Cape Town Convention Academic Project Conference 2019

Session ‘Comprehensive case study of Oceanair insolvency: (1) political economy and practical considerations; (2) treatment of key issues which arose in the Official Commentary; (3) US chapter 15 proceedings’

Report of Chairman

This reports on the above session, held on 10 September 2019 at the Cape Town Convention Academic Project Conference.

The panelists for the session were Professor John Pottow (University of Michigan), Mr William Piels (Partner, Holland & Knight, San Francisco) and Mr Henry Nahm (recent graduate of Columbia Law School and entering Associate, Millbank, New York). The session was chaired by Professor Jeffrey Wool (University of Washington and University of Oxford).

The session focused on a specific but impactful set of issues arising and judicially addressed in cross-border insolvency proceedings involving a Brazilian airline, Oceanair Linhas Aereas S/A (‘Oceanair’).

I. FACTS AND ISSUES

The main insolvency proceedings were in Brazil, Oceanair’s center-of-main-interest (‘COMI’). Secondary proceedings were in the United States under Chapter 15. Both Brazil and the United States are Contracting States to the Cape Town Convention (‘Convention’) and its Aircraft Protocol (‘Protocol’).

At the time of its ratification, Brazil declared applicable ‘Alternative A’ of Article XI of the Protocol (‘Alternative A’), which states that a debtor or its insolvency administrator shall, inter alia, cure all defaults or give possession of aircraft collateral to its creditors by the end of a declared waiting period. All Contracting States to the Protocol are bound by Article XXX(4) thereof, which states that ‘[t]he courts of Contracting States shall apply Article XI [Alternative A] in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction’. It was not in dispute that Brazil was the ‘primacy insolvency jurisdiction’.

The court in Brazil1 misapplied Alternative A, as declared by Brazil, by impermissibly extending (beyond the end of the waiting period) the time by which the Oceanair needed to cure defaults or give possession.

Another panel discussed that misapplication. The current panel, taking such misapplication as legal fact, focused on subsequent court action in the United States.\(^2\)

The threshold issue was whether, under international law, the US court (1) must strictly interpret Article XXX(4) and apply Alternative A as declared by Brazil, or (2) could defer to the Brazilian court on its Alternative A ruling, despite its erroneous nature. Referring to the plain meaning of the text, as well as Official Commentary,\(^3\) the panel agreed that the former is intended.

Yet, the US court deferred to the Brazilian court. This decision, in addition to being inconsistent with the express and unambiguous terms of the Protocol, was equally inconsistent with the fundamental policy objective of the Protocol – where Alternative A was declared by the primary insolvency jurisdiction – to provide global and uniform application of that provision, anchored in its fixed and judicially non-extendable waiting period. Alternative A was specifically designed to increase the availability, and reduce the cost, of aviation credit, thus reducing the risk of insolvency. Article XXX(4) was specifically designed to prevent forum shopping, including to avoid application of Alternative A.

The panel concluded that the US court decision is not supported by the best reading of the Protocol and would likely have been reversed on appeal. The panel considered what factors led to this decision.

II. PANEL DISCUSSION

The following were discussed as an explanation of, rather than rationale for, the US court decision.

First, and most generally, Chapter 15, implementing the UNCITRAL Model Law on Cross-Border Insolvency, is rooted in cooperation by courts with, and substantial deference to, foreign main proceedings. The Model Law’s ‘modified universalist’ approach to insolvency, which permits the legal export of COMI rules (as countries may from time-to-time be on either side of such exportation), provides a foundation for such deference and cooperation. An underlying concern was that strict application of Article XXX(4) would have the effect of limiting such cooperation and deference, which the US courts expect to benefit from when they, as is often the case, are the venue of the main proceedings. These cooperation and deference tendencies are so ingrained that Section 1503 of Chapter 15 did not counter them. It should have. Section 1503 is an internal conflicts rule that defers to a treaty.\(^4\) For the court, this ‘conflicting comities’, cross-border primary proceedings, on the one hand, and treaty-based, on the other, vectored towards the former.

Secondly, US bankruptcy courts are deeply committed to maximizing the prospects for a successful reorganization. Strict application of Article XXX(4) would not serve that objective. Doubts and ambiguities, however tenuous, generally are, and here were,....

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\(^3\) ‘Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance’: see Roy Goode, Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary (3rd edn, UNIDROIT 2013) para 3.126.

\(^4\) ‘To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty ... the requirements of the treaty ... prevail’: see 11 USC s 1503.
resolved in a debtor’s favor. This highlights the deep divide between the conflicting objectives of leasing and secured credit law, as embodied in the Convention and Protocol (risk reduction and bankruptcy avoidance) and insolvency law (reorganization and employment). The former focuses on predictability – from a pre-insolvency perspective; the latter focuses on rehabilitation – from a post-insolvency perspective.

Thirdly, the US court, like most courts, was uncomfortable with arguments that it lacked discretion, despite that being the precise point of Article XXX(4). While this is a separation of powers and constitutional point, it has explanatory power. Moreover, aversion to discretion limitation was allied in this case with judicial pragmatism: the US court could justify its (trial-level) discretion-based decision by knowing that the creditors could take appellate-level action in Brazil, despite the commercial impracticality.

The panel addressed the related issues of the relationship between Protocol Articles XII(2) (a specific insolvency cooperation provision)\(^5\) and Article XXX(4), concluding that the former presupposes compliance with the latter, otherwise treaty non-compliance would be endorsed and amplified, which cannot be the case. It also concluded that the US court misapplied Article 54(2) of the Convention, which is intended to address the procedure for remedies in the declaring state, not a universalization therefor; the Convention did not seek to internationalize procedure law.

Finally, one panelist discussed whether the Convention and Protocol, in general, and Alternative A\(^6\) and Article XXX(4), in particular, are consistent with pre-existing US law, and, more broadly, whether they could be deemed enforceable despite any differences with existing US law, concluding, in both cases, that they are, thus rendering them enforceable federal law pursuant to the Supremacy Clause of the US Constitution. That was supplemented by balance of power and policy consideration, each reinforcing such enforceability.

END

5. ‘The Courts of a Contracting State in which the aircraft object is situated shall, in accordance with the laws of the Contracting States, co-operate to the maximum extent possible with foreign courts … in carrying out the provisions of Article XI’: see Article XII(2) of the Protocol.
6. Which is originally based on and developed from a parallel US insolvency rule, namely 11 USC s 1110.