

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

Reference: Ireland, case 8 [2019]		
Date of Judgment:	6 March 2019	
Case:	UniCredit Global Leasing Export GmbH -v- Business Aviation Limited and Aviareto Limited (reported)	
Relevant CTC/Protocol (IR Rules & Procedures)	Article 25(4); Article 40; Article 44	IR Rules and Procedures Regulation 5.4(f)
Relevant CTC Jurisdictions	Ireland	
CTC Facts, Conclusions and Analysis		
I. Facts:		
1	The First Respondent, Business Aviation Limited (BAL), a United Arab Emirates (UAE) corporation registered three (3) purported 'registerable non-consensual interests' (RNCRI s) against a Bombardier Challenger 850 aircraft and its two GE engines (the Aircraft). The Aircraft was registered in Germany and was owned by the Applicant, UniCredit Global Leasing Export GmbH (UniCredit) an Austrian corporation. It was leased by UniCredit to Phoenix XX (Twenty) Aviation Management GmbH (Phoenix) an Austrian corporation under an aircraft finance lease agreement and operated by ImperialJet Europe GmbH (ImperialJet) a German corporation under an aircraft operating lease agreement.	
2	BAL and ImperialJet had a common owner.	
3	The underlying dispute to which the purported RNCRI's related was in respect of a payment made by ImperialJet to UniCredit in respect of a debt deferral arrangement between UniCredit and Phoenix the terms of which were governed by Austrian law and provided that acceptance was constituted by performance - in this case, payment of a down payment. The amount which had been paid by ImperialJet to UniCredit and which was the subject of BAL's claim was the exact amount of the down payment.	
4	There was no contractual relationship between UniCredit and ImperialJet or between UniCredit and BAL.	

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**.

- 5 On default of the debt deferral arrangements by Phoenix, UniCredit had terminated the aircraft finance lease agreement with Phoenix, had taken possession of the Aircraft and had instituted proceedings in Germany against ImperialJet in order to secure re-delivery of the aircraft documentation.
- 6 BAL registered the RNCRI's on the IR in respect of the amount paid by ImperialJet to UniCredit. In its submissions for registration, it expressly stated that the State of Registry of the Aircraft was the UAE (which the Judge noted was 'manifestly not correct').
- 7 UniCredit demanded in writing that BAL remove the registrations and, when no satisfactory response was received, proceedings were commenced in Ireland seeking an order of the Irish High Court directing BAL to procure the discharge of the registrations. UniCredit also sought an order pursuant to Article 44(1) and/or Article 44(3) of the Convention requiring the Registrar to discharge the RNCRI's in the event that BAL failed to procure their discharge within 48 hours after making the order against BAL.
- 8 There were three principal grounds upon which UniCredit contested the validity of BAL's registrations:
- (i) neither the Convention nor the Protocol applied to the RNCRI's as there was no 'connecting factor' to support the registrations;
 - (ii) without prejudice to (i) above, the claim asserted by BAL did not fall within any applicable category of RNCRI the subject of the UAE declaration under Article 40 of the Convention; and
 - (iii) prior to submitting its registrations, BAL had not obtained an Authorising Entry Point (**AEP**) code from the civil aviation authority of the UAE.
- 9 Whilst BAL had actively participated and had submitted a number of affidavits in the proceedings and had been notified of the Court hearing, BAL did not attend the court hearing.
- 10 At the hearing for final orders, UniCredit made a specific application seeking an order restraining the Registrar and Mr Martin Spiegel (the managing director of ImperialJet) from registering any further RNCRI's against the Aircraft. Judge McDonald deferred making an order to give Mr Spiegel and BAL the opportunity to address the issue and to make submissions to the Court.

II. Conclusions:

Connecting Factors

- 11 The Court noted the two factors that attract the application of the Convention being (i) if the 'debtor' is situated in a Contracting State or (ii) if the aircraft is registered in a Contracting State. It further noted that the situation of the 'creditor' is not relevant to the application of the Convention.

The Court concluded that there was no connecting factor to the Convention and, on that basis alone, there was no foundation under the Convention or under the Protocol for the registration of the RNCRI's by BAL. Its conclusion was based on the following analysis:

- (1) the applicability of the Convention depends on the situation of the 'debtor' or the place of registration of the aircraft.
- (2) UniCredit is a 'debtor' under the Convention as a 'person whose interest in an object is burdened by a registrable non-consensual right or interest'. However, for the Convention to apply, a debtor must be 'situated' in a Contracting State. Based on Article 4.1 of the Convention, UniCredit was incorporated

and had its registered office in Austria and was therefore 'situated' in Austria. Austria is not a Contracting State. Accordingly, UniCredit is not a debtor 'situated' in a Contracting State. The Court therefore determined that the Convention cannot apply to the interests claimed by BAL unless the Aircraft is registered in a Contracting State.

(3) while the Court recalled that BAL, when submitting its registrations, purported to state that the Aircraft was registered in UAE, it noted that that was 'manifestly not correct'. It was clear from the certificate of registration dated 26 February 2010, that it was registered in Germany. The Court noted that the certificate of registration had not been questioned by BAL in any of its affidavits. The Court further noted that Germany is not a Contracting State. Accordingly, the Convention could not apply to the interests claimed by BAL on the basis that the Aircraft was registered in a Contracting State because the Aircraft was not registered in a Contracting State.

12 Citing Ireland, Case 3 [2015] *Belair Holdings v Etole Holdings Ltd*², the Court held that the fact that the Convention did not apply was sufficient ground, in itself, to order BAL to remove or discharge the registrations. It was not necessary to go any further.

13 The Court noted that Article 25 (4) of the Convention states that where a registration 'ought not to be made or is incorrect, the person in whose favour the registration is made shall, without under delay, procure its discharge or amendment'. Accordingly, the Court determined that BAL had a positive obligation to discharge the registrations on demand made by UniCredit under Article 25(4) and, having failed to do so, the Court made an order directing BAL to discharge the registrations from the IR within 48 hours, failing which the Registrar was directed to effect the discharge. BAL failed to make the required discharges and the Registrar duly complied with its obligations and procured the discharge of the registrations on 21 February 2019.

14 For completeness, notwithstanding that there was no requirement to express a view, Judge McDonald also considered the remaining arguments made by UniCredit.

UAE Article 40 Declaration

15 In relation to the argument that BAL's claim did not fall under any of the categories of RNCRI the subject of the UAEs declaration under Article 40 of the Convention, the Court noted that

(1) pursuant to Article 40 it is for each Contracting State to declare the categories of RNCRI that may be registrable.

(2) if BAL was seeking to rely on the UAE Article 40 declaration, it was 'crucially' important that BAL establish that, under the laws of the UAE, it holds an interest that falls within the scope of the UAE Article 40 declaration.

(3) the Court considered the question whether the claim made by BAL for repayment of the monies paid by ImperialJet to UniCredit was 'capable of registration' under the UAE Article 40 declaration. In this regard, the Court cited Professor Goode's explanation at para 4.25 of the Official Commentary (Third Edition) to support the view that rights or interests 'capable of being registered' under an Article 40 declaration do not extend to purely *in personam* claims.

2. *Belair Holdings v Etole Holdings Ltd* [2015] IEHC 569

In this regard, the Court noted that there was no contractual relationship between BAL and UniCredit or between ImperialJet and UniCredit. The Court determined that BAL's claim to repayment of the monies paid by ImperialJet to UniCredit was properly characterised as a claim for unjust enrichment.

(4) the Court, citing Article 5 of the Convention, determined that the nature of a claim and whether it was an *in personam* claim fell to be determined by the law applicable to the claim. Having analysed the facts to determine the governing law, the Court determined that Article 10.3 of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II) applied and that Austrian law was the applicable law governing the claim and the assignability of any claim by ImperialJet to BAL as Austria was the place where the unjust enrichment took place (the monies having been transferred to an account in Austria).

(5) having determined that Austrian law governed the claim, the Court considered expert evidence as to Austrian law from Professor Georg E. Kodek (Head of the Commercial Law Group at the Vienna University of Economics and Business), who noted that under Austrian law (ss. 1431 and 1435 of the Austrian Civil Code) claims to unjust enrichment are recognised but that such claims are *in personam* in nature.

(6) the Court concluded that, based on the expert evidence as to Austrian law, the only claim which BAL or ImperialJet could conceivably assert was an *in personam* claim. The Judge stated that 'even if there was a relevant connecting factor (which there is not) this would not give rise to a right to register an RNCRI'³

- 16 Notwithstanding that the Court had determined that Austrian law was the applicable law to determine if BAL had a claim 'capable of registration' under the UAE Article 40 declaration and that it was not strictly necessary to consider UAE law, he went on to consider UAE law.

The Court considered the affidavits of experts on UAE law submitted by BAL and by UniCredit. Based on the evidence, the Court concluded that there was no basis, by reference to the UAE Article 40 declaration, that BAL had a right or interest 'capable of registration' as an RNCRI against the Aircraft or engines. Therefore even if there was a 'connecting factor' there was no basis in UAE law under which BAL could maintain the registrations of the RNCRI's.

AEP Code

- 17 The Court did not make a formal finding on the argument that BAL did not obtain an AEP code noting that, having come to the conclusion that the registrations were invalid on other grounds, it was not necessary to make a formal finding in relation to the AEP issue.

Restraining Order

- 18 In considering the application for an order restraining BAL and Mr. Spiegel from registering any further RNCRI's against the Aircraft referred to at 10. above, the Court noted that the mere fact that an applicant has succeeded in an application to require a registrant to discharge a registration does not, of itself, provide any basis for the grant of an order restraining that registrant from registering any further RNCRI's against the relevant aircraft. However, the Judge indicated that there may be circumstances where it is entirely appropriate to make such a restraining order. In particular, it may be necessary to do so where it has been demonstrated to the court that a registration was registered abusively such as to give rise to a concern that a registrant may involve itself in further unconscionable registrations against the same aircraft in the future. The Judge concluded that, where the court can be satisfied that there is a 'real danger' that this will occur, there can be no doubt but that the court has an appropriate ancillary power to grant a restraining order against such a registrant.

3. *Ibid at Para 80*

The Court had deferred making an order to allow BAL and/or Mr. Spiegel to make submissions. No submission having been made, the Court ordered that BAL and Mr Martin Spiegel be restrained from making any further non-consensual registrations against the Aircraft.

19 The Judge, in support of his Order, referred to certain facts, including:

- that the registration contained a 'manifestly false statement' as to the state of registry of the Aircraft being in the UAE.
- the expert evidence of UniCredit's legal expert shows that there was no arguable basis on which (even under UAE law), the BAL claim could be said to fall within paragraph (d) of the Article 40 Declaration made by the UAE. He noted that the exercise which BAL's expert was asked to conduct was a very limited one containing 'very obvious and crucially important omissions' raising significant issues as to the *bona fides* of the approach taken by BAL to the registration and to the claim. It made it 'difficult to avoid the conclusion that a deliberate decision was made to very narrowly confine the exercise that [BAL's expert] was asked to carry out'
- there was no documentary evidence to support that BAL was an assignee of ImperialJet's interest in the payment. Under Regulation 5.4 of the Regulations and Procedures for the International Registry Eighth Edition 2019 (the **Regulations**) the only documentary evidence submitted was the bank transfer order.

Court's Jurisdiction

20 The Court fully considered its jurisdiction to make the requisite orders against BAL and against the Registrar.

Article 44(2): UniCredit had made a demand on BAL under Article 25(4) of the Convention demanding that BAL remove the offending registrations. It was the view of the Court that BAL was under a positive obligation under Article 25(4) to take all necessary steps to remove the registrations upon receipt of the demand. It indicated that their persistent failure to do so required the intervention of the Court and that it had no hesitation in making an order directing BAL to discharge the three registrations in question. The Judge confirmed that the Court's power to make such an order is expressly contemplated in the language of Article 44(2) which cross-refers to Article 25 and speaks of an order being made against a registrant '*requiring it to procure the discharge of the registration*'.⁴

Article 44(3): BAL having failed to discharge the registrations, the Court had no hesitation in making the further order sought under Article 44(3) of the Convention requiring the Registrar to discharge the registrations. The Court cited the order made by Kelly J. in Ireland, case 2 *Transfin-M Ltd -v- Stream Aero Investments SA and Aviareto Limited* noting that it is an order that is now 'routinely' made in proceedings of this kind. The Court affirmatively stated that there is no doubt that the Irish High court is a court of competent jurisdiction for the purposes of Article 44(3).

Court's Jurisdiction against BAL: The Court noted that prior to January 2019, BAL had fully participated in the proceedings and had submitted to the jurisdiction of the Court. It went on to note that, even if it had not submitted to the jurisdiction in that way, there could no doubt that the Court had jurisdiction against BAL. The Court noted: firstly, Regulation 5.4(f) of the Regulations expressly requires, as a condition to the registration of an RNCRI, that the registrant agrees to submit to the jurisdiction of the courts where the Registrar has its centre of administration; and secondly, Professor Goode at paragraph 2.228 of the Official Commentary (Third Edition) had noted the decision of Kelly J. in Ireland, case 2 that the Court has jurisdiction against a non-EU defendant (in this case BAL) under Order 11 Rule 1(f) and (g) of the Rules of the Superior Courts on the grounds that the proceedings of this kind related to tort committed within the jurisdiction (slander of title, malicious falsehood and misrepresentation) and on that ground the order sought is in substance an injunction as to any activity performed within the jurisdiction.

⁴ Note analysis at III. 25 below.

Costs

21 With regard to costs, the Court ordered that BAL pay the costs of UniCredit and Aviareto.

III. Analysis:

[Timing of Case]

- 22 The case commenced in July 2018. It had been heavily contested until shortly before the hearing, with numerous affidavits filed on behalf of BAL. This level of contest in cases involving the Registrar is unusual and had caused the delay.
- 23 The application was heard and the requisite orders against BAL and the Registrar were made on 19 February 2019. The registrations were discharged by the Registrar on 21 February 2019.
- 24 In his written judgment, Judge McDonald confirmed that at the hearing of the application he was mindful of the importance of dealing with the application as speedily as possible referring to the Rules of the Superior Courts that facilitate speed and efficiency and to Judge O'Malley's judgment in Ireland, Case 3 [2015] *Belair Holdings Ltd –v- Etole Holdings Ltd and Aviareto Ltd* where she had emphasised the importance of removing misleading registrations from the IR to maintain the integrity of the IR.

[Court's jurisdiction]

- 25 The Court was very clear on the basis on which it had jurisdiction to make the requisite orders against BAL and the Registrar and, in the case of the restraining order, the managing director of BAL. In the case of jurisdiction arising under Article 44(2), the Court may not be strictly speaking correct in that Article 44(2) applies where "a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purposes of enabling an order to be made against it ...". In this case BAL had not ceased to exist and had made an appearance in the proceedings as a respondent. However, the Court in any event had jurisdiction under Article 44(3) and under Order 11 Rule (f) and (g) of the Rules of the Superior Courts.

[Court consideration of other relevant provisions of the Convention]

- 26 The defence of the proceedings afforded the Court the opportunity to consider other relevant provisions of the Convention – see II. 14 to 16 (inclusive above). The consideration and conclusions of the Court on those matters were clear, reasoned and instructive and whilst made obiter and accordingly are not binding, they provide valuable guidance and support to courts in Ireland and in other Contracting States when considering the same provisions of the Convention.

[Restraining Order]

- 27 This is the first case in Ireland where an order has been sought and granted whereby a Registrant and/or related party is restrained from making any further registrations against an aircraft object. When considering the application for the restraining orders, the Judge in his written judgment emphasised that the registration system established under the Convention and the Protocol assumes that registrants will act in a *bona fide* way. Noting that the Registrar has no function to review or interrogate an application for registration, the system depends on 'participants acting responsibly'. He cited the Practitioners Guide at page 74 where it is emphasised that a registrant who knowingly submits a registration containing false particulars shows contempt for the entire system of registration and is plainly acting in an abusive manner. He noted that in such cases 'it may well be essential, in order to maintain the integrity of the registration system to make an order of the kind proposed here to ensure that there is no continuation of such abusive and reprehensible behaviour'. He took the view in making the orders that where a court is

satisfied that there is a real danger that in the absence of a restraining order there would be nothing to prevent an unscrupulous registrant (or someone acting on its behalf) from registering a further purported RNCRI against the aircraft, 'there can be no doubt but that the court has appropriate ancillary power to grant a restraining order against such a registrant'.

IV. Annotations Reflecting Subsequent Legal Developments

[N/A]