

# Aviation Insider

PwC Aviation Newsletter (Issue 9), July 2022

## In this issue:

The case for sustainable aviation fuel.....	2
China intellectual property legal reforms fostering innovation.....	6
The final appellate court's decision in the <i>Wells Fargo</i> case.....	11

# The case for sustainable aviation fuel



**Tejaswi Nimmagadda**  
Partner  
Tiang & Partners\*



**Charissa Chu**  
Solicitor  
Tiang & Partners\*



## Significant headway in use of sustainable aviation fuel

Tightening regulations and public policies around the world, coupled with shifts in investors' appetite and financiers' requirements have put building pressure on the aviation industry to bring environmental, social and governance (ESG) factors into their decision making and growth strategies.

Notably, China's national emission trading scheme (ETS) became operational last year, and it has been announced that the scope of ETS is expected to be extended in the near future to cover the domestic aviation sector.

As airlines, lessors, manufacturers and financiers continue to work collectively towards green aviation, Sustainable aviation fuel (SAF) will be a key part of achieving the industry's net-zero carbon emissions targets by 2050. <sup>1</sup>

The aviation industry has made significant headway with the development of revolutionary aircraft technologies in recent years. However, as these technologies (such as electric propulsion and hydrogen fueled aircraft) are not expected to be commercially viable in the near future, SAF is seen as the most practical emissions reducing option in the near to medium term (and in the longer term for long-haul flights).

## What is SAF?

SAF (in some cases also referred to as 'alternative fuels') is derived from non-conventional sources that have the potential to generate lower carbon emissions than conventional kerosene on a life cycle basis. On top of emissions directly resulting from fuel combustion, life cycle emissions assessment methodologies take into account emissions from feedstock production, extraction, fuel conversion and transportation and distribution including those connected with land use changes, etc. <sup>2</sup>

SAF can be produced via a handful of different production methods, either from biomass or alternative sustainable sources:

### Biofuels

There is a wide spectrum of biomass that can be used to produce SAF, and care needs to be taken to consider their overall sustainability impact.

First generation biofuels derived from crops grown on agricultural land<sup>3</sup> raised concerns about the impact on the environment and local communities during the production process. <sup>4</sup>

Current technology allows the production of SAF from more advanced sources (such as waste or novel feedstocks, for example, algae) that are more sustainable than first generation biofuels.

### E-fuels

Aside from production centred on biomass and waste, SAF produced using electricity and solar heat technologies is expected to be introduced to the market in the near future. <sup>5</sup> Experts are hopeful that these new technologies would be able to increase the competitiveness and efficiencies of SAF by lowering its production, storage and distribution costs.

## Benefits of SAF

Due to similarities in their physical and chemical characteristics, SAF can be safely blended with conventional jet fuel to be transported via existing distribution infrastructure and used as interchangeable substitutes to power aircraft.

As compared to conventional jet fuels, SAF can significantly reduce emissions over their life cycles (up to 80%, depending on the feedstock and production technology).

Apart from environmental benefits, as fluctuating crude oil prices remains to be one of the biggest cost variables for airlines, SAF also provides an opportunity for diversifying fuel supply and offers a solution to related cost fluctuations.

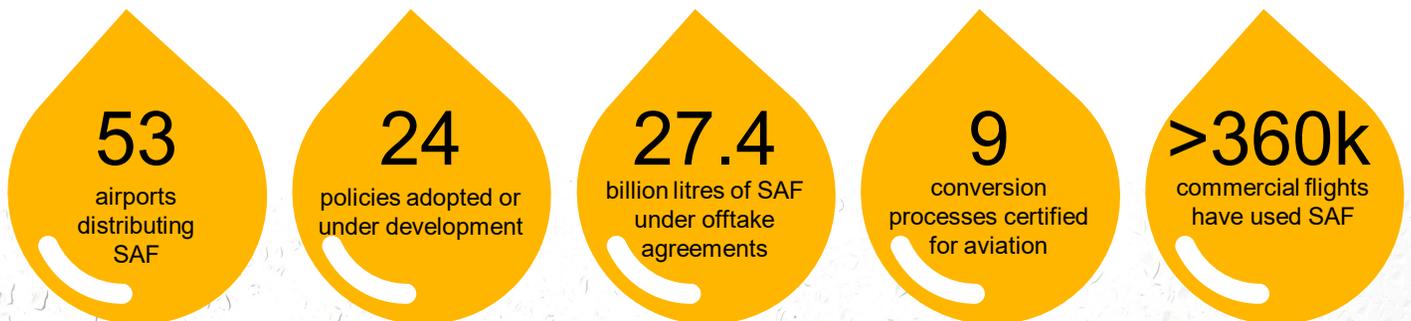
## 'Chicken-and-egg' challenge

However, despite its benefits and investments made by the industry over the past 15 years, the availability of SAF remains limited and the growth in its use is slow, although it has been increasing steadily. The World Economic Forum's Clean Skies for Tomorrow 2022 report predicted that if all SAF projects that have been publicly announced are completed, volumes produced will just be over 1% of expected global jet fuel demand in 2030. <sup>6</sup>

Economic cost, which led to the current low level of production and adoption of SAF, is the key stumbling block to the greater use of SAF. <sup>7</sup> Currently, SAF is two to five times the price of conventional jet fuel, which makes it difficult for aircraft operators to afford SAF and remain economically competitive.

The price gap can be reduced if production scales up and economics of scale kicks in. However, the lack of a guaranteed market has prevented fuel providers from increasing production, leading to a 'chicken-and-egg' situation.

To date:



Source: <https://www.jcao.int/environmental-protection/GFAAF/Pages/default.aspx>



## Bridging the gap

Clearer demand signals, significant and more innovative investments across the whole value chain, and supportive and progressive regulatory mechanisms will be imperative in incentivising the scaling up of SAF production and uptake to make a real difference in reducing emission levels.

## Sustainability-linked and transition financing

Aviation was traditionally seen as a 'hard to abate' sector in reducing emissions. However, with the development of sustainability-linked and transition financing, financiers and lessors will now be able to support the sector's journey towards net zero while meeting their own ESG commitments.

As compared to traditional 'green' financings targeting 'green' borrowers and ring-fencing proceeds for specific 'green' uses, sustainability-linked and transition financing recognises that the path to net zero may necessarily include incremental steps that may not be seen as 'green' in the short term. Sustainability-linked and transition financing measures the borrowers' wider sustainability performance and shorter-term improvements using transition metrics tailored for the industry, and allows proceeds to be used for wider purposes.

Reports of pioneering transactions in the last months, including the first sustainability-linked loan and lease to airlines as well as the first sustainable aviation fund<sup>8</sup>, are proof that sustainability financing is gaining momentum in the aviation finance space.

There is much room for sustainability-linked and transition finance to grow in the aviation sector, with clear and ambitious target setting and transparency on sustainability credentials being the keys to winning support from financiers and investors.<sup>9</sup>

## SAF and corporate programmes

Apart from stakeholders in the aviation industry, with numerous companies setting their own net zero commitments, corporations from all sectors can also play a role in reducing their carbon footprint as users of air transport.

The Sustainable Aviation Fuel Certificate (SAF<sub>c</sub>) framework developed by the World Economic Forum's Clean Skies for Tomorrow Coalition in collaboration with RMI and PwC Netherlands provides a robust way for corporations with significant air travel and freight carbon footprints to offset their emissions and catalyse SAF demand. Under the SAF<sub>c</sub> mechanism (which is modelled on established virtual accounting systems used in renewable electricity markets), fuel producers generating eligible SAF are issued a defined amount of SAF<sub>c</sub> based on either fuel volume or overall life cycle emission reductions. Once the SAF has been certified as sustainable, the SAF and SAF<sub>c</sub> can be transacted and tracked separately. This allows SAF buyers or users to claim the direct emissions reduction value of the SAF itself, while buyers of the SAF<sub>c</sub> (who could be corporations with business travel needs) can claim the related indirect emission reductions separately.<sup>10 11</sup>

## PwC China joins Asia's first major corporate SAF programme

PwC is committed to net zero greenhouse gas emissions by 2030.

Aside from choosing greener alternatives for business travels and investing in high quality carbon reduction projects, PwC China has recently announced its participation in Cathay Pacific's pilot Corporate Sustainable Aviation Fuel programme as one of the first movers, committing to purchase SAF certified by internationally recognised sustainability standards. The SAF will be used to power the airline's flights and the airline will issue a verified emissions reduction certificate and proof of sustainability which will enable the reduction in emissions from the use of SAF to be attributed to PwC China's emissions reporting.

This is the first major programme of its kind in Asia. Participation in this programme provides PwC China with the opportunity to reduce its carbon footprint from business travel by contributing to the use of SAF for business travel and airfreight and promoting the use of SAF in the region.

Through the collaborative effort of many stakeholders along the supply chain and various government departments, the launch of this programme marked the very first uplift of the use of SAF at Hong Kong International Airport.

(Find out more about this programme at: [https://www.cathayair.com/cx/en\\_HK/about-us/sustainability/climate-action/corporate-sustainable-aviation-fuel-programme.html](https://www.cathayair.com/cx/en_HK/about-us/sustainability/climate-action/corporate-sustainable-aviation-fuel-programme.html))

## Final remarks

In September 2021, 60 companies in the World Economic Forum's Clean Skies for Tomorrow Coalition made a commitment to power global aviation with 10% SAF by 2030.<sup>12</sup>

A high ranking official from the China Air Transport Association commented that the development of SAF will be crucial for accelerating the decarbonisation of civil aviation.<sup>13</sup> The European Commission and the UK also announced proposals such as the ReFuelEU Aviation<sup>14</sup> and Transport Decarbonisation Plan<sup>15</sup> to require increasing proportions of SAF to be used in jet fuels with the aim to accelerate the commercialisation of SAF.

These are no doubt encouraging steps. However, it is also clear that while the net zero targets are achievable, action will be immediately required along the whole aviation supply chain. Innovation in developing new technologies and suitable investment products bolstered by appropriate regulatory regimes will be crucial in the transition to bluer skies.<sup>16</sup>

Remarks: This article was first published in Chambers 'Aviation Finance & Leasing 2022 Global Practice Guide' to which Tiang & Partners is contributing author for Hong Kong SAR.





**Chiang Ling Li**  
Partner  
Tiang & Partners\*



With macro-economic realities continue to challenge the sustainability of manufacturing within China, value chain transformation and innovation will play a major role in the competitiveness and sustainability of manufacturers in China.

The changing economic landscape has also brought a renewed focus on the legal protections being afforded to those driving innovation and seeking protection for their intellectual property rights.

China's long held ambitions and goals on developing its own commercial aircraft product as well as featuring heavily in the complex manufacturing and assembly space continues to be realised.

Recent changes in China's intellectual property law, including the enhanced patent and trade secret protection, are important for fostering such innovation desired by manufacturers and their investors, including within the aviation sector.

These developments are being driven from a variety of angles, which all point towards greater protections being afforded to industry players within the aviation sector.

This article provides a brief overview of recent legal developments in a sector agnostic manner so as to provide an overview of the protections that might be expected in the future - so that companies doing business in or with China may take another look at potential opportunities emanating from the Chinese market.

## Patent term extension and adjustment

China's fourth Amended Patent Law, which came into force on 1 June 2021, provides for patent term adjustment, providing incentives for innovation.

Article 42 of the Amended Patent Law allows the Chinese Patent Office to, at the request of the patentee, adjust the term of an invention patent to compensate for unreasonable delays in the patent examination process, unless the delays were caused by the patentee. Such an adjustment is available only when the patent is granted after at least four years from the filing date, and at least three years after the request for substantive examination was filed.

## Increased statutory damages and introduction of punitive damages

The Amended Patent Law increases statutory damages and introduces punitive damages. The stronger intellectual property protection is conducive to innovation.

Article 71 of the Amended Patent Law increases the statutory damages that can be awarded to a patentee. With the amendment, Chinese courts may ascertain the amount of compensation to be awarded in a patent infringement action on the basis of either the actual losses suffered by the patentee, or the gains reaped by the accused party from the infringing activities, instead of resorting to the latter when the former is not available as in the old law. If it is difficult to determine the infringer's gains and the patentee's losses, multiples of reasonable patent royalties may be used to determine the damages award. Where all of the above are difficult to determine, Chinese courts may award statutory damages; the minimum amount has been increased from CNY10,000 to CNY30,000 and the maximum amount has been increased from CNY1 million to CNY5 million.

Article 71 of the Amended Patent Law further introduces punitive damages for the purpose of deterrence. For any intentional infringement of patent rights, if the circumstances are serious, the amount of compensation could be one to five times the amount ascertained by the court on the basis of the losses suffered by the patentee, the gains reaped by the accused party, or multiples of reasonable patent royalties for the patent. The introduction of punitive damages aligns with the Civil Code of the People's Republic of China (effective 1 January 2021), which allows the rights holder to be awarded punitive damages for any intentional infringement of intellectual property. In fact, punitive damages relating to intellectual property cases have been widely considered by the Chinese government in recent years, and relevant rules have been added to a number of Chinese laws and guidelines. These include the third and fourth amended Trademark Law of the People's Republic of China in 2013 and 2019, the Guidelines on Determination of Damages and Statutory Damages in Disputes over Intellectual Property and Unfair Competition released by the Beijing Higher People's Court on 21 April 2020, and the amended Copyright Law of the People's Republic of China effective 1 June 2021.

The amended China Anti-unfair Competition Law which became effective in April 2019 provided for punitive damages for trade secret misappropriation. In the Guangzhou Tinci Advanced Materials Co., Ltd. v. Anhui Newman case, the IP Tribunal awarded punitive damages so that the final damage award was five times the actual damages. In this case, Guangzhou Tinci filed a lawsuit against Anhui Newman Company ('Newman'), alleging misappropriation of trade secrets. The lower court held that the actual damages should be CNY12 million (approximately USD1.9 million), calculated based on the profits earned by Newman. This court awarded punitive damages so that the total damage award was CNY30 million, which was around 2.5 times the actual damages.

The IP Tribunal disagreed. It held that the calculation of actual damages should be based on the contribution of the alleged trade secrets, and that the lower court failed to consider the contribution of non-trade secrets to the entire manufacturing process. It found that contribution of the trade secrets should be 50% of the entire manufacturing process, and hence the actual damages should be CNY6 million.

However, the IP Tribunal awarded punitive damages so that the final damage award was still CNY30 million, which is the highest punitive damage award in China. The IP Tribunal considered the following factors to determine the punitive damages: (i) since its establishment, Newman had been manufacturing the products using the misappropriated trade secrets; (ii) Newman had never manufactured any other products, or ceased manufacturing the misappropriated product, even though Newman's legal representative had been held liable in a corresponding criminal case; (iii) Newman sold infringing products to approximately 20 countries and regions worldwide; and (iv) Newman refused to submit its books and accounts for calculation of damages.





## Clarifying definition of trade secrets

Trade secrets are very important for aviation and other companies relying on technology. China has recently strengthened protection of trade secrets which is evident in the law, court cases and administrative ruling.

The new trade secret regulation (Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringements upon Trade Secrets ('Trade Secret Regulation')) clarifies what may be protected as trade secrets, specifically identifying certain technical information and business information, and bringing light to an area that has long frustrated trade secret enforcement efforts in China.

More than 66.7% of the trade secret cases in China were lost because the court ruled that the technical or business information claimed as trade secrets was not protectable trade secrets. The new Trade Secret Regulation targets this issue.

Articles 1 and 2 of the regulation specify that business information includes all information 'on creativity, management, sale, finance, plans, samples, bidding materials, clients' information and data, relating to business activities.'

The regulation focuses on customer information, a common area of dispute, defining the term 'clients' information' to include 'client's name, address, contact information, and trading practices, business plans, commercial details, and other information.'

However, a party may not claim a specific client as a trade secret solely because the party 'maintains a long-term stable trading relationship with the client.' Additionally, an accused infringer who is an ex-employee of the plaintiff and conducts business with the plaintiff's client after leaving the plaintiff will not be liable for trade secret misappropriation if the client voluntarily chooses to conduct business with the ex-employee based on the client's personal trust of that ex-employee.

These new legal provisions are conducive to fostering innovation in China.

## Clarifying definition of confidentiality measures required for trade secret protection

The new Trade Secret Regulation enhances trade secret protection by clarifying confidentiality measures needed for obtaining trade secret protection.

The new regulation set out examples of such confidentiality measures:

- entering into confidentiality agreements;
- adopting confidentiality requirements in the form of company rules, training, regulations or written notifications to employees, former employees, suppliers, clients, visitors and others who are able to access or obtain trade secrets;
- restricting access to the factory, workshop and other production or distribution premises involving the trade secret;
- adopting special treatment for or segregating trade secrets and their embodiments, such as (1) identifying them as trade secrets, (2) using encryption to protect the trade secrets, (3) locking up the trade secret, or (4) limiting individuals who are able to access or obtain the trade secrets or their embodiments;
- prohibiting or restricting the use of, access to, or reproduction from computer equipment, electronic equipment, network equipment, storage equipment or software that can access or obtain trade secrets; and
- requiring exiting employees to register and either return or destroy the trade secrets they accessed during their employment and to affirm that they will continue to honor confidentiality obligations.

The lack of clarity of this issue has long frustrated trade secret enforcement efforts in China, and again, the new regulatory reform provides stronger protection to trade secrets in favour of innovations.



## Right of preliminary injunction confirmed

The new Trade Secret Regulation reiterates the right of trade secret owners to obtain preliminary injunctive relief. Although technically the law has long provided for preliminary injunctions, such relief was in practice rarely granted in trade secret misappropriation cases. The rightsholder may file such a petition before or at the time as filing suit.

Further, under urgent circumstances, the court should make a decision within 48 hours. Again, the new regulatory reform favours innovation in all industries.

## Most evidence formed outside China admissible without notarisation and legalisation

The new intellectual property evidence rule (Several Provisions of the Supreme People's Court on Evidence in Civil Procedures Involving Intellectual Property Rights ('IP Evidence Rule')) removes the requirement that all evidence formed outside of China must be notarised and legalised. Given the time-sensitive nature of claims for theft of trade secrets, the delays associated with the formerly onerous process had significant consequences.

Under the new rule, only a narrow subset of evidence, such as evidence concerning identity (e.g. powers of attorney, or official documents issued by government agencies or courts outside of China), needs to be notarised and legalised. The rule further provides that evidence formed outside of China may be admissible if the party submitting the evidence declares the authenticity of the evidence and offers to accept punishment if he or she commits perjury.

## Threshold for criminal enforcement against trade secret misappropriation lowered

The new criminal regulation (Decision on Amending the Criteria for Launching Formal Investigation into Criminal Cases of Infringement upon Trade Secrets) lowers the threshold for initiating trade secret criminal actions, and hence offers stronger protection to innovation. Previously, trade secret owners were required to prove that the illegal income from the misappropriation exceeded USD70,000, which was difficult to establish given the lack of a common law system of discovery in China.

Under the new regulations, trade secret owners may initiate a criminal action by proving either of the following: (1) the illegal income from the misappropriation exceeded USD42,000; or (2) the trade secret owners face bankruptcy or liquidation due to major operational difficulties directly caused by the trade secret misappropriation. Criminal actions are very powerful tools in China for fighting trade secret misappropriation and hence the new legal development is again important for protecting innovation.

The case *Jiaying Zhonghua Chemical Co. Ltd. and Shanghai Xinchun New Technology Co. v. Wanglong Group Co. Ltd.* is a trade secret misappropriation case which showcases the importance of its related criminal case. The IP Tribunal of the Supreme People's Court in the case awarded the plaintiffs USD24.9 million in damages which is the largest damage award ever awarded by a Chinese court in trade secret misappropriation cases.

In this case, Zhonghua Chemical developed a highly lauded new process to manufacture vanillin, and protected the related technologies, including equipment and the manufacturing process, as trade secrets.

In 2010, Wanglong Group paid Zhonghua Chemical's former employee, Fu Xianggen, who was also sued as an individual, to disclose Zhonghua Chemical's vanillin manufacturing process. Fu was subsequently employed by an affiliate of Wanglong Group, working at the vanillin workshop. In June 2011, Wanglong Group began to manufacture vanillin. In a very short period of time, by selling vanillin at a comparably low price, Wanglong Group became the third-largest vanillin manufacturer in the world, and Zhonghua Chemical's global vanillin market share dropped from 60% to 50%.

One key feature of this case — and critical to Zhonghua Chemical's success — is that most evidence was obtained from a corresponding criminal case. Without access to this information, Zhonghua Chemical would have faced potentially prohibitive challenges with obtaining evidence for the case.

The criminal trade secret misappropriation case was commenced by the Jiaying Public Security Bureau, and its powerful investigation furnished essential evidence for the civil trade secret misappropriation case.

## Reverse burden of proof

The new China regulations reasonably distribute the burden of proof between plaintiffs and defendants, allowing infringed companies to have a more level playing field.

In general, in China, each party in litigation bears the burden of proof for all its claims, and neither party can obtain discovery from its adversary, though courts may assist a party in obtaining evidence under exceptional circumstances.

Without the benefit of a common law discovery system, and in light of strict rules on evidence collection by private parties, the previous burden of proof created a nearly insurmountable challenge to plaintiffs bringing patent and trade secret cases in China.

Article 71 of the Amended Patent Law provides a potential shift of the burden of proof to the accused party. With the amendment, a Chinese court may order the accused party in a patent infringement action to submit financial books and materials to evidence the gains obtained from infringement; if the accused party refuses to comply, the court could determine damages based on evidence adduced and claims raised by the patentee. The new rule helps lower the patentees' burden of proof that has been aggravated by the lack of discovery process in China and may potentially increase the amount of damages awarded to patentees.

Under the revised Chinese Anti-Unfair Competition Law, once the plaintiff has established a prima facie case of access and substantial similarity, the burden of proof shifts to the defendant to disprove misappropriation of trade secrets.

Also, the IP Evidence Rule provides that the party with the burden of proof may petition the court to order the party in possession of the evidence to produce the evidence. If the court considers the grounds of the petition reasonable, it is required to issue such an order.

In addition, if a party refuses to submit such evidence without justifiable reason, submits false evidence, destroys evidence, or conducts any other act that renders the evidence unusable, the court is required to find against the party on the issue.

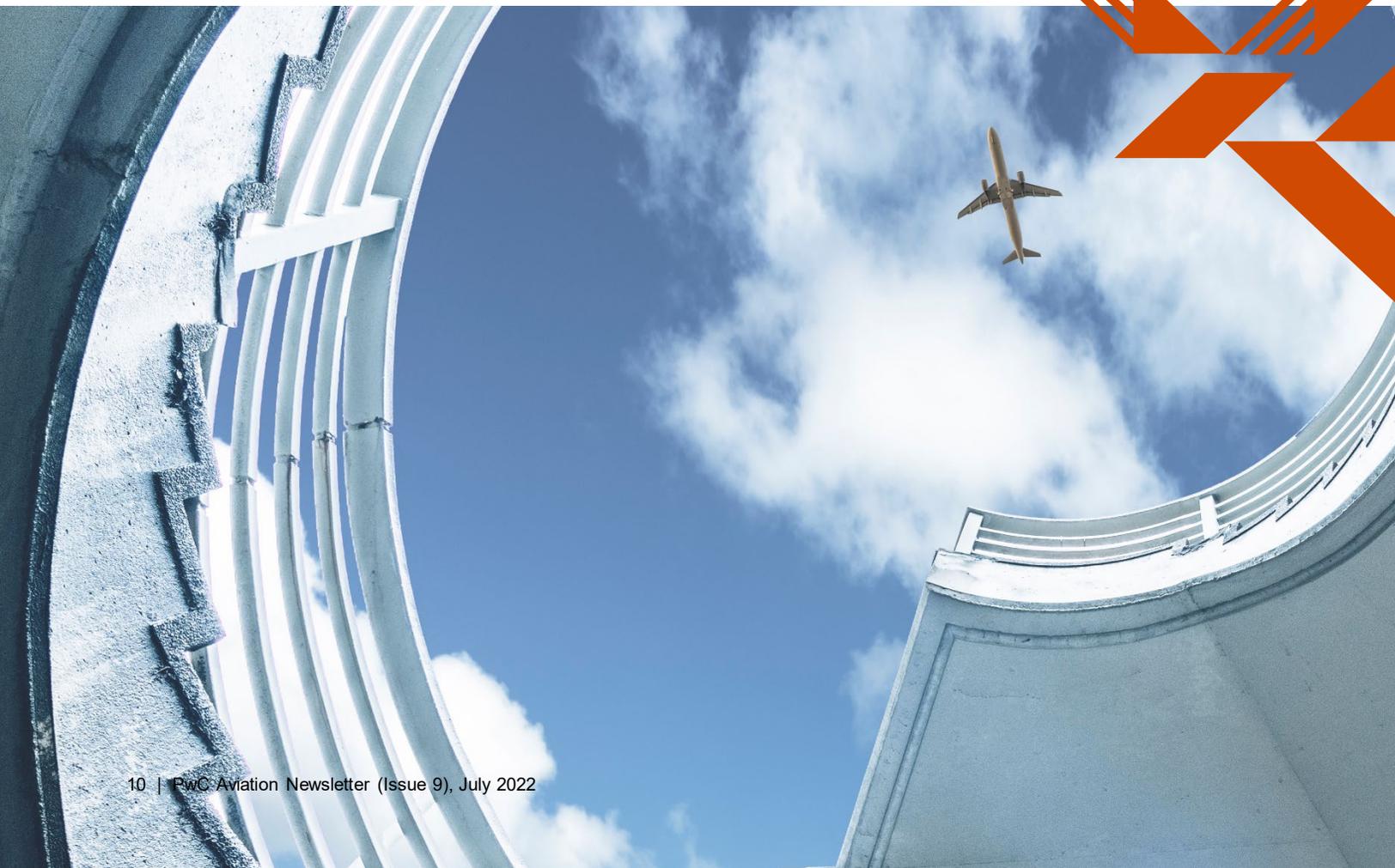
Chinese courts have been proactive in shifting the burden of proof. *Qianyou v. Xu Hao and Xiao Xin* is a case which illustrates this point. In this case, Qianyou developed and operated online game software. The defendants were former Qianyou employees. After resigning from Qianyou, the defendants established their own company and operated an online game very similar to Qianyou's game.

The alleged trade secret was the game's source code. Qianyou submitted preliminary evidence showing that the defendants likely misappropriated the source code. Because the defendants owned and controlled their game's source code and object code, Qianyou did not have access to the code to prove misappropriation. Applying the new law, the court shifted the burden of proof from Qianyou to the defendants and ordered the defendants to submit their source code. When the defendants refused, and did not provide any justification for their refusal, the court ruled in favour of Qianyou and found that the defendants had misappropriated Qianyou's trade secrets.

## Conclusion

Companies doing business in or with China still face obstacles in enforcing intellectual property rights in China, including the lack of common law discovery procedures and strict rules on evidence collection by private parties.

However, the recent legal reforms have put companies on a more level playing field and has provided more legal certainty for all in favour of real innovation.



# The final appellate court's decision in the *Wells Fargo* case



**Tejaswi Nimmagadda**  
Partner  
Tiang & Partners\*



**Nai Kwok**  
Registered Foreign Lawyer  
Tiang & Partners\*



## Introduction

In our January 2021 update, we had covered the decision of the Federal Court of Australia's Court of Appeal in the Wells Fargo case (*Wells Fargo Trust Company, National Association (owner trustee) v VB Leaseco Pty Ltd (administrators appointed)*). This decision was important, being one of the first cases considering the content of the requirements under Alternative A of the Cape Town Convention (and the first to focus on the meaning of 'give possession' specifically).

This decision has now been upheld by the High Court of Australia (HCA). The HCA's decision marks an important milestone as it is Australia's court of final appeal and is binding on all other federal and state courts in Australia. As one of the first final appellate courts to render a decision on a topic which is a question of general importance to the aviation industry and not just in Australia, the HCA's decision will likely be considered of persuasive value and its reasoning taken into account in other jurisdictions.<sup>17</sup>

## Background

As discussed in our previous updates, this case involved Wells Fargo (as owner trustee for Willis Leasing) seeking to recover an aircraft engine leased to VB Leaseco under an engine lease agreement after Virgin Airlines went into administration.

As the Virgin group was the subject of an insolvency proceeding, Article XI and Alternative A of the Cape Town Convention and its aircraft protocol (CTC) were engaged.<sup>18</sup>

This provision of the CTC provides a specific insolvency remedy to creditors, such that following the opening of insolvency proceedings, the company or its insolvency practitioner has to 'give possession' of the aircraft object to the creditor within a specified waiting period or otherwise cure all defaults other than the insolvency default. The issue that was put before the courts was whether the company or its insolvency administrator had an obligation to take positive action to physically redeliver the aircraft object to the creditor (including to comply with its contractual obligation upon the relevant agreement upon default) under Article XI of the CTC.

As mentioned in our previous updates, Wells Fargo contended that the administrator's obligation to 'give possession' meant that the administrator had a positive obligation to deliver physical possession of the aircraft to the creditor, and the place for delivery of possession should be the place specified in the lease agreement (being a location in the US), together with the aircraft documents and records in the condition required under the lease agreement.

The administrator's position, on the other hand, was that the obligation to 'give possession' could be satisfied making the aircraft object (in this case, aircraft engines) available to the creditor so that the creditor is able to take possession. In other words, it should not be for the administrator to incur the cost to physically deliver possession of the aircraft object to the creditor.

While Wells Fargo was successful at first instance, the Court of Appeal over-turned the decision and held that the requirement to 'give possession' under Alternative A was to give the opportunity for the lessor to take possession of the aircraft object. In other words, physical delivery was not required.



## The HCA's decision

This position has now been upheld by the High Court in a very concise and directed decision which is well worth reading. In rendering its decision, the HCA considered the structure and framework of the insolvency remedies of the CTC, and held that a creditor was only entitled to require the administrator to give up possession of the object and not to physically deliver the object to the creditor.

It is by now uncontroversial that the effect of the implementing legislation in Australia is that the CTC 'prevails' to the extent of any inconsistency. However, prevailing over inconsistency does not mean that existing Australian insolvency law is entirely displaced, and in particular, the CTC provides that any procedural rules relating to insolvency are not displaced.

The HCA held that in the context of the exercise of remedies by a creditor in accordance with other parts of the CTC (apart from Article XI, specifically dealing with insolvency) the procedural rules of insolvency in Australia included restrictions on the enforcement and exercise of rights by third parties without consent of the administrator or leave of the court<sup>19</sup>, and therefore any exercise of the lessor's rights to the remedies set out in the CTC (including exercise of default remedies) was subject to a stay in accordance with the local legislation (section 440B).

However, since Article XI specifically applies on insolvency, the administrators were under an obligation to 'give possession' of the aircraft object to the creditor at the end of the waiting period set out in Alternative A (being 60 days for Australia), and in this sense, our reading of the decision would be that Article XI prevails over section 440B to the extent they are inconsistent.

When considering the content of the requirement to 'give possession', the HCA held that the obligation would be satisfied so long as the administrator did everything necessary in order to allow the lessor to 'take possession to the exclusion of others', which did not extend to compliance with the underlying lease agreement. The HCA considered the meaning of possession as used throughout the CTC and that this was consistent with possession having a wider meaning than giving physical possession. Accordingly, the HCA took this obligation to mean that the administrator was only required to give possession in the sense of 'physical control to the exclusion of others'.

It was, therefore, not necessary for the administrators to have to deliver the engines back to the lessor in accordance with the provisions of the lease agreement. The administrators did have positive obligations, however, and these included the obligation to do anything necessary to give the lessor an opportunity to take possession, and to preserve the aircraft objects in accordance with the requirements of the CTC until it had fulfilled this obligation.

The HCA reasoned that this was not only consistent with existing Australian law, but also because the CTC contains further remedies available to creditors under the other provisions of the CTC, including:

- to procure the expeditious de-registration and physical transfer of an aircraft object to another jurisdiction; and
- to require the local aviation authorities' co-operation to de-register the aircraft object from the aviation registration and to export such object to another jurisdiction.

These remedies would only make sense in the context of the administrators only being required to give up possession without being required to procure export and physical transfer. Once the creditor exercised its rights under Alternative A to take possession, it would be for the creditor itself to exercise further remedies under the CTC to which it had available, including to arrange for the de-registration and transfer of the relevant objects at its own cost (and require the aviation registry to expeditiously co-operate).

While not directly referred to by the HCA (who restricted their reasoning to the text and framework of the CTC, the enabling legislation in Australia and the Official Commentary prepared by Professor Roy Goode on the CTC), had Wells Fargo been successful, unsecured creditors (and the chances of rehabilitation of a company in administration) could have ended up being significantly worse off, as significant amounts of cash and other assets could be depleted from the company's insolvency estate in order to meet lease redelivery conditions to the detriment of all other creditors. This would enable secured creditors to 'jump the queue' in relation to the redelivery costs, which would ordinarily rank equally with other unsecured claims.

The HCA's decision preserves the pre-CTC position, that once the creditor repossesses an aircraft object, the costs of exercising its further rights and remedies can be added to any other remaining claims against the debtor (for example, in respect of loss of profit and other enforcement or repossession costs and expenses), but these unsecured claims would rank equally with other unsecured creditors.

As mentioned above, the HCA gave a very narrow decision which was confined to the specific question at hand. Given the HCA's approach to give precedence to the CTC by reference to it prevails to the extent of any inconsistency, it may be that other issues may come up in future that would require this inconsistency analysis. As demonstrated by this case, the answer may not always be straightforward and may require a review and analysis of the laws of the applicable local jurisdiction and how it interacts with the CTC.

<sup>1</sup> Commentators have estimated that for airlines to achieve their 2050 net zero target, 65% of the emissions reductions will need to come from replacing traditional fuels with SAF. <https://www.reuters.com/business/sustainable-business/airlines-seek-clearance-liftoff-sustainable-aviation-fuels-2022-04-18/>

<sup>2</sup> <https://www.iata.org/contentassets/d13875e9ed784f75bac90f000760e998/saf-what-is-saf.pdf>; [https://www.icao.int/environmental-protection/pages/SAF\\_LifeCycle.aspx](https://www.icao.int/environmental-protection/pages/SAF_LifeCycle.aspx)

<sup>3</sup> [https://aviationbenefits.org/media/166152/beginners-guide-to-saf\\_web.pdf](https://aviationbenefits.org/media/166152/beginners-guide-to-saf_web.pdf)

<sup>4</sup> These include, for example, deforestation, changes in the use of agricultural land and water and impact of the production process on local environments.

<sup>5</sup> <https://airlines.iata.org/analysis/solar-fuel-aids-sustainability-ambitions>

<sup>6</sup> <https://www.weforum.org/reports/clean-skies-for-tomorrow-sustainable-aviation-fuels-as-a-pathway-to-net-zero-aviation>

<sup>7</sup> The foundational report of the World Economic Forum's Clean Skies for Tomorrow coalition concluded that sufficient sustainable feedstocks are available to meet the projected jet fuel demand for global aviation in 2030, SAF production costs must be reduced to meet the necessary production levels. See <https://www.weforum.org/reports/clean-skies-for-tomorrow-sustainable-aviation-fuels-as-a-pathway-to-net-zero-aviation>

<sup>8</sup> <https://www.ishkaglobal.com/News/Article/6628/Aviation-sustainable-finance-firsts-A-fund-a-secured-loan-and-an-operating-lea>

<sup>9</sup> <https://sg.news.yahoo.com/sustainable-finance-why-transition-bonds-053550281.html>

<sup>10</sup> <https://www.weforum.org/reports/powering-sustainable-aviation-through-consumer-demand-the-clean-skies-for-tomorrow-sustainable-aviation-fuel-certificate-safc-framework>

<sup>11</sup> <https://www.greenairnews.com/?p=1266>; <https://airlines.iata.org/analysis/solar-fuel-aids-sustainability-ambitions>

<sup>12</sup> <https://www.weforum.org/press/2021/09/clean-skies-for-tomorrow-leaders-commit-to-10-sustainable-aviation-fuel-by-2030/>

<sup>13</sup> [http://www.caacnews.com.cn/2022zhuanti/2022lh/2022jzplh/2022lhjz3/202203/t20220306\\_1340615.html](http://www.caacnews.com.cn/2022zhuanti/2022lh/2022jzplh/2022lhjz3/202203/t20220306_1340615.html)

<sup>14</sup> <https://epthinktank.eu/2022/02/02/refueleu-aviation-initiative-sustainable-aviation-fuels-and-the-fit-for-55-package-eu-legislation-in-progress/>

<sup>15</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1060601/sustainable-aviation-fuels-mandate-consultation-summary-of-responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060601/sustainable-aviation-fuels-mandate-consultation-summary-of-responses.pdf)

<sup>16</sup> Other References: <https://www.honeywell.com/us/en/news/2021/12/what-is-sustainable-aviation-fuel>; <https://blog.geaviation.com/sustainability/four-things-to-know-about-sustainable-aviation-fuel-saf/>; <https://www.nortonrosefulbright.com/en-hk/knowledge/publications/f81d3390/new-regulatory-initiatives-supporting-sustainable-aviation-fuel>

<sup>17</sup> It is interesting to note that the Wells Fargo decision of the Court of Appeal has already been referred to in other insolvency cases, including the implementation of a court approved restructuring plan in the Norwegian Airlines examinership and the AirAsiaX scheme of arrangement hearing before Justice Ong. In both cases, the relevant courts cited the Wells Fargo case with approval in respect of its approach to considering the interaction between the CTC and the local insolvency regimes, and its approach in construing provisions of the CTC, although the specific legal questions to be decided were different in each of those cases.

<sup>18</sup> This was so clearly an insolvency proceeding under Australian law that it was agreed between the parties that an insolvency event had occurred under the CTC, so the question of what constitutes an 'insolvency proceeding' under the CTC did not need to be considered.

<sup>19</sup> The stay on repossession without administrator consent or leave of the court is set out under section 440B of the Corporations Act (Commonwealth) ('section 440B').



## Contact us

### Advisory



**Johnny Lau**  
Aviation Business Services  
Chief Consultant  
PwC Hong Kong  
+852 2289 5670  
johnny.lau@hk.pwc.com



**Liang Jiang**  
Corporate & Regulatory  
Partner  
PwC Mainland China  
+86 (21) 2323 8873  
liang.l.jiang@cn.pwc.com



**Jing Wang**  
Corporate & Regulatory  
Partner  
PwC Mainland China  
+86 (10) 8553 1566  
jing.jm.wang@cn.pwc.com



**Martin Lu**  
Aviation Business Services  
Director  
PwC Mainland China  
+86 (10) 6533 3116  
martin.y.lu@cn.pwc.com



**Shanshan Wang**  
Aviation Business Services  
Senior Manager  
PwC Mainland China  
+86 (10) 8553 6355  
shanshan.ss.wang@cn.pwc.com



**Karen Wong**  
Aviation Business Services  
Senior Manager  
PwC Hong Kong  
+852 2289 3594  
karen.hl.wong@hk.pwc.com



**Victor Cui**  
Aviation Business Services  
Senior Manager  
PwC Mainland China  
+86 (21) 2323 1290  
victor.cui@cn.pwc.com



**James Wang**  
Aviation Business Services  
Senior Associate  
+86 (21) 2323 2959  
james.f.wang@cn.pwc.com

### Tax



**Spencer Chong**  
China Tax Markets Leader  
PwC Mainland China  
+86 (21) 2323 2580  
spencer.chong@cn.pwc.com



**Clarence Leung**  
Partner  
Asset Finance & Leasing Tax  
PwC Hong Kong  
+852 2289 3599  
clarence.kf.leung@hk.pwc.com



**Bo Yu**  
Tax Partner  
PwC Mainland China  
+86 (10) 6533 3206  
bo.yu@cn.pwc.com



**Stella Fu**  
Aviation Business Service  
Leader  
PwC Mainland China  
+86 (21) 2323 2907  
stella.fu@cn.pwc.com



**Vivian Gao**  
Tax Partner  
PwC Mainland China  
+86 (10) 6533 3077  
yan.y.gao@cn.pwc.com



**Yew Kuan Kuok**  
Financial Services Tax  
Senior Manager  
PwC Hong Kong  
+852 2289 8204  
yew.k.kuok@hk.pwc.com



**Wayne Zhao**  
Aviation Finance & Leasing Tax  
Senior Manager  
PwC Hong Kong  
+852 2289 3009  
wayne.q.zhao@hk.pwc.com

## Legal



**Tejaswi Nimmagadda**  
Partner  
Tiang & Partners\*  
+852 2833 4908  
tejaswi.nimmagadda@  
tiangandpartners.com



**Michelle Taylor**  
Partner  
Tiang & Partners\*  
+852 2833 4994  
michelle.a.taylor@  
tiangandpartners.com



**Nai Kwok**  
Registered Foreign Lawyer  
Tiang & Partners\*  
+852 2289 4939  
nai.kwok@  
tiangandpartners.com



**Chiang Ling Li**  
Partner  
Tiang & Partners\*  
+852 2833 4938  
chiang.ling.li@  
tiangandpartners.com



**Charissa Chu**  
Solicitor  
Tiang & Partners\*  
+852 2833 4914  
charissa.hy.chu@  
tiangandpartners.com



**Kevin Tsang**  
Counsel  
Tiang & Partners\*  
+852 2833 4902  
kevin.kw.tsang@  
tiangandpartners.com

## ESG



**Amy Cai**  
ESG Managing Partner  
PwC Mainland China  
+86 (21) 2323 3698  
amy.cai@cn.pwc.com



**Qing Ni**  
ESG Markets Leader,  
ESG - Climate and  
Sustainability Lead Partner  
PwC Mainland China  
+86 (10) 6533 2599  
qing.ni@cn.pwc.com



**Cindy KY Ngan**  
Partner  
PwC Hong Kong  
+852 2289 2749  
cindy.ky.ngan@hk.pwc.com



**Cyrus Cheung**  
Partner  
PwC Hong Kong  
+852 2289 1709  
cyrus.lk.cheung@hk.pwc.com

## Assurance



**Yvonne Kam**  
Assurance Partner  
PwC Mainland China  
+86 (21) 2323 3267  
yvonne.kam@cn.pwc.com



**Charles Chow**  
China South Assurance Leader  
PwC Mainland China  
+86 (755) 8261 8988  
charles.s.chow@cn.pwc.com



**Arthur Yeung**  
Partner  
PwC Hong Kong  
+852 2289 8062  
arthur.wh.yeung@hk.pwc.com

### Editorial Team:

Tejaswi Nimmagadda  
Legal — Aircraft Finance & Leasing  
Tiang & Partners\*\*

\* Tiang & Partners is an independent Hong Kong law firm.

Scan the QR code to subscribe to our newsletter:



This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

© 2022 PwC. All rights reserved. PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity.

Please see [www.pwc.com/structure](http://www.pwc.com/structure) for further details.