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Contract practices under Cape Town Convention



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Mary Townsend, senior associate at A&L Goodbody, talks about the role of Cape Town counsel and contract practices under the Convention.

During the past 12 months, the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on Matters Specific to Aircraft Equipment (Cape Town Convention) has taken effect in Australia, Ivory Coast, Denmark, Spain, Sweden and the UK.

A&L Goodbody has been advising on the convention for more than 10 years, since it was ratified by Ireland in 2006. During this time, we have gained considerable insight on how best to manage the legal and practical issues relating to our performance of this role.

Role of Cape Town counsel

The role of Cape Town counsel includes advising on the applicability of the convention providing advice on the creation of international interests under the convention, assisting clients in relation to the registration of those international interests with the International Registry and providing legal opinions to lessors and financiers confirming that relevant international interests have been registered.

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On a cross-border transaction with counsel appointed in each relevant jurisdiction, it is the commercial practice that counsel in one jurisdiction will be appointed as Cape Town counsel tasked with looking at the transaction as a whole and considering the applicability of the convention to that transaction.

Irish counsel have often been chosen for this role because of expertise and familiarity with the convention, but since aircraft are commonly operated outside of Ireland under documents governed by New York, English or other governing laws, this task has required us, as Irish lawyers, to look beyond our usual role of advising as to Irish law and to look at the totality of the relevant transaction across multiple jurisdictions.

We have found that there are three key aspects to advising on a transaction as Cape Town counsel:

1. Advising on the relevant national law; when the convention took effect; what declarations have been made by the relevant jurisdiction as part of the ratification process; and, where applicable, the process for applications to the local aviation authority for authorised entry point codes.

2. Advising on the convention as a body of law independent of national laws.

This is a more difficult role for lawyers because it requires us to consider the convention outside of the constraints of national law and the concepts with which we are familiar; and to consider instead whether interests are created under the convention that are not dependent on national law.

For example, in the case of a New York law aircraft mortgage, the chief considerations to determine if the mortgage constitutes an international interest under the convention are:

- does it relate to an aircraft object within the meaning of the convention – ie, an airframe, aircraft engine or helicopter that meets the technical specifications set out in the protocol?
- is it a security agreement within the meaning of the convention?

Once it is established that a valid agreement has been created as a matter of the governing law of the mortgage, then, regardless of how it may be characterised as a matter of the governing law¹, the question of whether it is a “security agreement” or a “lease” or a “title reservation agreement” for the purposes of the convention is determined by the convention itself.

The definition of a security agreement in the convention is drafted to encompass security agreements in their widest context. If it is “an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an [aircraft] object to secure performance of any existing or future obligation of the chargor or a third person”, then it is a security agreement for the purposes of the convention. The governing law characterisation of an agreement is only relevant for the purposes of the remedies applicable to the international interest under the convention.

- does it meet the formal requirements of Article 7 of the convention – ie, in writing, relates to an object of which the debtor (in our case, the mortgagor) has power to dispose, describes the aircraft object by manufacturer, serial

number and model designator and enables the secured obligations to be determined?

- is there a connecting factor for the purposes of the convention – ie, is the mortgagor situated in a contracting state and/or is the airframe registered in a contracting state?

3. Assisting our clients with making registrations of the international interests on the International Registry.

We may be advising our clients on how to register their aircraft-owning entities as transacting user entities with the International Registry, or how to consent to or refuse an application made by another party.

As lawyers, we have established A&L Goodbody as a professional user entity which allows us to apply to transacting user entities to initiate, or to consent to, registrations on their behalf.

We are often involved in setting up a closing room. The closing room is a very useful functionality on the International Registry website for multiple aircraft multi-jurisdiction transactions. It allows us to pre-position registrations in a prescribed order to which each transacting party must consent before the registrations in the closing room go live.

Contract practices

When drafting documents that are intended to constitute international interests under the convention or reviewing documents as Cape Town counsel which are drafted by others, there are certain issues which we must consider:

- at a basic level, have the formal requirements of Article 7 been met?
- what representations are required in order to back up our analysis and conclusions as to the constitution of international interests under the document? Typically, these include that the airframe and engines are aircraft objects and meet the minimum technical specifications set out in the protocol, that the debtor is situated in a contracting state within the meaning of Article 4, and that the debtor has power to dispose of the relevant aircraft object;
- what covenants are required to facilitate the making of the registrations with the International Registry? Typically, these include that a party will register as a transacting user entity or will grant professional user authorisation to A&L Goodbody to allow us to complete the registrations, and a further assurance covenant by which the debtor agrees to enter into such further documents as are required in order to constitute an international interest under the convention.

¹For example, in the US and other jurisdictions, a conditional sale agreement or title reservation agreement and certain types of leases may be characterised as security agreements for the purposes of the governing law but for the purposes of the convention they would be a “title reservation agreement” or a “lease”.

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