

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

Reference number: 2012-1

Reference:		
Date of Judgment:	5 December 2012	
Case:	Socjeta' Aeroporto Catania S.p.A. vs ALS Irish Aircraft Leasing MSN 215 Limited and Wind Jet S.p.A. Socjeta' Aeroporto Catania S.p.A. vs Eden Irish Aircraft Leasing MSN 204 Limited and Wind Jet S.p.A.	
Relevant CTC/Protocol (IR Rules and Procedures)	Article 3, Article 39, Article 55 of the Convention. Article IV of the Protocol.	IR Rules and Procedures
Relevant CTC Jurisdictions	Malta, Ireland	
CTC Facts, Conclusions and Analysis		
I. Facts:		
1	The proceedings related to two Airbus A320 aircraft (the Aircraft), MSN 215 owned by the first respondent in the first case, ALS Irish Aircraft Leasing MSN 215 Limited (ALS) and bearing MSN 204 owned by the first respondent in the second case, Eden Irish Aircraft Leasing Limited (ELS and together with ALS, the Lessors) which are leased to the second respondent in each case, WindJet SpA (the Lessee). The Lessee was Italian and it operated the Aircraft in Italy (a non-Contracting State). The Aircraft were registered in Ireland (a Contracting State).	
2	The Lessors each registered an international interest in respect of the leases of its Aircraft to the Lessee insofar as that lease related to the airframe of that Aircraft, the 'connecting factor' for the purposes of the Convention being the registration of the Aircraft in Ireland.	
3	The Lessee entered into insolvency proceedings owing dues to the Applicant, Società Aeroporto Catania SpA (Airport). Under Italian law: <ul style="list-style-type: none"> - the Airport had a special privileged claim over the Aircraft (pursuant to Article 1023 of the Italian Codice della Navigazione) giving it an attachment right in rem in the Aircraft ranking above the interests of the Lessors as legal owners of the Aircraft in respect of the unpaid dues; and - the Lessors as owners of the Aircraft were jointly and severally liable with the Lessee for the unpaid dues (pursuant to Article 6 of Italian law 324/1976). 	

¹ Unless otherwise indicated, Articles references in Arabic numerals are to those the Convention on International Interests in Mobile Equipment (**Convention**), and in Roman numerals are to those on the Protocol on Matters Specific to Aircraft Objects (**Protocol**). The Convention, as modified by the Protocol, is referred to as **CTC**.

- 4 The Airport applied for, and obtained, an order from the Italian court for a precautionary arrest warrant (*Sequestro Conservativo*) in respect of the Aircraft under the Italian Navigation Code and the Italian Civil Procedure Code. The order granted the Airport the right to detain the Aircraft pending payment of the unpaid dues. In the event that the unpaid dues remained unpaid after final judgment, the Airport would have had the right to seek an Italian court order for the sale of the Aircraft and for the unpaid dues to be paid to the Airport from the proceeds of sale of the Aircraft in priority to other claims.
- 5 The Lessors terminated the leases of the Aircraft on the Lessee's default and flew the Aircraft to Malta (a Contracting State) to protect the Aircraft from the Airport's claim.
- 6 Malta's declaration under Article 39 of the Convention does not include unpaid airport dues as a non-consensual right or interest having priority over a registered international interest.
- 7 On the basis of the *Sequestro Conservativo* order, the Airport applied to the Maltese Court for a precautionary warrant of arrest citing Article 31 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Brussels I**).
- Article 31 of Brussels I deals with jurisdiction and provides that 'Application may be made to the courts of a Member State [in this case, Malta] for such provisional, including protective, measures as may be available under the law of that Member State, even if, under this Regulation, the Court of another member State [in this case, Italy] have jurisdiction as to the substance of the matter'.
- 8 The Maltese court found in favour of the Airport granting it a precautionary warrant of arrest over the Aircraft in Malta.
- 9 The Aircraft were released after sufficient funds were deposited by the Lessors in the Maltese Court to secure the claim of the Airport.
- 10 The Lessors argued that the deposit should be returned to them if the arrest of the Aircraft was found to not have been validly granted.

In this regard, the Lessors argued that the precautionary arrest of the Aircraft in Malta frustrated the Lessors from their right under the Convention as holders of registered international interests in the Aircraft to re-possess the Aircraft. Malta as a Contracting State must recognise the Lessors' right to re-possess the Aircraft under the Convention. The Maltese Court rejected this argument and appears to have relied on Article 31 of Brussels I stating that *prima facie* the Airport had a claim against the Lessors under Italian law, and therefore the deposit should not be released.

The Lessors further argued that their rights in the Aircraft arising from their registered international interests in the Aircraft were being prejudiced. The Maltese court dismissed this argument, stating that any claims, registered interests and international interests which the Lessors had against the Lessee would still be considered in a ranking of creditors' interests in the Lessee's insolvency, and in any case, noted that the arrest of the Aircraft would not hinder the repossession of the Aircraft by the Lessors which could still take place.

II. Conclusions:

- 11 The Maltese court referred to Article 31 of Brussels I but did not provide any detailed analysis of the application of Brussels I. The grant of the judgments mainly focused on Maltese procedural law.
- 12 The Maltese court's focus was only on whether the Airport had, *prima facie*, a case against the Lessors or otherwise to detain the Aircraft. The Maltese court concluded that it did. Its conclusion was based of the claims which the Airport had under Italian law.

13 In applying its jurisdiction under Article 31 of Brussels I the Maltese Court appeared to rely on the European Union's declaration under Article 55 of the Convention which reads as follows:

'Pursuant to Article 55 of the Cape Town Convention, where the debtor is domiciled in the territory of a Member State of the Community, the Member States bound by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will apply Articles 13 and 43 of the Cape Town Convention for interim relief only in accordance with Article 31 of [Brussels I] ...'

14 The case was resolved as between the parties and, accordingly, the substantive issues were never considered and resolved by the Maltese court.

III. Analysis:

15 Whilst the substantive issues raised were unfortunately not considered and resolved by the Maltese Court, the case highlights a number of important issues vis the interaction, and potential conflict, between the provisions of Brussels I and the Convention as a result of the declarations made by the European Union upon acceding to the Cape Town Convention. In particular, the Maltese Court did not analyse the declarations made by Malta and by the European Union on acceding to the Convention, and the effect of the declarations made by the European Union on Article 39 of the Convention in light of the provisions of Brussels I.

16 The implication of the Maltese court's decision to grant the warrant for the arrest of the Aircraft is that, even if the Lessors had re-possessed the Aircraft in Malta, the Aircraft could still have been arrested in Malta by the Airport for unpaid dues under the jurisdiction of the Maltese court under Article 31 of Brussels I on the basis that, under Italian law, the Lessors were jointly and severally liable for the unpaid airport dues. Taking this further, if the Italian court had ordered the sale of the Aircraft which, under Italian law, would entitle the Airport to payment of its claim in priority to the Lessors claim (see I. 3 above), would the Maltese court have enforced that order under Article 33 of Brussels I? If yes, it would have granted priority to the Airport's claim over the Lessors' international interests even though the Airports claim did not have priority under Malta's declaration under Article 39 of the Convention.

17 As Kenneth Gray points out in his Article in the Cape Town Journal², any decision to prioritise Brussels I over the Convention, if correct, would reduce the degree to which commercial parties can rely on Article 39 declarations made by Member States: the priority which is supposed to be guaranteed by the Convention can be subverted by the enforcement of a court order of another Member State...'

He notes that conversely Article 33 of Brussels I permits the holder of an international interest who has an enforcement judgment of a court in a Contracting State to enforce that judgment in a Member State which is not a Contracting State. He states 'We can therefore envisage a situation in which the guarantees provided by the Convention can be enforced in Member States which have not ratified the Convention by use of Article 33 of Brussels I.'

18 The case highlights the need for purchasers and creditors of aircraft objects to understand that their rights may be at risk in Contracting States where a claim of a third party creditor may be given priority over their interest in an aircraft object even in circumstances where the third party claim does not have the benefit of priority under the Article 39 declaration of that Contracting State.

IV. Annotations Reflecting Subsequent Legal Developments

² Kenneth Gray (2016) *CTC in Europe: assessment of ratifications to date and implication of Brexit on the ratification by the UK*, *Cape Town Convention Journal*, 5:1, 1-21, DOI: 10.1080/2049761X.2016.1252136