

Aviation Liability 2021

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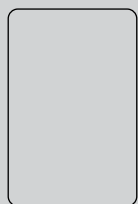
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Aviation Liability

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Aviation Liability*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew J Harakas of Clyde & Co US LLP, for his continued assistance with this volume.



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APPLICABLE TREATIES

Major air law treaties

1 | To which major air law treaties related to carrier liability for passenger injury or death is your state a party?

Austria is a party to the following international Conventions:

- Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (entry into force on 28 June 2004);
- Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (entry into force on 27 December 1961), as well as the Hague Protocol amending the Warsaw Convention (entry into force on 24 June 1971) (but not the Montreal Protocols Nos. 1–4);
- Guadalajara Supplementary Convention of 1961 (entry into force on 21 March 1966); and
- Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963 (entry into force on 8 May 1974).

International Conventions typically need to be implemented into national law and are not directly applicable.

INTERNATIONAL CARRIAGE – LIABILITY FOR PASSENGER INJURY OR DEATH

Montreal Convention and Warsaw Convention

2 | Do the courts in your state interpret the similar provisions of the Montreal Convention and the Warsaw Convention in the same way?

Yes. The courts consider the Montreal Convention a revision of the Warsaw Convention and interpret notions used in both Conventions in a continuous way. Furthermore, the courts might also refer to foreign precedents, in particular of German courts, aiming at a uniform interpretation of these international rules.

3 | Do the courts in your state consider the Montreal Convention and Warsaw Convention to provide the sole or exclusive basis for air carrier liability for passenger injury or death?

Where an event falls into the scope of one of the Conventions, the courts consider these Conventions the exclusive basis for air carrier liability. However, where a European Air Carrier in the sense of Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, as amended by Regulation (EC) No. 889/2002 is concerned, these Regulations would be the prevailing basis and referred to by the court.

Definition of 'carrier'

4 | In your state, who is considered to be a 'carrier' under the Montreal and Warsaw Conventions?

'Carrier' in the sense of the Montreal and Warsaw Conventions is the party that contractually promises carriage of persons and objects by air in its own name. It is irrelevant whether the contractual carrier in fact also will be the operating carrier or whether it is at all able to be so. Consequently, a travel agent or tour operator can also be the 'carrier' in the sense of the Montreal Convention.

Carrier liability condition

5 | How do the courts in your state interpret the conditions for air carrier liability – 'accident', 'bodily injury', 'in the course of any of the operations of embarking or disembarking' – for passenger injury or death in article 17(1) of the Montreal Convention and article 17 of the Warsaw Convention?

Austrian courts interpret the conditions for air carrier liability taking into consideration not only national precedents but also German court decisions and the interpretation of these terms in the sense of Regulation (EC) No. 2027/97.

'Accident' in this regard means an external, sudden event that is determined in place and time, by which the passenger is injured or killed. Until recently, Austrian courts also required that by the event an aviation-specific hazard was materialised. However, the Court of Justice of the European Union, in its decision dated 19 December 2019 (C-532/18 *Niki Luftfahrt*), which had to examine whether the airline was liable for scalding caused by hot coffee that tipped over on a flight for unknown reasons, overruled this interpretation and ruled that it is not necessary that an event stems from a hazard typically associated with aviation.

'Bodily injury' means bodily harm in the sense that the injury has to result in a medical condition that can be diagnosed by a doctor.

The understanding of the notion 'in the course of any of the operations of embarking or disembarking' is disputed as to when the process of embarking begins and when disembarking ends. In any case, the interpretation is rather wide and also includes the route to the aircraft, for example either by walking over the apron or taking the bus.

No negligence defence

- 6 | How do the courts in your state interpret and apply the 'no negligence' defence in article 21 of the Montreal Convention, and the 'all reasonable measures' defence in article 20 and the 'wilful misconduct' standard of article 25 of the Warsaw Convention?

The defences of 'no negligence' (article 21 of the Montreal Convention) and 'wilful misconduct' (article 25 of the Warsaw Convention) must both be proven by the air carrier in the sense that the burden of proof is shifted to the air carrier. Whether the air carrier did not act negligently or intentionally is determined in a twofold way, objectively and subjectively.

Regarding the defence of 'all reasonable measures', the Austrian courts determine this on a case-by-case basis with a strong influence as to how German courts assess this notion.

Advance payment for injury or death

- 7 | Does your state require that advance payment be made to injured passengers or the family members of deceased passengers following an aircraft accident?

Pursuant to article 5 of Regulation (EC) No. 2027/97, the air carrier must make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered. In case of death, the advance payment must be at least 16,000 special drawing rights per passenger.

Deciding jurisdiction

- 8 | How do the courts of your state interpret each of the jurisdictions set forth in article 33 of the Montreal Convention and article 28 of the Warsaw Convention?

Austrian courts uphold and accept all jurisdictions set forth in article 33 of the Montreal Convention or article 28 of the Warsaw Convention as alternative possible jurisdictions. Austrian courts do not recognise the forum non conveniens doctrine.

Period of limitation

- 9 | How do the courts of your state interpret and apply the two-year period of limitations in article 35 of the Montreal Convention and article 29 of the Warsaw Convention?

The limitation period of two years is upheld in Austria. A complaint must be filed before the courts within the limitation period. It is possible to extend the limitation period by agreement between the parties or by a waiver of carrier to raise the defence of expired limitation period in civil court proceedings.

Liability of carriage

- 10 | How do the courts of your state address the liability of carriage performed by a person other than the contracting carrier under the Montreal and Warsaw Conventions?

The principal liable party is the contracting carrier; however, article 40 of the Montreal Convention is respected so that the actual carrier is also jointly liable and can be held liable.

DOMESTIC CARRIAGE – LIABILITY FOR PASSENGER INJURY OR DEATH**Governing laws**

- 11 | What laws in your state govern the liability of an air carrier for passenger injury or death occurring during domestic carriage?

The relevant provisions can be found in article 146ff of the Austrian Aviation Act (*Luftfahrtgesetz – LFG*).

Since 1997, a unified regulatory regime for carrier liability relating to passenger injury and death is applicable by means of Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, as amended by Regulation (EC) No. 889/2002. These rules are applicable to Community Air Carriers notwithstanding whether they perform international or domestic flights. Article 146ff LFG consequently only apply to cases which fall neither under this regulatory regime nor the Montreal or Warsaw Convention.

Nature of carrier liability

- 12 | What is the nature of, and what are the conditions for, an air carrier's liability?

As in the Montreal/Warsaw regime, the LFG provides for a strict liability in article 156. However, a claim under strict liability is limited to 113,100 special drawing rights (SDR) per passenger, if the carrier can prove that the damage was not caused by default or solely by default of a third party. The burden of proof for the applicability of the liability limit therefore lies upon the carrier.

Liability limits

- 13 | Is there any limit of a carrier's liability for personal injury or death?

The limit of liability, unless the carrier cannot prove that it is not at fault, is 113,100 SDR per passenger.

Main defences

- 14 | What are the main defences available to the air carrier?

The main defences of the air carrier would be the same as within the Montreal and Warsaw Convention system, namely, limit of liability and no fault of the air carrier.

Damages

- 15 | Is the air carrier's liability for damages joint and several?

Depending on the circumstances, the air carrier's liability might or might not be joint and several. If the operating and contracting air carrier are two different entities, both are jointly and severally liable pursuant to article 157 LFG.

Rule for apportioning fault

- 16 | What rule do the courts in your state apply to apportioning fault when the injury or death was caused in whole or in part by the person claiming compensation or the person from whom the right is derived?

Austria follows the principle of contributory negligence pursuant to article 1304 of the Austrian General Civil Code (*Allgemeines Burgerliches Gesetzbuch – ABGB*). If the damage was caused in whole by the injured party themselves, the court will usually exculpate the air carrier. If the injured party is partly at fault, the court will allocate damages in proportion to the allocation of fault.

Children under 14 and persons with reduced mental capacity can also be assessed under contributory negligence; however, other criteria apply that are more lenient and are ruled on an individual basis taking into account the respective person's actual mental capacity and understanding.

Statute of limitations

17 | What is the time within which an action against an air carrier for injury or death must be filed?

Actions against the air carrier under the Austrian regime of the LFG are subject to the general limits of liability of the ABGB. The limitation of liability for personal injury or death claims is three years from:

- the moment the damage was caused; and
- the moment the injuring party becomes known to the injured party.

In order to remain within the time limitation, a complaint has to be filed within that period with the competent court.

THIRD-PARTY ACTIONS

Seeking recovery

18 | What are the applicable procedures to seek recovery from another party for contribution or indemnity?

An injured party may file a complaint against all possible injuring parties, in which case they all become defendants in the dispute.

If an air carrier might be able to seek recovery from another party, it can declare litigation against such third party in pending civil court proceedings. This declaration will have the effect that the third party may (or may not at its discretion) join the civil court proceedings to secure its best possible position and assist the party on whose side it joins in defending their position.

Time limits

19 | What time limits apply?

The time limit for claims for compensation of damages is three years from:

- knowledge of damage; and
- knowledge of the injuring party,

by filing a lawsuit with the competent court. An out of court declaration of litigation does not interrupt or suspend the limitation periods.

LIABILITY FOR GROUND DAMAGE

Applicable laws

20 | What laws apply to the liability of the air carrier for injury or damage caused to persons on the ground by an aircraft accident?

Article 148 of the Austrian Aviation Act (*Luftfahrtgesetz* – LFG) applies, which provides for the air carrier's liability if a person who is not a passenger is injured or killed in an accident by the operation of an aircraft or unmanned flight object.

Nature and conditions of liability

21 | What is the nature of, and what are the conditions for, an air carrier's liability for ground damage?

The carrier's liability pursuant to article 148 LFG is strict.

Liability limits

22 | Is there any limit of carriers' liability for ground damage?

The carrier's liability is limited as follows:

- Maximum take-off mass (MTOM) less than 500 kg – 750,000 special drawing rights (SDR);
- MTOM less than 1,000 kg – 1,500,000 SDR;
- MTOM less than 2,700 kg – 3,000,000 SDR;
- MTOM less than 6,000 kg – 7,000,000 SDR;
- MTOM less than 12,000 kg – 18,000,000 SDR;
- MTOM less than 25,000 kg – 80,000,000 SDR;
- MTOM less than 50,000 kg – 150,000,000 SDR;
- MTOM less than 200,000 kg – 300,000,000 SDR;
- MTOM less than 500,000 kg – 500,000,000 SDR; and
- MTOM equal to or over 500,000 kg – 700,000,000 SDR.

Main defences

23 | What are the main defences available to the air carrier in a claim for damage caused on the ground?

Main defences are the limitation of liability above as well as the defence of contributory negligence.

LIABILITY FOR UNRULY PASSENGERS AND TERRORIST EVENTS

Applicable laws

24 | What laws apply to the liability of the air carrier for injury or death caused by an unruly passenger or a terrorist event?

There are no special rules that apply for injury or death caused by unruly passengers and terrorist attacks. It is not, however, completely clear whether and when such an event is considered an accident.

Nature and conditions of liability

25 | What is the nature of, and what are the conditions for, an air carrier's liability for injury or death caused by an unruly passenger or a terrorist event?

The same rules apply as for all events that are considered accidents.

Liability limits

26 | Is there any limit of liability for injury or death caused by an unruly passenger or a terrorist event?

The same rules apply as for all events that are considered accidents.

Main defences

27 | What are the main defences available to the air carrier in a claim for injury or death caused by an unruly passenger or a terrorist event?

The same rules apply as for all events that are considered accidents.

LIABILITY FOR HARM CAUSED BY DRONES

Applicable legislation

28 | Summarise the laws or regulations related to the liability for injuries or damage caused by drones.

There are no special rules applicable to drones: a drone is considered an aircraft in the sense of the Austrian Aviation Act (*Luftfahrtgesetz* – LFG) and therefore the same regime as for liability for the use of other aircraft pursuant to article 146ff LFG apply.

CONSUMER PROTECTION AND PASSENGER RIGHTS

Applicable legislation

- 29 | Summarise aviation-related consumer-protection laws or regulations related to passengers with reduced mobility, flight delays and overbooking, tarmac delay and other relevant areas.

In Austria, aviation-related consumer-protection laws are subject to harmonised EU law, namely the following Regulations:

- Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; and
- Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

Furthermore, consumers in Austria are also protected by the Austrian Consumer Protection Act (*Konsumenschutzgesetz* – KSchG), which also applies to carrier agreements with respect to the clarity and specification of general conditions of carriage.

LIABILITY OF GOVERNMENT ENTITIES PROVIDING SERVICES TO CARRIERS

Relevant laws

- 30 | What laws apply to the liability of the government entities that provide services to the air carrier?

With respect to liability of any government entity or authority, the Austrian Government Liability Act (*Amtshaftungsgesetz* – AHG) applies. The AHG refers to the general provisions of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – ABGB) on liability and the compensation of damages with some special provisions applicable exclusively for claims against government entities or authorities.

Nature and conditions of liability

- 31 | What is the nature of, and what are the conditions for, the government's liability?

The government's liability is fault-based, meaning that damage must have been caused unlawfully and by default by an individual acting in their official capacity for a governmental body in application of the law. The individual personally is exempt from liability. Only monetary claims can be made.

The injured party must first serve to the government entity a notice of claim in writing, explicitly requesting the government entity to declare within three months whether it acknowledges or contests the claim.

Liability limits

- 32 | Are there any limitations to seeking recovery from the government entity?

Compensation for damages under the AHG cannot be claimed from the government entity, if the damage could have been avoided by the injured party by taking legal remedy against damaging decisions of authorities of first instance, for example by appealing to the higher authorities or filing a complaint to the administrative courts.

CRIMINAL PROCEEDINGS

Responsibility for accidents

- 33 | Can an air carrier be criminally responsible for an aviation accident?

Only individuals can commit criminal offences. However, legal entities may be subject to criminal court proceedings under the Statute on Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz* – VbVG), if the criminal offence committed by the individual can be ascribed to the legal entity. That is the case if either the criminal offence was committed for the benefit of the legal entity (ie, the legal entity profited from it or saved an effort) or legal duties of the legal entity were violated by the criminal offence.

Consequently, an air carrier can be criminally responsible for an aviation accident, if it did not follow all legal duties and obligations imposed on air carriers (for example with regard to safety of the aircraft).

Effect of proceedings

- 34 | What is the effect of criminal proceedings against the air carrier on a civil action by the passenger or their representatives?

A judgment in Austrian criminal court proceedings has binding effect on the Austrian civil courts, so if the air carrier is convicted, civil courts will be able to rely on the civil liability of the air carrier. However, if the air carrier is considered not guilty from a criminal law perspective, this does not necessarily mean that the civil liability is ruled out as the criteria are not completely the same with regard to criminal and civil liability.

Typically, pending civil court proceedings will be interrupted until a judgment in criminal court proceedings is obtained, if such judgment is prejudicial for the civil court proceedings.

Compensation

- 35 | Can claims for compensation by passengers or their representatives be made against the air carrier through the criminal proceedings?

Injured parties may adhere to criminal court proceedings against the accused (be it the carrier or the individual which is on trial) with their civil claims for compensation. The criminal court may or may not rule on the admissibility of those claims. Very often, in particular if the claim is complex (eg, alleged long-term damages), the criminal courts will refer the civil claimants to the civil courts instead of making a ruling within the criminal court proceedings.

EFFECT OF CARRIER'S CONDITIONS OF CARRIAGE AND TARIFFS

Liability

- 36 | What is the legal effect of a carrier's conditions of carriage or tariffs on the carrier's liability?

A carrier's general conditions of carriage are only binding when they are agreed upon before the contract between the carrier and the passenger is concluded. For that to happen, the passenger needs to have had the opportunity to read and understand the general conditions of carriage. It is not relevant whether the passenger actually read the general conditions of carriage. The same applies to conditions of tariff.

Pursuant to the provisions of the Austrian Consumer Protection Act (*Konsumenschutzgesetz*), general terms and conditions must not contain certain provisions that are very detrimental to the passenger,

that go against good morals or whose content was unforeseeable to the passenger. In this regard, Austrian courts have already overruled several provisions in general conditions of carriage, such as the exclusion of liability for valuables carried in baggage already checked in and the provision that getting in contact with the airline to make a claim must be made through predefined online forms.

DAMAGES

Damage recovery

37 | What damages are recoverable for the personal injury of a passenger?

The Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides that in case of personal injuries the injured person is entitled to claim reimbursement for their medical expenses, loss of profit, any future losses of profit in case the injury hinders the person from working, and an adequate compensation for pain and suffering. Furthermore, in case of visible damages to the appearance of a person (eg, visible burns), additional compensation for such damages can be claimed.

Austrian case law is rather generous when it comes to reimbursement of medical expenses, as any medical treatments that may have a positive effect on the condition of the injured person are usually reimbursable. Loss of profit is usually based on a comparison of the income of the injured person before the injury and after the injury, whereby persons who do private housekeeping either full or part time are entitled to the costs of a housekeeping aid. Future losses of profit are usually assessed based on an expert opinion on the reduction in earning capacity.

Compensation for pain and suffering is often calculated based on a daily tariff with three levels of pain (light, medium and intense). For every 24 hours of pain – usually assessed by an expert opinion – one daily rate of compensation for pain and suffering is granted. Daily rates range between €100 (light pain) and €400 (intense pain). The Austrian Supreme Court, however, does not apply these daily rates but rather opts for a comprehensive assessment of pain and suffering.

Damages are not limited, however the highest amount granted by any Austrian court for pain and suffering to date was some €250,000. Punitive damages are not allowed. The person sustaining the injury has standing to the claim and is also the beneficiary.

38 | What damages are recoverable for the death of a passenger?

For the death of a passenger recoverable damages are the costs for the funeral, losses of alimonies of legally entitled relatives and pain and suffering of close relatives.

In the case of a medical condition caused by the death of a passenger, compensation for pain and suffering, as well as compensation for mourning, can be claimed.

ACCIDENT INVESTIGATION AND FAMILY ASSISTANCE

Investigatory authority

39 | Who is responsible in your state for investigating aviation accidents?

The relevant Austrian authority for investigating accidents of civil aircraft is the Federal Safety Investigation Authority, situated at the Federal Ministry of Climate Protection, Environment, Energy, Mobility, Innovation and Technology and is the competent authority for investigating accidents in the areas of rail, shipping, cable cars and civil aviation. Its establishment is based on article 137 of the Austrian Aviation Act (*Luftfahrtgesetz*), the Austrian Accident Investigation Act

(*Unfalluntersuchungsgesetz*) and Regulation (EU) No. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation, as last amended by Regulation (EU) No. 2018/1139. However, notifications to the Federal Safety Investigation Authority in the sense of article 9 of Regulation (EU) No. 996/2010 shall be filed with Austro Control GmbH (which is the Austrian aviation regulatory authority).

Disclosure restrictions

40 | Set forth any restrictions on the disclosure and use of accident reports, flight data recorder information or cockpit voice recordings in litigation.

Pursuant to article 14 of Regulation (EU) No. 996/2010 certain information, in particular witness statements given before the investigation authority, information and material collected by the investigation authority and cockpit voice and image recordings shall principally not be made available or used for purposes other than safety investigation. However, the investigation report shall be made public and can be used in litigation.

Relevant post-accident assistance laws

41 | Does your state have any laws or regulations addressing the provision of assistance to passengers and their family after an aviation accident?

There are no particular post-accident assistance laws.

INSURANCE REQUIREMENTS

Mandatory requirements

42 | Are there mandatory insurance requirements for air carriers?

Insurance requirements for air carriers and aircraft operators are set out in Regulation (EC) No. 785/2004 of 21 April 2004 on insurance requirements for air carriers and aircraft operators as last amended by Regulation (EU) No. 2019/1243. For those air carriers or aircraft that are outside the scope of Regulation (EU) No. 785/2004 (such as state aircraft or certain non-commercial light aircraft), article 164 ff of the Austrian Aviation Act (*Luftfahrtgesetz*) provide for insurance requirements.

According to article 6 of Regulation (EU) No. 785/2004, for liability in respect of passengers the minimum insurance cover shall be 250,000 special drawing rights (SDR) per passenger; for liability in respect of baggage, the minimum insurance cover shall be 1,131 SDR per passenger in commercial operations; and for liability in respect of cargo, the minimum insurance cover shall be 19 SDR per kilogram in commercial operations.

In respect of third-party liability article 7, para 1 of Regulation (EU) No. 785/2004 provides for a minimum insurance cover dependant on the maximum take-off mass (MTOM) (kg), from 0.75 million SDR for aircraft under 500 kg MTOM to 700 million SDR for aircraft above 500,000 kg MTOM.

LITIGATION PROCEDURE

Court structure

43 | Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.

In Austria, civil aviation liability claims and appeals are judged by civil courts. If the counterparty of the air carrier is a consumer, proceedings are handled by regular civil courts, and if the counterparty is considered a business entity, proceedings are handled by civil courts as commercial courts.

Claims of up to €15,000 must be brought before district courts. Any claims valued higher than this threshold must be brought before regional courts. Depending on the trial court, appeals are to be brought either before the regional courts or higher regional courts. Decisions on appeals may also be challenged before the Austrian supreme court under certain conditions (eg, due to lack of case law).

Allowable discovery

44 | What is the nature and extent of allowable discovery/disclosure?

Austrian law does not provide for allowable discovery/disclosure. Each party can only present the evidence that it has access to. However, the law typically assigns the burden of proof to the party which is closer to the evidence, so if that party does not provide exculpatory evidence the court will rule in favour of the other party.

In the case a party is known to hold certain evidence, the counterparty may apply for submission of that evidence or courts may also directly order a party to submit it. If a party does not submit evidence as ordered by a court, the court cannot force the party to submit the evidence, but it may incorporate the refusal to submit evidence into its decision to the detriment of the refusing party.

Evidence

45 | Does the law of your state provide for any rules regarding preservation and spoliation of evidence?

Austrian law provides for preservation of evidence procedure before courts in the case such evidence is bound to be lost or hard to obtain at a later point (which is to be evidenced by the applicant), or if the current state of an object shall be assessed and the applicant has a legal interest in such assessment.

Regarding spoliation of evidence, no specific rules exist. Under Austrian law a party making a claim in a proceeding must provide sufficient evidence to support such claim. It is at the court's discretion to assess the credibility and quality of such evidence or lack thereof (including a party's refusal to submit evidence). In any decision the court has to assert on what evidence it relied and the reasons for relying on such evidence.

Recoverability of fees and costs

46 | Are attorneys' fees and litigation costs recoverable?

Attorneys' fees are recoverable based on a legal tariff that prescribes the amount recoverable depending on the value of the claim. Depending on the quota of the claimed amount the prevailing party is entitled to a quota of its litigation costs based on the legal tariff. In case of claims being granted in full, the prevailing party is entitled to full recovery of its litigation costs under the tariff. If both parties prevail only in part, the costs are either set off against each other (ie, each party pays its own costs) or distributed proportionately, but the judge may also decide to have the costs borne by the party losing the matter disproportionately (eg, if one party wins by 80 per cent, it may receive 100 per cent of its costs). The costs of malicious initiation of court proceedings are to be borne by the party initiating the proceedings.

JUDGMENTS AND SETTLEMENT

Pre- and post-judgment interest

47 | Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?

In Austria no specific pre- or post-judgment interest rate exists; however, courts will award interest based on either an interest rate agreed upon between the parties or – for lack of an agreed interest rate – statutory interest rates. The statutory interest rates are currently 4 per cent per year for claims involving at least one consumer, and for claims with entrepreneurs on each side 9.2 per cent per year, above the base interest rate set by the Austrian National Bank.

Settlements

48 | Is court approval required for settlements?

No, any settlement can be made without court approval. Although an out of court settlement is binding upon the parties, it is not directly enforceable. However, a settlement negotiated out of (or by the parties in) court can be entered into before a court (*pratorischer Vergleich*) in order to gain a legal title that allows for direct enforcement.

49 | What is the effect of a settlement on the right to seek contribution or indemnity from another person or entity? Can it still be pursued?

A settlement between two parties can generally not have an effect for another party, unless it is intended to be an agreement for the benefit of a third party (in which case that third party needs to be named specifically in such settlement agreement). A general waiver of seeking indemnity from third parties is not effective.

50 | Are there any financial sanctions, laws or regulations in your state that must be considered before an air carrier or its insurer may pay a judgment or settlement?

Other than possible tax issues (eg, settlement amount to be paid including or excluding VAT), no financial restrictions, laws or regulations exist that must be considered before an air carrier or its insurer may pay a judgment. If a settlement is concluded out of court, stamp duty might apply in the amount of 2 per cent of the agreed compensation, or 1 per cent if the matter is settled in court (*pratorischer Vergleich*).

UPDATE AND TRENDS

Key developments of the past year

51 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Court of Justice of the European Union (CJEU) in its decision dated 19 December 2019 (C-532/18 *Niki Luftfahrt*) significantly changed the notion of 'accident' in the sense of the Montreal and Warsaw Conventions. It had to examine whether hot coffee that tipped over on a flight for unknown reasons was considered an accident, which the Austrian courts rejected. The CJEU overruled this interpretation and ruled that it is not necessary that an event stems from a hazard typically associated with aviation, so that spilt hot coffee is also considered an 'accident'.

More recently, the CJEU in a decision dated 3 September 2020 (C-530/19 *Niki Luftfahrt*) stated that a carrier that is required under Regulation (EU) No. 261/2004 to provide accommodation to passengers of delayed flights is not per se liable for injuries a passenger suffers in the accommodation.

Both CJEU decisions were initiated by preliminary ruling requests from Austrian courts.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Austrian government has implemented a lot of different state aid programmes for Austrian businesses that have suffered as a result of the pandemic. Such state aid includes direct and non-repayable state contributions, state guarantees and payment deferrals. Time limits for applications for filing for insolvency have been extended in order to give companies more time to adjust to the losses the pandemic has, and still is, causing the economy.

Furthermore, innovative projects and new developments are subsidised by the federal states, depending on where the company has its seat, for example regarding digitalisation, growth and investment.

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