

UNIVERSITY OF CAMBRIDGE

**The Cape Town Convention and
Pretoria Protocol**

Notes accompanying a lecture by Professor Sir Roy Goode QC

NB: This is not a lecture outline. These notes are designed purely as an aide-memoire to save time in the oral presentation.

1. The problem: security, title retention and leasing interests (for brevity, “security interests”) in high-value mobile equipment prior to the Cape Town Convention
 - (1) The inadequacy of the *lex situs (lex rei sitae)* rule
 - (2) The lack of uniformity in the treatment of security interests
 - (3) The impact on access to credit/leasing facilities and on the cost.
2. The initial approach
 - (1) Cover equipment normally moving from one State to another
 - (2) Adopt mixture of conflict rules (recognition of security interest created under the law of the State of the debtor’s principal place of business) and substantive rules (default remedies and priority).
 - (3) Adopt functional approach to security, as under UCC Article 9 (eg treat conditional sale agreements as security agreements).

The Convention

3. Six deviations from the original scheme
 - (1) Functional approach abandoned, so separate rules for security agreements on the one hand and title reservation agreements and leasing agreements on the other. But the applicable determines into which of these categories an international interest falls: Article 2(4)
 - (2) Limitation in first instance to aircraft objects, railway rolling stock and space assets
 - (3) Replacement of idea of recognition of national interest with entirely new international interest, created by the Convention itself, with set of basic default remedies

- (4) Establishment of International Registry for perfection and priority purposes
 - (5) The two-instrument approach: Convention and Protocol for each category of equipment.
 - (6) The declarations system: certain provisions do not apply unless a Contracting State make a declaration
4. Principal objective: to make acquisition finance more readily available, particularly in developing countries, and reduce the cost of credit and credit insurance, by reducing risks to creditors.
 5. Underlying principles: practicality, party autonomy, predictability (replacing usual reference to good faith), transparency and sensitivity to national legal cultures through system of opt-in or opt-out of particular provisions
 6. The definitions (Article1)
 7. Conditions of application of Convention: arts 2, 3 and 7
 - (1) Equipment must belong to one of following categories:
 - (a) airframes, aircraft engines and helicopters (for definitions, see Aircraft Equipment Protocol, art I);
 - (b) railway rolling stock (for definition, see Luxembourg Protocol, art I(2));
 - (c) space assets;

These are the only categories listed in the Convention. But pursuant to the procedure laid down in Article 51 an additional protocol (the Pretoria Protocol) on mining, agricultural and construction equipment (MAC equipment) was adopted in Pretoria in November 2019
 - (2) Equipment must be of kind in respect of which a Protocol has been made.
 - (3) Equipment must be uniquely identifiable as provided by the Protocol.
 - (4) Interest in the equipment must be security interest or interest vested in a person who is a seller under reservation of title or a lessor (characterisation is determined by the applicable law). But registration and priority provisions apply to outright sales in case of aircraft objects and space assets.
 - (5) There must be an appropriate connection to a Contracting State: arts 3 and 4
 8. Formalities for constitution of international interest: art 7

- (1) Agreement in writing (see Art. 1(nn))
- (2) Chargor, conditional seller or lessor has power to dispose
- (3) Object identifiable in accordance with Protocol.

Note differences between Aircraft Protocol and subsequent Protocols: unique identification required only for registration, not for constitution of international interest; no extension to sales under Luxembourg and Pretoria Protocols

- (4) In case of security agreement, determinability of secured obligations.

Relevance of national law in relation to (1) and (2).

9. Default remedies

- (1) Of chargee under security agreement: Article 8 (possession sale, etc) and 9 (appropriation of object)
- (2) Of conditional seller or lessor: Article 10 (termination of agreement and possession)
- (3) And any additional remedies provided by the applicable law: Article 10
- (4) Speedy relief pending final determination on evidence of default: Article 13

10. Registration, perfection and priorities: the International Registry as the heart of the Convention and Protocols

11. Key features of the International Registry

- (1) Asset-based, hence no registration of interests covering after-acquired property
- (2) Wholly electronic
- (3) Allows registration of international interests, prospective international interests, and certain other interests and assignments: art 16
- (4) Access for registration restricted; for searches, open.

12. Priorities: art 29

- (1) Basic rule: registered interest has priority over subsequently registered interest and over unregistered interest, even if not registrable
- (2) Principal exceptions:

- (a) Pre-registration buyer
 - (b) Conditional buyer or lessee whose seller or lessor registers before registration by a third party, eg a chargee
 - (c) Agreement for subordination.
13. Protection against debtor's insolvency: art 30.
- International interest is "effective". i.e. proprietary and thus in principle outranking unsecured creditors, if (a) registered prior to the commencement of the insolvency proceedings or (b) effective under the applicable law
14. Assignments: Articles 31-36
- (1) Unless otherwise agreed, assignment of associated rights (right to payment and other rights under the agreement) transfers to assignee the related international interest and all interests and priorities: Article 31
 - (2) Assignment of international interest not valid unless some or all associated rights are also assigned: Article 32(2)
 - (3) Debtor's duty to pay assignee if given notice in writing of assignment identifying the associated rights: Article 33(1)
 - (4) On default by assignor under assignment of associated rights and related international interest by way of security, default remedies in Chapter III of Convention apply: Article 34
 - (5) Priority issues:
 - (a) Successive assignments of associated rights in relation to different international interests: each assignee succeeds to the priority of its assignor regardless of the order of registration of the assignments: Article 31(1)(b)
 - (b) Successive assignments of associated rights in relation to same international interest where at least one of the assignments includes the international interest and the assignment of that interest is registered: priority is determined by order of registration of assignments: Article 35. But priority limited as provided by Article 36
15. Ratifications of the Convention and Aircraft Protocol to date:
 Convention: 82 ratifications + what is now the EU
 Protocol: 79 ratifications + what is now the EU
16. Subsequent Protocols

Luxembourg Protocol on railway rolling stock 2007
Space Protocol 2012 on satellites and other space assets
Pretoria Protocol on mining, agricultural and construction equipment 2019s

The Pretoria Protocol

17. Sphere of application: mining, agricultural and construction equipment falling within 56 of the 5,224 contained in the 2017 edition of the World Customs Organization Harmonized Commodity Description and Coding System (“Harmonized System”), the selected 56 HS codes being annexed to the Protocol as Annex 1 (mining equipment), Annex 2 (agricultural equipment) and Annex 3 (construction equipment). For an explanation, see the Appendix.
18. A Contracting State may by declaration exclude one or two of the Annexes but if the same code also appears in a non-excluded Annex the Protocol will apply. Excluded is equipment covered by an earlier Protocol, eg MAC equipment also falling within the Luxembourg Protocol: Article II.
19. Provisions in the Pretoria Protocol common to earlier protocols:
 - (1) Parties’ power of derogation or variation by agreement as regards relations between themselves (Article III)
 - (2) Person’s power, in relation to equipment, to enter into an agreement, effect a registration and assert rights under the Convention in an agency, trust or representative capacity (Article IV)
 - (3) Flexible means of identification for the purposes of constituting an international interest, enabling, for example, an international interest to be created over after-acquired property (Article V)
 - (4) Freedom of parties to choose the applicable (domestic) law but only in proceedings in a Contracting State which has made an opt-in declaration (Article VI)
 - (5) Modification of default remedies to add export and physical transfer. Replaces Article 8(3) of the Convention to provide all remedies to be exercised in a commercially reasonable manner, which is deemed to be the case where in conformity with a provision in the agreement except where this is manifestly unreasonable (Article VIII). Also enhances provision regarding advance relief under Article 13 (Article IX)
 - (6) Remedies on insolvency (Article X) - see below
20. Remedies on insolvency: Articles X and XI

- (1) Applicable where Contracting State which is the primary insolvency jurisdiction (i.e. where the debtor has its centre of main interests) makes declaration under Article XXVIII(3) applying Article X.
- (2) Other Contracting States free to make declaration or not, but even if they do not their courts are obliged to apply Article X in conformity with declaration by COMI Contracting State: Article XXVIII(7)
- (3) Broad effect is that insolvency administrator or debtor has waiting period as declared by Contracting State (typically 60 days) to remedy past breaches and agree to perform future obligations, failing which the creditor may repossess the equipment and the court may not intervene to extend the time or modify the agreement.
- (4) Courts of any other Contracting State in which the equipment is situated must, in accordance with the law of that State, provide maximum assistance to foreign courts and foreign insolvency administrators.

21. Inventory: Article XII

- (1) Contracting States with efficient debtor-based registration system may by declaration disapply most of Convention rules regarding registration and priorities, which they may wish to do as asset-based registration unduly burdensome when applied to large number of inventory items where international interest is likely to be purely transitory as items sold off, necessitating multiple registrations followed soon after by registrations of discharges.
- (2) Protection for outright buyer under Article 29(3)(b) and conditional buyer or lessee under Article 29(4)(b) disappplied where taking from a dealer situated in a declaring Contracting State at time it acquires interest in or rights over the inventory.

22. Designated entry points: Article XVI

Contracting State may designate entry point for most types of registration but breach of entry point requirements does not invalidate registration (*contra*, position under Aircraft Registry regulations), though it may attract penalties under national law.

23. Modification of discharge provisions: Article XIX

Amends Article 25 of the Convention to extend the range of parties entitled to procure discharge of a registration and the grounds of discharge.

24. Protocol does not extend Convention to outright sales. Interests in these may not be registered but creditor may register notice of sale, which has no Convention effects but may affect priorities under national law.
25. Adjustment of HS Codes on acceptance of an HS revision: Article XXXV,
26. Modification of Protocol Annexes otherwise than adjustments: Article XXXVI.

For latest comprehensive analysis of Convention and Aircraft Protocol see Official Commentary by Roy Goode (4th edn, 2019, UNIDROIT).

The Official Commentary on the Convention and MAC Protocol will be published in April 2021.

APPENDIX

EXPLANATION OF HARMONIZED SYSTEM CODES (taken from the draft MAC Official Commentary©)

The Harmonized System

3.13. “Harmonized System” (commonly abbreviated to “HS”) is defined by I(2)(i) of the Protocol as “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. Article 1(a) of the above Convention defines the system as “the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System set out in the Annex to this Convention.” The HS Nomenclature is revised every five years, the latest revision being the 2017 revision. “Harmonized System revision” is defined by Article I(2)(j) as a revision of the Harmonized System codes as accepted by the World Customs Organization (established as the Customs Co-Operation Council) according to its procedures. Revisions are proposed by the Council and, if not objected to, adopted by the Council. Provisions relating to amendment of the Protocol Annexes distinguish between those resulting from adjustments and modifications to the HS Codes (Article XXXV) and other adjustments (Article XXXVI).

3.14. The HS is an international product nomenclature developed by the WCO to classify a large number of products by material composition, form or function. It is designed for a variety of purposes, serving as a basis, among other things, for customs and transport tariffs, the collection of statistics and the monitoring of controlled goods. The system has a hierarchical structure, being divided into Sections, Chapters, Headings and Sub-Headings in a descending order of specificity which is signified below the Section level by the number of digits in the code, as shown below:

Section	General nature of product
Chapter	Category of product: two digits
Heading	Specific type: four digits

Subheading (one-dash) More specific: five digits

Subheading (two-dash) Most specific international level: six digits

Where either a heading or one-dash subheading level is not further subdivided in the HS, it adds two or one further zeros respectively at the end of the code to create a six-digit number.

Individual countries and regional organisations such as the European Union can add further sub-divisions with eight or ten digits but these have no relevance to the application of the Protocol.

The 2017 revision contains 96 two-digit chapters (chapter 97 is not in use), subdivided into 1,224 four-digit headings and further sub-divided into 5,244 six-digit sub-headings, each with its own code number, the specific sub-type of a coded product being indicated by the one-dash or (if there is one) two-dash sub-heading at the end of the description.

The codes in the Protocol

3.15. Of the total 5,244 codes in the 2017 revision the Protocol uses only a very small number, 56 in total. These are found in the three Annexes to the Protocol:

Annex 1	Mining equipment
Annex 2	Agricultural equipment
Annex 3	Construction equipment.

These are not mutually exclusive. A number of codes feature in all three Annexes and a number of others in two of them. The significance of this is described in paragraph 3.22. The intention is that the Protocol will apply the HS Codes as currently in force at any given time, hence the provisions in Article XXXV for amendments to the Annexes to reflect periodic changes to the HS Codes, existing rights remaining unaffected (see paragraphs 3.156, 3.171) . It would have been possible to list all the selected codes in a single Annex but the tripartite division was adopted to allow a Contracting State to exclude by declaration one or two of the three categories (see paragraph 3.22). The selection of the codes was determined by five main criteria:

- (1) The codes should cover equipment predominantly utilized in the mining, agricultural and construction sectors thus excluding general-use equipment or equipment used predominantly for maintenance, e.g. snow clearing equipment, rather than construction;
- (2) The codes should cover equipment primarily used on-site rather than off-site
- (3) They should cover equipment that is of predominantly high value, at least when new
- (4) They should cover equipment that is individually serialized, since the serial number is required to be stated in order to effect registration
- (5) They should cover complete equipment rather than parts except where these are predominantly of high value and are the subject of individual financing and thus

feature within a distinct Annex code and heading. There is no Annex code just applying to parts as such.

Also relevant to the selection of a code was the estimated volume of exports of equipment covered by the code. Numerous suggestions for additions to the Annexes were rejected on the ground that the equipment they covered was predominantly used outside the MAC sectors and/or was predominantly of relatively low value. But codes do not necessarily exclude all equipment of low value, nor is equipment within a code that is of high value when new necessarily of high value when disposed of second-hand.

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