

THE CAPE TOWN CONVENTION – THE AUSTRALIAN EXPERIENCE AND VIEWS FROM THE CLASSROOM

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I INTRODUCTION

On 1 September 2015, the Convention on International Interest Mobile Equipment 2001 (*the Cape Town Convention*) and the Aircraft Protocol (*the Aviation Protocol*) (together the '*CTC*') entered into force in Australia.¹ As with all convention the words of Professor Roy Goode apply, namely that "governments around the world display inertia when it comes to ratifying an adopted instrument."² This is true in the case of Australia but rather surprising especially since the CTC is unique because its invention was driven by industry rather than by government. Furthermore there are very sound financial considerations that support the adoption of the CTC. The Government's last assessment in 2013 estimated that airlines could save between AU\$330,000 to AU\$2.5 million for the purchase of a new aircraft.³ This is for both regional and

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¹ *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth).

² Roy Goode, "Security Interests in Mobile Equipment: Lawmaking Lessons from the Cape Town Convention" (2014) 25(4) *Adelaide Law Review*.

³ Commonwealth, *Second Reading Speech – International Interests in Mobile Equipment (Cape Town Convention) Bill 2013*, House of Representatives, 29 May 2013 [(Anthony Albanese)].

larger airlines. The Government estimated a savings of up to \$2.5 million on a new Airbus A30 and \$1.7 million on a Boeing 787-8. Regional airlines will be able to expand or renew their fleets and save up to \$330,000 on an ATR-72. Discounted financing will also be available for purchases of second hand aircraft which will help smaller regional airlines upgrade and maintain their fleet.⁴ For a start, it gives Australia a premium discount of up to ten percent from export credit agencies under the Organisation for Economic Co-operation and Development's ('*OECD*') Aircraft Sector Understanding on Export Credits for Civil Aircraft ('*ASU*').⁵ In addition to discounts from export credit financing, financial institutions may be willing to reduce their lending charges in light of the enhanced creditor security that the CTC provides. In fact, financiers have indicated a trend towards ratification of the CTC becoming the 'rule rather than the exception' when it comes to aircraft financing. This global shift towards the CTC is something that Australia had to confront. Prior to accession, the financial infrastructure for Australia's aviation industry was incongruent with international standards. Given Australia's relatively isolated location and reliance on air transportation, harmonising Australia's aviation securities laws with those that apply internationally would only strengthen Australia's competitive edge. In contrast, the cost of compliance is small. These primarily involve the costs of logging with the CTC's international registry (US\$200 user set up fee and US\$100 registration fee). The Government also found that accession to the Convention would have "no financial impacts on the Commonwealth Budget."⁶ Given that the CTC provides the aviation industry with a fee discount from international export credit agencies and generates cheaper finance as a result of reduced capital risk there was no real reason for the government not to ratify the CTC. This is especially so as the convention is cost-neutral to government budgets. This paper therefore argues that the CTC is the perfect impetus for law reform especially in the two connected areas such as the insolvency legislation and the personal property securities legislation and explore the scope of the CTC and its interactions with

⁴ 'Campaign Transcript: Key Note Address to CAPA Australia-Pacific Aviation Summit by Deputy Prime Minister' (Australian Labour Party, 7 August 2013).

⁵ Annex 1 of the ASU allows countries that have ratified the CTC under specific declarations to qualify for discounted credit finance from international Export Credit Agencies (*ECAs*).

⁶ Commonwealth of Australia Explanatory Memoranda, International Interests In Mobile Equipment (Cape Town Convention) Bill 2013 (Cth), 4.

national law. This paper discusses Australia's perspective and how the CTC affects laws in Australia. The issue of how the CTC is reconciled with domestic law is of interest. To that end it is important to understand the background in the negotiations and thinking of government agencies in relation to the CTC.

II BACKGROUND TO THE ADOPTION OF THE CTC

Australia's journey leading to 1 September 2015 began as far back as 1996 when the Australian Law Reform Commission ('ALRC') tabled a report on "Legal Risk in International Transactions" (more commonly known as the "Cross Borders Report") ('*Report*'). Two major findings came out of the Report: the aviation industry supported greater access to international capital market; and when the Report assessed the scope for legal reform in international commerce, it found that a foreign creditor who leased an aircraft to an Australian carrier had to contend with "commercial comfort".⁷ This is rather interesting because Section 27A of the *Air Navigation Act 1920* provides the government with legislative authority for the establishment of a register containing security interests in relation to aircraft and aircraft objects. The Department of Transport and Regional Services ('DOTARS'), which had the function of instituting and maintaining an encumbrance register, did not get around to it.⁸ It would not be entirely true to say that Australia did not have a security register for aircraft. There was definitely no registrations system for retention of title claims. The company charge system was recording security for aircraft, however, they were over aircraft as a whole, rather than aircraft objects such as engines and tyres. In addition, Australia did not recognise security interests over aircraft created in other countries. The same mutual lack of recognition was afforded to Australia. As a result, other means of identifying security interests had to be applied, including, the use of fireproof name plates in cockpits and on aircraft engines to identify the owner and other interest holders. Apart from being a costly exercise, this practice is unreliable since name plating interferes with aircraft safety and maintenance compliance on

⁷ Australian Law Reform Commission, *Legal Risk in International Transactions*, Report No 80 (1996) [54].

⁸ Nicholas Humphrey and Vernon Nase, "The Cape Town Convention 2001: An Australian Perspective" (2006) 31 *Air and Space Law*.

some engines, making it an impossible exercise. It should be noted, there wasn't any security system with legislative backing.⁹ The problem with not having a proper system of recording securities reared its ugly head not long after this issue was pointed out by the Report. In 2001, Ansett Airlines,¹⁰ Australia's second largest and oldest domestic carrier collapsed. Ansett owned 14 businesses and 134 aircraft. Hazelton Airlines, a regional airline under Ansett, had to appoint four administrators over its parts due to conflict of interests relating to auditors and between members in the group. As with most airlines when they purchased a fleet of aircraft, Hazelton also purchased spare engines so that these could be swapped out for routine maintenance. When the group went into voluntary administration, engines that originally belonged to a particular aircraft were either undergoing maintenance or on another aircraft. Without a system of recording securities, engines ended up on aircrafts owned by different members of the group.¹¹ As one can imagine, different members had different secured creditors or creditors with different priority positions. In the end, the administrators report, at paragraph 3.2, recommended the Ansett Group as a whole be pooled because it was concluded that they may never be able to determine the right owner of certain engines. It wasn't difficult to see why international financiers lost confidence in Australia's asset security system. Coincidentally, two months after Ansett's collapse, the CTC was adopted in Cape Town on 16 November 2001 and entered into force on 1 March 2006.

In 2008 the Australian government consulted the aviation industry on whether or not Australia should sign the CTC. Most supported accession to the CTC. They also regarded the CTC's international register for security in aircrafts objects to be useful. Three significant recommendations by the law firms who made submissions were noted namely¹² a system for dual registration; a preference for the 'Alternative A' insolvency regime; and the

⁹ Australian Law Reform Commission, *Legal Risk in International Transactions*, Report No 80 (1996).

¹⁰ Its demise in September 2001 has far-reaching implications. It is the largest mass sacking in Australian history with 16,000 jobs lost and threatened another 60,000 jobs in supplier companies and throughout the tourism industry.

¹¹ The real problem with engines was that most of those that arrived with the aircraft were not charged separately and not registered as such on the company's register of charges. Those, which were delivered separately, were mostly separately registered.

¹² Australian Parliament House, "National Interest Analysis [2012] ATNIA 24 With Attachment On Consultation And Regulation Impact Statement" <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=jst/1november2012/treaties/mobile_nia.pdf>.

importance of ensuring that *Personal Property Securities Act 2009* reforms and the CTC balanced and complemented each other.¹³ They also suggested that the CTC be implemented around the same time as the PPSA reforms. All these recommendations were adopted. In 2012 the Minister for Infrastructure and Transport announced that Australia would accede to the Convention. Consequently, the Government called for feedback from key stakeholders and received significant support.¹⁴ The responses expected Australia to benefit both financially and in legally.¹⁵ The respondents saw harmonisation of Australia's aviation securities laws that are in line with international standards as being desirable.¹⁶ The Government tabled the Regulation Impact Statement and National Interest Analysis at a Joint Standing Committee of the Senate ('JSCOT') during the implementation process. These documents provided a good starting point for assessing whether the Convention should be made law in Australia. In summary, the objective of government action is to provide the Australian aviation industry with cheaper access to capital finance, including international finance. In order for this to happen effectively, Australia needs to ensure that its financial infrastructure is consistent with global standards. Financiers needed more certainty around Australia's insolvency laws in relation to aircraft objects.

In 2013 the enabling legislation *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* and the *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013* were drafted to provide the legislative framework for the Convention

¹³ Personal Property Security (PPS) reform brings the different Commonwealth, State and Territory laws and registers regarding security interests in personal property under one national system. PPS reform introduces the *Personal Property Securities Act 2009* (Cth) and a single national online PPS register. The PPS replaced numerous State, Territory and Commonwealth electronic and paper registers, such as REVS and ASIC charges.

¹⁴ Australian Government Department of Infrastructure and Regional Development, *Cape Town Convention 2014 Consultation Paper*, August 2014.

¹⁵ Benefits include (1) improved predictability of the enforceability of security, title reservation and leasing rights in respect of high value mobile equipment and aircraft objects; (2) reduced risks for creditors and consequently borrowing costs for debtors, that will in turn facilitate the extension of credit for the acquisition of aircraft and aircraft engines in Australia; and; (3) harmonisation of Australia's aviation securities law in line with other participating countries.

¹⁶ Dale Rayner, "The Cape Town Convention Lands In Australia", Norton Rose Publications, June 2015, <<http://www.nortonrosefulbright.com/knowledge/publications/129229/the-cape-town-convention-lands-in-australia>>.

to have force of law in Australia.¹⁷ In 2015 Australia's accession to the CTC completed a formal process, which commenced with the passing of enabling legislation in 2013 and came into effect by proclamation on 1 September 2015. Australia made declarations under Articles 39(1)(a), 52, 54(2) and 55 of the CTC and under Articles XXX(1) and XXX(3) of the Aircraft Protocol which will be discussed below.

III EFFECTS OF ACCEDING TO THE CAPE TOWN CONVENTION

The course of law reform is never a simple process. Any accession to a convention necessitates changes to domestic law hence it is of importance to understand: how the enabling legislation has changed national laws; what has changed; and what are the contentious areas. It is worth noting that Australia considered three alternative models for ratification before acceding to the CTC, including, UNIDROIT providing regulatory tool kits ('accession kits') and States are able to choose a number of different routes to incorporation of the specific rules.¹⁸ Each option results in a different outcome. Option one gives the CTC direct force of law in Australia by making all declarations specified in the 'Sector Understanding on Export Credits for Civil Aircraft' ('ASU'). In the event of conflict, the CTC prevails over Australia's domestic securities law, the PPSA. This in turn means better security for aircraft financiers and reduced costs for airlines. Option two is to do nothing as far as the CTC is concerned. The fact that Australia already amended the PPSA in 2009 and incorporated CTC terms and provisions within it meant that the domestic environment for the protection of securities interests had improved. However, this does not open up access to international finance. Airlines may continue to struggle for finance in a limited local market. Option three is a hybrid approach. It means acceding to the CTC without making all the necessary declarations to qualify for cheaper finance. This option would have little impact on the aviation

¹⁷ Department of Infrastructure and Regional Development, 'The Cape Town Convention', (Consultation Paper, Department of Infrastructure and Regional Development, March 2015) <http://www.infrastructure.gov.au/aviation/international/consultation_cape_town.aspx>.

¹⁸ Department of Infrastructure and Transport 'Cape Town Convention Implementation Options, Pre-existing Interests, Courts and Insolvency Issues' (Consultation Paper, Department of Infrastructure and Transport, 2010).

industry and essentially rendered ratification a futile exercise. The recommended option was option one, which promotes maximum economic benefits to all industry stakeholders at minimal costs.

A *Enabling legislation and reforms to national law*

So far, studies on the impact of Australia's accession showed "no major constitutional impediments" that might stop or delay Australian engagement with the CTC.¹⁹ The enabling acts that set the legislative framework for Australia's accession to the CTC and provides for instruments to be made under the legislative power to give the Convention effect in Australia are firstly, the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* and its Explanatory Memorandum. As the Explanatory Memoranda pointed out, the enabling acts will allow the Convention "to have precedence over all other laws to the extent that any inconsistency arises." Secondly, *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013* which was assed to deal with the PPSA, insolvency and other related issues. It allows amendments to the *Air Services Act 1995*, *Civil Aviation Act 1988*,^{20,21} and PPSA to ensure the CTC and protocol "complement and operate in harmony" with other Australian laws.²² Thirdly, *International Interests in Mobile Equipment (Cape Town Convention) Rules 2014* ('Rules') which confers powers upon the Civil Aviation Safety Authority ('CASA') in relation to an Irrevocable Deregistration and Export Request Authorisation ('IDERA'). The IDERA Rules will become effective when the CTC commences, which means it is in place as at 1 September 2015. With IDERA rules having been legislated, Australia has adopted the relevant provisions of the Aircraft Protocol relating to irrevocable deregistration and export request authorisations. So how does the CTC apply in Australia?

¹⁹ Nicholas Humphrey and Vernon Nase, "The Cape Town Convention 2001: An Australian Perspective" (2006) 32 *Air and Space Law*, 18.

²⁰ The legislative rules require consequential amendments to Part 47 of *Civil Aviation Safety Regulation 1998* with regards to the registration of aircraft, identification of the registered operator of an aircraft, transfer of ownership and suspension and cancellation of registration.

²¹ *Irrevocable Deregistration And Export Request Authorisation | Civil Aviation Safety Authority* (2016) Civil Aviation Authority <<https://www.casa.gov.au/standard-page/irrevocable-deregistration-and-export-request-authorisation-idera>>.

²² *International Interests in Mobile Equipment (Cape Town Convention) Bill 2013* (Cth).

B *Australia's declarations and reservations under the CTC*

1 *Article 39(1)(a) "Rights having priority without registration"*

Gives protection to the State and State entity around the recovery of debt and allows it to arrest or detain aircraft and aircraft object under domestic laws; and a statutory liens registered under the *Air Services Act 1995* are non-consensual rights with priority over the International Registry.

2 *Article 53 "Determination of courts"*

The Federal Court of Australia and Supreme Court of all states and territories have jurisdiction in respect of the CTC.

3 *Article 54(2) "Declarations regarding remedies"*

In the event of debtor default, Australian courts are required to observe the 'self help' nature of remedies available to creditors under the CTC. All parties seeking to enforce the remedies may apply to a court without need to exercise leave of the court. It is expected that international financiers and lessors will welcome access to the CTC's self help remedies.

4 *Article 55 "Declarations regarding relief pending final determination"*

Australia will not adopt the CTC's interim relief measures.²³

5 *Article 30(1) "Declarations relating to certain provisions"*

Australia will apply the following Articles under the Aircraft Protocol.

6 *Article 8 "Choice of law"*

Parties may agree freely on a choice of law that is to govern their contractual rights and obligations, wholly or in part. This rule becomes part of Australia's domestic law in relation to the contracts.

7 *Article 13 "Insolvency assistance"*

Australian courts will cooperate with foreign courts and foreign insolvency administrators in carrying out Article 11. This means two things: Australia will adopt IDERA, a remedy provided under the CTC that allows for deregistration and export of an aircraft asset in the event of debtor default or insolvency. It is a voluntary measure that provides greater security to creditors by preventing a

²³ For example, preservation, immobilisation or custody of the relevant object.

debtor from flying the asset to a jurisdiction where the CTC does not apply.²⁴ To facilitate this remedy the registration holder submits an IDERA to the Civil Aviation Safety Authority ('CASA') indicating that the only party with the right to deregister and export a specified aircraft object is a specified 'authorised party'.²⁵ In the case of a foreign aircraft situated in Australia, Australia courts shall cooperate with foreign courts and foreign insolvency administrators by exercising remedies under the CTC.

8 *Article 30(3) "Declarations relating to certain provisions"*

For insolvency related proceedings, Australia has adopted "Alternative A." This means during an insolvency, the administrator or debtor must give possession of the aircraft object to the creditor no later than 60 calendar days, or if a shorter period applies under Australian insolvency law, within that shorter period. With this declaration, Australian courts are restrained from delaying or preventing the enforcement of this remedy. However, it should be noted that currently, Australia's insolvency law does not specify any period. Section 443B of the *Corporations Act 2001* ('*Corporations Act*') applies that so that an administrator has to elect, within five business days, to notify the creditor that the debtor does not propose to exercise rights in relation to the aircraft. If an administrator does this, it becomes liable for rent and other costs relating to an aircraft during the course of the administration. Even without specifying a period, this provision often gives rise to consensual agreement that the possession of an aircraft is given back to a creditor earlier. The *Corporations Act* will still apply, but in any event, the CTC now sets a maximum give back period of 60 calendar days. In summary, the main provisions and declarations relevant to Australia are: freedom as to choice of law; timely interim remedies and the ability to exercise remedies without leave of court; insolvency regime under Alternative A with a waiting period of 60 calendar days and de-registration and export remedy (IDERA mechanism).

²⁴ IDERA are a remedy provided under the CTC that allows for deregistration and export of an aircraft asset in the event of debtor default or insolvency.

²⁵ Explanatory Statement, International Interests in Mobile Equipment (Cape Town Convention) Bill 2013 (Cth).

C *Interactions between the CTC and the PPSA*

As noted before on 30 January 2012, the PPSA commenced in Australia and established a new system for the registration of security interests in personal property. The Act overhauled Australia's regulation of personal properties securities and reconciles more than 70 pieces of Commonwealth, State and Territory legislation. It provides a comprehensive national PPSA framework covering all personal property and now includes aircraft objects. Importantly, aircraft is personal property to which the PPS Act applies. This means security interests in aircraft can be registered and searched on the Personal Property Securities Register ('*PPS Register*'). Prior to the PPSA reform, security interests in aircraft were created by way of mortgage or fixed and floating charges. These were registered on the Australian Securities and Investment Commission ('*ASIC*') Register of Company Charges. Registration and the relative priority of these interests were governed by the Corporations Act. However, as we saw earlier, there wasn't a separate register for security interest in aircraft even despite legislative provision for one under the *Air Navigation Act 1920*. The Australian Civil Aircraft Register, provided for by the *Civil Aviation Safety Regulations 1998* does not record security interests in an aircraft. It records the aircraft for the purpose of designating Australian nationality to it. It is worth noting that security interest in an aircraft asset registered with the CTC's International Registry of Mobile Assets will have priority over the PPSR even if registration was lodged with the PPSR first.²⁶ The CTC does not exclude the operation of the domestic PPSR. It is just that the CTC prevails over Australian laws to the extent of any inconsistency. Whilst the provisions of the CTC had been taken into account during amendments of the PPS Act, "aircraft equipment" has not been excluded in its entirety. This means that the PPSA will continue to operate alongside the CTC to some extent. At this stage, the full impact of this is unknown. But a number of effects should be noted. Firstly, the impact of Australia signing up to the CTC is that checks for registration on both the domestic and international registries will now be required. Secondly, given that the CTC is now in force, registration of aviation interests should be made under the Convention.²⁷ Thirdly, The PPSA also

²⁶ *Aircraft Financing / PPSR* (2016) Australian Financial Security Authority <<http://www.ppsr.gov.au/aircraft-financing>>.

²⁷ Neil Hannan, "The Cape Town Convention" (2013) 25 *Australian Insolvency Journal*.

covers proceeds, therefore the continued registration on the PPSR should be considered for all transactions. Whilst the interplay of these pieces of legislation is being fine-tuned, financiers should ensure that their aviation interests are recorded on both the PPS Registry and the CTC's International Registry.²⁸ The practical effect for both financiers and insolvency administrators mean that there will be two competing security registration systems in place in relation to aircraft covered by the CTC. In terms of remedies, the PPSA appears to be broader in its application compared to the CTC. The PPSA extends rights over proceeds from the sale of an aircraft object to 'identifiable or traceable property which will allow property to be identified where it is different to the property originally received by the debtor as proceeds. Another difference is the ambit of each regime. Lastly, while the PPSA applies to all aircraft objects regardless of size and type, the CTC is more limited in its application. It only applies to airframes of a certain size and aircraft engines of a certain thrust. For many smaller, recreational fliers, the targeted scope of the CTC is a positive if not neutral feature, as the benefits of the CTC may not necessarily outweigh the costs of this segment within the aviation industry.²⁹

D *Interactions between the CTC and domestic insolvency laws*

Earlier, we saw that Australia adopted Alternative A for insolvency related proceedings under Article 30(3). This means secured creditors are entitled to enforce their rights after 60 calendar days without court interference.³⁰ Whilst the courts are restrained from delaying or preventing the enforcement of this remedy, they continue to have jurisdictions in relation to other aspects of security matters, such as validity of the claim over a security interest. This could have significant consequences for a company which enters into voluntary administration under Part 5.3A of the Corporations Act. Under this provision, administrators and creditors are given 25 business days to consider what to do

²⁸ *The Cape Town Convention / Capabilities / FTI Consulting* (2016) FTI Consulting Asia <<http://www.fticonsulting-asia.com/insights/capabilities/the-cape-town-convention-some-practical-insights>>.

²⁹ *Ibid.*

³⁰ Government must make certain qualifying declarations under the CTC (for example, Alternative A) for cheaper finance through export credit agencies to happen.

with the company. In practice, courts often extend this by up to six months or more. During the administration period, secured creditors are prohibited from exercising their rights. This is a fundamental feature of Australia's voluntary administration regime. Implementation of the Alternative A insolvency regime will mean that, in some circumstances, companies that enter into voluntary administration will lose the debtor-friendly arrangements under the Corporations Act. Giving secured creditors, owners or lessors the ability to enforce their security or rights during voluntary administration undoubtedly lowers the prospects of a company with aircraft assets being reorganised successfully. This clashes with the intention of Part 5.3A, which the courts have stringently defended. Going back to Ansett Airlines as an example, during its voluntary administration, the owners and lessors of a Boeing 727-227F aircraft attempted to repossess their aircraft. The Federal Court granted their application. However, their leave to obtain possession of the aircraft was both temporary and limited to the sole purpose of enabling it to continue freight operations that it had previously been carrying out in conjunction with Ansett. Despite their interest, the Court refused to give the owners and lessors full and unconditional possession of the aircraft, so as not to prejudice the negotiations which the administrators were undertaking, or undermine Part 5.3A of the Corporations Act.³¹ In fact, an independent third party legal analysis by Fitch Ratings in 2013 concluded that the Australian insolvency regime is slightly less beneficial to note holders than Section 1110 of the US Bankruptcy Code or the CTC and the Australian regime is not aircraft-specific, unlike Section 1110 and the CTC and does not have a cure requirement, unlike Section 1110 or the CTC.³²

IV CONCLUSION ON THE AUSTRALIAN EXPERIENCE

As we saw earlier, *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013* allows

³¹ *Re Ansett Australia Ltd (administrator appointed); Intrepid Aviation Partners VII LLC v Ansett Australia Ltd (administrator appointed) and Others* (2001) 39 ACSR 255.

³² Aviation Working Group, "Debt Capital Markets Financing Of Aircraft Equipment" (2014) <http://www.awg.aero/assets/docs/Capital_Markets_Paper.pdf>.

amendments to the *Air Services Act 1995*, *Civil Aviation Act 1988*,³³ and *PPSA* to ensure the CTC and protocol “complement and operate in harmony” with other Australian laws.³⁴ We also saw some incongruence between the CTC and the *PPSA* and domestic insolvency laws. Even though the CTC holds precedence over Australian laws in the event of inconsistency, it is not clear what “to the extent of any inconsistency” really means. On one level, it would not be inconsistent to record security interests on both the *PPSR* and the CTC’s International Registry. The real untested issues in the future is going to be priority issues between security interests registered on the *PPSR* and those on the CTC register, especially considering the differences in interests that can be registered. Financiers will need to check both registers to determine what securities are held over the aircraft, and what rights they have as such rights will vary according to whether the CTC or the *PPSA* applies. Until these issues are determined, it’d be wise for financiers to register on both. A potential issue of contention may arise over the proceeds of sale of aircraft. A *PPSA* security interest over aircraft includes the proceeds of that collateral. That means the *PPSA* security interest extends to cash proceeds if the grantor were to sell the aircraft. On the other hand, the CTC is intended only to deal with security over the “metal.” The security interest continues in the aircraft metal but not the proceeds after sale. So in this respect, a secured party would not be protected under the CTC International Register even though they would be protected if a *PPSA* security interest were made. Therefore, security registration under the *PPSA* may require some amendments to reflect the prevalence of the CTC to the extent of any inconsistency. The States and Territories will not be required to amend their legislation. However, they will be consulted on any changes to the *PPSA*. More analysis needs to be done around the interaction of the CTC with Australia’s insolvency laws especially its interaction with administration laws under the *Corporations Act*. It may require amendment so that Alternative A can prevail over existing insolvency laws where aircraft objects are concerned. It appears that the areas being looked at closely right now are the operation of an insolvency moratorium under s 440B and the exception for

³³ The legislative rules require consequential amendments to Part 47 of *Civil Aviation Safety Regulation 1998* with regards to the registration of aircraft, identification of the registered operator of an aircraft, transfer of ownership and suspension and cancellation of registration.

³⁴ *International Interests in Mobile Equipment (Cape Town Convention) Bill 2013* (Cth).

leases under s 443B. Opinions within the legal profession are that even solely for aircraft, for example, metal, both the Corporations Act and the Alternative A regime would co-exist. Only if there were an inconsistent result if both regimes applied would the CTC provision prevail. Arguably the Government was not prepared to make any substantial changes to domestic laws to accommodate for the CTC. They relied on the inconsistency provision in the enabling legislation instead. However, the Government was prepared to choose Alternative A because it wanted to give financiers the creditor-friendly protection, for example, the hard 60 days give back provision, and Accession qualified Australia and its airlines for a “Cape Town discount” in the exposure fees to export credit agencies.³⁵ In a parliamentary address given by Mr Warren Truss, leader of The Nationals, he acknowledged the benefits of acceding to the Convention and concluded that the Coalition will support implementation of the Convention, he also stated, “I must add that I have some discomfort with the concept that treaties might override Australian courts and cede authority to another land of an international organisation.” Coming from a politician with more than 25 years of experience in parliament, this is perhaps a not uncommon reflection of sensitivities and protectionism towards national laws. Fortunately, economic sense prevailed and Mr Truss conceded that, “I recognise, however, that to remain outside this Convention will disadvantage Australian airlines and make aircraft purchase more expensive.”³⁶ The impact of the CTC, and what it means for aircraft leasing and financing transactions in Australia will – in the expressed opinion of the legal market – need the combined efforts of the law firms, banks, lessors and airlines to come to a common understanding.³⁷

³⁵ Jeffrey Wool and Andrej Jonovic, “The Relationship Between Transnational Commercial Law Treaties and National Law – A Framework as Applied to the Cape Town Convention” (2013) 2 *Cape Town Convention Journal*.

³⁶ Commonwealth, *International Interests in Mobile Equipment (Cape Town Convention) Bill 2013, International Interests in Mobile Equipment (Cape Town Convention) Consequential Amendments) Bill 2013*, Federation Chamber, 5 June 2013, 5494 (Warren Truss).

³⁷ John Canning, “Australian Accedes To The Cape Town Convention” <<http://www.kwm.com/en/au/knowledge/insights/australia-accedes-to-cape-town-convention> 20150527>.

V VIEWS FROM THE CLASSROOM ON THE TEACHING OF TRANSNATIONAL LAW

So how does the CTC fit into a Transnational Commercial Law program from a students' point of view, as an example? I consulted with my classmates, both law and non-law students like myself. We all think it would be great to touch upon the CTC a little more than we did, although we understood time did not allow it. Professor Camilla Andersen introduced the CTC to us in the foundation unit in the context of legal harmonisation. I was intrigued by her description of the CTC, for example, how the protocol modifies and supplements the CTC in relation to aircraft objects. She first talked about how the CTC reached into areas of law that were until now, the domain of national legal systems. For example security registration, priority rules, insolvency and enforcement remedies.³⁸ She used the analogy of paper figure with different clothes to describe how by varying the content of the protocol, the contracting state, or the figure in this analogy, can address different domestic obligations and balance this against the legitimacy of the CTC. So I got hooked and ended up choosing the CTC as the topic for my very first legal paper, ever! I did not expect to see such narratives used to describe the CTC such as, “wildly unrealistic”,³⁹ “unorthodox”,⁴⁰ and breaking “new ground”,⁴¹ just to name a few. As I wrote the paper, I fell totally in love with the CTC and in the process, the study of law. These are the reasons I can't get enough of the CTC. It is unique, in the quarter of a century of international lawmaking in the field of secured transactions; the CTC is the only convention that has come into fruition.⁴²

³⁸ Brian F Havel and John Q Mulligan, 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic' (2015) 3 *Cape Town Convention Journal*.

³⁹ Roy Goode, 'Earth, Air, and Space: The Cape Town Convention and Protocols and Their Contribution to International Commercial Law' in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford Scholarship Online, 2009). In which he stated, “they both came into force on 1 March 2006 and provide precisely the international legal regime that would once have been dismissed as wildly unrealistic.”

⁴⁰ Iwan Davies, 'The New Lex Mercatoria: International Interests in Mobile Equipment' (2003) 52 *International and Comparative Law Quarterly*.

⁴¹ Jeffrey Wool, 'Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: A Preliminary Proposal for the Development of a Policy-based Unification Model' [1997] *Uniform Law Review*.

⁴² The International Institute for the Unification of Private Law (“UNIDROIT”) Convention on International Factoring, concluded in 1988, is in force but has secured few ratifications, mainly because its scope is too narrow: it is confined to notification factoring, which went out of favour soon

What an amazing feat. I'd like to know how we could replicate this? Driven by industry, the CTC has demonstrated that modern international commercial law should be derived from a wider field of sources, including the business community, to be truly responsive to market needs. It embodies the interplay between law and business from an original perspective. It was industry push that brought all the stakeholders including, governments, manufacturers, financiers, leasing companies and airlines, together and got everyone working together on an international substantive law.⁴³ Exploring party autonomy, I learnt about how party autonomy can be applied in a treaty by example of the CTC.⁴⁴⁴⁵ Because of the CTC, I learnt how scholarship freed from the constraints of comparative methodology and compulsion to adopt widely different judicial concepts allowed commercial outcomes to be kept firmly in focus. Whilst the CTC was not constructed using traditional legal methods, it is backed by a system of best practice based on modern financial modeling techniques. Since law is meant to facilitate trade, it bodes well for the authorities to support a legal framework informed by commercial objectives,

after its conclusion following a strong move towards non-notification invoice discounting. The UNIDROIT Convention on International Financial Leasing, adopted at the same diplomatic Conference, is also in force but has not been a success, though there are greater hopes for the 2008 UNIDROIT Model Law on Leasing. The 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, which came close to success after a mere two and a half years from start to finish, largely due to the driving force of Australian lawyer Richard Potok, came unstuck because of a significant change in approach and formulation at the diplomatic Conference, which upset the Europeans. Finally, the 2001 United Nations Convention on the Assignment of Receivables in International Trade has secured only a single ratification (by Liberia) in more than 11 years, which is perhaps because it is too wide-ranging and unfocused, though there are rumours that the US will ratify it.

⁴³ In the interest of progressing a common market, and perhaps in a nod to *laissez-faire* and party autonomy, the Convention was driven by industry both in effort and resources, rather than by lawmakers ... This can be traced back to 1994 when an ad hoc Aviation Working Group (AWG) was formed to emphasize the economic aspects of the international private law system. Before that, national legal regimes do not provide adequately for securitisation of aircraft assets. Consequently, the AWG proposed the negotiation of an umbrella Convention to be supplemented and modified by individual protocols to address different categories of high value equipment.

⁴⁴ For instance, it aims to reduce the cost of credit by providing predictability as well as the ability to create transactions that addresses different commercial needs. Article 8 allows for the inclusion of self-help remedies and Article 54(2) provides the right to opt out. Article 42 also allows parties to select the jurisdiction where disputes can be adjudicated. So how far can party autonomy reach? The answer is in so far as to not affect the proprietary aspects of a transaction.

⁴⁵ N. Orkun Akseli, *International Secured Transactions Law* (Routledge, 2011), 121.

based on responsible scholarship methodology, and brings in financial benefits. When looking at thinking outside the square, if anything, the freedom to identify areas in need of an improved legal framework, and free reign to structure the processes and organise the work, allowed the AWG to develop two unique and flexible instruments, including, the base convention and its associated protocol. Whilst it was not unusual for a treaty to be amended or supplemented by a protocol, what is uncommon about the CTC is the prevalent role assigned to the associated protocol since it is not simply an addendum but wields the power to override the base convention.⁴⁶ I learnt that harmonisation is not just about creating a global standard. For example, Australia's ratification of the CTC will bring the Council of Australian Governments ('COAG') one step closer to harmonising the laws between Australia and New Zealand. This has been an objective of the National Reform Agenda since 1992 and the CTC has played a supporting role in this.⁴⁷

The CTC is influential and inspiring. I think the CTC is a pioneer in so many ways. When it was first debated in 1996, there was a reference to its application to the shipping sector. The CMI, IMO as well as UNCTAD opposed it right away. They didn't think it was a good idea as the shipping sector always had its own international legal regime. The international convention governing security interests in ships, *The Maritime Liens and Mortgages Convention 1993*, had also just been adopted.⁴⁸ However, I believe that UNIDROIT is giving consideration to incorporating ships within the CTC. This time round, CMI is open to the idea and the President has convened a working group to review their position.⁴⁹ So I think the CTC is influential in many ways. What would I like to learn more in class? If time permits, general principles and features of debt capital markets financing and the importance of predictable insolvency laws. When I wrote the paper on the CTC earlier this year, I asked whether it

⁴⁶ This means that in essence, by varying the content of the protocol as it is adopted, a Contracting State can address its domestic obligations and balance this against the legitimacy of the Convention.

⁴⁷ In 1992, COAG signed an *Agreement Relating to Mutual Recognition* with New Zealand. The aim of the mutual recognition has been to create a national market for goods and services by establishing a regulatory environment which encourages this.

⁴⁸ Comité Maritime International, "International Working Group - Cape Town Convention" (2015) <<http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Assembly%20attachment%2015.pdf>>.

⁴⁹ Stuart Hetherington, 'International Law: Current Issues at the Comité Maritime International' (2014) 28 *Australian and New Zealand Maritime Law Journal*.

was a “balancing act or brave new world?” I approached the paper by debating the following issues: commercial sensibilities versus political sensitivities, national laws versus international laws, scholarship freedom versus bureaucratic constraints, compromise versus clarity, rules-based system versus mercantilist approach, legal authority versus influence of the private sector. One of the board positions I hold in my day job is Governing Board Member of The Confucius Institute at UWA. So please allow me to give Confucius a plug by sharing a quote I used to conclude the paper on the CTC: Confucius might well have had the Convention in mind when he said, “this equilibrium is the great root from which grow all human acting in the world, and this harmony is the universal path which they all should pursue.”⁵⁰

⁵⁰ Confucius., Mencius. and James Legge, *The Four Books* (Chinese Book Co., 1933). The original text in Chinese is: “中也者，天下之大本也；和也者，天下之达道也。”