

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS

Produced by the Legal Advisory Panel to the Aviation Working Group

Reference: South African case 1, [2019]		
Date of Judgment	19 March 2018	
Case:	Export Development Canada and another v Westdawn Investments (Pty) Ltd and others [2018] 2 All SA 783 (GJ)	
Relevant CTC/Protocol; (IR Rules & Procedures)	<p>CTC</p> <p>Article 10 (Remedies f conditional seller or lessor)</p> <p>Article 11 (Meaning of default)</p> <p>Article 13 (Relief pending final determination)</p> <p>Article 43 (Jurisdiction under Article 13)</p> <p>Article 54 (Declarations regarding remedies)</p> <p>Protocol</p> <p>Article X of the Protocol to the Convention (Modification of provisions regarding relief pending final determination)</p>	<p style="color: yellow; font-weight: bold;">IR Rules and Procedures</p> <p>None</p>
Relevant CTC Jurisdictions	South Africa	
CTC Related Facts, Conclusions and Analysis		
<p>I. <u>Facts</u></p> <p>1. In 2015, Export Development Canada (as original lender, agent and security trustee, "EDC") financed the purchase by Stone River MSN 9631 Aircraft Designated Activity Company (a company located in Ireland) ("Stoneriver") of 1 (one) Bombardier Global 6000 Aircraft with registration mark ZS-OAK (the "Aircraft"). As part of the financing, the Aircraft was leased by Stoneriver to Westdawn Investments Proprietary Limited, a company incorporated in South Africa ("Westdawn"). The financing was guaranteed by various corporate and individual guarantors, including Oakbay Investments Proprietary Limited, a South African incorporated company (as corporate guarantor, "Oakbay") and certain Gupta family members (as individual guarantors). The Aircraft was operated by ExecuJet Proprietary Limited (although at the time of the below legal proceedings ExecuJet had terminated its appointment as the operator of the Aircraft).</p>		

2. Included in the security package is first ranking English and South African law registered security (including a South African law aircraft mortgage) and appropriate international interests filed on the International Registry.
3. Milbank, Tweed, Hadley & McCloy LLP and Webber Wentzel acted as English and South African counsel (respectively) to EDC in respect of the financing and subsequent enforcement proceedings.
4. Following the occurrence of various events of default under the financing and leasing in and during 2017 (and which were continuing in 2018 and beyond), EDC ordered Stone River to terminate the leasing of the Aircraft and ordered the return of the Aircraft to an agreed delivery location.
5. Court proceedings were first launched in the English courts. Westdawn challenged the validity of the termination of the lease and refused to return the Aircraft as directed.
6. EDC launched parallel proceedings in the South African courts on an urgent basis for interim relief, and (pending final determination in the English courts) sought the grounding, return and storage of the Aircraft in South Africa.
7. The High Court of South Africa Gauteng Local Division, Johannesburg (the "**Court**"), in a ruling on 19 March 2018 ordered that (i) Westdawn return the Aircraft to Lanseria International Airport; (ii) the Aircraft not be used, sold or disposed of by EDC during the interim period without the approval of a court of competent jurisdiction; (iii) that EDC maintain the Aircraft while it is being stored; and (iv) the Aviation Authority deregister the Aircraft from the register in the event that Westdawn failed to return the Aircraft (the "**Order**").
8. On 23 March 2018, Westdawn applied for leave to appeal the Order. EDC and Stoneriver launched contempt of court proceedings against *inter alia* Westdawn which were heard at the same time as the leave to appeal application. Westdawn continued to refuse to return the Aircraft in light of the pending leave to appeal application.
9. The leave to appeal application was dismissed, and the Gupta respondents were declared in breach of the Order and were given 5 calendar days to comply with the Order.
10. Westdawn subsequently returned the Aircraft 'voluntarily'.
11. The Aircraft is currently in storage in South Africa.
12. Discussions were held with various anti-corruption authorities in South Africa regarding competing claims to the Aircraft (on the basis of being proceeds of crime). The relevant authorities have recognised EDC's first ranking security interests in the Aircraft.
13. Our understanding is that the UK proceedings are stayed for the moment (the status of the UK proceedings are subject to confirmation).

II. Conclusions

1. Despite the Gupta respondent's contention that the matter be struck from the roll for lack of urgency the court found that, "This application is enrolled as an urgent application and, insofar as may be necessary, the forms prescribed by the rules of this Honourable Court are dispensed with, that this application be heard as one of urgency under rule 6(12)".
2. The Gupta respondent's contended further that the relief sought by the applicants cannot be granted as it involves an "inversion of the status quo" and that they are "entitled to continue the enjoyment of the full spectrum of rights granted under the lease agreement". The court however, provided that, amongst other reasons, the relief sought in the notice of motion is the very relief required by Article 13 (Relief pending final determination) of the Cape Town Convention (the "**CTC**"), which obliges a Contracting State to provide "speedy relief" involving "preservation of the object" and "immobilisation of the object" pending final determination of a claim for default".
3. The Court ordered that, pending final determination of the matter in the English courts, (i) Westdawn return the Aircraft to Lanseria International Airport; (ii) the Aircraft not be used, sold or disposed of by EDC during the interim period without the approval of a court of competent jurisdiction; (iii) that EDC maintain the Aircraft while it is being stored; and (iv) the Aviation Authority deregister the Aircraft from the register in the event that Westdawn fails to return the Aircraft.
4. The first to the fourth respondents were ordered to pay the costs of the application, including the costs of two counsel.

iii. **Analysis**

1. The Court papers expressly referred to the rights of the creditor under the CTC and oral argument was heard on the material aspects of the CTC.
2. The case is significant in that: (i) it is the first court case in South Africa dealing expressly with the CTC and (ii) the judgment confirmed the following: (a) it confirmed that the CTC and the Protocol have the force of domestic law; (b) it affirmed the rights of a creditor to speedy relief under Article 13 (Relief pending final determination) and (c) it affirmed the jurisdiction of the South African courts pursuant to Article 43 (Jurisdiction under Article 13) - courts of the Contracting State chosen by the parties have jurisdiction.
3. Administrative authorities can be compelled by a court to comply with the CTC provisions / remedies. As seen from the EDC case, it appears that our courts are likely to recognise the CTC and give effect to the CTC and a creditor's rights pursuant to the CTC.

Speedy Relief - Article 13

4. The Court stated that the Convention read together with the Protocol support the expeditious hearing of matters of this nature. The courts aim to provide speedy relief to applicants within the prescribed time limits as set out in South Africa's Declarations under the CTC. In the EDC case, proceedings were launched in the Court on an urgent basis, it was set down on the urgent court roll in March 2018 and judgment was obtained within 3 weeks. The Court stated that: "*Article X of the Protocol (which South Africa has, under its Declarations, agreed to apply in its entirety) added article 13(1)(e) to the Convention in the*

following terms: [(e) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom]. It also states that "speedy" under article 13(1) means "within such number of working days from the date of filing of the application for relief as is specified in [South Africa's] declaration."

5. The Court provided that: "*South Africa's declaration states that the time period is no longer than 10 calendar days in relation to the remedies set forth in Articles 13(1)(a)–(c) and not longer than 30 calendar days in respect of the remedies in Articles 13(1)(d) and (e). South Africa has thus undertaken to have the matters which are the subject of this application heard and decided urgently and within a matter of days.*"
6. Whilst the Court recognised the rights of EDC to urgent remedial relief under Article 13, the Court also confirmed that EDC satisfied the test for urgency as a matter of South African law. What is not clear from the judgment is whether the Court would have upheld EDC's rights to urgent relief under CTC in circumstances where it had not made out a case for urgency and not satisfied or met the test for urgency under South African law. No pronouncement was made on this aspect which therefore remains undetermined.

Jurisdiction of South African courts - Article 43

7. The Respondents did not submit to the jurisdiction of the Court and argued the Court did not have jurisdiction to hear the application.
8. The Court rejected the Respondents arguments on various grounds, including on the grounds of the CTC.
9. The Court provided that: "*Under Article 11 of the Convention, the debtor and creditor may agree in writing to the events that constitute a default and give rise to remedies specified in the Convention. When such an event of default has occurred, the lessor may seek a remedy under Article 10 and:*
"(a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object which the agreement relates; or
(b) apply for a court order authorising or directing either of these acts."
10. The Court further provided that: "*Article 13(1) sets out an extensive list of remedies which a court may grant on an interim basis. This includes an order vesting the possession, control, custody, or management of the Aircraft in the creditor or immobilising the Aircraft. Article 43 preserves jurisdiction for the purposes of Article 13. Articles 43(1) and (2) state that the courts of the Contracting State chosen by the parties have jurisdiction to grant relief under article 13(1). Article 43(3) states that a court has jurisdiction to provide interim relief under article 43(1) or (2) irrespective of whether the final determination of the relief claimed in article 13(1) will take place in a court of another Contracting State.*"
11. The Court stated that: "*Under Article 43 of the Convention, the South African courts are therefore expressly recognised as having jurisdiction in this matter. South Africa is a Contracting State, and the South African courts are the applicants' chosen forum for these interim proceedings, as permitted by the Lease and Facility Agreements.*"
12. Whilst the Court clearly confirmed the jurisdiction of the South African courts in terms of Article 43, the Court also confirmed it had jurisdiction in this application on various other grounds. What is not clear from the judgment is whether the Court would have confirmed it had jurisdiction in the application under and in terms of the CTC in circumstances where, but for the CTC, the Court would not have had such jurisdiction to hear the application. No pronouncement was

made on this aspect. This distinction however is moot for the reason that the grounds on which the CTC has application to a transaction pursuant to Article 3 of the Convention and Article IV of the Protocol are the same grounds which the Court relies for its jurisdiction under South African law.

General

13. The EDC judgment is binding on all one-judge panels in the Gauteng Division of the High Court (Pretoria and Johannesburg). It is also of persuasive (but not binding) value to all other courts in South Africa.

IV. Annotations Reflecting Subsequent Judicial and Legislative Developments

1. As at the date of compiling this report, the interim order by the Court remains in effect. The Aircraft remains in South Africa and the English law proceedings are on hold pending discussions between the parties.
2. There is currently an amendment bill to the Convention. Optimistically, we would hope that the bill is passed in 2019. The purpose of the bill is to (i) clarify the legal status of the Declarations, to ensure that they are considered to be properly incorporated into domestic law and (ii) to give primacy to the Convention over contradicting domestic law, in particular our Companies Act and the business rescue regime contained in that Act (currently, the Companies Act and in particular a company in business rescue, will prevail over Alternative A and Article XI). There is an ongoing debate regarding the validity/legality of the 'self-help' Declaration (the concern being that it is unconstitutional) and is subject to debate in the preparation and drafting of the amendment bill.