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Portugal

AVIATION FINANCE & LEASING

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This country-specific Q&A provides an overview of aviation finance & leasing laws and regulations applicable in Portugal.

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PORTUGAL

AVIATION FINANCE & LEASING



1. What international aviation conventions has your jurisdiction signed and/or ratified?

The following international aviation conventions are applicable in Portugal:

- i. The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air;
- ii. The Chicago Convention on International Civil Aviation;
- iii. The Geneva Convention on the International Recognition of Rights in Aircraft;
- iv. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- v. The Montreal Convention for the Unification of Certain Rules for International Carriage by Air.

Under the Portuguese Constitution, international conventions ratified or approved by Portugal are directly applicable in the country. Furthermore, the rules pertaining to the hierarchy of rules dictate that international law ranks higher than internal provisions.

2. If your jurisdiction has signed and ratified the Cape Town Convention: a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention? b. Does the Cape Town Convention take priority over conflicting national law?

N/A, as Portugal has not ratified the Cape Town Convention (Convention on International Interests in Mobile Equipment).

3. Will a court uphold the choice of a foreign governing law in respect of the following contracts and if so, please also

state any conditions or formality requirements to this recognition a. Lease and b. Security document (for example, mortgage)?

The parties may choose a foreign law to govern an aircraft lease agreement pursuant to Regulation (EC) no. 593/2008 of the European Parliament and the Council of 17 June on the Law Applicable to Contractual Obligations. A Portuguese court would deem valid and uphold a choice of foreign law made in accordance with that Regulation.

Under the Portuguese Civil Code (“**PCC**”) liens over real estate assets or moveable assets subject to registration (such as aircraft) are created through mortgages. Moreover, Article 46.3 of the PCC requires that the creation (or assignment) of security interests over any means of transportation subject to registration are governed by the laws of the country of the relevant registry. Therefore, if an aircraft is registered in Portugal, a mortgage over the aircraft will have to be created in accordance with Portuguese law. The mortgage must be registered with the National Aircraft Registry (“Registo Aeronáutico Nacional” – “**RAN**”) to be valid, effective and enforceable in Portugal. The RAN is organized and maintained by the Portuguese Civil Aviation Authority (“Autoridade Nacional de Aviação Civil” – “**ANAC**”). Only a mortgage created over a Portuguese-registered aircraft under Portuguese law and registered with the RAN would be upheld by a Portuguese court in case of foreclosure proceedings.

4. Please confirm whether it is (i) customary and (ii) necessary to also take a local law mortgage and if so, why?

As follows from the preceding question, it is necessary to take a Portuguese law mortgage over an aircraft registered in Portugal at the time of creation of the mortgage.

5. Are foreign judgments recognized and enforceable by courts of your jurisdiction and if so, please also state any conditions or formality requirements to this recognition (for example, do you require a local court order confirming such recognition)?

Yes, foreign judgments are recognized and enforceable by Portuguese courts. The applicable procedure varies depending on the country of origin of the foreign judicial decision:

- i. If the court decision is rendered by a court of an EU Member State, the judgment is automatically enforceable in Portugal, without any prior recognition requirements (pursuant to articles 36 and 39 of Regulation (EU) no. 1215/2012 of the European Parliament and the Council of 21 December).
- ii. If the court decision was rendered by a court of a non-EU Member State, the judgment is only enforceable after completion of a review and confirmation by procedure by the competent Portuguese court (the procedure is laid out in articles 978 to 985 of the Portuguese Civil Procedure Code). The party interested in the recognition and subsequent enforcement must provide an original or a certified copy of that decision. If the decision was not rendered in Portuguese, a duly certified translation is also required. Once these documents are filed, the opposing party is served with notice to submit its opposition within 15 days of service.

In addition to the above rules, Portugal is bound by The Hague Convention on Choice of Court Agreements (as a result of its approval by the European Union). This Convention provides a framework of rules relating to exclusive jurisdiction agreements in civil and commercial matters, and the subsequent recognition and enforcement of a judgment given by a court of a contracting state designated in the jurisdiction agreement.

6. Is your aircraft registry an owner-register (registering ownership interests) or an operator-register (registering interests as operator)? Please also state any conditions, procedural steps or formality requirements for such

registration and explain how this is evidenced (for example, the issuance of a Certificate of Registration)

Portugal has an owner-register aircraft registry system. Moreover, it is a single registry system as the registration of ownership with the RAN requires no additional filings/registration with any other entities.

An application form for aircraft registration must be filed with ANAC along with the following supporting documents:

- i. Original or certified copy of the sale and purchase agreement or document of sale (bill of sale);
- ii. Deregistration certificate from the aeronautical registry of the country of previous registration or a certificate of non-registration (if the aircraft was previously registered in another country).
- iii. Customs clearance certificate or evidence of customs clearance and entry summary declaration (in the case of an aircraft imported from a non-EU country, except for Iceland and Norway);
- iv. Proof of payment of the applicable registration fee;
- v. Notarized and apostilled power of attorney empowering a local counsel (or other representative) to sign the application to be submitted with ANAC (if applicable).

If the documents are issued in Portugal by a legal entity or by an attorney-in-fact, the signatures of the signatories must be certified in accordance with Portuguese law and the certification must specifically state that the signatory(ies) is(are) acting in a specific capacity and are duly empowered to do so.

If the documents are issued in a foreign country, the signatories' signatures must be (i) certified by a notary and (ii) apostilled or certified by the diplomatic or consular agent of the Portuguese consulate in the country of origin.

For the purposes of registration with ANAC, documents may be presented in English.

Upon completion of the registration process, aircraft registration is evidenced by a Certificate of Registration issued by ANAC, which included the following information:

- i. Aircraft registration number;
- ii. Aircraft nationality and registration marks;
- iii. Name and address of the owner;

- iv. Details of the aircraft (manufacturer, model, serial number, general classification of the aircraft).

7. Is there a security document register in your jurisdiction where a mortgagee's interests will be recorded? If so, please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a certificate or official stamp on the security document)

Mortgages over Portuguese-registered aircraft must be registered with the RAN as well. As mentioned above, this registration is not only mandatory but an essential requirement for the validity and effectiveness of the mortgage even between the parties.

The documents required to complete the registration of a mortgage over an aircraft registered in Portugal are:

- i. application form;
- ii. original or certified copy of the mortgage agreement, which must:
 - a. be subject to the Portuguese law; and
 - b. indicate the maximum amount secured by the mortgage.
- iii. proof of payment of the applicable registration fee;
- iv. notarized and apostilled power of attorney empowering a local counsel (or other representative) to sign the application to be submitted with ANAC (if applicable).

If the documents are issued in Portugal by a legal entity or by an attorney-in-fact, the signatures of the signatories must be certified in accordance with Portuguese law and the certification must specifically state that the signatory(ies) is(are) acting in a specific capacity and are duly empowered to do so.

If the documents are issued in a foreign country, the signatories' signatures must be (i) certified by a notary and (ii) apostilled or certified by the diplomatic or consular agent of the Portuguese consulate in the country of origin.

For the purposes of registration with ANAC, documents may be presented in English.

8. What is the effect of registration of: a. Ownership interest (for example, proof of title to third parties of ownership) b. Lease (for example, perfects the status of the Lessor under the Lease) c. Security document (for example, secures priority over later registered security). If there are any interests that could rank prior to the security document please state these

Registration of ownership constitutes proof of title of ownership towards third parties.

The registration of a lease agreement serves as evidence of the lease relationship but is, as a general rule, not essential to perfect the status of the lessor under the lease.

Under Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, an aircraft used by a Community air carrier must be registered, at the option of the Member State whose competent authority issues the operating license, either in its own national register or in the national register of another Member State. However, this is not the case if the aircraft is used under a dry lease or a wet lease agreement in accordance with Article 13 of the Regulation, in which case such aircraft may be registered in the national register either of any Member State or of a third country. This means that there are situations where a lease agreement must be registered with the RAN to allow the operation of the aircraft.

Registration of the mortgage ensures the validity, effectiveness (between the parties and towards third parties) and enforceability of said security interest with priority over common creditors of the mortgagor and holders of subsequently registered mortgages. In addition to previously registered mortgages, there are certain types of rights that can take precedence over an aircraft security interest created under a mortgage, such as possessory liens and/or privileged credits in favor of certain entities.

9. What types of lease are recognized in your jurisdiction (for example, translation, notarization, apostille, legalization etc.)?

In Portugal, the main distinction to be made is between operating leases (dry leases and wet leases) and finance leases.

10. What formalities are required to perfect Lessor's rights under a lease in your jurisdiction?

The documents required to complete the registration of a lease agreement over an aircraft registered in Portugal are:

- i. application form;
- ii. original or certified copy of lease agreement;
- iii. proof of payment of the applicable registration fee;
- iv. notarized and apostilled power of attorney enabling a local counsel (or other representative) to sign the application to be submitted with ANAC (if applicable).

If the documents are issued in Portugal by a legal entity or by an attorney-in-fact, the signatures of the signatories must be certified in accordance with Portuguese law and the certification must specifically state that the signatory(ies) is(are) acting in a specific capacity and are duly empowered to do so.

If the documents are issued in a foreign country, the signatories' signatures must be (i) certified by a notary and (ii) apostilled or certified by the diplomatic or consular agent of the Portuguese consulate in the country of origin.

For the purposes of registration with ANAC, documents may be presented in English.

11. Are the ownership rights relating to engines recognized as separate and distinct from the ownership of the rest of the aircraft in your jurisdiction? Please highlight any separate registration, filing or additional formalities that are required to be completed to perfect Lessor's interest in the engines

Engines (and other autonomous equipment, such as APUs, rotors and propellers) are also registerable with the RAN.

Title to an engine included in the application form for aircraft registration will automatically vest in the owner of that aircraft unless a specific reference is made in the application to enable the registration of ownership (or of any type of interest) with a different entity.

12. What form does security over aircraft

generally take in your jurisdiction?

Security interests over Portuguese registered aircraft are created under a mortgage agreement ("*hipoteca*").

13. Are there any particular terms or characteristics that such a security document must take (for instance, a cap on the secured liabilities)?

The mortgage agreement must clearly indicate (i) the identity of the mortgagor and the mortgagee; (ii) the type, model, registration marks and serial number of the mortgaged aircraft; and (iii) the maximum secured amount.

The maximum secured amount will correspond to the sum of:

- a. principal amount;
- b. costs, charges and expenses that might arise of, or in connection with, the enforcement of the mortgage (including, inter alia, all expenses incurred by the mortgagee to enforce its rights under the mortgage);
- c. interest over the outstanding principal amount (up to a maximum period of 36 consecutive calendar months).

A mortgage created under Portuguese law does not involve the transfer of ownership or the possession of the mortgaged aircraft. Moreover, it does not allow the mortgagee to dispose of the mortgaged aircraft. However, it does grant the mortgagee a preferred interest to be repaid out of the proceeds of the judicial sale of the aircraft under any foreclosure proceedings. Any provisions in the mortgage agreement aimed at granting the mortgagee the right to directly dispose of the aircraft would be null and void (due to the prohibition on any commissary pact ("*pacto comissório*").

Although necessarily subject to Portuguese law, the mortgage agreement may be drafted in English and ANAC accepts the registration of the mortgage in English language without a Portuguese translation being required.

14. Are there any perfection requirements for such security document? If so, please state any conditions, procedural steps, formality requirements or documentation (for example, corporates, list of directors etc.) required to effect this

As mentioned above, the registration of a mortgage with the RAN created under Portuguese law constitutes a requirement for the validity, effectiveness (between the parties and towards third parties) and enforceability of the security interest. The documents required to complete the registration of a mortgage over an aircraft registered in Portugal are:

- i. application form;
- ii. original or certified copy of the mortgage agreement, which must:
 - a. be subject to the Portuguese law; and
 - b. indicate the maximum amount secured by the mortgage and the fact that the mortgagor explicitly recognizes the existence of such debt and its position as debtor towards the mortgagee.
- iii. proof of payment of the registration fee;
- iv. power of attorney enabling a local counsel (or other representative) to sign the application form on behalf of the applicant. If issued abroad, this power of attorney must be notarized and apostilled (or notarized and legalized at the Portuguese consulate with jurisdiction over the country).

If the documents are issued in Portugal by a legal entity or by an attorney-in-fact, the signatures of the signatories must be certified in accordance with Portuguese law and the certification must specifically state that the signatory(ies) is(are) acting in a specific capacity and are duly empowered to do so.

If the documents are issued in a foreign country, the signatories' signatures must be (i) certified by a notary and (ii) apostilled or certified by the diplomatic or consular agent of the Portuguese consulate in the country of origin.

For the purposes of registration with ANAC, documents may be presented in English.

15. Summarize any captive insurance regime in your jurisdiction as applicable to aviation.

There is no specific regime regarding captive insurance applicable to aviation, under Portuguese law. However, Law no. 147/2015 of 9 September, on access to the insurance and reinsurance activity regime, which incorporated Directive 2009/138/EC of 25 November into Portuguese law, expressly allows the existence and incorporation of such companies. It also defines the

concept of captive insurance and reinsurance companies and establishes their limitations.

16. Are cut-through clauses under the insurance and reinsurance documentation legally effective in your jurisdiction?

Under article 11 of Law no. 72/2008 of 16 April, on the insurance regime, any insurance contract is governed by freedom of contract, within the limits of Portuguese law. This means that cut-through clauses which are not contrary to Portuguese law, public order, morality or good faith are legally effective.

17. Are there minimum requirements for the amount of third-party liability cover that must be in place in your jurisdiction?

Regulation (CE) no. 785/2004 of 21 April, of the European Parliament and of the Council (consolidated version of 30.07.2020), establishes the minimum insurance requirements for air carriers and aircraft operators in respect of passengers, baggage, cargo and third parties. Therefore, the minimum insurance requirements for air carriers and aircraft operators set out in that Regulation apply directly in Portugal.

In addition to the above Regulation, Decree-Law no. 223/2005 of 27 December 2005 sets out the insurance requirements for any loss or damage caused to passengers in non-commercial operations by aircraft with a Maximum Take Off Mass (MTOM) equal to or below 2700 kg.

18. Can a mortgagee (or equivalent security interest holder) or lessor following an event of default under a mortgage (or equivalent security document) or lease, respectively, take possession of the aircraft without judicial intervention in your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage, corporates etc.) required to effect this

A mortgage created under Portuguese law does not allow the mortgagee to assume ownership or possession of the aircraft following an event of default. Upon the occurrence of an event of default, judicial foreclosure proceedings need to be filed and the mortgagee is

granted a preferred interest to be repaid out of the proceeds of the judicial sale of the aircraft.

19. How can a mortgagee (or equivalent security interest holder), lessor under a lease or designee/beneficiary of an IDERA deregister the aircraft? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage/IDERA etc.) required to effect this

To deregister an aircraft, a mortgagee or lessor will have to apply for deregistration with the RAN. The procedures and supporting documents vary depending on the exact situation. In the event of enforcement of a mortgage, deregistration is likely to be applied for by the new owner of the aircraft pursuant to the judicial sale, as the mortgage agreement may not grant to the mortgagee the right to directly dispose of the aircraft.

In the case of a lessor under a lease agreement, the application for deregistration will need to evidence, inter alia, that the lease agreement has been terminated.

Portugal has not ratified the Cape Town Convention (Convention on International Interests in Mobile Equipment), which means that an IDERA will not be enforceable in Portugal.

20. Can the government or the lessee lawfully prevent the repossession or deregistration and if so, in what circumstances

No, the owner will have to apply for deregistration with the RAN to allow export from Portugal. The consent of the lessee/operator is not required, but it is necessary to provide evidence that the lease agreement has been terminated. This may be convoluted if the termination is pursuant to an event of default rather than due to expiry of its term or mutual termination.

Typically, owners/lessors are provided with irrevocable powers of attorney to enable applying for deregistration without lessee's intervention. However, in practical terms, it may still be difficult to repossess the aircraft without the lessee's cooperation and/or court intervention, as there are certain material acts where that cooperation may be crucial (such as obtaining airport access and access to the aircraft itself and to its technical books).

It is possible for the lessee to apply for an injunction or an interim measure with the court, which may, on a temporary basis, prevent ANAC from deregistering the aircraft and enabling its export. These measures may be in force until the dispute on termination is settled.

21. If judicial intervention is required, please describe the process? Please also state any procedural steps, length of time to complete and advise as to documentation required

Judicial intervention is required to enforce a mortgage agreement, in which case foreclosure proceedings will need to be filed before the judicial court in Portugal.

In the case of repossession further to an event of default under a lease, judicial intervention may be required if the lessee and/or operator does not cooperate. The exact documents required will depend on the specific details of the case, but it is anticipated that the lessor will be required to provide, inter alia, (i) copy of the lease agreement; (ii) evidence of the lessee's default; and (iii) evidence of the termination of the lease further to the event of default.

22. How is legal title transferred under the laws of your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, corporates etc.) required to effect this

Transfer of title in an aircraft that is registered in Portugal at the time of the transfer is effective if made pursuant to a sale and purchase agreement or a bill of sale. The new owner must then apply for registration of ownership with the RAN to render same effective vis-à-vis third parties.

An application form for transfer of title must be filed with ANAC along with the following supporting documents:

- i. Original or certified copy of sale and purchase agreement or document of sale (bill of sale);
- ii. Return of the previous certificate of registration;
- iii. Proof of payment of the applicable registration fee (if applicable);
- iv. Notarized and apostilled power of attorney empowering a local counsel (or other representative) to sign the application to be submitted with ANAC (if applicable).

If the documents are issued in Portugal by a legal entity or by an attorney-in-fact, the signatures of the signatories must be certified in accordance with Portuguese law and the certification must specifically state that the signatory(ies) is(are) acting in a specific capacity and are duly empowered to do so.

If the documents are issued in a foreign country, the signatories' signatures must be (i) certified by a notary and (ii) apostilled or certified by the diplomatic or consular agent of the Portuguese consulate in the country of origin.

For the purposes of registration with ANAC, documents may be presented in English.

23. Are there any restrictions on the sale of an aircraft following enforcement (for example, the requirement to obtain a court order or conduct a public auction or other action in order to sell the aircraft upon enforcement)

The enforcement of a mortgage created under Portuguese law grants the mortgagee the right to take ownership of the aircraft following an event of default but does not enable the mortgagee to take ownership of the aircraft. The mortgagee is repaid out of the proceeds of the sale of the aircraft, which is organized by the court.

24. Would lease rentals be subject to tax (for example, withholding or income tax)? Please also state if there are any conditions for such tax to be imposed and any steps usually taken to mitigate this

Aviation-related lease payments are subject to a 25% withholding tax rate whenever the lessee is a Portuguese tax resident entity, and the lessor is a non-Portuguese tax resident entity without a permanent establishment located in Portugal to which the rental income is attributable. An exemption may be available under any applicable tax treaty.

VAT will be due on a B2B financial lease of an aircraft considered to be located in Portugal, at the standard rate of 23% in Portugal mainland. The main issue is, however, to determine on a case-by-case basis whether it will be considered a supply of goods or a supply of services. If the transaction is subject to VAT in Portugal, VAT exemptions may apply considering the aircraft's future use (namely, international traffic).

25. Would a sale of an aircraft in your jurisdiction incur sales tax? Please also provide details of amount or calculation and any steps usually taken to mitigate this

Under the Portuguese VAT Code, Portuguese VAT (at a 23% rate in Portugal mainland) applies on sales of goods that are located within Portuguese territory whenever: (i) the transport or dispatch to the purchaser begins; or (ii) if there is no transport or dispatch, when they are made available to the purchaser.

However, the sale of aircraft by Portuguese entities (exports) may be exempt from Portuguese VAT considering the aircraft's future use (namely, international traffic). On the other hand, the purchase of aircraft by a Portuguese resident company is subject to, but not exempt from, VAT at the standard rate of 23% in Portugal mainland.

26. Are there any restrictions on the import or export of aircraft in your jurisdiction and would such importation or exportation incur any liability as to customs or taxes? Please also state if any consents or approvals are required and the procedural steps taken to obtain these, and any procedural steps or formality requirements to mitigate any taxes

Import of aircraft is generally subject to, but not exempt from, VAT and custom duties.

Export of aircraft by Portuguese entities is generally subject to VAT. However, an exemption may apply considering the aircraft's future use (namely, international traffic).

27. Are there any foreign exchange restrictions on transfers of funds

There are generally no restrictions on foreign exchange operations in Portugal. Under the EU principle of free movement of capital, all restrictions on capital movements and payments between EU member states are prohibited. Therefore, there are no exchange controls or currency regulations affecting inbound or outbound investment, the repatriation of income, capital or dividends, the holding of currency accounts, or the settlement of currency trading transactions between Portugal and others EU member states.

28. How successful have foreign creditors and lessors been in enforcing their security and lessor rights over and successfully repossessing aircraft in a timely manner?

We are not aware of any difficulties or constraints affecting foreign creditors in this domain. However, Portuguese court proceedings are, as a rule, relatively long and cumbersome.

29. What government led reforms affecting creditor and lessor rights are currently underway in the aviation sector in your jurisdiction?

As mentioned above, there is no consolidated legal framework on the National Aircraft Registry. The most relevant provisions are scattered among several statutes, including a few articles of the completely outdated Air Navigation Regulations of 1931. In January 2009, a draft Aircraft Registry Code was made available for public consultation. However, as no subsequent information has been made public on the status of this much needed reform since 2009, it is difficult to classify it "as currently underway".

30. Please describe any interesting legal development in your jurisdiction (for instance, decided court cases or arbitral awards) which affect creditor and lessor

rights?

We are not aware of any recent legal developments which affect creditor and lessor rights.

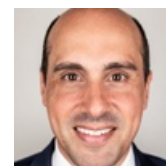
31. Please discuss any relevant governmental regulations implemented in your country to help alleviate the financial and other difficulties faced by airlines in your jurisdiction caused by CoVid 19 and whether that will impact rights of lessors (who lease aircraft to the airlines) and lenders (who finance such aircraft which are mortgaged in favour of the lenders)? Are such governmental regulations expected to be in place until the difficulties faced by airlines caused by the CoVid 19 subside or are they more long term?

Measures adopted by the Portuguese Government to alleviate financial difficulties faced by airlines are not expected to impact lessors' and lenders' rights. Noteworthy measures in this regard were the approval of (i) Portuguese restructuring aid in favour of TAP Group in addition to compensation for damages suffered due to coronavirus pandemic; and (ii) Portuguese restructuring aid in favour of SATA Group. Both restructuring aid packages have been approved by the European Commission and are expected to contribute to enable the two airlines continuing to comply with their obligations towards, inter alia, lessors and lenders.

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