



Unidroit Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment



Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment)

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### ESTABLISHMENT OF AN INTERNATIONAL REGISTRY FOR THE REGISTRATION OF INTERNATIONAL INTERESTS IN AIRCRAFT OBJECTS

(Presented by the ICAO Secretariat)

#### 1. PURPOSE OF THE WORKING PAPER

1.1 This working paper addresses legal, operational and financial questions concerning the establishment and operation of an International Registry for the registration of international interests in aircraft objects raised by the preliminary draft [Unidroit] Convention on International Interests in Mobile Equipment (contained in LSC/ME-WP/3 and Unidroit Study LXXII Doc. 42) (hereinafter referred to as the «draft Convention») and the preliminary draft Protocol to the preliminary draft [Unidroit] Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (contained in LSC/ME-WP/4 and Unidroit Study LXXIID Doc. 3) (hereinafter referred to as the «draft Protocol»), both of which were submitted to the Joint Session for consideration. The paper also proposes the creation of a Registry Expert Group to deal with the important open issues of the international registry system.

#### 2. SUMMARY OF THE DRAFT RULES RELATING TO THE INTERNATIONAL REGISTRY

The draft Convention and the draft Protocol set out the functions and certain aspects of the mode of operation of the International Registry. The following briefly sums up the relevant provisions.

##### 2.1 Functions of the Registry

2.1.1 The International Registry as conceived by the draft Convention and the draft Protocol is a public register in which the holder of a security interest in an aircraft object may register its interest in order to give public notice of this interest to third parties and to establish its priority over subsequently registered interests and unregistered interests. Registrable interests are certain defined categories of consensual interests, i.e. interests created by agreement between parties, and of non-consensual interests, i.e. interests created by law. Non-consensual interests are registrable only if so specifically designated by a Contracting State (Articles 16 and 39 of the draft Convention and Article IV of the draft Protocol). The priorities among registered interests are based on the first-to-file rule (Article 28 of the draft Convention), except for certain categories of non-consensual rights and interests which, under certain conditions, have priority over registered interests if so specifically designated by a Contracting State (Article 40 of the draft Convention).

2.1.2 In addition to registrations of private parties' international interests, the International Registry shall maintain a list of national non-consensual rights and interests designated by Contracting States to be registrable (Article 24 of the draft Convention). Information in the Registry shall be searchable by interested parties (Article 20 of the draft Convention). To provide parties with evidence of the registered information, the Registry shall issue search certificates stating the registered information (Article 23 of the draft Convention).

## 2.2 Institutional Framework for the Registry

2.2.1 The draft Convention and the draft Protocol make several alternative proposals with respect to the institutional implementation of operation, oversight and regulation of the Registry. Pursuant to «Alternative A» (Article XVI of the draft Protocol), the operation of the Registry on the one hand and its oversight and regulation on the other hand shall either be combined in a single entity, the International Registry Authority (unitary system) or divided between the International Regulator and the Registrar (binary system). «Alternative B» (Article XVI of the draft Protocol) provides that in the case that a binary system is established, the ICAO Council or any other permanent body shall be designated to be the International Regulator (called «Intergovernmental Regulator» in the draft Convention) and a special purpose affiliate of IATA shall be created to act as the Registrar. The International Registry shall be vested with international legal personality (Article 16(2) of the draft Convention).

2.2.2 The draft Convention envisages that national registration facilities form an integral part of the international registration system as transmitters of filings or, under certain conditions, as exclusive points of access to the International Registry (Article 17 (2) of the draft Convention). Contracting States, however, are free to designate national registration facilities (Article XVIII of the draft Protocol).

## 2.3 Regulation of the Registry

2.3.1 The Intergovernmental Regulator (in case of a binary system) or the International Registry Authority (in case of a unitary system) shall establish the Registry, designate the Registrar, and oversee and regulate the activities of the Registrar and the operation of the Registry (Article 17 (3) of the draft Convention). To this effect, the Intergovernmental Regulator shall establish regulations which prescribe, *inter alia*, (see Article XIX (5) of the draft Protocol):

- 1) the responsibilities of the Registrar and national registration facilities insofar as they are not contained in the Protocol (Article 17 (2) of the draft Convention);
- 2) the conditions and requirements under which a registration is effected (Article 18 of the draft Convention);
- 3) the procedures pursuant to which the Registrar and national registration facilities may request advice from the Intergovernmental Regulator and the manner in which the oversight is conducted (Articles 17 (4) and (7) of the draft Convention);
- 4) the conditions of public accessibility of the Registry, its search, and the issuance and form of search certificates (Articles 23 and 25 of the draft Convention);
- 5) the availability of a list of non-consensual rights and interests (Article 24 of the draft Convention);
- 6) the medium of transmission of information to the Registry (Article 19 of the draft Convention);

- 7) the period of effectiveness of the registration (Article 22 of the draft Convention);
- 8) the applicable fees (Article 17 (4) of the draft Convention).

The Intergovernmental Regulator shall be responsible to the Contracting States (Article XVII of the draft Protocol).

## **2.4 Operation of the Registry**

2.4.1 The operator of the International Registry (i.e. either the International Registry Authority or the Registrar) shall operate the Registry pursuant to the rules in the draft Convention, the draft Protocol and the Regulations and pursuant to directions of the International Regulator. The Registrar shall insure against liability for its acts and report to the International Regulator (Article 17 (5) of the draft Convention). It shall be an asset-based database, i.e. searchable according to the manufacturer's airframe or engine serial number (Article 20 (1) of the draft Convention, Article XIX (1) of the draft Protocol).

## **3. ISSUES REQUIRING CONSIDERATION**

### **3.1 The Filing and Registration System**

3.1.1 There are basically two different kinds of filing and registration systems, the notice filing system and the document filing system. In the notice filing system, the records of the registry consist only of so-called financing statements submitted by filing parties which contain the minimum information necessary to make third parties aware of other titles or interests in a collateral. In the document filing system, the records of the registry contain the full documents evidencing title or interest. As the document filing system would involve the registration of sometimes lengthy documents, the selection of one of the mentioned systems has implications for the speediness and efficiency of the Registry, the potential for on-line search and registration, and the magnitude of work required from the Registrar, all of which would impact directly on the operating costs of the Registry.

3.1.2 While the draft Convention and the draft Protocol do not specify a particular filing system for the International Registry (leaving it to be governed by the Regulations), it was agreed in the Study Group's Working Group to Consider the Legal and Technical Issues Raised by the Establishment of an International Register that the need for a fast and efficient system demands a notice filing system. The draft Convention and the draft Protocol were drawn up accordingly so as to allow implementation of a notice filing system which would ideally be operated to the highest extent possible as an on-line system where national registration facilities would have direct access to the International Registry's database and private parties could effect filings and searches from remote locations via any computer terminal with appropriate modem.

3.1.3 In a pure notice filing system the filing party would not be required to file evidence of its title or interest in the form of the deed itself. Consequently, the registrar's ability to review the entitlement of the filing party would be limited. The registrar would only satisfy itself prior to registration that evidence of entitlement seems to exist according to the information provided by the filing party on the notice. Such a system would provide fast notice to third parties of filed security interests and priorities and reduce the possibility of delays and errors in the registration process. However, it would not provide third parties with much certainty as to existence or validity of the registered interests. An International Registry based on a pure notice filing system would be an efficient and lean public «notice board» for the establishment of priorities among interests and notifications by private parties of their interests and titles.

3.1.4 A document filing system would allow the registrar to examine the deed with regard to its formal compliance with particular requirements and conditions for registration.

3.1.5 As an alternative between the two extremes described, a mixed system could be envisaged which would be notice-based with complementary document filing for information purposes only and/or review of documents with a view to securing that the filing party is at least formally entitled with respect to the registered interest.

3.1.6 While most of the world's aviation registration systems are based on the document filing system (including the US register), the UK's civil aviation mortgage register and the Canadian provincial registers are based on the notice filing system. The UK system requires the deed to be filed together with the financing statement or notice. The Quebec register for the registration of security rights in movable personal property is a pure notice filing system.

### **3.2 Hybrid System: Central Registry and National Registration Facilities**

3.2.1 The draft Convention and the draft Protocol provide that a Contracting State may designate national registration facilities under certain conditions as exclusive entry points to the International Registry. However, the draft Convention and the draft Protocol leave the precise role of the national registration facilities to be determined by the Regulations. This warrants consideration:

1) if the role of the national registration facilities shall be limited to the transmission of filed documents or notices to the International Registry or if the national registration facilities shall have direct access to the Registry database so as to allow them to effect registrations directly in the databank; and

2) if the national registration facilities shall perform the vetting of filings, i.e. the process of verifying the compliance of a filed statement or document with the requirements and conditions to be set out in the Regulations.

3.2.2 The role attributed to the national registration facilities will depend on their availability, the applicable filing system, and the technology of the system, as registration through national registration facilities requires an on-line connection between the national registration facilities and the International Registry's database.

3.2.3 In a hybrid system, the smooth functioning of the international registration system will essentially depend on the national registration facilities. The role of the International Registry will depend on the governments' ability to designate adequate national registration facilities. Where no such registration facilities are designated, the International Registry will have to perform the relevant function, e.g. the vetting of filings.

### **3.3 Conditions for Registration/Vetting Procedures**

3.3.1 The draft Convention in conjunction with the draft Protocol leaves the decision on conditions and requirements to be fulfilled in order to effect a registration to the Regulations. A notice filing system would be logically complemented by an administrative screening process, i.e. the Registrar would only satisfy itself that certain conditions for registration appear to exist according to the information provided by the filing party on the notice. However, the Registrar would not verify the contents of the notice, e.g. if the registered interest constitutes in fact an international interest in the sense of the draft Convention. While the verification if the filing party's statements on the notice (financing statement) comply with the conditions for registration could be performed electronically by a computer, the screening of a deed would imply human involvement in the screening process.

3.3.2 If the national registration facilities are included in the pre-registration vetting process, it must be decided if the conditions and requirements to be fulfilled in order to effect a registration need to

be set out comprehensively in the Regulations or if the regulations may limit themselves to setting uniform standards to be filled out by national legislation.

### 3.4 **Transmission of Data and Security**

3.4.1 The draft Convention and the draft Protocol require that the recorded information be stored in electronic format so as to be searchable according to the specified criteria. The mode of transmission to the Registry of the information to be recorded in the International Registry is left to the Regulations. If the rule is to be adopted that a registration takes effect when the information is entered into the Registry's database so as to be searchable (see Article 20 (1) of the draft Convention), the speed of transmission (and processing) of data is of importance to the filing party. It has been recommended that the future system should be operated on-line, i.e. allowing direct access to the central databank. On-line connection could be established via the Internet or any privately-operated network.

3.4.2 On-line access for national registration facilities would allow them to effect registrations of notices/documents filed with them by private parties directly in the Registry's database. The time required to put an on-line system in place for all national registration facilities will necessitate the need for a transition period where a «paper» system (i.e. a transmission of the paper notice/document) co-exists with an on-line system.

3.4.3 On-line access for private parties could allow them to either effect registrations directly in the International Registry's database or, without permitting access to the database itself, to deposit their filings for processing by the Registrar or the national registration facilities.

3.4.4 On-line access to the International Registry raises security concerns. Special mechanisms need to be implemented to safeguard the integrity of the International Registry's databank and to guarantee confidentiality of the transmitted data. Arrangements need to be made between the Registrar and the filing party to allow the Registrar to verify the originator and the authenticity of the electronically transmitted notices. Experience with national registries suggests that it is possible to implement a system of security devices which meets the specific requirements of an on-line registration system.

3.4.5 The entry of information into the database by the national registration facilities or the Registrar may be either by manual or optical means (optical recognition system or scanner), provided the technology is of sufficient reliability. A document filing system intended for electronic storage of the filed documents can only be reasonably operated on the basis of electronic image storing technology. It appears that, at the present time, most national registries rely on manual input, although the US and the UK are in the process of switching to electronic image storage systems. The Quebec registry already relies on this technology for the conversion of paper notices into electronic format.

### 3.5 **Regulations**

3.5.1 The Regulations promulgated by the Intergovernmental Regulator would be in the nature of secondary legislation. In light of the important issues left to the Regulations (e.g. the determination of the role of national registration facilities; the filing system; the determination of the order in which applications received by the Registrar shall be registered), the Regulations should either be declared binding upon the Contracting States or the relevant issues should be included in the Protocol.

### 3.6 **Liability**

3.6.1 The acceptance by the industry of the future Convention and Protocol will be influenced by the existence of a liability regime for acts and omissions of the International Registry. The draft Convention therefore envisages that any person suffering a loss by reason of any error or system malfunction of the International Registry shall be entitled to indemnity (Article 27 of the draft Convention).

3.6.2 A future liability regime should seek a balance between immunity of the International Registry and an equitable approach towards private parties. The choice for a particular liability regime will depend on the applicable filing system, the degree of automatization of the registration process, and the role of the Registrar and of the national registration facilities in the registration process. These elements will influence the likeliness of errors and omissions by the Registry and will consequently determine the Registrar's exposure to liability.

3.6.3 The liability regime will have to set out who may incur liability: the Registrar, the Intergovernmental Regulator, the International Registry and/or the national registration facilities, and define the acts/omissions for which liability may be incurred. In particular it should be identified if and when a delay, as opposed to an omission, in the registration of a filing by the central registry or a national registration facility shall give rise to liability. This is of particular relevance if the rule of the draft Convention is retained that a registration takes effect upon its entering into the Registry's database so as to be searchable (Article 20 (1)). It will further depend on the setting of a time-frame for the processing of filings (processing times may differ from national registration facility to national registration facility) and the possibility to register an «application pending» notice.

3.6.4 With respect to the liability regime, a decision must be made for strict or fault-based liability with reversal of the burden of proof, taking into account the degree of human involvement in the registration process. The wording of Article 27 of the draft Convention suggests a strict liability regime which is commensurate with the high degree of automatization envisaged by the drafters. As a general guideline, the liability regime should reflect accepted liability standards of national laws for the same kind of activity.

3.6.5 The choice for a particular liability regime must also include a decision on a liability ceiling and the recoverable damage (e.g. consequential damages). Both issues have an influence on the availability of insurance for the activities of the International Registry.

3.6.6 Experience with national registration systems for security rights in aircraft indicates that the International Registry's exposure to liability is likely to be minimal, particularly if human involvement in the registration process is reduced. Liability of the Canadian provincial personal property security registers which register security interests concerning a great variety of consumer goods, including automobiles and aircraft equipment, was invoked only once in 15 years. Similarly, the UK — which equally features a notice filing system — counted only a single liability action, involving moderate sums, for acts of its aircraft mortgage registry in the last 5 years. Liability action in the US in connection with the registration of security interests against aircraft has been comparably low. It shall be noted that the Canadian registries rely to a great extent on electronic data management and involve high volumes of registrations whereas the International Registry would involve relatively low volumes.

### 3.7 Institutional Aspects

3.7.1 The draft Protocol leaves open the decision as to whether the International Registry shall be operated and overseen by one single legal entity (unitary system) or by two different legal entities, the Registrar and the Intergovernmental Regulator. «Alternative A» of Article XVI of the Protocol contains both alternatives.

3.7.2 From an operational point of view, it seems preferable to combine the administration of the Registry and the regulation of its activities into one single self-regulating entity. The unitary system would be more cost-effective than a binary system since it would avoid the duplication of administrative structures.

3.7.3 A binary system, requiring more extensive administrative resources, would only be justified if the Registrar is intended to be a private entity while the Intergovernmental Regulator is an intergovernmental organization. However, the recording of international interests with the objective of giving public notice to third parties and establishing priorities among competing interests **is essentially a public function**. By registering an interest, the International Registry establishes the priority of this interest over subsequently registered interests with effect on third parties. This gives the operation of the International Registry an adjudicative character. Consequently, most states confer the registration of security rights upon public bodies or even courts. The International Registry as well as its regulation should therefore be entrusted to a governmental body.

### 3.8 Sub-Registries

3.8.1 The International Registry should be divided into categories, such as airframes, engines, as well as a list of non-consensual national rights and interests which have priority over registered international interests (Articles 24 and 40 of the draft Convention). It is suggested that it also maintain a list of non-consensual national rights and interests which are registrable in the same way as an international interest under the draft Convention (Article 40 of the draft Convention).

### 3.9 Financial Aspects

3.9.1 On the financial side, the draft Convention/Protocol only provides that user fees shall be levied to recover the costs for operating, designing and implementing the International Registry but leave other details to the Regulations. It seems desirable that some principles regarding the allocation of costs between the International Registry and the national registration facilities be set out in the draft Convention/Protocol. It seems also desirable to indicate in the draft Convention/Protocol if the costs of overseeing and regulating of the International Registry by the Intergovernmental Regulator are recoverable through user fees.

## 4. INFORMATION ON COSTS

4.1 The costs of developing and operating the international registry system will depend on the choices made with respect to the filing system, the performance requirements, the security standards and the extent of the use of national registration facilities. Operating costs will further depend on the volume of registrations effected by the International Registry which will be relatively low. They will also be influenced by the choice for a unitary or a binary system, i.e. the operation and regulation of the International Registry by one single entity or by two different entities. Experience of national registries indicate that prospective fees, when calculated on a cost recovery basis, would likely be at a level that would make them a very minor if not insignificant cost item in any aircraft financing transaction.

4.2 The experience of Contracting States to the 1948 Geneva *Convention on the International Recognition of Rights in Aircraft* with their national registers for the registration of security rights in aircraft will facilitate the development of the International Registry. The use of expertise from national registries, and the possibility to build on highly developed existing systems (e.g. the Canadian provincial registration systems for securities on personal property, including aircraft objects) are likely to reduce considerably the development and setting-up costs of the International Registry.

## 5. ACTION BY THE JOINT SESSION

5.1 The Joint Session is invited to establish a working group of governmental experts to deal specifically with institutional, legal, operational and other relevant issues of the establishment and operation of the International Registry (Registry Working Group).

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