

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

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| Reference: Ireland case 8 2021 | | |
| Date of Judgment: | 21 April 2021 | |
| Case: | In the matter of Arctic Aviation Assets DAC and others and in the matter of Norwegian Air Shuttle ASA as a related company within the meaning of s.517 and s.2(10) of the Companies Act 2014 | |
| Relevant CTC/Protocol (IR Rules and Procedures) | Article I(2)(m)(i), Article I(2)(n), Article XXX(4), Alternative A Article XI (2), (5), (6), (9), (10) and (11) of the Protocol Article 39(1)(a) of CTC | IR Rules and Procedures None |
| Relevant CTC Jurisdictions | Ireland Norway | |
| CTC Facts, Conclusions and Analysis | | |
| <p>I. <u>Facts:</u></p> <ol style="list-style-type: none">1. On 18 November 2020, the Irish High Court approved the appointment of an interim examiner to Norwegian Air Shuttle ASA (NAS) and five of its Irish subsidiaries including Arctic Aviation Assets DAC (AAA) and Norwegian Air International Limited (NAI) thereby placing these companies into examinership (NAS, NAI, AAA and the other Irish subsidiaries are together called the Companies and each a Company).2. NAS acquired and financed aircraft through head lease/sublease structures using special purpose group companies as head lessees. A head lessee would sublease to airline members of the group including NAS and NAI. In some cases, NAS and / or AAA would provide guarantees to the financier or third party lessors of the head lessees obligations under the head lease. | | |

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**.

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

3. On 14 January 2021, the Norwegian group publicly announced its business plan. As part of the strategic business plan for the survival of NAS, NAI and the other Irish subsidiaries and the whole or part of their undertakings as a going concern, the Companies (excluding Torskefjorden Leasing Limited in circumstances where court protection was lifted in respect of this Company on 15 January 2021) proposed that it was necessary to repudiate certain contracts including *inter alia*, the relevant head leases, subleases, lease security assignments and the guarantees given to the financiers and third party lessors in relation to aircraft surplus to the Norwegian group's requirements in the future.
4. On 22 January 2021, certain of the Companies issued the first of four separate applications pursuant to s.537(1) of the Irish Companies Act 2014 for approval to repudiate, inter alia, certain head leases, subleases, lease security assignments and guarantees.
5. Three groups of financiers opposed the applications to repudiate. The court was asked to approve the repudiation of the leases and guarantees. The relevant Companies' application in this regard was opposed by the opposing parties.
6. In considering approval of the repudiations, the court was asked to consider, inter alia, (1) the impact (if any) of CTC and (2) the manner of determination of the quantum of loss or damage suffered as a result of any repudiation of leases approved by the court.
7. On 15 February 2021, certain of the Companies in an outline legal submission argued that it had complied with its obligation to 'give possession' of the aircraft pursuant to Article XI(2) of the Protocol, Alternative A, citing the decision of the Federal Court of Australia in *VB Leaseco Pty Ltd (administrators appointed)-v- Wells Fargo, National Association (trustee) [2020] FCAFC 168 (VB Leaseco)* which held that the obligation to 'give possession' does not require redelivery in accordance with the terms of the lease. They argued that the relevant Companies had not obstructed any lessor from recovering its aircraft. Furthermore, both prior to and after expiration of the 60 day waiting period, they had proactively and constructively engaged and worked with lessors (at a lessor's request) to facilitate repossession of aircraft, engines and technical records in circumstances where arrangements to restructure to keep the aircraft within the fleet could not be met including (at the relevant lessor's expense) assisting the lessor with performing return to service works, deregistration tasks and ferrying the relevant aircraft to an agreed location on a lessor's behalf.
8. Some aircraft engines were under the control of Lufthansa Technik for servicing in Bucharest and in Oslo. Lufthansa Technik was claiming a lien in respect of works previously carried out by it in relation to those engines under its control. The engines were subject to leases with group companies that were not subject to the examinership but whose obligations under the leases were the subject of guarantees by NAS. The Companies confirmed that they were willing to return the aircraft in accordance with CTC but argued that their obligations under CTC did not extend to funding the cost of discharging the claim of the lienholder in order to facilitate the release of the engines.

II. Conclusions

9. On 5 March 2021, the court approved the repudiation of the leases and guarantees over which it had jurisdiction and directed that the quantum of loss or damage suffered by the three counterparties which had opposed the repudiations application be determined at a hearing pursuant to s.537(3) of the Irish Companies Act 2014 (**s.537**).

10. On 21 April, 2021, the judge issued a written judgement. In the judgment, the judge indicated that he had been asked to consider (1) the impact of CTC and (2) the manner of determining the quantum of loss or damage suffered as a result of the repudiations. This LAA report deals only with the judge's consideration of the impact of CTC and the determination of loss.
11. The court upheld the application of CTC to an examinership as an 'insolvency proceeding' within the meaning of CTC for the purposes of the occurrence of an 'insolvency-related event' under Article XI(2)(m)(i) of the Protocol. This was not disputed.
12. The court noted that CTC did not apply to the guarantees provided by NAS and AAA but did apply to the subleases of aircraft to NAS and NAI (**relevant subleases**).
13. The court approved the repudiation of the relevant subleases and, relying on the judgement of the Federal Court of Australia in VB Leaseco, determined that the obligation to 'give possession' under Article XI(2) of the Protocol did not include an obligation to effect redelivery of the aircraft in accordance with the terms of the lease as if the lease had ended.
14. The court further expressed a view that it would not be appropriate as a condition to approving a repudiation of an agreement under s.537 to compel a company to discharge claims of third party lienholders for the benefit of a creditor and in priority to all other claims against that company. Such losses should constitute an unsecured claim for damages for breach of contract.
15. The court noted that Article XI (10) clearly prohibits the modification of an agreement without the consent of the counterparty. Article XI(11) makes it clear that the Protocol does not preclude an act of termination by an 'insolvency administrator'. Repudiation is an act of termination and not modification and is therefore not prohibited by the Protocol.
16. The term 'insolvency administrator' as defined in CTC includes a 'debtor in possession if permitted by the applicable insolvency law'. Under Part 10 of the Irish Companies Act, each applicable Company is clearly a 'debtor in possession'
17. Insofar as the definition of 'insolvency administrator' extends to the 'debtor in possession', the act of repudiation of the relevant leases and subleases by the applicable Companies is not prohibited.
18. The court cited the decision of the High Court of Malaysia in *AirAsia X Berhad –v- BOC Aviation Limited (WA-24NCC-467-10/2020)*, in which the Malaysian court concluded that a company could terminate a lease under Article XI(11) of the Protocol. The Malaysian court further held that, upon termination, the lessor can exercise the self help remedy of repossessing the aircraft and shall have a right to claim for damages for loss arising from the termination of the leases. It held that the claim for damages is the same as a claim on a liquidation ranking pari passu with other unsecured creditors. The scheme in that case sought to compromise the quantum of damages. The court held that such a compromise was not in contravention of Article XI(10) of the Protocol prohibiting modification of the obligations without the consent of the counterparty.

19. The court concluded that, by repudiating the relevant head leases and subleases, the applicable Companies no longer sought to retain possession or the benefit of the aircraft.
20. The court further noted that nothing in CTC or the Protocol precludes a lessor or holder of security from exercising the self-help remedy of repossessing the aircraft.
21. In the specific case of the engines subject to the Lufthansa Technik liens, the court noted that, while NAS as guarantor was subject to the examinership, the lessees whose obligations were guaranteed by NAS were not in examinership. As such, the lessees were not subject to the jurisdiction of the court in the examinership proceedings and, accordingly, the remedies of repossession available to the creditor and its borrower were not stayed or restricted by the examinership proceedings nor did the court have any jurisdiction to make any orders imposing any terms regarding their obligations on return of the aircraft. The court went on to determine that, in circumstances where there was no evidence of the any group company seeking to retain the aircraft or engines, the existence of the lien claims would not justify the court refusing approval of the repudiation of the related guarantee. The Court further determined that the cost to the creditor of repossessing the aircraft including the cost of discharging the liens would be relevant to the determination of the quantum of the creditor's losses.

III. Analysis

[Applicability of CTC]

22. Examinership constitutes an 'insolvency-related event' under Article XI(2)(m)(i) of the Protocol triggering the application of Alternative A.
23. Pursuant to Article XXX(4) of the Protocol, Alternative A of Article XI of the Protocol as declared by the 'primary insolvency jurisdiction' applies.
24. Article I(2)(n) of the Protocol defines the 'primary insolvency jurisdiction' as the Contracting State in which the 'centre of the debtor's main interests is situated' of which is deemed to be the debtors statutory seat or the place of incorporation unless proved otherwise.
25. Neither CTC nor the Protocol seek to define the term 'give possession' under Article XI(2). The court relied on the precedent created by the Federal Court of Australia in VB Leasco to support its order that the obligation to 'give possession' under Article XI(2) of the Protocol does not include an obligation to effect redelivery of the aircraft in accordance with the terms of the lease as if the lease had ended. To that extent, the court order does not fully comport with the purposes and intent of Article XI(2) of the Protocol – see also the Legal Activity Analysis Reference: [*Australia case 1 2022*] relating to VB LeaseCo.
26. With regard to the view expressed by the court outlined at paragraph 14 above, it should be noted that none of the aircraft leased under the relevant subleases, was subject to a lien. Accordingly, no arguments were made to, or considered by, the court in relation to specific liens. The court's view is therefore not binding.

[Timing]

27. Norway and Ireland are Contracting States and both have adopted Alternative A into its laws. Norway is NAS's 'primary insolvency jurisdiction' and Ireland is the 'primary insolvency jurisdiction' of AAA, NAI and the other Irish subsidiaries. Accordingly, for the purposes of Article XI(2) the insolvency-related event occurred when the interim examiner was appointed on 18 November 2020. The timelines and other provisions of Alternative A applied from that date.

IV. Annotations Reflecting Subsequent Legal Developments:

28. On appeal to the High Court of Australia (the highest court in Australia from which there is no further right of appeal), the High Court on 16 March 2022, affirmed the decision of the Federal Court of Australia in VB Leasco that the obligation to 'give possession' under Article XI(2) does not include an obligation to redeliver the aircraft in accordance with the terms of the relevant lease. See [*Australia, case 1 2022*] for analysis.