

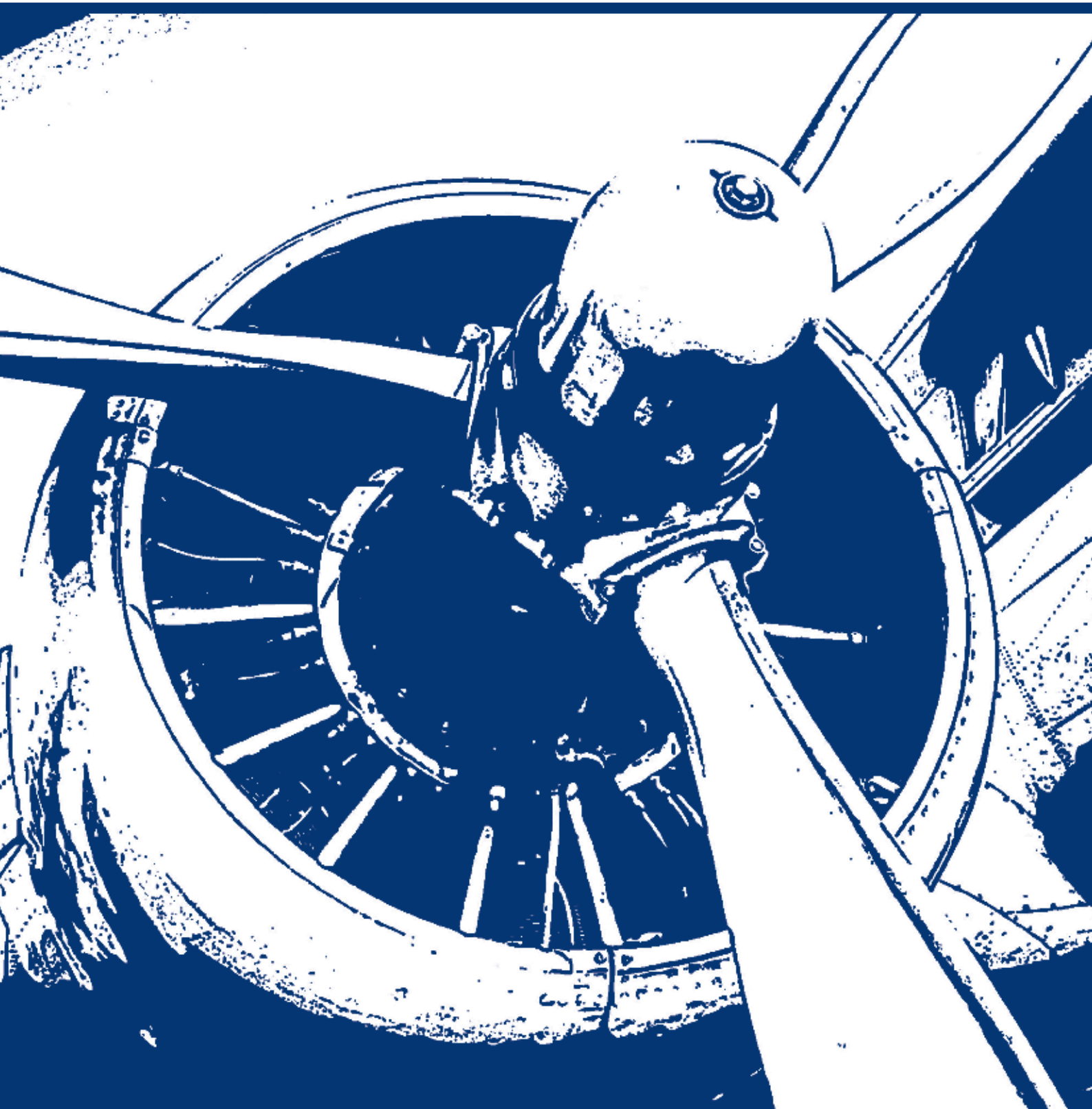


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Portuguese legal environment concerning the leasing of aircrafts

Introduction

A big stake of the commercial fleet registered in Portugal is leased and around 95 per cent of the fleet operated by the flag carrier airline Transportes Aéreos Portugueses (TAP) is under financial or operational leases.

Airlines appear to be aligned in the decision to lease their fleets instead of owning the aircrafts. Experience shows that this approach is allowing operators to take advantage of the attractive fleet solutions that are usually provided by leasing companies, to accommodate their fleet structure in accordance with the variations of the market and to find cost-efficient solutions to renew their fleet and use fuel more efficiently.

The purpose of this article is to provide a general overview of the main topics that are usually raised by aircraft lessors when negotiating leases with Portuguese airlines.

The regulatory authority in Portugal for the aviation sector is the Autoridade Nacional de Aviação Civil (ANAC).¹ ANAC oversees all aspects of civil aviation in the Portuguese territory and its legal, regulatory and technical departments play a major role in all transactions involving the migration of aircrafts into the Air Operator Certificate (AOC) of a Portuguese airline, notably when we are dealing with the leasing of aircrafts.

The general requirements for the leasing of aircraft by Portuguese operators are detailed in National Regulation No 32/2003 of 31 July as amended by Regulation No 249/2007 of 18 September, Regulation No 417/2008 of 30 July and Regulation No 832/2010 of 8 November, all of which were issued by ANAC.²

We do not anticipate new legislative and/or material regulatory proposals that may have particular effects on the aviation market or potential investors in this market. Our domestic legislation governing the aviation sector results from the implementation of European Union law and therefore any potential changes that may have impact in the Portuguese aviation market should arise more from the European legislation than

from any legal and/or regulatory alteration implemented by the competent authorities in Portugal (notably ANAC).

Portugal is a party to the Chicago, Montreal and Geneva Conventions but is not a party to the Convention on International Interests in Mobile Equipment and its Aircraft Equipment Protocol (together, the ‘Cape Town Convention’).

Aircraft lease

The aircraft, its engines and its equipment, the ownership interest in the aircraft, its engines, any lease agreement and any specific mortgage shall be registered with the national aircraft registry – the Registo Aeronáutico Nacional or ‘RAN’ – organised by ANAC.³ The renewal of the interest is executed through the registration of the lease amendment/extension and no costs will be charged by ANAC in order to register this renewal.

The vast majority of registered owners and lessors are international lessors and international banking entities. The registration in Portugal is possible, provided that the lessee is a Portuguese carrier with a Portuguese AOC.

The lease agreement between the lessor and the airline (lessee) shall be registered with ANAC to enable the migration of the aircraft into the AOC of the airline and to recognise the rights of the lessor and the lessee. Additional documentation may be required by ANAC in case we are dealing with a more complex chain of contractual arrangements (eg, sublease, wet lease, etc). To have an aircraft registered in Portugal, ANAC shall also be provided with the Bill of Sale, that is, a document evidencing that the owner has full legal and beneficial title of the aircraft.

The fees payable for the registration of an aircraft are related to the issue of the aircraft certificates and books (journey log book, engine log books and the aircraft log books). Additional costs may be charged by ANAC

and shall be confirmed on a case-by-case basis.

Although it is advisable to double check the fulfilment of the conditions established under Regulation No 32/2003 of 31 July, as amended, before filing the lease with ANAC, the majority of the conditions established under the said Regulation are applicable to the airline (lessee) holding a Portuguese AOC (eg, the airline shall demonstrate that such lease is necessary for the reinforcement of its fleet or the temporary replacement of an aircraft).

As a rule, Portuguese agencies are bound to accept documents in Portuguese only. However, in line with international civil aviation common practices, ANAC accepts documents in the English language.

Further to the completion of all registration formalities, the owner of the aircraft will be duly registered with the RAN and such ownership will also be evidenced in the relevant aircraft certificates (radio-station licence and registration/mark certificate) and in the aircraft log books.

On termination of the lease (by expiry or otherwise), as contemplated in the lease agreement, the lessor and, on termination of the leasing of the aircraft, the owner (and lessor) would be entitled to: repossess the aircraft from the airline; deregister the aircraft from the RAN; and take the aircraft away from Portugal, without requiring further consents, approvals or licences from any governmental or regulatory authority in Portugal, other than those associated with the obtaining of a certificate of airworthiness for export, the cancellation of the aircraft registries (including any mortgage) and compliance with the procedures and documents required by ANAC to assure that the aircraft is duly removed by qualified personnel after the mentioned cancellation for registration in another jurisdiction.

Deregistration formalities

The procedure to be followed with ANAC for deregistration purposes (the so-called *'abate'*) is the following:

- The owner or an appointed attorney duly empowered for such purpose shall file an application with ANAC for the issue of the deregistration certificate and inform about the next state of registration.
- In case the aircraft will be exported to a non-EU country, an additional application shall be filed by the owner in order to obtain the Certificate of Airworthiness ('C

of A') for Export. If applicable, the issue of the C of A for Export is a condition precedent for deregistration and will require an on-site inspection of the aircraft by ANAC technicians. This on-site inspection can take place in a foreign country.

- The intervention of the lessor, lessee, airline, etc will also be required to confirm that such other parties with registered contractual rights have no objection to deregistration.
- The aircraft certificates, the journey log book, engine log books and the aircraft log books shall be returned to ANAC.

Please also note that deregistration shall only occur after the prior or simultaneous cancellation of any mortgage registered with ANAC. Therefore, deregistration of the aircraft shall only be possible in case the mortgagee authorises the cancellation of the mortgage.

In case the airline (lessee) refuses to issue, deliver, transfer or assign documentation or instruments required for deregistration, the owner (and lessor) shall be in conditions to enforce its rights acting on behalf of the airline by using the Irrevocable Deregistration Power of Attorney.⁴ It is market practice to have an Irrevocable Deregistration Power of Attorney issued by the lessee⁵ as a condition precedent to the lease.

The purpose of the Irrevocable Deregistration Power of Attorney is precisely to overcome any difficulties with the deregistration formalities in case the lessee is not willing to cooperate with the lessor in the deregistration. Although ANAC has scarce experience with the unilateral enforcement of deregistration (ie, without the cooperation of all parties), the appointed attorney(s) under the Irrevocable Deregistration Power of Attorney should be duly empowered to enforce deregistration.

Creation and registration of mortgage

A typical matter that surfaces in Portugal is the intended creation of mortgages over the aircraft/engines to secure the lenders.

In the absence of specific legislation governing the creation and registration of mortgages over aircrafts, this matter is governed by the relevant provisions of the Portuguese Civil Code and Real Estate Registry Code.

Pursuant to the Portuguese Civil Code, the creation of a mortgage over an aircraft registered in Portugal shall be governed by

the laws of the country of registration and such registration is a condition precedent to its effectiveness (even between the parties), that is, registered interests beat unregistered. Portugal is a single registry state and the registration of a mortgage over an aircraft with the RAN is fully effective under the terms of Portuguese law.

The mortgage agreement creates a security right *in rem* which grants the mortgagee the right to be paid out of the maximum guaranteed amount with priority over other creditors who do not hold a special privilege or a priority registered right over the aircraft.

Only as from the date of registration of the mortgage agreement will the rights granted to the mortgagee be valid and enforceable against any and all third parties, including those subsequently acquiring conflicting rights over the aircraft such as, for example: a subsequent buyer of the aircraft assuming its continued registration in Portugal; a subsequently ranking mortgagee; or a beneficiary of a judicial seizure or attachment.

There are, however, certain privileged creditors whose credit rights rank in priority to those of a mortgagee, including a first-ranking mortgagee. That is the case of the beneficiaries of special movable privileges for certain credits granted directly by law (eg, judicial costs, transfer and property taxes) and of the holders of a retention right (the so-called *direito de retenção*), which is granted to creditors who are obliged to deliver a property but are by law allowed to retain it and, prior to delivery, to enforce on the property the same rights as a mortgagee would be entitled to for credit rights (eg, non-payment of airport charges and/or Eurocontrol route charges under the relevant applicable Conventions and national laws).

The cancellation of the mortgage must be based on any evidence that the mortgage was extinct. According to the Portuguese Civil Code, the mortgage is extinct when:

1. secured obligations are fully discharged;
2. the mortgaged assets are destroyed (without prejudice of the mortgage holder maintaining payment privileges over any compensation or indemnity that may be due to mortgagor, further from being entitled to request a mortgage reinforcement); or
3. when the beneficiary of the mortgage releases the mortgage.

The creation of a mortgage under the financial or operational lease of aircrafts is not very common in Portugal due to its tax impact. In fact, the same is subject to stamp duty

calculated over the secured amount (capital plus interest up to three years and expenses can be covered) at a rate varying in accordance with the maturity of the loan (0.5 per cent for obligations with a maturity up to five years; 0.6 per cent for maturities exceeding five years).

In addition to the stamp duty payable, ANAC charges a fee for the registration of each mortgage that ranges from circa €72 to circa €940 per aircraft depending on the maximum secured amount.

The market practice in Portugal is for the lenders to be secured by means of one or more Irrevocable Deregistration Power(s) of Attorney granted by the parties directly involved with the operation of the aircraft and to have other contractual arrangements as part of the security package, namely a security assignment, assignment of insurances, security deposit, etc.

Cape Town Convention

Since Portugal has not ratified the Cape Town Convention, ANAC will not promote the registration of a lien created by a mortgage agreement with the International Registry that operates under the legal framework of the Cape Town Convention. Likewise, there is no Irrevocable Deregistration and Export Request Authorisation (IDERA) form available in the Portuguese jurisdiction and ANAC will not recognise and/or register any IDERA with the RAN.

Although there are several virtues of the Cape Town Convention that are very interesting from the perspective of aircraft financiers, it is difficult to say how long it will take for Portugal to become a ratifying state because this matter has not been considered as a priority by successive governments.

Notes

- 1 The Articles of Association of ANAC were approved by Decree-Law 40/2015 of 16 March.
- 2 The relevant provisions of the Portuguese Civil Code and domestic legislation governing operating and financial leases may also apply to specific aspects of the Lease Agreements depending on the governing law.
- 3 The list of aircrafts registered with the RAN is published on an annual basis by ANAC.
- 4 The Deregistration Power of Attorney shall be granted before a Notary and comply with the relevant provisions of the Portuguese Civil Code. The original Power of Attorney remains filed with the Notarial Office.
- 5 Our experience shows that other Deregistration Power(s) of Attorney may be required in case there are other parties (eg, sublessor, wet lessee, etc) with registered rights at ANAC.