

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

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Reference: India, case 1 [2015]		
Date of Judgment	19 March 2015	
Case:	AWAS 29423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anor [Spicejet] And Wilmington Trust SP Services (Dublin) Ltd v Directorate General of Civil Aviation & Anor [Spicejet]	
Relevant CTC/Protocol; (IR Rules & Procedures)	CTC Article 5(1); Article 7; Article 10; Article 11(1); Article 13(2),(3); Article 39; Article 40; Article 54(2) Protocol Article IX; Article X; Article XIII; Article XXX(1)	IR Rules and Procedures None
Relevant CTC Jurisdictions	India	
CTC Related Facts, Conclusions and Analysis		
I. <u>Facts</u> 1. The High Court of Delhi at New Delhi (the ' Court '), in a joint ruling on 19 March 2015 for the two petitions (one involving 3 aircraft under lease from the Petitioner AWAS and one involving 3 aircraft under lease from the Petitioner Wilmington) described the relief requested, which was for an order that the first named Respondent, the Directorate General of Civil Aviation (' DGCA ') de-register aircraft which were registered under the name of the second named Respondent, Spicejet Limited, an Indian Corporation (' Spicejet ').		

¹ Unless otherwise indicated, Article references in Arabic numerals are to those in the Convention on International Interests in Mobile Equipment (**Convention**), and Article references in Roman numerals are to those in the Protocol on Matters Specific to Aircraft Objects (**Protocol**). The Convention, as modified by the Protocol, is referred to as the **CTC**. Paragraph number references in parentheses below are to paragraph numbers in the Court's order.

² See part IV, if applicable, containing annotations based on subsequent legal developments.

2. The subject leases in each of the two petitions were entered into after the Convention and Protocol each came into effect in India. An Irrevocable De-Registration and Export Request Authorization('IDERA')for each aircraft had been executed by Spicejet and recorded with the DGCA.
3. Each of the leases was terminated due to a default in payment among other defaults by Spicejet. Both Petitioners sought re-delivery of the aircraft described in each petition in December 2014 and on subsequent dates. Petitioner AWAS asked the DGCA for assistance in the de-registration of the aircraft (among other requests) on 19 December 2014. Petitioner Wilmington asked the DGCA for assistance in the de-registration of the aircraft (among other requests) on 30 December 2014. The DGCA had been informed by both Petitioners that the leases were terminated, and the DGCA had been provided with the original IDERAs and photocopies of priority search certificates showing that the lessors, owners, and mortgagees described in detail in the judgment were the only registered interest holders, accompanied by written statements of the Petitioners confirming that these were the only registered interest holders.
4. On 09 January 2015, the DGCA informed Spicejet that it was required to surrender the certificates of registration and to deactivate the transponder codes for each aircraft. The DGCA said that this was in order to proceed with the lessor's request for deregistration. Spicejet did not take the action so required.
5. Petitioner AWAS commenced their petition on 30 January 2015. Petitioner Wilmington commenced their petition on 28 January 2015.
6. On 09 February 2015, Rule 30 of the Indian Aircraft Rules was amended with the insertion of sub-rule (7) to read in relevant part as follows in the quoted text from the Court's order:

'7. The registration of an aircraft registered in India, to which the provisions of the Cape Town Convention or Cape Town Protocol apply, shall be cancelled by the Central Government, as provided in the Cape Town Protocol, if an application is received from IDERA Holder prior to expiry of the lease along with:-

 - (i). The original or notarized copy of the IDERA; and
 - (ii). A certificate that all registered interests ranking in priority have been discharged or the holders of such interest have consented to the deregistration and export'. (para 22.3)
7. The Court considered the Convention and the Protocol in the above two petitions brought by the Petitioners in which the DGCA had failed to de-register the subject aircraft pursuant to an IDERA properly submitted to the DGCA under the provisions of Articles IX and XIII of the Protocol and as provided by the new Indian Aircraft Rule 30(7). The Court issued an order on 19 March 2015 to the DGCA to forthwith de-register the subject aircraft from the Indian Civil Aviation Register.

II. Conclusions

8. The Court concluded that the declaration by India pursuant to Article XXX(1) of the Protocol as to Article XIII with respect to the IDERA permit the de-registration remedies under Article IX(1) to be triggered and that these remedies have been triggered. (paras 17.4, 17.5 and 17.6)
9. The Court concluded that the remedies under Article IX can be exercised without court intervention and thus without leave of court. (para 17.7)

10. The Court noted that 'clause (4) of Article XIII says that the "registry authority" and other administrative authorities in the contracting State, "shall" expeditiously, co-operate with and assist the authorised party in exercise of the remedies provided under Article IX.' (para 17.5)
11. The Court concluded that, if the following two conditions were fulfilled, the DGCA must honour a request for de-registration and export without a court order:
 - '(1) The request made, has been properly submitted by an authorized party or its certified designee, under a recorded IDERA;
 - (2) The authorized party or its certified designee has certified 'to the registry authority that all registered interests ranking in priority to that of the creditor in whose favour the authorization has been issued have been discharged, or that, the holders of such interests have consented to the de-registration and export'.

(paras 17.5 and 18)
12. The Court concluded that the existence of an Article 39(1)(a) 'lien' does not prevent de-registration under an IDERA that is properly submitted pursuant to the Protocol and the Indian Aircraft Rules. (para 20)
13. The Court held that the new sub-rule 30(7) under the Indian Aircraft Rules establishes a mandatory obligation on the DGCA to de-register the aircraft on fulfilment of the relevant criteria in the sub-rule, which criteria match the above two described conditions in paragraph 11 of this Legal Activity Analysis.
14. The Court rejected arguments that the validity of a termination of a lease must be decided prior to a de-registration. The Court noted that termination of an aircraft lease is not a condition to de-registration under Article IX of the Protocol. (para 26)
15. The Court considered the other relief sought for export of the aircraft pursuant to the terms of the IDERA submitted to the DGCA. The Court remanded the case to the DGCA for decision within 2 weeks as to whether an Article 39(1) 'lien' is operable and to deal with the IDERA authorization for export of the aircraft along with the documentation on board out of the country. (para 28)
16. In response to an argument of the Respondents, the Court concluded that, if the creditor were to request an order for de-registration in an action for relief pending final determination pursuant to Article 13(1) and X(6), as supported by the interpretation in paragraph 3.3(2) of the Official Commentary (3rd Ed.), the DGCA must honour the request for de-registration within five working days of the order in favour of the creditor by a court.
17. The Respondents had argued that an alternative proceeding in England commenced by the Petitioners should prevent the Court from making a decision. This argument was rejected by the Court in part on the basis that the aircraft were registered in the Indian Civil Aircraft Registry and that thereby the Court had jurisdiction to decide the petitions. The Respondents also noted that Spicejet had not filed any proceedings in the nature of an anti-suit injunction. (para 24)
18. The Court rejected a contention by the Respondents that, because the Petitioners had cash security they had alternatives to obtain a remedy that Spicejet did not have, de-registration should be denied. The Court did not accept that arguments of equity could be used to reach a result contrary to the terms of the leases, the CTC or the Municipal Law. (para 25.1)

19. The Court rejected what it called the ‘nebulous ground of equity’ as an argument for preventing the de-registration. The Court stated as a rationale that India is a ratified party to the Convention and the Protocol and the principles of interpretation under the Convention in Article 5(1) set forth, ‘inter alia’, an obligation on the [C]ontracting States, to promote uniformity and predictability in the application of the Convention’. (para 25.2)
20. The Court also rejected submissions that a de-registration or even a re-possession of the aircraft ‘would impinge upon public interest’. It rejected arguments that contracts with passengers would be the basis of that public interest and said that when India ratified the Convention and the Protocol it gives rise to the presumption that it was done in the larger public interest, and the larger public interest is that of the Contracting State to honour its commitments under the Convention and the Protocol and that of the parties to adhere to their contractual obligations. (para 27)

III. Analysis

[Timing of Case]

21. The case was resolved within 2 months. The appeal that was lodged thereafter was withdrawn.

[Court holding as to de-registration pursuant to IDERA was compliant with the Protocol]

22. This was a well-reasoned case, whose conclusions were generally compliant with the terms and intent of the Convention and the Protocol. The Court’s orders required rectification of prior action by the DGCA (acting prior to the passage of amendments to the Aircraft Rules that implemented the Protocol terms) which otherwise would have raised compliance questions since the DGCA had not de-registered the aircraft upon receiving a correctly supported IDERA request.

[Strong endorsement of the Protocol]

23. This case represents the first substantive decision by the Indian Courts addressing the Convention and the Protocol where the treaty directly applies to a transaction. The Court strongly endorsed the terms of the Convention and the Protocol and did so in both an analytical and a policy supporting manner. The Court used the provisions of the CTC, international treaty law and the Indian Aircraft Rules to reach their decision.

[Enforceability of the request for de-registration under the CTC without leave of the Court]

24. The Court discussed the enforceability of the request for de-registration under the CTC both without leave of the Court and with Court order. The Protocol, supported by the Official Commentary, provides two routes by which to exercise the remedies, which are dependent on a declaration by the Contracting State which is the State of registry of the aircraft. The Court stated that India has made such declarations and reviewed the relevant declarations that were then used to support the Court’s decision on enforceability of the IDERA without leave of court.

[Indian Aircraft Rules]

25. The case was significantly affected by the amendment to the Indian Aircraft Rules after the Petitions were filed and the case was underway. The provisions of the added Rule 30(7) mirrored the provisions of the Protocol for conditions that were required to de-register an aircraft pursuant to an IDERA. While the Court justified its decision based on the Protocol and the Convention provisions, along with international treaty law, the amended Rule gave the Court a national law basis. The amended rule thereby assisted the Court by avoiding a conflict between the prior Indian Aircraft Rule on the points in this case and the dictates of the Convention pursuant to the principles of international law as set forth in paragraph 35 below.

[A Court to order de-registration within five working days of Court action under Article 13]

26. In response to an argument that the IDERA request to the DGCA without leave of the Court in Article IX of the Protocol had to be given effect within five working days, the Court explained the difference between the IDERA route to de-registration and the Court route to de-registration (and in doing so quoted from the Official Commentary to explain a known drafting slip in the Protocol) so as to confirm that if the Court route were taken under Article X combined with Article 13, the registry authority or other administrative authorities are required to deregister within five working days of the Court order. (para 23.3).

[NCRIs, Article 39(1)(a) and Article 40]

27. The Court gave an exposition on the concepts of non-consensual rights or interests (an 'NCRi') under Article 39(1)(a) and registrable NCRIs under Article 40. Where the Court used the term Article 39(a) 'liens' in its conclusions, it also explained the concepts using NCRIs and must have meant any applicable NCRIs in that conclusion and not just 'liens'.
28. The Respondents alleged that a registerable NCRi was in existence and that, with such a 'registered interest' not discharged, the DGCA could not therefore proceed to de-register the aircraft. While the Court set out how a registrable NCRi that existed and was registered under the declaration as to Article 40 could prevent de-registration if it had priority over an international interest (para 19.2), there were no such registered Article 40 'liens' to which the counsel the DGCA could refer the Court. (para 20.1) In relation to Article 39(1)(a) NCRIs, the Court stated the following:

'A bare perusal provisions of the Article 39(1)(a) of the Convention would show that the Contracting State is required to indicate (by filing relevant declaration), the types of NCRIs (other than a NCRi to which Article 40 applies) which, under the Municipal Law, have priority, over an interest in the aircraft object equivalent to that of the holder of registered international interest and, which shall have priority over a registered international interest, without they themselves being registered as international rights or interests.'(para 18.3)

[Aircraft shall be deregistered pursuant to the IDERA despite any Article 39(1)(a) NCRi. Recognition that NCRi is limited by Declaration]

29. The Court went on to review the concept that such an NCRi is itself a status conferred by 'Municipal Law'. This distinction was important to the Court in making the point that such an NCRi would have priority over a registered international interest. (para 19.2) Unlike the Article 40 NCRIs that are registered, the existence of a lien under Article 39(1)(a), the Court opined, had nothing to do with the remedy sought under Article IX of the Protocol:

'De-registration of the aircraft is not, in my opinion, hampered by the existence of liens, if any, under the Municipal Law of the Contracting State. The liens, as indicated above, under Article 39(1) (a) shall obtain if so provided under the Municipal Law. The extent of the lien shall also be governed by the Municipal Law and not by the Convention.' (para 20)

30. The Court seems to have erred in using the words 'Municipal Law' throughout its discussion and by saying that the extent of the lien shall be governed by the Municipal Law and not by the Convention. The extent of the lien, an NCRi, is limited by both the Municipal Law and the Convention. Any such Municipal Law liens are limited by the Declaration and thus by the Convention itself. As noted by the Court elsewhere in the decision, the India Declaration lodged as to Article 39(1)(a) had limited such liens by the precise wording of the Declaration to three types of Indian liens: (a) unpaid airline employee wages since time of declared default, (b) liens for taxes and other unpaid charges arising from or related to use of an aircraft since the time of declared default and (c) liens in favour of repairers of an aircraft. (para 18.9) The Court was clearly aware of this limitation because later in the opinion it stated that a future decision by the DGCA that had to be made as to the existence of any liens was to be made 'with reference to the relevant Municipal Law as required by the declarations filed by the Government of India'. (para 28.1)

[No decision with respect to export of Aircraft pursuant to the IDERA in the event of Article 39(1)(a) NCRi]

31. While the Court noted that the existence of a lien under Article 39(1) should not affect the de-registration of the aircraft, it may, however affect the issue of export. The Court requested that the DGCA make a decision regarding the existence of a 'lien' under Article 39(1) (if any) before the Court could consider whether or not to grant the other relief of export sought by the Petitioners. Accordingly, the export portion of the IDERA was not expressly decided by the Court in the same way other issues were decided, but the order remanding the final decision to the DGCA would appear to be an implied decision of the Court in the form of an order that would require any such Article 39(1) 'liens' that do exist to be satisfied prior to the DGCA expediting the export, and in doing so the Court fashioned its own time period of 2 weeks. (para 28) The Court omitted the letter (a) in its use of the Article 39(1), but elsewhere in the opinion it commonly used Article 39(1)(a) and even in paragraph 28 of the decision its use of the qualifying words 'liens obtaining vis-à-vis the aircraft objects under the Municipal law; as contemplated under Article 39(1) of the Convention' shows that it meant Article 39(1)(a).

[Rejection of the necessity for lease termination as a condition to deregistration of aircraft pursuant to Article IX]

32. It was ruled that in order to comply with Article IX (which contains no condition that other remedies be taken) termination of a lease in relation to an aircraft will not constitute a precondition for de-registration. This is consistent under the new Rule 30(7) of the Indian Aircraft Rules. (para 26)

[Conflict with alternative proceedings not an impediment to court proceedings with respect to deregistration of the Aircraft]

33. The Court stated that the commencement of alternative proceedings in another jurisdiction would not oust the Indian Court's jurisdiction to hear the matter. The Court noted that Spicejet had not filed any 'anti-suit injunction'. (para 24) This raises the question of what the decision might have been if the parties had agreed to an exclusive submission to a foreign court, which is binding under Article 42 of the Convention. As it is difficult to see how a foreign court could have jurisdiction to make orders over a national authority such as the DGCA, one must conclude that an exclusive submission to foreign jurisdiction on matters between the parties to an agreement should not prevent residual local jurisdiction to make such orders.

[Arguments of the public interest not an impediment to deregistration or repossession of the Aircraft under the Convention and Protocol]

34. In rejecting the arguments by Respondents that there was a public interest to be served in disallowing de-registration or re-possession, the Court stated that a larger public interest lay in promoting uniformity and honouring its commitments under the Convention and Protocol. The Court noted that a court ought not to proceed in a manner which retards funnelling of much needed private finance for business transactions in India. (para 27) The Court took the broad policy approach to this issue, but it could have also pointed out that the amended Aircraft Rules in new sub-rule 7 are expressly structured with language that did not refer to public interest, whereas the remaining Aircraft Rules applicable to other actions continue to refer expressly to public interest as a relevant factor for purposes of those actions.

[Obligation on India under Article 5(1) of the Convention and as a matter of international treaty law to promote uniformity and predictability in application of the Convention]

35. The Court placed strong reliance on the terms of Article 5(1) of the Convention to promote uniformity and predictability as to interpretation and application of the Convention, in this case as to whether an argument that as a matter of equity the Petitioners should use other security rather than be entitled to de-registration. The Court cited, among other references, the Vienna Convention to say that a State should not cite internal law as a justification for failure to perform its obligation under a treaty. (para 25.2) The Court concluded by stating 'that the courts must prod the concerned statutory authorities to act in consonance with the provisions of international conventions, to which the Contracting State is a party'. (para 25.4)

36. The Court reached the conclusions, described in paragraphs 14, 16, 17, 18, 19 and 20 of this Legal Activity Analysis, which resolved issues that were termed by the Court as 'tertiary submissions made by counsels'. (para 23) Whether or not these conclusions were necessary to the main holdings, the conclusions were important and useful for future analysis.

I. **Annotations Reflecting Subsequent Judicial and Legislative Developments**

N/A

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