

**AWG View on the CTC and its Aircraft Protocol
in connection with
Japanese Consideration of Ratification**



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Topics

- I. Background : past, present and future of the aviation industry and its financing and consequences for treaty
- II. Development / status of the CTC and Aircraft Protocol (treaty)
- III. Legal overview and assessment
- IV. Implementation aspects: International Registry: relation with national law; and contract practices
- V. Benefits analysis and comments
- VI. Japanese Policy Analysis and Consideration of Ratification

I. Past, present and future of the aviation industry / financing

- Phase 1: Statism
 - State ownership/control/guarantee
 - High degree of regulation
 - Low probability of default
- Phase 2: Transition
 - Advanced contracting practices
 - Complex structures and reliance on favorable choice of law/forum
 - Eroding phase 1 features
- Phase 3: Privatism
 - Private ownership/control; less State guarantee
 - Less regulation
 - Increased probability of default

II. Past, present and future ...Consequences for treaty

- The objective of the treaty is to **reduce the risk of loss in transactions**
- That depends on **timely and predictable access to collateral**
- **Such widening is the basis of the economic benefits** of the text
- Cape Town is based the core '**asset based financing principles**'
 - (1) prompt / predictable enforcement, including in insolvency,
 - (2) clear and objective priority rules, and
 - (3) on party autonomy, and reducing gap b/ contract and law
- Cape Town permits a set of declarations that produce such benefits
- **Without the key declarations (below), and the proper implementation of the treaty, major risks are not reduced**

II. Historical Development of the Treaty

- Unprecedented cooperation between governments and industry
- AWG was formed, at the request of Unidroit, to contribute to the effort
 - AWG members sell / lease or finance a substantial majority of the world's aircraft and engines. See next slide
- AWG (creditor) – IATA (debtor) alignment of interest and joint positions. Indication of 'technical nature' of Cape Town
- Japanese involvement in the negotiations and adoption
- Rapid adoption of Aircraft Protocol (46 countries (Convention – 52))
 - Asian countries: China, Singapore, Indonesia, Malaysia, New Zealand
 - Other key aviation countries, including the USA, Russia, India, Brazil, UAE
 - Indications of ratification in Canada, Australia, and UK

Aviation Working Group - Membership



III. Legal Overview and Assessment

- **A. Basics**
- **Application** - state of registry (save engines) (Protocol) added to debtor location (liberal rule, makes sense regarding property interests)
- **New interests, not 'pre-existing'** – no retroactivity
- **Creation** – uniform criteria for creating interests in airframes / engines
- **Enforcement / remedies** – prompt and contractually based; declaration on role of the court. (For 'relief pending', see part B)
- **Priority** – first to file, based on an electronic International Registry
- **Insolvency** – 'validity' . Meaning and limitations
- **Juridical items** – choice of law (Protocol) / choice of forum (Convention), each party autonomy based

III. Legal Overview and Assessment

- **B. Key Points in the Aircraft Protocol**
- **Extension to sales** – deals with *lex situs* problem and permits a comprehensive priority regime (art III)
- **Engines as separate property** – overrides national accession law (definitions) (cf. art XIV(3) with C, art 29(7))
- **Extensive treatment of insolvency** – hard v. soft options and their rationale. Insolvency cooperation (definitions and arts XI and XII)
- **Relief pending final determination** – treaty-based form of court remedies, similar to but different from traditional interim remedies (art X; C, art 13)
- **Deregistration and export** – innovative, creative concept (IDERA); relationship with public law (art IX and XIII)
- **Waiver of sovereign immunity** – validity of waiver, not affirmative rule
- **Quiet possession system** – unique, based on the international registry

III. Legal Overview and Assessment

- **C. Declaration system**
- Declarations - choices to be made at the time of ratification
- Declarations are not permitted on basic conceptual elements
- First reaction is often: 'retention of current law' v. 'move to an international standard' (the latter producing the economic benefits).
- That often evolves during the ratification process
- Common approach has developed on economic declarations

III. Legal Overview and Assessment

- **OECD Qualifying Declarations / Key Economic Declarations**
- 1. Insolvency (Alt. A with up to a 60 day period) – P, Art. XI (see next slide)
- 2. Method of exercising remedies:
 - non-judicial remedies – C, Art. 54(2) and/or judicial timetables
 - timely judicial – P, Art. X (10 calendar days for conserving remedies (C, Art. 13(a)-(c)) and 30 calendar days for disposition remedies (C, Art. 13(d)-(e))
- 3. Deregistration and export – P, Art. XIII
- 4. Choice of law – P, Art. VIII
- Percentages re the above: #1: **87%**; #2: **94%**; # 3: **82%**; #4: **91%**
- Declarations not to be made in connection with the foregoing

III. Legal Overview and Assessment

- **Focus on insolvency(Alt. A with up to a 60 day period) – P, Art. XI**
- Condition to economic benefits
 - Example 1: capital markets (e.g., up to two notch upgrade)(15m in 500m deal)
 - Example 2: export credit (with other qualifying declarations)(b/ .08 and 1.8%)
 - Example 3: developing position in leasing / banking
- No legal disadvantage to any party – centered on efficiency / predictability
 - US experience – airlines not disadvantaged
 - Provides incentives to cooperate
 - Provides incentives for action in the home country
- 87% of eligible countries have elected Alternative A
 - New international standard
- In line with new ‘context thinking’ on insolvency

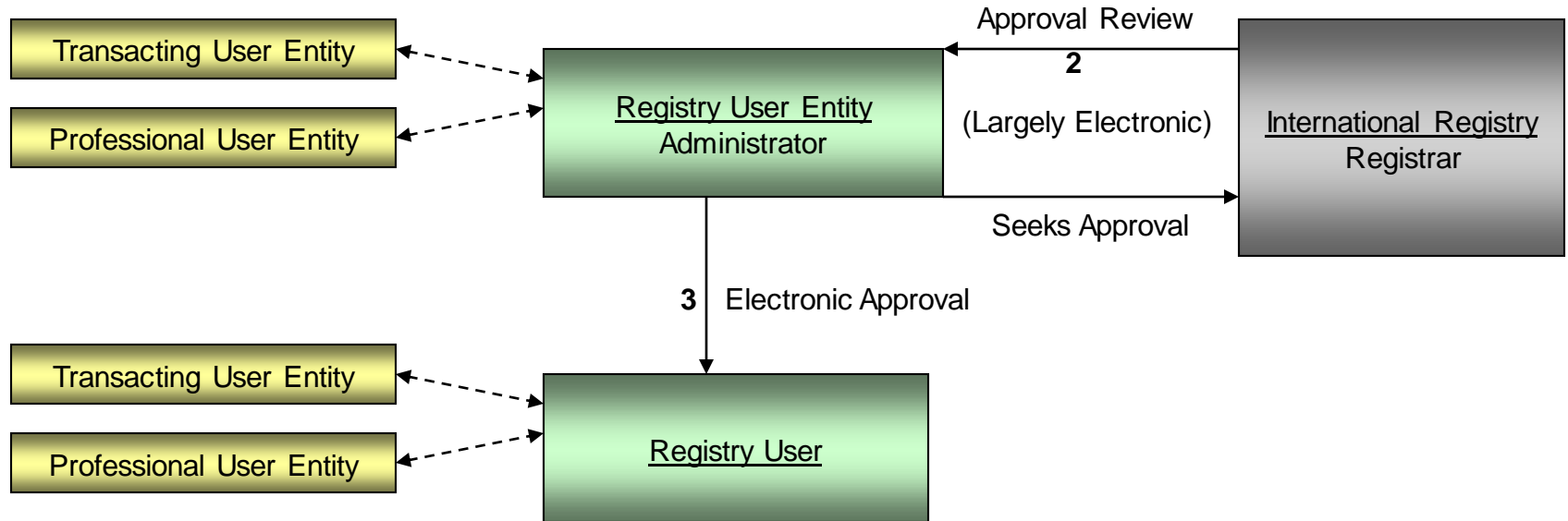
IV. Implementation Aspects: International Registry; Relationship with National Law; and Contract Practices

- **Registrations in the IR determine priority of financial interests**
- The system is 'notice-based', not documentary
- ICAO is the Supervisory Authority. That role has been critical to the system
- ICAO established a Commission of Experts ('CESAIR'). Very effective.
- The IR has established an advisory board - coordinated user input
- More than half the worlds new transactions are now being registered
- Generation 2 of the IR: fundamental redesign to enhance efficiency by:
 - 1. replicating a transaction closing, and
 - 2. permitting entries of data application to multiple registration
 - Timing – phased in 2013 / 2014

IV. Implementation Aspects: International Registry; Relationship with National Law; and Contract Practices

- Legal Hierarchy of rules relating to the IR
 - C: Chapters IV – VII (IR system; related matter; immunities; liabilities)
 - P: Chapters I and III; n.b.: overrides C (see C, Art. 49(1)(b))
 - Regulations: As amended; basis: P, Art. 17(2)(d)
 - Procedures: As amended; basis: R, Sec. 15)
- Schematic A: Overall structure / framework of the IR
- Schematic B: Approval process
- Schematic C: Registration process

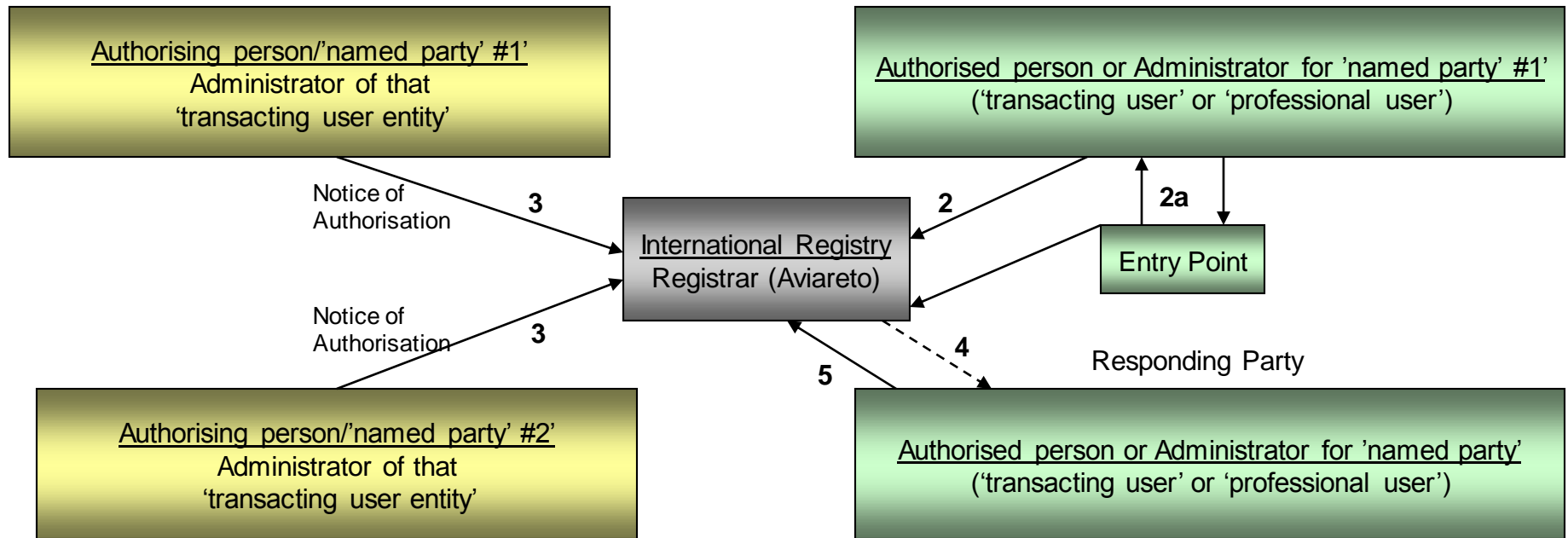
Schematic B: Description of the IR – Approval Process¹



Notes:

1. The result of the approval processes is the issuance of a digital certificate (and password). That is a necessary, but, except for an administrator, not a sufficient condition to accessing the International Registry (save for searches, where no approval is needed). The required additional step is 'authorisation'. See Schematic on Registration Process.
2. See Reg. 4.1 (registry user entity/administrator approval). There is a two part test: Registrar concludes (a) that the entity/administrator are who they assert they are, and (b) on the basis of information submitted, the administrator is entitled to act for the entity.
3. See Reg 4.2 (registry user electronic approval). This is an electronic procedure which, upon payment of the applicable fee, is automatic.

Schematic C: Description of the IR – Registration Process¹



Notes:

1. This chart applies to any 'registration' (as defined in Convention, Art. 16(3) to include amendments, extensions and discharges) where, both parties or the non-submitting party must consent thereto under Convention, Art. 20 (see also Convention, Art. 18(1)(a) and Regulations 2.1.1 to 2.1.3 and 5. It applies equally to the 'registration' of a 'pre-existing right or interest'.
2. An initiating person must seek authorisation from the 'named party' on whose behalf the registration is being made. If there is no authorised person for the initiating party, only its administrator can so initiate.
- 2a. If an entry point was designated, whether 'authorising' or 'direct', electronic consents to the International Registry are nonetheless required. See Regulation 5.11.
3. The changes to Regulation 4.1 made at the 3rd meeting of the PCIR were intended to provide much flexibility to users by permitting a wide range of authorisations (i.e., to any person for one, many, or all objects, or to more than one person for one, many, or all objects, in each case where a company is a 'named party').
4. Upon receipt of the electronic consents from all other named parties, the registration is completed for purposes of Convention, Art. 19, is assigned a sequentially ordered file number, and becomes searchable - thus establishing its time for purposes of priority.
5. **N.B.:** Substantial practical changes will be effected in Generation 2 of the IR

IV. Implementation Aspects: International Registry; Relationship with National Law; and Contract Practices

- **Effective implementation (Relationship with National law)**
- Basic requirements
 - 1. Force of law
 - 2. Priority over conflicting law
 - N.B.: Limits of Vienna Treaty on Treaties, 1969
- Need for legislation or not; if so, form of legislation
- **Contract practices**
- AWG led effort to coordinate or inform contract practices and legal opinions
- Centerpiece: Practitioner's Handbook (www.awg.aero)

V. Benefit analysis and comments

- With the proper declarations, Cape Town is in line with:
 - (a) the requirements of the international capital markets;
 - (b) the methodology of the rating agencies;
 - (c) the direction of capital requirements under BIS II and BIS III;
 - (d) lending credit committee approval processes;
 - (e) export credit rules under the OECD; and
 - (f) basic concepts of efficiency
- OECD discount, Asian Eligibility: (1) Singapore; (2) New Zealand; (3) Indonesia; and (4) Singapore
 - China is under evaluation by OECD
- Cape Town is already one of the most successful commercial law treaties, with even brighter future
- Japan should join and benefit from the international system

VI. Japanese Policy Analysis and Consideration of Ratification

- Step 1, economic: what is required to produce economic benefit
- Step 2, analytic: comparison of treaty with national law
- **Step 3, policy: do economic / other advantages justify change in law**
 - Non-economic advantages:
 - 1. Inclusion in international aviation regime
 - 2. Nature of asset (extreme mobility) and special law (lex specialis)
 - 3. Considered best practice international legal principles
 - 4. Continuous access to finance for safe / efficient aircraft
- Step 4, process:
 - Lead government agency and inter-agency work
 - Decision on other key items (e.g., int'l registry; non-consensual interests)
- N.B.: important role of industry and the legal community
- AWG stands ready to consult and assist, as may be helpful