

AVIATION AND TRANSPORT
NEWSLETTER

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Belgian Aircraft Finance: New Rules on Security Interests in Engines and Aircraft

Belgium has recently adopted new legislation that will significantly reform how security interests may be taken on moveable goods.

The law of 11 July 2013 (the "Act") is the final result of a long work of research that started in 2010 when the then Ministry of Justice commissioned a study aimed at preparing a bill for an in-depth reform of the Belgian security interests regime over moveable goods.

The Act has several implications for aircraft finance transactions in Belgium as it allows to easily structure the financing of a Belgian registered aircraft through loan/pledge mechanisms instead of leasing arrangements.

The Act also has an important impact on engine financing as, once the Act will come into effect, engines could be pledged.

Belgian Aircraft Finance Transactions Under the Current Regime

Under Belgian law, an aircraft cannot be mortgaged.

The only form of security available on aircraft is a pledge. In order for a pledge to be valid and enforceable such pledge must meet the so called "dispossession requirement".

This entails that the pledgor cannot be left in possession of the pledged asset. It is therefore impossible to finance aircraft or engines in Belgium under a loan structure coupled with a pledge on the asset.

Indeed, if the borrower is the airline, it will not be able to pledge the relevant engine or aircraft if such goods are used by the airline itself.

As a consequence a Belgian driven aircraft finance transaction contains always a lease agreement. If a loan is chosen, the borrower will be an SPV and the airline will be the lessee and third party pledge holder of the relevant aircraft.

As an alternative, and this applies mainly to the financing of business aircraft, the lenders will require non asset-based types of security such as personal guarantees from the borrower.

Moreover, a pledge cannot be enforced without court intervention and gives right to the pledgee solely to the proceeds of a sale at auction of the aircraft.

Most Relevant Innovations Introduced by the Act

The Act introduces several important innovations in particular in relation to perfection and enforcement of pledges over moveable assets.

Perfection of a pledge

The most important change introduced by the Act is undoubtedly the abolishment of the "dispossession requirement". A pledge will now be created by the mere agreement of the parties and perfected through registration of the pledge in a national electronic registry of pledges.

The national registry of pledges will not be a purely public registry, but will only be accessible to pledgor and pledgee and to a list of parties to be determined by decree.

The abolishment of the dispossession requirement opens the Belgian market to new aircraft (and engines) financing structures as a loan coupled with a pledge will now be perfectly valid as the airline/operator of the aircraft or engine will be able to remain in possession of the relevant goods and to grant a security interest over the same.

Enforcement of a pledge

Under the Act, if an event of default occurs, the pledgee will have the right to enforce the pledge without prior court authorisation. Enforcement may be carried out through a public or private sale of the asset, a lease or, if so agreed, the appropriation of the asset.

However, at least ten days before enforcing its pledge, the pledgee must inform the debtor or the pledgor of its intention to enforce the pledge.

If the pledgor intends to object to the enforcement, it will have to raise its objections within the ten days period before the competent judge of the attachments.

If the relevant agreement provides that the pledgee may repossess the asset, the value of the pledged asset must be determined by an expert or based on the fair market value of the asset at the time of the repossession.

Final Remarks

The Act provides that it should come into effect as of 1st December 2014, however this date does not appear to be realistic as the national electronic registry of pledges should be ready by such date.

Whether or not the law would come into effect by that date, we believe that operators and lenders should start building in their documentation appropriate clauses so as to allow creation and registration of a pledge on the financed asset if and when the law would be fully applicable.

As a general conclusion, we consider that the Act is an important step towards modernisation of Belgian law on security interests and it appears quite close to the system introduced by the Cape Town Convention on International Interests in Moveable Goods.

However, an important difference from the Cape Town system is that the national registry of pledges will not be freely accessible. A decree will indicate the persons authorised to access the registry.

This choice of the Belgian legislator is regrettable as it creates a group of preferred creditors which will have access to the registry and will therefore be able to better assess the situation of the relevant debtor as opposed to the other creditors which will not benefit of such right.

We believe that, on this specific point, the Act could prove problematic and could justify a recourse against this provision before the Belgian Constitutional Court.

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