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The year 2001 saw three significant developments that have the potential for shaping transactions involving and affecting the shipping community for a considerable time to come.

First, the United Nations Commission on International Trade Law (UNCITRAL) completed its work on the multinational "Convention on the Assignment of Receivables in International Trade" (the "Receivables Convention"). It was adopted by the U.N. General Assembly in December and is open for signature. Because the classic form of international vessel financing includes assignments of a vessel owner's accounts receivables (charter hire), with respect to the vessel and assignments of the vessel owner's rights under insurance policies taken out with respect to the vessel, and the Convention would appear to treat both as assignments of "receivables" within its purview, the Convention bears scrutiny.

Second, the International Institute for the Unification of Private Law (UNIDROIT) completed its work on a Convention on International Interests in Mobile Equipment and a related Protocol covering aircraft equipment (the "Moveables Convention") with the Diplomatic Conference held in the fall (at which the Convention and Protocol were adopted). Neither the Convention, nor any presently proposed Protocol, applies to vessels or other marine equipment. A Diplomatic Conference was held as recently as 1993, at which a Convention on Maritime Liens and Mortgages was adopted, and which capped some ten years of intensive work by the Comité Maritime International (CMI) and the United Nations Conference on Trade and Development (UNCTAD). Thus, there appeared to be little enthusiasm for a wholesale review of secured vessel financing.

The Moveables Convention covers interests created by security agreements (the mortgage equivalent), lease agreements, and title retention agreements.[1] Unique to this Convention, but possibly a precursor of things to come, is the creation and recognition of an "international interest" distinct from security interests created at the national level, which

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1. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, art. 2(2) [hereinafter Moveables Convention].

through the operation of a Convention adopted by a number of states became internationally recognized with applicable uniformity in their treatment.[2] The Liens and Mortgages Convention, building on the nationality of vessels, belongs to the latter category of conventions.

The Moveables Convention applies only to categories of mobile equipment,[3] made subject to the Convention by the adoption of separate Protocols,[4] which, in turn contain special provisions applicable to a particular category of equipment. The possible inclusion of vessels or other maritime equipment, such as cargo containers, within the purview of the Convention was discussed at an early stage, but as noted above, the work on maritime liens and mortgages, to which the CMI devoted a considerable effort, seemed to have been conducted too recently to justify a new look at the fundamentals. The vessel financing community had raised interests in vessels created by lease agreements as a point for consideration some forty years before in the 1960s when the predecessor to the 1993 Convention was developed. The conclusion has generally been that the system of secret maritime liens effectively precludes the development of secured financing for vessels where the secured party holds title to the vessel. Possible inclusion of cargo containers remains the most likely extension of the Convention into the maritime field, although there does not, at present, appear to be sufficient industry enthusiasm for generating the necessary protocol.

Third, the CMI has completed and published its final draft of the Instrument on Transport Law and submitted it for consideration to UNCITRAL. This is an ambitious project and is, as has been noted by others, a long way from completion. The Instrument on Transport Law is initially focused on carrier/cargo issues during the sea portion of carriage now covered by statutes such as the U.S. Carriage of Goods by Sea Act (COGSA) and the subsequently developed permutations known as Hague/Visby and the Hamburg Rules. The current project, however, envisions extension of the work to cover electronic communication,[5] multi-modal liability,[6] transport documents,[7] freight,[8] liens, delivery,[9] negotiability, and other topics. Criticism of this project is based on the sheer ambition of the undertaking and the apparent assumption that various disparate topics, any one of which could well form the subject of a separate convention, can be combined in a single instrument, effectively dealt with, and provide a basis for wide international agreement within a reasonable time. Indeed, the undertaking with respect to formulating an alternative to COGSA is somewhat late to the plate, following years of discussion and debate and the introduction into the U.S. Congress, with considerable industry and legal support, of a bill to overhaul COGSA.

These three projects are separately discussed below.

I. Convention on the Assignment of Receivables in International Trade

The Receivables Convention is intended to facilitate cross-border transactions involving the assignment of receivables. As noted above, the standard vessel financing package in-

2. *Id.* art. 2.
3. *Id.* art. 2(1).
4. *Id.* art. 51.
5. *CMI Draft Instrument on Transport Law*, 2001 CMI Y.B. 532 [hereinafter CMI Draft].
6. *Id.* ch. 6, at 552.
7. *Id.* ch. 8, at 567.
8. *Id.* ch. 9, at 577.
9. *Id.* ch. 10, at 579.

cludes assignments of a vessel owner's interest in charter hires with respect to the vessel and of the insurance proceeds related to it. It is not the purpose of this review to analyze the changes that might be called for in current practice should the Convention be adopted in one or more of the countries where ship financing transactions are usually structured. Rather, the purpose of this article is to review the approach to various issues related to receivables assignments reflected in the Convention with the thought that they may find application, if not through direct application of the convention, then through seepage of the Convention's provisions into applicable national law. *The Business Lawyer* has recently published a careful and thorough analysis of the Receivables Convention with comparisons to comparable provisions in the Uniform Commercial Code. Parties interested in a more detailed explanation of the Receivables Convention are directed to that article.[10]

For purposes of this review, it is notable that the Receivables Convention validates: (1) assignments of receivables in bulk, (2) assignments of future receivables by present assignments, and (3) assignments of partial and undivided interests in receivables.[11]

However, the Convention applies only if the assignment or the receivable is international.[12] Basically, the receivable is international if the contract from which the receivable arises is between parties located in different countries.[13] The assignment is international if the assignee and assignor are located in different countries.[14] The Convention will only apply where there is an appropriate nexus to a country that is party to the Convention.[15] The article referred to above contains a useful comparison between the "location" rules under the Convention and the UCC.[16] As the article points out, the application of the Receivables Convention's choice of law rules, when considered with the Convention's party location rules, needs to be carefully reviewed since they may not provide the same results as under UCC Article 9.[17] As concerns the priority, however, the Convention contains a choice of law rule that looks to the internal law of the country where the assignor is located to determine the priority of the assigned interest.[18]

The Convention provides that an assignment of a receivable also transfers to the assignee any guaranty or collateral supporting or securing the payment of the receivable without a separate act of transfer.[19] If the law governing the property right constituting security requires a separate transfer, then the assignor is obligated to provide it.[20]

II. Convention on International Interests in Mobile Equipment

The adoption of the UNIDROIT-sponsored Convention on International Interests in Mobile Equipment at a diplomatic conference last fall represents another step in the globalization of secured lending laws. The Mobile Equipment Convention is designed to pro-

10. Harry C. Sigman & Edwin E. Smith, *Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade*, 57 Bus. Law. 727 (2002).

11. Draft Convention on the Assignment of Receivables in International Trade, July 5, 2001, art. 8(1) [hereinafter Receivables Convention].

12. *Id.* art. 1(1)(a).

13. *Id.* art. 3.

14. *Id.*

15. *Id.* art. 1.

16. Sigman & Smith, *supra* note 10, at 764–66.

17. *Id.* at 755.

18. Receivables Convention, *supra* note 11, art. 30.

19. *Id.* art. 10(d).

20. *Id.*

vide a body of international substantive law displacing otherwise applicable national law, dealing with key features of secured financing of mobile equipment: creation of interests,[21] priority of interests,[22] public disclosure of interests,[23] and enforcement after default.[24] This Convention applies to three types of agreements: security agreements, title retention (conditional sale) agreements, and lease agreements.[25]

The Mobile Equipment Convention, as adopted, specifies only three types of objects to which it would apply: "airframes, aircraft engines and helicopters," "railway rolling stock," and "space assets."[26] Application, however, depends on the adoption of a Protocol to the Convention covering a particular category of equipment. Only one protocol, applicable to aircraft equipment, has been finalized.

Section 51 of this Convention also provides for the extension of the Convention to other types of equipment through one or more additional protocols. Creation of working groups to develop such Protocols is left in the hands of the depository.

The Convention provides that each Protocol will establish a supervisory authority that will, in turn, establish an international registry; appoint and dismiss the registrar; publish regulations dealing with the operation of the international registry; establish administrative procedures and fees; and supervise its operation.[27]

The Moveables Convention contemplates the creation of "an efficient notice-based electronic registration system."[28] Matters relating to registration (e.g., identification of the object), information to be entered, searches, and confidentiality are left to a particular protocol.[29]

Registrations are to be permitted of the following interests: "international interests, prospective international interests, and registerable non-consensual rights and interests";[30] "assignments and prospective assignments of international interests";[31] subrogations;[32] and "notices of national interests."[33]

Assuming the object involved is one covered by a Protocol, the provisions of the Moveables Convention would apply if the debtor is situated in a country that is party to the Convention and an applicable Protocol.[34] Where the creditor is situated does not affect the applicability of the Convention.[35]

For purposes of determining applicability under the Convention, a debtor is situated in any of the following: place of incorporation, place of registered office or "statutory seat," center of administration, or principal place of business.[36]

21. Moveables Convention, *supra* note 1, art. 7.
22. *Id.* art 10(1).
23. *Id.* art. 18.
24. *Id.* art. 34.
25. *Id.* art. 1(a).
26. *Id.* art. 2(3).
27. *Id.* art. 17.
28. *Id.* art. 17(2)(I).
29. *Id.* art. 18.
30. *Id.* art. 16(1)(a).
31. *Id.* art. 16(1)(b).
32. *Id.* art. 16(1)(c).
33. *Id.* art. 16(1)(d).
34. *Id.* art. 3(1).
35. *Id.* art. 3(2).
36. *Id.* art. 8(1).

Certain minimal formalities are required for an agreement creating an international interest to be recognized by the Moveables Convention. It must (1) be in writing, (2) be related to an object over which the party granting the interest has power to dispose, (3) provide identification of the object in conformity with the applicable protocol, and, in the case of a security agreement, (4) enable the secured obligation to be determined, but without the need to state an amount or maximum amount secured.[37]

Remedies on default of a security agreement consist principally of taking possession or control of an object and selling or leasing it, in addition to collecting income or profits from its management or use.[38] Remedies under a lease or title retention contract are basically limited to taking possession or control. Title is already in the name of the secured party. All remedies must be exercised in a commercially reasonable manner.[39] A specified alternative to direct action by the creditor is the application to a court for authority and direction to undertake any of the actions described.[40]

Before selling or leasing, the defaulted creditor must give reasonable prior notice to interested parties, which are defined as the debtor and any other party (such as a guarantor) who are responsible for the performance of the debtor's obligations, and parties with rights to the object provided that they have notified the defaulted creditor within a reasonable time prior to the sale or lease.[41]

Sums collected by the defaulted creditor are to be applied, first, to payment of the secured obligations and the reasonable costs of exercising the remedy, next, to other parties with ranking interests in the object, and finally to the owner.[42]

Unless ordered by a court, vesting of ownership of the object in the security holder apparently requires the consent of all parties, including the debtor, whose consent must be obtained after the default.[43] Prior to sale, the object can be redeemed by the owner, or any other interested party who is subrogated to the rights being paid off.[44]

Sale after default, in accordance with the provisions of the Convention, passes ownership free of the interest of the secured party causing the sale and any other interest in the object over which the secured party had priority under the convention.[45]

Interim relief provided for by the Convention includes preservation of the object and its value and immobilization of the object.[46] These remedies are obtained by imposing on each contracting state an obligation of providing access to such remedies to the secured party.[47]

Notwithstanding the foregoing, the remedies provided for in the Moveables Convention may be subject to certain limits, which are to be declared by a contracting state at the time of ratification.[48] These limitations include whether or not a lease may be granted in that

37. *Id.* art. 7.
38. *Id.* art. 8(1).
39. *Id.* art. 8(3).
40. *Id.* art. 8(2).
41. *Id.* art. 8(1).
42. *Id.* art. 8(5), (6).
43. *Id.* art. 9(1).
44. *Id.* art. 9(4).
45. *Id.* art. 9(5).
46. *Id.* art. 13(1).
47. *Id.*
48. *Id.* art. 4.

jurisdiction and whether or not specific remedies provided by the Convention may only be exercised in the state with leave of the court.[49] The basic priority rule is straightforward. A registered interest has priority over both subsequently registered and unregistered interests.[50] The Convention adopts a strict requirement with respect to time of registration of interests. Thus, a registered interest ranks ahead of a previously granted but unregistered interest, even if that unregistered interest was given for value and was known to the holder of the first registered interest.[51] A buyer of an object acquires its interest free of an unregistered interest, even if known to the buyer.[52] A conditional buyer is similarly protected.[53] Priorities given to an interest in an object also includes proceeds.[54]

The Convention also contains rules related to assignment of interests and "associated rights." Associated rights are "rights to payment or other performance by a debtor under an agreement secured by . . . the object."[55]

The maritime industry, although shy in participating in its formulation, might profitably look to the Convention in its final form for useful ways to connect vessel and other types of marine financing to the rules generally applicable in modern secured financing of an international nature.

III. Draft Instrument on Transport Law

The CMI Draft Instrument on Transport Law (Transport Draft), which was prepared under the auspices of and presented to, UNCITRAL, consists of an Introduction describing the basis of the work done to date plus some seventeen chapters comprising, in effect, an outline of the work that has been undertaken and is referred to in commentary as the "Outline Instrument." The chapters range from Electronic Communication (Chapter 2) through Obligations of Carrier and Liability of Carrier (Chapters 5 and 6), Obligations of the Shipper (Chapter 7), Delivery to the Consignee (Chapter 10), Rights of Control (Chapter 11), Time of Suit (Chapter 14), General Average (Chapter 15), and Limits of Contractual Freedom (Chapter 17).

According to the commentary, the provisions of the Transport Draft reflect the views of a majority of delegates at a meeting of the CMI's International Subcommittee on Issues of Transport Law in November 2001, distilled after several successive drafts had been circulated for comment to national associations and interested international organizations.[56] The final draft, dated December 10, 2001, with commentary based on this extensive vetting process, is published in the CMI Yearbook 2001 on pages 523–597.

The commentary, which is an exceptionally useful discussion of alternative approaches to the issues addressed by the Transport Draft, makes it clear that one of the objects of the Transport Draft is to "apply it to all contracts of carriage, including those concluded electronically."[57] The CMI recommends a clear statement in the preamble that the principles

49. *Id.* art. 54(2).
50. *Id.* art. 29(1).
51. *Id.* art. 29(2).
52. *Id.* art. 29(3)(b).
53. *Id.* art. 29(4).
54. *Id.* art. 29(6).
55. *Id.* art. 1(c).
56. CMI Draft, *supra* note 5, at 533.
57. *Id.*

of the UNCITRAL Model Law on Electronic Commerce, 1996, are adopted.[58] The commentary and proposed rules recognize the considerable difficulties in adapting those rules (e.g., relating to negotiability) now applicable to paper contracts for application to electronic contracts and recognizes that the Transport Draft represents a choice between several different ideas that might be acceptable and may already be applied in limited circumstances. Again, the commentary provides excellent guidance in pointing out the options and suggesting criteria that might be helpful in making such choices. In connection with negotiability of contracts the CMI suggests that the term may provide too narrow a frame of reference and recommends that the focus should be on the transfer of rights (to obtain delivery of or the right to control) under a contract of carriage when there is no documentation. The need for negotiable documents in most instances is called into question. The CMI recommends that the use of electronic records to evidence contracts of carriage be validated and that the final rules validate the electronic transfer of rights under any contract of carriage.

The commentary stresses that the Transport Draft is still under consideration as to the range of topics that it should cover and the scope of its application. It notes that the Transport Draft contains no provisions on jurisdiction and arbitration and that current regimes, which the Transport Draft is designed to replace, indeed reflect different approaches to inclusion of these subjects.[59] Other Conventions may overlap (or conflict) in these areas.

The main transport issues addressed by the Transport Draft are the scope and basis of a carrier's responsibility for performance of not only the sea portion of the carriage, but other legs as well. The Transport Draft presents the view that the carrier is responsible for loss or damage "during the period of the carrier's responsibility" unless the carrier proves a lack of fault on its part or on the part of any "performing party" executing the carrier's responsibilities under a contract of carriage.[60]

The traditional exceptions of carrier's liability—act or neglect by the master or crew and fire not caused by the carrier—are included in the text of the draft but bracketed to indicate a substantial division of viewpoint concerning whether these exceptions should be retained.[61] The commentary sets out and analyses the usual arguments both for and against inclusion. Other traditional exceptions from carrier liability are set out in the Transport Draft, but the commentary indicates a strong division of opinion as to whether they should be included as exceptions from liabilities or only as presumptions. The Transport Draft indicates a preference for a presumption-based regime.

Among other topics addressed by the Transport Draft is the treatment of "performing parties." Indeed, the very definition is the subject of considerable discussion in the commentary. Debate remains as to whether "performing parties," essentially those who perform "core obligations of the carrier" under the contract of carriage, should have any direct liability to the shipper, and under what circumstances.[62]

The Transport Draft reflects the beginning of an ambitious undertaking. The draft, and its commentary, also provides a useful up-to-the-minute account of the debate that is currently being held over the shape of the regime to replace the COGSA, Hague, Hague/Visby and Hamburg laws. Additionally, the draft provides a helpful analysis of the issues that must be addressed in creating a satisfactory set of legal rules for electronic contracts of carriage.

58. *Id.*
59. *Id.* at 535.
60. *Id.* § 6.1.1, at 552.
61. *Id.* § 6.1.2, at 552.
62. *Id.* at 558.