

ITALY

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ITALY

PART 1

LIENS

1

What is a lien under Italian law?

Nature of a lien

Under the Italian law, the lien is a security interest on asset(s) which can be created voluntarily (mortgages, pledges) or by operation of law (so called "privileges") and which can be general (privileges only) or special (mortgages, pledges and privileges).

According to art.2741 of the Italian Civil Code ("ICC"), creditors have equal rights to debtor's assets, except for the liens recognised under Italian law.

Immovable and registered movable assets are generally subject to two types of security interests:

- privileges (*privilegi*); and
- mortgages (*ipoteche*).

Special and general liens

As pointed out above, liens can be general and special. A general lien is enforceable on all movable assets of the debtor; a special lien is enforceable both on specified movable or immovable assets. The mortgage (*ipoteca*)¹ can only be special and can only be granted on immovable or registered immovable.

AIRCRAFT LIENS

2

What aircraft liens exist under Italian law? What are their essential characteristics?

Under the Italian law, there are two categories of liens on aircraft, i.e. mortgages ("*ipoteche*") and privileges ("*privilegi*").

The mortgage is the most common priority on aircraft and the only one which can be voluntarily granted, whilst privileges on aircraft can only arise by operation of law. A mortgage on aircraft can only be created by public deed, either unilateral or bilateral, certified by a public notary and registered with the *Registro Aeronautico Nazionale* ("Italian Aircraft

Registry or RAN") kept by *Ente Nazionale per L'Aviazione Civile* ('ENAC").

There are two categories of privileges: ICC privileges, which are provided by the Italian Civil Code, and INC privileges, which are provided by the Italian Navigation Code. ICC privileges on aircraft secure ordinary costs of participation in the enforcement proceedings,² as well as conservation and upgrading costs (*conservazione e miglioramento*).³ INC privileges secure⁴:

- salvage liens;
- possessory liens (for custody and conservation of the aircraft);
- judicial expenses and costs;
- airport duties or similar duties and taxes;
- wages of the captain and crew;
- credits of the Aviation Administration or the Italian Consular Authorities;
- credits for social security contributions;
- damages caused by the aircraft to third parties or goods; and
- expenses incurred by the aircraft's captain.

As far as the priority, creditors secured by an INC privilege on the aircraft are preferred to mortgage creditors, whilst INC⁵ privileges and mortgages are preferred to ICC privileges.

3 REGISTRATION OF AIRCRAFT LIENS

Can aircraft liens be registered in the Italian Aircraft Registry? Or in any other public register? What is the effect of registration?

A mortgage is the only lien which can be registered in the Italian Aircraft Registry pursuant to art.1030 INC and it takes effect from the relevant registration. Failing the registration, the mortgage is null and void, as if it had never come into existence.

Mortgages are granted by way of registration of the deed which gave rise to the mortgage in the Aircraft Registry and making an annotation on the Certificate of Registration that the aircraft is subject to a mortgage.

A mortgage can also be granted over an aircraft under construction. In this case, it can be registered in the special construction registry (which is maintained separately from the Aircraft Registry) as soon as the construction of the aircraft is noted in such a registry.

Unlike mortgages, privileges cannot be registered with the Italian Aircraft Registry. There is no other public registry in Italy where privileges can be registered.

SELLER'S LIENS

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What is a seller's lien? When will it arise in the case of an aircraft?

In Italy, there is no seller's lien on the aircraft. The seller of an immovable asset is entitled to a "legal mortgage" (*ipoteca legale*) on the asset which has been sold up to full payment of the purchase price.⁶ "Legal mortgage" means a mortgage arising automatically as a consequence of a provision of law. Such legal mortgage does not arise in respect of the payment of the purchase price of aircraft (and vessels), and this absence has been explained by some authors as being necessary to facilitate the sale and the finance of aircraft (and vessels).⁷ A potential purchaser (or financier) will be reassured by the absence of any legal mortgage on the aircraft, and will only need to check with the Italian Aircraft Registry to determine the absence of contractual mortgages.

Consequently, the seller of an aircraft is not granted neither with a mortgage nor with a privilege, but can always agree on a voluntary mortgage with the purchaser to secure the payment of the purchase price. In any case, should the purchaser fail to pay the purchase price, the seller can start legal proceedings for payment and request the precautionary arrest (*pignoramento*) of the aircraft.

SALVAGE LIEN

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What is a salvage lien? When will it arise in the case of aircraft?

A salvage lien arises over an aircraft for "assistance (to persons) and salvage (of the aircraft) fees and indemnities".⁸ As in other jurisdictions, under the Italian law, the salvage of an aircraft in distress (and of the persons on board in danger) is a compulsory obligation. Thus, the captain of an aircraft who fails to provide assistance to or to attempt the salvage of another aircraft when that aircraft is in distress, will incur criminal sanctions. This obligation to render assistance to (or the salvage of) an aircraft during air navigation is compulsory when the aircraft in danger is on sea, internal waters, or in a desert area.⁹

"Aircraft in distress" means an aircraft that is incapable of taking-off again. "Persons in danger" mean persons whose lives are in danger.¹⁰ The captain of an aircraft in flight or which is ready to take-off must provide assistance when he/she has been made aware of the situation and believes that assistance can be effectively carried out with no serious danger to aircraft by rendering such assistance.

The salvaged aircraft is subject to a salvage lien both in respect of any assistance rendered to passengers in danger and the salvage of the aircraft itself.

6 POSSESSORY LIEN

What is a possessory lien? When will it arise in the case of aircraft?

Possessory liens are provided by arts 552 and 1023 INC and arise from the "costs of custody and conservation" of aircraft.

According to Italian case law, the word "custody" means keeping the aircraft safe while it is stationary and grounded.¹¹ The word "conservation" refers only to the costs that are strictly necessary to preserve the aircraft when it is subject to attachment.¹² According to certain Italian doctrine, all costs for keeping the aircraft airworthy shall be treated as falling within the meaning of the word "conservation" and thus they shall be secured by this lien.¹³ Other doctrine limits the secured expenses to those that are necessary "for safety (of the vessel) and its ordinary maintenance".¹⁴ Custody or conservation have to be authorised by the owner or the lessee. Performance of A-D checks will likely give rise to a lien over the aircraft in favour of the maintenance provider. Similarly, warehousing will likely be regarded as a form of custody, thus originating a lien.

The aircraft custodian or repairer has not only the right in rem against the aircraft to meet the debt arising from its work, but also a right of aircraft detention until full payment of that debt.¹⁵

7 CONTRACTUAL LIEN

What is a contractual lien? When will it arise in the case of aircraft?

The contractual lien is a security created voluntarily on an aircraft. The only lien which can be voluntarily granted on aircraft is the mortgage,¹⁶ which is created by unilateral or bilateral public deed.

8 OTHER TYPES OF AIRCRAFT LIEN

Are there any other forms of aircraft lien? Or similar rights that do not give rise to a lien?

Besides the salvage lien and the possessory lien, there are various other liens that can arise on aircraft. In particular (see art.1023 INC):

- (a) *Judicial expenses and costs.* Judicial costs due to the State (i.e. the Ministry of Justice or other governmental bodies) and costs incurred in the common interest of the creditors for enforcement measures against the aircraft (see 13) give rise to a lien. The latter includes the so-called "enforcement procedure" (*procedura esecutiva*), which is the procedure for the public action of the aircraft and the parts and accessories thereof. This lien will not only extend to the parts and accessories of the aircraft, but also to the amounts due by the lessee to the lessor for its (last) flight.

- (b) *Airport duties.* Airport duties incurred by an aircraft can give rise to a lien (see 18).
- (c) *Wages of the captain and crew.* Unpaid wages of the master and the crew can give rise to a lien on the aircraft,¹⁷ on parts and accessories of the same and on the money due by the lessee to the lessor.
- (d) *Credits of the Aviation Administration or of the Consulate.* Costs incurred by the Aviation Administration or by an Italian consulate to assist (and, where applicable, to repatriate) the aircraft crew give rise to a lien over the aircraft.¹⁸ Aviation Administration refers to the Ministry of Transport and the Italian Civil Aviation Authority (ENAC).
- (e) *Credits for social contributions.* Compulsory social contributions due to the Italian Social Security (or any other similar institution) in respect of the aircraft's crew give rise to a lien.¹⁹ Social contributions are only those originated during the last flight.
- (f) *Damages caused by aircraft.* Compensation for third party damages on ground caused by the aircraft when the operator has not taken out compulsory insurance cover gives rise to a lien.²⁰ Similarly, compensation for damages caused by the aircraft to other aircraft or vessels gives rise to a lien. The Italian Navigation Code expressly provides that this form of lien arises when the damages are caused by physical contact of an aircraft with another aircraft or with a vessel. The aircraft has to be "in flight". This definition includes the period of time from the beginning of take-off to the completion of landing procedures. A lien also arises when the damage is a consequence of a "movement of air" caused by the aircraft²¹ and or for any other similar reason. Finally, compensation for damages and injury to passengers and goods on the aircraft give rise to a lien.
- (g) *Expenses of the captain.* Expenses incurred by the aircraft captain give rise to a lien when they have been made to preserve the aircraft or to enable it to continue its journey. An example the undertaking of repairs or the purchase of fuel by the captain in order to continue the flight.

The INC liens above (including salvage lien) have two common characteristics:

- (1) the lien secures only the credits arising from a specific flight.²²
- (2) the lien is cancelled upon full payment of the debt, or 90 days after the date:
 - (i) of salvage operation ending (salvage lien);
 - (ii) of the accident (damage lien);
 - (iii) of the arrival of the crew at the airport of final destination following the expiration of their employment contracts (wage lien); or
 - (iv) when payment was due (for the other types of INC liens).²³

PRIORITY OF AIRCRAFT LIENS

9 What is the priority of aircraft liens under Italian law?

The priority of aircraft liens under Italian law is as follows:

- (1) *Judicial expenses and costs, airport duties (or similar duties or taxes), and custody and conservation costs.* The Italian Navigation Code refers to "airport duties, other similar duties or taxes". This definition is not clear, and it could be argued that also air navigation charges are included therein. These three categories of aircraft liens have the same priority, and the order of priority is determined in accordance with the order on which the incidents occurred (i.e. first in time, first in line);
- (2) *Wages of captain and crew;*
- (3) *Credits of the Italian Aviation Administration or the Italian Consular Authorities;*
- (4) *Credits for social security contributions;*
- (5) *Damages caused by the aircraft.* An aircraft lien for injury to persons has priority over the one for damages to goods²⁴;
- (6) *Expenses incurred by the aircraft's captain;*
- (7) *Registered mortgages.* Registered mortgages have priority over ICC liens. However, they do not have priority over INC liens listed in (1)–(6), above²⁵; and finally
- (8) *ICC liens.* The Italian Civil Code provides a number of liens. Most of these liens are not applicable to aircraft, and it is believed that only the liens for judicial expenses and costs, on one hand and for conservation and upgrading costs on the other hand will apply. However, some of the other liens can have impact on the air carrier business. For example, the lien of handling company on air carrier equipment provided to the handling agent to perform certain activities for the air carrier.²⁶

If more than one lien of the same category arises on the same aircraft, the order of priority will be the order on which the liens arose or (for the mortgages) were registered (i.e. first in time, first in line).

RIGHTS OF OWNER OR LESSOR V LIENHOLDER

10 What are the rights of the owner or a lessor of an aircraft against a lienholder?

Italian law does not allow self-help remedies. Therefore, the liens can only be enforced through the judicial system, before the competent court. The owner (or the lessor) of the aircraft is entitled to oppose the lienholder's claim if he can give evidence that the relevant lien did not, in fact, arise (e.g. because the conditions for the existence of the lien did not

occur), or that the credit secured by the lien does not exist, or has been satisfied.

The lienholder will have the right to bring an action against the owner to enforce its lien, and it may apply for the attachment or seizure of the aircraft (*sequestro conservativo*) before the Italian court which has jurisdiction.²⁷ Further, once the legal proceedings for enforcement against the aircraft have been completed, the lienholder will have priority to the sale proceeds of the aircraft over the other creditors.

RIGHTS OF MORTGAGEE V LIENHOLDER

What are the rights of a mortgagee of an aircraft against a lienholder?

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As indicated in 9 above, the aircraft liens provided by art.1023 INC take priority on the mortgage, which means they are preferred in the distribution of the sale proceeds. The mortgage takes priority on the aircraft liens arising pursuant to the ICC.

RIGHTS OF LESSEE V LIENHOLDER

What are the rights of a lessee of an aircraft against a lienholder?

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Liens cannot be registered in Italy, and the lessee will not be able to know the possible existence of the same by checking the Italian Aircraft Registry. However, the lessee will be aware of most of the liens that will arise on the aircraft being the operator of the same. In particular, the lessee is normally aware, having caused the same through the operation of the aircraft, of the costs and expenses generating aircraft liens. For these liens see 2 above.

ENFORCEMENT OF AIRCRAFT LIENS

How does an aircraft lienholder enforce its lien under the Italian law? What Italian court will have jurisdiction?

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Legal proceedings

As pointed out in 10 above, under the Italian law self-help remedies are not enforceable and a lien grants priority on the sale proceeds of the relevant aircraft. As a result, a lienholder shall always act before the competent court to enforce its right and priority before other creditors. The lienholder may request that the Italian court imposes a *sequestro conservativo* (i.e. a precautionary arrest) on the aircraft, if it assumes that the satisfaction of its credit can be jeopardised by the length of the ordinary enforcement proceedings (see below).

The enforcement proceedings on aircraft start with the service of a notice to pay to the debtor.²⁸ The notice warns the debtor to settle its outstanding debt within 24 hours.²⁹ Failure to settle within this timeframe will result in the second phase, which is the service of a notice

(*pignoramento*) on the debtor and on the captain of the aircraft.³⁰ This notice will contain details of the aircraft and will warn the captain not to take off, nor to remove the aircraft from its present location.³¹ The Italian Aircraft Registry will receive a certified true copy of the enforcement notice and will record it on the Register.

Arrest of the aircraft

Italy is party to the Rome Convention on the Precautionary Arrest of Aircraft (see 15). As a result, certain aircraft are exempt from arrest. Precautionary arrest can be obtained rather quickly from an Italian court,³² and it follows the general rules of the Code of Civil Procedure.³³ The precautionary arrest injunction will be served on the owner of the aircraft and on the captain.³⁴ The Italian court will authorise the arrest of the aircraft and will appoint a custodian for the aircraft, as requested, either by the debtor or the creditor, fixing the terms and the limits of his or her duties.³⁵ The custodian could be authorised by the judge to carry out maintenance on the aircraft pending its arrest. The arrest of the aircraft will be performed by a bailiff (*ufficiale giudiziario*), who is appointed by the court.

Furthermore, pursuant to art.1057 INC, to the extent an aircraft is operated for scheduled services in Italy, seizure, confiscation, attachment, arrest or precautionary measures on such aircraft would require the prior authorisation of the Italian Ministry of Transport. The provision above is meant to prevent such seizure, confiscation, or attachment interfering with the correct and punctual performance of scheduled flight services for passengers.

Jurisdiction

If no legal proceedings have been instituted, the Italian court having jurisdiction on the precautionary arrest of the aircraft is the court of the place where the aircraft is located. If legal proceedings have been already instituted, the Italian court having jurisdiction on the merits of the proceedings has also jurisdiction on the precautionary arrest of the aircraft.

Sale of the aircraft

The sale of the aircraft can be requested from 30 to 90 days after the service of an enforcement notice. The Italian judge will then receive an appraisal by the Italian Aircraft Registry and will order the sale of the aircraft within five days after receipt of the appraisal.

RIGHTS IN REM AGAINST AIRCRAFT

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Is there a right in rem against an aircraft under Italian law?

As mentioned in point 1, an aircraft is a "registered movable asset". As such, it is subject to rights in rem, provided that the concept of a right in rem under the Italian legal system is rather different to the English one. The lien is regarded as a guarantee right in rem (*diritto reale di garanzia*) as opposed to an enjoyment right in rem (*diritto reale di godimento*), such as the right of a lessee.

Thus, under the Italian law the lienholder has a ius in rem on the property of a third party, and may bring an action against the owner of an aircraft to assert its lien and to claim priority on the proceeds of the sale of the aircraft (see 13).

INTERNATIONAL CONVENTIONS AND LIENS

15

Is Italy party to any international Conventions that relate to aircraft liens? How do these Conventions apply?

Geneva Convention

Italy is signatory of, and has ratified, the Geneva Convention on the International Recognition of Rights in Aircraft (the "Geneva Convention") on December 6, 1960.³⁶ As a result, the provisions of the Geneva Convention apply as part of Italian law. The Geneva Convention requires a Contracting State to recognise certain "rights" on aircraft, where they:

- have been constituted according to the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution; and
- are regularly registered in a public registry of the Contracting State where the aircraft is registered.³⁷

Such "rights" include conditional sale and credit sale agreements, mortgages (legal and equitable), fleet mortgages, leases with a term of more than six months, aircraft trust agreements and pledges. The Convention also provides that, in priority to these rights, Contracting States must recognise claims in respect of:

- compensation for the salvage of the aircraft; and
- extraordinary expenses indispensable for the preservation of the aircraft, providing that these acts gave rise to a charge against the aircraft under the law of the Contracting State where the salvage or preservation operations terminated.³⁸ Further, these foreign claims will only have priority provided that they have been noted in the foreign Aircraft Registry within three months from the date of the

