



Open Discussion on the Cape Town Convention and Cross-Border Insolvency

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Open Discussion on the Cape Town Convention and Cross-Border Insolvency

The fifth Cape Town Convention Academic Project Conference was held 13–14 September 2016. On 14 September, an open discussion on the Cape Town Convention (CTC) and cross-border insolvency was held. Nick Segal moderated the session and Sir Roy Goode, Jeffrey Wool, and Donald Gray participated in the panel. The presenters discussed the following topics with comments and questions from the audience:

- Provisions in the convention and protocols dealing with insolvency and cross-border insolvency, along with related interpretative materials
- Principles of international law and national court practices that affect cross-border insolvency
- The location of the commencement of insolvency proceedings on the determination of the ‘primary insolvency jurisdiction’ (PIJ)
- The factors that determine the debtor’s ‘centre of main interests’ (COMI) for CTC purposes
- The treatment of special purpose entities under COMI and PIJ analyses
- The effect of the CTC, if any, on assertions of extraterritorial effects of insolvency proceedings
- The relationship between the CTC’s cross-border insolvency provisions and the UNCITRAL Model Law of Cross-Border Insolvency

The slides from the session are reproduced.

Open discussion on CTC and cross-border insolvency

(powerpoint prepared by CTC academic project for discussion-purposes only)

Moderator: Nick Segal (Freshfields Bruckhaus Deringer)

Contributors: Roy Goode (University of Oxford), Donald Gray (Blake, Cassels & Graydon LLP), Jeffrey Wool (Universities of Washington and Oxford, Aviation Working Group)

Cape Town Convention Academic Project

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



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Background

□ Convention (C) and Protocols (P) (using aircraft protocol as example) provisions on insolvency (I) and cross-border insolvency (X-I) :-

- C, arts 1(k)(definition of 'insolvency administrator'), 1(l) (definition of 'insolvency proceedings'), 30 (effects of insolvency), 37 (effects of assignor's insolvency), 39(1)(a)(non-consensual rights and interests in insolvency), and 60 (transitional provisions, if applicable). See also C, arts 5(1) and (2) (gap-filing), 14 (procedural requirements), and 54(2) (role of court in remedies)
- P, arts 2(m) (definition of 'insolvency-related event'), 2(n) (definition of 'primary insolvency jurisdiction'), XI (remedies on insolvency), and XII (insolvency assistance)
- See supplemental PDF with these provisions

□ Relevant interpretive materials (selective): -

- Official commentary (OC) paras 2.179-2.184, 2.229, 2.241, 3.38, 3.102-3.116, 3.118-3.119, 3.120, 4.17, 4.18, 4.208-4.215, 5.14, 5.15, 5.56-5.66, and 5.67
- Annotations thereto (OC-A), number 4 (remedies on insolvency)
- See supplemental PDF with these provisions

□ Principles of treaty (international) law that impact (i) the obligations of countries and courts in the X-I context, and (ii) national court practices with practical implications

Discussion purpose questions on cross-border insolvency (selective)

1. Is it necessary that insolvency proceedings be commenced in state X for it to be the 'primary insolvency jurisdiction' (**PIJ**)?
2. Must an insolvency court (or debtor or insolvency administrator, as the case may be) in a contracting state which did not make a declaration under P, art XI apply the declaration relating thereto of a contracting state which is the PIJ?
3. For CTC purposes, what factors determine where 'the centre of the debtor's main interests are situated' (**COMI**)? Is it the same as European jurisprudence?

Discussion purpose questions on cross-border insolvency (selective)

4. How are special purpose entities treated in the PIJ and COMI analyses?
5. Can there be more than one PIJ in consolidated proceedings (in one jurisdiction) involving debtors incorporated in different jurisdictions?
6. With reference to what time is the PIJ determined: (i) when the transaction closes, or (ii) at the time of insolvency? Does the answer to this question impact the transitional provisions in any way?
7. Does CTC impact the validity, to the extent valid, of an assertion of extraterritorial effect of national insolvency law/proceedings and any stay issued or applied thereunder?

Discussion purpose questions on cross-border insolvency (selective)

8. How, if at all, does P, art. XII (if declared) change the substantive and/or procedural rules impacting the applicable law, which might or might not be insolvency law, in the state where the object is situated (when insolvency proceeding are occurring in another contracting state (which did or did not make a declaration to apply P, art XI)?
9. What is the relationship between the CTC's X-I provisions and the UNCITRAL Model Law of Cross-Border Insolvency, if applicable through enactment as national law?
10. Are the answers to any of the above questions different if the insolvency-related event arises under P, art 2(m)(ii)(suspension of payments plus inability to legally enforce) rather than P, art 2(m)(i)(commencement of insolvency proceedings)?