An overview of the work of UNIDROIT on secured transactions law: The Cape Town Convention system

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- Legal risks in equipment financing:
  - Traditional approach (*lex rei sitae*) not suited for highly mobile assets (*Blue Sky v. Mahan Air*)
  - Legal systems vary in their approach to recognition of security interests (e.g. title-retention and leasing agreements), the process for enforcement, and the remedies available
  - Legal uncertainty = higher risk = higher costs

- General purpose of the Cape Town Convention: to encourage finance and reduce its cost by introducing a sound, internationally adopted legal regime for the creation and enforcement of security interests in high-value mobile equipment
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– Challenges:
  • Diversity of deep-rooted legal theories characterising security interests
  • Political sensitivity of property and insolvency law

– Solutions:
  • Cape Town offers clear rules for establishing priority, including as against interests under domestic law and provides the creditor with a range of basic default and insolvency-related remedies and, in case of default, a means of obtaining speedy interim relief pending final determination of its claim on the merits
  • Cape Town established an electronic international registry for the registration of international interests to give notice to third parties and enable the creditor to preserve its priority
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– Flexible, evolving structure
  • Convention establishes a common core of principles
  • Equipment-specific protocols allow for adaptation to the needs of particular industries (aircraft, rail, space assets)

– System of declarations
  • Contracting States are permitted to make declarations modifying the operation of some provisions
  • Contracting States have taken different approaches in choosing which declarations to make
  • Convention may apply in different ways to different Contracting States, according to declarations made
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**Aircraft Protocol (2001)**

- Ratified by 65 States parties and the EU (as reginal organisation)
- 2006: fully operational registry (Aviareto)
- ICAO as Supervisory Authority for the International Registry
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**Luxemburg Protocol on Railway Rolling Stock (2007)**

- Signed by France, Germany, Italy, Mozambique, Switzerland, United Kingdom; signed and ratified by Luxembourg and the EU (as reginal organisation)
- 2014: contract with the Registrar
- OTIF: Secretariat to the future Supervisory Authority for the International Registry
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Berlin Protocol on Space Objects (2012)
- Signed by Burkina Faso, Germany, Saudi Arabia, Zimbabwe
- 2014: draft regulations approved by Preparatory Commission
- ITU as a candidate for becoming the future Supervisory Authority for the International Registry
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Characteristics of the International Registry

- Notice-based registry (not a ‘documentary’ system)

- Registry determines priority among secured creditors (except for non-consensual interests under Art. 39(1)(a) of the Convention)
  - ‘First in time, first in right’ eliminates disputes concerning knowledge/good faith
  - Neither a condition to creation of an interest, nor proof that it exists

- Each Registry operated by a company established for that particular purpose and supervised by an international organisation with a relevant mandate, with the assistance of industry experts
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International Registry (Aircraft)

- Assed-based rather than debtor registry (unlike UNCITRAL Model Law, OAS Model Law, UCC Article 9 etc.) requiring unique identification of equipment
- Operated by Aviareto, a private company, by appointment and under the supervision of International Civil Aviation Organisation (ICAO), with the assistance of industry experts
- Fully electronic registry accessible to 24/7
- More than 700,000 entries since 2006
- ‘Closed system’ for registration, but ‘open system’ for searching
- All parties must consent to registrations, except in the case of Art. 40 (registrable, non consensuals). Only ‘benefiting party’ consents to discharge
OECD Aircraft Sector Understanding

Part of the OECD Arrangement on Officially Supported Export Credits negotiated to avoid unfair competition through subsidised export credit rates

sets out the “most favourable terms and conditions on which officially supported export credits may be provided.”

ASU authorizes participating agencies to grant a reduction of 10% off the minimum premium rate (“Cape Town Discount”) if the aircraft operator is based in a country that ratified the Cape Town Convention
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**Economic Impact - Economic savings though short aircraft repossession delay**

- Upfront *risk fee reduction* (% of the loan principal) ranging from 0.26% for a AAA credit rating all the way up to 6.96% for CCC/C-rated debtors
- Assuming B8 average airline credit rating and US$4,728 billion aircraft orders in 2009-2030 (Airline Monitor’s forecast) and US$4,018 billion financing need (85% of total orders), **US$161 billion total savings** due to reducing the worldwide repossession delay from ten to two months
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- New negotiations about to start: [Preliminary draft] Protocol on Agricultural, mining and construction equipment
- Possible additional protocols: shipping and renewable energy equipment
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– Distinct features of the Cape Town system
  • Extensive feasibility and economic impact assessment
  • Co-ordinated industry involvement from early stages
  • Operation infrastructure (registry) unique among uniform commercial law instruments
  • Institutional partnerships with other IGOs (supervisory authority)
  • Unique economic incentives mechanism (OECD ASU)

– Challenges of the Cape Town system
  • Designed only for high-value mobile equipment
  • Varying degree of industry support depending on market structure and financing patterns
Thank you for your attention.

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