

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

Initial posting: [_____²]

Reference: Canada, case 3 2022		
Date of Judgment:	20 July 2022	
Case:	<i>Avmax Aircraft Leasing Inc. v Air X Charter Ltd.</i> , 2022 ABCA 252 between Avmax Aircraft Leasing Inc., as Appellant / Defendant / Plaintiff by Counter Claim, Air X Charter Limited, Air X Aviation Inc., Air X Aircraft Finance I Limited, as Respondent / Plaintiffs / Defendants by Counter Claim, and Export Development Canada, as Intervenor	
Relevant CTC/Protocol (IR Rules and Procedures)	CTC: Articles 8, 9, 10, 11, 13, and 54 Protocol: Articles IX, XIII, and XXX	IR Rules and Procedures None
Relevant Jurisdictions	CTC Alberta, Canada Malta	
CTC Facts, Conclusions and Analysis		
<p>I. Facts:</p> <p>1. Avmax Aircraft Leasing Inc. (the 'Appellant') is a Canadian aircraft leasing company. Air X Aircraft Finance I Limited, Air X Charter Limited, and Air X Aviation Inc. (collectively, the 'Respondent') is a private charter airline based in Malta with operations across Europe. Pursuant to several lease</p>		

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.

agreements (the '**Leases**'), the Appellant leased eight business jets (the '**Aircraft**') to the Respondent. The initial purchase of the Aircraft by the Appellant was financed by Export Development Canada (the '**Intervenor**'). The Aircraft were all registered in Malta.

2. Under the Leases, the Appellant's obligations were subject to, among other conditions, the Respondent executing irrevocable de-registration and export request authorizations ('**IDERAs**') in favour of a mortgagee such as the Intervenor (or its designee), and delivering those IDERAs to the registry authority. The Respondent executed IDERAs in favour of the Intervenor "or the person it certifies as its designee" for each of the Aircraft.
3. The Appellant's remedies in the event of the Respondent's default permitted the Appellant to '*exercise any right the Lessor may have under [...] any IDERA*'.
4. The Respondent fell into arrears in payments due under the Leases following business challenges arising from the impact of the COVID-19 pandemic.
5. The Appellant issued a notice of default and termination notices for the Leases and demanded that the Aircraft be grounded. The Intervenor's designee under the IDERAs requested de-registration of the Aircraft from the Maltese registry authority.
6. The Respondent applied for an interim injunction in Alberta to prohibit the Appellant from taking steps to ground or repossess the Aircraft. The Appellant argued that the Convention on International Interests in Mobile Equipment 2001 and the Protocol thereto on Matters Specific to Aircraft Equipment 2001 (collectively the '**CTC**') permitted the extra-judicial exercise of IDERAs, and that an injunction should not be granted.
7. The court of first instance granted the injunction sought by the Respondent on the basis that the CTC was permissive and has no "legal and binding effect" in Alberta.
8. The Appellant appealed the injunction to the Court of Appeal of Alberta.

II. Conclusions:

9. The Court of Appeal held that CTC had been adopted and implemented into Canadian and Alberta law through federal and provincial legislative enactments and, as such, has force of law in Canada and Alberta.
10. The IDERA is a special remedy for aircraft that is agreed in advance by a debtor. It allows creditors to obtain control or custody of an asset *pending final determination* of the creditor's claim on the merits.
11. Both Canada and Malta had made declarations providing for the availability of extra-judicial relief under CTC in their respective territories. Articles XIII and IX (5) and (6) of the Protocol allows for immediate de-registration of the aircraft for the export and transfer of the aircraft from the territory in which it is situated '*without the need for any further debtor or court approval*.'
12. The Court also found that the IDERAs were valid and had not been revoked.

13. Citing Article XIII (4) of the Protocol and the Official Commentary at pp220-221,223,226, the Court concluded that before the creditor may exercise the IDERA, the debtor must be on default of its obligations under the agreement; however, the creditor does not have to terminate the agreement and the registry authority cannot require evidence of the debtor's default or any other formalities other than those prescribed by the Protocol.
14. The Court agreed with the Intervenor's submission that the default remedies under Chapter III of the Convention and Article IX of the Protocol *and agreed to by the Respondent 'do not require a final determination of default'*.
15. The chambers judge erred in concluding that CTC was permissive and had no legal effect in Alberta.

III. Analysis:

[Application of the Cape Town Convention]

16. The Court relied on the CTC, the Official Commentary, the Practitioners' Guide, a related decision of the Maltese Civil Court, and Canadian domestic law to reach its conclusion.
17. The Court recognized the CTC as domestic law, interpreted its provisions in reference to the underlying purposes and objectives of the CTC, and applied the specific provisions of the CTC to the common law test for an interim injunction. The Court held that the "Convention and Aircraft Protocol along with the evidence in relation to the IDERAs executed by Air X are relevant at each stage of the test" for an injunction, and upon reviewing each stage, found that none of the threshold conditions for an interim injunction were satisfied in the circumstances.
18. The decision provides clear appellate direction that the CTC is domestic law in Alberta and Canada, and will be enforced in accordance with a straightforward interpretation of its provisions and objectives. The court of Appeal restored the certainty in mobile asset-based transactions that may otherwise have been eroded by the lower court's decision.
19. In affirming the enforceability of the CTC as domestic law, and the importance of a purposive interpretation of the CTC that furthers the objectives underlying the adoption of the CTC into domestic law, the decision offers a clear example of the successful implementation of the CTC by a Contracting State.

[Judicial Commentary on the Merits of the Convention]

20. The Court accepted the position of the Appellant and Intervenor that '[u]nique challenges arise with the acquisition and financing of aircraft and other economically important items of mobile equipment', and as a result, a 'key purpose' of the CTC is to provide creditors with speedy relief in the event of default. In particular, the Court acknowledged that undue delay caused by waiting for a final determination of default could result in the value of the aircraft in possession of the distressed debtor being lost or the aircraft being moved 'beyond the reach of the creditor'. To address this, the CTC allows creditors 'to control, and preserve the value of, aircraft while disputes between debtors and creditors regarding events of default are resolved'.

21. In overturning the Injunction, the Court referenced the overarching policy goals of the CTC. The Court reasoned that the Injunction undermined the CTC and its remedies and caused “erosion of certainty and confidence in mobile asset-based transactions” that would undermine the 'broader public interest in the aims of the *Convention and Aircraft Protocol*; namely an economically viable airline sector'.

IV. Annotations Reflecting Subsequent Legal Developments:

22. The Respondent did not seek leave to appeal to the Supreme Court of Canada. The decision of the Court of Appeal is final.