



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



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Summary and Issues Note relating to the International Registry System contemplated by the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment as applied to aircraft equipment by virtue of the Preliminary Draft Protocol on matters specific to Aircraft Equipment

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The Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment (**convention**),¹ as applied to aircraft equipment² by virtue of a specified protocol (**aircraft protocol**),³ contemplates the establishment of an international registry system for the registration of certain property interests in aircraft objects (**international registry system (aircraft)**).⁴ Different registries may be established for different categories of objects covered by the convention.⁵

* While reflecting, in part, the views of various participants in, and commentators on, the preparatory work on the convention/aircraft protocol, the views set out in this paper are those of the author. The paper, therefore, does not necessarily reflect the positions, official or otherwise, of Unidroit, the International Civil Aviation Organization or any grouping.

¹ See Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment, UNIDROIT 1998 Study LXXII - Doc. 42.

² See *id.* art. U (stating that the convention only applies as regards any category of object as from the time of entry into force, and subject to the terms, of a protocol covering such objects.

³ See Preliminary Draft Protocol to the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, UNIDROIT 1998 Study LXXIID - Doc. 3.

⁴ See convention, *supra* note 1, arts. 16-27; aircraft protocol, *supra* note 3, arts. XVI-XIX.

⁵ See convention, *supra* note 1, art. 16(3).

The primary purpose of this paper is to assist government representatives and other interested parties in their assessment of the open issues, and the scope of possible future work, relating to the proposed international registry system (aircraft).

Part I will provide background by synthesizing the relevant registry-related provisions in the convention and aircraft protocol and explaining their combined effect. **Part II** will address the ancillary matter of the relationship between convention/aircraft protocol and the two international aviation conventions implicating national aviation registries and registration, namely the Convention on International Civil Aviation (**Chicago Convention**)⁶ and the Convention on the International Recognition of Rights in Aircraft (**Geneva Convention**).⁷ **Part III is the centerpiece of the paper. It will highlight the principal policy and practical issues worthy of consideration.** The paper will conclude by calling for the creation of a working party to make recommendations on these issues.

Part I - Synthesis of Registry-Related Provisions and Explanation of Their Effect

*(i) Function of the International Registry System (Aircraft)*⁸

The international registry system (aircraft) will serve as the instrumentality for determining the priority of conflicting property interests in aircraft objects.⁹ Notices of international interests, prospective international interests and registrable nonconsensual interests, *inter alia*,¹⁰ may be registered, amended and discharged in the international registry.¹¹ The sequential ordering of registration is the sole criterion for all priority determinations not involving preferred

⁶ Signed at Chicago, 7 December 1944, 15 UNTS 295, ICAO Doc. 7300/6.

⁷ Signed at Geneva, 19 June 1948, 310 UNTS 151.

⁸ Parts I and II of this paper are taken from my recent article, 'The Next Generation of International Aviation Finance Law: An Overview of the Proposed Unidroit Convention on International Interests in Mobile Equipment as Applied to Aircraft Equipment,' *Air and Space Journal*, December 1998, Vol. XXIII, No. 6 at 243.

⁹ See convention, *supra* note 1, art. 28(1) (a "registered interest" has priority over any other interest subsequently "registered" and over an "unregistered interest"). The relevant definitions of these terms and expressions are linked to registration or nonregistration in the international registry system created by the convention/aircraft protocol. See *id.* art. 1.

¹⁰ Notices of contracts of sale, and prospective contracts of sale, may also be registered. See aircraft protocol, *supra* note 3, art. IV (rendering convention Article 16(1) (other than subparagraph (c)) and Articles 18-20 applicable to contracts of sale). Notices of assignments of international interests, and prospective assignments, may likewise be registered. See convention, *supra* note 1, art. 16(1)(b). Parties also have the facility to register notices of subordinations to protect their positions against third parties. See *id.* art. 16(1)(c).

¹¹ See *id.* arts. 16(1)(a), 16(4).

nonconsensual rights and interests. Even the latter, in category form, will be available through the international registry as a matter of information to assist in transaction risk assessment.¹²

Priority setting, while indispensable, is the *exclusive function* of the international registry system (aircraft). Two matters outside the scope of the international registry system (aircraft) are noteworthy. First, registration of interests is not, as in select systems of laws, an aspect of or condition to the creation or validity of that interest or its enforceability *inter se*.¹³ Similarly, if an interest has not been validly created under the convention/aircraft protocol or if the factual predicate to that interest is false, the act of registration will not rectify such defects. Registration is not a prophylactic. While regulations¹⁴ will be promulgated to minimise the risk of incorrect or inaccurate filings in the international registry - and, depending on their final form, may do so materially¹⁵ - the legal effect of such an improper filing is neutral. Registration puts searchers on notice of the potential existence of superior interests,¹⁶ and enables a registrant to establish its priority,¹⁷ but goes no further. It is dissimilar, for example, to commonly encountered land registries, the basic function of which is to quasi-guarantee title and other property interests.

Secondly, the international registry, as a system concerned solely with property interests in aircraft equipment, does not address the basic subject matter of the Chicago Convention:¹⁸ the framework applicable to the regulation of international civil aviation.¹⁹

¹² See *id.* art. 24. This provision is linked to the provision requiring the declaration of preferred nonconsensual rights and interests as a condition to maintaining national law preferences. See *id.* art. 40.

¹³ See Exploratory Report, Working Group to Consider the Legal and Technical Issues Raised by the Establishment of an International Register, UNIDROIT 1996 Study LXXIIC - Doc. 1.

¹⁴ See generally convention, *supra* note 1, art. 17(4). For the requirement that initial regulations be promulgated, and entered into force coincident with the entry into force of the aircraft protocol, see aircraft protocol, *supra* note 3, art. XVII(3) [hereinafter **aircraft registry regulations**].

¹⁵ The extent to which that risk will be minimised will be directly related to the level of factual review included in the conditions to registration. See *infra* note 47 and accompanying text.

¹⁶ If, by way of example, a prior registration, having satisfied the conditions to registration, nonetheless evidences an invalid interest (e.g., by reason of the obligor's lack of "power to enter into the agreement" [convention, art. 8(b)]), the registration's potential for priority is not realised. In practice, this is fallback legal protection. The searching party, on notice of the prior interest, will make the relevant inquiries regarding the prior registration prior to funding.

¹⁷ By virtue of the comprehensiveness of the proposed priority system, the universe of possible superior interests is limited to (i) previously registered international interests or registrable non-consensual rights and interests and (ii) preferred nonconsensual rights and interests arising in a contracting state that declared that preference in its ratification instrument (a catalogue of such declarations to be available on-line at the international registry or its registration facilities).

¹⁸ For a discussion of the relation between the convention/aircraft protocol and the Chicago Convention see *infra* notes 62-71 and accompanying text.

(ii) *Nature of the International Registry System (Aircraft)*

Reflecting the principal objective of facilitating asset-based financing and leasing, the international registry will be asset - rather than debtor- based.²⁰ Registrations, defined to include amendments and discharges,²¹ are made against specifically identified airframes, aircraft engines or helicopters. That identification will be the manufacturer's serial number, as supplemented in accordance with the aircraft registry regulations to ensure uniqueness.²² The manufacturer's serial numbers will also constitute the principal search criterion.²³

(iii) *Structure of the International Registry System (Aircraft)*

The basic structure of the international registry system (aircraft) was a subject that attracted the particular attention of the aircraft protocol group. In light of the work on the subject undertaken by a subgroup of the Unidroit study group tasked with addressing registry matters,²⁴ yet seeking to provide governments with a range of options on this fundamental matter, the aircraft protocol group set out two alternative formulations of the basic structure provision. Its views were summarised as follows:

Two alternative formulations of Article [XVI] of the Aircraft protocol have been inserted into the text. That Article addresses the general structure of the proposed international registry system. Square brackets have been placed around these alternative provisions to indicate both their provisional nature and the need for further consideration....

Alternative A has been prepared with a view towards leaving governmental experts with maximum flexibility in their consideration of the structure of the proposed international registry system. That alternative itself contains two mutually exclusive bracketed provisions. The first provision contemplates a *unitary registry*

¹⁹ Starting from nationalist first principles, that framework, set out in the blueprint for I.C.A.O. and subsequently developed by that institution, is one designed to promote the safe and orderly growth of international civil aviation. *See generally* N.M. Matte, 'The Chicago Convention - Where From and Where To, I.C.A.O.?' [hereinafter **Matte, Chicago Convention**], *Annals of Air and Space Law, Chicago 1994 Conference Anniversary, 1944-1994, vol. XIX, pt. I (Montreal, McGill University)*, 1994, at 371; A. Kotaite, 'Legal Aspects of the International Regulation of Civil Aviation' [hereinafter **Kotaite, Legal Aspects**], *Annals of Air and Space Law, vol. XX-1995, pt. I (Montreal, McGill University)*, 1995, at 9. For thinking on the current reconsideration of aspects of the nationalist first principles, see Milde, Chicago Convention Amendments, *infra* note 68.

²⁰ *See* convention, *supra* note 1, art. 20(6); aircraft protocol, *supra* note 3, art. XIX(1).

²¹ *See* convention, *supra* note 1, art. 16(4).

²² *See* aircraft protocol, *supra* note 3, art. XIX(1). The need for uniqueness-ensuring supplemental information in the aircraft registry regulations arises as a result of the manufacturer's serial number allocation system of one of the major aircraft manufacturers. That system is designed to ensure uniqueness regarding a particular model number type only.

²³ *See id.*

²⁴ *See generally* Summary Report, Working Group to Consider the Legal and Technical Issues Raised by the Establishment of an International Register, UNIDROIT 1997, Study LXXIIc - Doc. 3.

structure, that is, a structure in which an intergovernmental entity both operates and regulates the registry. That intergovernmental entity would be accountable to the [c]ontracting [s]tates. The second provision contemplates a *binary registry structure*. Such a structure is the type envisaged by the [c]onvention. In a binary registry structure, the operational and regulatory functions are separate. While the regulator of the system would be intergovernmental and accountable to the [c]ontracting [s]tates, the operator could well be a private sector service provider acting under the supervision and oversight of the intergovernmental regulator. Alternative A does not, moreover, suggest the identity of the entities to perform the operational and/or regulatory functions. The objective of leaving maximizing flexibility again underlies this aspect of Alternative A.

Alternative B, conversely, seeks to provide governmental experts with guidance and detail on a possible international registry system. It adopts the binary registry structure approach. It then identifies both the Council of the International Civil Aviation Organization or a body designated by it as a potential intergovernmental regulator, and a newly created, special purpose independent affiliate of the International Air Transport Association as a potential initial registrar. These entities have been identified, for consideration by governments, based on their respective significant roles in international civil aviation. The objectives of expediting governmental consideration of the new system and the creation of the proposed registry underlie this aspect of Alternative B.²⁵

[[Author's Note - It is understood that the representatives of I.C.A.O. and I.A.T.A. on the aircraft protocol group are now of the view that Alternative B should be deleted from the current draft of the aircraft protocol.]]

Whether the unitary registry structure, employing a single International Registry Authority²⁶ as both the operator and regulator of the international registry, or the binary registry structure, distinguishing between the operator of the system, the Registrar,²⁷ and its regulator, the International Regulator,²⁸ is ultimately selected by governments, other constitutional features of the international registry system (aircraft) are the same.

²⁵ See Second Draft of Aircraft Equipment Protocol and Introductory Remarks Prepared by Chairman of the Aircraft Protocol Group to Reflect the Decisions Taken at the 25-27 August 1997 Meeting of the Aircraft Protocol Group [hereinafter **APG M.1 Report**], APG 1997 Doc. 7, at (vii) {copy on file with the author}. See also Steering and Revisions Committee, Report, UNIDROIT 1998 Study LXXII - Doc. 41 [hereinafter **SRC M.1 Report**], at 35-36 (calling on governments to consider the relative advantages and disadvantages of the unitary registry structure and the binary registry structure).

²⁶ See aircraft protocol, *supra* note 3, arts. I (definition of "International Registry Authority"), and XVI (first bracketed provision in Alternative A).

²⁷ See *id.* arts. I (definition of "Registrar") and XVI (second bracketed provision in Alternative A and Alternative B).

²⁸ See *id.* arts. I (definition of "International Regulator") and XVI (second bracketed provision in Alternative A and Alternative B).

The international registry shall have *international legal personality* and legal capacity to exercise its functions.²⁹ In performing such functions, the international registry will not be subject to any particular national law and will be entitled to certain limited immunities.³⁰ These concepts also apply to the registration facilities, discussed immediately below, solely in their capacity as such.³¹

When ratifying the relevant instrument, contracting states *have the option of* designating operators of registration facilities, which are essentially points of input to the international registry.³² They constitute an integral part of the international registry system (aircraft)³³ and, accordingly, will follow the uniform aircraft registry regulations, rather than national regulatory law and practice, in performing their functions under the convention/aircraft protocol international registry system (aircraft).³⁴ Operators of registration facilities, in all probability national civil aviation authorities, will transmit the information required for registration to the international registry. In the event a contracting state designates registration facilities, it shall specify the extent to which such designation precludes alternative access to the system,³⁵ that is, filings directly with the international registry. A contracting state may only designate registration facilities as points of access in relation to (a) helicopters or airframes pertaining to aircraft of its nationality and (b) registrable nonconsensual rights or interests created under its domestic law.³⁶ Since aircraft engines have no independent nationality under the Chicago Convention, no country can require registrations relating to aircraft engines through its registration facilities. Under the current draft, all registrations relating to aircraft engines must therefore be made directly with the international registry.³⁷

To summarise the relevant relationships, the contracting states to the convention/aircraft protocol, through those instruments, create and agree to the international registry system (aircraft) regarding

²⁹ See convention, *supra* note 1, art. 16(2). In a similar vein, a question for governments is whether the International Regulator (or the International Registry Authority acting in that capacity, as the case may be) should also have international legal personality. See SRC M.1 Report, *supra* note 25, at 36.

³⁰ Cf. convention, *supra* note 1, arts. 27(3), (4).

³¹ See Convention, *supra* note 1, art. 17(2); and accompanying text.

³² See generally convention, *supra* note 1, art. 17(2), aircraft protocol, *supra* note 3, art. XVIII(1)(a).

³³ See convention, *supra* note 1, art. 17(2).

³⁴ Cf. *id.* It is, however, theoretically possible that the convention/aircraft protocol could refer to national law and practice or the required conditions to registration.

³⁵ See *id.*; aircraft protocol, *supra* note 3, art. XVIII(1)(b).

³⁶ See *id.* art. XVIII(2).

³⁷ Cf. *id.* Since aircraft engines are not specified in Article XVIII, the default is to the general provisions requiring registration directly with the Registrar or the International Registry authority, as the case may be.

all, and only, those matters set out in the convention/aircraft protocol. The instruments are the constituting documents. Contracting states delegate regulatory and oversight responsibility to the regulator of the system, itself an intergovernmental entity. Contracting states are the sovereigns; the regulator, whatever form it takes, is accountable to the contracting states.³⁸ The regulator, in turn, regulates the operator of the international registry (including registration facility operators), whether these functions are undertaken by it (unitary registry structure) or another (binary registry structure). The operator of the international registry is accountable to the regulator. Operators of registration facilities, if declared by a contracting state, undertake their responsibilities under the convention/aircraft protocol as part of the international registry system (aircraft).

These relationships can be usefully illustrated by reference to the aircraft registry regulations. The convention/aircraft protocol requires that certain items be included in the initial regulations promulgated by the regulator.³⁹ As the instruments are constitutive, such matters must be included. These particular matters have been agreed to by contracting states. Revisions to the aircraft registry regulations are made by and at the discretion of the regulator,⁴⁰ subject to its reporting responsibilities to contracting states.⁴¹ The operators of the international registry and registration facilities are required to perform their respective functions in accordance with the aircraft registry regulations, as amended from time to time, and are accountable in this regard to the regulator.

(iv) *Responsibilities of operators/regulators*

The operator of the international registry has five broad responsibilities under the convention/aircraft protocol.⁴² First, it shall operate the international registry effectively and responsibly, and shall do so on a *24-hour basis*.⁴³ Secondly, it shall perform the various functions assigned to it under the convention/aircraft protocol and aircraft registry regulations. Thirdly, the operator shall report to the regulator on the performance of its functions and shall otherwise comply with specified oversight requirements. Fourthly, it shall maintain financial records relating to its functions in a form specified by the regulator. Finally, it shall ensure against liabilities for acts and omissions in a manner acceptable to the regulator.⁴⁴

As indicated, the regulator, accountable to contracting states, is to regulate and oversee the operators of the system. It shall issue the initial aircraft registry regulations and revise the same from time to time as appropriate.

³⁸ *See id.* art. XVII(2).

³⁹ *See id.* art. XIX(5).

⁴⁰ *See* convention, *supra* note 1, art. 17(4).

⁴¹ *Id.* art. 17(5)

⁴² *See Id.*

⁴³ *See* aircraft protocol, *supra* note 3, art. XIX(4). The various registration facilities will be operated and administered during working hours in their respective territories. *See id.*

⁴⁴ The requirement may raise select issues in the case of intergovernmental operation of the International Registry or its registration facilities.

In addition, while the regulator shall act in a nonadjudicative capacity, it shall have the power to require acts and omissions that are in contravention of the convention/aircraft protocol or aircraft registry regulations to be rectified.⁴⁵ Pursuant to procedures to be set out in the aircraft registry regulations, the regulator shall, at the request of the registrar, issue advisory rulings regarding the exercise of functions under the convention/aircraft protocol and aircraft registry regulations.⁴⁶

(v) *Modalities of registration and systems implications*

The aircraft registry regulations will set out the conditions and requirements that must be fulfilled in order to effect a registration or convert the registration of a prospective interest into an actual one.⁴⁷ These conditions to registration are not to be confused with the requirements to effect a registration. Once the conditions, whatever they may be, are satisfied, the registration is made. It becomes effective upon entry of the required information into the international registry database so as to be "searchable".⁴⁸ A registration is searchable when it has been assigned a sequentially ordered file number, and it, together with that number, may be accessed at all points in the international registry system (aircraft).⁴⁹

Numerous matters relating to the functioning of the international registry system (aircraft) are to be determined. They will be addressed in the aircraft registry regulations, including (a) the medium of information transmission to the international registry or registration facilities,⁵⁰ (b) the duration period of a registration,⁵¹ (c) the requirements for requesting or conducting a search⁵² of the

⁴⁵ See convention, *supra* note 1, art. 17(6); aircraft protocol, *supra* note 3, XIX(5) (providing that matters relating to the correction of such acts and omissions be addressed in the aircraft registry regulations).

⁴⁶ See convention, *supra* note 1, art. 17(7); aircraft protocol, *supra* note 3, art. XIX(5) (providing that matters relating to the requesting and issuance of such advice be addressed in the aircraft registry regulations).

⁴⁷ See convention, *supra* note 1, art. 18; aircraft protocol, *supra* note 3, art. XIX(5) (providing the conditions to registration specified in the aircraft registry regulations).

⁴⁸ See convention, *supra* note 1, art. 20(1).

⁴⁹ See *id.* art. 20(2).

⁵⁰ See convention, *supra* note 1, art. 19; aircraft protocol, *supra* note 3, XIX(5).

⁵¹ See convention, *supra* note 1, art. 22; aircraft protocol, *supra* note XIX(5). The aircraft protocol group, in its final text, expressed the view that the duration of a registration should be indefinite. See Preliminary Draft Protocol on Matters Specific to Aircraft Equipment As Established by a Working Group organised by Mr. J. Wool, Expert Consultant to the Study Group on International Aviation Finance Matters, at the Invitation of the President, at the Conclusion of the Second Session, Held in Geneva from 19 to 21 November 1997, UNIDROIT 1998 Study LXXIID -Doc. 1 [hereinafter **preliminary draft aircraft protocol (aircraft protocol group)**], art. XXX(10).

⁵² An issue to be determined is whether remote access searches, beyond a search made at the local registration facilities, will be permitted. One factor relevant to that determination will be its impact on system security, an issue requiring further design work on the international registry system. For notes on the prompt need for such work, see SRC M.1 Report, *supra* note 25, at 39-40.

international registry,⁵³ and (d) the form of certificates to be issued by the international registry.⁵⁴ Such certificates will be *prima facie* proof of facts contained therein.⁵⁵

(vi) *Errors and omissions*

The operator of the international registry system (aircraft) and its registration facilities are liable for their errors and omissions and for system malfunctions.⁵⁶ Any person suffering resulting loss shall be entitled to an indemnity in an amount equal to its compensatory damages.⁵⁷ Such liability must be insured against in a manner satisfactory to the regulator.⁵⁸ These provisions are considered essential to building confidence in the international registry system (aircraft), particularly during its infancy. In the event the registrar is an intergovernmental body, and in the case of the operators of registration facilities, consideration must be given to the most appropriate means of addressing these liability and insurance requirements.

The courts in which the registrar or the operators of registration facilities are located shall have jurisdiction to resolve any issue relating to errors and omissions liability.⁵⁹ Such courts, however, shall not apply national law but rather the international standard established by the convention/aircraft protocol.

(vii) *Registry fee structure*

Questions have been asked regarding the aggregate costs and additional transaction costs likely to be associated with the creation and use of the international registry system (aircraft).

The texts provide that the cost of creation and operation will be financed by user fees, and that the fee schedule will be determined on a *cost recovery* basis.⁶⁰ Operating the system will therefore not be a source of profit for the operator. The fee structure will be set out by the regulator in the aircraft registry regulations.⁶¹ While more precise comments cannot fairly be made at this stage, those in the process to date expect that, by excluding a profit component, individual transaction fees will not be affected in an adverse material manner.

⁵³ See convention, *supra* note 1, art. 23(1); aircraft protocol, *supra* note 5, art. XIX(5).

⁵⁴ See convention, *supra* note 1, art. 25; aircraft protocol, *supra* note 5, art. XIX(5).

⁵⁵ See convention, *supra* note 1, art. 25.

⁵⁶ See *id.* art. 27(1). It will be for governments to consider whether the liability regime should be based on strict liability. See SRC M.1 Report, *supra* note 25, at 36.

⁵⁷ See convention, *supra* note 1, art. 27(1).

⁵⁸ See *id.* art. 17(5)(e).

⁵⁹ See *id.* art. 27(2).

⁶⁰ See *id.* art. 17(4); aircraft protocol, *supra* note 3, art. XIX(3).

⁶¹ See generally convention, *supra* note 1, art. 17(4).

Part II - Relationship Between Convention/Aircraft Protocol and International Aviation Conventions Implicating National Aviation Registries

(i) Convention on International Civil Aviation

One misconception about the convention/aircraft protocol and its international registry system (aircraft) must be promptly dispelled. Use of the terms "registry" and "registration" has, among certain observers, raised concern that the operation of the convention/aircraft protocol may affect matters within the scope of the Chicago Convention, the constitution of the system of international civil aviation.

This is simply not the case. The misunderstandings are attributable to the historical linkage between the Geneva Convention and the Chicago Convention,⁶² and differing usages of the term "registered" in these instruments and in the convention/aircraft protocol.⁶³ With one narrow exception that neither requires amendment to the Chicago Convention nor raises policy issues, there is no subject matter overlap between the convention/aircraft protocol and the Chicago Convention. The convention/aircraft protocol does not purport to regulate any aspect of international civil aviation.

The one narrow exception relates to the default remedy provision in the convention/aircraft protocol permitting an obligee to deregister the aircraft from its nationality register⁶⁴ and the related provision, on which a reservation is permitted, that makes use of an internationally sanctioned request authorisation to expedite and facilitate that deregistration.⁶⁵ The relationship arises by virtue of the provision in the Chicago Convention that, in effect, points to the law of the country of nationality to determine the rules applicable to deregistration.⁶⁶

No amendment to the Chicago Convention is required since the terms of the relevant article in that instrument are unaffected. The laws of the country of nationality registration will continue to determine deregistration criteria. The convention/aircraft protocol simply requires that its

⁶² The Geneva Convention requires its contracting states to recognise certain interests constituted in accordance with the law of the state in which an aircraft was registered as to nationality at the time of creation. *See* Geneva Convention, *supra* note 7, art. I(1). The nationality of an aircraft, in turn, is addressed internationally by the Chicago Convention. *See* Chicago Convention, *supra* note 6, Chapter III.

⁶³ In the Chicago Convention, registration and nationality are coextensive and are jointly linked to basic regulatory responsibility. Registration has public function implications, that is, it is an act of consequence under *public international law*. Registration under the convention/aircraft protocol, conversely, is simply the instrumentality to enhance rights derived from *private international law*. Governments might consider use of alternative clarifying terminology in the convention/aircraft protocol.

⁶⁴ *See* aircraft protocol, *supra* note 3, art. IX(1)(a).

⁶⁵ *See id*, *supra* note 3, art. XIII.

⁶⁶ *See* Chicago Convention, *supra* note 6, art. 19 ("the ... transfer of registration of aircraft in any contracting state shall be made in accordance with its laws and regulations").

contracting states give effect, by implementing legislation if necessary,⁶⁷ to the above-identified provisions as a matter of national law.

These provisions should not raise Chicago Convention policy concerns since they are consistent with the purposes of the Chicago Convention in general, and the regulatory aspects of its nationality provisions in particular.⁶⁸ In simplest terms, the exclusive nationality of an aircraft imposes safety and operational regulatory responsibilities on the country of nationality registration.⁶⁹ In the context of an exercise of aircraft financing and leasing default remedies, deregistration, by definition, relates to a *change* in ownership and/or use of an aircraft. In other words, the regulation-justifying nexus will be altered.

In two respects, adoption of the convention/aircraft protocol should be affirmatively embraced by the international civil aviation regulatory community. Firstly, the treaty will facilitate the financing, and thus acquisition and use, of newer, *safer* aircraft equipment. The policy value of this cannot be overstated.

Secondly, and more speculatively, one can plausibly argue that delinking the system applicable to property rights in aircraft from safety and operational regulatory responsibility will actually promote the basic purposes of the Chicago Convention.⁷⁰ Depending upon a variety of factors,⁷¹ the convention/aircraft protocol - through its general upgrade of commercial law - may lessen the incentive of financiers and lessors to demand "off-shore" structured financing. In broad terms, that is a transaction in which, in an attempt to avoid application of perceived inadequate commercial and/or insolvency laws of the country of airline domicile or operations, foreign nationality

⁶⁷ For a general overview of the relationship between international and national law in general, and its implications for the purpose of implementing acts, see J.H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 *American Journal of International Law*, 1992, at 310.

⁶⁸ For a discussion of possible policy-based amendments to the Chicago Convention, including its nationality provisions, see M. Milde, 'The Chicago Convention - Are Major Amendments Necessary or Desirable 50 years later?', *Annals of Air and Space Law, Chicago Conference Anniversary, 1944-1994*, vol. XIX, pt. 1 (Montreal, McGill University), at 401-47, 1995 [hereinafter **Milde, Chicago Convention Amendments**].

⁶⁹ See generally Chicago Convention, *supra* note 6, art. 12, Chapters III-VI.

⁷⁰ An analogy may usefully be drawn to the adoption of Article 83*bis*, a substantive amendment to the Chicago Convention that recognises the relationship between changes in aircraft use and financing, on the one hand, and regulatory responsibility, on the other. See Protocol Relating to an Amendment to the Convention on International Civil Aviation, 6 October 1980, I.C.A.O. Doc. 9318 [hereinafter **Article 83bis**]. Article 83*bis* permits the state of registry, in agreement with the state of the operator, to transfer to the latter select responsibilities of the state of registry in respect of that aircraft under the Chicago Convention.

⁷¹ These factors include, in particular, the perceived political risks in a particular country and the extent to which the convention/aircraft protocol has been effectively implemented into a particular national legal system.

registration is sought. In effect, this practice is not dissimilar to shipping flags of convenience, a concept in tension with the historical regulation of international civil aviation.

(ii) *Convention on the International Recognition of Rights in Aircraft*

The relationship between the convention/aircraft protocol and the Geneva Convention is a critical issue for the international aviation community. In sharp contrast to the Chicago Convention, the subject matter of the Geneva Convention, property rights in aircraft, is shared with that of the convention/aircraft protocol. Yet there are important, indeed fundamental, conceptual differences between the two instruments. These differences, perhaps best explained by reference to their histories and the circumstances surrounding their development, are worth highlighting before turning to the relevant provision addressing relationships between the two instruments.

Four conceptual differences are of particular note. Firstly, whereas the Geneva Convention is principally, though not exclusively, a recognition-of-rights instrument, the convention/aircraft protocol lays down substantive rules regarding secured transactions and leasing.⁷² One cannot doubt that reaching international agreement in 1948 on the notion of one state's recognition of rights duly constituted under the laws of, and recorded in a bona fide public record of, another was a significant accomplishment.⁷³ In the early post-war period, it is fair to describe the Geneva Convention as groundbreaking for that reason alone. Moreover, the Geneva Convention does contain several important substantive provisions, including select default remedies⁷⁴ and priority rules.⁷⁵ While certain states have taken issue with aspects of one or more of these provisions,⁷⁶ they too represented forward-looking law-making. All that said, 50 years have passed since the Geneva Convention was adopted, and, more important for our purposes, internationally developed and widely accepted asset-based financing and leasing techniques have become the centre piece of modern and forward-looking aircraft financing.

Secondly, the Geneva Convention takes as its starting point a nationally created property interest, whereas the convention/aircraft protocol uses an international interest.⁷⁷ Once again, the Geneva Convention approach was both necessary and appropriate in 1948, particularly given the historical

⁷² Compare Geneva Convention, *supra* note 7, art. I(1) with convention, *supra* note 3, Chapters 2, 3, 7.

⁷³ See *id.* For the view that the conflict of laws system embodied in the Geneva Convention was, in essence, an attempt to reconcile the U.S. secured transactions system (that, at the time, utilised a wide variety of financing structures and did not require filing or other publication of conditional sales contracts and other forms of quasi-security) and the European system (that, developed from ship financing precedent, required a high degree of formalism), see C. Svernlöv, 'Security in Aircraft,' *Annals of Air and Space Law*, vol. XVII, pt. II (Montreal, McGill University), 1992, at 369-95.

⁷⁴ See, e.g., Geneva Convention, *supra* note 7, art. VII.

⁷⁵ See, e.g., *id.* art. IV.

⁷⁶ In particular, the absence of priority to states for tax and other fiscal claims. See C. Svernlöv, 'Security in Aircraft', *supra* note 7, at 374.

⁷⁷ Compare Geneva Convention, *supra* note 7, art. I(1)(i) with convention, *supra* note 1, arts. 2, 8.

and textual linkages between it and the Chicago Convention and the latter's utilisation of the notion of nationality.⁷⁸ The reasoning in support of an internationally created interest is the same as that mentioned above, the recognition and encouragement of international asset-based and leasing financing techniques and structures. It also reflects the fact that because of global market forces and industry trends, aircraft have increasingly fewer permanent and inextricable links to any particular country.⁷⁹ The importance of airline capacity management through subleasing is but one example.

Thirdly, and an extension of the previous point, the Geneva Convention relies upon rights and interests recorded in national registries, whereas the convention/aircraft protocol makes use of an international registry system. In effect, the decision to ratify the convention/aircraft protocol represents a contracting state's decision to internationalise public notification of property rights in aircraft. It is an act of sovereignty. Moreover, ongoing responsibility for the regulation of the international registry system is merely *delegated* to the international regulator, the latter remaining accountable to contracting states.

Fourthly, whereas the Geneva Convention, while making provisions for security of stored spare engines,⁸⁰ in broad and nontechnical terms, views engines as part of a larger composite aircraft,⁸¹ the convention/aircraft protocol regards aircraft engines as distinct, valuable and separately financable assets. Current engine practice, including greater use of engine pooling and interchange agreements and broader engine or "thrust" management techniques, justifies the approach adopted in the convention/aircraft protocol.⁸²

With the foregoing as background, attention now turns to the actual coordinating provisions and the thinking of the aircraft protocol group.⁸³ As a starting point, a basic decision was made to ensure the continued existence of the international legal relationship of state parties to the Geneva Convention. A second principle was that the two instruments should be coordinated to the extent practicable. Most important in this regard, the basic choice of law notion in the Geneva Convention

⁷⁸ See *supra* note 63 and accompanying text. For evidence of the deeper historical linkage between the two instruments, see Resolution of the Final Act of the International Civil Aviation Conference, Part V (bridging the relevant work the Comité International Technique d'Experts Juridiques Aériens (CITEJA) completed in 1931 with the future work leading to the Geneva Convention).

⁷⁹ Cf. Milde, Chicago Convention Amendments, *supra* note 68, at 423-24 (stating that the concept of "nationality of aircraft and [its] impact on the application of other provisions of the Chicago Convention ... requires **profound re-thinking** and modernisation to serve the changed and changing conditions of international civil aviation" (emphasis added)).

⁸⁰ See Geneva Convention, *supra* note 7, art. X.

⁸¹ See *id.* art. XVI (defining an aircraft to include engines intended for use in the aircraft, whether installed or temporarily separated).

⁸² See M. Arundell and F. S. Wilson, 'The Need for International Secured Transactions and Leasing Rules for Aircraft Engines through the Proposed Unidroit Convention', *Air & Space Law Journal*, vol. XXIII at 283.

⁸³ See aircraft protocol, *supra* note 3, art. XXII.

was retained in a manner consistent with the primacy of the substantive provisions in the convention/aircraft protocol.⁸⁴ In effect, parties to the Geneva Convention will continue to recognise rights constituted in accordance with the "law" of other contracting states, but where such states are party to the convention/aircraft protocol, that law shall include the substance of the convention/aircraft protocol.⁸⁵ A third principle was that transaction parties would retain the option, by an act of election, to exercise certain contractual default remedies under the relevant provisions of the Geneva Convention.⁸⁶

Finally, and recognising the importance of asset-based financing and leasing, the convention/aircraft protocol would supersede the Geneva Convention on all residual matters.⁸⁷

Part III - Principal Issues for Further Consideration

The following, in question form, is a summary of the principal issues worthy of further consideration at this juncture relating to the proposed international registry system (aircraft):

- 1 Should the *unitary registry structure*, where a single intergovernmental entity both operates and regulates the system, or the *binary registry structure*, where different entities operate and regulate the system, be employed?**

[see aircraft protocol art. XVI]

related questions –

- What process should be followed in determining (i) the entity or entities to perform the operational and/or regulatory functions, and (ii) where such functions will be performed?
- What is the appropriate timing of these determinations?

- 2 What process should be followed in *preparing the initial aircraft registry regulations*?**

[See aircraft protocol art. XVII (3)]

related questions –

- What are the appropriate procedures pursuant to which the registrar may request advisory rulings from the regulator?

⁸⁴ See *id.* art. XXII(1).

⁸⁵ See *id.*

⁸⁶ See *id.* art. XXII(3); see also APG M.1 Report, *supra* note 25, at (vii).

⁸⁷ See aircraft protocol, *supra* note 3, art. XXII(2).

- Against what standards, and pursuant to what procedures, will the regulator be empowered to require rectification of acts and omissions in contravention of the provisions of the convention/aircraft protocol?
- Which media of information transmission to the international registry or registration facilities will be required or permitted?
- What will be the duration period for a registration?
- What are the requirements for requesting or conducting a search of the international registry system (aircraft)?
- What is the appropriate timing of the above determinations?

3 Weighing accuracy versus efficiency objectives, and in light of cost considerations, what are the appropriate *conditions to registration*, i.e., is the function of the operators of the system wholly or largely administrative?

[See convention art. 18 and aircraft protocol art. XIX(5)]

related questions –

- Should the operators of registration facilities (assumed to be national civil aviation authorities) be required to follow the same standards as the registrar or, for example, might they be required or permitted to employ their own accuracy-promoting procedures prior to effecting registrations?
- Which traditional accuracy-promoting conditions, if any, can now reliably be addressed through high-technology means (e.g., digital signatures)?
- In the event accuracy objectives are viewed as paramount, may the review function be delegated, at the option of contracting states, to nationally or internationally sanctioned expert examiners?
- For efficiency purposes, might a system of expert examination be used to delegate the review function at the central registrar level?

4 Which *language or languages* should be used in the international registry system(aircraft)?

5 What procedures should be followed in-

- (i) *designing and developing the international registry system (aircraft), including the establishment of links between operators of registration facilities and the central registrar,*
- (ii) *acquiring necessary hardware and soft ware and*
- (iii) *setting the initial cost-recovery fee schedule?*

[cf. aircraft protocol art XIX (3)]

related questions –

- Against what standards should system security be assessed?
- What are the costs of system design and construction, and who will fund them prior to their amortization from cost-recovery for user-fee payments?
- What use and frequency assumptions should be used in setting the initial fee schedule?
- What correction mechanism is appropriate if such assumptions prove to be inconsistent?
- How should cost-recovery fees be allocated as between the central registrar and operators of registration facilities?

What is the appropriate timing for system design and construction?

6 Regarding *errors* by the operators and/or *system malfunctions*, are the liability-imposing, jurisdiction-granting and insurance-requiring provisions acceptable?

[see convention arts. 17(5)(c) and 27(1) and (2)]

related questions –

- Are there international or national law impediments to the imposition of errors and omission liability on –
 - (i) an intergovernmental entity or
 - (ii) national civil aviation authorities in their capacities as operators of registration facilities?
- What are the insurance costs, who should underwrite the insurance, and what recourse, if any, should an injured party have if insurance proceeds are not paid?

7 Are the *international legal personality, immunity* and *asset/document/archives protection* provisions satisfactory?

[See convention art. 27(3) and (4)?]

8 In the context of the *aircraft engines* - which lack separate nationality under the Chicago Convention and are subject to a higher volume of transactions, at times on short notice - are different rules needed? In particular, should different standards apply to-

- (i) the role of operators of registration facilities and
- (ii) the conditions to registration?

[cf. aircraft protocol art. XVIII(2)(a)]

Conclusion - Need for Working Party

It has been noted, both by governments⁸⁸ and representatives of the aviation industry,⁸⁹ that focused, accelerated work on the particulars of the proposed international registry system (aircraft) is now required. Absent such work - undertaken within a prescribed timetable - efforts to maximize the efficiency of intergovernmental negotiations relating to the convention/aircraft protocol will be prejudiced.

It is against this backdrop that the creation of, and terms of reference for, a working party is hereby requested. That working party should consider the legal, technological and cost-related issues, and practical and organisation matters, relating to the establishment, operation and regulation of the proposed system.

While the initial focus of that working party should be the international registry system (aircraft), its work may well be cross-applicable to other categories of objects, and thus its conclusion may well serve the broader objectives of the Unidroit initiatives. In that regard, the working group should self-consciously build upon earlier work carried out under the auspices of the Unidroit study group by a subsidiary group.⁹⁰ It might usefully consider the (limited) international precedent,⁹¹ the work

⁸⁸ See, e.g., UNIDROIT 1998 Study LXXIID-Doc. 7 at 2 (comments of Government of Canada on the aircraft protocol).

⁸⁹ See SRC M.1 Report, *supra* note 25, at 39-40.

⁹⁰ Chaired by Professor Ronald Cuming. See UNIDROIT 1997 Study LXXIIC - Doc. 3.

⁹¹ Several international registry systems are currently in existence. The United Nations Office of Outer Space Affairs administers a registry pursuant to the Convention on Registration of Objects Launched into Outer Space, *opened for signature* 14 January 1975, 1023 UNTS 15. In addition, the World Intellectual Property Organization (WIPO) maintains registers for appellations of origin, industrial designs, patents and trademarks. See Convention Establishing the World Intellectual Property Organization, 14 July 1967, as amended on 28 September 1979, available on the WIPO home page at <http://www.wipo.org>; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 31 October 1958, as revised on 14 July 1967 and as amended on 28 September 1979, available on the WIPO home page at <http://www.wipo.org>; The Hague Agreement Concerning the International Deposit of Industrial Designs, 6 November 1925, The Hague Act of 28 November 1960, available on the WIPO home page at <http://www.wipo.org>; The Hague Agreement Concerning the International Deposit of Industrial Designs, 6 November 1925, the London Act of 2 June 1934, available on the WIPO home page at <http://www.wipo.org>; The Hague Agreement Concerning the International Deposit of Industrial Designs, 6 November 1925, Complementary Act of Stockholm of 14 July 1967, as amended on 28 September 1979, available on the WIPO home page at <http://www.wipo.org>; Patent Cooperation Treaty, 19 June 1970, amended on 28 September 1979 and modified on 3 February 1984, available on the WIPO home page at <http://www.wipo.org>; Madrid Agreement Concerning the International Registration of Marks, 14 April 1891, as revised, available on the home page at <http://www.wipo.org>; and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 28 June 1989, available on the WIPO home page at <http://www.wipo.org>.

currently being undertaken by other international organisations,⁹² and the treatment of similar questions in the context of recent national law reform.⁹³

It is thus suggested that the working party be inclusive, with participation from interested States, I.C.A.O., the European Joint Aviation Authority, the United States Federal Aviation Administration, I.A.T.A., the A.W.G., and individuals and entities with systems-building expertise and experience of advanced registration systems.

⁹² The United Nations Commission on International Trade Law (UNCITRAL) is currently at work on a draft Convention on Assignment in Receivables Financing. Section II of the Annex to the current draft addresses registration and would establish an international registration system for data on assignments. *See* Draft Convention on Assignment in Receivables Financing, unofficial document compiled on the basis of U.N. Docs. A/CN.9/WG.II/WP.102, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.96, A/CN.9/455 and A/CN.9/447. This draft Convention anticipates that the registrar will promulgate regulations prescribing how the registration system will operate, as well as procedures for resolving disputes. Under the draft Convention, parties may search the records of the registry. More broadly, UNCITRAL has also examined the general subject of international registration systems and noted it as a topic of possible future work. *See* 'Possible Future Work: Registration: Note by the Secretariat,' U.N. Commission on International Trade Law, 31st Sess., U.N. Doc. A/CN.9 (1995).

⁹³ A number of countries are currently reforming their secured transactions laws, and as part of that process are considering the role of modern systems of registration. *See, e.g.* J.L. Simpson et al., 'Feasibility Study for a Computerised Registration System for Charges in Hungary,' European Bank for Reconstruction and Development (July 1996). For information on the Mexican law reform effort, see the web page for the National Law Center, which is involved in the project, at <http://www.natlaw.com>.

The Canadian Atlantic Provinces (New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island), in conjunction with Unisys Canada, Inc., have developed an electronic database containing information maintained by the four provincial governments under their respective enactments of the Personal Property Security Act. The system, known as Atlantic Canada On-Line (ACOL), provides access to the registries of these provinces. Nova Scotia and Prince Edward Island are currently on-line. According to ACOL, the other two Atlantic provinces are expected to be on-line later this year.