

Aviation Finance & Leasing

in Portugal

Downloaded on 24 June 2019

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OVERVIEW**Conventions****To which major air law treaties is your state a party?**

Portugal has approved but not ratified the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Portugal is a party to the 1944 Chicago Convention on International Civil Aviation and to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

Portugal is also a party to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed on 12 October 1929 and to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, signed on 28 May 1999.

The Cape Town Convention on International Interests in Mobile Equipment of 2001 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment are not in force in Portugal.

Domestic legislation**What is the principal domestic legislation applicable to aviation finance and leasing?**

The general legal provisions of the Civil Code (Book II, Title II, Chapter IV of article 1022 et seq) governing the rights and obligations of lessors and lessees also apply to the lease of aircraft. A lease contract is defined therein as the agreement whereby a party undertakes to grant the other the temporary use of an asset for consideration. Unless otherwise agreed, the lessee undertakes to return the asset in the same condition at the end of the contract, save for the deteriorations inherent in cautious use of the asset in accordance with the purpose of the contract.

Portuguese law makes a distinction between operating leases, where the temporary use of an asset is the main purpose of the contract, and financial leases, which are defined by Decree-Law No. 149/95 of 24 June 1995, as amended and supplemented by Decree-Law No. 265/97 of 2 October 1997, Rectification No. 17-B/97 of 31 October 1997, Decree-Law No. 285/2001 of 3 November 2001 and Decree-Law No. 30/2008 of 25 February 2008, as the agreement whereby a party undertakes, for consideration, to cede to the other the temporary use of an asset, purchased or manufactured in accordance with the lessee's instructions, which the lessee has the right to buy at the end of the agreed period of time for a pre-established or pre-determinable price.

In both operating and financial leases, the legal ownership of the asset remains with the lessor until its purchase by the lessee or another party. For accounting and tax purposes, the economic substance prevails over the legal form, and therefore a lease agreement may be qualified as a financial or an operating lease for accounting and tax purposes regardless of its legal qualification or the contract title as attributed by the parties.

Financial lease companies, governed by Decree-Law No. 72/95 of 5 April 1995, as amended by Decree-Law No. 285/2001, Decree-Law No. 186/2002 of 21 August 2002, Decree-Law No. 157/2014 of 24 October 2014 and Decree-Law No. 100/2015 of 2 June 2015, are credit institutions that deal exclusively with financial lease activity. As a complementary activity, financial lease companies may alienate, assign the exploitation, lease or perform other management acts over assets that have been returned by virtue of termination of a financial lease contract, or in the event of the lessee not exercising the right to acquire its ownership.

Besides financial lease companies, only credit institutions, financial companies and financial credit institutions may legally enter into financial lease agreements as lessors.

Decree-Law No. 298/92 of 31 December 1992, as amended and supplemented (with the last amendment under Decree

Law No. 15/2019 of 12 February), governs the process for the establishment and carrying out of the activity of credit institutions and financial companies, largely reflecting EU Directives. In this Legal Framework of Credit Institutions and Financial Companies, a credit institution is an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account, whereas a financial company is a company that is not a credit institution and whose main activity consists in one or more of the following: credit operations, including granting guarantees and other engagements, financial lease and factoring.

Financial credit institutions were created and are governed by Decree-Law No. 186/2002. These are defined as credit institutions with the purpose of carrying out the same operations as banks, with the exception of receiving deposits.

Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable 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). Hence the transfer of title or the creation of a mortgage as regards an aircraft that is registered in Portugal falls under the scope of this rule: if an aircraft is registered in Portugal at the time of the transfer of its ownership or at the time of the creation of a mortgage, these must be governed by Portuguese law and should be registered with the National Aircraft Registry (RAN).

The parties may choose the law governing the bill of sale, pursuant to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), but for the contract to have a transfer of title effect it must be valid and legally effective in accordance with the governing law, and the sale will have to be registered in accordance with the law of registration.

If the envisaged security involves 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.

Moreover, and in view of the above, if the lessor of an aircraft on lease to a lessee assigns by way of security or otherwise grants a security interest pursuant to a security assignment governed by a foreign law, any rights thus purported to be created over an aircraft registered in Portugal will only be enforceable for parties inside Portugal. They will be contractual obligations of such parties, but they will not grant security rights over such aircraft registered in Portugal, in view of the Portuguese rule of conflict of laws mentioned above.

TITLE TRANSFER

Transfer of aircraft

How is title in an aircraft transferred?

A bill of sale or a purchase agreement, evidencing the owner's title to the aircraft, is effective to transfer title in an aircraft that is registered in Portugal at the time of the transfer as between transferor and transferee.

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

Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

All documents to be filed with RAN must be notarised, and the signature notarisation should state the signatories' authority.

Documents issued or executed in other jurisdictions must be legalised through apostille (the Hague Convention of 5 October 1961), or by a Portuguese consulate, before being filed for registration in Portugal. However, documents to be filed in relation to aircraft registration may be written in English, without the need for translation into Portuguese.

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

Identify and describe the aircraft registry.

The registration of aircraft is the responsibility of RAN, which is a department of the Portuguese Civil Aviation Authority (ANAC). RAN is a substantive register, and registration establishes the recognition and priority of interests of owners and mortgagees.

The registration of title and any other interest constitutes evidence of the ownership as well as of any other rights and interests to and in the aircraft.

Registration publicises the relevant fact, and so will constitute public notice to third parties.

Moreover, under Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the EC, an aircraft used by an EC air carrier must be registered in the national register or within the EC.

Hence, if an aircraft is operated by a Portuguese airline under a lease, both such aircraft and the lease must be recorded with RAN to enable the airline to operate the aircraft.

Portugal has entered into bilateral agreements for the transfer of oversight responsibilities under article 83-bis of the Convention on International Civil Aviation (Chicago Convention) with Spain (20 June 1997), Italy (14 July 2010) and Germany (2 July 2011). Each possible 83-bis situation should, as a matter of caution, be reviewed on a case-by-case basis.

There is no specific separate engine register. Engines are registered with RAN.

Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Both ownership and the lease interest resulting from a lease agreement over aircraft can be registered with RAN.

There are no limitations on who can be recorded as owner, and an ownership interest regarding aircraft cannot and should not be registered with any registry other than RAN.

RAN also records owners' and lessees' interests in autonomous equipment, including engines.

Registration of ownership interests

Summarise the process to register an ownership interest.

The following is a basic list of the required documentation to register an ownership interest:

- notarised and apostilled bill of sale (or purchase agreement) evidencing the owner's title;
- deregistration certificate issued by the original registry office, if the aircraft was previously registered in another state;
- customs clearance certificate (on the importation of the aircraft to Portugal); for EU member states, it is enough to fill in the traffic form if the import is made through the airport, and such form will then be stamped by Portuguese customs;
- petition by the owner to the chairperson of ANAC applying for the ownership registration; and
- notarised 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 ownership registration.

The following are the complementary licences to be granted for the operation of the aircraft in Portugal (assuming the lessee is a local operator):

- airworthiness certificate;
- radio station licence;
- air navigation diary;
- noise certificate; and
- aircraft logbooks.

For registration of an aircraft in Portugal, including the registration of two engines and auxiliary power unit, the overall total cost is currently €769.66.

The recognition of the rights of the new owner takes effect from the date the documents are filed with RAN.

Title to an engine that is mentioned in the registration petition applying for the ownership registration of an aircraft shall automatically vest in the owner of such aircraft, unless the engine ownership is specifically registered with a different owner.

Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration constitutes proof of title, and third parties can rely on the accuracy of the public registration of the ownership interest (as recorded on the certificate of registration).

A registered ownership interest is effective against third parties until a new owner files for the registration of ownership or any interested party legally challenges the registered owner's defective interest.

Registration of lease interests

Summarise the process to register a lease interest.

To record and perfect the registration of a lease, the following basic documentation is required (assuming the aircraft has already been registered in accordance with question 8):

- a notarised and apostilled lease agreement;
- a petition by the lessor or owner to the chairperson of the board of directors of ANAC, applying for lease registration; and
- a notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the lessor and proceed with the filing for the lease registration.

The registration of a lease, by itself, if the aircraft is already registered, does not have any cost, and the corresponding certificate issued to evidence the registration of the lease interests is also obtained without any additional cost.

All documents to be filed with RAN must be certified or notarised, and they must also be legalised with the Hague Apostille of 5 October 1961 or at the nearest Portuguese consulate.

The recognition of the rights of the lessor and lessee takes effect from the date the documents are filed with RAN.

Certificate of registration**What is the regime for certification of registered aviation interests in your jurisdiction?**

The certificate of registration is issued by ANAC.

RAN registration records the following facts, and a certificate shall be issued to evidence same:

- the aircraft registration number;
- the manufacturer's serial number of the aircraft and of the engines;
- the name and address of the owner or lessor, and of any lessee, as well as any other interest in the aircraft (co-ownership, mortgages etc); and
- the name and address of the relevant party.

A separate engine certificate of registration may be obtained if the engine is registered separately from the aircraft, and ownership, security and lease interests may be recorded for an engine.

Deregistration and export**Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?**

The deregistration or export of the aircraft must be petitioned or consented by the aircraft owner.

From a Portuguese registration perspective, it is the registered owner of the aircraft that is entitled to the rights over the aircraft, limited only by any liens and interests, created pursuant to Portuguese law, as may be registered with RAN.

If the aircraft has been mortgaged, the specific consent in writing (duly notarised and legalised) of the lender or

mortgagee will also be required.

In any case, the owner must submit evidence to RAN that the lease has been duly terminated.

The operator can block the export by filing a lawsuit, namely claiming that the lease has not been duly terminated.

Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A deregistration power of attorney shall enable the owner, the attorneys mentioned therein or both to act as representative of the lessee or operator and deregister and export the aircraft.

An irrevocable deregistration power of attorney granted by lessee to lessor should be a condition precedent (a pre-delivery requirement) in a lease.

It is important that the wording of the irrevocable deregistration power of attorney complies with the Portuguese rules governing voluntary representation, namely that the attorney be expressly authorised by the grantor to represent both the grantor and the attorney in any act or contract to avoid a conflict of the attorney representing both parties' interests, which is forbidden by Portuguese law unless expressly authorised by the grantor, as business with oneself.

By using the irrevocable deregistration power of attorney, the lessor will be able to deregister the aircraft, and a court intervention will not usually be required unless the lessee would seek to contend that such repossession was wrongful.

The lessor must have cooperation from the lessee to have access to the airport, the aircraft and the technical books in order to obtain the certificate of airworthiness for export issued by ANAC if required by the country of destination.

In case the lessor has no cooperation from the lessee, the alternative is to initiate proceedings against the lessee, in this case an injunction for provisional possession followed, within 30 days, by the main suit to claim effective possession.

If the lessee is declared insolvent, the deregistration power of attorney will be terminated by mere effect of the law upon the declaration of insolvency of the lessee.

Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention and Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment are not in force in Portugal.

SECURITY

Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

If the aircraft is registered in Portugal at the time of creation of a mortgage, the mortgage must be governed by Portuguese law and registered with RAN.

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 created under Portuguese law does not involve the transfer of ownership or the possession of the mortgaged assets, and it does not allow the mortgagee to directly dispose of the mortgaged asset.

The mortgagee shall have a preferred interest to be repaid out of the proceeds of the sale of the mortgaged asset (the aircraft, in this case), prior to the mortgagor's ordinary or common creditors, and to subsequently registered mortgages over the same aircraft, pursuant to specific court foreclosure proceedings.

Under Portuguese law, a mortgage can be created and registered against a future or conditional debt, provided it is for a specific amount or a specific obligation that can be determined. The mortgage may also comprise any incidental obligations provided they are mentioned in the mortgage title and duly registered. Therefore 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, as otherwise the Portuguese legal interest rate shall be deemed applicable to the guaranteed principal (the Portuguese legal interest rate is a variable rate, periodically fixed by joint decree of the Ministries of Justice and of Finance).

Note that, notwithstanding any stipulation of the parties to the contrary, a mortgage created under Portuguese law cannot comprise more than three years of interest, but a new mortgage can be registered with relation to outstanding interest.

A mortgage created under Portuguese law may be denominated in euros or in any foreign currency that may be legally converted to euros.

A mortgage over an aircraft registered in Portugal must be governed by Portuguese law, but it may be written in English.

RAN will accept the filing of the relevant documents in English. The Portuguese translation of the aircraft mortgage documents will only be required if such documents have to be submitted to a Portuguese court.

For registration purposes, the total mortgage amount must be indicated, 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).

Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft?
What are the documentary costs?

The mortgage must be notarised and legalised with the Hague Apostille, or at the nearest Portuguese consulate.

If it is written in English, no translation is required.

Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

To record and perfect the registration of a mortgage, the following basic documents are required (assuming the aircraft has already been registered in Portugal, in accordance with question 8):

- a notarised and apostilled mortgage;
- a petition by the aircraft owner to the chairperson of ANAC applying for the mortgage registration; and
- a notarised 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.

The recognition of the rights of the mortgagee takes effect from the date the documents are filed with RAN.

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.

The registration need not be renewed, but a new mortgage may be required, and should be registered, with relation to outstanding interest, in view of the above-mentioned rule that a mortgage created under Portuguese law cannot comprise more than three years of interest.

RAN registration 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.

For registration of a mortgage, the basis for calculating the cost of the mortgage is 1/100,000 over the actual mortgage total amount. The following limit amounts to be paid to ANAC are as follows:

- minimum limit per mortgage: €72.33; and
- maximum limit per mortgage: €947.72.

Registration of security

How is registration of a security interest certified?

The registration of a mortgage is evidence by means of a registration certificate, which shall state the rank or priority of the mortgage.

The registration certificate is issued by ANAC, and will normally be available within five days from filing for registration.

Effect of registration of a security interest

What is the effect of registration as to third parties?

Registration of a mortgage created under Portuguese law is mandatory. It is an essential legal requirement for the

creation and perfection of a mortgage, for it to be valid and effective between mortgagee and mortgagor.

Registration confers priority over subsequent security interests, and third parties can rely on the accuracy of the public registration of the security interest as recorded on the certificate of registration.

Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Portugal does not recognise the concept of trust or the role of a security trustee.

Under Portuguese rules of conflict of laws, the creation and assignment of interests over any means of transportation subject to registration must be governed by the laws of the country of the relevant registry, as discussed above. Hence the creation of a mortgage over an aircraft registered in Portugal must be governed by and registered in accordance with Portuguese law.

Typically, security over aircraft is granted by means of a mortgage.

Security over leases is also typically structured by means of the assignment of the rents as guaranty.

A mortgage created and registered in accordance with Portuguese law is a right in rem.

Loan transfers that operate as classic novations do not affect the security if the mortgage is created and registered in accordance with Portuguese law, nor do new security registrations need to be effected if the loan is transferred to a new lender. But there must always be some connection (eg, by means of an agreement) between the registered owner of the aircraft and its lessor.

Changes to the security or its beneficiaries, in terms such that the identity of the aircraft owner or the lessor of the aircraft remain unchanged, will not trigger the requirement for an update of the aircraft registration.

Security over spare engines

What form does security over spare engines typically take and how does it operate?

A mortgage over a spare engine that is not installed on a host aircraft follows very much the same process as the mortgage of an aircraft as regards its form and required registration.

If the engine is installed on a host aircraft, it follows the mortgage of the aircraft unless the engine has a different registered owner.

Whether a security interest over financed aircraft creates an independent security interest over its engines, or the aircraft and engines are treated as a single item of property, depends on the terms of such security.

An effective security interest may be created over an engine if it is registered separately and not as installed on the aircraft at the time of creation (assuming that the non-installed engine is also in the jurisdiction).

An encumbered engine shall cease to be encumbered upon the express consent of the mortgagee for the cancellation of such encumbrance.

ENFORCEMENT MEASURES

Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

For the repossession of the aircraft and its export from Portugal, it will be necessary for the registered owner to apply for deregistration with RAN.

The consent of the lessee or operator is not necessary, but it is necessary to submit evidence to RAN demonstrating that the lease agreement has been terminated.

With cooperation from the lessee or operator, the deregistration process should take five to seven days.

Without cooperation from the lessee or operator, and provided that the lessor has an irrevocable power of attorney granted by the lessee or operator and no injunction is filed with the court to prevent it, deregistration should take 10 to 15 days.

The lessee may file with the court for an interim measure that will effectively, albeit temporarily, prevent ANAC from deregistering the aircraft and authorising its exportation, pending the discussion in a lawsuit of the termination dispute.

Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

As mentioned above, a mortgage created under Portuguese law does not involve the transfer of ownership; nor does it grant the mortgagee any possession rights over the mortgaged assets. Any provisions purporting to grant the mortgagee the right to directly dispose of the mortgaged asset will be deemed null and void.

The mortgagee shall have a preferred interest to be repaid out of the proceeds of the sale of the mortgaged asset (the aircraft, in this case), prior to the mortgagor's ordinary or common creditors, and to subsequently registered mortgages over the same aircraft, pursuant to specific court foreclosure proceedings.

The owner may not lawfully impede the mortgagee's right to enforce.

In insolvency proceedings, secured claims, which are those with security in rem over assets in the estate, up to the value of such assets, are not affected and will cover the claims and also the interest on them.

Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following rights or interest will take precedence over aircraft ownership or an aircraft security interest:

- any previously registered mortgage;
- any possessory lien arising out of work done on the aircraft or in connection with expenses incurred to preserve and avoid deterioration of the aircraft; or
- privileged credits in respect of taxes and duties owed to the state (including aircraft charges and air navigation charges) or the municipalities, and crews' wages.

The airport authorities have a specific possessory lien of the aircraft in the case of lack of mandatory information or non-payment by the lessee or operator of the applicable airport fees. Notwithstanding, note that all the above-mentioned rights arise out of debts that are typically debts of the operator or lessee. In a lease situation, where the owner or lessor and the operator or lessee are separate entities, the lessee's debts are not deemed guaranteed by an aircraft on lease, and only privileged credits arising from the owner or lessor's debts, if any, will take precedence over the registered lease.

Public requisition of the aircraft may occur in time of war or serious national emergency. Compensation would then be due.

Enforcement of foreign judgments and arbitral awards

How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?

According to 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 - which is the case for New York court judgments - 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 recognise 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 filed, together with the documents identified above, the opposing party is summoned to, within 15 days, submit its opposition. The trial is conducted pursuant to the rules applicable to appeals.

Portugal ratified the 1958 New York Convention on 18 October 1994. However, pursuant to article 1 (3) of the Convention, Portugal entered a reservation stating that the same shall only apply in cases where the arbitral awards were rendered in the territory of States bound by the Convention.

Without prejudice to the mandatory provisions of the New York Convention as well as to other treaties or conventions that bind the Portuguese State, arbitral awards issued in arbitrations seated abroad shall only be effective in Portugal if they are recognised by the competent Portuguese state courts. Nevertheless, Portuguese courts are generally favourable to the recognition and enforcement of foreign arbitration awards.

TAXES AND PAYMENT RESTRICTIONS

Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Under the general rules, withholding of Portuguese corporate income tax (PCIT) 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 (DTT) entered into by Portugal applies, in which case such 25 per cent PCIT domestic withholding rate may be reduced under the applicable DTT (since income derived from the lease of commercial or industrial equipment is generally qualified as a royalty, as a rule PCIT would be withheld under the rates provided for in article 12 of the applicable DTT). To apply for the DTT benefits, some formal procedures must be fulfilled (more precisely, in the alternative, said benefit must be claimed by way of the form Mod 21-RFI, which must be duly certified by the tax authorities of the income recipient's country of residence or a non-certified version of the form Mod 21-RFI properly filled out jointly with a tax certificate issued by the tax authorities of the country of residence attesting that the recipient of the income is a residence of such country).

The withholding of PCIT may, however, be exempt whenever the conditions provided for in EU Council Directive 2003/49/EC of 3 June 2003, applicable to interest and royalty payments made between associated companies of different member states, are met; notably, a direct minimum participation of 25 per cent between the lessor and the lessee, held for at least an uninterrupted period of two years or, where both the lessor and the lessee are held in, at least, 25 per cent by the same entity, during the two years preceding the attribution of income. Moreover, the relevant companies must have one of the legal forms listed in the Annex to the Directive and must be subject to PCIT or to an equivalent tax in their country of residence.

Additionally, an ad hoc exemption from PCIT on the lease rents may, however, be granted on public services grounds, upon formal request to be submitted by the lessee to the Portuguese Minister of Finance, provided that the lessor is a non-Portuguese resident entity without a permanent establishment located therein to which the rental income is attributable.

As for VAT, the aircraft lease agreements are qualified as supplies of services that would be located in Portugal whenever the lessee or recipient of the service is a Portuguese taxable person (the general place of supply rule for business-to-business transactions foreseen in the domestic rule equivalent to article 44 of the Council VAT Directive 2006/112/EC of 28 November 2006 would apply). This means that the VAT that may be due will have to be accounted for and paid to the Portuguese Tax Authorities by the lessee under the reverse-charge mechanism. A VAT exemption may, however, be applicable if the aircraft being leased is aimed to be used by an airline operating for reward chiefly on international routes (ie, whenever, by reference to the preceding 12 months, the percentage of turnover attributable to international air traffic or, alternatively, the number of passengers carried in international routes exceeds 50 per cent of the total turnover or passengers).

In general, a final PCIT withholding of 25 per cent would be levied over the interest component of a loan repayment whenever the debtor is a Portuguese tax resident entity and the creditor is a non-Portuguese tax resident entity (without a permanent establishment located therein to which the interest income is imputable). This withholding tax on interest may be reduced where a DTT entered into by Portugal applies (see above the formal requirements for the concession of DTT's benefits).

Moreover, where both the creditor and the debtor are entities resident for tax purposes in the European Union, the withholding of PCIT on interest may, however, be exempt whenever the conditions provided for in Council Directive 2003/49/EC, applicable to interest and royalty payments made between associated companies of different member states, are met (see above the main conditions that must be met).

Also, regarding the payment of interest to non-Portuguese tax resident entities not having a permanent establishment located therein, to which said income is imputable, an ad hoc exemption from withholding of PCIT may be granted on public services grounds, upon formal request to be submitted by the debtor to the Portuguese Minister of Finance.

In principle, a loan repayment would not trigger any Portuguese VAT taxation, since the VAT exemption provided for financial transactions would apply to the interest component of the payments.

Whenever the entity transferring the ownership of the aircraft is not resident in the Portuguese territory, nor does it have a permanent establishment located therein to which such transaction is imputable, the transfer of the aircraft will not trigger any PCIT taxation. If, rather than transferring the ownership of the aircraft, one were to transfer the stock (or the

beneficial interest) in the company that owns the aircraft (aircraft special purpose entity (SPE)), no PCIT would be due either, whenever the seller is a non-Portuguese tax-resident company without a permanent establishment located therein to which such transaction is attributable, and the aircraft SPE whose stock (or the beneficial interest) is being transferred is also not resident in Portugal.

The transfer of the ownership of the aircraft will be liable to Portuguese VAT, provided that the aircraft is put at the acquirer's disposal in Portuguese territory (ie, the aircraft is on Portuguese soil or in Portuguese airspace at the moment it is transferred to the acquirer). Therefore, if the acquirer of the aircraft is an entity established in Portugal for VAT purposes, then the VAT that may be due would have to be accounted for and paid to the Portuguese tax authorities by the acquirer. Conversely, if the acquirer of the aircraft is an entity not established in Portugal for VAT purposes, then the reverse-charge mechanism would not apply. As a consequence, the non-established seller would have to:

- trigger a VAT registration in Portugal (and, if resident outside the EU territory, also appoint a tax representative in Portugal); and
- account for and pay any Portuguese VAT due.

Notwithstanding the above, a VAT exemption may apply provided that the aircraft being transmitted is intended to be used by airlines operating for reward chiefly on international routes (which would have to be demonstrated by the applicant - see above). In such case, the non-established seller will be dismissed from the obligation to register in Portugal for VAT purposes.

Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

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.

Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No. Maximum interest rates are only applicable to credit granted to consumers, that is, natural persons taking out loans for purposes unrelated to their commercial or professional activity and provided that the amount of the loan is comprised within certain amounts.

Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

According to the EU regulations, there are no customs duties to bring the aircraft into Portugal or to take it out, provided the importer entity obtains the required customs qualification as end use for the aircraft.

To obtain such qualification, a customs clearance officer is generally retained and the average fee for their services is €800 to €1,000.

The liability shall attach to the airline, as the importing entity must be the holder of an air transport licence and an air operator's certificate.

INSURANCE AND REINSURANCE

Captive insurance

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

The Portuguese insurance legal regime applicable to aviation is currently set forth in Decree-Law No. 321/89 of 25 September 1989, as amended by Decree-Law No. 208/2004 of 19 August 2004; and in Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004, as amended by Regulation (EC) No. 1137/2008 of the European Parliament and of the Council of 22 October 2008; and by Commission Regulation (EU) No. 285/2010 of 6 April 2010 on insurance requirements for air carriers and aircraft operators. The purpose of these pieces of legislation is to set forth minimum insurance requirements for air carriers and aircraft in respect of passengers, baggage, cargo and third parties, for both commercial and private flights.

Additionally, Decree-Law No. 223/2005 of 27 December 2005 sets forth the insurance requirements applicable regarding non-commercial operations by aircraft with a maximum take-off mass (MTOM) of 2,700kg or less.

Insurance and reinsurance activities are regulated and therefore the exercise of said activities by, and the incorporation of, insurance or reinsurance companies in Portugal is subject to specific requirements set forth in the Portuguese Legal Regime applicable to Insurance and Reinsurance Activities (PLRIRA), approved by Law No. 147/2015 of 9 September 2015, which has enacted into Portuguese law Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (as amended).

Although there is no specific requirement under Portuguese law regarding a captive insurance regime specifically applicable to aviation, the PLRIRA expressly allows the incorporation of captive reinsurance companies.

In Portugal, aviation insurance and reinsurance agreements may be entered into with any insurance or reinsurance company incorporated in Portugal or authorised to exercise its activity in Portugal.

Provided the above-mentioned requirements are met, no specific provision applies requiring the insurance or reinsurance agreement to be placed in the jurisdiction.

Furthermore, regarding reinsurance agreements, there is no minimum or maximum percentage of the insurance that must be retained in the Portuguese jurisdiction. In fact, the PLRIRA authorises reinsurance agreements to be placed with reinsurance companies whose head offices are located outside the EU territory, and that are not established in Portugal, provided these are duly authorised to carry out the reinsurance activity in the relevant country. However, whenever said reinsurance company's head offices are located within the territory of a country that has not entered into an agreement with the European Union on supervision requirements, said reinsurance company will be required to grant additional guaranties as set forth by regulations issued by the Portuguese Supervisory Authority.

Finally, note that there are no legal requirements determining the placement of the reinsurance with more than one reinsurance company.

Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Although cut-through clauses are more commonly used in reinsurance agreements entered into with captive reinsurers, they may also be included in reinsurance agreements entered into with reinsurance companies.

Pursuant to the Portuguese Insurance Law (approved by Decree-Law No. 72/2008 of 16 April 2008), unless otherwise set forth by law or in the reinsurance agreement, the reinsurance agreement does not grant to the policy holder any rights or obligations with regard to the reinsurer, or vice versa.

Notwithstanding the above, the same provision establishes that the above-mentioned general rule does not jeopardise the validity and enforceability of the clauses pursuant to which the insurer grants to the policyholder the ownership or the exercise of rights initially granted to the insurer pursuant to the reinsurance agreement, provided said clauses are admissible in accordance with the general law.

Considering that, pursuant to Portuguese law, at least part of the credits towards the reinsurers are included among the assets representing the technical provisions, and that said assets are deemed as a privileged patrimony specially aimed at guaranteeing the credits emerging from the insurance agreements, and that in case of insolvency of the insurer the policyholders are granted by law a privileged credit over said patrimony, in the scenario of the insolvency of the insurer, the validity and enforceability of cut-through clauses may be challenged on the basis that they constitute an unauthorised preference in liquidation.

Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

As a general rule, Portuguese law authorises not only the assignment of rights but also the assignment of the contractual position entitling one of the counterparties to transfer to a third party not only the rights but also the obligations emerging from a given agreement.

While in the first case the validity and enforceability of the assignment is not subject to the authorisation of the counterparty (in this case the only exceptions to the general rule of free assignability: the agreement itself prohibits assignment; the assignment is prohibited by law; or the agreements calls for the performance of 'personal services'), the assignment of rights and obligations is subject to the prior authorisation of the counterparty. Should that authorisation be granted before the execution of the assignment, it will only become perfected upon its notification to the counterparty.

Notwithstanding the above, assignments of reinsurance are not common regarding aviation leasing and finance transactions. Generally, said assignment may only occur in run-off situations.

Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

For the purposes of determining potential liabilities, Portuguese law classifies three categories of entities:

- the owner (ie, the registered owner of the aircraft);
- the user (ie, the entity using the aircraft); and
- the air transporter (ie, the entity authorised to provide air services by transporting persons, luggage, cargo or mail in such aircraft).

The owner will only be liable if it is also the user of the aircraft.

If the use of the aircraft has been ceded to another party (eg, operator or lessee), the user will be liable for the operation

of the aircraft and related activities of the operator, and no liability shall accrue to the owner or lessor.

The financier shall not be liable for the operation of the aircraft or the activities of the operator.

Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

In compliance with Regulation (EC) No. 785/2004 (as amended by Regulation (EC) No. 1137/2008, and by Commission Regulation (EU) No. 285/2010) on insurance requirements for air carriers and aircraft operators, Decree-Law No. 321/89 sets forth that air carriers and aircraft operators shall be insured in accordance with the said law as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties. The insured risks shall include acts of war, terrorism, hijacking, sabotage, unlawful seizure of aircraft and civil commotion.

Furthermore, it sets forth that air carriers and aircraft operators shall ensure that insurance cover exists for each and every flight, regardless of whether the aircraft operated is at their disposal through ownership or any form of lease agreement or through joint or franchise operations, code-sharing or any other agreement of the same nature.

Third-party liability insurance

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

The minimum requirements applicable by Portuguese law are the ones set forth in Regulation (EC) No. 785/2004 (as amended by Regulation (EC) No. 1137/2008, and by Commission Regulation (EU) No. 285/2010) on insurance requirements for air carriers and aircraft operators (see table).

* The author would like to acknowledge, with thanks, the assistance of the following colleagues: Conceição Balcão Reis (M&A and aviation); Afonso Moucho Diogo (litigation); Diogo Ortigão Ramos and Mário Silva Costa (tax) and Ana Sofia Silva (insurance).

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics in aviation finance and leasing in your jurisdiction?

No updates at this time.