

Austria

Martin Geiger

Benn-Ibler Rechtsanwälte GmbH

OVERVIEW

Conventions

1 | To which major air law treaties is your state a party?

Austria is a party to the Chicago Convention (ratified 26 September 1948), the New York Convention (ratified 2 May 1961), the Warsaw Convention (ratified 27 December 1961), the Washington Convention (ratified 25 May 1971), the Tokyo Convention (ratified 8 May 1974), the Hague Convention (ratified 13 March 1974) and the Montreal Convention (ratified 28 June 2004).

Austria is not a party to the Rome Convention (1933), the Geneva Convention (1948) or the Cape Town Convention (2001).

Domestic legislation

2 | What is the principal domestic legislation applicable to aviation finance and leasing?

The principal Austrian legislation applicable to aviation finance and leasing is the following:

- the General Austrian Civil Code, providing the basic legal framework for purchase and lease contracts in general as well as relevant provisions on transfer of title in, and taking security over, assets (eg, aircraft) and enforcement of security interests;
- the Austrian Aviation Act and related ordinances, providing relevant provisions relating to the aircraft register or the aircraft operation certificate;
- the Austrian Banking Act, providing the regulatory framework for financiers and commercial lessors of aircraft; and
- the Austrian Insolvency Code, providing relevant provisions on the implications of insolvency over assets of a debtor or a lessor and on the rights of holders of security interests.

Governing law

3 | Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Parties are in general free to agree on the applicable law. According to the Austrian Private International Law Act (IPRG), rights in rem pertaining to registered aircraft (such as a pledge) are subject to the law of the jurisdiction where the aircraft is registered.

In the case of a pledge or retention right derived from law securing claims for damages caused by the aircraft or expenses made for the aircraft, according to the IPRG, Austrian law shall be applicable if the triggering event takes place in Austria.

TITLE TRANSFER

Transfer of aircraft

4 | How is title in an aircraft transferred?

Ownership title in an aircraft under Austrian law is principally transferred by agreement on a valid title (contractual agreement, ie, titulus) and by physical delivery of the aircraft to the intended title-holder (modus).

A bill of sale (alone) is not effective for the valid transfer of title to an aircraft under Austrian law, but may serve as written evidence for the transfer of title.

Transfer document requirements

5 | What are the formalities for creating an enforceable transfer document for an aircraft?

Austrian law does not provide for a specified form for creating an enforceable transfer document for an aircraft. Under Austrian law the existence of concurrence of wills (for the intended transfer of ownership) between the parties constitutes the essential requirement for such transfer.

To effect the change of ownership in the Austrian aircraft registry, a document evidencing title to the aircraft of the owner (eg, purchase agreement or bill of sale) must be filed with the competent authority in the course of the formal application at the aircraft registry.

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

6 | Identify and describe the aircraft registry.

The Austrian aircraft registry is operated by Austro Control in Vienna (www.austrocontrol.at). The following information is to be registered in the aircraft registry:

- the ordinal number of the aircraft;
- the nationality and registration mark of the aircraft;
- the producer and the serial number of the aircraft;
- the maximum permissible take-off mass; and
- the name and address of the operator.

The Austrian aircraft registry is an operator registry. The registration in the Austrian registry is an administrative requirement and does not impact the legal ownership of an aircraft. Therefore, a registration within the registry (as operator of an aircraft) does not legally prove or constitute a valid ownership title to the aircraft.

There is no specific engine registry in Austria.

Registrability of ownership of aircraft and lease interests

7 | Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Since the Austrian aircraft registry is an operator registry, ownership, lease or security interests are not to be registered therein. There is no other Austrian registry in addition to the aircraft registry operated by Austro Control.

Other than with respect to the operator (ie, requirement of an aircraft operating certificate), there are restrictions on neither the legal status nor the nationality of the legal owner of an aircraft. Consequently, Austrian or foreign individuals as well as companies may be registered as the operator or owner of an aircraft.

Registration of ownership interests

8 | Summarise the process to register an ownership interest.

The following documents and information are required to be attached to the application form for registration of an aircraft in the Austrian aircraft registry and issuance of a registration number to the aircraft:

- name and address of the operator;
- name and address of the owner;
- documents evidencing title to the aircraft of the owner (eg, purchase agreement and bill of sale);
- documents evidencing that the operator is located in an EU member state or such state equated by bilateral agreement (excerpt of the respective commercial register required);
- declaration on the transfer of operatorship by owner, if the owner does not operate the aircraft;
- documents evidencing the name and address of the aircraft manufacturer and their Austrian representatives;
- documents relating to the aircraft, type and the manufacturer's serial number;
- confirmation from the tax and revenue office pursuant to the Austrian Value Added Tax Act in the case of an intra-community acquisition of the aircraft;
- documents from the manufacturer evidencing that the aircraft has not been registered in any other state (certificate of non-registration), or documents of the state in which the aircraft has been registered, evidencing that the aircraft is no longer registered (certificate of cancellation); and
- documents evidencing that the aircraft complies with the Austrian Civil Aircraft Noise Admissibility Regulation (noise test report and noise certificate).

A specific form of the above-mentioned documents is not required by law. Application forms, as well as forms relating to a change of ownership or operatorship are available online.

Sole title to an engine does not automatically vest in the owner of a host aircraft or airframe.

Costs or fees for registration of an aircraft depend on the weight of the aircraft and amount up to €2,957 plus €107 for aircraft over 20 tons. Fees for deregistration will range between €53 and €1,419. Fees for the issuance of an (initial) airworthiness review certificate will range from €775 to €21,748. Fees for the (ongoing) issuance of a certificate of airworthiness will range between €236 and €7,564.

A registration may be effected within a few days. In practice we recommend first contacting the competent authority and individually clarifying the administrative requirements for registration of the specific

aircraft. Such preliminary clarification might also speed up the registration procedure.

Title and third parties

9 | What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration does not prove or constitute title to an aircraft; it has purely declaratory character. Therefore, third parties cannot rely on the registration of the ownership interest as recorded. The consequences of an Austrian registration are entitlement to operate the aircraft, Austrian nationality of the aircraft and a more difficult 'bona fide acquisition' of the aircraft if the aircraft is acquired from any other entity than the registered owner.

Registration of lease interests

10 | Summarise the process to register a lease interest.

The registration of lease interest is not feasible under Austrian law.

Certificate of registration

11 | What is the regime for certification of registered aviation interests in your jurisdiction?

The certificates are issued by Austro Control. The registration certificate contains information on the following:

- the registration number and the type of the aircraft;
- the nationality and registration marks;
- the aircraft manufacturer and the manufacturer's designation of the aircraft;
- the manufacturer's serial number; and
- the name and address of the operator.

The legal owner, lease or security interests are not recorded or stated in the registration certificate. A separate engine certificate cannot be issued.

Deregistration and export

12 | Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The operator and the owner are both likewise involved in the deregistration process. Whereas the operator is principally responsible and competent for arranging registration and deregistration of an aircraft, the operator requires the owner's cooperation and consent, as the owner is in practice required to sign the relevant application forms submitted to the aircraft registry.

The owner, as well as lenders or finance providers, usually request a power of attorney (POA) from the operator to be in a position to deregister or arrange other changes to the registration of the aircraft and to avoid the operator blocking such intention for registration or deregistration or change. In this respect, the operating agreement or the finance agreement regularly contain further regulations between the parties.

Powers of attorney

13 | What are the principal characteristics of deregistration and export powers of attorney?

The parties are free to agree on the respective characteristics or necessities of the power of attorney (POA). POAs usually entitle the agent to freely deregister or register and export the aircraft. The underlying

contractual relationship (eg, purchase contract and lease contract) usually sets forth further provisions pertaining to the POA and potential admissibility requirements (eg, potential termination event for the finance contract). The POA may be granted irrevocably or to more than one attorney.

Even in the case that a POA has been granted irrevocably, it can be terminated for good cause and will lapse upon the opening of insolvency proceedings over the assets of the grantor.

Cape Town Convention and IDERA

- 14 | If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

This is not applicable in Austria, as Austria is not party to the Cape Town Convention.

SECURITY

Security document (mortgage) form and content

- 15 | What is the typical form of a security document over the aircraft and what must it contain?

No mortgages over aircraft may be registered in Austria, as such instrument is not foreseen under Austrian law.

Although pledge agreements governed by Austrian law over an aircraft are used by some market participants in Austria, there is great discussion in the legal literature and doubts caused by Austrian Supreme Court decisions based on the Austrian property law principle of dead pledge, which provides that pledged mobile assets must be physically handed over by the pledgor to the pledgee or an agent of the pledgee (eg, an operator holding the aircraft for the pledgee).

For this reason, in Austria, finance leasing of aircraft (whereby the financier is the owner or title-holder of the aircraft) is much more widely used (ie, title remains with the lessor as security until final payment) than aircraft credit agreements with pledges (whereby the pledgor is the owner or title-holder of the aircraft).

The language used in such documents is usually German or English, subject to the parties' agreement. We see more English language documents than German language documents.

There is no specific form required.

A maximum secured amount is not foreseen in Austrian law as a requirement in such documents.

We recommend that certain economic terms of the financing transaction are reflected in the agreements as to the individual and concrete underlying obligation or claim, which is to be properly defined and declared due and payable in order to be in the position to realise or exercise the security interest rights of the financier.

Security documentary requirements and costs

- 16 | What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no formal requirements with respect to financing or security agreements. There is no specific language required and there are no notarisation or stamping obligations.

In the course of ordinary court proceedings before Austrian courts all documents submitted to the court would need to be certified translated into the German language.

Perfection of a pledge requires physical delivery of the aircraft from the owner to the pledgee (the dead pledge principle). Usually, if

a pledge is used, the aircraft is in the possession of the operator at the time of granting the pledge by the owner as pledgor to the financier as pledgee. Delivery of the aircraft can be effected by way of instruction of the operator (by the owner as pledgor) to hold and possess the aircraft for and on behalf of the pledgee. Additionally, it is necessary to mark the pledge as being subject to an Austrian law pledge by affixing plates to the airframe (and ideally also to each engine) to create external visibility of the pledge.

However, owing to certain constraints under Austrian law regarding pledges of mobile assets, aircraft finance leasing (whereby retention of title remains with the financier until the last payment) is much more widely used by market participants.

Security registration requirements

- 17 | Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Austrian law neither provides for, nor offers the possibility of, filing the security document with the aviation authority (or any other registry) as a condition to its effective creation or perfection.

Registration of security

- 18 | How is registration of a security interest certified?

Austrian law neither provides for, nor offers the possibility of, registration of a security interest with any register.

Effect of registration of a security interest

- 19 | What is the effect of registration as to third parties?

Not applicable.

Security structure and alteration

- 20 | How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

In Austria, typically, finance leasing of aircraft (whereby the financier is the owner or title-holder of the aircraft) is used (ie, title remains with the lessor as security until final payment).

It is common practice that the lessors request additional security to secure their claims. Such security might be an abstract guarantee provided from a separate person or entity (eg, holding company or beneficial owner).

The concept of trust is recognised in Austria but not used in granting security.

An aircraft financing agreement and its related security interests may in principle be transferred by all parties, for example, to a new financier or to a new lessee. However, a transfer is usually limited by the terms of the agreements to the financier side, whereas the lessee (or grantor of security) usually requires prior written consent by the financier to the transfer of its contractual position.

Security over spare engines

- 21 | What form does security over spare engines typically take and how does it operate?

Airframes and engines are treated as separate items of property. Therefore, any security interest (either in the aircraft, airframe or engine) must be created separately. If airframes and engines are pledged, they are usually subject to the same pledge agreement. Separate pledge

agreements may be more appropriate if the engines have not yet (at the time of perfection of the security interest in the aircraft or airframe) been installed on the aircraft. In general, a pledge over engines follows the same requirements for perfection as a pledge over the aircraft or airframe.

ENFORCEMENT MEASURES

Repossession following lease termination

22 | Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Austrian law leasing agreements (or related tripartite agreements) usually foresee irrevocable powers of attorney by lessee and operator granting rights to the owner or lessor to repossess and (de)register the aircraft. A lessee will not be in a practical position with regard to the competent authorities (airports, Austro Control) to obstruct repossession by the owner or lessor. An operator may invoke its right of retention until its fees and costs with respect to the aircraft are paid in full.

Although a court order does not in principle need to be obtained by the lessor if retention of title in the aircraft is validly existing and the underlying obligation becomes due and payable subject to proper termination, court proceedings might have to be opened (as a last resort) to regain possession from an obstructive operator.

Enforcement of security

23 | Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Enforcement measures must be in line with respective regulations that principally provide for creditors' entitlement to an out-of-court realisation of the pledge (ie, repossession and sale of the aircraft) provided that the underlying claim has become due and payable and the debtor or pledgor have been warned of the realisation of the pledge. The creditor shall wait with the realisation for one month after having warned the pledgor to realise the pledge; this stay period is shortened by law to one week if both parties are entrepreneurs. We recommend additional clarification within the security agreement (pledge agreement) that an out-of-court realisation of the pledge will take place in the event of a termination owing to the lessee's payment default. Alternatively, the creditor may enforce the pledge via the court.

In the course of initiation of insolvency proceedings over the assets of the lessee, the lessor has a right of extraction from the assets under insolvency as owner of the aircraft.

In the course of initiation of insolvency proceedings over the assets of the pledgor, the pledgee (as secured creditor) would be entitled to a separate and preferential satisfaction (right to segregation) from the proceeds of the sale of the aircraft by the insolvency administrator appointed by the competent court.

If the proceeds from the sale, for example, do not cover all the creditor's claims, the creditor would have to register the remaining outstanding claims in the insolvency proceedings. In this case, the creditor (in respect of claims against the debtor) would be treated the same as other unsecured creditors (claims).

Priority liens and rights

24 | Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Austrian statutory law does not provide for detention of the aircraft in respect of unpaid airport charges, air navigation charges or other unpaid debts.

Rights of liens to the aircraft may be based on claims against the legal owner of the aircraft. Claims against the operator, however, may not create a right of lien against the aircraft. An existing right of lien does not generally impact the validity of an existing aircraft security interest such as a pledge.

Unless there is suspicion of a criminal act in connection with the aircraft or its owner, or both, the Austrian state will not, in practice, confiscate an aircraft.

Enforcement of foreign judgments and arbitral awards

25 | How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?

Before judgments of foreign courts can be enforced in Austria, they need to be recognised in respective court proceedings. For judgments of courts of the European Union, Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Ia Regulation) is applicable, which provides for a simplified procedure, which aims at facilitating circulation of foreign judgments within the EU member states. Other foreign judgments need to follow the national provisions on the recognition of foreign judgments set out in the Austrian Enforcement Act, unless bilateral treaties exist which provide for mutual recognition and enforcement of judgments, in which case these rules prevail.

Austria is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (the New York Convention).

TAXES AND PAYMENT RESTRICTIONS

Taxes

26 | What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Subject to the applicable jurisdiction as to the delivery of the aircraft, as well as the type and use of the aircraft, VAT might be applicable. VAT may, under certain circumstances (subject to an individual assessment of the intended sales structure), be avoided (eg, delivery of the aircraft in international airspace).

Income from the leased asset or from the provision of finance services (eg, granting loans) may be subject to (corporate) income tax depending on whether the lessor or financier has its registered seat or permanent establishment in Austria.

Withholding tax does not apply to lease payments (principal or interest) or loan repayments.

Usually Austrian law facility agreements contain tax-indemnity or gross-up provisions to mitigate potential tax risks. Such clauses are generally effective under Austrian law.

Exchange control

- 27 | Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Austrian law does not generally provide for restrictions on international payments and exchange controls regarding civil aviation financing. Under the Austrian Banking Act certain finance providers are obliged to comply with relevant anti-money laundering and counter-terrorism financing provisions. Such provisions aim to identify ultimate beneficial ownership and report suspicious transactions to the competent authorities.

Default interest

- 28 | Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Default interest rates are in general subject to agreement between the parties provided that the agreement is not contrary to principles of good faith. Therefore, excessive interest rates (exceeding principal debt) may not be claimed under Austrian law. Such unlawful provisions within the parties' contractual agreement are at risk of being regarded null and void.

Customs, import and export

- 29 | Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Besides the existing VAT risk, for which the owner would be held liable by the competent tax authorities, and fees pertaining to the registration of the aircraft, Austrian aviation law provides for a permission to enter or leave the Austrian territory. These permissions are subject to additional fees payable by the operator depending on the weight of the aircraft.

INSURANCE AND REINSURANCE**Captive insurance**

- 30 | Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

No such captive insurance regime is applicable to aviation in Austria.

Cut-through clauses

- 31 | Are cut-through clauses under the insurance and reinsurance documentation legally effective?

As Austrian law does not generally provide for the prohibition of cut-through clauses, such clauses on behalf of a policyholder are, in our view, legally effective.

Reinsurance

- 32 | Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective. Assignments of insurance claims are typically provided for in aviation leasing and finance transactions, whereas assignments of reinsurance claims cannot be regarded as being typically provided for.

BENN-IBLER**Martin Geiger**

martin.geiger@benn-ibler.com

Tuchlauben 8
1010 Vienna
Austria
Tel: +43 1 531 55 550
Fax: +43 1 531 55 555
www.benn-ibler.com

Liability

- 33 | Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Unless owners, lessors or financiers do not have operational control over the aircraft they cannot be held liable for the operation of the aircraft.

Strict liability

- 34 | Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Austrian law has not adopted a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft since it has adopted a regime of strict liability for the operator. If aircraft are being operated by more than one operator, these operators shall generally be jointly and severally liable.

Third-party liability insurance

- 35 | Are there minimum requirements for the amount of third-party liability cover that must be in place?

The minimum requirement for the amount of third-party liability cover under Austrian law depends on the maximum take-off mass of the aircraft. The limits of liability that need to be covered by liability insurance range from 750,000 special drawing rights (as defined by the International Monetary Fund) for a maximum take-off mass of less than 500kg to 700 million special drawing rights for a maximum take-off mass of more than 500 tons.

UPDATE AND TRENDS**Key developments of the past year**

- 36 | What were the key cases, decisions, judgements and policy and legislative developments of the past year?

The Austrian Ministry of Transport, Innovation and Technology recently published an 'Aviation Road Map 2020'. This overall strategy, developed together with stakeholders in the Austrian aviation industry, offers the aviation industry a comprehensive planning and decision-making structure for the coming years. The new Austrian government has, additionally, committed itself to implementing several new measures to reduce carbon dioxide emissions.