

On the Crossroads of Security Interests and Insolvency Law: Art. 10 of the 4th Protocol of the Cape Town Convention

Tartu, 8 December 2022

What is this all about?

- Security interest law
 - National
 - International
 - Tertium non datur
- Insolvency law
 - National
 - International
 - Tertium non datur
- Or is there a tertium?

The System

- Convention (Cape Town)
 - Protocols
 - On Aircraft
 - On Rail
 - On Space
 - On Mining, Agriculture, Construction (MAC)
- Purpose → „the need to ensure that interests in such equipment (i.e. of high value) are recognised and protected universally“

Some Background

- In order to fully understand the ideological setting of this remarkably successful concept, one should read →

Alberto Mazzoni / Maria Chiara Malaguti, *Diritto del Commercio internazionale – fondamenti e prospettive*, 2019

→ This is a strong plea for the benefits and blessings of a *lex mercatoria*

The Setting

- The Convention is the umbrella Act which frames the rights and remedies of the affected parties of certain security interests → security agreement (as defined under art. 1(ii)), title reservation 1(II)), leasing agreement (1(q))
- Specifications for certain categories of valuable equipment are contained in Protocols
- C + P shall be understood as unity – in case of doubt P prevails, art. 6

The Setting 2

- Convention provides for the creation of a security interest pursuant to the CTC → art. 7, 16 ff.: form + registration
- In an insolvency such a security interest has super priority.
- Via European Union Germany and Estonia are contracting states of the Convention → applicability is determined by where the debtor is „situated“, art. 3 (and 4).

Cross roads

Art. 30 CTC:

1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.
2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.
3. Nothing in this Article affects:
 - (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
 - (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

Cross roads 2

What means „effective“? → **art. 29:**

1. A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

2. The priority of the first-mentioned interest under the preceding paragraph applies:

(a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and

(b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

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Cross roads 3

Available Remedies → art. 8:

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

- (a) take possession or control of any object charged to it;
- (b) sell or grant a lease of any such object;
- (c) collect or receive any income or profits arising from the management or use of any such object.

2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.

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Cross roads 4

Art. X MAC protocol:

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the equipment to the creditor not later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the equipment if this Article did not apply.

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5. Unless and until the creditor is given the opportunity to take possession under paragraph 3:

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the equipment and maintain it and its value in accordance with the agreement; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

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Cross roads 5

Art. VIII MAC protocol:

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of equipment from the territory in which it is situated.
2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

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Cross roads 5

Art. 8 EIR:

(1) The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

→ Possibly turns out to be irrelevant with regard to equipments covered by any of the protocols (as art. 8 implies the applicability of the *lex rei sitae*)

Fundamentals

- Is lex mercatoria better than state ordered law?
- Pro → the two presidents of Unidroit, op. cit., and many more: in the long run everything turns out to be fine
- Contra → debt relationships are always and everywhere a battle field on which both parties struggle for supremacy. The function and task of law is to protect the weaker (cf. CGP, Juridica International most recently)

Tänan teid tähelepanu eest!

Prof. (a.D.) Dr. Christoph G. Paulus, LL.M. (Berkeley)
Of Counsel, White & Case, Berlin
Ass. Member of South Square, London