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Details of Filing

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Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB Leaseco Pty Ltd (Administrators Appointed) & Ors

Federal Court of Australia Proceeding No. NSD 713 of 2020

DEFENDANTS' OUTLINE OF SUBMISSIONS ON ORIGINATING PROCESS OF 30 JUNE 2020 AND AMENDED INTERLOCUTORY PROCESS OF 17 JULY 2020

A. INTRODUCTION AND OVERVIEW

1. By an Originating Application filed on 30 June 2020, the First and Second Plaintiffs (**Plaintiffs**) claim two broad categories of relief.

2. *First*, by prayers 1 to 4, the Plaintiffs seek certain declaratory relief, and an order that the Third Defendants (together, **the Administrators**) deliver up, or cause to be delivered up, certain "aircraft objects", consisting of four CFM International Engines, certain accessories, parts and equipment, and certain data manuals and records (together, the **Aircraft Objects**) to the Plaintiffs in the United States by 31 July 2020. The issue raised in this respect is whether, as the Plaintiffs contend, the phrase "give possession of the aircraft object to the creditor" in Article XI(2) of the Aircraft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, done at Cape Town on 16 November 2001 (**Aircraft Protocol**), is to be construed to mean "delivery up in accordance with the contractual regime for delivery" (Plaintiffs' Submissions (**PS**) at [5]). The Defendants contend that the phrase should instead be construed to mean "make available the aircraft objects to the creditor".

3. *Secondly*, by prayers 5 and 6, the Plaintiffs seek a declaration that a notice served on the Plaintiffs by the Administrators on 16 June 2020 (the **443B(3) Notice**) did not have the effect of relieving the Administrators of their obligations under s 443B(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**) in respect of the Aircraft Objects, and an order that the Administrators pay rent or other amounts payable pursuant to s 443B(2) of the Corporations Act in respect of the Aircraft Objects from 16 June 2020.

4. The Defendants do not oppose a grant of leave to proceed against them (to the extent necessary). Nor do they contest, for the purposes of this Application, that the First Plaintiff holds, for the benefit of the Second Plaintiff, an international interest in the identified

aircraft objects (prayer 1). However, for the reasons developed below, all of the other grounds of relief should be refused.

5. As to prayers 2 to 4, the Plaintiffs' proposed construction of Art XI(2) of the Aircraft Protocol should be rejected, and the Court should conclude that the Defendants have complied with their obligation to "give possession" by reason of the steps taken to make the Aircraft Objects available to the Plaintiffs to date. As to prayers 5 and 6, the Court should find that the 443B(3) Notice satisfied the requirements of s 443B(3) of the Corporations Act, and therefore precluded any personal liability for rent or other amounts under s 443B(2) of the Corporations Act from arising with respect to the Aircraft Objects. Should the Court find that the 443B(3) Notice is defective (which is denied), it should nonetheless order that the Administrators be excused from any liability in respect of the Aircraft Objects from 16 June 2020 by way of an order pursuant to s 443B(8) or s 447A(1) of the Corporations Act. The Defendants have sought such an order by their Interlocutory Process filed on 17 July 2020 (**Interlocutory Process**). By their Interlocutory Process, the Defendants seek further relief in respect of the Administrators' work in identifying, caring for, preserving and facilitating the return of the Aircraft Objects to the Plaintiffs from 16 June 2020 onwards, by way of a declaration or order that the Administrators may exercise a lien over certain of the Aircraft Objects for their reasonable and proper remuneration, costs and expenses attributable to the work done in that regard.

6. In support of their claim for the relief sought in the Interlocutory Process, and in answer to the Plaintiffs' claim for relief in the Originating Application, the Defendants rely on the affidavit of Salvatore Algeri sworn 17 July 2020 (**Algeri Affidavit**), and the affidavit of Darren William Dunbier affirmed 17 July 2020 (**Dunbier Affidavit**).

7. These submissions are structured as follows.

8. *First*, important aspects of the factual background are identified. *Secondly*, the Defendants' position with respect to leave is noted. *Thirdly*, the Defendants' submissions in respect of Art XI of the Aircraft Protocol are outlined. *Fourthly*, the Defendants' submissions in response to the Plaintiffs' claim relating to the 443B(3) Notice are set out. *Fifthly*, the Defendants' claim for relief in respect of the Administrators' work in identifying, caring for, preserving and facilitating the Plaintiffs in taking possession of the Aircraft Objects is addressed.

B. FACTUAL BACKGROUND

9. The factual background is set out in the Agreed Facts, as well as the Algeri Affidavit at [10]-[53], is unlikely to be controversial. The key facts may be summarised as follows.

10. The Aircraft Objects were leased from Wells Fargo (the First Plaintiff) as trustee for Willis (the Second Plaintiff) by VB LeaseCo Pty Ltd (**LeaseCo**) (the First Defendant) under four leases. The four leases were entered into on 24 May, 14 June, 28 August and 13 September 2019 respectively. Each incorporated the terms of a document entitled "General Terms Engine Lease Agreement" dated 24 May 2019 between LeaseCo and Wells Fargo as trustee for Willis (**GTA**). LeaseCo then sub-leased the Aircraft Objects to Virgin Australia Airlines Pty Ltd (**Virgin Australia**) (the Second Defendant).

11. Following their appointment, the Administrators took steps to enter into a protocol with lessors and financiers of aircraft property leased by LeaseCo (including the Plaintiffs), regarding the terms of ongoing retention of aircraft property in the possession of the Virgin Companies.[1] The Plaintiffs' engines have not been used at any time during the administration period (apart from in relation to necessary maintenance activities) and no revenue has been generated from them by the First and Second Defendants.[2]

12. By email dated 2 June 2020, the Plaintiffs indicated that they did not agree to sign the proposed protocol, and requested that (as Mr Algeri understood it), the Administrators effectively adopt the leases between Wells Fargo and LeaseCo.[3] The Administrators indicated that they were not in a position to adopt the leases.[4] Accordingly, they intended to issue a notice under s 443B(3) of the Corporations Act in relation to the Plaintiffs' engines, after which the Plaintiffs will "have to recover possession of the Engines at your own cost on an 'as is, where is' basis", albeit that the Administrators were prepared to provide reasonable assistance to the Plaintiffs in taking possession of the Aircraft Objects.[5]

13. On 16 June 2020, the Administrators issued the 443B(3) Notice, notifying the Plaintiffs that the Defendants did not intend to exercise any rights in respect of the property leased from

[1] Algeri Affidavit at [11]-[19], [21].
[2] Algeri Affidavit at [30].
[3] Algeri Affidavit at [22]-[23].
[4] Algeri Affidavit at [23].
[5] Algeri Affidavit at [23].

the Plaintiffs.[6] The effectiveness of the 443B(3) Notice is put in issue by prayers 4 and 5 of the Originating Application.

14. Between 16 June and 13 July 2020, the Administrators and the Plaintiffs engaged in extended discussions in respect of the Aircraft Objects, during which the Administrators attempted to assist the Plaintiffs in taking possession of those Objects. Those steps are outlined at [30]-[53] of the Algeri Affidavit. Whether or not the service of the 443B(3) Notice and subsequent steps taken to assist the Plaintiffs were sufficient to "give [the Plaintiffs] possession" of the Aircraft Objects is put in issue by prayers 2 to 4 of the Originating Application.

C. LEAVE NOT OPPOSED

15. It seems clear, on any view, that the Plaintiffs require leave to proceed under s 440D or 440B(2) of the Corporations Act in respect of prayers 5 and 6 of the Originating Application. Those prayers for relief are not brought under the Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001 (**Cape Town Convention**) or the Aircraft Protocol. While there remains a question as to whether or not leave is required in respect of prayers 1 to 4 of the Originating Application (see PS[94]-[99]), the Defendants do not oppose a grant of leave (should leave be necessary), such that it is not necessary for the Court to determine the issue.

D. CLAIM FOR DELIVERY

16. This matter is addressed in the Originating Application at prayers 2 to 4. The Defendants rely on the Algeri Affidavit at [10]-[56] and the Dunbier Affidavit at [16]-[22] in respect of those prayers for relief.

17. The central question raised by prayers 2 to 4 of the Originating Application is whether the Administrators have complied with their Cape Town Convention obligation to "give possession" of the Aircraft Objects: PS[2]. This question turns on: (a) the proper construction of Art XI(2) of the Aircraft Protocol; and (b) the application of that article, properly construed, to the circumstances of this case. Each matter will be dealt with in turn. First, however, it is convenient to deal with the applicable legal principles.

D.1 Legal Principles

18. Certain matters of principle are not in dispute.

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[6] Algeri Affidavit at [27].

19. The Cape Town Convention and the Aircraft Protocol have the force of law in Australia,[7] and both the Convention and Protocol prevail over any law of the Commonwealth (including the Corporations Act), and any law of a State or Territory, to the extent of any inconsistency.[8]

20. Australia has declared that it will apply Art XI, Alternative A of the Aircraft Protocol in its entirety to all types of insolvency proceeding, and that the waiting period for the purposes of Art XI.2 shall be 60 calendar days.[9]

21. The practical effect of Alternative A is to give insolvency administrators a prescribed "waiting period" (namely, 60 days) during which the administrators must either: (i) cure all defaults under the applicable agreement (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement; or (ii) "give possession" of the relevant aircraft object to the applicable creditor.[10] The concept of a stay limitation, or "waiting period" in respect of an aircraft as appears in Alternative A is drawn from s 1110 of the United States Bankruptcy Code.[11]

22. Given that the central issue arising out of prayers 2 to 4 of the Originating Application relates to the proper construction of the Protocol, it is convenient to set out in brief terms the principles governing the construction of the Convention and Protocol.

23. Article 5(1) of the Convention provides that, in construing the Convention (and the Protocol[12]), regard is to be had to "its purposes as set forth in the preamble, to its international character and the need to promote uniformity and predictability in its application." Article 5(2) provides that questions concerning matters governed by the Convention which are not expressly settled in the Convention itself are to be settled "in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law."[13] Article 6 further provides that while the Convention and Protocol "shall be read and interpreted together as a single instrument"

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[7] *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth), s 7.
[8] *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth), s 8.
[9] Declarations Lodged by Australia under the Aircraft Protocol at the time of the Deposit of its Instrument of Accession: see https://www.unidroit.org/status-2001capetown/518-instruments/security-interests/cape-town-convention-aircraft-protocol-2001/depositary-functions-aircraft-2001/declarations-by-contracting-state/1874-declarations-lodged-by-australia-under-the-aircraft-protocol-at-the-time-of-the-deposit-of-its-instrument-of-accession, accessed 9 July 2020.
[10] See, for example, DG Gray, DN Gerber and J Wool (2016) 'The Cape Town Convention aircraft protocol's substantive insolvency regime: a case study of Alternative A', *Cape Town Convention Journal*, 5(1) 115 at 116-117.
[11] Sir Roy Goode's Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Objects (4th Ed, 2019) (**Official Commentary**) at [3.1].
[12] Art 6(1) of the Cape Town Convention.
[13] Art 5 of the Cape Town Convention.

(Art 6(1)), to the "extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail" (Art 6(2)).

24. The proper construction of the Convention and Protocol are also governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (**Vienna Convention**).[14]

25. Article 31(1) is in mandatory terms. It requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". As McHugh J observed in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 252-253 (footnotes omitted), Art 31(1):

> contains three separate but related principles. First, an interpretation must be in good faith, which flows directly from the rule pacta sunt servanda. Second, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intentions. This principle has been described as the 'very essence' of a textual approach to treaty interpretation. Third, the ordinary meaning of the words are not to be determined in a vacuum removed from the context of the treaty or its object or purpose.

His Honour continued, at 254, after considering the authorities: "Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered".

26. Article 31(2) sets out what constitutes "context" for the purpose of the interpretation of a treaty, namely, in addition to "the text, including its preamble and annexes", any "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" and "[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". No agreement or instrument of a kind described in Art 31(2) has been identified by the parties as being relevant to the construction exercise before the Court.

27. Article 31(3) requires that certain further matters shall be "taken into account, together with the context", namely any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

[14] As McHugh J observed in *Povey v Qantas Airways* (2005) 223 CLR 189 at 211, when considering article 17 of the Warsaw Convention, "an Australian court should apply the rules of interpretation of international treaties that the Vienna Convention on the Law of Treaties has codified."

interpretation", and "[a]ny relevant rules of international law applicable in the relations between the parties". Once again, no agreement, practice or rules have been identified that would be required to be taken into account by this Court in construing Art XI(2) of the Aircraft Protocol, by reason of Art 31(3) of the Vienna Convention.

28. Article 32 addresses the extent to which recourse may be had to "supplementary means of interpretation" in construing a treaty. Two aspects of this article should be noted. *First*, unlike Art 31, Art 32 is in permissive terms: "[r]ecourse *may* be had to supplementary means of interpretation". *Secondly*, Art 32 is conditional; recourse may *only* be had to supplementary means of interpretation in certain circumstances, namely (a) "in order to confirm the meaning resulting from the application of article 31"; or (b) in circumstances where the interpretation according to Art 31 "[l]eaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable". It follows that a Court must be satisfied of either (a) or (b) before having regard to supplementary means of interpretation.

29. Read as a whole, Art 32 grants conditional permission to consider materials beyond the primary materials required to be considered under Art 31 when construing a treaty. This must be borne in mind in considering the Plaintiffs' reliance on secondary materials such as the *travaux preparatoires* (cf PS[46]). Importantly, the absence of authorities guiding the proper construction of a particular treaty provision cannot itself provide a basis on which to consider secondary materials (cf PS[48]). Attention must first be directed to the text. If that does not disclose ambiguity or absurdity, recourse need not and should not be had to secondary materials.

D.2 The obligation to "give possession"

30. None of the matters set out in PS[49] is in dispute. Accordingly, the central issue between the parties in respect of prayers 2 to 4 of the Originating Application is the proper construction of the phrase "give possession" in Art XI(2) of the Aircraft Protocol.

31. The Defendants submit that the phrase "give possession of the aircraft object to the creditor" in Art XI(2) should be construed to mean "make available the aircraft object to the creditor". As will be seen, this construction accords with the "ordinary meaning" of the phrase, read in "context and in light of [the treaty's] object and purpose."[15] Precisely what is involved in making aircraft objects available to a creditor will depend on the circumstances. The Court need not reach any generalised conclusion as to what is required of an insolvency

[15] Art 31(1) of the Vienna Convention.

administrator or debtor in order to satisfy their obligation to "give possession" under Art XI(2) of the Aircraft Protocol. All that need be determined is whether the obligation—which the Defendants say consists of an obligation to make aircraft objects available to a creditor—has been satisfied on the facts before the Court.

32. While the Plaintiffs on occasion equivocate (e.g., PS[52] and [62]), it appears clear from PS[5], [63] and [68] that they contend that the requirement to "give possession of the aircraft object to the creditor" requires an insolvency administrator or debtor to "redeliver the aircraft objects to the creditor in accordance with the underlying agreement" (PS[5]). It is worth pausing to note the detail of that construction and its disconformity with the text. The Plaintiffs appear to contend that the phrase "give possession" directs not merely "redelivery" at large, but rather redelivery "in accordance with the underlying agreement". The qualification is understandable. An obligation to redeliver at large would not be capable of satisfaction by an insolvency administrator or debtor without further negotiation with a creditor, as the content of such an obligation could not be identified. For example, it would not be apparent whether aircraft objects should be redelivered to a creditor's head office—which may not have facilities required to accept delivery—or some other location. Given that the Aircraft Protocol is unlikely to impose an obligation on insolvency administrators and debtors with which such persons cannot (unilaterally) comply, it is to be expected that, on the Plaintiffs' construction, some content must be given to the obligation to "redeliver", which content the Plaintiffs source in the underlying agreement between the creditor and debtor. None of this is supported by the text of the Aircraft Protocol.

(a) The correct construction of 'give possession'

33. For the six reasons that follow, the Defendants' construction of "give possession" should be adopted, and the Plaintiffs' construction should be rejected.

34. *First,* the "ordinary meaning"[16] of the phrase "give possession of the aircraft object" requires the insolvency administrator or debtor to make the aircraft object available to the creditor, thereby allowing the creditor to take up possession of their object. This common-sense interpretation has the benefit of promoting "uniformity and predictability" in the application of Art XI(2) of the Aircraft Protocol, consistent with Art 5 of the Cape Town Convention. The content of the obligation in a particular factual scenario can be determined by the insolvency administrator or debtor as appropriate.

[16] Art 31(1) of the Vienna Convention.

35. The Plaintiffs' contrary submission to the effect that the words "give possession … to the creditor" "impose a positive obligation upon the debtor or insolvency administrator to return the aircraft" (PS[52]) is based on the contention that "[t]he ordinary natural meaning of the word 'give' connotes positive action by the debtor and receipt by the creditor. It is an active verb" (PS[51]). This contention gives undue weight to the term "give" and fails to read it as part of the compound phrase "give possession". "Give" is a protean term. In some contexts, it connotes a positive action (e.g., to "give a compliment"), while in other contexts (e.g., "to give way") it does not. The ordinary meaning of the word "give" thus may convey a positive act of transferring or handing something over (consistent with the Plaintiffs' construction), but may also mean to cause or allow someone to have something (consistent with the Defendants' construction). Considered in isolation, "give" is agnostic as between the Plaintiffs' and the Defendants' construction, as the degree of activity or passivity connoted by the term "give" will turn on context. Its immediate present context is the compound phrase "give possession".

36. To possess means to exercise dominion over (here) an object. To *give* possession then means to provide the opportunity to exercise dominion over an object; to make the object available. The phrase "give possession" does not, on its ordinary meaning, connote a positive act by the giver. The Defendants' construction should be preferred to that of the Plaintiffs, based on the "ordinary meaning to be given to the terms" of Art XI(2).

37. *Secondly*, the Defendants' construction is confirmed when Art XI is read as a whole. The term "possession" is used throughout Art XI accompanied by various qualifying verbs. The first appears in the chapeaux of Art XI(2), being to "give" possession. Immediate meaning is given to the word "give" by Art XI(2)(b), which refers to the creditor "be[ing] entitled to" possession. A legal entitlement to *be* in possession is a state of affairs achieved through the person being given the opportunity to take possession, but does not necessarily require delivery of the property in question to that person.

38. Art XI(5) provides "Unless and until the creditor is *given the opportunity to take possession under paragraph 2*…" (emphasis added). This cross-reference to paragraph 2 provides a strong textual indication that the obligation on an insolvency administrator or debtor to "give possession" of aircraft objects in Art XI(2) should be read as requiring the insolvency administrator to give the creditor "the opportunity to take possession"; that is, to make the objects available to the creditor; who must then take some positive step to take up possession. The fact that Art XI(5) contemplates a creditor taking a positive step in order to

obtain possession suggests that the reference to "giv[ing] possession" in Art XI(2) does **not** require delivery up of the aircraft objects. If that were so, no positive act of "taking" possession on the part of a creditor would be required.

39. This construction of Art XI(5) is supported by Professor Goode's Official Commentary at [5.65]. That explains, with respect to Art XI(5), that "[t]he duty of the insolvency administrator or the debtor under the Convention to preserve the aircraft object and its value comes to an end once the administrator or the debtor, as the case may be, has given the *creditor the opportunity to take possession, whether or not the creditor avails itself of that opportunity.* Thereafter, the duty to take care of the aircraft object is governed by the applicable law" (emphasis added).[17] Professor Goode thus confirms that Art XI(5) contemplates an active step on the part of a creditor in *taking up* the opportunity to possess the aircraft objects, which tells against construing the phrase "give possession" as requiring delivery up.

40. The Plaintiffs seek to minimise the significance of Art XI(5) by submitting that the "opportunity to 'take' arises only *after* the debtor has 'given' possession" (PS[54], emphasis in original). They contend that Art XI(5) deals with a step subsequent to that identified in Art XI(2), which accordingly has no bearing on the proper construction of Art XI(2). The Plaintiffs seek to bifurcate the concept of "giv[ing] possession" in Art XI(2), and "giv[ing] the opportunity to take possession" in Art XI(5) by interposing a temporal distinction between the two concepts. This is not supported by the text of Art XI, and should be rejected. The phrases "give possession" in Art XI(2) and "given the opportunity to take possession" in Art XI(5) denote one and the same event. The giving of possession is the proffering, and the opportunity to take possession is the direct correlative of that proffering, such that there is no temporal distinction between the two concepts. Once this is appreciated, it can be seen that to "give possession" is to carry out the very same act as "to give the opportunity to take possession". This construction is confirmed by the fact that Art XI(5) refers to the creditor being "given the opportunity to take possession *under paragraph 2*" (emphasis added). That makes explicit the fact that the obligation to "give the opportunity to take possession" referred to in Art XI(5) is the obligation that arises under Art XI(2) – that is, to "give possession" means to "give the opportunity to take possession". The Plaintiff does not grapple with the express reference to "under paragraph 2" in Art XI(5) at PS[53]-[56].

[17] See at [5.65].

41. The final qualified use of "possession" occurs within Art XI(7). That provides: "the insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where…" It states the opposite of the circumstance in Art XI(2), and does so by the notion of "retaining" possession. It thereby indicates that "give" is no more than the obverse of "retain". This suggests that to "give" possession means to "not retain" possession; that is, to make aircraft objects available to a creditor.

42. Drawing these threads together, "Alternative A" in Art XI contemplates two different scenarios with respect to the possession of aircraft objects in an insolvency context. Either possession is "retained" by the insolvency administrator or debtor (Art XI(7)) or possession is "given" to the creditor (Art XI(2)), which involves giving the creditor "the opportunity to take" possession (Art XI(5)). This supports a construction of "give possession" in Art XI(2) as meaning "to make available". And it speaks against the Plaintiffs' construction. "Redelivery" is not the opposite of "retaining" possession (cf Art XI(2) and XI(7)), and redelivery does not require a positive act on the part of the creditor (cf Art XI(5)). This is to say nothing of the need wholly to import the words "in accordance with the contractual regime for redelivery" (PS[5]) into the text of Art XI(2), for which there is no textual support in Art XI at all.

43. *Thirdly*, the Defendants' construction is consistent with the requirement in Art 5(1) of the Cape Town Convention, which requires regard to be had, relevantly, to "the need to promote uniformity and predictability in [the Convention's] application". An obligation to make aircraft objects available is able to be applied predictably and uniformly across various factual scenarios. The question in each case will simply be whether the creditor has been given the opportunity to take possession in the circumstances. An obligation to "delive[r] up in accordance with the contractual regime for redelivery", as propounded by the Plaintiffs, necessarily demands a different approach to be taken in each case in which the obligation in Art XI(2) applies, given the multiplicity of signatory nations and the plurality of possible contracts. Indeed, it is possible that, in some circumstances, there will be no obligation to redeliver in the underlying agreement between the creditor and debtor at all, in which case the practical operation of Art XI(2) on the Plaintiffs' construction is unclear. It is not obvious that the obligation to "give possession" would revert to some lesser requirement than delivery in such circumstances. It is also possible that a financier or lessor may, for whatever reason (e.g., when no revenue can be generated from the aircraft object because of a global pandemic), be unwilling or unable to take delivery of an aircraft object, frustrating the ability of the insolvency administrator or debtor to "give possession" by discharging the

purported redelivery obligation. On the Plaintiffs' construction, this would saddle (for an indefinite period) the insolvency administrator with the ongoing obligation to preserve the aircraft object and its value pursuant to Art XI(5). The lack of uniformity, and indeed likely heterogeneity, in the operation of Art XI(2) on the Plaintiffs' construction tells against such a construction being accepted, as per Art 5(1) of the Convention.

44. *Fourthly,* the "general principles" on which the Cape Town Convention and Aircraft Protocol are based support the Defendants' construction of Art XI(2).[18] The preamble to the Convention states that the parties to the convention are "desiring to provide broad and mutual economic benefits for all interested parties". There is no basis on which the Court could conclude that the intention to provide "broad and mutual economic benefits for all interested parties" ought not apply in an insolvency context. The contention that an insolvency administrator or debtor should incur significant costs in complying with Art XI(2), to the detriment of the general body of creditors, is contrary to the general principles underlying the Convention and Protocol, as set out in the Preamble to the Convention. These matters argue against construing the phrase "give possession" in Art XI(2) as requiring delivery of aircraft objects to a creditor. Construing the phrase "give possession" as meaning to "make available" is, by contrast, consistent with the general principles underlying the Convention and Protocol.

45. *Fifthly,* Alternative A is drawn from Section 1110 of the US Bankruptcy Code. Case law concerning that regime supports the Defendants' construction. Regard may be had to the "antecedent municipal law of nations for the purpose of elucidating the meaning and effect of the convention and the new rules which it introduces."[19] See also the *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol The Legal Advisory Panel of the Aviation Working Group* which states, at [128]: "In interpreting certain aspects of Alternative A, practitioners should take into account the leading jurisprudence on those issues under U.S. law".

46. Section 1110(c)(1) relevantly provides (emphasis added):

> In any case under this chapter, the trustee shall immediately *surrender and return* to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(3), if at any time after the date of the order for relief under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession to the trustee.

[18] Cape Town Convention, Art 5.
[19] *Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* at 159.

47. It is immediately apparent that the language used in sub-s (c)(1) differs to that in Art XI(2), in particular providing for the "surrender and return" of equipment, rather than the giving of possession. Nonetheless, in *In re Republic Airways Holdings Inc*, 547 B.R. 578 (S.D.N.Y, 2016), the United States Bankruptcy Court held that a debtor was able to comply with s 1110 by making the aircraft and related equipment immediately available to the lender. The following passages are instructive, and it is convenient to set them out in full (at 584-587, emphasis added):

> Although the statute provides an immediate 'surrender and return,' it does not specify the conditions for the surrender and return, including whether a debtor must comply with any conditions of return in the underlying agreement. As the Collier on Bankruptcy treatise states: 'there is no reported authority under the present version of section 1110 as to whether a debtor has an obligation to do more than make the aircraft immediately available to the lessor or secured party at its location and in its condition on the applicable date, or as to whether the costs of repair and repositioning are administrative expenses, if the lease is not timely rejected before the 60th day of the case.'
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> Applying these principles to the parties' dispute in this case, the Court rejects the majority of Citibank's objections. First and foremost, the Court declines to adopt Citibank's suggestion that the Debtors return the aircraft with the matching engines. … Citibank complains that some of their engines are not in the same location as the matching aircraft, and that some engines in their airframes are owned by unidentified third-parties so that those engines must be removed before the aircraft may be returned to Citibank. But Citibank's request is *akin to requiring the Debtors to comply with the conditions for surrender in the underlying agreements between the parties. That argument has been rejected by the few courts that have spoken on the issue.*
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> …
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> As the court in *Northwest Airlines* bankruptcy observed: '[T]he hallmark of Section 1110 is speed. Congress heeded the insistence of aircraft lenders and lessors that they be able to retrieve their property without delay. It will be difficult to convince this Court that a lender has acted reasonably if it tarries in accepting surrender and return or taking possession of its property.' Thus the court in *Northwest Airlines rejected the argument that the debtors must comply with all the return provisions of a given lease or security agreement, noting that '[t]hat is precisely what Section 1110 does not provide.'*
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> …
>
> Similar return requirements were rejected in the *Delta Air Lines* case. *The court refused to require the debtors to* repair aircraft or *transport unserviceable aircraft to the Section 1110 parties*, concluding that the statute does not give lenders and

> lessors a 'miracle right to have [the debtors] put it all back together again.' … The court made clear that section 1110 meant that *'you get [the equipment] immediately and you get it as is, where it is'* (finding it counterintuitive to require immediate return of equipment while also imposing conditions on its return).
>
> The same result is appropriate here. The Court will *not require that the Debtors return the aircraft and related equipment in a particular condition for surrender and return.*
>
> …
>
> The Court takes the same approach to the records for these aircraft and related equipment. Citibank requests that Debtors return such records at the same time it surrenders and returns any aircraft or related equipment. *But the Debtors have already made such records and documentation available for pick-up by Citibank. … For the reasons set forth above, therefore, the Debtors have honoured their obligations for surrender and return of such records and documentation*, subject once again to Citibank's right to file a claim.

48. As these passages make clear, it is sufficient under Section 1110 of the US Bankruptcy Code for a debtor to make aircraft objects available to a lessor in order to give over possession, without being required to deliver up the aircraft objects.

49. The reasoning underlying this conclusion, as set out in the passages extracted above, applies equally to Art XI(2) of the Aircraft Protocol. To require delivery up under Art XI(2) is to require an insolvency administrator to comply with the underlying agreement between creditor and debtor; the Plaintiffs concede as much in their submissions at PS[5], [63] and [68]. Indeed, as explained above, requiring compliance with the underlying agreement seems a necessary corollary of construing the phrase "give possession" to mean "redelivery", as absent a requirement to comply with the underlying agreement, the content of the obligation to redeliver would be obscure. However, as the Court explained in *In re Republic Airways Holdings Inc*, compliance with the underlying agreement is "is precisely what Section 1110 does not provide". The same is true of Alternative A in XI(2). Under Alternative A, an insolvency administrator and debtor are given two options; either "give possession of the aircraft object to the creditor" within sixty days, or perform all obligations under the agreement (cf Art XI(2) and XI(7)).

50. It is clear, then, that Art XI(2), like s 1110 of the Bankruptcy Code, contemplates "giving possession" as being something other than complying with the agreement, such a course being an alternative to such compliance. The elision of the two alternative options granted to an insolvency administrator or debtor under Alternative A on the Plaintiffs' construction

is another reason, supported by US case law, to reject the Plaintiffs' construction and instead adopt the Defendants' construction.

51. Academic commentary supports this conclusion. Havel and Sanchez say this about Alternative A (footnotes omitted):[20]

> Alternative A resembles and is "similar in ideology" to the Section 1110 procedure in the U.S. bankruptcy code. As prescribed by the Convention, this first alternative requires the debtor or insolvency administrator within the time period prescribed by the contracting State in its insolvency declaration either to give the creditor possession of the aircraft object or to cure all defaults under the relevant agreement and agree to perform all future obligations under that agreement. Should the debtor fail to perform all future obligations, there will not be a second opportunity to cure defaults and the aircraft object will have to be transferred right away. The insolvency administrator or debtor is required to preserve the aircraft object and maintain its value until the creditor is given the opportunity to take possession…The creditor is also entitled to deregistration and export on an expedited basis, and local bankruptcy courts are barred from staying or interfering with the creditor's rights or exercise of its remedies as permitted by the Cape Town Convention and the Aircraft Protocol.

52. *Sixthly*, considering the Aircraft Protocol together with the Convention, as is required by Art 6(1) of the Convention, it can be appreciated that the only remedies available to a lessor under the Convention on an event of default are: (a) to terminate the agreement; and (b) to "take possession or control" of any object to which the agreement relates: Art 10. As has been observed in academic writing, "[t]his reflects the fact that, as the owner of the object, the conditional seller/lessor does not need more extensive remedies and, once the agreement is terminated and the object repossessed, is free to deal with it as it wishes."[21]

53. It would be surprising if the remedies available to a lessor in an insolvency context under Art XI(2) of the Aircraft Protocol extended beyond those available to lessors in any other context involving an event of default under Art 10 of the Convention, absent any textual indication to support such an extension. When Art XI(2) of the Aircraft Protocol is read together with Art 10 of the Convention, the better view is that Art XI(2) grants creditors additional protection in an insolvency context by imposing an *obligation* on the debtor or insolvency administrator to make aircraft objects available to a creditor, so that the creditor does not themselves need to enforce their entitlement under Art 10 of the Convention to

[20] BF Havel & GS Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge: Cambridge University Press, 2014), pp. 373 – 374.
[21] S Saidova, 'The Cape Town Convention: Repossession and Sale of Charged Aircraft Objects in a Commercially Reasonable Manner' (2013) *Lloyd's Maritime and Commercial Law Quarterly* 180 at 181.

"take possession or control" of its aircraft objects. In that way, Art XI(2) of the Aircraft Protocol provides assistance to a creditor in obtaining the substantive benefit of the remedy conferred by Art 10 of the Convention (namely the taking of possession of its aircraft objects) in an insolvency context. The harmonious operation of Art 10 of the Convention and Art XI(2) of the Aircraft Protocol on the Defendants' construction of Art XI(2) provides further support for that construction.

54. The Plaintiffs' construction of Art XI(2) would result in Art XI(2) providing creditors with a wholly different remedy in an insolvency context than those which are available under the Convention. There is no textual foundation for construing Art XI(2) as offering a substantively different remedy to creditors beyond those offered under the Convention. To the contrary, the Aircraft Protocol uses the same terminology as that appearing in the Art 10 of the Convention (that is, the taking of "possession"). The need to construe the Convention and Protocol together as a single instrument under Art 6(1) of the Convention, and the inconsistency between the two that flows from the Plaintiffs' construction of Art XI(2) thus further tells against the acceptance of that construction.

55. For those reasons, the Defendants' construction of Art XI(2) should be preferred. It is, however, necessary briefly to respond to additional arguments put by the Plaintiffs.

(b) The Plaintiffs' contentions in support of their preferred construction

56. In addition to their contention with respect to the "ordinary meaning" of the phrase "give possession", the Plaintiffs offer several further reasons in support of their preferred construction of Art XI(2) that warrant detailed reply. Each can be dealt with in turn.

57. *First*, the Plaintiffs contend that their construction is supported by the objects and purpose of the Cape Town Convention and Aircraft Protocol: PS[64]-[67]. More specifically, the Plaintiffs emphasise that the Convention and Protocol are a creditor-focussed regime, and it is therefore said that an onerous obligation on debtors and insolvency administrators to redeliver aircraft objects is "entirely consistent with the objects and purpose of the Cape Town Convention and Aircraft Protocol" (PS[67]). It is correct to identify the protection of creditor interests as *one* object of the Cape Town Convention and Aircraft Protocol. But that object is one among the various objects and purposes of the Convention and Protocol.

58. The objects and purposes of the Aircraft Protocol are dealt with in the preamble to the Protocol, which refers to the necessity of implementing the Convention. It is necessary to consider the preamble to the Convention to identify the objects and purposes of both the

Convention and the Aircraft Protocol. It should be noted, in this context, that the Second Reading Speech of the Bill that became the Cape Town Convention Act is not relevant to this Court's identification of the objects and purposes of the Cape Town Convention and Aircraft Protocol (cf PS[65]). As a statement by domestic legislators in the context of the passing of domestic legislation, at most the Second Reading Speech may assist in the construction of the domestic Act implementing the Convention in Australia. It cannot assist with the interpretation of the Convention itself, which must instead be construed based on "broad principles of general acceptation".[22]

59. Turning then to the preamble of the Convention, while certain items in the preamble focus on the interests of creditors (for example, "[m]indful of the need to ensure that interests in such equipment are recognised and protected universally"), other items extend beyond the interests of creditors (for example, "[r]ecognising the advantages of asset-based financing and leasing … and desiring to facilitate these types of transaction by establishing clear rules to govern them"; and "[d]esiring to provide broad and mutual economic benefits for all interested parties"). What emerges from the preamble is the objective of enacting clear and uniform rules to govern matters relating to interests in mobile equipment.

60. In those circumstances, if it be the case that the Convention is in part directed towards *improving* protections for creditors (which is accepted), the question arises as to vis-à-vis whom or what creditors' position is to be improved? The Plaintiffs assume any increase in the protections afforded to creditors under the Convention is to the detriment of debtors: PS[67]. Yet, the better view is that the increase in protection is vis-à-vis private international law rules that would otherwise have applied to creditors, namely the *lex rei sitae*, which is difficult to apply to mobile assets.

61. While it is accepted that, at [3.117] of the Official Commentary, Professor Goode observed that "Article XI introduces special rules in relation to aircraft objects designed to strengthen the creditor's position vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event" (see PS[66]), this is distinguishable from the purpose of the Convention and Protocol more generally. As Professor Goode himself elsewhere observes:

> The Convention addresses what has been a problem of long standing, namely the instability of security, title retention and leasing interests in mobile equipment of high unit value or particular economic significance … [Prior to the operation of the Cape Town Convention] [t]he creditor's rights in the event of default and its priority vis-à-vis holders of competing interests are

[22] *Buchanan & Co v Babco Ltd* [1978] AC 141 at 152.

> determined by the applicable law under the rules of private international law of the forum. The traditional conflict rule governing dealings in moveables is the lex rei sitae, which works well enough in the case of goods that rarely, if ever, cross national borders but is more difficult to apply to moveables that have no fixed situs because, like aircraft and railway rolling stock, they are constantly moving from one country to another or, like satellites, are not located on earth at all.[23]

62. The object of the Cape Town Convention is, relevantly, to improve the position of creditors, as compared to their prior position. The prior position was regulated by the Convention on the International Recognition of Rights in Aircraft, done in Geneva, on 19 June 1948 (the **Geneva Convention**). The Geneva Convention offers no unified notion of a security right that is eligible for international protection. It serves instead as a choice of law treaty, "aiming only to deflect automatic application of the law of the location of the aircraft (the *lex situs*) and imposes a choice of law on the court of the *situs*."[24] It has for this reason been described as a "conflict of laws treaty that deals with recognition of rights, not a substantive treaty that creates rights".[25] A further difficulty presented by the Geneva Convention is that it involves an open-ended determination of which state's laws apply in the event of an insolvency. A creditor or lessor's position is improved vis-à-vis the prior state of the law by the Cape Town Convention through a number of means, including through the introduction of an international registration system and the clarification on laws applicable in the event of insolvency.[26] There is nothing in the preamble of the Convention that would support the conclusion that the Convention (or the Aircraft Protocol) is intended to improve the position of creditors at the expense of the position of debtors.

63. The benefits of this regime have recently been identified by Sanam Saidova, in a manner supportive of the Defendants' construction generally: [27]

> Alternative A, also known as the 'hard option', requires the person in charge of the insolvency, such as an insolvency administrator or the debtor, either: (a) to cure all defaults and agree to perform all future obligations within a specified waiting period; or (b) to give the creditor the opportunity to take possession of the object.

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[23] R Goode, 'The International Interest as an Autonomous Property Interest' (2004) *European Review of Private Law* Vol 1, 18 at 19.
[24] BF Havel & GS Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge: Cambridge University Press, 2014), p. 348.
[25] DP Hanley, *Aircraft Operating Leases: A Legal and Practical Analysis in the Context of Public and private International Aviation Law* (Kluwer Law International, 2012) at 93, 144-145
[26] *Ibid* at 22.
[27] S Saidova, *Security Interests under the Cape Town Convention on International Interests in Mobile Equipment* (Bloomsbury: Hart Publishing, 2020) Chapter 6, e-book at p. 408 and 429-432

…

> The disadvantages associated with repossession mean that the secured creditor will not always be ready and willing to take possession of the object. But if taking possession and moving the object to a different jurisdiction can help the secured creditor "avoid insolvency stays, lengthy court proceedings and increase the likelihood of better sale proceeds, the secured creditor may decide to repossess. Taking possession is a powerful remedy because it divests the debtor of the valuable asset, and in some cases a mere threat of repossession can induce the debtor to cure the default. Once the secured creditor gains physical control over the object, it may find it easier to negotiate with the debtor because the loss or unavailability of even one such object can cause serious disruption to the latter's schedule. Another reason why the secured creditor can take possession of the object is to keep it in operation where the debtor has ceased trading so that profit can still be earned. By taking possession, the secured creditor can also intercept any rentals payable under the leases, provided that they do not terminate once the security interest is enforced. Most importantly, the secured creditor will need to take possession of the object in order to sell it. Since the Convention permits self-help repossession, the secured creditor may be able to seize the object without applying for a court order, saving both time and cost. The availability of the remedy of repossession also means that the secured creditor can be more certain that if the debtor defaults, it can take the object and realise it to obtain repayment of the debt. This will reduce the risk of non-repayment and give the debtor access to credit at lower cost.

64. Once it is appreciated that the Cape Town Convention and the Aircraft Protocol are not directed to protecting creditors at the expense of debtors (indeed, to the contrary, the Convention is directed to providing "broad and mutual economic benefits for all interested parties"), the Plaintiffs' contention that their construction of Art XI(2) of the Aircraft Protocol, which substantially improves the position of a creditor at the expense of a debtor, is supported by the object and purpose of the Convention and Aircraft Protocol falls away.

65. There is no basis on which to assume that the obligation imposed on an insolvency administrator under Art XI.2 is necessarily more onerous than would be required "under any local law" (cf PS[67]). In any event, it should be noted that, even if the Cape Town Convention and Aircraft Protocol were understood to be creditor-focussed, it is far from clear why redelivery of aircraft objects would be the preferable default international norm from a creditor's perspective, as compared to having aircraft objects made available in an insolvency context, given the likelihood of delays in creditors receiving the benefit of their aircraft objects should an insolvent debtor be tasked with redelivery.

66. *Secondly*, as to the Plaintiffs' reliance at PS[61] on Professor Goode's statement in [5.70] in "Illustration 71" that "[t]he financed aircraft engine *must be returned* at the end of the 60-day

period" (emphasis added), that reliance is, with respect, misplaced. As the Plaintiffs recognise, that illustration was not addressing the precise issue in question. In those circumstances, it would be inappropriate to conclude that the Official Commentary supports the Plaintiffs' construction of Art XI(2); to the contrary, passages in the Commentary pointing in the opposite direction (and dealing directly with Art XI(2)) can be identified (see, for example [5.65], referred to at [39]). Additionally, the reference to "expenditure from general assets of the estate" that is cited at PS[61] must be read in its context, being expenditures in relation to "maintain[ing] the aircraft engine and its value in accordance with the terms of the security agreement" (i.e., expenditures arising in relation to Art XI(5) rather than Art XI(2)).

67. *Thirdly*, as to the Plaintiffs' reliance on the *travaux preparatoires*, as explained above at [28]-[29], the Court may not have regard to secondary materials unless those materials either confirm the construction of Art XI(2) that emerges from an application of the principles of construction set out in Art 31 of the Vienna Convention, or unless the Court is satisfied that the interpretation that follows from an application of Art 31 is ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. It is submitted that the Court could not be satisfied of either matter, and so the *travaux preparatoires* are unavailable as a source of construction material in the present case. The *travaux preparatoires* do not confirm the construction which emerges based on an application of Art 31 of the Vienna Convention (being the construction put forward by the Defendants), and that construction is not ambiguous or obscure, and does not lead to a result which is manifestly absurd or unreasonable. In those circumstances, Art 32 of the Vienna Convention prohibits regard being had to materials of the kind put forward by the Plaintiffs at PS[68]-[78].

68. In any event, even if regard is to be had to the draft materials, they do not assist the Plaintiffs. The point can be dealt with shortly. While the drafting appearing in the UNIDROIT 1997, Study LXXI Doc 36, add 3 might support the Plaintiffs' construction, it will be immediately apparent that that early iteration of what later became Art XI(2) is in markedly different terms to the final version. In those circumstances, there is nothing to be drawn from that early draft, which was several years away from being agreed to by the contracting States and was ultimately substantially re-written.

69. The drafting in the version that appeared in the 1998 draft moved away from the language of "return and deliver" and instead adopted the ultimate language of "give possession". The Plaintiffs seek to emphasise a drafting note providing "[in accordance with, and in the

condition specified in the agreement and related transaction documents]", which remained in the drafts circulated in both February and September 1999. However, the purpose of the drafting note is far from clear. Item 8 of Document 31, relevantly quoted in FN32 of the Plaintiffs' Submissions, does not fully disclose the purpose of the notation, given that multiple types of notation are identified in that passage. Indeed, it is far from clear whether the drafting note was directed to the *manner* in which possession should be given, or as to, for example, the form in which the aircraft objects must be given over (such as in particular condition, or together with certain ancillary property). In circumstances where the purpose and meaning of the drafting note is unclear and, more fundamentally, the note was not included in the final text of Art IX(2), the Court would not rely on that drafting note to reach a conclusion as to the construction of Art XI.2 which is contrary to the text itself.

70. As to the Third Joint Session Report, it should be noted that at [199] the Report states: "The Rapporteur stated that the Convention applied except to the extent that it was modified by the Protocol. Article XI, Alternative A, *was simply concerned with the ability to acquire possession*, the power of sale would apply by virtue of the Protocol and not of the Convention, and then Article 8 of the Convention would come into play." A concern to confer the "ability to acquire possession" on creditors is consistent with the Defendants' construction of the phrase "give possession" as "make available to the creditor", and does not reveal any intention to impose an obligation on debtors and insolvency administrators to deliver up aircraft objects to creditors – it is trite to observe that creditors may have the ability to acquire possession of aircraft objects without in fact having been delivered the objects. This passage therefore supports the Defendants' construction, rather than that of the Plaintiffs.

71. The *travaux preparatoires* are at best ambivalent as to the proper construction of Art XI(2) in its final form. The earliest draft of what became Art XI was in a form so different to the final version that it must be put to one side. The later materials are of limited assistance, as they do not clearly point in favour of the Plaintiffs' construction or that of the Defendants – observations in favour of both constructions can be identified.

72. *Fourthly*, the Plaintiffs say that the Defendants' construction would leave "a lessor in circumstances where it may have to search for and recover its assets from numerous jurisdictions". That does not follow. Giving possession on the Defendants' construction would involve identifying the location of aircraft objects, so as to make them available to a creditor; there would be no need to "search for" assets in such circumstances. Further, the

fact that a creditor may be required to recover its assets from numerous jurisdictions is no reason to eschew the Defendants' construction. That is simply a risk that lessors bear in leasing out highly mobile assets. It lies with a lessor to take steps to avoid such an outcome, for example by requiring that the leased assets remain within particular jurisdictions, or, alternatively, to increase the rent payable so as to price in this risk. The possible need to recover assets from multiple jurisdictions does not render the Defendants' construction of Art XI.2 uncommercial, and is no reason not to adopt the Defendants' construction which is consistent with the text and context of Art XI.2. Indeed, the corollary of the Plaintiffs' construction – that an insolvent debtor is responsible for returning aircraft assets to lessors all around the world – is more commercially improbable, given the likely delays and potential inability of an insolvent debtor to comply with such an obligation.

73. *Fifthly,* the Plaintiffs rely upon *The Leasing Centre (Aust) Pty Ltd v Rollpress Proplate Group Pty Ltd* [2010] NSWSC 282: PS[55]-[56]. Setting to one side that the case dealt with an obligation to redeliver rather than "give possession" and so cannot offer any guidance as to the meaning of the words "give" and "take" in the context of an obligation to give possession, more fundamentally, it introduces domestic Australian law into a discussion of the text of a Convention in an impermissible way.

74. While the decisions of domestic courts with respect to the interpretation of the Cape Town Convention and the Aircraft Protocol may be relevant to the proper construction of those instruments,[28] this Court may not have regard to a domestic decision relating to the proper interpretation of key terms in a different context when construing the Convention and Protocol. As Lord Wilberforce observed in *Buchanan & Co v Babco Ltd* [1978] AC 141 at 152, in a passage repeatedly approved in Australian decisions,[29] "the correct approach is to interpret the English text … in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, *or by English legal precedent*, but on broad principles of general acceptation" (emphasis added). The need to disregard domestic legal precedent in construing a treaty reflects the fact that the construction of a treaty "must be uniform throughout the courts of the Member States. It cannot be dominated by a domestic law approach in cases brought under the domestic jurisdiction, whether it be statutory or inherent": *K (A Child)* [2013] EWCA Civ 895 at [19].

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[28] A Roberts, 'Comparative International Law? The role of national courts in creating and enforcing international law' (Jan 2011) *The International Comparative Law Quarterly* Vol 6(1) 57 at 59.

[29] *Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142, 159 (Mason and Wilson JJ); *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417, 425; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 240 (Dawson J).

75. The position can be distinguished from having recourse to decisions concerning antecedents to the treaty provisions in question. As Mason and Wilson JJ observed in *Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* at 159:

> Nor do the principles of interpretation of an international convention exclude recourse to the antecedent municipal law of nations for the purpose of elucidating the meaning and effect of the convention and the new rules which it introduces. It would be extremely difficult to interpret the new rules as if they existed in a vacuum without taking into account antecedent municipal law and the problems which its application generated."

76. No assistance may be gained from domestic decisions, such as *The Leasing Centre*, concerning the proper interpretation of particular terms in a context other than the treaty in question.

D.3 The obligation to 'give possession' on the facts

77. The Administrators have complied with their obligation under Art IX(2) (properly construed) to "give possession of the aircraft object[s]" to the Plaintiffs. They have done so by making those objects available to the Plaintiffs in the manner set out in the Algeri Affidavit.

78. On 16 June 2020, the Administrators sent the 443B(3) Notice to the Plaintiffs, under cover of a letter from the Administrators stating "[f]or the avoidance of doubt, your engines are available for you to take possession and arrange collection from the date of this letter".[30] The Administrators further explained that they did "not intend to exercise any of their rights in respect of the property identified in the enclosed Form 509B 'Notice of Administrators' Intention Not to Exercise Property Rights'"[31], and noted "it is our intention to discuss and agree an orderly hand back arrangement with you. Gordon Chan and Ian Boulton from Deloitte will work with you and the Virgin team to co-ordinate the orderly return of your engines and all their respective technical and historical records."

79. On 18 June 2020, pursuant to the orderly hand back arrangement proposed in the letter dated 16 June 2020, Mr Boulton of the Administrators emailed the Plaintiffs confirming that the Administrators would liaise with the Second Plaintiff's staff to facilitate an orderly handback of the engines, summarised the status and location of the engines and engine stands, offered to assist in providing services to the Second Plaintiff in removing and

[30] Ex DB-2 at 492.
[31] Ex DB-2 at 491.

delivering the engines (at the Second Plaintiff's cost), and confirmed that the Administrators continued to insure and store the engines.[32]

80. It follows that, from at least 18 June 2020, the engines and the engine stands identified at paragraphs 1 to 5 of Schedule 2 to the Originating Application were made available to the Plaintiffs. The same is true of the QEC Units identified in paragraph 6 of Schedule 2, which were attached to the engines. By 18 June, the Administrators had identified the location of those Aircraft Objects, and stated in terms that the Administrators, LeaseCo and Virgin did not intend to exercise any of their rights in respect of those Objects and that they were available for collection by the Plaintiffs. That was sufficient to discharge the Administrators' obligation to "*give possession*" under Art XI(2), properly construed.

81. The Defendants do not say that the process of giving notice under s 443B(3) of the Corporations Act in some way limits the Administrators' obligation under Art XI.2 (cf PS[4]). Rather, on the particular facts of this case, the step taken in giving notice under s 443B(3) on 16 June 2020, together with further steps taken as outlined above to implement the orderly hand back arrangement, were sufficient to "give possession" to the Plaintiffs for the purposes of Art XI.2 of the Aircraft Protocol. There is no need for the Court to go so far as to determine that a s 443B(3) notice will always be effective, in and of itself, to satisfy an Administrator's obligations under Art XI(2).

82. Between 18 June and 10 July 2020, the Administrators and the Plaintiffs corresponded in respect of the Plaintiffs' requests for engine records. This correspondence is outlined in the Algeri Affidavit at [36]-[37]. As Mr Dunbier explains at [18] of the Dunbier Affidavit, the Defendants have taken all reasonable steps to locate the documents identified by the Plaintiffs, and have now made all of the engine records available via a data room to which the Plaintiffs have access, other than a FAA Form 8130-3 or EASA Form 1, being documents the Virgin companies are not authorised to, and therefore cannot, issue.[33] In the absence of confirmation from the Plaintiffs (which has not been forthcoming) that the Plaintiffs will release the Administrators from any personal liability arising from causing Darren Dunbier or an appropriately qualified representative of the First and Second Defendants to sign the "Status Statements" (as defined in the Algeri Affidavit), or "End of Lease Operator Records" (as defined in the Warner Affidavit), the Defendants have not yet completed and signed those documents.[34] In those circumstances, the Court should

[32] Ex DB-2 at 503-504. See also Algeri Affidavit at [48].
[33] Dunbier Affidavit at [17]. Affidavit of Derych Warner sworn 22 July 2020 (**Warner Affidavit**) at [30]–[31], [35].
[34] See Algeri Affidavit at [36].

conclude that the Administrators have "given possession" of the engine records identified at Schedule 2, paragraph 7, of the Originating Application.

83. Accordingly, on the proper construction of Art IX(2) of the Aircraft Protocol, the Administrators have complied with their obligation to "give possession" of the Aircraft Objects. The Aircraft Objects remain in the possession of the Virgin companies only because the Plaintiffs have not availed themselves of the opportunity to take possession. The Plaintiffs are unwilling to do so until this proceeding is resolved.[35]

D.4 Manner of exercise of remedy not 'commercially reasonable'

84. At PS[79]-[83], the Plaintiffs raise the issue of whether or not their exercise of a convention remedy is "commercially reasonable". This question is co-extensive with the principal question of construction dealt with in Section D.2 above. If the Plaintiffs' construction of Art XI(2) is accepted, then their proposed exercise of that remedy must be said to be "commercially reasonable". If the Defendants' construction is preferred, then the exercise of the remedy in the manner proposed would not be commercially reasonable. Accordingly, the question of commercial reasonableness stands or falls with the main argument, and need not be discretely addressed.

E. CLAIMS UNDER S 443B

85. This matter is addressed in the Originating Application at prayers 5 and 6, and the Defendants' Interlocutory Process at prayer 1. The Defendants rely on the Algeri Affidavit at [21]-[58] and the Dunbier Affidavit at [7]-[22] in respect of these prayers for relief.

86. Prayers 5 and 6 of the Originating Application seek relief from the Administrators under s 443B(2) of the Corporations Act in respect of rent or other amounts payable in respect of the Aircraft Objects from 16 June 2020. These prayers raise two questions. *First*: Was the 443B(3) Notice ineffective? *Secondly*: If the 443B(3) Notice was ineffective, should the Administrators be excused from liability in any event in exercise of the power in s 443B(8) or s 447A(1) of the Corporations Act? Each question will be addressed in turn.

E.1 The 443B(3) Notice was effective

87. The Plaintiffs contend that the 443B(3) Notice was deficient for three reasons, and was therefore ineffective: PS[90]. The primary two reasons relate to the identification of the location of certain of the Plaintiffs' engines and engine stands. As to the engines, the

[35] See Algeri Affidavit at [32]; Exhibit SA-2 at 1.

Plaintiffs assume, based on discrepancies between the 443B(3) Notice and Mr Boulton's email dated 18 June 2020,[36] that the 443B(3) Notice incorrectly stated the locations of two of the engines: PS[32]-[35]. As to the engine stands, the Plaintiffs rely on the fact that the 443B(3) Notice did not identify their whereabouts. Their location was confirmed two days later on 18 June[37] (cf PS[90](b)). The third reason given for invalidity is that "access to any records was not given to Willis until 8 July 2020 at which time access to a data room was provided".

88. The Defendants' primary submission is that the 443B(3) Notice was effective, as none of the purported deficiencies identified by the Plaintiffs invalidate the Notice. However, the point can be dealt with briefly, as the purported deficiencies identified by the Plaintiffs are of a kind that would appropriately attract an order under s 443B(8) (or s 447A(1)) of the Corporations Act, excusing the Administrators from liability in respect of the Aircraft Objects from 16 June 2020. In those circumstances, it may not be necessary to determine the substantive question of the validity of the 443B(3) Notice. Taking the Plaintiffs' contentions at their highest, the Court would be comfortably satisfied that this is a case that engages the power to excuse in sub-section (8).

89. Dealing shortly with the Plaintiffs' three criticisms of the 443B(3) Notice, *first*, as to the engines, the 443B(3) Notice correctly stated the location of each of the engines, and so there was no deficiency in the Notice in that regard. Mr Boulton's email contained the error, which was in any case of no practical consequence given that it simply reversed the locations of the two engines (of the same make and model), such that one engine in Adelaide was said to be in Melbourne and one engine in Melbourne was said to be in Adelaide. The important facts (that there are four engines, three of which are in Melbourne and one of which is in Adelaide) have never been in doubt.

90. *Secondly*, as to the engine stands, it should be observed that the principal purposes of a notice under s 443B(3) is to put owners and lessors on notice that an administrator does not intend to use or occupy property of the company and to permit the administrator to avoid the personal liability that would otherwise arise under s 443B(2). To fulfil that purpose, the critical requirements are those prescribed by s 443B(3)(a) and (b). Consistently with that proposition, the requirement in s 443B(3)(c) to identify the location of the property is conditional and informed by considerations of reasonableness. The administrator is only

[36] Exhibit DB-2 at 503-504.
[37] Ex DB-2 at 503-504.

required to identify the location of the property if, and to the extent, known or knowable by reasonable diligence. It follows that a notice under s 443B may be valid in certain cases even where the location of the relevant property is unspecified.

91. In the present case, the s 443B Notice was sufficient to discharge the requirements in s 443B(3)(a) and (b). The property was identified with specificity (by reference to the underlying lease agreements) and the Administrators' intention not to exercise any rights in respect of the property was stated expressly. The Plaintiffs do not contend otherwise.

92. Further, and more fundamentally, it was sufficient for purposes of s 443B(3) in the present circumstances to identify the location of the principal property leased pursuant to those leases, namely the engines. That sufficed to put the Plaintiffs on notice that the Administrators were not intending to exercise any rights in respect of the property the subject of the leases. The failure to identify the location of the engine stands in the 443B(3) Notice itself ought not be regarded as invalidating the Notice or rendering it ineffective. That is because the Notice was sufficient to discharge its statutory purpose.

93. The case might be different where a s 443B notice is so deficient in its identification of the property or its location as to frustrate attempts by the owner or lessor to retake possession. Where, however, a notice is sufficient and effective to put the relevant owner or lessor on notice of the matters in s 443B(3)(a) and (b), minor and inconsequential errors as to description or location will not deny the notice its effect under s 443B(4).

94. *Finally*, as to the engine records, the provision of access to those records via an online data room following consultation with the Plaintiffs was an appropriate mechanism by which to ensure all records were provided to the Plaintiffs in a convenient manner. No sub-section of s 443B(3) has been identified by the Plaintiffs that would ground a finding of invalidity by reason of the Administrators adopting such a pragmatic and efficient course.

95. Accordingly, the invalidity contention should be rejected, and the relief sought in prayers 5 and 6 of the Originating Application should be refused.

E.2 Relief should be granted under s 443B(8) or s 447A(1)

96. Even if the deficiencies identified by the Plaintiffs were to result in the invalidity of the s 443B(3) Notice (which is denied), the deficiencies are of a kind that would justify the Court granting relief under s 443B(8) or 447A(1) of the Corporations Act, consistent with prayer 1 of the Interlocutory Process.

97. The discretion in s 443B(8) is wide, albeit not absolute and unfettered and it must be exercised judicially: *Nardell Coal Corp (in liq) v Hunter Valley Coal Processing Pty Ltd* (2003) 46 ACSR 467 at [63]-[65] and [102] (construing the analogous discretion in s 419A(7)). It is a discretion that must be exercised having regard to the impact on creditors: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* (2020) 144 ACSR 310; [2020] FCA 571 at [22].

98. Relief should be granted to the Administrators for the following reasons.

99. *First*, the 443B(3) Notice was clearly effective to put the Plaintiffs on notice of the Administrators' intention that LeaseCo and Virgin would not exercise rights in relation to the property the subject of the relevant airline leases. In circumstances where the Plaintiffs had such notice *in fact* from 16 June (and do not contend otherwise in their evidence or submissions), there can be no prejudice or injustice in exercising the power under s 443B(8) to grant relief from 16 June, being the date of the 443B Notice. The Plaintiffs' understanding of the position is confirmed by an email from Mr Chirico of the Plaintiffs to the Administrators sent on 16 June 2020.[38]

100. *Secondly*, if there was a deficiency in the 443B(3) Notice, it was inadvertent and arose in circumstances where the Administrators were otherwise seeking to comply with s 443B(3), as is clear from [27]-[31] of the Algeri Affidavit.

101. *Thirdly*, the correspondence between the Administrators and the Plaintiffs demonstrates that the Administrators have engaged in good faith efforts to locate and make available all of the Aircraft Objects to the Plaintiffs. The steps taken are set out in detail at [30]-[53] of the Algeri Affidavit.

102. *Fourthly*, the Administrators have not caused the company to in fact use or exercise rights in respect of any of the property.[39]

103. *Fifthly*, waiving liability under s 443B(8) would not prejudice the interests of any other creditors.

104. *Sixthly*, the purported deficiencies identified by the Plaintiffs in the 443B(3) Notice are of a trivial kind, were corrected in correspondence two days later,[40] and had no practical

[38] See Ex DP-2 at 506; Algeri Affidavit at [29].
[39] Algeri Affidavit at [30]-[31].
[40] Ex DB-2 at 503-504.

implications for the Plaintiffs, as no steps were taken to recover the Aircraft Objects between service of the 443B(3) Notice and the correction of the deficiencies.

105. In those circumstances, this Court should grant relief to the Administrators as sought by prayer 1 of the Interlocutory Process.

F. ADMINISTRATORS' CLAIM FOR RELIEF

106. This matter is addressed in the Defendants' Interlocutory Process at prayer 2 and in the Algeri Affidavit at [57], [59]-[60].

107. The Administrators seek a declaration or order pursuant to s 90-15(1) of the Insolvency Practice Schedule (Corporations) that they may exercise a lien over the Aircraft Objects for the Administrators' reasonable and proper remuneration, costs and expenses attributable to work done in identifying, caring for, preserving or facilitating the return of that property to the Plaintiffs. As Mr Algeri explains at [60] of the Algeri Affidavit, the Administrators "have voluntarily agreed to meet insurance and maintenance costs and the Administrators' professional time arising between 16 and 30 June 2020", and so any lien would only operate in respect of costs incurred after 30 June 2020.

108. It is convenient briefly to identify the applicable legal principles, before moving to the facts.

F.1 Legal principles

109. An administrator will be entitled to an equitable lien over the property of third parties in circumstances where, broadly speaking, the general principles of justice support such a lien.[41] In *Universal Distributing,*[42] as interpreted by the High Court in *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307 at [22], it was held that "a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor."

110. As Crennan, Kiefel, Bell, Gageler and Keane JJ continued at [23]:

> The circumstances in which the principle will apply are where: there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator's costs and expenses of realisation and the debt due to a secured creditor; and the creditor claims the fund. In these

[41] *Hewett v Court* (1983) 149 CLR 639 at 646.
[42] *In re Universal Distributing Co Ltd (in liquidation)* (1933) 48 CLR 171 at 174 (Dixon J).

> circumstances, it is just that the liquidator be recompensed. To use the language of Deane J in *Hewett v Court*, it might be said that a secured creditor would be acting unconscientiously in taking the benefit of the liquidator's work without the liquidator's expenses being met. However, such a conclusion is avoided by the application of the principle in *Universal Distributing*.

111. These principles may apply to administrators.[43] There need not be a "fund" for the principle to apply.[44] A charge may apply to property if no fund is created.[45] Further, the costs recoverable by a liquidator or administrator, secured by an equitable lien, are not limited to the costs of realisation of assets, but also extend to the costs of the care and preservation of assets.[46] As Maxwell P explained in *Primary Securities Ltd v Willmott Forests Limited* [2016] VSCA 309; 50 VR 752 at [11], this is "doubtless because the incurring of those costs was seen to have – or to be capable of having – the same nexus with the benefit accruing to creditors."

F.2 Application to the facts

112. The Administrators are straightforwardly entitled to exercise a lien over the Aircraft Objects to secure their reasonable and proper remuneration, costs and expenses attributable to work done in identifying, caring for, preserving and facilitating the return of the Aircraft Objects to the Plaintiffs.

113. Applying the test as set out in *Stewart*, quoted above at [110], (a) LeaseCo and Virgin are in administration; (b) the Administrators have incurred expenses and rendered services in realising, caring for and preserving assets (the Aircraft Objects);[47] and (c) the creditors (the Plaintiffs) claim the assets that have been realised, cared for and preserved. Importantly, the steps taken by the Administrators in realising, caring for and preserving the Aircraft Objects (including through locating, isolating, insuring and maintaining the Aircraft Objects, as well as readying the assets for collection) were taken solely for the benefit of the Plaintiffs,[48] not the creditors of the First and Second Defendants (or the Virgin companies) more broadly.

114. In those circumstances, the Court should conclude, consistently with *Universal Distributing*, that the Administrators' reasonable and proper remuneration, costs and expenses attributable to work done in identifying, caring for, preserving and facilitating the return of

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[43] *White, in the matter of Mossgreen Pty Ltd (Administrators Appointed) v Robertson* (2018) 125 ACSR 390, [22]-[23].
[44] *Primary Securities Ltd v Willmott Forests Limited* (2016) 50 VR 752, [6] (Maxwell P), [120] (Whelan and Santamaria JJA).
[45] *Thackray* (2011) 85 ACSR 144, [40].
[46] *In re Universal Distributing Co Ltd (in liquidation)* (1933) 48 CLR 171 at 174 (Dixon J).
[47] Algeri Affidavit at [30]-[53].
[48] Algeri Affidavit at [60].

the Aircraft Objects to the Plaintiffs should be borne by the Plaintiffs. This would extend to all maintenance and insurance costs incurred in respect of the Aircraft Objects after 30 June 2020. As Davies J observed in *Thackray* (2011) 85 ACSR 144 at [48], "[t]he cases that have applied the Re Universal Distributing principles … demonstrate that there is no limit on the type of expense or work done for which remuneration is claimed that may be the subject of an equitable lien, other than that the expenditure and remuneration must be referable to the care and protection of, or calling in and conversion of the assets producing the fund."[49]

115. The Court therefore should grant the relief sought in prayer 2 of the Interlocutory Process, confirming that the Plaintiffs may exercise a lien over the Aircraft Objects to secure the Plaintiffs' liability for the Administrators' reasonable and proper remuneration, costs and expenses as outlined above. The Administrators propose to approach the Court with evidence as to the quantum of those costs at a later stage should relief of the nature sought in prayer 2 of the Interlocutory Process be granted.

G. CONCLUSION

116. The Court should refuse the relief sought in the Originating Application, and grant the relief sought in either order 2 of the Interlocutory Process. If the Court concludes that the 443B(3) Notice does not have the effect of relieving the Administrators of their obligations under s 443B(2) of the Corporations Act in respect of some or all of the Aircraft Objects (which is denied), the Court should further grant prayer 1 of the Interlocutory Process.

24 July 2020

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[49] *Primary Securities Pty Ltd v Willmott Forests Limited* (2016) 50 VR 752, [125] (Whelan and Santamaria JJA).