

# 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

**Release No. 2**  
**Date: 13 July 2020**

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, Fourth Edition (the '**Official Commentary**').

This document is issued by the Cape Town Convention Academic Project, a joint undertaking of the University of Cambridge Faculty of Law and UNIDROIT, 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 2.      Official Commentary Reference(s): 3.122, 3.123, 3.124, 5.15 and 5.61**

Background/ issue: Article XI(1) of the Protocol states that the special rules applicable to aircraft objects following the occurrence of an insolvency-related event apply only where the Contracting State that is the 'primary insolvency jurisdiction' as defined in Article I(2)(m) (**primary insolvency jurisdiction**) has made a declaration pursuant to Article XXX(3) opting to apply Alternative A or Alternative B. 'Primary insolvency jurisdiction' is defined as the Contracting State in which the centre of the debtor's main interests is situated, which is presumed to be the debtor's statutory seat (or, if none, the place where the debtor is incorporated or formed) unless proved otherwise. The Convention does not define 'centre of main interests' (**COMI**). The Official Commentary confirms that the term 'primary insolvency jurisdiction' (and the embedded COMI concept) has an autonomous meaning under the Convention, but the Official Commentary does not set out the test for, or identify the factors that would be relevant to, giving that concept its appropriate autonomous meaning for the purposes of the Convention. See paragraph 3.122 of the Official Commentary.

**Technical Note:** While the Official Commentary notes that the text of the definition of ‘primary insolvency jurisdiction’ was derived from the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**), and refers to the factors under the Model Law that are relevant to determining whether a debtor’s COMI is situated in a different location from its statutory seat (see paragraph 3.122 of the Official Commentary), the purpose of determining a debtor’s COMI under the Model Law differs materially from the purpose of determining a debtor’s COMI for purposes of the Convention. In the case of the Model Law, the purpose is to select a state’s insolvency court as the forum for the debtor’s main insolvency proceeding (**MIP**). In the case of the Convention, the purpose is to determine in any proceeding, regardless of which Contracting State is the venue, which Contracting State’s declaration under Article XXX(3) applies to the international interests created by the debtor, such Contracting State being the debtor’s ‘primary insolvency jurisdiction’ (**PIJ**).

**Annotation:** The presumption that a debtor’s COMI is situated in its statutory seat (or, if none, place where the debtor is incorporated or formed) may not be displaced lightly, and the party asserting a different location carries a substantial burden of proof. The question of whether a debtor’s COMI is situated in a particular Contracting State must be resolved by an autonomous interpretation of the Convention. For purposes of Article XI(1) and Article XXX(4):

1. The test to override the strong presumption that a debtor’s COMI is situated in its statutory seat (or, if none, place where the debtor is incorporated or formed) is whether, in view of preponderance of factors in point (2) below, a different state is visible to creditors in doing business with the debtor as the main state in and from which the ordinary course activities and decision-making relating to the debtor’s overall business and operations with respect to aircraft objects are conducted.
2. In line with point 1 above, the primary factors in determining that a debtor’s COMI differs from its statutory seat (or, if none, place where the debtor is incorporated or formed) are that:
  - a. The debtor management team with whom the creditors conduct business in relation to its aircraft objects is situated in a state that is different from its statutory seat;
  - b. The debtor’s primary base of operations for, and where decisions relating to, its aircraft objects is located in a state that is different from its statutory seat; and
  - c. The debtor deriving its authority to operate its aircraft objects, and/or authority to operate its aircraft objects on particular routes, from a state that is different from its statutory seat.
3. In line with point 1 above, the following factors are not relevant to establishing a debtor’s COMI:
  - a. The state where the creditors of the debtor reside and from which they act;
  - b. The terms of the agreement creating or providing for the relevant international interests, such as terms providing for payments in the currency of or to a bank account in a particular state, submission to the jurisdiction of the courts of a particular state for the resolution of disputes, or application of the laws of a particular state as the governing law of the agreement; and
  - c. The state where the agreement creating or providing for the relevant international interests is prepared and/or concluded.
4. The factors relevant to determining whether a debtor’s COMI differs from its statutory seat (or, if none, place where the debtor is incorporated or formed) crystallize upon the occurrence of an insolvency-related event, and are judged by reference to the facts that were visible to and could have been reasonably relied upon by creditors generally when dealing with the debtor.
5. Once an insolvency-related event has occurred, in any proceeding that occurs in a Contracting State, the forum shall apply Article XI in conformity with the Article XXX(3) declaration made by the

debtor's PIJ. The foregoing applies whether or not any insolvency proceedings have been commenced in the debtor's PIJ. See Article XXX(4) of the Protocol.

### *Illustration*

Airline's statutory seat is located in Contracting State 1, where the team of managers who deal with aircraft lessors is located, where its operating certificate was issued, and from whom Airline has been granted authority to operate its domestic and international routes. Contracting State 1 has made an Alternative A declaration and has adopted the Model Law as part of its national law. Airline entered into a series of operating transactions to assemble its fleet of 18 aircraft, with six each being leased from Lease Co-1, Lease Co-2 and Lease Co-3, all of whom reside in Contracting State 2. Contracting State 2 has not made an Alternative A declaration. All leases are governed by the laws of Contracting State 2, call for payments in Contracting State 2's currency and require disputes to be resolved in the courts of Contracting State 2. Airline maintains bank accounts in Contracting State 2 and has route authority to operate international flights between Contracting State 1 and Contracting State 2. Airline has no authority to operate flights domestically between points in Contracting State 2. Contracting State 2 allows a non-citizen debtor to open bankruptcy proceedings in its courts and under its bankruptcy laws so long as such debtor has sufficient contacts with Contracting State 2. Airline meets Contracting State 2's contacts test and files bankruptcy proceedings there.

Contracting State 1 is where the Airline's statutory seat and management team that deals with creditors in relation to aircraft objects is located, and it is the jurisdiction that granted Airline its operating certificate and route authority. Such factors mean that Contracting State 1 is Airline's COMI, and therefore its PIJ. Contracting State 1 made an Alternative A declaration. Alternative A would therefore apply to all 18 leases. The fact that Airline's insolvency proceeding will be conducted in the insolvency courts of Contracting State 2, rather than Contracting State 1, is not relevant to this outcome. Under Article XXX(4), Contracting State 2 is obligated to apply Alternative A to all 18 leases.

Rationale: Article XI constitutes the most significant provision of the Convention economically. See paragraph 5.60 of the Official Commentary. Its purpose is to reflect the realities of modern structured finance, and in particular to facilitate capital markets financing. See paragraph 5.61 of the Official Commentary. To achieve that purpose, the applicability of Article XI must be readily predictable for the creditor at the time of the transaction, based on clear and objective criteria, so that the creditor may rely upon the risk mitigation afforded by Article XI's special rules should the debtor suffer an insolvency-related event, and authorize and price the transaction accordingly. 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, see Article 5(2) of the Convention. The present annotation interprets 'primary insolvency jurisdiction' to have a meaning that focuses on the attributes of the debtor that are visible to creditors, may be objectively determined and are connected with the debtor's ordinary conduct of its business and operations with respect to its aircraft objects in ways that are unlikely to change. The interpretation in this annotation makes the application of Article XI in any proceeding (including any insolvency proceeding) that is held in a Contracting State clear and predictable to creditors when they do business with a debtor. Accordingly, where the test outlined in this annotation is satisfied, creditors may reasonably rely on Article XI applying to their transaction in all Contracting States, no matter where insolvency proceedings with respect to the debtor may be opened, regardless of whether any proceedings are opened in the debtor's PIJ. Similarly, the interpretation in this annotation ensures that Contracting States are able to clearly identify the debtors to whom their Article XXX(3) declaration, and corresponding policy decision seeking to enhance the flow of capital, will apply. The interpretation of 'primary insolvency jurisdiction' set forth in this annotation establishes an analytical framework to fill the gaps left in the text of Article I(2)(n) in conformity with the general principles underlying that text by (a) yielding results that are practical and predictable by creditors, and (b) allowing Contracting States to implement the Convention in their respective jurisdictions in a manner that applies Article XI to the group of debtors they intend to support.