THE HIGH COURT OF AUSTRALIA CONSTRUES THE CAPE TOWN CONVENTION

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Uniform rules of international civil aviation law

Private international law rules governing the conduct of international civil aviation have long been the subject of uniform international conventions.[2] The uniform interpretation and application of those rules has been developed through national final Courts of Appeal applying international law rules for the interpretation of treaties and by adopting approaches to construction and application which are harmonious with each other.[3]

The scope of uniform rules governing civil aviation has recently been extended to deal with aircraft leasing. The Cape Town *Convention on International Interests in Mobile Equipment* together and its *Protocol on Matters Specific to Aircraft Equipment* commenced in force in 2001; and in the years since have been enacted as part of the law of major civil aviation jurisdictions.[4]

The High Court deals with the Convention and Protocol

In *Wells Fargo Trust Company v VB Lease Co Pty Ltd* [2022] HCA 8 the High Court of Australia became the first final Court of Appeal of the Contracting States to the Cape Town Convention to construe substantive provisions of the Convention and Aircraft Protocol.

The issue in the case was whether, in order to give possession of leased aircraft engines for the purposes of Article XI of the Protocol, administrators of an insolvent airline group, Virgin Australia, were required to return the engines to the lessor in the United States in accordance with the provisions of the lease documents, or whether it was sufficient for the administrators to give the lessor the opportunity to collect the engines (with all their maintenance records) where they were located in Australia and in the condition in which they were then in.

The Aircraft Protocol provides two alternative regimes governing the giving of possession of aircraft objects during external administration of a lessee: Alternative A and Alternative B.

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[1] Barrister, Sydney, who acted for the administrators of VB LeaseCo in an aspect of the proceedings the subject of the High Court appeal the subject of this paper.

[2] For example the Convention for the Unification of Certain Rules Relating to International Carriage by Air open for signature at Warsaw on 12 October 1929 **(Warsaw Convention**); the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier open for signature at Guadalajara on 18 September 1961 **(Guadalajara Convention)**; the Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999 (**1999 Montreal Convention**).

[3] See for example *Parkes Shire Council v South West Helicopters Pty Ltd* (2019) 266 CLR 212 in which the High Court of Australia referred to and applied its own reasoning in *Povey v Qantas Airways Limited* (2005) 233 CLR 189, that of the English House of Lords and United Kingdom Supreme Court in *Sidhu v British Airways Plc* [1997] AC 430 at 453 and *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347; of the United States Supreme Court in *Zicherman v Korean Airlines Co Ltd* (1996) 516 US 217 and *El Al Israel Airlines Ltd v Tseng* (1999) 525 US 155 and of the Supreme Court of Canada in *Thibodeau v Air Canada* [2014] 3 SCR 340.

[4] The Depository of the Cape Town Convention, UNIDROIT records 80 Contracting States plus the European Union as parties to the Convention with it having commenced in force in all but 6 Contracting States.

Among the Contracting States to the Convention, Alternative A is almost uniformly the option applied, and it is the option applied by Australia.[5]

The insolvency administration of the Virgin companies was pursuant to Australian law and it was therefore Alternative A that fell to be construed and applied by the High Court.

Construction of the Convention

The reasoning of the Court shows that the word "possession" when used both in the Convention and in the Protocol is to be construed as covering both possession in the common law sense and *detention* in the civil law sense: that is "possession" is a reference to physical control to the exclusion of others.

The High Court's reasoning also shows that the Convention fully recognises, but confers no enhanced status, on all remedies provided to a lessor under an aircraft lease agreement. Those remedies are enforceable according to the domestic rules of law applicable by virtue of the rules of private international law of the forum State.

In the case of insolvency proceedings there are ordinarily domestic rules of insolvency procedure designed to limit the enforcement of security or other property rights in the interests of the general body of creditors. In Australia the *Corporations Act 2001* provides for an automatic stay on the enforcement of security to facilitate a reorganisation once an insolvency administrator was appointed.

The High Court held that the enforcement of the lessor's rights under its lease, and its separate rights under Article 8 of the Convention to take possession of the aircraft objects in the event of default, are subject to any applicable domestic laws of insolvency procedure. As the insolvency administration in this case was Australian, the automatic statutory stay on enforcement of those rights applied unless and until the lessor sought and obtained an order from a Court having the effect of lifting the stay. That had not been done.

Construction of the Protocol

The High Court then turned to consider the Protocol, and found it had the following effects.

First, upon the commencement of insolvency proceedings there is a waiting period. The length of the waiting period is the period specified by the Contracting State in its instrument by which it elects to apply Alternative A in Article XI. In Australia' s case that was 60 days.

Secondly, during the waiting period the lessee or its administrator is entitled to use the aircraft object to attempt to trade out of its default.

Thirdly, if the lessee or its administrator is unwilling or unable to avail itself of that opportunity it must then "give possession" to the lessor. It does so by giving the lessor the opportunity to take possession.

Fourthly, if the lessor chooses to take up the opportunity to take possession domestic insolvency rules will not operate to stand in the way.

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[5] Of those Contracting States which have applied Article XI of the Protocol all, but Mexico, have applied Alternative A.

Fifthly, a lessor who takes possession of an aircraft or an aircraft object has additional rights under Article IX of the Protocol to procure deregistration of the aircraft or the aircraft object from the domestic registry authority of the Contracting State, to procure export of the aircraft object with the cooperation of that registry authority and to procure the physical transfer of the aircraft object out of the territory in which it is situated. In giving effect to that change of registration and physical export of aircraft objects the Aircraft Protocol operates so that the lessor need not obtain any cooperation of the lessee or its administrator.

The High Court noted that its construction of the Convention and Protocol was harmonious with the operation of the provision of the United States Bankruptcy Code[6] upon which Alternative A of Article XI of the Protocol was substantially based. That is, Alternative A operates so that the lessor gets the equipment "immediately … as is, where it is."[7]

In the case before the High Court of Australia the result was that it was the lessor, and not the administrators of the Virgin group that was required to meet the costs of flying the engines from Australia to Miami.

[6] 11 USC 1110.
[7] The High Court referred to *Re Republic Airways Holdings Inc* (2016) 547 BR 578 at 586.