



CHECK OF ENCUMBRANCES ON ENGINES AT PURCHASE*

Emiliano MARCHISIO**

Para citar este artículo puede utilizarse el siguiente formato:

Emiliano Marchisio (2014-2015): "Check of Encumbrances on Engines at Purchase", en *Revista europea de derecho de la navegación marítima y aeronáutica*, nº 31-32 (2014-2015), pp. 83-89. En línea: <http://www.eumed.net/rev/rednma/31-32/em.html>.

ABSTRACT: It is not unusual, in commercial practice, that airlines purchase used aircraft engines to destine it to their fleet. A company, in the process of purchasing an aircraft engine, before execution need to ascertain whether on that engine there are encumbrances, whose existence would consistently affect the real value of the asset purchased or, in the worst case, reduce it to null. This article provides a short overview on registry and other searches that can be carried out to perform an "encumbrance check" with respect to Italian law.

KEY WORDS: Aircraft Engine, Encumbrance, Charge, Mortgage.

RESUMEN: No resulta extraño que, en la práctica comercial, las aerolíneas compren motores de aeronaves usados para destinarlos a su flota. Una empresa, en el proceso de compra de un motor de aeronave, antes ha de tener en cuenta la conveniencia de saber si sobre el mismo motor hay gravámenes, cuya existencia afectaría consistentemente al valor real de los activos comprados o, en el peor de los casos, ocasionaría la devolución del mismo por considerarlo nulo. Este artículo ofrece una breve visión general sobre el registro y otras búsquedas que se pueden llevar a cabo para realizar una "verificación de gravamen" con respecto a la ley italiana

PALABRAS CLAVE: Motor de Aeronave, Gravamen, Compromiso, Hipoteca.

1. *The problem*

It is not unusual, in commercial practice, that airlines purchase used aircraft engines to destine it to their fleet. A company, in the process of purchasing an aircraft engine, before execution need to ascertain whether on that engine there are encumbrances, whose existence would consistently affect the real value of the asset purchased or, in the worst case, reduce it to null. Therefore, in order to protect the effectiveness and value of their purchase, they want to know whether there are any registry or other searches that can, or should, be carried out to perform this check. This article provides a short overview on the issue above mentioned, with respect to Italian law.

* The information contained in this article represents information as of April 2014. It does not constitute legal representation by the author. Interpretation and application of the rules dealt with in this article depend on the facts of any single case: before using any information in this publication it is recommended that an attorney be consulted for specific legal advice. Therefore, the author expressly disclaims responsibility for any loss or damage resulting from the use or reliance on the contents of this publication.

** Admitted in Italy as associate professor in Commercial Law, confirmed researcher in Commercial Law and Aggregate Professor in Competition and IP Law (*Diritto Industriale*), University of Rome "Tor Vergata". Avvocato in Rome (BVR&Partners).

2. The aircraft engine and the pledge of the engine

Under Italian law the engine is a movable asset (art. 812.3 of the Italian civil code: the ICC) *not* subject to registration in public registries, as it is the case, on the other hand, for Aircraft¹. Charges on engines are not subject to registration, therefore.

The existence of a pledge on the engine, however, would be relatively easy to check. As a matter of fact, under Italian law, the constitution of a charge on movable, non registered, assets (“pegno”)² requires both dispossession of the debtor and *delivery* of the asset to the creditor³ or to a third depository or anyway *co-possession between debtor and creditor* (so that the former cannot dispose of the asset without cooperation of the latter)⁴.

It is to be noted, for the sake of completeness, that under Italian law the “pegno” is a “*contratto reale*”, which means that it becomes valid and effective only after delivery of the charged asset⁵. Delivery has the scope to allow third parties to be advised that the asset is not anymore within the owner’s full availability⁶. As a matter of fact, the possessor of the charged asset is disciplined under Italian law as a depository under art. 1770 ICC and cannot use the asset unless use is necessary for its conservation⁷.

The right of the creditor to be preferred to other creditors on the monies coming from the sale of the asset⁸ requires that the creditor or the designed

¹ See the Italian Code of Civil Navigation (ICCN), II part: II book, titles I and II; book III, title V heading II; book IV title III heading II.

² The specification that the “pegno” relates only to movable property is in art. 2784.2 ICC. As noted below, however, not all movable assets are subject to the rules on “pegno”: in case of movable *registered* assets, the latter are subject more precisely to “*ipoteca*” (mortgage) as it happens for aircraft: see further, § 3.

³ See art. 2786.1 ICC. If the availability of the asset is conferred by a document, a “pegno” may be constituted by delivery of the document. On this issue and on the relationship between dispossession of the debtor and (the logically different and subsequent) delivery to the creditor see: Ciccarello (1982), “Pegno (dir. priv.)”, *Enc. Dir.*, XXXII, p. 690; Chironi (1917), *Trattato dei privilegi delle ipoteche e del pegno*, II ed., I, Torino, p. 560; Gorla (1968), *Del pegno*, in Galgano (ed.), *Commentario del codice civile Scialoja-Branca*, III ed., Roma, p. 72; Rubino (1956), “Il pegno”, in Vassalli (ed.), *Trattato di diritto civile italiano*, XIV, t. 1, Torino, pp. 217 s.

⁴ See art. 2786.2 ICC. On this issue: Ciccarello (1982), “Pegno (dir. priv.)”, *Enc. Dir.*, XXXII, pp. 682 f. and 690 ff.

⁵ Ciccarello (1982), “Pegno (dir. priv.)”, *Enc. Dir.*, XXXII, p. 693; Messineo (1959), *Manuale di diritto civile e commerciale*, Milano, p. 104; Barbero (1958), *Sistema istituzionale del diritto privato italiano*, VII ed., II, Torino, p. 612. Someone believes that delivery of the asset is always necessary for the “pegno” to be constituted but proposes that perfection may be differently defined by way of contract: Forchielli (1952), *I contratti reali*, Milano, pp. 10 ss.

⁶ Ciccarello (1982), “Pegno (dir. priv.)”, *Enc. Dir.*, XXXII, p. 691; Gorla (1968), *Del pegno*, in Galgano (ed.), *Commentario del codice civile Scialoja-Branca*, III ed., Roma, p. 49; Pugliatti (1957), “La trascrizione. La pubblicità in generale”, in Cicu & Messineo (eds), *Trattato di diritto civile e commerciale*, XIV-I, t. I, Milano, pp. 290 ff.; Chironi (1917), *Trattato dei privilegi delle ipoteche e del pegno*, II ed., I, Torino, p. 617.

⁷ See art. 2790 ICC.

⁸ See art. 2787.1 ICC. In principle under Italian law the mortgagee is not allowed to be transferred, by the mortgagor, ownership of the mortgaged property and to return the mortgaged property only once the loan is repaid or other mortgage obligations are fulfilled (so called “mortgage by demise”), as it is allowed under English law, even if the use of the mortgage by demise was minimised (e.g. as it happened as regards registered interests in land: see sect. 23 of the Land Registration Act 2002). In fact, in Italy there exists a prohibition of the “*patto commissorio*” (“*pacte comissoire*”) with respect, among others, to mortgages: “*it is null*

depositor maintain possession of the charged asset⁹ and, if the credit guaranteed exceed € 2.58, that the “*pegno*” is vested in a written deed, which describes the charged property, entered into in a date certain (“*data certa*”)¹⁰. The latter requirement is historically (since the French *code Napoléon*) aimed at preventing frauds against creditors by fictitious creation of charges, so that, independently from the problem whether a charge is created *tout court*, the absence of the written form prevents preference in favor of the creditor from being created¹¹.

Therefore, the existence of a charge on a engine alone (“*pegno*”) may be ascertained by checking whether the owner has full possession of the engine or not. Even in case of a charge agreement (“*contratto di pegno*”) between debtor and creditor, in fact, full possession of the engine by the debtor would show that the creditor or the designed depositor lost possession of the charged asset¹² and, in principle, that the creditor cannot enforce any priority on the engine against the purchaser.

and void any agreement under which, if payment is not made within the agreed term, ownership of the mortgaged asset is transferred to the creditor...” (art. 2744 ICC): Anelli (1996), *L’alienazione in funzione di garanzia*, Milano; C. M. Bianca (1957), *Il divieto del patto commissorio*, Milano; Alb. Candian (1999), “Appunti dubbiosi sulla “ratio” del divieto di patto commissorio”, in *Foro it.*, I, c. 175; Carnevali (1982), “Patto commissorio”, in *Enc. dir.*, XXXII, Milano, 505; Bussani (2000), *Il problema del patto commissorio. Studio di diritto comparato*, Torino; Cipriani (2000), *Patto commissorio e patto marciano - Proporzionalità e legittimità delle garanzie*, Napoli; Di Paolo (1995), “Patto commissorio”, in *Digesto (disc. priv.)*, Torino, 309 ss.; Girino (1991), “Garanzie sui finanziamenti: le insidie del patto commissorio”, in *Amm. e fin.*, 15, p. 819; Lojacono (1952), *Il patto commissorio nei contratti di garanzia*, Milano; Luminoso (1990), “Alla ricerca degli arcani confini del patto commissorio”, in *Riv. dir. civ.*, I, p. 219; Sassi (1999), *Garanzie del credito e tipologie commissorie*, Napoli. Such a prohibition appears to be declining in several European continental jurisdictions as a consequence of international commercial law and practice. This was noted, as regards Italian law, by Alb. Candian (2005), “Le garanzie finanziarie dopo il d.lg. 170/2004”, in Berlingieri (ed.), *Temi e problemi della civilistica contemporanea. Venticinque anni della Rassegna di diritto civile*, Napoli, 40 and as regards French law, after the *ordonnance n. 2006-346 du 23 mars 2006 relative aux sûretés*, by Briolini (2007), “La riforma del diritto delle garanzie in Francia”, in *Banca, borsa e titoli di credito*, II, p. 226; Fiorentini (2006), “La riforma francese delle garanzie nella prospettiva comparatistica”, in *Europa dir. priv.*, p. 1155; Simler (2006), “La réforme du droit des sûretés”, in *La semaine juridique*, n. 13, p. 124. It is to be noted, incidentally, that under Italian law the creditor may keep the asset mortgaged only if the estimation is made after the debtor defaults (so called “*patto marciano*”). If an estimation is provided at the time of transfer, the agreement is null unless the debtor is allowed to prove that the value of the mortgaged asset at the time of default is different from that at the time of transfer. A similar solution is adopted under French law (see art. 2348 of the French *code civil*), even if art. 2348.2 of the French *Code Civil* provides that the conveyed asset must be estimated by the parties or an expert appointed by the court at the time of transfer (« *la valeur du bien est déterminée au jour du transfert par un expert désigné à l’amiable ou judiciairement* ») and not, as in Italian law, after the debtor defaults.

⁹ See art. 2787.2 ICC. If possession is lost but can be gained another time, then preference of the creditor *vis-à-vis* third parties is lost but the charge agreement between the creditor and the debtor is deemed still effective, so that a new “*pegno*” is constituted when the creditor repossesses the asset: Ciccarello (1982), “Pegno (dir. priv.)”, *Enc. Dir.*, XXXII, p. 697; Rubino (1956), “Il pegno”, in Vassalli (ed.), *Trattato di diritto civile italiano*, XIV, t. 1, Torino, p. 283.

¹⁰ See art. 2787.3 ICC. Under Italian law the requirement of a date certain is normally complied by having the deed issued by a notary public (“*atto pubblico*”), a private deed authenticated by a public official or the document postmarked.

¹¹ Ciccarello (1982), “Pegno (dir. priv.)”, *Enc. Dir.*, XXXII, pp. 695 f.; Rubino (1956), “Il pegno”, in Vassalli (ed.), *Trattato di diritto civile italiano*, XIV, t. 1, Torino, pp. 224 f.; Gorla (1968), *Del pegno*, in Galgano (ed.), *Commentario del codice civile Scialoja-Branca*, III ed., Roma, pp. 70 ff.

¹² See art. 2787.2 ICC.

3. *Encumbrances on the engine as a consequence of the mortgage of the aircraft it belongs to*

An engine, however, may be subject to a charge in case the aircraft it belongs to is mortgaged (“*ipotecato*”), since, under Italian law, “*mortgages on aircraft includes the aircraft, its pertinences and separable parts, unless the latter results owned by parties different from the aircraft owner pursuant to deeds having a date certain or by the aircraft registration certificate*”¹³.

Engines are certainly intended permanently to the service of the aircraft and are therefore “separable part” of the aircraft under Italian law¹⁴. It is to be noted that Italian case law seem to require, in order to consider engines to be mortgaged along with the aircraft they belong to, that they are currently installed thereon. The requirement of service of the aircraft is to be understood, in fact, as a *present* functional destination¹⁵ and not a potential or future one. Therefore, a mortgage on an aircraft does not extend to pertinences and separable parts that are generally intended to all the aircraft within the fleet and are not bonded to a single aircraft¹⁶.

More precisely, case law does not seem to exclude that an engine currently held in warehouse may be mortgaged along with the aircraft it belongs to; however, this would require, “*in terms of evidence, the precise identification of the parts separable from the single aircraft, in order to have the mortgage be effective with respect to them*”¹⁷.

Following the above summarized law, one may distinguish three different hypotheses.

In the first one, the engine is installed on the mortgaged aircraft. In this case the mortgage extends to the installed engine unless, pursuant to art. 1029 ICCN, the engine results owned by a third party pursuant to deeds having legally date certain or by the aircraft registration certificate (“*certificato di immatricolazione*”).

In the second case, the engine is not installed on the mortgaged aircraft and is held in a warehouse as a spare part intended permanently to the service of several aircraft. In this case, the mortgage certainly does not extend to the engine.

The third case is the most complex one and relates to the hypothesis where the engine is *not* installed on the mortgaged aircraft but there is a clear

¹³ See art. 1029 ICCN.

¹⁴ See artt. 817.1 and 862.3 ICC.

¹⁵ Cass. 14 March 1975, n. 974; Trib. Roma, 14 February 1986, *Dir. fall.*, 1986, II, p. 399.

¹⁶ Cass., 24 July 1989, n. 3486, *Foro it.*, 1990, I, c. 923. It ought to be noted that there are no other precedents on this same issue with the sole exception of the Trib. Roma, 14 February 1986 mentioned above, under note n. 10. However, the principle may be considered well established under Italian law when one makes reference to other hypotheses of extension of the mortgage. This is the case, e.g., of the extension of the mortgage on industrial factories to the machineries constituting a pertinence thereto (Cass. 26 January 1985, n. 391, in *Foro it. Rep.*, 1985, “*ipoteca*”, n. 5; Cass. 9 April 1984, n. 2255, in *Foro it.*, 1984, I, 2239, note by Pezzano; Trib. Ascoli Piceno 31 October 1985, in *Fallimento*, 1986, p. 567, note by Cantele, “*Sull’estensione del vincolo ipotecario gravante su edificio industriale: si riparla del rapporto pertinenziale fra macchine ed edificio*”). In general, as regards limitations on the extension of the mortgage on a pertinence thereof see: Ravazzoni (1985), “*Le ipoteche*”, in Rescigno (ed.), *Trattato di diritto civile*, XX, t. II, Torino, p. 24.

¹⁷ *Ibidem*.

identification of the aircraft the engine belongs to¹⁸. Here, under the case law above mentioned, it appears that the main problem is to assess whether there is “*in terms of evidence, the precise identification*” of the engine “*separable from the single aircraft, in order to have the mortgage be effective with respect to them*”¹⁹.

It appears difficult to list all the hypotheses under which, in terms of evidence, such precise identification occurs. One may think, as an example, to the case of a fleet made of several short to medium ranges aircraft (e.g.: Boeing 727) and only a longer range aircraft (e.g.: Boeing 777). An engine held in warehouse which would fit only with the latter aircraft (e.g.: a PW 4098) could be intended as a “separable part” only of that aircraft and, therefore, could be subject to the mortgage constituted on the same aircraft. This may be the case of an engine owned by the operator, currently under maintenance in a store, which is substituted by an engine leased for the time necessary to have the owned engine fully maintained. In this case, in principle, the mortgage would not extend to the installed (leased) engine but would extend to the engine under maintenance.

3.1. Check on the existence of a mortgage on the engine as a consequence of the mortgage of the aircraft it belongs to

The existence of a mortgage on an engine, as a consequence of the mortgage of the aircraft it belongs to, may be ascertained by performance of two checks.

The first check is aimed at verifying whether the engine is intended to all aircraft within the fleet or is bonded to a single aircraft. As noted above, the engine is understood to be intended to the whole fleet if it is not installed on the mortgaged aircraft and is held in a warehouse as a spare part *not bonded* to a single aircraft. The engine is understood to be bonded to a single aircraft, on the other hand, if (a) it is installed on the mortgaged aircraft and the engine does not result owned by a third party (pursuant to deeds having legally date certain or by the aircraft registration certificate) or (b) it is not installed on the mortgaged aircraft but there is a clear identification of the aircraft the engine belongs to.

In case this first check shows that the engine is not bonded to a single aircraft, there is no risk that it be mortgaged along with an aircraft. If the opposite case, the second check is aimed at verifying whether the aircraft the engine belongs to is mortgaged. This requires some further detail into mortgage of aircraft under Italian law.

3.2. Mortgages of aircraft

Under art. 1027.1 ICCN, “*on aircrafts is only possible to register voluntary mortgages*”²⁰. Under following art. 1027.2 “*a mortgage may be created only by*

¹⁸ *Ibidem*.

¹⁹ *Ibidem*.

²⁰ Marini (1996), “Sul principio della volontarietà nell’ipoteca navale”, *Trasp.*, 68, p. 91; Fragali (1965), “L’ipoteca penale e l’ipoteca sull’aeromobile”, *Dir. Aereo*, p. 1. See also Spasiano (1972), “Ipoteca navale e aeronautica”, *Enc. Dir.*, XXII, p. 873; De Marchi (1987), “L’ipoteca navale: considerazioni e raffronti con l’ipoteca immobiliare”, *Vita not.*, p. 63; Righetti (1992), “Ipoteca navale ed aeronautica”, *Dig. Comm.*, VII, p. 535; Berlingieri (1965), *I diritti di garanzia sulla nave, l’aeromobile e le cose caricate*, Padova, pp. 282 ff.; Ripert (1952), *Droit maritime*, 4th ed., II, Paris, pp. 9 ff.

*public deed or private written deed containing the specific particulars to identify the aircraft*²¹. In case of violation the mortgage would be null and void²².

Under Italian law²³, a mortgage is validly constituted only after it is registered in the relevant public registry [the national registry of constructions if the Aircraft is under construction at the moment the mortgage is constituted or, in the other cases, the aeronautic national registry (RAN)²⁴]. The mortgage need be annotated also on the Aircraft Registration Certificate ("*Certificato di Immatricolazione*").

If a mortgage deed is not registered in the relevant registry, *no mortgage is created either against third parties or between the parties to the mortgage deed*²⁵. Therefore, it is possible to check whether a mortgage on an aircraft exist by checking with the Italian navigation authority (ENAC) whether in the relevant registry (RAN) a mortgage is registered.

It ought to be noted, for the sake of completeness, that the lack of record in the registration certificate would not deprive the mortgage of its validity and effectiveness. In fact, under art. 869.2 ICCN it is possible that at the moment of filing of the mortgage, the registration certificate is not delivered to the ENAC (this happens if the aircraft is currently elsewhere). In this case, the mortgage is considered as validly created and the law only requires that the record on the registration certificate is made in a further moment. As a matter of fact, the creation of the mortgage only requires its registration in the registry²⁶ and the recording in the registration certificate is only the compliance with a specific obligation with respect to a mortgage already created.

4. Attachment and seizure of the engine

Attachments and seizures of an engine raise some peculiar issues that need specific exam.

As a matter of fact, attachment of "separable parts" of the aircraft (like engines, as noted above²⁷) is made pursuant to the rules on attachment of movable assets detailed in the Italian code of civil procedure (ICCP)²⁸. This means that, *inter alia*, the debtor cannot dispose of the attached engine²⁹. Upon request by the creditor, the engine need be guarded in a public depository or by a custodian³⁰, but this is not necessarily the case.

²¹ Under art. 750.3 ICCN, the identification of an aircraft is made by reference to its registration marks and manufacturer's serial number.

²² See also art. 2821.1 ICC.

²³ See art. 1030 ICCN.

²⁴ Artt. 1027 and 1028 ICNC.

²⁵ Spasiano (1972), "Ipoteca navale", in *Enciclopedia del diritto*, XXII, Milano, p. 885; Rubino (1956), "L'ipoteca immobiliare e mobiliare", in Cicu & Messineo (eds), *Trattato di diritto civile e commerciale*, XIX, Milano, pp. 212 ff.; Pugliatti (1957), "La trascrizione. La pubblicità in generale", in Cicu & Messineo (eds), *Trattato di diritto civile e commerciale*, XIV-I, t. I, Milano, pp. 432 ff.; Berlingieri (1965), *I diritti di garanzia sulla nave, l'aeromobile e le cose caricate*, Padova, pp. 272 ff.

²⁶ See artt. 870 and 256 ICCN.

²⁷ See art. 862.3 ICCN.

²⁸ See art. 1062 ICCN.

²⁹ See artt. 518.1 and 492.1 ICCP.

³⁰ See art. 520.2 ICCP.

If the creditor required custody, the existence of an attachment may be ascertained by checking whether the owner has full possession of the engine or not, as it happens with respect to the pledge.

In the other case, there is no need to ascertain the attachment: any sale of the attached movable, non registered asset (even if in violation of the prohibition upon the debtor to dispose of the asset) would, under the most recent case law, be valid and enforceable by the purchaser third party as long as the purchase was made in good faith³¹. In fact, any act of disposition³² of the attached movable, non registered asset under Italian law would be (valid but) not enforceable³³.

A similar rule apply to seizures: since seizure on engines is not expressly disciplined in the ICCN, the general discipline detailed in the ICCP applies³⁴, which means that the seizure is carried out as the attachment³⁵. Of course, seizure would convert into attachment “*once the creditor is granted an enforceable judgment*”³⁶.

<p><i>Recibido el 29 de noviembre de 2014 y aceptado el 15 de diciembre de 2014.</i></p>
--

³¹ Art. 2913 ICC. In fact, the Court of Cassation allows the purchaser to claim an “*opposizione di terzo*” (opposition by a third party) under art. 619 ICCP to claim non-existence or nullity of the attachment (Cass. 26 July 2004, n. 14003; Cass. 23 January 2009, n. 1703). It is acknowledged, in commentaries, that before this position was taken, the third purchaser was recognized narrower rights (see e.g. Cass. 23 March 1978, n. 1408; Cass. 27 August 1984, n. 4703; Cass. 4 September 1985, n. 4612). On this issue see also Soldi (2014), *Manuale dell’esecuzione forzata*, IV ed., Padova, pp. 328 ff.

³² Even if the law only refers to transfer (“*alienazione*”), it is undisputed that this is to be interpreted as making reference to any act of disposal: Verde (1983), “*Pignoramento in generale*”, *Enc. Dir.*, XXXIII, p. 800; Bonsignori (1966), “*Pignoramento*”, *Novissimo Digesto Italiano*, XIII, p. 82; Castoro (2006), *Il processo di esecuzione nel suo aspetto pratico*, Milano, p. 164.

³³ Cass. 5 August 1987, n. 6748.

³⁴ See art. 1079 ICCN.

³⁵ See art. 678.1 ICCP.

³⁶ See art. 686.1 ICCP.