

# International Comparative Legal Guides



Practical cross-border insights into aviation law

## Aviation Law 2022

10<sup>th</sup> Edition

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## Industry Chapter

1

**WALA: Bringing Together Airport Lawyers as We Emerge From the COVID-19 Pandemic**  
Elizabeth Albergoni, Worldwide Airports Lawyers Association (WALA)

## Expert Analysis Chapters

4

**The Use of Personal Data in the Commercial Aviation Industry**  
Alan D. Meneghetti, RadcliffesLeBrasseur LLP

9

**Investing in Mid-Life Aviation Assets – The Final Edition**  
Philip Perrotta, K&L Gates LLP

15

**Post-Pandemic Aviation News: Airlines Recover and Passenger Rights**  
Marc S. Moller, Justin T. Green & Erin R. Applebaum, Kreindler & Kreindler LLP

19

**Regulations on Drone Flights in Japan**  
Hiromi Hayashi & Koji Toshima, Mori Hamada & Matsumoto

24

**EU Law: Passenger Rights and Protections**  
Anna Anatolitou & Rachel Richards, Ince

## Q&A Chapters

32

**Austria**  
Benn-Ibler Rechtsanwalte GmbH:  
Mag. Irena Gogl-Hassanin, LL.M.

39

**Belgium**  
Goemans, De Scheemaecker & De Wit:  
Birgitta Van Itterbeek & Annick Sleeckx

51

**British Virgin Islands**  
Maples Group: Michael Gagie, Rebecca Lee &  
Ruairi Bourke

59

**Cayman Islands**  
Maples Group: Sherice Arman & Joe Jackson

67

**Chile**  
PRAT & CIA. Abogados: Francisco Prat &  
Valentina Ravera

76

**Cyprus**  
Phoebus, Christos Clerides & Associates LLC:  
Professor Christos Clerides

86

**Dominican Republic**  
Raful Sicard Polanco & Fernández: María Esther  
Fernández Álvarez de Pou, María Fernanda Pou  
Fernández & María Gabriela Pou Fernández

96

**France**  
Clyde & Co: Grégory Laville de la Plaigne &  
Ionna Poirer

106

**Germany**  
Urwantschky Dangel Borst PartmbB: Rainer Amann &  
Claudia Hess

115

**India**  
AZB & Partners: Anand Shah, Rishiraj Baruah &  
Abhilasha Agarwal

127

**Indonesia**  
Bahar: Wahyuni Bahar, Fairuz Rista Ismah &  
Endraswari E. Sayekti

135

**Ireland**  
Maples Group: Mary O'Neill & Mary Dunne

149

**Israel**  
Gross, Orad, Schlimoff & Co. (GOS): Omer Shalev

160

**Italy**  
Vitale & Partners: Professor Salvatore Vitale

177

**Japan**  
Mori Hamada & Matsumoto: Hiromi Hayashi

188

**Malaysia**  
SARANJIT SINGH, Advocates & Solicitors:  
Saranjit Singh & Dhiya Damia Shukri

199

**Mexico**  
Canales, Dávila, De la Paz, Enríquez, Sáenz, Leal, S.C.:  
Bernardo Canales Fausti & Aldo Álvarez Martínez

206

**Nigeria**  
ÆLEX: L. Fubara Anga, SAN & Rafiq Anammah

213

**Panama**  
Galindo, Arias & López: Cristina Lewis, Daniel E. Sessa &  
Claudia Juárez

## Q&A Chapters Continued

219

### Portugal

PLMJ Advogados, SP, RL: Saul Fonseca & Diogo Perestrelo

228

### Spain

Augusta Abogados: Sergi Giménez Binder

237

### Switzerland

VISCHER AG: Urs Haegi & Dr. Thomas Weibel

247

### Thailand

SRPP Limited: Passawan Navanithikul & Viparvee Chaemchaeng

254

### United Kingdom

RadcliffesLeBrasseur LLP: Alan D. Meneghetti  
K&L Gates LLP: Philip Perrotta

270

### USA

Fox Rothschild LLP: Diane Westwood Wilson,  
Paul N. Bowles III & Jean M. Cunningham

# Spain

Augusta Abogados



Sergi Giménez Binder

## 1 General

**1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.**

The main bodies that regulate aviation in Spain are the Directorate General of Civil Aviation (*Dirección General de Aviación Civil*, “DGAC”) and the State Agency for Aviation Safety (*Agencia Estatal de Seguridad Aérea*, “AESA”), both of which are under the umbrella of the Ministry for Development (*Ministerio de Fomento*). The DGAC is governed mainly by Royal Decree 953/2018 and is responsible for the preparation of industrial and strategic policies and proposals for the aviation sector, representation and coordination with other public administrations and with the European Union (“EU”) in matters of air transport policy, and the approval of aeronautical circulars. AESA was created following the mandate of Act 28/2006, whereby state agencies were created with the aim of modernising the Spanish administration, and is mainly regulated by Royal Decree 184/2008; it has responsibility for exercising inspection and penalisation authority in civil aviation matters, and it takes the initiative to approve provisions in matters of aviation safety and passenger protection, among other topics.

In addition to international treaties to which Spain is a party and EU legislation, the main Spanish domestic provisions applicable to aviation are:

- 1954 Act on Pledges over Movable Assets and Mortgage without Displacement.
- 1960 Air Navigation Act (*Ley de Navegación Aérea*, “LNA”).
- Act 28/1988 on Instalment Sales of Movable Assets.
- Air Safety Act 21/2003 (*Ley de Seguridad Aérea*, “LSA”).
- Royal Decree 384/2015 – Regulations for the granting of registration marks.

**1.2 What are the steps which air carriers need to take in order to obtain an operating licence?**

AESA is the competent licensing authority in Spain relating to the granting of an operating licence. Given Spain’s membership of the EU, the main requirements are those set out in Regulation 1008/2008 and are identical to those of other Member States:

- The applicant must decide whether it desires a Type A or Type B licence, depending on the operations to be undertaken.
- To obtain a Spanish licence, the operator’s principal place of business must be located in Spain.

- The operator must also obtain a valid air operator certificate (“AOC”) issued by AESA, which in turn requires having at least one aircraft at its disposal through ownership or a dry lease agreement – wet lease agreements are not acceptable for the purposes of obtaining an operator’s licence.
- The principal activity of the applicant must be the operation of air services, although ancillary activities such as repair or maintenance of aircraft are also admissible.
- EU Member States or their nationals must own more than 50% of the operator and exercise, directly or indirectly, effective control.
- Regulation 1008/2008 also stipulates certain financial, insurance and reputational requirements that the applicant must meet.

**1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?**

As a member of the EU, Spain is bound by all Regulations, Directives, legal provisions and jurisprudence approved by the EU’s legislative bodies and courts. From a domestic perspective, the main provisions are embodied in the LNA and the LSA, although – as with EU legislation – there are detailed regulations on many specific aspects of aviation operations. Air safety is essentially under the control of AESA, although other governmental agencies (such as police bodies) cooperate with AESA as well.

**1.4 Is air safety regulated separately for commercial, cargo and private carriers?**

The LSA imposes a number of rules that apply to all parties which are in any way involved in aviation: personnel; flight schools; aeroclubs; designers; manufacturers; maintenance and service providers; air operators; commercial airlines; aerial works; air navigation service providers; handling agents; airport and aerodrome managers, etc. – including passengers. In addition to those general provisions, the LSA then sets out rules which specifically apply to specific participants or categories of participants. The International Civil Aviation Organization’s (“ICAO”) definition, whereby general aviation is deemed to be “*all civil aviation operations other than scheduled air services and non-scheduled air transport operations for remuneration or hire*”, is also applicable in Spain and is used to distinguish general aviation from commercial and public transport.

**1.5 Are air charters regulated separately for commercial, cargo and private carriers?**

Leaving aside military activities, all aviation issues are regulated

by AESA. Charter services are regulated in accordance with the Chicago Convention and EU Regulations, and present no special characteristics in respect of those. We should point out, though, that AESA considers that all airlines which are interested in carrying out a “series of commercial air operations” within Spanish airspace must submit their programmes for review (Community carriers only in respect of their extra-EU flights). In this respect, AESA considers that charter flights which constitute an evident systematic series also fall under the category of a “series of commercial air operations”, and therefore that non-EU carriers should obtain the relevant licences before starting this type of operation. Where charter operations are only of an “occasional” nature, AESA has created a specific procedure.

**1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with ‘domestic’ or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.**

Like in the rest of the EU Member States, the provisions of Regulation (EC) 1008/2008 on common rules for the operation of air services (along with all related rules and regulations) apply in Spain. Although the provisions of this Regulation are directly applicable, some follow-up and detailed provisions were approved in Spain through the Ministerial Order of 12 March 1998, which was recently replaced by Order TMA/105/2020. Thus, to the extent that interested parties comply with the requirements of Regulation 1008/2008 (as amended), access to the Spanish market – and thereby to the EU market – will be granted.

Intra-EU routes are, in general terms, automatically authorised pursuant to Regulation 1008/2008, so that no specific commercial licences must be obtained. As an exception, certain routes which are classified as being of public interest, as well as operations between the Canary Islands and Gibraltar, are subject to certain restrictions.

To operate extra-EU routes commercially, Community carriers must ask AESA to issue the relevant air traffic licence. Normally this will require the existence of an air transport agreement between Spain or the EU and the country in question. Most of these agreements demand that the airlines chosen to operate air services must have been formally designated by the Spanish aeronautical authority. Airlines from third countries will also need to be designated by their respective aviation authority and, before performing any scheduled flights, become accredited by AESA in accordance with the requirements set forth in Royal Decree 1392/2007.

Non-scheduled commercial operations are subject to different rules under the Chicago Convention 1944. Generally speaking, the Spanish authorities allow such operations to be carried out by air carriers belonging to signatory states of the Chicago Convention if the state concerned applies reciprocal treatment to Spanish air carriers.

AESA has published the various procedures and forms of documents (in Spanish and English) on its website: <https://www.seguridadareea.gob.es/es/ambitos/operaciones-aereas/permisos-comerciales>.

**1.7 Are airports state or privately owned?**

Most Spanish airports are state-owned although, following a privatisation process, they are being managed by a private

company named “AENA, S.A.”, in which the state has also a stake. Additionally, there is a small number of privately owned airports and airports owned by the Autonomous Regions.

**1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?**

There are no particular requirements imposed on carriers other than those arising from EU legislation relating to security, safety and operational requirements, as well as slot availability.

**1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?**

In line with ICAO guidelines and EU legislation (mainly embodied in Regulation (EU) 996/2010 on the investigation and prevention of accidents and incidents in civil aviation), Spain has created the Commission for the Investigation of Accidents and Incidents in Civil Aviation (*Comisión de Investigación de Accidentes e Incidentes de Aviación Civil*, “CIAIAC”, <https://www.mitma.gob.es/organos-colegiados/ciaiac>). Domestic legislation has developed in some detail the international provisions (mainly laid out in the Chicago Convention 1944 and EU Regulation 376/2014) through Royal Decree 389/1998, the LSA, Royal Decree 1334/2005 and certain other Royal Decrees which periodically publish the State Program of Operational Safety for Civil Aviation. In line with the legislative framework, the CIAIAC’s investigations are exclusively technical in nature, with the ultimate aim to prevent future accidents and incidents, and are not directed towards allocating any kind of liability.

Pursuant to the LSA and Royal Decree 389/1998, “any person” who becomes aware of an accident or incident in civil aviation must “immediately” report it to the closest authorities, who then must urgently contact the CIAIAC. Obviously, special reporting obligations are imposed upon pilots, operators, aircraft owners, aviation authorities, airport directors, air traffic controllers and all other related services and bodies.

The detailed reporting system is set forth in Royal Decree 1334/2005, which applies to all events occurring in Spanish territory or where Spanish-registered aircraft or those operated by Spanish citizens are involved. All reports are directed to the DGAC, which then coordinates its activities with the CIAIAC and other relevant agencies.

**1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?**

Over the past year, the main topics of concern have obviously been those related with the COVID-19 pandemic. The aviation industry has been severely hit by the events. Since tourism is one of Spain’s largest industries, the country is highly dependent on air traffic. Like other countries, restrictions on movement, enhanced health controls for travellers from abroad and other measures to control the virus spread have been approved, mostly in coordination with other EU countries. Spanish airlines have received more than €1,000 million in government-backed loans to assist with cash-flow impasses.

The merger between Iberia and Air Europa announced in December 2019 was suspended due to the pandemic and has been restructured to account for the changed economic environment.

At the time of writing, the uncertainties arising from the economic crisis created by COVID-19 are still on everybody's mind. In addition to the financial support which the industry in general is receiving from public authorities, it will have to be analysed whether the travel restrictions and public health controls presently in place will progressively be taken down or whether they will become a permanent part of the travel experience. The logistics and costs associated with these measures are likely to adversely impact all players in the market.

**1.11 Are there any specifically environment-related obligations or risks for aircraft owners, airlines, financiers, or airports in your jurisdiction, and to what extent is your jurisdiction a participant in (a) the EU Emissions Trading System (EU ETS) or a national equivalent, and (b) ICAO's Carbon Offsetting and Reduction Scheme for International Aviation (CORSA)?**

Like in all other EU member countries, the EU ETS scheme is fully applicable in Spain and, as a matter of fact, Spanish airlines have been implementing internal procedures over the years to be compliant. Similarly, AESA is cooperating with ICAO and other aviation authorities to implement CORSIA in Spain.

## 2 Aircraft Trading, Finance and Leasing

**2.1 Does registration of ownership in the aircraft register constitute proof of ownership?**

In Spain there is a dual registration system. Its main features can be summarised as follows.

- **Aircraft Matriculation Registry**  
First, there is an aircraft registry, the Aircraft Matriculation Registry (*Registro de Matricula de Aeronaves*, "RMA"), (<https://www.seguridadaerea.gob.es/es/ambitos/aeronaves/registro-de-matriculas-de-aeronaves-civiles/registro-de-matriculas>). The RMA falls under the jurisdiction of AESA ([www.seguridadaerea.es](http://www.seguridadaerea.es)), a body of the Ministry of Development. The RMA is an administrative registry of aircraft, but not a registry of title or ownership of aircraft. It is operator-based. The main effect of registration is that an aircraft is provided with a Spanish registration number (beginning with the letters EC, followed by a hyphen and a combination of three letters, e.g. EC-XXX) and thus becomes a Spanish aircraft.
- **Central Movable Assets Registry**  
Second, there is the Central Movable Assets Registry (*Registro de Bienes Muebles*, "RBM"), under the jurisdiction of the Directorate General of Registries and Notaries, a body of the Ministry of Justice. The RBM is a register of title, ownership and encumbrances over movable assets, including aircraft. The main effect of registration is that evidence is provided in respect of the status of ownership and liens over assets.

Historically, the LNA established that only Spanish individuals or companies were allowed to register their ownership title over aircraft. Upon Spain's entry into the European Economic Community ("EEC") in 1986, this provision began to be interpreted so as to include EU citizens. However, this has not yet been expressly stated in any legal provision relating to the RBM. Article 185 of the 1956 Commercial Registry Regulations (which is still in force pursuant to the 13<sup>th</sup> Additional Provision of Royal Decree 1784/1996) merely states that foreign legal entities may record their ownership title over aircraft at the Commercial Registry, subject to international treaties, the principle of reciprocity and

legal provisions. For these purposes, the Commercial Registry has since been replaced by the RBM. So far, no express legal provision, reciprocity plan or international treaty has been enacted or published whereby foreign owners would be allowed to register their ownership title in aircraft at the RBM. Nevertheless, Royal Decree 384/2015, which contains the RMA Regulations, is being interpreted in practice so as to allow (and actually oblige) non-Spanish aircraft owners (including non-EU citizens) to register their ownership title in all aircraft that are to bear Spanish registration marks. While this seems to be commonly accepted practice, some legal authors question this interpretation of the law and consider that such recording of aircraft transactions at the RBM is not mandatory. In practice though, and but for a few exceptions, most transactions involving Spanish-registered aircraft must be recorded at both the RMA and the RBM.

**2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?**

As indicated above, the RBM is a registry of title and, hence, mortgages and charges over aircraft are to be recorded there. In accordance with the provisions of Regulation (EC) 593/2008, of 17 June 2008, on the Law Applicable to Contractual Obligations (the Rome I Regulation), Spanish law follows the principle of *lex rei sitae* (i.e., place of location of an asset) to determine which law is applicable to securities and guarantees created over assets, such as mortgages and pledges. Thus, where the security relates to assets or rights located in Spain at the time of creating the assignment, Spanish material legal provisions on pledges over assets or mortgages would become applicable. Article 10.2 of the Spanish Civil Code states that mortgages over aircraft are governed by the law of the country of their registration. Thus, a non-Spanish law mortgage created over an aircraft while such aircraft is registered in the RMA would not be considered a valid mortgage by the Spanish courts.

Given the formalities and costs involved in setting up a Spanish law aircraft mortgage, these are created only occasionally. Such mortgages have to be set up in a public deed executed before a notary public, which has to include certain essential information (parties, detailed description of the charged assets, title of the mortgagor, secured amount, valuation of the assets, etc.). This document must be executed in Spanish, although there is no obstacle to attaching an English translation. The mortgage must be recorded at the RBM. Mortgages are subject to stamp duty tax, at a rate that varies between 1% and 1.5% on the value of the charged asset. Further, the fees of the notary public and of the RBM should also be taken into account, since they also depend on the value of the charged asset. Finally, where there is an international element to the transaction, often translation costs are to be paid.

**2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?**

Other than those arising from the prohibition of self-help in Spain (see question 3.2 below), there are no specific regulatory requirements. In most situations, aircraft are returned to their owners or lessors by executing a termination agreement, a possibility that is expressly contemplated under the RMA Regulations. It should be borne in mind, though, that given the dual-registry situation in Spain, the entire process may be more time-consuming than in other jurisdictions.

**2.4 As a matter of local law, is there any concept of title annexation, whereby ownership or security interests in a single engine are at risk of automatic transfer or other prejudice when installed 'on-wing' on an aircraft owned by another party? If so, what are the conditions to such title annexation and can owners and financiers of engines take pre-emptive steps to mitigate the risks?**

Spanish law recognises the concept of “accession” (derived from Roman law), and it is particularly relevant when an engine owned by one party is affixed to an airframe owned by another party. We are not aware of any existing case law that would resolve this issue, but it is common practice for the parties to enter into rights recognition agreements in these situations. Also, since the entry into force of the Cape Town Convention 2001 in 2016, rights over aircraft engines can now be recorded as “international interests” at the International Registry of Mobile Assets, which provides for enhanced protection.

**2.5 What (if any) are the tax implications in your jurisdiction for aircraft trading as regards a) value-added tax (VAT) and/or goods and services tax (GST), and b) documentary taxes such as stamp duty; and (to the extent applicable) do exemptions exist as regards non-domestic purchasers and sellers of aircraft and/or particular aircraft types or operations?**

Although the tax aspects of aircraft trading transactions must be analysed on a case-by-case basis, in general terms lease payments, loan repayments and transfers of aircraft are usually tax-exempt when they relate to aircraft that are chiefly operated for international commercial flights. However, despite being tax-exempt, the parties are still obliged to submit certain tax filings with the Spanish tax authorities before such transactions can be recorded. Furthermore, particular attention should be paid when an aircraft is transferred while being in Spanish territory, because value-added tax at a rate of 21% could be triggered under certain circumstances.

**2.6 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?**

The Kingdom of Spain is a state party to the following air law treaties (all of them in effect), among others:

- Warsaw Convention 1929 (as subsequently amended by the Montreal and Hague Protocols).
- Rome Convention 1933.
- Chicago Convention 1944.
- Rome Convention 1952.
- The Hague Convention 1970.
- Montreal Convention 1971.
- Montreal Convention 1999.
- Cape Town Convention 2001.

**2.7 How are the Conventions applied in your jurisdiction?**

In accordance with Article 94 of the Spanish Constitution, once an international treaty has been approved by the Parliament, ratified by the King and published in the State Official Gazette, it enjoys a higher hierarchical status than domestic legislation; consequently, its provisions prevail over any conflicting internal rules or provisions. Spanish judges regularly apply international treaties when those are applicable.

**2.8 Does your jurisdiction make use of any taxation benefits which enhance aircraft trading and leasing (either in-bound or out-bound leasing), for example access to an extensive network of Double Tax Treaties or similar, or favourable tax treatment on the disposal of aircraft?**

Spain is bound by EU legal provisions concerning taxation relating to the trading and leasing of aircraft and, consequently, there are no particular tax benefits foreseen for this industry. However, Spain has entered into Double Tax Treaties with some 89 countries, which facilitate international trade, including the leasing, acquisition and disposal of aircraft.

**2.9 To what extent is there a risk from the perspective of an owner or financier that a lessee of aircraft or other aviation assets in your jurisdiction may acquire an economic interest in the aircraft merely by payment of rent and thereby potentially frustrate any rights to possession or legal ownership or security?**

Spanish law makes a clear distinction between possession, legal ownership and security “*in rem*”. Where the terms of an aircraft lease agreement are clear, Spanish courts would generally not recharacterise the transaction as having a different nature just based on the payment of rent. However, in addition to the contract between the parties, a Spanish court might take into account external circumstances (such as the actual behaviour of the parties, exchange of correspondence, etc.) to identify the parties’ actual intent and the true nature of the transaction.

### 3 Litigation and Dispute Resolution

**3.1 What rights of detention are available in relation to aircraft and unpaid debts?**

The main liens and detention rights to be considered are the following:

- Maintenance providers have a right of retention over those pieces of equipment which are in their possession until payment in full for the works undertaken. The nature of this right is sometimes disputed, but certain regional codes clearly state that it is a right *in rem*.
- Expenses which are necessary for the rescue and maintenance of an aircraft have priority over a registered mortgage over the aircraft under certain circumstances.
- Salary debts towards employees have priority over debts owed to creditors secured by registered mortgages and pledges.
- Under the LNA, the preferential credits on an aircraft would be: (i) tax credits owed to states; (ii) last month’s wages owed to the crew; (iii) credits of insurers for the last two years; (iv) payments owed as compensation for damages; and (v) rescue costs.
- In insolvency situations, holders of privileged credits over an aircraft have a separation right of the aircraft from the “assets of the insolvency’s estate” (*masa activa del concurso*) of the relevant debtor.
- Although not expressly contemplated in legal provisions, in practice AENA exercises a *de facto* detention right when airport charges and similar items have not been paid in full. Under applicable law, AENA is entitled to request a seizure of assets to collect payments arising from “public services” (e.g. use of airport runways, aviation meteorological services, etc.) if such payments have been resolved

upon within a “forced recovery procedure” (*procedimiento de apremio*) initiated by AENA. If the debtor does not pay when requested to do so, its assets will be seized through the Spanish tax authorities. Spanish law establishes an order of precedence to seize assets (i.e., firstly cash and bank accounts, then marketable securities and instruments, etc).

**3.2 Is there a regime of self-help available to a lessor or a financier of an aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?**

As a general rule, self-help is not allowed under Spanish law and is, in fact, considered to be against Spanish public order. Therefore, if the Spanish operator refuses to cooperate during the termination/de-registration/repossession process, a lessor/owner would have to seek court assistance to enforce its rights. The specific procedure to be followed will depend on the type of remedy which the lessor is seeking. Only where self-help is expressly permitted by Spanish law or international treaties can such remedies be used. When ratifying the Cape Town Convention, Spain expressly declared that all remedies contemplated under the Convention would require leave of court, with the exception of Irrevocable De-registration and Export Request Authorisations (“IDERAs”).

**3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your jurisdiction regarding the courts in which civil and criminal cases are brought?**

The Spanish judiciary is basically organised into three branches: civil; criminal; and contentious-administrative. Broadly speaking, and since criminal cases are unusual in the aviation industry, most aviation disputes are handled in the civil courts (when they arise between private individuals) or in the contentious-administrative courts (when public authorities are involved). The commercial courts have the authority to make decisions where the dispute relates to transportation issues (such as passenger claims for delayed or cancelled flights). When deciding where to bring an action, the nature of such action needs to be analysed.

**3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?**

Service requirements in international disputes are governed by either Regulation (EC) 1393/2007, Regulation 2020/1784 (once it enters into force in 2022) or the 1965 Hague Convention on the service of documents abroad. When neither of these instruments is applicable, and in the absence of a specific bilateral treaty, the domestic provisions are embodied in the International Legal Cooperation Act 2015, which essentially follows the principles of the European Regulation. Thus, rather than making a distinction between domestic and non-domestic parties, it should be analysed whether the parties involved are bound by the aforementioned international instruments.

**3.5 What types of remedy are available from the courts or arbitral tribunals in your jurisdiction, both on i) an interim basis, and ii) a final basis?**

Remedies available to the parties depend on the nature of the dispute, and are numerous. In general terms, a party seeking

interim relief will have to show a *prima facie* right for its request (*fumus bonum iuris*) and a risk that, if the relief is not granted, it may be prevented from achieving an effective result (*periculum in mora*). Parties may ask the courts for the seizure of assets of the other party (such as bank accounts, movable assets including aircraft, real estate, etc.), for an order to be put in possession of certain assets, injunctions to prevent the other party from taking certain actions, or ordering certain actions to be taken, etc.

**3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal and, if so, in what circumstances do these rights arise?**

A distinction should be made between court decisions and arbitral awards:

- In general terms, rulings of the Courts of First Instance can usually be appealed to the Provincial Audience. Under certain circumstances, judgments of the Provincial Audiences can then be elevated to the Regional Superior Court of Justice or the Spanish Supreme Court.
- On the other hand, arbitral awards are generally not subject to appeal, unless one of the few exceptional circumstances set forth in the 2003 Arbitration Act applies (such as lack of existence of an arbitration clause, breach of public order, etc.). In such case, the award would be voided.

**3.7 What rights exist generally in law in relation to unforeseen events which might enable a party to an agreement to suspend or even terminate contractual obligations (in particular payment) to its contract counterparties due to *force majeure* or frustration or any similar doctrine or concept?**

*Force majeure* is an implied term in contracts which are governed by Spanish law pursuant to Article 1105 of the Civil Code and long-standing case law at all jurisdictional levels. This concept is often combined with the “*rebus sic stantibus*” principle or clause when exceptional situations arise (such as the COVID-19 pandemic) which prevent the parties from performing their contractual obligations. The Spanish legal system does not allow a general or automatic application of these principles, but rather requires that the courts assess the specific circumstances of each case and the actual impact of the supervened circumstances on the contractual relationship. As far as international contracts are concerned, similar principles can be found in several international treaties (such as the 1980 UN Convention on Contracts for the International Sale of Goods) or documents (such as the 2016 UNIDROIT Principles of International or the Principles of European Contract Law). In this type of contracts, often “material adverse change clauses” can be found, which are generally upheld in Spain.

## 4 Commercial and Regulatory

**4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?**

There is no specific policy in Spain concerning airline access or competition, since all these matters are to be handled in line with EU policies and rules (essentially Article 101 TFEU). The CNMC uses the same criteria as the European competition defence authorities. However, since most transactions in the aviation industry have an EU dimension, they are normally assessed by the European Commission rather than the Spanish authorities.



#### 4.2 How do the competition authorities in your jurisdiction determine the 'relevant market' for the purposes of mergers and acquisitions?

No domestic sector-specific competition rules have been published, but given Spain's membership of the EU, Spanish competition authorities are bound by and follow the legislation and guidelines which emanate from the EU and particularly from the European Court of Justice (city pairs, airport substitution, premium *vs.* non-premium passengers, etc.). These are abundant as far as the aviation industry is concerned and focus mostly on state subsidies, concentrations of undertakings and fostering free competition.

The main body in charge of supervising competition rules in Spain is the National Commission for Markets and Competition (*Comisión Nacional de Mercados y Competencia*, "CNMC"), which has jurisdiction over all economic areas. However, the CNMC is organised internally into various directorates, one of which is specifically in charge of transportation matters. The CNMC follows, in general terms, the definitions, methods and criteria established by the European competition authorities, including the European Court of Justice, to define the relevant market.

It is difficult to provide a general rule in this regard, because the criteria depend on the type of transaction under analysis. When it comes to the review of potential state subsidies or actions against free competition, the criteria are fixed and assessed on a case-by-case basis, taking into account, of course, existing precedents and guidelines.

When it comes to concentrations of undertakings, such as mergers between enterprises and company acquisitions, Spanish domestic competition legislation provides more detailed thresholds (see question 4.4).

#### 4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

After the entry into force of European Regulation 1/2003, the notification system was abolished for agreements with a Community dimension. However, the 2007 Competition Defence Act contemplated a system of compulsory prior notification of concentrations of undertakings, which includes joint venture agreements.

#### 4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

Economic concentrations are governed by the 2007 Competition Defence Act when they fall outside the thresholds of the EU Merger Control Regulation 139/2004. Mergers are defined broadly and include the actual merger of two or more previously independent companies, the acquisition of control over an undertaking by another, the creation of a joint venture or the acquisition of joint control over an undertaking. As a general rule, concentrations of undertakings must be notified to the CNMC, in order to obtain approval when, as a consequence of the transaction, a share of 30% or more is acquired in the "relevant market". Such market can be either the entire territory of Spain or a smaller, geographically defined market (e.g. a certain region). The communication is also mandatory when the turnover of the participants in Spain exceeds €240 million and at least one of them has a turnover of more than €60 million. However, no notification is needed if the turnover of the acquired company is less than €10 million, unless a market share of 50% or more is achieved (*de minimis* exception).

#### 4.5 Please provide details of the procedure, including time frames for clearance and any costs of notifications.

In merger transactions, the CNMC has a period of one month from receipt of the notice to decide whether or not it wishes to pursue the investigations any further ("first phase"). If no decision is made within this time period, the transaction is deemed to be approved. If the CNMC decides to deepen the analysis, it opens the so-called "second phase" and then has an additional period of two months to issue a decision. This timing is often extended to take into account delays arising from the receipt of any information requested additionally. A final decision is then taken by the Council of Ministers within one more month.

#### 4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

Since its entry into the EEC in 1986, Spain has attempted to comply with European legislation on state aid and implemented policies to make existing aid compliant with the rules. Presently, Spain complies with EU legislation as regards exemptions and exonerations, such as the EU's 2014 Guidelines on State Aid to Airports and Airlines.

As indicated above, no domestic sector-specific state aid rules have been published, but EU legislation is fully applicable in Spain. The most recent piece of legislation is Regulation (EU) 2019/712, which is aimed at levelling the playing field between EU carriers and non-EU carriers in certain areas such as subsidies and the provision of air services into non-EU countries.

#### 4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

In accordance with Article 16 of Regulation 1008/2008, public service obligations apply in Spain. Those obligations relate mostly to certain islands which form part of the Spanish territory, such as the Balearics and the Canaries, as well as to the Spanish cities in North Africa (Ceuta and Melilla). However, due to the substantial reduction of domestic flights caused by the COVID-19 crisis, the government has dictated temporary public service obligations in respect of airports in mainland Spain, such as Almería or Badajoz. The Spanish government regularly publishes updates about such routes, including pricing.

In fact, the CNMC acts only *ex post* where state aid is concerned, either by launching investigations into specific persons or industries or by publishing studies on certain types of aid. Given the large variety of potential aid that may be deemed unlawful and the large number of potential "producers" of such aid (including regional governments, municipalities, public enterprises, etc.), *ex ante* control is not foreseen. However, interested parties have the possibility of liaising with the CNMC to gather its opinion before adopting any steps in this regard.

#### 4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines and airports?

Like in all other EU countries, the GDPR is directly applicable in Spain. In December 2018, the Spanish Parliament approved

the Organic Act on Protection of Personal Data 3/2018, which develops and clarifies some aspects of the GDPR. Most recently, the Spanish Parliament passed the Organic Act 1/2020 on the use of passenger name record (“PNR”) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. This provision implements the related Directive (EU) 2016/681, of the European Parliament and of the Council dated 27 April 2016, and regulates the transfer by air carriers of PNR data of passengers, the processing of such data, the period of data retention, etc.

**4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?**

There are no specific obligations under Spanish aviation legislation relating to data losses by air carriers. These types of incident are covered by the GDPR and by the Organic Act on Protection of Personal Data. Pursuant to the rules set out in these pieces of legislation, all data controllers are obliged to notify the data protection authorities and all interested parties of data loss incidents, and must demonstrate that all adequate security and protection measures had been taken. Failure to comply with data protection laws entails the imposition of fines which, under the GDPR, can amount to 4% of the carrier’s worldwide turnover. Additionally, failure to transfer PNR data to the relevant authorities (for instance, due to a data loss) can be regarded as a breach of the obligations under the Organic Act 3/2020 and also be subject to specific fines.

**4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?**

The 1996 Intellectual Property Act and the 2015 Patents Act incorporate the principles of IP protection embodied in international treaties.

**4.11 Is there any legislation governing the denial of boarding rights and/or cancelled flights?**

As part of the EU, Spain applies the entire set of European legislation, Directives and guidelines relating to the protection of passengers, along with the provisions contained in international treaties such as the 1999 Montreal Convention where applicable. The provisions of Regulation 261/2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, are fully applicable in Spain, and AESA and the Spanish courts regularly enforce this body of law.

**4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?**

AESA has been designated as the national enforcement body pursuant to Regulation 261/2004. In that capacity, AESA has the power to make enquiries relating to the protection of passengers in all the situations covered by the said Regulation, as well as to give opinions and impose penalties upon airlines for failure to comply with the Regulation. AESA has also been designated as an arbitration tribunal to solve claims filed by passengers under Regulation 261/2004, whose rulings will be binding upon the airlines. This authority has not come into force yet, as the COVID-19 pandemic has caused this initiative to be suspended.

**4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?**

The basic text governing airport authorities is the LNA. After the management of most Spanish airports was privatised to AENA, a new system of economic regulation was set up, and has proved to be controversial. Nevertheless, airport managers must ensure that public airports are open to all interested parties on equal terms (subject to slot availability and operational requirements), and must also ensure that the general legislation relating to health, safety, disability discrimination, employment, etc. is complied with.

**4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?**

Spanish consumer protection laws, embodied mainly in Royal Legislative Decree 1/2007 on the Protection of Consumers and Users, apply to all transactions which are considered to be “consumer transactions”. Thus, to the extent that an airport operator engages in these kinds of transaction, it will be caught by this legislation.

**4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?**

The main GDS operating in Spain is Amadeus, with a share of about 90%. Travelport/Galileo and Sabre have also made some attempts to enter the market.

**4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?**

There are no specific ownership requirements for GDSs.

**4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?**

There is no express prohibition, although the general competition rules would come into play, notably those relating to the potential abuse of a dominant position.

**4.18 Are there any nationality requirements for entities applying for an Air Operator’s Certificate in your jurisdiction or operators of aircraft generally into and out of your jurisdiction?**

As in the other EU Member States, the provisions of Regulation (EC) 1008/2008 on common rules for the operation of air services (along with all related rules and regulations) apply in Spain. Given the direct applicability of Regulation 1008/2008 in Spain, the requirements are identical to those of other EU Member States. Financial fitness is regulated under Article 5 of the Regulation, and basically requires that applicants provide evidence that they can meet their financial obligations for a period of 24 months from the start of operations and their fixed and operational costs for a period of three months from the start of operations, without taking into account any income. Lower thresholds apply to operators with aircraft of less than 10 tonnes

MTOW or less than 20 seats. AESA closely analyses and monitors the business plans submitted by interested parties to ensure that they are realistic and in line with the EU Regulation. AESA has particular regard to past experiences where financial troubles have led to the demise of a number of Spanish airlines.

Shortly after Spain's entry into the European Community in 1986, nationality, ownership and control requirements were interpreted as referring to European citizens rather than only Spanish nationals, despite domestic legislation to the contrary. This topic is nowadays covered by the provisions of Regulation 1008/2008, whose Article 4 states that, as a general rule, only Member States and/or nationals of Member States that own more than 50% of the airline and effectively control it, whether directly or indirectly, can obtain a Community carrier licence, and then only if the airline's principal place of business is established inside the EU. These provisions have become the subject of intense scrutiny within the context of the United Kingdom's exit from the EU. In June 2016, AESA published certain interpretative criteria relating to the term "ownership and control" which must, however, be read in connection with the Interpretative Guidelines published by the European Commission in June 2017 and the Notice to Stakeholders of January 2019.

## 5 In Future

**5.1 In your opinion, which pending legislative or regulatory changes (if any), or potential developments affecting the aviation industry more generally in your jurisdiction, are likely to feature or be worthy of attention in the next two years or so?**

In addition to the issues mentioned under question 1.10, the development of the aviation industry in Spain and worldwide is certainly conditioned by the evolution of the COVID-19 pandemic. Since March 2020, the Spanish government has issued a large number of new rules and protocols that must be taken into account in international air travel. To protect Spanish carriers and other sensitive enterprises from being taken over, foreign investments in certain industries and sectors are now subject to strict controls. It remains to be seen if this emergency legislation will be lifted once the pandemic is under control, or whether parts of such legislation remain in place for the future.

It can be expected that within the next 12–24 months legislation will be passed to improve AESA's position as an arbitration tribunal in disputes between airlines and passengers relating to flight cancellations and delays under Regulation 261. Furthermore, some initiatives have been taken to adapt Spanish insolvency legislation to the provisions of the Cape Town Convention 2001, although this should not be expected to be passed in the short term.



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Augusta Abogados is a professional law firm specialised in commercial law, tax, restructuring of companies, labour law, air and space law and procedural law, amongst others, with the aim of creating innovative projects, and the ability to attract high-quality professionals. It currently brings together a set of partners with strong international backgrounds, all of whom are renowned for their remarkable reputation and broad experience. The partners at Augusta Abogados have gathered a high-performing, close-knit team of professionals which covers the main areas of corporate law. Its aviation law department is highly recognised by the leading international directories.

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