

Aviation - International

Have you properly perfected your international interest against a helicopter engine?

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Introduction

The Cape Town Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment took effect on March 1 2006. At that time, aircraft and helicopter owners and financiers alike took advantage of perfecting their ownership, security and lease interests under the Cape Town Treaty by making registrations with the International Registry. It was not until 2008 that the validity of registrations with the International Registry against helicopter engines came into question.

Interests may be filed on the International Registry that relate to 'aircraft objects', defined as airframes, aircraft engines and helicopters⁽¹⁾ that meet certain technical conditions. The definition of 'aircraft engines' was generally believed by industry members to cover helicopter engines, as well as aircraft engines, and no distinction was made between the perfection of an interest in a helicopter engine and in an aircraft engine.

However, in 2008 Professor Sir Roy Goode authored a revised version of the official commentary to the Cape Town Treaty,⁽²⁾ which called into question the validity of an international interest filed against a helicopter engine that is actually attached to a helicopter. The effect of this interpretation is that if an international interest is registered with the International Registry while the helicopter engine is attached, such registration will be insufficient to perfect the owner or financier's title to that engine if it is later removed from the helicopter. This also creates a conflict of law question, because under the applicable Federal Aviation Regulations and applicable state law, the ownership or financial interest of a financier of the helicopter engine has been properly lodged.

To address the issue facing helicopter financiers created by this interpretation, industry members adopted a workaround, recommending that a 'prospective international interest' be filed against helicopter engines, and Goode has endorsed this approach. Therefore, owners or financiers must not only ensure registration of an international interest against a helicopter engine, but also procure a prospective international interest filing.

State of the law

Goode reiterated his conclusion in the recently published third edition of the official commentary to the Cape Town Treaty.⁽³⁾ Therein, he states that:

"It is clear that 'aircraft engine' means an engine which is an 'aircraft object,' and does not include an engine installed on a helicopter. This conclusion is reinforced by the fact that (a) if the intention had been to treat installed helicopter engines in the same way as engines installed on an airframe, the reference would have been to a helicopter frame rather than a helicopter, (b) in the definition of 'aircraft' in Article I(2)(a) [of the Protocol] there is a specific reference to aircraft engines installed on an airframe but no such reference to engines installed on a helicopter, and (c) in the definition of 'airframes' in Article I(2)(e) [of the Protocol] there is a reference to installed accessories which expressly excludes aircraft engines but there is no such exclusion in the definition of 'helicopters' in Article I(2)(1)."

Goode recognises that the definition of 'aircraft engines' refers to both aircraft and helicopter engines. Therefore, before installation or after removal, a helicopter engine

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can be independently deemed an 'aircraft object' and subject to registration on its own with the International Registry. The problem with registration of an international interest against a helicopter engine arises only when the engine is installed in the helicopter, becoming an accessory and no longer a separate aircraft object. Even Goode noted in his most recent commentary that "this is an awkward consequence of the fact that engines installed on a helicopter are not treated as a separate objects"; he invited this issue to be addressed by the reviewers of the Cape Town Treaty.

When a prospective international interest is filed against a helicopter engine at such time that the engine is later removed from the helicopter, the international interest will automatically attach, effectively perfecting the international interest in the helicopter engine at such later time. Such international interest will then be preserved even after re-installation in the helicopter.

Practical application

Many helicopter financings occur when a helicopter is delivered new to the operator. The engines are certainly installed in the helicopter at that time, and it is impractical for helicopter engines to be removed for the sole purpose of effecting proper registration of an international interest against the helicopter engine.

Since it is fairly common among helicopter operators to swap engines throughout their helicopter fleet, engines are regularly removed from helicopters and not returned to the original airframe. Therefore, if a prospective international interest is not made per the existing recommendations against the helicopter engine, the owner or financier's interest in the engine may not be protected at the International Registry.

Practically, this means that if a helicopter were financed by Lender A and the international interests to perfect Lender A's interest in the helicopter frame and engines were filed while the engines were attached to the helicopter, Lender A would not be entitled to protections available under the Cape Town Treaty with regard to the filings against the engines. Therefore, if the engines were later removed from the helicopter and attached to a different helicopter that happened to be subject to financing by Lender B, then on exercise of remedies by Lender B against the operator of such helicopter, Lender B could repossess that helicopter with Lender A's engine attached, and Lender B's rights to the engines may have priority over Lender A's rights under the Cape Town Treaty.

Comment

Even Goode has recognised the absurdity of this conclusion, which could have the effect of negating the protection to financiers that was intended with the adoption of the Cape Town Treaty. As with most other conflicts under the treaty, this has yet to be adjudicated by a court of law. Perhaps with Goode's recommendation, the impractical result caused by the definitions of 'helicopter', 'airframe engine' and 'aircraft' will be addressed by the drafters at a review conference and amendments made to rectify the situation. For now, the only way to ensure perfection of interest in a helicopter engine (short of removing an installed engine from its helicopter frame at the time of filing) is to register a prospective international interest, as well as an international interest (for the avoidance of doubt), against any helicopter engine.

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Endnotes

(1) Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment at (I)(2)(c).

(2) Goode, Official Commentary of the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment.

(3) Goode, Official Commentary of the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment (3rd edition).

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