Cape Town Convention Academic Project Conference 2019

Session ‘Comprehensive case study of Oceanair insolvency: (1) facts; (2) setting: Brazilian ratification, legal system and key legal practices; (3) arguments made by all parties; (4) action taken by courts and administrative authorities; (5) discussion and assessment’

Report of Chairman

This reports on the above session, held on 10 September 2019 at the Cape Town Convention Academic Project Conference.

The panelists for the session were Professor Francisco Satiro (University of São Paulo Faculty of Law); Professor Marcelo von Adamek (University of São Paulo Faculty of Law); Ms Renata Iezzi (Partner, Basch & Rameh, São Paulo) and Mr Fabio Falkenburger (Partner, Machado Meyer Sendacz & Opice, São Paulo). The session was chaired by Mr Kenneth Basch (Basch & Rameh, São Paulo).

The session focused on (i) the Brazilian Bankruptcy Law, (ii) the insolvency provisions of the Cape Town Convention (‘Convention’) as implemented in Brazil, (iii) lower court and appellate court decisions of the judiciary of the State of São Paulo, Brazil, involving the insolvency proceedings of a Brazilian airline, Oceanair Linhas Aereas S/A (‘Oceanair’) and (iv) arguments asserted by Oceanair during the insolvency proceedings.

I. FACTS AND ISSUES

Oceanair filed for ‘judicial recuperation’ protection under the Brazilian Bankruptcy Law in December 2018. The case was assigned to the 1st Bankruptcy Court of the State of São Paulo, sitting in the City of São Paulo. Brazil is a Contracting State to the Convention and its Aircraft Protocol (‘Protocol’).

At the time of its ratification, Brazil declared applicable ‘Alternative A’ of Article XI of the Protocol (‘Alternative A’), which states that a debtor or its insolvency administrator shall, inter alia, cure all defaults or give possession of aircraft collateral to its creditors by the end of a declared waiting period. Brazil’s declared waiting period is 30 days.

1. ‘Judicial Recuperation’ is the expression used in the Brazilian Bankruptcy Law for the restructuring of a company. It is roughly analogous to a United States Chapter 11 proceeding or an English or Irish scheme of arrangement, however, the Brazilian process is not identical to bankruptcy restructuring proceedings of any other jurisdiction.
In addition, Article XI(2)(b) of the Protocol provides that the applicable waiting period for insolvency administrators or debtors to give possession of aircraft objects to creditors does not increase from the previously applicable stay periods as a result of a Contracting State’s declaration specifying the waiting period. Article 199 of the Brazilian Bankruptcy Law, which preceded Brazil’s ratification of the Convention, stipulates that aircraft lessors are not subject to any stay from repossessing leased aircraft and aircraft engines, even if the lessee has judicial recuperation protection.

For approximately 120 days from the date on which Oceanair was granted Brazilian judicial recuperation protection the Bankruptcy Court stayed lessors’ actions to repossess leased aircraft. One decision of the Bankruptcy Court expressly enjoined lessors and the Brazilian Civil Aviation Agency – ANAC, from de-registering pursuant to Irrevocable De-registration and Export Authorisations (“IDERAs”). During that period various interlocutory appeals were filed by lessors seeking to repossess leased aircraft. Those appeals were decided on an interim basis by the São Paulo Court of Appeals (Bankruptcy Division). At least one appeal was decided by the President of the Brazilian Superior Court of Justice in the Federal Capital of Brasília and one other appeal was decided by the President of the São Paulo State Judiciary. All of those interlocutory decisions allowed for Oceanair to retain possession of leased aircraft objects beyond the waiting period stipulated in Brazil’s Alternative A declaration.

On 8 April 2019, by a decision of the São Paulo Appeals Court (Bankruptcy Division), all stays were lifted and lessors were given the right to pursue repossession of leased aircraft. Oceanair did not voluntarily tender leased aircraft to lessors and the Bankruptcy Court refused to issue repossession orders, holding that it had jurisdiction to enjoin lessors from repossessing but that its jurisdiction did not extend to ordering Oceanair to redeliver aircraft. Lessor were forced to seek repossession orders from various civil courts. As of the time of the panel discussion virtually all of Oceanair’s fleet (which had been 100 per cent leased) had been repossessed and the few aircraft Oceanair still had in its fleet were grounded.

The panel discussed whether the decisions of the Brazilian judiciary during the first 120 days following initiation of the judicial recuperation period were compliant with the Protocol and Brazil’s declarations thereunder and whether the Bankruptcy Court violated the Protocol by enjoining enforcement of IDERAs.

II. PANEL DISCUSSION

The panelists were not unanimous in their conclusions. Professor Satiro, who had issued legal opinions on behalf of Oceanair, argued that the objective of a judicial recuperation proceeding is to provide a distressed debtor with means to reorganize its finances and thereby preserve the going concern of the business in the ultimate interests of all creditors and stakeholders. Professor Satiro asserted that the Convention shares the same overall objective to preserve the debtor’s business since it is in the public interest and will maximize returns to all stakeholders. He questioned whether the 30-day waiting period of Brazil’s Decree 8008/2013 was ever realistic, that Article XI of the Convention’s Protocol allows for a longer automatic stay and that specific provisions of the Bankruptcy Law and the Convention had to be interpreted in ways that are consistent with the overall domestic insolvency regime – especially the lack of DIP (“debtor-in-possession”) financing provisions in the Brazilian insolvency law. He also argued that the Convention had revoked Article 199 of the Brazilian Bankruptcy Law.
For these reasons Professor Satiro concluded that the Brazilian judiciary was justified in prohibiting lessors from repossessing aircraft for a period longer than the declared waiting period of 30 days.

The other panelists disagreed. They asserted that the applicable terms of the Convention, the Protocol and the Brazilian Bankruptcy Law are clear and should not be ignored based on general arguments of public interest. The Convention and Protocol and Brazil’s decisions in relation to its declarations contemplated the public interest, which includes the interests of creditors, especially lessors. When a jurisdiction ratifies the Convention and becomes a Contracting State, the leasing community examines the jurisdiction’s declarations and makes credit decisions based on those declarations and with the expectation that the Convention and Protocol will be enforceable in accordance with their respective terms. The other panelists argued that giving debtors additional time based on a vague public interest argument was inconsistent with both the spirit and letter of the Convention and the Protocol.

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