

International **Comparative** Legal Guides



Aviation Finance & Leasing **2020**

A practical cross-border insight into aviation finance law

First Edition

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Dr. Christoph Wildmoser

1 General and Contractual

1.1 What are the typical structures available for financing the purchase of an aircraft?

Typical structures are operating leases and finance leases either standalone or as part of aircraft financing structured as sale and leaseback transactions or ECA financing.

1.2 What are the key advantages/disadvantages and main issues arising in relation to these financing structures?

Under an operating lease, the owner/lessor owns the aircraft that is leased to a lessee. At the end of the lease term, the aircraft is returned to the owner/lessor for release or sale. The owner/lessor is in most cases a leasing company.

There are two types of operating leases:

- A dry lease where the owner/lessor provides the aircraft while the lessee is responsible for operating, maintaining, insuring, and providing a crew for the aircraft.
- A wet lease where the owner/lessor retains operational control of the aircraft, operates flights for the airline with crew provided by the owner/lessor and maintains and insures the aircraft. The costs for these services are paid by the lessee under the lease.

The advantages of the operating lease include giving lessees greater flexibility in managing their fleet because they can react on increased capacity needs and lease aircraft only as and when needed. However, operating leases can be a more expensive alternative in relation to other forms of financing.

Under a finance lease, an owner/lessor purchases the aircraft from a manufacturer at their own cost which it then leases to the lessee, while through the lease payments the entire or substantial part of the purchase price is re-financed. At the end of the lease term, the lessee is required to purchase aircraft.

1.3 What types of leasing are possible under the laws of your jurisdiction? What are their essential characteristics?

The types of leasing under Austrian law ranges from mere rental agreements to concealed hire purchase agreements. The distinction between these types of leasing arises primarily in the case of finance lease agreements which replace the traditional form of investment financing.

The two general types of leasing are full amortisation leases (full pay-out leasing) and partial amortisation leases (non-full

pay-out leasing or residual value leasing). Under full amortisation leases, the lessee pays during the lease term the owner/lessor's investment costs plus a profit, while under partial amortisation leases, the lessee does not cover the owner/lessor's entire expenses.

Finance leases are either full amortisation leases or partial amortisation leases. Another typical feature of finance leases are the minimum, or initial fixed, lease term, during which neither party may terminate the lease contract, and the transfer of the risk of accidental loss or damage of the asset to the lessee. Essentially, owner-like risks and obligations are transferred to the lessee without transfer of legal ownership. At the end of the leasing term, a potential residual value is repaid by realising the leased asset either through the purchase of the asset by the lessee or by a third party nominated by the lessee. Possible losses from the sale are borne by the lessee.

Although under an operating lease the lessee is also liable in particular for the risks of accidental loss, accidental damage and for the agreed condition of the leased asset at the end of the lease term, the lessee is not liable for the realisable proceeds after return of the leased asset. Furthermore, at the end of the lease term, the purchase of the leased asset by the lessee is usually not envisaged and the lessee is only liable for the condition of the leased asset upon return as agreed in the lease contract.

1.4 Are there any proposals for reform in the area of aviation finance?

Currently, there are no proposals for reform in relation to aviation finance.

1.5 Is it possible according to the laws in your jurisdiction to enter into non-binding or partially binding pre-contractual agreements (e.g. 'letters of intent') which will NOT take effect as fully enforceable agreements?

Under Austrian law it is possible to enter into non- or partially binding pre-contractual agreements which do not take effect as fully enforceable agreements.

1.6 Is there a doctrine of 'good faith' in your jurisdiction which applies to all pre-contractual agreement, financing and leasing transaction documents, and the conduct of parties connected to them?

General *bona fide* principles are set out in Sec 879 Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*). Agreements in

contravention of Austrian *bona fide* requirements are generally void and unenforceable in Austria, irrespective of the law by which they purport to be governed.

2 Taxation and Related Matters

2.1 Which government authority in your jurisdiction has primary responsibility for the accounting for and regulation of revenue control and taxes?

The respective tax office at the seat of the relevant entity.

2.2 What are typically the taxes in your jurisdiction which may arise in relation to a sale, a lease or a financing of an aircraft or an engine?

Subject to the applicable jurisdiction with regard to the delivery of the aircraft, as well as the type and use of the aircraft, VAT might be applicable. However, subject to the structure of the purchase, VAT may be avoided (e.g. through delivery of the aircraft in international airspace).

Income from the lease may be subject to Austrian (corporate) income tax depending on whether the lessor or financier has its registered seat or permanent establishment in Austria.

2.3 Is the provision of a current tax-residency certificate by a payee sufficient for a lessee or a borrower potentially subject to withholding taxes in your jurisdiction on rental or interest payments to avail itself of treaty access and the mitigation of tax liability?

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

2.4 Has the advent of BEPS (the Base Erosion and Profit Shifting initiative of the OECD) had any effect as regards structures in aviation finance and leasing or their interpretation?

There are no effects from the BEPS action plan as regards the structures in aviation finance and leasing in Austria yet.

2.5 What are the typical thresholds in your jurisdiction for which a permanent establishment may be triggered under the terms of any relevant double-tax treaty or similar?

A permanent establishment is a fixed place of business through which the activities of an enterprise are wholly or partly carried on and, thus, requires:

- the authority to dispose of certain facilities (owned or rented), premises or machinery;
- that it is located at a specific place for a certain period of time; and
- that the undertaking must pursue its commercial activities at this fixed place.

A “permanent establishment” in particular comprises the place of management, a branch, an office, a factory and a workshop. Facilities that serve exclusively preparatory and auxiliary functions are not qualified as a permanent establishment.

However, the double tax treaties which Austria has adopted do not always follow the OECD model convention in full, so that it is essential to consult the applicable double tax treaties in each individual case.

2.6 Is the authority at question 2.1 likely to establish a ‘look-through’ right or similar as regards a lender or a lessor which is a special-purpose vehicle involved for the purpose of tax treaty access?

No, it is not.

2.7 Will the import of an aircraft into your jurisdiction and/or the sale or leasing of the aircraft give rise to any VAT, sales or use taxes or any customs import or excise duties?

Depending on the applicable jurisdiction with regard to the delivery of the aircraft, as well as on the type of the aircraft, VAT as well as customs duties may be payable in connection with the import of an aircraft into Austria.

In the case of an intra-community purchase of an aircraft by an Austrian purchaser, the VAT exemption may apply, in which case the supply of the Aircraft might be exempt from VAT in Austria.

2.8 Are there any documentary taxes (for example, stamp duty payable on the execution of documents)?

Lease agreements executed in Austria or relating to an asset located in Austria are subject to Austrian stamp duty. In such cases, Austrian stamp duty is calculated as a multiple of the annual rent including VAT and ancillary costs. The multiple depends on the terms of the lease.

3 Registration and Deregistration

3.1 Which government authority in your jurisdiction has primary responsibility for the regulation of aviation and the registration of aircraft? Is it an owner registry or an operator registry? If the aircraft register is an operator register, is it possible to record the details of an owner or lessor and any financier with an aircraft mortgage?

The Austrian aircraft register is operated by *Austro Control Österreichische Gesellschaft für Zivilluftfahrt mit beschränkter Haftung* (Austro Control), which is a government subsidiary that has been vested with sovereign rights.

The following information is registered in the Austrian aircraft registry:

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

The Austrian aircraft register is an operator register. Thus ownership, lease and/or security interests are not registered.

Other than with respect to the commercial operators (who are required to have an operating licence), there are no restrictions on the nationality of the legal owner of an aircraft. Consequently, foreign legal entities as well as natural persons may be owners of aircraft that are registered in Austria.

3.2 What is the effect of registration of the aircraft? Does registration on your national aircraft register confer proof of ownership of the aircraft and/or engine?

The registration in the Austrian aircraft register is an administrative requirement and does not impact the legal ownership of

an aircraft and does not evidence or constitute legal ownership of the aircraft.

The consequences of registration in the Austrian aircraft register in particular is the entitlement to operate the aircraft under Austrian nationality, that no *bona fide* acquisition of title in the aircraft is possible, if the aircraft is acquired from a person other than the owner, and that according to Sec 33 Austrian International Private Law Act (*IPR-Gesetz*), rights *in rem* including ownership rights and pledges are subject to and shall be constituted in accordance with the relevant provision of the laws of the state of registration of an aircraft. While the title for the transfer of ownership of an aircraft (e.g. the purchase agreement) can be made subject to any law, the mode (i.e. the delivery) must be carried out in accordance with mandatory provisions of Austrian law.

3.3 Can foreign-owned aircraft be registered on your national aircraft register and are there limits or restrictions on the age of aircraft that may be registered or operated?

Foreign-owned aircraft can be registered in the Austrian aircraft register. There are no limits or restrictions as to the age of the aircraft; however, a certificate of airworthiness issued by Austro Control is required for the operation of an aircraft.

3.4 Can aircraft leases be registered? If so, in what circumstances? Must the lease be in a particular form if it is to be valid and enforceable (for example, must it be in a particular language or be notarised, legalised or apostilled)?

Leases cannot be registered in the aircraft register under Austrian law.

3.5 How is deregistration affected and what steps can a lessor take to de-register the aircraft on termination of the lease?

The operator and the owner are both involved in the deregistration process. Whilst the operator is principally responsible and competent for registration and deregistration of an aircraft, the operator is dependent on the cooperation and consent of the owner, because the owner is required to sign the relevant application forms to be submitted to the aircraft register.

The owner and lenders (or other finance providers) usually request a deregistration power of attorney from the operator enabling them to amend the registration of or to de-register an aircraft.

4 Security

4.1 Is it possible to create a mortgage over an aircraft or engine in your jurisdiction? If so, what are the types of aircraft mortgage and engine mortgage available and what formalities are required in order to perfect it?

Pursuant to Sec 33 para 1 Austrian International Private Law Act, all rights *in rem* over aircrafts are subject to the laws of the state in which the aircraft is registered, i.e. Austrian law in case of aircraft registered in the Austrian aircraft register.

A mortgage over tangible assets, including aircraft, is unknown to Austrian law. However, it is possible to create a pledge (*Pfandrecht*) over an aircraft under Austrian law. Creation

of a pledge requires a valid underlying contractual obligation (pledge agreement). The pledge agreement itself does not require any specific form or formality, nor is it required to be written in any particular language. An Austrian court or other competent Austrian authority, however, may request delivery of certified translations of the pledge agreement or other documents, if not drafted in the German language.

In addition, and as a principle of pledging tangible assets under Austrian law, the pledgor is required to physically hand over the aircraft to the pledgee or an agent of the pledgee (in practice the operator holding possession over the aircraft for the pledgee).

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 affected 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. In practice, metal plates are in addition affixed to the airframe and the engines, indicating that the airframe and engines are subject to an Austrian law pledge in order to create external visibility of the pledge.

4.2 Can spare parts, including future parts, be subject to the aircraft mortgage or engine mortgage (as the case may be)? If not, are there any other forms of security that can be taken over spare parts?

The pledgor and pledgee may agree in the pledge agreement that the pledgee shall be obliged to also pledge spare parts and future spare parts. In any event, perfection of a pledge with regard to those (future) spare parts requires an act of publicity by physical delivery to a pledgee (please see question 4.1).

4.3 Is there a register of mortgages or rights over aircraft and/or engine?

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

4.4 What other forms of security can be taken over an aircraft and/or engine and can these other forms be registered?

Under Austrian law the most relevant form of security over an aircraft is a pledge (*Pfandrecht*). Another form of security would be the transfer of ownership by way of security (*Sicherungsübereignung*).

4.5 What claims and rights would take priority in your jurisdiction over a registered mortgage?

The priority of the pledgee may only be safeguarded by respective provisions in the pledge agreement. The priority of pledges under Austrian law depends upon the time the act of publicity was made (and thereby the publicity requirement met) in a particular pledging situation.

4.6 What other forms of security can be granted over an aircraft and/or engine lease?

Please see question 4.4.

5 Enforcement and Repossession

5.1 What are the circumstances in which a mortgagee or owner can take possession of the aircraft and/or sell the aircraft? What requirements must the mortgagee or owner comply with?

As a general principle under Austrian law, the owner/lessor is not entitled to repossession as long as the operator/lessee is validly entitled to operate the aircraft, i.e. as long as no event of default has occurred under the respective lease contract.

Thus, as a first step, the owner/lessor would be required to terminate the lease contract. In such case it must be considered, however, that Sec 25(a) Austrian Insolvency Code (*Insolvenzordnung*) restricts the termination rights of the owner/lessor if insolvency proceedings have been opened with regard to operator/lessee (please see question 8.4).

In case the aircraft is subject to a pledge, the pledgee may enforce the pledge if the payment obligations secured by the pledge are not paid when due. In the event of such default, the pledgee is obliged to request in writing from the pledgor to settle the obligations and shall inform the pledgor in such request that a public auction or a private sale will take place if the obligations are not settled in full within a period not less than seven days. Enforcement can be made by way of public auction or freehand sale (*Freihandverkauf*).

In the case of a public auction, the pledgee would not be entitled to sell the Aircraft by way of private sale, but must appoint an auctioneer publicly authorised in accordance with the Austrian Trade Code (*Gewerbeordnung*).

5.2 What is the procedure for repossession of the aircraft?

Unless the aircraft is redelivered by an operator/lessee upon termination of the lease agreement, or the owner/lessor was able to take the possession of the aircraft by exercising the remedies as agreed in the lease agreement, the owner/lessor would require court assistance for repossession.

The owner/lessor would have to sue the operator/lessee for redelivery of the aircraft and would need to obtain a final judgment by the competent regional court (*Landesgericht*), unless the owner/lessor and the operator/lessee have entered into an irrevocable and unconditional undertaking of the operator/lessee to surrender the aircraft to the owner/lessor in the form of an immediately enforceable notarial deed (*sofort vollstreckbarer Notariatsakt*). Such undertaking substitutes a final court judgment and entitles the owner/lessor to directly apply for an enforcement court order by the municipal court (*Bezirksgericht*) at the Lessee's place of business or at the place where the aircraft is located to repossess the aircraft.

Self-help enforcement will in any event not be permitted.

5.3 Will local courts recognise a choice of foreign law in an aircraft mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?

The Austrian courts would give effect to the choice of foreign law to govern the Austrian pledge agreement subject to the provisions of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and, where it concerns non-contractual obligations arising out of such pledge agreement, subject to the provisions of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11

July 2007 on the law applicable to non-contractual obligations (Rome II), provided, however, that according to the Austrian Private International Law Act, rights *in rem* pertaining to aircraft registered in the Austrian aircraft register (such as a pledge) are in any case subject to Austrian law.

5.4 Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee or lessor? Are any interim relief measures available?

A judgment, decree or order of a foreign court is recognised and can be enforced in Austria in accordance with Sec 2 para 2 Austrian Enforcement Act (*Exekutionsordnung*), if it is directly enforceable in Austria pursuant to EC Regulation No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Judgments outside the scope of EC Regulation 805/2004 can be enforced in Austria if (i) their enforceability is provided for in an international treaty or EC Regulation 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, and (ii) if the court rendering the judgment had jurisdiction, the defendant was properly summoned by the relevant court, and the judgment is enforceable in the state where such court is located. Furthermore, enforcement of such judgment requires an order of enforcement (*Vollstreckbarkeitserklärung*) by the municipal court (*Bezirksgericht*) at the Lessee's (or the person's against who enforcement is sought) registered office.

5.5 Are powers of attorney from a local airline in favour of a lessor or mortgagee likely to be effective to allow the lessor or mortgagee to deregister the aircraft? Can such powers be irrevocable, be governed by a foreign law and/or do they need to be in any particular form for local recognition?

Deregistration powers of attorney granted from a local airline in favour of a lessor or pledgee are effective. Basically, a deregistration power of attorney can be governed by a foreign law and can be granted for an indefinite period and/or irrevocably. In the event of the opening of bankruptcy proceedings over the grantor of the deregistration power of attorney, however, such indefinite or irrevocable power of attorney will lapse in accordance with mandatory provisions of the Austrian Insolvency Code.

Besides, a deregistration power of attorney which has been irrevocably granted may nevertheless be revoked by the principal in accordance with Austrian *ordre public*.

No specific form requirements apply to deregistration powers of attorney; in practice, however, such powers of attorney are always made in the form of a written document.

5.6 If recovery of the aircraft is contested by the lessee and a court judgment is obtained in favour of the lessor, how long is it likely to take to gain possession of the aircraft?

Court proceedings for enforcement of a court judgment take two to four weeks but may take much longer if the lessee uses all remedies available to him.

5.7 Are there any restrictions on the ability of the lessor to export the aircraft from your jurisdiction on termination of the leasing?

There are no restrictions in relation to the export of the aircraft

from Austria upon termination of the lease. However, an export certificate of airworthiness (*Lufttüchtigkeitszeugnis für die Ausfuhr*) will be required in certain cases.

5.8 Are exchange controls prevailing in your jurisdiction as regards payments in foreign currency? Will any consents be required for the remittance of the sale proceeds abroad?

In general, payments to foreign recipients, including remittance of sale proceeds abroad, are not subject to exchange control. However, the Austrian National Bank may issue regulations or resolutions by which certain transactions with foreigners are restricted.

If a transaction is subject to prior approval, such approval must be obtained from the Austrian National Bank. Transactions made without approval are void unless such transaction was permitted retrospectively.

5.9 If the lease is governed by English law and a judgment is obtained by the lessor in the English courts, can that judgment be automatically enforced in your jurisdiction or will the case have to be re-examined on its merits?

Please see question 5.4.

5.10 What is the applicable procedure for repossession of an aircraft under other forms of security interests?

Please see questions 5.1 and 5.2.

6 Conventions

6.1 Has your jurisdiction ratified any of the following: (a) The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention); (b) The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention); (c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention); and (d) The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention) and the Protocol on the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment?

Austria has only ratified the Chicago Convention of 1944 on International Civil Aviation effective as of 26 September 1948. The Geneva Convention, the Rome Convention and the Cape Town Convention have not been ratified.

6.2 Has ratification of the Cape Town Convention caused any conflicts or issues with local laws?

This is not applicable.

6.3 What is the legal position regarding non-consensual rights and interests under Article 39 of the Cape Town Convention?

This is not applicable.

6.4 Has your jurisdiction adopted the remedies on insolvency provided under Article XI of the Protocol to the Cape Town Convention?

This is not applicable.

6.5 What is the procedure to file an irrevocable deregistration and export request authorisation under the Cape Town Convention (IDERA)?

This is not applicable.

7 Liability for Damage and Environmental

7.1 Can the owner be strictly liable – liable without a requirement to prove fault or negligence – for any damage or loss caused by the aircraft assuming the owner is an innocent owner with no operational control of the aircraft?

The owner without operational control over the aircraft is not liable for damages caused by an aircraft under Austrian law.

7.2 Does the EU Emissions Trading System (EU ETS), or any similar scheme, apply to aircraft and aircraft operators in your jurisdiction? Will charges levied according to the EU ETS, or its equivalent, give rise to any *in rem* rights in relevant aircraft which are part of the fleet of the operator concerned and, if so, will such rights rank in priority ahead of any mortgage interests properly registered in the relevant aircraft and/or engine?

The EU Emissions Trading System has been incorporated in the Austrian Emission Certificate Act (*Emissionszertifikatesetz 2011*) and applies to aircraft and operators of aircraft.

Under Austrian law, charges under the EU ETS do not create *in rem* rights in relevant aircraft which are part of the fleet of the operator concerned.

7.3 What liabilities (actual or potential) could an owner, lessor or financier of an aircraft incur in your jurisdiction because of a failure to comply with local environmental law and/or regulations on the part of an operator of aircraft leased or financed by it?

Under Austrian law, the owner, lessor or financier of an aircraft are not liable for breaches of local environmental law and/or regulations.

Relevant environmental regulations, such as in particular the Austrian Emission Certificate Act and the Austrian Civil Aircraft Noise Acceptance Ordinance (*Zivilluftfahrzeug-Lärmzulässigkeitsverordnung*), apply to the operator.

The regulations of the Austrian Emission Certificate Act impose penalties on the operator of the aircraft for the failure to provide adequate monitoring of emissions from aviation activity, to submit a monitoring plan, to report emissions from aviation activity, to submit a certificate from an independent verifier and to report within the prescribed time limit. In addition, sanctions will be imposed on the operator of the aircraft, in case he has not surrendered a sufficient number of emission certificates in time to cover his emissions.

The Austrian Civil Aircraft Noise Acceptance Ordinance includes sanctions if the operator of an aircraft does not provide appropriate evidence that the operation of the aircraft does not cause excessive noise.

8 Insolvency and Searches

8.1 Are there any public registers in your jurisdiction where a search can be carried out to determine whether an order or resolution for any bankruptcy, bankruptcy protection or similar insolvency proceedings has been registered in relation to an operator or lessee?

The Austrian insolvency register is owned and maintained by the Austrian Federal Ministry of Justice. It contains information on the initiation of insolvency proceedings and key procedural steps in the process.

The Austrian insolvency register is accessible via the website of the legal notices database (*Ediktsdatei*) under www.edikte.justiz.gv.at.

8.2 In the event that an operator or lessee were to become insolvent either on a balance sheet basis (assets less than liabilities) or is unable to pay debts as fall due, would an operator or lessee be required to file for insolvency protection?

An operator/lessee must file for insolvency without undue delay, but in any case within 60 days of the operator/lessee becoming illiquid or over-indebted pursuant to the respective provisions of the Austrian Insolvency Code.

A debtor is illiquid within the meaning of Sec 66 Austrian Insolvency Code when it is permanently unable to pay all of its liabilities that are currently due. Liabilities that will be due in the future are not taken into account for this test.

A debtor is over-indebted within the meaning of Sec 67 Austrian Insolvency Code if (i) the aggregate amount of its liabilities exceeds the aggregate liquidation value of its realisable assets, and (i) a business forecast shows that the debtor is likely to become illiquid within the current or the following fiscal year.

8.3 Do the available forms of insolvency protection in your jurisdiction involve the appointment of either an officer of the court or a specifically court appointed official to take control of the operator or lessee (an 'Insolvency Official') while in insolvency protection?

Upon the opening of insolvency proceedings, an insolvency administrator is appointed by the competent insolvency court who will take over the management of the debtor and the debtor's business operations.

8.4 Does the commencement of insolvency protection involving the appointment of an Insolvency Official in your jurisdiction have the effect of prohibiting the owner from taking the following actions to enforce the lease after commencement of such protection: (a) applying any security deposit held by the owner against any unpaid amounts due under the lease; (b) accepting payment of rent or other lease payments from the lessee, a guarantor or a shareholder; (c) giving notice of default under the lease; (d) obtaining a judgment or arbitral award for unpaid lease payments; (e) giving notice to terminate the leasing of the aircraft and/or engine; or (f) exercising rights to repossess the aircraft and/or engine?

The application of security deposits depends on the structuring of such deposit and may be restricted.

Acceptance of rent or lease payment is permitted unless the payor itself is insolvent. Thus, in case insolvency proceedings are opened over the lessee, any payment of the lessee to the owner made after the lessee has become illiquid or over-indebted may be challenged by the insolvency administrator.

The giving of notice of default is not restricted.

Upon commencement of insolvency proceedings, legal actions against the lessee for unpaid lease payments are not permitted. Pending lawsuits against the lessee will be stayed. The owner would have to assert his claim to be taken into account during the insolvency proceedings.

The termination of a contract by a creditor within a period of six months after the opening of insolvency proceedings is only permitted for good cause, if the termination of the contract could endanger continued operation of the business of the operator/lessee. The deterioration of the operator/lessee's economic position and the default of the operator/lessee concerning claims that have become due prior to the opening of insolvency proceedings do not qualify as a "good cause".

During the first six months of the insolvency proceedings, the owner is not entitled to demand re-delivery of the aircraft or exercise any rights for repossession in case this would endanger the continuation of the business of the lessee.

8.5 Can the commencement of insolvency proceedings have retrospective effect in relation to any such actions taken before commencement? If so, for what period can there be a look back?

The commencement of insolvency proceedings does not have retrospective effect. However, the insolvency administrator may challenge certain legal actions taken by the debtor with or in favour of a creditor to the detriment of other creditors. The time period for such challenge varies from six months up to 10 years in specific cases.

8.6 Is there, either under law or as a matter of practice in your jurisdiction, a period of time within which the Insolvency Official will either 'adopt' the lease and pay rent and other lease payments as an expense of the insolvency or 'reject' the lease and permit the owner to enforce such rights as it may have under the lease? (a) If the lease is 'adopted', will the Insolvency Official also pay any unpaid lease payments due as at commencement of the insolvency protection? (b) If not or if the lease is 'rejected', would the owner's claim for any outstanding sums rank equally with other ordinary unsecured creditors of the lessee?

Under Austrian law, the lease agreement will be continued with the insolvency estate upon commencement of the insolvency proceedings. The insolvency administrator is entitled to terminate the lease agreement any time within the statutory notice period or a shorter notice period if and as agreed in the lease agreement.

Unpaid lease payments due at the commencement date will not be paid by the insolvency administrator but must be filed as insolvency claims. The same applies in case the insolvency administrator should decide to terminate the lease agreement. In any case, such claims will rank equally with other ordinary unsecured creditors of the lessee.

8.7 Are there certain types of preferred creditors whose claims will rank above claims of the owner?

Costs of the insolvency proceedings, expenses incurred by the insolvency administrator in connection with the operation of the debtor's business, including taxes, wages and creditors' claims arising after commencement of the insolvency proceedings rank above unsecured claims of the owner.

In case the claims of the owners are secured (e.g. by a pledge), the owner may demand separation of the pledged asset from the insolvency estate and separate liquidation. The owner's claims will then be satisfied out of the liquidation proceeds.

8.8 If the aircraft is in the possession of a person other than the operator or lessee at the commencement of Insolvency Protection of the operator or lessee, for example, an independent maintenance facility, will such person be entitled, under the laws of your jurisdiction, to assert a lien arising under law or contract over the aircraft in respect of amounts then due and unpaid to such person by the operator or lessee?

No – such person would not be entitled to assert a lien.

9 Detention and Confiscation

9.1 Other than insolvency laws (see section 8), are there any laws which may have the effect of defeating the owner's right in the aircraft – for example, Government requisition? Do the laws of your jurisdiction provide for any compensation in such circumstances?

Customs authorities and criminal courts may detain and seize the aircraft in the course of criminal proceedings or proceedings for fiscal offences. Also, tax authorities may initiate enforcement proceedings to enforce collection of tax payables (these proceedings would in principle follow the same procedure as the enforcement of the lease agreement or the pledge).

9.2 Are there any rights in relation to third parties to detain or sell the aircraft pursuant to illegal activities, tax or any other laws if the operator or lessee fails to pay when due? If so, can the aircraft be forfeited and sold without the owner being made aware?

See question 9.1.



Dr. Christoph Wildmoser is a partner of the firm. He specialises in M&A, private equity and finance transactions. Christoph has acted for national and international clients on domestic and cross-border private and public M&A and private equity transactions as well as acquisition and asset financings. In particular, he has extensive experience in rail and aviation financings.

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