FAA Aircraft Registration, The Cape Town Convention and the International Registry

GKG Law, P.C. Webinar Series

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FAA Aircraft Registration

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Who May Register an Aircraft in the U.S.

- A “Citizen of the United States”
- A resident alien lawfully residing in the U.S.
- A domestic corporation that does not qualify as a “Citizen of the United States”, if the aircraft is Based And Primarily Used within the U.S. (a.k.a. “BAPU” registration)
Who/What is a “Citizen of the United States”? 

➤ An individual who is a U.S. citizen

➤ A partnership, if each of the partners is an individual who is a U.S. citizen

➤ A corporation or association, if:
  • the entity is organized under the laws of the U.S. or any state, territory or possession of the U.S.
  • the President and at least 2/3 of the directors and other managing officers are individuals who are U.S. citizens
  • at least 3/4 of the voting interests are owned or controlled by citizens of the U.S. or its possessions
Limited Liability Companies

- Not specifically addressed in the statute or regulations
- FAA applies the citizenship test applicable to corporations and associations
- Must submit to FAA either Articles of Formation and Operating Agreement, or LLC Citizenship Statement
BAPU Registration

A corporation that does not qualify as a “Citizen of the United States”, may register and aircraft in the U.S. if the aircraft is Based And Primarily Used within the U.S.

• must be a U.S. corporation (LLC’s do not qualify)
• at least 60% of flight hours must be in the U.S.
• must report to FAA that 60% requirement is met every six months
Options for Non-Citizens

Ownership Trust:
• May be used by anyone (individuals and business entities, citizens and non-citizens)

Voting Trust
• May only be used by corporations that fail the 75% ownership/control test, but otherwise qualify as “Citizens of the United States”
Ownership Trusts

- Trustee holds legal title to aircraft in trust for benefit of Trustor/Beneficiary

- Trustee must be a “Citizen of the United States”

- Aircraft is registered in the name of the Trustee (not in the name of the Trust itself)

- A Written Trust Agreement must be filed with the FAA
Ownership Trusts

If the beneficiary of an Ownership Trust is not a “Citizen of the United States”:

- The Trust Agreement must provide that non-citizens may have no more than 25% of the power (in the aggregate) to direct or remove the Trustee (except for cause), and procedures for replacement of Trustee; and
Ownership Trusts

- Trustee must provide affidavit stating that the beneficiary is not a U.S. citizen, and that the trustee is not aware of any reason, situation or relationship which results in non-citizens having more than 25% of the power (in the aggregate) to limit or influence the exercise of the Trustee’s authority.
Voting Trusts

- Used by corporations that fail the 75% ownership/control test, but otherwise qualify as “Citizens of the United States”

- Trustee must be a “Citizen of the United States”

- Requires a Written Voting Trust Agreement that transfers the voting rights of the stock to the Trustee
Voting Trusts

- Trustee may not be a past, present or prospective director, officer, employee, attorney, agent, beneficiary, creditor, debtor, supplier or contractor of any other party to the Trust Agreement.

- The corporation (not the Trustee) holds title to, and registers, the aircraft.
Voting Trusts

Trustee must provide affidavit stating that the trustee is not aware of any reason, situation or relationship under which any other party to the Voting Trust Agreement might influence the totally independent judgment of the Trustee.
Registration Documents

- Bill of Sale/Proof of Ownership - AC Form 8050-2
- Aircraft Registration Application - AC Form 8050-1
  - White and Green copies to FAA
  - Pink copy to aircraft (authority to operate within the U.S. - not a “temporary” registration)
- Declaration of International Operations
- Fly Wire – (temporary registration)
- Certificate of Aircraft Registration - AC Form 8050-3
Closing Remarks

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The Cape Town Convention and the International Registry

- Change in U.S Law - Time to wake up!

Bad things can happen

- What’s International about the International Registry?
Terms to Remember

There’s Registration and then there is Registration

- **Nationality registration** of an aircraft with the civil aviation authority in a country
  - FAA Registration of an aircraft in the name of an owner
  - File Bill of Sale and Aircraft Registration Application with the FAA
- **Registration of Rights** on the International Registry pursuant to the Cape Town Convention
  - Electronic/computer registry – no documents filed with the IR
Change in U.S. Law

→ Cape Town Convention
  - Effective in U.S. on March 1, 2006
  - Originally 8 countries ratified
  - Now more than 30, including U.S., Ireland, China, India, Mexico, Indonesia, Malaysia, South Africa, Panama, UAE,

→ CTC is an international treaty ratified by the Senate that is the law of the land in the US

→ CTC changes prior US law on how parties perfect ownership and lien rights in aircraft
Change in U.S. Law

Prior Law
- Register aircraft at the FAA to establish ownership*
- File and record security agreements, leases and other encumbrances to perfect those rights in aircraft and engines

New Law (CTC)
- Everything listed above; AND
- Register sales of airframes and engines on the IR
- Register “international interests”
Change in U.S. Law

- Failure to do both FAA filings and IR registrations
  - Your rights are not perfected/priorities are not established
  - You may LOSE your aircraft to a
    - Subsequent purchaser who does register their rights on IR
    - Competing Creditor who registers on IR
    - Bankruptcy Trustee who registers on IR

- Ask the folks involved in Philko vs. Shackett
  - Pre-Cape Town case
  - Supreme Court held that second purchaser (who filed at FAA) wins unless they had actual notice of first purchaser
  - Cape Town provides: Notice of prior interest is not relevant
What’s International about the International Registry?

• (Nothing other than the name)
• Resistance to registering rights on the International Registry
  • The primary arguments are that CTC does not apply to the transaction because…..
    • The aircraft will not be flown internationally – only in the US - and CTC is an international treaty
      • It’s even in the name! “Convention on International Interests in Mobile Equipment”
  • Also, I am just buying the aircraft – no financing so I don’t need to register anything on the IR
None of those are valid reasons

- CTC applies to the sale of aircraft
- CTC applies whether the aircraft ever leaves the US or any other country – international operations are NOT an element of CTC applying to a deal
Does Cape Town Apply to the Transaction?

Sphere of Application
- Airframe registered in Contracting State
- Agreement for airframe registration in a Contracting State
- Debtor situated in a contracting state

Size
- 8 seats for aircraft
- 5 seats for helicopter

Interest
- International interest (security agreement, lease, conditional sale)
- Ownership interest
- Assignment
- Subordination or subrogation
If Cape Town Applies – Register Now (avoid bad results)
Cape Town Applies to the deal – What’s Next

✓ Requires Advance planning and thought
  • How will Cape Town impact closings?
    • Timing
    • Documentation
  • What interests will be registered?
    • Segment by segment analysis
      • Sale
      • Security agreements
      • Leases
      • assignments
  • What parties must establish accounts on the IR?
    • Each party to each interest to be registered on IR
  • Should the company establish and administer the IR account
    • Internally
    • Externally – hire an agent/administrator
  • Documents to be changed to address CT issues?
What should be registered to obtain CT protection?

- Everything...all interests that can be registered should be registered.
- So analyze each deal, the documents and the interest that are created and determine if they fall within the purview of CTC.
What should be registered to obtain CT protection?

➤ Everything. Why?
➤ Does the registration of a sale/purchase in favor of Buyer protect Buyer against other claims such as the wrongful disposition of the aircraft by a Lessee, such as the sublease to SL?
➤ According to the Official Commentary, the answer is “no”
  • See Official Commentary Section 3.58
    • “in short, there is no cross-over protection,“
  • See Official Commentary, Section 5.23
    • “The two registrations have separate functions… Registrations of one such interest does not protect the registrant against the consequences of failure to register the other.”
Buyer purchases aircraft and registers the sale from Seller to buyer. Buyer leases the aircraft to Lessee but does not register the lease because the lessee says its all a waste of time and money.

- The Official Commentary at Section 3.58 provides that:
  - The registration of a sale protects Buyer from a subsequently registered sale by Seller and against the insolvency creditors of Seller but does not protect Buyer from a wrongful disposition by a Lessee or against insolvency creditors of those party
And the reverse scenario Buyer fails to register its purchase of the aircraft because the seller refuses to cooperate. Buyer leases the aircraft to a lessee and does register the lease on the IR.

- The Official Commentary at Section 3.58 provides that:
  - Buyer is protected from a wrongful disposition by Lessee and against insolvency creditors of the Lessee but it is not protected against a second purchaser of the original seller (or against the seller’s insolvency creditors)
Register all rights under the CTC, Example #3

Register all rights on the IR under Cape Town

- Example from the Official Commentary, Section 4.76, Illustration 4:
  
  - O, the owner of an airframe leases it to Lessee but fails to register the international interest. Lessee wrongfully sells the airframe to Buyer. Who wins?
    - Since Lessee, although only a lessee, has a power to dispose of the aircraft for purposes of the Convention, Buyer acquires an overriding title displacing that of O. See Article 29(4)(b)
    - There may be some exceptions to this but be wise and register…
Perhaps the Commentary is incorrect on this issue?

Article XIV provides that

- “A buyer of an aircraft object under a registered sale acquires its interest in that object free from an interest subsequently registered and from an unregistered interest…”
- There is nothing in this language that limits the “interest” that is protected (i.e., there is no requirement that the protection is shields actions by a dishonest seller but does not extend to actions by a dishonest lessee.
- If there is a conflict between the Convention and the Protocol, the Protocol prevails, so at least you have an argument
- But no one wants to be the test case, so register all the interests that are available under the Convention
Dealing with Resistance to Cape Town
Just Register!
Registration Issues

The analysis needs to be deliberate and thoughtful… perhaps conservative because

- We are working without a net –
  - New, untested law
  - The IR Computer system (any computer system) is unforgiving
    - Establish systems for quality control
  - Very little guidance
    - No case law and unlikely any time soon
    - Official Commentary
    - Revised Official Commentary
    - AWG-LAP Papers
Title Insurance for Aircraft Deals?

- Brief introduction
- When a warranty is meaningless and an indemnification is worthless, you want title insurance
- When the FAA records can’t be cleared, you want title insurance
- When things go horribly wrong, you wish you had title insurance
Title Insurance

Introduction

• Policy Re-written to cover
  • essentially all claims that pertain to title of aircraft
  • Liens on aircraft and engines,
  • known or unknown,
  • of record at the FAA or the International Registry
  • (read the policy, certain exceptions!)
Title Insurance

Federal and State Tax Liens

• Policy covers
  • $250,000 in federal tax claims
  • $25,000 in state tax claims

• Endorsement for full coverage available on a state by state basis for state tax liens

• Nationwide basis for federal tax liens

• Reasonable, recommended
Title Insurance

- Two Sources
  - First American
  - Fidelity National

- Know your Agent
  - There are only a handful
    - Global Aviation (Polk, Van Laanen and McCreary)
    - Aircraft Title Insurance (Cheek)
    - Federal Aviation Title (Cheek)
    - Aero Records Title
    - Clay Healey (AIC)
    - Eagle Aviation (DFPHJ)
Warranties are not always what they appear to be --

- When a warranty is meaningless and an indemnification is worthless, you want title insurance
Warranties and Title Insurance

- Warranties are not what they appear –
  - If the seller is an SPC or has few assets
  - If the seller is a Trustee or Trust
  - If the seller is wanted in seven states
  - If the seller is a repossessing lender
  - If you are the lender you are not getting any warranty
  - In these cases you are taking the risk
    - Self insuring
Title Insurance

Comes to the rescue when the FAA or IR records cannot be cleared

• Seller or lender require clean FAA or IR records that cannot be cleared
• Title Insurance policy can cover that risk and allow parties to close.
When things go horribly wrong, you wish you had title insurance

⇒ Forged lien releases, a significant threat to lenders
  • Textron case in Florida
  • USA vs. Pompano Helicopters, Inc., et al
When things go horribly wrong, you wish you had title insurance

- Imports – the notice of deregistration is not a guarantee that the aircraft is free and clear
  - Does not cover engines at all
  - May not be a Geneva country (e.g., Canada)
  - Even if a Geneva country, there may be other liens, e.g., on the IR, mechanics liens or tax liens
  - Forged Notices of Deregistration
    - More common then you think
    - Many disputes and several lawsuits filed over forged notices of deregistration
When things go horribly wrong, you wish you had title insurance

➔ The phone call you don’t want
  • Covered claim
  • No insurance, no coverage
Ending (finally)

➤ Thank You
➤ Questions?

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