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THE INTERNATIONAL REGISTRY FOR INTERESTS IN AIRCRAFT: AN OVERVIEW OF ITS STRUCTURE

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The International Registry for Interests in Aircraft : An Overview of its Structure

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I. – BACKGROUND AND CONTEXT

When the *Convention on International Interests in Mobile Equipment* (“the Convention”) and the *Protocol on Matters specific to Aircraft Equipment* (“the Protocol”)¹ came into effect as international law,² the International Registry for aircraft objects (“the Registry”)³ became operational. The Registry, the first of its kind in history, is a central feature of the priority structure of the Convention and Protocol applicable to seven types of transaction⁴ involving property interests in aircraft airframes, aircraft engines and helicopters (cumulatively referred to as “aircraft objects”).⁵ Its role is to provide a functionally efficient and commercially acceptable method for setting the priority rights of competing claimants to property interests in aircraft objects. It is a modern, notice registry with many features patterned on the secured transactions registries of the

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¹ The texts of the Convention and the Protocol are reproduced on the web page of the International Institute for the Unification of Private Law (UNIDROIT): <<http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>>. The background to the Convention and Protocol has been extensively described and documented. See, e.g., Sir Roy GOODE, *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment*, Rome: International Institute for the Unification of Private Law (UNIDROIT), 2002, and Select bibliography on UNIDROIT’s work on international interests in mobile equipment: <<http://www.unidroit.org/english/conventions/mobile-equipment/bibliography/bibliography1-main.htm>>.

² In accordance with Art. 49(1) of the Convention and Art. XXVIII(1) of the Protocol, the Protocol, and the Convention as applied to aircraft objects, entered into force on 1 March 2006. See ICAO Doc. PCIR 2/11/05.

³ Convention, Art. 16.

⁴ A security agreement providing for a charge, a sale with reservation of title, a lease agreement, an assignment of any one of these transactions and a sale without reservation of title. Convention, Arts. 1 (definitions), 2(2) and 41 and Protocol, Art. III. Under Art. 40 of the Convention, a Contracting State can elect to have non-consensual rights or interests, as defined in Art. 1(s), treated as registrable interests subject to the priority rules of the Convention. Under Art. 50 of the Convention, a Contracting State may declare that the Convention shall not apply to an internal transaction in relation to that State. An “internal transaction” as defined in Art. 1(n) is a transaction where the centre of the main interests of all parties is situated and the aircraft object is located in the Contracting State making the declaration at the time of conclusion of the contract and where the interest created by the transaction has been registered in a national registry of that State. See also Protocol, Art. IV(2). However, the priority structure of the Convention, including the associated registration requirements of the Convention, applies to the transactions. Convention, Art. 50(2). A registration relating to an internal transaction is referred to as a “notice of national interest”. Convention, Art. 16(1)(d).

⁵ These terms are defined in Art. I(2) of the Protocol. The term “aircraft engine” is defined as an engine (other than one used in military, customs or police services) powered by jet propulsion or turbine or piston technology and, (i) in the case of jet propulsion aircraft engines, having at least 1750 lb of thrust or its equivalent; and (ii) in the case of turbine-powered or piston-powered aircraft engines, having at least 550 rated take-off shaft horsepower or its equivalent; together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto. The term “airframe” is defined as an airframe (other than one used in military, customs or police services) that, when appropriate aircraft engines are installed thereon, is of a type certified by the competent aviation authority to transport (i) at least eight (8) persons including crew; or (ii) goods in excess of 2750 kilograms, together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto.

provinces of Canada and the states of the United States. The design of the system makes it possible to effect registrations and obtain searches quickly⁶ at modest cost,⁷ and to minimize the potential for errors in handling registration data or fraudulent manipulation or corruption of the data. Although its principal data base and centre of operations are located in Dublin, Ireland, the Registry is completely electronic and accessible from any place in the world having connections to the internet.⁸

The Registry is not a title registry. Only in a restricted, negative sense does it address ownership rights in aircraft objects. Under prescribed circumstances, the priority rules of the Convention subject the proprietary rights of a secured creditor, or the ownership of a lessor or title reservation seller of an aircraft object to defeat if a registration relating to the security agreement, lease or sale contract is not effected or is effected after a competing interest created under a transaction with the debtor, lessee or buyer has been acquired and registered in the aircraft object.⁹ Similarly, the ownership rights of a buyer of an aircraft object can be defeated unless a registration disclosing those rights is effected. However, registration does not entail any legal guarantee or presumption that the lessor, seller or buyer is the owner of the aircraft object identified in the registration. Ownership in this context remains a matter to be determined under the applicable law.

The Registry is the only relevant registry for registrable interests in aircraft objects when competing interests in those interests arise. While there is nothing in the Convention or Protocol to prevent a Contracting State from providing under its domestic law for the registration of these interests in a national registry, the only way a holder of such an interest can protect it from defeat under the priority rules of the Convention and Protocol is to effect a registration relating to that interest in the Registry.

A significant feature of the registration system of the Registry and the associated priority rules of the Convention is the separate treatment of airframes and engines. In this respect, the approach of the Convention differs from the provisions of the *Convention on International Civil Aviation, 1944* ("the Chicago Convention") dealing with nationality registration that do not distinguish between airframes and engines. Where a single transaction providing for or effecting a registrable interest in an airframe and attached engines is involved, it is necessary to effect separate registrations relating to the airframe and each of the engines.

The legal structure providing for the creation and operation of the Registry is contained in four documents: the Convention, the Protocol, the Regulations and the Procedures.¹⁰ While these sources are co-ordinated, they lack systematic organization and contain a certain amount of replication. As a result, a particular feature of the system may be addressed in two or more provisions. This is primarily a product of the structure of the Convention as a base law designed to facilitate international registries for interests in at least three different types of property governed by separate protocols and regulations.¹¹ A contributing factor was the logistical complexities associated with developing detailed international legislation and delegated legislation.

⁶ The only significant delay in effecting a registration is caused by the necessity to identify and approve system users and to obtain the requisite consents under Art. 20 of the Convention. See Procedures, ss. 10, 11 and 12.2.

⁷ The fees payable for Registry services are set out in the Fee Schedule to the Procedures.

⁸ Procedures, s. 7.1-7.3.

⁹ Art. 29(1) of the Convention provides that a registered interest has priority over any other interest subsequently registered and over an unregistered interest. Art. 29(3) provides that a buyer of an object acquires its interest subject to a prior registered interest and free from a prior unregistered interest. The same approach is applied to sales of aircraft objects by Art. 41 of the Convention and Arts III and XIV of the Protocol.

¹⁰ The Regulations and Procedures for the International Registry are contained in ICAO Document 9864. See the text thereof reproduced in this issue of *Unif. L. Rev. / Rev. dr. unif.*, 60.

¹¹ Convention, Art. 2(3).

Article 26 of the Convention guarantees universal access to the Registry. Anyone who complies with the procedural requirements of the Convention, Regulations and Procedures may access the Registry. This facility is not limited to nationals of Contracting States. However, while there is no requirement that the secured creditor, lessor, seller under a title reservation agreement or buyer be located in a Contracting State, it is not possible to effect a registration relating to an interest under a transaction involving a debtor, lessee, buyer under a title reservation agreement or seller who was not situated in a Contracting State at the time of the conclusion of the agreement creating or providing for an international interest¹² unless the aircraft object in the form of an airframe or a helicopter is registered in a Contracting State pursuant to the Chicago Convention.¹³ Furthermore, it is not possible to access the Registry directly for registration purposes with respect to an interest in an airframe or helicopter that is registered as to nationality in a Contracting State that has designated a mandatory entry point.¹⁴ The registration must be effected through that entry point.

II. – THE CONSTITUTIONAL AND STRUCTURAL FEATURES OF THE REGISTRY

1. The Supervisory Authority

The constitutional elements and operational structure of the Registry and the administrative responsibility for its operation are specified in considerable detail in the Convention and the Protocol.¹⁵

The Registry is established and supervised by the Supervisory Authority.¹⁶ In accordance with Resolution No. 2 of the Final Act of the Cape Town Diplomatic Conference and the decision of the Council of the International Civil Aviation Organization (ICAO), the Council agreed to assume the functions of Supervisory Authority upon the entry into force of the Protocol. As part of its plenary obligation 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,¹⁷ the Supervisory Authority has the legal responsibility to appoint and supervise the Registrar and to prepare and publish regulations relating to the operation of the Registry. Pursuant to Resolution No. 2 of the Final Act, these functions were delegated by the Diplomatic Conference to a Preparatory Commission, acting under the guidance and supervision of the ICAO Council, with full authority as the Provisional Supervisory Authority to establish the Registry. This entailed creating the Regulations and Procedures and contracting with an entity that assumes the function of the Registrar. The Preparatory Commission became *functus* and full responsibility for the Registry was assumed by the ICAO Council when the Convention and the Protocol (and, therefore, the Convention as applied to aircraft objects) came into force.¹⁸

The Registrar is an entity separate from the Supervisory Authority that carries out, under a term contract with the Supervisory Authority,¹⁹ the functions required of the registrar by the Convention and Protocol. The Registrar for the first five years of operation of the International Registry is AVIARETO Ltd.²⁰ located at Dublin, Ireland.

¹² Convention, Arts. 3(1) and 4.

¹³ Protocol, Art. IV(1).

¹⁴ For a detailed exposition of this feature, see heading II. 6 *infra*.

¹⁵ Convention, Arts. 16-28; Protocol, Arts. XVII-XX.

¹⁶ Convention, Art. 17.

¹⁷ Convention, Art. 17(2)(i).

¹⁸ For a presentation of the work of the International Registry Task Force in the process of establishment of the Registry, see Joseph R. STANDELL, “The Role of the International Registry Task Force (I.R.T.F.) in the Development of the International Registry for Interests in Aircraft”, reproduced in this issue of *Unif. L. Rev. / Rev. dr. unif.*, 8.

¹⁹ Convention, Arts. 17(3) and 17(5); Protocol, Art. XVII(5).

²⁰ AVIARETO is a joint venture between SITA SC, a global communication services integrator, and the Irish Government.

2. A notice registration system

Article 17(2)(i) of the Convention dictates that, structurally, the Registry must provide for “notice registration”, not contractual document registration. Registration of an interest or prospective interest in an aircraft object is effected by transmitting to the Registry basic, limited information about a transaction or prospective transaction.²¹ A registration does not involve public disclosure of the contract between the parties involved. It is a public record of the existence or potential existence of an interest of the kind addressed in the Convention and Protocol in a specified aircraft object and of the identity of the principal parties involved in the transaction.

This feature of the Registry system reflects the conclusion that there is no commercial need to include extensive details of the agreement or relationship between the parties. In the few circumstances in which these details are relevant, they can be obtained from the secured party, lessor or seller directly or through the debtor, lessee or buyer.²² In the great bulk of cases, the functions of the Registry are fully served by providing public notice of the existence or potential existence of registrable interests affecting aircraft objects. A person who discovers this fact through a search of the Registry will be able to take the steps necessary to remove the legal risk associated with being subordinate to an existing or potential interest in the aircraft object. That person will refuse to deal further with the person identified in the registration as debtor, lessee or buyer, require a discharge of the registration (in cases where the registration does not support an extant international interest) or go directly to the secured creditor, seller or lessor and offer to buy out or obtain a contractual subordination of its interest.

A notice registration system requiring that only very minimal information be included in a registration offers important benefits. It precludes public disclosure of confidential details of business relations between the secured party, lessor, or seller, and the debtor, lessee or buyer. Furthermore, there is a direct relationship between the amount of data that must be included in the registration and the incidence of error on the part of registrants in assembling and transmitting that data to the Registry.

In a functional sense, the role of the registration is to “give notice” of the interest or potential interest. In a technical sense, this is not the case. While registration provides the facility through which a third party can acquire information as to the existence or potential existence of the registered interest, the priority of the registered interest is not dependent upon the state of knowledge of the third party. The function of registration is to set the priority of the interest of a secured creditor, lessor, seller or buyer. Priority or lack of it does not depend upon the state of knowledge of the holder of a competing interest.²³

3. Registrations relating to existing and potential interests

Article 16 of the Convention and Article III of the Protocol prescribe the types of interests or potential interests in aircraft objects with respect to which registrations in the Registry can be effected.²⁴ In addition, it is possible to effect a registration relating to international interests acquired through legal or contractual subrogation and agreements providing for the subordination of any registrable interest.

²¹ In the case of a registrable non-consensual interest, it is a notice of the lien or charge affecting the identified aircraft object.

²² Rarely will a subsequent security interest be taken in aircraft objects without agreement on the part of the secured creditor to subordinate any future enhanced interest it may acquire in the equipment. As a result of Art. 29(2)(b) of the Convention, advances made by a secured creditor to a debtor at any time during the currency of the security agreement have the priority position established by the registration relating to the security interest. Consequently, a third party's interest in an aircraft object is automatically diminished to the extent that such advances are made unless the secured creditor has agreed to subordinate its interest created by these advances to the interest of the person in whose favour the subordination is given.

²³ Convention, Art. 29.

²⁴ See *supra*, note 4.

A feature that on first impression appears anomalous, but one that is of important practical significance, is the facility to effect a registration relating to a transaction that has not been entered into or an interest that has not come into existence at the date of the registration. Article 16 permits registrations of prospective international interests—and prospective assignments of international interests.²⁵ The Protocol extends this concept to prospective sales.²⁶ The practical and legal importance of this facility is that such a registration establishes a priority position for the interest to which it relates. As a result of Articles 19(4) and 29 of the Convention, priority is not determined on the basis of the date of execution of the contract providing for an international interest or the date when the interest is created, but on the basis of the date when a registration relating to it was effected. The result is that an interest to which a registration relates has priority over a prior, but later registered interest in the same aircraft object. Persons who are engaged in negotiations for a contract involving an international interest in a particular aircraft object may effect a registration as soon as the negotiations begin so as to establish the priority of the international interest should the negotiations be successful.

Article 41 of the Convention and Articles III and XIV of the Protocol prescribe the same approach to prospective sales²⁷ of aircraft objects under contracts that do not provide for retention of title. Consequently, a prospective buyer of an aircraft object who effects a registration relating to a potential sale contract then being negotiated and who later enters into a contract with the seller, is given priority over a person who acquired and registered a property interest in the object under a contract entered into between the date of the registration and the date the sale contract comes into existence.

4. The registration-search criterion

As noted above, the Registry is a notice registry system. Only very minimal information is required or permitted in order to effect a registration. One item of information that must be provided by a registrant is the appropriate registration-search criterion. This comprises the data that are used as key for archiving and retrieving the file containing a registration; it is the criterion under which the registration data are stored in the data base of the Registry and the criterion through which data are recovered through a Registry search. Accordingly, the criterion used to search the data base is identical to the criterion used to in-put and store the registration data.

Articles 19(2) and 19(6) of the Convention incorporate this principle. Together they provide that in order for a registration to be “valid”,²⁸ the registration criterion entered in the Registry data base to effect the registration must include the search criterion that permits the registration to be searchable.²⁹ Article 18(1) provides that the registration-search criteria are to be set by the Protocol and Regulations. Section 7.2 of the Regulations refer to three “criteria” specified in Article XX(1) of the Protocol as those required for a “priority search”³⁰ and, by implication, a registration. To the extent that this can be read as referring to three separate registration-search criteria, the section is misleading. There is only one registration-search criterion having three components.³¹

²⁵ These are defined terms. See Convention, Arts. 1(o), 1(x) and 1(y).

²⁶ Protocol, Art. III.

²⁷ This is a defined term. See Convention, Art. 1(z).

²⁸ More accurately, for a registration to occur.

²⁹ Section 5 of the Regulations requires information in addition to the registration criterion. However, these data do not play a role in the storage and retrieval system of the Registry.

³⁰ Sections 7.3 and 7.5 of the Regulations provide for two other types of search: an informational search and a Contracting State search. However, the issue of validity of a registration does not arise in the context of the information retrieved by these searches.

³¹ The Protocol provides for “such supplementary information” as “specified in the regulations.” However, any such information cannot be an aspect of the registration-search criterion.

The three components specified in the Protocol are the name of the aircraft object manufacturer, the manufacturer's serial number and the model designation.³²

5. Consent to effect or amend a registration

Article 20(1) of the Convention requires that both parties to a transaction or potential transaction to which a registration relates must consent to the registration or any amendment of a registration or extension of its period of effectiveness.³³ Without the requisite consent, data that in every other respect comply with the Convention, Protocol and Regulations transmitted to and accepted by the Registry cannot give rise to a registration.³⁴ However, while provision for obtaining consent (to be given in electronic form) is made in the Regulations and Procedures,³⁵ the Registrar is not under a duty to ensure that consent has in fact been given by the appropriate person.³⁶ Consequently, it is possible that what appears from a search of the Registry to be a registration has no legal significance since the requirements of Article 20 have only apparently been met,³⁷ although it is important to remember that the Registry has been designed in such a way as to reduce the probability of such cases occurring.

6. Entry points (transmission entities)

Article 18(5) of the Convention contemplates provisions in the Protocol under which a Contracting State may designate an entity or entities in its territory as the entry point or entry points through which registration data shall or may be transmitted to the Registry.³⁸ Pursuant to Section 12.6 of the Regulations, a registration may not be effected other than through the appropriate designated mandatory entry point (entity).³⁹ The Contracting State making a designation may specify the requirements to be satisfied before the data are transmitted to the Registry.⁴⁰

³² Section 5.1 of the Regulations and s. 12.1 of the Procedures contemplate a system under which the registrant is given a computerized drop-down list of all aircraft objects from which the appropriate elements of the registration criterion can be selected when effecting a registration. Although there is no requirement that such lists be provided by the Registrar, the author has been informed by Registry officials that all the major aircraft object manufacturing companies have provided the Registrar with the model designations and serial numbers of the objects they have manufactured. These will be set out on the drop-down lists available to users of the system.

³³ No consent is required where the registration being effected relates to a subordination and the registrant is the person giving the subordination, where it relates to the acquisition of an international interest by subrogation and the registrant is the subrogee, or where it relates to a non-consensual right or interest or internal transaction interest and the registrant is the holder of the interest. Convention, Art. 20. Pursuant to section 5.8 of the Regulations, there is no requirement for consent of a debtor, assignor, seller or person subordinating a right or interest to effect a registration of a pre-existing right or interest required as a result of a declaration under Article 60(3) of the Convention.

³⁴ The Convention uses the term "valid registration". However, technically, there is no such thing as an "invalid registration".

³⁵ Convention, Art. 18(1)(a), Regulations ss. 5.3(f), 5.4(b), 5.5(b), 5.6(b), 5.7(b), 5.9(b) and 5.11 and Procedures ss. 2(e), 12.2-12.3. When registration data are transmitted to the Registry (to effect, amend or discharge a registration) each party identified in the data whose consent is required, is electronically requested by the Registry to consent. The data are not entered into the data base until the requisite consents are obtained. Failure on the part of any person to give a required consent within 36 hours of the request being communicated results in the process being aborted. Procedures s. 12.2.

³⁶ Convention, Art. 18(2).

³⁷ This is likely to be a very minor issue given the measures taken by the Registrar to identify the persons from whom consent is required. See Procedures ss. 12.2-12.3.

³⁸ See also Regulations s. 12. This section provides for "authorizing entry point[s]" and "direct entry point[s]". An authorizing entry point is one that authorizes transmission of registration data to the Registry while a direct entry point transmits the data on behalf of the registrant. See also Procedures s. 8.

³⁹ Section 12.5 of the Regulations requires the Registrar to provide an electric warning against attempts to effect a registration other than through a mandatory entry point or other than in accordance with procedures required by an authorizing entry point. The nature and extent of the warning is to be "agreed between the International Registry and the Contracting State declaring that entry point." See also Procedures s. 8.

⁴⁰ Pursuant to Art. XIX(1) of the Protocol, a designation of an entry point (transmission entity) does not apply to registrations of notices of national interests or registrable non-consensual rights or interests arising under the laws of another State.

Article XIX(2) of the Protocol and Section 12.2 of the Regulations preclude mandatory use of an entry point (entity) with respect to registrations relating to registrable interests in aircraft engines. The basis for the distinction between registrations relating to airframes and helicopters and those relating to engines alone is historic. Under Chapter III of the Chicago Convention, all aircraft must have nationality and every Contracting State must provide a record of each of its non-military aircraft. Almost all States currently have a recording office operated by a civil aviation authority at which aircraft 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. These existing facilities can be designated under the Protocol as exclusive or non-exclusive transmitters of registration data. However, the Chicago Convention does not distinguish between airframes and engines. It uses the term “aircraft” to refer to a single unit which may or may not have engines. Consequently, there is no need for separate registration of ownership or nationality of engines.⁴¹

While an entry point referred to in Article 18(5) of the Convention or Article XIX of the Protocol need not be a Contracting State’s agency for the purposes of registering aircraft under the Chicago Convention, the assumption behind these provisions is that Contracting States that designate entry points may well use their Chicago Convention agencies for this purpose. As there is no requirement to register the ownership of engines under the Chicago Convention, a Contracting State may not require that its agency be a mandatory entry point for registrations affecting engines.⁴²

As noted above, Article 18(5) of the Convention permits a Contracting State not only to designate an entity or entities within its territory through or with the authorization of which registration data must or may be transmitted to the Registry, but, in addition, to specify requirements that must be met before this service is provided.⁴³ These requirements need not relate to any feature of the Convention, Protocol or Regulations. They can be requirements that relate to matters of domestic law. For example, they may be a copy of a sale contract, lease or security agreement to which a registration is to relate. Where the registration sought is to reflect a transfer of ownership, the requirements of the entry point agency could be proof of ownership of the seller. However, verification of the documentation involved in the creation of an international interest is a matter outside the scope and policy of the Convention and Protocol. As noted above, the Registry has no role in verifying the ownership or property rights of the parties to a transaction to which a registration relates or the existence or enforceability of those transactions.

7. Date a registration comes into existence

Article 19(2) of the Convention implicitly dictates an important structural feature of the Registry system: a registration cannot come into existence (or, to use the words of the Convention, cannot be “complete”) until it is searchable. Even though the requisite registration data have been transmitted to and received by the Registrar, no registration exists until those data are searchable using the appropriate search criterion.⁴⁴

⁴¹ In addition, some States have central national or regional registries for interests in aircraft and aircraft engines created under domestic law. While these may be designated as entry points (entities) they may not be mandatory entry points (entities) for engines.

⁴² Section 12.2 of the Regulations permits the designation of an authorizing entry point or a direct entry point by a Contracting State that has taken regulatory steps to become the State of Registry of an airframe or helicopter where the registration relates to prospective international interests, prospective assignments of international interests, and prospective sales of the object.

⁴³ Presumably these requirements would relate only to requests for registrations relating to international interests in airframes. A Contracting State may not require that registrations relating to international interests in engines be effected through an entry point.

⁴⁴ As to the appropriate registration-search criterion, see heading II. 4 *supra*.

An important question arises as to what constitutes “searchability” in this context. There could be at least two reasons why registration data transmitted to the Registry are not searchable. One is that the data have not been entered into the Registry data base in a manner or form that their retrieval is possible using the appropriate search criterion. The other is that the registration data have been entered so that the registration can be searched but, for some operational reason,⁴⁵ the Registry cannot be accessed for searching purposes. The intention, however, must be that Article 19(2) and (3) of the Convention contemplate only the first of these situations. A registration exists as soon as it can be retrieved using the appropriate search criterion whether or not at that time the Registry is accessible. Under this approach any risk associated with lost functionality of the Registry system will be allocated depending upon the point in the process of registration the loss occurred. If it occurred before the registration data are entered into the data base in a form searchable using the appropriate criterion, the risk is borne by the registrant. If it occurs after this point, it is borne by a person searching the Registry.

As noted above, the Convention provides for registration of prospective interests. In effect, what are involved are registrations relating to security agreements, leases, title retention sales agreements and sales that, at the date the registrations are effected, have not been consummated. Notwithstanding the lack of binding agreements at the dates of the registrations, priority of the interests that are affected by the agreements is determined on the basis of the time the registrations are effected.⁴⁶ In recognition of this feature of the Convention, Articles 18(3) and 19(4) provide that no additional information need be transmitted to the Registry in order for the validity and status of a registration relating to a prospective international interest to apply to the international interest once it comes into existence.

8. Confirmation of registration

Section 6 of the Regulations provides that the Registrar shall give prompt electronic confirmation of a registration to the registrant and to all persons entitled to notice of a registration.⁴⁷ The information in the confirmation is identical to that contained on a registry search certificate issued pursuant to Article 22(2) of the Convention.

A confirmation of registration has the important function of informing the registrant of the existence of the registration, the time when it was effected and the registration information.⁴⁸ In this context it relieves the registrant from the necessity to order a registry search certificate to determine whether or not a registration has been successfully effected.⁴⁹ Yet it may be considered best practice for registering parties to order such a certificate, thus confirming that the intended priority has been obtained.

Where a registration relates to an aircraft object, a confirmation (notice of the registration) is sent to persons referred to in any other registration relating to the object.⁵⁰ While there is no definition of “relating”, the intention must be that the concept includes all registrations affecting that object. The effect of this provision is to inform everyone who is named in a registration relating to an aircraft object of the fact of any additional registrations affecting the object.

9. Duration of a registration and discharge of a registration

Article 21 of the Convention provides that a registration “remains effective” (continues to exist) until it is discharged or until expiry of the period specified in the registration. However, registration

⁴⁵ See, *e.g.*, Regulations, s. 3.4 and Procedures s. 7.4.

⁴⁶ Convention, Art. 19(4).

⁴⁷ Persons entitled to notice of a registration are those specified by the registrant in the data transmitted to the Registry to effect a registration as provided in section 5 of the Regulations. See also Procedures s. 12.3.

⁴⁸ As to the possible significance of a confirmation of registration or notice provided under section 6 of the Regulations in the context of an action against the Registrar, see text following note 75, *infra*.

⁴⁹ Procedures s. 12.5 and 12.6.

⁵⁰ Regulations, 6.3.

of a contract of sale (but not of a prospective contract of sale) continues indefinitely and may not be discharged.⁵¹

This feature as it applies to registrations other than those relating to sales of aircraft objects raises an important issue endemic to all registry systems affecting legal rights, particularly those that permit registrations relating to prospective rights. Situations will arise when a security interest has been discharged, the purchase price of goods acquired under a title retention sale agreement has been paid or negotiations fail to produce agreements providing for or effecting international interests. If registrations relating to the performed transactions or the prospective agreements that never materialized remain undischarged, considerable difficulties may be encountered by persons who want to enter into other transactions involving the aircraft objects identified in the registrations. A former debtor that has discharged a security interest in an aircraft object owned by it or a person who was involved in aborted negotiations with a potential creditor to give a security interest in an aircraft object has an interest in insuring that any registration affecting that aircraft object is discharged so as not to impede further commercial dealing with its rights in the object.

Article 25 of the Convention⁵² embodies recognition of the potential for this problem to develop in the context of the Registry system and provides a partial remedy to address it. It places a legal obligation, invoked by written demand of the person whose interest is affected by the registration, on a secured party in the case of a registration relating to a discharged security agreement or a non-consensual right or interest, on a title retention seller in the case of a performed sale contract, and on the registrant in the case of registrations relating to prospective international interests, to procure discharge of the registration.⁵³ Article XX(2) of the Protocol specifies a short time period (five days after a demand for discharge has been received) for the registrant to discharge a registration relating to a prospective international interest or a prospective assignment of an international interest. Similarly, an obligation is placed on a registrant to discharge or amend a registration in a case where the registration ought not to have been made or is incorrect.

Enforcement of the obligations contained in Article 25 involves jurisdictional issues. Ultimately the only completely effective way to enforce the obligation in a case where the responsible person refuses or fails to comply with the demand made in accordance with the Article is to require the Registrar to discharge or amend the registration, as the case may be. This solution can be readily implemented in the context of a situation in which court orders can be enforced against the Registrar. However, implementation in an international context is much more difficult where the Registry is not likely to be subject to the jurisdiction of the courts where either the registrant or the person seeking correction of the registry records is located.

A partial solution is provided by Article 44 of the Convention. It should be noted that, where litigation related to registrations occurs in courts other than Irish courts, that solution may be convoluted and expensive. The base principle as stated in paragraph 1 of the Article is that the courts of the place in which the Registrar has its centre of administration have exclusive jurisdiction to make orders (including damage awards) against the Registrar. For the period 2006-2011, orders against the Registrar can be made only by the Irish courts.

Where the person who is obligated under Article 25 to discharge or amend a registration fails to do so, Article 44(3) provides that the person entitled to demand that the Registry records be corrected may bring action in the court⁵⁴ having jurisdiction under the Convention, seeking an order requiring compliance with the demand. Under Article 42 of the Convention, this is the court

⁵¹ Protocol, Art. V(3).

⁵² Art. III of the Protocol makes Art. 25(2) applicable to registrations relating to prospective sales.

⁵³ The same obligation is placed on the registrant in the case of a registration relating to an internal transaction. Convention, Art. 25(3).

⁵⁴ Pursuant to Arts.1(h) and 53 of the Convention, a Contracting State may declare that a "court" includes an administrative or arbitration tribunal established by the Contracting State.

of a Contracting State chosen “by the parties” in the manner required by the law of the chosen forum. In cases where no choice has been made or where the choice made is not recognized as valid under the law of the chosen forum, the action may be brought in a court of any Contracting State that concludes it has jurisdiction and is a *forum conveniens* under its procedural rules.

However, what can be obtained from a court other than an Irish court is an order against the registrant, not an order against the Registrar. A registrant who fails to comply with the order will be subject to the coercive powers of the court that has issued it. An award of damages alone, however, may not address the problem unless it is accompanied by a mandatory injunction, enforced through contempt or equivalent proceedings, requiring the registrant to discharge or amend the registration. Article 44(3) suggests the ultimate remedy in cases of non-compliance. An order issued by a court of competent jurisdiction requiring the registrant to correct the registry records may be enforced by the Irish courts through a direction to the Registrar to give effect to it. The Irish implementing legislation confers jurisdiction on Irish courts for these and related purposes.⁵⁵

Article 44(2) of the Convention addresses the situation where the registrant to whom the demand under Article 25 has been made ceases to exist or cannot be found for the purposes of an order to discharge a registration effected by that person. In this case, the Irish courts have exclusive jurisdiction to make such an order. While the matter is not free from doubt, it is reasonable to assume that in such an application the Irish court will be prepared to hear the case even though the parties have included in their contract an exclusive choice of jurisdiction provision.

10. Registry (priority) searches

In practical terms, the function of the Registry system is to provide a person who is considering acquiring an interest in an aircraft object the facility to determine whether or not the object offered for sale or as collateral is subject to a prior proprietary right in the form of a security interest, the ownership of a lessor, seller or other person, or a non-consensual right or interest. Consequently, the Convention provides for searches of the Registry data base⁵⁶ so that a person can accurately assess the legal risk involved in acquiring an interest in an aircraft object.⁵⁷ Article 19(6) of the Convention provides that a registration is searchable according to the criteria (criterion) prescribed by the Protocol. The right to obtain a Registry search and the contents of a search result (search certificate) are elaborated in Article 22 of the Convention and section 7 of the Regulations.

As noted above, the criterion used to effect a registration is the same criterion used to obtain a search certificate. Section 7.2 of the Regulations refer to three “criteria”⁵⁸ specified in Article XX(1) of the Protocol as those required for a “priority search” and, by implication, a registration.⁵⁹ The three components of the search criterion⁶⁰ specified in the Protocol are the name of the aircraft object manufacturer, the manufacturer’s serial number and the model designation.⁶¹

⁵⁵ The scope of jurisdiction “to make orders” under Art. 44(1) is not circumscribed by the Convention. See GOODE, *Official Commentary*, *supra* note 1, 146-148.

⁵⁶ Convention, Art. 22. See also Regulations s. 7 and Procedures s. 13.

⁵⁷ A person requesting a search need not have an interest in the aircraft object that is the subject-matter of the search. Convention, Art. 22(1) and Regulations, s. 7.1.

⁵⁸ See *supra* note 32.

⁵⁹ See also Procedures s. 13.1(b).

⁶⁰ As noted above, there is only one registration-search criterion with three components.

⁶¹ Drop-down lists will be available for this purpose. See *supra* note 33.

When a “priority search”⁶² has been requested⁶³ in the manner set out in the Regulations, the Registry is required by Article 22 of the Convention to issued a registry priority “search certificate” with respect to the object described in the search criterion set out in the search request, stating all “registration information” relating to that object, along with a statement of the date and time the registration was effected.⁶⁴ The certificate must indicate the name of the secured creditor, title reservation seller, lessor or person who has purchased the object, but may not indicate whether the registration relates to an extant or prospective⁶⁵ registrable interest.⁶⁶ If no registration exists with respect to the object, the search certificate must so indicate. A document in the form of a search certificate is deemed, until proved otherwise, to have been issued by the Registrar, and is *prima facie* proof in legal proceedings of the facts recited in it.⁶⁷

11. Searches without priority significance

Section 7.1 of the Regulations provides that an “informational search”⁶⁸ of the Registry may be requested in connection with an aircraft object using cumulatively a manufacturer’s name, a manufacturer’s generic model designation, a manufacturer’s serial number and, in the case of an airframe or helicopter, a State of registry of an aircraft of which it is a part, or an aircraft nationality or registration mark.⁶⁹ There is no provision in the Convention or Protocol for this type of search. Consequently, the facility to obtain information from the Registry on this basis is a service provided by the Registry and not a legal obligation imposed by the Convention or Protocol.⁷⁰

While the search criterion for an informational search is the same as that for a priority search, the scope of the information disclosed is different. An informational search certificate identifies an aircraft object that is the subject-matter of registration effected using the search criterion. It does not contain the other information required by Article 22 of the Convention.

Sections 7.1 and 7.5 of the Regulations provide for a “Contracting State” search and a “Contracting State Certificate”.⁷¹ This is not a search relating to any particular aircraft object. It is a search for all declarations and designations and withdrawals therefrom made under the Convention and Protocol. Article 23 of the Convention obligates the Registrar to maintain a list of declarations and withdrawals of declarations communicated to the Registry by the Depositary. In addition, the Registrar must maintain a list of all declarations relating to non-consensual rights and interests under Article 39 communicated by the Depositary. The Article requires that the lists be recorded and searchable in the name of the declaring State and be provided to any person requesting it as provided in the Protocol and Regulations.

⁶² Regulations ss. 7.2 and 7.4.

⁶³ Section 13.4 of the Procedures provides that the person requesting a priority search must disclose the name of the person or persons “having the benefit of the search.” The section lists such persons as including “(a) parties entering into, planning or forbearing from commercial transactions involving a named party of an aircraft object; or (b) parties providing legal or other professional advice to, or insuring, the parties” referred to in (a). The names of these persons are to be set out in the search certificate.

⁶⁴ Art. 18(4) of the Convention provides that registrations shall be stored and searchable in chronological order of receipt and that each registration file shall indicate the “date and time of receipt.” The reference to the date of receipt should be read as referring to the date the registration is effected since the date of receipt of the registration information is not relevant for priority purposes.

⁶⁵ As noted above, the distinction between an existing and prospective interest is irrelevant under the priority structure of the Convention. See heading II. 3 *supra*.

⁶⁶ A search certificate relating to an aircraft object will disclose all prior registrations of buyers’ interests.

⁶⁷ Convention, Art. 24. See also Procedures, s. 13.5.

⁶⁸ See also Procedures, s. 13.2-13-3.

⁶⁹ See also Procedures, s. 13.2.

⁷⁰ Section 13.2 of the Procedures states that “[t]he object of an informational search is to provide the searching person with sufficient information to perform a priority search.”

⁷¹ See also Procedures, s. 13.5.

12. Guarantee of system reliability

As a result of Article 27 of the Convention and Article XVII(3) of the Protocol (which incorporate by reference the legal immunity enjoyed by the International Civil Aviation Organization), the Supervisory Authority (the Council of the International Civil Aviation Organization) enjoys the immunity of an international organization from action brought by any person who has suffered loss or damage as a result of the failure of the Registry to perform the functions prescribed by the Convention and Protocol. However, this immunity does not extend to the Registrar.

Under Article 28 of the Convention, the Registrar is liable for 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.⁷² This liability does not include loss resulting from a malfunction caused by “an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation.”⁷³

An action against the Registrar to obtain compensation for loss referred to in Article 28 must be brought in the Irish courts. Articles 44(1) and (3) give to the courts of the place in which the Registrar has its centre of administration the exclusive jurisdiction to award damages against the Registrar.⁷⁴

Recovery against the Registrar pursuant to Article 28 is limited to persons who have suffered damage “directly resulting” from an error, omission or malfunction. A claimant need not be a registrant or someone who has relied on a misleading registry search certificate or who has received a confirmation or notice of the registration as provided by section 6 of the Regulations. However, a confirmation or notice may have a significant role in litigation brought under Article 28 of the Convention based on allegations of errors or omissions of the Registrar or a malfunction of the Registry system. Article 28(3) provides that the amount recovered from the Registrar “may be reduced to the extent that [the persons who suffered loss or damage] caused or contributed to that damage.” It is conceivable that a court will conclude that when an error or omission on the part of the Registry was disclosed to a registrant in the confirmation, failure on the part of the registrant to take steps before the damage occurred to effect an amendment to the registration to correct the error or omission constitutes conduct that contributed to or resulted in the loss.

An issue that may arise in litigation is whether the failure of the Registry system to prevent unauthorized registrations, amendments of registrations or discharges of registrations constitutes “an error, omission or malfunction” of the system.⁷⁵ Article 18(2) of the Convention provides that the Registrar is not under a duty to enquire whether a “consent to registration under Article 20 has in fact been given or is valid.” Article 16(3) provides that the term registration, “includes, where appropriate, an amendment, extension or discharge of a registration.” Consequently, Article 18(2) exonerates the Registrar in cases where an apparent registration has been effected or registration

⁷² Section 14 of the Regulations specifies procedural steps that are conditions precedent to bringing an action against the Registrar under Art. 28 of the Convention. It also authorizes amplification of these steps in the Procedures. Section 15 of the Procedures provides this amplification.

⁷³ *Ex abundanti cautela*, Art. 28(2) provides that the Registrar is not liable for factual inaccuracy of registration data transmitted to the Registrar nor for circumstances arising prior to receipt of registration data by the Registry. In case there is any doubt, this is repeated in section 15.1 of the Procedures.

⁷⁴ It is not clear whether, as a result of this feature, Irish law will govern not only the procedures involved in such an action but the substantive aspects as well. For example, it will be necessary for a court to refer to substantive law when determining what constitutes damages “directly resulting” from the error, omission or malfunction.

⁷⁵ Section 13.3 of the Procedures provides that the Registrar “shall not be liable in respect of the content of an informational search listing.” As noted above, an informational search is not the type of search authorized by the Convention. However, it is authorized by s. 7.3 of the Regulations. Art. 28 of the Convention does not limit the liability of the Registrar to situations where there has been loss resulting from reliance on a certificate issued pursuant to the Convention. Consequently, it is open to conclude that any act by the Registrar that is authorized or required by the Regulations falling within the broad wording of Art. 28 of the Convention can give rise to a valid claim against the Registrar under that Article. In any event, it is submitted that section 13.3 of the Procedures has no constitutional validity since it addresses a matter that is not procedural.

has been amended or discharged without the authorization of the person legally entitled under Article 20 to consent to the measure.

A potentially important aspect of Article 28 is the capacity of the Registrar to satisfy a judgment against it. Given the very high unit value of many aircraft objects, such a judgment could require the payment of a large sum of money. In order to ensure that a successful judgment creditor of the Registrar does not get a hollow judgment or to ensure that a large judgment would not result in the insolvency of the Registrar and the consequent (at least temporary) disruption of Registry services, Article 28 requires the Registrar to “procure insurance or a financial guarantee covering the liability” provided in the Article “to the extent determined by the Supervisory Authority, in accordance with the Protocol.” Article XX(5) of the Protocol provides that the amount of insurance or financial guarantee “shall, in respect of each event, be not less than the maximum value of an aircraft object as determined by the Supervisory Authority.”

The question has been raised as to whether the meaning of Article XX(5) is totally clear. There is no doubt that the Supervisory Authority has a central role in the determination as to the amount of insurance or financial guarantee that the Registrar is required to obtain. What that role is cannot easily be identified. The wording of the Article appears to give to the Supervisory Authority the task of determining what kind of aircraft object is to be used as the basis for setting the amount of insurance or guarantee coverage. However, there are implicit parameters set by the policy of Article 28 within which that determination must be made.

In exercise of the powers of the Supervisory Authority, the Preparatory Commission requested the Registrar to obtain the maximum amount (not less than US \$10 million)⁷⁶ to cover its potential liability under the Convention.

III. – ADMINISTRATIVE FEATURES OF THE REGISTRY

1. Overview

The Registry contains many of the features found in the most advanced modern North American electronic registries for security interests. Access to the Registry is through the internet using a graphical user interface.⁷⁷ There is no administrative involvement on the part of Registry staff in the entry or amendment of registration data in the data base or in the discharge of a registration. Once authority to access the Registry and the requisite consents have been obtained, registration data are transmitted directly to the data base. All amendments and discharges of registrations are effected by the persons with authority to access the data. However, the Registry is a much more controlled system than its domestic counterparts.

An obvious goal of the designers of the administrative structure of the system and the drafters of the Procedures is to ensure that the system is flexible and efficient but, at the same time, as reliable as can reasonably be expected given its international role and the available technology. The need to limit access to the Registry to appropriate persons and to obtain required consents entails administrative measures that slow the process of accessing Registry facilities at least for first time or infrequent users. Use of Registry services is limited to persons who have made prior arrangements with the Registry or who have the authority of such persons. These will be people who have considerable sophistication with respect to its requirements and operational features.

⁷⁶ The Commission authorized its Chairman to approve, with the assistance of the ICAO Secretariat, the amount of insurance to be procured by AVIARETO LTD. By letter dated 4 March 2005, the Chairman approved, for the first year of operation of the Registry, an amount of US \$10 million per loss and in yearly aggregate, with a deductible of US \$1million per claim.

⁷⁷ The uniform resource locator for the International Registry is: <www.internationalregistry.aero>

The Procedures, for obvious reasons, provide very different approaches to effecting, consenting to, amending or discharging registrations, on the one hand, and obtaining searches from the Registry, on the other. The former is highly regulated and controlled; the latter is much less so.

2. The players

The terminology used in the Regulations and Procedures to label the various entities or persons who use or participate in the use of the system is somewhat cumbersome. However, it adequately serves the intended function.

The Regulations provide for two types of registry users. A “registry user entity” and a “registry user” are either (i) a “transacting user entity” or “transacting user” if that entity or person is someone “intending to be a named party”⁷⁸ in one or more registrations” or (ii) a “professional user entity” or “professional user” if that entity is a firm (or other grouping of persons)⁷⁹ or a person who is a member employee or partner of a firm “providing professional services to transacting user entities in connection with the transmission of information ... relating to registrations.”⁸⁰ In other words, a registry user can be an entity or person acting on its or his/her⁸¹ own behalf or acting in an agency capacity in effecting, consenting to, amending or discharging registrations.

A registry user can access the Registry only through or with the authorization of a single, Registrar approved⁸² “administrator.” This is someone nominated or authorized by a registry user⁸³ to deal with the Registry⁸⁴ in effecting, consenting to, amending or discharging registrations.⁸⁵ An approved administrator may give a special purpose entity⁸⁶ authority to deal with the Registry on behalf of the registry user for whom the administrator acts. An approved administrator is given a range of powers and responsibilities consonant with his/her obligations to ensure that no unauthorized access to registration data occurs and that the Registrar is provided with all relevant information relating to the registry user that appointed the administrator.⁸⁷

The approval process for a person nominated as administrator of a registry user involves the Registrar being satisfied⁸⁸ on the basis of information provided by a nominating registry user⁸⁹ and obtained from independent sources as to the identity of the entity that has nominated the person and the identify of the nominee.⁹⁰ An administrator need not be an employee of the registry user entity, but “should” be someone holding “appropriate formal professional qualifications commensurate with the requirements of the functions of administrator.”⁹¹ Since the Registrar has the power to approve or disapprove of a person as administrator, it will decide what constitutes appropriate formal qualifications for this purpose.⁹²

⁷⁸ Defined in s. 2.1.5 of the Regulations as “a transacting user entity named in a registration.”

⁷⁹ It is submitted that, in determining the meaning and scope of the terms “firm” and “other grouping of persons”, the latter must be read as being broader in scope than the former.

⁸⁰ It would appear that an individual, other than an employee, partner or member of a “firm”, cannot be a professional registry user.

⁸¹ In the balance of this Article, it is assumed that a registry user is an entity.

⁸² Regulations ss. 2.1.1, 4.1.

⁸³ Procedures ss. 4-5.

⁸⁴ Procedures s. 11.

⁸⁵ Regulations s. 4.2 and Procedures ss. 5.4, 5.7, 5.15, 6.1-6.2 and 12.4. An approved administrator may appoint an acting administrator for periods not exceeding three months. Regulations s. 4.1. However, a registry user may have only one administrator with authority to carry out the functions of the administrator. Procedures s. 5.3.

⁸⁶ Regulations ss. 2.1.10 and 4.3.

⁸⁷ Procedures ss. 5.8-5.12.

⁸⁸ Registry personnel estimate that, on average, this process should take about two business days.

⁸⁹ Procedures s. 10.

⁹⁰ Regulations s. 4.1 and Procedures s. 5.14.

⁹¹ Procedures ss. 5.1-5.2.

⁹² Procedures s. 5.4.

When an administrator is approved, he/she is issued a password and digital certificate⁹³ that must remain on “the computer on which it was first installed.”⁹⁴ The administrator may approve the issue of a digital certificate to other users within his/her entity and may authorize a professional user entity to complete a registration on a specific aircraft object on behalf of the entity the administrator represents.⁹⁵ Passwords and digital certificates provide the mechanism through which the Registry seeks to limit access to the data base or consents only to authorized or appropriate persons enjoying such access.⁹⁶

IV. – THE FUTURE

While the concept of an international registry for property interests is novel, the structure of the Registry as prescribed by the Convention and Protocol reflects extensive experience with similar (but much more complex) domestic systems over the last 30 years. The designers of the Registry system were not required to experiment with untried technology or approaches. Given this and its relative simplicity, there is every reason to expect that the Registry will function in an efficient, reliable and cost-effective manner. No doubt, minor adjustments will have to be made during the initial stages of operation. However, these will amount to “fine-tuning” rather than fundamental changes.

The current design of the system does not facilitate or permit the use of a language other than English. Section 7.2 of the Procedures alludes to the possibility of making the system available in other languages “when the necessary financial means are available.” If registry facilities are to be made available in other languages, the Supervisory Authority will have to determine what those languages will be.

- END -

⁹³ The system used for this purpose will employ a Public Key Private Key Infrastructure (PKI) system supplied by Verisign.

⁹⁴ Procedures s. 5.5. If that computer is replaced, permission is required from the Registrar to move the password and certificate to the replacement unit.

⁹⁵ Procedures s. 5.15-16 and s. 10.

⁹⁶ Procedures s. 7.5-7.6.