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**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**

LORNE S. CLARK*

ON NOVEMBER 16, 2001, delegations from 68 States and 14 international organizations,¹ meeting in diplomatic conference in Cape Town, South Africa, adopted the Cape Town Convention on International Interests in Mobile Equipment² and the Aircraft Equipment Protocol³ thereto.⁴ This event was particularly noteworthy for a number of reasons: it was the first major diplomatic conference ever held in South Africa's "mother city" and the first time that Cape Town has given its name to an international treaty; it broke new ground in enshrining asset-based financing principles in a multilateral treaty applicable to aircraft and engines; it demonstrated unprecedented cooperation between the International Institute for the Unification of

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¹ *Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol*, Cape Town, South Africa, 29 October – 16 November 2001, at <http://www.unidroit.org/english/internationalinterests/conference2001/main.htm> (last visited Jan. 26, 2004).

² *Opened for signature*, Nov. 16, 2001, available at <http://www.unidroit.org/english/conventions/c-main.htm> [hereinafter *Convention*].

³ Protocol to the Convention on International Interests in Mobile Equipment, *opened for signature* Nov. 16, 2001, available at <http://www.unidroit.org/> [hereinafter *Protocol*].

⁴ The "categories of mobile equipment" covered by the Convention are: "(a) airframes, aircraft engines and helicopters; (b) railway rolling stock; and (c) space assets." *Convention*, *supra* note 2, art. 2, para. 3. In the Aircraft Protocol "Aircraft objects" are defined as "airframes, aircraft engines and helicopters." *Protocol*, *supra* note 3, art. I, para. 2(c).

Private Law (Unidroit)⁵ and the International Civil Aviation Organization (ICAO), the two organizations under whose aegis the Diplomatic Conference was convened; it represented the culmination of almost unprecedented public-private sector cooperation among governments, international organizations and the aviation industry, including aerospace manufacturers, aircraft and engine leasing companies, banks and other lending institutions engaged in financing aircraft and engine acquisition; and it laid the groundwork for the negotiation and adoption of at least two further Protocols to the Cape Town Convention: one on Railway Rolling Stock⁶ and one on Space Assets.⁷

The Cape Town Conference was the successful result of more than thirteen years of work: within Unidroit from 1988 to 1997, and from 1997 to 2001 in several forums; in particular the Aviation Working Group (AWG),⁸ the International Air Transport Association (IATA)⁹ and ICAO, as well as in Unidroit. At the end of the period 1988 to 1997, Unidroit found itself in a veritable cul-de-sac as its diligent efforts to produce new treaty law governing security interests in cross border transactions concerning high-value mobile assets were largely frustrated by the virtual impossibility of devising a single regime applicable to property as diverse as aircraft and engines, railway rolling stock, space property, offshore oil rigs and certain types of ships.

⁵ Unidroit, based in Rome, has 59 Member States. *Unidroit – International Institute for the Unification of Private Law: Presentation*, at <http://www.unidroit.org/english/presentation/main.htm> (last visited Jan. 26, 2004).

⁶ The rail protocol is being coordinated by Unidroit with the close cooperation of OTIF, the 41 Member State (mainly European) Intergovernmental Organization for International Carriage by Rail, with Headquarters in Berne. See *Development of Work Within UNIDROIT on International Interests in Mobile Equipment*, at <http://www.unidroit.org/english/internationalinterests/history.htm> (last visited Jan. 26, 2004).

⁷ The space property protocol is being developed by Unidroit with the close cooperation of the U.N. Committee on Peaceful Uses of Outer Space (UNCOPUOS). *Id.*

⁸ The AWG is a not-for-profit trade association representing aerospace manufacturers, air transport leasing companies, and major financial institutions supporting the aviation industry. It is co-chaired by Airbus and Boeing, and its members include Bombardier, Boullioun Aviation, Citibank, debis Airfinance, DVB Bank, EMBRAER, GE Capital Aviation, GE, Indosuez Air Finance, ILFC, JP Morgan, KfW, Morgan Stanley, Rolls-Royce, Singapore Aircraft Leasing, SNECMA and UTC- Pratt & Whitney. See *AWG Structure and Membership*, at <http://www.awg.aero/publiccontent/organisation.htm> (last visited Jan. 26, 2004).

⁹ IATA's 270 member airlines carry over 95% of scheduled international traffic. See *IATA – About Us*, at <http://www.iata.org/about/index> (last visited Jan. 26, 2004).

In late 1996, The Boeing Company contacted IATA to seek assistance in “breaking the logjam” in Unidroit with a specific request that IATA propose a means of moving forward with respect to aircraft equipment only. In early 1997, at a meeting convened by the AWG in Paris and chaired by Boeing, the author—then General Counsel and Corporate Secretary of IATA—recommended what came to be known as the “Convention plus Protocols” approach. This involved de-linking the various properties, elaborating a shorter, more general “umbrella” Convention and negotiating separately and securing the adoption of a series of property-specific protocols to the Convention.

This proposal was immediately accepted and endorsed by Boeing and the other members of the AWG and was formally put to Unidroit, which after due consideration, enthusiastically embraced the new concept. While Unidroit focused on the “umbrella” Convention during the next two years, an Aircraft Protocol Group (APG) was established at the invitation of the President of Unidroit, with participation by IATA and the AWG. ICAO was also invited to join. Jeffrey Wool,¹⁰ the AWG Secretary, chaired the Group. Although ICAO had rejected overtures from Unidroit in the early 1990s to become involved in the high value mobile assets treaty development exercise (on the grounds that that this would not be an “air law” treaty), the new invitation regarding the proposed Aircraft Equipment Protocol was of interest to ICAO and it became an active member of the APG and contributed significantly to the development of the Aircraft Protocol instrument.

Despite Unidroit’s interest in proceeding with the elaboration of Protocols on Railway Rolling Stock and Space Assets, it quickly became common ground among all stakeholders that the first Protocol, to be adopted at the same time as the Convention, would be an Aircraft Equipment Protocol. Thus, from 1997 to 2000, while Unidroit continued its efforts on the development of the “umbrella” Convention, the elaboration of the Aircraft Equipment Protocol was largely the result of intense work on the part of the AWG and IATA, with significant input from ICAO and overall coordination and oversight by Unidroit,

¹⁰ Mr. Wool, a partner at the law firm of Perkins Coie in Washington, D.C., is an eminent aviation lawyer who contributed significantly to the Cape Town instruments process. He was an expert consultant to Unidroit in the field of aviation finance and is currently AWG Group Secretary and General Counsel.

so as to ensure full compatibility between the two evolving treaty instruments.

Even after the IATA-proposed multi-protocol approach was approved by Unidroit and accepted by the ICAO in 1997, and despite heroic efforts by IATA and the AWG to move the project forward more rapidly thereafter, the negotiating process leading to Cape Town was at times frustratingly slow and pedantic. Nevertheless, all of the stakeholders remained committed to the elaboration of new international commercial law based on tried and proven financial rules to reduce the cost of, and make more available, cross border aircraft and engine acquisition. Also, unusual in the ICAO context, where treaty drafting is generally within the purview of Ministries of Transport or Civil Aviation and Foreign Ministries, the Mobile Equipment Convention attracted the interest of and input from a much wider national governmental spectrum, among which were Ministries of Justice, Ministries of Finance, Ministries of Economic Development and Planning, and Ministries of International Trade.

The Cape Town Convention regime breaks new ground in several respects, including the provisions in regard to its entry into force and the legal relationship between the “umbrella” Convention and the Aircraft Equipment Protocol and provisions respecting the international registration of aircraft engines in their own right as high value “mobile equipment.” Thus, Article 49 of the Convention,¹¹ innovative among international legal instruments, intentionally delays entry into force of the Convention, even though it may have the requisite number of ratifications, acceptances, approvals, or accessions (i.e., three), until at least one Protocol is brought into force. The Aircraft Protocol requires eight ratifications, acceptances, approvals, or accessions to come into force.¹²

Furthermore, the Convention specifically provides for the Aircraft Equipment Protocol *and* subsequent Protocols to override and supersede the terms of the Convention itself.¹³ As can be imagined, these rather novel features were the subject of

¹¹ Article 49 provides: “This Convention enters into force, but only as regards a category of objects to which a Protocol applies: (a) as from the time of entry into force of that Protocol; (b) subject to the terms of that Protocol; and (c) as between States parties to this Convention and that Protocol.” Convention, *supra* note 2, art. 49, para. 1.

¹² Protocol, *supra* note 3, art. XXVIII, para. 1.

¹³ “The Convention shall apply in relation to aircraft objects *as provided by the terms of this Protocol.*” *Id.* art. 2, para. 1 (emphasis added).

lengthy and vigorous debate during the negotiating process. The more traditionalist international lawyers, especially aviation lawyers, argued against such innovation. On the other hand, more pragmatic, asset-financing and commercial lawyers contended that effective international regimes for the respective properties required that the individual Protocols be paramount, and that the Convention should make this crystal clear so as to avoid any misapprehension and misinterpretation in the future.

While it is in fact normal practice for one or more subsequent international legal instruments to amend an earlier treaty,¹⁴ it is admittedly unusual to state categorically that a Protocol negotiated and adopted at the same time as the Convention to which it is directly and legally linked must prevail as between the two. The core reason for this innovation goes back to the decision to terminate the Unidroit effort to draft a single, all-encompassing treaty applicable to aircraft equipment, railway rolling stock, space assets, offshore oilrigs, and certain types of ships, in favor of an “umbrella” Convention and diverse property-specific Protocols. With the abandonment of the “one size fits all” approach, it became necessary to ensure that the rules governing specific property, such as aircraft and engines, prevailed over any provisions set out in the generally applicable Convention. In addition, it was considered imperative that the Convention not be permitted to come into force in relation to a particular type of property unless and until a property-specific Protocol also came into force. This would assist and promote predictability and transparency, two necessary attributes of the new asset-based financing regime.

It is also worth noting that the Convention has specific provisions dealing with “Relationship with other Conventions” and which specifically state that the Cape Town instrument “shall prevail over the 2001 UN Convention on the Assignment of Receivables in International Trade . . . as it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.”¹⁵ Such prevalence, of course, will apply only

¹⁴ An excellent example is the Warsaw Convention air transport liability system, where the 1929 Warsaw Convention has been amended by several subsequent instruments, including the 1972 Hague Protocol and the 1975 Montreal Protocols.

¹⁵ Convention, *supra* note 2, art. 45; *see also id.* art. 46 (providing that the Protocol “may determine the relationship between this Convention and the (1988) Unidroit Convention on International Financial Leasing.”).

as between parties to both Conventions. In turn, the Protocol also has three articles dealing with its "Relationship with Other Conventions" addressing: the 1948 Convention on the International Recognition of Rights in Aircraft; the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft; and the 1988 Unidroit Convention on International Financial Leasing.¹⁶

With respect to aircraft equipment, the Cape Town regime is designed to provide for the creation, enforcement, registration and priority of security interests held by chargees, conditional sellers, and lessors of aircraft and engines on a first-to-file basis, and to establish a new International Registry to record such interests. While complex due to the fact that the subject matter is complicated and admittedly rather esoteric, the treaty system is nevertheless user-friendly in that it gives Contracting States broad latitude in deciding which particular international legal obligations they wish to be bound by in addition to mandatory provisions. This is accomplished through a system of "declarations," which are known as the "opt in" or "opt out" provisions. It is thus highly respectful of state sovereignty, of differing political, economic, and social environments, differing speeds of economic development, and national requirements as perceived by governments, and it permits and facilitates changes in position in accordance with changing circumstances and needs.

The "opt in" declarations are binding commitments by States in relation to particular Convention/Protocol regime provisions that would otherwise not be applicable to that State.¹⁷ The "opt out" declarations allow States to exclude applicability of certain treaty provisions to them.¹⁸ In addition, there are mandatory declarations relating to Regional Economic Integration Organizations (such as the European Union), requiring specification of matters within the competence of the Organization, as opposed to its Member States,¹⁹ and relating to whether remedies

¹⁶ Protocol, *supra* note 3, arts. XXIII-XV.

¹⁷ See *id.*, *supra* note 2, art. 39 (regarding non-consensual rights and interests having priority without registration); art. 40 (regarding registrable non-consensual rights or interests); art. 60 (regarding application of Convention priority rules to pre-existing rights or interests).

¹⁸ See *id.* art. 54, para. 1 (relating to the power to lease a charged object located in the declaring State's territory); *id.* art. 54, para. 2 (relating to extra-judicial remedies); *id.* art. 55 (relating to interim relief); *id.* art. 50, para. 1 (relating to application of Convention to international transactions).

¹⁹ *Id.* art. 48, para. 2.

may be exercised only with leave of the relevant court.²⁰ The Cape Town regime exhibits flexibility and openness to change, in that, other than with respect to declarations made under Article 60, concerning the application of Convention priority rules to pre-existing rights or interests, a Contracting State may modify or replace any declaration at any time.²¹

The newly established International Registry, not to be confused with Chicago Convention-type national aircraft registries,²² is a 24-hour a day, 7 days a week, 365 days a year, first-to-file electronic registry established to implement the Convention regime. In particular, it deals with registration of (a) international interests, prospective international interests, and registrable non-consensual rights and interests; (b) assignments and prospective assignments; (c) acquisitions of international interests by legal or contractual subrogations under applicable law; (d) notices of national interests; and (e) subordinations of interests referred to in (a) to (d) above.²³ For the purposes of this provision (and certain other provisions) of the Convention, the term "registration" includes "an amendment, extension or discharge of a registration."²⁴

The International Registry was the subject of particularly detailed and lengthy negotiation, with respect to both its nature and responsibilities as well as its accountability and oversight. The airlines, supported by the manufacturer, leasing company, and financial institution members of the AWG, were concerned that the registry structure be simple, efficient, and inexpensive, to operate so as to ensure that only reasonable charges would be imposed for recording transactions. ICAO, at least until the latter stages of the negotiating process, evidenced great interest in being designated as the Registrar and developing this role into a possible revenue-generating function for the Organization. In Cape Town, it was finally agreed that the International Registry would be a not-for-profit operation, though the fee structure *would* provide for recovery of initial set-up costs over time, and

²⁰ *Id.* art. 54, para. 2.

²¹ *Id.* arts. 57-58.

²² Nevertheless, Article XIX of the Protocol permits the designation by a Contracting State of a national Chicago Convention-type registry as the "entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration. . . ." Protocol, *supra* note 3, art. XIX, para. 1.

²³ Convention, *supra* note 2, art. 16, para. 1.

²⁴ *Id.* art. 16, para. 3.

the Registrar would be an individual rather than an international organization or constituent part thereof.²⁵

Under the Convention/Protocol regime for aircraft and engines, a "Supervisory Authority" for intergovernmental oversight and regulation of the Registry is established²⁶ and Resolution No. 2 of the Diplomatic Conference invites ICAO to fulfill this function and to establish a Commission of Experts to assist the Authority upon entry into force of the Cape Town treaty instruments.²⁷ However, as part of the checks and balances instituted by the Protocol, and to avoid centralizing too much control in ICAO, 20 specifically designated States, selected to ensure appropriate geographic representation and including those that played a major part in the treaty-negotiating process, are empowered as a Preparatory Commission to act "with full authority" as the Provisional Supervisory Authority for the establishment of the Registry "under the guidance and supervision of ICAO."²⁸

As recognized high-value mobile equipment, aircraft engines are to be registrable in the new International Registry in their own right, in the same manner as airframes or helicopters. Under Article XIV of the Protocol, specifically overriding what would otherwise be applicable national law, neither an engine's installation nor removal from an aircraft will affect the ownership or other interest in the engine.²⁹ Thus, as pointed out in the Official Commentary,³⁰ "[s]o, if, for example, an aircraft en-

²⁵ Protocol, *supra* note 3, art. XX, para. 3.

²⁶ See Convention, *supra* note 2, art. 17, para. 1; Protocol, *supra* note 3, art. XVII.

²⁷ *Final Act of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol*, Res. 2 (Nov. 16, 2001), at <http://www.unidroit.org/english/internationalinterests/conference2001/finalact.pdf> [hereinafter *Final Act*].

²⁸ The "for involvement in" States are "Argentina, Brazil, Canada, China, Egypt, France, Germany, India, Ireland, Kenya, Nigeria, Russian Federation, Senegal, Singapore, Switzerland, South Africa, Tonga, United Arab Emirates and the United States." *Id.*

²⁹ Protocol, *supra* note 3, art. 14, para. 3.

³⁰ The Official Commentary was approved for distribution by the ICAO and Unidroit Secretariats by Resolution No. 5 of the Diplomatic Conference; the Official Commentary is in five parts: (1) brief history of the Convention; (2) an Overview of the Convention; (3) an Overview of the Protocol; (4) article by article analysis of the Convention; and (5) article by article analysis of the Protocol. See *Final Act*, *supra* note 27, Res. 5. ROY GOODE, OFFICIAL COMMENTARY ON THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (International Institute for the Unification of Private Law 2002). Copies of the Official Commentary can be ordered at www.unidroit.org/english/publications/goode/order.pdf.

engine is leased by its owner to an airline and installed on its aircraft, ownership of the engine does not pass to the airline but remains with the lessor.”³¹ In this case, the International Registry adopts the principle of title tracking rather than title transfer.

The Diplomatic-Conference-approved Official Commentary was prepared in order to assist governments in understanding and appreciating the Convention/Protocol. It was written by the Chairman of the Conference Drafting Committee, Professor Sir Roy Goode.³² In addition the AWG prepared a highly useful “Matrix of declarations permitted under the Convention and Protocol.”³³ Furthermore, partly in a bow towards the many government representatives who were insisting on a “single aircraft equipment treaty,” as opposed to the Convention/Protocol approach,³⁴ and partly for ease of convenience, interpretation, and to facilitate application and implementation of the treaty regime, a “Consolidated Text of the Convention and Aircraft Equipment Protocol”³⁵ was prepared jointly by Unidroit and the ICAO Secretariats.³⁶ This Consolidated Text reproduces with regard to “aircraft objects,” i.e., airframes, aircraft engines, and helicopters, the combined effect of the Convention and Aircraft Equipment Protocol. As the Official Commentary indicates, the Text is “designed as a useful working tool for those involved in aviation finance and it [was] prepared with great care to ensure conformity with the Convention and the Aircraft Equipment Protocol.”³⁷

While technically it has no legal status, though it was in fact formally “noted” by the Diplomatic Conference, it is widely believed that this extremely helpful document will quickly become the “text of choice” for everyday use. The Official Commentary, the Matrix, and the Consolidated Text are currently under care-

³¹ GOODE, *supra* note 30 at 207.

³² Head of the United Kingdom Delegation and Emeritus Professor of Law, University of Oxford.

³³ GOODE, *supra* note 30, annex X.

³⁴ These supporters believed that a single treaty would seriously disadvantage and likely delay future international legal instruments in respect of railway rolling stock, space assets and, possibly, other mobile equipment.

³⁵ This was the subject of Resolution 1 of the Diplomatic Conference. See GOODE, *supra* note 30 at annex IV.

³⁶ Consolidated Text, available for purchase from Unidroit. For information contact unidroit.rome@unidroit.org.

³⁷ *Id.* at 2.

ful scrutiny by governments in many parts of the world as they actively consider ratification of the Cape Town instruments.

The Convention and Protocol were signed by 20 States at the conclusion of the Cape Town Diplomatic Conference on November 16, 2001, and since then by six additional States, including the United States, on May 9, 2003, and have thus far been ratified by only one State, Panama, on July 28, 2003. The list is set out below.

TABLE 1
SIGNATORIES OF THE CAPE TOWN CONVENTION
AND THE AIRCRAFT PROTOCOL

| | |
|--|-------------|
| Burundi | 16.XI.2001 |
| Chile | 16.XI.2001 |
| China | 16.XI.2001 |
| Congo | 16.XI.2001 |
| Cuba | 16.XI.2001 |
| Ethiopia | 16.XI.2001 |
| France | 16.XI.2001 |
| Ghana | 16.XI.2001 |
| Jamaica | 16.XI.2001 |
| Jordan | 16.XI.2001 |
| Kenya | 16.XI.2001 |
| Lesotho | 16.XI.2001 |
| Nigeria | 16.XI.2001 |
| South Africa | 16.XI.2001 |
| Sudan | 16.XI.2001 |
| Switzerland (<i>ad referendum</i>) | 16.XI.2001 |
| Tonga | 16.XI.2001 |
| Turkey | 16.XI.2001 |
| United Kingdom (<i>with declaration</i>) | 16.XI.2001 |
| United Republic of Tanzania | 16.XI.2001 |
| Italy | 6.XII.2001 |
| Senegal | 2.IV.2002 |
| Panama | 11.IX.2002 |
| Germany (<i>with declaration</i>) | 17.IX.2002 |
| Saudi Arabia | 12.III.2003 |
| United States of America | 9.V.2003 |
| Ukraine | 3.III.2004 |

TABLE 2
CONTRACTING STATE TO THE CAPE TOWN
CONVENTION AND AIRCRAFT PROTOCOL

| | |
|--|-------------|
| Panama (<i>with declarations</i>) | 28.VII.2003 |
| Ethiopia (with declarations under Articles 39(1)(a), 40 and 54(2)) | 21.XI.2003 |
| Nigeria (with a declaration under Article 54(2)) | 16.XII.2003 |

The treaty instruments require eight ratifications in order to come into force.³⁸ Despite ICAO's initial insistence on 30 ratifications, this relatively low number³⁹ was agreed to after many months of spirited lobbying by IATA and the AWG and rather heated debate in Cape Town. At its 57th Annual General Meeting in Madrid in June 2001, the Members of IATA had unanimously adopted a Resolution stating that IATA: "strongly recommends that the treaties' rapid entry into force be facilitated by requiring a minimum number of ratifications for this purpose."⁴⁰ IATA and the AWG forcefully argued that, since the treaties are private international commercially-oriented instruments, quasi-universality or even widespread acceptance is not needed to launch the new regime. This is especially so given that less than 30 States account for over eighty percent of all aircraft and engine transactions⁴¹ in today's world. The 30 States are: Australia, Brazil, Canada, China, Egypt, Finland, France, Germany, India, Ireland, Italy, Japan, Malaysia, Mexico, the Netherlands, the three Scandinavian countries,⁴² Poland, Russia, South Korea, Saudi Arabia, Singapore, South Africa,

³⁸ See Convention, *supra* note 2, art. 49 (providing that only three ratifications are required for its entry into force, but providing that it will come into force with respect to aircraft and engines *only* when the Aircraft Equipment Protocol comes into force after eight ratifications).

³⁹ Unidroit's "normal" number of ratifications is only three, and thus, the Convention requires only three; however, as noted, it cannot come into force in respect of particular equipment without a relevant Protocol entering into force. See *id.*

⁴⁰ 57th IATA Annual General Meeting Resolution IV; see also Flug Revue Online, Update (June 3, 2001), available at <http://www.flug-revue.rotor.com/FRNews1/FRNews01/FR010603.htm> ("[g]overnments were urged to support the adoption of a proposed Convention and Protocol on advanced asset - based financing and leasing, which would reduce the cost of credit by substantial sums. Such adoption would take place at the Diplomatic Conference in Capetown, October 2001").

⁴¹ IATA, Presentation to the AWG Annual General Meeting (Oct. 20, 1999).

⁴² Denmark, Norway and Sweden.

Spain, Switzerland, the United Arab Emirates, the United Kingdom, and the United States.

Indeed, it was the strongly held common view of IATA, the AWG and Unidroit, that any requirement for more than a single-digit number of ratifications would create a risk that the treaty instruments might never come into force, as has been the case with a number of ICAO treaties.⁴³ After intensive corridor discussions and consultations among key government delegations, ICAO, Unidroit, the AWG, and IATA, the diplomatic conference endorsed this position.

As noted above, as a member of the Aircraft Protocol Group ICAO had significant input into the Aircraft Protocol (and some modest involvement in the elaboration of the “umbrella” Convention), and the draft instruments were duly processed through the Legal Committee and the Council of ICAO. Furthermore, ICAO agreed to be a co-sponsor with Unidroit of the Cape Town Diplomatic Conference. However Unidroit, the AWG, and IATA were the continuing engines of progress, in particular, throughout the last three years of the negotiations. In particular, the AWG and IATA were constantly pressing for timelines, and it was they who sought out, visited and secured a commitment by South Africa to host the Diplomatic Conference. The AWG and IATA arranged, conducted, and their representatives participated in information seminars around the world,⁴⁴ their representatives prepared and circulated information papers, and wrote articles in learned journals directed to demystifying asset-based financing for high-value mobile equipment.

In fact, Unidroit, IATA and the AWG – supported by many governments – were fully prepared, as was the host State of South Africa, to hold the Diplomatic Conference in the year 2000 or early 2001 and the Unidroit Governing Council specifically approved this. However, ICAO administrative and bureau-

⁴³ See, e.g., Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955, *opened for signature* Mar. 8, 1971, 10 I.L.M. 613, ICAO Doc. 8932; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, *opened for signature* Sept. 25, 1975, ICAO Doc. 9147.

⁴⁴ The AWG and IATA organised or played major roles in seminars and meetings in: Moscow, Brussels, London, Geneva, Beijing, New Delhi, Singapore, Johannesburg, Rio de Janeiro, Buenos Aires, Miami, Tokyo, Bangkok and Dubai.

cratic processes led to the delay until October or November 2001.

In 1998, the AWG and IATA, on behalf of those two private sector bodies and ICAO, commissioned an independent *Economic Impact Assessment*,⁴⁵ prepared by two distinguished, applied international economists from the Salomon Centre at New York University and INSEAD in France. The study estimated that given widespread acceptance and effective implementation, airlines could save *billions* of U.S. dollars annually in financing costs.⁴⁶ Reviewing the modalities and implications of the law and finance relationship and the benefits of asset-based financing, the *Economic Assessment* describes in detail and attempts to quantify various categories of economic benefit in relation to effective implementation of the Convention/Aircraft Protocol. “Effective implementation” is defined as including all actions necessary to ensure that the treaty provisions will be strictly and reliably enforced by national courts and the establishment, efficient operation and appropriate regulation of an international registry system in which property instruments in aircraft and engines will be recorded, thus determining their priority in a fully transparent manner.⁴⁷ The study provides a set of estimates of aircraft equipment-financing cost savings based on ranges of pricing differentials reflecting the greater security for lenders and enhanced access to capital markets as a result of lower risk.⁴⁸ Significantly, in addition to the Convention/Protocol reducing the need for sovereign debt to acquire aircraft and engines, the authors of the *Economic Assessment* point out that, in certain cases, credit will be extended where, absent the Cape Town regime, it would simply be unavailable to the prospective borrower or lessor at any price.⁴⁹ Commenting on the “optional” provisions, the study states:

The adoption of these provisions would significantly enhance the economic value of the law reform in a particular country. Countries that opt-in to these provisions can expect materially greater financing-related benefits than those that do not. Moreover, the

⁴⁵ Anthony Sanders & Ingo Walter, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment*, 23 AIR & SPACE L. 339 (1998) [hereinafter *Economic Assessment*].

⁴⁶ *See id.* at iii.

⁴⁷ *Id.* at iv.

⁴⁸ *Id.*

⁴⁹ *Id.*

optional provisions contain certain features that are necessary, if not by themselves sufficient, conditions to accessing capital markets in transactions secured by aviation equipment.⁵⁰

It should be noted that the AWG and IATA were also members of Unidroit's "Steering and Revisions Committee," directed by the Unidroit Governing Council to complete the work on the treaties, and thus, were in a position of special relationship with Unidroit. For its part, the ICAO Secretariat had some difficulty in accepting and accommodating input from the two non-governmental entities as full partners in the negotiating process despite the very significant contribution of both to the success of the treaty-drafting process. Furthermore, it was only at the very end of the negotiations that ICAO abandoned its earlier stance strongly favoring a "single instrument," and reluctantly agreed to accept the Convention plus Protocol approach, partly in an effort to help ensure that ICAO be designated the Depositary for the Aircraft Protocol. In the event the Diplomatic Conference unanimously decided otherwise, Article XXXVII of the Protocol designates Unidroit as the Depositary in the same manner as Article 62 of the Convention does for the umbrella treaty.⁵¹ This clear recognition by the Diplomatic Conference and the participating governments of Unidroit's long involvement in, dedication to, and perseverance with the mobile equipment treaties, especially for aircraft equipment, has without doubt enhanced its international reputation, and has led to Unidroit becoming better known and more widely respected.

Unidroit has continued its work on the Railway Rolling Stock and Space Assets Protocols, largely building on the negotiating process and final text of the Aircraft Equipment Protocol with the active involvement of the Intergovernmental Organization for International Carriage by Rail (OTIF) and the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS). As a result of a more focused and energized process and the success achieved at a number of meetings, there are now preliminary draft texts with respect to both these high value mobile assets. Indeed, Unidroit anticipates that the Rail Protocol will possibly be completed and a conference convened to adopt and open it for signature and ratification within the next two years. This will, eventually, be followed by the conclusion of a Space Protocol to the Cape Town Convention.

⁵⁰ *Id.*

⁵¹ See Convention, *supra* note 2, art. 62; Protocol, *supra* note 3, art. XXXVII.

The Cape Town Convention instruments represent a classic win-win scenario. Airlines win in that, over time, the cost of aircraft and engine acquisition will be reduced in relation to what they would have been absent the new regime. The manufacturers and leasing companies win in that lower costs for aircraft and engines will enhance their sales and leases and increase their markets. Financial institutions win because their risks are reduced and their assets are better protected within a treaty framework providing for predictability and transparency. Governments win due to a reduced need for sovereign guarantees, for involvement in financing equipment upgrade and replacement, and to underwrite capital expenditures by their national airlines. Passengers also win since it is anticipated that the effective and widespread implementation of the Convention/Protocol will eventually lead to lower fares. Above all, the availability of more and less expensive financing for the international air transport industry will help facilitate fleet modernization with attendant significant benefits in terms of safety, fuel efficiency, noise reduction, environmental protection, and consumer comfort.

An important move was made by the Export-Import Bank of the United States on January 31, 2003, when it decided to lower the cost of acquisition of certain types of aircraft on the basis of reduced risk in connection with the Cape Town instruments. On that date, the Ex-Im Bank announced a “plan to reduce its exposure fee by one-third on financing of large commercial aircraft to buyers in foreign countries that sign, ratify and implement the Cape Town Convention. . . Ex-Im Bank’s plan will enable eligible foreign buyers to receive an Ex-Im Bank exposure fee of as low as 2 percent, a one-third reduction of the current minimum 3 percent exposure fee on financing of large commercial aircraft.”⁵² The export credit agencies of other major Western countries and Japan are still studying this decision by the Ex-Im Bank and their eventual reactions will be of great interest, especially to airlines around the world.

A number of governments have indicated that they are currently actively engaged in the internal processes required in order to ratify the Cape Town instruments, and it is generally

⁵² Press Release, Export-Import Bank of the United States, Ex-Im Bank Offers One-Third Reduction of Its Exposure Fee on Export Financing for U.S. Large Commercial Aircraft (Jan. 31, 2003), *available at* <http://www.exim.gov/pressrelease.cfm/6F76B4BA-1032-5B0F-BDC2F28463DF4239/> (last visited Jan. 26, 2004).

expected that the Convention and Aircraft Protocol will secure the additional ratifications needed for entry into force in 2004. As noted above, the United States did not sign the treaties at the conclusion of the Cape Town Diplomatic Conference, but eventually did so after careful inter-agency review and consideration, on May 9, 2003. The Bush Administration is now seeking the advice and consent of the Senate to permit deposit of the U.S. instrument of ratification. Indeed, the U.S. Government gave additional concrete evidence of its commitment to the Cape Town treaties by hosting a Special Seminar for significant stakeholders on June 15, 2003, in Paris.⁵³ That meeting was specifically directed to energizing the ratification process and ensuring that all necessary information was made available to allow for informed decision-making by governments to facilitate early entry into force of the Convention/Protocol.

Unidroit and ICAO, as well as the AWG and IATA, believe that a “building block” approach is the key to fostering sufficiently widespread acceptance of the Cape Town Convention and Aircraft Protocol. When they come into force and the initial transactions are conducted within the treaty framework, the real, substantial benefits will quickly become evident, and this in turn, will attract more adherents to the new regime, further promoting its advantages and increasing the critical mass of Contracting States.

As is stated so succinctly but eloquently on the back cover of the Official Commentary:

The 2001 Cape Town Convention and Aircraft Equipment Protocol represent one of the most ambitious and imaginative private commercial law projects ever to have been concluded. By providing an international legal regimen for security and related interests in aircraft objects, railway rolling stock and space assets, the Convention and Protocol help to reduce legal uncertainty caused by differences in national laws and thereby open up to developing countries access to finance at reasonable cost.⁵⁴

At this most difficult of times for the aviation industry and all its component parts, with sluggish traffic, reduced passenger revenues and massive retrenchment, there is a clear and present

⁵³ The Seminar, at which the author was privileged to speak, was attended by representatives of Albania, Brazil, Canada, Cape Verde, France, Ghana, Haiti, Indonesia, Kenya, Korea, Luxembourg, Macedonia, Malaysia, Nepal, Romania, Russia, Serbia and Montenegro, Sweden, Viet Nam, the United Kingdom, the USA and Uzbekistan as well as Taiwan, the EBRD and the AWG.

⁵⁴ GOODE, *supra* note 30, at back cover.

need for airlines to lower costs while respecting environmental concerns as they “meet the needs of the peoples of the world for safe, regular, efficient and economical air transport.”⁵⁵ The timely advent of the Cape Town regime, with its prospects for aiding the airlines financially while letting governments further disengage from subsidizing and providing fiscal safety nets for carriers, and ensuring more “Practicality, Party autonomy, Predictability, Transparency and Sensitivity”⁵⁶ is an idea whose time has come – and none too soon!

⁵⁵ Convention on International Civil Aviation, *opened for signature*, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, art. 44(d).

⁵⁶ GOODE, *supra* note 30, at 7-8.

