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**ENTRY INTO FORCE OF TRANSACTIONAL PRIVATE
LAW TREATIES AFFECTING AVIATION: CASE STUDY –
PROPOSED UNIDROIT/ICAO CONVENTION AS
APPLIED TO AIRCRAFT EQUIPMENT**

LORNE CLARK AND JEFFREY WOOL*

A DIPLOMATIC conference will be held from October 29th to November 16th of this year for the adoption of the proposed UNIDROIT/ICAO Convention on International Interests (Convention)¹ as applied to aircraft equipment by virtue of a protocol thereto (Protocol).²

This brief article will address the broad contours of the key issue for that conference: i.e. under what conditions will the Convention/Protocol come into force.

The matter is being addressed for two reasons. First, its resolution is of utmost practical and economic importance. Second, it has previously been discussed in abstract terms, without a proper analytic framework, including an agreed system of treaty taxonomy and associated lexicon.

As the Convention/Protocol, jointly sponsored by the International Institute for the Unification of Private Law (UNIDROIT)³

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¹ See *Convention Relating to International Interests in Mobile Equipment*, at Attachment D, pt. I, ICAO Doc. 9765-LC/191 (June 4, 2001) (Report of the 31st Session of the Legal Committee).

² See *id.* at Attachment E, pt. I.

³ The UNIDROIT was chartered under the League of Nations in 1926 and was reconstituted after World War II. The UNIDROIT Convention examines ways of harmonizing and coordinating the private laws of States and groups of States. See Statute of UNIDROIT, Nov. 26, 1991, art. 1, 15 U.S.T. 2494, T.I.A.S. No. 5743 (official translation approved by its General Assembly).

and the International Civil Aviation Organization (ICAO),⁴ conjures private versus public law concepts and air law versus non-air law practices, they make for an interesting, broader case study. How should entry into force questions be viewed in the context of a *transactional private law treaty affecting aviation*?

Our basic conclusion is that the Convention/Protocol should enter into force when a small number of States have ratified these instruments. A corollary is that all stakeholders in the treaty finalization process should, at this stage, be making robust efforts to ensure that there are no practical impediments to achieving that objective.

This article is organized as follows: Part I will set out basic principles, including those relating to treaty law generally, treaty taxonomy, and the proper classification of the Convention/Protocol. Part II will outline the six principal arguments in favor of prompt entry into force. Part III will outline, then counter and/or annotate, three arguments in favor of more protracted entry into force. Part IV will set out the realistic options on entry into force, which may assist interested parties in their planning for the diplomatic conference.

PART I: BASIC PRINCIPLES

A. TREATY LAW GENERALLY

In line with the treaty-as-contract model⁵ embodied in the 1969 Vienna Convention on the Law of Treaties (Vienna Treaty Convention),⁶ a treaty enters into force in the manner and on the dates provided for in the treaty or as the negotiating States may agree.⁷

This basic rule has two qualifications of potential relevance in the instant case. First, select provisions that, by their nature, relate to entry into force or actions prior thereto, apply as of diplomatic adoption of the text.⁸

⁴ ICAO was formed by virtue of the Convention on International Civil Aviation. See Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. ICAO is charged with ensuring the "safe and orderly growth of international civil aviation." See *id.* at art. 44(a).

⁵ The principle of *pacta sunt servanda* is foundational to the theory and practice of international treaty-making and is recognized in the Vienna Treaty Convention, *infra* note 6, at Third Recital.

⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

⁷ *Id.* at art. 24(1).

⁸ *Id.* at art. 24(4).

Second, a treaty or parts of it may be “applied provisionally pending its entry into force” if the treaty so provides or the negotiating States otherwise agree (Provisional Application).⁹ However, unless otherwise agreed in the treaty or by such States, that provisional application is easily terminable by a State. It must simply notify the relevant States (those agreeing to such Provisional Application) of its intention not to become a party to the treaty.¹⁰

B. TREATY TAXONOMY

As a general proposition, the law applicable to the entry into force of treaties does not differentiate between treaty types. Yet treaty practice with respect to entry into force differs, often materially, based on the treaty’s characteristics, the objectives of the relevant states, the customary practices of its sponsors, and the personal experiences of those involved.

Threshold questions in addressing entry into force issues are thus often taxonomic: how are treaties classified, at least for entry into force purposes? Unfortunately, there is neither a universal classification system nor an accepted lexicon, which may be called upon to reach a summary conclusion.

Broad distinctions are often made between *public international treaties* and *private international treaties*. The latter might be succinctly defined as treaties addressing relations among private parties (persons and businesses); the former, as addressing relations among states or between states and private parties. These definitions, while setting baselines, admittedly lack nuance: many, if not most, treaties have both private and public law elements.

A sub-distinction, within the broader category of private international law, and one that has not yet gained popular currency, is centered on the nature of the private activity. Is the private action *transactional*, that is, does it address planned and patterned commercial dealings (*e.g.*, extensions of credit, sale transactions, etc.)? In contrast, is the private action *non-transactional*, involving acts that are unforeseen, if not unforeseeable (*e.g.*, tortious acts)? We suggest denoting the former

⁹ *Id.* at art. 25(1). See generally René Lefebvre, *The Provisional Application of Treaties*, in *ESSAYS ON THE LAW OF TREATIES* (Jan Klabbbers and René Lefebvre, eds., 1998).

¹⁰ See Vienna Treaty Convention, *supra* note 6, at art. 25(2).

"TRANSACTIONAL PRIVATE LAW TREATIES," and will henceforth employ that expression.

Second, distinctions might be made between *air law treaties* and other treaties. Air law treaties have aviation as their principal subject. A controversial question is whether this is exhaustive. Do treaties that merely, *inter alia*, impact or affect aviation constitute air law treaties? While there is much to say on this matter, particularly in the context of economic regulation, we will leave that for a later occasion.

Its limited relevance, for the topic at hand, relates to the role and practices of the ICAO, the United Nations body with exclusive competence in matters of air law.

C. CLASSIFICATION OF CONVENTION/PROTOCOL

The Convention/Protocol is centered on facilitating certain transaction types, the secured financing and leasing of aircraft and of aircraft equipment.¹¹ Indeed, the *sole reason* it has attracted aviation industry support is its baseline objective of increasing the availability and reducing the costs of aviation credit through advanced, structured financing practices.¹²

The principal features of the Convention/Protocol are classical, indeed prototypical, private law matters: the establishment of criteria for creating a *sui generis* proprietary interest in aircraft equipment,¹³ the setting of rules for the enforcement of that interest between the transaction parties *inter se*,¹⁴ and the ranking of conflicting proprietary interests in aircraft equipment.¹⁵ The first two aspects, creation and enforcement, affect two private parties. The third, ranking, affects the private parties with competing interests.

¹¹ See generally Roy Goode, *Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment*, 1 UNIFORM LAW REVIEW 52, 62-68 (1998), and G. Lauzon, *Report of the Rapporteur on International Interests in Mobile Equipment (Aircraft Equipment)*, LC/31-WP/3-4 at ¶ 9-19.

¹² See Jeffrey Wool, *The Case for a Commercial Orientation to the Proposed UNIDROIT Convention as applied to Aircraft Equipment*, 31 LAW & POL. IN INT'L BUS. 79, 81-83 (1999).

¹³ See Convention, *supra* note 1, at arts. 2(2) (types of interests), 2(3)(a) (interests in aircraft equipment), and 6 (creation criteria).

¹⁴ See *id.* at arts. 7-14 (general remedies); see also, Protocol, *supra* note 2, at arts. IX-XIII (modifications applicable to aircraft equipment).

¹⁵ See Convention, *supra* note 1, at art. 28 (general priority rules); see also, Protocol, *supra* note 2, at art. XIV (modifications applicable to aircraft equipment).

Thus, the Convention/Protocol is fundamentally a transactional private law treaty. This point is worth emphasizing since select provisions in the text *ancillary to its core purposes* touch upon matters that give rise to mischaracterization of the instruments as a whole. First, the Convention/Protocol will create a new electronic international registry, the sole purpose of which will be to establish a first-in-time priority rule for ranking interests (International Registry).¹⁶ While it is proposed that it be governed by an intergovernmental “supervisory authority,” the latter’s functions are circumscribed by the limited purpose of the International Registry.¹⁷ The Convention/Protocol will also set out jurisdictional rules relating to dispute resolution among private parties in a transactional context (not for aggrieved states as a matter of public law).¹⁸

A sophisticated analysis of the Convention/Protocol’s International Registry and jurisdictional provisions lead to the conclusion that they support the private law treaty characterization. From a broader perspective, the inclusion of these *supporting functional features* is part of an emerging trend in transactional private law treaties. These instruments increasingly seek to address the practicalities of their covered transactions, even if doing so widens their scope.¹⁹

Whether the Convention/Protocol is an air law instrument is subject to legitimate debate. We do not express a view on the point since the question lacks practical import, at least for the moment. The diplomatic conference for its adoption will be co-sponsored by UNIDROIT and ICAO.

In sum, a synthetic characterization of the Convention/Protocol is that of a Transactional Private Law Treaty affecting aviation. The foregoing description does not, of course, qualify aspects of the Convention that apply to non-aircraft equipment

¹⁶ See Convention, *supra* note 1, at arts. 1(cc) (definition of “registered interest”), 15 (establishment of International Registry), and 28 (priority rules).

¹⁷ See *id.* at art. 16(2)(i) (residual “do all things necessary power,” emphasizing the need to ensure that an “efficient notice-based electronic registration exists”).

¹⁸ See *id.* at arts. 41–43 (general jurisdictional provisions); see also, Protocol, *supra* note 2, at art. XX (additional bases applicable to aircraft equipment).

¹⁹ See e.g., *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*, G.A. Res. 50/48, U.N. GAOR, 50th Sess., at art. 20, U.N. Doc. A/RES/50/48 (1995) (addressing provisional court measures in the context of banking transactions) [hereinafter *Banking Convention*].

via other protocols,²⁰ the development of which are well underway.²¹

PART II: PROMPT ENTRY INTO FORCE: THE ARGUMENTS

For completeness, six principal arguments supporting provisions in the Convention/Protocol designed to expedite its prompt entry into force are listed and briefly discussed. In our view, each argument, argument A (Economic Argument), argument B (Horizontal Equity), argument C (Enhanced Safety), and argument F (Paradigmatic Argument), is dispositive, itself justifying such provisions. In addition, we believe that argument D (Precedents) and argument E (New Initiative) are sound.

A. THE ECONOMIC ARGUMENT

The economic justification for prompt entry into force is simple and compelling. Independent economic studies²² have concluded that the macro- and micro- economic benefits of the Convention/Protocol are significant²³ and will be widely shared among states, airlines, manufacturers, financiers, and the traveling public.²⁴

These benefits start accruing only when the Convention/Protocol is in effect. The longer the waiting period prior to entry into force, the less the aggregate benefit. Sometimes clichés really do make the point: in this context, “time is money”.

²⁰ See Convention, *supra* note 1, at arts. 2(3)(b), (c) (Convention applies to railway rolling stock and space property when a protocol therefor is in effect) and 47(a)-(c) (controlling nature of the protocols).

²¹ Intergovernmental analysis of both the railway rolling stock and the space protocols have commenced. In the former case, UNIDROIT is cooperating with the Intergovernmental Organization for International Carriage by Rail (OTIF). A jointly sponsored intergovernmental meeting was held in March 2001. In the latter case, UNIDROIT is cooperating with the UN Office for Outer Space Affairs' Committee on the Peaceful Uses of Outer Space (COPOUS). That committee first studied the current text in April 2001.

²² See A. Saunders & Ingo Walter, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment*, 23 AIR & SPACE L. 339 (1998) [hereinafter Economic Impact Assessment]. This study, prepared by leading applied economists, was undertaken under the auspices of the Institut Européen d'Administration des Affaires (INSEAD) and the Salomon Center of New York University.

²³ The Economic Impact Assessment states that “[o]n conservative assumptions,” the Convention/Protocol will produce economic gains “estimated at several billion U.S. dollars on an annual basis.” See *id.* at 343.

²⁴ See *id.* at 343-44.

Transactional Private Law Treaties that seek to produce economic benefits should seek to maximize such benefits. The assertion – which has been made – that a larger number of ratifications will produce greater aggregate economic benefits misses the temporal aspect of the calculation. That is evident in the most rudimentary of economic models.

B. THE HORIZONTAL EQUITY ARGUMENT

A subtler, yet equally compelling, economic-related argument considers the *comparative impact of entry into force timing on different states*. From an equitable perspective, this argument trenchantly differentiates the entry into force implications of Transactional Private Law Treaties from that of other treaties.

Airlines in different states need and acquire aircraft equipment at different points in times. In many cases, delivery schedules are known or are reasonably predictable.²⁵ By way of example, -an airline in State 1 (S1) may take delivery next year, airlines in State 2 (S2) the following years, and airlines in State 3 (S3) three years from now, and so on. Some airlines take delivery of a large percentage of their required aircraft within a relatively short window of time. Aircraft equipment usually has a long life.²⁶ As a result, some states whose airlines take deliveries at one point in time may not take additional deliveries for a significant period thereafter.

The foregoing points lead to this unassailable conclusion: on a comparative basis, the costs in lost benefits of protracted entry into force are wholly allocated to states and airlines that take delivery of aircraft during the waiting period. These states are often known and identifiable. In other words, entry into force provisions, in this specific context, produces winners and losers, known *ex ante*.

Thus, the difficult question: why should some states (S3) benefit from the Convention/Protocol, while others (S1) do not, simply on the basis of their respective delivery schedules? More to the point, why should a Ratifying Transactional State's (and

²⁵ While specific delivery information is confidential, related data is available from a variety of commercial database services.

²⁶ A reasonable estimate of the average life of an aircraft in air travel service is approximately 25 years. Many aircraft are then converted to freight transport for an additional period of time. See generally *Airbus Global Market Forecast 2000 –2019* 1, 21 (July 2000), available at <http://www.2airbus.com/pdfs/media/GMF2000.pdf>; see also *Boeing's Current Market Outlook 2001* 32, available at <http://www.boeing.com/commercial/cmo/index.html>.

its airlines') ability to benefit from the treaty be wholly dependent on ratification by third states – that may have no deliveries scheduled for a comfortable period of time?

Prompt entry into force provisions ensure *horizontal equity* among states and their airlines, and do not pass the costs, on a comparative basis, of any delays to an identifiable group of states and airlines. Simply stated, the shorter the entry into force waiting period, the fairer the process.

C. THE ENHANCED SAFETY ARGUMENT

Access to financing, particularly for the States and airlines most in need, will assist in the acquisition of newer aircraft equipment. This will enhance aviation safety, the most fundamental objective of all actors in the air transport sector, including air transport policymakers.

Accordingly, prompt entry into force of the Convention/Protocol should be supported on general aviation policy grounds.

D. THE PRECEDENT ARGUMENT

The weight of precedent in the context of Transactional Private Law Treaties solidly supports minimum ratification requirements, specifically designed to expedite their entry into force.

If one objectively considers such requirements, particularly the instruments sponsored by the leading intergovernmental bodies in this field,²⁷ the following conclusions will be drawn.

First, there is a trend, discernable in recently adopted treaties, requiring a very small number of ratifications, between two and five.²⁸

²⁷ Joining UNIDROIT, the two other leading non-regional international organizations in this field are the United Nations Commission on International Trade Law [hereinafter UNCITRAL] and the Hague Conference Private International Law [hereinafter Hague Conference]. Established in 1966, the UNCITRAL actively examines ways of reducing or remedying obstacles to international trade. See *United Nations Commission on International Trade Law*, G.A. Res. 2205, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). First convened in 1893 by the government of the Netherlands, the Hague Conference became a permanent intergovernmental organization with the entry into force of its statute on July 15, 1955. Its mission is to bring about the progressive unification of the rules of private international law. See Statute of the Hague Conference on Private International Law, entered into force July 15, 1955, at art. 1, available at <http://www.hcch.net/e/conventions/text01e.html> (English translation of the statute).

²⁸ The three most recent elaborated Transactional Private Law Treaties, as well as, the one currently in its final stage of development, require between *two and five ratifications*. See UNIDROIT Convention on International Financial Leasing,

Second, the mean number of ratifications required is approximately five.²⁹

Third, the largest number is ten ratifications.³⁰

Fourth, it is not unusual for a large number of States to subsequently ratify a treaty that came into force with a small number of initial ratifications.³¹ There is no necessary connection between entry into force requirements and the quantum of ultimate ratifications. International legal instruments attract support based on merit, not initial ratification requirements.

opened for signature May 28, 1988, art. 16(1), *reprinted in* 27 INT'L LEGAL MATERIALS 931 (1988) [hereinafter Financial Leasing Convention] (three ratifications); UNIDROIT Convention on International Factoring, opened for signature May 28, 1988, art. 14(1), *reprinted in* 27 INT'L LEGAL MATERIALS 943 (1988) (three ratifications), Inter-American Convention on the Law applicable to International Contracts, opened for signature Mar. 17, 1994, *reprinted in* 33 INT'L LEGAL MATERIALS 732 (1994); General Secretariat of the Organization of American States, T.S. No. 78, art. 28 (two ratifications); Draft UNCITRAL Convention on Receivables, 33rd Sess., U.N. Doc. A/CN.9/466 (1999), United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices*, U.N. GAOR, 33rd Sess., at Annex 1, art. 43, U.N. Doc. A/CN.9/466 (1999). (five ratifications).

²⁹ See e.g., Banking Convention, *supra* note 19, at art. 28(1) (five ratifications); Convention on the Law Applicable to Contracts for the International Sale of Goods (1986), opened for signature Dec. 22, 1986, art. 27(1), 24 INT'L LEGAL MATERIALS 1573 (1985) (five ratifications); Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, opened for signature July 1, 1964, art. VIII(1), 384 U.N.T.S. 169 (five ratifications); Convention Relating to a Uniform Law on the International Sale of Goods (1964), opened for signature July 1, 1964, art. X(1), 384 U.N.T.S. 169 (five ratifications).

³⁰ See, e.g., *Convention on the International Sale of Goods*, Apr. 11, 1980, art 99(1), U.N. Doc. A/CONF.97/18, *reprinted in* 19 INT'L LEGAL MATERIALS 668 [hereinafter CISG] (ten ratifications). This comparatively large number is best understood in context. CISG is a comprehensive treaty, addressing contracting generally, which is the very foundation of commercial law.

³¹ The classic examples of the non-relationship between required and actual ratifications (i) in the Transactional Private Law Treaty context, is the CISG (ten required and 58 actual ratifications (as of 8 March 2001)); (ii) in the transactional air law context, the Convention on the International Recognition of Rights in Aircraft, June 19, 1948, 4 U.S.T. 1830, 310 U.N.T.S. 151 [hereinafter Geneva Convention] (two required and 85 actual ratifications (as of 8 March 2001, UNTC)); and (iii) in the broader non-transactional private international treaty law context, is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, entered into force June 7, 1959, 330 U.N.T.S. 38 (1959) [hereinafter Foreign Arbitral Awards Convention] (three required and 148 actual ratifications (as of 27 May 1999, UNCITRAL online updated 8 March 2001 and U.N.T.S.)).

E. THE NEW INITIATIVE ARGUMENT

There is a commonly held view that treaties addressing new topics, initiatives or thinking ought to enter into force more quickly than ones requiring a transition from existing, well-established treaty systems. The basic notion is that there is a reinforcing relation between the growth of new-systems and their acceptance. Having new-system treaties in force will contribute to their development, which, in turn, will attract further ratifications, and so on.

The Convention/Protocol is a new-initiative treaty. There is no significant body of existing international law dealing with advanced international secured financing and leasing practices. While there are a few instruments touching on select aspects of its subject matter,³² the basic concepts in the texts are *sui generis*, and thus, would not be disruptive vis-à-vis extant law and practice.³³

F. PARADIGMATIC ARGUMENT

That Transactional Private Law Treaties are modeled on, and presuppose transactional paradigms, is tautological.

The paradigm for the Convention/Protocol is understood through a simple hypothetical set of facts. Party 1, an airline (P1) located in S1, wishes to lease aircraft engines from Party 2, a leasing company (P2) located in S2. S2, in turn, funds its purchase of the leased engines by borrowing from a bank (P3) located in S3. For spice, let us further assume the following: P1 is a state-owned airline, and the only airline operating in S1, a small island-nation heavily dependent upon tourism. P1 needs aircraft engines to ensure safe, efficient travel to and from its

³² See Geneva Convention, *supra* note 31 (principally a conflict of laws convention (State X agrees to recognize proprietary rights in aircraft created in State Y, the State where the aircraft is registered for nationality purposes under the Chicago Convention)); Financial Leasing Convention, *supra* note 28 (a convention confined to three-party financial leasing, and not addressing, *inter alia*, priorities or insolvency).

³³ As regards law, the Convention contains provisions, which establish its relationship with the Geneva Convention and the Financial Leasing Convention. See Protocol, *supra* note 2, at arts. XXII (Convention supercedes the Geneva Convention as relates to aircraft and aircraft objects (as defined in the former), with the latter continuing to apply to rights and interest not "covered or affected" by the Convention, a phrase intended to be interpreted broadly), XXIV (Convention supercedes the Financial Leasing Convention as regards aircraft objects). As regards practice, the Convention has been designed to reflect advance asset-based financing and leasing practices employed in the aviation sector.

balmy shores. However, S1 currently does not have sufficiently well developed and/or internationally recognized leasing and accession laws. Thus, on grounds of excessive risk, P2, which would otherwise lease the engines, will not. Nor will others. P2 happens to be the sole international financial institution in neighboring S2 that wishes to establish itself as a banking enclave in this set of island nations.

While one can add to this paradigm, for example, by asserting that P1 sub-leases the engine, or that P2 sells the engine to a third party, such additions are not necessary to make the essential point.

That point is straightforward: assuming S1 and S2 ratify the Convention/Protocol (Ratifying Transactional States), why should P1 and P2 (even P3)³⁴ not be able to enjoy the treaty's benefits on account of non-ratification by S3 or (*a fortiori*) by other states with no connection at all to the transaction? A conclusion that they should be so affected disregards the paradigm underlying Transactional Private Law Treaties.

PART III: PROTRACTED ENTRY INTO FORCE: THE ARGUMENTS AND RESPONSES

The main arguments to date in favor of protracted entry into force provisions have been few and tentative. Notwithstanding the bracketed current provisions in the Convention/Protocol calling for three to five ratifications and the points made above, three such arguments may be distilled. We find these arguments, first, unconvincing on their face, and, second, vastly outweighed from a policy perspective by the arguments made in Part II above. Nonetheless, and with a view towards encouraging unified thinking at the diplomatic conference, we take up and respond to these arguments.

A. THE AIR LAW ARGUMENT

The first argument refers to a subset of existing air law treaties requiring a significantly higher number of ratifications. It then concludes that "air law" precedent and ICAO practice require a higher number of ratifications.

³⁴ The Convention/Protocol applies if a debtor is situated or an aircraft is registered in a Contracting State, regardless of where a creditor is legally located. See Convention, *supra* note 1, at arts. 3–5 (Convention connecting factors); *see also*, Protocol, *supra* note 2, at art. IV(1) (additional bases applicable to aircraft equipment).

This argument is vulnerable on two broad fronts. First, the proffered treaties are of a fundamentally different type than the Convention/Protocol. They are either public law treaties, such as the Chicago Convention of 1944,³⁵ or non-transactional treaties, such as those compromising the Warsaw system and the modernizing and consolidating Montreal Convention.³⁶ Unlike the Convention/Protocol, the latter treaty also would fall into the category of treaties modifying established international systems.

Non-transactional private law treaties, in the instant case, air liability treaties, address random events. The costs, if any, of their entry into force delay, are allocated fairly, considered *ex ante*. They are distributed among all states and airlines. The foregoing sharply contrasts with the situation under the Convention/Protocol.

In sum, while a larger number of ratifications is justified in the air liability setting, the financing context is completely different, even if both affect aviation.

Second, a careful survey of relevant air law actually supports a low number of ratifications in the transactional context. The air law treaty with the nearest relation is the Geneva Convention. It strikingly required but *two ratifications*.³⁷ The thinking associated with the 1948 Geneva Convention's small-number-of-required-ratifications approach reveals reasoning similar to that contained in this article.³⁸ The only other tangentially related air law instrument, the Convention on the Unification of Cer-

³⁵ The Chicago Convention established a basic framework, rules of decision, and select standards for State action and interaction in the civil aviation. Its guiding principles are statist, to-wit, sovereignty, territoriality, and nationality. See Chicago Convention, *supra* note 4, at arts. 1 (States have complete and exclusive sovereignty over the airspace above their territory), 2 (defining territory), and 17 (aircraft have the nationality of the State in which it is registered). Private activity as such is not addressed in that instrument.

³⁶ See *Convention for the Unification of Certain Rules for International Carriage by Air* (1999), done May 28, 1999, ICAO DCW Doc. No. 57, reprinted in 4 UNIFORM LAW REVIEW 835, 948 (1999).

³⁷ See Geneva Convention, *supra* note 31, at art. XX.

³⁸ See *Annotated Text of Convention on International Recognition of Rights in Aircraft – Prepared by the Legal Subcommittee of the Air Coordinating Committee*, 16 J. AIR L. & COM. 70, 91 (1949) (noting the desirability of bringing the treaty into force “immediately” with respect to two States since they themselves can amply fulfil their respective treaty obligations).

tain Rules relating to the Precautionary Arrest of Aircraft, required five ratifications.³⁹

B. THE UNIVERSALISTIC ARGUMENT

The second argument is a bit more vague and rarely articulated with precision. If it were, it would go something like the following. The Chicago Convention, a gem in the history of international lawmaking and institution-building, created ICAO. That treaty was universalistic.⁴⁰ It sought and achieved worldwide acceptance. In practice, ICAO carries that approach forward.⁴¹ This general attitude has contributed to, and perhaps produced, a large degree of uniformity in international civil aviation, a societal good. Thus, this universal approach should be followed in the present case.

This argument, possibly pleasing in abstract terms, does not stand scrutiny in this context. As a threshold matter, it imposes a public law approach – which, in the particular context of aviation, carries universalistic overtones – on the private, transactional law subject matter of the Convention/Protocol. General air safety, navigation, and security require worldwide thinking, if not approaches. Aircraft financing simply does not.

The critique goes much deeper. The Convention/Protocol self-consciously avoids excessive uniformity. It does so given, *inter alia*, the complexity of the subject matter, the national policies affected, and its relations with non-aviation law, often the core commercial law in states. The Convention/Protocol is sensitive to the particular needs of individual states. States should come into the system when they are ready and choose the option by which they agree to be bound.

³⁹ *Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft*, at art. 11(2), ICAO Doc. 7620 (May 29, 1933).

⁴⁰ Of relevance, that universality, now assumed, was *not a necessary feature* of the Chicago Convention regime, which came into force after *twenty-six ratifications*. See Chicago Convention, *supra* note 4, at art. 91(b). Two inferences may be drawn supporting points made elsewhere in this article. First, the Chicago Convention itself, when adopted, had attributes of a “new initiative” instrument, encouraging early activation as a means, *inter alia*, of attracting support and ratifications, thereby reinforcing the system. Second, the Chicago Convention experience also supports the assertion that there is no necessary relation between required and actual treaty ratifications.

⁴¹ In part, by virtue of the requirement contained in that instrument that at least two-thirds of its Contracting State ratify any proposed amendment thereto. See *id.* at art. 94(a).

If anything is left of this argument, it is vastly outweighed by the economic, fairness, and safety arguments made in Part II.

A universalistic approach to the Convention/Protocol is transparently inconsistent with the general thinking underlying the development of the Convention/Protocol.

C. THE INSTITUTION-CREATION ARGUMENT

The final argument focuses on the fact that the Convention/Protocol will create an International Registry, proposing regulation by a supervisory authority. Reduced to its essence, the argument is that precedent for and practicalities of "institution-creating" treaties justify slower or more complex entry into force arrangements. This argument is the easiest to refute.

Both the "precedent" and the "practicality" argument reflect a misunderstanding of the function, nature, and technological features of the contemplated International Registry. It will not be a traditional, civil aviation style, documentary, manual registry.⁴² It will be a wholly electronic "notice-based" registry system.⁴³

The system will be "next generation" – conceptually – but will employ essentially, off-the-shelf technology. As contemplated, it will be inexpensive to create, use, or maintain. Its sole function will be to electronically register notices of interests, thereby providing objective criteria for the Convention/Protocol's first-in-time ranking of claims rule. The core responsibility of the supervisory authority will be to ensure that this electronic system works efficiently and fairly.⁴⁴

Plainly, neither the International Registry nor ICAO as a candidate for the supervisory function would create an institution comparable to, for example, PICAO, GATT, Intelsat, and the International Criminal Court. The arrangements creating these

⁴² See *Report of the International Registry Task Force*, at Attachment I, ICAO Doc. C-WP/11505 (162nd Session, Reference Material: *Second Report of the International Registry Task Force and attachments*) (Basic Features of the proposed International Registry contemplated by the Convention as modified by the Aircraft Equipment Protocol) [hereinafter IRTF Registry Summary]. See *id.* at ¶¶ I(3) (registry will serve the *sole function* of establishing priorities among competing, valid claims), I(5) (registry will be a minimalist, notice-based system, in which documents may not be registered), and I(6) (registrar's role will be administrative, not interventionist).

⁴³ See *id.* at ¶ I(2) (registrations and searches will be made solely by electronic means).

⁴⁴ See *supra* note 17 and accompanying text; see also IRTF Registry Summary, *supra* note 42, at ¶¶ I(7) and II(11).

bona fide institutions contained in their enabling international instruments were understandably complex. Analogies between the creation of a simple electronic system and these complex and highly staffed institutions are clearly inapposite.

The only impediments to a prompt and rapid development of the International Registry are political: who will operate it and from where.⁴⁵

In view of the points favoring prompt entry into force as set out in Part II, it is incumbent upon all interested parties to ensure that the creation of the International Registry is not used as a pacing item, justifying delay. That would be a distortion, indeed, a transmutation, of the International Registry. An electronic system, requiring proper design, professional support, and appropriate oversight, is not an elaborate new institution?

PART IV: REALISTIC ENTRY INTO FORCE SCENARIOS

Based on the foregoing, we believe there are only two options for entry into force worthy of serious consideration. The first is much preferred: a small number of required ratifications coupled with advance development of the International Registry. The second is complex: provisional application.

A. SMALL NUMBER OF RATIFICATIONS WITH ADVANCE REGISTRY DEVELOPMENT

The most appropriate course of action would be for the diplomatic conference to endorse the current text. The effect would be to require a small number of required ratifications, between three and five, to bring the Convention/Protocol into force. Coupled with the meaningful advance development of the electronic International Registry and robust ratification efforts, that approach could have the instrument in force within a year of the conference, that is, late 2002.⁴⁶

⁴⁵ While a "request for proposals" from those States wishing to host the registry will soon be to States on an *informal basis* by the ICAO, that organization has elected not to require formal responses thereto prior to the diplomatic conference. At the time of this writing, UNIDROIT's approach to the matter has not yet been announced. For the practical importance of prompt development of the physical registry, see *infra* Parts IV A and B.

⁴⁶ Entry into force one year following adoption is a realistic target, which has been achieved, in circumstances less compelling than those that apply to the present case. See Foreign Arbitral Awards Convention, *supra* note 31 (adopted June 10, 1958 and entered into force on June 7, 1959).

Such an approach would produce the maximum economic and safety-enhancement benefits, and would minimize the horizon inequity problem.

Significant conceptual work has already been done on the International Registry, principally by a special *Ad Hoc* Task Force.⁴⁷ That group has been reporting to UNIDROIT and ICAO. Based on the texts, it has developed and articulated the technical requirements of the International Registry, addressed a range of legal items,⁴⁸ and prepared in-process a working draft of regulations. It has also proposed substantive and procedural elements on the registrar-selection process.

What has not been done, however, is work on the physicality of the International Registry. This work is now a high priority. Developmental work – prototypes and testing – should be undertaken during the period prior to the conference to avoid unnecessary delay thereafter.

B. PROVISIONAL APPLICATION

Absent the above approach, it will be necessary for the conference to explore the rich topic of provisional application (and use of other treaty mechanisms) as a means of ensuring the early realization of benefits. Provisional application is a realistic yet complex option. It should be responsibly considered at this stage.

A few threshold points are of note. It is misleading to speak of “provisional entry into force.” The Vienna Treaty Convention contemplates the provisional *application* of a treaty prior to entry into force.⁴⁹ The concept, employed rarely at the time of Vienna, has since become more common. The reasons for this include the need to apply modern treaties sooner rather than

⁴⁷ That group, chaired by France and the United States, was created during the intergovernmental negotiating process. It has been instructed to continue its preparatory work for use at the diplomatic conference. Its work to date has recently been summarized and reported. See IRTF Registry Summary, *supra* note 42 (reference material and attachments).

⁴⁸ Including, (i) the legal relationship between the supervisory authority and the registrar, (ii) questions of immunities, (iii) ownership of the International Registry, its software and data, and (iv) liability for financial loss based on error, design problems and *force majeure* events. See *id.*

⁴⁹ Where a treaty has a provisional application clause, the obligation arises by virtue of a State's participation in the adoption of that treaty. Absent such a clause, the obligation typically stems from a State's supporting vote for a conference resolution endorsing provisional application. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 139 (Cambridge University Press 2001).

later and the experience of ratification difficulties.⁵⁰ The Chicago Convention itself contained aspects of provisional application.⁵¹

Provisional application is a flexible and elastic concept. It has taken, and in the subject case, may take many possible forms. There is leading precedent for presumptive provisional application, basically implied consent to provisional application, with an opt-out.⁵² There is also leading precedent for quite long-term "provisional" arrangements.⁵³

It must be immediately noted, however, that there are four material disadvantages in pursuing provisional application in this case. We believe that these disadvantages counsel use of provisional application only as a last resort. First, the concept is complex. The Convention/Protocol are intricate instruments, some think too intricate. Another legal doctrine layered on its top might be unacceptably heavy to states. Second, many states need legislative or parliamentary consent to provisional application, thus significantly reducing its advantage.⁵⁴

Third, and potentially troubling in practice, the details of any provisional application arrangement may require creative problem-solving in order to avoid limiting the intended treaty benefits. By way of example, provisional application might be employed to by-pass the need to wait for the creation of the International Registry. This case – the most likely (but avoidable) scenario – would require alternative rules for perfection of international interests in both airframe and aircraft engines. The foregoing underscores the need to advance rapidly with the physical development of the International Registry, including potential use under a provisional application arrangement.

⁵⁰ See *id.* See also Lefeber, *supra* note 9, at 82.

⁵¹ See generally *Interim Agreement on International Civil Aviation*, at 59-86, ICAO Doc. 7300/7 (Dec. 7, 1944) (establishing, *inter alia*, the Provisional International Civil Aviation Organization, and making interim arrangements for its governance and financing).

⁵² See United Nations Convention on Law of the Sea, opened for signature Dec. 10, 1982, art. 7, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 INT'L. LEGAL MATERIALS 1261 (1982) (stating that if the instrument did not enter into force by a specified date – which it did not – the same would be applied provisionally by signatory States not notifying the depositary otherwise (17 of 79 signatories so opted out)).

⁵³ The General Agreement on Tariffs and Trade 1947 was applied provisionally for several decades through a Protocol of Provisional Application. 55 U.N.T.S. 171 (no. 814 ((b)) and 55 U.N.T.S. 308 (No. 814I (c))).

⁵⁴ See Lefeber, *supra* note 9, at 89 - 90.

Fourth, unless states (accepting such provisional application) as a group otherwise agree,⁵⁵ the relative ease with which a particular state may disassociate itself from the provisional arrangement⁵⁶ is in tension with the predictability objectives of the Convention/Protocol. This problem can be mitigated, however, by protecting vested interests at the time of any such disassociation. That approach would find parallels in the Convention/Protocol proper.⁵⁷

Failing technical provisional application, other types of implementing treaty-based agreements are possible.

CONCLUSION

Work on the Convention/Protocol has spanned a significant number of years, and now these painstakingly drafted, leading texts are ripe for adoption at the upcoming diplomatic Conference scheduled for October 29th to November 16th of this year in Cape Town.

However, adoption of these new international legal instruments will only serve the pressing needs of states and the air transport sector if the entry into force provisions of the Convention/Protocol contemplate – and facilitate – the prompt activation of the treaty.

Requiring a small number of ratifications, such as three to five as currently in the texts, is fully consistent with the proper classification of the Convention/Protocol. It is a Transactional Private Law Treaty affecting aviation. This approach would be in line with modern trends in this important field of international law making. It would permit entry into force timing comparable with best international practices.

Coupled with advance work on physical development of the International Registry, this minimum required ratification standard would help maximize the economic and other benefits of the Convention/Protocol. Finally, it would not be prejudicial to the interests of states whose airlines anticipate taking aircraft deliveries in the near term.

⁵⁵ Which they are permitted and may do. See Vienna Treaty Convention, *supra* note 6, at art. 25 (2).

⁵⁶ See *id.*

⁵⁷ See Protocol, *supra* note 2, at arts. XXIX (subsequent declaration does not affect “rights and interests arising prior to the effective date of that subsequent declaration”) and XXXI (denunciation does not affect “rights and interests arising prior to the effective date of that denunciation”).