

NOTES AND COMMENTS

Significance of Coordination: A Comparison between the Cape Town Convention and Hague Securities Convention

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(Received 2 December 2024; revised 16 July 2025; accepted 23 July 2025)

Abstract

The Cape Town Convention is widely regarded as the most successful international convention in terms of ratifications. This essay aims to explore the fundamental reasons behind this success. While it is undeniable that the Cape Town Convention receives substantial industrial support in response to urgent market demands and the innovative protocols it established, this essay argues that this alone does not fundamentally explain its success.

Instead, the underlying reason lies in the Convention's ability to avoid the trap of a false dichotomy – where one side seeks to convince the other to agree with its viewpoint. Rather, the key is to strive for a viable compromise that accommodates the perspectives of both, or even multiple stakeholders. This proposition will be illustrated by drawing on the social science concept of coordination, through a comparative analysis of the drafting processes of the Cape Town Convention and the Hague Securities Convention.

Keywords Cape Town Convention; Hague Securities Convention; Private International Law; Ratification; Coordination; Industrial Support

Harmonization in international commercial law is a complex endeavour. Nonetheless, the Cape Town Convention on International Interests in Mobile Equipment (the “Cape Town Convention”) has been generally recognized as the most successful international convention.¹ This year, India witnessed a prosperous course to ratify it, following the announcement by the Ministry of Civil Aviation Secretary Vumlunmang Vualnam in his inaugural address.² More recently, International Institute for the Unification of Private Law

¹ Thomas KEIJSER, “The Aircraft Protocol and the Imminent Entry into Force of the Rail Protocol to the Cape Town Convention: Time to Factor in Developed-Developing Countries Dynamics and the Environment” *Oxford Business Law Blog* (15 January 2024), online: Oxford University <https://blogs.law.ox.ac.uk/oblb/blog-post/2024/01/aircraft-protocol-and-imminent-entry-force-rail-protocol-cape-town>.

² Dev KACHARI, “Ratification of Cape Town Convention at Final Stages: Aviation Secretary” *Economic Times* (5 June 2024), online: Economic Times <https://infra.economictimes.indiatimes.com/news/aviation/ratification-of-cape-town-convention-at-final-stages-aviation-secretary/110735138>.

co-hosts consultation event on the implementation of the Cape Town Convention and its Protocols in Hong Kong, China.³

Nonetheless, it is widely believed that harmonization of property and priority matters prove to be exceedingly difficult. While some suggest that the immense industrial support is a crucial factor contributing to the success of the Cape Town Convention, a comparison with the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary in 2002 (the “Hague Securities Convention”), which also enjoyed a similar level of support, indicates that the latter’s failure points to more fundamental reasons explaining the success of the Cape Town Convention.

To further develop this argument, this essay draws on the two-stage process of ratification articulated by Hoekstra.⁴ He suggests that the first stage involves agenda-setting, where the convention must be prioritized before ratification is considered.⁵ The second stage requires the convention to navigate the national legislative process in order to achieve ratification.⁶ While Hoekstra emphasizes the first stage, this essay focuses on the second stage, wherein I propose that the appropriate course of action is not to seek agreement, as no party should be persuaded to align with the other. Rather, the goal should be to find a middle ground that accommodates the interests of as many stakeholders as possible. This approach is illustrated by the success of the Cape Town Convention in contrast to the failure of the Hague Securities Convention.

I. A brief overview of the Cape Town Convention

The Cape Town Convention creates an international framework for the secured financing of high-value mobile equipment that is transported across borders or frequently utilized overseas. By reducing the risks for financial institutions involved in exporting this equipment, the Convention also helps lower borrowing costs associated with equipment financing, ultimately benefiting both the public sector and businesses that need movable equipment (such as MAC equipment) for their initiatives.⁷

Traditionally, disputes involving individuals from different jurisdictions have been settled through the application of conflict-of-law rules.⁸ Each jurisdiction has its unique set of conflict-of-laws principles, meaning that the applicable legal framework and the resolution of the dispute largely hinge on where the proceedings take place.⁹ This situation can create unpredictability in the application of legal standards regarding enforcement, insolvency, and the establishment of real rights in equipment.

³ UNIDROIT, “UNIDROIT Co-Hosts Consultation Event on the Implementation of the Cape Town Convention and Its Protocols in Hong Kong, China” (28 November 2024), online: UNIDROIT <https://www.unidroit.org/unidroit-co-hosts-consultation-event-on-the-implementation-of-the-cape-town-convention-and-its-protocols-in-hong-kong-china/>.

⁴ Johanna HOEKSTRA, “Political Barriers in the Ratification of International Commercial Law Conventions” (2021) 26 Uniform Law Review 43 at 45.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Iyare OTABOR-OLUBOR, “From Red Tape to Red Carpet: The UNIDROIT Cape Town Convention and MAC Protocol’s Adventure in Africa” (2024) 29(3) Uniform Law Review 379 at 383.

⁸ Michael BOGDAN, *Private International Law as Component of the Law of the Forum* (The Hague Academy of International Law 2012) at 27.

⁹ *Ibid.*

In transnational commercial law, especially concerning cross-border transactions like international equipment financing, it is crucial to undertake concerted efforts to minimize reliance on these unpredictable conflict-of-laws systems.¹⁰ To facilitate the financing of particular categories of high-value mobile equipment, the Convention establishes a consistent set of rules for the creation and enforcement of three types of personal property interests:

1. A grantee's security interest;
2. An unpaid seller's lien under a title reservation agreement; and
3. A proprietary right held by a lessor under a financial and true lease agreement.¹¹

These interests are referred to within the Convention as "international interests".¹² It is necessary for the debtor to be located in a Contracting State at the time the agreement is made, thereby allowing for the effective establishment of an international interest in the collateral for the financier, even if the financier is based in a non-Contracting State.¹³ Under the Convention, international interests are recognized independently of national interests, meaning that no reference to them is necessary, nor is compliance with any national law required for their creation.¹⁴ The significance of the Convention is underscored by its status as the "most successful secured transactions-related international instrument ever, by virtually any standard".¹⁵

II. Industrial support of the Cape Town Convention

The success of the convention is encouraging because it is widely believed that it is difficult to harmonize matters on property and priority matters. There have been suggestions that achieving harmonization through conventions is particularly challenging in certain legal domains, such as property rights, priority rules, and insolvency laws.¹⁶ These areas of law have deep-rooted traditions within each jurisdiction and are intertwined with the fabric of their respective societies. The difficulty in harmonizing security interests was underscored in a previous instance, when the United Nations Commission on International Trade Law (UNCITRAL) commissioned Professor Ulrich Drobnig to conduct a comprehensive study on the legal principles governing security interests across diverse legal systems worldwide.¹⁷ The study revealed significant disparities in the treatment of secured credit among jurisdictions. As such, garnering adequate government support for an international conference addressing the relatively technical topic of security interests would likely prove challenging.¹⁸ Furthermore, even if a consensus on the text of an international instrument could

¹⁰ 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: Oxford University Press, 2009), 650.

¹¹ Cape Town Convention, Article 1(j).

¹² Cape Town Convention, Article 2.

¹³ T Teresa DE LAS HERAS BALLELL, "The Interaction Between the MAC Protocol to the Cape Town Convention and Domestic Law" (2020) 2 *Journal of International Banking and Financial Law* 112 at 113.

¹⁴ Sandeep GOPALAN, "Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment" (2003) 9 *Law and Business Review of the Americas* 255 at 263.

¹⁵ Benjamin VON BODUNGEN and Charles W. MOONEY Jr., "Immovable-Associated Equipment Under the Draft MAC Protocol: A Sui Generis Challenge for the Cape Town Convention" (2017) 6 *Cape Town Convention Journal* 37 at 37.

¹⁶ Roy GOODE, "Security Interests in Mobile Equipment: Lawmaking Lessons from the Cape Town Convention" (2014) 35 *Adelaide Law Review* 59 at 69.

¹⁷ UN Secretary-General, *Study on Security Interests* (U.N. Doc. A/CN.9/131, P 4.2.1, 1977) 218.

¹⁸ *Ibid.*

be reached, it is observed that national parliaments would probably exhibit a slow and, perhaps, reluctant pace in ratifying such a text.¹⁹

This reluctance to establish uniform rules concerning the international financing of the acquisition and utilization of mobile equipment in the context of priority rules can be attributed, to a large extent, to the hesitance observed among continental European states. These states appear to express concerns regarding the potential impact of common law principles on their national laws, which prescribe strict limitations (*numerus clausus*) on in rem interests.²⁰ Consequently, the efforts to promote international and regional initiatives in the realm of security in movable property have encountered significant challenges, as noted by Professor Goode, with minimal success achieved thus far.²¹

Academics generally attributed the success to overcoming these difficulties to the immense industrial support it received.²² Beyond question, the project was strongly supported by the aviation industry fundamentally due to great demand.²³ The market players' involvement is evidenced by their contribution to the drafting process. Indeed, the drafting of the Cape Town Convention was significantly influenced by industrial responses and the involvement of key figures in the aviation industry. A prime example is how the original formulation of the convention only comprised only five articles, but later gained momentum and became increasingly ambitious with the active participation of industry experts and the establishment of the Aviation Working Group (AWG) under the guidance of UNIDROIT's consultant Jeffrey Wool.²⁴ The range of issues to be considered multiplied exponentially, ending up with 62 articles and an Aircraft Protocol of a further 77 articles – 99 articles in total.²⁵

The drafting of the Cape Town Convention was also characterized by a deliberate and thorough approach. An illustrative example of this careful consideration can be seen in the extensive discussions surrounding the treatment of aircraft engines. One fundamental question was whether aircraft engines should be considered an integral part of an aircraft (title transfer) or treated as standalone assets, irrespective of whether they are on-wing or off-wing, and regardless of whose wing they are attached to (title tracking).²⁶

The aviation industry dedicated a substantial amount of time, precisely six months, to delve into this matter.²⁷ An ad hoc committee was established. After careful consideration and thorough discussions, a consensus emerged within the industry that the development of a title-tracking regime would serve the industry's interests more effectively. This consensus was officially communicated to the larger working group through a memorandum. This was followed by intergovernmental negotiations which spanned six years and were conducted under the auspices of the International Civil Aviation Organization and UNIDROIT. The negotiations received significant support and active participation from key stakeholders, including AWG, which represented manufacturers, leasing companies, and banks, as

¹⁹ *Ibid.*

²⁰ Alejandra M. GARRO, "The Reform and Harmonization of Personal Property Security Law in Latin America" (1990) 59 *Rev Jur U P R* 1 at 133.

²¹ Goode, *supra* note 16 at 60.

²² Gopalan, *supra* note 14 at 270.

²³ Goode, *supra* note 16 at 62.

²⁴ Goode, *supra* note 16 at 63.

²⁵ Roy GOODE, "From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols" (2012) 17 *Uniform Law Review* 599 at 602.

²⁶ *Ibid.*, 603.

²⁷ Roy GOODE, "Creativity and Transnational Commercial Law: From Carchemish to Cape Town" (2021) 70 *International and Comparative Law Quarterly* 1 at 25.

well as the International Air Transport Association, representing a majority of the world's airlines.

Throughout these negotiations, the treatment of aircraft engines as separate assets was a subject of discussion and occasional challenge. The debate was spirited, but instead of seeking to force one side to surrender, emphasis was placed on investing time and patience to persuade and convince all parties involved. The goal was to ensure that any proposals put forth would, to the best extent possible, accommodate the interests and concerns of all stakeholders involved.

Nonetheless, it is not uncommon for conventions to be launched due to industrial need, yet their practical implementation often falls short of expectations and fails to generate the desired impact. A prime example would be the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary in 2002 (the "Hague Securities Convention").

III. Hague Securities Convention and the insufficiency of industrial support alone

The proposal was formulated on the basis of a fundamental observation – in modern markets, transactions involving intermediaries who act as intermediaries between the issuer and the holder of securities have become commonplace. But in such transactions, the interest of the holder is only recorded and represented solely by the intermediary, with no resort to the issuer of securities.²⁸ The proposal argued that "[t]he need for a convention is urgent because of the systemic risk implications and because the existing legal uncertainty in the area has the potential to impede the growth internationally of financial services industry arrangements for the transfer of securities through multiple tiers of intermediaries".²⁹

The securities industry also consistently emphasizes the prevalence and significance of intermediaries transactions, which underscores the importance of addressing and regulating such practices within the industry. The International Swaps and Derivatives Association recognized that "there are a number of weaknesses in the legal framework for indirectly held securities in many, if not most, jurisdictions around the world".³⁰ The Securities Industry Association in its comments on the (then) proposed Hague Securities Convention, noted that "[p]ublic trust and confidence in the capital markets, as well as market efficiency, are enhanced when national laws are harmonized to ensure legal certainty and predictability, so that parties' expectations as to the applicable law governing their transactions are not frustrated".³¹

The European countries were all along involved in all stages of the negotiation process. Thus, the Hague Securities Convention was the result of negotiations conducted by diverse delegations representing a wide range of stakeholders. These delegations included representatives from 31 member states of the Hague Conference, 2 non-member States, 8 intergovernmental organizations, and 9 non-governmental organizations.³² They were carefully designed to reflect major legal systems and ensure expertise in various areas.

²⁸ Hague Conference on Private International Law, *Proposal by the Delegations of Australia, the United Kingdom and the United States of America* (Working Document No 1E, May 2000).

²⁹ *Ibid.*

³⁰ Sandeep GOPALAN, "A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law" (2008) 39 *Georgetown Journal of International Law* 327 at 343.

³¹ *Ibid.*

³² Christophe BERNASCONI and Harry C. SIGMAN, "The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (Hague Securities Convention)" (2005) 10 *Uniform Law Review* 117 at 118.

Notably, the participants comprised not only private international law experts but also delegates with specialized knowledge in securities industry practices and commercial law.³³

Despite its undeniable need and extensive engagement with stakeholders, the Hague Securities Convention has still experienced limited success, with only three ratifications obtained thus far. Notably, significant members of the European Union and the European Central Bank voiced objections to the approach taken in its final text, indicating a divergence of perspectives in relation to priority and property rules.³⁴ Similarly, Professor Goode points out that the Hague Securities Convention “came unstuck because of a significant change in approach and formulation at the diplomatic Conference, which upset the Europeans”.³⁵

This highlights that the mere existence of a demand for a convention to harmonize laws is not enough on its own, especially when industrial participants from different countries may hold divergent views on harmonization, particularly concerning priority and property rules. Therefore, it becomes crucial to explore what contributed to the success of the Cape Town Convention other than its market demand.

IV. Coordination but not cooperation for success of a convention

In explaining the success of the Cape Town Convention, I argue that it is important appreciate the difference between coordination and cooperation. Coordination is broadly understood in the social sciences as the linking, meshing, synchronization, or alignment of actions.³⁶ Coordination typically involves the specification and operation of information-sharing, decision-making, and feedback mechanisms in the relationship to unify and bring order to partners’ efforts, and to combine partners’ resources in productive ways.

A conceptual emphasis on coordination issues, rather than on cooperation issues, reveals a nuanced perspective on alliances. While the cooperation lens centres on the degree of consensus among partners regarding objectives, resource contributions, and the distribution of benefits, the coordination lens illuminates the *specific methodologies* partners adopt to implement and manage their relationship.³⁷ Coordination requires adjustment of own interest to each other’s practices and structures.³⁸

It is wholly inadequate for a convention to seek uniformity in complex matters merely through cooperation, which implies little more than the parties convening based on common reference points. As discussed in the preceding section, industrial support alone does not guarantee the success of the Cape Town Convention. Therefore, it is imperative to prioritize coordination, necessitating an adjustment of expectations to incorporate the perspectives of other states in the pursuit of uniformity.

However, this still begs a pivotal question regarding the nature of these adjustments to expectations, a question that the concept of coordination remains silent on. It leaves hanging the question of how much adjusting each party undertakes.³⁹ Consequently, I propose that instead of compelling other parties to conform to one of the available options, the focus should be on striving for a middle ground that accommodates the diverse opinions

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Goode, *supra* note 16 at 61.

³⁶ Gerardo A. OKHUYSEN and Beth A. BECHKY, “Coordination in Organizations: An Integrative Perspective” (2009) 3 *Academy of Management Annals* 463 at 484.

³⁷ Ranjay GULATI, Franz WOHLEGEZOGEN, and Pavel ZHELYAZKOV, “The Two Facets of Collaboration: Cooperation and Coordination in Strategic Alliances” (2012) *The Academy of Management Annals* 1 at 7.

³⁸ *Ibid.*

³⁹ Okhuysen and Bechky, *supra* note 36 at 480.

and interests of all stakeholders. This principle is poignantly illustrated by the contrasts between the Hague Securities Convention and the Cape Town Convention.

A. Hague Securities Convention

The negotiation process of the Hague Securities Convention witnessed a significant philosophical divide centred around the choice between adopting the Uniform Commercial Code UCC approach, favoured by the United States, and a more traditional property-law-based approach, which found support among the European countries.⁴⁰ The UCC approach would grant flexibility to intermediaries and account holders to designate the applicable law. On the other hand, the traditional property-law-based approach sought to identify the appropriate location of securities accounts or adopt a similar approach.⁴¹

Unfortunately, instead of seeking a compromise that would accommodate both approaches, the drafting process became trapped in a false dichotomy, where it seemed necessary to choose one over the other. Eventually, the European countries, not fully accepting the UCC approach, were ultimately deemed represented by the European Union given its alleged competence based on previously promulgated directives.⁴² The European Union aligned itself with the UCC approach, leading to a “compromise” that was more driven by institutional dynamics than a genuine consensus on the preferred approach. Nonetheless, the directives alone actually did not impose a binding obligation on the member states.⁴³ As a result, the European countries retained their autonomy and subsequently chose not to ratify the convention.

B. Cape Town Convention

The case of Hague Securities Convention underscores the significance of exercising patience and attentiveness to all perspectives and come to a solution which pleases all the parties concerned. In other words, coordination should take the form of not aiming to convince others to side with one, but seeking a solution which is able to accommodate the concerns of all the parties. The Cape Town Convention is a paradigm example of such a coordination. The Cape Town Convention contains three mechanisms which bear the hallmarks of such a feature, namely (1) creation of an international interest; (2) declarations; and (3) the protocol systems.

Recognizing the challenge of unifying priority rules across different legal traditions, instead of opting for one approach in preference over the others, the Cape Town Convention creates an international regime to address this issue. However, the concept of establishing a single international registry to record international interests through a fully electronic system was initially considered “a flight of fancy”.⁴⁴ The technological complexities involved in implementing the International Registry proved to be more complex than anticipated.⁴⁵ The rules governing the International Registry were intricate. For example, a Supervisory Authority also needs to be established to oversee its operations. Questions as to its immunity, whether the liability of the registrar should be strict, and insurance provisions were all difficult questions.⁴⁶ In terms of operation, ensuring a seamless 24/7 operation required

⁴⁰ Charles W. MOONEY Jr., “Introductory Note to Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary” (2007) 46 International Legal Materials 645 at 647.

⁴¹ *Ibid.*

⁴² Mooney, *supra* note 40 at 648.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Goode, *supra* note 16 at 64.

⁴⁶ Goode, *supra* note 25 at 603.

cooperation between public and private sectors.⁴⁷ Despite these substantial challenges, the determination and efforts exerted by the drafters and market players played a pivotal role in convincing different states to adopt and contribute to this registry. The International Registry has been described as the “central plank” of the Cape Town Convention,⁴⁸ underscoring its significance in facilitating the effective implementation of the convention.

Another example is the disapplication mechanism contained in the Cape Town Convention, whereby states can choose to disapply some of the provisions. The primary objective of the Cape Town Convention is to offer creditors prompt and effective remedies. However, concerns arose regarding certain provisions that potentially conflicted with long-established public policy principles of states, thus creating reluctance among states to ratify the convention. Instead of forbearing the concerns raised by some of the states, to address this issue, a well-structured mechanism of declarations was established. Through this mechanism, a Contracting State can choose to exclude specific provisions that may contradict its public policy, such as the exercise of self-help remedies, expedited relief for creditors pending the final resolution of their claims, or the selection of jurisdiction.⁴⁹ Additionally, other provisions are not automatically applicable within a Contracting State unless the state has made a declaration to opt into them. Examples of such provisions include choice of law or the enforcement of creditors’ rights in insolvency proceedings.⁵⁰ This carefully devised system of declarations ensures that the Cape Town Convention can be tailored to respect the diverse public policy considerations of each Contracting State, thereby facilitating wider acceptance and implementation of the convention while addressing potential conflicts with pre-existing legal frameworks.⁵¹

The declaration system could also be seen in the Hague Securities Convention, yet with a much more limited scope. It primarily focuses on determining the applicable law for multi-unit states. However, the use of declaration systems should have been maximized to accommodate and address any concerns raised by individual states. For instance, in the case of the European Union countries, one of their concerns was that the Hague Securities Convention could potentially restrict their ability to regulate financial institutions and markets.⁵² In this regard, one might consider offering means to the states whereby they make declarations that specific provisions should not affect their regulatory powers could serve as an institutionalized assurance. This would provide a level of reassurance to states that might otherwise be hesitant to ratify it.

In addition to the declaration system, the use of protocols can also contribute to accommodating the concerns of individual states. This creates flexibility as to the degree of involvement the states wish to join, rather than imposing a once-for-all approach. The protocol framework employed by the Cape Town Convention is an innovative approach. The Cape Town Convention itself serves as a framework convention incorporating general provisions that apply to various categories of mobile equipment. The specific rules and regulations pertaining to different categories of mobile equipment are then outlined in separate protocols. Its importance lies in the fact that, at the time, the aviation industry

⁴⁷ Jane K. WINN, “The Cape Town Convention’s International Registry: Decoding the Secrets of Success in Global Electronic Commerce” (2012) 1 Cape Town Convention Journal 25 at 44.

⁴⁸ Goode, *supra* note 16 at 67.

⁴⁹ Goode, *supra* note 16 at 66.

⁵⁰ *Ibid.*

⁵¹ Roy GOODE, “Issues of Interpretation Under the Cape Town Convention and Its Protocols” (2022) 8 Cape Town Convention Journal 3 at 5.

⁵² Mooney, *supra* note 40 at 647.

was well ahead of the rail and space industries and did not want to be held up by them.⁵³ The use of protocols in this manner empowers states and the industry participants to tailor their participation in the Cape Town Convention based on their individual circumstances and preferences. It ensures a more nuanced and adaptable approach that can effectively accommodate diverse legal systems and concerns while maintaining the core principles and benefits of the Cape Town Convention.

V. Conclusions

This essay examines the primary factors contributing to the success of the Cape Town Convention in comparison to the Hague Securities Convention. It particularly focuses on the second stage of the two-stage process proposed by Hoekstra, which involves navigating the national legislative process to achieve ratification. In this context, the essay contends that mere industrial support is insufficient for the Cape Town Convention to achieve the success it requires, especially given the complexities of harmonizing priority and property matters. This inadequacy is evidenced by the failure of the Hague Securities Convention, which also aimed to harmonize these priorities.

Thus, it becomes essential to uncover the underlying reasons for the Cape Town Convention's success over the Hague Securities Convention. To address this question, the essay draws on the concepts of coordination and cooperation from social science. It posits that while cooperation allows individuals with common interests to gather and discuss the convention – what industrial support facilitates – it is coordination that extends further by necessitating an adjustment of individual interests to align with one another's expectations. Achieving uniformity in priority matters will likely require adjustments concerning what each party wishes to accomplish and what they are prepared to relinquish.

Nevertheless, the concept of coordination raises the critical question of how precisely these adjustments should be made. Therefore, this essay proposes that the necessary adjustments should not entail compelling one state's concerns to yield to the preferences of others. Rather, as vividly illustrated by the case of the Cape Town Convention, a more appropriate approach would be to seek coordination by arriving at a middle solution that accommodates the concerns of all parties involved.

Acknowledgments. No acknowledgement.

Funding statement. No funding received.

Competing interests. No competing interest.

Kai Tik Au Yeung is a part-time lecturer at the University of Hong Kong.

⁵³ Goode, *supra* note 16 at 64.

Cite this article: AU YEUNG KT (2025). Significance of Coordination: A Comparison between the Cape Town Convention and Hague Securities Convention. *Asian Journal of International Law*, 1–9. <https://doi.org/10.1017/S2044251325100799>