

THE REGISTRY SYSTEM OF THE (draft) CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE (draft) AIRCRAFT EQUIPMENT PROTOCOL

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**THE REGISTRY SYSTEM OF THE (draft)
CONVENTION ON INTERNATIONAL INTERESTS IN
MOBILE EQUIPMENT AND THE (draft) AIRCRAFT
EQUIPMENT PROTOCOL**

Ronald C.C. Cuming*

I. INTRODUCTION

A Convention on International Interests in Mobile Equipment (hereafter "draft Convention" or "Convention") and an associated Protocol on Matters Specific to Aircraft Equipment (hereafter "draft Aircraft Protocol" or "Protocol") are very likely to be adopted at a diplomatic conference to be held in South Africa in the autumn of 2001. The Convention and Protocol will very likely come into force within a 12-18 month period immediately following the conference.

The basic structures of the draft Convention and draft Aircraft Protocol were developed by the International Institute on Unification of Private Law (hereafter "UNIDROIT").¹ Late in

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1 The concepts and various drafts of the draft Convention and draft Aircraft Protocol have generated a considerable amount of academic literature. The following is a sampling: D. CLANCY and G. VOSS, "Facilitating Asset-based Financing and Leasing of Aircraft Equipment Through the Proposed UNIDROIT Convention: Manufacturers' Perspective," (1998) *XXIII Air. & Sp. L.* 286; L. CLARK and J. WOOL, "A Report on the Development of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applied to Aircraft" (1999), 31 *U.C.C. L.J.* 389; B. CRANS, "Analysing the Merits of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol on the Basis of a Fictional Scenario" (2000) *XXV Air. & Sp. L.* 51; R. CUMING, "Considerations in the Design of an International Registry for Interests in Mobile Equipment" 1999-2 *Unif. L. Rev.* 275; T. GALAGHER, "Assessment of the Anticipated Economic Benefits of the UNIDROIT Convention," (1998) *XXIII Air & Sp. L.* 294; R. GOODE, "Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment," 1992-2 *Unif. L. Rev.* 52; A. HARMATHY, "The Regulation of Secured Transactions Under the Future UNIDROIT Convention: A Hungarian Point of View,"

the development process, the International Civil Aviation Organization (hereafter "ICAO") became involved because of the interest in the project demonstrated by the aircraft industry, including manufacturers, airlines and financiers. Three UNIDROIT-ICAO cosponsored meetings of governmental experts and members of an ICAO legal subcommittee were held in 1999 and 2000, at which the UNIDROIT proposals were further developed.² Additional refinements were made at the meeting of the ICAO Legal Committee³ and approved by the ICAO Council.

The draft Convention was designed to apply to a range of different types of mobile equipment.⁴ Because of the early

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- 1 1999-2 *Unif. L. Rev.* 433; P. LARSEN and J. HEILBOCK, "UNIDROIT Project on Security Interests: How the Project Affects Space Objects," (1999), 64 *J. Air L. & Comm.* 702; H. ROSEN, "Creating an International Security Structure for Railway Rolling Stock: An Idea Ahead of Time?" 1999-2 *Unif. L. Rev.* 313; M. STANFORD, "A Broader or Narrower Band of Beneficiaries for the Proposed New International Regime? Some Reflections on the Merits of the Convention/Protocol Structure in Facilitating the Former" 1999-2 *Unif. L. Rev.* 242; J. STOUFFLET, "L'avant-projet de Convention d'UNIDROIT : réflexions sur son insertion dans le système juridique français," 1999-2 *Unif. L. Rev.* 361; L. WEBER and S. ESPINOLA, "The Development of a New Convention Relating to International Interests in Mobile Equipment, in Particular Aircraft Equipment: A Joint ICAO-UNIDROIT Project," 1999-2 *Unif. L. Rev.* 463.
 - 2 See *Report of the First Joint Session of the Unidroit Committee of governmental experts and the Sub-Committee of the ICAO Legal Committee on the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters Specific to Aircraft Equipment*, Unidroit CGE/Int.Int/-Report; ICAO Ref. LSC/ME-Report; *Report of the Second Session* (Dec.1999), Unidroit CGE/Int.Int/2-Report; ICAO Ref. LSC/ME/2-Report; *Report of the Third Session* (Mar. 2000), Unidroit CGE/Int.Int/3-Report; ICAO Ref. LSC/ME/3-Report.
 - 3 See CAO LEGAL COMMITTEE - 31st Session, Doc. 9765-LC/191 (Nov. 6/00).
 - 4 INTERNATIONAL INSTITUTE ON UNIFICATION OF PRIVATE LAW, *Convention on International Interests in Mobile Equipment* (hereinafter called the draft convention) Article 2(3) lists three categories of equipment to which the Convention will apply: aircraft objects (airframes, aircraft engines and helicopters), railway rolling stock and space property. Article 49 prescribes a system allowing for the adoption of protocols dealing with railway rolling stock and space property without the need for a formal diplomatic conference. Article 50 provides for the development and adoption of protocols dealing with other types of high-value mobile equipment.

participation of an Aviation Working Group formed by representatives of a wide range of organizations involved in the sale, financing and use of commercial aircraft with a mandate to work with UNIDROIT in the preparation of the Convention, the draft Aircraft Protocol was the first to reach full development. As a result, both drafts can be addressed in tandem at the diplomatic conference.

II. THE RAISON D'ÊTRE AND SCOPE OF THE CONVENTION AND PROTOCOL

The problem that induced interest in a convention of this kind was the lack of recognition, priority or enforcement in one state of a security interest in mobile equipment created under the laws of another state.⁵ The goal of the designers of the draft Convention was to develop a body of international substantive law⁶ that would supplant national law by addressing the central legal elements of secured financing and leasing of high-value mobile equipment: creation of interests, priority of interests, public disclosure of interests and enforcement following default.

The draft Convention employs both a functional and a formal approach to the identification of transactions falling within its scope. A functional test is used to identify transactions that create international security interests. Article 2(2)(a) stipulates that the draft Convention applies to a "security

5 See generally Ronald C.C. CUMING, "International Regulation of Aspects of Security Interests in Mobile Equipment" *supra*, note 4, at 77-89, and SHILLING, "Some European Decisions on Non-possessory Security Rights in Private International Law" (1985), 34 *International and Comparative Law Quarterly* 87.

6 The draft Convention and draft Aircraft Protocol are revolutionary in that, unlike the *Geneva Convention on the Recognition of Rights in Aircraft*, 1948, they prescribe a body of substantive law. While the "applicable law" provides background to the instrument, the central features of modern secured financing transactions are addressed in the draft Convention and draft Aircraft Protocol.

agreement” defined in Article 1(jj)⁷ in generic terms as “[a]n agreement by which a chargor grants or agrees to grant to a chargee an interest in or over an object to secure the performance of an existing or future obligation of the chargor or third person.” However, this approach was not applied universally. Article 2(2) of the draft Convention includes two additional types of agreements solely by reference to their form:⁸ a lease agreement⁹ and a conditional sale agreement.¹⁰ Articles 31 and 32 bring within the draft Convention assignments of international interests and “associated rights.”¹¹

The draft Aircraft Protocol specifies that the Convention’s priority and registration provisions apply to sales of aircraft and aircraft engines.¹² While this feature will not provide a title

7 References in this paper to specific articles of the proposed Convention are to the articles of the draft prepared by the third joint UNIDROIT-ICAO session *Report of the Third Session* (Mar. 2000), Unidroit CGE/Int.Int/3-Report; ICAO Ref. LSC/ME/3-Report, as modified at the meeting of the ICAO Legal Committee as recorded in Legal Committee - 31st Session, Doc. 9765-LC/191 (Nov. 6/00). A consolidated text of the draft Convention and draft Aircraft Protocol was prepared for the Legal Committee and Council of ICAO. See ICAO Doc. 9765-LC/191 Attachment F, Part 1. However, all references herein to the draft Convention and draft Aircraft Protocol are to the unconsolidated instruments.

8 The distinctions between the types of transactions to which the draft Convention applies are significant only to the extent that post-default enforcement is involved. The rules dealing with creation, registration and priorities apply equally to all three types of agreements. Where a lease or conditional sale agreement is involved, the remedy of the lessor or seller is to recover possession of the equipment. Article 9. Where a security agreement is involved, the debtor’s interest in the property is recognized through an obligation of the secured party to sell or lease the equipment or to take it in satisfaction of all or part of the obligation secured, and a right given to the debtor to redeem it before disposition by the secured party. Articles 7-8.

9 Article 1(q) of the draft Convention.

10 Article 2(5) of the draft Convention provides that an international interest in an object extends to proceeds of that interest. In Article 1(bb) of the draft Convention, “proceeds” are defined as “money or non-money proceeds arising from the total or partial loss or physical destruction or expropriation of an item of equipment.”

11 This term is defined in Article 1(c) of the draft Convention as “all rights to payments or other performance by a debtor under an agreement which are secured by or associated with the object.”

12 INTERNATIONAL INSTITUTE ON UNIFICATION OF PRIVATE LAW PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (hereinafter called “Protocol”), Article III and Convention, Article 40.

registration system, it will have a similar effect with respect to aircraft and engines purchased from manufacturers after the Convention and Protocol come into effect. A potential buyer will be able to search the “chain of ownership” from the manufacturer to the seller. A person who buys on the strength of this information will take free from an intervening transfer of ownership that has not been registered.

The proposed Convention also provides for the extension of the registration and priority rules to a “non-consensual right or interest,” such as a repairer’s or supplier’s lien, a tax lien or a wage lien, that a contracting state in its declaration elects to treat as consensual international interest.¹³

III. WHEN THE CONVENTION APPLIES

The Convention will apply when, at the time of execution of the agreement creating or providing for an international interest,¹⁴ the debtor, lessee or buyer is located in a contracting state.¹⁵ The location of the secured party, lessor or seller is not relevant. The Convention will apply to what in other contexts would be a transaction governed by national law because all of the factors relating to the agreement and the equipment are located in a single state. Although any state that becomes party to the Convention will be entitled to

13 Article 38 of the draft Convention. The term “non-consensual right or interest” is defined in Article 1(s) as “a right or interest conferred by law to secure the performance of an obligation, including an obligation to a state or state entity.”

Article 39 of the draft Convention provides for the recognition of the priority of non-consensual interests under national law that are declared by a contracting state. These are interests that have priority under national law. They are not subject to the registration requirement or priority regime of the Convention. The list of such interests will be kept on record at the International Registry. Article 22 of the draft Convention.

14 Article 6 of the draft Convention sets out the requirements for the creation of an international interest. All that will be necessary is an agreement in writing that contains a description under which the equipment can be identified. This need not be a specific item description so long as there is a formula in the agreement under which the object can be identified. What constitutes an adequate description will be specified in the applicable protocol. Article VII of the draft Aircraft Protocol prescribes the description requirements for aircraft objects.

15 Article 3 of the draft Convention.

declare that it will not apply to "an internal transaction,"¹⁶ the registration and priority rules of the Convention will apply to the rights of the creditor under such transaction.¹⁷ Consequently, "national interests"¹⁸ are registerable in the same way as international interests. Article IV of the draft Aircraft Protocol provides, however, that the Convention will apply to a transaction involving an aircraft if the aircraft is registered in a contracting state or an agreement exists that the aircraft will be registered in a contracting state.

IV. PRIORITIES

The priority rules of the draft Convention are very simple. Competing registered interests will rank in order of their registration,¹⁹ and a registered interest will have priority over an unregistered interest. Knowledge of a prior unregistered interest will not affect the priority status of a holder of a registered interest.²⁰ An unregistered international interest will be subordinate to a buyer's interest in the property acquired from the debtor, lessee or buyer. This is so whether or not the buyer's interest was acquired with or without actual knowledge of the unregistered international interest.

A registered international interest will have priority over a trustee in bankruptcy and execution or attaching creditors. However, an international interest will have the same priority in insolvency proceedings that it has under the applicable law.²¹ Consequently, if, under that law, the international

16 Article 48 of the draft Convention.

17 The term "internal transaction" is defined in Article 1(n) of the draft Convention as "a transaction ... where the centre of the main interests of all parties is situated, and the relevant object is located (as specified in the Protocol) in the same contracting state at the time of the conclusion of the transaction."

18 A "national interest" is defined in Article 1(r) of the draft Convention as "an interest in an object created by an internal transaction."

19 Convention, Article 28(1). As to priority in the case of competing buyers, see Protocol, Article XIV(1). The Convention does not determine priority between the holder of an interest in an item (other than an aircraft engine) held prior to its installation on an object and the holder of an international interest in that object. It is also silent on the issue of its application to parts removed from an object and sold.

20 Convention, Article 28(2).

21 Convention, Article 29.

interest is valid without registration against a trustee in bankruptcy, there will be no requirement to register it in the International Registry to maintain that priority. This feature will be significant in cases where there is no registration requirement for non-security leases under the applicable law.

V. THE INTERNATIONAL REGISTRY

1. INTRODUCTION

The priority structure of the draft Convention assumes the existence of an International Registry (hereafter "Registry") for international interests and registerable non-consensual interests. Articles 15-27 of the draft Convention prescribe the basic features of the registries that will be established under protocols. The following description of the proposed International Registry is based on the provisions of the draft Convention and draft Aircraft Protocol. However, such description cannot be definitive because these provisions may be changed at the diplomatic conference and because many of the details regarding the Registry's operation will be set out in regulations promulgated by the Supervisory Authority once it is named as stipulated in the Convention and Protocol.²²

2. THE ADMINISTRATIVE STRUCTURE

(i) A Single Registry for All Interests

The draft Convention and draft Aircraft Protocol provide for a single registry for the registration of all international interests²³ in aircraft objects.²⁴ There will be no direct reliance on or coordination with existing national registries. All registration information will be communicated directly to a single registry location.

²² Protocol, Article XVI.

²³ See also Ronald C.C. CUMING, "Considerations in the Design of an International Registry for Interests in Mobile Equipment", (1999-2), *Uniform Law Review* 275.

²⁴ As noted above, assignments of international interests, non-consensual interests and sales of aircraft will also be registerable in the International Registry.

It will be permissible, however, for a contracting state to designate an entity in its territory as an alternative or the exclusive conduit through which registration data are transmitted to the International Registry.²⁵ Almost all states currently have a recording office operated by a civil aviation authority as required by the *Chicago Convention on International Civil Aviation, 1944*, at which aircraft airframes and helicopters are registered as to nationality. States that are party to the *Geneva Convention on the International Recognition of Rights in Aircraft, 1948* use these offices as registries for interests recognized by that Convention. In addition, some states have central national or regional registries for interests in aircraft and aircraft engines created under domestic law. These facilities could be designated under the draft Aircraft Protocol as exclusive or non-exclusive transmitters of registration data. However, the designation can apply only with respect to international interests in, or sales of, helicopters or airframes and registerable non-consensual interests.²⁶ It cannot include international interest in or sales of aircraft engines. Similarly, the national agency will not be the conduit for discharges, amendments or subordinations of registrations.

(ii) The Supervisory Authority

Since the Registry will not be under the administrative control of any national government, it has been necessary to establish a body that will provide the administrative structure through which policy decisions are made, regulations addressing the details of the system are adopted and concerns of system users are addressed. The draft Convention and draft Aircraft Protocol call for the designation of a Supervisory

25 Convention, Article 17(4) and Protocol, Article XVIII.

26 Protocol, Article XVIII(2). While not specifically stated in the draft Protocol, it is understood that a contracting state that takes advantage of this feature will be entitled to impose conditions that must be met before it is obligated to transmit registration data to the International Registry. See Report of the 31st Session of the ICAO Legal Committee, Report, as modified at the meeting of the ICAO Legal Committee as recorded in Legal Committee - 31st Session, Doc. 9765-LC/191 (Nov. 6/00), at par. 3:86.

Authority²⁷ that will have powers and responsibilities paralleling those of a government department responsible for establishing and maintaining a registry.²⁸ Article 16 of the draft Convention assigns responsibility to the Supervisory Authority for a wide range of matters relating to the Registry, including establishing it, appointing the Registrar, making regulations for the operation of the Registry, providing guidance to the Registrar, setting registry fees and addressing users' complaints. More generally, the Supervisory Authority is required to "do all things necessary to ensure that an efficient, notice-based electronic registration system exists to implement the objectives of the" Convention and Protocol.²⁹ However, the Supervisory Authority will not operate the International Registry; rather, the latter's day-to-day operation will be managed by a Registrar retained under contract with the Supervisory Authority for this purpose.³⁰

A central issue associated with the Registry under the draft Aircraft Protocol is the choice of the Supervisory Authority. It is very likely that ICAO will become the Supervisory Authority or will create a body to fulfill this role as one of its branches.³¹ ICAO is the arm of the United Nations mandated to regulate many aspects of civil aviation; it has international legal personality and an established bureaucracy.

(iii) The Registrar

The Registrar appointed by the Supervisory Authority³² is likely to be a private company or an agency of a national or

27 The Supervisory Authority will have international legal personality and will enjoy immunity from legal or administrative process and freedom from taxes. Convention, Article 26.

28 Convention, Article 16. The Supervisory Authority is to be appointed as provided in the relevant protocol. See Article XVI of the draft Aircraft Protocol.

29 Convention, Article 16(2)(f).

30 Article 16(2)(b) of the draft Convention. Under Article XVI of the draft Aircraft Protocol, the contract will have a five-year term but it will be renewable.

31 On the recommendation of the Legal Committee, the ICAO Council has given its preliminary support for ICAO accepting the role of Supervisory Authority. See Summary of Council Decision (C-DEC 161/9, 24/11/00).

32 Convention, Articles 16(2)(b)-(c) and (f) and Protocol, Article XVI(2). Contracts for the operation of the International Registry will have a five-year term, but will be renewable.

sub-national government that has expertise and facilities to operate a modern electronic registry. Canada, Ireland and Singapore have indicated preliminary interest in hosting the International Registry. In the Canadian context, every province has a modern, efficient remote-access registry for security interests in personal property that could be adapted to accommodate the International Registry. The location of ICAO headquarters in Montréal, Canada would suggest that, all other things being equal, it would be logical to ask the *Registre des droits personnels et réels mobiliers* to act as Registrar for the International Registry. It is one of the most modern and technologically sophisticated registries in the world, with adequate capacity to handle the small volume of registrations that will be made in the International Registry.

(iv) Guarantee of Reliability

An important feature of a modern registry of legal rights is protection of users against structural or operational deficiencies in its operation. Without this protection, a registry loses much of its value. The amounts involved in aircraft financing are very large and deficiencies in the system can be very costly to its users. Consequently, reliability of the Registry has been a central theme in its development.

The draft Convention does not permit the system to force users to rely on self-insurance.³³ It requires the Registrar to provide insurance or a financial guarantee covering liability for losses suffered by users as a result of system failure. Since it is most unlikely that the Registrar, whether a private company or a national or sub-national government agency, will be prepared to assume this liability, external insurance will be obtained. The International Registry must be financially self-supporting³⁴; consequently, the cost of liability insurance must be recovered in the fees charged for registry services.³⁵ Preliminary investigations carried out by a subcommittee of

33 Article 27 of the Convention requires the Registrar to provide insurance or a financial guarantee covering the Registrar's liability as provided in Article 27(1). See also Protocol, Article XIX(5).

34 Protocol, Article XIX(3).

35 Experience with the computerized Canadian registry systems is that the potential for liability is very small if the system is properly designed.

the Registry Task Force have led to the conclusion that this insurance can be obtained at an acceptable cost so long as the scope of liability of the Registrar is appropriately limited.³⁶

The draft Convention provides that the Registrar shall "be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the registry system."³⁷ However, exceptions are to be recognized. The scope of these exceptions was not formulated at any of the UNIDROIT-ICAO joint sessions or at the ICAO Legal Committee meeting. It was left to the Registry Task Force to develop the list of exceptions to be presented at the diplomatic conference. A subcommittee of the Task Force which was assigned this responsibility and included delegates from Canada and Sweden has recommended that the Registrar not be liable for "damage caused by an event of an inevitable, unforeseeable and irresistible nature."³⁸ The recommendation sets out a non-exclusive list of specific events resulting in loss to users for which the Registrar will not be liable. Generally, these involve matters over which the Registrar would have no control:

- inaccuracy of data transmitted by a user and received by the Registry in reflecting the existence and scope of an international interest;
- delay in or failure of transmission of data occurring prior to the time when the data came within the exclusive control of the Registrar;
- an unauthorized registration, discharge of registration or amendment or corruption of data in the Registry database effected by a person or official body using an authorized signature of a user;

36 "Cost of Insurance" an unpublished Report of the Swedish and Canadian Delegations to the Registry Task Force Meeting, Feb.13-15, 2001, Dublin, Ireland. This list reflects the assumptions of the Canada-Sweden Subcommittee as to the basic structure of the International Registry.

37 Convention, Article 27.

38 "Cost of Insurance" an unpublished Report of the Swedish and Canadian Delegations to the Registry Task Force.

- amendment or corruption of data in the Registry database resulting from unauthorized external access to the database by a person not using an authorized signature that could not reasonably have been prevented by the use of technology available at the time the Registry is established or by technology available thereafter that can be implemented without unreasonable cost or disruption to the operation of the Registry.³⁹

3. OPERATIONAL FEATURES OF THE INTERNATIONAL REGISTRY⁴⁰

(i) Notice Registration

The International Registry will provide for notice, not document registration. What will be entered into the system database will be minimal information relating to an existing or potential interest. Apart from the description of the property that is subject to the international interest,⁴¹ the draft Convention and draft Aircraft Protocol leave to the regulations the types of data that will constitute a registration. If the pattern of most modern North American registries is followed, all that will be required to effect a registration will be identification of the type of transaction, the names and addresses of the debtor, buyer or lessee, assignor or transferor and the secured party, conditional seller, lessor, assignee or transferee, as the case may be, and a description of the property affected by the interest.⁴² No additional details of the transaction giving rise to the international interest

39 *Ibid.*

40 Article 16(2)(i) of the draft Convention requires that the International Registry employ a "notice-based electronic registration system."

41 A description that allows the equipment to be specifically identified is necessary since this will be the factor (registration-search criterion) used to store registration data in and retrieve them from the Registry database. See Protocol, Article XIX(1).

42 Protocol, Article XIX(1).

will be required or permitted.⁴³ This approach represents the conclusion that it is not the function of the Registry to provide the details of the contract creating the interest. This information must come from the party who has effected the registration through direct inquiry, or indirectly, through the debtor, buyer or lessee, assignor or transferor, as the case may be.⁴⁴

(ii) Format of Registration Data

The requirements that the Registry be efficient and reliable and that users be protected by insurance from loss due to failure of the system dictate that registration data are to be transmitted to the Registry in digital format and that all information disclosed in searches of the database be sent in digital format from the Registry to the person requesting it. If it were permissible to transmit registration data in hardcopy format, not only would there be significant problems of delay in effecting registrations, but the potential for human error in entering the data into the Registry database would dramatically increase the risk of loss and attendant liability of the Registrar.

While a system based totally on electronic transmission of data will require that users of the system have facilities and some expertise in the use of the technology, this should not be a source of concern. Aircraft financing and acquisition are

43 A feature of the draft Convention that dictates a minimalist approach to registration data is provision for registrations relating to a "prospective international interest." See Articles 15(1)(a) and 18(3). This term is defined in Article 1(y) as "an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor's acquisition of an interest in the object) whether or not the occurrence of the event is certain." By definition, a registration relating to a prospective international interest cannot contain details of an agreement since no agreement may exist at the time the registration is effected.

44 The amount of information included in registrations is an important consideration when designing a system that must function in more than one language. The Registry Task Force did not make recommendations with respect to the number of languages in which the Registry will function. While there are political considerations involved, the most important determinant is likely to be the cost of creating and operating a system in more than one or two languages.

carried out by experts who have the necessary facilities and expertise. There is no requirement in the draft Convention or draft Aircraft Protocol that at the time of registration of an interest, the registering party be located in a contracting state or in a jurisdiction in which an aircraft is registered as provided in the *Chicago Convention on International Civil Aviation, 1944*. Parties located in states that do not have the necessary electronic communications facilities to access the Registry can go through service providers located in states having this capacity.

(iii) The Role of the Registrar

A central feature of a modern electronic registry system is the limited role of registry personnel. Under this type of system, the registrar has little or no role in determining what goes into the registry database. This is very likely to be a feature of the International Registry under the draft Aircraft Protocol. All the Registrar will be required to do is to ensure that the Registry regulations are followed; he or she should have no obligation⁴⁵ to verify registration data submitted by a registrant or to confirm the source of that information, except to the extent that this can be accomplished through the software employed by the Registry.⁴⁶ The Registry should accept any data that comply with the requirements as to form set out in the regulations and programmed into the software. It is very likely that the Supervisory Authority will require the Registrar to obtain software that, as much as is practicable, will be able to process registrations, amendments, assignments and discharges electronically and without human involvement.

(iv) Access to the Registry

The draft Convention guarantees open access to the Registry by anyone, located anywhere, who complies with the

45 Article 17(2) of the draft Convention makes it clear that the Registrar has no responsibility to ensure that consent to the registration as required by Articles 19(1)-(3) has been obtained.

46 The use of PKI technology provides for verification of the transmitter's identity, data confidentiality and identification of any corruption of data during transmission.

prescribed procedures.⁴⁷ A completely electronic system would permit access to the Registry through the Internet or an intranet system for anyone who has made the appropriate arrangements with the Registrar. Subject to security measures designed to protect the data in the Registry, this will include transmission of registration data, amendments, discharges or subordinations of registrations as well as searches of the database.

(v) Pre-agreement Registration

The draft Convention provides for registration of a “prospective international interest” and a “prospective assignment.” As is the case under the *Canadian personal property security acts* and Article 9 of the U.S. *Uniform Commercial Code*, it will be possible to effect a registration relating to an aircraft object before the transaction creating an interest in that object has been executed.⁴⁸ The priority of this interest goes back to the date of its registration as a prospective interest and not to the date the interest arises.⁴⁹

(vi) Date of Effectiveness and Duration of a Registration

A registration will be valid only when it is searchable.⁵⁰ The effect of this provision is to put on the registering party not only the risk of delay in transmission of registration data to the International Registry, but also any risk of delay resulting from temporary suspension of Registry facilities. However, management of this risk will not be difficult. A registering party will send the registration data and shortly thereafter request a search result from the International Registry. If the result is not available or does not indicate the registration, it is clear that some aspect of the transmission, reception and

47 Convention, Article 25. However, while not specifically stated in the draft Protocol, it is understood that a contracting state that takes advantage of this feature will be entitled to impose conditions that must be met before it is obligated to transmit registration data to the International Registry.

48 Convention, Articles 15(1), 18(3)-(4).

49 Convention, Articles 18(3)-(4).

50 Convention, Article 18(1)-(2)

storage of the data is non-functional. The ability to register a prospective international interest or a prospective assignment of an international interest will be very important in this context. Pre-agreement registration not only allows the registering party to determine what its priority status will be if it executes the proposed agreement, but in addition, its use provides a warning with respect to problems with the functioning of the Registry that could delay establishing that priority position.

A registration of an international interest is effective until discharge.⁵¹ The registration of a transfer of an aircraft object remains in perpetuity.⁵²

(vii) Compulsory Discharge

The draft Convention requires discharge of a registration relating to an international interest arising under a security agreement or title retention sale, or a registration relating to a prospective interest or an assignment of a prospective interest, when the obligations protected by the interest have been discharged or where no such obligations were created. When the person who effected the registration fails to discharge it, the aggrieved party must seek a remedy in a court having the power to enforce compliance.⁵³ This order can be enforced by the court of the place in which the Registrar has its centre of administration. However, where the person who effected the registration cannot be found or has ceased to exist,⁵⁴ this court has original jurisdiction to order discharge of the registration.

(ix) Registration-Search Criterion

The draft Convention provides for the possibility of having more than one registration-search criterion.⁵⁵ However, the draft Aircraft Protocol specifies that the only permissible

51 Convention, Article 19(4). This article provides alternatives: registration until discharge or registration for the period chosen by the registering party. Only the first of these will apply to registration of interests in aircraft objects. See Protocol, Article V(3).

52 Protocol, Article V(3).

53 Convention, Article 43(3).

54 Convention, Article 43(2).

55 Convention, Article 17(1).

registration-search criterion for an interest in an aircraft object will be the manufacturer's serial number, supplemented by requirements set out in the regulations as may be necessary to ensure uniqueness.⁵⁶ The exclusive use of a specific collateral description as the registration-search criterion eliminates the almost intractable language problems that would arise in an international registry allowing registration on the basis of the debtor's name.

(x) Transition

An important issue that must be addressed any time a new registration system is put into operation is whether or not interests created under pre-Convention contracts will have to be registered in the new system in order to have priority over new interests created after the system comes into effect. Two approaches were considered by the drafters. Under the first approach, the Convention would not apply to a pre-existing right or interest. Any such right or interest would retain the priority it enjoyed before the Convention came into force. Under the second approach, the Convention would apply to prior interests to the extent of their being brought into the Registry and priority structure after a specified grace period. The effect of this approach would be to require the holder of a pre-Convention interest that would constitute an international interest had it come into existence after the Convention came into force to register the interest in the International Registry. If registration were effected, the interest would retain its pre-Convention priority. If it were not, the interest would be treated as an unregistered international interest under Article 28.

The only merit of the first approach is that it allows holders of such interests to have priority without incurring the costs of registration. Supporters of this approach argued that the costs of identifying and registering all pre-existing interests would be prohibitive, particularly in the context of aircraft financing, which tends to be multi-tiered and complex. However, the problems associated with this approach are

⁵⁶ Protocol, Article XIX(1).

significant. The purpose of the Registry is to allow persons who deal with property falling within the scope of the Convention and Protocol to reduce the legal risk that there may be prior interest in the property by requiring those interests to be registered as a condition of recognizing their priority. Under the first approach, this policy is substantially frustrated since the priority of unregistered interests is recognized. The second approach, if rigorously applied, would eliminate this problem. Prior interests would be treated in the same way for priority purposes as interests created under the Convention.

The ICAO Legal Committee decided to recommend a compromise solution.⁵⁷ The second approach would be adopted subject to a substantial grace period and a special fee structure for these registrations. However, since the suggested grace period would be ten years, the supporters of the second approach would appear to have won a Pyrrhic victory, given that most current financing agreements do not extend much beyond ten years.

IV. SUMMARY

The progress of the project to develop a convention providing for a substantive international legal regime to deal with the creation, enforcement and priority status of interests related to the financing of high-value, internationally mobile equipment has been impressive. While it has been twelve years since the project was first proposed, one could reasonably have expected that the complexity of the political, logistical and legal issues involved would necessitate a much longer period of gestation for a convention of this kind.

The draft Convention and draft Aircraft Protocol represent very important steps in the development of international commercial law. They contemplate the world's first truly international body of substantive secured financing (and leasing) law and first centralized international electronic registry for private interests.

57 Convention, Article 55. However, both approaches were retained in the text. The Committee's conclusion is reflected in a footnote to the text, which states that "[i]t is intended that the fees required for registration of pre-existing rights or interests will be nominal."