Cape Town Convention Academic Project Conference 2020

Session ‘Cape Town Convention and its Aircraft Protocol: issue-specific assessment of applicable law’

Report of Presenter

This reports on the above session, held on 10 September 2020 at the Cape Town Convention Academic Project Conference, which consisted of a presentation by Dr Barış Mesci.¹

The presentation focused on the issue of applicable law within the Cape Town Convention (‘Convention’) and its Aircraft Protocol (‘Protocol’).

A conflict of laws rule is a legal rule that determines lex causae. In this context, Articles 5(4), 14 and 39 of the Convention, Articles VIII and XII(2) of the Protocol are conflict of laws rules. Some provisions of the Convention² and the Protocol³ contain a ‘direct’ reference to the applicable law, but are not conflict of laws rules since they do not determine lex causae. Thus, a judge in a Contracting State must determine the applicable law by virtue of the conflict of laws rules of the forum State and apply the domestic rules of that law. On the other hand, some provisions of the Convention⁴ ‘indirectly’ require a Contracting State court to find the applicable law through its national conflict of laws rules.

When a legal relationship has both contractual and proprietary aspects, a distinction should be made between these aspects with regard to the applicable law, given that they are subject to different conflict of laws rules. It is generally accepted that lex fori is applied to the characterization of an issue as contractual or proprietary.

An international interest is an in rem interest and the characterization of the interest created by the agreement under Article 2(4) will determine the nature of the creditor’s proprietary right. It may be a security interest or an ownership interest. Therefore, the law applicable to the issue of characterization within the scope of Article 2(4) should be the law that governs the proprietary rights. Traditional conflict of laws rules apply lex situs to proprietary rights; however, in the case of aircraft some jurisdictions apply lex originis. Consequently, the conflict of laws rule and therefore the law applicable to characterization may vary depending on whether the object is registered or not. That law also determines whether an amendment to the agreement itself necessitates a recharacterization.

The determination of the applicable law in insolvency is more complex. In non-EU States, different approaches are adopted based on the issue concerned. Lex concursus/lex fori is usually applied for procedural issues (eg, the time of, and reasons for, the

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². Articles 1(d), 1(k), 2(4), 5(2), 12, 16(1)(c), 29(7)(a)–(b), 30(2), 31(3), 36(3), 38(1), 50(3), 60(1).
⁴. Articles 4(1)(a), 30(3)(a)–(b), 40, 42(2), 52(5)(a).
commencement of insolvency proceedings). For other issues (e.g., effects of insolvency on the proprietary rights, power of disposal of the insolvent party), lex situs/lex originis at the time of commencement of insolvency is usually applied.

The applicable law under Article XI (Alternative A)(5)(b) of the Protocol is the lex fori, given that interim relief is a matter of enforcement law and any interim relief given by foreign courts is usually not recognized and enforced.

The interaction between the overriding mandatory rules of the forum State (e.g., rules regarding COVID-19 health-related measures which impact the physical exercise of remedies) and the applicable law should also be considered. In some national laws these rules may apply regardless of the applicable law.

National laws may include a public policy exception to the application of foreign law when the relevant foreign rule is manifestly incompatible with the public policy of the forum State.

5. The applicable law determines the types of interim relief (other than that set out in Article XI(5)(a)) for which the creditor can apply.