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Navigating Turbulent Skies: Enforcement of Arbitral Awards in Curaçao

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What had to be a simple touch-and-go on the Curaçao, Caribbean airport for Venezuelan airline Albatros (officially named Alianza Glancelot C.A., "Albatros") became a longer-term storage exercise of one of its few aircraft, leading to significant loss of revenue and jeopardizing its ability to stay afloat as an airline.

Following a Florida seated arbitration in which a Miami-based aircraft maintenance company, 111 Repair LLC ("111"), was awarded approximately USD 500,000 as principal sum, an attachment on Albatros' Boeing 737 was levied upon touch-down on Curaçao airport. This attachment led to a variety of injunction proceedings and a procedure to enforce the Florida arbitral award in Curaçao and in Florida. This post relates to the developments in Curaçao.

Four court decisions have been made in Curaçao, three of which are published, in the case of 111 Repair LLC v. Alianza Glancelot C.A. (a.k.a. Albatros airlines—see here (judgment 29 Feburary 2024), here (judgment 26 March 2024), and here (judgment 14 June 2024)).

Background

The dispute between the parties arose in 2019 due to 111 not receiving payment for maintenance services it provided to Albatros. After Albatros fell behind on payments and various attempts to resolve the matter, a Florida seated arbitration was initiated. That arbitration resulted in a favourable award for 111, ordering Albatros to pay roughly USD 500,000 excluding interest. Following the issuance of the arbitral award, 111 moved to have the Florida courts confirm the arbitral award, which took place by order of 19 January 2024.

Having obtained an arbitral award, which had already been confirmed by the Florida courts, 111 explored further strategies to enforce the arbitral award. First, it reviewed the flight patterns of the Albatros aircraft and discovered that Albatros frequently landed at Curaçao airport. Understanding that receiving court permission to levy attachments over debtor's assets is easy in Curaçao, 111 sought an interim measure to levy an attachment on Albatros' Boeing 737 servicing the Curaçao airport. The Curacao court granted such request and the attachment was levied on 23 February 2024.

As the attachment resulted in the grounding of the Boeing 737 in Curaçao and left passengers

stranded, who had to make alternative travel arrangements, Albatros had an immediate and urgent interest in regaining control of its aircraft.

Albatros' interim relief application to lift the attachment on the Boeing 737

Immediately following the levying of the attachment, Albatros brought an injunction against 111 to lift the attachment. Given that the attachment in this case was levied in a pre-judgment phase (that is the phase before an enforcement order for the arbitral award is granted in Curaçao), Albatros could seek to have the attachment lifted on various grounds. These grounds typically include lifting:

- against having procured sufficient security for the creditor's claim;
- when formalities have been neglected;
- when the attachment is manifestly unnecessary;
- when the claim for which the attachment is levied is evidently without merit; or
- when a balancing of interest weighs in favor of lifting.

Albatros primarily sought the lifting of the attachment based on a balancing of interests. It argued that, due to the attachment, it could not transport passengers and generate revenue, and that the aircraft would lose value without proper maintenance. The judge had to weigh the continuity of Albatros as an airline against 111's interest in having the arbitral award enforced in Curacao.

Albatros had not procured security by way of a bank guarantee, but did offer the vesting of a mortgage on another smaller aircraft, an Embraer airplane, during the hearing on the interim relief application. Due to the value of the Embraer airplane being uncertain, as was the ability for a US claimant to enforce the mortgage in Venezuela and the possible already existence of a previous mortgage on that airplane, the form of security through a mortgage was not considered sufficient. Further alternative forms of security were discussed, including an offer from Albatros to immediately make an interim payment and make further payments through a payment plan. This was not considered sufficient, also in view of Albatros having breached previous payment undertakings. Pledges on invoices were already dismissed as a viable option for security in the arbitration. Also in view of no less intrusive assets being available for enforcement, the court considered that Albatros did not sufficiently tried to either pay or procure security.

The judge dismissed the claim to lift the attachment by judgment of 29 February 2024, as a balancing of interests would not lead to Albatros' interests outweighing those of 111.

The following (three) interim relief applications, incl. a *de facto* enforcement application

As Albatros was not successful in lifting the attachment on the Boeing 737, 111 could proceeded with enforcement. 111 initiated a *de facto* urgent enforcement application on 15 March 2024. Instead of seeking permission to enforce the arbitral award under the New York Convention, 111 commenced a separate procedure to obtain an interim relief money judgment ordering Albatros to pay to 111 all amounts awarded in the arbitral award.

111 thereby effectively circumvented the regular course of action by seeking an interim relief

money judgment. The money judgment, if ordered and rendered enforceable immediately (which is customary), would authorize 111 to immediately sell-off the Boeing 737 to satisfy the arbitral award before effectively having obtained an enforcement order in Curaçao.

Following the commencement of this interim relief application, Albatros commenced another interim relief application against 111, this time to obtain an order to allow Venezuelan engineers to perform regular maintenance on the aircraft while being grounded in Curaçao, or allowing Albatros itself to perform the maintenance.

In addition, a third party, who alleged to have extended a loan of several million US dollars to Albatros and would have obtained a mortgage on the aircraft as security for repayment filed an interim relief application against Albatros to lift the attachment on the aircraft.

The Curaçao court joined the three interim relief proceedings, scheduled one hearing and issued one judgment on (a) the money judgment application of 111, (b) the second application to lift the attachment, and (c) the application for regular maintenance to be performed.

The judgment on the three interim relief applications

In its judgment of 26 March 2024, the court as a starting point clarified that none of the additional three interim relief application can be used as a (disguised) appeal against the 29 February 2024 judgment, which had upheld the attachment. As a result, the court showed little interest in revisiting issues, such as which party could be perceived as the actual owner of the aircraft.

- **111's interim relief application for obtaining a money judgment**

The court provided a separate analysis for each of the interim relief applications, commencing with 111's interim relief money judgment application. The court perceived the 111's application as 111 seeking an advance payment on amounts that would eventually be recoverable after the enforcement of the Florida arbitral award before Curaçao courts.

Albatros raised a jurisdictional defence based on the arbitration clause agreed upon the parties, arguing that 111's interim relief application to be submitted before an arbitral tribunal. In the judgment, the judge did not address its international jurisdiction in much detail. It only considered that Albatros could not invoke the arbitral clause as that clause would no longer have effect following an arbitral award having been issued.

While the jurisdiction objection was not an issue for the claim to lift the attachment on the aircraft, as the court that granted the attachment order has jurisdiction to lift the attachment, jurisdiction was assumed rather easily.

On the merits of the interim relief money judgment application, the court ruled that Albatros effectively had no valid defense, as an arbitral award had already been issued against it. Taking a pragmatic approach, the court determined that there was no benefit in awaiting for the outcome of an enforcement procedure to obtain court permission to enforce the Florida arbitral award. Accordingly, the court granted the relief.

- **The second attempt to lift the aircraft attachment**

The alleged lender invoked an existing mortgage on the aircraft to request the lifting of the attachment. It argued that, as a secured creditor, it had a higher claim than 111, an unsecured creditor, and should therefore get priority.

The court assessed that the attachment on the aircraft no longer constituted a pre-judgment attachment. By ordering Albatros to pay money to 111, the attachment automatically changed into an immediate enforceable attachment. The court considered that a further enforcement phase had been reached, and, as such, a more restrictive test applies for lifting any attachment. In this phase, the test for lifting the attachment is limited to prohibiting enforcement only if it would constitute an abuse of the creditor's right to levy and maintain an attachment.

The court considered that 111 was not abusing its right. It considered, among other reasons, that lifting the attachment in exchange for sufficient security would not be sufficient and that any further offers made by the applicant to provide security were not sufficiently concrete.

- **The interim measures application seeking maintenance of the aircraft**

As both the applicant and the respondent in the maintenance interim measures agreed that maintenance needed to be performed, the court only had to determine who should be responsible for carrying out the maintenance, i.e., Venezuelan engineers or engineers from Albatros or Curaçao based engineers.

During the hearing, the aircraft custodian made declarations as to the manner in which performance was performed during the COVID-19 lockdown. The custodian, an aircraft engineer at Curaçao, specified that it was not uncommon for preservation maintenance to be performed by local aircraft engineers, with the ability for an aircraft to perform a 'ferry flight' back, in this case, to Venezuela, to regain the necessary flight approvals.

The judgment does not contain much analysis, but the court considered the custodian's declarations plausible. Consequently, 111 was ordered to preserve maintenance performed by local aircraft engineers, while allowing the Venezuelan aircraft certification institution to review the maintenance works.

The enforcement order relating to the arbitral award

Following the judgements rendered on 29 February 2024 and 26 March 2024, 111 sought to enforce the award before to the Curaçao court. As Albatros did not appear, and no enforcement refusal grounds were considered present, the enforcement order was granted on 14 June 2024.

Analysis

The first judgment, of 29 February 2024, is a typical judgment in a case where a debtor seeks to lift an attachment in a phase before a judgment or arbitral award is considered enforceable in Curaçao. Lifting attachments in this phase is difficult, especially given that a Florida arbitral award had already been issued, which concluded the main proceedings.

As Albatros could not demonstrate that its interests were to outweigh those of its creditor, 111, and it could not offer sufficient security to ensure the eventual enforcement of the arbitral award, the lifting application was dismissed.

The second judgment, of 26 March 2024, is interesting because 111 opted for an uncommon manner to be able to take recourse against the aircraft in Curaçao. Instead of levying the attachment in support of the arbitral award enforcement proceedings, the attachment was levied in support of the interim measures application seeking a money judgment.

While interim measures applications to obtain money judgments are common in Curaçao to effectively obtain an advance payment before or in lieu of a main procedure, such proceedings are not common in relation to enforcement of a foreign arbitral award. In case of an undisputed or undisputable claim, money judgments can be issued as an interim measure. In such proceedings, the judges also consider, aside of the plausibility of the claim, (a) the urgent interest in obtaining a money judgment, (b) the possibility for the creditor to repay if main proceedings would be commenced and result in an opposite judgment, and (c) the balance of parties' mutual interests. When the plausibility of the claim is strong, less weight is attributed to the other elements.

The Curaçao court considered the arbitration clause between the parties to no longer be effective after the award on the merits was issued. That seems to be incorrect as the arbitration clause would not lose its effect following an arbitration having been concluded. Instead, the Curaçao could have assumed jurisdiction for the interim measures money judgment application, based on the *lex arbitri*. The Florida International Commercial Arbitration Act ("FICAA") likely would have permitted a court to grant interim measures. Specifically, Art. 648.001 of the FICAA allows courts to intervene with interim measures.

The Curaçao court might also have been able to accept jurisdiction based on the fact that interim measures are not exclusively within the jurisdiction of Florida-seated arbitrators. Additionally, the connection of the case with Curaçao could have justified the court's jurisdiction in this matter. In Curaçao, jurisdiction in interim measures proceedings can always be upheld by the court of the place where an interim measure is sought to be effectuated, as per Dutch Supreme Court caselaw.

These jurisdictional grounds do not persuade the authors of the necessity for the Curaçao court to accept jurisdiction. Like any other creditor having obtained an arbitral award, it could have levied the attachment through an enforcement application based on the New York Convention. In such a scenario, jurisdiction could not be questioned. The authors also do not see the significant advantage of seeking a money judgment as an interim measure over a New York Convention enforcement procedure. Typically the period between commencement and conclusion of such a procedure is rather limited. The attachment would have remained in place, and the debtor would have been able to raise an interim measure to block enforcement. It seems that 111 was either unaware of the correct procedure to take recourse against the aircraft or just sought to take a somewhat risky route in an attempt for the maintenance costs not to increase in such a manner that it would be able to enforce the arbitral award in full.

Conclusion

The case of 111 against Albatros is interesting for a variety of reasons. The first important takeaway is the understanding of the ease with which attachments can be levied in the Kingdom of the Netherlands, including in Curaçao, and the high threshold required to lift such attachments. Even during a pre-arbitration phase, creditors can levy attachments on assets of the debtor in the Kingdom of the Netherlands. The case also demonstrates that interim measures on money judgments can be obtained even if the underlying claim has already been awarded in a foreign jurisdiction. However, creditors should carefully evaluate whether pursuing interim measures is worthwhile compared to simply seeking the enforcement of an award under the New York Convention.
