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HARMONIZATION OF COMMERCIAL LAW:
LESSONS FROM THE CAPE TOWN
CONVENTION ON INTERNATIONAL
INTERESTS IN MOBILE EQUIPMENT

Sandeep Gopalan*

THE 2001 Cape Town Convention on International Interests in Mobile Equipment (hereinafter referred to as the Convention) is arguably the most significant piece of private international law in recent history. A testament to its importance is the fact that twenty-six states have already signed the Convention, with the United States being the latest signatory. One country, Panama has just deposited its instrument of ratification. The International Institution for the Unification of Private Law (UNIDROIT) recently reported that three states are about to deposit their instruments of ratification and that the Convention and the Aircraft Protocol are likely to come into force shortly. As a tool to

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* Doctoral candidate, University of Oxford. I am grateful to Prof. Sir Roy Goode, St. John’s College, Oxford, for his comments. Errors and omissions are entirely of my own commission.


3. See UNIDROIT, Implementation of UNIDROIT Conventions, at http://www.unidroit.org/english/implement/i-2001-aircraftprotocol.htm (last visited Sept. 11, 2003) (indicating that Panama ratified the Protocol on July 28, 2003). According to article 49, the Convention enters into force after three ratifications. However, this is conditioned by the fact that the Convention has no force unless a Protocol enters into force, and the Aircraft Protocol, the only Protocol which has been adopted so far, requires eight ratifications as per its article XXVIII. Thus eight ratifications are required for the Convention and Aircraft Protocol to become effective.

analyze the harmonization process, the Convention contains invaluable lessons, and it will be examined in the following pages.

I. SECURITY INTERESTS IN MOBILE EQUIPMENT: THE NEED FOR HARMONIZATION

The genesis of the Convention was a recommendation by the Canadian government that UNIDROIT examine the feasibility of harmonizing the law relating to security interests in mobile equipment, as a logical extension of the 1988 Ottawa Conventions. Professor Cuming of the University of Saskatchewan was charged with the task of preparing an exploratory report that examined the prevailing law. Known as the Cuming Study, the report included questionnaires to individuals and agencies familiar with the relevant body of law. The Cuming Study found that “the great variety of national approaches to the recognition of foreign security interests in movable property often ensures financing organizations will encounter difficulties when issues of recognition and enforcement of their security interests arise in the new situs, thus conditioning the extension of secured financing.”

II. DIVERGENT NATIONAL LAWS

The vast differences in treatment of security interests in mobile equipment across national boundaries offer the most powerful motivation for harmonization of the law in this area. The law governing rights regard-
ing movable property, in most jurisdictions outside North America, is the *lex situs*. The application of the rule, when movables subject to a security interest validly created under the law of one state are moved to another state and thereby acquire a new *situs*, leads to the question whether a security interest acquired in the first state has an extra-territorial effect outside its jurisdictional boundaries, even though the security interest, if taken in the second state, would be invalid. The problem does not stop there: If the security interest is recognized as valid under the law of the second state, the second question is whether, despite its existence, it is displaced by the *in rem* rights acquired in the property under the law of the second state, which is the new *situs*. The answers to these questions have important implications for issues like priority, where there are competing interests.

In common law, generally, the foreign security interest is treated as valid in the new *situs* unless and until it is displaced by a new security interest acquired in accordance with the law of the new *situs*. In contrast, the Cuming Study found that the approach in some continental European legal systems appeared to be that the continued existence of rights in the form of a security interest created under the original *situs* is dependent upon whether the foreign security interest can be accommodated to the municipal law of the new *situs*. Common law courts were more willing to look to the original *lex situs* to determine the nature of a foreign security interest before deciding how it was to be treated, and these courts had less difficulty in accommodating most foreign security interests because of the flexible approach taken by equity to the requirements for a valid security interest in the form of an equitable mortgage or equitable charge. However, the continental European approach, could lead to the law of the second *situs* not recognizing a security interest as valid if it did not have an analogous counterpart that could be accommodated in its own law.

Once validity was established, many countries seemed to accord the security interest the same status as security interests of a similar nature created under their own laws. Domestication has the potential to create uncertainty where analogies between foreign security interests and those

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9. This refers to the law of the place where the property is situated.
11. *Id.*
12. *Id.* See also Theodor J.R. Schilling, *Some European Decisions on Non-Possessory Security Rights in Private International Law*, 34 INT`L & COMP. L.Q. 87, 97-98 (1985). Even if the second *situs* does recognize the security interest as valid, the efficacy of the interest is in doubt. The security interest could have the same inter-parties effect and priority status in the second state as it has under the law of the state where the security interest was created, or it could be transposed and could have the same status as that enjoyed by similar types of security interests under the law of the second state. This uncertainty is a high price to pay in commercial transactions.
recognized by the local law of the second \textit{situs} are only approximate, because the security interest may end up with rights more or less favorable than those accorded to it under the law of the \textit{situs} where the security interest was created.\textsuperscript{14} Judicial practice showed a variation in treatment across even geographically proximate countries, revealing that the principal indicator was the forum's general approach to security interests, as evidenced by the very liberal German system's broad reception of foreign security interests contrasted with the restrictive Austrian approach.\textsuperscript{15}

The Cuming Study concluded that:

First, the chances of domesticating a foreign-created security interest depend a great deal on the spirit and structure of the substantive rules governing security interests at the new location of the encumbered goods. The more developed and liberal this law is, the easier the domestication of foreign security interests will be. Thus, the all-embracing, uniform security interest of the United States should be particularly open in receiving any foreign security interest whatsoever. On the other hand, the widespread French spectrum of the varied, specific security interests will create considerable obstacles to the domestication of foreign security interests.

... on a technical level domestication should achieve continuity between the foreign and the domestic security interest. Domestication is only the transformation of a pre-existing security, which preserves its identity, although it may change its form and effects. Wherever the time of creation of a security interest is relevant (e.g., in the rules on fraudulent preferences), the original creation at the foreign \textit{situs} should be relevant.\textsuperscript{16}

In the United States, reform was well underway as work on the Convention was commencing. In 1990 the American Law Institute and the National Conference of Commissioners on Uniform State Laws constituted a committee to evaluate the possibility of changes to article 9.\textsuperscript{17} Based on the committee’s report, a drafting committee was formed to make changes, and the new version took shape in 1999.\textsuperscript{18} According to section 9-203 (a) and (b), a security agreement attaches to collateral when it becomes enforceable against the debtor, and it is only enforceable if value has been given and the debtor has the rights in the collateral or the power to transfer rights in the collateral to a secured party.\textsuperscript{19} The security agreement may also provide for the creation of security interests in

\textsuperscript{14} Cuming, \textit{supra} note 6, at 85. This is especially so where the law of the first \textit{situs} is more willing to give scope to non-possessory security interests than the law of the second \textit{situs}.

\textsuperscript{15} 1977 UNCITRAL Y.B. 214, U.N. Doc. A/CN.9/SER.A/1977. In contrast, Austrian courts have recognized those German security interests that complied with Austrian law but generally rejected those that were incompatible. The very restrictive French attitude toward security interests has resulted in a general denial of effect to foreign security interests if domestication has not been undertaken.

\textsuperscript{16} Cuming, \textit{supra} note 6.

\textsuperscript{17} Edwin E. Smith, \textit{Overview of Revised Article 9}, 73 \textit{AM. BANKR. L.J.} 1 (1999).

\textsuperscript{18} \textit{Id.} at 2.

\textsuperscript{19} U.C.C. § 9-203(a)–(b) (1998 with 2001 amendments).
Section 9-207 confers rights and imposes duties upon the secured party who is in possession or control of the collateral. The secured party is expected to take reasonable care to preserve and protect the collateral, which includes the duty to take reasonable steps to protect rights against prior parties in the collateral. When the secured party has possession, the reasonable expenses which include insurance costs, and taxes, that are incurred in the custody, preservation, use, or operation of the collateral are charged to the debtor and are secured by the collateral, with the debtor bearing the risk of accidental loss or damage in case of deficient insurance. The secured party can commingle fungible assets but must keep other property identifiable, and the secured party can use or operate the secured assets when it is needed for the preservation of the collateral or its value, with the permission of the court, or in the manner and to the extent permitted by the debtor. The secured party in possession or having control of the collateral can hold as additional security proceeds other than money or funds received from the collateral. The secured party also has a duty to reduce the secured obligation by applying the proceeds unless the proceeds have been paid to the debtor.

Section 9-301 determines the law governing the perfection and priority of security interests. According to this article, when the debtor is located in a particular jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the collateral. As a general rule, a financing

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20. § 9-204(a).
21. § 9-207; § 9-208.
22. § 9-207(b)(1).
23. § 9-207(b)(2).
24. § 9-207(b)(3).
25. § 9-207(b)(4)(A).
27. § 9-207(b)(4)(C).
28. § 9-207(c)(1).
29. § 9-207(c)(2).
30. § 9-301.
31. § 9-307(b). Except as otherwise provided in this section, the following rules determine a debtor's location:
   (1) A debtor who is an individual is located at the individual's principal residence.
   (2) A debtor that is an organization and has only one place of business is located at its place of business.
   (3) A debtor that is an organization and has more than one place of business is located at its chief executive office.
32. § 9-301(1).
33. § 9-301(2).
statement must be filed to perfect a security interest. With regard to priority, security interests rank in priority according to priority at the time of filing or perfection. An unperfected security interest ranks lower than a perfected security interest. The time of filing or perfection is also the relevant time with respect to the priority of proceeds. Part 6 determines the rights of a secured party upon default. The secured party can repossess the collateral and dispose of it provided that it is done in a commercially reasonable manner. The requirement of commercial reasonableness cannot be waived.

The situation in developing and under-developed countries was rather different. Movable property could not be used as collateral because the law did not allow it. The result is that in these countries only real estate can serve as collateral, thus restricting the availability of credit.

At its April 1989 meeting, the Governing Council of UNIDROIT instructed the Secretary General to prepare, in conjunction with Professor Cuming, a questionnaire for business and financial circles designed to elicit the empirical information required before a final decision was made as to whether UNIDROIT should proceed further to prepare a draft convention. Approximately 1,000 copies of the questionnaire were sent with Professor Cuming's report, typically to banks and financial institutions, confederations of industry, major industrial concerns, and airlines. Ninety-three replies were received, from twenty-nine countries and five international bodies. Fifty-two of the respondents were lenders, eight sellers, ten buyers, one foreign trade corporation, two governmental agencies, ten law teachers, and twelve practicing lawyers. One espe-

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34. § 9-102(39) defines a "financing statement" to mean "a record or records composed of an initial financing statement and any filed record relating to the initial financing statement."
35. § 9-322(a)(1).
36. § 9-322(a)(2).
37. § 9-322(b)(1).
38. Pursuant to a judicial process or without judicial process if it can be done without breach of the peace. See § 9-609(b).
39. § 9-609; § 9-610. The secured party can sell, lease, license, or otherwise dispose of the whole or part of the collateral "in its present condition or following any commercially reasonable preparation or processing." Unless the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must send the debtor and certain other persons reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale is to take place. The debtor may waive its right to receive this notice but only after default. § 9-624(a).
40. § 9-624(a).
42. Id. at 2. Pena points out that in such countries the interest on working capital loans for those without real estate to provide as collateral will be in the range of 30-50 percentage points above the government borrowing rate. The article lists Mexico, Argentina, Jamaica, Uruguay, Bangladesh, Nepal, Romania, Bulgaria, Thailand, Korea, Russia, and Indonesia among countries where the law is in need of reform.
43. UNIDROIT, STUDY LXXII-Doc. 2 (1989).
cially interesting response indicated that the largest type of debtors were
domestic buyers who used the movables principally within the state
where they were purchased and infrequently transported them else-
where.\footnote{Id. at 5.} Most of the respondents stated that secured creditors rights
were recognized either occasionally or frequently by the law of other
states to which they have been taken.\footnote{Id. at 6.} The UNIDROIT Secretariat con-
cluded that:

Many respondents considered the lack of an international system of
law in this area a negative factor in decisions by lenders to sell on
credit or take security interests in movables of a kind generally
moved from one State to another and asserted that this resulted in
higher credit charges. One respondent (a New Zealand buyer) cited
the narrowing of available markets and higher transaction costs.
This point was also raised by a U.K. lender.\footnote{Id. at 7.}

Thus, UNIDROIT thought there was a sufficient need for harmoniza-
tion of the law pertaining to security interests in mobile equipment.\footnote{Id.}
That there is a market for such a law can be seen by the fact that model
laws on secured transactions were sponsored by the World Bank in a
number of Central and South American jurisdictions.\footnote{See UNIDROIT, supra note 8.}
The European Bank for Reconstruction and Development had drafted a model law for
security interests that was designed to assist Central and Eastern Euro-
pean countries in their attempts to draft their own legislation. The first
session of the UNIDROIT Subcommittee for the Preparation of First
Draft noted:

all these initiatives pointed up the marriage (sic) of common law and
civil law ideas already taking place on this subject. It would of
course be important for UNIDROIT: . . to build on these regional
initiatives. The usefulness . . . might in particular be seen in its ability

\footnote{The analysis of replies is rather sketchy in the answer to the most crucial
question:

Question 5. The lack of an international system of law providing that the
rights of secured creditors created under the laws of one state will be recog-
nized in other States: (a) is of no significance to sellers or buyers of the high
cost movables; (b) is of no significance to lending organizations which deal
with businesses that acquire movables that are moved from one state to an-
other; (c) results in sellers refusing to sell on a secured credit basis movables
that are of a type that are moved from one state to another; (d) results in
lenders refusing to lend money on the security of movables that are of a type
that are moved from one state to another; (e) is a negative factor in decisions
on the part of sellers of high cost movables to sell on credit movables that are
of a kind that are moved from one state to another; (f) is a negative factor in
decisions on the part of lenders to make loans where the security for the
loans consists of movables that are of a kind generally moved from one state
to another; (g) results in higher credit charges for buyers of movables that
are of a kind generally moved from one state to another and/or higher loan
charges for borrowers which offer such movables as collateral for loans; or
(h) has the following effects: (please specify).

\footnote{The answer to Question 5 does not reveal the number of replies.}
to incorporate the lessons to be drawn from the operation of these first generation laws and to offer these to the wider world business community. UNIDROIT could also play an important role in filling a need that had manifested itself as these various regional initiatives had developed, namely in bringing together the various organisations engaged in these efforts so as to ensure the maximum coordination between these various projects.\(^5\)

III. WHAT SHAPE SHOULD HARMONIZATION TAKE?

Harmonization can result in a variety of legal instruments, each of varying force. For instance, harmonization may result in a model law;\(^5\)\(^1\) a codification of custom and usage promulgated by an international non-governmental organization;\(^5\)\(^2\) the promulgation of international trade terms;\(^5\)\(^3\) model forms;\(^5\)\(^4\) contracts;\(^5\)\(^5\) restatements by leading scholars and experts;\(^5\)\(^6\) or international conventions, each of which has its own advan-

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50. UNIDROIT, STUDY LXXII-DOC. 12, at 7 (1994).
51. See UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985) was principally crafted to assist countries in reforming and modernizing their laws on arbitration in order to make them relevant to the needs of international commercial arbitration. The UNCITRAL Model Law has been enacted into law by a large number of jurisdictions, including Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom: Scotland; within the United States of America: California, Connecticut, Illinois, Oregon, and Texas; Zambia, and Zimbabwe. Available at http://www.unictral.org/en-index.htm (last visited Oct. 14, 2003).
52. For example, the International Chamber of Commerce (ICC) Uniform Customs and Practice for Documentary Credits. The ICC, which was founded in 1919 in Paris, is a federation of business organizations and businessmen. It is a non-governmental body, neither supervised nor subsidized by governments.
53. See International Chamber of Commerce, Incoterms 2000, available at http://www.iccwbo.org/index_incoterms.asp (last visited May 23, 2003). The ICC introduced the first version of Incoterms (abbreviation for International Commercial Terms) in 1936. Since then, they have acquired tremendous popularity and are the standard trade definitions universally used in international sales contracts. Among the best known Incoterms are EXW (Ex works), FOB (Free on Board), and CIF (Cost, Insurance, and Freight).
55. The Grain and Free Trade Association (GAFTA) has more than eighty contracts covering CIF, FOB, and delivered terms. Over eighty million tons of the world's trade in cereals and 70 percent of trade in animal feeds relies on these standard form contracts.
tages and disadvantages.\textsuperscript{57} In this case, UNIDROIT chose to draft an international convention, particularly due to the influence of the aircraft lobby, which wanted a binding instrument.

Even after the determination is made that an international convention is the appropriate instrument, there is still the question as to whether the convention should restrict itself to harmonizing the conflict of laws rules or whether it should attack the meatier, and hence more controversial, substantive rules. A majority of respondents supported the formulation of a set of substantive rules to be included in a convention, but a significant number of respondents wanted the matter to be left to the applicable law.\textsuperscript{58}

IV. THE CONVENTION

A. Scope

The drafters of the Convention recognized early on that a project of this immensity could only be manageable if restricted to high value equipment that was of an international nature. Under the Convention, an international interest can be one of the following: (a) an interest granted under a security agreement; (b) an interest vested in a conditional seller under a title reservation agreement; or (c) an interest vested in a lessor under a leasing agreement.\textsuperscript{59}

For the Convention to apply, at the time of conclusion of the agreement that creates the security interest, the debtor must be situated in a Contracting State.\textsuperscript{60} With regard to the form requirements of an international interest: (a) it must be in writing; (b) it must relate to an object in respect of which the chargor, the conditional seller, or the lessor has the power to enter into contractual relations; (c) the object that is subject to the agreement must be uniquely identifiable; and (d) the obligations contemplated by the agreement must be identifiable.\textsuperscript{61} The international interest created under the Convention is of an autonomous character that does not rely upon any national law definitions. In the interpretation of the Convention, three factors are to be considered: the purposes set forth in the preamble,\textsuperscript{62} its international character, and the need to promote

\textsuperscript{58} UNIDROIT, STUDY LXXII-DOC. 4, at 9 (1992). Replies dealing with the law applicable to the enforcement of security interests did not indicate overwhelming support for any one of the possibilities suggested. The aircraft lobby was very specific: Airbus Industries suggested that the Convention set forth practical steps enabling the recovery of an asset.
\textsuperscript{59} UNIDROIT, \textit{Convention on International Interests in Mobile Equipment}, art. 2.
\textsuperscript{60} \textit{Id.} art. 3. It does not matter that the creditor is situated in a non-Contracting State.
\textsuperscript{61} \textit{Id.} art. 7.
\textsuperscript{62} \textit{Id.} The Convention’s preamble recites that:

The States Parties To This Convention,
uniformity and predictability in its application.\(^{63}\)

**B. Registration**

Regarding registration, as the explanatory report to the Convention notes, "The registration system lies at the heart of the Convention's system of priorities."\(^{64}\) It allows for the centralized registration and searching of international interests.\(^{65}\) Once registration is affected, the creditor is on notice and can act to safeguard his interests accordingly. The registry is intended to be an electronic database and will be searchable by anyone in accordance with the regulations drawn up for the purpose.\(^{66}\) The statement issued by the registry pursuant to a search is prima facie proof of the registration, its time, and date.\(^{67}\) For convenience, the Convention allows nationally designated entry points, which transmit the registration information to the international registry.\(^{68}\) This is particularly useful for commercial parties in that the nationally designated entry point can serve as a single window for registration of both a national interest and a convention interest, thus saving time and expense. The registrar is under the control of the supervisory authority,\(^{69}\) which has international legal personality. The assets, documents, databases, and archives of the

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Aware of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner, Recognising the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them, Mindful of the need to ensure that interests in such equipment are recognised and protected universally, Desiring to provide broad and mutual economic benefits for all interested parties, Believing that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions, Conscious of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection, Taking into consideration the objectives and principles enunciated in existing Conventions relating to such equipment" have agreed to the provisions of the Convention.\(^{63}\) *Id.* art. 5(1). According to article 5(2) and (3), questions concerning matters governed by the Convention which are not settled by it expressly, are to be settled in conformity with the general principles on which the Convention is based or, in the absence of such principles, in conformity with the applicable law, which only includes the domestic law.\(^{64}\) *UNIDROIT, Convention on International Interests in Mobile Equipment, Explanatory Report and Commentary* (2001).\(^{65}\) *Id.* art. 16.\(^{66}\) *Id.* art. 26.\(^{67}\) *Id.* art. 24.\(^{68}\) *Id.* art. 18(5).\(^{69}\) *Id.* art. 17. The Supervisory Authority can appoint and dismiss the Registrar, can make or approve regulations dealing with the operation of the Registry, can establish procedures for the filing of complaints, and can set and review the fee structure.
registry enjoy immunity from legal and administrative process.\footnote{Id. art. 27. The Supervisory Authority also enjoys exemption from taxes. \textit{Id.} art. 27(3). Its assets, documents, databases, and archives are inviolable and immune from seizure or other legal or administrative process. \textit{Id.} art. 27(4). This inviolability and immunity can be waived. \textit{Id.} art. 27(6).} A key innovation introduced by the Convention is the pinning of liability on the registrar. Under article 28, the registrar is liable for compensatory damages in case of loss sustained directly as a result of its error or omission or from a malfunction of the international registration system. However, the registrar is not liable for malfunction of an irresistible or inevitable nature, when this cannot be prevented.\footnote{Id. art. 28(1).} The article also provides for compensatory damages to be reduced to take into account any contributory causation by the party suffering the damage.\footnote{Id. art. 28(3).}

C. Priority Rules

The priority rules of the Convention are aimed at simplifying conflicts involving competing interests. The rules can be summarized as follows: (a) a registered interest has priority over a subsequently registered interest and over an unregistered interest;\footnote{Id. art. 29(1).} and (b) the Convention eschews messy “actual knowledge” battles by making irrelevant the fact that the registered holder had actual knowledge of a prior competing interest. It suffices that he has beaten the other party in the race to register.\footnote{Id. art. 29(2).} Given the fact that the parties contemplated by the Convention are commercially sophisticated and are expected to be armed with an array of counsel, the seeming harshness of part (b) above, is minimized in reality. Once an easily accessible registry exists, the risk of delay must be borne by the negligent party, and a first-to-file regime is the least time consuming and predictable of the alternatives available. The rights of an asset buyer are subject to an interest registered at the time of purchase but are not subject to an unregistered interest even if the buyer knew of the interest at the time of purchase.\footnote{Id. art. 29(3).} Parties may vary priority by agreement.\footnote{Id. art. 29(5).} However, an assignee of a subordinated interest is not bound by the subordination agreement unless the subordination had been registered at the time of assignment.

D. Default Remedies

Default remedies are arguably the most significant part of the Convention. While national legal remedies are still applicable, they are restricted
by the fact that the remedies crafted by the Convention are mandatory.\textsuperscript{77} Thus they come into play only to the extent that they are not inconsistent with the Convention’s remedies.\textsuperscript{78} The drafters had to arrive at a delicate balance between the demands of commercial expediency and party autonomy on the one hand, and the interests of states in protecting the integrity of their legal systems on the other. Self-help in the exercise of remedies was the holy grail of the aircraft lobby, and it is a tribute to their persistence that it survived the strong opposition from many quarters, chiefly from civil law jurisdictions.\textsuperscript{79} Accordingly, article 8 considers all these concerns and provides the chargee with the following remedies in the case of default: The chargee may: (a) take possession or control of any object charged to it; (b) sell or grant a lease of any such object; and (c) collect or receive any income or profits arising from the management or use of any such object.\textsuperscript{80}

Although all the above remedies may be exercised without the permission of a court, the article allows the chargee to apply to a court for an order authorizing or directing any of the above acts.\textsuperscript{81} Similarly, a conditional seller, or the lessor as the case may be in the event of a default by a conditional buyer under a title reservation agreement or by the lessee under a leasing agreement, terminate the agreement and take possession or control of the object.\textsuperscript{82}

The Aircraft Protocol provides additional default remedies. According to article IX, the creditor can, to the extent agreed to by the debtor, procure the de-registration of the aircraft,\textsuperscript{83} and procure the export and physical transfer of the aircraft object from the territory in which it is situated.\textsuperscript{84} However, these two remedies can only be exercised with the

\textsuperscript{77} Id. art. 12.
\textsuperscript{78} However, the procedural rules are still determined by the national law. The reasons for this are obvious. The Convention and its Protocols are substantive in nature and do not seek to harmonize national procedural laws. Every attempt to tinker with procedure has met with stunted opposition, and the drafters wisely chose not to tread on states’ toes in this area. See, for instance, the comments submitted by the government of Japan in 1999, wherein it was categorically stated that “imposing under Article X(1) a 30 day deadline (or any deadline) for obtaining judicial relief would be inconsistent with concepts of civil procedure in Japan and, therefore, unacceptable.” UNIDROIT, STUDY LXII-DOc. 49 (1999); UNIDROIT, STUDY LXXII-DOc. 9, at 3 (1999).
\textsuperscript{79} These countries argued that such a provision would run counter to their public policy.
\textsuperscript{80} The meaning of default may be determined by the parties in the agreement. If the parties do not define it, default means that the creditor is deprived substantially of that which it is entitled to expect under the agreement. This is in accord with the rule of contract law, which states that the parties should be given the benefit of their bargain. See UNIDROIT, Convention on International Interests in Mobile Equipment, art. 11(2). The parties may trigger the application of the remedies even in cases where there is no real “default.”
\textsuperscript{81} Id. art. 8(2).
\textsuperscript{82} Id. art. 10. The party may also apply to a court for authorization or direction to effectuate any of the remedies.
\textsuperscript{83} Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. IX(1)(a).
\textsuperscript{84} Id. art. IX(1)(b).
prior written consent of the holder of any registered interest that ranks in
priority to that of the creditor.\textsuperscript{85} With regard to interim remedies, article
X allows a State to make a declaration specifying the number of working
days within which the relief must be granted.\textsuperscript{86} The article also modifies
article 13(1) of the Convention to provide for sale as a remedy in the
event of default if the debtor and creditor have specifically agreed
thereto.\textsuperscript{87} The objective is to grant due weight to party autonomy and to
increase the range of remedies available to the creditor.

The draft Space Protocol also makes modifications to these general
rules found in the framework Convention. Following extensive debate to
provide the most efficacious remedy given the unique nature of space
assets, the draft Protocol allows the parties to agree to place into escrow
with the International Registry, or any other escrow agent, the access and
command codes required for access to, command, control, and operation
of the asset.\textsuperscript{88} In addition, the parties may agree that the creditor may
change or cause to be changed any access and command codes to facili-
tate the access to, command, control, and operation of the asset.\textsuperscript{89} The
chief difficulty in a full-fledged party autonomy-based system in the case
of space assets relates to the interests of states in protecting their inter-
ests. States may have legitimate interests in preventing such information
from falling into alien hands and the draft Protocol recognizes this. Ac-
cordingly, it allows states to restrict the remedies provided in the Conven-
tion, and the draft Protocol where the exercise of the remedy would
require the disclosure of restricted or controlled information\textsuperscript{90} to aliens
without prior approval.

Although the Convention provides that remedies must be exercised in
a commercially reasonable manner, if the remedy is exercised in a man-
ner consistent with a provision of the security agreement which is not
manifestly unreasonable it is deemed to have been exercised in a com-
mercially reasonable manner.\textsuperscript{91} Thus, once again party autonomy is
respected. Further, the creditor cannot exercise the remedies without
giving prior notice to interested persons.\textsuperscript{92}

\textsuperscript{85} Id. art. IX(2). A chargee who seeks to procure de-registration and export of an
aircraft without the order of a court has to give reasonable prior notice to inter-
ested persons.
\textsuperscript{86} Id. art. X(1), (2).
\textsuperscript{87} Id. art. X(3).
\textsuperscript{88} UNIDROIT, Draft Space Protocol art. 9(2); UNIDROIT, Study LXXIIJ-Doc. 7, at vii (2002).
\textsuperscript{89} Id. art. 9(3).
\textsuperscript{90} The draft is limited to "technical" information, but as indicated by its presence in
brackets, the limitation is unlikely to survive. See id. art. 9(4).
\textsuperscript{91} Id. art. 8(3).
\textsuperscript{92} Id. art. 8(4). Such interested persons include the debtor, any person who, for pur-
pose of ensuring performance of any of the obligations in favor of the creditor,
gives or issues a surety or demand guarantee or a standby letter of credit or any
other form of credit insurance, and other persons having rights in the object.
V. HARMONIZATION WITH A DIFFERENCE

The Convention presents perhaps the first instance of such extensive intervention by an industry group in the formulation of international law. Once such intervention was recognized by the sponsoring agencies, it was inevitable that the instrument would be honed more with commercial considerations in mind than any outmoded considerations of finding a balance between the common law and civil law.93 The Aircraft Protocol Group94 had identified the commercial objective of the Convention as being the lowering of aviation credit and the facilitation of asset-based financing of aircraft.95 Accordingly, the aviation industry sought to ensure that the full benefits of an asset-finance based law would flow from the Convention to effectuate this objective. This approach is in evidence in a memorandum prepared jointly by Airbus Industrie and Boeing on behalf of the aviation working group dealing with default remedies:

To be materially beneficial, the basic (non-exclusive) remedies under the proposed convention of possession/repossession/seizure, judicially supervised sale and judicial sale set forth in the summary report need to be available within an expedited time frame, and notwithstanding any contrary provisions of national law. We recommend, therefore, that the proposed convention provide a mandatory timetable in which courts having jurisdiction under the proposed convention would be required to determine issues brought before them relating to these basic remedies. In particular, we recommend that such courts be required to issue non-appealable, final decisions in respect of the availability of (a) the grounding of the aircraft (pending further litigation procedures) no later than five days, and (b) the right of the financier/lessor to repossession/seizure, or to a judicially supervised sale/judicial sale, of the aircraft no later than thirty days, in each case of the date on which the application is made to the court with in rem jurisdiction over the aircraft.96

93. Striking such a balance had been an objective. See, Jeffrey Wool, The Case for a Commercial Orientation to the Proposed Unidroit Convention as Applied to Aircraft Equipment, 31 LAW & POL'Y INT'L BUS. 79, 82 (1999) (noting that the drafters had stated as an objective the need to attain a balance between civil law and common law systems).
94. The Aircraft Protocol Group was formed in 1997 and comprised of representatives from the International Civil Aviation Organization (ICAO), IATA, and the Aviation Working Group (AWG).
95. Wool, supra note 93, at 83, 84. Wool notes three commercial principles: (1) that a lessor should be able to determine priority of his security interest, (2) that he should be able to repossess the asset expeditiously in case of default, and (3) that insolvency should not result in the modification of his rights. Id. at 84.
96. UNIDROIT, STUDY LXXII-DOC. 16, at 16-17 (1995). Further, the aviation group emphasizes that for commercial reasons these remedies must be non-exclusive, that is the additional remedies available under the selected law, where there is a contractual choice of law provision, or under the private international law rules of the forum, which may include self-help remedies such as repossession, possessory management/receivership, and private sale must also be available to the transaction parties.
The rationale is that the right to gain prompt access to the asset is the
sine qua non of asset-based finance, and without addressing timing con-
siderations, the proposed convention provides a theoretical right that
lacks utility. They state that the recommendations regarding the timing
of final court decisions are “designed to ensure that the proposed conven-
tion’s important basic substantive remedies are not undercut by Byzan-
tine implementation rules or intended or unintended delays resulting
from national procedural rules”97 and argue that national rules regarding
deregistration of aircraft and their export are potential obstacles to the
basic commercial rights of possession and sale.

The most fundamental of asset-based financing principles is the prin-
ciple that, in exchange for a reduced interest or rental rate, a secured party/
lessor will have the ability to promptly take possession of the asset and
convert it into proceeds for application against the obligations secured, in
case there is default. The international legal framework applicable to air-
craft equipment financings, in many instances, does not facilitate the op-
eration of this principle.98 It was thus important for the aviation lobby to
hone the law so as to satisfy this principle. Having minced no words in
outlining their purpose in taking such a pro-active role in drafting the
Convention, through sheer hard bargaining, they were able to craft inno-
vative solutions that ensured that tough choices would not be eschewed.99
One such solution was the creation of the Opt-in100 and Opt-out101 decla-
rations that would allow states to make choices based on the degree to
which they wanted their legal systems to facilitate asset-based finance.
This gives States remarkable flexibility in choosing from a menu of provi-

97. Id.
99. “Our highest priority in participating in the proposed convention is to ensure that
contracting states have the option of selecting rules which embody this fundamen-
tal principle, thereby permitting transaction parties in their countries to take
greater advantage of international asset-based financing in connection with the
acquisition of unprecedented amounts of required aircraft equipment... This funda-
mental principle is but abstract rhetoric if the actual timing element is undefined
and potentially open-ended. In direct terms, if this timing element is not ad-
dressed, both inside and outside the insolvency contexts, the proposed convention
will have a marginal impact on credit, leasing and lending decisions and will thus
be of marginal benefit to the air transport industry.” Id. at 2-3.
100. Article 39 deals with categories of non-consensual right or interest which under
that State’s law have priority over registered international interests. Article 40
allows a State to list the categories of non-consensual right or interest which shall
be registrable under the Convention as if it were an international interest. Article
60 pertains to the application of priority rules to pre-existing rights or interests,
which retain the priority enjoyed prior to the effective date of the Convention.
101. Article 54(1) allows a State to declare that while the charged asset is situated
within its territory the chargee shall not grant a lease of that asset in that territory.
Article 54(2) allows a State to declare whether or not any remedy available to the
creditor under any provision of the Convention which does not require an applica-
tion to the court can only be exercised with the leave of the court. Article 55
allows a State to declare that it will not apply the provisions of article 13 (interim
relief) or article 43 (jurisdiction under article 13), or both, wholly or in part. Arti-
cle 50(1) allows a State to declare that the Convention does not apply to purely
internal transactions.
sions that satisfy their desire to please particular political constituencies and make policy choices. While it is arguable that allowing so much choice may result in less harmonization and greater disparity, the benefits far outweigh the risks. Conventions that are over-ambitious are condemned to be shunned by countries that may not be willing to make the leap and allowing choice will at least allow countries to progressively reach uniformity.

VI. CONCLUSION

The Cape Town Convention is the herald of a new era where harmonization endeavours owe their success more to the demands of industry than those of academics or lawmakers. This is clearly the conclusion to be drawn from the pioneering role of the aircraft industry in the formulation of the Convention.\textsuperscript{102} Although such a role could not have been conceived of when work on the Convention started, it is impossible to imagine how such an instrument could have been adopted in such a short time-frame without the impetus provided by them. This is a lesson for other industry sectors on the kind of benefits that can be obtained from vigorous engagement in the drafting process and is unlikely to be lost on interest groups.

\textsuperscript{102} This presupposes there is a demand for international law in that particular area, as an industry that is inherently bottom-line oriented is unlikely to invest money and time on fruitless ventures. There is another great advantage to involving industry extensively in the crafting of international legal instruments: It acts as a powerful check against the creation of white elephants like the Convention Relating to a Uniform Law on the International Sale of Goods of 1964, and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964. Both were only ratified by eight countries, the last of which did so in 1979. They are monuments to the failure of harmonization when not properly attempted.