

THE TRANSPORT
FINANCE LAW
REVIEW

SIXTH EDITION

Editor
Harry Theochari

THE LAWREVIEWS

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PREFACE

The Transport Finance Law Review is intended to provide the industry with a guide to transport finance today, in each of the key jurisdictions globally in which aircraft, rolling stock and ships are financed.

The transformation of the asset finance industry triggered by the global financial crisis has been well-documented. Before the crisis, traditional asset finance, in the form of bank debt, had been the mainstay of the transport sector.

Now, regulation introduced with the intention of preventing future crises, such as Basel III and Basel IV, has made long-term lending to the transport sector significantly less attractive. This has, in part, led certain banks to exit the asset finance market altogether, by selling all or part of their loan books to help them to meet their capital requirements.

At the same time, the aviation, rail and cruise industries have required a steady stream of finance to acquire additional assets to help them to meet growing demand from passengers, particularly in developing economies. This, coupled with the desire, and in many cases the requirement, for more environmentally friendly and sustainable transport, the advent of new and disruptive technologies (such as autonomy, blockchain and artificial intelligence) and the introduction of increasingly sophisticated technology (such as high-speed rail and high-specification ships) is leading to increased funding requirements in many areas of the transport sector.

Asset finance in its traditional form is now available from relatively few banks, who in turn are prepared to lend to relatively few names, which are usually leaders in their relevant sectors and have green credentials, which satisfy new environmental standards set out in, for example, the Equator Principles or the Poseidon Principles. Tenors tend to be shorter, and borrowing more expensive. It is clear that debt finance alone is no longer sufficient to meet the needs of the global aviation, rail and shipping industries. Other financiers and investors have recognised this and have identified significant opportunities to secure returns, using innovative new funding structures, and often in collaboration with traditional lenders who have remained in the market.

These developments have meant that legal advisers to the transport finance sector are now required to provide a far broader set of legal skills and market knowledge than has previously been required.

At the time of writing, capital is readily available to much of the aviation industry, which is benefiting from rising demand for air travel and industry forecasts anticipating a doubling of passenger numbers in the next 20 years. The capital markets are also open for business for the aviation industry, and there is a flow of equity investments from both hedge funds and private equity as well as large-scale investments from Asia (and China in particular).

In the rail market, passenger demand is also increasing and significant investment is being made in new and existing rail assets globally. Increased appetite for high-speed rail and light rail transit is encouraging rail market participants to look outside of their traditional markets in search of new opportunities in developing countries, including those forming part of China's Belt & Road Initiative.

Attitudes towards the shipping industry are generally more cautious. The amount of debt finance available to shipping has fallen dramatically, and alternative sources of finance, such as private equity, hedge funds, bond markets and capital markets, have also reduced. This is not surprising to many as shipping gradually emerges from possibly the worst recession it has ever experienced in modern times, impacting across the entire spectrum of the industry. Shipping is still a hugely entrepreneurial business with more than its fair share of dynamic owner principals who are still making sizeable commercial bets as to where the industry is heading and this has led, in a number of sectors, to an over ordering of ships in recent times, which has kept the market depressed.

Today, capital markets, private equity structures and leasing account for a substantial proportion of the transport finance market. A number of private equity players are buying loans from traditional banks at a large discount to see immediate returns. Others have invested directly in shipping in the belief that the cyclical nature of shipping will result in returns in the medium to long term. In the aviation industry, leasing firms, which are frequently supported by private equity players, now account for about 40 per cent of the major aircraft manufacturers' sales. In the case of rail, new investors are being attracted to the industry by the commitments made by governments worldwide to improve existing infrastructure and invest in new, sophisticated rail links.

Against this evolving financing landscape, new environmental regulation and disruptive technology is bringing about further changes. Artificial intelligence, distributed ledger technology such as blockchain, and low carbon technology are creating new funding requirements, as well as bringing new participants into the transport sector, with new ideas for raising finance.

The aviation, rail and shipping industries each have their own unique characteristics and need lawyers with a deep understanding of how each of these complex industries operates. A detailed knowledge of the principles of asset finance is now also required, combined with the ability to advise on new capital markets, leasing and corporate structures. In addition, while the majority of asset financings in the transport sector tend to be governed by English or New York law, an understanding of the principles of local law in the key jurisdictions in which transport assets are registered is also of great importance.

We have sought contributions from jurisdictions that play a leading role in the financing of transport assets. Each chapter provides an overview of the transport finance industry in these jurisdictions, with an analysis of how key lenders have changed over the past five years and how the financing of assets has developed as a result. Contributors have provided an overview of the legislative framework for transport finance and financial regulation affecting lenders to the transport sector. Authors have also been asked to review any significant innovations and notable recent and pending financings and cases, and to provide assessments of how the transport sector is likely to continue to develop in their markets.

I would like to thank the contributors to this volume. Their efforts are deeply appreciated and represent a substantial contribution to the transport law library as the sector continues its transformation.

Each contribution reflects the significance of the transport sector today, and the need for readily available funding for industries that underpin the global economy by transporting people and commodities around the world every day.

Lawyers have had to become increasingly nimble as clients require advice on developing intricate joint-venture agreements and complex capital market products, and increasingly on the opportunities and threats presented by environmental challenges and disruptive change throughout the transport sector. It is an incredibly exciting time to be a lawyer in this field, as our contributors demonstrate in the following chapters.

Harry Theochari

Norton Rose Fulbright

London

April 2020

PORTUGAL

Hélder Frias and Sofia Santos Júnior¹

I INTRODUCTION

i The transport finance industry

Shipping

Portugal is historically a country of maritime adventurers, shipowners and shipbuilders. Portugal's geography, which includes the archipelagos of Madeira and the Azores and a long Atlantic coast, calls for port activity and places Portugal as an entry point for the transport of goods into Europe.

Notwithstanding this, the shipping industry in Portugal has struggled in recent decades. The number of newly built ships was low and shipyard activity mainly focused on repairs and maintenance. In addition, a significant number of shipowners active in Portugal corresponded and still correspond to international carriers and not to nationally run companies.

In this context, Portugal took the opportunity to regain its importance as a player in the shipping sector through the International Shipping Register of Madeira (MAR). MAR is a second shipping register operating under the Portuguese flag, open to non-residents and allowing registration of both commercial vessels and yachts. MAR was created in the late 1980s within the International Business Centre of Madeira (IBCM), which consists of a set of incentives, mainly of a tax nature, approved by the European Commission and currently in its fourth version. MAR offers attractive conditions for shipowners and crew members, while ensuring high levels of security. MAR is proving to be very successful in attracting foreign investment and is now one of the largest shipping registers in Europe.² At the end of December 2018, MAR had 662 ships,³ which means that the register is growing year after year. Among those ships, a significant number – 96 vessels – belong to the main ship-owners acting at international level (APM-Maersk, Mediterranean Shipping Company (MSC), CMA CGM Group and Cosco Shipping).⁴

As a consequence of the above, and drawing on our experience, domestic financing for the construction and acquisition of vessels currently has a residual importance, while the relevance of Portugal as a flag-state significantly increased. In fact, in recent years there have

1 Hélder Frias is a counsel and Sofia Santos Júnior is a junior associate at Uría Menéndez – Proença de Carvalho. The authors would like to thank Maria João Dias and André Almeida Martins for their assistance in preparing this article. The information in this chapter was accurate as at April 2019.

2 Refer to Decree-Law 96/89, of 28 March (DL 96/89), which enacts the legal framework of MAR, and to the information available on the official IBCM website: www.ibc-madeira.com/en/welcome.html.

3 Information available at the official IBCM website: <https://www.ibc-madeira.com/pt/noticias/noticias/550-em-2018%20cinm-mantém-crescimento-de-entidades-licenciadas-e-de-emprego.html>.

4 IBCM official newsletter 2018-01.

been several significant financings for the construction or transfer of ships at an international level, connected with Portugal through MAR. The registration of vessels in MAR calls for the application of the Portuguese jurisdiction, mainly as concerns security packages.

More recently, the links to Portugal appear to be expanding. In fact, there has been a significant increase in new constructions in Portugal. The press reported several new constructions in the shipyard Estaleiros de Viana. This shift appears to mean that there is now room for financing new constructions in Portugal.

On the other hand, recent legislative changes focused on modernising the ordinary register in Portugal. Therefore, the Portuguese flag is aiming to also become relevant at the level of the ordinary register.

Aviation

The main Portuguese airports are located in Lisbon, Porto, Faro, Funchal (Madeira) and Ponta Delgada (the Azores). More than half of the movements and passengers go through Lisbon airport. In 2018, as in 2017, an overall increase of activity in the main airports was noted. The force behind this increase is international air passenger transport, in which low-cost airlines – among others, easyJet and Ryanair – are playing a significant role. According to the information available for the third quarter of 2018, the most important airlines at the main airports are in general TAP, Ryanair and easyJet. In Ponta Delgada, the presence of SATA Air Açores and SATA Internacional is also very significant, whereas in Funchal Transavia Airlines replaces Ryanair in the top three airlines and in Faro Jet2 also plays an important role.⁵

At the end of 2017, there were 1,227 aircraft registered in Portugal, which represents an overall increase of five aircraft in relation to 2016. The total number of aircraft includes, among others, 605 intended for private transportation, 230 for non-regular transportation and 85 for regular and non-regular transportation. There were also 28 companies licensed for air transportation and 16 for executive aviation.⁶ In our experience, numerous aircraft are operated in our jurisdiction under lease or financial lease agreements.

Rail

The railway network in Portugal is currently managed by Infraestruturas de Portugal, SA (IP), a public company that resulted from the merger of Rede Ferroviária Nacional – REFER, EPE (REFER) and EP – Estradas de Portugal, SA, enacted by means of Decree-Law 91/2015, of 29 May and which is responsible for managing road and rail infrastructures, under a concession agreement.

ii Recent changes

The main changes to the transport industry in Portugal over the past five years consist of political responses to the global financial crisis, implemented through legislative or regulatory measures.

In this context, the privatisations of both a national shipyard (Estaleiros de Viana) and the management body of the main Portuguese airports (ANA) took place. Transportes Aéreos Portugueses, SA (TAP), the national airline, has also been partially privatised.

5 Quarterly Statistics Report concerning 2017, available at <http://www.anac.pt/vPT/Generico/PublicacoesINAC/BoletinsEstatisticosTrimestrais/Paginas/BoletinsEstatisticosTrimestrais.aspx>.

6 https://www.anac.pt/SiteCollectionDocuments/Publicacoes/anuarios/ACC_2017.pdf.

In a different matter, in the judgment of the Court of Justice (First Chamber) of 11 September 2014 (Case C-277/13), Portugal was censured in connection with competition restrictions at Lisbon, Porto and Faro airports concerning ground-handling activity (baggage handling, ramp handling and freight and mail handling). In spite of this, Parliament Resolution No. 78/2016, approved on 31 March 2016, provides some guidelines that show that the liberalisation process of the ground handling services in Portugal may be put on hold.

Portugal has also been undergoing changes over the past few years aimed at enabling or providing incentives for transportation on electric power and on the increase of the renewable sources of energy.

Technology is also taking the spotlight in the transport sector. In 2017, certain measures in transport-related industries, such as the Single Port Invoice,⁷ came to light. In turn, legislation regarding the transport of passengers in ordinary vehicles by means of electronic platforms was enacted in 2018, by means of Law 45/2018, of 10 August.

In summary, some of the main changes to the transport industry in Portugal over the past years concern the increase of private investment in traditionally publicly held companies and the international pressure to allow competition, together with the increasing awareness of the relevance of technology and environmentally friendly sources of energy.

II LEGISLATIVE FRAMEWORK

The financing of aviation, rail and shipping assets is not subject to specific regulations in Portugal. In general terms, the common legislation applicable to civil and commercial matters applies.

Notwithstanding this, there are certain specificities particular to the financing of transport assets when security interests are created. Mortgages are the most common guarantee granted in Portugal to secure the financing of transport assets and may be subject to specific rules, depending on the financed asset and its registration rules.

Finally, the legal framework applicable to transport matters in Portugal is highly fragmented. There are numerous outdated provisions and conventions, which sometimes overlap with European Union instruments or conflict with common practices. Even though this general note does not apply to MAR's specific regime nor does it currently deter transport finance in Portugal, this factor should be taken into consideration by operators in the Portuguese transport sector.

i Domestic and international law and regulation

The ship register system in Portugal is a dual registration system, comprising an administrative register and a commercial register.

Up until recently, the cornerstones of the ordinary register's legal framework were the General Regulation of Captaincies and Regulation of Recreational Navigation, established by Decree-Law No. 124/2004, of 25 May, which regulated the administrative register, and the commercial register, enacted by Decree-Law No. 4264, of 14 November 1959. Recently, Decree-Law 92/2018, of 13 November (DL 92/2018) enacted a simplified register procedure,

⁷ The Single Port Invoice was enacted by Decree-Law 6/2017 of 6 January and Order 14/2017 of 10 January.

which revokes the register provisions of the General Regulation of Captaincies and Regulation of Recreational Navigation. Therefore, and among other measures, DL 92/2018 replaces the provisions concerning the administrative register.

Other relevant pieces of legislation apply. Pursuant to Article 589 of the Portuguese Commercial Code (the Commercial Code), mortgages over vessels may guarantee up to five years of interest, while the ordinary regime set out in Article 693 of the Portuguese Civil Code (the Civil Code) only allows for a maximum of three years.

DL 96/89 sets out some specific rules applicable to mortgages registered in MAR. In fact, and among other specificities, MAR's regime allows the parties to choose the law applicable to the mortgage. This option may be particularly interesting taking into consideration, for example, that a mortgage under Portuguese law may not allow for self-help remedies.

If the parties fail to choose the applicable law, Portuguese law will apply nevertheless. In that scenario, however, the right to release a mortgage set out by Article 721(b) of the Civil Code will not apply. Such a right would allow the acquirer of the mortgaged asset to cancel the mortgage by paying the mortgagee an amount equal to the price paid for the mortgaged asset. Pursuant to the MAR regime, release under those circumstances can only occur if the acquirer undertakes to pay the mortgagee for all rights under the mortgage agreement.

Recently, by means of Decree-Law 92/2018, of 13 November (DL 92/2018), the possibility of choosing the law applicable to the mortgage was also adopted in the ordinary register and the exception to Article 721(b) of the Civil Code were also set out, in similar terms, for the ordinary register.

Concerning aviation, the registration of aircraft in Portugal must be submitted to the ANAC, further to Decree 20062, of 13 July 1931 (the Air Navigation Regulation). ANAC is also competent to register mortgages.

Finally, it should be noted that Portugal did not sign the Cape Town Convention on International Interests in Mobile Equipment.

ii Specific practices

Under Portuguese law, rights *in rem* usually are constituted or transferred by means of the applicable agreement. However, mortgages require registration and will only be deemed incorporated upon registration, which should be carefully provided for within a financing.

The possibility of choosing the law applicable to the mortgage registered in MAR – and now also in the ordinary register – should be carefully evaluated, taking potential discrepancies between applicable jurisdiction and applicable law specifically into consideration, as well as accounting for any enforcement issues that could arise.

Finally, and given the fragmented legal framework applicable to the Portuguese transport industry, it is advisable to liaise beforehand with the competent authorities for the registration of the financed asset concerning any aspect of the transaction that may give rise to registry or regulatory issues.

In this regard, MAR is very approachable and usually renders timely and useful support for the clarification of any doubts arising in a specific transaction.

III FINANCIAL REGULATION

In Portugal, only credit institutions have permission to grant credit as a professional activity. The legal definition of a credit institution is provided by Decree-Law No. 298/92, of 31 December (DL 298/92). DL 298/92 enacts the General Credit Institution and Finance

Companies Regime, which regulates the activities of banks and other financial institutions. According to DL 298/92, credit institutions are defined as entities whose activity consists of receiving deposits from the public, or other kinds of repayable funds, and granting credit on their own account. Only entities expressly recognised as credit institutions are authorised to carry out financing activities. Obviously, banks, as the main credit institutions, assume a central role in the field of financing activities.

Portugal is part of the single supervisory mechanism, with the banking system supervised by the Bank of Portugal (BdP) in partnership with the European Central Bank (ECB). Created to ensure the safety and soundness of the European banking system, the single supervisory mechanism comprises the ECB and the competent national authorities of each Member State of the euro area (of which the BdP is part). The ECB directly supervises the main credit institutions, while the BdP is responsible for the supervision of the remaining institutions. Notwithstanding this, the ECB has the power to replace the BdP at any time and directly supervise the other institutions. In addition, whenever credit institutions or financial companies also pursue financial intermediation activities, they will be subject to the supervision of, and regulations issued by, the Portuguese Securities Exchange and Market Commission (CMVM). The same applies to the insurance intermediation activities that may be pursued by banks, which are also subject to the supervisory powers of the Portuguese Insurance and Pension Funds Supervisory Authority, being required in such case to comply with the regulations or circular letters issued by the latter.

i Regulatory capital and liquidity

The need to ensure the safety and soundness of the national (and European) banking system after the 2007 international financial crisis, and the adoption of the Basel III Agreements – which were implemented in the European Union through Directive No. 2013/36/EU and Regulation No. 575/2013 – resulted in the implementation of a set of important measures intended to ensure the solvency and liquidity of banks and to reinforce the powers of the supervisory authorities.

Consequently, among other aspects, Portuguese banks are now obliged to ensure that their own funds are never below the minimum amount of share capital legally required. Additionally, current Portuguese legislation compels banks to have a minimum share capital of €17.5 million for banks and €5 million for investment firms in general.

Under Regulation No. 575/2013 on prudential requirements for credit institutions and investment firms, institutions must maintain a common equity Tier 1 (CET1) capital of at least 4.5 per cent of their risk-weighted assets (RWAs), a Tier 1 capital of at least 6 per cent of their RWAs and a total capital of at least 8 per cent of their RWAs. Nevertheless, and as agreed with the ECB, the European Commission and the International Monetary Fund in the context of the bail-out package provided to Portugal in 2011, the BdP determined that Portuguese credit institutions and investment firms must have a CET1 ratio not below 7 per cent. This obligation is to last until the adoption in full by these entities of the rules applicable under the Capital Requirement Directives IV package.

ii Supervisory regime

The supervisory system for Portuguese banks is based on two fundamental components: prudential supervision and ‘supervision of conduct’.

Prudential supervision has the main objective of ensuring credit institutions’ financial stability and the security of the funds that are entrusted to them. Therefore, supervisory

institutions have power to authorise the incorporation of credit institutions, monitor their activity, enforce compliance with the applicable regulations, issue rules and recommendations, sanction potential infractions and take extraordinary measures to correct irregularities.

On the other hand, supervision of conduct compels credit institutions to respect certain standards of conduct in their relations with clients. This second component of this supervisory regime entitles supervisory institutions to establish rules to assure the transparency of the information provided by credit institutions to their clients, as well as the fairness of products and financial services transactions – either between credit institutions or between credit institutions and their clients – in addition to regulatory and supervisory powers. The legal framework also grants clients the right to file complaints with the BdP.

The year 2017 was marked by the entry into force of two new laws, namely Law No. 83/2017 of 18 August and Law No. 89/2017 of 21 August, which provide for preventive and repressive measures to fight money laundering and terrorism financing, and partially transpose the Directive No. 2015/849/EU from the European Parliament and Council of 20 May 2015 into Portuguese law. In particular, Law 89/2017 establishes the legal regime of the Central Registry of the Effective Beneficiary (CREB), which is further regulated and detailed by Ordinance No. 233/2018, of 21 August. The CREB consists of a database with information regarding the effective beneficiary of entities subject to it (e.g., commercial companies), managed by the National Registry Office. All entities subject to the CREB have the duty to provide sufficient, exact and up-to-date information on its effective beneficiaries, all circumstances that indict such quality and the information on the economic interest they hold in the entities.

Finally, it is important to stress the existence of a central credit register. The central credit register is a central database, managed by the BdP, that contains detailed information regarding the loans granted by credit institutions to their clients.⁸ All credit institutions are obliged to communicate this information so that the BdP, on a monthly basis, may determine the amount of credit granted to each client. Through this mechanism, credit institutions are able to evaluate the risks of granting credit to a specific client with a higher degree of accuracy.

IV SECURITY AND ENFORCEMENT

In the Portuguese context, financing of new assets usually follows the traditional pattern of credit against a security interest over the asset. Accordingly, security plays a key role in both the negotiation and the execution of the asset financing agreement. The most common security required by finance providers is, unquestionably, a mortgage over the asset, but the security package may also include other instruments such as pledge over shares of ship-owning companies, pledge over bank accounts, assignment of earnings or receivables and retention title instruments. Currently, Portugal is not a party to any convention regarding securities over aviation, rail and shipping assets (such as the Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, adopted in Brussels on 10 April 1926, and the Convention relating to Maritime Liens and Mortgages, adopted in Geneva on 6 May 1993).

⁸ Only balances for liabilities with a value of at least €50 need to be communicated.

i Security

Shipping

Portuguese law provides a specific and mandatory framework on security interests over vessels that, among other aspects: (1) sets out a list of 15 credits that enjoy a priority-ranking privilege (Article 578 of the Commercial Code); and (2) establishes that the vessel's constructor and the maritime rescuer are granted the right to retain the vessel as security for the payment of the credits arising from its construction and the maritime salvage (Article 25 of Decree-Law 201/98, of 10 July (DL 201/98) and Article 14 of Decree-Law 203/98, of 10 July). This mandatory framework prevails over any provisions set forth in the asset financing agreement and its respective security package.

According to that special framework, namely the provisions of the Commercial Code, there is a special regime for mortgages over vessels that differs from the mortgage's general framework set out in the Civil Code. In fact, the mortgagee is granted a priority-ranking privilege, which prevails (even in the event of the mortgagor's insolvency) over: (1) the priority-ranking privileges provided for by the Civil Code and any other statutes (Article 574 of the Commercial Code); and (2) rights of retention subsequently constituted (Article 750 of the Civil Code). In this regard, the recent Decree-Law 92/2018, of 13 November (DL 92/2018) introduced some reforms to the regime for mortgages over vessels.⁹ On the one hand, parties are now allowed to designate the law applicable to the mortgage, which must be indicated at the time of registration, together with the handing over of a copy of the relevant legislation. On the other hand, Article 21, No. 6 sets forth that the purchaser of mortgaged assets can only exercise the right to extinguish the mortgage (provided for in article 721 of the Civil Code) if the exercise of this right guarantees the mortgagee full payment of all the rights and charges arising from the mortgage agreement.¹⁰ Notwithstanding this, still pursuant to the above-mentioned special regime, court expenses and monetary consideration for maritime salvage are ranked as having priority over the mortgagee's credit (Article 578(1) (2) of the Commercial Code).

Aviation and rail

Portuguese law does not grant specific priority-ranking privileges to entities that finance the acquisition of aviation or rail assets. As such, the lender's position – if a security interest is constituted over the aircraft or the rolling stock – results from the general framework set out in the Civil Code.

In fact, Portuguese law only provides the Portuguese state, the autonomous region of the Azores and the airports' managing body with a priority-ranking privilege over the aircraft as security for the payment of: (1) fees due for the operation of airline companies in Portuguese airports; and (2) administrative fines imposed for infringement of the framework governing non-scheduled transport services (Article 46 of Decree-Law 254/2012 of 28 November, Article 30 of Regional Legislative Decree 35/2002/A of 21 November and Article 38 of Decree-Law 19/82 of 28 January).

9 In some aspects, introducing provisions already in force in the International Ship Registry of Madeira.

10 Therefore, rendering non applicable to these mortgages the provision of article 721b of the Civil Code according to which the acquirer of a mortgaged asset may extinguish the mortgage by declaring he or she is ready to pay creditors up to the amount for which he or she acquired the goods (or its estimated value when the acquisition was free of charge or with no price fixing).

According to general rules, the mortgagee's credits shall be ranked as having priority over: (1) the credits secured by a priority-ranking privilege that has been subsequently constituted; and (2) the credits held by entities that enjoy a right to retain the aircraft (Articles 686, 750 and 758 of the Civil Code).

In practice, aircraft are usually acquired under a financial lease agreement. Generally, the parties enter into a sale and leaseback arrangement: the airline operator negotiates the construction and acquisition of the asset, purchases it and oversees the import procedure; then, registers the aircraft and sells it to the financial lessor. Subsequently, the operator is granted the use of the asset under a financial lease agreement (the term of which may not exceed 30 years). In many cases, the financing is granted by several financial lessors (acting as a consortium), as a means to mitigate the economic risk of the transaction.¹¹

ii Enforcement

A secured creditor may enforce security by means of judicial action filed against the debtor, which may encompass an interim measure (namely, an arrest), a main declaratory action and, finally, an enforcement procedure in which the asset is sold through the court. The merits of the dispute may be decided in accordance with the laws of another jurisdiction if private international law leads to the exclusion of Portuguese law (e.g., in the event that the parties have validly chosen the law of another jurisdiction to govern the financing or the security relationship).

It is generally stated that, after the breach of the contract, the mortgagee may take possession over the secured asset without filing a claim if the parties have entered into an agreement whereby the mortgagee undertakes: (1) to request an updated valuation of the asset (in accordance with a procedure defined by the parties); and (2) to repay the amount corresponding to the difference between the asset's value and the amount of the debt. In fact, it is said that the rules prohibiting self-enforcement only apply if the procedure is not agreed with the mortgagor and may not be controlled by this entity (otherwise, their rights are not jeopardised).

iii Arrest and judicial sale

Shipping

Portugal has ratified the Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, adopted in Brussels on 10 May 1952 (the Brussels Convention). The arrest of a vessel is governed by Brussels Convention whenever: (1) the claimant holds a maritime claim pursuant to Article 1 of the Brussels Convention (namely a credit secured by a mortgage); and (2) the vessel is present in Portugal and flying the flag of a contracting state.¹² The nationality or the address of the owner of the vessel or its domicile is thus irrelevant.

The Brussels Convention can only be applied when at least one of two elements (the flag of the vessel or the domicile of the applicant for the arrest) does not have a connection with the Portuguese jurisdiction (Article 8(4)).

11 See Conceição Soares Fatela, 'A Locação Financeira de Aeronaves', *Cadernos de Direito Privado*, No. 49, January/March 2015.

12 The protective order may also be accepted if the vessel flies the flag of a non-contracting state: in this case, the vessel may be arrested to secure a maritime claim pursuant to Article 1 of the Brussels Convention, or any other claim that legitimates the arrest according to the *lex fori* (Article 8(2)(3) of the Brussels Convention).

The Brussels Convention regulates: (1) the arrest of the ship to which the credit refers (offending ship), when the debtor is the owner or the charterer or whenever a third party is a debtor of a maritime credit related to that ship; and (2) the arrest of another ship (sister ship) belonging to the person who, on the date of the constitution of the credit, is the owner or the charterer of the ship to which the credit refers, or debtor of a maritime credit, unless the injunction seeks coercive compliance regarding the credits indicated in Article 1(1)(o)(p) or (q) of the Brussels Convention.

For a vessel to be arrested under this international instrument, a mere claim of the right of maritime credit suffices; it is not necessary for the claimant to present evidence for the procedure, nor to allege and prove the risk of the loss of the guarantee represented by the asset (*periculum in mora*) (Articles 3 and 5 of the Brussels Convention).

If the case does not fall within the scope of the Brussels Convention, the Portuguese Civil Procedure Code (CPC) will be applicable. In this circumstance:

- a the claimant must allege and present evidence of the relevant facts, including the credit entitlement and the grounds for granting the interim measure (*fumus boni iuris*), the risk of losing the security and the admissibility of attaching the vessel (Articles 365(1), 368(1), 391(1), 392(1) and 394 of the CPC);
- b if the legal requirements are met, the arrest is declared by the court without hearing the defendant (Article 393(1) of the CPC); and
- c the vessel may be arrested even if it is undertaking a journey (Article 9(1) of DL 201/98).

The Brussels Convention and the CPC set out similar provisions:

- a the claimant may request the arrest even if it does not enjoy any security interest (mortgage) over the vessel;
- b other ships owned by the debtor may be arrested, even if they have not been given as security; and
- c the claimant may be liable for all damages arising out of the arrest in the event that the measure is deemed unjustified (this liability shall be governed by the Portuguese internal rules).

If the arrest is granted, the asset is judicially seized and physically apprehended. Notwithstanding, the mortgagee may request the court that the vessel continues to operate until its judicial sale, if the mortgagor expressly agrees or, if said agreement is obtained, by providing an adequate guarantee (Articles 769 and 770 of the CPC).

Following the arrest decision, the claimant must file a main declaratory action within 30 days to obtain an enforceable decision regarding its credit and the respective security.

After obtaining a favourable ruling in the main proceedings, the claimant has to file an enforcement proceeding to judicially sell the vessel. The judicial sale is carried out by an enforcement agent, in accordance with the rules set out in the CPC that sets forth several sale methods (sealed bids, public auction, private negotiation). The vessel is sold free from any charges or encumbrances and normally 'as is'.

If the debtor is insolvent, the sale of the asset is governed by the Insolvency Code, as any other asset seized for the insolvency estate.

Aviation

In the case where the aircraft was acquired under a financial lease agreement, Article 21 of Decree-Law 149/95, of 24 June, entitles the financial lessor to make a request to the court for the immediate apprehension and restitution of the leased asset in the event of termination of the financial lease agreement (due, among other grounds, to an event of default attributable to the financial lessee).

The granting of the interim measure depends on:

- a* the termination of the agreement having been declared by the financial lessor, by serving a written notice to the counterparty;
- b* the registration of the agreement having been cancelled; and
- c* the court considering proved – prima facie – the defaulting event, the non-delivery of the asset and the termination of the agreement.

Once the apprehension is ordered, the financial lessor is entitled to grant a third party the use of the asset, namely by entering into a sale and purchase, lease or financial lease agreement.

If the aircraft is owned by the airline company, judicial action (declaratory action or enforcement procedure) has to be filed to collect the debt (through judicial sale).

V CURRENT DEVELOPMENTS

i Developments in policy and legislation

One of the most important developments in transport finance over the past several years was enacted by Decree-Law 8/2009, of 7 January, which amended the Commercial Code to include the credits guaranteed by mortgages or pledges over the vessel in the third position of the ranking of privileges over the vessel.

This measure was followed, in 2011, by Portugal's withdrawal from the Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, adopted in Brussels on 10 April 1926.

In fact, up until those legislative measures were introduced, mortgages would be ranked in a less favourable way (from the credit institutions' perspective), which was presumably preventing registrations in Portugal (and in MAR). These changes were a turning point for creditors, which to some extent contributed to the growth of MAR.

Very recently, Decree-Law 43/2018, of 18 June, created a National System for Vessels and Maritimes, which aims at centralising and publicising all registrations and certifications concerning maritime activity. Shortly after, DL 92/2018 enacted a simplified register of vessels and crafts.

DL 92/2018 is currently a fundamental piece of the legislative framework in the ordinary register. DL 92/2018 addresses a variety of register matters, such as bareboat charter in, the formalities of bills of sale or specificities of the mortgages.¹³ The provisions of DL 92/2018 on the register of vessels entered into force on 1 January 2019.

On a different matter, DL 92/2018 put into place a special tax regime where the tax base is based on the tonnage of the ships and crafts (tonnage tax).

13 Please refer to Sections II.i and IV.i.

ii Trends and outlook for the future

Portugal is regaining its importance in the shipping sector, and specifically in the asset finance industry through MAR. In fact, the second registry in Portugal has undergone a steady and sustainable increase over the past years and is drawing the attention of shipowners and finance parties alike. At the end of 2018, MAR had 662 ships. In 2017, MAR had 562 vessels¹⁴ and in 2016¹⁵ MAR had 491 vessels (40 commercial yachts, 73 recreational craft and 378 commercial vessels), with a gross tonnage of 12,076,294. At the end of the previous year of 2015, a total of 399 vessels were registered, with a gross tonnage of 7,925,042. The average age of the ships dropped from 11.9 years in 2015 to 11.8 in 2016, and currently it is 11.7 years.¹⁶ In our experience, lenders from jurisdictions as varied as Spain, China and Japan are relying on Madeiran mortgages to secure financing.

MAR is not only impressive in numbers. Its safety and quality standards maintain sound recognition worldwide. As a consequence, vessels flying the Portuguese flag were included, for the first time in 2017, in the index Qualship 21 of the United States Coast Guard. Likewise, Portugal maintained its position in the White List of the Paris MoU on Port State Control, which will be valid until June 2019.

The growth of MAR has been drawing public attention to maritime issues, particularly regarding the concerns of creditors in the financing of vessels and tax issues from the exploitation of the same. As a consequence, the ordinary register is seeking to mimic MAR. On the other hand, there are ongoing – and much needed – modernisation efforts in areas adjacent to the shipping register.

A broad, planned reform of the legal framework applicable to the maritime and transport sector in Portugal is long overdue. The legislative measures that came to light in 2019 are aligned towards the correct goals but, to some extent, lack in coherence. Notwithstanding this, the current refocusing of legislative efforts in the shipping sector is very exciting. We can anticipate that this once forgotten sector will increasingly be more dynamic.

14 With reference to the end of October 2017 and based on information made available on the official website of the International Business Centre of Madeira (IBCM): <https://www.ibc-madeira.com/pt/noticias/noticias/511-mar-contribui-para-entrada-do-pavilhao-portugues-no-qualship-21.html>.

15 Official newsletter 2017-01 of CINM, encompassing data concerning 2016.

16 Information made available on the official website of IBCM: <https://www.ibc-madeira.com/pt/noticias/noticias/550-em-2018%20cinm-mantem-crescimento-de-entidades-licenciadas-e-de-emprego.html>.

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