.3 *Ships*

The history of development of the CTC provisions relating to ships is filled with obscurity and uncertainty. The initiative to develop an international treaty regulating security interests in mobile equipment resulted in a remarkably different outcome within the maritime industry, compared to its aviation counterpart: ships ended up being completely excluded from the scope of the Convention. This seems all the more puzzling, since ships – just like aircraft – should easily satisfy any requirements of high cost and mobility: the former are objects of very high value and often cross national borders and can operate beyond national jurisdiction on the high seas. What went wrong and why are the results so different for the maritime industry?

3.3.1 Existing international rules affecting ship finance

As in the case of aircraft, the main initial challenge for the application of the draft Convention in the area of maritime financing was created by the existing international regulation. The inappropriateness of *lex situs* had already been recognised and reflected

in a number of international instruments. The 1926 Brussels Convention¹⁸³ provided for the recognition of all ‘mortgages, hypothecations, and other similar charges upon vessels’, whenever these were (i) ‘duly effected in accordance with the law of the contracting state to which the vessel belongs’ and (ii) ‘registered in a public register either at the port of the vessel’s registry or a central office’.¹⁸⁴ The 1967 Brussels Convention similarly treated as ‘enforceable’ those mortgages and ‘hypotheques’ over sea-going vessels which ‘have been effected and registered in accordance with the law of the State where the vessel is registered’¹⁸⁵ (while adding a whole array of other requirements, such as the need to disclose the amount secured).¹⁸⁶ Both instruments, however, enjoyed limited success and did not apply in major shipping countries.¹⁸⁷

A similar approach was utilised in the 1965 Geneva Convention, which provides that ‘rights of ownership, usufruct or mortgage entered in a register of one of the Contracting Parties shall be recognised in the territory of the other Contracting Parties’.¹⁸⁸ Similarly to the two Brussels Conventions above, the application of this treaty was very limited: by 1989 it had been adopted only in five states.¹⁸⁹

¹⁸³ In this thesis the author uses the translation taken from the Treaty Information Bulletin No. 19, 1931, of the Department of State of the United States of America, as reproduced in Unidroit, *Security Interests Study Group 1st session Misc. 3 (1993)*.

¹⁸⁴ Article 1 of the 1926 Brussels Convention.

¹⁸⁵ Article 1(a) of the 1967 Brussels Convention.

¹⁸⁶ See Article 1(b) and 1(c) of the 1967 Brussels Convention.

¹⁸⁷ By 1989 only 23 states had been bound by the 1926 Brussels Convention, while the 1967 Brussels Convention had been adopted by five, and ratified by just three, countries (Denmark, Norway and Sweden) – see Part III in CMI, *CMI Yearbook 2015* 458; 484.

¹⁸⁸ Article 5 of Protocol No. 1 Concerning Rights in rem in Inland Navigation Vessels to the 1965 Geneva Convention.

¹⁸⁹ Austria, France, Luxembourg, Netherlands and Switzerland – see United Nations, ‘Convention on the registration of inland navigation vessels’ (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-4&chapter=12&clang=_en) accessed 02 June 2017.

As a result, at the start of development of the Cape Town Convention the international regulation of security interests over vessels of various types was somewhat similar to that which applied to aircraft. The *lex situs* connecting factor was deemed clearly inconsistent with the interests of legal certainty and replaced with *lex registri*¹⁹⁰ in a number of international instruments. On the other hand, the shipping conventions struggled to achieve the level of acceptance of the 1948 Geneva Convention, which had applied in 53 states by 1989.¹⁹¹ The most successful treaty (at the time) regulating security over vessels, the 1926 Brussels Convention, was in need of revision and modernisation,¹⁹² and its 1967 successor had failed to achieve that. The prospects of further unification in the area of security interests over vessels on the basis of pre-existing international instruments seemed questionable at best, and one might expect that the shipping industry would be genuinely interested in the UNIDROIT initiative – and be mistaken.

3.3.2 *Exclusion of ships from the scope of the CTC*

The first argument in favour of excluding ships from the scope of the future Cape Town Convention surfaced at the very start of the project: in June 1990 Danmarks Rederiforening (Danish Shipowners' Association) submitted a letter to UNIDROIT which stated that the two Brussels Conventions of 1926 and 1967 had been 'under review by IMO and UNCTAD for a couple of years', a new draft treaty had been

¹⁹⁰ But see n 16 in section 2.1.1.

¹⁹¹ See ICAO, 'Convention on the International Recognition of Rights in Aircraft Signed at Geneva on 19 June 1948' (http://www.icao.int/secretariat/legal/List%20of%20Parties/Geneva_EN.pdf) accessed 02 June 2017.

¹⁹² While endorsing the *lex registri* approach, the 1926 Brussels Convention did little else to harmonise the international regime for the creation and effectiveness of ship mortgages and hypothecations: it left the registration requirements to be regulated by national laws, adopted a hands-off approach to the effects of valid (and recognised) mortgages and hypothecations created under domestic law and did not regulate priority as between various consensual security interests *inter se* (while stating that they rank below maritime liens). For a more detailed discussion of the deficiencies of the two Brussels conventions see Ole Böger, 'The Cape Town Convention and Proprietary Security over Ships' (2014) 19 Uniform Law Review 24, 41.

prepared on the basis of such review and, consequently, ships (as well as mobile platforms) should be excluded from the scope of the new UNIDROIT convention.¹⁹³ In early 1992 the first formal group of experts convened to assess the UNIDROIT project (the REWG) acknowledged the existence of this parallel project by IMO and UNCTAD as a ‘strong argument for excluding ships’¹⁹⁴ – a year later the same point was reiterated during the first session of the Study Group by the observer representing the International Maritime Committee (CMI).¹⁹⁵

At the time, the discussions concerning ships shared two common characteristics. First, rather surprisingly, there is no record of any substantive analysis of the provisions of the IMO/UNCTAD convention in the context of the UNIDROIT project. Of the two potentially overlapping treaties, the one prepared by IMO/UNCTAD¹⁹⁶ came out first: its final text was adopted on 6 May 1993 during the Diplomatic Conference in Geneva and was ready for review (at that time the UNIDROIT project was still at an early stage – it would take more than a year for the first basic set of draft articles of the CTC to emerge in the first place). As a result, the overall appropriateness of the 1993 Geneva Convention for the shipping industry as a whole, and the ship financiers in particular, was not scrutinised by the UNIDROIT working groups or the various commentators: the latter advocated a total hands-off approach.¹⁹⁷

¹⁹³ Danmarks Rederiforening, *Letter from Danmarks Rederiforening to UNIDROIT* (8 June 1990). The author is grateful to the UNIDROIT Secretariat for the opportunity to examine the correspondence relating to the CTC and stored in the UNIDROIT archives.

¹⁹⁴ Unidroit, *Study LXXII - Doc. 5 (1992)* 3.

¹⁹⁵ Unidroit, *Study LXXII - Doc. 7 (1993)* 4.

¹⁹⁶ See the 1993 International Convention on Maritime Liens and Mortgages (the ‘1993 Geneva Convention’).

¹⁹⁷ In its comments submitted in early 1993 (shortly before the adoption of the 1993 Geneva Convention) the German Federal Ministry of Justice simply concluded that ‘in view of both the existing international Conventions for the unification of certain rules relating to maritime liens and mortgages and the additional prospective Convention on this subject, there did not seem to be any need for any further international regulation in this field’ – see Unidroit, *Study LXXII - Doc. 6 Add. (1993)* 2. One cannot help but wonder why the same comments – but in respect of aircraft –

Second, neither UNIDROIT, nor the CMI – at least officially – excluded the opportunity for reopening the discussion about ships once the UNIDROIT project crystallises into a more definitive draft. To this end the Study Group ‘decided to defer consideration of the matter until such time as it had a clearer idea of the kind of rules that were emerging’,¹⁹⁸ while the CMI acknowledged that ‘there was a possibility that ships might ultimately benefit from inclusion in the projected Unidroit Convention if they could be shown to fit into the system created thereunder’.¹⁹⁹ Furthermore, the UNIDROIT treaty was even considered as a potentially helpful addition to the recent 1993 Geneva Convention: the former could be drafted in a such a way that would exclude its application to registered ships (as these had already been covered by the latter), but at the same time cover non-registered ships, as well as containers and other maritime equipment.²⁰⁰

Overall, the prospects of extending the scope of the draft CTC to ships did not seem entirely unrealistic initially: in the end, it was perfectly reasonable to wait until the UNIDROIT convention takes shape before any conclusive decision could be made. This optimistic conclusion is supported by the comments of Rolf Herber, representative of the CMI, who approached the matter from the end user’s viewpoint: the future UNIDROIT convention could actually make it beneficial for ship financiers to ‘enter...rights into an additional register under the proposed Unidroit Convention in order to extend their

conversely deemed it ‘necessary...to check carefully as to what extent [the 1948 Geneva Convention] was inadequate’, particularly in light of the fact that at the time the aviation convention had almost twice as many ratifications and accessions as both of the 1926 and 1967 Brussels Conventions combined. However outdated the 1948 Geneva Convention might have been at the time (see section 3.2 above), it is hard to figure out the reason why the system of international regulation of security interests over ships, built around three conventions on maritime liens and mortgages (one of which had very limited application and the others were not even in force) was to be accepted at face value, except perhaps wishful thinking that the third attempt was somehow destined to be more successful than the first two.

¹⁹⁸ Unidroit, *Study LXXII - Doc. 7 (1993)* 4.

¹⁹⁹ Unidroit, *Study LXXIIB - Doc. 1 (1995)* 11.

²⁰⁰ Unidroit, *Study LXXII - Doc. 14 Add 1 (1994)* 2.

recognition'.²⁰¹ According to Herber,²⁰² such a scenario was actually possible, provided that 'the charge on the vessel as such would not be changed by the Convention, but only the scope of its recognition'.²⁰³ In other words, another treaty which would strengthen the position of financiers, while preserving the existing system of security interests in registered ships revolving around maritime liens and mortgages, would in principle be acceptable.

Such open-minded approach seemed to be a reasonable compromise: it effectively gave UNIDROIT every opportunity to develop a new ambitious treaty that could be ultimately accepted by the shipping industry if tangible benefits for ship financiers were shown to stem from it. For this reason, the drafting of the CTC remained open-ended, permitting ships to be included in its scope, either impliedly²⁰⁴ or by express reference to that end.²⁰⁵

In 1996, following the second session of the Study Group, it became clear that the UNIDROIT initiative had evolved into a rather ambitious undertaking aimed at establishing a new international regime for international interests in mobile equipment – interests that were *sui generis* in nature, completely detached from their domestic law counterparts²⁰⁶ and thus in no way interfering with the validity of the latter. This regime would regulate not only the effects of international interests between parties to the relevant transaction *inter se* (ie remedies of the creditor), but also the effects of an

²⁰¹ *ibid.*

²⁰² It should be noted that these comments were submitted by Rolf Herber in his personal capacity, and 'did not represent the considered opinion of the CMI' – see footnote 1 in *ibid* 1.

²⁰³ *ibid* 2.

²⁰⁴ See Article 1(2)(a) referring to any 'equipment of a kind normally moved from one State to another in the course of business' in Unidroit, *Study LXXII - Doc. 13 (1994)*.

²⁰⁵ In subsequent drafts ships were included in the text in square brackets, ie on a provisional basis. See Article 1(2)(c) in Unidroit, *Study LXXII - Doc. 18 (1995)*; Article 2(1)(c) in Unidroit, *Study LXXII - Doc. 22 (1996)*; Article 2(1)(c) in Unidroit, *Study LXXII - Doc. 24 (1996)*.

²⁰⁶ See section 2.2.2 above.

international interest as against third parties (ie priorities). Herber's hypothetical scenario whereby the UNIDROIT instrument would preserve the existing system of security interests, while strengthening the position of the creditor, was slowly being realised. The time was ripe to re-examine the case of ships.

After the initial opposition from shipping circles it was imperative for UNIDROIT either to reverse the position of the CMI or to obtain support from the industry itself. To that end UNIDROIT invited the CMI to 'organise a working group...to submit a representative shipping industry view on the desirable content of the proposed Convention as the same related to shipping'.²⁰⁷ The example, which had been set by the aviation industry in the form of the AWG, was still fresh, and there is little doubt that a favourable reaction from the industry could sway the CMI and provide the much-needed support for the UNIDROIT initiative. But more importantly, only feedback from the industry itself could adequately address what seems to be the key concern expressed by Herber back in 1994, namely 'whether it could be of benefit to creditors of maritime mortgages to enter these rights into an additional register under the proposed...Convention'.²⁰⁸

Unfortunately, the possibility of a constructive dialogue with the shipping industry was made virtually impossible by the international organisations standing behind the 1993 Geneva Convention. In July 1996 Secretaries-General of UNCTAD and IMO submitted two separate, yet similar,²⁰⁹ letters to UNIDROIT requesting that ships be excluded from the Convention. The arguments given in both letters were essentially the

²⁰⁷ Unidroit, *Study LXXII - Doc. 27 (1996)* 13.

²⁰⁸ Unidroit, *Study LXXII - Doc. 14 Add 1 (1994)* 2.

²⁰⁹ The timing, brevity, argumentation of both letters, as well as the coordinated effort of the two organisations to produce the 1993 Geneva Convention strongly suggest a degree of coordination between IMO and UNCTAD at that stage.

same. First, the new UNIDROIT Convention was considered a potential source of conflict with the recently adopted 1993 Geneva Convention. Second, international maritime law was seen as a distinctive *corpus juris* developed by specialised international organisations.²¹⁰ Both arguments were driven by the clear intention to preserve the existing *status quo* in the maritime industry, to the exclusion of other valid concerns. On the one hand, at the time it was already clear that the international interest created by the Convention would be of *sui generis* nature and thus detached from any national law counterparts, significantly reducing the possibility of overlaps with the other international treaties. On the other hand, the pressure to exclude ships regardless of any meaningful discussion and analysis of the scope, structure and implications of the UNIDROIT instrument within the shipping industry – given that the latter could end up being the main beneficiary of the Convention – makes it very difficult to avoid noticing self-serving context in the submissions of IMO and UNCTAD. The absence of such discussion and analysis is perhaps the best explanation for the UNIDROIT’s decision at that stage not to exclude ships from the scope of the Convention, albeit provisionally: the standpoint of the CMI, and Rolf Herber specifically, up to that point seemed more constructive and left room for further discussion about the fate of ships.²¹¹

This optimism, however, soon dissipated, as the CMI itself called for the exclusion of ships from the scope of the Convention in 1997. Interestingly, the CMI attempted to defend the existing *status quo* in ship financing as well by concluding that ‘present national regimes [had] proved satisfactory for the necessities of the shipowning countries’.²¹² There can be little doubt that this conclusion was not based on the actual satisfaction with the coexistence of widely differing national regimes – instead, it was an

²¹⁰ See Appendices I and II in Unidroit, *Study LXXII - Doc. 29 (1996)*.

²¹¹ See n 201 and the corresponding discussion.

²¹² Unidroit, *Study LXXII - Doc. 36 (1997)* 11.

acknowledgment that the previous attempts to harmonise maritime law had failed and therefore ‘achieved only a part of the aim to unify’.²¹³

Perhaps the most troubling aspect of this conclusion lies in the lack of conceptual analysis of the draft Convention, which did not in reality attempt to unify the very different domestic laws governing national security over movable assets:²¹⁴ in 1997 the draft treaty was clearly aiming to establish and regulate an entirely new, international, type of interest that would be separate from its domestic law counterparts.²¹⁵

While it is conceivable that previous unsuccessful unification attempts in maritime law may have discouraged the corresponding international organisations and even end users of such law, it does not explain why such negative experiences might have affected the Convention – a treaty specifically drafted to avoid wholesale international harmonisation of domestic legal regimes. The argument of the CMI was thus somewhat similar to those formulated by IMO and UNCTAD: the means of reaching the destination (ie the argumentation against the UNIDROIT instrument) appeared less important than the destination itself (ie preserving the existing *status quo* in international maritime law).

The decision to switch to an umbrella structure of the Convention²¹⁶ helped ease the tension generated by the shipping circles: at least on paper the CMI acknowledged that it might be ‘possible at a later stage to extend the Convention to apply to registered

²¹³ *ibid.*

²¹⁴ See sections 2.1.2 and 2.1.3 discussing the various unification options.

²¹⁵ See section 2.2.2.

²¹⁶ See CHAPTER IV.

ships if and when the necessity [was] felt in shipping circles'.²¹⁷ Until recently, little had been done to actually assess whether such a necessity might exist.²¹⁸ It is, however, perhaps symbolic that it was the CMI which took the first steps in this direction: in 2015 it established an International Working Group to consider the existing financing security practices in various states in order to form an opinion 'as to whether anything has changed since the Cape Town Convention in 2001'.²¹⁹ It remains to be seen whether the signs of a renewed interest of the shipping circles towards the CTC will lead to any tangible results, but history suggests it is highly unlikely that a shipping protocol would ever emerge without the full support of the industry.²²⁰

3.4 Mining, agricultural and construction equipment

The adoption of the Space Protocol in 2012 completed the initial agenda envisaged in the text of Article 2(3) of the CTC to cover three groups of assets: aircraft objects, railway rolling stock and space assets. Since these categories are the only ones expressly referred to in the Convention, any further expansion of the scope of the latter means that 'latecomers' to the CTC family of protocols will first have to pass the residual 'gateway' tests established in Article 51(1) in relation to eligible equipment: (i) high value, (ii) mobility and (iii) unique identifiability. As was noted in section 3.1.1, each leg of this test was intentionally left vague to keep the CTC open for future expansion. Mining, agricultural and construction equipment comprises the first asset category to which the

²¹⁷ Unidroit, *Study LXXII - Doc. 36 (1997)* 11.

²¹⁸ Despite the very limited signals coming from the shipping industry, a recent academic study has concluded that the preparation of a shipping protocol 'could be an enormously valuable contribution to the law of proprietary security over ships worldwide'. See Ole Böger, 'The case for a new Protocol to the Cape Town Convention covering security over ships' (2016) 5 *Cape Town Convention Journal* 73, 101.

²¹⁹ CMI, *CMI Yearbook 2015* 428.

²²⁰ The relevance of industry support is discussed in greater detail in section 8.3.

requirements of Article 51(1) have been applied in practice: the draft MAC Protocol has reached the governmental expert stage and is on track towards adoption.

Interestingly, the idea of addressing mining, agricultural and construction equipment in the Convention emerged long before the adoption of the first protocol in 2001. At its second session in 1996, the Study Group considered ‘construction machinery’ and ‘tunnel-digging equipment’ among other asset types.²²¹ In 1997 Mooney and Whalen recommended the inclusion of ‘both construction equipment and agricultural equipment’ to the list of eligible objects.²²² Similarly, Electricite de France proposed to add cranes and construction equipment to the list.²²³

The level of support in favour of regulating these asset types, however, was not high enough to warrant a place among the potential lists of eligible equipment in any of the drafts of the CTC (unlike ships, oil rigs and even containers).²²⁴ On the one hand, this signals an overall lower level of support coming from the relevant industries at the time (although the same can be said about the maritime industry). On the other hand, the physical characteristics of those assets which the draft MAC Protocol purports to cover challenge the very concept of ‘mobile equipment’ and each of the three eligibility criteria established by the Convention. In doing so, they test the limits of the scope envisaged by the CTC system and affect the possibility of future expansion via new protocols.

The major difficulty is presented by the ‘mobility’ requirement: while potentially movable, the relevant assets (eg earth-moving equipment) may never cross national borders. At first glance, this argument does not seem particularly problematic.

²²¹ See paragraphs 24-25 in Unidroit, *Study LXXII - Doc. 27 (1996)* 15.

²²² See paragraph 31 in Unidroit, *Study LXXII - Doc. 36 (1997)* 10.

²²³ See paragraph 41 in *ibid.*

²²⁴ See, eg, Article 1(2) in Unidroit, *Study LXXII - Doc. 18 (1995)* 5; Article 2(1) in Unidroit, *Study LXXII - Doc. 22 (1996)*; Article 2(1) in Unidroit, *Study LXXII - Doc. 30 (1996)* 9-10; Article 2(1) in Unidroit, *Study LXXII - Doc. 35 (1997)*.

First, the Convention has abolished the test of ‘internationality’ and applies to domestic transactions (subject to declarations under Article 50(1) of the CTC).²²⁵ Second, the cross-border operation of most equipment is not determined by its physical characteristics in many situations and may be driven by a number of accidental factors (such as the size of the relevant country): in larger states aircraft are often operated on domestic routes, never crossing any borders.²²⁶

Overall, there is no question that mining, agricultural and construction equipment is able to cross national borders. However, there is a difference between the asset’s ‘transportability’, on the one hand, and its operational mobility. In the end, most things on the planet could be moved with the right technology: even the colossal Statue of Liberty crossed the ocean to reach New York in 1885. The question is thus: when do we say ‘enough’ and draw a line that should not be crossed? Is it enough that the asset is merely ‘transportable’ to another location (as in the case of the famous monument)? These questions are especially relevant in the context of those types of mining, agricultural and construction equipment, which remain entirely stationary during their operation (eg cranes).

What seemed like a distant problem back in 2001, when the Convention was adopted, suddenly became a very serious issue with little prospect of satisfactory resolution. At its third session held in 2015, the study group established by UNIDROIT to prepare the draft MAC Protocol considered a number of alternative approaches to the satisfaction of the mobility criterion. Unfortunately, most of the proposed solutions eventually implied the replacement of the idea of mobility with the concept of

²²⁵ See section 2.3.3.

²²⁶ In addition, according to a recent observation of the UNIDROIT Secretariat, over 50% of registrations performed in the international registry established under the Aircraft Protocol ‘were for assets that were not internationally mobile in their operation’. See paragraph 53 in Unidroit, *Study 72k - SG3 - Doc. 5 (2015)* 8.

‘internationality’, whereby the former test was satisfied so long as the underlying financing transaction was international in nature or the object was exported to another state.²²⁷ In doing so, members of the study group were effectively substituting one of the key eligibility requirements linked to the physical characteristics of the asset (mobility) with a long-abolished concept relying on the structure of the underlying transaction and factual circumstances of a particular situation (internationality), perhaps forgetting about the main reason for its abandonment: the need to achieve greater certainty and to give third parties the ability to know from the nature of the object whether or not it is subject to the Convention rules.²²⁸ In other words, there is a big difference between asking whether the object has actually moved across national borders or whether the object is of a kind that can be moved internationally. The answer to the first question depends on the circumstances of each particular situation. The answer to the second one depends on the characteristics of the asset.

Overall, the mobility problem proved too difficult to handle and the study group resorted to the same solution as it had previously envisaged to tackle the ‘high value’ criterion, namely the Harmonized Commodity Description and Coding System (the ‘Harmonized System’) developed by the WCO to achieve uniform classification of commodities in international trade and covering over 98% of all international trade.²²⁹ This solution identified eligible equipment not on the basis of its physical characteristics as such, but by reference to the corresponding code of the Harmonized System annexed to the MAC Protocol.

²²⁷ See paragraphs 54 and 60 in *ibid* 8-9.

²²⁸ See section 2.3.2.

²²⁹ See paragraph 6 in Unidroit, *Study 72k - CGE1 - Doc. 4 (2017)* 3.

The new approach has the potential to address more than one problem, if utilised correctly. First, it can eliminate the need to come up with additional criteria to filter out low cost items.²³⁰ Second, it can be used to cover all three groups of assets (mining, agricultural, construction equipment), without the need to develop special criteria for each category. The underlying difficulties however, are also self-evident: (i) the relevant codes must be carefully selected (as assets not covered by them would be left out), (ii) some codes can be used to identify more than one category of equipment²³¹ and thus can create problems in states applying the MAC Protocol to some, but not all, of such categories, (iii) an externally administered system of codes may be subject to changes, which the draft protocol will have to address.

These issues are largely technical and have largely been tackled at the first session of governmental experts in March 2017.²³² So far, a serious challenge stems from the complexity of the Harmonized System: the latter uses a variety of codes containing different numbers of digits (the longer the code, the more specific it becomes), which could confuse governments.²³³ The asset selection criteria in the MAC Protocol are much

²³⁰ The high cost requirement has to be 'built into' the code selection. At the same time, the current draft of the MAC Protocol incorporates codes covering objects of relatively low value (eg HS code 843221 covers harrows used for soil cultivation that could cost, according to the UNIDROIT documentation, as low as USD 10,000). See section 21 in Unidroit, *Study 72k - CGE1 - Doc. 5 corr (2017)* 10.

²³¹ Eg HS code 842919 covers certain multiple purpose bulldozers and angledozers (graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers).

²³² See the revised drafts of Article II(3) and Article XXXII in Appendix III to Unidroit, *Study 72k - CGE1 - Report (2017)* 28, 43-44.

²³³ This was the case during the first session of governmental experts attended by the author in March 2017, when the South African delegate expressed serious concerns about including the first HS code mentioned in Annex 1 to the draft MAC Protocol. The objection stemmed from the description of the relevant code, which included, among other things, fire extinguishers and spray guns. It was later explained by other delegations, that the different codes vary in their specificity, shorter codes being more general and longer codes being more specific. Apparently, the confusion came from the fact that the actual codes in the annexes to the MAC Protocol were using six digit codes (which included higher value items), whereas the textual descriptions (provided for clarity) were borrowed from the more general four digit codes (which could indeed incorporate less expensive items).

more technical (compared to other protocols) and may cause difficulties at the adoption or implementation stage. Nevertheless, the Harmonized System appears to be an efficient solution.

The attractiveness of this system is easily explained from the point of view of increased certainty generated by the use of specific codes: if the HS classification is the only criterion for identifying eligible equipment, then the test is objective, does not depend on transaction mechanics and, with the right codes, could be sufficiently specific. If the requirements of ‘high value’ and ‘mobility’ are seen as prerequisites necessary to provide private parties with clear guidance as to what assets are covered by the protocol, then the Harmonized System indeed does the trick by jumping over these undefined terms straight to the list of assets.

At the same time, the tests in Article 51(1) have another important, ‘gatekeeping’ function: they preserve the integrity of the CTC system aimed at promoting asset financing of equipment enshrined in its Preamble. From this perspective, the Harmonized System appears to be a convenient workaround for the test of ‘mobility’ in cases when stationary equipment is captured by the selected HS codes. In this case, the use of neutral numbers (coupled with a supportive official commentary confirming that that all the necessary boxes have been ticked) looks much more plausible than the odd attempt to define something that never moves as ‘mobile’. A quick look at the pre-selected equipment categories shows that certain stationary equipment is indeed covered by the draft MAC Protocol: examples include HS code 847432 (machines for mixing mineral substances with bitumen) and HS code 847982 (mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines).²³⁴

²³⁴ See Annexes 2 to Unidroit, *Study 72k - CGE1 - Doc. 2 corr. (2017)* 25; Unidroit, *Study 72k - CGE1 - Doc. 5 corr (2017)* 12.

It could be argued that not all equipment covered by the other protocols is mobile *per se*: after all, airframes do not move without their engines attached. But the above HS codes do not represent high value parts of a larger asset (of which there are many examples in the draft MAC Protocol):²³⁵ they represent the complete final equipment that is entirely stationary. In this respect, this protocol (in its current form) goes beyond the other three by covering assets that do not move at all during operation. If this approach is accepted at a future diplomatic conference, the Convention's 'mobility' criteria will effectively amount to mere 'transportability' (akin to that displayed by the Statue of Liberty). Whether or not this outcome is appropriate will be decided by governments, but the author believes that such extension of the present scope of the CTC must be made clear and uniformly understood to avoid difficulties during adoption and implementation.²³⁶

One possible solution for achieving greater clarity among governments could lie in the amendment of the illustrated list of codes prepared by UNIDROIT²³⁷ by including a separate column entitled 'mobility' to indicate whether each category of equipment is stationary when used. After all, there are separate columns for the other two remaining criteria (including approximate list prices and identifiability criteria). It is conceivable that some governments will not be in a position to fully assess the appropriateness of each individual HS code in the run-up to the adoption stage – yet a clear early indication of the degree of mobility of every category may help to avoid subsequent confusion when these states perform a more thorough analysis of eligible types of equipment.

²³⁵ See, eg, HS code 843210 covering a variety of plows in Annex 1 to Unidroit, *Study 72k - CGEI - Doc. 2 corr. (2017)* 22; Unidroit, *Study 72k - CGEI - Doc. 5 corr (2017)* 9.

²³⁶ Issues concerning the appropriateness of the selected HS codes to meet all the 'gateway' criteria were raised multiple times during the governmental expert session in March 2017 – see paragraphs 85-87, 159-161 in Unidroit, *Study 72k - CGEI - Report (2017)* 10, 17-18.

²³⁷ See Unidroit, *Study 72k - CGEI - Doc. 5 corr (2017)*. The document is not part of the MAC Protocol, but is useful to explain how the various requirements are fulfilled by the relevant equipment.

It is clear that the current list of HS codes included in the draft MAC Protocol is not yet final, but the changes made to it (if any) prior to the diplomatic conference will determine the nature of the ‘mobility’ test applied by the CTC. In practical terms, there is nothing wrong with expanding the scope of the Convention to cover any high cost ‘transportable’ equipment, so long as in doing so the MAC Protocol promotes asset financing.

In addition to the above difficulties with satisfying the ‘gateway’ provisions of Article 51(1) of the CTC, the characteristics of mining, agricultural and construction equipment created other notable challenges for the developers of the MAC Protocol.

First, certain jurisdictions extend the scope of domestic rules regulating immovable property to cover also the movable equipment ‘associated’ with it.²³⁸ Second, it remains to be seen whether the issue of ‘internal transactions’ will arise in the context of mining, agricultural and construction equipment. It will be recalled from section 2.3.3 that in the case of the Rail Protocol the scope of declarations under Article 50(1) of the CTC was expanded to cover those objects which can only operate on a single railway system within the relevant contracting state.²³⁹ Given the very limited mobility of certain types of equipment covered by the MAC Protocol,²⁴⁰ it is conceivable that this matter will similarly arise in subsequent discussions of governmental experts or during the diplomatic conference.²⁴¹

²³⁸ See n 124 in section 7.2 and the corresponding discussion.

²³⁹ See n 204 in section 2.3.3.

²⁴⁰ See n 234 and the relevant examples.

²⁴¹ A similar matter was previously discussed within the MAC Protocol study group: one of the members suggested an opt-out rule for ‘purely stationary’ equipment. It appears to have been dismissed on the grounds that it ‘would cause additional issues and would require the term “stationary” to be defined’. See paragraph 65 in Unidroit, *Study 72k - SG3 - Doc. 5 (2015)* 9.

CHAPTER IV. CHOOSING THE APPROPRIATE STRUCTURE OF THE CONVENTION

The current structure of the CTC comprises the Convention itself and three protocols: the Aircraft Protocol, the Rail Protocol and the Space Protocol.¹ The protocols amend, supplement and override the CTC in order to adapt its provisions to each specific type of mobile equipment. This so-called ‘umbrella’ structure is, however, more common for business contracts, rather than commercial law treaties.² This two-fold structure was not envisaged by the developers of the Convention at the start of the project and emerged at a later stage – this chapter explains the origins of such change and analyses the challenges that led to the adoption of the umbrella structure.

4.1 Combining general and industry-specific provisions: transition to asset-specific regulation

While the first draft set of articles of the CTC produced in 1994 did not include any provisions specific to any category of financiers,³ the feedback received from the AWG⁴ in 1995 reflected not only a high interest on the part of the aviation industry towards the Convention, but also the industry’s expectation that the new treaty would reflect its specific needs through an ‘increase in the availability of credit, and/or reduction in the

¹ The MAC Protocol has only reached the governmental expert stage.

² International over-the-counter derivative transactions (ie those which are not concluded on an exchange) are often based on the templates promulgated by the International Swaps and Derivatives Association (ISDA), which comprise the Master Agreement and a corresponding Schedule: the former sets out the basic provisions, while the latter adds party-specific or jurisdiction-specific details (such as additional representations by the weaker party or provisions required to meet various transaction execution formalities). A similar practice applies in international repo transactions (ie transactions for the sale of an asset, such as securities, with an obligation to repurchase such asset in the future) that follow the Global Master Repurchase Agreement template developed by the International Capital Market Association (ICMA), and in bullion transactions concluded using the standard form International Bullion Master Agreement drafted by the London Bullion Market Association (LBMA).

³ See Unidroit, *Study LXXII - Doc. 13 (1994)*.

⁴ See section 3.2.

cost of such credit, to owners/operators of aircraft equipment'.⁵ Many of the changes proposed by the AWG, however, went far beyond the scope of the first draft.

First, the future Convention was to treat aircraft engines differently from other aircraft parts: any interests in engines were to be made registrable separately by reference to the manufacturer's serial number.⁶ Second, the Convention was expected to permit not only the registration of international interests over aircraft and aircraft engines, but also title/ownership transfers over the same in a way that failure to do so would render such transfer voidable as against third parties who register their interests subsequently (but not as between the parties themselves).⁷ Third, lease assignments were to be covered by the Convention to reflect the existing practices in aviation finance transactions.⁸ Fourth, the creditor's position was to be significantly improved by establishing mandatory time limits within which courts having jurisdiction under the Convention were required to issue judgments concerning remedies, on the one hand, and by allowing the financier to deregister (and thus effectively ground) the relevant aircraft upon default by the debtor without any interference by any government or third party (eg the operating airline), on the other.⁹ Fifth, the AWG called for the abolition of any requirement of 'internationality' whatsoever.¹⁰ Sixth, state parties to the future treaty were expected to lodge with UNIDROIT a list of types of creditors under the law of such states whose rights would have priority over an international interest, in order to give prospective financiers maximum information for the purposes of calculating legal risks (as any category of preferred domestic creditors not recorded with UNIDROIT would lose its

⁵ Unidroit, *Study LXXII - Doc. 16 (1995)* 5.

⁶ *ibid* 18.

⁷ *ibid* 8.

⁸ *ibid* 15.

⁹ *ibid* 17.

¹⁰ *ibid* 20. Cf Article 4 in Unidroit, *Study LXXII - Doc. 13 (1994)*. See also section 2.3.

priority).¹¹ Seventh, the Convention was to envisage several optional provisions that states could opt into: (i) an unqualified recognition of the law chosen by the parties to a Convention-governed transaction as the law regulating the contractual interpretation and remedies,¹² and (ii) a rule requiring the debtor/lessee, in the event of insolvency proceedings, either to cure all defaults within a specified time, or to return the aircraft equipment to the financier/lessor.¹³

Overall, the level of detail and specificity found in the recommendations of the AWG made it clear that the original Convention structure (which comprised merely five articles) would require a major overhaul to accommodate the changes (if they were found desirable). Yet the primary challenge, as was rightly pointed out by Thomas Whalen in 1995, was ‘the difficult task...to develop a universally acceptable Convention covering various forms of mobile equipment, the financing of which may not have reached the sophistication of aircraft financing’.¹⁴ Despite the absence of similar reaction from other industries, the feedback of the AWG could be neither ignored, nor used to change the overall structure of the first draft without turning the draft Convention into essentially an aircraft-specific treaty. As a result, the Drafting Group decided to create (albeit provisionally) a special chapter (entitled ‘Special Provisions for Aircraft and Aircraft Engines’) to incorporate all matters specific to aircraft.¹⁵ The resulting second draft of the CTC marked the beginning of separation of industry-specific provisions from the ‘core’ provisions of the Convention.¹⁶

¹¹ Unidroit, *Study LXXII - Doc. 16 (1995)* 22.

¹² *ibid* 24.

¹³ *ibid* 26.

¹⁴ Unidroit, *Study LXXII - Doc. 17 (1995)* 2.

¹⁵ See Appendix to Unidroit, *Study LXXII - Doc. 18 (1995)* 2.

¹⁶ *ibid*.

It should be noted that, while all of the AWG recommendations sought to address aircraft finance practices, only some of the suggested amendments were, strictly speaking, unique to the aviation industry.¹⁷ Most of the proposed changes could eventually prove useful for the other industry groups – when the latter were prepared to consider the scope of the future Convention. As a result, the list of aircraft-specific rules could potentially be reduced by turning some of them into the baseline provisions of general application once it became clear that they were supported by other industries. In the absence of any guidance from the latter, the AWG was invited by UNIDROIT in 1995 to give shape to its recommendations by formulating the ‘supplementary rules for aircraft and aircraft engines’.¹⁸ The resulting feedback, surprisingly,¹⁹ did not take the form of stand-alone supplementary rules: the AWG effectively redrafted the whole text of the Convention incorporating new provisions into the existing structure.²⁰ More importantly, the resulting ‘Draft Aviation Text’ not only proved that the (then) current draft Convention could accommodate most of the AWG suggestions as basic (rather than aircraft-specific) provisions, but, by establishing a new template for the UNIDROIT treaty, it substantially modified the agenda for any subsequent discussions of the draft Convention and provided other industries with a clear, albeit lengthy, account of the aviation industry needs. Out of 32 articles comprising the Draft Aviation Text only one was limited to matters specific to aircraft – which included different treatment of

¹⁷ An example would be the proposed different treatment of aircraft engines or the proposed remedy of aircraft deregistration.

¹⁸ Unidroit, *Study LXXII - Doc. 21 (1995)* 13.

¹⁹ The commentary of the AWG shows that, instead of literally following the request of UNIDROIT to prepare ‘the text of supplementary rules’, it relied on the Study Group’s conclusion that some of its proposed rules ‘might be found to have more general application and might to this extent assist other industry groups in their analysis of the desired scope and content of the proposed convention’. See Unidroit, *Study LXXII - Doc. 23 (1996)* 2-3.

²⁰ See Annex 1 (labelled ‘Convention on International Interests in Mobile Equipment: Draft Aviation Text’) to *ibid.*

engines, the unique remedy in the form of deregistration of aircraft upon default of the debtor and the relationship of the draft Convention with the other aviation treaties.²¹

Despite the proactive stance of the aviation industry, the UNIDROIT Study Group was not quick to incorporate the amendments suggested by the AWG, particularly in light of limited feedback from other industries: the two subsequent drafts of the Convention prepared in 1996 retained a placeholder (empty) chapter labelled, respectively, ‘Special Provisions for Aircraft and Aircraft Engines’²² and ‘Special Provisions for Aircraft Property’.²³ At the time, there was no argument as to the possibility of seamless incorporation of the AWG provisions into the body of the UNIDROIT text: Roy Goode, Chairman of the Study Group, specifically addressed the issue by drawing up a revised structure of the future Convention ‘with a view to seeing how the...draft might look after incorporation of key elements of the draft aviation text’.²⁴ The resulting structure proved workable and had no significant impact on the basic structure.²⁵

Against this background, a scenario whereby a single international convention would be able to cover international interests in various types of mobile equipment at once did not seem entirely unrealistic – all that was needed was to ensure which proposals of the AWG would be acceptable for other industries (and if they were, the asset-specific provisions could be limited to a single article, as was demonstrated by the Draft Aviation Text). Nevertheless, as discussions continued, more and more evidence

²¹ See Article 23 in Annex 1 to *ibid.*

²² See Chapter VIII in Unidroit, *Study LXXII - Doc. 24 (1996)*.

²³ See Chapter VIII in Appendix IV to Unidroit, *Study LXXII - Doc. 27 (1996)*.

²⁴ See Appendix III in *ibid.*

²⁵ *ibid.* 8.

emerged suggesting that mechanisms to promote aviation financing proposed by the AWG might generate opposition from the other industries.

The first point of contention concerned the extension of the scope of the future Convention to outright sales, ie transactions whereby title passes to the purchaser at once without any form of reservation of title by the seller (as opposed to retention of title agreements). The intent of the aviation industry was clear: the registration of sales in addition to an already comprehensive array of transactions having the function of security (security agreements in the narrow sense, leases and reservation of title agreements) would not only simplify any priority rules by eliminating contests between purchasers and/or their creditors and the holders of interests in aircraft objects – they would facilitate the market for used engines and aircraft²⁶ and even eliminate the problem of characterisation of agreements into outright sales or title retention contracts. Furthermore, the practice of registering title transfers over aircraft had already been widely used in a substantial number of jurisdictions.²⁷ At the same time, the manner in which this concept was incorporated into the Draft Aviation Text was somewhat clumsy: the AWG document effectively labelled the right of ownership as yet another type of ‘international interest’ (on par with the interests of a chargor under a security agreement, seller under a title reservation agreement and lessor under a leasing agreement), disregarding the fact that an ‘international interest’ is, *ipso facto*, an *in rem* right having the function of security (which of course cannot be said about the title passing under an

²⁶ According to the AWG’s own calculations performed in 1995, roughly a quarter of newly financed aircraft were subsequently refinanced, with yearly financing of used aircraft equipment estimated at approximately USD 12.5 billion. See footnote 17 in Unidroit, *Study LXXII - Doc. 16 (1995)* 8.

²⁷ According to the AWG, the following jurisdictions either permitted, or required such registrations: Argentina, Austria, Belgium, Brazil, Chile, China, Colombia, Costa Rica, Denmark, Egypt, France, Germany, Greece, Guatemala, Iceland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Peru, the Philippines, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, UAE, the USA, Uruguay, Venezuela. See footnote 19 in *ibid* 9.

outright sale agreement).²⁸ Yet, while the drafting problem could no doubt be resolved at a later stage, the AWG proposal appeared so radical that the aviation industry effectively had to defend its idea not only against potential dissent from the other industries (which had not at the time expressed their views on the matter), but also against members of the Study Group itself, some of whom reserved their position ‘until they had time to appreciate the full implications of this proposal’.²⁹ In the absence of any expression of interest towards extending the scope of the Convention to outright sales, the Drafting Group subsequently chose not to rectify the deficiencies in the Draft Aviation Text and simply moved the draft provision on outright sales to the chapter concerning aircraft-specific provisions.³⁰

The second challenge was even more fundamental: no other industry had managed to come up with a truly representative group to act as its ‘voice’ in the course of development of the Convention. As a result, the occasional signs of support in favour of including one or another asset category³¹ into the scope of the UNIDROIT instrument remained inconclusive and unsystematic. After all, any extension of scope to a different industry was not merely a matter of adding as many asset types into the scope of the Convention: if nothing else, the new treaty was expected to give registered international

²⁸ See Article 1(3)(e) in Annex 1 to Unidroit, *Study LXXII - Doc. 23 (1996)*, which defines an ‘international interest’ as ‘an interest...transferred by a transferor under a transfer document’, and paragraph 48 in Annexure to *ibid*, whereby a ‘transfer document’ is defined as ‘an agreement (other than a title reservation agreement)...by or in which one person...sells...property to another person...and that is expressed to fully divest the transferor of its interest in the property’.

²⁹ Unidroit, *Study LXXII - Doc. 27 (1996)* 12.

³⁰ See paragraph 16 in Unidroit, *Study LXXII - Doc. 30 (1996)* 4. See also draft Chapter X in Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment in *ibid*.

³¹ This was the case with, eg, omnibuses, construction machinery and large lorries supported by Germany, or the enthusiasm in the USA to include pleasure yachts, or even the proposal of the UNIDROIT Secretariat to extend the scope of the Convention to air-cushion vehicles. See Unidroit, *Study LXXII - Doc. 27 (1996)* 15.

interests priority over any unregistered interests, thus generating pressure to register in all situations out of fear of losing priority.³²

The third difficulty concerned a very ambitious proposal by the AWG to fix in the Convention absolute time limits for any judicial proceedings relating to the enforcement of Convention remedies: court actions relating to the ability of a holder of an international interest to take possession of the charged property following a default by the debtor were to be completed within 5 working days after their commencement, whereas court actions relating to ‘any other claim or right’ were to be completed within 30 days after their initiation (in either case proceedings were to be commenced within 3 working days after lodging ‘an initiating document’ with the relevant authorities).³³ Although the record of the Study Group deliberations on this matter in April 1996 shows an overall positive reaction of the members to the AWG proposal, a more detailed analysis makes it clear that the very idea of imposing a hard cap on the duration of court proceedings appeared extremely difficult to stomach. Instead of supporting the AWG approach in its original form, the Study Group agreed that ‘in practice the chargee’s single most effective weapon in the type of circumstance contemplated was the ability to obtain *interim injunctive relief* to have the asset held in one place’,³⁴ essentially substituting the AWG concept of an overall limit on the duration of court proceedings with a view that effective interim relief would be more appropriate. The fundamental difference between the two approaches is clear – the watered-down alternative of the Study Group imposed no obligation on the court to issue a final decision as to the substance of the dispute (which could effectively drag on for years). Nevertheless, in an attempt to alleviate the concerns of the aviation industry, the Study Group added two

³² Challenges involved in the development of the system of priorities are examined in section 6.1.

³³ See Article 13 in Annex 1 to Unidroit, *Study LXXII - Doc. 23 (1996)*.

³⁴ Unidroit, *Study LXXII - Doc. 27 (1996)* 41 (emphasis added).

elements to the proposed interim relief mechanism. First, it would include ‘the ability to have the asset held in one place under judicial supervision and control’ as a form of asset immobilisation.³⁵ Second, it was suggested that the court would be given the power to appoint a receiver ‘to realise the value of the asset as speedily as possible’.³⁶ Despite the ‘widespread agreement’ of the Study Group on this solution, the AWG representative reserved the position of the AWG, given the transformation that had occurred to its proposal.³⁷

For the purposes of this section, however, another factor is of paramount importance: in the course of the above discussions the Study Group performed an unenviable function of determining whether the concept suggested by the AWG would remain realistic not only as part of aviation-specific provisions, but also – potentially – as a baseline provision applicable to all asset types covered by the Convention. If that were not the case, the proposal to establish a cap on the duration of judicial proceedings could have been more easily dealt with by sweeping the corresponding provision into the ‘aircraft-specific’ category (just as this was done in the case of outright sales). Instead, the relevant discussions of the Study Group addressed the feasibility of having an overall timing limit for obtaining relief under the Convention as a baseline provision: the Drafting Group was eventually tasked with preparing a general ‘formula which would permit the chargee, seller or lessor to obtain expeditious relief in order to protect its position’.³⁸ This conclusion is further reinforced by the subsequent draft prepared by the Drafting Group in October 1996, which incorporated for the first time an article on

³⁵ ibid 41.

³⁶ ibid.

³⁷ The development of the concept of advance relief is discussed in greater detail in section 5.2.3.

³⁸ Unidroit, *Study LXXII - Doc. 27 (1996)* 42.

advance relief – and located it among other general provisions.³⁹ Nonetheless, the solution (and the corresponding provision) remained merely a compromise compared to the original proposal of the AWG, acting as yet another reminder of the very far-reaching expectations of the aviation industry from the future Convention.⁴⁰

The combined effect of all of the above factors clearly demonstrated the divide between the aviation industry and any other potential beneficiaries of the draft Convention considered at the time. The detailed and very ambitious agenda of the former had no equal, and was beginning to stall. By June 1996 the need to address this issue became so apparent that two members of the UNIDROIT Governing Council had to voice a proposal to ‘deal in the first instance only with aircraft and perhaps one or two other categories, possibly leaving other types of equipment to be catered for in a *second instrument*’.⁴¹ The existence of a draft Convention in the form of a single document was coming to an end.

4.2 Separation of the aircraft protocol: separate protocols or separate conventions

The actual separation of the draft Convention into separate instruments began with a letter prepared jointly by the AWG and IATA in December 1996, which proposed a two-part structure for the UNIDROIT treaty: the base/umbrella Convention setting out ‘the basic legal framework applicable to all categories of equipment’ and equipment-specific protocols.⁴² Four observations supported this suggestion, three of which were either not new, or derived from the previous negotiation/drafting process: (i) there was a need for

³⁹ See Article 15 in Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment in Unidroit, *Study LXXII - Doc. 30 (1996)*.

⁴⁰ The very perception of the AWG proposals as very ambitious can be perhaps best demonstrated by the Study Group’s concern that the approach of the AWG ‘might cause the future Convention to overreach itself by seeking to deal with all matters seen as having a bearing on the effectiveness of the international interest’. See paragraph 108 in Unidroit, *Study LXXII - Doc. 27 (1996)* 46.

⁴¹ Unidroit, *Study LXXII - Doc. 28 (1996)* 4 (emphasis added).

⁴² Unidroit, *Study LXXII - Doc. 32 (1996)* 2.

asset-specific rules for each category of equipment, (ii) other industries needed to organise themselves to contribute to the UNIDROIT project and (iii) different industries might require different timetables to reach a consensus among themselves.⁴³ The fourth one was new, however, and involved the possibility to adopt and ratify the Convention on an equipment-specific basis⁴⁴ – unlike the previous discussions, this one no longer focused on the need to incorporate asset-specific provisions into the text (something that was not really disputed), but rather allowed selective application of the Convention to different objects through the interface of protocols.⁴⁵

The proposal quickly gained the support within the Study Group⁴⁶ and was formally approved at its third session in January 1997, and by the Governing Council at its 76th session in April 1997.⁴⁷ Following this decision, the President of UNIDROIT invited Jeffrey Wool, an expert consultant to the Study Group on international aviation finance matters and co-ordinator of the AWG, to organise a special working group to prepare the first draft protocol on aircraft equipment.⁴⁸

The initial reaction towards the dual convention/protocol structure was almost universally favourable:⁴⁹ the possibility of sending all asset-specific provisions to separate documents gave unprecedented freedom and flexibility to accommodate the

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ For a more detailed discussion of the protocol system utilised by the CTC see Mark J. Sundahl, 'The Cape Town Approach: A New Method of Making International Law' (2006) 44 *Colum J Transnat'l L* 339.

⁴⁶ See Unidroit, *Study LXXII - Doc. 32 Add. 1 (1997)* 1; Unidroit, *Study LXXII - Doc. 32 Add. 3 (1997)* 2.

⁴⁷ See Introductory Note in Unidroit, *Study LXXIID - Doc. 1 (1998)* 1.

⁴⁸ *ibid.*

⁴⁹ For a somewhat critical view of the protocol system (although more in terms of technical issues, rather than the substance) see paragraph 50 in Unidroit, *Study LXXII - Doc. 36 (1997)* 14-15.

needs of different industries as and when they were ready,⁵⁰ while at the same time providing the governments with – in the words of Roy Goode – a ‘menu’ of protocols to choose from.⁵¹ The Drafting Group was unanimous in its view that the protocol approach was ‘essential’ to make it possible to simultaneously accommodate both a free-standing instrument and asset-specific provisions⁵²: protocols were seen as a ‘fundamental necessity...at least in the absence of any other workable solution’.⁵³ Ironically, another ‘workable solution’ emerged very quickly – and generated much greater debate.

In February 1998, the UNIDROIT Governing Council finally had before it the results of the labour of the Study Group and the new working group for the preparation of a protocol specific to aircraft (Aircraft Protocol Group or the ‘APG’): the revised draft Convention and the draft Aircraft Protocol prepared pursuant to an earlier decision to switch to the umbrella structure.⁵⁴ Despite the efforts of the rail and space industries, no other draft protocol was ready at the time, as ‘work on the preparation of these texts had commenced later than work on the aircraft equipment protocol and had not...attracted quite the same degree of support from industry’.⁵⁵ Consequently, the main point of the agenda was to review the draft Convention and the draft Aircraft Protocol and determine whether the documents were ready to be submitted to governmental experts for finalisation.⁵⁶

⁵⁰ See Unidroit, *Study LXXII - Doc. 35 (1997)* 5. See also paragraph 49 in Unidroit, *Study LXXII - Doc. 36 (1997)* 14.

⁵¹ Unidroit, *Study LXXII - Doc. 40 (1998)* 7.

⁵² See paragraph 13 in Unidroit, *Study LXXII - Doc. 35 (1997)* 13.

⁵³ See paragraph 18 in *ibid* 4-5.

⁵⁴ See n 48 and the corresponding discussion.

⁵⁵ Unidroit, *Study LXXII - Doc. 40 (1998)* 3.

⁵⁶ *ibid* 1.

The new concern was first voiced by the French member of the UNIDROIT Governing Council, Jean-Pierre Plantard, who observed that the provisions of the draft Aircraft Protocol ‘frequently contradicted or varied the terms of the preliminary draft Convention via a series of exceptions and cross-references’ and thus wondered whether ‘a clearer result might not be obtained by drawing up several different Conventions rather than one framework Convention and several different Protocols’.⁵⁷ Several standalone conventions would be ‘easier to read and understand’ and still reflect the earlier decision to separate asset-specific provisions. Therefore, the question as to whether asset-specific provisions should be moved into a different document lost its relevance and was superseded by a more pressing concern: how best to achieve this separation.

The ease of comprehension was not the only difficulty created by the dual convention/protocol structure. Of much greater importance was the need to secure the broad acceptance of the new instruments among various states: a look from a ‘purely strategic point of view’⁵⁸ suggested that an aircraft-only convention would be easier to promote, while the conceptual sacrifices would be easier to swallow if limited to only one type of equipment (both at the cost of the overall ambition of the project to cover other types of movable assets).⁵⁹

Objections to the suggested structure based on a series of standalone treaties were essentially two-fold. First, the complexity and lack of coordination⁶⁰ between the

⁵⁷ *ibid* 19.

⁵⁸ *ibid* 21.

⁵⁹ Examples of conceptual challenges included the limited availability of self-help remedies in Civil law jurisdictions, equal treatment of ‘true leases’ and leases having the function of security (see section 2.1.4.1) and the concern that Civil law countries ‘were not familiar with the chattel mortgage concept’ (see commentary by Anne Marie Trahan in *ibid* 21).

⁶⁰ The Aircraft Protocol Group, which had prepared the draft Aircraft Protocol, did not mirror the membership of the UNIDROIT Study Group working on the baseline Convention, and was

existing documents was, at its core, a problem of style, which could be resolved by way of moving certain provisions of the draft Aircraft Protocol to the main Convention. Second, and more importantly, abandoning the protocol-based approach would deprive the UNIDROIT project of its unifying factor and require either a separate convention of general provisions somehow incorporated in each equipment-specific convention, or a series of conventions essentially repeating the general provisions in their texts.⁶¹

Whilst the Governing Council adopted no immediate conclusion as to the most appropriate structure of the future Convention, a decision was made to address at least one of the key issues identified during the discussion: the lack of coordination between the draft Convention and the draft Aircraft Protocol. A special working group (the Steering and Revisions Committee) was formed for the purpose of refining both drafts by way of, first, relocating the protocol provisions of general application to the draft Convention, and, second, aligning the instruments as to both style and methodology.⁶²

The SRC, which convened later the same year,⁶³ performed mostly a technical role of reconciling the two instruments and did not regard itself as competent to decide upon the final structure of the UNIDROIT instrument.⁶⁴ The latter problem was labelled as one of policy and submitted to the governmental experts alongside three alternatives.

formed of aviation experts: Ludwig Weber (Director of the ICAO Legal Bureau), Lorne Clark (General Counsel and Corporate Secretary of IATA) and Jeffrey Wool (Partner at Perkins Coie, co-ordinator of the AWG and expert consultant to the Study Group on international aviation finance). As a result of lack of coordination, the draft Aircraft Protocol emerged so detailed that the number of articles in it (47) surpassed that of the main draft Convention (45, counting all draft final provisions). Cf Unidroit, *Study LXXIID - Doc. 1 (1998)* and Unidroit, *Study LXXII - Doc. 37 (1997)*.

⁶¹ Unidroit, *Study LXXII - Doc. 40 (1998)* 20. It is also clear that the new conventions were likely to be ‘drafted by different hands’, making the results less predictable – see Roy Goode, ‘From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols’ (2012) 17 *Uniform Law Review* 599, 604.

⁶² Unidroit, *Study LXXII - Doc. 40 (1998)* 37.

⁶³ See Unidroit, *Study LXXII - Doc. 41 (1998)*.

⁶⁴ As a result of this revision, the number of provisions in the draft Aircraft Protocol was reduced by more than a quarter – from 47 to 34 articles.

The first one was based on the existing draft and was favoured by the SRC, which stressed its key advantage: the flexibility for different industry sectors to address their specific needs ‘*at such time as they were ready to do so but without compromising the aviation sector’s desire to see the Convention in operation as regards aircraft equipment as speedily as possible*’.⁶⁵ The second option involved separate asset-specific conventions, whereas the third alternative ‘at all worthy of consideration’ contemplated a single treaty with a set of annexes akin to the Chicago Convention.⁶⁶

The problem of determining the structure of the Convention was one of the first ones to emerge during the First Joint Session of governmental experts in 1999 – it was raised at the very start of the proceedings during the general discussion of the UNIDROIT treaty. While no conclusive decision about the structure emerged out of these discussions, the most notable development in this context can be attributed to the delegation of Germany, which prepared and submitted for consideration the first consolidated text of the draft Convention and the Aircraft Protocol.⁶⁷ The document, entitled ‘Consolidated Version of a Preliminary Draft Unidroit Convention on International Interests in *Aircraft* Equipment’ (emphasis added) was apparently intended to change the direction of the drafting process towards creating a standalone aircraft-specific treaty, since, as the German delegation noted, ‘there was no guarantee that other preliminary draft Protocols would emerge’.⁶⁸ The persistence of the German delegation,⁶⁹ however, did not result in a great deal of approval, particularly in light of

⁶⁵ Unidroit, *Study LXXII - Doc. 41 (1998)* 28 (emphasis in the original).

⁶⁶ *ibid.*

⁶⁷ See Unidroit, *Unidroit CGE/Int.Int./WP/9 ICAO Ref. LSC/ME-WP/20 (1999)*.

⁶⁸ See paragraph 22 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 6.

⁶⁹ The same delegation kept raising the issue repeatedly – see paragraphs 151 and 157 in *ibid* 22-23.

submitted evidence that the work on other draft protocols was ongoing.⁷⁰ But perhaps more importantly, the consolidated text demonstrated quite well that the dual convention/protocol structure could be presented in the form of a single document, should such need arise.

When the same matter of structure of the Convention was discussed during the Second Joint Session, the possibility of having a single consolidated convention/protocol text came up several times⁷¹ – yet this time it was viewed not as an alternative to the umbrella structure suggested by the German delegation during the First Joint Session, but rather as an element of convenience allowing to have the best of both different structures: a stable core of Convention provisions, an expandable scope based on a series of protocols and the user-friendliness of the consolidated text. The precise moment when such text should be prepared was left open – but it was clear that the criticism of the umbrella structure of the future Convention was losing its substance. The remaining arguments were two-fold: first, one delegation saw a problem of legitimacy in the fact that other industries would end up using a baseline treaty developed by the aviation sector;⁷² second, another delegation expected difficulties with ratification of a ‘complex two-instrument structure’.⁷³ Neither of the two seems convincing, however. The first one falls apart when viewed through the prism of the work that was performed by the rail and space industries to prepare (and *ipso facto* support) separate protocols⁷⁴ and pales in

⁷⁰ According to the Secretary-General of UNIDROIT, draft protocols on railway rolling stock and space property were ‘at an advanced stage of preparation’. In addition, OTIF, which had agreed to co-ordinate the consultations on the preliminary draft protocol on railway rolling stock, had submitted to UNIDROIT a letter stressing ‘the importance of maintaining the dual structure of a base Convention and specific Protocols for different categories of equipment’. See paragraph 22 in *ibid* 6; Unidroit, *Unidroit CGE/Int.Int./WP/8 ICAO Ref. LSC/ME-WP/19 (1999)*.

⁷¹ See paragraphs 4:2, 4:3, 4:5 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

⁷² See paragraph 4:4 in *ibid*.

⁷³ See paragraph 4:5 in *ibid*.

⁷⁴ See paragraph 4:1 in *ibid*.

comparison to the freeriding opportunity and ‘broader social benefit’ generated by the combined efforts of the aviation industry.⁷⁵ The second argument simply overstates the problem, which does not exist so long as the relationship between the baseline Convention and each protocol is clearly articulated.

The lack of substantive issues with the umbrella structure was later confirmed by Herbert Kronke in his opening statement during the Third Joint Session, who confirmed that the former ‘was no longer a source of concern to States’,⁷⁶ as well as by the Public International Law Working Group,⁷⁷ which concluded that ‘the Convention/Protocol structure contemplated by the proposed new international regimen was consistent with existing treaty law and practice’.⁷⁸

The final test of the two-instrument approach, however, took place during the Cape Town Diplomatic Conference. The two working groups developing the draft protocols on railway rolling stock and space assets reiterated their commitment to the prompt finalisation of the corresponding protocols. In its comments the Rail Working Group firmly rejected ‘any idea of an “Aviation only Convention”’,⁷⁹ noting, among other reasons, the high inefficiency of such approach, which would preclude the development and use by practitioners in different industries of ‘a common base position and common jurisprudence’.⁸⁰ In an independent submission, OTIF not only supported the umbrella structure, but also annexed a ‘Preliminary Draft Protocol on Matters

⁷⁵ See paragraph 4:6 in *ibid.*

⁷⁶ See paragraph 2 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 1.

⁷⁷ The role of various working groups is examined in section 8.1.3.

⁷⁸ See paragraph 9 in Unidroit, *Unidroit CGE/Int.Int./3-WP/18 ICAO Ref. LSC/ME/3-WP/18 12/03/00 (2000)* 5.

⁷⁹ Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 135.

⁸⁰ *ibid* 136.

Specific to Railway Rolling Stock’.⁸¹ Similarly, the Space Working Group expressed a strong urge to uphold the dual convention/protocol approach and attached, respectively, the preliminary draft ‘Protocol on Matters specific to Space Property’.⁸² In light of the above developments, delegates to the Cape Town Diplomatic Conference expressed overwhelming support⁸³ towards the adoption of the Convention and the Aircraft Protocol as separate documents (with the exception of the delegations of China and Lebanon), which culminated in the adoption of two separate instruments: the CTC and the Aircraft Protocol in November 2001. The Rail Protocol and the Space Protocol followed afterwards, in 2007 and 2012, respectively.

Over the years of development, the Convention had gone a long way from attempting to integrate the Draft Aviation Text submitted by the AWG into the basic draft Convention to the separation of a single draft into a baseline treaty accompanied by a set of protocols. While the CTC and each protocol were adopted as separate documents, the usefulness of the consolidated versions of the corresponding texts (now found in the corresponding Official Commentaries) suggests that, perhaps in the eyes of the end user, the development of the Convention eventually made a full circle: practitioners would clearly prefer to use a single document. However, as has been shown in this chapter, the structure of an international convention as adopted may be quite different from the structure of the same instrument as utilised by the end users – the existence of a ‘basic’ convention has preserved the continuity of international interests across a whole range of mobile equipment (aircraft objects, railway rolling stock and space assets) and will continue to do so for any future protocols.

⁸¹ ibid 114.

⁸² ibid 129.

⁸³ This support was expressed by the German delegation as well – see ibid 745.

CHAPTER V. ADDRESSING INTER PARTES MATTERS: REMEDIES AND PARTY AUTONOMY

The autonomous concept of ‘international interest’ developed within the UNIDROIT Study Group was an elegant alternative to the recognition of various interests created under domestic law: it envisaged the creation of a new, Convention-based type of security regardless of the existence of a national law counterpart.¹ This solution, however, had little inherent value for financiers without a dedicated machinery in place to give effect to the international interest, thus giving it purpose. As a result, the Convention gained a whole array of provisions that associate the international interest with tangible consequences, both between the parties to the relevant underlying (security, lease, title reservation) agreements (*inter partes* effects) and against third parties. These consequences, and the history of development of the corresponding provisions, are the focus of CHAPTER V and CHAPTER VI, respectively.

This chapter addresses *inter partes* aspects of the CTC as follows. First, it briefly explains the relevance of party autonomy in the Convention. Second, it analyses the key challenges encountered during the development of the remedy provisions in the CTC.

5.1 *The role of party autonomy*

The Convention’s preamble expressly recognises the importance of party autonomy, calling it ‘necessary’ in asset-based financing and leasing transactions. The Official Commentary² and other academic literature³ treat party autonomy as one of the

¹ See section 2.2.2.

² See paragraph 2.17 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 22.

underlying principles of the CTC and its protocols. The reasons for the wide application of the principle of party autonomy were succinctly summarised by Roy Goode, who explained that ‘contracting parties to...high-unit value transactions should in general be able to look after themselves and therefore enjoy a wide measure of freedom of contract, albeit subject to certain mandatory provisions to prevent possible abuse’.⁴

This important principle is reflected in a number of provisions of the Convention and its protocols. These provisions allow parties, by virtue of agreement among them, to: (i) agree on the use of certain remedies,⁵ (ii) identify events that trigger the application of remedy provisions,⁶ (iii) agree upon remedies not envisaged by the Convention,⁷ including special remedies added by the protocols,⁸ (iv) derogate from the Convention’s remedy provisions in their relations with each other,⁹ (v) derogate from the protocol provisions in their relations with each other,¹⁰ (vi) exclude certain debtor protection mechanisms,¹¹ (vii) add extra creditor protection mechanisms,¹² (viii) remove

³ See, eg, Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (Routledge 2011) 121.

⁴ Unidroit, *Study LXXII - Doc. 40 (1998)* 40.

⁵ See Articles 8(1), 9(1) of the CTC. Article 13(1) only applies if the debtor has agreed to advance relief.

⁶ Article 11 of the CTC.

⁷ Article 12 of the CTC.

⁸ Article IX(1), Article X(3) of the Aircraft Protocol, Article VIII(3) of the Rail Protocol, Articles XIX and XX(3) of the Space Protocol.

⁹ Article 15 of the CTC. Exceptions are limited and are driven largely by the need to (i) protect the debtor against abuse of the creditor’s dominant position (Article 8(3)-(6), Article 9(3)-(4), Art. 13(2) of the CTC), (ii) prevent unjust enrichment by the holder of a senior interest (Article 8(6) of the CTC) and (iii) preserve integrity of domestic rules of procedure of states (Article 14 of the CTC).

¹⁰ Article IV (3) of the Aircraft Protocol, Article III of the Rail Protocol, Article XVI of the Space Protocol. The exceptions pursue three objectives: (i) debtor protection (Article IX(3) of the Aircraft Protocol, Article VII(3) of the Rail Protocol, Article XVII(1) of the Space Protocol), (ii) protection of the interests of the senior creditor (Article IX(2) of the Aircraft Protocol) and (iii) enhancing legal certainty by defining ‘reasonable prior notice’ (Article IX(4) of the Aircraft Protocol, Article VII(4) of the Rail Protocol, Article XVII(2) of the Space Protocol).

¹¹ Article X(5) of the Aircraft Protocol, Article VIII(5) of the Rail Protocol and Article XX(5) of the Space Protocol.

certain creditor protection mechanisms,¹³ (ix) change the priority of competing rights and interests between their holders,¹⁴ (x) exclude priority-related enforcement restrictions,¹⁵ (xi) select the courts having jurisdiction over claims brought under the CTC,¹⁶ (xii) determine the law governing their contractual rights and obligations.¹⁷

These provisions share a common feature: their effect is entirely *inter partes*. In addition, the overwhelming majority of articles based on party autonomy relate to remedies and enforcement under the CTC and its protocols: the remaining few provisions affect priorities, jurisdiction and applicable law. The following sections focus on the remedy provisions in the Convention, which at first reflected the concept of party autonomy in its purest form (as they were available only pursuant to an agreement of the parties), but over the years were supplemented by a number of important exceptions in an attempt to achieve a fair balance of interests of various parties.

5.2 Remedies

The key role of remedy provisions in the Convention has been summarised in the most recent edition of the Practitioner's Guide issued by the AWG:

A core purpose of the Convention is to create greater certainty that, upon default, creditors can swiftly, but in a commercially reasonable

¹² Article XXV(4) of the Rail Protocol.

¹³ Article XXVII(9) of the Space Protocol.

¹⁴ Article 29(5) of the CTC.

¹⁵ Article XVII(3) of the Space Protocol. The provision does not raise a priority issue as such, as the interests are in different objects – see paragraph 5.71 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets: Official Commentary* (International Institute for the Unification of Private Law (UNIDROIT) 2013) 451.

¹⁶ Article 42 of the CTC. Exceptions relate to advance relief remedies (Article 43 of the CTC) and jurisdiction to make orders against the Registrar (Article 44 of the CTC).

¹⁷ Article VIII(2) of the Aircraft Protocol, Article VI(2) of the Rail Protocol and Article VIII(2) of the Space Protocol. Neither provision applies by default: in each case, a state must make a corresponding declaration (see Article VIII(1) of the Aircraft Protocol, Article (VI)(1) of the Rail Protocol and Article VIII(1) of the Space Protocol).

manner, exercise their remedies to repossess, deregister and export, if applicable, and sell or otherwise realize upon aircraft objects.¹⁸

While this commentary refers only to aircraft objects, it provides perhaps the strongest possible evidence of the relevance of enforcement provisions, since it reflects the views of practitioners as end-users of the CTC.

5.2.1 *Origins of the enforcement provisions in the Convention*

The need to protect in the future Convention the rights of a secured party in the event of default of the debtor was first recognised by Cuming in his 1989 Study, which suggested ‘either...consistent choice of law rules to determine the law governing such rights or a set of substantive rules dealing with default rights and remedies’.¹⁹ Responses to Cuming’s subsequent Questionnaire did not reveal a clear preference among the respondents in favour of either option. 26 votes supported the idea of setting up dedicated rules ‘to deal with inter partes rights and remedies upon default where a security interest is being enforced in a State other than that of the State the laws of which govern the validity of the security interest being enforced’. 19 respondents favoured leaving *inter partes* rights to the law applicable to the validity of the security interest. 21 respondents preferred to retain the distinction between substantive and procedural matters, leaving the former to the law governing the validity of the security agreement and the latter – to the law of the forum.²⁰ To make matters worse, later Cuming acknowledged ‘some support’ for an alternative that had not been suggested in his Questionnaire at all: a number of respondents preferred ‘to allow the parties to the security agreement to choose the applicable law’.²¹ This lack of consensus among

¹⁸ The Legal Advisory Panel of the Aviation Working Group, *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol* 109.

¹⁹ Unidroit, *Study LXXII - Doc. 1 (1989)* 29.

²⁰ Unidroit, *Study LXXII - Doc. 3 (1991)* 12.

²¹ Unidroit, *Study LXXII - Doc. 4 (1992)* 9.

respondents gave little guidance to the Study Group, which essentially considered 2 different options.²² The first one involved setting up dedicated rules on ‘rights of possession and sale’ (as modified by the security agreement).²³ The alternative was basically a hands-off approach to regulating all *inter partes* matters altogether: ‘rights of the parties...could be left to be dealt with by [their] agreement as controlled by the law applicable under the rules of private international law of the forum’.²⁴

This lack of consensus can be explained by the lack of uniform approach to security interests at the early stage, when the idea of establishing an ‘international security interest’ coexisted with the concept of recognition of foreign national security interests.²⁵ The latter was associated with the problem of transposition (ie finding the closest domestic equivalent for foreign security interests), a key obstacle to enforcement acknowledged by the EBRD, which warned that ‘it [was] difficult to see how the courts in one Contracting State [could] be relied on to provide proper remedies in relation to a security interest under the laws of another Contracting State’.²⁶ Another difficulty was associated with the problem of ‘internationality’:²⁷ according to Cuming, ‘it would be necessary to avoid imposing the convention enforcement system on what would be viewed as purely domestic situations’.²⁸

²² This lack of consensus within the Study Group was later expressly acknowledged by Cuming in Unidroit, *Study LXXII - Doc. 8 (1993)* 28.

²³ See paragraph 12(2) in Unidroit, *Study LXXII - Doc. 5 (1992)* 6.

²⁴ See paragraph 13 in *ibid.* This solution can be seen as an indirect acknowledgment of the party choice option (as long as the laws of the forum recognise it) and also as a reflection of the option which, according to Cuming, had not received meaningful support among the respondents: to ‘leave all matters of inter partes rights and remedies upon default to the law of the forum’ – cf question 7(b) and paragraph 18 in Unidroit, *Study LXXII - Doc. 3 (1991)* 11-12.

²⁵ cf paragraph 8 and paragraph 9 in Unidroit, *Study LXXII - Doc. 5 (1992)* 4-5.

²⁶ See paragraph 1 in Unidroit, *Study LXXII - Doc. 6 Add. 2 (1993)* 1. See also paragraph 5(a) in Unidroit, *Study LXXII - Doc. 6 Add. 3 (1993)* 2.

²⁷ See section 2.3.

²⁸ Unidroit, *Study LXXII - Doc. 8 (1993)* 28.

Despite a number of proposals to provide certain basic enforcement rules in the text of the Convention itself,²⁹ the first draft set of articles of the CTC contained no such provisions³⁰ and merely provided:

In any proceedings for enforcement of an international interest in mobile equipment, the courts of a Contracting State shall recognise the validity and effects of that interest where the issue before the court is a non-domestic issue.³¹

The lack of dedicated rules on enforcement³² and the lack of clarity as to what kinds of ‘effects’ of an international interest were to be recognised gave rise to commentator criticism³³ and led to a detailed discussion during the second session of the First Draft Subcommittee in 1995, which adopted a number of conclusions relating to remedies. First, the Convention was to include a list of minimum remedies, which were to be limited to *in rem* remedies.³⁴ Second, remedies could be set out separately for different types of agreements (security interest, title reservation, lease) in view of conceptual difficulties.³⁵ Third, the Convention was not supposed to preclude the use of other remedies chosen by the parties.³⁶ Fourth, possible Convention remedies could include

²⁹ See, eg, *ibid* 45; paragraph 5 in Unidroit, *Security Interests Study Group Sub-committee 1st session Misc. 3 Add. (1994)* 2.

³⁰ A possible explanation for this decision is that the Drafting Group viewed the preceding discussions of the First Draft Subcommittee as inconclusive and lacking sufficient guidance. For example, the discussions of the subcommittee on remedies concluded with a warning to ‘avoid reference to recovery of possession’, which was not allowed in Civil law jurisdictions – see paragraph 6(xviii) in Unidroit, *Study LXXII - Doc. 12 (1994)* 6. On the other hand, the same subcommittee did end up formulating a solution ‘in terms of the secured party’s right to look to the equipment for satisfaction of the debt and...to have the equipment realised and the proceeds applied towards satisfaction of the debt’ – see *ibid*. It is thus conceivable that the Drafting Group simply decided to postpone formulating the remedy provisions until a later draft.

³¹ See Article 5 in Unidroit, *Study LXXII - Doc. 13 (1994)* 4.

³² The plans for the introduction of such rules were clearly contemplated by the earlier session of the First Draft Subcommittee – see paragraph 6(xvi) in Unidroit, *Study LXXII - Doc. 12 (1994)*.

³³ See, eg, Unidroit, *Study LXXII - Doc. 14 Add 1 (1994)* 1; Unidroit, *Study LXXII - Doc. 14 (1994)* 3.

³⁴ See paragraph 10(xii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 6.

³⁵ *ibid*.

³⁶ See paragraphs 10(xiii) and 10(xviii) in *ibid* 6-7.

self-help repossession, judicial sale and judicially supervised sale.³⁷ Fifth, the Convention enforcement provisions could not apply in the absence of ‘a genuinely foreign element’.³⁸ Later the same year most of these conclusions³⁹ were reflected in the subsequent draft of the CTC, which for the first time included a dedicated Chapter IV on remedies entitled ‘Effects of an International Interest as Between the Parties’.⁴⁰

This new chapter essentially formed the early prototype of the present-day enforcement provisions in the Convention. It included separate remedies for the secured party under a security agreement (taking possession and sale or lease of the object on reasonable terms) (Article 6(1))⁴¹ and for the lessor or seller under a title reservation agreement (Article 7(1)),⁴² an option for the transfer of ownership over the collateral to the secured party in satisfaction of its claims (Article 6(2))⁴³ and for the voluntary redemption of the collateral by the debtor (Article 6(3)),⁴⁴ as well as provisions permitting the parties to agree on any additional remedies (Articles 6(4) and 7(2)).⁴⁵ No rules on advance relief (currently found in Article 13 of the CTC) were envisaged at that stage – the development of these rules is analysed separately in section 5.2.3.

At the same time, the draft had one distinct feature that warrants a deeper look. The entire Chapter IV applied on a party ‘opt-in’ basis, meaning that each of the basic

³⁷ See paragraph 10(xiv) in *ibid* 6.

³⁸ See paragraph 10(xvi) in *ibid*.

³⁹ The idea of internationality was left out.

⁴⁰ Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

⁴¹ cf Article 8 of the CTC.

⁴² cf Article 10 of the CTC.

⁴³ cf Articles 9(1)-(2) of the CTC.

⁴⁴ cf Article 9(4) of the CTC.

⁴⁵ cf Article 12 of the CTC.

Convention remedies required a corresponding agreement of the parties and was not available to the financier by default.⁴⁶ This issue is examined in section 5.2.2.

5.2.2 *Convention remedies: party opt-in or opt-out?*⁴⁷

By mid-1995 it was already clear that the future Convention would include substantive rules governing enforcement, listing certain minimum remedies available to financiers.⁴⁸ The mode of application of these rules, however, was subject to interesting debate. The decision of the Drafting Group to make all remedy provisions exercisable only following an agreement of the parties⁴⁹ was approved during the subsequent meeting of the First Draft Subcommittee, which confirmed that ‘parties would have to opt into, as opposed to being required to opt out of’ the relevant rules.⁵⁰ The subcommittee’s intention was relatively straightforward: to leave parties ‘free to choose whatever rules they wished to govern their relations *inter se*’.⁵¹

It did not take long, however, before the Drafting Group changed its view on the same provision it had originally proposed: what had previously been drafted as an ‘opt-in’ provision was reformulated as two alternatives. Alternative I essentially reflected the previous version of Article 4, whereas Alternative II turned the provision on its head by giving Convention remedies direct application, subject only to an agreement of the parties to the contrary (ie ‘opt-out’): ‘The parties may agree in writing to exclude, wholly

⁴⁶ See Article 4 in Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

⁴⁷ This should not be confused with state opt-in and opt-out, ie ability of contracting states to apply or disapply a certain optional provision. The Convention and its protocols tackle these by means of a system of declarations – see n 153 in section 7.2 and the corresponding discussion. In the context of remedies, the key declarations are listed in Articles 54 and 55 and, on the one hand, give contracting states the freedom not to apply certain remedies (Articles 54(1), 55), while, on the other hand, requiring clarity from participating countries as to whether self-help remedies are exercisable without leave of court (Article 54(2)).

⁴⁸ See paragraph 10(xii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 6.

⁴⁹ See Article 4 in Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

⁵⁰ See paragraph 12 in Unidroit, *Study LXXII - Doc. 21 (1995)* 7.

⁵¹ See paragraph 16 in *ibid* 8 (emphasis in the original).

or in part, any right or remedy conferred on the chargee, seller or lessor by this Chapter'.⁵²

While there was no unanimity among the commentators in favour of either option,⁵³ the subsequent session of the Study Group approved the 'opt-out' version of the article, citing the importance of avoiding a 'legal vacuum' in situations when parties have for some reason failed to reach an agreement on specific remedies.⁵⁴ There is little doubt that this decision was influenced by the position of the aviation industry reflected in Article 6(1) of the Draft Aviation Text proposed by the AWG, which followed the 'opt-out' route:

The parties may agree in writing to exclude, wholly or in part, any rights conferred on the chargee, seller or lessor, security assignment assignee, assignee, transferee, engine rights grantee [*sic*] by this Chapter.⁵⁵

The following draft of the Convention essentially reproduced, almost word for word, Alternative II cited above, subject only to minor technical changes.⁵⁶ On its face, nothing changed in terms of the ability of the financier to pressure the debtor into a creditor-friendly agreement. A deeper look, however, shows that this is not quite true. The reason for this lies in a fundamental change of approach envisaged during the second session of the Study Group in 1996, which agreed that the draft Convention 'should...incorporate a general rule providing that the remedies exercisable by the chargee...were to be exercised in a commercially reasonable manner'.⁵⁷ Despite the opposition from the

⁵² See Article 7 in Unidroit, *Study LXXII - Doc. 22 (1996)*. See also paragraph in *ibid* ii.

⁵³ cf the views of the Banking Federation of the European Union in Unidroit, *Study LXXII - Doc. 26 (1996)* 4 and the preference for the 'opt-in' version by Peter Nesgos and Shiva Falsafi in Unidroit, *Study LXXII - Doc. 26 Add. 3 (1996)* 2.

⁵⁴ See paragraph 46 in Unidroit, *Study LXXII - Doc. 27 (1996)* 23.

⁵⁵ See Article 6(1) of Annex 1 in Unidroit, *Study LXXII - Doc. 23 (1996)*.

⁵⁶ See Article 13 in Unidroit, *Study LXXII - Doc. 30 (1996)* 13.

⁵⁷ See paragraph 53 in Unidroit, *Study LXXII - Doc. 27 (1996)* 26.

AWG suggesting the removal of restrictions on the exercise of remedies,⁵⁸ the Study Group reasoned that the absence of such general protections for the debtor could ‘constitute an impediment to the willingness of States to agree that self-help remedies should replace remedies exercised through judicial proceedings’,⁵⁹ since Civil law jurisdictions, where self-help was less common, generally relied on courts to protect the interests of other stakeholders and – in cases when self-help was not available – did not provide the corresponding protections known to many Common law countries, such as a duty to obtain the best price and respect the interests of other parties in the collateral. To allow unqualified use of self-help remedies in such jurisdictions would effectively mean leaving the debtor at the mercy of the financier.

In the context of the ‘opt-out’ rule, this change had an important effect (in addition to the obvious extension of scope of debtor protection), which can be demonstrated by comparing the self-help remedies in the different drafts of the Convention prepared in late 1995 and in late 1996. In the earlier draft, the requirement to act reasonably was not treated as a separate duty of the financier, but was ‘built into’ the remedy. In other words, the Convention’s remedy was not the right to ‘sell or grant a lease of an object’ – it was the right to ‘sell or grant a lease of any such object *on reasonable terms*’.⁶⁰ Since parties were free to exclude ‘any right or remedy’⁶¹ (but not a duty), all that was necessary to exclude the debtor protection mechanism was to remove the remedy, as drafted, replacing it with a right to sell or grant a lease of an object (a non-Convention remedy). This would not work in the later draft,⁶² which detached the

⁵⁸ The AWG proposed to delete the words ‘on reasonable terms’, which qualified the remedy of sale or granting a lease of an object – see *ibid.*

⁵⁹ *ibid.*

⁶⁰ See Article 9(1)(c) in Unidroit, *Study LXXII - Doc. 22 (1996) (emphasis added)*.

⁶¹ See Article 7(1) of Alternative II in *ibid.*

⁶² Unidroit, *Study LXXII - Doc. 30 (1996)*.

reasonable enforcement test from the actual remedy (now formulated simply as a right to ‘sell or grant a lease of any...object’),⁶³ turned it into a duty and applied to self-help remedies of the secured party generally.⁶⁴

Formulation of the general restriction on the exercise of remedies had another important effect: it indirectly restricted the scope of party autonomy, which even in the revised version allowed the exclusion of rights or remedies only.⁶⁵ Since Article 8(2) was formulated as an obligation (‘any remedy...*shall* be exercised in a commercially reasonable manner’),⁶⁶ it can be treated as the first substantive restriction on the exercise of party autonomy in respect of remedies (in addition to the straightforward obligation not to exercise other remedies in contravention of the Convention). This restriction was formalised in 1997, when the Drafting Group finally came up with the modern version of the ‘opt-out’ provision, which, instead of permitting parties to exclude rights and remedies only, allowed to ‘derogate from or vary the effect of any of the provisions of the Convention’,⁶⁷ subject to certain mandatory, non-derogable, provisions.⁶⁸

The first (tentative) list of such mandatory provisions was proposed by the Drafting Group in July 1997 and was surprisingly close to the final text of Article 15 of the CTC.⁶⁹ In fact, the only notable changes involve (i) Article 13(2) of the CTC protecting the ‘interested persons’ in cases of issuing advance relief (which protection was not envisaged back in 1997) and (ii) the general requirement that additional

⁶³ See Article 8(1)(b) in *ibid.*

⁶⁴ See Article 8(2) in *ibid.*

⁶⁵ See Article 13(1) in *ibid.*

⁶⁶ See Article 8(2) in *ibid.* (emphasis added).

⁶⁷ See Article 5 in Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*.

⁶⁸ cf Article 15 of the CTC.

⁶⁹ See paragraph 21 in Unidroit, *Study LXXII - Doc. 35 (1997) 5*.

remedies should not be inconsistent with the provisions of the Convention.⁷⁰ While the first of these two changes is relatively straightforward (it emerged only during the governmental expert stage),⁷¹ the documentary history of the CTC does not give a definitive answer as to why the second restriction on party autonomy was removed from the final text. In fact, this limitation on the exercise of additional remedies consistently maintained its mandatory status throughout all the subsequent drafts⁷² preceding the Third Joint Session in 2000, without any major review or documented discussion.⁷³

The report of the Third Joint Session contains absolutely no mention of any discussion of Article 5 (which listed the non-derogable provisions) and virtually no opposition to Article 13 (which stipulated the restriction on the exercise of additional remedies) either.⁷⁴ Nevertheless, the resulting draft prepared at its conclusion, which changed the order of some provisions (including Article 5, which became Article 14, and Article 13, which became Article 11), no longer treated the restriction on the exercise of additional remedies as non-derogable.⁷⁵ A thorough review of all the working papers relating to the Third Joint Session provides an explanation: the *ad hoc* Drafting Group, which had been established after the conclusion of the Second Joint Session to complete

⁷⁰ See Article 13 in *ibid.* Cf Articles 12 and 15 of the final text of the CTC.

⁷¹ See Article 14(2) in Appendix I to Attachment D in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*.

⁷² See Articles 6 and 14 in Unidroit, *Study LXXII - Doc. 37 (1997)*; Articles 6 and 14 in Unidroit, *Study LXXII - Doc. 39 (1998)*; Articles 6 and 14 in Unidroit, *Study LXXII - Doc. 42 (1998)*; Articles 5 and 13 in Appendix I of Attachment D in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*; Articles 5 and 13 in Appendix I of Attachment F in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

⁷³ See paragraphs 37 and 49 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 8; paragraphs 5:8 and 5:19 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)* 5-2.

⁷⁴ See paragraphs 104-105 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 13.

⁷⁵ cf Articles 14 and 11 in Appendix I of Attachment C in *ibid.*

the work left unfinished by the Drafting Committee of that session,⁷⁶ deleted from Article 5 the reference to Article 13,⁷⁷ without any documented explanation and disregarding the fact that both provisions had been previously approved by the delegates without discussion. As a result, the delegates and the Drafting Group at the Third Joint Session were considering the amended version of Article 5 – yet no record of any discussion of this text exists.⁷⁸ The result of these developments can now be found in the final text of the CTC, which – similarly – does not treat Article 12 as non-derogable and, by virtue of Article 15, allows parties to deviate from it by agreement in their relations with each other. Whether or not this change is appropriate is ultimately a matter of policy that could be examined in case of any future revision of the Convention.⁷⁹

In addition to the formulation of mandatory provisions, the general transition to an ‘opt-out’ regime in the application of remedies was affected by another important development: certain remedies were given non-automatic effect, requiring the consent of the financier’s counterparty. This change affected two categories of Convention remedies⁸⁰ – self-help remedies and advance relief⁸¹ – and occurred only at the governmental expert stage, when the results of the work of the Study Group, the APG

⁷⁶ See paragraph 1 in Unidroit, *Unidroit CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2 (2000)* 1.

⁷⁷ See Article 5 in Appendix III to *ibid.*

⁷⁸ The report of the Drafting Group of the Third Joint Session shows that Article 5 was relocated to Article 14 without any substantive changes, except renumbering – see Article 5 in Unidroit, *Unidroit CGE/Int.Int./3-WP/40 ICAO Ref. LSC/ME/3-WP/40 30/03/00 (2000)*.

⁷⁹ See Article 61(2)(d) of the CTC.

⁸⁰ There is, of course, the separate remedy exercisable only upon agreement of both the chargee and the debtor (as well as all interested parties), namely the vesting of the ownership over the relevant object in satisfaction of the secured obligations found in Article 9(1) of the CTC. However, the very concept of this remedy is based on the idea that after default (and not earlier than that) parties agree to transfer the ownership over the asset to extinguish the debt. In other words, for this remedy, agreement of the parties is an inherent element. For this reason, the drafting history of Article 9(1) was relatively straightforward: this type of remedy appeared in the first draft that included remedy provisions and similarly referred to the agreement of the parties (together with its alternative, ie court-ordered vesting of the object, which is now found in Article 9(2) of the CTC) – see Article 6(2) in Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

⁸¹ The development of advance relief provisions is analysed separately in section 5.2.3.

and the SRC were formally discussed at a governmental level. The corresponding amendments to the relevant provisions⁸² were introduced during the First Joint Session, but, surprisingly, had little in common with the discussions held during the plenary and reflected in the actual report of the session. Following one delegation's mention of difficulties expected to accompany the transposition of Convention remedies into national law,⁸³ the governmental experts instructed the Drafting Committee to 'review the question of self-help remedies' and consider whether it would be advisable to introduce the concepts of 'good faith' and 'public order'.⁸⁴ In respect of advance relief, there is no record of a plenary discussion concerning advisability of turning the relevant article (Article 15) into an 'opt-in' provision.⁸⁵ Despite this, the reports of the Drafting Committee show rather different developments. First, the US delegation came up with a proposal to add the requirement of chargor's consent ('if the chargor has so agreed') to the self-help remedy provisions⁸⁶ and later, in a separate submission, to the rules on advance relief ('to the extent the obligor has so agreed').⁸⁷ The intermediate reports of the Drafting Committee of the First Joint Session do not reflect the underlying discussion, but the final report shows that both US proposals were accepted by the Drafting Committee, with minor technical adjustments.⁸⁸

⁸² See Articles 9 and 15 in Unidroit, *Study LXXII - Doc. 42 (1998)* 5, 7.

⁸³ See paragraph 42 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 8.

⁸⁴ See paragraph 44 in *ibid.* The author notes that the words 'public order' are used in the report, but should probably be read as references to the concept of *ordre public*, ie public policy.

⁸⁵ See paragraphs 51-53 in *ibid* 9.

⁸⁶ See Article 9(1) in Unidroit, *Unidroit CGE/Int.Int. ICAO Ref. LSC/ME DC-WP/7 5/02/99 (1999)* 2.

⁸⁷ See Article 15 in Unidroit, *Unidroit CGE/Int.Int. ICAO Ref. LSC/ME DC-WP/10 8/02/99 (1999)* 2.

⁸⁸ See Articles 8(1) and 14(1) in Appendix I to Attachment D in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*.

The proposal of governmental representatives to consider the introduction of the concepts of ‘good faith’ and ‘public order’⁸⁹ is a clear indication of the need to address state sensitivities, such as debtor protection and preservation of public interests. The introduction of the ‘opt-in’ element in the application of self-help remedies and advance relief certainly goes some way towards achieving the former (although not as strongly as the mandatory restrictions on the exercise of creditor’s authority),⁹⁰ but does little (if anything) to address the latter (ie broader public policy concerns). Nevertheless, this change was not challenged in the subsequent meetings of governmental experts and was retained in the final text of the CTC.⁹¹

As a result, the Convention remedy rules underwent significant transformation during the development of the CTC: from being entirely optional provisions (party ‘opt-in’), to becoming available generally absent party agreement to the contrary (party ‘opt-out’), with some instruments (self-help and advance relief) available only with the consent of the debtor (partial party ‘opt-in’).⁹²

5.2.3 *Advance relief*

One of the biggest transformations in the history of the remedy provisions relates to the Convention rules on advance relief, which can now be found in Article 13 of the CTC. Their origins go back to 1995, when the AWG proposed setting up strict time frames for national courts to issue ‘non-appealable, final decisions’ in respect of remedies: 5 days for the ‘grounding’ of aircraft and 30 days for repossession by the financier or judicially

⁸⁹ See paragraph 44 in *ibid* 8.

⁹⁰ cf Article 8(3) of the CTC.

⁹¹ See Articles 8(1) and 13(1) of the CTC.

⁹² It is noted that all the remedies found in the protocols to the CTC, except remedies on insolvency, also follow the party ‘opt-in’ route: see Articles IX(1) and X(3) of the Aircraft Protocol, Articles VII(1) and VIII(3) of the Rail Protocol, Article XX(2) of the Space Protocol; Article VIII(1) of the draft MAC Protocol in Unidroit, *Study 72k - CGEI - Doc. 2 corr. (2017)* 8.

supervised sale of the same.⁹³ The need for prompt access to the asset in case of default was considered so important by the AWG, that this proposal was part of the so-called ‘core’ provisions, which were expected to apply on a mandatory basis by each contracting state:⁹⁴ without such rules the future Convention, it was believed, would provide ‘a theoretical right which lacks utility’.⁹⁵ Shortly afterwards, having received comments on its original memorandum, the AWG acknowledged the overly ambitious character of its initial proposal and agreed to make the rules on time limits for the Convention’s remedies optional, ie applicable only after separate enactment by the state which has decided to opt into this regime.⁹⁶

In its second memorandum, the AWG extended its proposal on mandatory time frames to cover (i) judicial proceedings relating to the ability of the financier to take possession of collateral (5 working days), (ii) judicial proceedings relating to any other claim under the Convention (30 days),⁹⁷ repossession in the context of insolvency proceedings (30 days)⁹⁸ and deregistration of aircraft by the aviation authorities, as well as export and removal of the object from the jurisdiction upon default (7 days).⁹⁹ The first three scenarios were scrutinised by the Study Group during its second session in

⁹³ See paragraph 5.1 in Unidroit, *Study LXXII - Doc. 16 (1995)* 16-17.

⁹⁴ *ibid* 6.

⁹⁵ *ibid* 17.

⁹⁶ Unidroit, *Study LXXII - Doc. 19 Add. 4 (1995)* 1.

⁹⁷ See Articles 13(1)-(2) and 31(2)(a)(iii) of the Draft Aviation Text in Annex 1 to Unidroit, *Study LXXII - Doc. 23 (1996)*. The author notes that these provisions were drafted by the AWG as ‘opt-out’, rather than ‘opt-in’ rules: contracting states could disapply the relevant rules by virtue of corresponding ‘reservations’.

⁹⁸ See Articles 14(a)(i) and 31(2)(a)(iv) in *ibid*. This provision was clearly modelled after Section 1110 of the US Bankruptcy Code: this was subsequently acknowledged in Unidroit, *Study LXXII - Doc. 27 (1996)* 40.

⁹⁹ See Article 23(2)(b) in Unidroit, *Study LXXII - Doc. 23 (1996)*. Unlike Articles 13 and 14, this provision was drafted as not permitting state ‘reservations’ – see Article 31 in *ibid*. In this respect, the subsequent comment by the AWG labelling all the timing provisions as ‘optional’ is inaccurate – cf Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 3.

1996, which immediately noted the difficulties¹⁰⁰ with the practical implementation of strict time limits by national courts and sought an alternative method to address the AWG concerns that would be ‘perceived as somewhat lighter from the point of view of their potential interference with the sensitivities of States’.¹⁰¹ In seeking such method, the Study Group reasoned that, instead of having to adjudicate on the merits of the case (outside insolvency proceedings), courts could be relied on to provide ‘interim relief or similar protective measures’ reflecting two fundamental elements: (i) the ability to have the asset held in one place under judicial supervision and (ii) the power of the court to appoint a receiver to realise the value of the asset.¹⁰²

In response to this new solution, which immediately gained broad support of the Study Group (but not of the AWG, which initially reserved its position on this matter¹⁰³), the Drafting Group made the first attempt to craft an appropriate solution by introducing a new article giving the financier a new remedy in the form of ‘speedy provisional or interim judicial relief’.¹⁰⁴ At the time, the draft Convention was still conceived as a single instrument, incorporating certain aircraft-specific provisions.¹⁰⁵ This changed very soon, when the AWG and IATA proposed the umbrella structure for the treaty,¹⁰⁶ which created an excellent opportunity for the AWG to reassert its requirement of strict time frames on various proceedings: it accepted the Drafting Group’s solution as part of the

¹⁰⁰ In addition to the obvious state sensitivities, some commentators noted that mandatory time frames for courts were not practicable generally, given the ‘general absence of any enforcement system to deal with judges and court officers who ignore the legally-specified timetable’ – see paragraph 73 in Unidroit, *Study LXXII - Doc. 26 Add. 2 (1996)* 20-21.

¹⁰¹ See paragraph 95 in Unidroit, *Study LXXII - Doc. 27 (1996)* 41.

¹⁰² See paragraph 96 in *ibid.*

¹⁰³ See paragraph 97 in *ibid.*

¹⁰⁴ See Article 15 in Unidroit, *Study LXXII - Doc. 30 (1996)* 14.

¹⁰⁵ See draft Chapter X ‘Special Provisions for Aircraft Property’ in *ibid.* 22.

¹⁰⁶ See section 4.2. The Drafting Group convened on 23-24 October 1996, while the AWG/IATA proposal was received by UNIDROIT on 16 December 1996. Cf paragraph 1 in *ibid.* 1 and Introduction in Unidroit, *Study LXXII - Doc. 32 (1996)* 1.

base Convention, but insisted on having a maximum period of 30 days for the relevant proceedings relating to the equipment in the aircraft-specific protocol.¹⁰⁷ Most importantly, however, the AWG and IATA accepted the distinction between ‘judicial proceedings *relating to the asset* on the one hand, and judicial proceedings *relating to the ultimate liability*, on the other’.¹⁰⁸ The thirty-day limit proposed for the future protocol was directed at the former and did not purport to represent the time required to determine the final liability of the parties. The AWG/IATA were also the first ones to stress the *sui generis* nature of the interim measures envisaged in the draft, distinct from ‘traditional notions of injunction relief and the particular national standards associated therewith’.¹⁰⁹

The scope of advance relief found in Article 13 of the CTC took years to crystallise in its current form. The first draft included four measures: (i) preservation of the object, (ii) possession, custody or management of the object, (iii) sale of the object and (iv) immobilisation of the object.¹¹⁰ The AWG and IATA soon added the fifth option: application of proceeds or retention of income resulting from the sale or lease of the object.¹¹¹ With technical amendments and revisions (including the addition of lease to the ‘sale’ option), these five measures remained in all the subsequent drafts of the Convention preceding the governmental expert stage.¹¹² Despite this continuity, this combination was the subject of significant criticism from various commentators for

¹⁰⁷ Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 3.

¹⁰⁸ *ibid* (emphasis in the original).

¹⁰⁹ *ibid* 12. The *sui generis* nature of advance relief is confirmed in the Official Commentaries – see, eg, paragraph 2.104 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 70.

¹¹⁰ See Article 15 in Unidroit, *Study LXXII - Doc. 30 (1996)* 14.

¹¹¹ See Article 15(3)(d) in Appendix to Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)*.

¹¹² See Article 14(2) in Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*; Article 14(2) in Unidroit, *Study LXXII - Doc. 35 (1997)*; Article 13(1) in Unidroit, *International Interests Study Group 4th session Misc. 5 (1997)*; Article 15(1) in Unidroit, *Study LXXII - Doc. 37 (1997)*; Article 16(1) in Unidroit, *Study LXXII - Doc. 39 (1998)*; Article 15(1) in Unidroit, *Study LXXII - Doc. 42 (1998)*.

treating sale and lease of collateral in the same way as other, essentially ‘conservatory’ measures aiming to preserve the *status quo* pending the final determination of the claim.¹¹³ The same criticism was raised by the governments,¹¹⁴ but it was not until the Third Joint Session in 2000 that the opposition raised a major discussion warranting amendment of the underlying provision. To address this issue, the governmental experts convened a dedicated working group (consisting of representatives of Canada, France, Japan, Singapore and Sweden and attended by the AWG), which reached a consensus in recommending the removal of sale and the application of proceeds from the baseline Convention rules on advance relief and placing them into the draft Aircraft Protocol as an optional provision to which contracting states could ‘opt in’.¹¹⁵ These rebalancing changes explain the interplay between Article 13(1) of the CTC and Articles X(1), (3) of the Aircraft Protocol: the most intrusive measures became subject to non-automatic application requiring express state approval in the first place (as opposed to passive non-objection in the case of ‘basic’ forms of advance relief).¹¹⁶

As history tends to sometimes repeat itself, so was the case with the time limits for court-sanctioned remedies in the Convention, when in the course of the Third Joint Session the US delegation came up with a proposal for a new provision for inclusion in the draft Aircraft Protocol, which stated in its first paragraph:

A Contracting State shall ensure that judicial proceedings relating to the remedies under the Convention will be completed within the period set forth in a declaration to this Protocol.¹¹⁷

¹¹³ See paragraphs 130, 131, 133 in Unidroit, *Study LXXII - Doc. 36 (1997)* 32; see also Unidroit, *Study LXXII - Doc. 44 (1998)* 3.

¹¹⁴ See, eg, paragraph 5:21 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)* 5-4.

¹¹⁵ See Unidroit, *Unidroit CGE/Int.Int./3-WP/24 ICAO Ref. LSC/ME/3-WP/24 (2000)*.

¹¹⁶ cf Article X (‘Declarations regarding relief pending final determination’) in Appendix I to Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* and Article X(1) in Appendix II to Attachment C in *ibid*.

¹¹⁷ See Unidroit, *Unidroit CGE/Int.Int./3-WP/25 ICAO Ref. LSC/ME/3-WP/25 (2000)*.

This provision, which effectively put to the test the discussions within the Study Group back in 1996 that gave birth to the rules on advance relief in the first place, was summarily dismissed by the governmental representatives as ‘highly controversial’.¹¹⁸ It will be recalled that the AWG and IATA previously supported the idea of limiting the time during which the protective measures could be issued.¹¹⁹ Indeed, the early drafts of the Aircraft Protocol incorporated such a provision,¹²⁰ but the more the negotiations progressed, the more watered-down version of the corresponding article emerged as a result. At the conclusion of the First Joint Session, the fixed time frame of 30 days was replaced with an empty placeholder reference (‘not exceeding [...] calendar days’), and the whole provision was put into square brackets.¹²¹ By the start of the Third Joint Session, even the placeholder provision was removed and replaced with reference to the number of days specified in a declaration made by a contracting state, thus eliminating any attempt for the draft Aircraft Protocol to impose the time limits on domestic proceedings affecting advance relief (while still leaving the whole provision in square brackets).¹²²

Bearing in mind these developments and the fact that neither of the earlier drafts of the Aircraft Protocol ever attempted to establish time limits outside advance relief proceedings, it is no wonder that the US proposal to reintroduce a hard cap on the timing of all domestic judicial proceedings was met with such a strong opposition during the Third Joint Session. Even though this proposal was firmly rejected, it was instrumental in

¹¹⁸ See paragraph 118 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 14.

¹¹⁹ See n 107.

¹²⁰ See, eg, Article XVIII(1) in Unidroit, *Study LXXIID - Doc. 1 (1998)* and Article X(1) in Unidroit, *Study LXXIID - Doc. 3 (1998)*.

¹²¹ See Article X(1) of Appendix II to Attachment D in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*.

¹²² See Article X in Appendix IV to Unidroit, *Unidroit CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2 (2000)*.

testing the limits of state sensitivities: while disagreeing with the overly ambitious scope of the US proposal, several delegations nevertheless expressed their preparedness to accept the time limits, on the understanding that the provision would apply only subject to express consent by the states.¹²³ It is conceivable that the final decision to open the square brackets around the article¹²⁴ dedicated to the time limits for advance relief proceedings was influenced a great deal by the US initiative to go above and beyond the (then) existing draft.

5.2.4 *Achieving a balance of interests of parties in remedy provisions*

The challenges in drafting the remedy provisions of the CTC were not limited to finding the most appropriate enforcement provisions and determining the limits of party autonomy: of no less importance was the need to carefully consider the needs of all the stakeholders, stressing how vital it was ‘as a matter of general policy for the rules of the future Convention to be perceived as reflecting a balance between the interests of all the parties concerned’.¹²⁵ The instruments used to achieve this balance in the final text of the Convention are many and include mechanisms protecting not only the debtor (eg the obligation to exercise remedies in a commercially reasonable manner in Article 8(3) or the definition of ‘default’ in Article 11), but other creditors as well (eg the rules on redistribution of surplus among holders of subsequently ranking interests in Article 8(6) or the concept of ‘interested persons’ in Article 1(m) protecting the providers of credit insurance and other holders of rights in the collateral). Due to constraints of the thesis, this section will focus on two of such instruments that took longest to crystallise in their final form.

¹²³ See paragraph 119 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 14.

¹²⁴ See paragraph 121 in *ibid.*

¹²⁵ See paragraph 94 in Unidroit, *Study LXXII - Doc. 27 (1996)* 40.

5.2.4.1 Duty to exercise remedies in a commercially reasonable manner

From the historical perspective, the test of ‘reasonableness’ was the first restriction on the exercise of remedies to appear in the draft Convention. Its initial purpose was very limited: to restrict the ability of the secured party to sell and lease the collateral under a security agreement.¹²⁶ As was noted in section 5.2.2,¹²⁷ the test was subsequently transformed into a standalone restriction on the exercise of all non-judicial remedies of the chargee generally.¹²⁸ This decision, however, was preceded by a proposal by the AWG to delete the words ‘on reasonable terms’,¹²⁹ on the basis that they ‘were unclear and could lead to litigation.’¹³⁰ A better solution, according to the AWG, was to include a general reference to the terms of the underlying security agreement (‘to the extent and on the terms set forth in the security agreement’).¹³¹ Despite this, the Study Group reasoned that the absence of a relevant restriction on the exercise of remedies would be a serious impediment to the willingness of states to agree to self-help remedies, particularly from the point of view of Civil law jurisdictions, which relied on courts to balance the interests of various parties concerned.¹³² Interestingly, while the test of ‘reasonableness’ was considered appropriate for this role, another possible solution – the duty of the chargee to act in good faith – was not.¹³³ As a compromise, the proposal of the AWG to

¹²⁶ See Article 6(1)(b) in Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

¹²⁷ See n 66 and the corresponding discussion.

¹²⁸ See Article 8(2) in Unidroit, *Study LXXII - Doc. 30 (1996)* 11.

¹²⁹ See Article 8(1) of the Draft Aviation Text in Annex 1 to Unidroit, *Study LXXII - Doc. 23 (1996)*.

¹³⁰ See paragraph 53 in Unidroit, *Study LXXII - Doc. 27 (1996)* 26.

¹³¹ See Article 8(1) of the Draft Aviation Text in Annex 1 to Unidroit, *Study LXXII - Doc. 23 (1996)*.

¹³² See n 59.

¹³³ See paragraph 53 in Unidroit, *Study LXXII - Doc. 27 (1996)* 26. In the view of the Study Group, a ‘good faith’ requirement ‘would lead to uncertainty’. The author notes, however, that this argument is hardly convincing, since the same critique, as will be shown later, can be directed at the test of ‘reasonableness’ with equal force.

refer to the terms of the underlying agreement was also incorporated in the revised draft, this time not as alternative to the test of reasonableness, but as its part.¹³⁴

The compromise suggested by the Study Group, nonetheless, did not satisfy the AWG, which soon returned, in tandem with IATA, with a strong critique of such approach, adding two new arguments against the test of ‘reasonableness’: (i) its interpretation would vary widely between jurisdictions and (ii) it could be used to justify preferential court treatment of nationals in cross-border litigation.¹³⁵ Essentially, the AWG reasserted its earlier position, but the tone of its argument shifted slightly: this time, it acknowledged the possibility of including general restrictions on the exercise of remedies. The suggested restrictions would take two forms: (i) a mandatory notice period for the exercise of non-judicial sale and (ii) any other limitations on the ability of the parties to agree on the method for the exercise of remedies.¹³⁶

The uncertainties underlying the concept of ‘reasonableness’ were soon emphasised by various commentators, who characterised it as introducing ‘an element of subjectivity’¹³⁷ and even as having ‘no meaning either for lawyers from Civil law countries or for lawyers engaged in international commercial law’.¹³⁸ Mooney and Whalen came up with an alternative solution to strengthen the reference to the agreement of the parties, which would be conclusive ‘unless manifestly unreasonable’.¹³⁹ This odd transformation of one reasonableness test into another implied more deference to party autonomy, effectively allowing court interference only in the more extreme cases, but

¹³⁴ See Article 8(2) in Unidroit, *Study LXXII - Doc. 30 (1996)*. The relevance of the party agreement was fairly weak, as courts were merely expected to ‘have regard’ to the terms of the agreement.

¹³⁵ Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 9.

¹³⁶ *ibid* 10.

¹³⁷ See paragraph 83 in Unidroit, *Study LXXII - Doc. 36 (1997)* 24.

¹³⁸ See paragraph 82 in *ibid*.

¹³⁹ See paragraph 81 in *ibid*.

did not solve the problem at its core: in one form or another, the test of ‘reasonableness’ remained. Nonetheless, the draft produced following the fourth session of the Study Group in 1997 reflected this approach.¹⁴⁰

An interesting change occurred after the transition to the umbrella structure of the Convention: the APG, which was initially responsible for the preparation of the draft Aircraft Protocol, concluded that the test of reasonableness should apply not only in the case of remedies exercised under security agreements, but also in respect of conditional sale and leasing agreements – at least in relation to aircraft objects.¹⁴¹ This idea was supported by the Chairman of the SRC, Roy Goode, who removed the corresponding provision from the article addressing remedies of chargee under the security agreement and included it in the draft as a standalone restriction applicable to all Convention remedies.¹⁴² The change was, however, quickly reverted by the SRC, which felt that its mandate did not permit interference with the substance of provisions established previously by the Study Group and left the matter for consideration of the governmental experts, recalling that the approach envisaged by the draft Aircraft Protocol had previously been met with ‘fierce opposition’ from the leasing circles on the ground that the lessor – as owner of the relevant asset – should be allowed to ‘do whatever he liked with that asset’ in jurisdictions which did not treat leases as security interests.¹⁴³ This decision marked the separation of different approaches taken by the Convention and its protocols in addressing the test of ‘reasonableness’. Another difference stemmed from the fact that the early drafts of the Aircraft Protocol got rid even of the residual test of ‘manifest unreasonableness’ qualifying the ability of the parties to agree on rules of

¹⁴⁰ See Article 9(2) in Unidroit, *Study LXXII - Doc. 37 (1997)*.

¹⁴¹ Unidroit, *Study LXXII - Doc. 40 (1998)* 15.

¹⁴² See Article 15 in Unidroit, *Study LXXII - Doc. 39 (1998)*.

¹⁴³ See paragraphs 28, 94 and 117 in Unidroit, *Study LXXII - Doc. 41 (1998)* 13, 25, 29.

enforcement, as suggested by Mooney and Whalen and reflected in the draft CTC: the protocol treated party agreement as conclusive.¹⁴⁴

Overall, the draft Convention and the Aircraft Protocol reached the governmental stage in an odd state: in an attempt to restrain the enforcement powers of the financier, they relinquished the challenging concept of good faith by replacing it with the notion of party autonomy, restricted by the test of ‘manifest unreasonableness’ in one case and the idea of ‘public order’ in the other. Neither option provided a conclusive solution devoid of uncertainty, making it sometimes difficult to tell which solution makes more practical sense. This is best illustrated by the results of deliberations during the First Joint Session, where the governmental experts instructed the Drafting Committee to consider ‘whether the concept of “good faith” should be inserted instead of that of “a commercially reasonable manner”’.¹⁴⁵

The sensitivities involved in balancing the interests of various parties reached their peak during the Third Joint Session, when the ICAO Secretariat presented its paper on ‘remedies and interim relief’.¹⁴⁶ The paper was a radical attempt to influence the enforcement regime under the Aircraft Protocol that extended well beyond the safeguards envisaged by the Convention. First, it deleted references to the conclusive nature of party agreement relating to enforcement. Second, it included a duty of the creditor to ‘have due regard of all relevant circumstances’ when determining commercial reasonableness. Third, it entitled the debtor to claim compensatory damages in court in case of losses resulting from the exercise of remedies provided by the Convention or the

¹⁴⁴ See Article IX(3)(b)(2) in Unidroit, *Study LXXIID - Doc. 3 (1998)* 8. To address political sensitivities, the draft Aircraft Protocol limited the enforcement by prohibiting the taking of possession or control over collateral in a manner contrary to ‘public order’ – see Article IX(3)(b)(3) in *ibid*.

¹⁴⁵ See paragraph 45 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 8.

¹⁴⁶ See Unidroit, *Unidroit CGE/Int.Int./3-WP/12 ICAO Ref. LSC/ME/3-WP/12 (2000)*.

Aircraft Protocol.¹⁴⁷ Despite some limited support, the ICAO proposal was not reflected in the subsequent drafts.

Overall, the three sessions of governmental experts produced inconclusive results. On the one hand, the only material change in the Convention related to the scope of the ‘reasonableness’ test, which now applied to advance relief measures, in addition to self-help remedies of the chargee.¹⁴⁸ This change, however, had little practical effect, since the Aircraft Protocol displaced the Convention rules anyway, extending the ‘reasonableness’ test to the exercise of all remedies.¹⁴⁹ On the other hand, the Aircraft Protocol ultimately strengthened the role of party autonomy by getting rid of any of its restrictions, first, by replacing the duty to observe public order with references to the exercise of remedies by lawful means¹⁵⁰ and, second, by removing references to the latter at the conclusion of the Third Joint Session.¹⁵¹ Thus, the draft protocol had the potential of reaching both goals at once: (i) extending the scope of the reasonableness test to all remedies and (ii) ensuring that agreement of the parties as to the scope of this test is not challenged.

This changed during the Cape Town Diplomatic Conference, where a number of delegations (South Africa, Jamaica, Kenya, India) strongly opposed the idea that party

¹⁴⁷ *ibid* 6.

¹⁴⁸ cf Article 9(2) in Unidroit, *Study LXXII - Doc. 42 (1998)* and Article 7(2) in Appendix I of Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

¹⁴⁹ See Article IX(3) in Appendix II of Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

¹⁵⁰ cf Article IX(3)(b)(3) in Unidroit, *Study LXXIID - Doc. 3 (1998)* and Article IX(3)(b)(3) in Appendix II of Attachment F in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

¹⁵¹ See Article IX(3)(b) in Appendix II of Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

agreement should control without any qualification.¹⁵² As a result, the corresponding provision in the draft Aircraft Protocol was referred to the Drafting Committee, which found no better solution than to reproduce the same restriction that already existed in the text of the Convention (ie ‘manifest unreasonableness’). The test of ‘reasonableness’ thus went full circle, as the protocol lost its (previously) defining feature: unlimited party autonomy in determining the manner of enforcement. Nevertheless, the Aircraft Protocol still extended the scope of the ‘reasonableness’ restriction to all the remedies – a decision that was subsequently reproduced in every other adopted protocol.¹⁵³ The current draft of the MAC Protocol suggests a high probability of the same outcome in respect of mining, agricultural and construction equipment.¹⁵⁴

5.2.4.2 Meaning of ‘default’

The concept of ‘default’ appeared in the draft Convention together with the first provisions on remedies as a trigger for their exercise and was closely linked to the idea of party autonomy: even the draft articles in 1995 allowed parties to agree as to what events give rise to the enforcement rules of the treaty.¹⁵⁵ The idea of party agreement regarding the meaning of ‘default’ was never the subject of any substantial criticism,¹⁵⁶ which cannot be said about the application of the term when the parties have chosen to remain silent.

¹⁵² Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 824-829.

¹⁵³ See Article VII(3) of the Rail Protocol and Article XVII(1) of the Space Protocol.

¹⁵⁴ See Article VIII(3) in Unidroit, *Study 72k - CGE1 - Doc. 2 corr. (2017)*.

¹⁵⁵ See Article 5 in Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

¹⁵⁶ In fact, the scope of party autonomy was broadened further, by allowing parties to agree that events other than default may give rise to the Convention remedies – see paragraph 56 in Unidroit, *Study LXXII - Doc. 27 (1996)* 27.

At its second session held in 1996, the Study Group labelled the default provisions as ‘draconian’, as the existing draft permitted enforcement following any default whatsoever, however small or brief.¹⁵⁷ Two solutions were considered as necessary to ‘ensure...the fair and balanced character’ of the draft Convention: (i) introduction of the element of ‘materiality’ and (ii) incorporation of a provision giving the defaulting party a reasonable opportunity to remedy the default before the enforcement rules apply with full force. The Study Group relied on two existing international treaties for inspiration: the CISG, which permits avoidance of the contract by the buyer or the seller in case of a ‘fundamental breach’¹⁵⁸ or following the failure to perform the obligation within a reasonable time period fixed by the counterparty,¹⁵⁹ and the Financial Leasing Convention, which allows termination of the leasing contract in the event of ‘substantial default’¹⁶⁰ and requires the lessor to give the lessee ‘a reasonable opportunity of remedying the default’ before termination.¹⁶¹ The Drafting Group’s response to the guidance from the Study Group was laconic: it borrowed the ‘substantial default’ concept from the Financial Leasing Convention and introduced a new (undefined) concept of ‘persistent default’.¹⁶² The latter does not appear as analogous to the grace period provisions of the above two conventions, as it is not based on the right or duty of the financier to give the defaulting party an opportunity to cure the breach – instead, it signals a degree of longevity of the violation.

The obvious problem with the new ‘twin’ elements resulted from the applied drafting technique, which made the default criteria concise, but also abstract. As a result,

¹⁵⁷ See paragraph 56 in *ibid.*

¹⁵⁸ See Articles 49(1)(a) and 64(1)(a) of the CISG.

¹⁵⁹ See Article 49(1)(b) and 47(1); Articles 64(1)(b) and 63(1) of the CISG.

¹⁶⁰ See Article 13(2) of the Financial Leasing Convention.

¹⁶¹ See Article 13(5) of the Financial Leasing Convention.

¹⁶² See Article 11(1) in Unidroit, *Study LXXII - Doc. 30 (1996)* 13.

a very serious breach lasting only a moment could trigger the enforcement provisions, just like a minor technical omission persisting for a long period. Of course, these matters were routinely handled in commercial contacts using various techniques, such as the notion of ‘continuing’ default, which permits the use of remedies only insofar as the breach has not been remedied by the counterparty. However, as was noted earlier, the new default criteria were meant to deal with situations when the parties failed to agree as to what constitutes a default beforehand.

Failure to acknowledge the uncertainty resulting from any attempt to qualify the term ‘default’ using abstract criteria resulted in a series of unfortunate changes with little practical effect. First, following critique by Charles Mooney and Thomas Whalen,¹⁶³ the Drafting Group replaced the two alternative characteristics of default (‘substantial’ and ‘persistent’) with a single one (‘material’).¹⁶⁴ This change, in turn, triggered even more criticism from commentators, who stressed the insufficient clarity of the new term¹⁶⁵ and enquired whether ‘material default’ had the same meaning as ‘fundamental breach’ under the CISG and ‘fundamental non-performance’ under UPIC¹⁶⁶ and PECL.¹⁶⁷ As a result, the reference to ‘material default’ was replaced with ‘substantial default’ at the

¹⁶³ Unidroit, *Study LXXII - Doc. 32 Add. 3 (1997)* 5.

¹⁶⁴ See Art. 11(2) in Unidroit, *Study LXXII - Doc. 35 (1997)*.

¹⁶⁵ See paragraph 108 in Unidroit, *Study LXXII - Doc. 36 (1997)* 28.

¹⁶⁶ Article 7.3.1(1) of UPIC 1994 reads: ‘A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance’.

¹⁶⁷ Article 8.103 (previously Article 3.103) defines ‘fundamental’ non-performance. See paragraph 107 in Unidroit, *Study LXXII - Doc. 36 (1997)* 28.

conclusion of the fourth session of the Study Group in 1997,¹⁶⁸ clearly with no improvement in terms of clarity.¹⁶⁹

The only meaningful attempt to resolve the ‘default’ conundrum during the governmental expert stage took place during the Third Joint Session, when the plenary discussed the ICAO proposal to qualify this term by limiting default, first, to the non-fulfilment of a ‘primary obligation’ and, second, to instances of breach of payment obligations in the case of leases or sales involving payments by instalment.¹⁷⁰ The proposal was rejected by the delegates, which nonetheless agreed to adjust the definition of ‘default’: as if in an attempt to pick every possible combination of various abstract terms, it was agreed to bring back the ‘materiality’ criterion, this time not as replacement for the word ‘substantial’, but as a standalone trigger of the enforcement provisions.¹⁷¹ As a result, throughout the years the term ‘default’, which first appeared without any clarification, was qualified by a whole array of various criteria in different combinations: (i) ‘substantial or persistent’, (ii) ‘material’, (iii) ‘substantial’ and (iv) ‘substantial or material’.

For reasons that are not evident from the documentary history alone, the Drafting Committee nonetheless did not incorporate the decision of the plenary into the draft submitted to the Cape Town Diplomatic Conference, which simply read: ‘In the absence of such an agreement, “default” ... means a substantial default’.¹⁷²

¹⁶⁸ See Article 12(2) in Unidroit, *Study LXXII - Doc. 37 (1997)*.

¹⁶⁹ Prior to the start of governmental consultations, the Australian government submitted comments requesting more guidance ‘on what type of default would be regarded as “substantial”’ – see Unidroit, *Study LXXII - Doc. 44 (1998)* 3.

¹⁷⁰ Unidroit, *Unidroit CGE/Int.Int./3-WP/12 ICAO Ref. LSC/ME/3-WP/12 (2000)* 5.

¹⁷¹ See paragraphs 98 and 102 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 12-13.

¹⁷² See Article 10(2) in Appendix I to Attachment C in *ibid.*

Overall, this omission did not change much, since without a corresponding definition the provision remained abstract and unclear in either case. This situation changed during the Cape Town Diplomatic Conference, when the African States presented a paper suggesting the first definition of ‘substantial default’:

Substantial default means a default which deprives materially the non-defaulting party [of] the expected economic benefits it would obtain had performance been carried out by the defaulting party.¹⁷³

This proposal not only defined the relevant term: it incorporated a measure for assessing the magnitude of breach, by reference to perceived economic benefits of the non-defaulting party.¹⁷⁴ In response, the Drafting Committee took a more conservative approach, adding a definition into the text, but essentially reproducing (in part) the already well-known formula of ‘fundamental breach’ used in the CISG.¹⁷⁵ The more ambitious proposals (default by the creditor or reference to the expected economic benefit) never appeared in the actual text of the Convention.

Interestingly, the final text of the CTC uses the same term to identify the trigger for the enforcement provisions (‘default’) that was used in the initial draft which included remedy rules.¹⁷⁶ Over the years, the text lost all the abstract qualifying criteria (‘substantial’, ‘material’ etc) and instead gained a more concrete definition.¹⁷⁷ The value of this definition is of course questionable (particularly in light of the fact that the CTC is

¹⁷³ See paragraph 3.4 in Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 169. The author notes that the proposal by the African States went much further in attempting to reach the balance of interests of various parties and proposed a dedicated provision governing the consequences of a default committed by the creditor – see paragraph 3.2 in *ibid*.

¹⁷⁴ See CHAPTER VII and section 7.1.2 specifically for the discussion relating to the role of economic benefit.

¹⁷⁵ cf Article 11(2) of the CTC and Article 25 of the CISG.

¹⁷⁶ cf Article 5 on Unidroit, *Study LXXII - Doc. 18 (1995)* 7.

¹⁷⁷ The word ‘substantial’ was deleted from the final text of Article 11(2).

aimed at sophisticated parties) – yet it is an important step in guiding domestic courts enforcing the rule.

CHAPTER VI. ADDRESSING MATTERS AFFECTING THIRD PARTIES: KEY CONSIDERATIONS

Without substantive priority provisions in the text of the CTC, the creation of the autonomous concept of international interest discussed in section 2.2.2 would have achieved very little, except further complicating the existing national regimes by adding a new type of *in rem* interests on top of the existing ones. The Convention priority rules eliminate this uncertainty by putting the international interests ahead of their counterparts established by domestic law in terms of priority (with certain exceptions), provided that the perfection requirements (in the form of registration) have been complied with.

However, the priorities in the CTC do not stop at regulating the position of international interests vis-à-vis private property interests existing under national law. The abandonment of the concept of internationality (subject to declarations on internal transactions discussed in section 2.3.3) has effectively ‘locked in’ the industries affected by the relevant protocols,¹ essentially making registrations in the international registry mandatory even for purely domestic financings: an unregistered interest would lose priority to any registered interest, regardless of the time of its creation (except, of course, for pre-existing rights or interests under Article 60 of the CTC).²

Further extension of the scope of the priority system has resulted in the expansion of the list of registrable interests and introduction of various exceptions,³ but the end result was worth the effort: the principal first-to-file rule found in Articles 29(1)-

¹ The lock-in effect exists only where the relevant protocol is in force, and thus at the moment only applies to the aviation industry.

² See n 81 and the corresponding discussion.

³ See paragraphs 2.162-2.221 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 100-132.

(2) of the CTC is exceptionally strong and affects all types of interests, even those which are not registrable under the Convention.

This chapter examines the history of the twin facets of the Convention affecting third parties: the rules on priorities and the international registration system.

6.1 Development of the system of priorities

At the early stages of the UNIDROIT project to develop a treaty on international interests in mobile equipment there was very limited international guidance in terms of structuring the system of priorities.

On the one hand, the Financial Leasing Convention, adopted just before the review of the Canadian Proposal by the UNIDROIT Governing Council in June 1988,⁴ adopted a very cautious approach to priorities. First, its priority rules were limited to the recognition of the lessor's real rights against the lessee's trustee in bankruptcy.⁵ Second, it did not attempt to regulate the priority position of any creditors having (i) liens or security interests in the leased equipment arising outside attachment or execution, or (ii) rights of arrest, detention or disposition over ships or aircraft.⁶ Such a restrictive approach does not, however, reflect the original thinking of the study group working on that treaty, which had initially proposed a very simple and broad provision stating that '[the] lessor's title to the equipment shall be enforceable against *all third parties*' (subject to compliance with public notice requirements, if any).⁷ This straightforward provision, which essentially incorporated the *nemo dat quod non habet* rule to protect the lessor in all dealings of the lessee with third parties, could not withstand the opposition

⁴ See n 1 in section 2.1.1.

⁵ Article 7(1) of the Financial Leasing Convention.

⁶ Article 7(5) of the Financial Leasing Convention.

⁷ See Article 5 in Unidroit, *Study LIX - Doc. 16 (1984) 2* (emphasis added).

of Civil law jurisdictions (during the intergovernmental discussions), which utilised the principle *en fait de meubles possession vaut titre* protecting the innocent third party rather than dispossessed legal owner.⁸

On the other hand, existing asset-specific conventions included certain limited substantive priority provisions.⁹ Nevertheless, these priority rules mostly addressed the problem of liens ranking ahead of other security interests, and neither convention attempted to create a self-contained regime governing priorities.

Cuming's Questionnaire did not provide any conclusive guidance either. The majority of respondents (36) preferred a dedicated set of priority rules in the future convention on international interests in mobile equipment to deal with disputes involving not only secured parties, but also execution creditors and buyers. At the same time, 23 respondents opted for a hands-off approach, leaving all matters of priority to the applicable law.¹⁰ Despite these mixed signals, the initial preference within the Study Group was to follow the majority view and regulate priority issues by including dedicated substantive provisions in the future Convention.¹¹ This solution, however, had a limited reach due to the fact that it permitted co-existence of parallel systems of priorities.

⁸ See paragraph 89 in Unidroit, *Study LIX - Doc. 48 (1987)* 49.

⁹ See, eg, Articles IV(1), V, VII(4), VIII, X(3) of the 1948 Geneva Convention; Articles 3, 5, 6 of the 1926 Brussels Convention; Articles 5, 6 of the 1967 Brussels Convention; Article 6 and Chapter III of Protocol No. 1 Concerning Rights in rem in Inland Navigation Vessels to the 1965 Geneva Convention.

¹⁰ Unidroit, *Study LXXII - Doc. 3 (1991)* 11.

¹¹ See paragraph 13 in Unidroit, *Study LXXII - Doc. 7 (1993)* 6.

6.1.1 *Multiple priorities problem*

The multiplicity of priority regimes stemmed from one of the early design choices to avoid the application of the future Convention in ‘purely domestic situations’.¹² The difficulties in attempting to differentiate between domestic priorities, on the one hand, and their truly ‘international’ counterparts, on the other, surfaced very early.

According to Cuming’s records, the Study Group at its first session in March 1993 expressed ‘significant support’ for introducing two joint criteria necessary for the application of the future Convention’s priority rules: (i) the relevant mobile equipment subject to a domestic or Convention security interest is taken from one state to another (the second state being a party to the Convention), and (ii) a competing interest in such equipment arises in the second state.¹³ This solution gave the financier only limited control over its priority position, as the priority of any competing interests arising under the laws of the first state before the equipment is moved to a Convention state (or after the return of the equipment back to the first state) was determined by the laws of the first state, and not by the future Convention.¹⁴ In order to test the application of the original solution, Cuming reviewed nine different hypothetical scenarios, where various interests were created (and the relevant equipment was located) in different states. In most cases the suggested priority system yielded satisfactory results, however the possibility of simultaneous application of more than one priority system (ie national and international) gave rise to the problem of circular priorities.

¹² See paragraph 9 in *ibid* 5. Note, however, the existence of a minority view ‘that even a domestic priority issue should be decided under the Convention once an international security interest had been created’.

¹³ Unidroit, *Study LXXII - Doc. 8 (1993)* 20.

¹⁴ In addition, obvious additional risks would arise in the case of moving the equipment to a non-Convention state, followed by the creation of competing interests in that state.

A circular priority could be created, for example, in a situation when the equipment was moved from State A to State B (a Convention state) and three security interests were created in the following order: first, in favour of Creditor 1 (when the equipment was still in State A), second, in favour of Creditor 2 (when the equipment was in State B), third, in favour of Creditor 3 (also when the equipment was in State B). According to Cuming, to trigger a circular situation in this scenario, 2 additional assumptions were necessary: (i) Creditor 1 has failed to perfect its interest in accordance with the Convention (to trigger the application of its priority rules) before Creditor 2 and (ii) Creditor 2 has failed to perfect its interest in accordance with the laws of State B and, as a result, lost its priority to Creditor 3 under those laws. Cuming continues that, in this scenario, Creditor 2 has priority over Creditor 1 (under the Convention), Creditor 1 has priority over Creditor 3 (under the Convention), but at the same time Creditor 3 has priority over Creditor 2 (under the laws of State B).¹⁵

A major change of thinking occurred in late 1994 during the second session of the First Draft Subcommittee, which considered the key characteristics of the future system of priorities. On the one hand, it confirmed the first-to-file principle based on registration in the international register and giving priority over ‘all domestic security interests in the same equipment, whether filed on a national register or not and regardless of whether the national filing was first in time or not’.¹⁶ On the other hand, it abandoned the idea of establishing a special priority regime for purely domestic situations, noting that a corresponding provision ‘would complicate life enormously for the secured

¹⁵ See footnote 10 in Unidroit, *Study LXXII - Doc. 8 (1993)* 27. In his circular priorities scenario Cuming assumed that priority disputes between holders of interests created in the same state (in this case – Creditors 2 and 3) were governed by domestic law, and not by the Convention.

¹⁶ See paragraph 10(xxii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 8.

party'.¹⁷ The subcommittee thus removed one source of multiplicity of priority rules (different priorities for domestic and international situations), but the next draft of the Convention soon added another one in the form of Article 12(4), which stated:

An international interest is not valid against any third party who acquired an interest in the equipment under an agreement with the debtor, lessee or buyer at a time when the international interest was not registered.¹⁸

This exception made it possible for a third party to obtain priority over the holder of an international interest, and this priority could not be superseded by subsequent registration of the international interest. The First Draft Subcommittee later explained that to obtain such priority the interest of the third party had to be 'an interest other than an international interest'.¹⁹ In other words, the above provision did not regulate priority conflicts among a registered and an unregistered international interest (for which there was a simple rule in Article 12(3) giving priority to the holder of the registered interest): apparently, it aimed to protect the third party (such as the holder of a non-consensual interest) who was not capable of safeguarding its priority position through registration.

The same draft created one more exception from the first-to-file rule: the holder of a first ranking registered international interest was subordinated to the holder of a second ranking interest in respect of advances made after notice of the existence of the second interest (except where such advances were mandatory).²⁰ This provision aimed to protect the junior creditors against new borrowings from the senior creditor.

Each of these two exceptions created complications by itself: the former reduced the value of registration, both for the creditor and for any third parties, as it

¹⁷ See paragraph 10(xxvi) in *ibid* 9.

¹⁸ Unidroit, *Study LXXII - Doc. 18 (1995)* 9.

¹⁹ See paragraph 34 in Unidroit, *Study LXXII - Doc. 21 (1995)* 12.

²⁰ See Article 12(2) in Unidroit, *Study LXXII - Doc. 18 (1995)* 9.

could not guarantee priority, while the latter raised the problem of determining whether or not the advance was made with knowledge of a second interest.²¹ Taken together, they could lead to circular priorities in a situation when (i) Creditor 1 registers its international interest first, (ii) an interest not registrable under the Convention in favour of Creditor 2 arises second, (iii) Creditor 3 registers its international interest third, and (iv) Creditor 1 makes an advance to the debtor with knowledge of subsequent interests and without an obligation to do so. In this situation, in respect of the latter advance, Creditor 1 has priority over Creditor 2 (as first in time under the first exception), Creditor 2 has priority over Creditor 3 (as first in time under the first exception), but Creditor 3 has priority over Creditor 1 (under the second exception).²²

The complexity resulting from the use of the two exceptions outlined above generated opposition from various commentators, including the AWG,²³ and the priority rules were substantially simplified, first, by giving registered interests priority over any unregistered interests (including those that were not registrable under the Convention) and, second, by making references to actual knowledge or value given with such knowledge irrelevant in the context of priorities.²⁴ The resulting system of priorities emerged remarkably simple and straightforward, recognising the primacy of registration as the main source of priority. Nevertheless, the Convention could not get rid of all the provisions overriding this default approach. Such remaining provisions are rather limited, relate to preferred national creditors and are examined in section 6.1.2.

²¹ The latter clearly follows from the later draft – see Article 19(1) in Unidroit, *Study LXXII - Doc. 22 (1996)* 7.

²² See comments by Charles Mooney and Thomas Whalen in Unidroit, *Study LXXII - Doc. 32 Add. 3 (1997)* 7-8.

²³ See, eg, Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 13; Unidroit, *Study LXXII - Doc. 32 Add. 3 (1997)* 7-8; paragraph 164 in Unidroit, *Study LXXII - Doc. 36 (1997)* 39-40.

²⁴ See Article 25 in Unidroit, *International Interests Study Group 4th session Misc. 5 (1997)* 9.

The establishment of a self-contained system of priorities excluding multiple overlapping priority regimes was particularly useful for the autonomous concept of international interest,²⁵ which was created by the Convention itself and coexisted with its national law counterparts (or existed regardless of their invalidity): any exclusions from a single comprehensive set of rules in the form of references to domestic priorities would inevitably require courts to attempt to integrate international interests into their national rules, presumably by way of finding the ‘nearest equivalent’ or using some other form of approximation. The solid basic priority rule now found in Articles 29(1)-(2) mostly eschews the need to do so, although one hypothetical scenario (however unlikely it may seem in the context of sophisticated parties targeted by the CTC) may still prove somewhat puzzling, as it is not fully addressed by the Convention’s priority regime: in a situation when two domestic security interests are validly constituted and compete for priority, but for some reason neither party to the underlying agreements has registered the relevant international interest (assuming that both international interests have arisen), there are, in fact, a total of four competing interests (two of which arise by virtue of applicable national law, while two others arise automatically under the CTC). In this scenario, it is too early for the Convention priorities to apply, since neither international interest has been registered (although the one to register first will automatically get priority over the other three), but too late in the sense that the international interests have already arisen under the Convention and cannot simply be disregarded.²⁶

²⁵ See section 2.2.2.

²⁶ Deschamps suggests the existence of an ‘implied’ principle whereby after the start of a dispute a party may not improve its position by registering under the Convention – see Deschamps, ‘The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol: A comparative law analysis’ (2013) 2 Cape Town Convention Journal 51, 58. This view, however, does not correspond to the straightforward first-to-file rule of Article 29(1)-(2) of the CTC and does not explain the interplay between all the four interests described in the example.

Despite the simplicity of the basic priority rule contained in Articles 29(1)-(2) of the CTC, the Convention eventually developed a number of exceptions relating to proceeds (Article 29(6)), contractual subordination (Article 29(5)), prospective international interests (Article 19(4)), pre-existing interests (Article 60(1)), items that are not standalone objects covered by the protocols (Article 29(7)), survival of international interests in bankruptcy (Article 30(1)), non-consensual rights or interests (Articles 39 and 40), outright buyers, conditional buyers and lessees (Articles 29(3)-(4)), assignment and subrogation (Articles 35-36 and 38) and even the ability of the debtor to trump its own creditor (which cannot be found in the text of the Convention and stems from the Official Commentary).²⁷ The following section 6.1.2 focuses on the exceptions from the basic rule which underwent the biggest transformation during the development of the Convention.²⁸

6.1.2 *Priority position of nationally preferred creditors*

Early discussions about the prospects of regulating the priority position of preferred non-consensual creditors suggested a hands-off approach: at its second session in 1994, the First Draft Subcommittee concluded that the international interest ‘would inevitably have to yield priority’ to statutory liens in favour of preferential creditors.²⁹ The loss of priority of the international interest was not, however, the only problem, since it was recognised that state courts, if left to their own devices, would be faced with the task of integrating this Convention-specific interest into their national legal systems in order to determine its priority relative to domestically preferred creditors. This task was further

²⁷ See paragraph 2.171 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 105.

²⁸ For a detailed analysis of the priority provisions under the Convention as adopted see Goode, ‘The Priority Rules Under the Cape Town Convention and Protocols’ (2012) 1 Cape Town Convention Journal 95.

²⁹ See paragraph 10(xxiii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 8.

complicated by two problems. First, a number of jurisdictions did not recognise the concept of non-possessory security interests, title reservation and leasing in the first place, making it necessary for the Convention to spell out certain minimum legal characteristics of the international interest. Second, the national legal systems varied substantially in ranking various preferred creditors among themselves and in relation to security interests.³⁰

The early involvement of the aviation industry challenged the hands-off approach, suggesting a more active role of the Convention in regulating the priority of preferred national creditors. The Boeing Company went quite far by suggesting that the first-to-file priority rule should cover, among other things, ‘non-contractual security involving governmental creditors’, such as EUROCONTROL and tax creditors.³¹ The AWG as a whole, however, considered five alternative approaches to the issue of regulating nationally preferred creditors: (i) a ‘hard’ rule in the Convention overriding domestic priorities, (ii) imposing a duty on states to declare all types of preferred creditors, but without an option to enlarge or modify the list, (iii) imposing an obligation to declare preferred creditors, but with a right to amend the list (amendments to take effect without retrospective effect), (iv) imposing a duty on states to declare the preferred creditors, also with the right to amend the list at any time, but without any consequence and (v) a hands-off rule deferring the matter to local creditors.³² The third option was viewed by the AWG as providing the best balance between state interests and the objective of increasing legal certainty for private parties.

³⁰ ibid.

³¹ See Appendix to the comments by Scott Scherer in Unidroit, *Study LXXII - Doc. 14 Add 1 (1994)*.

³² Unidroit, *Study LXXII - Doc. 16 (1995)* 21-22.

Although the AWG proposal was limited to priority rules applicable in the context of aviation financing, the First Draft Subcommittee nevertheless recognised the utility³³ of this approach ‘in respect of the generality of equipment to be covered by the proposed Convention’, but only provided that it would not permit states to designate other consensual interests as having priority over the international interest.³⁴

In its Draft Aviation Text prepared in 1996, the AWG took its original proposal one step forward, by bifurcating all interests held by the (initially) single category of nationally preferred creditors into two: ‘preferred national interests’ and ‘registrable national interests’.³⁵ The former comprised national interests receiving automatic priority and existed outside the Convention registration system (insofar as they were designated as such by the relevant state), while the latter derived their priority from the act of registration, equally with the international interests. The second kind of priority, according to the AWG draft, was provided to: (i) attachment or execution creditors, (ii) lien holders, (iii) persons acquiring a national interest by virtue of the application of national accession rules or through the installation of the property in question onto other types of property in which such person had an interest and (iv) creditors having claims arising from non-payment of taxes, fees or similar governmental charges.³⁶

The above separation of two types of interests held by preferred national creditors later formed the basis of Articles 39 and 40 of the CTC, although initially the interests enjoying automatic priority were part of the ‘basic’ priority rules,³⁷ while the

³³ This was notwithstanding the view of certain commentators that such approach would be ‘unworkable and very difficult to oversee and implement’ – see Unidroit, *Study LXXII - Doc. 17 (1995)* 7.

³⁴ Unidroit, *Study LXXII - Doc. 21 (1995)* 13.

³⁵ See paragraphs 26 and 33 in Annexure to Unidroit, *Study LXXII - Doc. 23 (1996)*.

³⁶ See paragraph 33 in Annexure to *ibid.*

³⁷ See Article 26(4) in Unidroit, *Study LXXII - Doc. 30 (1996)* 19.

registrable national interests formed a dedicated chapter.³⁸ This was soon changed by placing both groups of interests, first, in a separate single article³⁹ and, shortly afterwards, into two dedicated provisions.⁴⁰

Interestingly, the two articles passed through the governmental expert stage and the Cape Town Diplomatic Conference differently: the proviso on registrable non-consensual rights or interests made it into the final text with minimal changes, whereas its counterpart giving ‘super-priority’ without registration generated debate. Most of the criticism related to the ability of states to designate national non-consensual interests and resulted in the gradual relaxation of the rule by way of (i) allowing state declarations to be formulated in broad terms⁴¹ and (ii) permitting state declarations to cover non-consensual interests created in the future.⁴² Following an intervention of the UK delegation at the Cape Town Diplomatic Conference, states were given the ability to apply the ‘super-priority’ retrospectively, but only upon ratification (in order to protect the non-consensual rights and interests of states against international interests already entered on the register as a result of another state ratifying the Convention first).⁴³

The final challenge to the provision was presented during the Cape Town Diplomatic Conference by the European Organisation for the Safety of Air Navigation (EUROCONTROL), which intended to protect its ability to collect route charges on

³⁸ See draft Chapter IX in *ibid* 21-22.

³⁹ See Article 35 in Unidroit, *Study LXXII - Doc. 35 (1997)*.

⁴⁰ See Articles 39-40 in Unidroit, *Study LXXII - Doc. 42 (1998)* 15-16.

⁴¹ See paragraph 89 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 13. Note the qualifying words ‘generally or specifically’ in Article 39(1) of the CTC, which are not present in Article 40.

⁴² *ibid*. Cf Article 39(2) of the CTC.

⁴³ See proposal by the UK in Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 127. Cf Article 39(4) of the CTC.

behalf of its member states. The difficulty stemmed from the fact that the charges in question, which were secured by a lien attaching to the aircraft, remained payable to EUROCONTROL itself (rather than its member states), but EUROCONTROL, incapable of becoming a party to the Convention,⁴⁴ enjoyed no dedicated protection under the Convention's system of priorities applicable to non-consensual rights and interests.⁴⁵ Possible solutions considered by the delegates varied greatly, from allowing EUROCONTROL to become party to the Convention, to changing the mechanism of collecting route charges. Eventually, a dedicated working group was established to come up with a compromise solution. The resulting proposal was surprisingly short and essentially cosmetic in nature. First, it sought to amend the definition of 'non-consensual right or interest' by making express reference to obligations owed to 'an intergovernmental or private organization'. However, this did not extend the scope of the definition in any way, since any mention of entities to which obligations may be owed is not more than a clarification, which is clear from the proposed text:

'Non-consensual right or interest' means a right or interest conferred under a declaring States's law to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organization.⁴⁶

Second, the proposal envisaged a dedicated clarification to be added to the *travaux préparatoires* suggesting that states should include 'reasonable information' on the nature of the non-consensual interest, as well as nature of the obligation it may secure.

Interestingly, the final text of Article 39 goes beyond these very modest recommendations and incorporates one important addition in the form of Article

⁴⁴ This right was reserved for states and Regional Economic Integration Organisations (see Article 48 of the CTC), and EUROCONTROL did not possess such status.

⁴⁵ See proposal by Belgium in Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 242-243.

⁴⁶ See proposal presented by South Africa in *ibid* 293.

39(1)(b), which is broad enough to protect EUROCONTROL's enforcement rights (but only insofar as they are permitted under the laws of the relevant state making the declaration). Perhaps as a result of its last-minute nature, this provision has a number of clear drafting omissions.⁴⁷

6.2 Development of the registration system

The importance of a registration-based public notice system for the secured transactions regime is well articulated in the UNCITRAL Legislative Guide on Secured Transactions:

The promotion of certainty and transparency of security rights in movable assets is a key objective of a modern secured transactions regime. Nothing is more central to the realization of this goal than the establishment of a general, notice-based, registry system.⁴⁸

The creation of an international asset-based system of registration has provided the key to the proper functioning of the priority rules established by the CTC and attracted significant attention among the commentators. One of the members of the UNIDROIT Governing Council characterised the creation of the international registration system as 'the single most important innovation of the...Convention'.⁴⁹ In a recent comparative study of the registry provisions of the three existing protocols, the authors similarly identified the concept of international registry as the 'key creation' of the CTC.⁵⁰ One author even used the success of the Convention's registration system as a source of inspiration to come up with an ambitious idea of an international registry of general

⁴⁷ See paragraph 4.276 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 377.

⁴⁸ United Nations, *UNCITRAL Legislative Guide on Secured Transactions* (2010) 149.

⁴⁹ Unidroit, *Study LXXII - Doc. 40* (1998) 22.

⁵⁰ Rory McPhillips and others, 'Comparative analysis of aircraft, rail and space international registries and their regulatory provisions' (2016) 5 Cape Town Convention Journal 29, 29.

application to record domestic security interests in respect of all movables – both tangible and intangible.⁵¹

This chapter tracks the key challenges underpinning the development of the registration provisions of the CTC.

6.2.1 *Origins of the registration system*

The philosophy underpinning the registration system established by the CTC goes back to UNIDROIT's preceding project – the Financial Leasing Convention. The study group working on that treaty 'recognised the ultimate desirability of a system of registration as the most effective means of giving notice...to third parties', but considered the idea unrealistic at the time, noting, however, that in many countries registration was only considered feasible 'for large unit goods that were easily identifiable'.⁵² The Canadian Proposal to adopt an international treaty on international interests in mobile equipment⁵³ soon provided an excellent opportunity to revisit the idea of setting up an international registration system.

The early vision of the future registration system was inspired by an outline of main features of the Canadian personal property registries prepared by Ronald Cuming in early 1993 for the attention of the Study Group at its first session. The experience in Canada included the establishment of fully computerised registries, searchable on a 24-hour basis without human involvement and allowing registration of short 'financing statements' (rather than entire agreements).⁵⁴ This practice was used by Cuming to

⁵¹ Mooney, 'Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application, The Essay' (2014) 55 Va J Int'l L 163-186, 174-175.

⁵² See paragraph 87 in Unidroit, *Study LIX - Doc. 48 (1987)* 48.

⁵³ See n 1 in section 2.1.1.

⁵⁴ Unidroit, *Security Interests Study Group 1st session Misc. 5 (1993)* 7.

prepare the first outline of the future registry system to be established under the Convention.⁵⁵

Despite the evidence and the proposal produced by Ronald Cuming, sessions of the First Draft Subcommittee produced more questions than answers. First, the registration system was initially envisaged as ‘being primarily against the debtor’, while registration against the asset was considered merely a possibility.⁵⁶ However, soon the position was reversed: an asset-based register became the preferred option, but a separate register of interests registrable against the debtor was considered a valid addition, particularly for those assets which did not lend themselves to identification.⁵⁷ Second, there was no agreement on the consequences of failure to register.⁵⁸ Third, no clear consensus existed on the effects of registration and the possibility of triggering the Convention provisions if no interest was registered in the registry.⁵⁹ In addition, the relationship between registration and constitution of the international interest changed from draft to draft: the initial logic that an international interest is created by registration⁶⁰ was replaced by a new approach whereby registration merely perfects an already existing international interest.⁶¹

Overall, the discussion did not move beyond the basic features of the future registration system due to insufficient expert knowledge on the matter, and the decision was made to convene a corresponding group of technical experts to consider both the

⁵⁵ See section V in Unidroit, *Study LXXII - Doc. 8 (1993)*.

⁵⁶ See paragraph 6(xi) in Unidroit, *Study LXXII - Doc. 12 (1994)* 5.

⁵⁷ See paragraph 10(ii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 3-4; see also Article 5(3) in Unidroit, *Study LXXII - Doc. 22 (1996)* 3.

⁵⁸ See paragraph 6(xix) in Unidroit, *Study LXXII - Doc. 12 (1994)* 6.

⁵⁹ See paragraph 10(i) in Unidroit, *Study LXXII - Doc. 15 (1995)* 3.

⁶⁰ See Article 2(c) in Unidroit, *Study LXXII - Doc. 13 (1994)* 2; paragraph 10(xxii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 8.

⁶¹ See paragraph 10 in Unidroit, *Study LXXII - Doc. 18 (1995)* 3.

legal and technical aspects of the registry.⁶² This marked the first primary challenge in the whole process of development of the registration provisions: the very technical nature of the problem and reliance on expert submissions. Registration working groups were formed at various stages of the development of the Convention: during the work of the Study Group⁶³ and during the governmental expert stage.⁶⁴ Following the adoption of the CTC and the relevant protocols, the work on the establishment of asset-specific registries continued in dedicated preparatory commissions.⁶⁵

The second challenge revolved around choosing between asset and debtor-based mechanisms. The transition to the present, purely asset-based, system, happened quite late. In April 1996, the Study Group at its second session still considered the possibility of registration against the name of the debtor ‘for the limited purpose of preserving the validity of the international interest against the trustee in bankruptcy and judgment creditors of the chargor, buyer and lessee’.⁶⁶ The final decision was left until a later time, pending feedback from the special registration working group. The latter expressed overall preference towards eliminating the debtor-based element due to a technical reason: such registration was likely to cause difficulties with recording all names in

⁶² See paragraph 39 in Unidroit, *Study LXXII - Doc. 21 (1995)* 13.

⁶³ The sessions were held in April 1996 and May 1997 – see Unidroit, *Study LXXIIC - Doc. 2 (1997)*; Unidroit, *Study LXXIIC - Doc. 3 (1997)*.

⁶⁴ See paragraph 14 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*; Attachment D in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

⁶⁵ The work of the preparatory commission established by Resolution No 2 of the Cape Town Diplomatic Conference resulted in the establishment of the Aircraft Registry, which commenced its operation on 01 March 2006. The work of the rail preparatory commission established by Resolution No 1 of the Luxembourg Diplomatic Conference in 2007 has led to the appointment of the Registrar – Regulis SA in November 2014 (although the rail registry itself is not yet in operation). The space preparatory commission established by Resolution No 1 of the Berlin Diplomatic Conference is still in the early stages of its work and has so far obtained a preliminary agreement from the ITU to become the Supervisory Authority, but more work is required before the Registrar can be appointed and the space registry begins its operation – see Unidroit, *Unidroit 2015 Prep. Comm. Space/4/Doc. 7 rev. (2015)* 8.

⁶⁶ See paragraph 39 in Unidroit, *Study LXXII - Doc. 27 (1996)* 20.

different alphabets (a problem that is non-existent in the case of serial numbers).⁶⁷ In response, the Drafting Group deleted all references to the registration against the debtor from the draft Convention.⁶⁸

The third challenge of the process of development of the registration system stemmed from the need to correspond to the system of priorities, which was gradually expanding its scope, eventually turning into a single self-contained regime.⁶⁹ As a result, the registration system, initially established solely for the registration of national interests⁷⁰ (and later – international interests),⁷¹ subsequently accommodated registrations of assignments and subordinations,⁷² prospective international interests, prospective assignments and registrable non-consensual interests⁷³ and acquisitions of international interests by subrogation.⁷⁴ Following extensive debate at the Third Joint Session relating to the feasibility of extending the scope of the Convention to ‘purely internal transactions’,⁷⁵ the registration system was used to protect the priority position of those financiers who could not register an international interest as a result of a declaration on internal transactions adopted by their home state (by allowing such

⁶⁷ Unidroit, *Study LXXXIC - Doc. 2 (1997)* 8.

⁶⁸ See Article 17(2) in Unidroit, *Study LXXII - Doc. 30 (1996)* 15.

⁶⁹ See section 6.1.1.

⁷⁰ See Articles 2(1), 1(2)(b)-(c) in Unidroit, *Study LXXII - Doc. 13 (1994)* 1-2.

⁷¹ See Article 2(1) in Unidroit, *Study LXXII - Doc. 18 (1995)* 6; Article 5(1) in Unidroit, *Study LXXII - Doc. 22 (1996)* 3.

⁷² See Articles 16(1) and 17(4) in Unidroit, *Study LXXII - Doc. 30 (1996)* 14-15.

⁷³ See Article 15(1)(a) in Unidroit, *Study LXXII - Doc. 35 (1997)*.

⁷⁴ See Article 15(1)(c) in Appendix I to Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

⁷⁵ See section 2.3.3.

financiers to register notices of national interests and treating them as ‘registered interests’ giving priority).⁷⁶

The Aircraft Protocol and the Space Protocol further enhanced the scope of the registration system by making it possible to register sales.⁷⁷ Contrary to this example, the Rail Protocol⁷⁸ and the current draft of the MAC Protocol⁷⁹ do not permit registration of sales as such, but nevertheless make it possible to register notices of sale. This turns the international registry into a conduit through which parties may attempt to secure priority under national law, although the effects of such registrations will eventually depend on the applicable law rules on giving notice.⁸⁰

The history of development of Article 60 of the CTC, coupled with the commentary of Charles Mooney on this matter, provide another example of the broad scope of the registration mechanics established by the Convention. This provision regulates the application of the treaty to ‘pre-existing rights or interests’, ie rights or interests that emerged before the effective date of the CTC,⁸¹ and pursues the clear objective of preventing the loss of priority by creditors who obtained their rights in the collateral prior to the entry into force of the Convention. In pursuit of this objective, the delegates of the Cape Town Diplomatic Conference were choosing between two alternatives, the first of which was extremely simple:

⁷⁶ See Article 1(cc) of the CTC. This provision was further strengthened by Article 1(n) of the CTC, which requires the establishment of national machinery for the transmission of notices to the international registry.

⁷⁷ See Article III of the Aircraft Protocol; Article IV of the Space Protocol.

⁷⁸ See Article XVII of the Rail Protocol.

⁷⁹ See draft Article XVIII in Unidroit, *Study 72k - CGE1 - Doc. 2 corr. (2017)* 15.

⁸⁰ See paragraph 5.70 in Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock: Official Commentary* (2nd edn, International Institute for the Unification of Private Law (UNIDROIT) 2014) 437.

⁸¹ See Article 1(v) of the CTC.

This Convention does not apply to a pre-existing right or interest, which shall retain the priority it enjoyed before this Convention entered into force.⁸²

This straightforward provision quickly gained the support of most delegations, including the UK, Switzerland, the US, Sweden, Australia and Argentina.⁸³ The overwhelming support of this option was, however, countered by the South African delegation speaking on behalf of African States in favour of the second alternative, which envisaged an important change.⁸⁴ In contrast to the above simple provision, which provided for essentially infinite protection of pre-existing rights or interests, the second option gave financiers only a limited amount of time (provisionally ten years) to register their existing rights or interests in the international registry. Upon such registration, the priority position of such rights and interests would be the same as prior to the entry into force of the Convention, but failure to register in time would subject the financiers to the standard priority rules of the treaty, with the inevitable result of being subordinated (as unregistered interests) to any registered interests.⁸⁵

The South African approach, supported by Ghana and Pakistan,⁸⁶ attempted to strengthen the role of the international registration system significantly by ensuring that following a set number of years the records of the registry would become conclusive and not subject to any ‘hidden’ unrecorded priorities of pre-existing transactions. In his recollection of this debate, Charles Mooney notes that the primary reasoning of the dissenting states ‘was based on perceived inadequacies of their existing domestic

⁸² See Article 55 (Alternative A) in Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 25.

⁸³ *ibid* 794.

⁸⁴ *ibid* 794-795.

⁸⁵ See Article 55 (Alternative B) in *ibid* 55.

⁸⁶ *ibid* 795.

registries’ and their resulting interest in allowing pre-existing transactions to ‘migrate’ to the international registry. On Mooney’s account, it was not the modern regime of secured transactions – but rather the international registration system itself – that made the CTC so attractive to such developing states.⁸⁷ As a result, the final text of Article 60(3) (or, rather, its history) is a fine illustration of the perceived benefits of the registration system going beyond the simple recordation of competing interests.

6.2.2 *Structure of the registration system*

The CTC created the first ever international system of registration of security interests. In the absence of existing international precedent,⁸⁸ the development of the most appropriate registration machinery was a particularly difficult task.

The early design choices relating to the structure of the international registration system established by the CTC go back to the work of the First Draft Subcommittee, which reflected a rather simplistic view that such a system would operate under the general oversight of the UNIDROIT Governing Council, the latter to have the authority to appoint and replace the relevant body administering the register. The administering body was to be given powers to adopt additional regulations supplementing the rules of the Convention.⁸⁹

This approach was reflected in one of the earlier drafts⁹⁰ and further revised by the AWG, which proposed to add an intermediate level between the Governing Council and the operator, labelled the ‘supervisory body’ and possessing expert knowledge in the

⁸⁷ Mooney, ‘Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application, The Essay’ (2014) 55 Va J Int'l L 163-186, 169.

⁸⁸ Other existing registration systems relating to security interests (whether general, as in the case of the Canadian personal property registries, or asset specific, eg, registries for the registration of rights in aircraft) operated on a domestic level.

⁸⁹ See paragraph 10(vii) in Unidroit, *Study LXXII - Doc. 15 (1995)* 5.

⁹⁰ See Article 5(2) in Unidroit, *Study LXXII - Doc. 22 (1996)*.

relevant area of asset finance practice and technical matters. The role of the supervisory body was to promulgate initial and ongoing rules and regulations implementing the future Convention. Registration was only possible through ‘satellite registrars’ designated by each contracting state upon ratification to transmit the registration details to the central registrar.⁹¹ The latter proposal was subsequently relaxed by the AWG and IATA, which agreed to make registration through satellite registries optional, rather than mandatory.⁹² On the one hand, this decision would permit all states to take advantage of the registration system, regardless of existing technical infrastructure. On the other hand, direct filings would require an international registry operating on a 24-hour basis to accommodate time zone differences. In the context of aviation industry, the transition to direct registrations circumventing the national aircraft registries would essentially result in a bifurcation of registration functions, with the domestic registries handling matters of safety and operation and the central registry recording private property rights.⁹³

1997 saw the fundamental change in the approach to the design of the future Convention and, with it, the establishment of the APG to prepare the draft aviation protocol.⁹⁴ Both the special registration working group and the APG were considering the question of the most appropriate structure of the future registration system and came up with different results.

In May 1997, the special registration working group completed its work at its second session and prepared its recommendations on the structure of the registration system. It favoured a binary system whereby each protocol would establish an intergovernmental organisation to act as the ‘Intergovernmental Regulator’ overseeing

⁹¹ Unidroit, *Study LXXII - Doc. 23 (1996)* 15.

⁹² Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 6.

⁹³ *ibid* 7.

⁹⁴ See section 4.2 and n 47 specifically.

the operation of the international registry. The registry itself was to be operated by a separate entity, the ‘Registrar’, which was independent from the Intergovernmental Regulator. An international organisation in the role of the Intergovernmental Regulator was seen as essential (though potentially problematic for certain categories of equipment) to ‘establish the international credibility’ of the registry and gain the confidence of the relevant industry.⁹⁵

In October 1997, the APG presented its own version of the registration provisions specific to the draft Aircraft Protocol. The principal changes from the registration working group proposal related not just to the level of specificity of the protocol provisions (reflected, eg, in the provisional designation of an affiliate of IATA as the operator of the registry), but to the overall approach to the registration structure. In addition to the binary scheme, it proposed an alternative, whereby the international registry was operated by the ‘International Registry Authority’.⁹⁶ In the latter scenario, the APG explained, an intergovernmental entity would both operate and regulate the registry at the same time.⁹⁷

As a result of the added flexibility provided by the APG text, the draft Convention and the draft Aircraft Protocol reached the governmental stage reflecting different approaches: the former followed the logic of the registration working group, and the latter reflected the vision of the APG. The two instruments were ultimately reconciled in the report of the Registration Working Group of the Second Joint Session, which agreed to separate the roles of the Registrar and the Intergovernmental Regulator

⁹⁵ See paragraph 16(v) in Unidroit, *Study LXXIIC - Doc. 3 (1997)* 8.

⁹⁶ See draft Article XVIII (Alternative A) in Unidroit, *Study LXXII - Doc. 36 Add. 3 (1997)*.

⁹⁷ See paragraph 29 in *ibid* vii.

(this time renamed to ‘Supervisory Authority’).⁹⁸ At the same time, as regards the procedure for appointment of the Supervisory Authority, the working group proposed three different alternatives: (i) to specify in the protocol the international organisation appointing or constituting it, (ii) to designate in the protocol the international organisation responsible for the appointment and substitution of its members, or (iii) to provide for the appointment of the Supervisory Authority by the contracting states after the entry into force of the Convention.⁹⁹ In the absence of definitive guidance from the governmental experts, the Drafting Committee opted for the first alternative (‘The Supervisory Authority shall be...’)¹⁰⁰ and the matter was eventually left for the Cape Town Diplomatic Conference, which ultimately invited ICAO to act as the Supervisory Authority under the Aircraft Protocol.¹⁰¹

The choice of ICAO was a simple one, given its authority in international aviation practice and the fact that most countries of the world are ICAO members. The nomination of the Supervisory Authority under the Space Protocol followed the same pattern, as the ITU (also practically a universal international organisation) was invited to perform the function right at the conclusion of the Berlin Diplomatic Conference.¹⁰² The situation with the Rail Protocol was quite different due to the limited membership of OTIF (essentially European, with several member states in North Africa and Near East), the only candidate intergovernmental organisation considered for the role. Reliance on OTIF as Supervisory Authority was considered problematic from the point of view of states outside its membership, and an entirely different mechanism for the appointment

⁹⁸ See paragraph 13 in Attachment D to Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

⁹⁹ See Article C in Appendix II of Attachment D to *ibid.*

¹⁰⁰ See paragraph 207 and Article XVI(1) in Appendix II of Attachment C to Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

¹⁰¹ See Resolution No 2 of the Cape Town Diplomatic Conference.

¹⁰² See Resolution No 2 of the Berlin Diplomatic Conference.

of the Supervisory Authority was established to make it possible for all the contracting states to have confidence in this body.¹⁰³ As a result, the Supervisory Authority under the Rail Protocol is a collegial body consisting of representatives of state parties, states designated by UNIDROIT and states designated by OTIF.¹⁰⁴

The most recent challenge in terms of selecting the Supervisory Authority surfaced in March 2017, during the first session of the MAC Protocol Committee of Governmental Experts. In contrast to the other protocols, the MAC Protocol covers a diverse group of assets,¹⁰⁵ which makes it particularly difficult to identify a single existing international organisation for the role of the Supervisory Authority. Although the UNIDROIT Secretariat was instructed to continue research to identify appropriate candidates, the World Bank Group has been considered as a potential candidate for the role.¹⁰⁶

¹⁰³ Unidroit, *Study LXXIIIH - Doc. 13 (2003)* 15-16.

¹⁰⁴ See Article XII of the Rail Protocol.

¹⁰⁵ See section 3.4.

¹⁰⁶ See paragraph 174 in Unidroit, *Study 72k - CGE1 - Report (2017)* 19.

CHAPTER VII. MEASURING THE FEASIBILITY OF THE CONVENTION: COMMERCIAL CONCERNS AND STATE SENSITIVITIES

This chapter examines how the feasibility of the Cape Town Convention was assessed during the development process by looking at two groups of factors. First, commercial factors are analysed to show when and how the economic benefits of adopting the CTC were assessed. Second, various state sensitivities are reviewed to determine their respective relevance and impact on the development of the Convention.

7.1 The role of commercial factors in the development of the CTC

How does one assess *ex ante* whether a proposed international convention is actually worth the effort? Without some form of economic analysis showing how the new instrument could enhance the position of various stakeholders or otherwise improve the existing regime, a draft treaty may lack the support of states, international organisations and domestic end-users. In a commercial law context, the role of such analysis increases significantly: in the words of Herbert Kronke, former Secretary-General of UNIDROIT, the only working criterion to determine the success of a treaty is whether it ‘reduces costs and enhances benefits in a given area of transnational commercial transactions’.¹ Once this is accepted, the opening question in this paragraph can be superseded by a different one: how does one measure the economic benefit of a proposed treaty?

The author’s work on this chapter coincided with the two sessions of an international academic workshop on the Economic Assessment of International Commercial Law Reform held at the University of Oxford in 2016 and 2017 (the

¹ Kronke, ‘International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice’ (2000) 5 Uniform Law Review 13, 16.

‘Workshop’).² The Workshop aimed to develop international principles, standards and parameters for assessing the economic benefit of reform in the area of commercial law and included, among many other things, a discussion of the feasibility of adopting a universal formula, first proposed by Jeffrey Wool, to measure such economic benefit. It was suggested that benefit is essentially generated where the combined savings resulting from the reform (such as risk reduction or reduction in transaction or litigation costs) outweigh the costs of creating the new rules and transitioning to them. While the fundamental basics of a cost-benefit analysis appear to be self-evident, there are apparent difficulties with quantifying each part of the equation (such as data availability and appropriate timing of the assessment). The author views the new attempts to bring the discussion on economic benefit analysis in commercial law to a new, more sophisticated, level as an important step in the direction of more rational and informed treaty-making in commercial law in the future.

Despite this recent development, the first attempt to quantify the economic benefits of the CTC appeared only in 1998, ie almost ten years after the start of the project. Before that, any attempts to provide some kind of commercial justification to the Convention remained abstract and based on qualitative, rather than quantitative, criteria. At the core of these attempts lay the ‘twin’ factors of certainty and predictability.³

7.1.1 Certainty/predictability and its role in the development of the CTC

Two distinct characteristics of certainty and predictability are relevant for the purposes of this section in the context of transnational commercial law. On the one hand, greater

² See ‘Economic Assessment of International Commercial Law Reform’ (<https://www.law.ox.ac.uk/research-subject-groups/economic-assessment-international-commercial-law-reform>) accessed 02 June 2017.

³ In this thesis, the author views these two concepts as synonymous, in the same manner as they are treated (and labelled ‘twin factors’) in the 1998 UNIDROIT Report of the SRC – see paragraph 44 in Unidroit, *Study LXXII - Doc. 41 (1998)* 16. For this reason, both terms are used interchangeably, unless the context otherwise requires.

certainty does not automatically translate into economic benefit. By way of example, an international convention might result in the adoption of a uniform, but wholly inappropriate connecting factor to a particular type of transaction: the resulting harmonisation would enhance certainty and may somewhat reduce the need for *ex ante* legal research, but is unlikely to lead to any meaningful cost savings. On the other hand, predictability carries with it *ipso facto* a subjective element: the need to take into account the particular actors for whom the new instrument is intended. In a sense, it implies a certain bond with the recipients of the new rules, a factor of paramount importance in commercial law. In the field of mobile equipment financing the principal recipients are, essentially, creditors who provide financing protected by security interests created over mobile assets. These creditors operate within a system that monetises risks: whenever the timely return of a loan and payment of respective interest cannot be guaranteed, the potential risk factors are analysed to assess the likelihood of being repaid and, depending on the severity of the risks involved, the cost of financing grows proportionately. This system is pragmatic at its core and is indifferent to achievements of harmonisation insofar as they do not make the return of the creditors' investment more likely, or rather, more commercially predictable.

As was noted in CHAPTER II, at the very early stages of development of the Convention the key challenge was to solve the problem of different connecting factors used by states to determine the law applicable to security interests created over mobile assets.⁴ Unification of conflict of laws rules could no doubt provide some increased predictability for commercial parties, but its scope would remain limited to ensuring that various courts apply the same rules in order to identify the national legal system

⁴ See section 2.1.1.

governing a particular relationship, translating into equally limited cost reduction for end-users.

Later developments showed that the degree of legal certainty generated by conflict of laws unification depended not only on the adoption of a uniform connecting factor, but also on the degree of deference to applicable law. In 1995, the AWG proposed to the Study Group to include in the draft Convention an optional provision requiring those states which elect to apply it to respect the choice of applicable law made by the parties to a transaction without any condition or qualification whatsoever.⁵ This approach, in the view of the AWG, would ‘give international financiers and lessors the benefit of the certainty and predictability...through the application of well-developed and commercially recognized laws’.⁶ On top of that, ‘the need for commercial certainty and predictability...[were] sufficient reasons in and of themselves for selecting law which is otherwise wholly unrelated to the parties and the transaction’.⁷

This proposal by the AWG was later criticised by Giuseppe Guerreri of the International Law Association as making possible the creation of a parallel system of rules which may conflict with the uniform rules envisaged in the draft Convention.⁸ In his comments, Guerreri stressed that a wholly permissive approach to the choice of law ‘would...impair the general applicability of the Convention and its importance as uniform international law’.⁹ This observation is particularly important for the purposes of this section, since it demonstrates how the aims of commercial certainty and unification of law may differ and even contradict each other.

⁵ Unidroit, *Study LXXII - Doc. 16 (1995)* 24.

⁶ *ibid* 25.

⁷ *ibid* 26. See also footnote 52 in *ibid* for a list of other concerns and objections to an unqualified recognition of the law chosen by the parties to a transaction.

⁸ The criticism was expressed in Mr. Guerreri’s personal capacity.

⁹ Unidroit, *Study LXXII - Doc. 17 Add. 3 (1995)*.

The position of the aviation industry, represented by the AWG, reflected a most pragmatic approach: while unification of laws in the area of secured transactions would be helpful, the desired level of legal certainty could be achieved more realistically through the ability to choose the laws of a creditor-friendly jurisdiction, provided that this choice of law was not qualified by any conditions other than the agreement of the parties. The pragmatism of this approach is easier to appreciate assuming that a wholesale unification of the law of secured transactions laws is not realistic: in this scenario, the unqualified recognition of the law of a well-known and respected chosen jurisdiction is an acceptable compromise that provides essentially the same amount of legal certainty. From a financier's standpoint, such alternative might even seem more attractive compared to actual unification, since it promotes regulatory competition among states.

The demand for certainty on a deeper, substantive level, surfaced very early: in 1989 Ronald Cuming acknowledged the need to ensure recognition of security interests created under the laws of other jurisdictions¹⁰ and later the Study Group opted for the creation of the new concept of 'international interest'¹¹ and an international system of priorities overriding the domestic regime.¹² These developments aimed to achieve predictability of applicable rules as such, rather than the ways to identify them. In the terms of legal risk assessment, the benefits of this approach are clear: so long as the respective substantive law provisions are not harmonised on a universal level, a proper risk assessment may involve the analysis of dozens of legal systems – a scenario so improbable that it hardly justifies further consideration. The cost of obtaining legal advice (both in terms of money, time spent and logistics) with respect to multiple legal

¹⁰ See section 2.1.2.

¹¹ See section 2.2.

¹² See section 6.1.

systems is generally high enough to justify taking a shorter and easier route: the risks involved are translated into additional cost of financing and transferred to the debtor. The result is generally a lose-lose situation, in which the creditor has no efficient means of ascertaining the contents of the rules to be applied by a court in case of a potential dispute, and the debtor is often charged disproportionate interest to compensate for such lack of assurance. Accordingly, the amount of resources required to achieve this level of commercial predictability is inversely proportional to the level of substantive law harmonisation in the field of security interests in mobile equipment. Conflict of laws unification is incapable of achieving this degree of predictability simply due to the fact that it cannot exclude the need to analyse the laws of different states.

A key to understanding the specific nature of substantive level predictability in the Convention lies in the mechanics underlying the notion of ‘international interest’.¹³ When this concept became autonomous, ie detached from the national legal systems, the CTC effectively started building a parallel system of regulation coexisting with domestic laws and the property interests created under such laws.¹⁴ In effect, despite the increased predictability, there was minimal actual unification of the national legal regimes: the Convention is built around the functional approach to security, but applies it to the concept of international interests rather than their domestic law counterparts. As a result, states are able to maintain any national distinctions between the different types of agreements covered by the Convention (the domestic characterisation is acknowledged in Article 2(4) of the CTC) and are free to regulate them independently: there is no pressure to unify. If the international interests are not registered, the national regimes

¹³ See section 2.2.2.

¹⁴ The level of detachment of this parallel system from domestic laws is not absolute, however, as a number of matters is left to be decided by the applicable law – see paragraphs 2.9 and 2.58 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 16-19, 48-50.

will continue to apply: the parties will still be able to utilise the Convention remedies (as these do not depend on registration), but the CTC priorities will be rendered ineffective until a registration occurs. As a result, the international regime established by the Convention achieves greater predictability not by harmonising the domestic security regimes as such (except setting a number of minimum remedies), but by creating very strong incentives to make use of the international regime (via the system of priorities).

It is true, at the same time, that the concept of international interest itself generated a degree of confusion even within the UNIDROIT Study Group,¹⁵ which acknowledged ‘the need to minimise the degree of uncertainty that would inevitably flow from the creation of the new autonomous interest’¹⁶ and decided against the inclusion in the text of the draft Convention of a list of factors which cannot invalidate an international interest. Such a list was initially proposed by the AWG in Article 5(2)(a)-(d) of the Draft Aviation Text essentially for illustrative purposes and contained a number of criteria that could not affect the existence or validity of the international interest: (i) recognition of the form of the interest in a contracting state, (ii) additional actions or formalities required by domestic laws, (iii) application of otherwise applicable conflict of laws rules of a contracting state to determine the validity of the interest, and (iv) other grounds existing under national law (except in relation to the capacity to enter into a corresponding agreement) that might result in invalidation or non-recognition of such interest.¹⁷ Despite the general preference towards achieving greater predictability by including these ‘potentially invalidating factors’, the Study Group expressed concern that the list could be missing other similar factors and thus be non-exhaustive – and, as a

¹⁵ See, eg, n 123 in section 2.2.2 and the corresponding discussion relating to the misconception in the commentary of some members of the Study Group in Unidroit, *Study LXXII - Doc. 26 Add. 1 (1996)*.

¹⁶ Unidroit, *Study LXXII - Doc. 27 (1996)* 21-22.

¹⁷ See Article 5 of the Draft Aviation Text in Annex 1 to Unidroit, *Study LXXII - Doc. 23 (1996)*.

result, any court interpreting the relevant provision might reason ‘that, such other potentially invalidating factors not having been specifically referred to, they were not intended to be covered’.¹⁸ Eventually, the Study Group agreed that corresponding clarifications relating to the various ‘potentially invalidating factors’ could be included in the explanatory report or commentary to the future Convention.¹⁹

The involvement of business circles in the project highlighted another important dimension of the twin concepts of certainty and predictability: the latter can be effectively increased in a commercial treaty even regardless of any change of the rules governing a particular legal relationship, whether on a domestic or an international level. It will be recalled from section 6.1.2 that, in its memorandum submitted to the Study Group in 1995, the AWG came up with five alternative options of regulating the priority position of nationally preferred creditors (ie categories of creditors who, as a result of their importance for the national legal system, should be allowed to retain priority regardless of the time of registration of the international interest), ranging from the most intrusive into the area of national laws (contemplating a complete override of domestic priority rules) to the least intrusive one (in the form of deference to the priority position under the domestic law).²⁰ In its commentary, the AWG explained that, in its view, the draft Convention ‘should embody a system in which maximum information is provided to financiers and lessors in order for them to calculate legal risks and appropriately price such risks in transactions’.²¹

In other words, greater certainty could be achieved not only via changes to the rules applicable to a particular category of secured transactions, but also through

¹⁸ Unidroit, *Study LXXII - Doc. 27 (1996)* 21.

¹⁹ *ibid* 22.

²⁰ See n 32 in section 6.1.2.

²¹ Unidroit, *Study LXXII - Doc. 16 (1995)* 22.

transparency-enhancing mechanisms, such as an obligation on contracting states to disclose the list of national creditors having priority over the holders of an international interest. Although the AWG clearly favoured a more intrusive option where any subsequent change to the list of such preferred creditors would have no retrospective effect (thus protecting the priority position of financiers against changes in law), it also envisaged an alternative whereby countries would only be required to record nationally preferred creditors, but ‘their ability to do so would be without consequence’.²² The latter option, it was noted, would not affect priorities in any way, but ‘it might reduce uncertainty and transaction/litigation costs’.²³ Concerns about the freedom of states to determine the priority position of their preferred national lien creditors, on the one hand, and reservations about the feasibility of requesting states to give public notice of domestic creditors granted preferential status²⁴ later resulted in the introduction of two separate categories of non-consensual preferred creditors in the CTC,²⁵ now found in Articles 39 and 40 of the Convention.

Other examples of enhanced certainty in the CTC on a substantive level cover various criteria for determining the applicability of the Convention. First, one should note the abandonment of idea of ‘internationality’:²⁶ in the view of the AWG, ‘aircraft are simply too mobile, aircraft financings are too complex, and the need for commercial certainty and predictability is too great, to condition the applicability of the proposed convention on factual predicates of this kind.’²⁷ Second, the Study Group opted for a

²² *ibid.*

²³ *ibid.*

²⁴ Unidroit, *Study LXXII - Doc. 27 (1996)* 37.

²⁵ See section 6.1.2.

²⁶ See section 2.3 for a more detailed discussion of the development of the concept of internationality.

²⁷ See footnote 14 in Unidroit, *Study LXXII - Doc. 16 (1995)* 7. Later, in 1999, an attempt to define the term ‘purely domestic transaction’ was met with similar criticism that ‘the very essence of the

closed list of asset types covered by the CTC to make it clear for third parties when the Convention applies: the alternative approach, it was felt, would ‘sacrifice an essential element of legal certainty’.²⁸ Third, during discussions concerning the feasibility of treating ‘true leases’ separately for the purposes of the draft Convention,²⁹ the AWG expressed a strong view that all leases should be covered by the new treaty, noting the need to ‘avoid complex characterisation issues that could only end up creating more uncertainty regarding the Convention’s applicability’.³⁰

Overall, it was the need for greater certainty – not unification as such – that formed the main driving force behind the development of the CTC.³¹ Many other considerations were affected by this overarching objective, directly or indirectly. By way of example, the need for greater certainty was only one of the objectives pursued by the aviation industry through the work of the AWG, which summarised its position by stating in its second memorandum to the Study Group in 1996 that the rules of the future Convention ‘must, *in addition to providing certainty*, ensure that the basic commercially oriented, and contractually agreed, rights of asset-based financiers and lessor are protected’.³² To address the latter concern, the AWG proposed a number of ‘asset-finance-facilitating “optional” provisions’:³³ (i) unqualified recognition of choice of law

Convention was to offer the holders of international interests clear predictability of their rights’ – see paragraph 5.37 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*.

²⁸ See paragraph 26 in Unidroit, *Study LXXII - Doc. 27 (1996)* 16.

²⁹ For a more detailed discussion of the legal issues concerning various types of leases see section 2.1.4.1 generally.

³⁰ See paragraph 35 in Unidroit, *Study LXXII - Doc. 27 (1996)* 19.

³¹ By way of example, comments prepared jointly by IATA and the AWG for the Committee of Governmental Experts in 1998 expressly state: ‘Vague standards, inconsistent with the basic objective of providing commercial predictability, should be avoided’ – see Unidroit, *Study LXXII - Doc. 45 / Study LXXIID - Doc. 6 (1998)*.

³² See footnote 10 in Unidroit, *Study LXXII - Doc. 23 (1996)* 3 (emphasis added).

³³ *ibid.*

selected by the parties,³⁴ (ii) protection of the financier upon the initiation of insolvency-related proceedings against the debtor/lessee by way of mandatory return of the equipment (or, alternatively, requirement to cure all defaults and perform contractual obligations),³⁵ and (iii) mandatory time frames for issuing final non-appealable court decisions in respect of remedies under the Convention.³⁶ It is not hard to notice, however, that each of these additional measures also aims to achieve greater certainty, respectively, in the application of substantive laws, on initiation of bankruptcy proceedings (and other bankruptcy related events) and in the course of enforcement of remedies.³⁷ The separation of these three groups of measures into a separate category by the AWG may thus seem (and is) somewhat misleading.

The Draft Aviation Text prepared by the AWG in 1996 – or rather its level of detail – suggests another certainty-enhancing feature generated by the aviation industry, which later translated into the final text of the CTC. The AWG text comprised 32 articles and Annexure with 51 definitions (25 pages overall) and more than tripled the size of the previous draft of the Convention, which had only 19 articles and 15 definitions across 8 pages.³⁸ While the increase in size can partly be explained by the introduction of aircraft-specific provisions (which had not existed in the earlier draft) and the new ‘optional’ provisions discussed in the previous paragraph, the drastic change of the overall volume cannot be attributed to these two factors alone. On the one hand, the aircraft-specific

³⁴ Unidroit, *Study LXXII - Doc. 16 (1995)* 24.

³⁵ *ibid* 26.

³⁶ See paragraph 2 in Unidroit, *Study LXXII - Doc. 19 Add. 4 (1995)*. It should be noted that this proposal was initially considered by the AWG as mandatory, rather than optional – see paragraph 5.1 in Unidroit, *Study LXXII - Doc. 16 (1995)* 16-17. However, later the position was reversed.

³⁷ During the second session of the Study Group in 1996, the AWG acknowledged that ‘an important element in the creation of that degree of legal certainty...was the ability for prospective financiers to know that, in the event of default and/or insolvency, their right to repossess and sell a charged asset would be enforced on a reasonable time scale’ – see Unidroit, *Study LXXII - Doc. 27 (1996)* 40.

³⁸ See Unidroit, *Study LXXII - Doc. 22 (1996)*.

provisions were reduced to a single article.³⁹ On the other hand, the ‘optional’ provisions were also quite limited.⁴⁰

The main reasons behind the dramatic increase of the size of the document lay in the different drafting technique utilised in the Draft Aviation Text: the latter added numerous technical provisions, as well as extra clarificatory language throughout the text in order to achieve greater certainty of the treaty rules. The new technical provisions included a number of definitions, such as ‘contractual rights and obligations’, ‘courts’, ‘judicial proceedings’, ‘party’, ‘ratification instrument’, ‘relevant Contracting State’, ‘selected law’, ‘take possession’ and others.⁴¹ The extra clarificatory language was either integrated into the existing provisions of the draft Convention, or added as part of the new articles proposed by the AWG. Examples of such language included: (i) adding detail to an otherwise self-sufficient provision,⁴² (ii) suggesting criteria or situations which did not affect the application of existing provisions⁴³ and (iii) including provisions essentially confirming the *status quo* which would have existed anyway in the absence of such provisions.⁴⁴

³⁹ See Article 23 of the Draft Aviation Text in Unidroit, *Study LXXII - Doc. 23 (1996)*.

⁴⁰ See Article 13, Article 24(3) and Article 31(2)(a)(iii) (for time limits of court proceedings), Articles 14-15 and Articles 31(2)(a)(iv)-(v) (for insolvency-related protections), Article 7(a), Article 25 and Article 31(2)(a)(i) (for recognition of contractual choice of law) of the Draft Aviation Text in *ibid*.

⁴¹ See Annexure to *ibid*.

⁴² See Article 5(1)(a) of the Draft Aviation Text in *ibid*, which supplemented ‘in writing’ with extra language: ‘signed by or on behalf of the parties’. See Article 8(1) of the same, which stressed that the various remedies could apply to ‘all or part of’ of the relevant property (cf Article 9 in Unidroit, *Study LXXII - Doc. 22 (1996)*). See Article 9 of the Draft Aviation Text in Unidroit, *Study LXXII - Doc. 23 (1996)*, which clarified that the remedy of taking possession could be exercised not only in respect of ‘all or any’ of the property, but also ‘to the extent and on the terms set forth in the agreement’ (cf Article 10 in Unidroit, *Study LXXII - Doc. 22 (1996)*).

⁴³ See Article 5(2) of the Draft Aviation Text in Unidroit, *Study LXXII - Doc. 23 (1996)*, which listed four groups of factors that could not affect the creation of a valid international interest.

⁴⁴ See Article 27 of the Draft Aviation Text in *ibid*, which provided that ‘all legal matters not expressly addressed in [the] Convention shall be governed by otherwise applicable law’.

The inclusion of these technical provisions and extra clarificatory language was a deliberate and informed act by the AWG – in his summary of the key concepts underlying the AWG submission to the Study Group in 1996 Jeffrey Wool explained that the future Convention was expected to ‘provide a sufficient level of detail as to its meaning and application so as materially to enhance the certainty of risk assessment in asset-based financing’.⁴⁵ The Study Group subsequently recognised the need for a ‘sufficient measure of predictability’ for aviation financiers, but at the same time noted the amount of detail that ‘was uncommon and...probably...undesirable in an international Convention’.⁴⁶ To balance these ‘twin’ considerations, the Study Group considered the idea of treating various detailed provisions as matters of interpretation that could be addressed in a separate report or commentary.⁴⁷

Interestingly, the earlier conclusion about the primacy of certainty and predictability in the development of the CTC finds support even in the context of ships, which have been excluded from the scope of the Convention despite the very good reasons for their inclusion.⁴⁸ The aviation industry, represented by the AWG (and later joined by IATA and ICAO), and the shipping circles, supported by the CMI, IMO and UNCTAD, took diametrically opposed views in relation to the future Convention while

⁴⁵ Unidroit, *Study LXXII - Doc. 25 (1996)* 1.

⁴⁶ See paragraph 9 in Unidroit, *Study LXXII - Doc. 27 (1996)* 9. In their subsequent comments the AWG, joined by IATA, further stressed the need for greater detail in the text of the treaty: ‘While we appreciate the advantages of keeping the proposed convention light and simple, this objective is in tension with the parallel objective of obtaining a high degree of commercial certainty’ – see paragraph 2.2 in Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)*.

⁴⁷ This gave rise to the compromise solution, whereby the more technical and detailed provisions were removed from the CTC, on the assumption that the relevant matters would be addressed in the corresponding explanatory materials. See also paragraphs 47, 56, 91 in Unidroit, *Study LXXII - Doc. 27 (1996)* 23, 27, 39. The AWG and IATA subsequently proposed a combination of (i) an ‘explanatory report’ (providing a general background, discussion and illustration) and (ii) ‘official comments’ (addressing specific points required to achieve greater certainty), suggesting that the latter should be obligatory in nature – see paragraph 2.2 in Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 4. See also the summary of comments made by Jeffrey Wool in Unidroit, *Study LXXII - Doc. 41 (1998)* 6, 10. Finally, see paragraph 25 in *ibid* 13 and paragraph 2 in Unidroit, *Study LXXII - Doc. 45 / Study LXXIID - Doc. 6 (1998)* 2.

⁴⁸ See section 3.3.

citing essentially the same reasons: the need to promote certainty and predictability. The only substantive argument⁴⁹ of the shipping industry against the inclusion of ships into the UNIDROIT treaty concerned the new International Convention on Maritime Liens and Mortgages adopted in 1993. According to UNCTAD, in the light of this new instrument the extension of scope of the draft Convention to ships ‘could only cause confusion and uncertainty’.⁵⁰

While the absence of any meaningful documented analysis of the provisions of the two instruments for potential conflicts or overlaps during the development process clearly signals the lack of interest from the shipping circles in the first place, it is not material for the purposes of this chapter. The UNCTAD’s speculation about uncertainty resulting from the co-existence of the two treaties could be real even in the absence of contradiction between them: in the end, having more than one instrument affecting security interests over ships could indeed cause some confusion.⁵¹ What is relevant, however, is the fact that the shipping industry highlighted the importance of the need to adjust to the new rules and the uncertainty resulting from their adoption.

A different course of action taken by each of the two industries demonstrates a different overall perception of the impact of this factor, but does little in terms of measuring its relevance. Without a quantitative analysis in the form of an economic benefit assessment, involving calculations of both the positive and negative impacts of

⁴⁹ The other argument was essentially the urge to avoid the interference by UNIDROIT with the development of rules impacting ships and shipping operations, which, according to Rubens Ricupero, the (then) Secretary-General of UNCTAD, ‘[had] always been elaborated within the *competent* international/intergovernmental organizations with full participation of the shipping community’ – see Appendix I in Unidroit, *Study LXXII - Doc. 29 (1996)* (emphasis added).

⁵⁰ *ibid.*

⁵¹ This does not explain, however, the negative reaction of the international organisations representing the shipping industry: after all, sophisticated parties involved in ship financing transactions could be expected to have the ability and resources to navigate the complex legal framework of maritime law, let alone two standalone conventions governing security over ships.

the new treaty, both sides essentially relied on the abstract notion of certainty and chose different ways. One can only presume that a separate study showing that the legal certainty resulting from the elimination of legal risks for the shipping industry would outweigh any adjustment costs could go a long way towards swaying the shipping circles in favour of the draft Convention. However, since UNIDROIT, IMO, the CMI and UNCTAD left things as they were, one should not be surprised by the lack of progress and eventual exclusion of ships from the scope of the CTC.

Despite the above examples, the relevance of the twin notions of certainty and predictability is probably best illustrated by the history of development of Article 5(1) of the CTC, which establishes the basic rules of interpretation of the Convention. The first draft of this provision can be found in Article 30 of the Draft Aviation Text proposed by the AWG in 1996, which reads:

In the interpretation and application of the terms of this Convention and the regulations regard shall be had to their international character and of the desirability of achieving uniformity in their interpretation and application.⁵²

This article was clearly modelled after Article 7(1) of the CISG, except that reference to the ‘observance of good faith in international trade’ was omitted. The omitted reference was, however, reinstated by the Drafting Group later the same year in the revised draft of the Convention: the newly added Article 6 reproduced word-for-word Article 7 of the CISG in its entirety.⁵³

Following the third session of the Study Group held in Rome in January 1997,⁵⁴ the Drafting Group prepared a revised draft of the Convention, which added for the first time a new overarching objective in interpretation of the treaty: the need to promote

⁵² See Annex I in Unidroit, *Study LXXII - Doc. 23 (1996)*.

⁵³ See Article 6 in Unidroit, *Study LXXII - Doc. 30 (1996)*.

⁵⁴ Unfortunately, no published record or report of this session of the Study Group has been produced to date.

‘predictability’ in its application.⁵⁵ This new objective did not replace any of the existing objectives (which included promotion of uniformity in the interpretation and the observance of good faith in international trade), but expressly recognised the relevance of commercial certainty for the proper understanding of the instrument. Despite the intense subsequent debate about the appropriateness of including a reference to ‘good faith’ as part of the interpretation process, the reference to ‘predictability’ was never omitted from subsequent drafts, even in cases when alternative wordings of the same text were proposed by the Drafting Group⁵⁶ or when the general formula of this provision was revised by adding reference to the Convention’s object and purpose.⁵⁷

Of crucial importance here is the fact that ‘predictability’ as another primary objective (i) was added prior to the removal of the reference to the ‘good faith’ principle and (ii) was included in each of the Alternative A and Alternative B proposed by the Drafting Group in 1997 at the conclusion of its fourth session.⁵⁸ Accordingly, it never came in direct conflict with the ‘good faith’ principle and thus the statement in the Official Commentary that in Article 5(1) ‘predictability has been *substituted* for good faith’⁵⁹ and that ‘predictability’ was included ‘replacing the normal reference to good faith’⁶⁰ is not entirely accurate. While there is no denying that predictability is one of the main principles on which the CTC as a whole is based, a deeper look at the drafting history of Article 5(1) clearly shows that ‘predictability’ did not replace ‘good faith’ (as

⁵⁵ See Article 6(1) in Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*.

⁵⁶ See Alternative A and Alternative B of Article 6 in Unidroit, *Study LXXII - Doc. 35 (1997)*.

⁵⁷ See Article 5(1) in Unidroit, *International Interests Study Group 4th session Misc. 5 (1997)*.

⁵⁸ See Article 6 in Unidroit, *Study LXXII - Doc. 35 (1997)*.

⁵⁹ See paragraph 4.61 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 272 (emphasis added).

⁶⁰ See paragraph 2.17 in *ibid* 22.

would seem to be the case upon a simple comparison of Article 5(1) of the CTC with Article 7(1) of the CISG): the former earned its own place among the primary interpretation objectives and would have existed regardless of the outcome of the dispute concerning ‘good faith’.

The history of the CTC shows that predictability was the principal commercial factor that determined the outcome of many drafting conflicts and shaped the CTC in its present form. This important factor, however, essentially remained abstract and did not lend itself to quantification, which significantly limited its usefulness, especially in situations when different commercial factors counteracted each other (as was the case with the shipping industry involvement and the perceived uncertainty generated by the draft Convention). Nevertheless, limited attempts to quantify the economic benefits generated by the CTC were made several times and at various stages of the development of the Convention and its protocols. These are addressed in greater detail in the following section.

7.1.2 Economic benefit studies in the history of the CTC

The first attempts to explain the relevance of the economic benefit generated by the CTC can be tracked back to the second memorandum prepared by the AWG in 1996. The utterly pragmatic approach of the aviation industry can be illustrated by the basic premise that ‘the value of the proposed convention is directly related to the extent to which its terms...result in an increase in the availability of credit, and/or a reduction in the cost of such credit, to owners/operators of aircraft equipment’.⁶¹ This premise was based on the high amount of credit required to finance future aircraft deliveries, which,

⁶¹ Unidroit, *Study LXXII - Doc. 23 (1996)* 3.

according to the estimates by the major airframe manufacturers, could be in the range of USD 900-1000 Billion.⁶²

A conceptual and qualitative, rather than quantitative, analysis of economic advantages of a new treaty governing security interests in movable assets was later provided jointly by the three members of the Center for Economic Analysis of Law (CEAL): Nuria de la Pena, Lance Girton and Heywood Fleisig.⁶³ Instead of attempting to quantify the prospective benefits of a future treaty, which at the time consisted of only 19 draft articles,⁶⁴ the authors suggested several economic conclusions resulting from their analysis of the draft text, some of which appeared rather basic. First, they simply concluded that ‘the more narrow the application of the convention to a list of specific equipment, the more limited its economic impact’.⁶⁵ Second, on the basis of abstract figures and hypothetical scenarios, the paper stressed the importance of priority rules, particularly in relation to future advances.⁶⁶ Third, it stressed the relevance of balancing costs and benefits when designing rules governing purchase money security interests.⁶⁷ Fourth, the authors outlined a number of issues relating to the prospects of establishing an international registry: (i) choosing between domestic registries and a wholly international registry, (ii) the need for greater access to registration records, (iii) the greater efficiency of a notice filing system and (iv) the relevance of pre-filing as a mechanism protecting the lender in cases when the debtor uses the loan to purchase the equipment used as collateral.⁶⁸ Fifth, the document focused on the economic relevance of

⁶² See footnote 9 in *ibid.*

⁶³ See Unidroit, *Study LXXII - Doc. 26 Add. 2 (1996)*.

⁶⁴ See Unidroit, *Study LXXII - Doc. 24 (1996)*.

⁶⁵ Unidroit, *Study LXXII - Doc. 26 Add. 2 (1996)* 11.

⁶⁶ *ibid* 12-14.

⁶⁷ *ibid* 16.

⁶⁸ *ibid* 16-19.

the ability of the secured creditor to enforce its security and concluded that ‘the greatest diminution in the economic value of collateral arises from problems in enforcing security interests’.⁶⁹ The authors identified two primary economic factors in assessing enforcement-related provisions: (i) the size of collection costs and (ii) correlation between the economic life of collateral and the time period required to seize and sell such collateral.⁷⁰ They also highlighted the importance of creditor protection in case of debtor’s insolvency, but at the same time expressed reservations as to the viability of the time limits for court judgments proposed by the AWG resulting from the lack of any enforcement system to deal with judges and court officers who ignore the legally-specified timetable.⁷¹

While the CEAL paper did not include any empirical economic benefit analysis, its role should not be underestimated: it identified those elements of the draft Convention which were capable of generating quantifiable economic benefit. In other words, it helped bridge the gap between the abstract notion of ‘certainty’ and the concrete reduction of costs to the end users of the future treaty. The second session of the Study Group held shortly afterwards, in April 1996, brought the draft Convention one step closer to an actual economic benefit analysis: it was suggested that the pricing of secured financing transactions was ‘directly related to perceptions of the probable timetable for repossession and sale in the event of default and/or insolvency’.⁷² These considerations formed the basis of some of the future economic benefit studies.

The first quantitative economic benefit analysis was commissioned by the Aircraft Protocol Group and prepared in 1998 by Anthony Saunders and Ingo Walter

⁶⁹ *ibid* 19.

⁷⁰ *ibid*.

⁷¹ *ibid* 20-21.

⁷² See paragraph 93 in Unidroit, *Study LXXII - Doc. 27 (1996)* 40.

under the Auspices of INSEAD and the New York University Salomon Center⁷³ (the ‘INSEAD Study’). The study was limited to the aviation sector and estimated the savings in the region of USD 5 billion per annum based on 20-year projected aircraft deliveries.⁷⁴ In select cases, the cost savings generated by the future Convention were deemed infinite, since in certain circumstances credit would be extended where it was simply unavailable before.⁷⁵

These savings were expected to be further supplemented by a variety of micro- and macroeconomic benefits. The former included: (i) benefits for commercial air carriers in the form of enhanced fleet planning, operational flexibility and resulting profit maximisation, (ii) reduction of transaction costs through simplification and standardisation, (iii) assumed pass-through of interest cost savings to reduce fares, (iv) reductions in litigation costs and delays and (v) reduced pressure for sale of used aircraft under conditions of financial distress. The latter amounted to a 2-3% reduction in external country debt for certain emerging market countries.⁷⁶

On its face, the INSEAD Study took into account three asset finance enhancing principles embodied in the draft Convention. The first one (‘transparent priority principle’) posited that a financier or lessor must be able to determine and ensure its first-ranking priority. The second one (‘prompt enforcement principle’) implied the ability of the financier or lessor, upon default of the debtor, to promptly realise the value of collateral or redeploy the asset to generate proceeds that could be applied against the

⁷³ Anthony Saunders and Ingo Walter, *Proposed Unidroit Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment* (A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center, 1998).

⁷⁴ *ibid* iii.

⁷⁵ *ibid*.

⁷⁶ *ibid* iv.

amount of unpaid debt. The third one ('bankruptcy law enforcement principle') required that the rights of a financier or lessor under the first two principles remained unaffected by the bankruptcy of the party providing the security.⁷⁷

Despite the very broad and far-reaching expected gains from the draft Convention, the methodology utilised by the authors of the INSEAD Study was based on very generous assumptions⁷⁸ and lacked sufficient data for a truly global research: it involved very limited country-specific data.⁷⁹ The study involved two main stages: (i) a calculation of costs savings by US airlines resulting from the adoption of the Bankruptcy Reform Act of 1994 (and Section 1110 of the US Bankruptcy Code⁸⁰) and (ii) generating broad estimates of possible cost savings by the global airline industry resulting from the draft Convention as applied to aircraft.⁸¹ In essence, the study was built on a 'what if' basis: the analysis used hypothetical pricing to form the basis of some of the key calculations⁸² and did not take into account the implementation costs of the new treaty.

⁷⁷ *ibid* 11.

⁷⁸ The estimated savings 'assume a 100-basis-point reduction in the overall cost per annum of 12-year fixed-rate aircraft loans, and comparable savings in the case of asset-backed bond rating upgrades' – see *ibid* iii.

⁷⁹ See Table 2 'Hypothetical savings in \$ million for 1992-1997' and Table 3 'Projected savings in \$ million for 1997-2016'. In each case, country-specific data was based on the airline spending: actual in the first case and projected in the second case.

⁸⁰ Title 11 of the United States Code.

⁸¹ Saunders and Walter, *Proposed Unidroit Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment (A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center, 1998)* 15.

⁸² The projected cost savings are based on hypothetical interest rate spread savings between hypothetical secured and unsecured financing transactions assigned to hypothetical secured transactions. Such spread savings amount to 100 basis points (in case of reduction from LIBOR plus 140 basis points to LIBOR plus 40 basis points) or 50 basis points (in case of reduction from LIBOR plus 90 basis points to LIBOR plus 40 basis points) – see paragraphs 4.10 and 4.11 in *ibid* 22-23. The authors explain that some figures are provided 'as reasonable indicators both of hypothetical secured and unsecured rates, as well as differentials between them', and simply acknowledge that 'actual rates and/or differentials may be higher or lower depending on a wide variety of factors' – see footnote 47 in *ibid* 20.

Despite its limited scope and methodology, the INSEAD Study remained the only *ex ante* quantitative economic benefit study prepared prior to the adoption of the Convention in 2001.⁸³ Although this study was referred to multiple times as evidence of possible practical gains resulting from the CTC,⁸⁴ such references primarily focused on the (quite lucrative) conclusions that the draft Convention ‘[would] achieve significant economic gains’ and that ‘the economic gains [would] be substantial and complementary’,⁸⁵ or on the three ‘principles underlying asset-based financing’.⁸⁶

Interestingly, there appears to be no record of the substantive review or critique of the INSEAD Study, despite its very real limitations. There is limited evidence suggesting that an element of peer feedback was involved in the development of the document and that the research ‘was coupled with contributing “economic fora” where a range of experts – airlines, financial institutions, international credit rating agencies, export credit agencies, and manufacturers – discussed the subject with the authors’.⁸⁷ It should be noted, however, that most, if not all, of the above participants were also the key stakeholders and prospective beneficiaries of the proposed reform generated by the Convention. It is also hoped that the ongoing project Economic Assessment of International Commercial Law Reform will review the limitations of the INSEAD research to strengthen the methodology of future *ex ante* economic benefit analyses.

⁸³ For completeness, the author notes a reference to a ‘Draft Economic Impact Assessment Study’ in the report of the 77th session of the UNIDROIT Governing Council – see Unidroit, *Study LXXII - Doc. 40 (1998)* 30. It is impossible to confirm or deny whether this reference relates to the INSEAD Study.

⁸⁴ See, eg, paragraph 4(a) in Unidroit, *Study LXXII - Doc. 43 / Study LXXIID - Doc. 4 (1998)* 3; paragraph 153 in Unidroit, *Study LXXII - Doc. 41 (1998)* 36-37.

⁸⁵ See footnote 7 in Jeffrey Wool, ‘The Case for a Commercial Orientation of the Proposed UNIDROIT Convention as applied to aircraft equipment’ (1999) 4 *Uniform Law Review* 289, 290.

⁸⁶ Wool, ‘Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention’ (2012) 17 *Uniform Law Review* 633, 644.

⁸⁷ Jeffrey Wool, ‘Economic Analysis and Harmonised Modernisation of Private Law’ (2003) 8 *Uniform Law Review* 389, 391.

Neither of the above concerns should, however, deemphasise the crucial role the INSEAD Study played in the development of the CTC. It was prepared in the run-up to the governmental consultations relating to the draft Convention and the Aircraft Protocol and provided ‘an invaluable pointer to the practical benefits that [Governments] could expect to derive from the proposed new international regimen’.⁸⁸ Perhaps even more importantly, it connected quantitative analysis with the three asset finance enhancing principles (transparent priority, prompt enforcement and bankruptcy enforcement),⁸⁹ essentially turning them into assumptions underlying the projected economic benefit. These assumptions, as was succinctly noted by Jeffrey Wool, had ‘in terrorem’ effect during the subsequent negotiations: any dilution of these principles in the final text would be perceived as diminishing the expected impact of the Convention. In addition, the INSEAD Study has an interesting connection to some of the following impact studies: in Appendix 4 the authors briefly discuss the feasibility of analysing repossession delays as an alternative method of economic assessment.⁹⁰

The delay between a debtor’s default and repossession of the collateral by the financier formed the basis of two economic benefit studies prepared by Vadim Linetsky in 2009 and 2010. The first one measured the risk and financing cost reduction to the lender resulting from the shortening of existing repossession delays to the 60-day maximum. The 60-day limit originated from Section 2(a) of Annex 1: Qualifying Declarations to the Sector Understanding on Export Credits for Civil Aircraft (‘ASU

⁸⁸ Unidroit, *Study LXXII - Doc. 40 (1998)* 30.

⁸⁹ The author notes that, while these principles were applied in the text of the INSEAD Study, they were not developed by its authors. This follows from the acknowledgement in footnote 1 in Saunders and Walter, *Proposed Unidroit Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment 1* (A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center, 1998).

⁹⁰ Appendix 4 is not present in the article form of the INSEAD research, co-authored by Jeffrey Wool and Anand Srinivasan – see Anthony Saunders and others, ‘The Economic Implications of International Secured Transactions Law Reform: A Case Study’ (1999) 20 U Pa J Int’lL 309.

2007') adopted by the OECD on 27 July 2007⁹¹ and formed one of the mandatory criteria established by the ASU 2007 that had to be fulfilled before a state could qualify for a special Cape Town Convention discount.⁹² The data on existing repossession delays was calculated on the basis of the World Bank statistics on contract enforcement delays, which were not specific to aircraft financing contracts, but were subsequently adjusted by applying certain commercial data on aircraft repossessions submitted by financial institutions.⁹³ The study concluded that the worldwide reduction of aircraft repossession delay from the median 10 months to 60 days could generate total savings on the order of USD 161 billion between 2009 and 2030. The 2010 study assessed the economic benefits of reducing aircraft repossession delays in the context of a single jurisdiction – the UK – and projected savings between GBP 538 and 2,705 billion in funding costs of financing aircraft deliveries over the next 20 years.⁹⁴

The two economic benefit studies by Vadim Linetsky focus on microeconomic benefits and employ a more robust methodology to calculate the impact generated by the CTC. This was possible for two principal reasons. First, both the Convention and the Aircraft Protocol were finalised, allowing researchers to focus more on the actual provisions of these documents rather than their general principles. Second, the ASU 2007, which set the 60-day threshold for qualifying declarations, provided a much

⁹¹ OECD, *Sector Understanding on Export Credits for Civil Aircraft* (2007).

⁹² The ASU 2007 established certain rules governing the financing that export credit agencies could provide for the purchase of aircraft. Its principal objective was to 'foster a level playing field for such export credits, in order to encourage competition among exporters based on quality and price of goods and services exported rather than on the most favourable officially supported financial terms and conditions' – see section 1(a) in *ibid.* According to the ASU 2007, its participants providing official support were required to charge, for the credit amount officially supported, no less than the minimum premium rate set out in the document (section 12(a)). The Cape Town Convention discount effectively reduced that minimum premium rate. Subsequently, the ASU 2007 was superseded by a new version adopted in 2011 (ASU 2011).

⁹³ Vadim Linetsky, *Economic Benefits of the Cape Town Treaty 4* (2009).

⁹⁴ Vadim Linetsky, *Accession to the Cape Town Convention by the UK: An Economic Impact Assessment Study 2* (2010).

needed actual, rather than hypothetical, starting point for measuring the delta of economic benefit.⁹⁵ In addition, as was noted by Jeffrey Wool, the published methodology of major credit rating agencies had shown that ‘the presence of the CTC (with the qualifying declarations and implementation) could result in up to a two notch upgrade in the rating of the relevant securities’.⁹⁶

Although most economic benefit studies relating to the CTC focused on the aviation sector and the Aircraft Protocol, certain limited attempts have been made to cover other, present and future protocols. These studies, however, either remain essentially qualitative in nature,⁹⁷ or are based on very generous assumptions and broad hypotheticals.⁹⁸

Overall, the practice of preparing economic benefit studies to measure the impact of the CTC is difficult to assess. On the one hand, the studies play an important role in the development of new protocols and the assessment of existing ones by signalling the level of change resulting from the adoption and implementation of the new instruments. On the other hand, the methods used to prepare such studies have been

⁹⁵ cf Saunders, Srinivasan and Walter, ‘Innovation in International Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention’ (2006) <<http://ssrn.com/abstract=894027>> accessed 02 June 2017. This study, prepared shortly before the adoption of the ASU 2007, had to rely on broad assumptions and general comparisons. On the one hand, the authors assumed that the ratification of the CTC would result in the improvement in the debt ratings of the airlines and prepared a study on a ‘what if’ basis, asking what savings may accrue to an airline if its rating were improved. On the other hand, the study used a single-country ‘event study’ of the reaction of the stock market to the US signature and ratification process in 2003 and 2004 to estimate the stock market valuation of publicly-traded airlines generally.

⁹⁶ Wool, ‘Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention’ (2012) 17 *Uniform Law Review* 633, 648-649.

⁹⁷ See Kozuka and Taniguchi, ‘An Economic Assessment of the Space Assets Protocol to the Cape Town Convention’ (2011) 16 *Uniform Law Review* 927; Unidroit, *Study 72K - CGE 1 - Doc. 10 (2017)*.

⁹⁸ See the paper ‘Extending UNIDROIT’s Cape Town Convention to Mining, Agricultural, and Construction Equipment: Economic Issues’ by Heywood Fleisig in Unidroit, *Unidroit 2013 C.D. (92) 5(b) (2013)*. This study broadly projected that the MAC Protocol would increase sales of mining, agricultural and construction equipment by about USD 600 billion over a period of five to seven years and facilitate using USD 2 trillion in such equipment as collateral for loans.

extremely diverse, and the results are hard to verify. It is posited that the situation can be improved in a number of ways. First, greater emphasis should be made on quantitative, as opposed to qualitative economic research. The latter often ends up repeating the basic asset financing principles on which the CTC is based, adding little in terms of actual impact analysis. Second, economic benefit studies should become more sophisticated and include multiple micro and macroeconomic indicators. Third, impact assessments should address not only the expected benefits of adopting the new instruments, but also the corresponding costs of implementation and other countervailing factors. It is hoped that the project Economic Assessment of International Commercial Law Reform will help to lay the foundation and formulate the best practices for future studies based on the CTC and its protocols.

7.2 *State sensitivities*

It is clear from the previous section that the development of the CTC, as a whole, was driven by commercial objectives. These objectives are reflected in the preamble of the Convention and include, among other things, the desire ‘to provide broad mutual economic benefits for all interested parties’. Past studies attempted to gauge such economic benefits, and it is hoped that future research will manage to make the assessment more accurate and reflect the economic costs associated with the CTC and its protocols. This thesis, however, goes beyond purely economic and commercial matters by analysing other factors that affected the scope of the Convention and its overall feasibility. This section focuses on such matters, which, for simplicity, are referred to as ‘state sensitivities’. These factors rarely lent themselves to quantification and often

contravened commercial factors⁹⁹, resulting in a set of provisions pursuing other, non-economic, aims.¹⁰⁰

One of the key obstacles to the promotion of commercial objectives in the CTC is the notion of sovereignty: the perception of governments as to what can or cannot be regulated in an international treaty significantly changed the scope of many provisions of the Convention and its protocols.

An obvious example of such sovereignty-driven non-commercial factors can be found in Article 2(2) of the CTC, which retains the distinction between security, leasing and title reservation agreements. As was explained in greater detail in section 2.1.4, the perceived conceptual differences between various legal traditions precluded the universal consensus to adopt a functional approach to security.¹⁰¹ Although in the end all three types of agreements ended up being covered in the Convention, the explicit reference to each of them is a clear reminder of the very real distinction in approach adopted by the national legal systems.

Another conceptual problem can be found in the records of the governmental expert stage in the run-up to the Cape Town Diplomatic Conference, where a last-minute intervention during the Third Joint Session eventually demolished the system of assignment that had been created by the draft Convention. At the time, the assignment

⁹⁹ This can be best illustrated by the words of several members of the Study Group at its second session in 1996, who stressed ‘how vital it would be as a matter of general policy for the rules of the future Convention to be perceived as reflecting a balance between the interests of all the parties concerned, as well as responding to the underlying objectives of the Convention, and as being consistent with the requirements of other branches of the law’ – see paragraph 94 in Unidroit, *Study LXXII - Doc. 27 (1996)* 40.

¹⁰⁰ An acknowledgment of the existence of other, non-commercial aims of the CTC based on state sensitivities can be found in an early article by Jeffrey Wool, who recognised the so-called ‘diplomatic objective’ (in addition to the ‘commercial objective’), namely the need to ‘generate a high level of international consensus’ – see Wool, ‘The Case for a Commercial Orientation of the Proposed UNIDROIT Convention as applied to aircraft equipment’ (1999) 4 *Uniform Law Review* 289, 291.

¹⁰¹ See n 41 in section 2.1.4.

provisions were following a simple logic that ‘an assignment of an international interest in an object...transfers to the assignee...(a) all the interests and priorities of the assignor... and (b) all associated rights’¹⁰² (ie rights to payment or other performance under the agreement secured by the relevant object). The underlying rationale was clear: since the draft CTC regulated international interests (rather than receivables generally), it only seemed intuitive to follow that approach and provide for the mechanism of assignment of such interests. This view, however, was challenged by the delegation of France, which submitted that the existing draft completely overturned French ‘ideas regarding the assignment of debts’: the latter followed the reverse logic that assignment of debt carries with it the accessory transfer of security (Articles 1690, 1692 of the French Civil Code).¹⁰³ The dramatic departure of the draft Convention from the French domestic notions of assignment prompted that delegation to request a mechanism permitting states not to apply the relevant chapter.¹⁰⁴ To address this matter, the delegations of Canada, France and the USA came together to propose two alternative versions of the assignment provisions.¹⁰⁵ Despite this effort, the matter was referred to the Cape Town Diplomatic Conference, which approved the current text that follows the French approach.¹⁰⁶

¹⁰² See Article 30(1) in Appendix III to Unidroit, *Unidroit CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2 (2000)*.

¹⁰³ Unidroit, *Unidroit CGE/Int.Int./3-WP/4 ICAO Ref. LSC/ME/3-WP/4 (2000)* 3.

¹⁰⁴ *ibid* 4.

¹⁰⁵ See paragraphs 223, 232-237 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*. See the actual text of proposal in Unidroit, *Unidroit CGE/Int.Int./3-WP/31 ICAO Ref. LSC/ME/3-WP/31 Rev. 29/03/00 (2000)*.

¹⁰⁶ See Chapter IX of the CTC. Note that the change of approach significantly complicated the priority rules applicable to assignment (see Article 36 of the CTC) to protect general receivables financiers – see paragraphs 4.254-4.263 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 364-370.

Bankruptcy law was another area which proved to be largely impenetrable by the CTC. The difficulties associated with unification of matters of bankruptcy law can perhaps be best illustrated by the fact that this problem was brought up during the very first discussion of the Canadian Proposal¹⁰⁷ by the UNIDROIT Governing Council in 1989, when Roy Goode expressed the view that ‘bankruptcy rules should...be totally excluded although rights created outside bankruptcy law would in many cases be given effect within bankruptcy law’.¹⁰⁸ This succinct comment, in essence, summarises quite well the future development of the bankruptcy-related provisions of the CTC. In the summary of responses to his 1990 Questionnaire, Ronald Cuming concluded that there was ‘considerable support for a minimalist, but not a hands-off, approach’: while an attempt to influence national bankruptcy laws in any significant way was considered ‘completely unrealistic’, most respondents favoured the need to ensure that transactions creating security interests governed by the future Convention were treated in bankruptcy as security agreements.¹⁰⁹ This outcome later translated into a unanimous decision by the Study Group that ‘the Convention should in no way seek to displace national bankruptcy rules but should rather simply seek to ensure the survival of the international security interest in bankruptcy proceedings’.¹¹⁰ In the words of Charles Mooney and Thomas Whalen, preservation of the international interest in bankruptcy ‘[was], perhaps, the single most fundamental role for the Convention’.¹¹¹

¹⁰⁷ See n 1 in section 2.1.1.

¹⁰⁸ Unidroit, *Governing Council C.D. 68 - Doc. 26 (1989)* 34.

¹⁰⁹ Unidroit, *Study LXXII - Doc. 4 (1992)* 9-10.

¹¹⁰ Unidroit, *Study LXXII - Doc. 7 (1993)* 6.

¹¹¹ Unidroit, *Study LXXII - Doc. 36 (1997)* 43.

The insolvency-related articles of the different protocols establishing various alternatives went beyond the original modest limits outlined above:¹¹² the relevant provisions in each protocol impose obligations on domestic insolvency administrators¹¹³ and even domestic courts¹¹⁴ in the course of insolvency proceedings. Nonetheless, neither of these provisions applies by default, as each requires a corresponding declaration – a clear indication of the special character of bankruptcy provisions. Following the adoption of the CTC and the Aircraft Protocol, the aviation industry was instrumental in designing economic incentives for the adoption of certain declarations in the form of the ASU 2007 and, later, the ASU 2011, but the more intrusive bankruptcy-related provisions remain optional in nature.

A very similar position applies to procedural matters under the Convention: the latter does not stipulate specific time limits for courts or other authorities, while the protocols allow corresponding declarations.¹¹⁵ The complexity of the issue of establishing hard cut-off timeframes is further strengthened by the due process concerns of fair hearing.¹¹⁶

Another taboo area untouched by the CTC concerns the enforcement of Convention provisions by the contracting states. Despite several attempts to establish some form of supranational body for the resolution of disputes arising under the Convention, the CTC incorporates no international control mechanism over its

¹¹² See n 90 in section 8.2 for a brief account of the history of the relevant provisions.

¹¹³ See, eg, Article XI(2) (Alternatives A and B) of the Aircraft Protocol, Article IX(3) (Alternatives A, B and C) of the Rail Protocol and Article XXI(2) (Alternatives A and B) of the Space Protocol.

¹¹⁴ See, eg, Article XII(2) of the Aircraft Protocol, Article X(2) of the Rail Protocol and Article XXII(2) of the Space Protocol.

¹¹⁵ See, eg, Article X(2), Article XI(3) (Alternative A) and Article XI(2) (Alternative B) of the Aircraft Protocol; Article VIII(2), Article IX(4) (Alternative A), Article IX(3) (Alternative B) and Article IX(15) (Alternative C) of the Rail Protocol; and Article XX(2), Article XXI(4) (Alternative A) and Article XXI(2) (Alternative B) of the Space Protocol.

¹¹⁶ See Unidroit, *Study LXXII - Doc. 19 Add. (1995)* 9.

compliance. In 1997, Vladislav Kouvshinov came up with an idea – inspired by the ICSID arbitration procedure established under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States – to set up an ‘International Centre for Settlement of Disputes Arising out of or in Connection with the Implementation of the Convention on International Interests in Mobile Equipment, Protocols to this Convention and the Regulations of the Intergovernmental Regulator’ (the ‘Centre’). According to this proposal, the jurisdiction of the Centre would cover (i) disputes between holders of international interests (and, potentially, holders of registered registrable national interests), (ii) disputes between such holders and the Registrar regarding acts and omissions of the latter and (iii) claims for the granting of speedy relief. The Centre’s Secretariat was expected to maintain a Panel of Arbitrators and a Panel of Conciliators consisting of duly qualified persons.¹¹⁷ A different, more modest, suggestion was made by Ioannis Voulgaris, who proposed the institution of ‘Boards of Appeal’ to hear appeals brought against the actions of the international registrar, modelled after the Board of Appeal set up under the European Regulations on the Community trade mark.¹¹⁸

Eventually, neither proposal was successful. Interestingly, the same is true in respect of recognition by contracting states of court judgments and rulings issued by other contracting states under the Convention. In 1997, the Space Working Group came up with the following proposal, which, however, was subsequently declined:

Subject to the public policy of each Contracting State, a Contracting State shall recognise the orders, rulings and judgments issued by courts of competent jurisdiction of other Contracting States that arise out of this Convention and are consistent with this Convention.¹¹⁹

¹¹⁷ See paragraph 198 in Unidroit, *Study LXXII - Doc. 36 (1997)* 52-54.

¹¹⁸ Unidroit, *Study LXXII - Doc. 40 (1998)* 19-20.

¹¹⁹ See paragraph 129 in Unidroit, *Study LXXII - Doc. 36 (1997)* 32.

Another area of state sensitivity relates to the special rules governing ‘internal transactions’.¹²⁰ In light of the importance of the twin notions of certainty and predictability for the development of the CTC,¹²¹ it might seem puzzling why the Convention treats the internal transactions separately.¹²² Nevertheless, the difficult history of the concept of internationality explained in section 2.3 and the number of declarations¹²³ made under Article 50(1) of the CTC show how difficult it has been for states to relinquish full control over transactions firmly associated with their national jurisdiction.

One of the most recent sovereignty-driven challenges concerns the upcoming MAC Protocol and relates to mobile equipment associated with immovable property.¹²⁴ This problem is new in the context of the CTC, since it had no relevance for any of the existing protocols, and originates from the fact that under certain legal systems mining, agricultural or construction equipment can become so associated with immovable property that the interests in the latter can extend to such equipment under domestic law. This created the possibility for serious objections from states to the transition to an international regime governing security interests in mining, agricultural and construction equipment, since immovable property interests are generally considered a matter of national sovereignty.¹²⁵ At first, this factor was not considered as a major obstacle, as it

¹²⁰ See section 2.3.3.

¹²¹ See section 7.1.1.

¹²² See Articles 1(n) and 50 of the CTC, Article IV(2) of the Aircraft Protocol, Article XXIX(2) of the Rail Protocol and Article I(3) of the Space Protocol.

¹²³ See n 202 in section 2.3.3.

¹²⁴ The author acknowledges that this matter has not been fully resolved at the time of submission of this thesis and that the corresponding discussions are still underway.

¹²⁵ This factor is a radical departure from the autonomous concept of mobility in the Convention, which does not depend on the domestic classification or characterisation of the relevant objects: eg for the purposes of the CTC it is irrelevant that under Russian law an aircraft subject to state registration is considered immovable property – see section 130 of the Civil Code of the Russian Federation. See further paragraphs 2 and 11(2) in Unidroit, *Study 72k - CGE1 - Doc. 9 (2017)* 1, 3.

was understood that the degree of ‘association’ with the immovable property necessary to trigger the application of the relevant domestic rules involved some kind of physical connection with the land (eg in the case of cranes). A comparative law analysis performed by the UNIDROIT Secretariat, however, revealed that in certain jurisdictions such rules can apply regardless of physical attachment: what matters is whether or not the equipment is ‘utilised for the economic exploitation of the immovable property’.¹²⁶ To address this issue, the UNIDROIT study group came up with three alternatives from which contracting states must choose (the relevant declarations are drafted as mandatory), ranging from a hands-off approach leaving the consequences of association with immovable property to domestic law (Alternative C), to a provision preserving both the existence and priority position of the international interest in the equipment which has been so associated (Alternative A).¹²⁷

As was noted in section 5.2.4, the desire to achieve a balance of interests is one of the important features of the system of remedies established by the CTC and its protocols. The Convention has set up a number of safeguards restricting the freedom of creditor in case of enforcement. These include the requirement to exercise remedies in a commercially reasonable manner,¹²⁸ the obligation of the chargee to give reasonable prior notice to ‘interested persons’ (which category includes the debtor),¹²⁹ the need to compare the amount of secured obligation with the value of the relevant object prior to

¹²⁶ See paragraph 77 in Unidroit, *Study 72k - CGEI - Doc. 4 (2017)* 16.

¹²⁷ See Article VII in Unidroit, *Study 72k - CGEI - Doc. 2 corr. (2017)*. Alternative A can be particularly problematic when the equipment becomes so connected with the immovable property that it loses its individual legal identity or that it cannot be removed without material damage to the immovable property or the equipment itself – see paragraph 11(3) in Unidroit, *Study 72k - CGEI - Doc. 9 (2017)* 3.

¹²⁸ Article 8(3) of the CTC.

¹²⁹ Article 8(4) and Article 1(m)(i) of the CTC.

the vesting of ownership to it in satisfaction under Article 9¹³⁰ or the right of the court to impose terms protecting interested persons in issuing advance relief under Article 13.¹³¹ The importance of the above protections is further reinforced by the fact that their application cannot be avoided by agreement of the parties.

Another example of non-commercial factors in development of the CTC restricting the exercise of treaty remedies relates to the so-called public service exemption envisaged by the Rail¹³² and Space¹³³ Protocols. At the core of the public service exemptions lies an acknowledgment that rolling stock and space assets (primarily satellites) are objects of special importance that can be utilised in delivery of public services and that ‘the denial of public access to such assets will create a disproportionate and greater loss for the greater economy compared to the loss for the individual creditor if there is no removal’.¹³⁴ The exemption itself aims to safeguard the ability of contracting states to prevent interruptions to public services upon default of the debtor, even if this causes inconvenience to the creditor, but the two protocols approach this matter differently.

The Space Protocol merely restricts the full exercise of remedies by the creditor during a certain period (but does not deny the relevant remedy),¹³⁵ while the Rail Protocol goes further than that and lays down a mechanism of compensation to the creditor in situations when the contracting state blocks repossession, use or control of the

¹³⁰ Article 9(3) of the CTC.

¹³¹ Article 13(2) of the CTC.

¹³² Article XXV of the Rail Protocol.

¹³³ Article XXVII of the Space Protocol.

¹³⁴ Rosen, ‘Public Service and the Cape Town Convention’ (2013) 2 Cape Town Convention Journal 131, 133.

¹³⁵ Article XXVII(3) of the Space Protocol.

collateral.¹³⁶ The solution envisaged in the Rail Protocol essentially maintains a balance of interests of both the state and the creditor in respect of rolling stock used for public service: the former is interested in exercising control over the relevant assets, while the latter wants to be repaid.

The importance of the non-commercial factor in relation to public service exemptions in these two protocols is further stressed by two additional factors. First, Article XXV(4) of the Rail Protocol contains what can be labelled as one of the most ‘anti-commercial’ provisions in any of the protocols, allowing contracting states, by virtue of a special declaration, not only to preclude enforcement of the relevant remedies, but also to deprive the creditor of any compensation (although with no retroactive effect).¹³⁷ This provision effectively nullifies the protections of the CTC in relation to the corresponding rolling stock. Second, Article XXVII(9) of the Space Protocol not only provides that the limitation on the exercise of remedies established by paragraph 3 does not apply to a creditor whose international interest was created prior to the conclusion of the contract with the public services provider, but makes this provision conditional on the lack of actual knowledge of the existence of a public services contract by such creditor. The need to ascertain the factual matter of existence or absence of actual knowledge appears only once across all three protocols and the Convention itself and this unusual provision looks very odd in a treaty built around the concept of legal certainty and numerous provisions expressly envisaging that the state of one’s mind has no bearing on its application.¹³⁸

¹³⁶ Article XXV(3) of the Rail Protocol.

¹³⁷ Article XXV(5) of the Rail Protocol.

¹³⁸ See Article 29(2)(a)-(b), Article 29(3)(b), Article 29(4)(b) of the CTC, Article XIV(1) of the Aircraft Protocol, Article XXIII(1) of the Space Protocol.

Interestingly, a public service exemption is not known to the Aircraft Protocol: in its first memorandum prepared for the UNIDROIT Study Group in 1995, the AWG expressly addressed the potential negative effect of the Rome Convention on the exercise of remedies under the draft Convention and requested an ‘express rejection of the rights and remedies accruing to an aircraft operator’ under the Rome Convention.¹³⁹ This rejection was reflected in the final text of Article XXIV of the CTC. While different possible explanations of this fact exist,¹⁴⁰ it is clear that in the case of aircraft the need to promote financing interests trumped the relevant non-commercial concerns.

Two additional important factors were counteracting the need for greater certainty (and the corresponding high amount of detail) in the CTC: the need to keep the text light and simple¹⁴¹ and the need to leave room for flexibility and future development of the Convention. The first conflict later resulted in the adoption of explanatory materials, whereas the latter led to the implementation of a mechanism for periodic review of the CTC,¹⁴² initially proposed by the AWG in 1997.¹⁴³

A curious example of non-commercial state sensitivities relates to what could be labelled as ‘trends’ in international treaty-making or ‘treaty fashion’. In the history of development of the CTC these matters were raised during the discussions of matters of jurisdiction and interpretation. In 1998, the SRC considered the question whether the three grounds of jurisdiction to grant ‘speedy judicial relief’¹⁴⁴ (which included the location of the object within the territory of the relevant state, the location of the relevant

¹³⁹ See footnote 40 in Unidroit, *Study LXXII - Doc. 16 (1995)* 17.

¹⁴⁰ See, eg, Rosen, ‘Public Service and the Cape Town Convention’ (2013) 2 *Cape Town Convention Journal* 131, 133.

¹⁴¹ See, eg, paragraphs 9 and 11 in Unidroit, *Study LXXII - Doc. 27 (1996)* 10; paragraph 11 in Unidroit, *Study LXXII - Doc. 36 (1997)* 5; Unidroit, *Study LXXII - Doc. 40 (1998)* 7.

¹⁴² Article 61 of the CTC.

¹⁴³ See paragraph 2.3 in Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 5.

¹⁴⁴ See Article 16(3) in Unidroit, *Study LXXII - Doc. 39 (1998)* 7.

parties in the relevant state and the agreement of the parties to confer jurisdiction on a court of their choice) were exclusive or whether it was possible to add other grounds. The key question was whether concurrent jurisdiction could be attributed to the court having the general jurisdiction over the merits of the case ‘in view of the growing trend to give extraterritorial effect to orders *in rem* in cases where the court making such orders was the court having jurisdiction over the merits of the case, where previously such effect would not have been given’.¹⁴⁵ Adding extraterritorial effect to interim *in rem* orders, it was felt, would ‘better fulfil the Convention’s vocation to reflect the conditions likely to prevail in the 21st Century’.¹⁴⁶ For essentially the same reasons, the reverse provision, which purported to give general jurisdiction over the merits to the court authorised to grant speedy judicial relief,¹⁴⁷ was subject to additional scrutiny by the SRC: it ‘would go against the current international trend by providing for a *forum arresti*, a jurisdiction known only to a very small number of States and one which had been widely criticised as exorbitant’.¹⁴⁸ In a similar fashion, the French delegation later cautioned the other participants of the Third Joint Session that the ‘Convention cannot, without incurring the risk of grave dysfunction, derogate in such a flagrant manner from the rules *normally used* by States for the founding of jurisdiction in respect of the granting of interim relief’.¹⁴⁹ During the same Third Joint Session, one delegation observed that the article on interpretation of the CTC was modelled after the corresponding provision of the CISG, noting that ‘all commercial law Conventions

¹⁴⁵ See paragraph 121 in Unidroit, *Study LXXII - Doc. 41 (1998)* 30 (emphasis in the original). The report specifically refers to the Helsinki Principles on Provisional and Protective Measures in International Litigation adopted in 1996 (the ‘Principles’). These Principles expressly recognise in paragraph 16 that ‘where the court is properly exercising jurisdiction over the substance of the matter, it should have the power to issue provisional and protective orders addressed to the defendant personally to freeze his assets, irrespective of their location’.

¹⁴⁶ *ibid.*

¹⁴⁷ See Article 17(1) in Unidroit, *Study LXXII - Doc. 39 (1998)* 7.

¹⁴⁸ See paragraph 124 in Unidroit, *Study LXXII - Doc. 41 (1998)* 30 (emphasis in the original).

¹⁴⁹ Unidroit, *Unidroit CGE/Int.Int./3-WP/4 ICAO Ref. LSC/ME/3-WP/4 (2000)* 5 (emphasis added).

adopted since 1980 had used [same] formulation and, if it were modified in this instrument, it might cast doubt on those other commercial law Conventions'.¹⁵⁰

Overall, the various state sensitivities obviously played a secondary role in the development of the CTC – a commercial convention. These factors are difficult to compare against their commercial counterparts, as the former are impossible to quantify. At the same time, the history of development of the CTC has shown that many of these factors (including insolvency rules, procedural laws and even matters affecting rights to immovable property) – despite their sensitive nature – can be effectively tackled in a commercial convention through the use of alternatives¹⁵¹, optional provisions and declarations.

The use of declarations to address state sensitivities deserves a separate mention: throughout the years of development the Convention and its protocols developed an elaborate system of declarations allowing (and in some cases requiring) contracting states to decide on a number of matters for which wholesale unification was not feasible. This system of declarations, coupled with express prohibition on reservations,¹⁵² prevents uncontrolled dilution of the scope and reach of these instruments, while at the same time allowing states to make choices in respect of the most sensitive matters. Available declarations come in five groups: opt-in declarations,

¹⁵⁰ See paragraph 90 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 11.

¹⁵¹ See section 8.2.

¹⁵² See Article 56(1) of the CTC, Article XXXII(1) of the Aircraft Protocol, Article XXVIII(1) of the Rail Protocol, Article XLIII(1) of the Space Protocol.

opt-out declarations, declarations relating to a contracting state's own laws, mandatory declarations and other declarations.¹⁵³

¹⁵³ See paragraph 2.266 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 155-156.

CHAPTER VIII. PROCESS-MANAGEMENT CHALLENGES

The process of development of the CTC was long and complex: the Convention and its first protocol were adopted more than 10 years after the start of the project by UNIDROIT. Such a marathon is not feasible without careful planning and forward-looking strategic thinking. This chapter examines various solutions utilised during the development of the Convention to make the overall process manageable and realistic.

8.1 The role of various working groups in development of the Convention

The development of the CTC was a multi-stage process, in which governments were not directly involved until the later stages: the UNIDROIT Governing Council formally included the matter of preparing a treaty on security interests in mobile equipment in its Work Programme in April 1989,¹ whereas the first session of governmental experts took place almost 10 years later, in February 1999.² Prior to formally submitting the texts to the review by states, UNIDROIT spent a significant amount of time to produce coherent and balanced draft instruments. This work was carried out by internal working groups and supervised by the UNIDROIT Governing Council acting as an important check on the overall process and the quality of the emerging solutions.

In the run-up to the governmental expert stage, UNIDROIT established two key working groups with a more general mandate: first, the Restricted Exploratory Working Group (REWG)³ (meeting once in March 1992)⁴ convened for the purposes of carrying out an early feasibility study (and submitting the results of such study to the Governing

¹ Unidroit, *Governing Council C.D. 68 - Doc. 26 (1989)* 36.

² See Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*.

³ The REWG was established in 1991 pursuant to a decision of the UNIDROIT Governing Council – see Unidroit, *Governing Council C.D. (70) 22 (1991)* 62.

⁴ See Unidroit, *Study LXXII - Doc. 5 (1992)*.

Council) and, second, the Study Group⁵ (meeting four times: in March 1993,⁶ April 1996,⁷ January 1997⁸ and November 1997⁹) established after the REWG to follow up with more substantial work, which culminated in the development of the draft Convention. Most of the fundamental decisions that steered the development of the CTC and its protocols followed from the work of these two working groups, but a large portion of the success of the Convention is attributable to the work of other, more specialised working groups and committees, which are examined in the subsequent sections 8.1.1 – 8.1.3.

8.1.1 Steering and Revisions Committee (SRC)

The SRC was convened in June 1998, following the review by the UNIDROIT Governing Council of the draft Convention and the draft Aircraft Protocol, which revealed the need for the latter to be ‘generally aligned, as to both style and terminology, with the preliminary draft Convention’.¹⁰ The differences resulted from the fact that both documents came essentially from different working groups: the draft Convention was prepared by the Study Group, while the draft Aircraft Protocol was established by the APG. The resulting misalignment and complexity of the draft protocol, which was ‘drafted in the style of very detailed legislation’,¹¹ was so apparent that some members of the UNIDROIT Governing Council queried ‘whether a clearer result might not be obtained by drawing up several different Conventions rather than one framework

⁵ The Study Group was established in 1992 pursuant to a decision of the UNIDROIT Governing Council – see Unidroit, *Governing Council C.D. (71) 18 (1992)* 33.

⁶ Unidroit, *Study LXXII - Doc. 7 (1993)*.

⁷ Unidroit, *Study LXXII - Doc. 27 (1996)*.

⁸ There is no report for this meeting, but the dates are confirmed in paragraph 3 in Unidroit, *Study LXXII - Doc. 35 (1997)* 1.

⁹ There is no report for this meeting, but the dates are confirmed in Unidroit, *Study LXXII - Doc. 37 (1997)*.

¹⁰ Unidroit, *Study LXXII - Doc. 40 (1998)* 37.

¹¹ *ibid* 7.

Convention and several different Protocols'.¹² This posed a real challenge to the umbrella structure¹³ of the CTC – one of style, rather than scope. Without proper alignment, presentation of the two texts to the governments was considered 'wholly inappropriate'.¹⁴

The role of the SRC was essentially technical: where policy matters were raised, the corresponding provisions were put in square brackets for the attention of state representatives during the governmental expert stage.¹⁵ The committee was careful not to exceed its terms of reference, even where an alternative solution seemed more intuitive.¹⁶ Nonetheless, the proper alignment of the two texts showed that the umbrella structure was indeed possible and realistic.¹⁷

8.1.2 Drafting groups and committees

The collegial nature of deliberations at various stages of development of the CTC required a dedicated body to translate the relevant decisions into the language that was appropriate for an international convention. In the context of development of the Convention itself, this role was performed by (i) the Chairman of the Study Group,¹⁸ (ii) the Drafting Group of the First Draft Subcommittee of the Study Group, which held four sessions in July 1994,¹⁹ June 1995,²⁰ December 1995²¹ and March 1996,²² (iii) the

¹² *ibid* 19.

¹³ See section 4.2.

¹⁴ Unidroit, *Study LXXII - Doc. 40 (1998)* 34.

¹⁵ Unidroit, *Study LXXII - Doc. 41 (1998)* 27.

¹⁶ Despite the proposal of the Chairman of the Study Group to amend the draft agreed by the Study Group previously, the SRC left it for the governments to decide whether the chargee's duty to exercise remedies in a commercially reasonable manner should apply to conditional sellers and lessors – see paragraphs 28, 38 and 117 in *ibid* 29. It will be recalled from section 5.2.4.1 that later every protocol, including the draft MAC Protocol, extended the scope of 'reasonableness' test to the exercise of all remedies.

¹⁷ See section 4.2.

¹⁸ See Unidroit, *Study LXXII - Doc. 39 (1998)*.

¹⁹ See Unidroit, *Study LXXII - Doc. 13 (1994)*.

Drafting Group of the Study Group as a whole, with sessions in April 1996,²³ October 1996,²⁴ January 1997,²⁵ (iv) the Drafting Committee of each of the three sessions of governmental experts in 1999 and 2000²⁶ and (v) the Drafting Committee of the Cape Town Diplomatic Conference.²⁷ Special drafting committees were also established for the purposes of development and adoption of other protocols, including a dedicated drafting committee under the auspices of the MAC Protocol Committee of Governmental Experts in March 2017.²⁸

Interestingly, the various drafting groups and committees went much further than rubber-stamping the decisions adopted by other working groups in multiple ways: by suggesting new approaches, formulating new concepts and even breaking deadlocks in negotiations. In doing so, they performed a steering role and significantly affected the course of development of multiple provisions.

Initially, the need for a more active role of the Drafting Group was dictated by practical considerations of drafting efficiency. The second session of the First Draft Subcommittee of the Study Group concluded with a decision to revise the early draft of the Convention²⁹ in light of two sets of comments: (i) the conclusions reached during

²⁰ See Unidroit, *Study LXXII - Doc. 18 (1995)*.

²¹ See Unidroit, *Study LXXII - Doc. 22 (1996)*.

²² See Unidroit, *Study LXXII - Doc. 24 (1996)*.

²³ See Appendix IV to Unidroit, *Study LXXII - Doc. 27 (1996)*.

²⁴ See Unidroit, *Study LXXII - Doc. 30 (1996)*.

²⁵ See Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)*.

²⁶ See Attachment D in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*; Attachment F in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)*; Attachment C in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)*.

²⁷ See Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international interests in mobile equipment and protocol thereto on matters specific to aircraft equipment]* (UNIDROIT 2006) 295.

²⁸ See Appendix III in Unidroit, *Study 72k - CGE1 - Report (2017)*.

²⁹ Unidroit, *Study LXXII - Doc. 13 (1994)*.

that meeting and (ii) a memorandum to be prepared by an ‘external group representing the interests of the aviation industry’ (later known as the AWG).³⁰ The latter document was not yet ready at the time and was to be produced in due course, yet the First Draft Subcommittee was keen to have the revised draft ready before the next session. Mindful that the future memorandum of the aviation industry might raise new and unexpected issues, the subcommittee empowered the Drafting Group to ‘be free, in proposing a revised text, to depart from what had been provisionally agreed to the extent necessary’.³¹

Following the above decision, the Drafting Group continued performing its steering function. One of the prime examples of this role is the decision to follow the model of Article 2 of the Convention for the European Patent for the Common Market and introduce the concept of ‘autonomous’ nature of the international interest, which served as a turning point in determining the characteristics of the latter.³² In a similar fashion, the Drafting Group deemed inappropriate the earlier decision of the First Draft Subcommittee to treat an international interest effective if it had been perfected in accordance with domestic law.³³ On a different occasion, the Drafting Group, dissatisfied with the earlier agreement of the First Draft Subcommittee to apply all the remedy provisions on an ‘opt-in’ basis,³⁴ proposed two alternative wordings to the same article to draw the attention of the Study Group to the effects of the initial approach in situations when the parties have failed to come to an agreement.³⁵ While incorporating the early provisions relating to the international registry, the Drafting Group introduced, on its

³⁰ See paragraph 11 in Unidroit, *Study LXXII - Doc. 15 (1995)* 9.

³¹ *ibid.*

³² See n 114 and the corresponding discussion in section 2.2.2.

³³ See paragraph 12 in Unidroit, *Study LXXII - Doc. 22 (1996)* ii.

³⁴ See paragraph 12 in Unidroit, *Study LXXII - Doc. 21 (1995)* 7.

³⁵ See paragraph 8 in Unidroit, *Study LXXII - Doc. 22 (1996)* ii. See also section 5.2.2.

own initiative, the idea of an ‘independent adjudicator’ authorised to hear complaints in respect of acts or omissions of the Registrar and operators of national registration facilities, citing the ‘principles of natural justice’.³⁶ In the same document, the Drafting Group ‘expressed itself to be against the idea of introducing the obligor’s written consent as a requirement for a valid assignment’, taking the view that this ‘would create as many problems as those it sought to solve’.³⁷ Later, during the First Joint Session, the Drafting Committee considered the instruction of the plenary to examine the feasibility of introducing the concepts of ‘good faith’ and ‘public order’ in the context of self-help remedies, and proceeded in a totally different direction, by adding the requirement of the chargor’s consent instead.³⁸

In addition to playing a proactive role by suggesting new alternative solutions and casting a critical eye on the changes agreed by the negotiators, the various drafting groups and committees were often called to decide on matters of policy when the relevant collegial bodies could not come to agreement. In these cases, a referral of a difficult matter to the draftsmen was essentially a shorthand for requesting a solution from the drafting experts, often to produce a basis for future discussions. This was the case during the second session of the Study Group, which ended its long and inconclusive discussions with a request to the Drafting Group to ‘do its best to capture the various ideas put forward in the course of the Study Group’s consideration’, even authorising it to enlist the assistance of an expert representing the aviation industry.³⁹

Reliance on the Drafting Committee as an instrument for breaking deadlocks in negotiations was even stronger during the governmental expert stage, with delegates

³⁶ See paragraph 42 in Unidroit, *Study LXXII - Doc. 35 (1997)* 8.

³⁷ See paragraph 50 in *ibid* 9.

³⁸ See n 84 in section 5.2.2 and the corresponding discussion.

³⁹ See paragraph 105 in Unidroit, *Study LXXII - Doc. 27 (1996)* 46.

often referring to the drafting team matters of higher complexity without adequate guidance due to the absence of an agreement. Examples include a general instruction to revise the bankruptcy provisions in the light of other international conventions and soft law instruments,⁴⁰ or an abstract decision that ‘the Drafting Committee should look at the entire Chapter VIII’.⁴¹ This led the Drafting Committee to admit in the course of the First Joint Session that in respect of certain issues it ‘did not feel that its instructions from the Joint Session permitted it to provide a solution’⁴² and to refer the same matters back to the delegates, effectively creating a ‘ping-pong’ situation.⁴³ This mutual referral of certain matters sometimes led to absurd results: delegates of the Second Joint Session gave the Drafting Committee the task of considering whether or not the additional language qualifying the right of the creditor to exercise certain remedies should be deleted,⁴⁴ without noticing that the additional language in question was in fact proposed by the Drafting Committee itself during the First Joint Session.⁴⁵ As a result, the Drafting Committee was essentially authorised to determine the fate of its own proposal.

It should be noted that, with some exceptions,⁴⁶ the initiatives taken by the drafting groups or drafting committees were appreciated by the competent working groups and governmental representatives, as a sign of the important role played by drafts in crystallising the difficult points in negotiations. Nonetheless, the unfortunate tendency to offload onto the Drafting Committee matters of policy resulted in inefficient use of its

⁴⁰ See paragraph 73 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*.

⁴¹ See paragraph 87 in *ibid* 13.

⁴² See paragraph 6 in Attachment D to *ibid* 11-12.

⁴³ See, eg, footnote 10 in Appendix I to Attachment D in *ibid*.

⁴⁴ See paragraph 5:14 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)* 5-3.

⁴⁵ See Article 8(2) (noting the words ‘and by lawful means’ in square brackets) in Appendix I to Attachment D in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)*.

⁴⁶ See n 141 in section 5.2.4 and the corresponding discussion for an example when the suggested change was reverted as exceeding the scope of prior agreement within the Study Group.

time and was no doubt among those factors that prevented the Drafting Committee from finishing its work by the end of the Second Joint Session and led to the establishment of an intersessional *ad hoc* drafting group to cope with the high workload.⁴⁷

8.1.3 *Specialist working groups and consultations*

Different approaches were used during the development of the CTC and its protocols to tackle complex issues requiring expert knowledge or empirical research unavailable within the relevant negotiating body. These included the commissioning of individual experts or organisations⁴⁸ to conduct research,⁴⁹ as well as internal research conducted by the UNIDROIT Secretariat.⁵⁰ The most sophisticated problems, however, could not be resolved by a single expert or the Secretariat alone to a satisfactory standard and required the pooling of expert knowledge in dedicated specialist working groups.

An example of such approach is the establishment of a ‘group of technical experts...to look at both the legal regimen...desirable for the proposed registration system...and the computer technology aspects of this system’ at the conclusion of the third session of the First Draft Subcommittee.⁵¹ The relevant working group met twice (in April 1996⁵² and May 1997⁵³) and produced not only comments regarding the structure and operation of the international registration system envisaged by the draft Convention, but also a set of revised provisions to be included in the draft treaty.⁵⁴

⁴⁷ See paragraph 1 in Unidroit, *Unidroit CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2 (2000)*.

⁴⁸ See, eg, paragraphs 4-5 in Unidroit, *Unidroit 2013 C.D. (92) 5(b) (2013)* 2.

⁴⁹ See, eg, Unidroit, *Study LXXII - Doc. 1 (1989)*; Unidroit, *Study LXXII - Doc. 2 (1989)*.

⁵⁰ See, eg, paragraph 1 in Unidroit, *Governing Council C.D. (86) 8 (d) (2007)* 1.

⁵¹ See paragraph 39 in Unidroit, *Study LXXII - Doc. 21 (1995)* 13.

⁵² Unidroit, *Study LXXIIC - Doc. 2 (1997)*.

⁵³ Unidroit, *Study LXXIIC - Doc. 3 (1997)*.

⁵⁴ See Appendix II in *ibid.*

In the run-up to the Cape Town Diplomatic Conference, the practice of setting up specialist working groups continued during the governmental expert stage, where the delegates established, among other things, (i) the Registration Working Group to deal with institutional, legal, operational and other relevant issues regarding the establishment of the international registry,⁵⁵ (ii) an informal working group to consider possible overlap of the draft Convention with the draft UNCITRAL Convention on Assignment in Receivables Financing,⁵⁶ (iii) an informal working group to analyse the insolvency-related provisions of the draft Convention and the draft Aircraft Protocol in the context of other existing international insolvency-related rules and instruments⁵⁷ (later given a formal status),⁵⁸ (iv) the Jurisdiction Working Group to discuss the most appropriate grounds for establishing the jurisdiction of courts under the Convention, the limits of party autonomy to determine such jurisdiction and other pertaining issues⁵⁹ and (v) the Public International Law Working Group to review the relationship between the draft Convention and its protocols, the number of ratifications required for their entry into force and other relevant matters.⁶⁰

While many of the above working groups continued their operation throughout multiple sessions of governmental experts, with the passing of time another important function of specialist working groups became apparent: in the run-up to the Cape Town Diplomatic Conference matters on which delegations struggled to agree were referred to *ad hoc* working groups to break the deadlock. The Third Joint Session gives two

⁵⁵ See paragraphs 14, 54 and Attachment C in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 5.

⁵⁶ See paragraph 74 in *ibid* 12.

⁵⁷ See paragraph 143 in *ibid* 21.

⁵⁸ See paragraph 3:1 in Unidroit, *ICAO Ref. LSC/ME/2-Report Unidroit CGE/Int.Int./2-Report (1999)* 3-1.

⁵⁹ See paragraphs 3:1, 3:3, 5:74-5:81 in *ibid*.

⁶⁰ See paragraphs 3:1, 3:4, 5:36 in *ibid*.

excellent examples. First, the plenary established a small working group to consider the concept of internationality⁶¹ ‘in consideration of the division of opinion among delegations’.⁶² Second, the delegates convened another small working group to examine the advance relief provisions⁶³ ‘in view of the opposing views that were expressed by a number of delegations’.⁶⁴ In each case, the small membership of the working groups helped crystallise the key points of contention and propose a single solution or a number of alternatives.

Composition of working groups created for the purpose of breaking deadlocks deserves a separate mention, as expert knowledge in a specific area was not the only or the primary factor in the selection of participants. Such groups were often intended to achieve a compromise rather than produce new knowledge, acting as think-tanks rather than miniature research bodies. This practice became even more evident during the Cape Town Diplomatic Conference,⁶⁵ where the Chairman, Antti Leinonen, established a number of working groups, often referred to as ‘informal consultations’, to seek a common solution on a variety of issues, such as (i) immunity of the Supervisory Authority,⁶⁶ (ii) choosing the most appropriate mechanism of assignment,⁶⁷ (iii)

⁶¹ See n 194 in section 2.3.3 and the corresponding discussion.

⁶² See paragraph 71 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 10.

⁶³ See n 115 in section 5.2.3 and the corresponding discussion.

⁶⁴ See paragraph 110 in Unidroit, *Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)* 13.

⁶⁵ The author is most grateful to the UNIDROIT Secretariat for providing a transcript of all sessions of the Cape Town Diplomatic Conference between 29 October and 16 November 2001, which helped a great deal to clarify the very brief summaries available from the published records of acts and proceedings in Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006).

⁶⁶ *ibid* 779-780.

⁶⁷ *ibid* 784.

application of the Convention to pre-existing rights or interests,⁶⁸ (iv) treatment of non-consensual rights and interests in the case of insolvency,⁶⁹ (v) providing support to states lacking the capacity to establish the connection between national entry points and the international registry,⁷⁰ (vi) requirements for the entry into force and the establishment of the international registry,⁷¹ (vii) rules on jurisdiction in light of the European Community legislation,⁷² (viii) protection of aircraft liens as security for EUROCONTROL charges⁷³ and (ix) procedure for amendments to the Convention and its protocols.⁷⁴

The consensus-building purpose of these informal ‘think-tanks’ stems not only from their objectives, but also from their composition, which was non-exclusive and open to any interested delegations, as indicated in the comments of the Chairman:

So, as always has been during these two weeks, all the consultations that will take place, be it informally in the corridors or in the form of an Informal Consultations Group, the consultations are always open to all the Member States, all the delegations present here.⁷⁵

Attempts to firmly distinguish between such informal consultations and working groups do not yield a satisfactory result, as the different labels, which were not always

⁶⁸ *ibid* 797.

⁶⁹ *ibid* 816. The published summary mentions only referral of the matter to the Drafting Committee, however the transcript reflects the invitation of the Chairman to the delegations of Singapore and Canada to hold informal negotiations – see Unidroit, *Cape Town Diplomatic Conference Transcript* 112.

⁷⁰ Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 836.

⁷¹ *ibid* 841.

⁷² *ibid* 847.

⁷³ *ibid* 845.

⁷⁴ *ibid* 905.

⁷⁵ Unidroit, *Cape Town Diplomatic Conference Transcript* 183. The same is confirmed in the summary of the Chairman’s response to an intervention by Kenya reproduced in a published source – see Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 878.

uniformly used (if the transcript available to the author is to be believed),⁷⁶ essentially reflect the same collaborative engagement of various delegations. What does matter, however, is that the referral of complex negotiation issues to delegates – rather than the Drafting Committee – left the policy matters in the hands of the actual decision-makers,⁷⁷ positively affecting the workload of the drafting team and reducing its workload.⁷⁸ This clear separation of policy matters (requiring consultations) and drafting matters (requiring a revised text) by the Chairman can be illustrated by his referral of the request for clarification relating to priority rules of the Convention as applied to aircraft engines for drafting improvements to Roy Goode instead of setting up informal consultations, after considering both options.⁷⁹ Of course, it is an entirely different matter to determine whether any particular substantive matter was intentionally labelled as a drafting issue – but analysis of this kind is beyond the scope of this thesis.

Overall, the practice of active engagement of delegations in small-group consultations and working groups was a highly effective way of reaching a satisfactory outcome of deliberations during the Cape Town Diplomatic Conference, with some delegations noting that ‘the Chairman’s role in facilitating sub-groups and informal

⁷⁶ See references to an ‘informal consultative group’ in Unidroit, *Cape Town Diplomatic Conference Transcript* 125.

⁷⁷ cf the occasional practice of referring matters of substance to the Drafting Committee during the Joint Sessions of governmental experts in section 8.1.2.

⁷⁸ In order to ensure objectivity, the Chairman intentionally distanced himself from all the informal consultation groups and did not participate in any of them – see Unidroit, *Cape Town Diplomatic Conference Transcript* 294-295. Unfortunately, this cannot be confirmed from the published summary of proceedings – cf Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 906.

⁷⁹ See Unidroit, *Cape Town Diplomatic Conference Transcript* 288. The published short summary does not fully reproduce the reasons for the Chairman’s decision reflected in the transcript and creates the impression that the sole reason for treating the matter as one of drafting was the lack of adequate time for consultations – see Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 903.

consultations had been the *main instrument* which had led to the conclusion of the meetings...[in] a very satisfactory manner'.⁸⁰

8.2 *Alternatives as an instrument of crystallising negotiations*

Throughout the whole period of development of the Convention and its protocols alternative texts of the same provision were produced to facilitate discussion and to emphasise the differences between the various views. Alternatives were used by virtually all the working groups, including: (i) the Drafting Group,⁸¹ (ii) the APG,⁸² (iii) the SRC,⁸³ (iv) specialist working groups during the Joint Sessions,⁸⁴ (v) the Drafting Committee of the Joint Sessions⁸⁵ and even commentators.⁸⁶

In all instances – but two – the alternatives reached their goal and resulted in the selection of a single option preferred (and revised as necessary) by the relevant working groups and delegates. The two sets of alternative provisions on which no agreement could be reached relate to (i) remedies on insolvency and (ii) association of mining, agricultural and construction equipment with immovable property. The former can now

⁸⁰ Unidroit, *Diplomatic conference to adopt a mobile equipment convention and an aircraft protocol: acts and proceedings; [Convention on international Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment]* (UNIDROIT 2006) 907 (emphasis added).

⁸¹ See, eg, alternative drafts of Article 1(2) in Unidroit, *Study LXXII - Doc. 18 (1995)* 5; alternative drafts of Article 7 in Unidroit, *Study LXXII - Doc. 22 (1996)* 4 and in Unidroit, *Study LXXII - Doc. 24 (1996)* iv; alternative drafts of Article 24(2) in Unidroit, *Study LXXII - Drafting Group Fourth Session (1997)* 9; alternative drafts of Articles 6 and 26 in Unidroit, *Study LXXII - Doc. 35 (1997)* ii-iii.

⁸² See, eg, alternative drafts of Article XXIII in Unidroit, *Study LXXIID - Doc. 1 (1998)* 14-15; alternative drafts of Article XVI in Unidroit, *Study LXXIID - Doc. 3 (1998)* 11.

⁸³ See alternative drafts of Article XVII in Appendix III to Unidroit, *Study LXXII - Doc. 41 (1998)*.

⁸⁴ See three alternative drafts of Article C proposed by the Registration Working Group in Appendix II to Unidroit, *ICAO Ref. LSC/ME/2-WP/17 Unidroit CGE/Int.Int./2-WP/17 (1999)*; Options A and B in paragraph 28 of Unidroit, *Unidroit CGE/Int.Int./3-WP/18 ICAO Ref. LSC/ME/3-WP/18 12/03/00 (2000)* 9.

⁸⁵ See, eg, alternative drafts of Article 26 bis on the liability of the Registrar in Unidroit, *Unidroit CGE/Int.Int./3-WP/28 Rev. ICAO Ref. LSC/ME/3-WP/28 Rev. 28/03/00 (2000)* 4.

⁸⁶ See, eg, alternatives A and B in draft Article 36(4) in Unidroit, *Study LXXII - Doc. 36 (1997)* 53.

be found in each of the adopted protocols⁸⁷ and the draft MAC Protocol,⁸⁸ and deserves a separate mention. The latter is addressed in section 7.2.⁸⁹

All the insolvency-related alternatives originate from the proposal of the AWG to incorporate into the draft Convention an optional ‘international insolvency provision’, modelled after Section 1110 of the US Bankruptcy Code and aiming to give greater protection to the financier in the event of the insolvency of the debtor.⁹⁰ By the start of the First Joint Session, the corresponding provision was made part of the draft Aircraft Protocol and contained in a single article, with no alternatives, but subject to the right of each contracting state not to apply the relevant provisions.⁹¹ Discussions at the First Joint Session, however, showed a divergence of opinion: one group of delegates noted the fact that the corresponding insolvency provision encroached significantly on national bankruptcy laws, while others stressed the ‘economic importance’⁹² of the rule. As a result, the Drafting Committee was instructed to prepare two alternative versions of the same article,⁹³ which it could not do in time, leaving the second option (Alternative B) empty. Importantly, however, nothing in the language of the alternatives indicates that they were formulated as options from which states could choose: they merely represented two different options for the governmental experts to consider at the next session.

⁸⁷ See Article XI of the Aircraft Protocol, Article IX of the Rail Protocol, Article XXI of the Space Protocol.

⁸⁸ See draft Article X in Unidroit, *Study 72k - CGEI - Doc. 2 corr. (2017)* 10-13.

⁸⁹ See n 127 in section 7.2.

⁹⁰ See Annex 4-B in Unidroit, *Study LXXII - Doc. 16 (1995)* 45.

⁹¹ See Articles XI and XXX in Unidroit, *Study LXXIID - Doc. 3 (1998)*.

⁹² See n 77 in section 7.1.2.

⁹³ See paragraph 123 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 19.

This changed after review of the report of the Insolvency Working Group during the Second Joint Session, which agreed ‘to proceed on the basis of offering Contracting States two alternative approaches’:⁹⁴ a ‘hard’ option, based on the draft proposed by the AWG allowing automatic transfer of possession to the creditor without court intervention, and a ‘soft’ version, based on the proposal of the French delegation, which provided for a degree of judicial control and discretion over the exercise of remedies. These two options formed the basis of Alternatives A and B in all the existing protocols. Alternative C, which largely follows Alternative A, but allows intervention by the insolvency administrator to suspend the obligation to give the creditor the opportunity to take possession of collateral, is currently unique to the Rail Protocol⁹⁵ (and the draft MAC Protocol),⁹⁶ appeared after the adoption of the Convention and the Aircraft Protocol, following a proposal by the Rail Working Group,⁹⁷ which intended to produce a compromise between the ‘hard’ and ‘soft’ options.

8.3 Obtaining industry support

In 1994, at a very early stage of development of the Convention, UNIDROIT reported an interesting ‘phenomenon’:

[A]n ever-lengthening number of international instruments in the business law field which, notwithstanding the most thorough intergovernmental preparation and the very best efforts of international Organisations...had either failed to enter into force at all or, at best, operated only as between a limited number of States.⁹⁸

This problem highlighted another challenge: to ensure that those who are in a position to exert the necessary pressure on governments (namely, the business circles affected by the

⁹⁴ See paragraph 2.2 in Unidroit, *ICAO Ref. LSC/ME/2-WP/19 Unidroit CGE/Int.Int./2-WP/19 26/8/99 (1999)* 2.

⁹⁵ See Article IX of the Rail Protocol.

⁹⁶ See draft Article X in Unidroit, *Study 72k - CGEI - Doc. 2 corr. (2017)*.

⁹⁷ See Attachment K in Unidroit, *Study LXXIIIH - Doc. 7 (2002)*.

⁹⁸ Unidroit, *Study LXXIIB - Doc. 1 (1995)* 2.

new instruments) view the proposed changes as necessary and beneficial to them. In the context of the CTC, the perceived effect of the changes brought about by this treaty was not uniformly understood among the different industries, which resulted in dramatically different levels of support expressed by them.

First attempts to measure the level of interest of various industries go back to Cuming's 1990 Questionnaire circulated among financial institutions, industry associations and concerns (according to UNIDROIT, approximately 1000 copies were distributed).⁹⁹ Among 93 respondents, the clear majority (52) identified themselves as 'lenders' and represented the financial services industry.¹⁰⁰ Over the years, the latter showed considerable support towards the Convention, viewing it as an important instrument for the promotion of asset finance. The banking industry generally looked at the UNIDROIT project through the prism of a risk averse creditor aiming to achieve a number of objectives, such as: (i) improved access to market information resulting from the establishment of an international register,¹⁰¹ (ii) cost reduction via elimination of legal risks and keeping in check the costs (both monetary and time-related) associated with the international registration system,¹⁰² (iii) maintaining the stability of the loan market by protecting pre-existing national interests and eliminating confusion from the coexistence of national and international interests,¹⁰³ or (iv) strengthening the creditor's position through the promotion of self-help remedies¹⁰⁴ and recovery of legal costs from the proceeds of enforcement.¹⁰⁵ The idea about conceptual differences between security

⁹⁹ Unidroit, *Study LXXII - Doc. 3 (1991)* 2.

¹⁰⁰ *ibid* 3. See also Appendix to the same.

¹⁰¹ Unidroit, *Study LXXII - Doc. 26 (1996)* 2.

¹⁰² *ibid* 2-3; Unidroit, *Study LXXII - Doc. 36 Add. 1 (1997)* 1.

¹⁰³ Unidroit, *Study LXXII - Doc. 26 (1996)* 3; Unidroit, *Study LXXII - Doc. 36 Add. 1 (1997)* 1-2.

¹⁰⁴ See paragraph 15 in Unidroit, *Study LXXII - Doc. 36 (1997)* 6.

¹⁰⁵ Unidroit, *Study LXXII - Doc. 36 Add. 1 (1997)* 2.

interests, on the one hand, and the rights of lessor and conditional seller, on the other,¹⁰⁶ was also picked up within the banking sector,¹⁰⁷ in addition to the active position taken by Leaseurope.¹⁰⁸

While the above banking concerns were aligned with the text of the Convention, the latter did not incorporate certain creditor-centric recommendations for various policy reasons. The proposal to extend the scope of the CTC to cover a broader range of mobile assets, including lorries and ships¹⁰⁹ was rejected, in the first instance, to restrict the Convention to assets of very high value¹¹⁰ and, in the second case, due to the resistance of the shipping circles.¹¹¹ The idea of establishment of a minimum threshold value of eligible assets¹¹² did not materialise to enhance predictability in the application of the CTC.¹¹³ The recommendation to give effect to registration of interests from the moment of transmission of registration information to the registry¹¹⁴ was rejected for the protection of interests of third parties.¹¹⁵

While the value of banking industry support should not be underestimated, the principal stakeholders of a treaty promoting asset financing techniques are, of course, the manufacturers and end users of relevant assets, ie those who produce and put to actual use such collateral. The lack of a shipping protocol is a fine illustration of this fact. This

¹⁰⁶ See section 2.1.4.

¹⁰⁷ See Unidroit, *Study LXXII - Doc. 26 (1996)* 3; paragraph 15 in Unidroit, *Study LXXII - Doc. 36 (1997)* 6.

¹⁰⁸ See n 42 in section 2.1.4.

¹⁰⁹ Unidroit, *Study LXXII - Doc. 26 (1996)* 3.

¹¹⁰ See section 3.1.2.

¹¹¹ See section 3.3.

¹¹² Unidroit, *Study LXXII - Doc. 26 (1996)* 3.

¹¹³ See section 3.1.1.

¹¹⁴ See paragraph 157 in Unidroit, *Study LXXII - Doc. 36 (1997)* 38.

¹¹⁵ See paragraph 4.144 in Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, International Institute for the Unification of Private Law (UNIDROIT) 2013) 311.

said, the impact of the relevant industry cannot be relegated to treaty promotion and domestic lobbying. In the case of the Aircraft Protocol alone, the involvement of the aviation circles had very practical needs¹¹⁶ and made possible, among other things, (i) the development of the appropriate definitions of ‘aircraft objects’,¹¹⁷ (ii) the selection of appropriate objective criteria (such as carrying capacity, thrust or horsepower) to limit the eligible aircraft objects to assets of high value, (iii) indication of the most appropriate mode of asset identification and (iv) the incorporation of additional rules specific to the relevant industry (such as the aviation-specific remedy of aircraft de-registration).¹¹⁸

In the history of the CTC, no other single industry provided so much support to the project as the aviation sector represented by the AWG. The effect that the aviation industry had on the draft Convention was so significant compared to other sectors that one of the commentators representing the leasing circles ended up expressing its ‘reservations regarding the extent to which the future Convention may be considered to be representative in view of the intense lobbying carried out by aviation interests’.¹¹⁹ Furthermore, the role of the AWG was not limited to providing sector-specific expertise and building consensus within the relevant industry group. The resources available to it allowed the AWG to undertake numerous international activities promoting the draft Convention – a practice that caused a great deal of confusion in the run-up to the governmental expert stage.

The promotional activities, which the AWG conducted at the time in cooperation with IATA, included briefings aimed at governmental audiences.

¹¹⁶ See Unidroit, *Study LXXII - Doc. 40 (1998)* 6-7.

¹¹⁷ The author posits, however, that a separate reference to ‘helicopters’ is unfortunate and unnecessary – see section 3.2.3.

¹¹⁸ See Article IX(1)(a) of the Aircraft Protocol.

¹¹⁹ See paragraph 205 in Unidroit, *Study LXXII - Doc. 36 (1997)* 58.

Apparently, the invitation letters sent on behalf of the AWG and IATA did not make it sufficiently clear that the two organisations were not acting on behalf of UNIDROIT or ICAO. As a result, a number of governments, upon receipt of such letters of invitation, ‘had gained the impression that it was I.A.T.A. and A.W.G. [*sic*] that were driving the project and that the role of Unidroit and I.C.A.O. [*sic*] was limited to doing the paper-work’.¹²⁰

The unfortunate practice (but not the very helpful promotional impact) of such briefings was condemned by the Acting Secretary-General of UNIDROIT, with the AWG and IATA representatives committing to ‘avoid recurrences of such confusion and embarrassment in future’.¹²¹ The same matter was raised again during the First Joint Session, which opened with a joint statement by the Secretary-General of UNIDROIT and the Director of the ICAO Legal Bureau addressed to all the industry groups ‘to respect the procedures of inter-governmental Organisations, in accordance with which relations with member States came within the exclusive purview of the inter-governmental Organisations concerned’.¹²² The strongest concluding part of the original statement, which was subsequently removed from the final report as a gesture of goodwill, can still be found in the earlier drafts: ‘This was so as to avoid the *unacceptable interferences* with member Governments that had regrettably occurred in the past’.¹²³

¹²⁰ See paragraph 156 in Unidroit, *Study LXXII - Doc. 41 (1998)* 37.

¹²¹ *ibid.*

¹²² See paragraph 2 in Unidroit, *Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)* 3.

¹²³ See paragraph 2 in Unidroit, *Unidroit CGE/Int.Int./WP/17 ICAO Ref. LSC/ME-WP/28 (1999)* 4 (emphasis added).

Following adoption of the CTC and the Aircraft Protocol, the aviation industry continued its efforts in assisting with the promotion and implementation of the two instruments, particularly via the activities of the CTCAP.¹²⁴

What ended up as a major enterprise for the promotion of aviation financing interests, started from an early initiative by The Boeing Company to take a proactive view and, having consulted with a number of industry participants (The Long-Term Credit Bank of Japan, Ltd, GE Capital Aviation Services Ltd), offer support to the future Convention, but only to the extent that the new instrument would address the needs of the aviation sector through a number of finance-enhancing mechanisms (such as a clear first-to-file priority rule, a modern electronic registry, validity of international interests in bankruptcy, extensive party autonomy, application to both domestic and international transactions, and even to assignments of contract rights). If a comprehensive new instrument meeting these criteria was not possible, The Boeing Company was ready to walk away, recommending the exclusion of aircraft and aircraft engines from the scope of the future Convention altogether.¹²⁵ The overall thrust of the feedback presented by the aviation industry did not change after the formal establishment of the AWG (as a joint initiative of The Boeing Company and Airbus Industrie) and its cooperation with IATA: the UNIDROIT instrument was seen as commercially acceptable ‘if, and only if, the proposed convention, taken as whole, materially [promoted] the asset-based financing of aviation equipment’.¹²⁶

Overall, the participation of the aviation industry in the development of the CTC had three important characteristics. First, the industry-wide interest group was formed

¹²⁴ Due to the restrictions of the thesis format, issues of implementation are not addressed in this document.

¹²⁵ See Appendix to the comments by Scott Scherer in Unidroit, *Study LXXII - Doc. 14 Add 1 (1994)*.

¹²⁶ Unidroit, *Study LXXII - Doc. 32 Add. 2 (1997)* 1.

and actively supported the Convention before the formal engagement of the corresponding intergovernmental organisation (ICAO).¹²⁷ Second, the composition of the AWG was very diverse and included, apart from major aircraft and engine manufacturers, commercial banks with strong aviation finance practices and leasing companies, providing a more representative view of the industry.¹²⁸ Third, the AWG was instrumental in aligning its interests with those of the governments by stressing the fact that the latter themselves often acted as primary risk-takers in aviation finance through the operation of export credit agencies.¹²⁹

As is clear from section 3.3, the fiasco of the idea of a shipping protocol under the Convention was the result of a very strong opposition from three international organisations: IMO, UNCTAD and the CMI. Unlike the aviation industry, the shipping business circles did not come together to form a dedicated interest group similar to the AWG, and occasionally produced individual comments and observations on the draft Convention.¹³⁰ Given the very early negative reaction of the shipping international organisations, and their very broad mandates, one can only speculate as to the possibility of a different outcome for the idea of a shipping protocol in case of direct engagement of the shipping industry disregarding the stance taken by IMO, UNCTAD and the CMI. However, this raises the delicate problem of international coordination and the need for collaboration among international organisations and the pressure to cooperate. It is thus unsurprising that UNIDROIT did not immediately proceed with the idea of a shipping protocol, unwilling to openly disregard the official position of major maritime

¹²⁷ ICAO was invited to participate in the preparation of the draft Aircraft Protocol in 1997 and hosted one of the APG sessions. See Unidroit, *Study LXXII - Doc. 40 (1998)* 17.

¹²⁸ See Annex 1 to Unidroit, *Study LXXII - Doc. 16 (1995)* 33-34.

¹²⁹ See *ibid* 27.

¹³⁰ See, eg, Unidroit, *Study LXXII - Doc. 36 Add. 2 (1997)* 1-2.

organisations.¹³¹ It is impossible to say with full certainty which of the two factors was decisive: the stance of these international organisations or the lack of clear industry support. However, for the purposes of this section, the author will make a cautious assumption that UNIDROIT was seeking either (i) a consensus within the relevant industry, or, at least, (ii) a position not subject to any major objections from within the industry.

The assumption above appears accurate in the context of the shipping protocol: both legs of the test failed, resulting in the decision not to continue with the idea of a dedicated shipping protocol. The same assumption, however, does not work if applied to the history of the Space Protocol, which was adopted despite major objections of parts of the target business sector. In 2008 and 2009, ie at an advance stage of development of the protocol, major satellite operators petitioned the UNIDROIT Secretariat not to proceed with the adoption of the instrument, claiming that it would ‘neither benefit the satellite industry nor facilitate space finance’.¹³² In the run-up to the Berlin Diplomatic Conference, this proposal was supplemented by a letter¹³³ allegedly signed by a large group of industry stakeholders¹³⁴ requesting no further action to adopt the Space Protocol.¹³⁵ The different arguments made in this letter can be reduced to two key

¹³¹ More recently, a more subtle approach has been utilised by UNIDROIT, which produced a limited feasibility study analysing the potential benefits of the CTC system for the shipping industry – see Unidroit, *Unidroit 2013 C.D. (92) 5(c)/(d) (2013)*.

¹³² Unidroit, *Study LXXIIIJ - Doc. 17 (2009)* 12.

¹³³ ‘Letter from a group of space industry representatives to Mr. Martin John Stanford’ (09 December 2011)
<[http://www.spacepolicyonline.com/pages/images/stories/Satellite_Industry_Letter_to_Unidroit_9_Dec_2011_\(rev\).pdf](http://www.spacepolicyonline.com/pages/images/stories/Satellite_Industry_Letter_to_Unidroit_9_Dec_2011_(rev).pdf)> accessed 02 June 2017.

¹³⁴ Despite the existence of a list of organisations at the bottom of the letter, the public version of the document shows no actual signatures, making it impossible to verify the claim about the actual level of support of the relevant position.

¹³⁵ The list included 45 entities identified as satellite operators, 12 entities labelled spacecraft manufacturers and launch service providers, 17 entities marked as space insurers and underwriters, 11 entities associated with the financial services sector and 8 ‘other’ satellite and space-related organisations and institutions.

statements: (i) the new instrument would not generate economic benefit and (ii) the existing financing regime was satisfactory and not in need of reform. Despite these and other similar efforts of the industry,¹³⁶ the Space Protocol was nevertheless adopted in 2012, generating even more vocal opposition.¹³⁷

This fact calls for reconsideration of an earlier hypothesis, since, first, there was clearly no consensus within the target business sector and, second, even a clear opposition of a particular industry did not affect the decision to adopt the Space Protocol. To accommodate this outcome, it appears that the actual test applied by UNIDROIT in assessing the level of industry support was based on but a single factor: whether or not there existed a representative industry view in support of the new instrument (regardless of the existence of objections from parts of the target sector).

The wisdom of this decision remains to be tested in the future, in light of the number of ratifications of the Space Protocol (which so far amount to zero) and its practical application by the end-users. In the end, many of the concerns voiced by the satellite industry may end up being overstated: it is immediately noticeable that the comments brought forward by the satellite industry are very (perhaps, too) vague and not backed by any empirical data. The author posits, however, that adoption of an international instrument despite the clear opposition of at least part of such instrument's target sector is unfortunate and should be avoided for two key reasons. First, it is counterproductive to adopt an instrument right now in hopes of persuading the opposing industry afterwards, since the latter is likely to engage in various activities undermining

¹³⁶ For more evidence of opposition of the satellite industry and additional critique see Sundahl, *The Cape Town Convention: Its Application to Space Assets and Relation to the Law of Outer Space* (Martinus Nijhoff Publishers 2013) 27.

¹³⁷ 'Global Satellite Industry denounces UNIDROIT Protocol' (09 March 2012) <<http://www.spacepolicyonline.com/pages/images/stories/SIA%20UNIDROIT%20March%202012.pdf>> accessed 02 June 2017.

the relevant instrument immediately following its adoption. Evidence of such behaviour can be found in the statement of the Secretary General of the EMEA Satellite Operators Association (ESOA) adopted following the Berlin Diplomatic Conference:

We will now work with our colleagues in the satellite industry on other continents to inform nations of the negative impact of the Protocol on this market as they consider ratification.¹³⁸

Second, one should not dismiss the critique of the uncooperative industry on the basis of its vague or unsubstantiated character. In the context of transnational commercial law reform, it is inappropriate to measure the validity of the target sector's counter-argument with the same force as during the assessment of the arguments in favour of reform formulated by the relevant agency. The reason is simple: the latter is interfering with the ongoing operation of the target sector and thus the onus is on the formulating agency to persuade the relevant stakeholders. This also means that it should be perfectly acceptable for the latter to question the benefits of the reform in abstract terms. A possible (although by no means simple) solution to the problem is an *ex ante* economic benefit assessment, which can at least alleviate the concerns about extra costs and the lack of tangible gains resulting from the new instrument and, by doing so, transform the substance of the debate from abstract to concrete. This idea is not new,¹³⁹ but it remains to be seen whether the upcoming adoption of the MAC Protocol¹⁴⁰ or the perspectives of a possible

¹³⁸ *ibid.* Some of the more recent communications from the satellite industry show potential for a more collaborative discussion relating to the possible implementation of the Space Protocol: in an open letter by Tom Stroup, the President of the Satellite Industry Association reiterated the opposition of the global satellite industry to this protocol, but nonetheless provided constructive feedback to the UNIDROIT questionnaire concerning the draft regulations for the space registry to ensure 'that [the Space Protocol] does as little damage as possible to the financial underpinnings of the industry'. See 'Letter from Tom Stroup to Ms. Carla Milani' (30 January 2015) <http://www.sia.org/wp-content/uploads/2015/01/SIA_UNIDROIT_Comments_2015.pdf> accessed 02 June 2017.

¹³⁹ See, eg, the proposal by the UK to commission a report on the economic impact of the Space Protocol in Unidroit, *Unidroit C.G.E./Space Pr./3/W.P. 12 (2009) 2*.

¹⁴⁰ See section 3.4.

shipping protocol looming on the horizon¹⁴¹ will show better use of economic benefit studies.

¹⁴¹ See n 219 in section 3.3.2.

CHAPTER IX. CONCLUSIONS

The recent developments in the realm of the Cape Town Convention are very positive: over the years of work on this thesis both the number of ratifications and the number of registrations in the international registry under the Aircraft Protocol have been growing steadily, while the draft MAC Protocol has reached the governmental expert stage. The opposition from the satellite industry to the Space Protocol, while still present, shows elements of constructive approach. Even the shipping industry displays early signs of interest in the Convention, despite its initial negative reaction. These developments are a tribute to the enormous work performed by UNIDROIT, the various experts and the relevant industries.

This outcome is possible due to the fact that the Cape Town Convention has for the most part provided adequate solutions to the challenges associated with its development. There is overwhelming evidence to support this view.

First, the CTC successfully resolved the original *lex situs* problem by establishing a new autonomous concept of ‘international interest’, while at the same time preserving state sensitivities and avoiding wholesale unification of domestic laws on the basis of functional approach to security interests.

Second, the abolition of the ‘internationality’ requirement, coupled with the self-contained system of priorities gave the Convention a surprising reach, eliminating much uncertainty in the application of the CTC and avoiding circular priorities.

Third, the Convention has intentionally left the concepts of ‘mobility’ and ‘high value’ vague in order to allow unhindered expansion in the future. This decision has yielded its dividend in the case of the draft MAC Protocol (but has created other challenges noted below as one of the qualifications).

Fourth, the umbrella structure of the Convention made possible a multiple speeds approach, whereby the relevant industries could proceed at their own pace, but at the same time preserved the integrity and continuity of the whole system created by the CTC.

Fifth, the remedy rules not only provided the necessary protections to the financiers, but were also carefully structured to promote party autonomy and preserve a balance of interests among various stakeholders, including the debtor and other creditors.

Sixth, the international registration system formed a solid basis for the Convention's system of priorities. For some states, the possibility of migration of national interests into the modern international system constituted the key benefit of the CTC regime.

Seventh, the Convention has provided an adequate response to the industry-driven call for greater commercial certainty, while at the same time preserving the sensitivities of states in handling complex issues.

At the same time, in several situations the CTC does not provide a solid response to the relevant challenges.

First, the final text of the Convention did not establish the limits of its scope and did not clarify the concept of 'mobility'. As a result, new protocols may end up covering stationary objects capable of being transported to another location, contrary to the original design of the CTC. The absence of clearly defined 'gateway' criteria raises the difficult question as to who should perform the role of the 'gatekeeper' of the integrity of the Convention's system in cases of future expansion of its scope (by ensuring that this expansion is not infinite). Both the formulating agency and the relevant industry can be seen as having a particular interest in such expansion due to the mandate of the former

and the potential economic gains of the latter. It is conceivable that the difficult task will thus fall on the shoulders of individual governments, but it remains to be seen whether a dispersed group of states could effectively perform the 'gatekeeper' function. At the same time, it might be an opportunity for increased coordination among international organisations active in the field of secured transactions.

Second, in an attempt to achieve a high degree of predictability among private parties, the Convention got rid of some misleading concepts, such as 'good faith' and 'public policy', but retained others (reasonableness and materiality).

Third, it has proven impossible to secure the support of a number of key (shipping, satellite) industries. In the first case, this eliminated one of the key asset categories (ships) from the scope of the Convention, despite unconvincing argumentation in favour of such exclusion. In the second case, this gave rise to public opposition to the idea of the Space Protocol. The unifying potential of economic benefit assessment was not fully utilised.

Fourth, the treatment of helicopters and helicopter engines in the Aircraft Protocol is unfortunate, although the problem is partly mitigated by the Official Commentary. A number of other omissions were identified and accompanied by proposals for amendment.

Clearly, these qualifications pale in comparison with the Convention's achievements: the CTC has created a highly effective machinery for regulating international interests in mobile assets.

9.1 *What are the lessons?*

In line with the title of this thesis, the author formulates a number of lessons originating from this research. Most of them are specific to commercial law treaties, but some may have more general application.

First, there is a need for greater use of economic benefit assessment studies to attract the attention of the target industry, to provide a credible challenge to any stakeholders opposing the new instruments and to give a clear indication of the resulting impact to governments. Methodology of future studies needs to be improved, and the studies will benefit from a more comprehensive analysis of the costs associated with the transition to the new instrument.

Second, the target industry plays a key role in the preparation and promotion of commercial law treaties. It is suggested that adoption of a commercial law treaty in light of open opposition of the target industry as a whole, or a substantial part thereof, is undesirable, and the onus to disprove any objections – however general or abstract – should be on the side of the formulating agency attempting to change the *status quo* of the existing legal regime.

Third, in light of the need for greater predictability, it has proven possible to establish substantive international rules in areas initially considered a ‘taboo’ (eg insolvency laws), however the conceptual problems remain strong in development of commercial law treaties. The differences of approach between the Civil and Common law jurisdictions and individual state sensitivities dictate the need for compromise solutions at the cost of simplicity and legal certainty.

Fourth, structural and procedural flexibility is a crucial element in building broad international support for new treaties. Dual convention/protocol structures, a

multiple speeds approach and declarations on the most sensitive matters can reduce the scope of state opposition to a new convention. At the same time, the integrity of the regulatory system established by the new instrument must be preserved using various instruments, including a clear identification of scope of the new regime and mandatory declarations.

Fifth, a variety of instruments can be used to enhance the procedural efficiency of the treaty-making process. These include: (i) engagement of specialist working groups to generate additional knowledge and break deadlocks in negotiations, (ii) efficient use of the expertise provided by the drafting groups, by avoiding the practice of labelling policy matters as drafting issues, but at the same time permitting the drafting team to make new proposals to facilitate discussion, and (iii) use of alternatives to crystallise the main points of objection, make subsequent discussions more focused and – if necessary – to provide greater flexibility to governments during adoption and ratification.

Sixth, official or otherwise authorised explanatory materials and commentaries can be used as an instrument for enhancing legal certainty without drafting an international treaty in the style of complex and detailed legislation.

9.2 Have the limitations been overcome?

Most limitations of this research have been successfully overcome. The assistance of the UNIDROIT Secretariat has been invaluable in gaining access to certain unpublished documents, reports and transcripts. At the same time, a number of documents could not be obtained. Several papers (the reports of the third and fourth sessions of the Study Group) have never been produced in the first place and thus are available to no one. A number of additional documents (the working papers of the APG) could not be located, as they are held by the third parties who were not accessible. The absence of these

documents, while unfortunate, is unable to alter the conclusions made in this thesis, since the outcome of the relevant discussions could be identified by reference to other available documents.

Clearly, the documentary history approach utilised by the author has its limitations: it cannot reconstruct the events of the past in full. However, the author's experience of utilising other methods, such as conducting limited interviews,¹ as part of this research, suggests that the documents provide the most accurate and neutral recollection of past discussions, as memories fade with time and can be selective.

The second limitation concerns the scope of the thesis format (in particular, its limited size): some of the research could not be reflected in the dissertation. The matters not included in the text include (i) conflict of laws matters and issues of jurisdiction, (ii) procedural matters, (iii) a detailed discussion of the various declarations, (iv) the matter of cooperation among various international organisations, (v) the problem of funding, (vi) the technical aspects of the treaty-making process, including drafting techniques, matters of style and terminology, or preparing instruments in multiple languages and (vii) challenges associated with interpretation of the CTC.

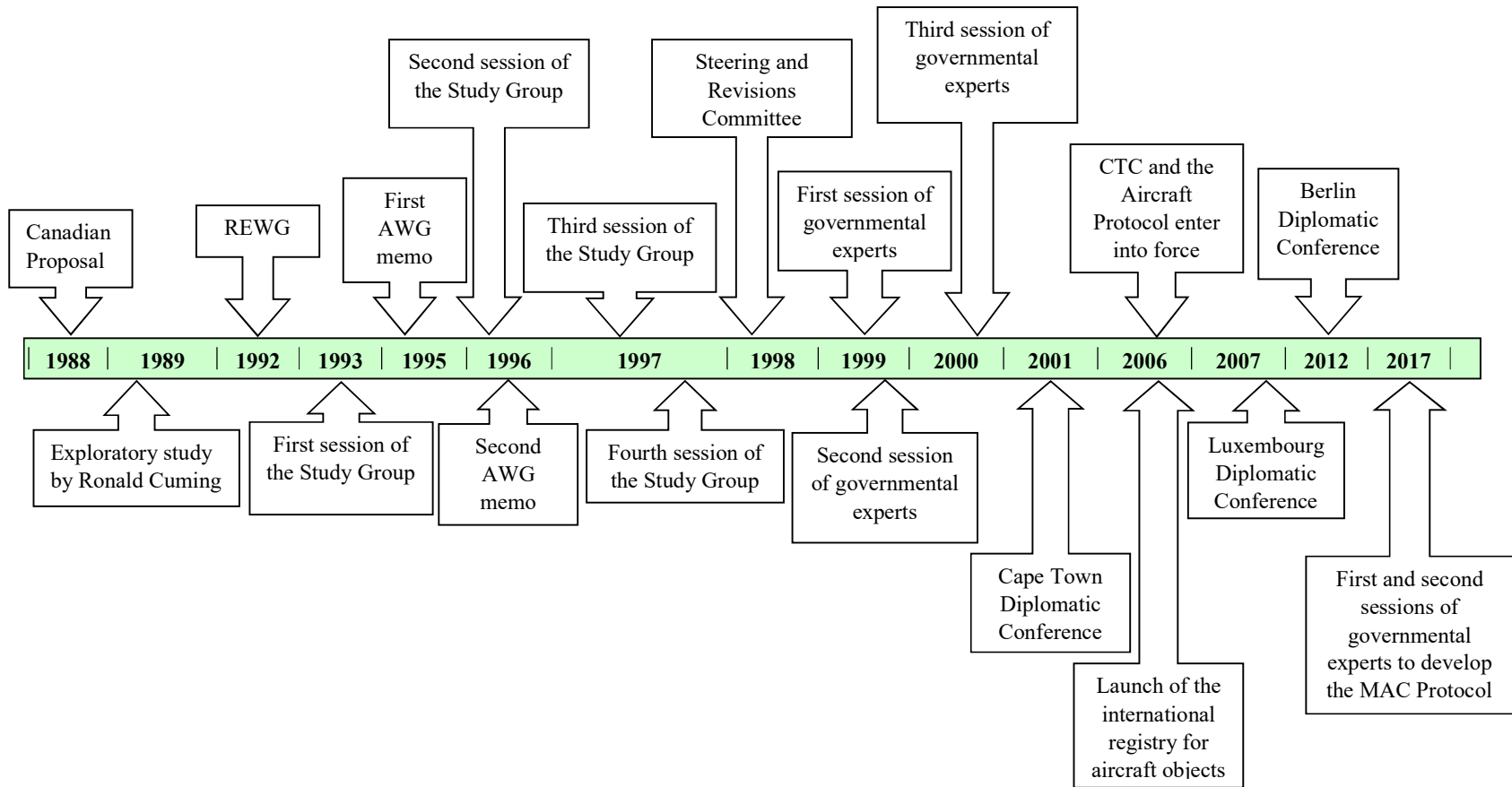
The third limitation concerns the relevance of the findings in this thesis: it is limited to the study of a single treaty and thus may have limited impact on the study of transnational commercial law. The author accepts this limitation, but at the same believes that many conclusions in this thesis – in particular the resulting lessons – can apply to other commercial law treaties with equal force.

¹ The author interviewed Mr. Martin Stanford, former Deputy Secretary-General of UNIDROIT.

9.3 *Future research in the area*

There is significant potential for future research of the Cape Town Convention following from this work. The various chapters of this thesis provide a starting point for deeper study of the various key elements of the CTC. At the same time, this research can grow organically by incorporating those aspects which have been left out and also by analysing the post-adoption implementation practice in different states, the efforts of the industry in promoting it and existing case law in various jurisdictions.

**APPENDIX I.
CAPE TOWN CONVENTION DEVELOPMENT TIMELINE: KEY MILESTONES**



APPENDIX II.
TABLE OF CONCORDANCE OF REPORTS AND WORKING PAPERS

UNIDROIT and joint UNIDROIT/ICAO, UNIDROIT/OTIF reports and working papers

No	Full title	Short title
1.	Preliminary draft uniform rules on international financial leasing, as adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract (UNIDROIT 1984 Study LIX - Doc 16, 1984)	Study LIX - Doc. 16 (1984)
2.	Draft Convention on International Financial Leasing as adopted by a Unidroit committee of governmental experts on 30 April 1987 with Explanatory Report prepared by the Unidroit Secretariat (UNIDROIT 1987 Study LIX - Doc 48, 1987)	Study LIX - Doc. 48 (1987)
3.	Governing Council 67th Session (Rome, 14 to 17 June 1988) Report on the Session (Prepared by the Secretariat) (UNIDROIT 1988 CD 67 - Doc 18, 1988)	Governing Council C.D. 67 - Doc. 18 (1988)
4.	Governing Council 68th Session (Rome, 10 to 12 April 1989) Report on the Session (Prepared by the Secretariat) (UNIDROIT 1989 CD 68 - Doc 26, 1989)	Governing Council C.D. 68 - Doc. 26 (1989)
5.	International Regulation of Aspects of Security Interests in Mobile Equipment: Study Prepared by Professor Ronald C.C. Cuming (College of Law, University of Saskatchewan) (UNIDROIT 1989 Study LXXII - Doc 1, 1989)	Study LXXII - Doc. 1 (1989)
6.	International Regulation of Aspects of Security Interests in Mobile Equipment: Questionnaire (UNIDROIT 1989 Study LXXII - Doc 2, 1989)	Study LXXII - Doc. 2 (1989)
7.	Analysis of the replies to the Questionnaire on an International Regulation of Aspects of Security Interests in Mobile Equipment (Prepared by the Unidroit Secretariat) (UNIDROIT 1991 Study LXXII - Doc 3, 1991)	Study LXXII - Doc. 3 (1991)
8.	Basic Issues Identified in Responses to the Questionnaire on an International Regulation of Aspects of Security Interests in Mobile Equipment by Professor Ronald C.C. Cuming (University of Saskatchewan) (UNIDROIT 1992 Study LXXII - Doc 4, 1992)	Study LXXII - Doc. 4 (1992)
9.	Governing Council 70th Session (Rome, 21 to 24 May 1991) Report on the Session (Prepared by the Secretariat) (UNIDROIT 1991 CD (70) 22, 1991)	Governing Council C.D. (70) 22 (1991)

No	Full title	Short title
10.	Governing Council 71st Session (Genoa, 22 to 24 June 1992) Report on the Session (prepared by the Secretariat) (UNIDROIT 1992 CD (71) 18, 1992)	Governing Council C.D. (71) 18 (1992)
11.	Restricted Exploratory Working Group to Examine the Feasibility of Drawing up Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Report (Adopted by the Working Group on 11 March 1992) (UNIDROIT 1992 Study LXXII - Doc 5, 1992)	Study LXXII - Doc. 5 (1992)
12.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Memorandum for the attention of the Study Group at its first session (prepared by the Unidroit Secretariat) (UNIDROIT 1993 Study LXXII - Doc 6, 1993)	Study LXXII - Doc. 6 (1993)
13.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Memorandum (for the attention of the Study Group at its first session): Addendum (Comments of the German Federal Ministry of Justice) (UNIDROIT 1993 Study LXXII - Doc 6 Add, 1993)	Study LXXII - Doc. 6 Add. (1993)
14.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Memorandum (for the attention of the Study Group at its first session): Addendum (Comments of the European Bank for Reconstruction and Development) (UNIDROIT 1993 Study LXXII - Doc 6 Add 2, 1993)	Study LXXII - Doc. 6 Add. 2 (1993)
15.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Memorandum (for the attention of the Study Group at its first session): Addendum (Comments of the European Federation of Equipment Leasing Company Associations (Leaseurope)) (UNIDROIT 1993 Study LXXII - Doc 6 Add 3, 1993)	Study LXXII - Doc. 6 Add. 3 (1993)
16.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment (First Session: Rome, 8 - 10 March 1993) - Summary Report (Prepared by the Unidroit Secretariat) (UNIDROIT 1993 Study LXXII - Doc 7, 1993)	Study LXXII - Doc. 7 (1993)

No	Full title	Short title
17.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Texts of international instruments and of a proposed new international instrument regulating the recognition and priority of security interests in ships and inland navigation vessels and appurtenances thereto (Security Interests Study Group 1st session Misc 3, 1993)	Security Interests Study Group 1st session Misc. 3 (1993)
18.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Some Preliminary Observations on the Process of Developing a Convention on International Security Interests by Professor R.C.C. Cuming (University of Saskatchewan) (Security Interests Study Group 1st session Misc 5, 1993)	Security Interests Study Group 1st session Misc. 5 (1993)
19.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Memorandum on a proposed Unidroit Convention on Security Interests in Mobile Equipment prepared by Professor R.C.C. Cuming (University of Saskatchewan) (UNIDROIT 1993 Study LXXII - Doc 8, 1993)	Study LXXII - Doc. 8 (1993)
20.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Comments by Mr Thomas J. Whalen to the Memorandum by Professor R.C.C. Cuming on a proposed Unidroit Convention on Security Interests in Mobile Equipment (UNIDROIT 1994 Study LXXII - Doc 9, 1994)	Study LXXII - Doc. 9 (1994)
21.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Comments by Professor C.W. Mooney, Jr. concerning the test of internationality to be employed in the proposed Unidroit Convention on Security Interests in Mobile Equipment (UNIDROIT 1994 Study LXXII - Doc 10, 1994)	Study LXXII - Doc. 10 (1994)
22.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment; Comments by Mr. J.-H. Roever (European Bank for Reconstruction and Development) to the Memorandum by Professor R.C.C. Cuming on a proposed Unidroit Convention on Security Interests in Mobile Equipment (UNIDROIT 1994 Study LXXII - Doc 11, 1994)	Study LXXII - Doc. 11 (1994)
23.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (First session: Rome, 14 - 16 February 1994) Summary report (prepared by the Unidroit Secretariat) (UNIDROIT 1994 Study LXXII - Doc 12, 1994)	Study LXXII - Doc. 12 (1994)

No	Full title	Short title
24.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Rome, 14 - 16 February 1994); Comments by Professor R.D. Vriesendorp (Catholic University of Brabant at Tilburg) to the Memorandum by Professor R.C.C. Cuming regarding a proposed Unidroit Convention on Security Interests in Mobile Equipment (Security Interests Study Group Sub-committee 1st session Misc 2, 1994)	Security Interests Study Group Sub-committee 1st session Misc. 2 (1994)
25.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Rome, 14 - 16 February 1994); Comments by The Boeing Company to the Memorandum by Professor R.C.C. Cuming regarding a proposed Unidroit Convention on Security Interests in Mobile Equipment (Security Interests Study Group Sub-committee 1st session Misc 3, 1994)	Security Interests Study Group Sub-committee 1st session Misc. 3 (1994)
26.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Rome, 14 - 16 February 1994): Addendum to the Comments by The Boeing Company to the Memorandum of Professor R.C.C. Cuming regarding a proposed Convention on Security Interests in Mobile Equipment (Security Interests Study Group Sub-committee 1st session Misc 3 Add, 1994)	Security Interests Study Group Sub-committee 1st session Misc. 3 Add. (1994)
27.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Proposals for a first draft (drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the latter at its first session) (UNIDROIT 1994 Study LXXII - Doc 13, 1994)	Study LXXII - Doc. 13 (1994)
28.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Proposals for a first draft (drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the latter at its first session): Comments (by members of the sub-committee and the study group and the international Organisations and professional associations represented by observers thereon) (UNIDROIT 1994 Study LXXII - Doc 14, 1994)	Study LXXII - Doc. 14 (1994)

No	Full title	Short title
29.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Proposals for a first draft (drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the latter at its first session): Comments (by Mr Thomas J. Whalen, Professor Rolf Herber and The Boeing Company) (UNIDROIT 1994 Study LXXII - Doc 14 Add 1, 1994)	Study LXXII - Doc. 14 Add 1 (1994)
30.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Proposals for a first draft (drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the latter at its first session): Comments by Professor Charles W. Mooney, Jr. and the Legal Committee of the Finance & Leasing Association of the United Kingdom) (UNIDROIT 1994 Study LXXII - Doc 14 Add 2, 1994)	Study LXXII - Doc. 14 Add 2 (1994)
31.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Proposals for a first draft (drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the latter at its first session): Comments (by the Banking Federation of the European Union and the Italian Banking Association) (UNIDROIT 1994 Study LXXII - Doc 14 Add 4, 1994)	Study LXXII - Doc. 14 Add 4 (1994)
32.	Meeting of International Organisations Currently Involved in the Preparation of Legislation in the Field of Personal Property Security (Rome, 29 November 1994): Report (prepared by the Unidroit Secretariat) (UNIDROIT 1995 Study LXXIIB - Doc 1, 1994)	Study LXXIIB - Doc. 1 (1995)
33.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Second session: Rome, 29 November - 1 December 1994) Summary report (prepared by the Unidroit Secretariat) (UNIDROIT 1995 Study LXXII - Doc 15, 1995)	Study LXXII - Doc. 15 (1995)
34.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (UNIDROIT 1995 Study LXXII - Doc 16, 1995)	Study LXXII - Doc. 16 (1995)

No	Full title	Short title
35.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: Comments (by members of the sub-committee) (UNIDROIT 1995 Study LXXII - Doc 17, 1995)	Study LXXII - Doc. 17 (1995)
36.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: Comments (by members of the Study Group and the international Organisations and professional associations represented by observers thereon) (UNIDROIT 1995 Study LXXII - Doc 17 Add 3, 1995)	Study LXXII - Doc. 17 Add. 3 (1995)
37.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Revised Proposals for a First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the sub-committee at its second session) (UNIDROIT 1995 Study LXXII - Doc 18, 1995)	Study LXXII - Doc. 18 (1995)
38.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Revised Proposals for a First Set of Draft Articles of a Future Unidroit Convnention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the sub-committee at its second session): Comments (by a member of the drafting group) (UNIDROIT 1995 Study LXXII - Doc 19, 1995)	Study LXXII - Doc. 19 (1995)
39.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Revised Proposals for a First Set of Draft Articles of a Future Unidroit Convnention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the sub-committee at its second session): Comments (by members of the Study Group and the Sub-committee and the international Organisations and professional associations represented by observers thereon) (UNIDROIT 1995 Study LXXII - Doc 19 Add, 1995)	Study LXXII - Doc. 19 Add. (1995)

No	Full title	Short title
40.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft; Revised Proposals for a First Set of Draft Articles of a Future Unidroit Convnention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the sub-committee at its second session): Comments (by Airbus Industrie / The Boeing Company on behalf of an aviation working group) (UNIDROIT 1995 Study LXXII - Doc 19 Add 4, 1995)	Study LXXII - Doc. 19 Add. 4 (1995)
41.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Third session: Rome, 11 - 13 October 1995) Summary report (prepared by the Unidroit Secretariat) (UNIDROIT 1995 Study LXXII - Doc 21, 1995)	Study LXXII - Doc. 21 (1995)
42.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Third session: Rome, 11 - 13 October 1995); Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: Comments (by the Equipment Leasing Association of America) (International Interests Study-Group Sub-committee 3rd session Misc 1, 1995)	International Interests Study-Group Sub-committee 3rd session Misc. 1 (1995)
43.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft (Third session: Rome, 11 - 13 October 1995) Extract from a work in progress by Professor Charles W. Mooney, Jr. on "Exporting Article 9 of the Uniform Commercial Code in an international Convention: the local law conundrum and possible solutions thereto" (International Interests Study Group Sub-committee 3rd session Misc 3, 1995)	International Interests Study Group Sub-committee 3rd session Misc. 3 (1995)
44.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 pursuant to the decisions taken by the Sub-committee of the Study Group at its third session) (UNIDROIT 1996 Study LXXII - Doc 22, 1996)	Study LXXII - Doc. 22 (1996)
45.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (UNIDROIT 1996 Study LXXII - Doc 23, 1996)	Study LXXII - Doc. 23 (1996)

No	Full title	Short title
46.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996) (UNIDROIT 1996 Study LXXII - Doc 24, 1996)	Study LXXII - Doc. 24 (1996)
47.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: Summary of Principal Concepts prepared by Mr Jeffrey Wool (expert consultant to the Study Group on international aviation finance matters) (UNIDROIT 1996 Study LXXII - Doc 25, 1996)	Study LXXII - Doc. 25 (1996)
48.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment; First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): Comments (by the Cosmic Space Agency of the Russian Federation and the Banking Federation of the European Union) (UNIDROIT 1996 Study LXXII - Doc 26, 1996)	Study LXXII - Doc. 26 (1996)
49.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment; First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): Comments (by Professor C.W. Mooney, Jr. and Mr T.J. Whalen) (UNIDROIT 1996 Study LXXII - Doc 26 Add 1, 1996)	Study LXXII - Doc. 26 Add. 1 (1996)
50.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment; First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): Comments (by Ms N. de la Pena, Professor L. Girton and Mr H. Fleisig) (UNIDROIT 1996 Study LXXII - Doc 26 Add 2, 1996)	Study LXXII - Doc. 26 Add. 2 (1996)
51.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment; First Set of Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): Comments (by the European Federation of Equipment Leasing Company Associations, Mr Peter D. Nesgos and Ms Shiva Falsafi) (UNIDROIT 1996 Study LXXII - Doc 26 Add 3, 1996)	Study LXXII - Doc. 26 Add. 3 (1996)

No	Full title	Short title
52.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment (Second session: Rome, 12 - 16 April 1996): Report (prepared by Unidroit Secretariat) (UNIDROIT 1996 Study LXXII - Doc 27, 1996)	Study LXXII - Doc. 27 (1996)
53.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Extract from the report on the 75th session of the Unidroit Governing Council (prepared by the Unidroit Secretariat) (UNIDROIT 1996 Study LXXII - Doc 28, 1996)	Study LXXII - Doc. 28 (1996)
54.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Consideration of the Case for the Exclusion of Registered Ships from the Sphere of Application of the Future Convention (Secretariat memorandum) (UNIDROIT 1996 Study LXXII - Doc 29, 1996)	Study LXXII - Doc. 29 (1996)
55.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (proposed by the Drafting Group in the light of the Study Group's reading at its second session of the first set of draft articles established by the Sub-committee in conjunction with the recommendations of the Aviation Working Group) with Introductory Remarks (prepared by the Unidroit Secretariat) (UNIDROIT 1996 Study LXXII - Doc 30, 1996)	Study LXXII - Doc. 30 (1996)
56.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: Preliminary Comments by the Russian Federation Aviation Working Group (UNIDROIT 1997 Study LXXII - Doc 31, 1997)	Study LXXII - Doc. 31 (1997)
57.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (proposed by the Drafting Group in the light of the Study Group's reading at its second session of the first set of draft articles established by the Sub-committee in conjunction with the recommendations of the Aviation Working Group): Comments (by the Aviation Working Group and the International Air Transport Association) (UNIDROIT 1996 Study LXXII - Doc 32, 1996)	Study LXXII - Doc. 32 (1996)

No	Full title	Short title
58.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (proposed by the Drafting Group in the light of the Study Group's reading at its second session of the first set of draft articles established by the Sub-committee in conjunction with the recommendations of the Aviation Working Group): Comments (by Mr S. Masuda) (UNIDROIT 1997 Study LXXII - Doc 32 Add 1, 1997)	Study LXXII - Doc. 32 Add. 1 (1997)
59.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (proposed by the Drafting Group in the light of the Study Group's reading at its second session of the first set of draft articles established by the Sub-committee in conjunction with the recommendations of the Aviation Working Group): Comments (by the Aviation Working Group and the International Air Transport Association) (UNIDROIT 1997 Study LXXII - Doc 32 Add 2, 1997)	Study LXXII - Doc. 32 Add. 2 (1997)
60.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (proposed by the Drafting Group in the light of the Study Group's reading at its second session of the first set of draft articles established by the Sub-committee in conjunction with the recommendations of the Aviation Working Group): Comments (by Professor C.W. Mooney, Jr. and Mr T. Whalen) (UNIDROIT 1997 Study LXXII - Doc 32 Add 3, 1997)	Study LXXII - Doc. 32 Add. 3 (1997)
61.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: (Fourth session: Rome, 3-8 November 1997): Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (as proposed by the Drafting Group at its fifth session, held in Rome from 4 to 7 November 1997) (International Interests Study Group 4th session Misc 5, 1997)	International Interests Study Group 4th session Misc. 5 (1997)
62.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Drafting Group (Fourth session: Wuerzburg, 24 - 26 July 1997) Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (prepared by the Chairman of the Study Group in the light of the deliberations of that Group at its third session, held in Rome from 15 to 21 January 1997, and of the proposals by the Drafting Group at its third session, held in Rome on 17 and 20 January 1997) (UNIDROIT 1997 International Interests/Study Group/Drafting Group/Fourth session/ WP 1, 1997)	Study LXXII - Drafting Group Fourth Session (1997)

No	Full title	Short title
63.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (as proposed by the Drafting Group at its fourth session, held in Wuerzburg from 24 to 26 July 1997) with Introductory Remarks (by the Unidroit Secretariat) (UNIDROIT 1997 Study LXXII - Doc 35, 1997)	Study LXXII - Doc. 35 (1997)
64.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (as proposed by the Drafting Group at its fourth session, held in Wuerzburg from 24 to 26 July 1997): Comments (by members of the Study Group, advisers thereto and the international Organisations, professional associations and other bodies represented thereon by observers as also those persons and bodies having participated from outside the Study Group in the development of the project) (UNIDROIT 1997 Study LXXII - Doc 36, 1997)	Study LXXII - Doc. 36 (1997)
65.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (as proposed by the Drafting Group at its fourth session, held in Wuerzburg from 24 to 26 July 1997): Comments (by the Federal German Association of Banks) (UNIDROIT 1997 Study LXXII - Doc 36 Add 1, 1997)	Study LXXII - Doc. 36 Add. 1 (1997)
66.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (as proposed by the Drafting Group at its fourth session, held in Wuerzburg from 24 to 26 July 1997): Comments (by the Intergovernmental Organisation for International Carriage by Rail, the European Company for the Financing of Railroad Rolling Stock, the Danish Shipowners' Association and the Elf Aquitaine Group) (UNIDROIT 1997 Study LXXII - Doc 36 Add 2, 1997)	Study LXXII - Doc. 36 Add. 2 (1997)
67.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Revised Draft Articles of a Future Unidroit Convention on International Interests in Mobile Equipment (as proposed by the Drafting Group at its fourth session, held in Wuerzburg from 24 to 26 July 1997): Comments (by the Aircraft Protocol Group) (UNIDROIT 1997 Study LXXII - Doc 36 Add 3, 1997)	Study LXXII - Doc. 36 Add. 3 (1997)

No	Full title	Short title
68.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (as established by the Study Group at the conclusion of its fourth session, held in Rome from 3 to 7 November 1997) (UNIDROIT 1997 Study LXXII - Doc 37, 1997)	Study LXXII - Doc. 37 (1997)
69.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Working Group to Consider the Legal and Technical Issues Raised by the Establishment of an International Register (First session: Rome, 16-18 April 1996): Summary Report (prepared by the Unidroit Secretariat) (UNIDROIT 1997 Study LXXIIC - Doc 2, 1997)	Study LXXIIC - Doc. 2 (1997)
70.	Study Group for the Preparation of Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Working Group to Consider the Legal and Technical Issues Raised by the Establishment of an International Register (Second session: Geneva, 26-28 May 1997): Summary Report (prepared by the Unidroit Secretariat) (UNIDROIT 1997 Study LXXIIC - Doc 3, 1997)	Study LXXIIC - Doc. 3 (1997)
71.	Steering and Revisions Committee for the Finalisation of the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment and the Preliminary Protocol thereto on Matters Specific to Aircraft Equipment: Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (as established by the Study Group at the conclusion of its fourth session, held in Rome from 3 to 7 November 1997, and as revised by the Chairman of the Study Group) (UNIDROIT 1998 Study LXXII - Doc 39, 1998)	Study LXXII - Doc. 39 (1998)
72.	Governing Council (77th Session: Rome, 16 - 20 February 1998): Extract from the Report on the Session Re item n 8 on the agenda: International interests in mobile equipment (UNIDROIT 1998 Etude LXXII - Doc 40, 1998)	Study LXXII - Doc. 40 (1998)
73.	Steering and Revisions Committee (Rome, 27 - 29 June 1998): Report (prepared by the Unidroit Secretariat) (UNIDROIT 1998 Study LXXII - Doc 41, 1998)	Study LXXII - Doc. 41 (1998)
74.	Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (as established by an Unidroit Study Group and revised, in accordance with a decision taken by the Unidroit Governing Council at its 77th session, held in Rome from 16 to 20 February 1998, by a Steering and Revisions Committee, meeting in Rome from 27 to 29 June 1998) (UNIDROIT 1998 Study LXXII - Doc 42, 1998)	Study LXXII - Doc. 42 (1998)

No	Full title	Short title
75.	Committee of Governmental Experts for the Preparation of a Draft Convention on International Interests in Mobile Equipment and a Draft Protocol on Matters Specific to Aircraft Equipment; Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment and Preliminary Draft Protocol to the Preliminary Draft Unidroit Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment: Preliminary Observations (submitted by the Government of the United States of America) (UNIDROIT 1998 Study LXXII - Doc 43 / Study LXXIID - Doc 4, 1998)	Study LXXII - Doc. 43 / Study LXXIID - Doc. 4 (1998)
76.	Committee of Governmental Experts for the Preparation of a Draft Convention on International Interests in Mobile Equipment and a Draft Protocol on Matters Specific to Aircraft Equipment; Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment: Comments (submitted by the Government of Australia) (UNIDROIT 1998 Study LXXII - Doc 44, 1998)	Study LXXII - Doc. 44 (1998)
77.	Committee of Governmental Experts for the Preparation of a Draft Convention on International Interests in Mobile Equipment and a Draft Protocol on Matters Specific to Aircraft Equipment; Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment and Preliminary Draft Protocol to the Preliminary Draft Unidroit Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment: Comments (submitted by the International Air Transport Association and the Aviation Working Group) (UNIDROIT 1998 Study LXXII - Doc 45 / Study LXXIID - Doc 6, 1998)	Study LXXII - Doc. 45 / Study LXXIID - Doc. 6 (1998)
78.	Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment; Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (as established by the Study Group at the conclusion of its fourth session, held in Rome from 3 to 7 November 1997: Preliminary Draft Protocol on Matters Specific to Aircraft Equipment (as established by a working group organised by Mr J. Wool, expert consultant to the Study Group on international aviation finance matters, at the invitation of the President, at the conclusion of its second session, held in Geneva from 19 to 21 November 1997) (UNIDROIT 1998 Study LXXIID - Doc 1, 1998)	Study LXXIID - Doc. 1 (1998)

No	Full title	Short title
79.	Preliminary Draft Protocol to the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (as established by a working group organised, at the invitation of the President of the Unidroit Study Group for the preparation of uniform rules on international interests in mobile equipment, and revised, in accordance with a decision taken by the Unidroit Governing Council at its 77th session, held in Rome from 16 to 20 February 1998, by a Steering and Revisions Committee, meeting in Rome from 27 to 29 June 1998) (UNIDROIT 1998 Study LXXIID - Doc 3, 1998)	Study LXXIID - Doc. 3 (1998)
80.	Committee of Governmental Experts for the Preparation of a Draft Convention on International Interests in Mobile Equipment and a Draft Protocol on Matters Specific to Aircraft Equipment; Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment and Preliminary Draft Protocol to the Preliminary Draft Unidroit Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment: Comments (submitted by the Government of Japan) (UNIDROIT 1999 Study LXXII - Doc 49 / Study LXXIID - Doc 9, 1999)	Study LXXII - Doc. 49 / Study LXXIID - Doc. 9 (1999)
81.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); First Joint Session (Rome, 1 - 12 February 1999): Report (Unidroit CGE/IntInt/Report ICAO Ref LSC/ME-Report, 1999)	Unidroit CGE/Int.Int./Report ICAO Ref. LSC/ME-Report (1999)
82.	Drafting Committee Proposal (submitted by the Delegation Of the United States of America) (Unidroit CGE/IntInt ICAO Ref LSC/ME DC-WP/7 5/02/99, 1999)	Unidroit CGE/Int.Int. ICAO Ref. LSC/ME DC-WP/7 5/02/99 (1999)
83.	Drafting Committee Proposal (submitted by the Delegation of the United States of America) (Unidroit CGE/IntInt ICAO Ref LSC/ME DC-WP/10 8/02/99, 1999)	Unidroit CGE/Int.Int. ICAO Ref. LSC/ME DC-WP/10 8/02/99 (1999)
84.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Joint Session (Rome, 1 - 12 February 1999): Information Paper (submitted jointly by the Unidroit Secretariat and the ICAO Secretariat) (Unidroit CGE/IntInt/WP/8 ICAO Ref LSC/ME-WP/19 8/02/99, 1999)	Unidroit CGE/Int.Int./WP/8 ICAO Ref. LSC/ME-WP/19 (1999)

No	Full title	Short title
85.	Consolidated Version of a Preliminary Draft Unidroit Convention on International Interests in Aircraft Equipment submitted by the German Delegation integrating the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment UNIDROIT 1998 Study LXXII - Doc. 42 and the Preliminary Draft Protocol to the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment Unidroit 1998 Study LXXIID - Doc. 3 established on the basis of the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (as established by an Unidroit Study Group and revised, in accordance with a decision taken by the Unidroit Governing Council at its 77th session, held in Rome from 16 to 29 February 1998, by a Steering and Revisions Committee, meeting in Rome from 27 to 29 June 1998) UNIDROIT 1998 Study LXXII - Doc. 42 (Unidroit CGE/IntInt/WP/9 ICAO Ref LSC/ME-WP/20, 1999)	Unidroit CGE/Int.Int./WP/9 ICAO Ref. LSC/ME-WP/20 (1999)
86.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Draft Report: Plenary Session; 1 - 12 February 1999 (Unidroit CGE/IntInt/WP/17 ICAO Ref LSC/ME-WP/28 12/02/99, 1999)	Unidroit CGE/Int.Int./WP/17 ICAO Ref. LSC/ME-WP/28 (1999)
87.	Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Second Joint Session (Montreal, 24 August - 3 September 1999): Report (ICAO Ref LSC/ME/2-Report Unidroit CGE/IntInt/2-Report, 1999)	ICAO Ref. LSC/ME/2- Report Unidroit CGE/Int.Int./2-Report (1999)
88.	Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Second Joint Session (Montreal, 24 August - 3 September 1999): Report (by the Registration Working Group (RWG)) (ICAO Ref LSC/ME/2-WP/17 Unidroit CGE/IntInt/2-WP/17, 1999)	ICAO Ref. LSC/ME/2- WP/17 Unidroit CGE/Int.Int./2-WP/17 (1999)

No	Full title	Short title
89.	Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Second Joint Session (Montreal, 24 August - 3 September 1999): Insolvency Working Group Report (ICAO Ref LSC/ME/2-WP/19 Unidroit CGE/IntInt/2-WP/19 26/8/99, 1999)	ICAO Ref. LSC/ME/2-WP/19 Unidroit CGE/Int.Int./2-WP/19 26/8/99 (1999)
90.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Report (Unidroit CGE/IntInt/3-Report ICAO Ref LSC/ME/3-Report, 2000)	Unidroit CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report (2000)
91.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Ad hoc Drafting Group (Rome 25-27 November 1999), Report (Unidroit CGE/IntInt/3-WP/2 ICAO Ref LSC/ME/3-WP/2, 2000)	Unidroit CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2 (2000)
92.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Preliminary Comments (submitted by the Government of France) (Unidroit CGE/IntInt/3-WP/4 ICAO Ref LSC/ME/3-WP/4, 2000)	Unidroit CGE/Int.Int./3-WP/4 ICAO Ref. LSC/ME/3-WP/4 (2000)
93.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Comments (submitted by the Secretariat of UNCITRAL) (Unidroit CGE/IntInt/3-WP/10 ICAO Ref LSC/ME/3-WP/10 2000)	Unidroit CGE/Int.Int./3-WP/10 ICAO Ref. LSC/ME/3-WP/10 (2000)

No	Full title	Short title
94.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Remedies and Interim Relief (submitted by the ICAO Secretariat) (Unidroit CGE/IntInt/3-WP/12 ICAO Ref LSC/ME/3-WP/12, 2000)	Unidroit CGE/Int.Int./3-WP/12 ICAO Ref. LSC/ME/3-WP/12 (2000)
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97.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Public International Law Working Group (Rome, 20 and 21 March 2000): Report (Unidroit CGE/IntInt/3-WP/18 ICAO Ref LSC/ME/3-WP/18 22/03/00, 2000)	Unidroit CGE/Int.Int./3-WP/18 ICAO Ref. LSC/ME/3-WP/18 12/03/00 (2000)

No	Full title	Short title
98.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Special Working Group on Article 14 of the Preliminary Draft Convention and Selected Aspects of Article X of the Preliminary Draft Aircraft Protocol: Report (Unidroit CGE/IntInt/3-WP/24 ICAO Ref LSC/ME/3-WP/24 2000)	Unidroit CGE/Int.Int./3-WP/24 ICAO Ref. LSC/ME/3-WP/24 (2000)
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100.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Special Working Group on Article 3 of the Preliminary Draft Convention; Second Report (Unidroit CGE/IntInt/3-WP/27 Corr ICAO Ref LSC/ME/3-WP/27 27/03/00, 2000)	Unidroit CGE/Int.Int./3-WP/27 Corr. ICAO Ref. LSC/ME/3-WP/27 27/03/00 (2000)
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No	Full title	Short title
102.	UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment; Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment); Third Joint Session (Rome, 20 - 31 March 2000): Proposal for Revised Text of Chapter IX of the Preliminary Draft Convention (Unidroit CGE/IntInt/3-WP/31 ICAO Ref LSC/ME/3-WP/31 29/03/00, 2000)	Unidroit CGE/Int.Int./3-WP/31 ICAO Ref. LSC/ME/3-WP/31 Rev. 29/03/00 (2000)
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109.	Unidroit Committee of governmental experts for the Preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets; Third session: Rome, 7/11 December 2009 (Unidroit 2009 CGE/Space Pr/3/WP 12, 2009)	Unidroit C.G.E./Space Pr./3/W.P. 12 (2009)
110.	Governing Council 92nd session; Rome, 8-10 May 2013: Item No. 5 on the agenda: International Interests in Mobile Equipment - (b) Possible preparation of other Protocols to the Cape Town Convention (i) Agricultural, mining and construction equipment (Memorandum prepared by the Secretariat) (Unidroit 2013 CD (92) 5(b), 2013)	Unidroit 2013 C.D. (92) 5(b) (2013)
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2.	United Nations, UNCITRAL Legislative Guide on Secured Transactions	UNCITRAL Legislative Guide on Secured Transactions (2010)
3.	Fenech A, <i>International Working Group - Cape Town Convention</i> (Report for the CMI Assembly - 9th June 2015, 2015)	Report for the CMI Assembly - 9th June 2015
4.	CMI, Yearbook 2015 (New York I: Documents for the Conference (published by CMI Headquarter; Dijckkaai 8, 2000 Antwerpen, Belgium), 2016)	CMI Yearbook 2015
5.	ICAO, ICAO Working Paper: Assembly - 39th session Legal Commission; Agenda Item 45: Work Programme of the Organization in the legal field: The International Registry After 10 years - Civil Aviation's Great Success Story (Presented by Brazil, Canada, Ireland, Luxembourg, Norway, Singapore, Spain, United Kingdom and the United States) (ICAO A39-WP/422 LE/14, 2016)	ICAO A39-WP/422 LE/14 (2016)

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