Issues of Interpretation under the Cape Town Convention and its Protocols

Roy Goode*

The 2001 Cape Town Convention on International Interests in Mobile Equipment and its associated Protocol on aircraft objects are among the most successful private commercial law instruments to have been adopted in recent years. Together with the other Protocols on railway rolling stock, space assets and mining, agricultural and construction equipment they are also the most complex, raising acute issues of interpretation which can sometimes be resolved only by departing from the strict language of the text. Though the instruments have stood up well to rigorous analysis they do contain errors, omissions, inconsistencies and ambiguities which the various Official Commentaries prepared by the writer have sought to address, with helpful input from the aviation industry, and there is also the difficulty of reconciling multi-language official texts which on occasion are not wholly consistent with each other. This article addresses the main problems of interpretation encountered.

Keywords: Convention, Protocol, treaty, interpretation, World Customs Organization, objects, proceeds

I. INTRODUCTION TO THE CONVENTION AND PROTOCOLS¹

The 2001 Cape Town Convention on International Interests in Mobile Equipment,² together with its associated Aircraft Protocol,³ is one of the most successful private commercial law conventions in modern times. The Convention, initiated by UNIDROIT⁴ with whom ICAO,⁵ the UN specialized agency, joined forces, is designed to provide enhanced security for financiers advancing funds on uniquely

* Emeritus Professor of Law in the University of Oxford and Emeritus Fellow of St John’s College, Oxford, UK. This article is a revised and updated version of a contribution to Fabrizio Marrella (ed), Arbitration and International Contract Law: Essays in Honour of Giorgio Bernini (Giuffrè, 2021) and is published by kind permission of Giuffrè Editore, omitting the tribute to the honorand.

1. The paragraphs below contain a very concise summary of the Convention and Aircraft Protocol, the latter constituting the prototype for all subsequent protocols. For comprehensive analyses see my series of Official Commentaries covering the Convention and Aircraft Protocol (5th edition, 2022), Luxembourg Protocol (2nd edition, 2014), Space Protocol (2013) and Pretoria Protocol (2021), all of these being published by UNIDROIT.


4. The International Institute for the Unification of Private Law.

5. The International Civil Aviation Organization.
identifiable mobile equipment of high unit value under security agreements, title reservation agreements and leasing agreements. The Convention has been ratified by 83 States and the Aircraft Protocol by 80 States. Both instruments entered into force on 1 March 2006 and have been adopted by what is now the European Union. The Aircraft Protocol has been followed by the 2007 Luxembourg Protocol on railway rolling stock, the 2012 Space Protocol on space assets and the 2019 Pretoria Protocol on mining, agricultural and construction equipment. Of the four Protocols only the Aircraft Protocol is in force, though the others will also be examined in this article.

The rationale for these instruments is, first, that traditional conflict of laws rules are not well suited to transactions in which the object to which they relate is regularly crossing national borders, so that the applicable law governing such matters as default remedies, enforcement, priorities and the impact of the debtor’s insolvency will depend on an often transitory location in a particular jurisdiction; and, second, that even if uniform conflicts rules were to be devised the substantive law would vary from jurisdiction to jurisdiction. The resulting uncertainty and consequent risk for creditors have in the past meant that organizations seeking finance, particularly in developing countries, either had to pay well above what might otherwise have been the market rate or were refused the requested finance altogether.

As regards the classes of object to which it applies, the Convention, as supplemented by the relevant Protocol, creates an entirely new concept, the international interest in mobile equipment, which does not depend on national law and comes into existence under an agreement between debtor and creditor conforming to a simple set of formal requirements; prescribes a set of uniform rules providing for basic default remedies, including speedy relief pending final determination of the creditor’s claim; establishes an asset-based International Registry to record international interests, together with a set of simple priority rules based on the order of registration and as supplemented by the Protocols; and provides various legal protections against the impact of the debtor’s insolvency. Currently the only operative Registry is the Aircraft Registry, based in Dublin, which in January 2019 celebrated its millionth registration. The Registry is wholly electronic, fast, cheap and efficient and has greatly contributed to the success of the Convention and Aircraft Protocol.

An international interest in mobile equipment is an interest in a uniquely identifiable object in a category covered by the Convention and constituted in accordance with the formal requirements of Article 7, which is (a) granted by the chargor under a security agreement, (b) vested in a person who is the conditional seller under a title reservation agreement or (c) vested in a person who is the lessor under a leasing agreement.

6. For brevity the term ‘security agreement’ is hereafter used to cover all three forms of finance.
10. Namely airframes, aircraft engines and helicopters, railway rolling stock, space assets and, under the 2019 Pretoria Protocol adopted pursuant to the procedure prescribed by Article 51 of the Convention, mining, agricultural and construction equipment, all these categories of object being defined in the relevant Protocol. As to helicopter engines, see text to fn 51.
agreement, whether or not containing an option to purchase. Categories (b) and (c) differ from category (a) in that the interest of a conditional seller or lessor does not derive from the title reservation or leasing agreement but typically arises under a prior acquisition, though becoming an international interest only on conclusion of the agreement.

The Convention also allows a Contracting State to make a declaration under Article 39 that non-consensual rights or interests having priority under its law over the equivalent of an international interest are to have priority over a registered international interest, while other specified non-consensual rights or interests given by that law may be registered under Article 40 as if they were international interests and have priority accordingly. An elaborate system of declarations enables Contracting States to not be bound by certain provisions that may run counter to the fundamental policy of their legal culture. This has helped to ensure that States which might otherwise have hesitated to ratify have done so. Another unique feature is that the Convention does not enter into force as regards any category of object until a Protocol covering that category is in force and that the Protocol can modify or exclude provisions of the Convention. It must be unique for a Protocol not merely to supplement but to control the Convention pursuant to which it is made. In theory a Protocol covering a particular category of objects could rewrite the Convention; in practice, the spirit of the two-instrument structure has been observed by making only such changes as are needed to accommodate the particular requirements of the industry concerned.

II. THE INTERPRETATION OF TREATIES: GENERAL CONSIDERATIONS

It will be the experience of every legal draftsman, whether engaged in private documents, legislation or international lawmaking, that drafting is an intricate process. In the first place, no text can sensibly be drafted so as to cover every situation; room must be left for commentators and the courts to fill gaps. In the words of the great chief draftsman of the Napoleonic code:

Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. Qui pourrait penser que ce sont ceux mêmes auquel un code paraît toujours trop volumineux, qui ose prescrire impérieusement au législateur, la terrible tâche de ne rien abandonner à la décision du juge?

Secondly, there is the meaning of the text. Words are slippery eels which, when we think they reflect our intended meaning, somehow slip out of our hands. Particular pitfalls of legal drafting are ambiguity (which is sometimes deliberate in order to

11. Article 2.
12. Hence the phrase ‘vested in a person who is the conditional seller …’, not ‘vested in a person as conditional seller …’.
13. Jean-Étienne-Marie Portalis, *Discours Préliminaire du Premier Projet de Code Civil* (1801) 16 (version produced by Claude Ovtcharenko). Earlier in the same discourse Portalis had emphasized that laws are made for people and not people for laws, a philosophy rather different from that of abstract, conceptual types of code – see ibid 14.
ensure consensus), inconsistency, omission and simple error. In the graphic words of Holmes J: ‘A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used’. 

The same applies to international treaties. As with interpretations of national legislation the primary rule is adherence to the text but it is widely accepted that this may need to be qualified by reference to various canons of interpretation, such as the context, the object and purpose of the treaty, the need to interpret so as to validate rather than invalidate, the avoidance of results which are absurd or contrary to the manifest intention of the parties, and the like. Complications are compounded where the text of a treaty is authenticated in two or more languages.

The rules of interpretation covering all these matters are to be found in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties, which provide as follows:

SECTION 3. INTERPRETATION OF TREATIES

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.
Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.20

The flexibility in interpretation embodied in these provisions, with their references to ‘object and purpose’ and ‘context’, applies equally to the provisions themselves, which are treated not as exhaustive but rather as starting point, to be used as guidelines rather than rules.21 Among the supplementary means of interpretation are the travaux préparatoires, such as successive drafts of a treaty, conference records, interpretative statements by chairmen of committees,22 explanatory statements by experts and the like, where these reflect the common understanding of participating States. But regard may also be had to other materials, such as Explanatory Reports presented to a Diplomatic Conference and Official Commentaries prepared afterwards.23

III. ISSUES OF INTERPRETATION UNDER THE CAPE TOWN CONVENTION

The Cape Town Convention consists of 62 Articles, and its associated Aircraft Protocol a further 37 Articles. With a total of 99 Articles it is scarcely surprising that under

22. As chairman of the drafting committee at the Cape Town Diplomatic Conference the writer gave answers to many questions of interpretation which were accepted by the delegates. Full details are contained in the unpublished transcript of the proceedings. The published Acts and Proceedings of the Diplomatic Conference record many, though not all, of these but erroneously describe them as responses of the United Kingdom when they were in fact responses made in the capacity of Chairman of the drafting committee.
23. In several jurisdictions ratifying the Cape Town Convention and Aircraft Protocol the enacting legislation provides that a court may have regard to the Official Commentary in interpreting these instruments. See, for example, s 4(1) of the Irish International Interests in Mobile Equipment (Cape Town Convention) Act 2005.
the time pressures of a three-week Diplomatic Conference the two instruments contain various errors, omissions, ambiguities and inconsistencies, some of which did not surface for many years. Interpretation of a complex instrument is an ongoing process which rarely, if ever, reaches finality. Further problems arise where there are differences in the various official language texts.24

1. The general rule

Article 5 of the Convention provides as follows:

Article 5 — Interpretation and applicable law

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

These rules of interpretation, together with those of the Vienna Convention, apply automatically to the Protocols.

The reference in paragraph 1 to the need to promote uniformity and predictability provides a strong steer towards avoiding reference to national law wherever the Convention itself does not refer an issue to the applicable law.25 Paragraph 1 also represents an important deviation from most commercial law conventions in that the normal reference to the observance of good faith in international trade, as, for example, in Article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods is replaced by ‘predictability in its application’. For transactions which might involve hundreds of millions of dollars good faith was considered to introduce too much uncertainty; in the context of high value financing predictability is of paramount importance. Paragraph 2 is in standard form and, as in other conventions, raises the question whether a matter not expressly stated in the Convention can be determined by the general principles on which it is based or whether on the other hand it is necessary to resort to the applicable law. The Official Commentary has identified at least three general principles on which the Convention is based, namely party autonomy, the availability of remedies to enforce Convention rights, as evidenced by a broad interpretation of Article 44 on jurisdiction to make orders against the Registrar of the International Registry and the integrity of the registration system, so that the priority rules in Article 29(1) are to be applied

24. See text to fn 66.
irrespective whether the party invoking priority on the basis of the first-to-register rule was aware of a prior unregistered interest.26

2. The connecting factor

The Convention applies only where the debtor is situated in a Contracting State at the time of the agreement.27 Where the agreement covers not only present but also after-acquired assets, which all the Protocols other than the Aircraft Protocol allow where the description covers all assets or a class of assets which enables the after-acquired asset to be identified to the agreement, the debtor’s situation at the time of the agreement is considered satisfied not only as to the existing assets but also as to the after-acquired assets. This is because the agreement constitutes a nascent international interest as to the after-acquired assets which, upon their acquisition, takes effect as from the time of the agreement.

Where the creditor concludes an agreement with a party acting through an agent, trustee or other representative, the question arises as to who is the debtor. This is to be determined by the law governing the agreement. Where the applicable law recognizes the concept of a trust it will usually be the trustee who holds legal title to the object given in security or supplied on conditional sale or lease28 and will be considered the debtor, not the beneficiary. In the case of agency or other representation the debtor will normally be the principal except where the agent or other representative contracts in its own name without revealing the existence or identity of the principal.

3. Autonomous interpretation

As Article 5(1) indicates, the answer to a question of interpretation should wherever possible be found in the Convention itself, whether from its express terms or from the principles on which it is based and the context in which it was fashioned. So where the question is whether an international interest has been constituted, this is to be determined by reference to Articles 2 and 7 of the Convention and the definition of ‘international interest’ in Article 1(o) of the Convention; the fact that the interest is not of a kind recognized by the applicable national law is irrelevant.29 Conversely, an agreement which is considered a security interest in some national legal systems but does not fall within one of the three categories of agreement specified in the Convention is outside the Convention despite the fact that, as a second-order issue, characterization is left to the applicable law. So although a consignment agreement is in certain conditions treated as creating a security interest under Article 9 of the US Uniform Commercial Code it does not fall within the Convention. Other provisions which have to be accorded an autonomous interpretation under the Convention are those

26. ibid paras 2.25–2.27.
27. Article 3. Article 4 specifies a variety of different ways in which this condition may be satisfied. As to the application of the Convention to a Contracting State’s territorial units, see Articles 5(4), 52. The latter determines whether the Convention applies at all to a given territorial unit.
28. Assuming that the trust is properly constituted and the trustee validly appointed, both questions being determined by the law applicable to the trust. See in this connection the 2015 Hague Convention on the Law Applicable to Trusts and on Their Recognition (adopted 1 July 1985, entered into force 1 January 1992) 1664 UNTS 311.
29. But whether the agreement satisfies the requirements necessary to constitute a valid contract is left to the applicable law.
relating to the meaning of ‘centre of main interests’ in the definition of ‘primary insolvency jurisdiction’ in the Protocols,\textsuperscript{30} the distinction between assignment and novation,\textsuperscript{31} the standard of proof required of a creditor seeking an order for advance relief under Article 13,\textsuperscript{32} and what constitutes commercial reasonableness.\textsuperscript{33}

There are, however, other cases in which the answer depends on the applicable law.\textsuperscript{34} The Convention itself specifies several such cases. Among these are Article 12, providing for remedies additional to those in the Convention to be exercisable if permitted by the applicable law and to the extent that they are not inconsistent with the mandatory provisions of the Convention; Article 13, which deals with the grant of speedy relief to a creditor who adduces evidence of default and provides in Article 13(4) that nothing in the Article limits the availability of other forms of interim relief, that is, relief available under the \textit{lex fori},\textsuperscript{35} and Article 30, under which a registered international interest is effective in insolvency proceedings against the debtor while providing that nothing in the Article impairs the effectiveness of an international interest\textsuperscript{36} in the insolvency proceedings where that interest is effective under the applicable law.

\section*{4. Interpretation by a court}

In principle, it is for the national court of a jurisdiction in which the Convention and Protocols have effect in domestic law\textsuperscript{37} to interpret the Convention and Protocols and so long as a court acts in good faith the fact that its interpretation may run counter to the consensus of expert opinion or decisions of courts of other Contracting States does not place the State of the court’s jurisdiction in breach of its international obligations under the Convention. There is no supra-national appeal court to decide which of the conflicting views is correct, and even in national courts a dissenting view may be upheld on appeal. But a decision showing deliberate failure to apply the Convention or Protocol provisions, if not successfully appealed, does place the Contracting State concerned in breach of its Convention obligations.

\section*{5. Interpretative rules of the World Customs Organization}

There is one case in which interpretation has to be sought from a source outside the Convention and Protocols themselves. The Pretoria Protocol defines the sphere of

\begin{itemize}
  \item \textsuperscript{30} See, for example, Goode (fn 25) para 3.122. The Protocols contain various provisions designed to strengthen the creditor’s rights upon the debtor’s insolvency, but such provisions can only be triggered by a declaration by a Contracting State that is the primary insolvency jurisdiction.
  \item \textsuperscript{31} See ibid paras 2.53–2.54.
  \item \textsuperscript{32} ibid paras 2.135–2.137.
  \item \textsuperscript{33} ibid, para 2.112. But see text below as to the provisions of the Protocols.
  \item \textsuperscript{35} Goode (fn 25) para 2.140.
  \item \textsuperscript{36} That is, an unregistered international interest.
  \item \textsuperscript{37} In some States treaties have effect automatically without need of domestic legislation, though their ranking in the hierarchy of legal sources varies from State to State; in others, treaties have effect only on the international plane unless and until they are carried into domestic law by legislation. For a comprehensive analysis see David Sloss (ed), \textit{The Role of Domestic Courts in Treaty Enforcement: A Comparative Study} (CUP 2009) and especially ch 1.
\end{itemize}
its application by reference to those harmonized system codes adopted by the World Customs Organization (WCO) which are listed in the three Annexes to the Protocol, which deal respectively with mining equipment, agricultural equipment and construction equipment. ‘Harmonized system’, abbreviated as ‘HS’, means the Harmonized Commodity Description and Coding System governed by the International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983 as amended by the Protocol of Amendment of 24 June 1986. The HS is an international product nomenclature developed by the WCO for various purposes, serving as a basis for customs and transport tariffs, the collection of statistics and the monitoring of controlled goods. The HS currently classifies 5,244 products by material composition, form or function. Of these only 56 were selected for inclusion in the Annexes to the Protocol as satisfying five criteria, including, in particular, relatively high value and unique identifiability by serial number. The HS is a highly complex system which has adopted detailed rules of interpretation, classification decisions being made by the Harmonized System Committee the most important of which are published by the WCO in five volumes, though these are persuasive only and lack legal force. Nevertheless, in adopting the selected codes the Protocol by implication also adopts the WCO rules of interpretation, albeit ultimately only a court can decide on a contested issue of coding.

6. Rules unstated but derived from the policy of the Convention

Though the Convention rules are laid down in some detail, others are not stated but are to be inferred as necessary to give effect to the policy of the Convention. Priority rules are prescribed by Article 29 and are relatively few and simple in nature. A registered interest has priority over a subsequently registered interest and over an unregistered interest, whether registrable or not and regardless of knowledge of the prior interest. An outright buyer of an object which acquires it before the registration of an international interest has priority over the holder of that interest. A conditional buyer or lessee takes free from an interest not registered prior to the registration of an international interest held by its conditional seller or lessor. The priority of competing interests may be varied by agreement between the holders of those interests but an assignee is not bound by its assignor’s subordination unless at the time of the assignment the subordination has been registered in the International Registry. However, these rules, and one or two others not mentioned here, are not exhaustive. Four examples will illustrate the point:

1. One unstated rule is that a debtor may not jump ahead of its own creditor by effecting a registration of its own ahead of its creditor’s registration. Typically this issue potentially arises in leasing transactions where the creditor is a lessor, L, and its lessee grants a sub-lease, becoming the sub-lessor, SL. Before L has

39. They are supplemented by priority rules in the Protocols, which are defective in some respects. See section III(K), text below ‘inconsistency’.
40. Article 29(1).
41. Article 29(2). The priority extends to value given with such knowledge.
42. Article 29(3).
43. Article 29(4).
44. Article 29(5).
registered its international interest as lessor SL registers its international interest as sub-lessee. The ordinary first-to-register rule would give SL priority over L but to allow this would be to enable SL to deny its own lessor’s title and to assert rights inconsistent with the obligations it has incurred to L under the lease. So SL cannot claim priority over L.45

2. A second unstated rule is that Article 29 only determines priorities between competing interests of the same degree. So in a case where SL as sub-lessee does not register, the interest of a transferee of SL’s interest who registers before the head lessor has registered its interest will confer on the transferee priority over SL but not over L. Similarly, a chargee of a sub-lease who registers before a chargee of the head lease cannot thereby gain priority over the latter, whose international interest is of a higher degree.46

3. Though fractional interests are not mentioned anywhere in the Convention the International Registry for aircraft objects accepts registration of fractional interests in an aircraft object financed by two or more lenders, as where lender A advances 60 per cent of the price and lender B 40 per cent and each registers its international interest. The Official Commentary therefore interprets Article 29(1), which deals with competing interests, as not applying to fractional interests, which are not in competition with each other, save only where a seller makes a wrongful second sale while still in possession, in which case priority goes to the buyer who is the first to register,47 or where the total amount of fractional interests registered exceeds 100 per cent, in which case priority is determined by the order of registration.48

4. The priority rules, though applicable to outright sales, to which the Convention is extended by the Aircraft and Space Protocols, work in an entirely different way.49

5. Article 60(1) of the Convention provides that it does not affect pre-existing rights or interests. A Contracting State may, however, make a declaration under Article 60(3) specifying a date not earlier than three years after its declaration becomes effective when for priority purposes the Convention will become applicable. The holder of a pre-existing right or interest must then take steps to preserve its existing priority under an agreement made while the debtor was situated in a State where the debtor had its centre of main interests. However, since the policy underlying Article 60(3) is to preserve the pre-existing right or interest against a subsequently registered interest it cannot be interpreted as permitting the holder of the pre-existing right or interest to gain priority over an interest already registered at the time the pre-existing right or interest was created by the agreement.50

7. Objects to which the Convention applies

As stated earlier, the Convention applies to three categories of object: aircraft objects (airframes, aircraft engines and helicopters), railway rolling stock and space assets.

45. See Goode (fn 25) para 2.221.
46. ibid para 2.207.
47. ibid para 3.96.
48. ibid para 3.97.
49. See text to fn 59.
50. See Goode (fn 25) para 2.310. Article 60 gave rise to a range of problems examined in detail in this Official Commentary (see paras 2.308 et seq), and key aspects of the analysis were adopted in subsequent Protocols, making explicit what was implicit in the Convention text.
The definition of each of these is contained in the relevant Protocol, as is the additional category not mentioned in the Convention but added in the Pretoria Protocol, namely mining, agricultural and construction equipment. The definitions are quite technical and raise some delicate questions as to how they should be interpreted.

**Helicopter engines**

In general, what constitutes an aircraft object is clear enough. Since it is common practice for aircraft engines to be financed separately from the airframe on which they are installed aircraft as such do not constitute objects to which the Convention applies; instead, the provisions relate separately to airframes and aircraft engines. However, the definition of ‘aircraft object’ also includes helicopters, which received rather less attention in work on the Convention, with the result that while installed on a helicopter an engine is not a separate object at all, merely a component of the helicopter. This initially caused consternation in the aviation industry which was, however, alleviated when the Official Commentary pointed out that there was a ready solution, namely to take and register an international interest in the helicopter and at the same time take and register a prospective international interest in the engine which would attach with retrospective effect the moment the engine was removed from the helicopter.51

**Unmanned aircraft (drones)**

In principle the Convention is as applicable to drones as it is to manned aircraft. However, even the largest drones do not yet have the power or carrying capacity to meet the definition of ‘aircraft objects’ in the Aircraft Protocol, and even drones approaching such capacity are used for military purposes and are thus excluded from the definition.

The only other definitional problems concerning objects within the Convention arise under the Luxembourg and Space Protocols.

**Railway rolling stock**

Article 1(e) of the Luxembourg Protocol defines railway rolling stock as:

> vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed or incorporated in the vehicles, and together with all data, manuals and records relating thereto.

This definition is very wide in scope, covering all types of railway rolling stock, with or without traction, regardless of speed, size or carrying capacity, whether used for passenger, freight or shunting, whether operating domestically or across national borders, whether for transportation on railway lines between cities and towns or up mountain tracks and whether on, above or below railway lines or other guideways.52

51. See now the analysis in Goode (fn 25) paras 3.9, 3.11.
52. See Roy Goode, Convention on International Interests in Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to Railway Rolling Stock: Official Commentary (2nd edn, UNIDROIT 2014) para 3.8, which goes on to give a range of examples.
No difficulty arises in relation to ‘fixed railway track’. What remains uncertain is the breadth of the phrase ‘or directly on, above or below a guideway’. Some cases are clear enough, such as trams, tram-trains and cable cars (but not trolley buses, where the connection to an overhead cable is for power, not as a guideway). More challenging are items such as lifts (elevators), the new type of horizontal lift and escalators. Most people would be astonished by the idea that a lift in an office building or a block of flats constitutes railway rolling stock. And what of escalators? It might be argued that an escalator used to take passengers down to or up from an underground railway is not a vehicle, but English language dictionary definitions use the word ‘vehicle’ in an extended sense to denote a means of transport of people or goods, while the French word ‘véhicule’ is defined in a French–French dictionary such as Larousse as ‘tout moyen de transport’ or ‘véhicule à moteur’ and in a Spanish dictionary such as the Diccionario de la lengua española the word ‘vehiculo’ covers any means of transport. Does the word ‘railway’ in the defined term itself incorporate a limiting factor? These are issues that will be addressed in the third edition of the Official Commentary on the Convention and Luxembourg Protocol in the light of general understandings in the rail industry.

**Space assets**

The definitional issue arising under the Space Protocol lies not in the meaning of the language but in the fact that, unusually, the application of the Protocol in relation to an international interest in parts of a spacecraft or parts of a payload (eg a transponder) is dependent on the registrability of the international interest in the Space Registry. This limitation is designed to ensure that only an international interest in a part of a spacecraft or payload sufficiently valuable to be bankable as collateral is registrable.

**8. Proceeds**

Article 2(5) of the Convention provides that an international interest in an object extends to proceeds. Under Article 29(6) any priority given by Article 29 to an interest in an object extends to proceeds. However, the word ‘proceeds’ does not bear its meaning but is restricted to ‘money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition’. At the Cape Town Diplomatic Conference the policy underlying this limitation to loss-related proceeds and the exclusion of general proceeds such as proceeds of sale was said to be based on the fact that the Cape Town Convention was concerned with physical assets, not with receivables as such, and on a concern that if general proceeds were concluded they could become the subject of assignment under the Convention with no linkage to the tangible object from which they were derived, so that a broad meaning of proceeds would trespass on the province of the pending UN Convention on the Assignment of Receivables in

55. Space Protocol, Article I(2)(k)(ii).
56. Convention, Article 1(w).
International Trade which was adopted the following month. This has since been stated in every edition of every Official Commentary.

However, a fresh analysis by the writer while working on a preliminary draft Official Commentary on the Convention and Pretoria Protocol has shown that the policy put forward was based on a misconception, since the same concern would apply to the assignment of loss-related proceeds and anyway the Convention remedies do in fact pick up proceeds of sale. The restricted definition is justified on quite different grounds, namely that it does not apply where the word ‘proceeds’ is not used and therefore does not, for example, preclude the creditor from asserting a priority right to (a) proceeds resulting from exercise of the remedy of sale under Article 8(1)(b) of the Convention,\(^{57}\) or (b) any proceeds captured by the definition of ‘associated rights’ in Article 1(c) and their assignment under Article 31, none of which provisions contains any reference to proceeds. Moreover, the definition does not apply where the context otherwise requires, for example in relation to the additional remedy of sale and the application of proceeds therefrom given by the Protocols where the debtor and the creditor specifically so agree.

So the justification for the restricted definition is not that ascribed to it previously but the fact that the definition is limited to what is necessary by capturing proceeds of a kind not covered by the above provisions, any broader definition being surplus to requirements. This is a striking illustration of the point made earlier that it can take a long time for issues to surface – in this case, 19 years!

### 9. Power to dispose

One of the essential constituents of an international interest is that it relates to an object of which the chargor, conditional seller or lessor has the power to dispose.\(^{58}\) The power of disposal is wider than the right to dispose, covering all cases where, by exception to the \textit{nemo dat} rule, the disposer can transfer a title greater than he himself possesses. Both in common law and in civil law jurisdictions exceptions to the \textit{nemo dat} rule may be found, usually based on the disposer’s possession as one who appears to be the owner or is an agent having apparent authority to dispose on behalf of his principal, whether or not such authority actually exists. Without Article 29(2) it might have been thought arguable that the power of disposal was exclusively referable to the applicable law. But to protect the integrity of the register maintained by the International Registry and to avoid factual disputes as to whether the holder of a subsequent international interest who is the first to register did or did not have knowledge of the prior unregistered interest Article 29(2) provides that such knowledge does not affect the priority of the first to register. Such a rule is rarely found in national legal systems, which generally make the priority dependent on the holder of the later interest acquiring in good faith and without knowledge of the earlier interest. It follows from this that the power of disposal may derive from the Convention itself, so that, for example, a conditional buyer or lessee in possession is to be considered as having a power to dispose even though lacking a right to dispose.

\(^{57}\) Which refers not to proceeds but to ‘sums collected or received by the charge as the result of exercise of any remedy set out in paragraph 1 or paragraph 2’ (of Article 8).

\(^{58}\) Convention, Article 7.
10. Outright sales

Sales without reservation of title are not international interests and are not within the Convention, but pursuant to Article 41 of the Convention many of its provisions, including those relating to registration and priority, but not, of course, its provisions on default remedies, have been extended to outright sales by the Aircraft and Space Protocols. However, the priority rules work in an entirely different way. This is because Article 29, which lays down the priority rules, applies only to interests which are in competition with each other. Where they are not, no priority issue arises. It has already been shown that the rules in Article 29 do not in general apply to successive registrations of fractional interests; they also do not apply to successive sales of aircraft objects or space assets. So in a chain of sales A > B > C > D, the buyers B, C and D are not in competition with each other, they are simply transferees in a chain, so that there is no priority issue and the fact that B is the first to register is irrelevant, as is the later registration by C. So contrary to what might appear from Article 29(1) the person with the best title is not the first buyer in the chain, B but the last buyer, D. The one exception is where a seller is allowed to remain in possession and then makes a wrongful second sale. So if C, after selling to D, is allowed to remain in possession and then makes a second sale, to E, there is a true priority issue as between D and E and priority will go to the first to register its purchase.

11. Errors, omissions and inconsistencies

Though the Convention stands up remarkably well to the detailed and rigorous analyses to which it has been subjected for more than two decades it does contain a sprinkling of errors, omissions, inconsistencies and the like, requiring supplementary means of interpretation as provided by Article 32 of the Vienna Convention. The Official Commentaries have applied Article 32 to interpret those provisions of the Convention and Protocols which contain errors, omissions or ambiguous or inconsistent provisions, with one exception, referred to below, where it was considered necessary to correct the text itself, using the procedure prescribed by Article 79 of the Vienna Convention.

Errors

Under Article 52(5)(c) any reference to the administrative authorities in a Contracting State having territorial units with different law systems is to be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention applies. This was taken verbatim from Article XXIX(5)(c) of the Aircraft Protocol but it was overlooked that the Convention contains no reference to administrative authorities. The provisions on the assignment of associated rights (rights to payment or other performance under the agreement) contain several errors, to some extent resulting from preferring conceptual purity to recognition of the asset-based nature of the Convention, which complicated the drafting considerably. So Article 35(1) refers

59. See Goode (fn 25) para 2.203.
60. The Drafting Committee had presented a text to the effect that the assignment of an international interest operated to transfer the associated rights. Objection was made on the ground that it was a general principle that security was an accessory to the debt, not the other way...
to an assignment of associated rights which is registered, whereas such an assignment is not registrable, and the same provision contains an erroneous double reference, so that the phrase ‘registered interest’ is allocated two different meanings one of which has, of course, to be discarded. Article X(6) of the Aircraft Protocol contains two references to Article IX(1) the second of which refers to relief granted (by a court) under Article IX(1), which features nowhere in the Convention or Protocol and should have been a reference to Article 13(1) of the Convention, as is clear from an earlier draft in the travaux préparatoires.61

All the errors referred to above were able to be dealt with by interpretation. However, there was one case where the faulty language was so clear and unambiguous that it proved necessary to resort to the process laid down in Article 79 of the Vienna Convention.

Article 25 of the Convention, concerning the right to apply for discharge of an improper or improperly maintained registration, was long known to suffer from serious defects to which as Rapporteur I drew the attention of the Pretoria Diplomatic Conference. In the first place, the only person entitled to apply for discharge of a registration was the debtor, whereas a variety of other parties had an interest in the discharge. For example, if a person registered a non-consensual right or interest which that person did not in fact possess, the registration would cast a shadow on a registered international interest that would adversely affect not only the debtor but any other person having rights in or over the object. Again, under the original Article 25 only the debtor could apply to discharge the registration of a prospective international interest or prospective assignment where the prospective creditor had not given value or incurred to give value, whereas the improper maintenance of the registration could affect not only other intending creditors or assignees but also existing registrants of an international interest, given the retrospective effect of the fruition of the prospective interest as an actual interest. In Transfin-M Ltd v Stream Aero Investments SA and Aviareto Ltd62 the Irish High Court, which has exclusive jurisdiction over claims against the Registrar of the International Registry for aircraft objects based in Dublin, adopted the reasoning in the Official Commentary that where it had jurisdiction to make an in personam order against the offending registrant under its general jurisdictional rules requiring the registrant to procure discharge of the registration it could then make an order under Article 44(1) of the Convention to enforce its own in personam order and direct the Registrar to discharge the registration. The High Court held that it did have jurisdiction to make an order in personam against the registrant and upon the registrant’s failure to comply with the order the court made an order under Article 44(1) directing discharge of the registration.63 The High Court has handed down numerous round. As Chairman of the Drafting Committee the writer pointed out that while this was conceptually correct the Convention was concerned with the financing of physical assets, not receivables. But the purists won the day, with the result that provisions had to be included that the Convention did not apply to an assignment of associated rights which is not effective to transfer the related international interest (Article 32(3)) and conversely that an assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights are transferred (Article 32(2)).

62. High Court (Commercial Division), 18 April 2013.
63. Section 4(1) of the Irish International Interests in Mobile Equipment (Cape Town Convention) Act 2005 provides that in interpreting the Convention and Aircraft Protocol a court may have recourse to (inter alia) ‘the Official Commentary by Professor Sir Roy Goode that was prepared in response to Resolution No. 5 of that Conference’.

© 2022 The Author
Journal compilation © 2022 Edward Elgar Publishing Ltd
decisions to similar effect since, though the jurisdiction point has never been put in issue by defendants.

Article 25 also failed to address the situation where the offending registrant had ceased to exist or could not be found, a situation that might arise not only where the registration was of an international interest or assignment but where it related to a prospective international interest or a prospective assignment for which no value had been given or no commitment to give value had been incurred. It was agreed at the Conference that these defects should be rectified. Accordingly, Article XIX of the Pretoria Protocol amended Article 25 of the Convention to address all these issues by amending paragraphs 2, 3 and 4 of Article 25 and adding new paragraphs 5 and 6. All was in order except for the revised paragraph 6, which unfortunately retained the phrase ‘on the application of the debtor’ whereas it should have said ‘on the application of the intending debtor or assignor’. The French text contained additional errors that needed to be rectified.

Accordingly, a Note Verbale was sent out to States on 29 April 2020 to correct the errors. Under Article 79(2) only the signatory States and the Contracting States had to be consulted and as there were then, and still are, no Contracting States, that left only the four signatory States whose assent to the corrections was required. But the UNIDROIT Secretariat sensibly felt it advisable also to involve the States that participated in the Drafting Committee in the error correction process, 90 days being allowed for objections expiring on 28 July 2020. None having been received Article XIX was corrected, the defective text being replaced *ab initio* in conformity with Article 79(4) of the Vienna Convention and thus deemed to operate retroactively from the date when the original text was approved, 22 November 2019.

**Omissions**

There are various cases in which text has to be supplied to make sense of the provisions. Article 19(4) of the Convention provides for the registration of a prospective international interest which, upon ripening into a full international interest has priority from the time of registration of the prospective international interest and Article 19(5) extends this with necessary modifications to the registration of a prospective assignment of an international interest. To avoid the need for a second registration when the prospective international interest becomes a complete international interest Article 22(3) provides that a search certificate is not to indicate whether what is registered is an international interest or a prospective international interest but is to say merely that the creditor named in the registration has acquired or intends to acquire an international interest in the object. By an oversight this provision was not extended to a search certificate covering registration of a prospective assignment but for conformity with Article 19(5) this is to be implied.64

Article 39(1)(b) empowers a Contracting State to make a declaration that nothing in the Convention is to affect the right of the State, State entity, intergovernmental organization or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organization or provider directly relating to those services in respect of that object or another object. However, Article 39(1)(b) omits a reference to amounts owed to the State itself, which

64. Goode (fn 25) para 2.195.
are plainly intended to be covered. Article 60 of the Convention, which contains
transitional provisions designed to exclude the application of the Convention to
pre-existing rights or interests, raised so many questions to which answers had to
be provided by the Official Commentary that, contrary to the general approach of
avoiding the use of a Protocol to make drafting improvements, subsequent Protocols
have incorporated additional text based on the Official Commentary, which the Offi-
cial Commentaries for those Protocols have made clear is not intended to change the
substantive effect of Article 60 but simply to make explicit what was originally implicit in that Article.

Inconsistency

Paragraph 1 of Article XIV of the Aircraft Protocol provides that the buyer of an
aircraft object under a registered sale acquires its interest free from an interest sub-
sequently registered and from an unregistered interest even if the buyer has actual
knowledge of the unregistered interest. Paragraph 2 was intended to provide the
converse case where the buyer’s registration was second in time but through a draft-
ing slip the phrase ‘under a registered sale’ was omitted. The Official Commentary
treats the words omitted as if they had been supplied, in order to ensure consistency
with the language of paragraph 1 and avoid the unintended subordination of a pro-
spective international interest registered before the competing registration but not
coming to fruition until after that registration. The error has been corrected in sub-
sequent Protocols.

12. Multi-lingual texts

The texts of the Cape Town Convention and Aircraft Protocol were reproduced in six
official languages, the Luxembourg Protocol in three and the Space Protocol and Pre-
toria Protocols in two. However, of the six language texts adopted in Cape Town only
the English text was prepared by the Drafting Committee. For reasons of practi-
cality all other texts had to be produced by ICAO translators in Montreal before being
released, and however competent translators might be they cannot match a drafting
committee’s familiarity with the text and the skill and knowledge of its members as
highly experienced lawyers versed in legal drafting. The widespread dissatisfaction
with the texts produced by the translators, who by ordinary translation standards did
an excellent job under severe time pressures, led to the inclusion in the Testimonium
at the end of the Convention and Protocol the effect of which was that participating
States could within 90 days propose linguistic alignments which the Joint Secretariats,
under the authority of the President of the Conference, were to authenticate as to
the conformity of the texts with one another, all such texts being equally authentic.

65 ibid para 3.98.
66 Of course, other States whose languages are different from the official languages will use
their own translations but these are ‘authoritative’ rather than ‘authentic’.
67 Arabic, Chinese, English, French, Russian and Spanish.
68 This equality of authenticity reflects the thinking of the International Law Commission,
whose Third Report (fn 17) formed the basis of the interpretation rules in Article 33 of the
Vienna Convention, that there is only a single agreement, even though expressed in different
languages. See Gardiner (fn 19) 475. See also Aust (fn 19).
This useful procedure has been adopted in every subsequent Protocol and deserves to be utilized as standard in multilingual treaties generally. The result is that none of the texts of the five instruments is quite the same as the text adopted at the relevant Diplomatic Conference.

For certain key concepts embodied in the Cape Town Convention language is used which is not country-specific. That is true of a number of the terms defined in Article 1, including the key phrase ‘international interest’, which does not feature in any of the Convention’s official languages and for which words had to be coined in the other languages, for example, ‘garantie internationale’ in the French text and ‘garantía internacional’ in the Spanish text. The source text is English and is likely to be used as a starting point on an issue of interpretation, The French text is one of the most likely target texts to be referred to for comparison, being the other of UNIDROIT’s two working languages, but of course this does not preclude reference to any of the other four authentic language texts. It is almost impossible for texts in different languages accurately to reflect not only dictionary definitions but also the same legal concepts and, more generally, legal thinking. For example, the English word ‘possession’ is unavoidably rendered ‘possession’ in the French text but the two words are faux amis in that under French law a lessee is merely a détenteur lacking possession, this being confined to those in possession in the capacity of owner, whereas under English law, and, indeed, common law systems generally, a person holding equipment under a lease has possession. In this case the text of the Convention, with its reference to the remedy of possession in Article 8(1), makes it clear that it is the English law concept that has to be applied. On the other hand, I recall being asked, when the texts were being aligned, whether the English text or the differing French text was correct and I advised that it was the French text that more accurately reflected the decision of the Conference, and so it was the English text that was corrected.

13. Some personal reflections on the task of interpreting private commercial law Conventions

The resolutions of successive diplomatic conferences mandating my preparation of the various Official Commentaries rightly required close collaboration with the Secretariats and other key figures involved in the preparatory work, whether as Chairmen, interested members of the drafting committee or observers, as well as circulation of the draft to all negotiating States and participating observers for comment, followed by the preparation of a revised final version and its transmission to all negotiating States and participating observers. Given that I bore the heavy responsibility of having the last word on the final text, such collaboration was essential and, indeed, proved invaluable. In addition to securing comments from renowned scholars and practising lawyers I also worked closely with the relevant industry lawyers, who would not only bring a rigorous analysis to bear on my draft but also identify issues arising in day-to-day practice of which I would otherwise have been unaware. Naturally enough, industry experts from time to time pressed an interpretation which would avoid problems for the industry but which I felt could not legitimately be extracted from the text, though in such cases I usually found ways of resolving the problems. But the collaborative spirit that prevailed following my ready acceptance of proposed changes both of substance and of drafting, and consequent removal of errors and improvement of the analysis, ensured that in the end what had been proposed was accepted.
IV. CONCLUDING THOUGHTS ON THE CAPE TOWN CONVENTION AND ITS PROTOCOLS

The interpretative problems presented by the Cape Town Convention and its Protocols analysed above should not be allowed to overshadow the towering achievement of those involved in bringing this immensely complex project to fruition: the initiating organization UNIDROIT, with its small but highly professional and dedicated Secretariat as well as UNIDROIT’s Governing Council for its willingness to run with an ever-expanding project; its subsequent partner ICAO, with its Legal Sub-Committee, for bringing its own expertise in international civil aviation to bear on the project and co-organizing the first Diplomatic Conference; the countless committees, specialist working groups and industry experts from around the world to produce blueprints and texts of remarkable range and detail; and the drafting committees for their skill in producing texts which not only produce the intended legal effect but are also for the most part characterized by the clarity of their drafting, itself a formidable achievement. The resulting instruments represent one of most important contributions ever made to international private commercial law in the facilitation of high value cross-border asset finance.

ENVOI

I have sought to describe in this article some of the key problems we had to confront in analysing these complex instruments and to show that even after the lapse of nearly 20 years since adoption of the Convention and Aircraft Protocol new ideas and new problems continue to surface, such as the purpose and significance of the restricted meaning of proceeds and the status of agents, trustees and other representatives in relation to entry into agreements, registration and the assertion of rights and interests. But for a scholar that is part of the fun of life: a never-ending search for the truth of things.

69. Particular tribute is owed to the Aviation Working Group, a legal entity comprising major aviation manufacturers, leasing companies and financial institutions facilitating advanced international financing and leasing, which not only contributed its formidable expertise and financial resources to the project but continues to promote its worldwide and monitor compliance by Contracting States in accurately reflecting the Convention and Protocols in their national laws.