



*Cape Town Convention Academic  
Project – 8<sup>th</sup> Conference*

*Avianca Case (Oceanair Brazil Insolvency)*

*Summary of the arguments used in the Legal  
Opinion granted to Lessors*

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The discipline of aircraft lease agreements within the scope of the judicial reorganization process of the airline.

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### KEY QUESTION IN AVIANCA'S CASE

“In the proceedings of judicial reorganization of an airline (BR-Chap. 11), the insolvency court may:

- *under the umbrella of the **principle of enterprise preservation** (LRF\*, art. 47)*
- ***disregard existing special discipline** (LRF, art. 199; Cape Town Convention and Protocol)*
- ***suspend rights deriving from aircraft lease agreements and their parts during the stay period** (LRF, art. 49, paragraph 3)?”*

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\* Brazilian Insolvency Law (Federal Law No. 11.101/2005)



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### **Main Arguments used in our Legal Opinion to rebut Prof. Satiro's Opinion granted to the Debtors**

- 1. Special regime of aircraft lease agreements under Brazilian insolvency law (LRF, art. 199).*
- 2. Supposed antinomy between paragraphs and main section of art. 199 of the LRF: temporary criterion;*
- 3. Supposed antinomy between paragraphs and main section of art. 199 of the LRF and arts. 2 and 49, 3<sup>rd</sup> paragraph: specialty criterion;*
- 4. Cape Town Convention and Protocol: treaty with ordinary force of law and thus prevailing over previous law;*
- 5. Principle of the preservation of the enterprise and the real scope of its normative force.*



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**1<sup>st</sup> Argument: Special regime of aircraft lease agreements under the Brazilian Insolvency Law (LRF, art. 199)**

- **Particularity of the assets** involved in aircraft leasing (value, technology, deterioration, constant maintenance);
- **Specific risks** justify the existence of special rules; principle of equal treatment before the law is therefore respected (CF, art. 5º, I);
- **Special rule concerning aircraft lease agreements and their parts** in airline insolvency processes.



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### **Special Rule:**

“**Art. 199.** Does not apply to the provision in art. 198 to companies referred to in art. 187 of Law No. 7.565 of 19<sup>th</sup> of December 1986.

**Paragraph 1.** In **judicial reorganization** and bankruptcy of companies referred to in the main section of this article **in no event shall the exercise of rights deriving from rental contracts, leasing or any other type of aircraft lease or its parts be suspended.**

**Paragraph 2.** Credits arising from the agreements mentioned in paragraph 1 of this article shall not be subject to the effects of judicial or extrajudicial recovery, as property rights shall prevail over the chose and the agreement conditions, and **the provision set forth in paragraph 3 of art. 49 of this Law shall not apply.**

**Paragraph 3.** (...).”



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### **General Rule:**

“**Art. 49.** All credits existing on the date of the request, even if not yet due, are subject to judicial reorganization proceeding.

(...)

**Paragraph 3.** In the case of a creditor holding the position of fiduciary owner of movable or immovable property, **lessor**, owner or committed seller of property whose respective agreements contain an irrevocability or irreversibility clause, including in real estate developments, or of an owner in a conditional sale agreement, its credit shall not be subject to the effects of judicial reorganization, and its property rights on the chose and agreement conditions shall prevail, subject to the respective legislation; **however, during the suspension period referred to in paragraph 4 of art. 6º of this Law” (= 180 days stay period from the date of the initial proceeding’s decision), the sale or removal from the debtor's establishment of capital goods essential to its business activity shall not be allowed.”**



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- As a **special discipline**, art. 199 of the LRF prevails, within its specific material scope, over the **general rules of the same law** (LRF, art. 49, Paragraph 3).
- **It is unconceivable to hold the *opposite* of what the law states** on the basis of arguments concerning the general procedural restriction of removal of other essential assets held by non-competing creditors during the stay period. **For them, other rules prevail.**



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**2<sup>nd</sup> Argument: Alleged antinomy between paragraphs and the head (*caput*) of art. 199 of the LRF shall be eliminated by the time criterion**

- **There is no** antinomy between the main section and the paragraphs of art. 199, LRF (*explained below*);
- **If there was** a conflict, it would be solved by time criterion: *lex posterior derogat legi priori*;
- The paragraphs of art. 199 were inserted by Law No. 11.196 of November 21, 2005, **after** the LRF (Law No. 11.101/2005) came into force and, therefore, **after** the original text of the head of the provision;
- As a later law, the paragraphs prevail over the head provision of art. 199.





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**“Art. 199.** Does not apply to the provision in art. 198 to companies referred to in art. 187 of Law No. 7.565 of 19<sup>th</sup> of December 1986”  
(= original rule of the LRF)

**Paragraph 1.** In **judicial reorganization** and bankruptcy of companies referred to in the main section of this article in no event shall the exercise of rights deriving from rental contracts, leasing or any other type of aircraft lease or its parts be suspended.

**Paragraph 2.** Credits arising from the agreements mentioned in paragraph 1 of this article shall not be subject to the effects of judicial or extrajudicial recovery, as property rights shall prevail over the chose and the agreement conditions, and the provision set forth in paragraph 3 of art. 49 of this Law shall not apply.

**Paragraph 3. (...)**”.

(= paragraphs introduced by a subsequent Law)



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**3<sup>rd</sup> Argument: Alleged antinomy between art. 199 and arts. 1<sup>st</sup>, 2<sup>nd</sup> and 49, paragraph 3 shall be eliminated by the specialty criterion**

- **There is no** antinomy between arts. 1, 2 and the head of art. 199, on one side, and the paragraphs of art. 199, LRF, on the other side.

Special rule that deviates from the general: mere exception.

There is no clash, rules are compatible.

- **If there was a clash**, it would be resolvable by the specialty criterion: *lex specialis derogat generali*.



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**Article 1.** This Law governs the judicial reorganization, the extrajudicial recovery and the bankruptcy of the businessman and the company, hereinafter referred to simply as debtor.

**Article 2.** This Law does not apply to:

- I – public company and mixed capital company;
- II – public or private financial institution, credit union, pool, private pension entity, health care plan operator, insurance company, capitalization company and other entities legally equivalent to the previous ones.



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### Harmony of rules:

- Arts. 2 and 199, main section of the LRF, subject airline companies to bankruptcy and judicial recovery proceedings.
- Art. 199, Paragraphs 1 to 3 of the LRF: exclude aircraft lease agreements and their parts from the effects of the proceedings. Reduction of practical effects of possible judicial reorganization.
- This is a **legislative option**. It admits disagreement and criticism, but not contempt.
- Valid law must be complied with. *Dura lex sed lex*. CF, art. 5<sup>th</sup>, II.



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#### **4<sup>th</sup> Argument: Cape Town Convention and Protocol are treaty with ordinary force of law**

**Cape Town Convention** was duly incorporated to the Brazilian internal law:

- Legislative Decree No. 135 of May 26, 2011
- Decree No. 8.008 of May 15, 2013
- As such, **it applies as an act of ordinary law** (CF, arts. 49, I, and 84, VIII).
- **It is part of the discipline of art. 199 of LRF** and complements it.



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- **Strong disagreement:**

- Assumptions that the Cape Town Convention and Protocol could be **disregarded**, as they were in this case, when they do not result in “**commercially reasonable measures**”. Or that “**the main purpose of any lender is not to get back the financed asset** – which is usually only in the direct interest of the user – but to actually receive the contracted amount for the asset it has made available”.
- The **agreement** set forth the **commercially reasonable measure** chosen by the parties themselves.
- **It is not possible to compare** the leasing of an Airbus commercial jet or the expensive turbine of an aircraft with the fiduciary alienation of a passenger car.
- Value to be preserved: **legal security** (legality, certainty and predictability).



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### **5<sup>th</sup> Argument: Preservation of the enterprise principle and the real scope of its normative force**

**The preservation principle of the company cannot be claimed merely to break the express rules of Law No. 11.101/2005 itself.**

- “Preservation of the enterprise” is not a reasonable basis for denying the application of express rules, just as claiming the “social function of the company” does not meet its end.
- Clash between rules and principle in the same normative plane: **rules prevail over principles.**
  - Result of a **consideration by the legislator** about the relevant aspects that may arise in the conflict between interests regulated in the law



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- The **principle of preservation of the enterprise** needs to be **combined with other vectors** of the competition law:
  - **Respect for the interest of creditors** (also provided for in LRF Art. 47)
  - **Supremacy of credit protection** (always informing competition laws overall)
  - **Lessors in Avianca`s case would have immediately** bear the costs

**In the medium and long term, all Brazilian businessmen in the industry** would have been severely harmed.





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### **Conclusions:**

- + Lessors' appeal was accepted by the State Court in São Paulo;
- + Lessors spent too much time and effort to revert the decision from the insolvency judge and reinstate possession of the aircrafts and its parts;
- + The discussions before the courts was mainly based on provisions from the Brazilian Insolvency Law;
- + Cape Town Convention was not truly known by the Judges;
- + Cape Town Convention was more an important argument (= risk of international consequences to other lease agreements) rather than a safe-harbor to Lessors.



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*Thank you for the attention*

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