

Cape Town Convention Academic Project

Facilitating the study of the Convention on International Interests in Mobile Equipment

CUMULATIVE ANNOTATIONS TO PROFESSOR SIR ROY GOODE'S

OFFICIAL COMMENTARY, THIRD EDITION (UNIDROIT, 2013)

CONVENTION ON INTERNATIONAL INTEREST IN MOBILE EQUIPMENT AND PROTOCOL THEREON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

Updated as of: 22 March 2016

This document sets out cumulative annotations (“**Annotations**”) to Professor Sir Roy Goode’s Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol Thereon on Matters Specific to Aircraft Object, Third Edition (the “**Official Commentary**”) organised with reference to the order of the Official Commentary.

This document is issued by the Cape Town Convention Academic Project, a joint undertaking of the University of Oxford Faculty of Law and the University of Washington School of Law, pursuant to procedures established by these two institutions.

The facility for the Cape Town Convention Academic Project to issue Annotations has been [endorsed by Professor Sir Roy Goode](#) in a personal, and not in any official, capacity. The Annotations have no official standing and do not constitute part of the Official Commentary, which is the only publication authorised by the 2001 Diplomatic Conference. It deals with questions not addressed or not fully addressed in the Official Commentary. It seeks to provide a neutral and informed analysis for the benefit of those involved with the above-noted convention (“**Convention**”) and protocol (“**Protocol**”).

The format followed in this document is to set out (i) the referenced paragraph(s) and/or illustration(s) in the Official Commentary, (ii) the background and/or issue(s), (iii) the Annotation related to such paragraph(s) and/or illustrations, and (iv) the rationale for such Annotation.

Annotation 1. Released: 26 February 2014

Official Commentary Reference(s): 2.65

Background/ issue: The Convention does not apply to a pre-existing right or interest unless the relevant contracting state has made a declaration under Article 60(1) of the Convention. However, parties may wish to take action to subject pre-existing transactions to the Convention. Confirmation has been sought that, in a pre-existing transaction, each type of Convention debtor, namely, a chargor, a conditional buyer, and a lessee, may create a new international interest in favour of its existing creditor thereby triggering the Convention and permitting, *inter alia*, registration with the international registry and the issuance of an IDERA.

In paragraph 2.65 of the Official Commentary, there is discussion about the power to dispose, and, in particular, an analysis of the ability of a conditional buyer or lessee to grant a second security interest by way of sub-sale or sub-lease, respectively. Paragraph 2.65 does not, however, specifically state whether a conditional buyer and/or lessee has the power to dispose of an aircraft object and grant an “international interest” by way of a security agreement.

Annotation: The implication of paragraph 2.65 is that each type of Convention debtor in a pre-existing transaction may create a new international interest in favour of its existing creditor to which the Convention applies, provided it is constituted after the effective date of the Convention in the contracting state where the debtor is situated. In the case of security given by a chargor, the grant is a second charge over its interest in the aircraft. In the case of security given by a conditional buyer, the grant is a security interest over its equity of redemption (by way of the equivalent of a second charge). In the case of security given by a lessee, the grant is a security interest over its leasehold interest. In all cases, a security interest (international interest) in the aircraft object is created and may be registered in the international registry, the secured obligations may be those out in set in the existing transaction, and an IDERA may be issued. The foregoing addresses neither the priority position of the new international interest vis-à-vis any intervening creditors nor the effect, if any, of insolvency rules (save those overridden by application of the Convention or Aircraft Protocol).

Rationale: In the case of a granting chargor, the Convention expresses supports these conclusions. In the case of a granting conditional buyer or lessee, the logic of Professor Goode’s treatment of the power to dispose requires these conclusions.

Annotation 2. Released 26 February 2014

Official Commentary Reference(s): 4.88, 4.89 and 4.91 - Illustration 7

Background/ issue: In paragraph 4.89 and Illustration 7 of the Official Commentary, reference is made to an Article 39 non-consensual rights or interests having priority over Article 29 registered interests. In particular, illustration 7 is express on that point. Neither paragraph 4.89 nor illustration 7 states that such prevailing non-consensual right or interest are limited to local interests, that is, those that arose and are given priority under the national law of the contracting state where the aircraft object is sold.

Annotation: The statements made, and conclusions reached, in paragraphs 4.89 (and by necessary implication 4.88 (regarding “interested parties” entitled to notices)) and Illustration 7 as regards the priority position of an Article 39 non-consensual right or interest assume that, and are limited to, such a right or interest created in, and recognised as having priority under the laws of, the same contracting state where the aircraft is sold. In Illustration 7, C5’s Convention entitlement is limited to that case.

Rationale: Professor Goode’s makes clear in paragraphs 2.212 and 4.269 that an Article 39 non-consensual right or interest is not entitled to recognition in another contracting state unless the conflict of laws rules of that state so require. (The same points are made in respect of rights of detention in paragraphs 2.215 and 4.272.) Rather, they enjoy a Convention priority only in, and under the laws of, the Article 39 declaring state. The above conclusions are required to ensure that result.

Annotation 3. Released 28 August 2015

Official Commentary Reference(s): 4.64

Background/Issue: Article 25(4) provides the principal basis upon which a party (a debtor or seller) whose interests are adversely affected by an improper registration may seek to have the registration discharged. The standard for seeking the discharge of a registration is that the registration 'ought not to have been made' or 'is incorrect'. While the Official Commentary refers to the standard in paragraph 4.164, it does not address the interpretation or application of that standard. There have been an increasing number of situations, including several court cases, in which the parties have sought removal of registrations with reference to that standard.

Annotation: A registration 'ought not to have been made' or is 'incorrect' for purposes of Article 25(4) if the underlying right or interest is falsely claimed or the information appearing on the priority search certificate relating to it is incorrect and misleading to third parties. The registration of a purported non-consensual right or interest that is not within the scope of the Article 40 declaration of the Contracting State under whose laws it purportedly arose is *per se* false and misleading. It is a unilateral registration that wrongly suggests both a Convention priority and, by reference to the related declaration, a category of right or interest, and must therefore be removed. That is to be distinguished from the registration of an interest to which the Convention may apply depending on the date on which it arose (for example, whether or not an interest is a pre-existing right or interest) or the presence of a connecting factor (for example, whether or not the debtor is situated in a Contracting State), potentially complex facts that can be ascertained and assessed through enquiry to the joint registering parties.

Rationale: A clear basis for a party whose interests are adversely affected by an improper registration to seek to have the registration discharged is needed. If the registry system becomes a means for clouding title or misleading those searching the registry regarding the nature, priority, or effect of the interests registered, without a clear standard for requiring a correction, the registry system will not serve the objective of giving creditors greater confidence in the decision to grant credit. See paragraph 2.6, bullet 5. That, in turn, would severely undermine the Convention's principal objective, which is to facilitate the efficient financing and leasing of mobile equipment. See paragraph 2.1.

Whether or not a right or interest is falsely claimed or a registration reflects incorrect information is self-explanatory, and applies to cases ranging from plain error to fraud. Whether or not a registration is misleading depends on the facts, but some rules and principles can be set out.

The clearest case of a false and misleading registration involves the registration of a purported non-consensual right or interest that is covered by the Article 39 declaration of the Contracting State under whose laws it purportedly arose (or is covered by no declaration at all) rather than such state's Article 40 declaration. See paragraph 2.33(4). In addition to being false, such a registration implies a Convention priority that is tied to the time of registration, when its priority is instead established by national law and is unrelated to registration. Such a registration is misleading as to the nature of the right or interest claimed since its improper characterization as an Article 40 registration implies that the underlying right or interest is within one of the categories listed by the relevant Contracting State's Article 40 declaration, when it is not. See paragraph 4.282.

Importantly, a purported non-consensual right or interest may be registered by the claimant without the consent of the debtor (by mischaracterizing the registration as relating to a proper Article 40 non-consensual right or interest), and is unique in that every other form of registration contemplated by the Convention (other than a notice of a national interest, to which this annotation applies *mutatis mutandis* as if it was a non-consensual right or interest) either requires the consent of the debtor, or does not benefit the person who makes the registration. While the unilateral registration of a proper Article 40 non-consensual right or interest is appropriate, the absence of a consenting party safeguard

and the self-interest aspects of the registration combine to create a material risk of an improper registration.

In contrast, the element of consent by the debtor serves as a safeguard against an improper registration of a pre-existing right or interest. See paragraph 4.148. As a result, instances in which a debtor may be adversely affected by such a registration are rare. While the registration of a pre-existing right or interest could be misleading to third parties in some technical respects (by implying that the Convention is applicable to establish the priority and effect of the registration), a pre-existing right or interest typically is analogous to an international interest, and carries rights and priorities under national law that will be consistent with those of a registered international interest under the Convention. Therefore, the registration of a pre-existing right or interest is unlikely to mislead third parties in any material way.

Annotation 4. Released 22 March 2016

Official Commentary Reference(s): 2.183, 2.236, 3.102-3.114, 4.10, 4.17-4.18, 4.211-4.215, 5.14, 5.15, 5.18, 5.56-5.68, 5.118

General Background/ Issues: The availability of remedies on insolvency, where a Contracting State has made a declaration under Article XXX(3) of the Protocol in respect of Article XI of the Protocol (**remedies on insolvency**), is designed to strengthen the creditor's position vis-à-vis the insolvency administrator or the debtor on the occurrence of an "insolvency-related event". See paragraph 3.102 of the Official Commentary. The underlying purpose is to reflect the realities of modern structured finance by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains the curing of all past defaults and a commitment to perform future obligations. See paragraph 5.57 of the Official Commentary.

This annotation addresses select points relating to the treatment of remedies on insolvency in the Convention and Protocol. It will be divided into four parts, supplementing the Official Commentary on these points. First, what are the parameters for determining when an insolvency-related event has occurred under Article I(2)(m)(ii) of the Protocol. Secondly, which party must comply with remedies on insolvency. Thirdly, may the parties delay or condition the timing of the remedies on insolvency by agreement following an insolvency-related event. Fourth, whether the remedies on insolvency are applicable to a debtor outside of its primary insolvency jurisdiction.

Part I: Parameters of Insolvency-Related Event under Article I(2)(m)(ii) of the Protocol

Specific Background/Issue: Remedies on insolvency are triggered if either (i) "insolvency proceedings" are commenced, or (ii) there is a "declared intention to suspend or actual suspension of payments by the debtor" where a right of a creditor to "institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action". This first limb, conventional insolvency proceedings, is given a wide and functional meaning under Article 1(l) of the Convention, and includes all collective proceedings, including interim proceedings, subject to control or supervision by a court (as defined in the Convention) for purposes of reorganisation or liquidation. The second limb, covering legislative, executive, or administrative action, is meant to make the definition of insolvency-related event more comprehensive and inclusive, triggering remedies on insolvency whenever (i) the debtor declares its intention to suspend payments or actually suspends payments, and (ii) the creditor's right to institute insolvency proceedings or exercise remedies under the Convention and Protocol is prevented or suspended by law or State action.

Annotation: A Contracting State that has declared the availability of remedies on insolvency may not, consistent with the Protocol, prevent or condition such or other Convention or Protocol remedies by law or state action outside the scope, or which seeks to avoid the effects, of an "insolvency-related event". Whether "insolvency proceedings" (Article I(2)(i)) have been commenced is a matter of national law. An insolvency-related event occurs under Article I(2)(m)(ii) of the Protocol on the date when two conditions have been met: (1) the debtor has suspended payments to a creditor or declared its intention to do so, and (2) a law has been enacted or state action occurs that prevents or suspends the rights of such creditor to initiate insolvency proceedings against the debtor or exercise remedies under the Convention and Protocol. . A declaration of intention to suspend payments is implicit in a statement by a debtor that it is unable to make payments to its creditors or that it intends to pay its creditors less than it is contractually obligated to pay.

Rationale: The annotation deals with actions contemplated by, and those inconsistent with, remedies on insolvency, and expands upon, and carries forward the logic of, paragraph 5.14 of ("the basic intent ... is to trigger the starting point of the time period in Article XI of the Protocol ... where there are financial problems and State action or law (whether made or taken before or after a declared intent to

suspend payment) prevents application of the remedies under the Convention') and 5.18 (illustration 57, which addresses the core case) of the Official Commentary. It more clearly defines a law or state action which violates the basic principles of the provision on remedies on insolvency.

Illustration A

Airline 1, owned and controlled by the government of State Y, has encountered financial difficulty. State Y is a Contracting State that has made a declaration under Article XXX(3) to adopt Alternative A with a waiting period of 60 days. State Y passed a law preventing creditors of Airline 1 from commencing insolvency proceedings, or exercising remedies under the Convention and Protocol, against Airline 1. That legislation permits the debtor or a third party appointed by the debtor or the minister of transportation (manager) to take all action needed to restructure Airline 1, including modification of contracts and asset sales, without creditor consent. The legislation states that the action by the manager is not subject to judicial review, as authority therefor arises under the legislation. That legislation is non-compliant with the Protocol, unless its application is conditioned on the occurrence of an insolvency-related event as defined in the Protocol and, in such application, is subject to the terms of Protocol. If Airline 1 issues a communication to one or more of its creditors advising that it intends to modify the payment terms of its leases, or actually suspends its payments, an insolvency-related event shall have occurred on the date of the communication or suspension. In that case, at the end of the 60 day waiting period following that insolvency-related event, the creditors of Airline 1 are permitted to exercise all remedies permitted by the Convention and the Protocol, notwithstanding the conflicting provisions of the State Y's national legislation.

Part II: Party Obligated to Comply with Remedies on Insolvency

Specific Background/Issue: Adoption of the Convention and Protocol obligates a Contracting State to give positive effect, within the timetable declared by the Contracting State that is the primary insolvency jurisdiction, to the remedies on insolvency. See paragraph 2.236 of the Official Commentary. The central requirements for meeting this obligation are that (i) a creditor is given possession of the object unless all transactional defaults (except one constituted by the opening of insolvency proceedings) are cured, and future obligations are committed to, by the end of the declared waiting period or earlier date on which a creditor is entitled to possession under applicable law, (ii) during the period described in (i), the object and its value is preserved and maintained in accordance with the agreement, and (iii) no obligations under the agreement may be modified without the consent of the creditor. See paragraphs 3.109 – 3.110 of the Official Commentary. This annotation focuses on which party is obligated to take or ensure these actions as part of Contracting State compliance with the Convention and Protocol.

Annotation:

In all cases where an “insolvency-related event” has occurred, there must be one party (the **responsible party**) obliged and empowered to take the action required to effect the remedies on insolvency.

Insolvency-related event under Article I(2)(m)(i) of the Protocol

In the case that the insolvency-related event has arisen under Article I(2)(m)(i) of the Protocol (insolvency proceedings), the responsible party is (i) the “insolvency administrator”, as defined in Article 1(k) of the Convention, which may be the “debtor in possession”, applying the debtor in possession criteria below, where an insolvency administrator exists, and (ii) the debtor as such, where no such insolvency administrator exists. Thus, if an insolvency administrator exists, it is the responsible party, and if an insolvency administrator does not exist, the debtor is the responsible party.

The Official Commentary, at paragraph 3.107, states that a debtor is its own insolvency administrator “where the estate is being administered in insolvency proceedings by a debtor in possession if permitted under applicable insolvency law”. The foregoing standard is met, and thus the debtor in possession is its own administrator, where the debtor has the authority to administer the estate, meaning that that it has the authority to enter into transactions and deal with assets, even if under the supervision of a court-appointed third party.

Illustration B

A court in State X issued an order commencing insolvency proceedings against Airline 1, which is necessary and sufficient to commence such proceedings under domestic insolvency law. The court appoints an interim manager, whose responsibilities under domestic insolvency law are to collect financial information about Airline 1, supervise Airline 1’s activities to preserve the value of the estate, and to interact with the supervising court in respect of matters that could adversely affect creditors generally. Airline 1, which has the power to remain operational, may enter into ordinary course transactions, but not make any substantial disposition of assets without the approval of the interim manager. Domestic insolvency law contemplates a later stage (following the end of the Alternative A waiting period) when a plan of reorganisation or restructuring, which may be proposed by any creditor, the debtor, or the interim manager, would be approved by the court. In this case, the debtor, and not interim manager, is the insolvency administrator with responsibilities to take action under Alternative A within the timetable declared by State X in its ratification of or accession to the Protocol.

Insolvency-related event under Article I(2)(m)(ii) of the Protocol

In the case that the insolvency-related event has arisen under Article I(2)(m)(ii) of the Protocol (law or state action described in the annotation above), the responsible party is the debtor as such, unless the law or state action expressly authorises a third party to administer the reorganization or liquidation, in which case it is such third party.

Rationale: The reference in Article XI (Alternative A and B) to action by “the insolvency administrator or the debtor, as applicable” is ambiguous in that it does not make clear how to determine which of those two parties is the responsible party. That lack of clarity leaves open the possibility that a debtor may claim that the actions required under Article XI are the responsibility of a purported insolvency administrator, while such purported insolvency administrator asserts that the responsibility remains with debtor. The annotation provides guidance by noting that in the absence of law or state action that expressly authorizes a third party to administer the reorganization or liquidation, the debtor remains the responsible party, and where an insolvency administrator exists, it is the responsible party.

Part III: Delay or Conditioning of Remedies on Insolvency following an Insolvency-Related Event

Background/Issue: Article XI(2) and (7) (**Alternative A**) of the Protocol, with the related declaration under Article XXX(2) and (3) of the Protocol, sets out explicit timetables for the giving or retaining possession of an object. The relevant parties, namely the creditor with rights under Alternative A and the insolvency administrator (as defined in Convention and discussed in the annotation above), may wish to agree to delay, or otherwise condition, the availability of such rights.

Annotation: The holder of an international interest with rights under Alternative A and the insolvency administrator or the debtor, as applicable, may agree (i) to delay the giving of possession of the object to the creditor, and (ii) to the conditions applicable to such delay.

Rationale: While Official Commentary in paragraphs 3.109, 5.60-5.63, and 5.66 address the time-based rules which are critical to Alternative A, the overriding principle of party autonomy remains. In addition to excluding the application of Article XI of the Protocol, the parties may derogate from or vary

its terms, provided that such is consistent with mandatory rules. See Article IV(3) of the Protocol, and, more generally, paragraphs 2.17 and 2.19 of the Official Commentary. A voluntary delay or conditioning of rights under Alternative A falls squarely with this party autonomy principle and does not violate mandatory rules in the instruments.

Part IV: Applicability of Remedies on Insolvency for a Proceeding Outside of the Primary Insolvency Jurisdiction.

Background/Issue: Upon the occurrence of an insolvency-related event, Article XI(1) of the Protocol conditions the applicability of the Article XI remedies on insolvency upon a declaration pursuant to Article XXX(3) of the Protocol having been made by the primary insolvency jurisdiction. There is no other condition. Article I(2)(n) of the Protocol defines the “primary insolvency jurisdiction” as the Contracting State where the centre of debtor’s main interests is situated. However, some jurisdictions provide for insolvency proceedings in respect of a debtor connected to the jurisdiction by having a domicile, place of business or property there, and purport to bind the creditors and property of the debtor wherever located. Aviation and aviation finance are global industries and participants may have a domicile, place of business or property in many different jurisdictions. Accordingly, insolvency proceeding in respect to a debtor may occur in a Contracting State that differs from the primary insolvency jurisdiction for that debtor.

Annotation: Article XI of the Protocol applies to a debtor in a Contracting State if the primary insolvency jurisdiction for that debtor has made a declaration pursuant to Article XXX(3) of the Protocol. The application of Article XI of the Protocol does not depend upon the insolvency proceeding taking place within the debtor’s primary insolvency jurisdiction. Whether the courts of another State have jurisdiction over matters governed by Article XI depends entirely on that State’s own insolvency jurisdiction rules. If Article XI of the Protocol applies to a debtor, then, in accordance with Article XXX(4) of the Protocol, the courts of any Contracting State in which an insolvency proceeding with respect to such debtor takes place are obligated to apply Article XI of the Protocol in conformity with the declaration made by the primary insolvency jurisdiction. Article XI of the Protocol overrides Article 30(3)(b) of the Convention, and therefore any rules of law of the forum that conflict with Article XI are superseded by the rules of Article XI. The content of this annotation is to be distinguished from, but is compatible with, the terms of Article XII of the Protocol, which applies where a Contracting State has made a declaration under Article XXX(1) of the Protocol in respect thereof. Article XII of the Protocol addresses the cooperation with foreign courts and insolvency administrators, and thus presupposes the existence of foreign main proceedings, when an aircraft object is situated in the Contracting State making that declaration.

This annotation does not imply that insolvency proceedings outside of the primary insolvency jurisdiction should be treated as primary or main-type proceedings by-passing the latter as and where they occur, as contemplated inter alia by the UN Model Law on Cross-Border Insolvency or the EU Regulation (EU) 2015/848 on insolvency proceedings.

Rationale: The annotation confirms the plain meaning of Articles I(2)(n), XI(1), and XXX(4) of the Protocol, none of which state that insolvency proceedings must occur in the primary insolvency jurisdiction, and expands upon paragraph 5.118 of the Official Commentary. In its discussion of the availability of the remedies on insolvency provided by Article XI of the Protocol, the Official Commentary addresses secondary insolvency proceedings occurring outside of the primary insolvency jurisdiction, the main insolvency proceedings occurring within the primary insolvency jurisdiction, and the relationship between the two. It does not directly address the availability of the remedies on insolvency provided by Article XI of the Protocol where the insolvency proceeding takes place outside of the primary insolvency jurisdiction. Clarity on this item, the applicability of Article XI as declared by the primary insolvency jurisdiction (whether or not insolvency proceedings are taking place therein) in all Contracting States, is essential to avoid insolvency forum shopping and produce the intended economic benefits of the Convention and Protocol (see paragraph 5.56 of the Official Commentary), which are directly related in this context.

