

# Global Transportation Finance Newsletter

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## EU Implications on Cape Town Convention Implementation in the UK

The UK government recently published revised draft legislation<sup>1</sup> designating the Convention on International Interests in Mobile Equipment (the Convention) and Protocol thereto on matters specific to Aircraft Equipment (the Protocol and, together with the Convention, the Treaty) as an “EU Treaty” which will allow the UK to pass legislation to implement the Treaty into national law. It also published a consultation on 16 June 2014 seeking views from stakeholders as to how the Treaty should be implemented in the UK.

The purpose of this article is three-fold: (1) to give an overview of the set-up of the European Union (the EU) and the division of competences between the EU and its member states since the UK’s implementation of the Treaty will be affected by its membership of the EU, (2) to summarise the declarations made by the EU at the time that it acceded to the Treaty and the consequences of this on the declarations that the UK will be able to make when it implements the Treaty, and (3) to provide an update on the status of the UK’s implementation of the Treaty.

To appreciate the context within which the UK is implementing the Treaty, it is necessary to understand the structure and some of the key guiding objectives and principles of the EU since these objectives and principles affected the declarations that the EU was able to make when it acceded to the Treaty in 2009. The EU’s declarations will, in turn, affect the declarations that the UK, as a member state of the EU, is able to make when it implements the Treaty.



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### The Commercial Aircraft Finance Handbook

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—Zolotusky, MD, Boeing Capital



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## The EU

### Overview

The EU currently comprises 28 member states<sup>2</sup> and is founded on a number of treaties which, amongst other things, set out the EU's objectives, rules for the EU institutions and their decision-making process, and governs the relationship between the member states. The key EU treaties are:

- **Treaty on the Functioning of the European Union** (the TFEU) – this treaty (previously referred to as the Treaty of Rome or the EC Treaty) entered into force on 1 January 1958 and established the European Economic Community (the predecessor of the EU);
- **Treaty on the European Union** – this treaty (also known as the Maastricht Treaty) entered into force on 1 November 1993 and established the EU; and
- **Treaty of Lisbon** – this treaty entered into force on 1 December 2009 (amending the TFEU and the Treaty of the European Union) and sets out the objectives of the EU.

The functions of the EU are performed by a number of institutions and, primarily, the European Commission (which is responsible for the drafting of legislative proposals), the European Parliament (which is the legislative arm of the EU), the EU Council (which is the EU's main decision-making body comprising representatives of the member states) and the Court of Justice of the EU.

The EU has separate legal personality and is therefore able to negotiate and sign international agreements on behalf of the EU and its member states and to become a member of international organisations.

### *Area of Freedom, Security and Justice*

One of the EU's objectives which is set out in the Treaty of Lisbon is to maintain and develop an area of freedom, security and justice without internal frontiers, thereby facilitating access to justice to all. The EU seeks to achieve this by adopting measures relating to judicial co-operation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market. The overriding purpose of such measures is to provide harmonisation between differing legal and administrative systems between the EU's member states.

### *Forms of EU Legislation*

EU legislation can take the following forms:

- **Directives** – these are binding on each member

state to which they are addressed as to the result that is to be achieved but leave it to the member states to determine the form and method of implementation;

- **Regulations** – these have general application and are binding in their entirety and directly applicable in each member state; and
- **Decisions** – these are binding in their entirety but deal only with particular issues and are binding only upon the specified persons (member states, organisations or individuals) to which they are addressed.

### *Division of Competences Between the EU and its Member States*

One of the three key principles (the other two principles being the principle of subsidiarity and the principle of proportionality) on which the EU is founded is the principle of conferral, which means that the EU is permitted to act only within the limits of the competences conferred upon it by its member states in specified areas.

The division of competences between the EU and its member states was initially set out in the TFEU and clarified by the Treaty of Lisbon (which amended the TFEU). The three areas of division are:

- **exclusive competence**: where the EU alone is able to legislate and adopt binding acts in these areas. The role of the member states is therefore limited to applying these acts unless authorised by the EU to adopt certain acts themselves;
- **shared competence**: where the EU and its member states are authorised to adopt binding acts in these areas. Member states are able to exercise their competence only in an area in which the EU has not exercised, or decided not to exercise, its own competence; and
- **supporting competence**: where the EU can intervene only to support, co-ordinate or complement the action of the member states; that is, the EU has no legislative power and these areas of competences are reserved for the member states.

The field of judicial co-operation in civil matters is designated as an area of shared competence. Within this category, the EU has produced a number of legislative acts aimed at unifying the rules between member states and thus facilitating access to justice, including:

- *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition*

and enforcement of judgments in civil and commercial matters (the Brussels Regulation)<sup>3</sup> – the Brussels Regulation provides a harmonised framework for determining the allocation of jurisdiction over a dispute and the recognition and reciprocal enforcement of judgments within the EU, the basic principle being that jurisdiction is to be exercised by the EU member state in which the defendant is domiciled, regardless of his nationality, subject to certain exceptions (including where the parties have made an express contractual choice);

- *Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings* (the Insolvency Regulation) – the Insolvency Regulation provides common rules for determining conflict of law issues for insolvency proceedings with respect to EU-based debtors that have operations in more than one member state. The key criterion being the determination of where the debtor has its centre of main interests (COMI), which should be the place where the insolvency proceedings over a debtor are commenced; and
- *Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)* – Rome I sets out rules determining the applicable law of contracts in civil and commercial matters.

The Brussels Regulation, the Insolvency Regulation and Rome I are all EU regulations and therefore have direct binding legal force in each member state, including the UK. Hence, there is no need for any further legislation at member-state level to implement the regulations into national law.

### **The EU's Declarations Pursuant to the Treaty**

It is against this backdrop that the EU acceded to the Treaty on 28 April 2009, which became effective on 1 August 2009. At the time of its accession, the EU made certain declarations, pursuant to Articles 48(2) and 55 of the Convention and Articles XXVII(2) and XXX(5) of the Protocol, as a Regional Economic Integration Organisation<sup>4</sup> with regard to various matters which the member states of the EU had transferred to the exclusive competence of the EU.

These included matters which affected the following subjects:

- the Brussels Regulation;
- the Insolvency Regulation;
- Rome I;
- where the debtor is domiciled in the territory of a

member state, the member states bound by the Brussels Regulation<sup>5</sup> will apply Articles 13 (*Relief pending final determination*) and 43 (*Jurisdiction under Article 13*) of the Treaty for interim relief in accordance with only the Brussels Regulation as interpreted by the Court of Justice of the EU<sup>6</sup>; and

- Article XXI (*Modification of jurisdiction provisions*) of the Protocol will not apply within the EU as the Brussels Regulation will apply to this matter for the member states bound by the Brussels Regulation or by any other agreement designed to extend its effects.<sup>7</sup>

The EU's declarations also noted:

- member states would retain their competence concerning the rules of substantive law as regards insolvency; and
- the EU would not make a declaration pursuant to Article XXX(1) concerning the application of Article VIII<sup>8</sup> nor would it make any of the declarations permitted under Articles XXX(2) and (3) concerning the application of Articles X<sup>9</sup> and XI,<sup>10</sup> respectively.

The EU also reserved its right to amend the declarations made by it, expressly stating that the EU's exercise of the competences transferred to it by its member states was a process of continuous development.

### **Effect of the EU's Declarations on the UK's Ability to Make Certain Declarations**

Given the EU's exclusive competence over the areas in which it has already made declarations under the Treaty, the cumulative effect is that the ability of the UK to make declarations under the following articles of the Protocol is affected (although the ability of the UK to make declarations under the other provisions of the Treaty are unaffected):<sup>11</sup>

- Article VIII (*Choice of law*): the UK is neither able to make a declaration under that Article nor able to amend its national law to the extent that it relates to that subject since Rome I will apply;
- Articles X (*Modification of provisions regarding relief pending final determination*) and XI (*Remedies on insolvency*): the UK is not able to make declarations under Articles X and XI of the Protocol but is able to amend its national law to produce the same substantive outcome as if declarations had been made under those Articles; and
- Article XXI (*Modification of jurisdiction provisions*): the UK is neither able to make a declaration under that Article nor able to amend its national law to

the extent that it relates to that subject since the Brussels Regulation will apply.

### Update on the UK's Implementation of the Treaty

As noted above, the UK government recently published revised draft legislation designating the Treaty as an EU Treaty for the purposes of Section 1(2) of the European Communities Act 1972 (the ECA). Pursuant to Section 2 of the ECA, the effect of this designation is to allow the UK Parliament to pass national legislation to implement the Treaty (to the extent within the UK's competence) in the UK.

In contrast to the position in relation to EU legislation such as the Brussels Regulation, the Insolvency Regulation and Rome I, which have direct and binding effect in the UK without the need for any further enactment by the UK Parliament, EU legislation which does not have direct and binding effect in the UK requires the passing of secondary legislation by the UK Parliament in order for it to become effective in national law and to allow the courts in the UK to interpret and apply it.

The UK government also published a consultation on 16 June 2014 to gather views as to how the UK should implement those provisions of the Treaty which fall outside the EU's competence and within the competence of the UK into national law. The consultation will close on 11 August 2014.

### Next Steps

The UK government has indicated that it intends to implement the Treaty by way of a single statutory instrument during 2014 although changes to existing legislation are likely to be needed. It has committed to publishing a response to the consultation within three months of the consultation closing where the UK government will detail how it intends to implement the Treaty and the timetable for ratification.

If you have questions about this update, please contact Natalie Chung at [nchung@vedderprice.com](mailto:nchung@vedderprice.com) or + 44 (0)20 3667 2916.

<sup>1</sup> *The European Union (Definition of Treaties) (Convention on International Interests in Mobile Equipment and Protocol thereto on matters specific to Aircraft Equipment) Order 2014.*

<sup>2</sup> These are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. To date, only Ireland, Latvia, Luxembourg, Malta and the Netherlands (for the purposes of Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba) have acceded to the Treaty. Spain has acceded to the Convention but not the Protocol.

<sup>3</sup> The Brussels Regulation has since been recast pursuant to *Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of*

*judgments in civil and commercial matters (recast)*, which will enter into force on 10 January 2015.

- <sup>4</sup> Article 48(1) of the Convention defines a Regional Economic Integration Organisation as an organisation "which is constituted by sovereign States and which has competence over certain matters governed by [the Convention]".
- <sup>5</sup> Based on the EU's opt-out system, the Brussels Regulation is not directly applicable to Denmark but has been extended to Denmark by virtue of the separate agreement between the EU and Denmark.
- <sup>6</sup> Article 13 of the Treaty contains certain speedy court remedies which are available to a creditor upon a default by a debtor pending final determination of the creditor's claim either in the same, or another, jurisdiction and Article 43 of the Treaty sets out the rules determining the jurisdictions in which a creditor can make an application for these speedy court remedies. Article 31 of the Brussels Regulation permits application to be made to a court of an EU member state for provisional relief even if the courts of another member state have jurisdiction as to substantive law, and there is a large body of case law relating to the interpretation of that provision.
- <sup>7</sup> Article XXI amends Article 43 of the Treaty by adding the state of registration of an airframe or a helicopter as a jurisdiction in which an application for speedy relief can be made. This provision will not apply within the EU as the Brussels Regulation will apply.
- <sup>8</sup> Article VIII gives effect to the contractual choice of law made by parties.
- <sup>9</sup> Article X amends Articles 13 and 43 of the Treaty by adding a number of options, including (a) allowing a contracting state to specify the number of days within which speedy relief must be granted by a court, (b) extending speedy relief to cover the sale of an object and application of sale proceeds and allowing relief to be sought in a jurisdiction either chosen by the parties or where the debtor is situated and (c) allowing a debtor and creditor to exclude in writing the application of Article 13(2) which permits a court to impose additional terms when granting an order for speedy relief.
- <sup>10</sup> Article XI sets out the two insolvency regimes, Alternative A and Alternative B.
- <sup>11</sup> The declarations made by Ireland (in 2005) and Luxembourg (in 2008) were made before the EU's accession in 2009 and prior to the formulation of guidance regarding the declarations that member states were able to make. The declarations made by Luxembourg were, however, stated to be made without prejudice to the future exercise by the European Community (the predecessor of the EU) of its competences.

## European Union's Emissions Trading Scheme: The Stopped Clock Keeps Ticking for Some

As a result of recent European Union (EU) legislative activity, the EU's Emissions Trading Scheme (EU-ETS) will, through 2016, continue exempting certain flights but remain in effect as to others. Consequently, airlines and operators flying within the European Economic Area (and those financing and leasing to them) need to remain aware of, and compliant with, EU-ETS requirements. In the meantime, the aviation industry will remain focused on the efforts of the International Civil Aviation Organization (ICAO) over the next two-plus years to devise and agree upon a global market-based measure for aviation greenhouse gas emissions trading.

On April 2, 2014, the European Parliament (EP) voted by nearly a four-to-one margin to maintain through December 31, 2016 the exemption (in place since the EU Commission's November 2012 "stop the clock"

decision) for flights by covered operators originating or ending outside the European Economic Area (EEA).<sup>1</sup> If by the conclusion of its next triennial assembly in Autumn 2016, ICAO fails to deliver the framework for a global emissions trading market-based measure capable of implementation worldwide by 2020, then the original full scope of EU-ETS will return, effective January 1, 2017.<sup>2</sup> In the meantime, flights within the EEA (even those operated by non-EEA carriers and operators) remain subject to the requirements of EU-ETS, and covered operators must report their 2013 and 2014 carbon dioxide (CO<sub>2</sub>) emissions by March 30, 2015 and surrender the requisite number of allowances by April 30, 2015 in order to remain in compliance. Those not in compliance continue to face penalties ranging from per diem monetary fines to (in extreme cases) aircraft seizures and operating bans. Lest anyone believe that EU-ETS regulatory bodies are not serious about enforcement, the German regulatory authority recently levied fines totaling €2.7 million against sixty-one operators (many of whom are not German) for non-compliance with EU-ETS reporting or trading requirements during 2012.<sup>3</sup> It is unclear whether the penalized operators will pay these fines, or whether the EU-ETS regulatory authorities in other jurisdictions might follow suit, but any enforcement action is likely to be controversial.

The European Parliament's April 2 vote capped a rancorous six months of debates, threats, litigation and counter-proposals, both within the EU and elsewhere, in the wake of the ICAO triennial assembly in October 2013. The often contentious assembly proceedings are likely to portend what the coming months will hold as ICAO attempts to achieve a consensus among its one hundred ninety-one members in crafting a global aviation emissions trading system. The resolution ultimately reached by ICAO in October 2013 forbids the EU from imposing EU-ETS on non-EU countries without their consent until (at the earliest) the end of 2016. In the meantime, the framework for a global market-based measure for aviation emissions trading capable of worldwide implementation by 2020 is to be presented at ICAO's 2016 assembly. The defeat at ICAO of the EU's plan to impose EU-ETS globally prompted reinstatement by the EU's low-cost airline association of a lawsuit against the EU Commission alleging that the limited application of EU-ETS unfairly disadvantaged and disproportionately burdened the EU's low-cost carriers. Against a backdrop of political and legal pressure, the EU Commission was faced with the following options: (i) revert to the original "all flights" scope of EU-ETS, which would assuage dissenters at home but almost certainly renew threats of trade wars and escalate political pressure from abroad; or (ii) amend EU-ETS to apply

only to intra-EEA flights; or (iii) amend EU-ETS to apply only to intra-EEA flights and that portion of intercontinental flights over EEA airspace; or (iv) abandon the inclusion of aviation in EU-ETS altogether. None of these scenarios would have placated all sides of the issue.

On October 16, 2013, notwithstanding the ICAO resolution, the EU Commission defiantly proclaimed the EU's sovereign right to control its airspace and announced a multi-pronged proposal to amend EU-ETS, effective January 1, 2014. The scheme would cover CO<sub>2</sub> emissions from all flights within the EEA and, between 2014 and 2020 (by which time a global scheme would presumably be in place), the portion of any intercontinental flight within EEA airspace—defined as the territory between the takeoff or landing airport and the point on the flight route twelve nautical miles beyond the outermost coastline of EEA land, but excluding the airspace of non-EEA countries and sea areas between EEA countries in excess of four hundred miles. Overflights of EEA territory, as well as flights to or from non-EEA countries which are considered "not developed"<sup>4</sup> would be exempt. A one-time change to the annual reporting and allowance surrender deadlines would be in effect, such that 2013 and 2014 emissions are to be reported by March 31, 2015 and the requisite amount of allowances surrendered by April 30, 2015. The proposed amendments, which would have accounted for only about one-third of the emissions that would have been subject to EU-ETS in its original "all flights" format, drew sharp criticism from the environmental lobby and various EU airline groups, who felt that environmental protection was being subverted to fears of political and economic reprisal. Meanwhile, non-EU countries denounced the EU for violating the spirit of the just-completed ICAO assembly proceedings. On January 30, 2014, the European Parliament's Environment Committee approved the proposed amendments, although this step in itself did not modify EU-ETS—only the plenary European Parliament vote to be held on April 2 would have binding legislative effect.

On March 4, 2014, just a few weeks ahead of the plenary European Parliament vote, with political pressure mounting on several fronts, the EU Commission modified its proposed EU-ETS amendments. The inclusion of the portion of intercontinental flights over EEA territory was removed, leaving all intercontinental flights exempted entirely through 2016. The threshold for operators to be eligible for simplified emissions reporting procedures was raised to include all operators emitting fewer than twenty-five thousand tons of CO<sub>2</sub> annually (previously this was only available to non-commercial operators emitting fewer than ten thousand tons of CO<sub>2</sub> annually or operating fewer than two hundred forty-three flights in each of three consecutive four-month periods). However, there was still no express requirement that any fees or

funds collected through the administration or enforcement of EU-ETS be allocated toward fighting climate change or developing greener technology, a long-standing criticism of the scheme. The exclusion of all intercontinental flights through 2016 was rejected by the European Parliament Environment Committee on March 19, 2014, but again this did not itself modify EU-ETS and was merely procedural run-up to the European Parliament's plenary vote, the outcome of which had the force of law.

In addition to extending through 2016 (and slightly expanding) the exemption from EU-ETS of flights originating or ending outside the EEA, and prescribing March 31, 2015 and April 30, 2015 as the next reporting and allowance trading deadlines (respectively) for operators still covered by EU-ETS, the European Parliament's April 2 vote also resulted in the exemption, through at least 2020, of all flights by non-commercial operators emitting fewer than one thousand tons of CO<sub>2</sub> per year. This should ease the burden on business jet operators who fly strictly for their own personal or business purposes and do not carry passengers or cargo for compensation. However, the debate in the coming months will likely include the scope of the exemption for non-commercial operators and the threshold of the exemption for commercial operators (currently ten thousand tons of CO<sub>2</sub> annually).

As the calendar advances toward January 1, 2017, we should expect to see advancements in engine design and technology, clean sky initiatives, biofuel development and green taxiing systems, all of which should help combat climate change and reduce aviation greenhouse gas emissions.<sup>5</sup> While the primary focus will be on ICAO's progress toward a global market-based measure for aviation greenhouse gas emissions trading, airlines and operators flying within the EEA must continue observing EU-ETS requirements, and the lessors and lenders who finance such airlines and operators need to be vigilant of their customers' compliance. Although many questions remain at this stage as to how aggressively EU regulatory authorities will act against delinquent operators, the fact remains that the consequences of non-compliance can be quite significant and should not be overlooked.

If you have questions about this update, please contact Jordan R. Labkon at [jlakon@vedderprice.com](mailto:jlakon@vedderprice.com) or +1 (312) 609 7758.

<sup>1</sup> The EEA is comprised of the 28 EU member states, plus Norway, Liechtenstein and Iceland. The European Parliament's April 2 vote actually expanded the reach of the original "stop the clock" exemption. Flights between EEA territory and Switzerland, EEA microstates (e.g., Monaco and Andorra), EEA overseas territories and EEA outermost regions are now also exempt through 2016. See, e.g., "The Trilogue Compromise is Voted at the

European Parliament," *Verifavia.com*, April 3, 2014.

- <sup>2</sup> Feisty Exchanges Over Aviation EU ETS as European Parliament Votes to Continue With 'Stop the Clock', *GreenAirOnline.com*, April 15, 2014.
- <sup>3</sup> "Germany Levies Fines on Aircraft Operators Over Emissions," *Bloomberg.com*, April 30, 2014.
- <sup>4</sup> There are approximately seventy-five such countries, whose operators emit less than one percent of the total of aviation emissions worldwide.
- <sup>5</sup> See, e.g., "Plant Power: Biofuel Development," *Airline Fleet Management*, April 22, 2014; "Honeywell Plans 2017 Green Taxiing System In-Service Date, Talks with COMAC," *Air Transport World*, May 22, 2014.

## Disputes Arising Out of Wrongful IR Registrations and the Irish High Court

With the Registrar of the International Registry (IR) for the Convention on International Interests in Mobile Equipment (the Convention) having its centre of administration in Ireland, the High Court of Ireland (the High Court) is becoming a key venue for disputes relating to IR registrations. The High Court has issued two recent rulings in disputes relating to IR registrations originating entirely outside of Ireland under the Convention and the Protocol thereto on Matters Specific to Aircraft Equipment. In these two cases, the High Court has addressed the issue of wrongful registrations taking the form of registrable non-consensual rights or interests (Non-Consensual Interests). Registrable Non-Consensual Interests are non-consensual rights or interests (i.e., a right or interest conferred under the law of the Contracting State)<sup>1</sup> registrable pursuant to Article 40. Non-Consensual Interests with respect to which a Contracting State has made a declaration under Article 40 have priority over registered international interest only if such Non-Consensual Interests are registered.

The Convention outlines a specific procedure that an aggrieved party should follow to have a wrongful registration (including a wrongful Non-Consensual Interest) removed from the IR:

- under Article 25(4), if a registration ought not to have been made or is incorrect, the creditor (as defined in the Convention) must, without undue delay, procure its discharge or amendment after written demand by the debtor (as defined in the Convention);
- if the creditor fails to respond to a demand under Article 25, Article 44(2) grants the Irish Courts exclusive jurisdiction, on the application of the debtor, to make an order directed to the Registrar of the IR (being currently Aviareto Limited), requiring that the Registrar discharge the registration; and
- under Article 44(3), if a person fails to comply with an order of the High Court requiring a

person to procure the amendment or discharge of a registration, the High Court may direct the Registrar to take such steps as will give effect to that order.

### **PNC Equipment Finance LLC v. Aviareto Limited and Link Aviation LLC (*unreported, High Court 19 December 2012*)**

Minnesota Choice Aviation III LLC (Minnesota Choice) was the registered owner of a Dassault-Breguet Falcon 900B (the Dassault Aircraft) which was financed by General Electric Capital Corporation (GECC). GECC's security interests were registered as international interests with the IR. Minnesota Choice subsequently leased the Dassault Aircraft to Link Aviation LLC (Link). The international interest created by the lease agreement in favour of Minnesota Choice was also registered on the IR. Immediately following the termination of the lease agreement (approximately one year after the commencement of the lease term), Link proceeded, for vexatious reasons, to register a purported registrable Non-Consensual Interest on the IR. The High Court subsequently confirmed the baseless nature of the registration.

Approximately ten months after Link registered its purported Non-Consensual Interest, PNC Equipment Finance LLC (PNC) acquired from GECC the debt relating to the financing of the Dassault Aircraft with a view to ultimately taking possession of and selling the Dassault Aircraft. In February 2010, following an application by Minnesota Choice, a court in the State of Minnesota required Link to immediately discharge the offending registrations. When Link failed to comply, PNC, through direct correspondence with the Registrar, requested assistance with the discharge of the Non-Consensual Interest. The Registrar declined to assist without an order from the High Court.

In March 2010, Minnesota Choice voluntarily surrendered possession of the Dassault Aircraft to PNC which would go on to sell the Dassault Aircraft to a third party. As it required unencumbered title over the Dassault Aircraft in order to sell it, PNC initiated proceedings in the High Court seeking an order under Article 44(1) of the Convention for the Registrar to procure the discharge of the Non-Consensual Interest from the IR. The High Court held that under Article 44(2), PNC was a "debtor" for the purposes of that Article by reason of (i) its obligation to assume clean title to the Dassault Aircraft before selling it to a third party and (ii) it being an assignee of the security interests originally held by GECC. The High Court also held that PNC had a

"sufficient interest" for the purposes of Article 44(3), and Nicholas Kearns J. held:

- that the order of the Minnesota Court was *prima facie* evidence that the disputed registrations should not have been made as a Non-Consensual Interest as it was not an interest recognised under the laws of the US as capable of registration on the IR (due to no Article 40 declaration having been made and due to the lack of relevant filing with the FAA); and
- that the Registrar could not remove the disputed registration except by order of the High Court.

Kearns J. directed the Registrar to remove the Non-Consensual Interest from the IR should Link fail to comply with the order within 21 days (which period corresponds to the time within which Link could have appealed the decision) and awarded costs in favour of PNC and the Registrar.

### **TransFin-M, Ltd v. Stream Aero Investments S.A. and Aviareto Limited, High Court (Commercial Division) 18 April 2013**

In September 2012 TransFin-M, Ltd (a Russian entity) (TransFin) and Stream Aero Investments S.A. (a Panamanian entity) (Stream Aero) signed a letter of intent regarding the potential sale of a Gulfstream G-550 aircraft (the Gulfstream Aircraft). Unbeknownst to TransFin, Stream Aero had signed the letter of intent in its capacity as a broker with the intention of selling the Gulfstream Aircraft to a third party, Star Jet (Hong Kong) Limited (Star Jet), immediately after acquiring it from TransFin. The negotiations between TransFin and Stream Aero were unsuccessful, but shortly after their collapse TransFin made contact with Star Jet and ultimately sold the Gulfstream Aircraft to Star Jet directly.

Stream Aero claimed that it was entitled to an agency fee as a result of the sale (such fee being a percentage of the total sale price of the Gulfstream Aircraft) and following demand for payment of monies allegedly owed to it, proceeded to register a Non-Consensual Interest against the Gulfstream Aircraft on the IR. TransFin sought an order from the commercial division of the High Court pursuant to Article 25(4) and Article 44(3) of the Convention.

Peter Kelly J. held:

- under Article 44(2) and Article 44(3) of the Convention, that the Registrar discharge the registration if, after 21 days from the perfection of the order, Stream Aero had failed to do so; and
- irrespective of whether Stream Aero had a contractual basis on which to claim the agency fee,

there was no legal basis for the IR registrations as neither Panama nor Russia had made the requisite declarations under Article 40.

Kelly J. also awarded costs in favour of TransFin and noted that TransFin could have sought relief from the Panamanian courts and then enforced any such relief through the Irish courts. Notwithstanding this comment from Kelly J., this case is a clear example of the High Court's willingness to rule on substantive issues in disputes.

### **Conclusion**

At this early stage in the life of the Convention, Ireland is presenting itself as a key jurisdiction for resolving IR-related disputes. The speed with which the Irish courts have thus far addressed and resolved these matters (the entire application of the TransFin case was processed through the Irish Courts in a matter of weeks), as well as their procedural capacity to make ex parte orders for leave to serve proceedings on parties outside of Ireland, may well prove to be significant incentives for litigants seeking to enforce their IR-related rights, to bring their disputes before the Irish courts.

While it is a promising development for the global aircraft finance industry that the High Court is willing to accept jurisdiction for wrongful IR registration disputes, it remains to be seen if it will also accept jurisdiction in cases on other aspects of the Convention and take the lead on interpreting its more substantive provisions. Nonetheless, in the short term, the practical and prompt approach of the Irish Courts will prove useful in the proper and efficient functioning of the IR, affording predictability regarding unfounded or malicious registrations.

If you have questions about this update, please contact Lev Gantly at [lgantly@vedderprice.com](mailto:lgantly@vedderprice.com) or +44 (0)20 3667 2923.

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<sup>1</sup> For example, in Malta a lien for unpaid wages or unpaid taxes constitutes a registrable Non-Consensual Interest, and in China, rights pursuant to a court order constitute a registrable Non-Consensual Interest (Goode, Official Commentary – Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment, p. 713).

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