

Navigating aircraft security in Québec

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The division of powers between federal and provincial jurisdictions in Canada empowers the provinces to exercise their legislative authority over property matters within their respective territories. Consequently, provinces have the autonomy to establish the rules and procedures governing the creation, registration and enforcement of security interests, known as hypothecs in the civil law regime of the province of Québec^[1]. However, certain assets such as intellectual property^[2], ships and vessels^[3] and aircraft^[4], among others, are subject to federal legislative authority. While provinces maintain control over many aspects of property law relating to such assets, the legal framework regulating these assets extends beyond provincial borders.

Lenders seeking to finance and obtain security on aircraft assets owned by debtors having their domicile (i.e., chief executive office) located in Québec may encounter challenges navigating the intricate regulatory landscape governing security interests on such assets, especially considering the civil law regime in the province of Québec, which might be unfamiliar to some lenders. In light of these complexities, we provide an overview of key points within this legal framework that lenders engaged, or interested to be involved in aircraft financing, should understand.

Québec requirements

Since Canada has not ratified the *Convention on the International Recognition of Rights in Aircraft* that was signed in Geneva on June 19, 1948^[5], which provides that contracting states undertake to recognize rights of property and security interests in aircraft if such rights are recorded in a public record of the contracting state in which the aircraft is registered^[6], registration (or publication in Québec) of a security interest or a hypothec on an aircraft in Canada needs to be made both at the public registry applicable in the applicable province^[7] and at the International Registry. This is required to create and register an international security interest (further discussed in the following section of this article).

In the province of Québec, according to the conflict of laws provisions set forth in the *Civil Code of Québec* (the CCQ), the validity of a security charged on a corporeal (*tangible*) movable (*personal*) asset that is ordinarily used in more than one jurisdiction is governed by the law of

the jurisdiction in which the grantor is domiciled at the time of creation of the security^[8]. Aircraft assets fall under this category, given their inherent characteristics, and lenders financing an aircraft owned by a debtor domiciled in the province of Québec should seek to obtain a hypothec on the aircraft. The publication (equivalent term for “registration” in Québec) of such hypothec will need to be made in Québec at the *Register of personal movable and real rights* (the RPMRR) to render same opposable against third parties.

A hypothec must provide a sufficient description of the aircraft, which in practice includes, for each of the airframe and the engine(s), the manufacturer name, the manufacture date, the model and the manufacturer serial number. Furthermore, unlike security agreements in common law provinces, a hypothec must indicate an amount in Canadian dollars for which it is granted^[9], on pain of absolute nullity. It is also important to note that the description of the property charged under the hypothec needs to be drawn up in French as applications for registrations at the RPMRR are required to be exclusively in French since September 1, 2022^[10]. In addition, if the hypothec is granted in favour of a representative of one or more creditors of the secured obligations, such representative will need to be appointed as hypothecary representative (within the meaning of Article 2692 of the CCQ) of such creditor(s) and the hypothec will have to be created under a deed of hypothec to be executed before a notary.

Cape Town Convention and international security interests

The *Cape Town Convention* (the CTC), officially known as the *Convention on International Interests in Mobile Equipment*, along with the *Protocol to the Convention on Matters specific to Aircraft Equipment* (the Protocol) was destined to standardize and universalize the registration of international interests in aircraft equipment. To achieve its purpose, the CTC established a framework for the creation, registration, and enforcement of security interests in such assets, and created the International Register, a centralized database where international interests, such as security agreements, title reservation agreements, or leasing agreements, could be recorded and accessed by relevant parties.

As of April 1, 2013, these international instruments came into effect in Canada, hence introducing international registration requirements for Canadian security transactions involving aircraft objects^[11].

On a preliminary basis, for the purposes of the CTC, “aircraft objects” are comprised of airframes, aircraft engines and helicopters^[12]. In that respect, we would like to highlight that the International Registry treats airframes and engines as separate entities, meaning a registration on each component is required when a transaction involves both an airframe and engines^[13].

The applicability of the CTC to a specific transaction, and, as a corollary, the requirement to register at the International Register to obtain priority, depends on the location of the debtor at the time of the closing of such transaction^[14]. The CTC applies when the debtor is situated in a contracting state, which means when it (a) is incorporated or formed in a contracting state, (b) has its registered office or statutory seat in a contracting state, (c) has its centre of administration in a contracting state or (d) has its principal place of business or its habitual residence^[15]. The CTC also applies when an airframe, or a helicopter is registered in a contracting state^[16].

To register an interest in an aircraft object, the manufacturer’s name, the model designation,

and the manufacturer's serial number of the aircraft are sufficient^[17].

On a related note, registration of these interests can be directed either directly to the International Registry or through a designated national entry point. In fact, pursuant to article 18(5) of the CTC, contracting states have the option to designate an entity or entities within its territory as the entry point for transmitting the required information for registration of an international interest to the International Registry. Consequently, in some cases, registration may need to be directed to the national entry point rather than directly to the International Registry. This is the case notably in the United States of America, where registrations of international interests in aircraft objects must be made with the Federal Aviation Administration. It is important to note that the specific registration requirements and procedures may vary depending on the jurisdiction and the applicable laws and regulations. Canada currently does not have such designated entry point, meaning that registrations are to be effected directly with the International Registry.

Now, in terms of priority of competing interests, pursuant to Section 19(4) and Section 29 of the CTC, the determination of priority in relation to contracts providing for an international interest or the creation of an interest is not based on the date of execution or creation, but rather on the date on which a registration relating to it was made. As a result, registrations made for transactions that have not yet come into existence can take priority over subsequently registered executed agreements.

IDERAs

When dealing with hypothecs (or security agreements) over aircraft, lenders will often require Irrevocable De-Registration and Export Request Authorizations (IDERAs). An IDERA is a voluntary measure issued by the debtor in favour of a designated creditor which grants the latter the authority to request the deregistration from the national registry authority of the contracting state in which the aircraft is registered and the transfer of such aircraft^[18]. This document is the equivalent of a power of attorney that is granted by a borrower to a lender in loan agreements and/or related documents, empowering the lender to perform certain actions on behalf of the borrower upon the occurrence of an event of default. In Canada, IDERAs are lodged with Transport Canada (Civil Aviation Services) (TCA) in the form specified in the Protocol^[19]. IDERAs provide creditors with a more efficient and streamlined process for deregistering aircraft compared to other remedies available, such as resorting to the courts, and permit creditors to receive prompt and cooperative assistance from the TCA and other administrative authorities in Canada^[20]. Furthermore, a lender financing an aircraft in Canada should request, as a condition precedent to the disbursement of the advances, a copy of each IDERA stamped and acknowledged by TCA since such stamp evidences registration of the IDERA within the registry.

Conclusion

This publication highlights some of the main requirements that must be met when it comes to dealing with taking security over aircraft in the province of Québec. We invite you to contact Mikulas Arendas, Étienne Massicotte and Samuel Julien should you have any questions, or to discuss the legal issues outlined in this publication. This publication provides general information only and does not constitute legal or other professional advice or an opinion of Osler, Hoskin & Harcourt LLP or any member of the firm on the points of law discussed herein.

[1] The main legal framework for hypothecs in Québec is mainly addressed in Book VI of the *Civil Code of Québec*.

[2] See for example the following federal laws: the *Patent Act*, the *Trademarks Act*, the *Copyright Act* and the *Industrial Design Act*, which are administered by the Canadian Intellectual Property Office.

[3] *Canada Shipping Act*, 2001.

[4] See for example the following federal laws: the *Canada Transport Act*, the *Aeronautics Act* and the *Canadian Aviation Regulations*.

[5] See online: <

<https://treaties.un.org/doc/Publication/UNTS/Volume%20310/volume-310-I-4492-English.pdf>>.

[6] There is no national registry to register security interest on aircraft assets in Canada. The Canadian Civil Aircraft Register merely records the owner (i.e., the person(s) or entities which have "custody and control") of aircraft registered thereunder.

[7] In common law provinces, the registry created under the applicable *Personal Property Security Act*, and in Québec, the Register of personal movable and real rights (also known as the RPMRR) in accordance with the CCQ. See Donal Hanley (2015) *The relationship between the Geneva and Cape Town conventions*, Cape Town Convention Journal, 4:1, 103-113, DOI: 10.1080/2049761X.2015.1102010.

[8] Article 3105 of the CCQ.

[9] Article 2689 of the CCQ.

[10] Bill 96 (*An Act respecting French, the official and common language of Québec*), Section 125.

[11] As of November 1, 2023, there were 87 contracting states to the CTC.

[12] Please refer to the definitions of "airframes", "helicopters" and "aircraft engines" in the CTC to learn more about the specific criteria.

[13] When it comes to helicopters, the classification of the engine depends on its attachment to the helicopter. A helicopter engine is considered an "aircraft engine" when it is not attached to a helicopter. However, once a helicopter engine is installed on a helicopter, it is no longer considered to be an "aircraft object" and instead becomes a component or accessory of the helicopter.

[14] *Convention on International Interests in Mobile Equipment*, November 16, 2001, article 3, online: <www.unidroit.org/instruments/security-interests/cape-town-convention/>.

[15] *Id.*, Article 4.

[16] *Protocol to the Convention on Matters specific to Aircraft Equipment*, 16 November 2001, Article IV, online : www.unidroit.org/instruments/security-interests/aircraft-protocol/ [the

"Protocol"].

[17] Article 7c) of the CTC; Article VII of the Protocol.

[18] Article X(6) of the Protocol.

[19] Article XIII of the Protocol.

[20] Article X(6) of the Protocol: National registry authority and administrative authorities are obligated to "expeditiously cooperate" for the purpose of deregistration. The *Protocol* provides that this cooperation must take place within a timeframe of "within 5 working days."