

**An overview of certain (legal) developments in the Dutch
Kingdom in aviation finance matters**

**The arrests of aircraft, airframes and
aircraft engines in Aruba and the
Netherlands Antilles**

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Introduction

The Courts of Aruba and the Netherlands Antilles have an important history of issuing orders for the arrests of aircraft, airframes and aircraft engines. In both jurisdictions the applicable law provides for a solid legal basis of these arrests. While the modernization of the Code of Civil Proceedings (2005) included to some practical changes, the basic legal framework still exists. Moreover, this legal system works in an efficient manner. The owners/lessors of aircraft, airframes and aircraft engines can rely on the applicable laws which provide for the enforcement of their rights in cases of default. It facilitates the repossession of their high-value aircraft objects. In addition, Aruba property law provides them with adequate secured interests. This gives the owners/lessors a significant reason to choose Aruba as a "flag of choice": a jurisdiction which adequately protects their interests in aircraft objects.

Besides, the alleged strict "doctrine of accession" concerning the attachment of aircraft engines to any airframe, which theory has been suggested by some persons in other jurisdictions, was rejected by the local courts of Aruba and the Netherlands Antilles. These rulings concur with the important decision of a Dutch Appellate Court. Additionally, they are in line with the methodology envisioned under the regime of the Cape Town Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol. These instruments have codified the global prevailing view that no accession of aircraft engines occurs when they are attached to an airframe. More importantly, the Government of Aruba has announced its intention to adopt these instruments as soon as possible. The acceptance of Cape Town is expected to enhance Aruba's position as a leading aviation financing jurisdiction. It will provide the owners/lessors of aircraft, airframes and aircraft

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engines with a strong international legal property law regime, which protects their secured interests at the global level.

The legal framework under the former legal regime

In the past, the Code of Civil Proceedings of Aruba provided the owners (lessors) of aircraft, airframes and aircraft engines the possibility to arrest their assets in the case of default of the debtor by means of an *actio revindicatoria*. For a successful action the owner was required to prove its title to the equipment and to evidence one or more occurrence(s) of default. The permit for the arrest was provided by a simple pre-trial petition, which was filed with the Court of First Instance of Aruba or the Netherlands Antilles. This was a simple proceeding in chambers. As per the then existing docket procedure, these matters were expedited by a preliminary judgment. Evidently, the outcome of the procedure depended on the facts and circumstances of a specific case. The Court's ruling could even be obtained after regular office hours. Once the court permitted the arrest, it was effectuated by a bailiff of the court. The bailiff would arrest the equipment and keep it in custody pending the perfection of the arrest by a civil proceeding. The perfection would be obtained from either the Court of First Instance or from a foreign court. The latter situation would occur in the event that the parties had opted for a foreign forum.

In most of these cases, the parties settled the dispute and the debtors voluntarily surrendered the arrested equipment. In cases involving the bankruptcy of the debtors, the trustees of the airlines/operators chose to cooperate with the repossession of the equipment by the owner/Lessor. Such a release would be based on the secured interest rights of the owner/Lessor which were created in the arrested aircraft objects.

Orders for arrest have been granted by the local courts of Aruba and the Netherlands Antilles relating to aircraft plus engines, as well as separate airframes and aircraft engines. In the latter cases the Courts ruled that the theory of accession was not applicable.

The legal framework under the new legal regime

The Code of Civil Proceedings ("CCP") of Aruba and the one of the Netherlands Antilles were both revised in 2005. The above-mentioned *actio revindicatoria* was not incorporated in the revision. The owners/lessors, however, were given the option to arrest their equipment

based on, for example, sections 729 through 729e CCP. This code contains a clause preventing the precautionary arrest of airlines. This restriction however is limited to those airlines whose flag state was a party to the Convention on the precautionary attachment of aircraft (Treaty of Rome of May 29th, 1933). The arrest of non treaty flag states remained possible. The Courts of First Instance of Aruba and the Netherlands Antilles have granted arrest orders in these cases, further evidencing the legal merit of this arrest.

Arrest of an airframe

In 2001 the Court of First Instance of Aruba granted an order for the arrest of an airframe, which was given as collateral to the owner/Lessor of the engines that were attached to the airframe, based on a right of first mortgage established under the laws of Aruba. The owner/Lessor initiated foreclosure proceedings but chose to abandon these procedures at a later stage.

Arrest of aircraft engines

In 2003 an owner/Lessor obtained an order for the arrest of 2 engines that were attached to an airframe owned by a third party. Subsequently the owner/Lessor initiated injunctive action to recover these engines. In the injunction the Court explicitly rejected the claim by the owner of the airframe alleging that the engines had become part of the airframe. The Court ruled that the doctrine of accession was not applicable to aircraft engines which are attached to airframes. This ruling was in line with a ruling issued earlier by an Appellate Court in the Netherlands and the methodology envisioned under the Cape Town Convention on Mobile Equipment and the Aircraft Equipment Protocol.

In 2005 a similar action i.e. arrest of airframe plus engines followed by an injunction allowed the owner/lessor to recover the equipment in the case at hand.

Besides, the combined courts of the Netherlands created the "Arrest/Repossession instructions reader" ("*Beslag Syllabus, 2008*"). This reader is, according to its introduction, primarily intended for use by the Courts in the Netherlands. It provides the presiding judges with a manual for various repossession/arrest cases. It is a guidance how the judges should view arrest/execution matters; it creates uniformity. The manual has been created under the auspices and the responsibility of the National Counsel of the Private Law Departments of the

Courts in the Netherlands ("*Landelijk Overleg van de Sectoren Civiel van de Rechtbanken/LOVC*"). The manual obtained the formal consent of this formal national judiciary institution on 14 December 2007.

In regard to the provisions in our Code of Civil Procedure concerning the arrest of aircraft engines, the manual states explicitly that "under circumstances" the separately leased aircraft engines can be arrested/repossessed by the Lessor ("Engine Lessor"). These circumstances are typical for international lease agreements which Engine Lessor enters into with Dutch and other parties. The manual submits that, accordingly, these kinds of arrests do not fall under the Rome Convention 1933 As mentioned above, this which treaty is valid in the Netherlands and Aruba and which prohibits specific arrests of "aircraft". In sum, leased engines can be arrested and repossessed, depending on the particular facts/circumstances of the case.

The Dutch court manual refers to the case of the Court of Appeals in Den Bosch, dated 15 August 2002, LJN: AE8293. The appellate court ruled that no accession of leased aircraft engines occurs under existing Dutch and international law. This is very relevant as all the Courts in the Netherlands will be expected to follow the manual. To a very large extent, the courts in Aruba and the Netherlands Antilles will concur.

In sum

The Courts of Aruba and the Netherlands Antilles have more experience with arrest and repossession matters than many other jurisdictions during the last 10 to 15 years. The legal framework provides the owner/Lessor with effective means to arrest and repossess their equipment. This track record enhanced the position of Aruba as a forum of choice in relation to arrest aircraft equipment, in cases where foreign law was applicable and the object was either located or expected to land in Aruba on an occasional basis.

The Government of Aruba has announced its intention to ratify the Cape Town Convention and Aircraft Equipment Protocol. Once this legal process is finalized, Aruba's legal regime will become even stronger and more effective. The owners/lessors may choose Aruba as a flag state to obtain these benefits. Airlines and other operators will have the added benefit of lower financing cost due to the reduced risk exposure.

Although this article has been prepared carefully, it may only serve as a summary of the facts presented its contents should not be relied upon blindly. The text is intended only as an overview of fundamental regulations of the subject and as such may contain inaccuracies and simplifications in its description of the applicable laws, regulations and case law. Application of rules and regulations in each case are on account of special circumstances and it is recommended that advice of counsel be sought in dealing with the application of the law. The text content may be subject to change. For further information and details please contact our offices.

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