

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, FOURTH EDITION (UNIDROIT, 2019)

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 There to on Matters Specific to Aircraft Object, Fourth 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 1. Official Commentary Reference(s): 3.118, 3.119, 4.21, 5.14, 5.16

Background/ issue: Article 30 of the Convention (**effects of insolvency**) provides for the effectiveness of an international interest when an 'insolvency proceeding' has been commenced by or against a debtor. See Article 1(l) of the Convention. 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**), the Convention and Protocol prescribe a specific regime (a *lex specialis*) to strengthen and make more predictable a creditor's position vis-à-vis the insolvency administrator or the debtor on the occurrence of an 'insolvency-related event'. See paragraph 5.61 of the Official Commentary. An 'insolvency-related event' occurs 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 exercise remedies under the Convention is prevented or suspended by law or State action' (Article I(2)(m)). Insolvency regimes in Contracting States take a variety of forms. Many Contracting States provide for proceedings that are designated by national law as 'insolvency proceedings' or 'bankruptcy proceedings', typically involving complete submission of the affairs of the debtor to the direct supervision of a court or similar authority. In some cases those same Contracting States may also provide for other, more limited, forms of debtor reorganization procedures, referred to under national law as 'schemes of arrangement', 'voluntary arrangements', or some similar term (which for convenience of reference in this annotation shall all without limitation be referred to as '**reorganisation arrangements**'), pursuant to which a debtor and its creditors follow a statutory process by which they seek to agree on a re-arrangement of that debtor's obligations, which requires the sanction or supervision of the court to carry into effect. Reorganisation arrangements often encompass certain classes of creditors, rather than all creditors, and may or may not prevent or suspend the right of a creditor to bring enforcement actions against a debtor. Reorganisation arrangements may or may not permit the terms of a creditor's agreement to be modified without the creditor's consent. This annotation addresses the characterization of reorganisation arrangements under the Convention and the Protocol for purposes of determining whether any such arrangement constitutes an insolvency proceeding, whether an insolvency related event occurs upon commencement of such an arrangement, and when, in accordance with Article 1(d) of the Convention, insolvency proceedings in the form of a such an arrangement will be regarded as having commenced.

Annotation: The question of whether a reorganisation arrangement is covered by Article 30 of the Convention and Article XI of the Aircraft Protocol is to be determined by the definition of 'insolvency proceedings' in Article 1(l) of the Convention, not by national law. Such arrangements fall within the definition of 'insolvency proceedings' in the Convention where they are (a) formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company, and (b) collective in that they are concluded on behalf of creditors generally or such classes of creditor as collectively represent a substantial part of the indebtedness. For purposes of the definition of 'insolvency-related event':

- a. where (a) and (b) above are satisfied, a reorganisation arrangement, in which a court acts to facilitate a statutory process, and where the court's approval is required for its implementation, constitutes 'insolvency proceedings' where the 'assets and affairs of the debtor are subject to control or supervision by a court for purposes of reorganization', and
- b. whether or not a moratorium on enforcement applies during a reorganisation arrangement is not relevant.

For purposes of Article 30 of the Convention and Article XI of the Protocol, a reorganisation arrangement, as 'insolvency proceedings' under the Convention and Protocol, will be deemed to have commenced when it does so under the law of the Contracting State providing for that arrangement.

Rationale: References to 'insolvency proceedings' are intended to be broad, covering all forms of collective proceedings of that nature. A broad interpretation is required given the fundamental importance of the provisions on insolvency in the Convention, and, particularly, Article XI of the Protocol. See paragraphs 4.21 and 5.60 of the Official Commentary. Article 5 of the Convention requires that the 'principle of autonomous interpretation' be followed in interpreting treaty terms, including definitions, and that 'national courts are to avoid national concepts in interpreting the texts'. See paragraphs 2.24 and 4.68 of the Official Commentary. To the extent any gaps in the text remain, they are to be filled, in the first instance, in conformity with the general principles underlying the text. Article 5(2) of the Convention. The plain reading of the definition of 'insolvency proceedings', and several general principles as set out in the preamble to the Convention (facilitating asset-based financing and leasing and promotion of party autonomy), each require a broad interpretation of the term 'insolvency proceeding'. Thus, whether a reorganisation arrangement is regarded as an insolvency proceeding under the national law of any Contracting State is not relevant to its characterization for purposes of the Convention and the Protocol. Finally, in a reorganisation arrangement which falls within the definition of 'insolvency proceedings' as interpreted in this annotation, any modification of the debtor's obligations under the agreement without the consent of a creditor (so-called 'cram-down' provisions) is inconsistent with Article XI(10) of the Protocol (Alternative A), where declared and implemented.