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**LEGAL  
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**COUNTRY  
COMPARATIVE  
GUIDES 2021**

# The Legal 500 Country Comparative Guides

## Portugal

# AVIATION FINANCE & LEASING

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This country-specific Q&A provides an overview of aviation finance & leasing country 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 aviation conventions are in place in Portugal:

- i. The Chicago Convention of 1944 on International Civil Aviation;
- ii. The 1948 Geneva Convention on the International Recognition of Rights in Aircraft;
- iii. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- iv. Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed on 12 October 1929;
- v. Montreal Convention for the Unification of Certain Rules for International Carriage by Air, signed on 28 May 1999.

### 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?

a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention:

N/A - The Cape Town Convention is not in force in Portugal.

b. Does the Cape Town Convention take priority over conflicting national law?

N/A - The Cape Town Convention is not in force in Portugal.

### 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)?

a. Lease The parties are free to choose the applicable law and the choice of English law would be respected.

b. Security document (for example, mortgage) The Mortgage Agreement must be governed by Portuguese law. Portuguese rules of conflict of laws provide that the creation and assignment of interests over any means of transportation subject to registration are governed by the laws of the country of the relevant registry (article 46(3) of the Civil Code).

The creation of a mortgage over an aircraft that is registered in Portugal at the time of creation of such security, this security must take the form of a mortgage governed by Portuguese law, and it must be registered with RAN to become valid, effective and enforceable in Portugal.

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

It is necessary because non-Portuguese law mortgage created over an aircraft while such aircraft is registered in the Portugal registry would not be considered a valid mortgage by the Portuguese courts.

It is customary in Portugal for an aircraft lender to create and register an aircraft mortgage ("hipoteca") on a Portugal registered aircraft in order to have priority over unsecured creditors.

### 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)?**

The article 36 of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council, of 21 December (Brussels I Regulation recast), the judgments rendered by the courts of another EU member state are automatically enforceable in Portugal, without any special procedure being required. Likewise, pursuant to article 39 of the same regulation, a judgment given in an EU member state, which is enforceable in that EU member state, shall be enforceable in Portugal without any declaration of enforceability being required.

In what concerns the decisions rendered by courts of non-EU countries the Portuguese Code of Civil Procedure provides that their enforceability is dependent upon prior review and confirmation by the competent Portuguese court. This assessment is carried out in accordance with a specific procedure set forth in articles 978-985 of said Code. The party wishing to recognize a foreign judgment, namely to have it enforced in Portugal, shall provide the original of the judgment duly authenticated or a copy duly certified of the same. If the judgment is not in Portuguese, the requesting party shall also provide a duly-certified translation in this language. Once the application for recognition is fled, together with the documents identified above, the opposing party is summoned to, within 15 days, submit its opposition.

**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)**

The Portuguese aircraft registry is an owner registry. The main details registered are the identity of the Owner, the details of the Aircraft (e.g., manufacturer and year of manufacture, model, serial number, number of engines) and its use. Aircraft leases and mortgages may be registered. Fractional ownerships and the percentages held in the ideal quota of an aircraft are also registrable.

In order to proceed with registration, an application form must be completed and signed, and a fee must be paid.

The following documents are required:

- i. Agreement or document of sale (Bill of Sale);
- ii. Deregistration certificate from the Aeronautical Registry of the country of previous registration or certificate of non-registration;
- iii. Customs clearance certificate in the case of an imported aircraft belonging to a non-EU country;
- iv. Two photographs of the aircraft, with a photograph of the front and a profile with the marks of nationality and registration painted in 9×12 format, borderless and printed with natural colours.

Documents issued in foreign countries must be signed by a notary and be legalized by a notary involved with the affixing of the Apostille as per Articles 3 and 4 of the Hague Convention of 05.10.1961 on the Suppression of the Requirement Legalization for Foreign Public Documents, or duly notarized and legalized by diplomatic or consular officer from the Portuguese embassy or consulate there. Documents issued in Portugal shall contain the signatures of the legal representatives recognized under the law with the words "in the capacity and authority to act".

The aircraft registration is evidenced by a Certificate of Registration issued by the Portugal aircraft register (ANAC).

**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)**

Aircraft mortgages governed by Portuguese law on Portuguese registered aircraft are registered on the Portuguese aircraft register. Such mortgage shall grant the mortgagee a security that shall be effective in rem over the specific mortgaged aircraft, and enforceable towards all, against any third parties, namely common creditors of the mortgagor and subsequently registered mortgagees.

To record and perfect the registration of a mortgage, the following basic documents are required:

- i. a notarized and apostilled

- mortgage;
- ii. a petition by the aircraft owner to the chairperson of ANAC applying for the mortgage registration; and
  - iii. a notarized and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the owner and proceed with the filing for the mortgage registration.

Note that the registration of a mortgage created under Portuguese law is mandatory and an essential legal requirement for the mortgage to be valid and effective, even with relation to the parties thereto.

Charges for a mortgage will be calculated in accordance with the actual mortgage total amount (which will be converted into euros for the calculation of registration charges if the mortgage is denominated in another currency). The registrar will calculate the amount payable for the registration of each mortgage based on the mortgage total amount.

**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**

a. Ownership interest (for example, proof of title to third parties of ownership) The aircraft certificate of registration is prima facie evidence of the aircraft ownership.

b. Lease (for example, perfects the status of the Lessor under the Lease) Registration of a lease by the aircraft owner will only protect the owner against its potential liability for damages caused by the aircraft while it is on lease. The main aim of the lease registration is to prove the identity of the aircraft operator.

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 The mortgage shall grant the mortgagee a security that shall be effective in rem over the specific mortgaged aircraft, and enforceable towards all, against any third parties, namely common creditors of the

mortgagor and subsequently registered mortgagees.

On the other hand, the mortgage registration provides public notice of the mortgage towards any third party, which can rely on its existence.

The mortgage is a right *in rem* (i.e. a right related to the legal asset and not a mortgagee's personal right). For this reason, the mortgage will follow every subsequent legal change of the aircraft, such as the transfer of the aircraft title.

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

The laws of Portugal recognize the usual types of leases, such as operative leases, finance leases, wet leases, etc.

Documents issued in foreign countries must be signed by a notary and be legalized by a notary involved with the affixing of the Apostille as per Articles 3 and 4 of the Hague Convention of 05.10.1961 on the Suppression of the Requirement Legalization for Foreign Public Documents, or duly notarized and legalized by diplomatic or consular officer from the Portuguese embassy or consulate there. Documents issued in Portugal shall contain the signatures of the legal representatives recognized under the law with the words "in the capacity and authority to act".

An aircraft lease will have to be translated into Portuguese before it is produced before a Portuguese court.

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

Lessor's rights under a lease are granted by the lease interest registration in the Portuguese aircraft register. To complete the registration, the Portuguese aircraft register requires a copy of the leasing contract.

**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

Yes, it is possible to perform the registration of autonomous ownership rights relating to engines. However, there is no specific separate engine register. Engines are registered with the Portuguese aircraft register.

### 12. What form does security over aircraft generally take in your jurisdiction?

In Portugal, the typical security over Portuguese registered aircraft is a Portuguese aircraft Mortgage (“hipoteca”).

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

Such mortgage shall grant the mortgagee a security that shall be effective in rem over the specific mortgaged aircraft, and enforceable towards all, against any third parties, namely common creditors of the mortgagor and subsequently registered mortgagees.

A mortgage document shall contain some relevant information regarding:

1. the name and personal information of the mortgagor and the mortgagee;
2. the type, model, registration marks and serial number of the mortgaged aircraft;
3. the secured monetary amount.

The mortgage may comprise any incidental obligations provided they are mentioned in the mortgage title and duly registered. It may cover all forms of interest payments, namely those usually contemplated in a lease agreement, as well as any additional amount related to the foreclosure or collection costs, such as attorney’s fees, court costs and related expenses. The agreed interest rate should be expressly mentioned in the mortgage document for registration purposes.

The total mortgage agreement must indicate the amount, comprising:

- the principal amount;
- the costs, charges and expenses arising out of, or in connection with, the enforcement of the mortgage, including (but not limited to) court fees, litigation fees, lawyer’s fees and any other disbursements made by the mortgagee in order to enforce its rights under

the mortgage, up to an amount equivalent, for the purpose of registration, to 10 per cent of the principal amount; and

- the maximum amount of interest over the outstanding principal amount, which will yield over a period of 36 consecutive calendar months (the maximum period permitted by Portuguese law).

### 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

The registration of a mortgage created under Portuguese law is mandatory and an essential legal requirement for the mortgage to be valid and effective, even with relation to the parties thereto.

The mortgage must be notarized and legalized with the Hague Apostille, or at the nearest Portuguese consulate. To record and perfect the registration of a mortgage, the following basic documents are required:

- a notarized and apostilled mortgage;
- a petition by the aircraft owner to the chairperson of Portuguese aircraft register applying for the mortgage registration;
- a notarized and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the owner and proceed with the filing for the mortgage registration.

Basically, when filing the request for registering the aircraft mortgage with the aircraft register, the mortgagee will have to provide the aircraft register with, inter alia, proof of its legal existence, and evidence that the signatory of the request is duly empowered.

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

There is no specific requirement under Portuguese law regarding a captive insurance regime specifically applicable to aviation.

### 16. Are cut-through clauses under the insurance and reinsurance documentation

**legally effective in your jurisdiction?**

Cut-through clauses under insurance and reinsurance documentation are legally effective in Portugal since they are not contrary to mandatory rules, public order or morality.

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

Regulation (EC) No. 785/2004, as subsequently amended by Regulation (EU) No. 285/2010, establishes minimum amount for insurance cover for passengers, baggage and cargo. As a member of the EU, the general requirements of third party liability coverage foreseen under EU law apply in Portugal as well.

**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**

There are no remedies available in Portugal to enable a mortgagee or a lessor to take the possession of the aircraft without judicial intervention. In the event of mortgagor or lessee's default or of any violation of mortgagor's or lessee's obligations, the mortgagee or the lessor must bring action before the competent Court.

**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**

The IDERA is a measure regulated by the Cape Town Convention which has not been ratified by Portugal yet.

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

The lessee can lawfully prevent the repossession by filing an opposition before the Court which ordered the measure. In this case, the lessee must prove that the owner/lessor is not entitled to claim the repossession of the aircraft.

**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**

In case repossession by a Lessor needs a court order, the documentation required is mainly the lease, proof of the lessee's default and of the lease termination.

**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**

In aircraft sale transactions, a bill of sale or a purchase agreement is generally accepted as a document which evidences transfer of title.

The new owner should apply for registration of ownership with Portuguese aircraft register for the transfer to become valid and effective as regards third parties.

The bill of sale or purchase agreement must be notarized, and the signature notarization should state the signatories' authority. Documents issued or executed in other jurisdictions must be legalized through apostille (the Hague Convention of 5 October 1961), or by a Portuguese consulate, before being filed for registration in Portugal.

**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)**

Where enforcement has taken place through actions in the Portuguese courts, the creditor's rights will depend on what exactly was requested from the court (e.g., repossession, seizure of asset, recognition of title, etc.). In general terms, non-owners of an asset cannot sell such asset directly, but only through a court-controlled system (usually a public auction).

**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**

The tax aspects of aircraft finance transactions must be analyzed on a case-by-case basis, and the relevant treaties to avoid double taxation need to be reviewed (if applicable).

However, as a rule, withholding tax will be levied over the aviation-related lease payments 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). This withholding tax on the lease rents would be levied at a 25 per cent flat rate (domestic rate), except where a double tax treaty entered into by Portugal applies.

The EU Council Directive 2003/49/EC of 3 June 2003, applicable to interest and royalty payments made between associated companies of different member states, shall also be considered.

**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**

The domestic transfer of an aircraft should originate the payment of Portuguese VAT. Purchaser shall be liable for VAT at the general rate of 23%. A VAT exemption shall be applicable if the purchaser is an airline operating for reward chiefly on international routes.

In case of an intra EU sale/purchase or transfer of title of an aircraft, the transfer of used aircraft should originate the payment of Portuguese VAT if the purchaser is a consumer or it does not have a valid EU VAT number. Otherwise, VAT will not be levied in Portugal, but it may be due in the country of the purchaser under the reverse

charge mechanism. The sale of new aircraft to another EU country is not subject to VAT in Portugal but VAT should in principle be levied in the country of destination.

**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**

As indicated, the tax aspects must be analyzed on a case-by-case basis, taking into account the relevant treaties to avoid double taxation (if applicable). Value Added Tax and customs duties are generally payable upon import of an aircraft, subject to exemptions depending on the tax and customs regime of the aircraft and on the future use of the aircraft.

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

There are no restrictions on international payments nor exchange controls in effect in Portugal, and capital import and export, as well as cash conversion to other currencies, are, in general, free as regards both EU and non-EU countries.

**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?**

Practical experience indicates that foreign creditors and lessors have not experienced particular difficulties in recovering their assets from Portuguese airlines.

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

There is no reform currently in discussion in the aviation sector.

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

There is not legal development our relevant court decision to be highlighted.

**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?**

To assist the Portuguese flag company, the Government injected 1.2 billion euros in TAP.

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