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## **VENEZUELA**

### **Part 1**

#### **1 Liens**

##### **1.1 What is a lien under Venezuelan law?**

###### **1.1.1 Concept of a Lien**

Venezuelan law recognizes the concept of a lien as a form of security or encumbrance over a particular property for the benefit of a creditor. Although Venezuelan law does not use the term 'lien' nevertheless the different types of liens under Venezuelan law, established in all cases by statute, are generally similar to those in effect in most Western legal systems. Accordingly, as a general proposition, Venezuelan liens are either in the nature of private contracts entered into by parties normally having direct commercial relations (usually to guarantee the payment of an indebtedness or performance of an obligation), or compulsive, whereby a legal or statutory lien may be imposed on property to enforce (ultimately by execution and sale) the performance of an obligation of the owner or the party in possession of the property. This obligation is normally financial in nature and owed to the State or a public authority.

Venezuelan law also recognizes the concepts of confiscation and expropriation. These are generally in connection with criminal acts or as a result of a public necessity. They should be distinguished from compulsory liens. Part 1 of this chapter deals with only the former type of

lien, that is of the private, essentially voluntary and non-compulsive nature. Compulsive liens, along with other forms of detention, are discussed in Part 2.

### **1.1.2 Private liens**

In terms of private liens, Venezuelan law recognizes the concept of a lien as, basically, a contract whereby the debtor pledges to a creditor an item of property as a guarantee for the repayment of the debt. Under Venezuelan law a lien does not give the creditor the right to acquire legal title to the property in the event of a default by the debtor. Rather, the lien gives the creditor a priority right over most other creditors to the proceeds deriving from the sale of the property, by means of a judicial auction, up to the amount of the credit secured by the lien.<sup>1</sup> Other than these general principles, there are several different types of contractual liens, each with its specific norms and limitations. These include a pledge of tangible goods, pledge of a particular source of revenue or of general business income, mortgage of a chattel, and mortgage of real property. However, in the case of aircraft in operation (see 2.1) Venezuelan law recognizes only one form of lien, by way of guarantee. This is the chattel mortgage, which is governed by the terms of the Chattel Mortgage Law.<sup>2</sup>

### **1.1.3 Other security interests**

Aside from liens, Venezuelan law recognizes several other types of security interests or related guarantees, as broadly defined. These include third party guarantees (whether or not securitized) including guarantees issued by banks or insurance companies which may take the form of letters of credit, bonds and related instruments; and sales of goods with a reservation of title. Generally, Venezuelan law is sufficiently flexible to permit a variety of forms of security to be created in Venezuela or abroad, except when they are created by reference to specific Venezuelan legislation or where possible restrictions relating to foreign exchange controls apply.

### **1.1.4 Prerequisites of a lien**

While the Chattel Mortgage Law establishes specific requirements for constituting a lien over an aircraft, generally, any lien or equivalent security instrument must fulfill the following criteria: be evidenced by a written agreement containing the basic elements of a contract; be in connection with a specific item of property which is owned by the pledgor or mortgagor; the item of property in question must be free of prior encumbrances (unless a lower-tier security interest is intended); the lien transaction must be previously authorized, if so required; and the lien document must be duly registered in the corresponding registry, if so required.

## **2 Aircraft Liens**

### **2.1 What aircraft liens exist under Venezuelan law? What are their essential characteristics?**

Generally, Venezuelan law only contemplates one form of contractual lien as a form of guarantee in the case of an aircraft in operation. This is the chattel mortgage. While an aircraft

may be the object of a pledge or other type of guarantee instrument, under normal circumstances and if the aircraft is to remain in the possession and operation of the debtor, the only general form of security is the chattel mortgage. The present norms on chattel mortgages date from 1973 with the promulgation of the Chattel Mortgage Law. This was adopted in particular to resolve the complications created by the traditional concept of a lien (or prenda in terms of the Civil Code) which required the actual delivery of the property being placed in guarantee to the pledgee (except under limited circumstances not relevant to aircraft). The essential characteristics of aircraft chattel mortgages are the following:<sup>3</sup>

(a) A chattel mortgage may only be constituted to guarantee certain classes of creditors, namely Venezuelan Governmental entities, foreign banking and international financial institutions duly authorized to be mortgagees by the Superintendency of Banks, Venezuelan financial entities and insurance companies, and private persons (*i.e.* companies or individuals, domestic or foreign) which are duly authorized (in the case of aircraft) by the Ministry of Infrastructure (until 1999 the Ministry of Transportation and Communications).<sup>4</sup>

(b) Expressly prohibited from being a chattel mortgagee is the vendor of the aircraft or of particular aircraft equipment in the case where the vendor's credit is within the provisions of the Sales with Reservation of Title Law.<sup>5</sup>

(c) The mortgaged aircraft must be free and clear of any other mortgages or liens unless the mortgage is to be created as a secondary or subsequent mortgage. Also, the purchase price must have been fully paid unless the mortgage is being created to guarantee the payment of the purchase price.<sup>6</sup> If the aircraft belongs to various owners, the mortgage can only be created with the consent of all of them.<sup>7</sup>

(d) The chattel mortgage must be created by a public document duly registered.<sup>8</sup>

(e) The mortgagor will retain possession and the right to use the mortgaged aircraft.<sup>9</sup>

(f) The owner of the mortgaged aircraft cannot sell or further encumber the aircraft without the prior consent of the mortgagee. In the event of unauthorized sale or encumbrance, the mortgage obligation will be deemed to be due and payable.<sup>10</sup> The unauthorized sale will also comprise a criminal act.<sup>11</sup>

(g) The mortgage will include insurance indemnities paid or arising in relation to incidents occurring after the inception of the mortgage.<sup>12</sup>

(h) In operating the aircraft the mortgagor will be held to the highest standards of care and must undertake all necessary repairs and maintenance at its own expense.<sup>13</sup>

(i) Unless the contrary is agreed, the mortgage will cover the aircraft's engines, radio and navigation equipment, instruments, accessories, furnishings and, in general, all belongings and gear destined for permanent use in the aircraft. The mortgage will cover such items even if removed from the aircraft unless they are replaced with identical equipment. Replacement parts can also be included if they are inventoried and specified in the mortgage.<sup>14</sup>

(j) In the case where the mortgagor is required to insure the aircraft and then fails to pay the premium, the mortgagee is entitled to either declare the mortgage to be in default or to pay the premium due, at the mortgagor's expense. In the latter case, the amount paid for the premium plus the stipulated rate of default interest (or the market rate if not stipulated) will also become due and payable, but only up to the maximum amount stipulated in the mortgage for collection fees and expenses.<sup>15</sup>

(k) The mortgage will accord the mortgagee a privileged position over other creditors with respect to the mortgaged assets (except as otherwise stipulated in 9.1) including the legal costs involved in executing the mortgage.<sup>16</sup>

(l) The statute of limitations for the chattel mortgage is two years.<sup>17</sup>

### **3 Registration of Aircraft Liens**

#### **3.1 Can aircraft liens be registered in the National Air Registry? Or in any other public registry? What is the effect of registration?**

In the case of any form of lien over an aircraft, and particularly in the case of a chattel mortgage, the lien must be registered in the National Air Registry of the National Civil Aviation Institute, which is under the Ministry of Infrastructure, as well as, for a mortgage, in the designated civil registry in the city of Caracas. Specifically, the Civil Aviation Law provides that all liens on aircraft must be registered in the National Air Registry to be enforceable against third parties.<sup>18</sup> The Chattel Mortgage Law complements this by providing that any mortgage over the aircraft must be registered in the civil registry of Caracas designated for this purpose by a resolution of the Ministry of Internal Affairs and Justice (until 1999 the Ministry of Justice).<sup>19</sup> Registration of the mortgage in the civil registry is a prerequisite to registration in the National Air Registry and both registrations are required for the mortgage to be entitled to the benefits established for mortgagees in the Chattel Mortgage Law.

### **4 Seller's lien**

#### **4.1 What is a seller's lien? When will it arise in the case of aircraft?**

Venezuelan law does not recognize the concept of a seller's lien in the case of an aircraft. The Civil Code, of course, recognizes the general right of a vendor to receive the benefit of its bargain, that is to be compensated for the item sold in the form as contracted or as understood in the trade or by custom.

#### **Possession delivered to purchaser**

In the event the purchaser defaults in its obligation to pay the vendor, and absent any form of security interest or guarantee established by contract between the parties, normally the only legal recourse of the vendor (assuming delivery to the purchaser has already taken place) is to bring suit for the collection of the sale debt. Absent any express contractual undertaking, the vendor,

with limited exceptions, does not have a security interest created by law over the item sold and delivered and is not entitled to recover that item. Likewise, the vendor does not have a particular right that is privileged or prior to that of any other creditors with respect to the particular item sold by the vendor.<sup>20</sup>

### **Possession not delivered to purchaser**

If the vendor has not yet delivered possession of the item being sold and the purchaser defaults with respect to a prior obligation (such as partial or total payment) then in those circumstances, and again absent a contractual obligation to the contrary, the vendor is entitled to withhold delivery and the purchaser would be barred from demanding specific performance from the vendor.<sup>21</sup>

Otherwise, in order for the seller to protect itself, it must negotiate and constitute with the purchaser as part of the sales transaction any form of lien rights or protection that the seller will be entitled to have. Aside from the chattel mortgage, the other forms of liens or sale with reservation of title referred to in 1 could be used.

## **5 Salvage Lien**

### **5.1 What is a salvage lien? When will it arise in the case of aircraft?**

The Civil Aviation Law contemplates two types of liens or privileges in relation to the provision of assistance to, or the salvage of, aircraft that are in danger or are damaged. These are expenses for providing such assistance or salvage services, and supplies for the last flight of the aircraft; and salaries of the crew for the last flight and up to 15 days after reaching the designated airport.<sup>22</sup>

There appears to be no jurisprudence regarding salvage liens nor on the limits or nature of the expenditure which may be associated with these situations.

## **6 Possessory Lien**

### **6.1 What is a possessory lien? When will it arise in the case of aircraft?**

A possessory lien under Venezuelan law, essentially, is the traditional lien or prenda contemplated in the Civil Code.<sup>23</sup> In the case of most chattels this requires the lienholder (or a designated third party) to have possession of the chattel. The prenda is also a contractual form of guarantee which must be established in a written instrument. By virtue of the obligation that the lienholder must have possession of the chattel, a possessory lien would normally be impractical in the case of aircraft, except for aircraft that are out of service either due to repair or storage.

Moreover, a possessory lien probably could not be used, for example, as a form of mechanics' lien (which does not exist in Venezuela), at least not in the case of aircraft used for public transport. This is for two reasons:

First, in the event that an aircraft owner or lessee fails to pay a third party for its repair or storage, or some other service, the provider of the service is not entitled to retain the aircraft as would be normal under a statutory mechanics' lien. Rather, it can only resort to the bringing of a lawsuit for collection of the debt.<sup>24</sup>

Second, Venezuela has a relatively restrictive public use doctrine in accordance with which the State may intervene to assure that assets, such as an aircraft engaged in public transport, remain in service so that the public is not prejudiced.<sup>25</sup> This doctrine would not be applicable except in the case of an aircraft providing a service to the public. However, again, the notion of a possessory lien could only arise if the aircraft's owner conveyed to its creditor the right of possession at the time of contracting its obligation.

## **7 Contractual Lien**

### **7.1 What is a contractual lien? When will it arise in the case of aircraft?**

Under Venezuelan law and practice the only practical form of contractual lien of a voluntary nature which is intended to secure a financial obligation is the chattel mortgage. It may be noted that, in accordance with the Chattel Mortgage Law, a mortgage on an aircraft also includes its engines and all equipment, accessories and other items, unless expressly excluded. Likewise, the mortgage may include stored replacement parts, unattached accessories etc. provided that they are inventoried and specified in the mortgage document.<sup>26</sup>

## **8 Other Types of Aircraft Lien**

### **8.1 Are there any other forms of aircraft lien? Or similar rights that do not give rise to a lien?**

Apart from the foregoing forms of general liens and lien type concepts of a private contractual, non-compulsory nature, there are no other types of liens contemplated under Venezuelan law.

## **9 Priority of Aircraft Liens**

### **9.1 What is the priority under Venezuelan law?**

The priority of a chattel mortgage or a prenda over an aircraft is subject to the provisions on privileges in the Civil Code, which were carried over to the Chattel Mortgage Law, and to those established in the Civil Aviation Law. However, as the Civil Aviation Law is a subsequent and special law, its provisions would prevail in the case of an aircraft. In this respect, the Civil Code provides that the only privileged credits with priority over a private security interest are expenses ordered by a court for the purpose of conserving or executing a decision with respect to the assets of the debtor in the interest of all of the creditors.<sup>27</sup> This same provision is contained in the Chattel Mortgage Law.<sup>28</sup> Otherwise, the Civil Aviation Law stipulates as privileged credits over the rights of aircraft lienholders

- a) Fines, fees and taxes contemplated in the Civil Aviation Law during the current year and the preceding year;
- b) Judicial expenses in the interest of all creditors;
- c) Indemnization for damages stipulated in the Civil Aviation Law;
- d) Expenses incurred in the rescue and salvage of the aircraft, and supplies for the last flight; and
- e) Salaries of the crew for the last flight, and for up to 15 days following the arrival of the aircraft at the airport of destination.<sup>29</sup>

## **10 Rights of Owner or Lessor v. Lienholder**

### **10.1 What are the rights of the owner or a lessor of an aircraft against a lienholder?**

The mortgagee or lienholder has an in rem first priority right over the chattel subject to the mortgage or lien such that, in the event of a default by the obligor, it may proceed to execute the mortgage or lien. In Venezuela this requires a legal action to be commenced in a mercantile court of first instance (see 11). Accordingly, the rights of an owner or a lessor are only those provided for in, essentially, the Code of Civil Procedure.<sup>30</sup>

## **11 Rights of Mortgagee v. Lienholder**

### **11.1 What are the rights of a mortgagee of an aircraft against a lienholder?**

The only liens that could take priority over a mortgage under Venezuelan law would be those statutory privileges or priority rights specified in 9 as well as those of a compulsory nature referred to in Part 2. Otherwise, the rights of a mortgagee would take priority over the rights of any lienholder. Therefore, in the event that a mortgagee executes its mortgage, the mortgaged chattel would be sold at judicial auction to satisfy the obligation owed to the mortgagee. Only then could a lienholder, assuming that it had a security interest of some order in the same chattel, assert its claim.<sup>31</sup>

## **12 Rights of Lessee v. Lienholder**

### **12.1 What are the rights of a lessee of an aircraft against a lienholder?**

The mortgagee or lienholder will be able to assert and enforce its mortgage or lien rights over those of a lessee by virtue of the in rem nature of the mortgage or lien. While any inconvenience or breach of contract this may cause to the lessee may give rise to a cause of action against its lessor, the existence of a lease will not, per se, interfere with the execution of a mortgage or a lien. However, it is again necessary to mention the concept of the public use doctrine in this context (see 6) since it is legally conceivable that the National Civil Aviation Institute or the Office of the Attorney General could intervene in an execution procedure in order to ensure the

continuation of a public air transport service even while endeavoring not to prejudice the rights of the mortgagee or lienholder.<sup>32</sup>

## **13 Enforcement of Aircraft Liens**

### **13.1 How does an aircraft lienholder enforce its lien under Venezuelan law? What Venezuelan court will have jurisdiction?**

#### **Jurisdiction**

In the case of a chattel mortgage over an aircraft and its accessories, as well as in the case of any type of prenda or another of the liens referred to in Part 1, the relevant court will be the mercantile court having jurisdiction by virtue of the amount involved and the place where the mortgage is registered, in the case of a chattel mortgage (that must be registered to be legally deemed to be such) and in the case of a prenda that has been registered (although this is not legally required in relation to aircraft or accessories). In the event of a chattel mortgage which includes various items registered in different jurisdictions any competent mercantile court could take proper jurisdiction.<sup>33</sup> Otherwise, any aspect as to the competent Venezuelan court or proper jurisdiction would be resolved by the provisions of the Code of Civil Procedure.<sup>34</sup>

#### **Enforcement**

As to the procedure for enforcement, in the case of chattel mortgages, the Chattel Mortgage Law establishes a special executory procedure intended to determine the default of the mortgagor and effect the execution of the mortgaged chattel in a comparatively brief period of time, which is designed to work to the advantage of the mortgagee. Thus, a lawsuit must be filed in accordance with the requirements of the Code of Civil Procedure, which suit has to be admitted by the court. When the suit is admitted by the court, the court will order the mortgagor to pay the entire debt outstanding within eight days thereof. At the same time, the court could order that the mortgaged item be sequestered. In the event that the aircraft is a commercial aircraft in public service, before the aircraft can be sequestered and taken out of service, as required by the Civil Aviation Law, the court is to consider the public interest involved and it is to notify the Attorney General of the Republic (Procurador de la República) who could, pursuant to the public use doctrine, require that the aircraft remain in public service. In such a case special conditions and restrictions would normally be imposed as mutually decided on between the Office of the Attorney General and the court.<sup>35</sup>

#### **Auction of the aircraft**

Once the notice period (which could vary depending on the nature and location or the possession of the aircraft) has terminated then any interested party may request the court to proceed with the judicial auction of the mortgaged aircraft. This procedure, again, will be conducted in accordance with the provisions of the Code of Civil Procedure, particularly with respect to establishing the rules for the public auction, determining a value for the aircraft to be sold, etc.<sup>36</sup> Again, the public use doctrine could influence this procedure in the case of an aircraft operating in public service (see 6), which is a risk the creditor of such an aircraft must be willing to accept.

## **Pledge of the aircraft, etc.**

In the case of a prenda or any of the other possible liens referred to in Part 1 the procedure for enforcement is that contemplated for the collection of any debt as established in the Code of Civil Procedure,<sup>37</sup> except that the chattel subject to the lien is treated as a security interest independent of the claims of any other creditor.<sup>38</sup> In principle, the standard enforcement proceeding is not executory in nature and so could entail a lengthier judicial procedure. However, depending on the circumstances of the case there may be little difference in practice between the procedure contemplated in the Chattel Mortgage Law and that of the Code of Civil Procedure since either could be subject to procedural complications or the lack thereof.

## **14 Rights in rem Against Aircraft**

### **14.1 Is there a right in rem against an aircraft under Venezuelan law?**

A lien under Venezuelan law is, by definition, a right in rem, that is a right enforceable against the chattel over which the lien is constituted. It is only subject to certain restrictions, such as the public use doctrine in the case of commercial aircraft (see 6) as well as the rights of expropriation and confiscation referred to in Part 2.

## **15 International Conventions on Liens**

### **15.1 Is Venezuela a party to any international conventions that relate to aircraft liens? How do these conventions apply?**

Venezuela is not a signatory to either the 1948 Geneva Convention on the International Recognition of Rights in Aircraft or to the 1933 Rome Convention on the Precautionary Arrest of Aircraft.

## **16 Recognition and Priority of Foreign Aircraft Liens**

### **16.1 Would a Venezuelan court recognize foreign aircraft liens? What priority would it give them?**

Since Venezuela is not a party to any international convention on the recognition of liens over aircraft (see 15) and given the exclusivity of the Chattel Mortgage Law with respect to mortgages over aircraft Venezuela would not recognize a foreign aircraft lien as such. Rather, the lienholder would have to bring suit either in its jurisdiction and then seek to enforce the judgment in Venezuela or to bring an original action in Venezuela, in both cases treating the claim as a financial obligation of the pledgor or mortgagor.

## **17 Rights of Detention and Sale**

### **17.1 What rights of detention and sale may be exercised against aircraft in Venezuela?**

As mentioned in the introduction to Part 1 aircraft may be subject to private or public legal actions when the owner of an aircraft is an obligor of a claimant. Aircraft are also subject to either expropriation or confiscation by the public authorities under certain legally defined circumstances.

The former type of situation arises, primarily, in the case of financial obligations, whether to a private creditor or to a public authority for legally imposed taxes or fees. In this case the claimant, through the ordinary legal process, may request the competent court to attach an aircraft (always subject to the public use doctrine, see 6) as security of the debt and, ultimately (if the debtor does not make payment, post alternate collateral, etc.) to proceed to a judicial auction of the aircraft to satisfy the claim. This is a legal right available to all creditors who bring a legal action of this nature. This does not imply any special security or lien interest in one or more particular aircraft, since all unsecured creditors would have the same level of claim over the general assets of the debtor. The situations in which the public authorities could expropriate or confiscate an aircraft are essentially in the event of a public emergency or if the aircraft were to be used in an illegal activity (see 28).

## **18 Airport Charges**

### **18.1 Under Venezuelan law can an aircraft be detained and sold for unpaid airport charges? In what circumstances?**

There is no express provision in Venezuelan law that would allow airport or air transport authorities to detain and ultimately sell an aircraft for the nonpayment of airport charges, such as landing and parking rights or the special fee payable for the use of mobile ramps.<sup>39</sup>

Rather, in Venezuela, a failure to pay these required fees in a timely manner would subject the owner or operator to the payment of a fine and the possible revocation of the operator's license.<sup>40</sup> In essence, this situation would be treated under the Venezuelan legal system as a debt, which would allow the airport authority to bring suit to collect the sum owed. As part of that action it could seek to attach the aircraft. On the other hand, airport charges are just one of several types of fees that aircraft operators are required to pay periodically, so that if an operator were to fail to maintain these payment obligations on a relatively current basis this could affect the several permits that are necessary in order for the aircraft to remain certified for operation.

## **19 Air Navigation Charges**

### **19.1 Under Venezuelan law can an aircraft be detained and sold for the nonpayment of air navigation charges? In what circumstances?**

Air navigation charges, as well as the fee payable for radio assistance, are among the most basic fees required to be paid by aircraft operators. As with airport charges (see 18) there is no legal stipulation permitting the authorities to detain and sell an aircraft if these fees are not paid. However, the authorities could impose fines and eventually prohibit the operation of the aircraft and bring a suit for debt collection.<sup>41</sup>

## **20 International Air Navigation Charges**

### **20.1 Under Venezuelan law can an aircraft be sold for the nonpayment of international air navigation charges? In what circumstances?**

Venezuela is not a party to any international convention covering air navigation charges. Therefore, a foreign creditor of such fees, pursuing a debtor with assets in Venezuela, would have to either bring suit in its home country and then seek to execute the foreign judgment in Venezuela,<sup>42</sup> in which case the assets could be attached or levied against; seek via a letters rogatory procedure<sup>43</sup> a preventive measure against the aircraft in the course of the foreign suit; or bring suit in Venezuela and seek to attach the aircraft or other assets of the debtor.

## **21 Licensing Contraventions**

### **21.1 Under Venezuelan law can an aircraft be detained and sold for the contravention of Venezuelan licensing requirements? In what circumstances?**

Venezuelan law requires that all aircraft be duly certified for operation based on the normal operating standards and conditions of the aircraft, as well as public safety and environmental considerations, among other matters. Any aircraft that is not certified or that ceases to be in compliance with the requirements for certification may be grounded or detained by the authorities and not permitted to operate until the relevant defect has been corrected. Moreover, Venezuelan laws contemplate a series of fines and other sanctions for failure to comply with aircraft licensing requirements.<sup>44</sup>

However, the mere violation of licensing obligations will not permit the authorities to detain and ultimately sell an aircraft, except to the extent that the relevant authorities become debt creditors due to the failure of the operator (who normally would also be the owner, since licensing applies to the operator of aircraft and not usually to an owner) to pay any such sanctions, in which case they may be able to levy execution against the aircraft.

## **22 Air Navigation Contraventions**

### **22.1 Under Venezuelan law can an aircraft be detained and sold for contraventions of air navigation regulations? In what circumstances?**

See 21.1. The same applies.

## **23 Customs Contraventions**

### **23.1 Under Venezuelan law can an aircraft be detained and sold for contraventions of Customs requirements? In what circumstances?**

Customs regulations could apply to an aircraft essentially in two ways: in connection with customs duties applicable to the import of goods transported by the aircraft or in the case of the import of the aircraft itself (as well as its accessories) as the object of the import or

“nationalization” of a chattel; or where the aircraft is used as the instrument of transport in the case of contraband (that is, the physical, as distinct from the legal import of goods which by their nature could otherwise be lawfully imported and that are transported by the aircraft).

In the case of the import of goods transported by the aircraft or where the aircraft itself is the object of the import then that import, or nationalization, is subject to the payment of customs duty and other import fees. However, in the case of the import of especially commercial aircraft under a variety of circumstances, in practice, it is possible to defer customs duty and the Civil Aviation Law contemplates an exoneration of payment of the Customs duty.<sup>45</sup>

In the case of any type of imported goods, until the proper taxes are paid Customs has the right to detain the aircraft and, ultimately, to have it sold by way of judicial auction to satisfy the Customs tax lien. In this respect, the Customs Law establishes a “privilege” or lien which will be prior to any other for the payment of Customs duties. This lien will arise on any type of vehicle used in international transport and on the actual goods transported.<sup>46</sup>

In the case of alleged contraband, when the aircraft is used as the method of transport it may be confiscated. However, this occurs only when it is proven that the owner of the aircraft is directly involved in the illegal activity whether as a principal or an accomplice.<sup>47</sup>

## **24 Noise and Emissions Contraventions**

### **24.1 Under Venezuelan law can an aircraft be detained and sold for contraventions of noise and emissions requirements? In what circumstances?**

There is no provision under Venezuelan law which permits the authorities to detain and eventually sell an aircraft for the violation of noise or emission regulations. Rather, the aircraft could only be grounded and prevented from operating until the violation is corrected.

## **25 Patent Infringements**

### **25.1 Under Venezuelan law can an aircraft be detained and sold for patent infringements? In what circumstances?**

Venezuelan law does not provide for detention and sale of aircraft in the case of patent infringements. Moreover, the 1944 Chicago Convention, which has been ratified by Venezuela, exempts aircraft from attachment in the case of patent infringement allegations.<sup>48</sup> However, it is possible that a Venezuelan court could issue an injunction in the case of an alleged patent infringement involving an aircraft.<sup>49</sup> In all cases this would be subject to the public use doctrine (see 6).

## **26 Public Health Requirements**

### **26.1 Under Venezuelan law can an aircraft be detained and sold for breaches of public health requirements? In what circumstances?**

Venezuelan law does not contemplate the possibility that an aircraft could be detained and later sold for the violation of public health regulations. However, both the aeronautical and the health authorities have the power to ground an aircraft that is operating under conditions that are dangerous to public safety and public health, or which is transporting materials that violate a public health regulation. Also, these authorities have the authority to impose fines<sup>50</sup> and even, ultimately, to destroy the object causing the public health hazard. However, in the case of an aircraft all that could generally be imposed on the aircraft are, by the aeronautical authorities, standards related to equipment safety and operability and by the health authorities adequate standards of decontamination the aircraft.

## **27 Tax Law Contraventions**

### **27.1 Under Venezuelan law can an aircraft be detained and sold for contravention of Venezuelan tax laws? In what circumstances?**

The Venezuelan Tax Code provides that national tax obligations are privileged credits in relation to all the assets of a tax obligor and that they have priority over all other creditors, except for those guaranteed by a mortgage or lien on property; and pensions, salaries and other income deriving from a person's work and social security.<sup>51</sup>

Accordingly, in the event that the owner of an aircraft is a tax obligor, with respect to any type of national tax obligation, including fees owed to the National Civil Aviation Institute, the tax authority is empowered to bring suit against it, to attach its property (including an aircraft, subject to the public use doctrine and any priority privilege) and to have the aircraft sold by way of judicial auction in satisfaction of the tax debt.<sup>52</sup>

## **28 Crimes**

### **28.1 Under Venezuelan law can an aircraft be detained and sold in connection with crimes? In particular, offences relating to terrorism and drug trafficking?**

An aircraft may be confiscated and later sold by the State if it is used in activities related to the transport of illegal narcotics<sup>53</sup> or of contraband goods,<sup>54</sup> provided it is proven that its owner is involved in the criminal activity. In any event, the aircraft may be detained at least temporarily while an investigation is carried out (the duration in this case may be related to the public use doctrine, see 6). Likewise, an aircraft used in terrorist or other criminal activities could be detained and ultimately confiscated, again if it is proven that its owner was involved in the criminal activity.<sup>55</sup>

## **29 War or National Emergency**

### **29.1 Under Venezuelan law can an aircraft be detained and sold by reason of war or other national emergency? In what circumstances?**

In the case of a national emergency, such as war or a natural catastrophe, the Government may suspend normal constitutional rights and expropriate private property, with its owner being

subsequently compensated for the value thereof. Accordingly, an aircraft may be detained and expropriated under these circumstances.<sup>56</sup>

### **30 Other Aircraft Detention and Sale Rights**

#### **30.1 What other rights are there under Venezuelan law to detain and sell aircraft?**

All of the forms of possible detention and subsequent sale of aircraft in the Venezuelan legal system have been mentioned, or alluded to, in the preceding sections.

### **31 Priority of Detention Rights**

#### **31.1 What is the priority of detention rights? In particular, what is their priority over aircraft liens?**

The right of the public authorities to detain an aircraft for violations of regulations to which it is subject, as well as the rights of expropriation or confiscation, are generally paramount to the rights of any private mortgagee or lienholder of the aircraft.

However, the detention of an aircraft by a public authority, as well as the possible attachment, or the securing of an injunction, over the operation of an aircraft are (except for expropriation and confiscation) temporary measures that would not normally affect the rights of a mortgagee or a lienholder. Otherwise, the general order of priority under Venezuelan law is discussed in 9.

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Código Penal, published in the *Gaceta Oficial Extraordinario* No.5.494, October 20, 2000 (“Criminal Code”).

Código de Procedimiento Civil, published in the *Gaceta Oficial Extraordinario* No. 4.196 of August 2, 1990 (“Code of Civil Procedure”).

Decreto No. 1.446, Decreto con Fuerza de Ley de Aviación Civil, published in the *Gaceta Oficial* No. 37.293, September 28, 2001 (“Civil Aviation Law”).

Ley General de Bancos y Otras Instituciones Financieras, published in the *Gaceta Oficial Extraordinario* No.5.555, November 13, 2001 (“General Banking Law”).

Ley de Hipotecas Mobiliarias y Prenda sin Desplazamiento de la Posesión, published in the *Gaceta Oficial Extraordinario* No. 1.575, April 4, 1973 (“Chattel Mortgage Law”).

Ley Orgánica de Aduanas, published in the *Gaceta Oficial Extraordinario* No. 5.353, June 17, 1999 (“Customs Law”).

Ley Orgánica de la Procuraduría General de la República, published in the *Gaceta Oficial Extraordinario* No.5.554, November 13, 2001 (“Law of the Office of the Attorney General”).

Ley Orgánica sobre Estados de Excepción, Publisher in the *Gaceta Oficial* No. 37.261, August 15, 2001 (“Law on Status of Exception”).

Ley sobre Ventas con Reserva de Dominio, published in the *Gaceta Oficial* No. 25.856, January 7, 1959 (“Sales with Reservation of Title Law”).

*Regulación Aeronáutica Venezolana 47, RAV 47, Registro Aéreo Nacional; Providencia No. PRE-CJU-04-044-016* of the Ministry of Infrastructure and INAC, published in the *Gaceta Oficial Extraordinaria*, No. 5.719, July 6, 2004 (“Regulations on the National Air Registry”).

*Regulación Aeronáutica Venezolana 110, RAV 110, Transporte Sin Riesgos de Mercancías Peligrosas y Transporte de Animales Vivos por Vía Aérea ; Providencia No. PRE-CJU-04-048-060* of the Ministry of Infrastructure and INAC, published in the *Gaceta Oficial Extraordinaria*, No. 5.719, July 6, 2004 (“Regulations on the Transportation of Dangerous Merchandise and Live Animals”).

Resolución No. 175, published in the *Gaceta Oficial* No. 35.743, June 29, 1995, setting airport service charges.

Resolución No. 244, published in the *Gaceta Oficial* No. 34.485, June 8, 1990, setting radio contact fees.

## Treaties

Convención Interamericana sobre Exhortos o Cartas Rogatorias, signed at Panama City in 1975, published in the *Gaceta Oficial* No. 33.033, August 3, 1984.

Convención Interamericana sobre Recepción de Pruebas en el Extranjero, signed at Panama City in 1975, published in the *Gaceta Oficial* No. 33.170, February 3, 1985.

Convención Interamericana sobre Eficacia Extraterritorial de las Sentencias y Laudos Arbitrales, signed at Montevideo in 1979, published in the *Gaceta Oficial* No. 33.144, January 15, 1985.

## Endnotes

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<sup>1</sup> The traditional concept of private liens and related aspects is established in the Civil Code, Art. 1837 *et seq.* However, please note that normally the traditional lien, or prenda, would not be used in connection with an aircraft by virtue of the requirement that the beneficiary (or designated third party) of the prenda maintain possession. This also requires the custodian to provide proper care for the pledged item and that it cannot use it while in its possession. It was for this reason that the special Chattel Mortgage Law was promulgated, as described in the text.

<sup>2</sup>The complete English title of this law is the “Law on Chattel Mortgages and Liens without Taking Possession”. Thus, as the title implies, this special law was intended by Congress (under the 1999 Constitution, the unicameral National Assembly) to create the norms to be followed in the case of chattel mortgages and contractual liens, or prendas, on goods specified in the law rather than the provisions of the Civil Code.

<sup>3</sup> This section is similar to Section 3.1 in the Chapter on Venezuela by the same author, in *Aircraft Finance: Registration, Security & Enforcement* (Vol. III, Thomson, Sweet & Maxwell as updated periodically).

<sup>4</sup> Chattel Mortgage Law, Art. 19.

<sup>5</sup> The Sales with Reservation of Title Law regulates conditional sale transactions in which title to the item sold remains with the vendor until the purchaser makes the final payment. The goods subject to this mechanism must be

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chattels that are specifically identified and that are not to be processed or transformed. This mechanism is essentially used, then, in the case of supplier's credits given in respect of capital goods.

<sup>6</sup> Chattel Mortgage Law, Art. 2.

<sup>7</sup> *ibid.*, Art. 1.

<sup>8</sup> *ibid.*, Art. 4.

<sup>9</sup> *ibid.*, Art. 5.

<sup>10</sup> *ibid.*, Art. 6.

<sup>11</sup> *ibid.*, Art. 16.

<sup>12</sup> *ibid.*, Art. 7.

<sup>13</sup> *ibid.*, Art. 8.

<sup>14</sup> *ibid.*, Art. 40.

<sup>15</sup> *ibid.*, Art. 9.

<sup>16</sup> *ibid.*, Art. 17.

<sup>17</sup> *ibid.*, Art.18.

<sup>18</sup> Civil Aviation Law, Art. 68. Also see Section 47.7 of the Regulations on the National Air Registry.

<sup>19</sup> Chattel Mortgage Law, Art. 81(4). The specific registry designated by the Ministry of Internal Affairs and Justice is the Subalternate Registry of the Third Registry Circuit of the Federal District. In this connection, it is essential to understand that the duplication in this case is due to the existence of both a general law (the Chattel Mortgage Law) and a specific law (the Civil Aviation Law) referring to the matter of the registration of aircraft mortgages. Hence, the principal registration is with the Subalternate Registry, with the Chattel Mortgage Law establishing the basic criteria therefor. Only after the registration with the Subalternate Registry has been accomplished is a certified copy thereof merely filed with the National Air Registry for simple recordation. Thus, the registry officials of the National Air Registry are not responsible for anything beyond merely filing said certified copy together with the registration documentation relating to the aircraft.

<sup>20</sup> Civil Code, Art. 1532. This provision stipulates that the vendor may only ask the court to restitute the chattel sold within 15 days of the delivery for nonpayment, provided it is in the possession of the buyer and has not been altered.

<sup>21</sup> *Ibid.*, Art. 1531.

<sup>22</sup> Civil Aviation Law, Art. 74(4) & (5).

<sup>23</sup> Civil Code, Arts 1837-1854.

<sup>24</sup> Code of Civil Procedure, Art. 338.

<sup>25</sup> Art. 76 of the Civil Aviation Law provides that in the case of an attachment or any other judicial measure that would have the effect of halting the operation of an aircraft used in providing public aviation services the judicial authority ordering such a measure shall assure, if possible, that this does not interrupt the continuation of the service

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provided by the operator. Moreover, the court is to notify the National Civil Aviation Institute of the situation. This provision of the Civil Aviation Law is without prejudice to the obligation on the part of the court to also notify the Office of the Attorney General. In this respect, Art. 97 of the Law of the Office of the Attorney General provides that in the case of a chattel engaged in a public service or of public utility, whether the property of a public or private entity, if a court decides or is requested to issue an attachment or sequestration order, the court must first notify the Office of the Attorney General in order that the Government, if it so decides, may take the measures necessary to avoid interruption of the service. The notification to the Office of the Attorney General has the effect of suspending the preventive measure for at least 45 days.

<sup>26</sup> Chattel Mortgage Law, Art. 40.

<sup>27</sup> Civil Code, Art. 1872.

<sup>28</sup> Chattel Mortgage Law, Art. 17.

<sup>29</sup> Civil Aviation Law, Art. 74. The indemnities referred to in Art. 74(3) are for the damages contemplated in Arts. 142-154, which generally stipulate the joint and several liability of aircraft owners, operators and public aviation service companies for harm caused by the use and operation of the aircraft, whether to persons or property on the aircraft or on the ground, as well as to other aircraft.

<sup>30</sup> The Code of Civil Procedure essentially establishes all of the aspects relating to a civil lawsuit. In particular, the Second Book deals with the procedure for an ordinary lawsuit.

<sup>31</sup> The judicial procedure for executing a chattel mortgage is stipulated in Arts 69—73 of the Chattel Mortgage Law, which supplements in this respect the general norms of the Code of Civil Procedure. Likewise, the rights of a lienholder other than a chattel mortgagee are established in the Civil Code, with the procedure for enforcement contained in the Code of Civil Procedure.

<sup>32</sup> See n. 25

<sup>33</sup> As to chattel mortgages, Art. 69 of the Chattel Mortgage Law.

<sup>34</sup> See Arts. 1-58 of the Code of Civil Procedure.

<sup>35</sup> See n. 25.

<sup>36</sup> The specific norms governing this procedure and the resulting judicial auction are contained in Arts 70 and 71 of the Chattel Mortgage Law as supplemented by the Code of Civil Procedure.

<sup>37</sup> See the Second Book of the Code of Civil Procedure.

<sup>38</sup> See n. 29

<sup>39</sup> The current regulations regarding the fees related to aviation are contained in Arts. 161-167 of the Civil Aviation Law.

<sup>40</sup> See Arts. 174-185 of the Civil Aviation Law.

<sup>41</sup> With respect to the discussion in sections 18 and 19, it should be noted that airport and navigation fees are deemed to be national taxes. Accordingly, an aircraft operator could be sued by the National Civil Aviation Institute for these sums in accordance with the provisions of the Tax Code, which does contemplate the attachment of the assets of a debtor, including of an aircraft. In this respect, then, it is conceivable that the attached asset could eventually be sold at public auction to collect the tax debt.

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<sup>42</sup> Enforcement of foreign judgments is regulated by the provisions of Arts 850—858 of the Code of Civil Procedure.

<sup>43</sup> The matter of letters rogatory is governed by Art. 188 of the Code of Civil Procedure. Venezuela is also a party to the several inter-American conventions on letters rogatory, the taking of evidence abroad, and the enforcement of foreign judgments and arbitral awards. See the full citations of these conventions in the bibliography.

<sup>44</sup> See Arts 174-185 of the Civil Aviation Law.

<sup>45</sup> Arts 95 and 97, in particular, of the Customs Law provides for the temporary admission of an aircraft with exemption from the payment of customs duties (as well as of the VAT), under the premise that the aircraft will eventually be exported or nationalized and the duties and other taxes paid. In principle, authorization for temporary admission, which is routinely granted in the case of leased commercial aircraft by the tax authority, should be subject to the constitution of a guarantee bond by the importer sufficient to cover the customs duty and VAT, although in practice this is generally waived. These tax exemptions are usually granted for one year, but are routinely renewed during the term of the lease. In the case of the Civil Aviation Law, the First Transitory Provision grants an exemption from the payment of customs duties on imported commercial aircraft for five years from the date of entry into effect, or until nearly the end of 2006. However, this exemption requires the promulgation of regulations by the President of Republic, which to date have not been issued. Accordingly, as a result the tax authority has, as a matter of practice, granted continuous deferments of customs duties (as well as of the VAT) for commercial aircraft. Likewise, to date customs duties have not been charged on wet leased aircraft used in international service by Venezuelan domiciled airlines. In addition, the Fifth Final Provision of the Civil Aviation Law provides a permanent exemption from customs duties for firefighting and salvage aircraft, provided they have been declared as such by the National Executive.

<sup>46</sup> See Arts 7 and 10 of the Customs Law.

<sup>47</sup> Art. 110 of the Customs Law provides that in case of contraband the objects of the crime, as well as the vehicles used shall be confiscated, provided that the owner of the vehicle is the author, coauthor, accomplice or collaborator of the contraband.

<sup>48</sup> Art. 27 of the Chicago Convention. The ratification by Venezuela, along with the text of the convention appears at *Gaceta Oficial Extraordinario* No. 1.976 of February 22, 1989.

<sup>49</sup> The authority of a Venezuelan court to issue an injunction under this circumstance is contained in Art. 588 of the Code of Civil Procedure. Moreover, Art. 87 of the Customs Law provides that a good that allegedly violates a Venezuelan intellectual property right is not to be allowed out of customs.

<sup>50</sup> For example, Arts. 174 and 175 of the Civil Aviation Law establish fines for operators and owners of aircraft that are used to transport arms, explosives or dangerous cargo. Art. 105 of the Civil Aviation Law prohibits the transport of narcotics, persons under the influence of narcotics, and persons with contagious or mental diseases when this could represent a danger to security. See also the Regulations on the Transportation of Dangerous Merchandise and Live Animals.

<sup>51</sup> Art. 68 of the Tax Code.

<sup>52</sup> See Arts. 1 and 296 of the Tax Code.

<sup>53</sup> With respect to narcotics, see Art. 66 of the Ley Orgánica sobre Sustancias Estupefacentes y Psicotrópicos, published in the *Gaceta Oficial Extraordinaria* No. 4.636 of September 30, 1993.

<sup>54</sup> Regarding contraband, see n. 46, above.

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<sup>55</sup> Art. 10 (10) of the Criminal Code provides for the taking of the “instruments or arms” with which a crime is committed.

<sup>56</sup> Arts. 24 and 25 of the Ley Orgánica de Estados de Excepción (Law on States of Exception) provide that once a state of exception is decreed the National Executive has the authority to requisition private property to be used to restore a state of normalcy. Once the state of exception has ceased the property so requisitioned is to be returned and the owner is to be compensated for the use of, as well as the harm caused to, the property (if it is destroyed, the state is to pay the value of the good as of the time it was requisitioned).