

Cape Town Convention Academic Project

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

ANNOTATION TO PROFESSOR SIR ROY GOODE'S

OFFICIAL COMMENTARY, THIRD EDITION (UNIDROIT, 2013)

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

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This document sets out an annotation (“**Annotation**”) to Professor Sir Roy Goode’s Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Object, Third Edition (the “**Official Commentary**”). There is a [separate document that sets out all Annotations](#) on a cumulative basis, organised with reference to the order of the Official Commentary.

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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 3. Official Commentary Reference(s): 4.164

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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.