

## **ENGINE LEASING IN ARGENTINA**

**JUAN MARTÍN AROCENA  
RATTAGAN MACCHIAVELLO AROCENA & PEÑA  
ROBIROSA**

**INTERNATIONAL BAR ASSOCIATION  
2<sup>ND</sup> LATIN AMERICAN  
AVIATION CONFERENCE  
SAO PAULO, BRAZIL**

## 1. Aircraft Leasing in Argentina

Given the cost of aircraft and their engines, especially those used for transportation in Argentina, the purchase of airplanes and engines by local carriers has always been financed in one way or another by the sellers or financial institutions.

When the bank or the seller are located in a common law jurisdiction, the usual structure for financing the sale of an engine or aircraft to an Argentine carrier would be a Lease with Purchase Option Agreement between the seller/lessor of the aircraft and the local operator or lessee, who will eventually exercise the purchase option and pay the purchase price. Since June 2000, a similar structure is provided by the Argentine law of Leasing, pursuant to which once the aircraft is delivered to the buyer, it will pay a regular fee until it becomes entitled or is able to pay the agreed purchase price.

There is, however, a pitfall to consider when the seller or lessor of the aircraft is a foreign company or individual. Pursuant to Argentine aeronautical law, aircrafts shall be owned and registered with the Federal Registry of Aircrafts (FRA) only by nationals, either local individuals or companies duly incorporated in Argentina. This of course became an obstacle for local carriers willing to lease an aircraft from some foreign party.

When this obstacle became apparent the Argentine Aeronautical Code (AC) was amended, allowing for the "**provisional registration** of aircrafts acquired under a conditional sales agreement, credit or **other agreements executed abroad**, pursuant to which the seller retains title to the aircraft until it is paid in full, or until the condition is finally fulfilled" (emphasis added), provided (i) the agreement conforms to the law of the country of origin (ii) the contract is entered into before the aircraft obtains Argentine registration, (iii) the purchaser qualifies to own an Argentina aircraft and (iv) the authorized maximum take-off weight exceeds 6 tons or the aircraft is by an airline to provide public transportation services.

Thus, when entering into a Lease with Purchase Option Agreement or Leasing agreement or "other agreements executed abroad" with a foreign party, the aircraft is "provisionally" registered before the FRA by the local carrier (eventual purchaser), who is considered by Argentine law to be provisional owner of said aircraft.

Notwithstanding this provisional registration by the lessee, the foreign seller/lessor's rights to the aircraft are still well protected. The FRA will take note of the seller/lessor as being the party holding title to the aircraft until the purchase option is executed by the local carrier, and this would be as good as registering the aircraft with its name (something that as we have seen is not allowed by Argentine law).

## **2. Engines Leasing in Argentina**

The AC provides that engines that are to be part of an aircraft may also be registered with the FRA. However, there is no provision within the AC similar to the one we described above for the registration of engines acquired under a conditional sales agreement, credit or other agreements executed abroad, pursuant to which the seller retains title to the engine until it is paid in full, or until the condition is finally fulfilled. Unfortunately, the AC might not be in accordance with modern international practice regarding engine acquisitions.

In order to overcome this limitation and in understanding of modern needs for international registration of engines, the FRA -applying certain internal regulations by analogy- allows for the registration of engine leasing agreements entered into with a foreign seller provided: (i) the foreign owner of the engine is registered as such with the FRA; and (ii) the financing structure is an Engine Leasing Agreement subject to Argentine law.

Although the Argentine registering process may be subject to certain informality, it must be said that in many occasions this is the result of the FRA trying to keep up with contemporary registration techniques, running ahead of substantive legislation.

## **3. Mortgages of Engines**

Pursuant to the AC engines may be mortgaged in Argentina.

Moreover, Argentina is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. Pursuant to the Geneva Convention Argentina will recognize foreign mortgages of engines registered abroad provided certain conditions are met. However, if the sale of the engine takes place in Argentina, the process will be governed by Argentine law, and the rights and

obligations of the parties will be subject to the effect of bankruptcy laws as further described below.

On those premises, an engine mortgage may either be extended in Argentina or abroad. However, in the last case it will have to be recorded before the FRA in order to be valid and binding *vis-à-vis* third parties.

We will analyze below the process for the registration of an Argentine mortgage and the recognition of a foreign mortgage granted abroad.

#### a. Creation of an engine mortgage in Argentina

Pursuant to Section 53 of the AC, mortgages may be created by either a public deed or a private document duly authenticated which must be filed and registered before the Federal Registry of Aircrafts.

The mortgage shall provide at least the following information:

- i. Name and address of the parties thereto;
- ii. Registration and serial number of the engine ;
- iii. Description of the insurance policies;
- iv. Amount of the secured principal, interest rate, maturity date and place of payment.

Additionally, the FRA requires the payment of 3 per thousand of the amount of the transaction as a registration fee. Mortgages shall be registered within sixty days since their execution, in which case they would be valid as from their execution.

#### b. Recognition of an Engine Mortgage granted abroad

The FRA allows for a special procedure for the recognition of foreign mortgages on engines granted in countries that are party to the Geneva Convention on the International Recognition of Rights in Aircraft. Pursuant to the Geneva Convention, the foreign mortgage may be recognized in Argentina provided that i) the mortgage was granted when the engine was registered in a foreign country party to said convention, ii) both the engine and the mortgage were recorded in the registry of said country and iii) all documents to be filed for registration or filed as evidence are originals, and the parties' signatures are notarized at the nearest Argentine Consulate or legalized by attaching the 1961 Hague Convention Apostille. Once in

Argentina, all documents that are not in Spanish shall be translated into Spanish by an Argentine certified translator.

c. Security under the Engine mortgage

Pursuant to sections 3108 and 3111 of the Argentine Civil Code, the mortgage secures the principal, interest expenses, damages and, in general, all accessories to the credit. Interests remain secured for up to two years after their maturity.

The mortgage covers any indemnification paid by the insurance company or by a third party for any damages caused to the engine as well as any indemnification paid in case of expropriation. If the engine is destroyed, the mortgagor may foreclose the mortgage against the remains of the engine (sections 54 and 55 of the AC).

The mortgage may be foreclosed against any third party purchaser or party in possession of the engine although this does not discharge the debtor liability for any unpaid amount.

d. Term of the registration

The term of the mortgage registration is seven years and may be extended at the request of any party.

e. Priorities

Other than in case of bankruptcy, only the following liens shall have priority over the mortgage.

1. Legal expenses incurred by the mortgagee;
2. Airport fees and other fees related to air navigation, up to one year prior to the claim thereunder;
3. Search and rescue expenses;
4. Supply and repair expenses incurred outside the destination of the aircraft, needed to continue the flight;
5. Crew's salaries for the last month.

These liens must be registered within three months as from the date on which they were incurred, and expire one year after such registration, unless it is renewed.

#### f. Foreclosure of Engine Mortgages in Argentina

Foreclosing an engine mortgage in Argentina implies the sale of the asset in a public auction which, in turn, implies the need to repossess it. This is done in a lawsuit which is pursued in an executory proceeding where the defendant may pose only a limited number of defenses. A foreign creditor may be required by the defendant to post a bond to secure the payment of legal fees and expenses. This is called the defense of "*arraigo*", which may be waived in the mortgage.

Mortgages customarily provide that the auctioneer shall be nominated by the creditor. However, the auctioneer is always appointed by the Court and, up to a certain extent, acts as a court officer. The creditor may buy in the auction and offset all or part of its credit against the purchase price, which may provide a practical answer to the question posed in the preceding paragraph. If upon offsetting there remains an unpaid balance, the creditor may pursue it as an unsecured credit against other assets of the debtor.

#### g. Engine Mortgages in case of Creditor's Reorganization and Bankruptcy

As a general rule, secured creditors must apply for having their credits allowed to the bankruptcy or reorganization proceedings, but need not wait until the completion thereof to sell the secured asset. Notwithstanding the foregoing, the Court may order the suspension of the auction for up to ninety days, if it decides that the asset is necessary and urgent for the continuation of the activities of the debtor. Interest accrued during the suspension period rank with top priority.

In case of bankruptcy of its debtor, the creditor may choose to participate in the bankruptcy procedure with all the other creditors or request the bankruptcy court the sale of the mortgaged asset and the enforcement of its mortgage under a separate procedure from the bankruptcy. For this purpose, the creditor shall file before the Bankruptcy Court all documents related to its credit. The Court and the trustee shall then review the documents and order the engine to be sold in a public auction. The Court shall reserve the corresponding amount for the payment of all the debts which have privileges *vis-à-vis* the mortgage holder and shall thereafter pay the mortgage creditor.

In case of a foreign mortgage, both in the event of bankruptcy or reorganization proceedings, the choice of forum provisions will be

ineffective, as all claims -whether in personam or in rem- are to be brought or pursued before the courts in charge thereof.

*Please do not hesitate to contact Juan M. Arocena ([jma@rmlex.com](mailto:jma@rmlex.com)) or Gonzalo Oliva Beltran ([gob@rmlex.com](mailto:gob@rmlex.com)) should you have any questions about this paper.*