The legal status of "aircraft component parts"---Dutch air law under debate

Aircraft component parts are typically leased. What happens if these parts are attached onto a Dutch registered aircraft which is owned either by the lessee or by another party?

Characteristic to aircraft equipment financing is its 'international resonance': whereas aircraft equipment enjoys a specific property status under international air law, domestic laws may nonetheless undesirably interfere. Consequently, the property status of aircraft equipment (*i.e.* rights of ownership, priority of security rights etc.) within the airline's estate is to some extent somewhat questionable. In this perspective, both the doctrine of accession and the different choice of law venues under international air law deserve attention. In this respect, a specific concern is whether the underlying legal documents shall be (equally) enforceable in all relevant jurisdictions.

This article explores whether, under Dutch law, contractual arrangements or covenants with respect to title to particular interchangeable aircraft component parts are a dead letter under Dutch law.

1. Introduction

It may be to no one's surprise that for airlines, aircraft equipment entails a capital investment of substantial size. Presently, airlines are faced with continuously high safety standards, increasing technical demands, fluctuating travel demand and performance levels. In their struggle to stay in the sky, many airlines look for pro-active tools and fitting strategies. In this view, access to expensive aircraft parts, which are easily

interchangeable between aircraft (*i.e.* without causing any damage) making possible the necessary revision and repairs or use onto other aircraft, may be key. Consequently, world wide, a significant market of substantial size has developed in order to serve the airline's demand for interchangeable aircraft parts.

Dutch law provides for a separate legal regime with respect to registered aircraft (book 8 Dutch Civil Code (hereinafter "**DCC**") securing the enforceability of the rights of interested parties. The enforceability of separate rights with respect to aircraft component parts may be interfered with under Dutch law, however. Obviously, this corresponds with a high degree of uncertainty and potential commercial risks for interested parties with respect to these aircraft component parts. Presently, the Dutch legal regime in respect to aircraft component parts is under debate in the Netherlands.

2. Debate

Dutch law may be interpreted as though, by mandatory law, the legal title to an aircraft includes all that is (intended to be) incorporated in or onto the aircraft. This for instance implies that under Dutch law a financier of any particular aircraft component part may loose its title to the component part to the aircraft owner by the mere fact that the part looses its separate legal status from the aircraft upon attachment of the equipment to the aircraft. Moreover, arguably, contractual lien rights (*i.e.* right of retention) with respect to aircraft component parts (e.g. under service agreements) may no longer be enforceable with priority pursuant to applicability of article 8:1316 DCC. [1]

[1] According to this provision, no right of retention may be exercised with respect to a 'registered aircraft'. Would the 'registered aircraft' include the aircraft parts, no right of retention may be exercised with respect to these parts either. The degree to which this provision applies in respect to aircraft parts is also under debate. ((F.A. van Zoest, Retentierecht op luchtvaartuigen in Boek 8 BW: een fout van de wetgever, TVR nr. 6, nov. 2002 blz. 183-192)F. van Zoest, TVR, 2002)

In this view, on the one hand the aircraft financing and service industry is advocating that, notwithstanding the special regime with respect to registered aircraft, Dutch law must also allow for a separate legal regime with respect to aircraft component parts. This is to cover the many risks, which are attendant to aircraft equipment financing. These risks are prompted by many different factors, including the fact that transportation (aircraft) equipment always represents a high-cost investment, whereas the collateral (aircraft equipment) may nevertheless be subject to rapid deterioration in value if not regularly used and maintained (e.g. lien right). Aircraft equipment generally has a very long economic life, causing in practice for a financing construction with similarly long financing terms preventing anticipation upon a changing financial climate (e.g. insolvency or suspension of payment). In addition, aircraft equipment is highly mobile, which raises the risk of the financier that it may be difficult to locate and recover its collateral (e.g. in the event of default of the airline). [2] Taking all of these risks into account, any financier would benefit to know that its (security) interest or claim to the aircraft equipment exists under any circumstance, including bankruptcy (reorganization). More importantly, the financier would like to rely that its claim to the particular component part remains enforceable, despite attachment thereof onto the aircraft (which may or may not belong to its financing counter party).

On the other hand, (Dutch) airlines argue that a separate legal regime is not attractive. Namely, would a separate legal regime be applicable to the (indispensable) equipment, such may at any time cause for an impediment to continued operations of the aircraft. Especially in the case of engine pooling between different airlines, it is not in the interest of the airlines that equipment can be easily removed from the aircraft in case of (possible)

[2] American Bankruptcy Law Journal, Winter, 1987 , 61 Am. Bankr. L.J. 1

contractual claims of third parties. The (indispensable) equipment may then be removed from the aircraft causing the aircraft being unfit for use.

Taking into account these opposing interests (financing industry and airlines), explicit contractual arrangements in respect to ownership and title to the aircraft component parts are generally made as between parties. In the Netherlands, in notary practice, separate registrations are made with the National Cadastral Register in regard to aircraft component parts. However, alarmingly, the security obtained, is highly elusive. This is because of the fact that under Dutch law, the legal definition of "aircraft" seems comprehensive, *i.e.* inclusive of all component parts by applicability of the theory of accession: neither separate contractual arrangements nor any separate (notary) registration shall then offer the fincancier the intended relief to a financier in case of default of its lessee or insolvency of the aircraft owner.

3. Aircraft Equipment Finance

Obviously, in regard to aircraft (equipment) a substantial financing practice exists in which a multiplicity of different innovative financing structures that may be chosen from by the airline. Therefore, without suggesting to provide a comprehensive analysis, in general, aircraft financing may for example be structured as a so-called "asset-based finance", in which the so-called 'revenue generating value' of the aircraft that is financed will be the primary source of repayment. [3] An airline may further finance its acquisition of aircraft equipment by either using its own funds or by borrowing funds from a bank or lender, or also by leasing the aircraft (equipment) for a fixed term. In the latter, when a lease is used, a lessor (or the lessor's lenders) in effect finances the acquisition.

[3] D. Bechara, in The Freeman, a publication of the Foundation for Economic Education, Inc., September 1986, Vol. 36, No. 9.

Aircraft equipment leases typically are innovative and complex (tax-driven). A variety of different leases exists in regard to aircraft (equipment). A distinction can for instance be made in regard to the object of the lease, which may either be:

1. "new aircraft", which means equipment that is newly constructed,
2. "aircraft new to the airline", which concerns equipment that is acquired by the airline for its own use for the first time;
3. "old aircraft" , which is equipment that is up for lease renewals, sale and leaseback or free as collateral for financing;
4. a combination of "old and new aircraft", which is equipment that contains both new and used components. [4]

Given the risks in regard to aircraft equipment financing and taking into account the attendant complexity, diversity and often magnitude of aircraft equipment financing transactions, financiers seek – indeed, mostly demand—maximum protection for their investment. More in particular, they seek protection from the worst-case scenario of an airline bankruptcy.

4. The legal status of registered aircraft under Dutch law

As can be derived from the Dutch Explanatory Statement in regard to the Geneva Convention on the Recognition of Rights in Aircraft of June 19, 1948 ("**Geneva Convention**"), the special legal status of registered aircraft in the

[4] Adapted from: 64 Am. Bankr. L.J. 109, Spring 1990, J.W. Giddens Sandor E. Schick, 'section 1110 of the bankruptcy code; time for refueling?'

Netherlands is, to the greatest extent possible, in conformity with the regime as adopted under the Geneva Convention. [5]

Accordingly, under Dutch air law only a limited range of property rights are enforceable upon a registered aircraft (*i.e.* enforced with a right of priority against any other third party). These are the rights that are explicitly recognized under Article 8:1305 DCC: the right of ownership, mortgage and lastly the rights as provided for under Article 8:1308 DCC (right to use the aircraft under a lease agreement for a period of minimally 6 months (e.g. operational lease) and Article 8:1309 DCC (purchase right of the aircraft " holder" (*i.e.* operator) upon fulfilment of certain conditions *i.e.* financial lease).

5. The legal status of Aircraft Component Parts under Dutch law

Applicability of the Dutch regime in regard to property rights to aircraft equipment is directly linked to the legal concept and definition of 'registered aircraft' (as codified in Article 8:3a DCC). In this view, the main question is whether or not in this regime room is left for a separate legal status of aircraft component parts.

As described, at present, an international market, which is of substantial size, exists with respect to aircraft equipment. This may include aircraft , but also aircraft engines, personal entertainment systems, passenger chairs, avionics and auxiliary ground power units. Among the general

[5] Supporting arguments with respect to the position that book 8 of the Dutch Civil Code is of exclusive, mandatory law are that the applicability thereof is made dependent upon the act of registry: '*…The ratio underlying the Convention firstly is, to offer wide protection to those with property interests to an object that by its very nature is highly mobile and in contact with many different jurisdictions. This interest, however, is not yet present with respect to an aircraft in construction; in this case, the normal rules of property law prevail as suffice. ….*'.[Dutch Explanatory Commentary with respect to article I WtbL] '*Op een luchtvaartuig zijn alle zakenrechtelijke voorschriften met betrekking tot roerende goederen van toepassing, voor zover geen afwijkende bepalingen in de wet voorkomen – dit is afgezien van de artikel 770h-k Rv niet het geval*.l [MvT WtbL].

characteristics of aircraft equipment are that it is capital expensive, interchangeable and highly mobile. [6] Also, aircraft equipment generally requires continuous repair, overhaul, and maintenance services. Aircraft equipment generally is financed separately from the aircraft; special pooling and maintenance service agreements are increasingly entered into and in some jurisdictions aircraft equipment may even be registered separately. [7] [8] [9] In Dutch notary practice, aircraft component parts are typically separately registered. Importantly, as shall be described in more detail below, the obtained security of such separate registration is elusive, however.

6. Dutch law: determining factors

6.1. Introduction

Preliminary important is what legal regime is applicable with respect to the question whether equipment is "part of" the aircraft. This is to be answered by applicable international private law. According to the Dutch Explanatory Commentary to Article II of the Geneva Convention the effects of recorded rights to aircraft with regard to third parties should be evaluated against the *lex registrationis*. Any contractual choice of law clause shall therefore remain without effect. However, applicability of the *lex rei sitae*, is also advocated. [10] Moreover, surprisingly, decisive may also be, the

[6] For purpose of this article, aircraft equipment for instance includes: avionics, ground power units, personal entertainment systems, chairs and engines.
[7] For instance in the United States of America
[8] Please note that, while the choice of law in a written contract between the parties will be treated by New York courts as a major factor in determining the situs of the transaction, another valid argument could be that the situs is the place of incorporation of the engine into the aircraft, *i.e.* England. If such an argument is successful, the laws of England will apply and thus the US theory of accession will be deemed inapplicable.
[9] 1 NY Jur Accession, Confusion and Improvements Sec.1 (Lawyer's Co-Operative Publishing Company 2000).
[10] Firstly, because of the fact that Article I indeed provides that the Geneva Convention is to be interpreted narrowly: only with respect to those aspects of property law that are explicitly provided for under Article I, which excludes lien rights for instance. Secondly, Article 2 sub b of the Dutch Act of Conflicts of Law Property (Wet Conflictenrecht Goederenrecht) makes

law of the country in which the particular aircraft equipment was in fact attached to the aircraft. This latter choice of law criterion was recently welcomely availed of by the Dutch Appellate court of 's-Hertogenbosch in the Netherlands. In this case, the Court held that, since the particular aircraft equipment was (already) attached in the UK, the equipment retained its own separate status from that of the aircraft. According to UK law, no accession shall take place. [11]

For purpose of this article, it is assumed that Dutch law is applicable.

6.2. Definition of "Registered Aircraft"

Pursuant to Article 8:3a DCC para. 2 the casco, engines, aircraft propellers, radio sets as well as any other objects that are designated for use in or on the aircraft, regardless of the fact that these are attached in, to or on the aircraft, or whether or not these are temporarily detached therefrom, are considered as part of the aircraft. [12] [13] In principle therefore, under Dutch law no separate rights with respect to aircraft component parts are recognized. This is because of this (seemingly) prevailing all encompassing

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applicable the *lex rei sitae* with respect to the question of what qualifies under 'component part'. However, this Dutch Act is not in force yet. In support of applicability of the lex registrationis with respect to the theory of accession, reference can also be made to Article 2 of "*Wet bepalingen van internationaal privaatrecht met betrekking tot zeerecht, binnenvaartrecht en luchtrecht*".

[11] JOR 2002/184, Appellate Court of 's-Hertogenbosch

[12] This Article is also part of Article 8:1316 DCC by reference (accordingly, the possibility of exercising a retention right with respect to aircraft component parts is also under debate).

[13] . Explanatory Commentary to Article 8:3a DCC: "..Under the second paragraph, the concept of 'registered aircraft' as provided for under Article XVI Geneva Convention is broadened; since the definition is particular as to what is part of the aircraft, Article 3:4 DCC (theory of accession) shall hardly play a role; nonetheless, in principle this provision shall remain applicalbe next to Article 8:3a DCC.; The third paragraph makes possible that the concept of 'registered aircraft' may be narrowed or broadened by Act of law.." (*'…In het tweede lid wordt uitbreiding gegeven aan het begrip luchtvaartuig…; …ingegeven door artikel XVI van Verdrag van Geneve* [hierna te noemen: VVG]*; door de nauwkeurige opsomming van wat tot het vliegtuig behoort, zal artikel 4 van boek 3 voor luchtvaartuigen weinig betekenis overhouden, al blijft het in beginsel naast de onderhavige bijzondere regel van toepassing. In het derde lid blijft de mogelijkheid geopend om het begrip 'luchtvaartuig' uit te breiden of in te perken bij AMvB.)*

definition of "registered aircraft", which includes everything that is intended to be attached onto the aircraft.

Consequently, despite separate contractual arrangements, aircraft component parts are subject to the identical rules which are applicable to the (registered) aircraft. The theory of accession seems to prevail. Any legal title obtained or secured with respect to an aircraft component part shall thus not be enforceable against the lessee or aircraft owner. Also, arguably, pursuant to Article 8:1316 DCC, contractually agreed lien rights with respect to aircraft component parts, which typically are adopted in maintenance agreements, may not be exercised with priority over the property rights (*i.e.* the limited range of recognized and enforceable property rights as provided for under Article 8:1305 DCC, 8:1308 DCC and 8:1309 DCC).

6.3. By Analogy with the Law of the Sea?

Interestingly, however, Dutch law, does allow for a separate legal regime applicable to a specific category of equipment with respect to a registered ship, which is similarly recognized as a mobile capital object: Article 8:1 DCC defines the legal concept of "*ship*". Accordingly, a distinction is made between *scheepstoebehoren* (parts that are in service of the ship) and *scheepsbestanddelen* (parts that are (deemed to be) attached to the ship). Importantly, contrary to *scheepsbestanddelen*, with respect to *scheepstoebehoren*, accession may be contractually excluded. This option is also widely availed of in commercial practice. [14] [15]

[14] (Ars Aequi Privaatrecht Natrekking, pag. 26.) Supreme Court of the Netherlands 15 November 1991, NJ 1993/316
"*..When objects are construed in (complete) correspondence, this highly infers that the equipment and the building are legally to be considered as one object……such can be equally inferred when –in light of suitabilty- the object should be considered as incomplete without such object…..*"

Whereas in this view, the ship engine should be subject to the same legal regime as the ship, Dutch parliamentary history suggests, however, that a ship engine may under circumstances be considered as separate part from ship for reason that it is not attached thereto and furthermore is highly interchangeable.[16] [17]

Since the legal status of aircraft is defined separately from a ship under Article 8:3a DCC, [18] analogy with the law of the sea does not seem to provide a tenable argument in favour of a separate legal regime with respect to any specific category of aircraft equipment.

6.4. The forgotten context

Whereas the wording of Article 8:3a DCC seems conclusive that all component parts are equally part of the registered aircraft, it is interesting to refer to its own proper historical and teleological context.

a. The origins: Geneva Convention: distinction between 'aircraft' and 'spare part'

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[15] Communis opinion and parties intent ("Verkeersopvatting en partijbedoeling ten aanzien van natrekking"); If Dutch law is applicable, the most central criterion with respect to the theory of accession is the prevailing *communis opinio*…..(verkeersopvatting); parties' intent is of no imporatnce in this perspective. [Groene Kluwer Vermogensrecht I]

[16] December 20, 1994, KG 1996, 61

[17] Explanatory Commentary page 1221 with respect to Article 8:1 para 3 DCC

[18] Text and Parliamentary Commentary to Article *8:3a DCC.* Nevertheless, using this analogy may be logical. It is discussed in Parliamentary History that with respect to Article 8:1 lid 3 DCC (legal concept of ship)'*…[a] de aanhangmotor die dikwijls dan bij het ene en dan bij het andere schip wordt gebruikt, behoort geen scheepsbestanddeel te zijn*…[inwisselbaarheid/uitwisselbaarheid]; [b] *Voorrechten drukken slechts op scheepstoebehoren die uit hoofde van bestemming blijvend met het schip is verbonden en toebehoren aan de eigenaar van het schip…' [c] Mogelijk is ook dat belanghebbenden bij schip en scheepstoebehoren overeen kunnen komen dat het scheepstoebehoren niet onder het begrip 'schip' zal vallen;* These provisions imply that it is possible to contractually exclude accession by simple phrasing in the contract: 'rights to objects that, by original designation and use, are permanently part of the ship, shall belong to the shipowner…' [page 29 Parliamentary History book 8 DCC].

Under the Geneva Convention, 'aircraft' includes the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.

Moreover, the Geneva Convention recognizes the possibility of a separate legal regime with respect to spare parts. In that case, specific strict requirements are to be met in order for a spare part to loose its -from the aircraft- separate legal status. In any case, mere attachment or designation to be used onto an aircraft is considered as insufficient. [19] [20]

In order to loose its separate status from the aircraft specific criteria should be met:

- The recorded right (in conformity with Article I) in an aircraft should be extended to spare parts (by simultaneous registry); and
- The spare part should be stored in a specified place; and
- The spare part should remain in the place specified; and
- A public notice of such recorded right and the holder thereof should be exhibited at the specified place.

Taking the Geneva Convention as a point of departure, the definition of registered aircraft under 'old' Article 1 of the Dutch Aircraft Registration Act (*Wet teboekstelling luchtvaartuigen*) also includes "*parts of the aircraft that are designated as to be used in or on to the aircraft, regardless of whether they are attached thereto or temporarily separated therefrom*."[21] Accordingly, it is held irrelevant whether or not the object is a part of the aircraft permanently or becomes part thereof by incidental mechanical attachment thereto.

[19] Introduction to Air Law, I.H.Ph. Diederiks-Verschoor, page 204
[20] Introduction to Air Law, I.H.Ph. Diederiks-Verschoor, page 204 and following
[21] [The Chicago Convention refers to the concept of 'articles'. However, the translation of this concept into a proper Dutch legal concept is considered as problematic in Dutch legal literature. …]

The conclusive criterion chosen is whether or not the object is intended or designated to be used in or onto the aircraft.[22] Furthermore, in principle, any object becomes component part of the aircraft upon 'mere' physical attachment thereto. Contrary to many other jurisdictions, Dutch law does not provide for the possibility of a separate legal regime in respect of spare parts.

b. Supplementary applicability of Articles 3:4 and 5:14 DCC

Thus, taking the law literally, the concept of aircraft is comprehensively defined under Article 8:3a DC. Accordingly, any object that is designated for use onto an aircraft is deemed part thereof and thus follows the legal regime applicable thereto.

However, the Dutch Explanatory Commentary with respect to Article 8:3a DCC, which is the old Article 1 of the Dutch Aircraft Registration Act (*Wet teboekstelling luchtvaartuigen*) ("**Wtb**"), retains its significance. In this context, it can be argued that under Dutch law the legislator did *not* intend Article 8:3a DCC to be comprehensive. Simultaneous reference was namely made to supplementary application of Articles 3:4 and 5:14 DCC. It was held important that room would be left for new development and yet unforeseeable (commercial) practices that would be otherwise obstructed by the mere fact of an object being deemed as part of the greater object of aircraft.

Accordingly, perhaps similar to the law of the sea, the Dutch legislator did intend to create an opening in respect to air law, whereby (title) arrangements with respect to component parts remain enforceable against

[22] The Explanatory Comment with respect to Wtb provides that parts, which may belong to third parties, shall nevertheless be part of the aircraft as soon as the part is "destined to be". ("Eventueel aan derden toebehorende delen maken dus desondanks deel uit van het luchtvaartuig, zodra zij tot gebruik in het toestel zijn bestemd…").

the aircraft owner and lessee if in correspondence with a generally prevailing opinion.[23] [24] Peculiarly, this strong argument is overlooked however.

This seems strange since indeed throughout the years a world wide commercial industry in regard to aircraft component parts has developed. Arguable this should open the door to additional applicability of Articles 5:14 and 3:4 DCC. Accordingly, accession (*natrekking*) of the aircraft component part to the registered aircraft occurs upon the fulfillment of either the following criteria: Firstly, accession occurs if the object is part of the aircraft according to generally prevailing common opinion (*verkeersopvatting*) (paragraph 1) or secondly, if the object is attached to the extent that it may not be separated without causing substantial damage (paragraph 2). [25] As shall be illustrated this corresponds with US law and other jurisdictions.

The main question that remains is how should a title reservation agreement be interpreted against this background?

At present under Dutch law, would parties conclude a 'Title Reservation Agreement', according to which title to a designated part of equipment aircraft (generally an engine) shall be reserved regardless of whether the engine is used on an aircraft of the lessee or another third party such an

[23] "Verkeersopvatting"; parties' intent is of no importance in this perspective. [Groene Kluwer Vermogensrecht I] WPNR 6393; Reactie B. Crans "Air Holland", WPNR 6393,pag. 179; B. Crans argues that under the Geneva Convention, Article XVI has a 'civil law' basis. Generally, under civil law, accession is quickly assumed

[24] Parlementary History in regard to Article 8:3a DCC suggests that [by analogy with law of the sea] the legal concept of is comprehensive, in order to prevent that the development of new, yet unforeseen constructions will be hindered by the fact that the object should or should not be considered to qualify as aircraft.

[25] As described, presently, aircraft equipment generally is a huge capital investment requiring it to be highly interchangeable. In general, the equipment may be easily detached (*i.e.* without causing any damage) for revision, repairs or use onto another aircraft. In this view the latter criterion shall not be further discussed in this article.

agreement shall not be enforceable under Dutch law. No contractual designation can namely interfere with the theory of accession.[26]

However, would the additional applicability of Articles 5:14 DCC and 3:4 DCC be accepted and taken into account, such a title reservation clause generally may be enforceable, provided that such a contractual reservation of title clause is in conformity with a generally prevailing practice or opinion. The existence thereof may be evidenced by the fact that a title reservation clause is general accepted in international commercial practice. Additionally, another supporting argument in regard to the existence of a generally prevailing opinion that component parts may be considered as separate from the aircraft, is the entry into force of the Capetown Convention and the Aircraft Protocol. [27]

c. Capetown Convention and Aircraft Protocol

With the adoption of the Capetown Convention, pursuant to Article 2 paragraph 2 jo. 3, Dutch law in any case shall have to recognize a separate regime with respect to airframes and aircraft engines. [28] In its commentary

[26] WPNR 6393; Reactie B. Crans "Air Holland", pag. 179; It is argued that under the Geneva Convention, Article XVI has a 'civil law' basis. Generally, under civil law, accession is quickly assumed. In general, Articles 5:14 and 3:4 DCC are of a mandatory nature. Accordingly, component aircraft parts that become attached to an aircraft, become part thereof and subsequently loose any separate legal status. Also, any reservation of title as stipulated by the owner of the specific part shall be lost through accession since in principle no contractual designation can easily interfere with the theory of accession. Except for the situation that a contractual reservation of title clause is in conformity with a generally prevailing practice or opinion, which is not easily accepted, such a clause may thus generally not be enforceable. This may have serious implications for international finance structures: In practice, a US lessor of aircraft component parts may be confronted with having the particular part attached to a Dutch registered aircraft. Accordingly, the Dutch aircraft owner simultaneously would become owner thereof. Any separate rights (of recourse), as provided for under a Title Reservation Agreement or Equipment Agreement, in respect to the equipment shall be lost.

[27] Capetown Convention on International Interests in Mobile Equipment (http://www.unidroit.org/english/conventions/mobile-equipment.pdf) and the 2001 Capetown Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (http://www.unidroit.org/english/conventions/aircraftprotocol.pdf).

[28] J. Hofland, (in his annotation to the mentioned 's-Hertogenbosch case in JOR 2002/184) refers to a practice of 'engine swap' or 'engine pooling'. He interestingly notes that (Dutch) legal practice takes note of the attendent risks and importantly refers to some (practical) solutions: '.if an aircraft engine requires replacement, a spare part from an engine pool shall be used accordingly. Contractual clauses aim to provide parties with security and try to minimize the risk of accession as good as possible: this

to the draft UNIDROIT Convention Mobile Equipment and Aircraft Protocol, the Dutch government remarkably, arguably in deviation of the established regime, explicitly recognized the possibility and attraction of having a separate legal regime with respect to aircraft engines:

"*….According to the regime of the Convention and the Protocol, the aircraft and its engines can be subject of separate international interests…If the engine lessor defaults under the loan agreement with the engine mortgagee, the engine mortgagee can, to the extent that the engine lessor so agreed, take possession of the engine and sell or lease the engine without leave of the court (Article 7, paragraph 1 of the Convention).' ' …Also, according to Article XIV para. 3 of the Aircraft Protocol, ownership of an aircraft engine shall not be effected by the installation on or removal from an aircraft. This Convention and Protocol shall be ratified by the European Union..' .* [29]

Whereas a separate legal regime may be recognized in respect to an aircraft engine under Dutch law, the uncertainty remains in respect to other capital aircraft component parts, however.

d. A separate legal regime with respect to aircraft component parts

Remarkably, Dutch law and the correlating applicability of the theory of accession is under heavy debate. Perhaps instigated by the fact that the international climate does recognize a separate status of aircraft components, Dutch courts get and remain confused. For example, kerosene

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may be done by adopting a so-called "ius tollendi" clause with the owner or by stipulating in the contract that the user or owner of the aircraft shall return the spare engine as soon as the repairs have taken place...also an unjust enrichment claim may offer some relief..."

[29] In its July 16, 2001 advice, the State Committee for International Private Law mentioned the legal consequences and took note of the (inter) national law aspects of the adoption of the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment and the Preliminary Draft Protocol on Matters Specific to Aircraft Equipment: "[translation:]…*Article XIV Protocol, para. 3 deserves attention: Ownership of an aircraft engine shall not pass by virtue of its installation on, or removal from, an airframe or an aircraft. This rule is in deviation of the now applicable Dutch theory of accession. In the New Statute on Conflicts of Law aspects of Property Law, this problem should be addressed under a new Article 1. The wording of this Article should be such that none of the conflicts of law rules shall interfere with the regime as adopted under the Convention and Protocol. ".*

may have its own separate legal status, thereby allowing for attachment thereof. [30] Also, the Court of 's-Hertogenbosch, would Dutch law have been applicable, recognized the possibility of a legal regime separate from the aircraft in respect to the aircraft engine. In this context, interestingly, reference was made to the existence of an internationally prevailing opinion and commercial practice, which was in this particular case evidenced by a letter drawn up by the KLM.

This confusion may either be a symptom of the fact that under specific circumstances Dutch law does allow for a from the aircraft separate status of aircraft component parts or it is an amend to the fact that Dutch law simply is not in sync with commercial practice and demands. One way or another, interested parties are left flying in a climate with unpredictable weather.

7. Comparative review of US law

In short, determining factors under US law with respect to the question whether or not a separate legal regime is enforceable with respect to aircraft parts include: firstly, whether or not the part is readily detachable from the aircraft; and secondly, parties' intent, which may be evidenced by the lease agreement. Also decisive may be the value of the principal part relative to that which is added to it; or whether the part added or the material supplied, can still be identified. [31] Another deciding factor may be whether or not detachment without damage to either the principal part or the attached part itself is possible. [32] US courts seem less likely to accept the theory of accession with respect to aircraft component parts if the part in question can be removed expediently and with little or no damage. In

[30] A.I.M. Mierlo, NbBW nr. 11, nov. 1996 blz. 110-112, Mierlo refers to (unpublished) case law in this respect.

[31] Burroughs v. Garrett, 67 NM 66, 352 P2d 644.

[32] Misel Tire Co. v. Mar-Bel Trading Co., 280 NYS 335 (1935); John Snyder, Inc. v. Aker, 236 NYS 28 (1929).

principle, as opposed to Dutch law, emphasis seems to be placed on the terms of the agreements and contracts involved in deciding whether or not a particular part should be deemed an integral part or not.[33] Accordingly, parties thereby obtain the desired security. A commercial climate with blue clear skies….

8. In conclusion [34]

At present, on an international level, airline's survival may arguably depend upon the existence of a distinct industry of substantial size in respect to aircraft equipment financing, pooling or maintenance. In this view, it is peculiarly alarming, that from literal reading of Article 8:3a DCC it may be inferred that under Dutch law no separate legal regime with respect to any specific category of aircraft equipment is provided for. This article explored that, under Dutch law, also the full historical legal background of Article 8:3a DCC should not be forgotten and be fully taken into account. Accordingly, by reference to the origins as provided by Geneva Convention and more importantly by accepting the supplementary application of Articles 3:4 and 5:14 DCC, it may be argued that the Dutch legislator did intend to create flexibility in order to meet new developments and changing demands of commercial practice in the airline industry.

The question that remains under Dutch law, however, is whether or not a contractual reservation of title or lien right with respect to aircraft parts is generally enforceable. The line of reasoning that could be followed in support of the argument of enforceability, is that according to an internationally prevailing opinion a separate status of aircraft component parts is possible. In this context, the Capetown Convention and Protocol

[33] 43 ALR 2d 813; the US case law referred to are with respect to motor vehicles/cars/automobiles.
[34] Contrary to Ms. Rank-Berenschot who argues that no reason exists for applicability of the general rule of Article 3:4 DCC next to Article 8:3a DCC (E.B. Rank-Berenschot, "Het luchtvaartuig als object van vermogensrecht", WPNR nr. 6198, 28 okt. 1995 pag. 691-695).

may be used as a significant source of reference. Interestingly, by adopting the Capetown Convention at least a separate status of aircraft engines seems now recognized under Dutch law. This amendment has not yet caused for any changes in the legal definition of 'registered aircraft'. With respect to other component parts parties are still left in the dark. The line of reasoning based on the historical and legal background of the definition of 'registered aircraft' is not a full proof argument but should nevertheless not be forgotten as a supporting argument for enforceability of a separate legal regime with respect to aircraft parts in the Netherlands. Recent case law shows that Dutch courts are willing to accept.

With the adoption of the Capetown Convention and Aircraft Protocol, a separate legal regime in respect to aircraft engines is now possible under Dutch law. Yet, in respect to other expensive aircraft equipment, the legal map of the Dutch air remains strikingly and unnecessarily clouded. In this regard, associated anticipation is called for. [35] For now, parties in a financing transaction, should ensure that the best legal methods are employed so that a lack of clarity is overcome and the contract is enforceable in the relevant jurisdictions, including the Netherlands. Preferably, this should include a perfected security interest or valid claim to the aircraft equipment in the event that the agreement, with respect to repayment, cannot be enforced through normal collection. In this view, in the Netherlands merely stipulating a contractual (lien) right to aircraft equipment or separate registration thereof in the Dutch National Cadastral Register by a notary, shall in any case not (yet) suffice. The negative consequences may, depending upon the specific circumstances of the case, be prevented by stipulating a '*ius tollendi*' or by agreeing with the lessee that the (spare) part shall be immediately/simultaneously returned/replaced

[35] Preferably, the legislator should act. Perhaps it is only a matter of time and the adoption of the Capetown Convention and the Aircraft Protocol will trigger such to happen.

after repair. Also, reference to the doctrine of unjustified enrichment may offer some protection.

Buckle up for your flight to the Netherlands…. !