

THE TRANSPORT
FINANCE LAW
REVIEW

EIGHTH EDITION

Editor
Richard Howley

THE LAWREVIEWS

THE
TRANSPORT
FINANCE LAW
REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Richard Howley

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADER

Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS

Rebecca Mogridge, Katie Hodgetts, Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE

Archie McEwan

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Felicia Rosas

SUBEDITOR

Helen Sou

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2022 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at April 2022, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-068-6

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

GANADO ADVOCATES

GOEMANS, DE SCHEEMAECKER & DE WIT (GDS ADVOCATEN)

JURINFLOT INTERNATIONAL LAW OFFICE

KARTAL LAW FIRM

MULLA & MULLA & CRAIGIE BLUNT & CAROE

NISHIMURA & ASAHI

NORTON ROSE FULBRIGHT

URÍA MENÉNDEZ

CONTENTS

| | |
|--|----|
| PREFACE | v |
| <i>Richard Howley</i> | |
| Chapter 1 BELGIUM..... | 1 |
| <i>Benoît Goemans and Birgitta Van Itterbeek</i> | |
| Chapter 2 INDIA | 12 |
| <i>Shardul J Thacker</i> | |
| Chapter 3 JAPAN | 26 |
| <i>Kosuke Shibukawa and Yoshiaki Tsuda</i> | |
| Chapter 4 MALTA..... | 37 |
| <i>Matthew Xerri and Caroline Risiott</i> | |
| Chapter 5 PORTUGAL | 50 |
| <i>Hélder Frias and Sofia Santos Júnior</i> | |
| Chapter 6 RUSSIA | 61 |
| <i>Alexander Mednikov</i> | |
| Chapter 7 SPAIN..... | 66 |
| <i>Carlos López-Quiroga</i> | |
| Chapter 8 TURKEY..... | 77 |
| <i>M Ali Kartal</i> | |
| Chapter 9 UNITED KINGDOM | 85 |
| <i>Kenneth Gray, Richard Howley, Andrew Williams and Louise Auty</i> | |
| Chapter 10 UNITED STATES | 97 |
| <i>Norton Rose Fulbright (United States practice)</i> | |

Contents

Appendix 1 ABOUT THE AUTHORS 105
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 111

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 covid-19 pandemic has provided an unprecedented level of turmoil to each of these vitally important industries, the full impact of which may not be known for a number of years. Each of the aviation and cruise and passenger ferry sectors have suffered an extraordinary reduction in demand due to lockdown and the closure of borders, while in the United Kingdom, there has been extensive government intervention that already presages transformative change.

The pandemic has caused a dramatic decline in new orders for aircraft, and a number of airline insolvencies and restructurings have occurred; however, the demand for capital has not in any way diminished and there are signs that airlines are now starting to request the delivery of aircraft deferred during the pandemic. All airlines that have managed to retain access to capital have been engaged in significant finance transactions during the past year, many by way of sale and leaseback of aircraft. Similarly, in the cruise industry, Carnival Corporation and Royal Caribbean International have made regular forays into the debt and equity capital markets to repair their affected balance sheets, often at better terms than they were able to secure during 2020.

Beyond the pandemic, the transport industries continue to face challenges, including increased financial regulation such as IBOR reform and environmental regulation. The year 2021 brought the IMO's introduction of the Energy Efficiency Existing Ship Index, which followed the 2020 sulphur cap in shipping, and these measures will inevitably be followed with further regulation on CO₂ emissions. In addition, some of the European Union's proposals in its 'Fit for 55' package could affect the shipping industry, for example, the intended expansion of the EU emissions trading scheme, the EU ETS, to include the maritime industry, would impact the United Kingdom's vessels calling at ports in the European Union.

These challenges mean that asset finance in its traditional form is now available from relatively few banks, which in turn are prepared to lend to relatively few names, being usually leaders in their relevant sectors that have green credentials and that 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.

Against this evolving financing landscape, new environmental regulation and disruptive technology are 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.

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.

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 seven 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.

Richard Howley

Norton Rose Fulbright

London

April 2022

SPAIN

*Carlos López-Quiroga*¹

I INTRODUCTION

i The transport finance industry

It is important to consider that the climate for transport asset financing in Spain does not significantly diverge from that of general financing. Undoubtedly, the covid-19 pandemic and the measures taken to bring it under control have affected the Spanish economy.

In this context, market-standard clauses in loan transactions are being revisited, such as those on force majeure, mandatory prepayments and financial covenants. Also of note is the increasing regulatory pressure (Basel III, etc.).

Shipping

Spain's ship finance industry is largely driven by shipbuilding, a sector that was considerably affected by the global credit crunch, resulting in fewer and more complex transactions. We have seen Spanish banks financing (traditionally foreign) shipowners building in Spanish yards, and increasingly resorting to export credit tools.

Fortunately, Spanish banks' traditional approach to ship finance has, for the time being, not varied during the covid-19 pandemic. It is still based on a combination of project and corporate finance. Lenders typically seek out a stable long-term charter to back the financing, but invariably scrutinise the shipowner's balance sheet.

Another angle has been the granting of pre-delivery financing to Spanish yards to assist them in completing the construction of vessels, or in the issuance of refund guarantees.

In view of this scenario, we cannot disregard the fact that the Spanish ship finance market is (and has been) shaped by the Spanish tax lease framework. The EU challenge negatively impacted domestic ship finance between 2011 and early 2015. The recuperation of the Spanish economy and approval of a new tax lease framework at both domestic and EU levels have revitalised the market.

Aviation

According to recent official statistics from Aena, SA (the Spanish airports operator), 276.23 million passengers travelled through Spanish airports in 2019. These numbers decreased in 2020 due to the health crisis, specifically to 76,064,322 passengers. The year

¹ Carlos López-Quiroga is a partner at Uría Menéndez. The author thanks his colleagues Isabel Aguilar, Luz Martínez de Azcoitia, José Sánchez-Fayos, Nicolás Nägele and Diego José Pérez, who also contributed to this chapter.

2021 did not see a full recovery to pre-pandemic figures, with just 119,959,671 passengers travelling through Spanish airports. Spanish airlines are no exception to the general trend in the industry and are facing a situation of financial stress.

Turning to financing tools, the domestic market (similar to the international one) is driven by financial tax structures, particularly operating leases. The entry into force of the ‘Cape Town system’ in Spain created a new framework for secured financings within the aviation market. Since the covid-19 outbreak, public support has also increased, creating more complex financing structures.

Rail

Spain is undertaking a comprehensive modernisation of the railway system, including the construction of a new high-speed network. Following the entry into force of the different European packages, the Spanish rail sector has been slowly opening up to competition. To date, in addition to freight transport, international transport of passengers and transport primarily for tourism purposes have been liberalised.

Although the passenger market continues to be controlled by Renfe Operadora, other operators have started to operate in this market, which was opened up to competition with the new working timetable launched on 14 December 2020.

The trend among Spanish manufacturers has been to export rolling stock abroad with export finance support.

Mobility

For years the transport sector was far removed from the boom in information society services, but the ever-increasing connection between technology and transport is transforming the traditional economic and organisational structures, and is having a significant social and political impact.

Electronic applications (apps) have changed not only how transport is contracted but also the conditions under which the journey is carried out (e.g., shared taxi and pre-established prices). They have also encouraged activities that were previously underutilised or unknown, such as renting urban vehicles, bicycles, scooters and motorcycles.

This development has sometimes been slowed down by legislation. However, in recent years, legislative changes have permitted significant growth of mobility platforms in the field of urban transport by taxi and tourist vehicles with driver (VTC).

These mobility platforms mainly rely on shareholders contributions but also resort to traditional bank financing (in this last case, particularly, for startup companies).

ii Recent changes

Shipping

Spain’s ship finance industry will unquestionably benefit from the approval of the new tax lease framework based on the European Commission’s decision of 20 November 2012, and from Royal Decree 874/2017 regulating interest rate subsidies for credits for vessel constructions.

Aviation

Two significant recent events are notable in the aviation sector – the partial privatisation of Aena, SA, in which the government still holds its majority stake, and the approval of Royal Decree 1036/2017, which regulates the civil use of remotely piloted aircraft (RPA).

Rail

The Spanish Rail Sector Act 38/2015 was modified by Royal Decree-Law 23/2018 of 21 December, which transposed Directive (EU) 2016/2370 into the Spanish legal system. Royal Decree-Law 23/2018 opened up the public railway transport sector to competition as of 1 January 2019, so that any railway company can request capacity for the working timetable starting on 14 December 2020.

The Royal Decree-Law also modifies the price regime for basic services, supplementary services and ancillary services.

According to the new wording of Article 101 of the Rail Sector Act, prices for basic services cannot exceed the cost of providing the service plus a reasonable profit. Supplementary services and ancillary services are subject to prices agreed between private parties. However, when those services are provided by a sole operator, the prices cannot exceed the cost of providing the service plus a reasonable profit.

II LEGISLATIVE FRAMEWORK

Domestic and international law and regulation

There are several notable provisions to take into account when financing the construction or acquisition of transport equipment. First, in the absence of an agreement or a specific act, the manufacture of transport equipment is regulated by the Spanish Civil Code, while the acquisition of transport equipment is regulated by the Commercial Code and, subsidiarily, by Civil Code.

Apart from this general rule, the following provisions that specifically regulate each type of transport equipment should be considered when financing such equipment.

Shipping

The Maritime Navigation Act regulates the main aspects of shipbuilding contracts and sale and purchase agreements. Although the provisions are not mandatory, the shipbuilder cannot be exonerated from liability in the event of wilful misconduct or gross negligence.

Spain has a dual registration system for ships, vessels and naval artefacts: the Ship Registry and the Chattel Registry. The Ship Registry is the administrative registry for registering vessels that fly the Spanish flag. Vessels flying the Spanish flag are bound by Spanish tax, employment, documentation and safety regulations. There is also a second administrative ship registry named the Special Registry of Ships and Shipping Companies located in the Canary Islands (REBECA).

Law 19/1994 of 6 July, which amends the Fiscal Economic Regime of the Canary Islands, has been amended pursuant to the first final provision of Law 11/2021 of 9 July on measures to prevent and combat tax fraud. This amendment entails the possibility of extending the tax benefits contemplated therein in respect of vessels that are registered in the European Union or European Economic Area and are operated by shipping companies registered with the REBECA.

The Chattel Registry is a private registry that contains information in its ships section regarding the ownership and encumbrance of ships, vessels and naval artefacts to provide legal certainty in related matters. Third parties have standing to challenge information registered in the Chattel Registry.

All ships, vessels and naval artefacts, including those under construction, may be subject to a ship mortgage pursuant to the provisions of the Maritime Navigation Act

and the International Convention on Maritime Liens and Mortgages signed in Geneva on 6 May 1993. The ship mortgage must be registered with the Chattel Registry to be valid and enforceable, and to have third-party effects.

When financing the construction of a vessel in Spain, the Spanish tax lease system (STLS) for the financing of assets, which in particular affects the financing of vessels, should be taken into consideration.

The STLS is based on the tax depreciation of leased assets and was approved by the European Union in the European Commission decision dated 20 November 2012 in case SA 34736 (2012/N). The STLS's general contractual structure is as follows: a builder and a leasing entity (the lease company) enter into a shipbuilding contract for the construction of a vessel, as negotiated in commercial terms between a shipowner and the builder. The lease company and an economic interest group (EIG) enter into a finance lease agreement with a purchase option. In turn, the EIG and the shipowner enter into a bareboat charter agreement permitting the use of the vessel by the latter after delivery. At a subsequent stage, the shipowner buys the vessel from the EIG and becomes its owner. In addition, Royal Decree 874/2017 regulates interest rate subsidies for credits for vessel construction.

Aviation

Spain has not passed any act specifically regulating the construction, acquisition or financing of aircraft.

After the amendments introduced by Royal Decree 384/2015 of 22 May, aircraft operated by Spanish operators must be registered with the Aircraft Matriculation Registry and the Chattel Registry. Registration of an aircraft with the Aircraft Matriculation Registry confers Spanish nationality as well as the applicable tax and safety provisions, while the Chattel Registry records ownership and encumbrances affecting the aircraft and has third-party effects.

Apart from the above, Spain has ratified the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, signed in Cape Town on 16 November 2001.

The result is that Spain has a triple registration system, with aircraft also potentially being registered with the International Registry set up by the Cape Town Protocol to Aircraft Equipment. International interests created pursuant to the Cape Town Protocol are enforceable in Spain.

Among its declarations to the Cape Town Protocol to Aircraft Equipment, Spain designated the Chattel Registry as the entry point to the International Registry.

That Spanish entry point has been set up as an authorising entry point (i.e., the Chattel Registry only authorises the transfer of mandatory information to the International Registry for the registration of an international interest by issuing a code). After obtaining that code, the parties are entitled to register and, therefore, claim an international interest in the International Registry by providing the required information electronically.

Furthermore, the creditor secured by an international interest is not entitled to take self-remedy actions unless it holds an irrevocable deregistration and export request authorisation (IDERA). According to the Spanish Declaration to the Cape Town Protocol to Aircraft Equipment, the holder of an IDERA is authorised to request deregistration and export of an aircraft without obtaining judicial authorisation.

Although the Chattel Mortgages and Non-dispossessionary Pledges Act of 16 December 1954 regulates chattel mortgages over an aircraft, in practice they will no longer be used in Spain in the near future as international interests take priority over any national interest created after 1 March 2016.

The main rules governing the management and legal status of RPAs (formerly governed by Act 18/2014 of 15 October) were updated by Royal Decree 1036/2017.

Rail

Spain has not enacted any provision that specifically regulates the financing, construction or acquisition of rolling stock. As with shipping transport equipment, rolling stock must be registered with the Special Railway Registry, an administrative registry. Registration of rolling stock with the Chattel Registry is optional.

Regarding interests, chattel mortgages can be created over private wagons and over public and private locomotives, as established by the Chattel Mortgages and Non-dispossessionary Pledges Act.

On 10 November 2021, Spain signed the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock signed on 23 February 2007, which is expected to enter into force in 2022.

Mobility

The regulations applicable to each mobility platform must be determined on a case-by-case basis, taking into account how they interact with their users and the underlying transport activity. The applicable regulations vary depending on the means (e.g., taxi or bus), the type of transport (public or private; discretionary or regular), where the service is provided and the degree of control over drivers and passengers, among other factors.

If the activity carried out by the platform is considered an ‘information society service’, Member States are only empowered to restrict their operations when such a restriction is justified for any of the reasons provided for in Directive 2000/31 of the European Parliament and the Council of 8 June 2000, such as consumer protection, public order, security or health.

However, if the activity falls outside the scope of ‘information society services’, then additional regulations must be analysed to assess whether any compulsory requirement is imposed. In other words, the fact that an activity is not an ‘information society service’ does not per se entail an obligation to apply for a permit or authorisation, but only when the legislation that governs the underlying dominated activity so stipulates.

Law 16/1987 of 30 July on land transport planning, Royal Decree 1211/1990 of 28 September that approves the Land Transport Regulations and local and regional regulations must also be taken into account.

III FINANCIAL REGULATION

i Regulatory capital and liquidity

The provisions of Basel III were implemented into the legal framework of the European Union, mainly through:

- a* Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV); and

- b* Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (CRR).

CRD IV has been implemented into Spanish law through:

- a* Law 10/2014 of 26 June on the organisation, supervision and solvency of credit institutions;
- b* Royal Decree 84/2015 of 13 February, which implements Law 10/2014 of 26 June on the organisation, supervision and solvency of credit institutions; and
- c* Circular 2/2016 of 26 February, of the Bank of Spain, to credit institutions, on supervision and solvency, completing the adaptation of Spanish domestic law to Directive 2013/36/EU and Regulation (EU) No. 575/2013.

The above legal framework imposes requirements on credit institutions in the following areas, among others:

- a* own funds and capital buffers;
- b* measure and management of risks;
- c* large exposures;
- d* liquidity and
- e* leverage.

CRD IV and CRR were amended with the approval of CRD V and CRR II on 20 May 2019, what is commonly known as the CRD V package. The key elements of the amendment were related to the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements. Spain partially transposed CRD IV into Spanish legislation with the adoption of two Royal Decrees in April 2021 and November 2021.

On 23 December 2021, the Official Gazette published Circular 5/2021 of the Bank of Spain, which amends Circular 2/2016, of 2 February on supervision and solvency of credit institutions. This Circular completes the implementation of CRD V in Spain and regulates, among other things, a new regulation of the countercyclical capital buffer that is consistent with the new wording of Article 45.1 of Law 10/2014, which allows the Bank of Spain to require the buffer for all of an institution's or group's exposures and, additionally or alternatively, for exposures to a certain sector or industry.

In October 2021, the European Commission adopted a review of both CRD IV and CRR (CRD VI and CRR III). The objectives of the legislative proposals are to strengthen the resilience of credit institutions to potential future economic shocks, to contribute to the green transition in environmental, social and governance (ESG) terms and to reinforce supervision, while contributing to Europe's recovery from the covid-19 pandemic.

ii Supervisory regime

Since the establishment of the Single Supervisory Mechanism in 2014, the supervision of credit entities in Spain is shared between the European Central Bank (ECB) and the Bank of Spain under the terms set out under Council Regulation (EU) No. 1024/2013 of 15 October 2013, conferring specific tasks on the European Central Bank that concern policies relating to the prudential supervision of credit institutions (SSM Regulation).

According to the SSM Regulation, the ECB has exclusive competence to carry out certain tasks for prudential supervisory purposes. For instance, it is responsible for granting and withdrawing authorisations for the establishment of credit institutions in the eurozone, assessing notifications for the acquisition and disposal of qualifying holdings, performing stress tests, supervising on a consolidated basis and ensuring banks' compliance with EU prudential requirements, such as own-funds requirements, liquidity, leverage or corporate governance.

However, for the sake of efficiency, supervisory tasks and responsibilities are allocated to the ECB and the Bank of Spain depending on the bank's significance in accordance with the SSM Regulation and Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014, establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities. The conditions for a bank to be considered as significant are established in the SSM Regulation and such conditions are published by the ECB and the Bank of Spain.

IV SECURITY AND ENFORCEMENT

Access to financing in the maritime, aircraft and railway sectors is a key factor for success in the current commercial context. The indebtedness that companies operating in those sectors must assume for the construction, financing and acquisition of vessels, aircraft and rolling stock depends on the companies' capacity to provide sufficient and adequate security to the financing entities. The security package is therefore essential in asset finance. In Spain, a mortgage over the financed asset is normally granted as security to the lenders and has an important economic function and an essential role in new building projects. The entry into force of the Maritime Navigation Act, representing a significant modernisation of Spain's former maritime regulation, establishes the legal framework governing ship mortgages. Mortgages over aircraft and rolling stock are also subject to specific regulations. Moreover, as previously mentioned, Spain is a party to various international conventions that apply to these types of guarantees, including the International Convention on Maritime Liens and Mortgages (1993) and the Cape Town Convention on international interests in mobile equipment.

i Financing of contracts

Shipping

The ship mortgage is the basic security normally granted within the scope of shipbuilding projects, but not the exclusive form, as ancillary security such as refund guarantees and pledges are also commonly used. The legal framework governing ship mortgages is primarily contained in Articles 126–144 of the Maritime Navigation Act, substituting Spain's previous framework on these types of security, and in the International Convention on Maritime Liens and Mortgages (1993).

There are two requirements under the Maritime Navigation Act for a ship mortgage to be validly created as a right *in rem* with effects against third parties: it must be documented in writing in either a private or public document; and it must be registered within the Chattel Registry. To create and register the mortgage over a vessel under construction, a third of the budgeted amount of the total hull value must have been invested and the ownership of the vessel registered with the Chattel Registry. The parties to the ship mortgage are the mortgagee

(normally a bank financing the construction of the vessel) and the mortgagor (which can be the debtor under the financing contracts or another party, as the mortgage can be granted as security of third-party obligations).

In respect of the asset, the mortgage extends to both the vessel's component parts and fittings, but not accessories. The mortgage also covers licences linked to the vessel (such as fishing licences), and compensation arising from insurance and from material damage to the vessel owing to collision or other accidents. In respect of the secured obligations, unless otherwise agreed, a mortgage granted as security of a credit that accrues interest will not exceed (to the detriment of a third party) the interest of the previous two years elapsed and the matured part of the current annual dues, in addition to the principal.

If a definitive change of the vessel's flag is intended, it may not be carried out unless all mortgages, charges and encumbrances have been cancelled or the written consent of the beneficiaries of the mortgages, charges or encumbrances has been granted. Temporary changes of flag will not affect the regulation applicable to the mortgage, which shall continue to be the act applicable under the flag flown by the vessel at the time the mortgage was granted.

Aviation

Aircraft finance can also be secured by granting a mortgage over the asset. The legal framework applicable to this kind of mortgage is primarily established in the Air Navigation Act and in the Chattel Mortgages and Non-dispossessionary Pledges Act. The mortgage must be registered with the Chattel Registry for its valid creation and the security must also be registered with the Aircraft Matriculation Registry. To be able to create and register the mortgage over an aircraft during its construction, a third of its budgeted amount must have been invested in the same. The aircraft must be identified in the mortgage deed by including the following information:

- a* registration number given to the aircraft by the Aircraft Matriculation Registry;
- b* stage of construction (if the aircraft remains under construction);
- c* domicile of the aircraft; and
- d* insurance policies covering the aircraft.

The mortgage extends to the airframes, engines, radio and navigation devices and accessories. The mortgage can also extend to spare parts, provided that they are listed in the mortgage deed.

Spain adhered to the Cape Town Convention in 2013, although it was not until 15 December 2015 that Spain adhered to the Aircraft Protocol, which entered into force in Spain on 1 March 2016. The Cape Town Convention contains the general framework applicable not only to securities over airframes, engines and helicopters but also to other mobile equipment, such as railway rolling stock and space assets (specific protocols are established for each type of mobile equipment). The Aircraft Protocol completes the Convention with specific terms and provisions regarding international interests in mobile equipment on matters specific to aircraft equipment. Thus, security can also be granted in the form of international interest over airframes, engines and helicopters, in accordance with the requirements under Article 7 of the Convention. The Convention also created an International Registry (Article 16) for the registration of, among other things, international interests, prospective international interests, assignments and prospective assignments of international interests and acquisitions of international interests.

Furthermore, the Directorate General for Registry and Notary Offices of the Ministry of Justice issued a resolution on 29 February 2016 with the aim of approving specific forms to facilitate access to the International Registry by means of the Spanish entry point, the Chattel

Registry. Spain also submitted declarations to the Convention. These declarations were made pursuant to Article 39 (rights having priority without registration), Article 40 (registrable non-consensual rights or interests) and Article 53 (determination of courts).

Rail

If a wagon or locomotive is privately owned, a chattel mortgage can be granted as security in accordance with Article 12.2 of the Chattel Mortgages and Non-dispossessionary Pledges Act. Chattel mortgages cannot be granted over wagons owned by the state. However, a pledge without displacement or non-possessory pledge over wagons, or a chattel mortgage over locomotives, may be granted instead.

ii Enforcement

Article 140 of the Maritime Navigation Act lists specific events that will entitle the mortgagee to enforce its right against the vessel with a subsequent judicial sale of the same (see Section IV.iii). Those events are as follows:

- a* expiry of the term agreed to return the principal or interest;
- b* the debtor's declaration of insolvency;
- c* deterioration of the mortgaged vessel rendering it definitively unseaworthy;
- d* the existence of two or more vessels mortgaged to fulfil the same obligation and where a loss or deterioration arises that renders either of them definitively unseaworthy; and
- e* the occurrence of any of the agreed termination events.

Upon the occurrence of any of the above events, the mortgagee has various alternatives to enforce the mortgage, basically consisting of:

- a* ordinary declarative proceedings;
- b* general rules for enforcement proceedings;
- c* special enforcement proceedings on mortgaged assets; and
- d* non-judicial enforcement proceedings before a notary public.

The action to enforce a ship mortgage has a limitation period of three years, which runs from the date on which any of the above events occur.

The enforcement of a mortgage over aircraft or rolling stock is not subject to specific regulations under Spanish law. Thus, the general rules for enforcement in the Civil Procedure Act apply.

If the mortgagee initiates the special enforcement proceedings on mortgaged assets (Articles 681–698 of the Civil Procedure Act), the claim for the due amounts secured with the mortgage can be exercised directly against the mortgaged asset itself. There are various formal requirements that must be fulfilled to initiate the proceedings, which essentially consist of the following:

- a* the price of the mortgaged asset must be indicated in the mortgage deed so that it can be used as a reservation price in the auction of the asset; and
- b* the debtor's domicile must be indicated in the mortgage deed (for notification and communication purposes).

iii Arrest and judicial sale

Shipping

Conservatory arrest of both domestic and foreign vessels is governed by the International Convention on the Arrest of Ships made in Geneva on 12 March 1999, Articles 470–479 of the Maritime Navigation Act and the Spanish Civil Procedure Act. The provisional court measure causes the detention and immobilisation of the vessel. The court with jurisdiction regarding subject matter to hear the main claim on the merits, or the court with territorial jurisdiction corresponding to the port or place where the vessel is located (or expected to arrive), will order the vessel's arrest. The arrest cannot be effected to ensure the enforcement of a previous judgment or arbitration award: arrest is a provisional ancillary measure for the main claim.

The arrest is conditional on the fulfilment of the following requirements:

- a* alleging the existence of a maritime claim and its cause;
- b* the vessel to be arrested is eligible for arrest under Article 3 of the Convention; and
- c* the claimant must provide security to cover any loss that may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable. Pursuant to Article 472.2 of the Maritime Navigation Act, the amount of the security must be at least 15 per cent of the amount of the maritime credit alleged.

Once the arrest has been ordered, the court will notify the harbour master of the port where the vessel is located (or expected to arrive) and will take the necessary measures to arrest and prohibit the vessel's departure. The arrest must also be notified to the vessel's master or shipping agent.

The judicial sale of a vessel is governed by the International Convention on Maritime Liens and Mortgages, made in Geneva on 6 May 1993 (1993 Geneva Convention), Articles 480–486 of the Maritime Navigation Act and, for matters not expressly addressed by those acts, by the Civil Procedure Act. Prior to the forced sale of the vessel, the court must give notification of the sale of the vessel at least 30 days prior to the date on which the forced sale is intended. The notification must be directed to:

- a* the registrar of the Chattel Registry and, if relevant, to the authority in charge of the registration of the vessel under a temporary change of flag;
- b* the owner of the vessel; and
- c* the mortgagees and holders of other encumbrances, including those established in Article 4 of the 1993 Geneva Convention (provided that the court has received notification of the corresponding credits).

The court's notification must state the date and place that the forced sale is to be carried out or, if it cannot be stated with certainty, the approximate date and place. The proceeds from the forced sale must first be used to pay the procedural costs and expenses arising from the arrest, or the enforcement and subsequent sale of the vessel (e.g., expenses arising from the upkeep of the vessel and the crew as well as wages, other sums and costs referred to in Article 4, Paragraph 1(a) of the 1993 Geneva Convention, incurred from the time of arrest or seizure). The remaining amount will then be distributed according to the terms and provisions of the 1993 Geneva Convention.

Aviation

Aircraft are also subject to arrest, which is governed by the Civil Procedure Act. However, there are specific particularities under Spanish law and international conventions ratified by Spain that render the cautionary measure of arrest unattractive in practice. Article 132 of the Air Navigation Act establishes that the arrest of aircraft owned by air traffic companies may not interrupt the public service for which they are operating. The same rule is established under the Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft, adopted in Rome on 29 May 1933.

V CURRENT DEVELOPMENTS

The main legislative development in the aviation sector was the entry into force in Spain of the Aircraft Protocol to the Cape Town Convention on 1 March 2016. Spain still faces the challenge of amending domestic legislation to ensure the international interest enforcement.

Turning to the shipping financing industry, the fact that the new Spanish tax lease framework was upheld by the judgment of the General Court of the European Union, together with the approval of Royal Decree 874/2017, provides an optimistic view of the future.

In the railway sector, Spain has transposed the market pillar of the Fourth Railway Package, commencing with the approval of Royal Decree-Law 23/2018. As a result, passenger railway transport has been open to competition since 1 January 2019, meaning that any railway company can request capacity in the working timetable starting on 14 December 2020. The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock that was signed on 23 February 2007, which Spain signed on 10 November 2021, is expected to enter into force in 2022, once a fourth country deposits its instrument of ratification, acceptance, approval or accession in accordance with Article XXIII of the Protocol.

ABOUT THE AUTHORS

CARLOS LÓPEZ-QUIROGA

Uría Menéndez

Carlos López-Quiroga has been a partner in the Madrid office of Uría Menéndez since 2002. He specialises in maritime and transport law, asset finance transactions in the transport sector and M&A. He advises on all kinds of complex structures for the acquisition, leasing, construction, insurance and securitisation of assets and transport infrastructures. Carlos has been recommended for shipping finance by *Chambers Europe* (2008–2021) and *Best Lawyers in Spain* (2013–2021).

URÍA MENÉNDEZ

Uría Menéndez – Proença de Carvalho
Praça Marquês de Pombal, 12
1250-162 Lisbon
Portugal
Tel: +351 21 030 8600
Fax: +351 21 030 8601
helder.frias@uria.com
sofia.santosjunior@uria.com

C/Príncipe de Vergara, 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 915 860 400
Fax: +34 915 860 403
carlos.lopez-quiroga@uria.com

www.uria.com

ISBN 978-1-80449-068-6