

## CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS<sup>1</sup>

Produced by the Legal Advisory Panel to the Aviation Working Group

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Reference: Ireland, case 3 [2015]		
Date of Judgment:	26 March 2015	
Case:	Belair Holdings Ltd -v- Etole Holdings Limited and Aviareto Limited	
Relevant CTC/Protocol (IR Rules & Procedures)	Article 20; Article 25(4); Article 39; Article 40; Article 44	IR Rules and Procedures  None
Relevant CTC Jurisdictions	Ireland; USA	
CTC Facts, Conclusions and Analysis		
<b>I. <u>Facts:</u></b>		
1. The Defendant, a British Virgin Islands company, pursuant to Article 20(4) of CTC registered a purported 'registrable non-consensual interest' in an aircraft registered for nationality purposes in the Cayman Islands and owned by the Applicant, a Cayman Islands corporation, in respect of a letter of intent relating to the sale of the aircraft to the Defendant which the Applicant claimed had lapsed due to failure to meet the conditions of the letter of intent (in that a sale and purchase agreement had not been entered into by 24 December 2014).		

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<sup>1</sup> 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**.

<sup>2</sup> See part IV, if applicable, containing annotations based on subsequent legal developments.

2. The substantive proceedings as to the commercial dispute relating to the letter of intent were issued in New York and subsequently Connecticut.
3. The Applicant had served a demand on the Defendant to remove the registration under Article 25(4) of CTC within 24 hours.
4. The Applicant made an ex-parte application to the Irish High Court (the **Court**), through its specialist Commercial Court division, to serve proceedings on the Defendant to seek an order of the Court directing the Defendant to procure discharge of the wrongful registration of a non-consensual interest under Article 40 of the CTC. The Applicant argued:
  - (1) the jurisdictions of the Applicant as vendor (Cayman Islands) and Defendant as purchaser (British Virgin Islands) under the letter of intent had not ratified the CTC nor had Monaco (being the jurisdiction of the purchaser's agent);
  - (2) the Defendant did not have a registrable non-consensual right or interest in the aircraft or, indeed, any right or interest in the aircraft; and
  - (3) that the registration had no basis under CTC.
5. The Defendant sought to justify its registration on the basis that the US was a Contracting State and that the negotiation of the letter of intent had been conducted by an agent in the US. In addition the Defendant submitted:
  - (1) the original demand by the Applicant under Article 25(4) of CTC was defective;
  - (2) a practice had developed for registration of this kind to be made to protect the interest of the holder of the non-consensual right or interest;
  - (3) the onus was on the Applicant to prove that the UK had not extended the provisions of CTC to overseas territories such as the British Virgin Islands and the Cayman Islands.

## **II. Conclusions:**

6. The Court concluded:
  - (1) No valid registrable non-consensual interest existed because no Contracting State with any arguable connection to the dealings between the parties had lodged an Article 40 declaration (the Applicant being situate in British Virgin Islands; the Defendant being situate in Cayman Islands; and the aircraft being registered in Cayman Islands). At the time of conclusion of the relevant agreement, the United Kingdom had signed but not ratified the CTC and therefore the Applicant/'debtor' was not situate in a Contracting State at the relevant time. Accordingly, the conditions of applicability of CTC had not been met.

- (2) The Court dismissed the arguments by the Defendant that the contract was concluded in the US and accordingly constituted a 'security agreement' or 'reservation of title' under CTC on the grounds that, even if that were the case, the registration would have required the consent of the Applicant.
  - (3) The Court dismissed the argument that the Defendant's rights accrued to it under the Article 39 declaration made by the US. The Court took the view that, even if that was correct, it could not justify registration on the basis that an Article 39 Declaration is a 'public announcement' by a state making the declaration as to the priority to be accorded to those rights by the law of that state. The Court concluded that such rights are not entitled to recognition in other Contracting States unless the applicable conflict of law rules accord such recognition and that such rights do not enjoy the same degree of recognition as 'registrable non consensual interests' registered pursuant to Article 40.
  - (4) The Court dismissed the argument that there was no 'technical impediment' to registrations of non-consensual interests arising under Article 39 on the basis that the lack of technical impediment cannot justify a misleading registration wrongly made.
  - (5) The Court further dismissed the submission by the Defendant that there was a developed practice of registering Article 39 interests. The Court concluded that the fact that the International Registry is set up in such a way that it precludes the necessity or possibility of the Registrar verifying the details of every registration, does not require the Court to condone a misleading registration.
  - (6) The Court dismissed the Defendant's argument that the demand by the Applicant under Article 25(4) of CTC was not compliant with the requirements of Article 25(4) to procure a discharge of registration 'without undue delay'. The Applicant had given 24 hours. The Court held that the demand to do something that was beyond the Defendant's powers (i.e. to effect discharge within 24 hours) did not render ineffective that part of the demand that was within its powers (i.e. procure discharge of the registration).
  - (7) The Court held that breach of a professional code as to service of the notice could not render ineffective service of a demand carried out in accordance with the rules of CTC.
  - (8) The Court dismissed criticism by the Defendant of the Applicant's lack of candour in making an ex-parte application to serve the proceedings on the Defendant outside of Ireland on the basis that, regardless of an applicant's behaviour, it cannot persuade a court that a registration that should not have been made should be left undisturbed. The Court cited the need to be 'conscious of the purpose and principles of the Convention and importance of maintaining the integrity of the Registry'.
7. The Court made an order under Article 44 of CTC directing the Defendant to discharge an invalid registration of a non-consensual interest within 3 weeks of the order and, in the absence of compliance by the Defendant with the order, directing the Registrar under Article 44(3) to discharge the registration.
  8. The Court awarded costs against the Defendant ordering it to pay both the Applicant's and the Registrar's costs.

### III. Analysis:

#### **[Timing of Case]**

9. The case was resolved within 2 months. The case was contested by the Defendant. An appeal was lodged but no stay was sought to the order to discharge the registration.

#### **[Court's jurisdiction]**

10. The Court did not have jurisdiction under the CTC itself. However, by making an appearance in the Irish proceedings, the Defendant had submitted to the jurisdiction of the Irish courts. If the Defendant had not made an appearance, the Court would have had to rely on its jurisdiction under the Rules of the Supreme Court as it had done in Ireland, case 2 [2013], on the basis of a tort committed in Ireland.

11. The decision of the Court was consistent with Ireland, case 1 [2012] and Ireland, case 2 [2013] in that, irrespective of the merits of the commercial dispute between the parties in relation to the letter of intent, no registrable non-consensual interest did (or could) exist under the CTC and accordingly the order could be made to direct the Defendant to procure discharge of the registration.

12. The Court in hearing the case determined that, notwithstanding the underlying commercial dispute between the parties, Ireland was the appropriate forum to hear the case insofar as it related to whether or not a valid registration under CTC had been made and to make the order to discharge the registration. In this case, as in Ireland case 1 [2012] and Ireland case 2 [2013] the registered interest was clearly not a registrable non-consensual right or interest within the meaning of Article 40 of CTC and, accordingly, the registration had no basis under CTC. If the validity of the registration had been in doubt, it is unlikely that the Court would have taken jurisdiction to determine its validity. In such circumstances, the Court would have required more than the appearance of the Defendant to take jurisdiction. The Court would more than likely have looked for an order of a court of competent jurisdiction which had determined the invalidity of the registration before accepting jurisdiction under Article 44(2) of CTC to make the order directing the Registrar to discharge the registration.

#### **[Court consideration of other relevant provisions of CTC]**

13. The appearance by the Defendant to the proceedings afforded the Court the opportunity to consider other relevant provisions of CTC. The consideration and conclusions of the Court on those matters were clear, reasoned and instructive and may provide guidance and support to courts in other Contracting States considering the same provisions of CTC.

#### **[Procedural concerns]**

14. A procedural concern arose as a result of the decision. The Court allowed 3 weeks for the Defendant to comply with the order. While notice of appeal was lodged, no stay was sought on the order to discharge and, accordingly, the registration was discharged. Had a stay been sought and granted, it would have (potentially significantly) further delayed removal of the invalid registration. It is essential to the industry and the credibility of the International Registry that the potential for such delay is mitigated either by preventing or discouraging misuse of the Registry in the first instance.

#### **IV. Annotations Reflecting Subsequent Legal Developments**

15. On August 28, 2015, the Cape Town Academic Project, a joint undertaking of the University of Oxford Faculty of Law and the University of Washington School of Law, released Annotation 3 to Professor Sir Roy Goode's Official Commentary on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects, Third Edition. Annotation 3 states that "the registration of a purported non-consensual right or interest that is not within the scope of the Article 40 declaration of the Contracting State under whose laws it purportedly arose is *per se* false and misleading", and concludes that any such registration "ought not to have been made" or is "incorrect", for purposes of Article 25(4) of the Convention.
16. The Regulations and Procedures for the International Registry have been amended to substantially modify the requirements applicable to the registration of a registrable non-consensual right or interest. Pursuant to Rule 5.4, a party on whose behalf such a registration is made must: (a) identify the primary obligor with respect to the obligation that is secured by the interest; (b) name the Contracting State under whose laws the registrable non-consensual right or interest has been conferred; (c) state the applicable category of registrable non-consensual right or interest; (d) certify that the registrable non-consensual right or interest has been validly conferred and that all of the registration information being provided with respect to it is accurate; (e) submit to the Registry documentary evidence of the registrable non-consensual right or interest; and (f) agree to submit to the jurisdiction of courts of Ireland and to be liable for the court costs of the Registrar unless the validity of the registration is upheld.<sup>3</sup>

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<sup>3</sup> [These amendments are not at the date of initial posting effective but are expected to be effective presently].