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## COMMENTARY

# Commentary on ‘Assessing the legal and economic case for a shipping protocol to the Cape Town Convention’

Vincent Power★

## 1. Introduction

This short article comments on the article by Dr Ole Boeger on the legal case for applying the Cape Town Convention (CTC)<sup>1</sup> to shipping and hence the need for a shipping protocol to that convention.<sup>2</sup>

★ Partner, A&L Goodbody, Dublin. This is an article only. No legal advice is being provided. All views are personal. Legal or other advice should be taken before making decisions on the matters discussed in this article.

<sup>1</sup> On the CTC, see, *inter alia*, the Cape Town Convention Journal generally as well as the superb repository of material available at the ‘Cape Town Convention Academic Project’s Repository’ at <http://cdm15895.contentdm.oclc.org/cdm/repository> accessed 21 September 2016. For a recent assessment of the Cape Town Convention, see R Goode, ‘Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of The Cape Town Convention 2001 and its Protocols’ (2016) 65 *International and Comparative Law Quarterly* 523.

<sup>2</sup> On shipping and the CTC, there are many sources available so the following is a small selection.

On the literature, see Ole Böger, ‘The Cape Town Convention and Proprietary Security over Ships’ (2014) 19(1) *Uniform Law Review* 24.

On UNIDROIT and the CTC in regard to ships, see the May 2016 memorandum entitled ‘Draft Triennial Work Programme 2017–2019 Secured transactions: Preparation of Protocols to the Cape Town Convention – Ships and maritime transport equipment’, <http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-13add-04rev-e.pdf>; UNIDROIT, Memorandum, March 2013 – ‘International Interests in Mobile Equipment – (b)

Possible preparation of other Protocols to the Cape Town Convention (ii) Ships and maritime transport equipment (iii) Off-shore wind power generation and similar equipment’, <http://www.unidroit.org/english/governments/councildocuments/2013session/cd92-05cd-e.pdf>.

On the Comité Maritime International and the CTC in regard to ships, see Ann Fenech’s very helpful presentation to Comité Maritime International’s 42nd International Conference in New York, 4 May 2016, ‘An Introduction to the CMI IWG on Ship Finance Security Practices’, <http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57331cc5a3360c5f776ea041/1462967494090/Session±6±±Anne±Fenech±Introduction.pdf>; CMI’s 42nd International Conference web page with materials related to Session 6 Documents – Ship Financing Security Practices, 4 May 2016 – <http://www.cmi2016newyork.org/session-6>; CMI, International Working Group Questionnaire, 19 April 2016, <http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57249d4e2b8dde53fd045a96/1462017358545/Letter±to±Presidents±re±IWG±±Ship±Financing±Security±Questionnaire.pdf>; CMI Assembly, International Working Group Letter, 9 June 2015, <http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Assembly%20attachment%202015.pdf>; and CMI Ship Financing Security Practice website – <http://www.comitemaritime.org/Ship-Financing-Security-Practices/0,27150,115032,00.html>.

See also the Vedder Price International Law Firm Presentation, ‘Cape Town Convention for Ships: A Solution in Search of a Problem?’, October 2015 – <https://www.marinemoney.com/sites/marinemoney.com/files/John%20Bradley.pdf>. Each as accessed on 21 September 2016.

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Dr Boeger's article<sup>3</sup> 'argues that there is a case for the extension of the Cape Town Convention system to ships.'<sup>4</sup> Ultimately, his paper concludes that

there is a clear case for the preparation of a new Protocol to the Cape Town Convention covering security over ships. Should UNIDROIT and the Comité Maritime International continue their work on this project and should they succeed in advertising its advantages to interested industry circles, it is to be expected that the project could well attract the necessary support by governments, industry and interested circles to become another successful addition to the Cape Town Convention system.<sup>5</sup>

Dr Boeger is to be congratulated for a wonderfully incisive and comprehensive paper on the case for a new protocol to the Cape Town Convention which would cover security over ships. And, while not everyone will agree with the conclusions (or, perhaps, not agree *yet* pending the outcome of the deliberations in various quarters), no one could fail to be impressed by the extraordinarily precise evidence which he has collated and cogent argumentation which he has deployed and presented in the Article.

This short commentary looks at this issue more from a shipping law perspective generally than a financing perspective particularly because Jovi Tenev commented adroitly and expertly on those financing aspects.

## 2. Answers need questions

The Article has presented the answer, if one might paraphrase, that there is a need for a protocol on shipping but the question to which this answer is given needs to be analysed carefully.

Is the question simply one of 'would a shipping protocol to the Cape Town Convention help resolve some of the difficulties and

challenges in shipping finance?' or, is the question, the more involved one of

would a shipping protocol to the Cape Town Convention help resolve some of the difficulties and challenges in shipping finance and, if it would resolve such issues, would the protocol be adopted, ratified, enter into force and be implemented or used by sufficient in the sector to make a real difference?

It is manifestly easier to answer the former rather than the latter question. It may well be that the first question – the threshold one – needs to be answered comprehensively so as to compel people to consider the second question.

The Article recalls that the 2001 UNIDROIT Convention on International Interests in Mobile Equipment (that is to say, the 'Cape Town Convention' or 'Convention') has been one of the most ambitious and successful international conventions in the field of private law.<sup>6</sup> This is absolutely correct and a tribute to all connected with the Convention. It is also true, however, that it was ambitious because it *needed* to be; there was a real and pressing need to fill the gaps which existed in regard to, for example, aviation. It has also been successful because the Cape Town Convention appears to have been the best way to address this issue. The supporters of the *status quo* in the maritime world would argue that there is no comparable need in the area of maritime matters and, in particular, taking security over ships. They would argue that the issues are different, the history is more complex, the tapestry of existing laws (both at national and international) are more involved and that it is not possible to simply graft the Cape Town Convention onto the pre-existing maritime fabric. The Cape Town Convention has been successful because there were gaps in the law relating to certain types of assets (namely, aircraft equipment<sup>7</sup> and, to a lesser extent, railway rolling stock and space assets). The question therefore is whether or not comparable gaps exist in regard to ships. The preliminary

<sup>3</sup> Referred to hereafter as the 'Article'.

<sup>4</sup> E.g. Article, page 21.

<sup>5</sup> Article, page 29.

<sup>6</sup> Article, page 1.

<sup>7</sup> I.e. airframes, aircraft engines and helicopters.

answer, as the Article demonstrates, is that there are many gaps, or at least, inconsistencies in the rules relating to the way in which security interests operate in regard to ships. The observation about 'inconsistencies' is important because legal problems can arise not only because there are gaps which call out for laws but there can also be inconsistencies in the laws which call out for harmonising laws.

The real challenge, in answering this need to address the gap, is the problem of pragmatism rather than the problem of theory, namely,

would a shipping protocol to the Cape Town Convention help resolve some of the difficulties and challenges in shipping finance and, if it would resolve such issues, would the protocol be adopted, ratified, enter into force and be implemented or used by sufficient in the sector to make a real difference?

### 3. What type of problems would be overcome by applying the convention to the maritime sector?

The Article observes, quite rightly, that the maritime financing

market is traditionally riddled with difficulties stemming to a large extent from an unsatisfactory legal framework especially as regards differences between the legal systems concerning the use and status of proprietary security in cross-border business, i.e., legal difficulties that are typically regarded as arguing for legal harmonization.<sup>8</sup>

This is so true that it is axiomatic.

The Article advocates that the creation of a shipping protocol to the Cape Town Convention would provide solutions in such areas as diverse as the validity and effectiveness of security rights over ships under a foreign flag,<sup>9</sup> the registration in a single international register for international interests in ships,<sup>10</sup> having a clear and uniform system of priority for consensual proprietary security over ships,<sup>11</sup> remedies of default,<sup>12</sup> and the

harmonisation of the law of maritime liens generally.<sup>13</sup> This can be assessed after a systematic review of national laws (like the one being undertaken by the Comité Maritime International (which will be discussed later)) but seems correct in principle. At a high level, the issues which the Article addresses are clearly ones which a shipping protocol to the Convention should, in principle, be able to resolve. So, it should resolve the need for recognition of ship's mortgages and hypothecations under foreign law,<sup>14</sup> priority of consensual proprietary security over ships,<sup>15</sup> various issues concerning the requirements of registration in registers under national law,<sup>16</sup> the role of different remedies under existing proprietary security rights,<sup>17</sup> diverse issues regarding conflicts with non-consensual maritime liens<sup>18</sup> and the existing international instruments on proprietary security over ships and their lack of success.<sup>19</sup> However, the challenge should not be underestimated. Take the area of, for example, liens. There is no agreement internationally as to which maritime liens may or may not exist as a matter of law. Even if there could be agreement on liens for the purposes of a shipping protocol to the Cape Town Convention, this would also involve understanding the interaction with other maritime conventions on areas such as arrest.<sup>20</sup> The challenge in 'joining the dots' between the shipping protocol to the Cape Town Convention and the somewhat chaotic<sup>21</sup> tapestry of international maritime conventions should not be underestimated.

<sup>13</sup> Article, page 24.

<sup>14</sup> Article, page 6.

<sup>15</sup> Article, page 9.

<sup>16</sup> Article, page 11.

<sup>17</sup> Article, page 14.

<sup>18</sup> Article, page 15.

<sup>19</sup> Article, page 19.

<sup>20</sup> See Article, page 25 on 'avoiding conflicts with other international instruments dealing with enforcement issues (arrest and judicial sales)'.

<sup>21</sup> The chaos is at several levels: even if all the conventions and instruments which exist were in force (which they are not), there are varying levels of signature, ratification, entry into force and amendment with all of them.

<sup>8</sup> Article, page 1.

<sup>9</sup> Article, page 21.

<sup>10</sup> Article, page 21.

<sup>11</sup> Article, page 23.

<sup>12</sup> Article, page 23.

At the international level, there is clearly little clarity or agreement on the prioritisation of security in regard to security over ships. The creation of a shipping protocol to the Cape Town Convention would certainly help to ameliorate those issues. However, the difficulty in even agreeing the methodology for the ranking of security instruments should not be underestimated – the variations between jurisdictions (e.g. the issue of registrations on the same day ranking as of equal priority in some jurisdictions<sup>22</sup> but not in other jurisdictions) could make uniformity and unanimity in approach difficult. The Article recognises<sup>23</sup> (quite correctly) the difficulties as the *rationale* for the creation of a shipping protocol to the Cape Town Convention but, ironically, these difficulties are also one of the *barriers* to the adoption of such a protocol.

The Article explains that

on the basis of the extension of the Cape Town Convention system to ships, the registration of ship mortgages and hypothecations in numerous different national registers would be replaced by the registration of the international interest in a single international register.<sup>24</sup>

This is correct as a matter of law but one has to wonder whether sovereign States who jealously guard their role in registration and seek to distinguish their registry from others would be willing to concede much to an international registry under the Cape Town Convention. The competitiveness and jostling (not to put too fine a point on it) between registries and jurisdictions as well as the occasional desire for opacity which characterises some in the maritime sector means that the brilliance of a solution may not necessarily appeal to those who do not want such a solution.

#### 4. Would a shipping protocol ever enter into force and be effective?

The Article recognises that 'international legal harmonisation in the area of private law,

specifically in the law of property, is a notoriously slow and difficult process'.<sup>25</sup> This is correct. But it is probably even more accurate in the case of maritime matters where harmonisation is not only slow but incomplete and an on-going process.

The Article recalls a good example, in regard to liens – a scenario which is typical of many areas:

[w]hile the 1926 Brussels Convention [for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages] attracted 28 States Parties in total, it generally failed to gain support among the most important shipping nations world-wide. The 1967 Brussels Convention [for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages] was ratified only by three States and never entered into force since it did not meet the required number of five States Parties. The drafting and adoption of the 1993 Geneva Convention [on Maritime Liens and Mortgages] was motivated by what was widely regarded as a failure by the 1926 and 1967 Brussels Conventions to attract widespread support, but in the end the 1993 Geneva Convention was even less successful with only 18 States Parties.<sup>26</sup>

A review of the Comité Maritime International's Yearbook will show that there are many other examples of similar conventions being in the nature of ships which are designed and built but never put to sea.

It is clear that there are States in the world which are not party to various conventions and there could be issues arising from the fact that they are not party. The judgment on 3 February 2016 by the São Paulo Appeals Court in Brazil held that Nordic Trustee's Liberian ship mortgage would not be recognised as a valid mortgage in the Brazilian proceedings, and this judgment was upheld in an appellate decision on 1 June 2016. What is pertinent about that case (in the context of this observation) is that Brazil was a party to the 1926 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages and to the

<sup>22</sup> Article, page 10.

<sup>23</sup> E.g. Article, page 11.

<sup>24</sup> Article, page 22.

<sup>25</sup> Article, page 1.

<sup>26</sup> Article, page 20 (footnotes omitted).

Bustamante Code but Liberia was not a signatory to either of these Conventions and therefore reciprocity is not ensured. It is clear therefore even if rules are adopted which make sense, there is no guarantee that the conventions or protocols will be adopted even though they make sense and the reason for this could be due to the competition between jurisdictions and registries as well as other factors. So, how could this be overcome (if it can be overcome)?

### 5. There is a need for involvement by the entire maritime community

Before any attempt is made to extend the Cape Town Convention to the maritime sector, there is a clear need to involve the full maritime community in the decision-making.

The Article is correct when it recalls the counter-argument, at a time when there was a proposal to extend the then nascent Cape Town Convention to the shipping context, that 'the preparation of international rules governing ships and shipping was traditionally the preserve of specific international organisations with full participation of shipping circles.'<sup>27</sup> This view would be espoused by many in the maritime sector.

There must be full involvement by the inter-governmental organisations such as the International Maritime Organisation but even greater involvement by the Comité Maritime International as well as, critically, the wider maritime industry (e.g. the owners, charterers, financiers and lawyers). The outcome of that process of consultation should be neither prejudged nor assumed to be an easy process of consultation. The difficulties will include possible conflicts with pre-existing legal instruments and approaches.<sup>28</sup>

<sup>27</sup> Article, page 2.

<sup>28</sup> E.g. the 'possible conflict with an already existing international instrument, namely the International Convention on Maritime Liens and Mortgages that was adopted only shortly before at the 1993 Geneva Conference of the United Nations and the International Maritime Organization' (identified in the Article on page 2).

The Comité Maritime International has already become involved in the issue. It established in 2014 a Working Group on Ship Financing Security Practices under the leadership of the very experienced Ann Fenech who is a renowned Maltese shipping lawyer.<sup>29</sup> As the Article recalls, her group has not yet taken a position on the issue but is currently undertaking preparatory work collecting data and information on current financing practices in the various shipping jurisdictions.<sup>30</sup>

It is fortunate that the architecture of the Cape Town Convention lends itself to there being a specific shipping protocol. A protocol could seek to address sector-specific issues by adopting sector-specific rules and be a shipping-focused document. The Article identifies correctly that the

Protocols are not only necessary as instruments that provide for the application of the Cape Town Convention to the category of objects covered by the respective Protocols, but they also contain sector-specific rules, amending the general rules of the Cape Town Convention according to the needs of the different industry sectors.<sup>31</sup>

In this respect, there is a certain beauty in the shipping community having its own shipping measure.

### 6. How would the adoption of the shipping protocol interact with existing international maritime measures?

It is worth considering the regime associated with the adoption of measures in the international

<sup>29</sup> See <<http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57331cc5a3360c5f776ea041/1462967494090/Session+6+-+Anne+Fenech+Introduction.pdf>> accessed 21 September 2016.

<sup>30</sup> See the questionnaire published on the website of the Comité Maritime: <<http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57249d4e2b8dde53fd045a96/1462017358545/Letter+to+Presidents+re+IWG+-+Ship+Financing+Security+Questionnaire.pdf>> accessed 21 September 2016.

<sup>31</sup> Article, page 1.

maritime sphere. The adoption process is often long and difficult. Even when the measures are adopted, there is no guarantee that they will enter into force; for example, the Brussels Convention for the 1967 Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages was adopted to replace the 1926 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens but it never entered into force. Moreover, as the Article identifies,<sup>32</sup> the approach of the Cape Town Convention is different from some pre-existing international instruments relating to proprietary security over ships and this means that there would have to be some movement on one side or the other of this debate and it seems difficult that the web of maritime measures<sup>33</sup> could be easily amended or ignored so as to fit into the regime and rubric of the Cape Town Convention regime. The question is whether the long-established and slightly idiosyncratic armada of maritime conventions will change course to align with the modern and nimble Cape Town Convention! This is not to be underestimated.

## 7. How would the adoption of the shipping protocol work from the perspective of the way in which the maritime sector perceives itself and it perceives the aviation sector?

In seeking to frame an international instrument and, moreover, have it accepted and operated, one has to be very skilful and reflective on all the dynamics and dimensions – this is the stuff of diplomacy. How a proposal is framed, shaped, worded, presented, perceived, implemented and operated are all very important. One need only reflect on, in a specific

<sup>32</sup> Article, page 19.

<sup>33</sup> E.g. in the context of proprietary security over ships, see the 1926 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, the 1967 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages and the 1993 Geneva Convention on Maritime Liens and Mortgages.

context, the engagement between China and the UK over Hong Kong.<sup>34</sup>

Many in the maritime community see maritime law as special and separate. They often see themselves as being particularly distinct from the aviation sector.

Ann Fenech described this concern by some in the sector in her very succinct remarks to the 42nd International Conference of the Comité Maritime International in New York on 4 May 2016 when she recalled that the

inclusion in the [draft Cape Town Convention] of ships was very vigorously questioned at the time by the International Maritime Organisation (IMO) as well as the United Nations Conference on Trade and Development (UNCTAD). The main reasons against the inclusion of a shipping protocol was the fact that international maritime law is a distinctive corpus juris which had long been established, furthermore the International Convention on Maritime Liens had just been adopted, and that furthermore any international development related to shipping had to include the industry and recognised bodies which had long been an intrinsic part of the development of International law related to and affecting shipping. As a result, references in the Cape Town Convention to shipping were effectively dropped and the Cape Town Convention was adopted in 2001<sup>35</sup>

but obviously without a protocol on ships.

If there is to be now a protocol on shipping then it is imperative that the maritime community is involved fully with a real sense of ownership and involvement.

## 8. Could the shipping community benefit from the application of the Cape Town Convention regime to shipping?

Could the shipping community benefit from the application of the Cape Town Convention

<sup>34</sup> See C Moore, 'Margaret Thatcher: The Authorized Biography' (2015) 2, 95–103.

<sup>35</sup> See page 1 of her remarks which are published at: <http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57331cc5a3360c5f776ea041/1462967494090/Session+6+-+Anne+Fenech+Introduction.pdf>.

regime to shipping? The short answer is that the shipping community could benefit. The level of international harmonisation, predictability, greater legal certainty and efficiency of process would certainly benefit the maritime community. The maritime space is, to borrow a phrase from the Article, so 'riddled with difficulties stemming to a large extent from an unsatisfactory legal framework'<sup>36</sup> that it would seem ripe for the Cape Town Convention.<sup>37</sup> The international element (as in Article 7 of the Cape Town Convention), the publicity of international interests in mobile equipment (as in Article 16 of the Cape Town Convention), the folio system (as in Article 22 of the Cape Town Convention) and the searchable/accessible format (also as in Article 22 of the Cape Town Convention) are all admirable from the perspective of the shipping sector. Systems which give clarity on priorities (as in Article 29 of the Cape Town Convention) would seem custom made for the shipping sector.

Would the Convention replace the existing regime(s) operating in the maritime sector? Does the Convention need to replace entirely the existing regime(s) operating in the maritime sector? 'No' would be the short answer to both of those questions. Therefore the protocol would have to be dovetailed into all of that pre-existing 'wiring'.

The Article also recognises that 'it often proves impossible to reach a broad international consensus which bridges the differences between states from different legal traditions and with different levels of socio-economic development'.<sup>38</sup> This is again correct. But it is probably even more accurate in the case of maritime matters where harmonisation is slow,

complicated, complex and fraught with difficulties.

Does the Convention limit what could be addressed in the shipping protocol? The answer is probably not. As the Article identifies: the

rules might even go beyond the scope of the issues originally envisaged for the Cape Town Convention, as evidenced by the provisions in the draft Protocol on Matters specific to Agricultural, Construction and Mining Equipment concerning conflicts with security over immovable property.<sup>39</sup>

## 9. Could the level of competition between states in the maritime sector deter co-operation in regard to the convention?

Is the level of competition between States in the maritime sector so great that this would deter co-operation in regard to the Convention? The Article observes correctly that the Convention has attracted 'wide-spread support world-wide, among its seventy-two State Parties are high-income economies, newly industrialised countries as well as developing countries and it includes countries from different legal backgrounds, whether civil law countries, countries from the common law world or others'.<sup>40</sup> Such cohesion and co-operation among States indicates a lack of competition or conflict among the contracting States to the Convention. However, is the level of competition between States lower in the maritime sector than it is in the area of aviation? Sadly, it probably is lower and therefore the challenge will be greater and the issues more complex particularly as the Law of the Flag is so important in maritime matters but some of the Flag States are not necessarily keen on adopting such measures – one need only think about the need to resort to Port State jurisdiction, rather than Flag State jurisdiction, in safety matters.

<sup>36</sup> Article, page 1.

<sup>37</sup> See O Böger, 'The Cape Town Convention and Proprietary Security over Ships' (2014) *Uniform Law Review* 24 and R Goode, 'Battening down your security interests: How the shipping industry can benefit from the UNIDROIT Convention on International Interests in Mobile Equipment' (2000) *Lloyd's Maritime and Commercial Law Quarterly* 161.

<sup>38</sup> Article, page 1.

<sup>39</sup> Article, page 1.

<sup>40</sup> Article, page 1.



## 10. The role of the crisis in the maritime sector as a stimulus for adopting a shipping protocol

The Article recognises that the maritime sector is in crisis.<sup>41</sup> This is correct but it is fair to say that the shipping sector is always in the middle of some crisis. Crises in terms of shipping finance are nothing new. (Noah probably had difficulty in raising the finance to build the Ark because no one believed there would be a flood and everyone wondered how a bank 'under water' would have been able to ensure payment when the courts were also 'under water'! Then when the rains started, everyone started seeking and providing finance for the building of arks but it was too late, the flood came before the arks were completed. There was then another crisis when the flood receded and there was reduced demand for arks. It is fair to say crises are regular and long-standing in this sector!) If the Cape Town Convention is to be extended to ships then the rules should not be designed solely to address the crisis issues (or the current crisis issues) but to address the issues arising in times of both boom and bust. Of course, the crisis might well be used to stimulate discussion and encourage agreement – using the old adage, 'never waste a good crisis'.

## 11. What would help gather industry support?

The shipping protocol must resolve some problems or issues which would not otherwise be soluble. The supporters or advocates of a protocol for ships should therefore survey the industry and sector thoroughly to identify problems and then see how a shipping protocol for the Cape Town Convention could resolve those issues. This is being done by the Comité Maritime International and their work will be valuable.

There could well be some support from the financiers because, as the Article identifies

<sup>41</sup> Article, page 2.

[s]trengthening the position of the creditor in the enforcement of the security against the debtor is another main objective of the Cape Town Convention. In the event of the debtor's default, the creditor may take recourse to a harmonised set of remedies, including self-help remedies, and appropriation of the collateral in satisfaction of the secured obligation is encouraged.<sup>42</sup>

The shipping protocol should be customised for shipping generally. It could also be the case that there could be a protocol dealing with particular types of vessel if needed.

It is worth acknowledging a somewhat deep seated view in many quarters of the maritime sector (and perhaps in the aviation sector) that there is relatively little which can be learned from the aviation sector by the maritime one. Advisors and those outside the sector are usually more convinced that there are lessons to be learned by the maritime sector from the aviation sector (and vice versa) than those people within the sectors. The protocol needs to be portrayed as a maritime measure and not as an aviation success which can now be grafted on the maritime sector. Put simply, the entire maritime community needs to 'own' the process and the protocol.

## 12. Conclusions

At a somewhat simplistic level, there is no harm in adopting a shipping protocol to the CTC because it could prove useful one day. As we all know, the initial drafting contemplated the application of the eventual Cape Town Convention to ships,<sup>43</sup> but it is a question of now whether that was an opportunity lost forever or an opportunity which can be regained. On balance, it should be regained but it should be recognised that it could be a difficult and long struggle which may not be entirely successful.

There would be great merit in waiting for the outcome of the very impressive and

<sup>42</sup> Article, page 5.

<sup>43</sup> Article 2(1)(c) of the first set of draft articles of a future UNIDROIT Convention on Interests in Mobile Equipment, March 1996, UNIDROIT document Study LXXII – Doc. 24.

comprehensive information gathering exercise conducted by the CMI – a review of the detailed questionnaire<sup>44</sup> would lead one to the conclusion that the information to be collated by that process would not only be rich in terms of the detail but essential to the 'next steps' to be taken.

It is quite possible that a shipping protocol would resolve many of the issues involved in the maritime sphere in theory and principle but it may not do so in practice unless there is a great deal of delicate diplomacy deployed. There are practical issues which need to be overcome: agreement on the contents; acceptance of the resultant regime;

activation of the regime in terms of entering into force; and co-ordination between the shipping protocol and the other laws and instruments in maritime law. The magnitude of that task should not be underestimated. It will be interesting to see the results of the Comité Maritime International's survey to see the scale of that task. In the interim, one answer – but an unsatisfactory one – to the question of 'should there be a maritime or shipping protocol to the Cape Town Convention?' is, like a wise old gentleman might say, at this stage of the process, 'to answer yes or no to that question might give the wrong impression'!

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<sup>44</sup> See <http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57249d4e2b8dde53fd045a96/1462017358545/Letter+to+Presidents+re+IWG+Ship+Financing+Security+Questionnaire.pdf> accessed 21 September 2016.