

## INTERNATIONAL AIRCRAFT REGISTRATION TREATY TAKES OFF

Protocol designed to assist creditors, reduce financing costs

By **RICH ROCHLIN**

There's a relatively inexpensive, expedient and well-settled process for taking and perfecting a lien on so-called "traditional" collateral such as inventory and equipment. It involves, in most instances, filing a UCC-1 with the Secretary of the State in the state of debtor's location. In contrast, the process of taking a security interest in and perfecting a lien on an aircraft or helicopter requires multiple filings, additional time, increased costs and a careful analysis of state and federal law, as well as, perhaps, the law of the jurisdiction where the aircraft or helicopter is to be located and operated.

As of March 1, 2006, this process changed and a new step was added when the United States and various other countries became bound to the Aircraft Protocol to the Cape Town Convention. The goal of the treaty was to establish an international and centralized filing system for registration of "international interests" in aircraft and to create more certainty for creditors enforcing post-default rights. The hope was that the uniformity of the treaty's provisions (i.e., each ratifying country would agree to be bound by the same rules) would assure lenders/lessors assurances that the remedies contained in their contracts with borrowers/lessees could actually have some bite in countries that had ratified the treaty. In so doing, collaborators posited, the costs



of financing aircraft would decrease and the frequency of financings would increase.

The treaty's goal to create a centralized filing system was realized with the establishment of the International Registry of Mobile Assets, a notice-based registry accessible and searchable at any time by anyone with Web access. The registry, operated out of Dublin, Ireland by Aviareto, is a joint venture between the Irish government and SITA, a Swiss information technology provider. The registry is supervised by the International Civil Aviation Organization (ICAO). Unlike the process of filing documents with the U.S. Federal Aviation Administration, parties need not file documents with the notice-

based registry. Accordingly, registrations are made against (and inquiries are made of) criteria such as serial number, model and manufacturer. Additionally, the registry, unlike the FAA, which maintains fairly traditional business hours, allows parties to register interests and conduct searches at any time via the Internet, without the logistical hassle of coordinating the time zone differences of contracting parties.

### Applicable Transaction

The treaty applies to the following aircraft objects:

- Aircraft certified to transport at least eight persons (including crew) or cargo in excess of 6,050 pounds
- Helicopters certified to transport at least five persons (including crew) or cargo in excess of 992 pounds
- Engines rated with at least 1,750 pounds of thrust or turbine/piston engines that have at least 550 rated takeoff shaft horsepower.

The treaty applies to these aircraft objects regardless of whether such objects are used for commercial or personal purposes. Engine parts and floating inventories of spare engines are not covered and should continue to be perfected against in the same manner they were prior to the treaty being adopted.

The treaty contemplates registration of "international interests." The main components of "international interests" include a lessor's interest in a lease, a security interest under a security agreement and title reservation agreements. Other concepts capa-

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ble of registration include subordination agreements, contracts of sale and assignments of international interests. Would-be registrants should not be fooled by the use of the slightly misleading term “international interests” and should instead focus on what it encompasses before electing not to register an interest in a purely U.S.-based transaction. The treaty is clear that it can and does apply to purely US-centric transactions (assuming the aircraft objects in play are covered by the treaty).

### Priority

Like the Uniform Commercial Code, the registry and treaty adhere to a “first-to-file” convention in determining priority of security interests. Thus, if an object is eligible for registration and it is not registered, the lessor/creditor will not have priority over the liens of other creditors that may register at a later date (but prior to the unregistered interest) – the equivalent result of failing to file a UCC-1 financing statement against a debtor. The treaty even adopts a harsher rule by not punishing a new creditor who registers an interest with the knowledge that an unregistered interest exists. It should be noted that the consensus among practitioners is that “interests” perfected prior to the effectiveness of the Treaty remain intact and no additional filings are needed.

### Remedies

If an aircraft is located in a country that has adopted the treaty, the rights of lessors/

creditors will be much more favorable to them and could provide for the following remedies:

- seek court orders to enforce agreements
- sale or lease of the aircraft
- replevin
- de-registration of the aircraft
- receive or collect income arising from the aircraft

### Conclusion

This article sets forth a basic framework for understanding the practical effects of the treaty and the registry. As one could imagine, there are many other significant implications for the treaty and the registry, particularly those that relate to the intersection of how existing U.S. law treats secured party remedies and how the treaty deals with these issues. While a full examination of all the issues one must consider in these types of transactions cannot be adequately covered in this space, practitioners (at a minimum) should carefully examine the deal documents to ensure that their clients are availing themselves of the benefits that the treaty provides. Parties should also consider the impact of having the aircraft reside in a country that has yet to adopt the treaty.

The point is that practitioners must carefully examine the details of a transaction and, if applicable, advise their clients of the necessity of registering the “international interest” created by their particular transaction with the Registry. As was the case prior



to March 1, 2006, parties must continue to make the requisite filings with the FAA in the traditional manner (the filing with the FAA is a prerequisite to registering with the Registry). The consequences of failing to file with the registry can be catastrophic: an unregistered security interest unperfected and can result in a loss of priority, even to a new creditor who has actual knowledge of the unregistered interest.

To minimize this risk, lawyers that represent lessors and lenders in “aviation-finance” transactions should engage FAA counsel to assist with the filing of certain transaction documents (e.g., the security agreement or lease agreement) with the FAA, to effectuate the registration with the Registry and to help navigate the issues arising from the intersection of the Treaty and the law of another relevant jurisdiction (including the U.S.). ■