

# 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: Australia, case [ • ] 2022		
Date of Judgment:	16 March 2022	
Case:	<i>Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (Administrators Appointed)</i> [2022] HCA 8	
Relevant CTC/Protocol (IR Rules and Procedures)	Articles 8,10 and 12 and Article 30(3) (b) of the Convention Articles IX(1) and (3) and Articles XI(2), (5), (7), (8),(9) and (13) of the Protocol	IR Rules and Procedures  None
Relevant CTC Jurisdictions	Australia	
CTC Facts, Conclusions and Analysis		
<b>I. <u>Facts:</u></b>		
1. Wells Fargo Trust Company (the ' <b>Wells Fargo</b> ') as legal owner and trustee for the beneficial owner, Willis Lease Finance Corporation (" <b>Willis</b> " and together with Wells Fargo, the ' <b>Applicant</b> ') leased 4 aircraft engines (the ' <b>Engines</b> ') to the VB Leaseco Pty Ltd (Subject to Deed of Company Arrangement) (the ' <b>Respondent</b> ') a member of the Virgin Australia group, who, in turn, subleased the Engines to Virgin Australia Airlines Pty Limited (Subject to Deed of Company Arrangement).		
2. The leases of the Engines were substantially documented in a General Terms Agreement (' <b>GTA</b> '). The Applicant's interest under the leases were registered on the International Registry as "international interests" under the Convention and the Protocol. There was no dispute that the interests constituted valid international interests.		
3. On 20 April 2020, the Virgin Group was placed into administration. That event constituted an event of default under the leases as specified in the GTA. The GTA specified that, upon the occurrence of an event of default, the Respondent was obliged to redeliver the Engines in the redelivery condition to a specific		

<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.

location in Florida (the '**Redelivery Location**'). That event also constituted a default triggering the Applicant's right under Article 10 of the Convention to terminate the lease agreements and to take possession or control of the Engines. That right is subject to Article 30(3)(b) of the Convention which preserves rules of insolvency procedure. Under s440(B) the Australian *Corporations Act 2001* (Cth) ('**Corporations Act**'), upon the appointment of the administrators to the Virgin Group (the '**Administrators**'), an automatic stay applied to the enforcement of the Applicant's rights against the Respondent. In its declarations under the Convention, Australia had opted to apply Alternative A of the insolvency remedies under Article XI of the Protocol with a waiting period of 60 days. Accordingly, the provisions of Article XI applied to displace the provisions of Article 30(3)(b) of the Convention (including the s440B prohibition on enforcement of the Applicants right to take possession of the Engines without the consent of the Administrators or leave of the court).

4. 60 days after the appointment of the administrators to the Virgin Group, the Applicant made a demand for redelivery of the Engines to the Redelivery Location. The demand was rejected by the Administrators who, the same day, exercised their power under section 443B(3) of the Corporations Act to give 5 Business Days notice to the Applicant that it did not propose to exercise rights in relation to the leased property and offering the Applicant the opportunity to take control of the Engines where they were located in Australia. By serving the s443B(3) notice, the Administrators' were relieved of personal liability for the rent and other amounts payable by the Respondent under the lease agreements attributable to the period 5 Business Days after notice and during which the Respondent continues to use, occupy or be in possession of the Engines.
5. The Applicant rejected the offer and brought an application in the Federal Court seeking various declarations and other relief, including (1) a declaration that the section 443B(3) notice did not discharge the Administrator's obligation under Art XI(2) of the Protocol to '*give possession*' of the Engines and (2) an order to the Administrator to deliver up the Engines in the Redelivery Location in accordance with, and as required by, the GTA.
6. The proceedings were heard by the Federal Court of Australia on 17 August 2020. On 3 September 2020, the Federal Court of Australia held that the obligation to '*give possession*' under Article XI(2) of the Protocol requires an insolvency administrator to provide 'redelivery... effectively in accordance with the terms of the lease agreements'. Accordingly, the Administrators were ordered, at their cost, to deliver the Engines to the Redelivery Location.
7. On appeal by the Administrators, the Full Federal Court of Australia overturned the Federal Court's decision. The Full Federal Court held that 'Art XI(2) does not impose a requirement to effect redelivery according to the terms of the agreement with the creditor.'
8. Special leave to appeal the Full Federal Court's decision to the High Court (the '**High Court**') was granted to the Applicant on 12 April 2021. In the meantime, the Engines had been redelivered in the US.
9. The High Court is the highest court in Australia from which there are no further rights of appeal.

## II. Conclusions:

10. The High Court held that the obligation to *'give possession'* under Article XI(2) of the Protocol is an obligation of the debtor to give possession of the aircraft object within the waiting period declared under Article XI(2). However, the High Court noted that the underlying question in the appeal was the construction of the obligation to *'give possession'* imposed by Article XI(2) of the Protocol and consequently the determination of whether the effort and cost of returning the Engines should be borne by the Applicant or by the general body of creditors of the Virgin Group.
11. The High Court, having considered the relevant provisions of the Convention and the Protocol, unanimously dismissed the appeal.
12. In reaching its decision, the High Court noted that the rules of construction of the Convention require the Convention and the Protocol to be read together as a single instrument and that, where there is inconsistency, the Protocol prevails. Accordingly, it determined that to ascertain the content of the obligation to *'give possession'* under Article XI(2) of the Protocol, it was necessary to consider the generic operation the Convention and then to note the specific modifications introduced by the Protocol. In so doing, the High Court concluded that:
  - unlike Article IX(1) of the Protocol (*the remedies of deregistration and export/physical transfer of an aircraft object*), Article XI(2) of the Protocol does not confer additional remedies on a creditor noting that neither Articles XI(9) nor (13) of the Protocol suggests to the contrary;
  - there was no reason to attribute to the term *'possession'* in Article XI(2) of the Protocol anything other than the meaning it has in Articles XI(5) and (7) of the Protocol, in Art 8 and Art 10 of the Convention and elsewhere in the Convention and the Protocol. Throughout the Convention and the Protocol, the reference to *'possession'* is to physical control of the aircraft object to the exclusion of others and not to the transfer of physical possession of the aircraft object. Accordingly, the Administrators' obligation to *'give possession'* under Article XI(2) of the Protocol was an obligation to give the Applicant 'the opportunity to take possession' of the Engines;
  - it is for a debtor or insolvency officer to take whatever steps may be necessary to provide an opportunity for a creditor to exercise its right to take possession under Articles 8 and 10 of the Convention. If the creditor takes up the opportunity to take possession, then the rules of insolvency procedure set out in Article 30(3)(b) of the Convention do not stand in the creditor's way;
  - once a creditor has taken possession, it is the creditor who undertakes, and is responsible for, the burden of effort and the expense of availing of the additional remedies in Article IX(1) of the Protocol to procure the de-registration of the aircraft object and to export and physically transfer it to another location. Article IX(5) of the Protocol contemplates that the creditor, in exercising those further rights, may take steps to procure the physical transfer of the aircraft object from the territory in which it is situated. In this regard, Article XI(8) of the Protocol obliges the Contracting State where the aircraft is located to *'expeditiously co-operate with and assist'* the creditor; and
  - under Article XI(5) of the Protocol, until the insolvency administrator has given the creditor the opportunity to take possession of the aircraft object, the insolvency administrator is obliged, at its cost, to preserve and maintain the aircraft object and its value in accordance with the underlying lease under Article XI(5) of the Protocol.

13. Applying that construction of the obligation to *'give possession'* in Article XI(2) of the Protocol, the High Court summarised the position of the Applicant under the Convention as modified by the Protocol as follows:

- on the appointment of the Administrators, the Applicant had a right under Article 10 of the Convention to take possession or control of the Engines and had rights under the GTA preserved by Article 12 of the Convention which included to demand redelivery of the Engines as if on expiration of the lease agreements;
- without the consent of the Administrators or leave of the court, the Applicant was restrained by the operation of s440B of the Corporations Act (as preserved by Article 30(3)(b) of the Convention) from exercising any of those rights;
- the Administrators' invitation to the Applicant to take control of the Engines where they were situated in Australia fulfilled the obligation to *'give possession'* imposed on the Administrators and the Virgin Group by Article XI(2) of the Protocol;
- that invitation allowed the Applicant to exercise its right to take possession under Article 10 of the Convention notwithstanding s.440(B) of the Corporations Act as preserved by Article 30(3)(b) of the Convention and to assume physical control of the Engines to the exclusion of others;
- if the Applicant chose to exercise its right under Article 10 of the Convention, Article IX(3) of the Protocol required it to do so in a commercially reasonable manner. Further, had the Applicant exercised its right under Article 10 of the Convention, the Applicant also had the ability to exercise its additional remedies under Article IX(1) of the Protocol as enhanced by Article XI(8) of the Protocol to procure expeditious deregistration of the aircraft on which the Engines were installed and to procure expeditious export and physical transfer of the Engines subject to any statutory liens registered in accordance with the *Australian Air Services Act*; and
- the Applicants right under the GTA as preserved by Article 12 of the Convention to demand redelivery of the Engines was unaffected. Similarly unaffected was the operation of s440(B) of the Corporations Act as preserved by Article 30(3)(b) of the Convention to constrain the exercise of that right to demand redelivery of the Engines under the GTA.

14. Whilst not stated by the High Court, implicit in the judgement is that a creditor's right to recover the cost of exercising its additional remedies under Article IX(1) of the Protocol to deregister and export and to physically transfer the aircraft object out of its location, lies in a claim for damages for breach of contract ranking *pari passu* with the other unsecured creditors of the debtor.

### III. **Analysis:**

15. In affirming the Full Federal Court's decision that (1) a creditor under CTC has a right to repossess its aircraft object within the waiting period under Article XI(2) of the Protocol; and that (2) it is the obligation of an insolvency administrator pending giving the creditor the opportunity to repossess the aircraft object, at its cost to preserve and maintain the aircraft object and its value, the High Court's decision is compliant with CTC. However, in upholding the Full Federal Court's decision to overturn the order of the court of first instance (being the Federal Court of Australia) that the obligation to *'give possession'* was

an obligation to give possession effectively in accordance with the terms of the lease agreement (thereby strictly enforcing Article XI(2) of the Protocol), the order of the High Court does not fully comport with the purposes and intent of Article XI(2) of the Protocol.

16. The High Court's decision is binding in Australia. While it may be of persuasive authority in the courts of other Contracting States, it is not binding on any court outside of Australia.

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

[N/A]