

# AVIATION Q&A – 20 THINGS TO THINK ABOUT FOR AVIATION DEALS IN SPAIN

10 JANUARY 2023 • ARTICLE



## OVERVIEW: AIRCRAFT REGISTRATION IN SPAIN

### 1. Which government authority has primary responsibility for the regulation of aviation in Spain?

The Ministry of Transport, Mobility and Urban Agenda (“*Ministerio de Transporte, Movilidad y Agenda Urbana*”), in particular, the General State Department for Transport and Mobility (*Secretaría General de Transporte y Movilidad*).

That department has two main bodies dealing with aviation matters: (i) the General Directorate of Civil Aviation (“*Dirección General de Aviación Civil*”), which creates strategy and defines aeronautical policies, prepares and proposes regulations and coordinates the agencies and entities associated with the department in the civil aviation space; and (ii) the Spanish Aviation Safety Agency (“*Agencia Española de Seguridad Aérea*” or “AESA”), which is in charge of supervising, inspecting and organising air transport and navigation and airport safety.

**"There are two different Spanish registries in which aircraft and contracts relating to them can be registered."**

### 2. What are the functions of the Registry of Aircraft and the Movable Assets Registry?

There are two different Spanish registries in which aircraft and contracts relating to them can be registered:

- Within AESA, the Registry of Aircraft (“*Registro de Matrícula de Aeronaves*” or “Registry of Aircraft”), is the competent public body in charge of registering aircraft in Spain and allocating Spanish registration marks (“EC-XXX”). A typical registration will be made based on a lease, but the Registry of Aircraft may also take into account other titles (ownership, mortgages, etc.) and contracts (e.g. sub-leases) over the asset, reflecting what is registered with the Movable Assets Registry of Madrid (“*Registro de Bienes Muebles de Madrid*” or “MAR” and together with the Registry of Aircraft, the “Spanish Registries”); and
- MAR is a register kept by Land and Commercial Registrars, one of whose responsibilities includes publicising the ownership as well as other rights (such as leases and sub-leases) and encumbrances on movable property. For example, under Spanish law, an aircraft mortgage only exists once registered with MAR.

Both registries act in coordination, so that registrations run parallel, although in practice there is often some delay in communications. Also, it is market practice for transaction lawyers to ensure timely coordination with both registries.

### 3. What are the fees for registering an aircraft in Spain?

#### Registry of Aircraft fees

AESA's aircraft registration fee varies from a minimum of €116.68 to a maximum of €233.34, depending on the MTOW of the aircraft. It costs €38.90 to obtain a certificate from the Registry of Aircraft.

#### MAR fees

There is also a registration fee for the recordation of an ownership title (e.g. bill of sale), a lease agreement or a mortgage with MAR which is calculated on, among factors, the value of the underlying contract (e.g. the total lease rent, the secured obligation under a mortgage or the purchase price) up to a maximum of €2,181.67 plus VAT.

A fee of €3.63 is payable to obtain a registry extract ("*nota simple*") and a fee of approximately €20 in order to obtain a certificate from the MAR ("*certificación literal*").

### 4. What formalities do documents require to access to the Aircraft Registries?

Spain has a rather formalistic legal system. In a nutshell, all documents to be registered with the Aircraft Registries need to be legalised by a notary (with confirmation of signatories' authority) and apostilled, if signed outside of Spain. They will also need to be in Spanish or sworn translated into Spanish. Other formalities are also required, particularly regarding bills of sale, where owners may face some difficulties registering unilateral instruments or documents "without price" (e.g. where the price is "US\$1 and other valuable consideration").

### 5. Are there any restrictions on the legal status or nationality of parties seeking to register an aircraft in Spain?

There is a distinction between the Registry of Aircraft and MAR. As to the former, only EU or EEA citizens or legal entities are entitled to register the ownership or other possession title (such as a lease agreement) over aircraft. The only exception concerns aircraft destined for private use, which can be registered despite not fulfilling the nationality requirements, provided the party registering them is either domiciled, or has a permanent establishment in Spain.

The above restrictions do not apply in the MAR, where ownership and any another possession title over aircraft can be registered without nationality constraints.

	Registration with the Registry of Aircraft	Registration with MAR
EU/EEA lessor leasing to Spanish airline	Yes	Yes

	Registration with the Registry of Aircraft	Registration with MAR
<b>Non-EU/EEA lessor leasing to Spanish airline</b>	No Only the lease is registerable by the Spanish airline	Yes

**"The Cape Town Treaty entered into force in Spain on 1st March 2016."**

As an ancillary remark, pursuant to Regulation (EC) No 1008/2008, any Spanish (or EU) operator must always be majority owned and effectively controlled by EU member states or nationals of member states.

## 6. Who is responsible for registering an aircraft in Spain? Is there a provisional and permanent registration of the aircraft?

Individuals or legal entities evidencing their ownership or possession of title over an aircraft are responsible for the registration of said aircraft in Spain. The Registry of Aircraft provides the required registration forms. In practice, WFW Madrid can also arrange the relevant filings (registration of aircraft title, lease, sublease, mortgage, etc.) with the Spanish Registries on behalf of owners, lessees or mortgagees under a power of attorney.

A typical registration procedure begins with a registration reservation ("*reserva de matricula*") which will last for a maximum of six months. It will then be followed by a provisional registration ("*registro provisional*"), with the same effect as a permanent registration, and after a maximum of three months (extendable in certain circumstances), a permanent one ("*matricula definitiva*").

## 7. Has Spain ratified and brought into force any of the following aviation related conventions: 1933 Rome Convention, 1944 Chicago Convention, 1948 Geneva Convention and 2001 Cape Town Convention?

Spain acceded to the Convention on International Interests in Mobile Equipment signed in Cape Town, South Africa on 16 November 2001 (the "Cape Town Convention") by means of an instrument dated 28 June 2013. It further acceded to the Protocol to the Convention on Matters Specific to Aircraft Equipment (the "Aircraft Protocol" together with the Cape Town Convention referred to as the "Cape Town Treaty") by means of an accession instrument dated 27 November 2015. The Cape Town Treaty entered into force in Spain on 1st March 2016.

Prior to that, Spain ratified the 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft and the 1944 Chicago Convention, but not the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. However, the Rome and Geneva Conventions are now replaced by the Cape Town Treaty.

## 8. Is IDERA available to creditors in Spain?

Yes, where a debtor has issued an Irrevocable De-registration and Export Request Authorization (“IDERA”) in the form annexed to the Aircraft Protocol and registered with the Registry of Aircraft, the person in favour of which the IDERA has been issued, the “authorised party” (or its certified designee) will be entitled to exercise the remedies specified in Article IX.1 of the Aircraft Protocol.

## MORTGAGE REGISTRATION AND ENFORCEMENT

### 9. Can aircraft be mortgaged in Spain?

Yes. However, the granting of a Spanish law mortgage involves high costs and taxes. First, the mortgage would need to be granted in the form of notarial public instrument (“*escritura pública*”) with its relevant notarial fees; secondly, it is subject to a 0.75% stamp duty tax based on the amount guaranteed by the mortgage, including normally principal, interest, default interest and costs and expenses related to the enforcement; and thirdly, registration fees at the MAR and the Registry of Aircraft would also apply.

### 10. Is a registered mortgage attached only to the aircraft, or are engines and other removable equipment also covered?

The registration of a Spanish law mortgage over an aircraft includes, unless expressly agreed otherwise, the airframe, engines, propellers, radio and navigation equipment, tools, accessories, furnishings and, in general, any equipment and appurtenances intended for the service of the aircraft, even if these are separable from the airframe.

Spanish law would not treat an engine owned by a third party and installed on an airframe owned by another party as being subject to the same ownership as the airframe itself. It is however generally recommended to affix a nameplate on such engine in order to give notice to third parties (in particular, in the context of an arrest of the aircraft). It would also be prudent to separately record the ownership of the engine with the MAR, although this is not normal practice and is also an expensive exercise.

### 11. Do certain rights have priority over those of the mortgagee?

Yes, in addition to any registered pre-existing right or interest, certain liens (“*privilegios*”) arise by operation of law and enable the arrest of an aircraft, although their nature and effect are subject to debate. They would take priority over the mortgage. Those include, for example, unpaid wages and salaries, credits for taxes, duties and excise duties of the State, costs of rescue or salvage of the aircraft itself or liens recognized over movable assets pursuant to the Spanish Civil Code.

#### Regarding the Cape Town Treaty

Since Spain did not make any declaration to that effect, the Cape Town Treaty does not apply to pre-existing rights or interests (as defined in Article 1(v) of the Cape Town Convention) which retain the priority they enjoyed under Spanish law.

Furthermore, Spain made specific declarations in relation to articles 39 (non-consensual rights or interests having priority according to the laws of Spain) and 40 (registerable non-consensual rights) of the Cape Town Convention. Therefore, certain non-consensual rights or interests identified in said declarations will have priority over registered international interests.

## **12. What is the procedure for a lender (as mortgagee) to enforce a mortgage over an aircraft in Spain? Can the lender as mortgagee enforce the mortgage by taking physical possession of the aircraft?**

In practice, enforcement of a mortgage in Spain can only take place via judicial sale of the aircraft, which starts with the arrest of the aircraft or an enforcement order. Also, as advanced at the time of ratification of the Aircraft Protocol, Spain made a declaration under Article 54 of the Cape Town Convention whereby all remedies of the Cape Town Treaty need to be exercised through the Spanish Courts. Generally, “self-help” remedies are not admitted in Spain.

## **13. Would a mortgage governed by foreign law over aircraft be recognised in Spain?**

Since Spanish aircraft mortgages are expensive, we quite often see New York or English law mortgages over Spanish registered aircraft. The following brief considerations should be noted:

- from a practical perspective, a New York or English law mortgage would typically be enforced locally first and then the judgment would be recognised in Spain, through the relevant exequatur procedures (or a treaty for the mutual recognition of court decisions, if any); however
- there is normally no expectation that a foreign law mortgage would be enforced in Spain in its own right. It would constitute a “Cape Town Mortgage” provided it is validly constituted under local laws and provided that it complies with the requirements of the Cape Town Treaty. Such “Cape Town Mortgage” (an international interest) would be directly enforceable in Spain to access the remedies given under Cape Town Treaty.

Regarding this second option, we are not aware of any Spanish Court having given judgment on any questions of interpretation arising from the Cape Town Treaty and therefore it is difficult to anticipate how the enforcement of the international interest arising from the “Cape Town Mortgage” would take place. We can say that, at the time of ratification of the Aircraft Protocol, Spain made a reservation whereby all remedies of the Cape Town Treaty need to be exercised through the Spanish Courts (declaration under Article 54).

## **LEASE REGISTRATION AND ENFORCEMENT**

### **14. Is registration of lease agreements with the Registry of Aircraft/MAR mandatory under Spanish law?**

To get the EC-Spanish registration mark, title or possession must be registered with the Registry of Aircraft. It can either be the ownership (e.g. bill of sale) or, in most cases, possession under a lease agreement.

Documents will need to be drafted in Spanish or sworn translated into Spanish and have the signatories’ signatures legalised by a notary public (and, if signed abroad, apostilled).

The same registrations are also made with the MAR.

## **15. How can lessors strengthen their rights in respect of a lease agreement toward third parties?**

For transactions where the aircraft are registered in Spain, the normal precautions for lessors already included in lease agreements will apply. Owners may register the ownership to their aircraft with MAR, to get *prima facie* evidence of their title. However, the common practice is to register only the lease, so that it is obvious that the lessee operator possesses the aircraft by virtue of an asset which it does not own. It is advisable to submit an IDERA for recordation with the Registry of Aircraft and register any international interest which may be deemed appropriate with the International Registry.

## **16. On the occurrence of an event of default under a lease or any termination of the leasing of an aircraft under a lease, assuming that the owner is permitted to do so under the terms of the lease, can they enforce said lease by taking physical possession of the aircraft?**

Generally speaking, “self-help” remedies and thus taking physical possession of an aircraft by a lessor unilaterally following a default, are not admissible. Therefore, repossession of assets would require the assistance of Spanish courts.

This position was stressed when Spain ratified the Cape Town Convention by including a declaration under Article 54.2 declaring that all remedies available to the creditor under the provisions of the Convention may be exercised only with leave of the court.

## **OTHER KEYS POINTS FOR LESSORS AND FINANCIERS**

### **17. Is it necessary for a lessor or mortgagee to have a place of business, or be domiciled, in Spain in order to enforce any provisions of the lease or mortgage in Spain?**

There is no specific domiciling requirement to enforce the provisions of a lease agreement or mortgage.

### **18. In the event that a Spanish lessee becomes insolvent, what would be the lessor’s rights?**

In terms of a leased aircraft, the lessor would need to bring evidence of its ownership so that the aircraft is separated from the debtor/lessee’s estate (i.e., not being one of the pool of assets against which creditors would have recourse against). This is simplified if the ownership is registered with MAR, since said registration provides an immediate evidence of ownership *vis-à-vis* third parties. If not, then the lessor can still evidence its title through the bill of sale and lease agreement (sworn translated into Spanish) and any other means of evidence.

If we consider a non-Spanish law lease agreement, then the remedies available to the lessor will be those agreed under said agreement and be subject to the laws governing it, which might be subject to certain restrictions, as mentioned in respect of “self-help” remedies for example. A court ruling obtained abroad on lessor’s rights would need to be first recognised in Spain (unless dictated in the EU) and then enforced.

Under Spanish law, from the time of the declaration of insolvency proceedings, if a lease concerns an aircraft that is necessary for the continuity of a debtor's activity, the lessor cannot initiate enforcement proceedings (and would have to stop any on-going ones) over the asset until a creditors' agreement is reached or one year has elapsed without the liquidation phase of the insolvency proceedings having started. The priority or ranking of the rents' payable by the debtor pre- and post-insolvency during such time, and the right of termination by the lessor, will vary depending on the nature of the lease (finance or operative).

However, nothing prevents the start of negotiations with the insolvency administrator for a repossession of the aircraft, which will need to be approved by the insolvency judge.

## **19. Are there any circumstances in which a Spanish court can sell, transfer or otherwise dispose of the aircraft without the consent and authorisation of the owner or the mortgagee?**

There are no circumstances under which, in the context of insolvency proceedings against a Spanish lessee, Spanish courts could order the sale of an aircraft owned by a third party (i.e. the lessor/financier). The release of any mortgage will require the mortgagee's consent.

## **20. Is it a legal requirement to insure the aircraft domestically in Spain?**

It is not. However, insurance, wherever placed, must meet the requirements set forth by European Regulation (EC) No. 785/2004 of 21 April 2004, as amended by the European Regulation (EU) No. 285/2010 of 6 April 2010 and the Regulation (EU) 2020/1118 of 27 April 2020 and, at national level, Articles 126 et seq. and the Third Final Provision of the Air Navigation Law 48/1960 of 21 July 1960 (*Ley sobre Navegación Aérea*).

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